Structuring the Prosecutor’s Duty to Search the Intelligence Community for Brady Material

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NOTE

STRUCTURING THE PROSECUTOR’S DUTY TO SEARCH THE INTELLIGENCE COMMUNITY FOR BRADY MATERIAL

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INTRODUCTION

As terrorism directed at the United States, its citizens, and its foreign interests has increased, so has the United States's effort to enforce its laws criminalizing terrorist activities planned and conducted primarily outside the United States. Thus far, however, the federal government has been unable to see most terrorism investigations.
through to criminal prosecution, a reality that undermines its efforts to prevent international terrorism through criminalization. Between 1997 and 2001, the Federal Bureau of Investigation (FBI) opened nearly 40,000 international terrorism investigations, of which only 385 were referred to federal prosecutors. Of these referrals, only 115 led to prosecutions—mostly post-attack prosecutions. And of these prosecutions, only twenty-four produced convictions, half of which resulted in the imposition of jail sentences of ten months or less. Syracuse University researchers concluded from this information that

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4 Successful criminal prosecution should, theoretically, reduce incidences of terrorism by (1) leading to the incarceration of terrorists who might otherwise commit further acts of terrorism, (2) deterring future terrorists from acting at all, (3) making it logistically more difficult for terrorists to carry out acts of terrorism, and (4) encouraging other governments to help prevent terrorism. See id. at 81.


8 See Transactional Records Access Clearing House, International Terrorism Lead Charge on Prosecutions Filed, supra note 7. The government apprehends and prosecutes very few international terrorists during the conspiracy stage—before they pose a real danger to the United States, its citizens, and its interests abroad. Between 1997 and 2001, conspiracy was the lead charge in only 1 of the 115 prosecutions for international terrorism. See id. The greatest number of prosecutions (36) involved foreign murder of U.S. nationals and kidnapping or hostage taking. See id. In those cases in which a federal offense was evident, prosecutors most often cited the “lack of evidence of criminal intent” or “weak or insufficient admissible evidence” for their failure to prosecute more suspected international terrorists. Transactional Records Access Clearing House, International Terrorism Referrals Declined by Declination Reason Fiscal Years 2001–2002, at http://trac.syr.edu/tracreports/terrorism/support/intter_pctdec.html (last visited Apr. 9, 2003).


"[t]he gap between the reported investigations and referrals for prosecution would appear to document a major challenge facing law enforcement in its attempts to prevent terrorism and punish terrorists."\textsuperscript{11}

The government’s inability to pursue more international terrorism prosecution referrals flows directly from federal law enforcement’s inability to investigate acts of international terrorism effectively. Although the federal government is increasing its efforts to investigate, apprehend, and prosecute suspected international terrorists,\textsuperscript{12} the paucity of international assistance prevents law enforcement from effectively monitoring international terrorist networks.\textsuperscript{13} This reality has prompted renewed demands from analysts,\textsuperscript{14} policymakers,\textsuperscript{15} and Congress\textsuperscript{16} for greater cooperation between the intelligence community and law enforcement in the war on terrorism.


\textsuperscript{12} See \textit{PILLAR}, supra note 1, at 80.

\textsuperscript{13} See \textit{infra} Part III.A.

\textsuperscript{14} See, e.g., Joseph S. Nye, \textit{How to Protect the Homeland}, \textit{N.Y. TIMES}, Sept. 25 2001, at A29 (stating that “the [CIA] and [FBI] must improve their ability to work together on detection and must reconcile their different authorities and programs in intelligence and law enforcement”). Several commentators recently observed that “spies collect information; law enforcement agents collect evidence. This cultural difference affects the use and effectiveness of information,” and “[t]he gaps separating the two communities cannot be closed entirely, but they can, and must, be bridged.” Frank J. Gillullo et al., \textit{Tools to Combat Terrorism: The Use and Limits of U.S. Intelligence}, \textit{WASH. Q.}, Winter 2002, at 61, 73.

\textsuperscript{15} In a 1996 speech at Georgetown University on international terrorism, former Director of Central Intelligence John Deutch described communication between CIA station chiefs and FBI legal attaches abroad as essential in dealing with the foreign terrorist threat. \textit{See} John Deutch, \textit{Address at Georgetown University, Fighting Foreign Terrorism}, (Sept. 5, 1996), \textit{http://www.cia.gov/cia/public_affairs/speeches/archives/1996/dci_speech_090596.htm}. In October of 1995, CIA General Counsel Jeffrey H. Smith told the Senate Select Intelligence Committee that effectively combating transnational threats requires “effective, extensive and routine cooperation between intelligence and law enforcement.” \textit{John Buntin, Cops and Spies: Federal Law Enforcement and Intelligence Agencies, Tired of Bumping into Each Other Overseas, Are Trying to Work Together, Gov't Executive}, April 1996, at 40, 41. The Director of Homeland Security, Tom Ridge, is seeking to improve cooperation between the CIA and FBI in investigating international terrorism. \textit{See David Jackson, Ridge Seeks to Boost Nation's Security Budget, DALLAS MORNING NEWS}, Jan. 25, 2002, at 27A. The FBI, aware of the limitations on its ability to conduct effective foreign investigations of international terrorism, has announced that it must improve relations and intelligence sharing with the intelligence community. \textit{See Press Release, Federal Bureau of Investigation, Reorganization of Federal Bureau of Investigation Headquarters (Dec. 3, 2001), http://www.fbi.gov/pressrel/pressrel01/reorg120301.htm}.

Despite its necessity, greater cooperation between law enforcement and the intelligence community may undermine the government's ability to pursue prosecution referrals of international terrorists because of the threat that such prosecutions pose to the disclosure of classified information. Recognition of the disclosure threat is evidenced by Department of Justice (DOJ) procedures. Before deciding whether to prosecute a violation of federal law in cases in which there is a possibility that classified information will be revealed, DOJ attorneys must consider "the likelihood that classified information will be revealed if the case is prosecuted" and "the damage to the national security that might result if classified information is revealed." Moreover, if the government does bring a prosecution, federal prosecutors are obligated to take every step possible to minimize their reliance on classified information. Recognizing the prominent role of the intelligence community in the investigation of international terrorism and the disclosure threat posed by criminal prosecutions of suspected international terrorists in federal courts, President George W. Bush, shortly after the September 11, 2001 terrorist attacks, authorized the creation of military tribunals to prosecute non-U.S. citizens suspected of engaging in international terrorist activities.

17 U.S. Dep't of Justice, Attorney General's Guidelines for Prosecution Involving Classified Information 4-6 (1981).

18 See U. S. Dep't of Justice, Criminal Resource Manual § 2052 (2002), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm. The Manual provides: [Searching intelligence community files] will be done (1) to assist the prosecutor in drafting his/her case to avoid implicating classified sources and methods, (2) when legally necessary to ensure that the prosecution team has met its legal obligations to an indicted defendant, or (3) under certain circumstances, to provide investigative leads to law enforcement for use in obtaining other admissible evidence.

19 See Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The President's military order stated that dangers to the safety of the United States and the nature of international terrorism make it impracticable to apply in military tribunals the principles of law and the rules of evidence generally recognized in criminal cases tried in federal courts. See id. § 1(f). Supporters of the tribunals have articulated various justifications, including the need to deprive suspected terrorists of a public stage from which to spew propaganda, the need to protect federal judges and juries from retaliation, and the need to protect classified information from disclosure. See, e.g., Verne Gay, A World-Class Headache: Bringing bin Laden to Trial? Bring Aspirin, Newsday, Nov. 29, 2001, at B35; Laura Ingraham, Military Tribunals Provide Streamlined Justice, USA Today, Nov. 26, 2001, at 15A; Charles Krauthammer, In Defense of Secret Tribunals, Time, Nov. 26, 2001, at 104. Some even argue that a secret trial would be the least prejudicial way of trying well-known terrorists such as Osama bin Laden. See, e.g., Terrorist Trials Best Handled by Military Commissions, Tampa Trib., Nov. 24, 2001, at 18 (quoting an article by Douglas M. Kmiec, Dean of Catholic University of America, appearing in the Wall Street Journal).

20 Columnist William Safire of the New York Times has commented that "we are letting George W. Bush get away with the replacement of the American rule of law with military..."
Some members of Congress have recognized the disclosure threat posed by federal court prosecutions. For example, Senator Orrin Hatch of Utah, who compared the need to prevent disclosure of classified information in the war on terrorism to the need for secrecy during World War II, expressed his support for military tribunals:

It is of the utmost importance that no information be permitted to reach the enemy on any of these matters. How the terrorists were so swiftly apprehended; how our intelligence services are equipped to work against them; what sources of information we have inside al Qaeda; who are the witnesses against the terrorists; how much we have learned about al Qaeda terrorist methods, plans, programs and the identity of other terrorists who might be or have been sent to this country; how much we have learned about al Qaeda weapons, intelligence methods, munitions plants and morale.

All of the testimony given at trial bears, to some degree, upon these matters. There is no satisfactory way of censoring and editing this testimony for the press without revealing, by statement or significant omission, the answers to many of the questions which may now be puzzling our enemies. We do not propose to tell our enemies the answers to the questions which are puzzling them. The only way not to tell them is not to tell them. The American people will not insist on acquiring information which by the mere telling would confer an untold advantage upon the enemy.21

The government's recent decision to prosecute suspected international terrorist Zacarias Moussaoui in federal court illustrates the effect that the threat of disclosure has on the government's choice of forum. Remarking on the government's decision not to prosecute Moussaoui in a military tribunal, Vice President Cheney told a Washington Times reporter that the forum decision was "'primarily based on an assessment [that] the case against Moussaoui . . . [could] be handled through the normal criminal justice system without compromising sources or methods of intelligence.'"22


Shortly after the President issued the order authorizing military tribunals, more than three hundred law professors sent an open letter to him expressing their opposition to the tribunals and disputing the order's implicit assumption that federal courts are unable to handle criminal prosecutions of suspected international terrorists. Indeed, the United States traditionally has prosecuted violations of its criminal laws in federal courts. However, in light of the apparent necessity of extensive interagency (particularly, intelligence community) cooperation for the effective investigation of international terrorism, one must ask whether critics of President Bush's attempt to remove criminal prosecutions of suspected international terrorists to an alternative forum have adequately considered whether federal courts are capable of entertaining such prosecutions without revealing to the world (and specifically to international terrorist organizations) the intelligence community's ability to spy on international terrorist networks. Although federal laws and procedures attempt to protect classified

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23 See Katharine Q. Seelye, In Letter, 300 Law Professors Oppose Tribunals Plan, N.Y. Times, Dec. 8, 2001, at B7. David Scheffer, a senior fellow at the U.S. Institute for Peace, criticized the President's decision to create the military tribunals on the grounds that "[the United States has] a good track record of successfully prosecuting terrorists in court while successfully protecting classified information." Our Credibility Is on the Line Here, Newsweek, Nov. 28, 2001, at http://www.msnbc.com/news/664569.asp. However, the statistical evidence showing that international terrorists are underprosecuted undermines the force of this assertion. See supra notes 5–10 and accompanying text.

24 Although neither defines what constitutes a source or method, both Executive Order 12,958 and the National Security Act of 1947 provide for the protection of intelligence sources and methods. See Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995); National Security Act of 1947 § 103(c)(6), 50 U.S.C. § 403-3(c)(6) (2000). Executive Order 12,958, which lays out the rules governing the classification of information, authorizes the President, agency heads, and other presidentially designated officials, as well as officials who have been delegated authority by agency heads, to classify information. See Exec. Order No. 12,958 § 1.4, 60 Fed. Reg. at 19,827. These officials may categorize information as top secret, secret, or confidential, depending on whether its unauthorized disclosure could be expected to cause exceptionally grave damage, serious damage, or damage, respectively, to national security. See id. § 1.3, 60 Fed. Reg. at 19,826. The National Security Act exempts the CIA from any law that would require the publication or disclosure of the functions, names, official titles, salaries, or numbers of its personnel. See 50 U.S.C. § 403g.

25 The discovery of classified information by defendants is regulated in part by the Classified Information Procedures Act (CIPA). See 18 U.S.C. app. 3 §§ 1–16 (2000). Section 4 of CIPA, titled "Discovery of classified information by defendants," provides that "[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure . . . ." Id. app. 3 § 4. This provision has been construed not to create "new rights of or limits on discovery of a specific area of classified information." United States v. Yunis, 867 F.2d 617, 621 (D.C. Cir. 1989). Rather, the D.C. Circuit has stated, CIPA "contemplates an application of the general law of discovery in criminal cases to the classified information area with limitations imposed based on the sensitive nature of the classified information." Id. Although one could imagine a situation in which § 4 of CIPA might provide a measure of protection to a prosecutor seeking to protect classified information in the face of a discovery request for all Brady material in the government's possession, it is important to note that a § 4 substitution issue will not arise until after the issue with which this Note is concerned—whether a
information from unnecessary disclosure, and federal courts traditionally have been sensitive to the necessity of protecting classified information from disclosure to defendants,26 the Supreme Court has imposed on prosecutors a duty, known as Brady obligations, to disclose to criminal defendants all exculpatory27 and impeachment28 material in the government’s possession. In addition, the Supreme Court recently imposed on prosecutors the duty to search for exculpatory or impeachment evidence not known to or possessed by the prosecution, but known to others acting on the government’s behalf in a particular case.29 Some courts of appeals have gone so far as to require that prosecutors search for exculpatory and impeachment material in any agency with a potential connection to the prosecution’s case.30 Because disclosure of intelligence community files could reveal the methods and sources that the government uses to monitor international terrorist networks, compelled disclosure of intelligence community files relating to targets of criminal investigations could eviscerate the government’s already limited ability to investigate international terrorism effectively. In light of prosecutors’ Brady obligations and of the unique interagency investigative burden imposed by international terrorism, it is questionable whether the federal courts are the appropriate forum in which to try suspected international terrorists.

This Note argues that federal courts can and must adopt a construction of the Supreme Court’s line of Brady cases that limits the prosecutor’s duty to search the intelligence community for exculpatory or impeachment material if the courts are to serve as a viable

26 Cf. United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) (observing that “[r]eveling [classified] information absent an essential need by a defendant would . . . result in the drying up of a primary source of information to our intelligence community”).
29 See Kyles v. Whitley, 514 U.S. 419, 438–39 (1995). Stanley Fisher argues that the Supreme Court’s line of Brady cases should be codified in ethical rules so that prosecutors have an ethical, as well as a constitutional, obligation “to learn of and disclose exculpatory evidence known to other members of the prosecution team, including law enforcement agents.” Stanley Z. Fisher, The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England, 68 Fordham L. Rev. 1379, 1422–23 (2000).
30 See infra Part II.
forum for the prosecution of international terrorists.³¹ Any standard regarding the proper scope of the prosecutor's duty to search the government for Brady material must be faithful to the policies underlying prosecutorial disclosure. Therefore, Part I discusses the doctrinal basis for the prosecutor's duty to discover and disclose Brady material within the government's possession and identifies the policies that prosecutorial disclosure aims to serve. Because the Supreme Court has not ruled on whether prosecutors must search for Brady material within government entities that have not engaged in law enforcement activity under a prosecutor's direction and control, Part II of this Note reviews the major circuit courts of appeals cases ruling on the prosecutor's duty to search for Brady material not known to or possessed by him. Part III explains the significance of the government's interest in preventing disclosure of classified information relating to its investigation of international terrorism by describing the source of the discovery problem at issue in this Note—namely, the need for extensive interagency cooperation in the government's investigation of international terrorism. This Part also explains why, in the context of a prosecution of an international terrorist, the various circuit approaches place inadequate limits on the prosecutor's duty to search for Brady material in the possession of any branch of the federal government. Part IV of this Note proposes a standard for applying a limited prosecutorial duty to search other government agencies for Brady material. This proposed standard better serves the government's interests in protecting classified information regarding its investigation of international terrorism than do the current circuit approaches. This Part also explains how the proposed standard conforms to existing Supreme Court case law, and how the standard implements all of the policies that prosecutorial disclosure is intended to serve.

³¹ Two commentators appear to disagree, expressly or implicitly, with the assertion that a prosecutor's duty can be so limited. Jonathan Fredman has argued that a prosecutor's duty to search for Brady material would reach the intelligence community if an intelligence agency were to become aligned with a specific prosecution or if a prosecutor were to have "reason to believe that a particular intelligence agency [had] any information relating to a specific defendant or the subject matter of a particular prosecution." See Jonathan M. Fredman, Intelligence Agencies, Law Enforcement, and the Prosecution Team, 16 YALE L. & POL'Y REV. 331, 370 (1998). Robert Hochman has argued that "[a]nyone who plays a part in bringing the power of the state to bear on the individual in the form of punishment must share the responsibility to uncover the truth that comes with that power." Robert Hochman, Comment, Brady v. Maryland and the Search for Truth in Criminal Trials, 63 U. CHI. L. REV. 1673, 1692 (1996). This Note seeks to demonstrate that neither of these broad approaches is compelled by case law.
Supreme Court Jurisprudence on the Prosecutor's Duty to Discover and Disclose Brady Material

Discovery in federal criminal proceedings has both constitutional and statutory dimensions. Although defendants have no general constitutional right to discovery in criminal proceedings, Congress has established rules providing for "the minimum amount of discovery to which the parties are entitled," and the Supreme Court has fashioned "what might loosely be called the area of constitutionally guaranteed access to evidence" designed to ensure that criminal prosecutions comport with due process. This Part discusses the prosecutor's constitutional discovery obligations under Brady v. Maryland and its progeny, paying particular attention to the Court's reasons for imposing the discovery and disclosure obligation and to Brady's power to compel a prosecutor to search other branches of the government for exculpatory or impeachment evidence not known to or possessed by the prosecutor. In doing so, this Part establishes

35 One might wonder why the disclosure problem associated with federal prosecutions of international terrorists is limited to the scope of a prosecutor's obligation to search other arms of government for Brady material, considering that Federal Rule of Criminal Procedure 17 permits a defendant to obtain a subpoena to "command each person to whom it is directed to attend and give testimony at the time and place specified therein," FED. R. CRIM. P. 17(a), or to "command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein," FED. R. CRIM. P. 17(c). In other words, if a defendant can simply subpoena elements of the intelligence community to discover any exculpatory or impeachment material he believes it might have, why is not the disclosure problem broader than the scope of Brady's search obligation? The answer is that a defendant cannot use his power of subpoena in a federal criminal proceeding as a discovery device. As the Supreme Court stated in Bowman Dairy Co. v. United States:

It was intended by the rules to give some measure of discovery. Rule 16 was adopted for that purpose. . . . Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. . . . Rule 16 provides the only way the defendant can reach such materials so as to inform himself. . . . . . Rule 17(c) was not intended to provide an additional means of discovery.
36 Discussion of a federal prosecutor's duty to search other branches of the federal government for Rule 16 or Jencks Act (Rule 26.2) material is outside the scope of this Note. However, cases discussing a prosecutor's duty to search for Rule 16 and Jencks Act materials that he neither has in his possession nor knows of suggest that courts impose the same search obligation in those contexts as they do in the Brady context. See, e.g., United States v. Hall, 171 F.3d 1133, 1144–45 (8th Cir. 1998) (holding that a prosecutor was not obligated to disclose medical and psychiatric records relating to a government witness's
that the prosecutor’s duty to discover and disclose *Brady* material is intended to implement several policies, including the preservation of the adversarial system of justice, the prevention of prosecutorial misconduct, the provision of fair trials (i.e., preventing harm to defendants), the promotion of public confidence in criminal convictions, and the administration of accurate convictions. These are the policies to be implemented by any standard regarding the prosecution’s duty to search for *Brady* material that is not within his knowledge or possession.

**A. The Policies Underlying Prosecutorial Disclosure**

Because the government has vastly superior investigative resources with which to discover information concerning alleged crimes,\(^{37}\) and because in most cases exculpatory information in the

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\(^{37}\) See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 76 (1991) (observing that “[p]rosecutors’ offices rarely have manpower advantages that would undermine adversarial equality” but that “they do have material resources unavailable to the defense,” such as “[t]he ability to employ police as investigators, use grand jury subpoena power to force cooperation of witnesses, time indictments, consult the government’s vast forensic services and computer records, and appeal to jurors’ natural fear of crime[, of which] all contribute to prosecutorial effectiveness”). Federal agencies employed almost 90,000 full-time investigative personnel authorized to make arrests and carry firearms as of 2000. Bureau of Justice Statistics, U.S. Dep’t of Justice, Federal Law Enforcement Statistics, at http://www.ojp.usdoj.gov/bjs/fedle.htm
prosecution’s possession will be unknown to defense counsel, one of the most valuable rights that a criminal defendant enjoys is his constitutional right to all evidence in the government’s possession that is material either to his guilt or punishment. The Court in Brady v. Maryland imposed on prosecutors the duty to disclose exculpatory evidence. The prosecution charged the defendant in that case, Brady, with first degree murder. Brady defended on the theory that, although he had participated in the crime, he had not killed the victim. Prior to trial, Brady requested that the prosecution permit his counsel to examine the extrajudicial statements of his alleged accomplice, Boblit. The prosecution complied by making some of Boblit’s statements available to Brady’s attorney, but it withheld one statement it possessed—and of which it was aware—in which Boblit admitted to committing the homicide. Brady learned of the statement after he had been tried, convicted, and sentenced to death for first-degree murder. The Supreme Court held that the suppression of Boblit’s statement was a violation of Brady’s due process rights, stating that, irrespective of the good faith or bad faith of the prosecution, “the suppression . . . of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.”

The Court’s minimal discussion of its rationale left much to be inferred. It stated generally that due process requires the disclosure

(last revised July 17, 2001). All state and local law enforcement agencies combined employed over 1,000,000 full-time investigative personnel. See Bureau of Justice Statistics, U.S. Dep’t of Justice, State and Local Law Enforcement Statistics, at http://www.ojp.usdoj.gov/bjs/sandlle.htm (last revised Jan. 29, 2003).


A detailed discussion of all the nuances of prosecutors’ Brady obligations is unnecessary for the purposes of this Note. For such a discussion, see 25 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 616.06 (3d ed. 1997) and Christopher P. DelRosso & Samuel F. Epstein, Discovery, Thirteenth Annual Review of Criminal Procedure, 89 GEO. L.J. 1343, 1343–56 (2001). For a succinct discussion of Brady and its doctrinal basis, see Victor Bass, Comment, Brady v. Maryland and the Prosecutor’s Duty to Disclose, 40 U. CHI. L. REV. 1343 (1972) and Note, The Prosecutor’s Constitutional Duty to Reveal Evidence to the Defendant, 74 YALE L.J. 136 (1964).


See id. at 84.

See id.

Id.

Id. The Supreme Court’s opinion states that the prosecution’s suppression of the statement was not done with “guile.” See id. at 84, 88.

Id. at 87. In Giglio v. United States, the Court subsequently ruled that impeachment evidence is covered by the Brady disclosure obligation, stating that “[w]hen the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.” 405 U.S. 150, 154 (1972) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)); see also infra notes 83–89 and accompanying text (discussing the Giglio case).
obligation, and that non-disclosure violates due process because it produces unjust and unfair trials.\textsuperscript{47} Speaking to its decision's doctrinal basis, the \textit{Brady} Court stated that its holding was an extension of its prior decision in \textit{Mooney v. Holohan}, a case involving deliberate prosecutorial suppression of impeachment evidence in which the Court stated that a conviction contrived through "the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury . . . is . . . inconsistent with the rudimentary demands of justice."\textsuperscript{48} Justifying its extension of \textit{Mooney} to cases of inadvertent suppression,\textsuperscript{49} such as the suppression at issue in \textit{Brady}, Justice Douglas, writing for the majority, observed that:

The principle of \textit{Mooney} . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.\textsuperscript{50}

Because the \textit{Brady} obligation is designed to ensure that defendants receive fair trials, a prosecutor's good or bad faith in suppressing evidence is, as the Court observed, irrelevant.\textsuperscript{51}

Despite its repeated references to fairness and justice, the \textit{Brady} opinion did not state clearly why prosecutorial nondisclosure is unfair to defendants. Does unfairness arise because of prosecutorial misconduct? In other words, does it stem from a prosecutor's failure to observe a procedural rule or from his engagement in arbitrary conduct? Does the unfairness stem from some evidentiary advantage that nondisclosure gives to a prosecutor? Does the unfairness derive from some fraud committed upon the court or upon the defendant? Although the Court answered none of these questions directly, its opinion suggests that it understood a "fair trial" to be a trial in which a court is not deceived by a prosecutor, the prosecutor engages in no misconduct, and the resulting conviction is accurate. For example, the Court's reliance on \textit{Mooney}, a misconduct case, indicates that it

\begin{itemize}
  \item \textsuperscript{47} See \textit{Brady}, 373 U.S. at 87.
  \item \textsuperscript{48} See \textit{id.} at 86 (quoting \textit{Mooney v. Holohan}, 294 U.S. 103, 112 (1935)). In \textit{Mooney}, the prosecuting state attorney intentionally suppressed evidence concerning the credibility of every government witness. See 294 U.S. at 110, 112–13. Mooney, a radical labor leader and accused anarchist, claimed that the prosecutor fabricated his entire case and alleged that his conviction was based on perjured testimony "which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him." \textit{id.} at 110. The \textit{Brady} Court also relied on \textit{Pyle v. Kansas}, 317 U.S. 213 (1942), another case involving deliberate suppression. See \textit{Brady}, 373 U.S. at 86.
  \item \textsuperscript{49} See \textit{supra} note 44.
  \item \textsuperscript{50} \textit{Brady}, 373 U.S. at 87.
  \item \textsuperscript{51} See \textit{id.}.
\end{itemize}
was concerned partially with preventing prosecutorial misconduct. In addition, the language it used suggests that the Court was concerned also with public perceptions of trial fairness: the Court observed that the disclosure rule sought to prevent a prosecutor from being cast in the "role of an architect of a proceeding that does not comport with standards of justice." Moreover, the irrelevance of a prosecutor's good or bad faith under Brady and the requirement that the suppressed evidence be material of guilt or punishment suggest that the Court understood fairness in terms of the accuracy of the trial outcome. Why else would the Court limit a prosecutor's disclosure obligation to evidence material to guilt or punishment if clearly, one may assume, a defendant would be harmed if he were denied the opportunity to exploit every piece of favorable (though not material) evidence in the prosecution's possession?

In subsequent decisions, the Supreme Court has infrequently and only briefly spoken to Brady's purpose. Nevertheless, its subsequent Brady cases indicate that disclosure is designed to implement a variety of policies. In its 1976 United States v. Agurs decision, a case involving a prosecutor's deliberate failure to disclose Brady material in his actual possession, the Court characterized Brady as a mechanism for preventing harm to defendants: "Although in Mooney [upon which Brady relied] the Court had been primarily concerned with the willful misbehavior of the prosecutor, in Brady the Court focused on the harm to the defendant resulting from nondisclosure." Although this statement emphasizes the policy of preventing harm to defendants, the opinion's discussion of prosecutorial integrity suggests that the Agurs Court understood fairness also in terms of preventing prosecutorial misconduct:

For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

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52 See supra text accompanying note 48.
53 Brady, 373 U.S. at 88. The Court quoted a portion of an address by former Solicitor General Simon E. Sobeloff:
The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.
Id. at 87 n.2.
55 Id. at 104 n.10.
56 Id. at 110-111 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
Moreover, the Court’s desire to implement the policy of ensuring the accuracy of convictions presumably served as the basis for Agurs’s conclusion that there is no difference between cases in which the defense has made merely a general request for exculpatory evidence and cases in which the defense has made no request for exculpatory evidence.\(^5\)

The Supreme Court expressed its understanding that disclosure functions also to ensure the accuracy of criminal convictions in its 1985 United States v. Bagley decision, a case in which the Court discussed the materiality limitation on the prosecutor’s duty to disclose Brady material.\(^5\) Although Bagley recognized that justice requires disclosure,\(^5\) the Court nevertheless pointed out that the disclosure obligation has its limits: “[T]he prosecutor is not required to deliver his entire file to defense counsel”\(^5\) because “[Brady’s] purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.”\(^5\) Thus, fairness to defendants, as understood by the Bagley Court, does not require that the prosecution turn over to the defendant every possible piece of evidence that might assist him in preparing his defense. Rather, a prosecutor need turn over only material evidence,\(^6\) and “evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”\(^6\) The Court’s belief that a defendant can receive a fair trial even if a prosecutor were to suppress non-outcome-determinative evidence suggests that

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\(^5\) See id. at 106–07. The Court noted that if there is a duty to respond to a general request . . . , it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Id. at 107.

\(^5\) 473 U.S. 667, 678–684 (1985). As it had in prior opinions, the Court also focused on the prosecutorial role that Brady envisions, observing that “the Brady rule represents a limited departure from a pure adversary model” and that “the prosecutor’s role transcends that of an adversary: he ‘is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” Id. at 675 n.6 (alterations in original) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). The prosecutor in Bagley failed to disclose impeachment evidence to the defense following a specific request. See id. at 669–70, 676.

\(^5\) See id. at 674–75.

\(^5\) Id. at 675.

\(^6\) Id. The Court reaffirmed the prosecutor’s sole authority to make disclosure determinations under Brady in its 1987 Pennsylvania v. Ritchie decision, in which it stated that “[d]efense counsel has no constitutional right to conduct his own search of the State’s files [for Brady material]” because “it is the State that decides which information must be disclosed” and “the prosecutor’s decision on disclosure is final.” 480 U.S. 39, 59 (1987).

\(^6\) See Bagley, 473 U.S. at 678.

\(^6\) Id. at 682. The Court defined a “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.” Id.
the purpose of disclosure is served so long as convictions are administered accurately.\textsuperscript{64}

The Supreme Court's recent \textit{Kyles v. Whitley} decision spoke of \textit{Brady} disclosure as a method of both ensuring public confidence in criminal convictions and promoting the accuracy of criminal convictions.\textsuperscript{65} The Court expressed its concern for promoting public confidence in criminal convictions through disclosure by stating that "[\textit{Brady}] disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"\textsuperscript{66} The \textit{Kyles} Court added that:

\begin{quote}
unless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.\textsuperscript{67}
\end{quote}

Moreover, \textit{Kyles}'s observation that "[\textit{Brady} disclosure] will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"\textsuperscript{68} expressed the Court's understanding that \textit{Brady} disclosure is also designed to serve the policy of assuring the accurate administration of convictions.

The Court's concern for implementing \textit{Brady} in a way that preserves the adversarial system of justice is not a subject of great discussion in its \textit{Brady} opinions, but it is nonetheless present throughout its opinions. For example, the Court stated in \textit{Kyles} that "[w]e have never held that the Constitution demands an open file policy,"\textsuperscript{69} in \textit{Pennsylvania v. Ritchie} that "[a] defendant's right to discover exculpatory

\begin{footnotesize}
\begin{enumerate}
\item \begin{footnotesize}Justice Marshall's dissenting opinion recognized the limitation that the majority's materiality requirement placed on the defendant's constitutional right to a fair trial, observing that the \textit{Brady} decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn over to the defendant, \textit{all} information known to the government that might reasonably be considered favorable to the defendant's case.\end{footnotesize}
\item See 514 U.S. 419, 454 (1995).
\item \begin{footnotesize}The three significant Supreme Court opinions preceding \textit{Kyles} that relied on \textit{Brady—Pennsylvania v. Ritchie}, 480 U.S. 39, 57 (1987), \textit{Moore v. Illinois}, 408 U.S. 786, 794-95 (1972), and \textit{Giglio v. United States}, 405 U.S. 150, 154 (1972)—provide little or no discussion of \textit{Brady}'s purpose.\end{footnotesize}
\item \begin{footnotesize}\textit{Kyles}, 514 U.S. at 439.\end{footnotesize}
\item \begin{footnotesize}\textit{Id.} at 440.\end{footnotesize}
\item \begin{footnotesize}\textit{Id.} at 437.\end{footnotesize}
\end{enumerate}
\end{footnotesize}
evidence does not include the unsupervised authority to search through the Commonwealth’s files,”70 and in *Agurs* that “we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel.”71 Why this limitation? In part, as the Court observed in *Bagley*, because it serves to preserve the adversarial system of justice: “[Brady’s] purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel . . . .”72

In summary, this subpart’s discussion indicates that, taken together, the *Brady* line of opinions reflects the Court’s understanding that disclosure of exculpatory and impeachment evidence is intended to implement several policies, including the preservation of the adversarial system of justice, the prevention of prosecutorial misconduct, the provision of fair trials (i.e., preventing harm to defendants), the promotion of public confidence in criminal convictions, and the administration of accurate convictions.

B. The Doctrinal Basis for the Prosecutor’s Duty to Search for *Brady* Material

As the previous subpart indicates, *Brady* forbids a prosecutor from suppressing evidence favorable to the accused.73 Subsequent Supreme Court cases recast the prosecutor’s obligation as the duty to turn over evidence in the government’s possession that is both favorable to the accused and material to guilt or punishment.74 Under either formulation, possession and notice of *Brady* material are implicit preconditions to the disclosure duty. In *Brady*, the prosecution withheld from the defendant exculpatory material in its possession of which it was aware.75 However, does a prosecutor commit a *Brady* violation if she fails to disclose exculpatory material in her possession but of which she is unaware? Does a prosecutor commit a violation if she fails to disclose exculpatory material not in her possession but of which she is aware? What if a prosecutor fails to disclose exculpatory information that is within neither her possession nor knowledge? Subsequent Supreme Court opinions construing *Brady*, discussed in this subpart, provide some guidance regarding the degree of prosecutorial knowledge and possession of exculpatory mate-

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70 *Ritchie*, 480 U.S. at 59.
73 See supra note 46 and accompanying text.
74 See *Ritchie*, 480 U.S. at 57; *Bagley*, 473 U.S. at 674–76.
75 See supra note 44 and accompanying text.
rial necessary for the imposition of a prosecutorial disclosure obligation. Because these cases describe the circumstances under which the courts will impute knowledge or possession of Brady material to a prosecutor, they implicitly set out the scope of the prosecutor’s duty to search for Brady material.

The simplest Brady violation one can imagine involves a prosecutor’s intentional failure to disclose exculpatory material to the defendant that is within the prosecutor’s actual possession and knowledge.76 In fact, the exculpatory or impeachment materials suppressed in Agurs, Moore v. Illinois, and Brady all were within the actual possession of a prosecutor.77 Thus, none of those opinions went so far as to hold that the prosecution has a duty to disclose any exculpatory or impeachment material not within its possession but nevertheless possessed by some arm of the government.78 However, although an implicit precondition to any duty to disclose under Brady is that the prosecution have notice of its possession of evidence materially favorable to the defendant, a prosecutor’s disclosure obligations are not limited to materials close to her or well known to her—that is, to materials within her actual possession or knowledge. Instead, as the Supreme Court has held in a line of cases, including Giglio v. United States,79 Bagley,80 Ritchie,81 and Kyles,82 a prosecutor’s disclosure obligations extend also to exculpatory material not known to or possessed by her but possessed by other members of a prosecutor’s office or by the law enforcement entity that investigated the particular crime on the prosecutor’s behalf.

The imputed knowledge doctrine finds its basis in Giglio, a case in which the defendant was convicted of passing forged money orders

76 The paradigmatic situation occurs where a prosecutor intentionally withholds information supporting a defendant’s sole defense simply because the defendant did not specifically request Brady material. See Agurs, 427 U.S. at 100–01.
77 See id. at 100–01, 106–07; Moore v. Illinois, 408 U.S. 786, 791–95 (1972); Brady v. Maryland, 373 U.S. 83, 84 (1963).
78 In fact, the entire Agurs opinion refers to exculpatory information in the hands of the prosecutor. The Agurs Court began its discussion of Brady by stating that “[t]he rule of Brady v. Maryland arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.” Agurs, 427 U.S. at 103 (citation omitted). The Agurs Court couched in the following language its holding that the Brady analysis does not vary depending on whether the defense’s request is general or whether there is a request at all: “[A general] request . . . gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request . . . , it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor.” Id. at 106–07 (emphasis added).
79 405 U.S. 150 (1972).
and sentenced to five years in prison. At trial, Taliento, Giglio's alleged but unindicted co-conspirator, testified that Giglio instigated the criminal scheme. Taliento was the federal government's only witness linking Giglio to the charged offense. During cross-examination, defense counsel unsuccessfully sought to discredit Taliento's testimony by attempting to reveal possible agreements with the government for prosecutorial leniency. While the appeal was pending, defense counsel discovered that the prosecutor had failed to disclose impeachment evidence to the defense—specifically, a promise to Taliento, recorded in an affidavit by an Assistant U.S. Attorney, DiPaola, that if Taliento testified before the grand jury and at trial he would not be prosecuted for his participation in the scheme. DiPaola had presented the government's case to the grand jury, but the case was tried by another Assistant U.S. Attorney who had filed an affidavit with the court and stated in his summation that the government had made no promise of immunity to Taliento. Although the Assistant U.S. Attorney who actually tried the case and who presumably would have been responsible for Brady disclosure apparently had no knowledge of the impeachment material, the Court nevertheless found a Brady violation: "A promise made by one attorney must be attributed, for . . . [Brady] purposes, to the Government." Thus was born the doctrine of imputed knowledge of Brady material.

In United States v. Bagley, the Court applied this constructive knowledge/possession doctrine to evidence known only to and possessed by the investigative arm of a prosecutor's office. In that case, the federal government convicted the defendant, Bagley, of narcotics offenses principally on the testimony of two witnesses. Prior to trial, Bagley requested that the prosecutor disclose materials relating to "any deals, promises, or inducements made to witnesses in exchange for their testimony." The prosecution disclosed no material relating to any such promises. Three years after his conviction, Bagley made a request for information under the Freedom of Information Act of 1974, in response to which he received copies of form contracts between the government's two witnesses and the Bureau of Alcohol, Tobacco and Firearms (ATF)—the law enforcement entity that

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83 Giglio, 405 U.S. at 150.
84 Id. at 151.
85 Id.
86 See id. at 151–52.
87 Id. at 150–51.
88 Id. at 151–52.
89 Id. at 154.
91 See id. at 669–71, 673.
92 Id. at 669–70.
93 See id. at 669–71.
apparently investigated Bagley on behalf of the prosecution\textsuperscript{94}—for the purchase of information related to Bagley's violations.\textsuperscript{95} In the suit to vacate his sentence, the Assistant U.S. Attorney who prosecuted Bagley stated that he had not known that the contracts existed and that he would have disclosed them to Bagley had he know of them.\textsuperscript{96} Although the Court did not discuss the reasons for its implicit extension of \textit{Brady} to materials outside the prosecutor's possession, the Court, relying on \textit{Brady}, \textit{Agurs}, and \textit{Moore}\textsuperscript{97}—three cases involving suppression of exculpatory or impeachment material within the actual possession of a prosecutor\textsuperscript{98}—found error in the nondisclosure because "the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses,"\textsuperscript{99} even though the Court appears to have acknowledged that the prosecution was unaware of and never possessed the suppressed evidence.\textsuperscript{100} The \textit{Bagley} Court thus construed \textit{Brady} to extend a prosecutor's disclosure obligation to materials possessed by other branches of the government—specifically, a prosecutor's investigative arm.

In \textit{Pennsylvania v. Ritchie}, the Supreme Court implicitly extended the scope of the prosecution's \textit{Brady} disclosure obligation to material possessed by a non-law-enforcement investigative branch of government.\textsuperscript{101} In \textit{Ritchie}, the government charged the defendant, Ritchie, with rape, involuntary deviate sexual intercourse, incest, and corruption of a minor.\textsuperscript{102} Prior to trial, Ritchie subpoenaed the Pennsylvania Children and Youth Services (CYS), a non-law-enforcement protective service agency responsible under Pennsylvania law for investigating cases of suspected mistreatment and neglect,\textsuperscript{103} for files related to his

\begin{itemize}
\item \textsuperscript{94} See id. at 670–71.
\item \textsuperscript{95} See id.
\item \textsuperscript{96} Id. at 671 n.4.
\item \textsuperscript{97} See id. at 674–78.
\item \textsuperscript{98} See supra note 77 and accompanying text.
\item \textsuperscript{99} Bagley, 473 U.S. at 676. The Court's understanding of the broad scope of the \textit{Brady} obligation is further reflected in Justice White's concurring opinion, in which he referred to suppression \textit{by the government} rather than specifically to suppression by the prosecution. Justice White stated that "[Bagley] is not entitled to have his conviction overturned unless he can show that the evidence withheld \textit{by the government} was 'material.'" Id. at 685 (White, J., concurring) (emphasis added).
\item \textsuperscript{100} Id. at 671 n.4. The Court remanded the case for consideration of whether the trial would have been different had the prosecution disclosed the \textit{Brady} material. Id. at 684. The Ninth Circuit Court of Appeals held that the prosecutor's failure to disclose the contracts between the witnesses and the ATF required reversal of Bagley's narcotics conviction. See Bagley v. Lumpkin, 798 F.2d 1297, 1298, 1302 (9th Cir. 1986). Bagley nonetheless served time for the firearms conviction that the two witnesses helped secure. See \textit{United States v. Bagley}, 659 F. Supp. 223, 229 (W.D. Wash. 1987).
\item \textsuperscript{101} See 480 U.S. 39, 58 (1987).
\item \textsuperscript{102} Id. at 43.
\item \textsuperscript{103} Id. The police apparently did not conduct such investigations but instead referred child mistreatment and neglect matters to CYS for investigation. See id.
\end{itemize}
prosecution. Ritchie believed that the files contained names of favorable witnesses as well as other unspecified exculpatory information, including a medical report. CYS refused to provide the files, and Ritchie was convicted and sentenced to three to ten years in prison. Although the Court acknowledged that the prosecutor neither had access to the files nor was aware of their contents, the Court ordered the files turned over to the trial judge for in camera review on the ground that Ritchie was entitled to any Brady information contained in them. Relying on Brady and Agurs, the Supreme Court stated broadly that “[i]t is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.” The Ritchie Court, without discussing the relationship between CYS and the prosecutor in this particular case, thus appeared to implicitly extend a prosecutor’s duty to search for Brady material to reach exculpatory or impeachment material not known to him, possessed by him, or even possessed by law enforcement agencies assisting in a particular prosecution.

Implicit in the Supreme Court’s constructive knowledge and possession cases is the belief that due process is offended if a prosecutor fails to search for Brady material not known to him but possibly possessed by some arm of the government involved in the investigation of a defendant’s allegedly unlawful conduct. In its 1995 Kyles v. Whitley decision, the Supreme Court finally expressly imposed on prosecutors a limited duty to search for Brady material not known to or possessed by them. The defendant in that case, Kyles, was convicted of first-degree murder and sentenced to death primarily on the testimony of four witnesses. In his defense, Kyles argued that the government’s informant had framed him. Prior to trial, defense counsel filed a lengthy motion for Brady material, to which the state prosecutor responded that he neither possessed nor had knowledge of any exculpa-

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104 Id. Pennsylvania law provided for the confidentiality of all reports and other information obtained in the course of a CYS investigation, subject to a certain number of exceptions. Id. One of those exceptions permitted CYS records to be revealed to law enforcement officials for use in criminal investigations. Id. at 43 n.2.
105 Id. at 44.
106 See id.
107 Id. at 45.
108 Id. at 44 n.4.
109 Id. at 61.
110 Id. at 57 (emphases added).
111 In Ritchie and Bagley, the Court implicitly imposed a disclosure obligation on material of which the prosecution has constructive possession. See supra notes 90–110 and accompanying text.
113 Id. at 423, 429–31.
114 Id. at 429.
During the appeal, it was discovered that the prosecutor failed to turn over impeachment evidence to the defense, including the witnesses' contemporaneous statements to the police, records of police conversations with the government's informant, and information linking the government's informant to other crimes. The prosecution argued on appeal that it had no knowledge of the Brady material held by the police—the prosecutor's investigative arm in the case—and that it should not be held accountable for evidence known only to police investigators. The Court acknowledged that "police investigators sometimes fail to inform a prosecutor of all they know," but nevertheless refused to accommodate the State's position, which the Court understood as "a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials," because to do so would "amount to a serious change of course from the Brady line of cases." Relying solely on Brady, the Court held that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."
II
THE CIRCUIT APPROACHES TO THE PROSECUTOR'S DUTY TO
SEARCH THE GOVERNMENT FOR BRADY MATERIAL

As discussed in Part I, the Supreme Court decision in Kyles expressly stated that the prosecution has a duty to search for Brady materials known to others acting on the government's behalf in a particular case. However, the Kyles Court, which had before it prosecutorial failure to discover Brady material known to and possessed by a police department that conducted the prosecutor's investigation, did not explain what kinds of relationships with the prosecution rise to the level of "acting on the government's behalf." This Part describes the different standards that the federal courts of appeals have applied—both before and after Kyles—when evaluating a prosecutor's duty to search for Brady material, several of which could be applied to determine the scope of a federal prosecutor's duty to search the intelligence community for exculpatory or impeachment material in prosecutions of international terrorists. As this Part indicates, the most government friendly approach—a pre-Kyles approach—has held that prosecutors have no duty to seek information not in their actual possession or knowledge, while the most liberal approach could be construed to impose on prosecutors a duty to make a thorough inquiry of all enforcement agencies that have a potential connection with the prosecution's case. Although the circuit courts generally provide little or no rationale in these cases for the extension of Brady to evidence not known to or possessed by a prosecutor, this Part discusses any explanation that they do provide. The scant reasoning provided by the circuits indicate that the courts of appeals share no common understanding regarding the policies that the Brady disclosure obligation is designed to serve, a conclusion which this Note discusses in Part IV.

A. The "Prosecution Team" Standard

The approach most commonly applied by the circuits to determine the scope of a prosecutor's duty to search for Brady material not within his actual possession or knowledge is the "prosecution team" standard. As this subpart demonstrates, the circuits that have applied the prosecution team standard have not, however, consistently resolved various issues that the standard raises. For example, the circuits do not agree as to whether a prosecutor's duty to search for Brady material extends to entities that have no interest in the prosecu-

120 See supra note 111 and accompanying text.
121 See infra notes 222–29 and accompanying text.
122 See infra note 186.
tion, whether the duty extends only to law enforcement entities, whether it extends only to persons acting under the direction or control of the prosecutor, and whether the duty extends to *Brady* material outside of a prosecutor's jurisdiction.

The prosecution team standard finds its roots in the Fifth Circuit's decision in *United States v. Antone.* The criminal prosecutions and convictions in *Antone* were the end product of a joint investigation undertaken by federal and state law enforcement officials to solve the murder of a Florida police officer. While appeals from the convictions were pending, the defendants learned that the federal prosecutor had failed to discover and disclose the fact that a state law enforcement agency had paid for the principal government witness's attorney. The federal government argued on appeal that the prosecutor's nondisclosure was not a *Brady* violation because the two investigative teams in the case represented entirely separate sovereigns, and because the knowledge of the state investigators should not be imputed to the federal prosecutor. Although the Fifth Circuit held that the suppressed evidence was not material enough to permit it to find a *Brady* violation, the court nonetheless imputed the state investigators' knowledge to the federal prosecutor, stating that "extensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [the government witness's] lawyer was paid from state funds must be imputed to the federal team." In response to the government's separate-sovereign arguments, the court remarked that "[i]mposing a rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process." The Fifth Circuit relied on the fact that "the two governments, state and federal, pooled their investigative energies to a considerable extent" and that "[t]he entire [investigative] effort was marked by this spirit of cooperation[,] and state officers were important witnesses in the federal prosecution." *Antone* thus held that a prosecutor's duty to search for *Brady* material

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123 603 F.2d 566 (5th Cir. 1979).
124 Id. at 568.
125 Id. at 567-68. Because the joint investigative team was concerned that someone might attempt to hire counsel for the indigent witness in an attempt to hamper the investigation, state law enforcement officials secretly obtained and paid for the witness's attorney. Id. at 568.
126 Id. at 569. The same-sovereign approach advocated by the prosecutor has been applied in the First, Eighth, and Ninth Circuits. See infra notes 210-21 and accompanying text.
127 *Antone*, 603 F.2d at 570.
128 Id.
129 Id. at 569.
130 Id.
extends to material that might be held by members of the "prosecution team," a term which, in light of the facts of the case, encompasses (1) law enforcement personnel or entities (2) that provide investigative and, possibly, trial assistance (3) as a result of having cooperated extensively and intimately with the prosecutor (4) from the outset (5) of a particular criminal investigation.\textsuperscript{131}

The Seventh Circuit applied the prosecution team standard in \textit{United States ex rel. Smith v. Fairman}, a case in which the defendant, convicted of attempted murder and attempted armed robbery, challenged the prosecution's failure to discover and disclose exculpatory material held by the prosecutor's law enforcement investigative arm—the police—that could have been used to impeach the credibility of one of the government's two key witnesses.\textsuperscript{132} The prosecution argued on appeal that no \textit{Brady} violation had occurred because the prosecutor had no knowledge or possession of the material.\textsuperscript{133} Finding that the prosecution had indeed suppressed evidence, the Seventh Circuit observed that suppression may occur "when the withheld evidence is under the control of a state instrumentality closely aligned with the prosecution, such as the police."\textsuperscript{134} The Seventh Circuit justified its prosecution team approach by recalling \textit{Brady}'s purpose, stating that "\textit{Brady} was aimed at ensuring that an accused receives a fair trial rather than punishing the prosecutor for failing to disclose exculpatory evidence,"\textsuperscript{135} and that "the purposes of \textit{Brady} would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure."\textsuperscript{136}

\textsuperscript{131} \textit{Antone} framed the issue in terms of the scope of the prosecutor's imputed knowledge of, rather than the scope of the prosecutor's duty to search for, \textit{Brady} material. However, implicit in a ruling that places certain \textit{Brady} material within a prosecutor's imputed knowledge is the imposition of an obligation to search for that material.

The Fifth Circuit subsequently relied on the prosecution team standard in \textit{Freeman v. Georgia}, in which it found a \textit{Brady} violation when a prosecutor failed to disclose that a police officer had deliberately concealed a key witness. 599 F.2d 65, 69–70 (5th Cir. 1979). The \textit{Freeman} court reasoned that "when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and the otherwise proper conduct of the state attorney, the policeman's conduct must be imputed to the state as part of the prosecution team." \textit{Id.} at 69. However, the Fifth Circuit has not consistently applied the prosecution team standard in \textit{Brady} cases following \textit{Antone}. \textit{See infra} notes 193–200 and accompanying text.

\textsuperscript{132} 769 F.2d 386, 389, 391 (7th Cir. 1985).
\textsuperscript{133} \textit{See id.} at 391.
\textsuperscript{134} \textit{Id.} The prosecution's law enforcement investigative arm—the police—appears to have provided the prosecutor's sole investigative and trial assistance in the criminal investigation of the defendant, Smith. Though the opinion does not explicitly address the point, there is no reason to doubt that the police cooperated extensively and intimately with the prosecutor from the outset of the investigation. \textit{See id.} at 388–89.
\textsuperscript{135} \textit{Id.} at 392.
\textsuperscript{136} \textit{Id.} at 391–92.
The Seventh Circuit again applied the prosecution team standard in its post-*Kyles United States v. Morris* decision.137 *Morris* involved evidence possessed not by the police but by federal agencies investigating the defendants' alleged unlawful conduct in an unrelated investigation.138 The defendants in *Morris* were charged and convicted of various counts of mail and wire fraud, based mostly on the testimony of a former bank officer who had pled guilty to involvement in the unlawful scheme and had agreed to cooperate with the government.139 Apparently unbeknownst to the prosecution, three federal agencies—the Office of Thrift Supervision (OTS), the Securities Exchange Commission (SEC), and the Internal Revenue Service (IRS)—had conducted their own investigations separate and apart from the Department of Justice's criminal investigation.140 After their convictions, the defendants alleged that the prosecutor had committed a *Brady* violation by failing to disclose materials possessed by the three separate federal agencies, specifically an OTS deposition of the government's key witness, SEC questionnaires of purchasers defrauded under the unlawful scheme, and IRS documents relating to the tax implications of transactions used to implement the unlawful scheme.141 The Seventh Circuit refused to rule that a *Brady* violation had occurred, holding that the prosecutor had no duty to seek out *Brady* material from the OTS, SEC, or IRS because "those agencies were [not] part of the team that investigated this case or participated in its prosecution."142 Characterizing its decision in *Fairman* and the Supreme Court's decision in *Kyles* as "prosecution team" cases, the Seventh Circuit observed that "neither *Kyles* nor *Fairman* can be read as imposing a duty on the prosecutor's office to learn of information possessed by other government agencies that have no involvement in the investigation or prosecution at issue."143

The Ninth Circuit also has applied the prosecution team standard to determine the scope of a prosecutor's duty to search for *Brady* material, though its decisions appear to relax the requirement that

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137 80 F.3d 1151 (7th Cir. 1996).
138 See id. at 1169.
139 Id. at 1154–55.
140 Id. at 1169–70.
141 See id. at 1168–69 & 1169 n.14.
142 Id. at 1169–70 (emphasis added).
143 Id. The court cited *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984), as support for this proposition, see *Morris*, 80 F.3d at 1169, a case oft cited for its dictum that a prosecutor cannot evade his *Brady* obligations by keeping himself in ignorance or "compartmentalizing information about different aspects of a case." *Carey*, 738 F.2d at 878. In dictum, the *Carey* court stated that it did "not need to decide whether DEA, the police, and the state prosecutor can all be charged with constructive knowledge of each other's arrangements," but nonetheless stated that "joint state-federal drug investigations are quite common" and that prosecutors, therefore, "should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team." Id. at 878.
the outside government entity be a law enforcement entity. In *United States v. Wood*, in which the defendants were charged and convicted of conspiring to defraud the FDA,\textsuperscript{144} Circuit Judge Noonan found that the government had suppressed evidence by failing to disclose certain FDA documents of which the prosecution was aware but which only the FDA possessed, stating that “[f]or *Brady* purposes, the FDA and the prosecutor were one.”\textsuperscript{145} Applying and perhaps expanding the prosecution team standard, the court held that “under *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute.”\textsuperscript{146} The decision did not discuss the prosecution team standard so much as it appealed to notions of basic fairness and the fact that the FDA had an institutional interest in prosecuting the defendants: “The government in the form of the prosecutor cannot tell the court that there is nothing more to disclose while the agency interested in the prosecution holds in its files information favorable to the defendant.”\textsuperscript{147} Similarly, in *United States v. Hsieh Hui Mei Chen*, the Ninth Circuit declined to reverse a district court’s refusal to compel the prosecution to discover and disclose *Brady* material beyond what was contained in its files, stating that “[w]hile the prosecution must disclose any information within the possession or control of law enforcement personnel, it has no duty to volunteer information that it does not possess or of which it is unaware.”\textsuperscript{148}

The Second Circuit decisions applying the prosecution team standard emphasize the limits on the scope of a prosecutor’s duty to search for *Brady* material. In *United States v. Payne*, for example, the

\textsuperscript{144} 57 F.3d 733, 735 (9th Cir. 1995).

\textsuperscript{145} Id. at 737.

\textsuperscript{146} Id.

\textsuperscript{147} Id. The FDA materials at the center of the controversy were requested under Rule 16. See id. at 736. The fact that the court looked to *Brady* to find the scope of the prosecutor’s duty to disclose exculpatory or impeachment evidence in response to the defendant’s motion supports the conclusion that any parameters set on the scope of a prosecutor’s duty to seek *Brady* material in the possession of other arms of the government will apply equally in the statutory discovery context. See supra note 35.

\textsuperscript{148} 754 F.2d 817, 824 (9th Cir. 1985) (citations omitted). The case that the Ninth Circuit cited for this proposition involved a prosecutor’s failure to disclose evidence possessed by the prosecution’s investigative arm—in that case, the police. See id. (citing Imbler v. Craven, 298 F. Supp. 795, 806 (C.D. Cal. 1969)). One may presume, then, that the *Hsieh Hui Mei Chen* court meant only that the prosecution must disclose information within the possession or control of law enforcement personnel involved in the investigation of the charged conduct. Moreover, the court in the same opinion declined to reverse the trial court’s refusal to compel the prosecution to hand over an internal Border Patrol investigative report regarding the government official that the defendant allegedly bribed on the basis of the immateriality of the evidence, not the government’s lack of control or possession of the evidence. See id. at 824.
Second Circuit, relying on the Supreme Court’s *Kyles* decision, found that a federal prosecutor had suppressed evidence when he failed to disclose to the defendant impeachment evidence known to him but filed with another trial court as part of a related action.\(^{149}\) The *Payne* court stated that “[t]he individual prosecutor is presumed to have knowledge of all information gathered in connection with the government’s investigation.”\(^{150}\) In *Payne*, the government’s key witness, as a result of the same DEA investigation that gave rise to the charges against the defendant, had been charged for her involvement in the defendant’s scheme before agreeing to cooperate with authorities.\(^{151}\) An affidavit the witness had submitted in her separate trial, before agreeing to cooperate with the government, contained statements that contradicted her trial testimony inculpating the defendant.\(^{152}\) The Second Circuit followed *Payne* in *United States v. Avellino*.\(^{153}\) The *Avellino* court did not reach the issue of the scope of a prosecutor’s duty to search for *Brady* material but, relying on its prior decisions in *United States v. Quinn*\(^{154}\) and *United States v. Locascio*\(^{155}\) as well as the Eastern District of New York’s decision in *United States v. Gambino*,\(^{156}\) nevertheless stated that

knowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor’s office on the case in question would inappropriately require us to adopt “a monolithic view of government” that would “condemn the prosecution of criminal cases to a state of paralysis.”\(^{157}\)

\(^{149}\) 63 F.3d 1200, 1208 (2d Cir. 1995).

\(^{150}\) Id. The prosecution argued on appeal that because the material was in public records, the defendant’s failure to obtain the documents was due to lack of diligence on the part of defense counsel. See id. Thus, the more specific ground for the court’s holding was that public availability does not obviate a prosecutor’s duty to search for *Brady* material if defense counsel lacks notice that a particular branch of the government possesses such material. See id. at 1209. Nevertheless, the court would not have reached the issue of public availability if it had not first implicitly ruled that the material was in the government’s possession. Its reliance on *Kyles* suggests that the court construed the prosecution’s duty to search for *Brady* material to be limited to material in the possession of some arm of the prosecution. Because the witness’s and the defendant’s separate prosecutions arose out of the same criminal investigation, the court concluded that any documents relating to any single prosecution were to be treated as part of the other prosecution as well. See id. at 1208–09.

\(^{151}\) See id. at 1203–05.

\(^{152}\) See id. at 1204–05.

\(^{153}\) 136 F.3d 249 (2d Cir. 1998).

\(^{154}\) 445 F.2d 940 (2d Cir. 1971).

\(^{155}\) 6 F.3d 924 (2d Cir. 1993).


\(^{157}\) 136 F.3d at 255 (quoting *Gambino*, 835 F. Supp. at 95). In *Gambino*, the district court refused to impute to the federal prosecutor knowledge of *Brady* material that a state
The Second Circuit thus recognizes that the courts, in seeking to ensure that criminal convictions are accurate, must not impose too great an administrative burden on a prosecutor’s office when requiring the prosecution to search other arms of the government.

The Tenth Circuit applies a version of the prosecution team standard that deviates from Antone in that it does not require the outside government entity to have been directed by a prosecutor’s office or to have cooperated with a prosecutor’s office in its investigation. In Smith v. Secretary of New Mexico Department of Corrections, the Tenth Circuit found that a state prosecutor had suppressed evidence when he failed to disclose impeachment material of which he was unaware but which was held by state law enforcement—county police investigators—known to be conducting a separate investigation of the defendant’s alleged crime. Relying on Giglio and the Fifth Circuit’s attorney and an FBI agent had gained in an unrelated criminal investigation four years earlier, on the grounds that such a holding would impose too burdensome a search duty. See 835 F. Supp. at 94–95. Other than the alleged Brady material’s lack of relation to the prosecution’s investigation and the extent of the administrative burden imposed by a broad duty to search, see id. at 95, Cambino did not suggest any other basis for limiting the prosecutor’s duty to search for Brady material.

The Avettino court relied also on Quinn in applying the prosecution team standard. See 136 F.3d at 255–56. In Quinn, the Second Circuit declined to find a Brady violation where a federal prosecutor in New York failed to disclose to the defense a government witness’s criminal records not known to the prosecutor but known to and possessed by a (presumably federal) prosecutor in Florida. See 445 F.2d at 944. The court concluded that the defendants had taken “the completely untenable position that ‘knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor’ and that ‘he [the New York prosecutor] must be deemed to have had constructive knowledge of this evidence.’” Id. (quoting Appellants’ Brief). In addition to the implicit jurisdictional limitation imposed by the court, Quinn pointed also to the administrative burden as a basis for limiting the prosecutor’s duty to search for Brady material: “The Department of Justice alone has thousands of employees in the fifty States of the Union. Add to these many more thousands of employees of ‘any part of the government.’ [Defendants’] argument can be disposed of on a ‘reductio ad absurdum’ basis.” Id.

Finally, the Avettino court relied also on Locascio in applying the prosecution team standard. See 136 F.3d at 255. In Locascio, the Second Circuit declined to find a Brady violation where a federal prosecutor in New York failed to disclose impeachment evidence that was not known to the prosecution but was held by the FBI. See 6 F.3d at 949–50. The report had been prepared by agents who were not involved in the defendants’ investigation or prosecution. See id. at 948. The court applied the prosecution team standard: “Even assuming the reports’ materiality, there is no evidence that the prosecution team in the instant case was aware of the reports that have subsequently come to light. We will not infer the prosecutors’ knowledge simply because some other government agents knew about the report.” Id. at 949.

The prosecutor apparently relied solely on investigative work done by authorities in Bernalillo County, New Mexico, but he apparently knew that authorities in Torrance County were conducting a separate investigation into the same crime. See id. at 825 n.36. “Clearly,” the court observed, “if the prosecution had actual knowledge that several arms of the State were involved in the investigation of a particular case, then the knowledge of those arms is imputed to the prosecution.” Id. The court recognized, however, that there is no settled approach regarding imputation in cases in which the prosecution is unaware of the separate investigation. See id.
decision in *Martinez v. Wainwright*, Circuit Judge Brorby stated that "the 'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture." In a statement that contemplates an even broader prosecutorial duty to search for *Brady* material, the Tenth Circuit in *United States v. Beers*, relying on both its prior prosecution team decision in *Smith* and the Ninth Circuit's same-sovereign availability/accessibility decision in *United States v. Aichele*, asserted that "[i]nformation possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case." However, Circuit Judge Tacha "decline[d] to extend this principle for federal prosecutors to exculpatory materials in the possession of the state government," holding that a New Mexico federal prosecutor did not suppress evidence when he failed to disclose impeachment material not known to him but possessed by the state of New Mexico. Elsewhere in its opinion, the *Beers* court implicitly limited the apparently broad scope of a prosecutor's duty to search for *Brady* material by basing its holding on the fact that New Mexico state officials were not a part of the prosecution team, observing that "there is no indication that the investigation was a joint effort between the state and federal government." Commenting on the administrative burden imposed by an any-sovereign approach to determining a prosecutor's duty to search for *Brady* material, the court remarked that "[i]t is unrealistic to expect federal prosecutors to know all information possessed by state officials affecting a federal case, especially when the information results from an unrelated state investigation."

The Eleventh Circuit, which was a part of the Fifth Circuit until 1981, adds a jurisdictional limitation to Antone's prosecution team standard. In *United States v. Meros*, for example, the Eleventh Circuit declined to find that a Florida federal prosecutor suppressed evidence when he failed to turn over impeachment material not known to him but possessed by Georgia and Pennsylvania federal prosecutors in-

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159 621 F.2d 184 (5th Cir. 1980). For a discussion of *Wainwright*, see infra notes 197-200 and accompanying text.
160 *Smith*, 50 F.3d at 824 (internal quotation marks omitted) (footnote and citation omitted).
161 See 189 F.3d 1297 (10th Cir. 1999).
162 941 F.2d 761 (9th Cir. 1991).
163 *Beers*, 189 F.3d at 1304.
164 Id.
165 See id. at 1303-04.
166 Id. at 1303.
167 Id. at 1304.
involved in separate investigations. The trial court denied the defendant’s motion to compel the Florida federal prosecutor to disclose information about a government witness’s plea agreements with federal prosecutors in Pennsylvania and Georgia. The trial court held that the material was not in the government’s possession for Brady purposes. Relying on the Fifth Circuit’s prosecution team decision in Antone and emphasizing a jurisdictional limitation on a prosecutor’s duty, the Eleventh Circuit refused to disturb the ruling, stating that “Brady and its progeny apply to evidence possessed by a ‘district’s prosecution’ team, which includes both investigative and prosecutorial personnel.” Brady, then, applies only to information possessed by the prosecutor or anyone over whom he has authority. Similarly, in Moon v. Head, the Eleventh Circuit declined to find that a Georgia state prosecutor had suppressed evidence when he failed to disclose to the defense impeachment material not known to him but possessed by Tennessee law enforcement officials, some of whom participated in the Georgia prosecution. Relying on the court’s prior Meros decision and the Fifth and Second Circuits’ prosecution team decisions in Antone and Avellino, Circuit Judge Tjoftal stated that the defendant was required to show that the Georgia state prosecutor had authority over the Tennessee law enforcement officials, that the Georgia prosecutor pooled his investigative energies with Tennessee law enforcement to prosecute the defendant, and that Tennessee law enforcement worked with the Georgia prosecutor’s office on the defendant’s case. The court found that none of these factors was present, stating that “[a]s the Georgia Supreme Court held, we find no evidence that Tennessee law enforcement officials and Georgia prosecutors engaged in a joint investigation of the [defendant’s crime].”

866 F.2d 1304, 1309 (11th Cir. 1989).

See id. at 1307–08.

Id. at 1309 (citation and footnote omitted) (quoting United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979)). Because the court’s decision stated that “[a] prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a Brady request,” id., Meros seemed to apply the same-jurisdiction limitation applied in the Second and Eighth Circuits in United States v. Quinn and United States v. Hawkins to determine the scope of a prosecutor’s duty to search for Brady material not in his possession. See supra note 154 and accompanying text; infra notes 220–21 and accompanying text. However, this jurisdictional limitation was unnecessary to the court’s application of the prosecution team standard.

285 F.3d 1301, 1308–10 (11th Cir. 2002).

See id. at 1309–10.

Id. at 1310 (internal quotation marks omitted). The Eleventh Circuit has applied the prosecution team standard in a number of other cases. See, e.g., McMillian v. Johnson, 88 F.3d 1554, 1568–69 (11th Cir. 1996) (finding that a prosecutor violated his Brady obligations by failing to disclose Brady material discovered by investigators during a separate but related contemporaneous investigation); Stano v. Butterworth, 51 F.3d 942, 945–46 (11th
The D.C. Circuit Court of Appeals also applies a prosecution team standard similar to that applied in Antone when evaluating the scope of a prosecutor's duty to search for Brady material, but requires that the search duty be triggered by a likelihood of a successful search. In United States v. Brooks, for example, Circuit Judge Williams ordered a federal prosecutor to search state law enforcement files for Brady material.\textsuperscript{174} Relying on the fact that "cases finding a duty to search have involved files maintained by branches of government 'closely aligned with the prosecution,'" the court held that because of the "close working relationship between the Washington metropolitan police and the U.S. Attorney for the District of Columbia (who prosecutes both federal and District crimes, in both the federal and Superior courts), a relationship obviously at work in this prosecution," any prosecutorial duty to search for Brady material extended to the police department's records.\textsuperscript{175} However, although the court found that the prosecutor's duty theoretically extended to the files, it held that the duty to search the files is triggered only if there is a sufficient likelihood that the files contain Brady material.\textsuperscript{176} Thus, if it should be clear to a prosecutor that its investigative arm might possess Brady material, or if defense counsel makes an explicit request pinpointing certain files that can be searched without difficulty and that have more than a trivial probability of containing Brady material, the D.C. Circuit will not find that a discovery request is too speculative to require a search.\textsuperscript{177}

\textsuperscript{174} 966 F.2d 1500, 1502-05 (D.C. Cir. 1992).
\textsuperscript{175}  Id. at 1503 (citation omitted).
\textsuperscript{176}  See id.
\textsuperscript{177}  See id. at 1504.
B. The "Availability/Accessibility" Standard

Another approach commonly applied by the circuits to determine the scope of a prosecutor's duty to search for *Brady* material not within his actual possession or knowledge is the "availability/accessibility" standard. As this subpart demonstrates, however, the circuits that have applied the availability/accessibility standard, like the courts applying the prosecution team standard, have not consistently resolved various issues that it raises, including whether the standard imposes a same-sovereign requirement, whether there is a good faith search exception to the standard, and whether the standard imposes a same-jurisdiction requirement.

The leading case is *United States v. Perdomo*, in which the defendant was convicted in a federal district court in the Virgin Islands of various felony drug offenses, primarily on the testimony of a paid government informant who testified about having purchased drugs from the defendant.\(^\text{178}\) Prior to trial, the defendant, Perdomo, submitted written requests for any information relating to the criminal background of any prosecution witness.\(^\text{179}\) After running a National Crime Information Center (NCIC) computer check, the prosecution responded that its key witness, the paid informant, had no criminal record.\(^\text{180}\) One day after Perdomo was convicted, it was discovered that the paid informant indeed had a prior arrest and conviction record that the prosecutor did not disclose because local Virgin Island arrests and convictions were not recorded in the NCIC database.\(^\text{181}\) Without discussing local law enforcement's apparent lack of participation in or connection with the federal prosecutor's criminal investigation of Perdomo,\(^\text{182}\) the Third Circuit found that the federal prosecutor had committed a *Brady* violation by failing to discover and disclose the government witness's local criminal record.\(^\text{183}\) The court held that "the prosecution is obligated to produce *Brady* material actually or constructively in its possession or accessible to it"\(^\text{184}\) and that "such informa-
tion was available to [the prosecutor].”185 Elaborating on the meaning of the availability standard, the *Perdomo* court stated that “the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state.”186 Thus, under *Perdomo*, the scope of a prosecutor’s duty to search for *Brady* material depends on the availability/accessibility of the material within some arm of the state.187

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185 *Id.*

186 *Id.* at 971. As discussed in this subpart, the Ninth Circuit has implicitly construed this standard to impose a same-sovereign limitation on the availability/accessibility standard. See infra notes 210–14 and accompanying text. Because *Perdomo* involved a federal prosecutor who failed to discover and disclose a criminal record not possessed by some arm of the federal government, see *Perdomo*, 929 F.2d at 968–69, the decision does not appear to have imposed such a limitation.

187 The Third Circuit must have understood the “state” to include both the federal and state governments within a jurisdiction, as the case involved a federal prosecutor’s failure to search local law enforcement for *Brady* material. See *Perdomo*, 929 F.2d at 970–71.

The Third Circuit has not uniformly applied *Perdomo*’s availability/accessibility standard. For example, in *United States v. Joseph*, a prosecutor failed to turn over to the defense impeachment evidence available on file in the prosecutor’s office from an unrelated case. See 996 F.2d 36, 37–38 (3d Cir. 1993). Although the case appeared to be controlled by *Perdomo* (because the file was readily available to the prosecution), the Third Circuit declined to find a *Brady* violation. *Id.* at 41. After stating that it “construe[s] the term ‘constructive possession’ to mean that although a prosecutor has no actual knowledge, he should nevertheless have known that the [Brady] material at issue was in existence,” *id.* at 39, the Third Circuit recast its *Perdomo* decision as a holding based not on an availability/accessibility standard but rather as one based on a constructive knowledge standard, see *id.* The court stated that, in *Perdomo*, it was “unwilling to allow the prosecution to avoid its [Brady] obligations by failing to take the minimal steps necessary to acquire the requested information. Thus, [it] implicitly held that the prosecutor’s actions were objectively unreasonable in that the *Perdomo* prosecutor should have known of the requested information.” *Id.* at 40. Thus, the search standard applied in the Third Circuit may be a broader “the prosecutor should have known of the *Brady* material” standard, rather than the already broad availability/accessibility standard.

In addition to applying this broad constructive knowledge standard, the Third Circuit has also applied a good faith exception to a prosecutor’s duty to search for *Brady* material. In *Hollman v. Wilson*, the Third Circuit declined to find a *Brady* violation where a prosecutor failed to turn over impeachment evidence it possessed due to a clerical error because, as the court stated, “where the government has diligently searched, no *Brady* violation will be found.” 158 F.3d 177, 181 (3d Cir. 1998).

In addition to the good faith exception it has recognized, the Third Circuit has also applied a “potential connection with the case” search standard that imposes no practical limits on a prosecutor’s duty to search the government for *Brady* material. In a 1993 case, *United States v. Thorton*, a prosecutor failed to discover and disclose, in response to a *Brady* request, information about DEA payments to two cooperating government witnesses. 1 F.3d 149, 157 (3d Cir. 1993). The Third Circuit construed *Perdomo* as imposing on prosecutors “an obligation to make a thorough inquiry of all enforcement agencies that [have] a potential connection with the witnesses.” *Id.* at 158 (emphasis added). Thus, as articulated in *Thorton*, *Brady* requires a prosecutor to search for exculpatory or impeachment materials possessed by any branch of government that has a potential connection with the case.
The Third Circuit’s *Perdomo* decision relied on various Fifth Circuit decisions, including *United States v. Deutsch*, a Fifth Circuit decision preceding the Circuit’s application of the prosecution team standard in *Antone*. The defendants in *Deutsch* were convicted of offering to pay a U.S. Postal Service employee to extract credit cards from the mail primarily on the testimony of another U.S. Postal Service employee, Morrison. Prior to trial, the defendants sought to obtain Morrison’s personnel file. The prosecution refused, arguing that it could not be compelled to disclose *Brady* material not in its possession and that, because the U.S. Postal Service was not an arm of the prosecution, the material it held was not in the government’s possession. The Fifth Circuit rejected the government’s argument and the lower court’s acceptance of it, stating that it found “no reference in *Brady* to an arm of the prosecution.” However, without identifying the factors closely connecting the U.S. Postal Service and the federal prosecutor’s office, the court hinted that it applied the prosecution team standard when it stated that “there is no suggestion in *Brady* that different ‘arms’ of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities.” Nevertheless, speaking implicitly to the scope of a prosecutor’s duty to search for *Brady* material, the court remarked that “[t]he government cannot compartmentalize the Department of Justice and permit it to bring a charge affecting a government employee in the Post Office and use him as its principal witness, but deny having access to the Post Office files.” *Deutsch* thus contemplates that the scope of a prosecutor’s duty to search for *Brady* material not known to her but possessed by other branches of the government is limited only by the availability/accessibility of the other branch’s material to the prosecutor.

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188 475 F.2d 55 (5th Cir. 1973), overruled on other grounds by United States v. Henry, 749 F.2d 203 (5th Cir. 1984).
189 Id. at 56–57.
190 Id. at 57.
191 Id.
192 Id.
193 Id. The summary of the facts indicates that Morrison’s superiors at the U.S. Postal Service arranged for the law enforcement officers to arrest the defendants midway through the transaction. See id. at 56.
194 Id. at 57 (emphasis added).
195 The Fifth Circuit subsequently applied *Deutsch*’s broad availability/accessibility standard in *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980). In that case, tried in the Eastern District of Texas, the defendant appealed based on the government’s failure to disclose the full criminal record of its key witness, which was contained in documents from Colorado and Texas. See id. at 480. The prosecutor argued that he had neither possession nor knowledge of the material indicating the witness’s criminal record, though his lack of knowledge was due to the fact that he failed to run an FBI or National Crime Information Center check. See id. at 481. Finding that the prosecutor had indeed suppressed evidence, the court relied on a prior Fifth Circuit decision for the proposition that “[t]he basic
The Fifth Circuit applied its broad availability/accessibility standard again in *Martinez v. Wainwright*, a case in which the defendant alleged that the prosecution violated its *Brady* obligations by failing to produce, in response to a specific request, a homicide victim's rap sheet. Although a copy of the rap sheet was available in the medical examiner's office and from the FBI throughout the prosecution, the prosecutor denied knowledge of a rap sheet before, during, and after the trial, assuring the court that he had made every effort possible to obtain one. In finding a *Brady* violation, the Fifth Circuit rejected the prosecution's argument that it could not have suppressed a document not known to it and not within its possession, observing that “[t]he prosecutor never alleged any difficulty in gaining access to the rap sheet held by the medical examiner’s office” and that “[t]he rule of *Brady* would be thwarted if a prosecutor were free to ignore specific requests for material information obtainable by the prosecutor from a related governmental entity.”

The Fifth Circuit's decision import of *Brady* is . . . that there is an obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it.” Id. (second alteration in original) (emphasis added) (quoting *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975)). Emphasizing its holding's basis in the availability of the evidence, the court remarked that “the prosecutor has ready access to a veritable storehouse of relevant facts and . . . this access must be shared.” Id. The Fifth Circuit followed *Auten* in *Williams v. Whitley*, in which the court held that the prosecution suppressed evidence when it withheld a police report, even though the prosecutor had no knowledge or possession of the material. 940 F.2d 132, 133 (1991). The court reasoned that “the prosecution is deemed to have knowledge of information readily available to it.” Id. The Fifth Circuit again applied the availability/accessibility standard in *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980). See infra notes 196-200 and accompanying text.

The Fifth Circuit has not consistently applied *Deutsch*’s broad availability/accessibility standard. As discussed supra, Fifth Circuit opinions subsequent to *Deutsch* have adopted the narrower construction of the court's holding. See supra notes 123-31 and accompanying text. In *United States v. Treseino*, for example, the Fifth Circuit declined to find that a federal prosecutor violated his *Brady* obligations by failing to disclose a presentence report containing information which could have been used to impeach the government's primary witness. 556 F.2d 1265, 1270-72 (5th Cir. 1977). The court noted that “[n]othing in the *Brady* opinion would encompass a report compiled in an earlier prosecution and held by the convicting court—which may or may not be the court in which the discovery motion is considered—through its probation service.” Id. at 1271. Without discussing why the evidence was unavailable to the prosecutor, the court stated that “*Brady* involved evidence available to and suppressed by the prosecution; its language is directed entirely to the proper role of the prosecutor in according the accused a fair trial.” Id. at 1270. The court observed that if the presentence report had been in the hands of the prosecutor and had contained *Brady* material, then it might have been compelled to find a *Brady* violation. See id. at 1271 n.7. Because *Treseino* did not cite *Deutsch*, which the Fifth Circuit had decided only four years earlier, the decision's failure to find a *Brady* violation on the basis of the material's availability to the prosecution implicitly indicated the Fifth Circuit's retreat from the broad availability/accessibility standard (i.e., cases like *Deutsch*) to the narrower prosecution team standard (i.e., cases like *Antone*).
did not discuss the prosecution team standard or even cite its prior Antone decision, and it appeared to rely on the availability of the Brady material to the prosecutor rather than on its possession by an arm of the prosecution. However, the court did rebuff the prosecution’s attempt to limit the scope of its duty to search for Brady material to law enforcement agencies, observing that such an argument “fails to explain why the medical examiner’s office is not a state investigative agency such that information in its possession is attributable to the state.”

Despite the Seventh Circuit’s occasional application of the more limited prosecution team standard, it has also applied a form of the availability/accessibility standard that recognizes a good faith search exception to a prosecutor’s duty to search for Brady material. In Crivens v. Roth, the Seventh Circuit found a Brady violation in a state prosecutor’s failure to discover and disclose a government witness’s criminal record not known to the prosecution but maintained by its investigative arm—in this case, the local police—because “the state . . . had the information at its disposal.” Although the facts suggest that the court could have applied the prosecution team standard, it expressly adopted the availability/accessibility standard applied in the Third and Fifth Circuits’ Perdomo and Wainwright decisions. The court remarked that “we agree with other circuits that have explained that ‘the availability of information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state.’” Similarly, in United States v. Young, the Seventh Circuit refused to find a Brady violation in a federal prosecutor’s failure to discover and disclose a government witness’s criminal record not known to him but maintained by state officials in another state, because the prosecution had made a good faith effort to discover Brady material not in its possession.

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200 Id. at 187 n.4.
201 See supra notes 132–43 and accompanying text.
202 172 F.3d 991, 997 (7th Cir. 1999).
203 The facts of the case suggest that the Chicago Police Department alone worked with the prosecution to provide all the investigative and trial assistance in the criminal investigation. See id. at 993–94, 997.
204 Id. at 997–98 (emphasis added) (quoting United States v. Perdomo, 929 F.2d 967, 971 (3d Cir. 1991)). The court provided no discussion of a prosecution team standard, even though it cited the Supreme Court’s decision in Kyles v. Whitley, 514 U.S. 419, 432 (1995), for the proposition that a prosecutor has an affirmative duty to disclose such evidence and a duty to learn of any favorable evidence known to the others acting on the government’s behalf in a case. See Crivens, 172 F.3d at 996.
205 20 F.3d 758, 764–65 (7th Cir. 1994). Robert Hochman has argued that cases like Young stand for the proposition that some circuits apply a same-sovereign standard (distinct from other standards) to determine the scope of a prosecutor’s duty to search for Brady material. See Hochman, supra note 31, at 1680–81. In fact, Young, which relies on Auten and Perdomo, and like cases are better treated as part of the same line of cases that
Circuit Judge Eschbach stated that "the prosecution's obligation in a criminal proceeding to disclose information is limited to information known to the prosecution." Moreover, relying on the Third and Fifth Circuits' *Perdomo* and *Auten* decisions, the court stated that it could find prosecutorial suppression only if "the government intentionally failed to seek out information readily available to it." Thus, deviating from the Third and Fifth Circuit approaches, *Young* held that the availability/accessibility standard is satisfied if a prosecutor makes a good faith effort to discover *Brady* material.

In addition to the prosecution team standard it has occasionally applied, the Ninth Circuit has also applied a form of the availability/accessibility standard that imposes a same-sovereign limitation on the scope of a prosecutor's duty to search for *Brady* material not in her possession or knowledge. For example, in *United States v. Aichele*, the Ninth Circuit declined to find a *Brady* violation when a federal prosecutor failed to disclose impeachment material apparently known to him, but held by a state department of correction, because the material was not under the federal prosecutor's control. Circuit Judge Rymer stated that "the only impeachment material still sought was [the government witness's] first California Department of Corrections file, which was under the control of California officials. The prosecution is under no obligation to turn over materials not under its control." That *Aichele* was based on the same-sovereignty limitation and not on the control standard is evidenced by the court's decision in

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206 Young, 20 F.3d at 764.
207 Id.
208 The court in *Young* observed that the case was "simply not analogous to *Perdomo* and *Auten*" because "the government did not 'keep itself in ignorance' about the witness's criminal history, but rather 'diligently searched the pertinent criminal records for information on [the witness], asked [the witness] directly about his criminal history, and disclosed all of its information to Young.'" Id. One could infer from this language that the decision was actually based on the prosecution's good faith effort to discover *Brady* material not in its possession. However, reading *Young* as creating a "good faith effort to discover" exception to the availability/accessibility standard applied in *Perdomo* and *Auten* appears to render the case inconsistent with *Brady's* holding that the good or bad faith of a prosecutor is irrelevant. See Brady v. Maryland, 373 U.S. 83, 87 (1963). On the other hand, the court's acceptance of a good faith but unsuccessful effort to discover *Brady* material not in the same sovereign's possession could be construed as consistent with Supreme Court precedent, because the Supreme Court has never required the prosecution to turn over exculpatory or impeachment material not in the same sovereign's possession.

209 See *supra* notes 144-48 and accompanying text.
210 941 F.3d 761, 764 (9th Cir. 1991).
211 Id. *Aichele* relied on *United States v. Gatto*, 763 F.2d 1040, 1049 (9th Cir. 1985), for this proposition. See *Aichele*, 941 F.3d at 764. In *Gatto*, the Ninth Circuit held that the
United States v. Jennings, in which the Ninth Circuit upheld a district court order compelling a federal prosecutor to review the files of testifying federal law enforcement personnel, apparently for impeachment evidence.\textsuperscript{212} "[P]ersonal responsibility [for compliance with Brady]," the court noted, "cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies."\textsuperscript{213} In support of its holding, the court cited Martinez v. Wainwright, the Fifth Circuit decision applying the availability/accessibility standard to the determination of the scope of a prosecutor's duty to search for Brady material not in his possession or knowledge.\textsuperscript{214}

The First Circuit has followed the Ninth Circuit's line of cases imposing a same-sovereign requirement on the availability/accessibility standard. In United States v. Sepulveda, the First Circuit, relying on the Ninth Circuit's decision in Aichele, held that a New Hampshire federal prosecutor did not have a duty to search for Brady material not known to him but possessed by New Hampshire state authorities.\textsuperscript{215} The court based its decision solely on the assertion that "the rigors of Brady do not usually attach to material outside the federal government's control."\textsuperscript{216} Similarly, in United States v. Osorio, the First Circuit found that a federal prosecutor violated his disclosure obligations because he failed to discover and disclose to the defense until midway through the defendant's trial that the government's chief witness was a major drug dealer; this information was unknown to the federal prosecutor but apparently was generally known within the U.S. Attorney's Office and the FBI.\textsuperscript{217} Implicitly imposing the same-sovereign requirement on the access/accessibility standard, the court stated that "'[t]he government' is not a congeries of independent hermetically sealed compartments; and the prosecutor in the courtroom, the United States Attorney's Office in which he works, and the FBI are not federal government need not produce materials controlled by state officials in response to a Rule 16 motion. 763 F.2d at 1049.\textsuperscript{212} 960 F.2d 1488, 1490–92 (9th Cir. 1992).
\textsuperscript{213} Id. at 1490. The lower court did not require the federal prosecutor to review the files of local and state law enforcement officers. Id. at 1489. The defendant apparently did not appeal this decision, which indicates that the validity of the same-sovereign limitation on the availability/accessibility standard was not in dispute in the Ninth Circuit at the time the court decided Jennings.\textsuperscript{214} See id. at 1490–91; see also supra notes 196–200 and accompanying text (discussing Martinez).
\textsuperscript{215} 15 F.3d 1161, 1179 (1st Cir. 1993).
\textsuperscript{216} Id. The alleged Brady material was a presentence report prepared for a New Hampshire state court that listed a key witness's entire criminal history; this history was not fully set out in FBI records furnished to the defendant during pretrial discovery. See id. at 1178–79. The court did not indicate whether New Hampshire law enforcement was involved in the defendant's investigation.
\textsuperscript{217} 929 F.2d 753, 756–57 (1st Cir. 1991).
separate sovereignties. The prosecution of criminal activity is a joint enterprise among all these aspects of ‘the government.’”

The Eighth Circuit has gone a step further than the First and Ninth Circuits by imposing a same-jurisdiction limitation in addition to the same-sovereign limitation on the availability/accessibility standard. For example, in *United States v. Hawkins*, a post-*Kyles* decision, the court declined to find that a Missouri federal prosecutor violated his *Brady* obligations when he failed to discover and disclose *Brady* material not known to him but possessed by a federal prosecutor in Illinois. The court based its decision on the grounds that “the prosecutor has no duty to undertake a fishing expedition in other jurisdictions in an effort to find impeaching evidence.”

C. The “Actual Knowledge and Possession” Standard

The Seventh Circuit has, in a pair of pre-*Kyles* opinions, held that the prosecution has no duty to search for *Brady* material not known to or possessed by it. In *United States v. Romo*, the defendant alleged that the prosecution violated its duty under *Brady* to search for exculpatory or impeachment material because the prosecutor refused to respond to the defendant’s requests that he make “various inquiries” of the local police force involved in the investigation that led to the defen-

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218 Id. at 760. It is important to note that the First Circuit was not articulating the prosecution team standard in this passage. As emphasized above, the court stated that “[i]t is apparent that [the chief witness’s] past was well known to others in ‘the government,’ including both the United States Attorney’s Office and the FBI, which was using him as a cooperating individual.” Id. The court also stated that “[i]t is wholly unacceptable that the Assistant United States Attorney trying the case was not prompted personally or institutionally to seek from knowledgeable colleagues highly material impeachment information concerning the government’s most significant witness.” Id. at 761. These passages imply that a federal prosecutor has a duty to search for *Brady* material known to or held by individuals within his own office or by individuals within the FBI regardless of their involvement in the immediate criminal prosecution. Although the case does not explicitly do so, the *Osorio* court’s formulation of the scope of a prosecutor’s duty to search for *Brady* material appears to limit that duty to members of law enforcement traditionally involved in criminal investigations.

219 The Eighth Circuit implicitly applied the same-sovereign limitation to the availability/accessibility standard in *United States v. Dunn*, 851 F.2d 1099 (8th Cir. 1988). In Dunn, the court declined to find that a South Dakota federal prosecutor violated his *Brady* obligations by failing to discover and disclose *Brady* material gathered by a South Dakota child protection worker: “The district court found that [the state child protection worker] was not a government employee, and . . . [b]ecause [her] report was not in the government’s possession, the *Brady* doctrine is inapplicable in this case.” Id. at 1101.

220 78 F.3d 348, 351 (8th Cir. 1996). The defendant also had charges pending against him in the Southern District of Illinois. See id. The court did not indicate if the Illinois charges arose from the same criminal investigation giving rise to the Missouri charges or if the *Brady* material in Illinois came from a source that participated in the investigation leading to the Missouri charges.

221 Id. (quoting *United States v. Jones*, 34 F.3d 596, 599 (8th Cir. 1994)).
dant’s indictment. In finding that the district court did not abuse its discretion by refusing to compel the prosecution to comply with the defendant’s request, Circuit Judge Manion stated that “prosecutors are not usually required to seek out [Brady material] which is not in their possession.” The court held that the prosecution is not required to search for Brady material in response to a defendant’s discovery request unless either the request gives an indication that there is exculpatory material to be discovered or the defendant makes a showing that the government has suppressed Brady material. Similarly, in United States v. Moore, the Seventh Circuit refused to find that the prosecution violated its Brady obligations by failing to disclose that one of its witnesses had previously been convicted of knowingly supplying false information to a police officer. Relying, as the Romo court had, on Mendoza v. Miller, Circuit Judge Wood stated that “[t]he rule in Brady simply does not apply unless the prosecutor had knowledge of the exculpatory information.” Then, quoting the Romo court’s erroneous reading of Mendoza, the Moore court went on to state that “prosecutors are not usually required to seek out information which is not in their possession.” The Seventh Circuit thus created a line of cases, without any support, that stand for the unquali-

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222 914 F.2d 889, 898 (7th Cir. 1990).
223 Id. Were it not qualified, this assertion would be a misstatement of the law on its face, even before Kyles. Nonetheless, this assertion is at least a misstatement of the rule announced in Mendoza v. Miller, 779 F.2d 1287 (7th Cir. 1985), the case the Romo court cited in support of this assertion. In Mendoza, which involved a habeas corpus petition, a prisoner challenged a prison disciplinary board’s failure to turn over FBI reports relating to his alleged offense. See Mendoza, 779 F.2d at 1296–97. Because the adjudication was civil in nature, Brady presumably did not apply. See id. at 1297. Nevertheless, in dictum, Circuit Judge Coffey applied the prosecution team standard to rule that the disciplinary board was not obligated to turn over the FBI report:

The prison staff conducts an investigation of prison incidents separate from any FBI investigation. Thus, the FBI is not a part of the disciplinary prosecution, they have no obligation to turn over their files to the disciplinary committee, and their alleged failure to disclose material cannot be attributed to the disciplinary committee.

Id. (citations omitted). Thus, even if this dictum were a binding statement of the law, it would not support the general proposition stated by the Seventh Circuit in Romo that “prosecutors are not usually required to seek out [Brady material] which is not in their possession.” Romo, 914 F.2d at 898.

224 See Romo, 914 F.2d at 898–99. Circuit Judge Manion pointed to two other factors. First, he noted that the prosecution made available all material that was actually in its possession, “which negates most arguments that the prosecutors suppressed exculpatory information.” Id. at 899. Second, he observed that the defense failed to subpoena the local police agency, and that this “strategic decision or mere failure . . . should not place the burden on the federal prosecutors to seek out such information on behalf of a defendant.” Id.

225 25 F.3d 563, 569 (7th Cir. 1994).
226 Id.
227 See supra note 223.
228 Moore, 25 F.3d at 569 (quoting Romo, 914 F.2d at 898).
fied proposition that the prosecution has no obligation to search for 

Brady material. 229

III

MUST PROSECUTORS SEARCH THE INTELLIGENCE COMMUNITY FOR 

Brady Material in International Terrorist Prosecutions Under 

the Circuit Approaches?

As the overview of circuit case law in Part II indicates, the circuit 
courts have applied varying standards to determine the scope of a 
prosecutor’s duty to search the government for Brady material. To 
understand why these approaches could be construed to require a 
trial court to impose on a federal prosecutor in an international ter-

rorist prosecution a duty to search for Brady material in the hands of 
the intelligence community, one must first understand the nature of 
the federal government’s interagency investigation of international 
terrorism.

A. The FBI’s Inability to Conduct Independent Investigations of 

International Terrorism

Countless terrorists and terrorist organizations throughout the 

world 230 perpetrate hundreds of international terrorist attacks each 

year. 231 Although the reasons for terrorist attacks vary widely, 232 the 

U.S. government believes that anti-U.S. sentiment motivated at least 

219 of the 348 terrorist attacks that occurred in 2001 (4 of which 
ocurred in North America). 233 More disturbing than the frequency of 
terrorist attacks is their increased lethality, 234 a reality due in part not

229 See, e.g., United States v. Earnest, 129 F.3d 906, 910 (7th Cir. 1997) (“[T]here is no 
affirmative duty on the part of the government to seek information not in its possession 
when it is unaware of the existence of that information.”); United States v. Jimenez-Rodri-
guez, Nos. 94-1968, 94-2072, 1995 WL 709639 (1st Cir. Dec. 1, 1995) (“[T]he rule of Brady 
v. Maryland imposes no general due diligence requirement.” (relying on Moore, 25 F.3d at 
569)).

230 As of August 2002, the U.S. Department of State has designated thirty-four groups 
as foreign terrorist organizations. See U.S. Dep’t of State, Foreign Terrorist Organizations 

231 See supra note 1.

232 Although Americans may be most familiar with religiously motivated international 
terrorism, terrorism may be motivated by many other reasons, including economic frustration, 
deprivation of rights, and ethnic and racial divisions. See Stephen Sloan, The Changing 
Nature of Terrorism, in The Terrorism Threat and U.S. Government Response: Opera-
tional and Organizational Factors 51, 56 (James M. Smith & William C. Thomas eds., 
2001).

233 See Patterns of Global Terrorism, supra note 1, app. 1, at 171, 176. As indicated 
in the Introduction of this Note, the United States is the world’s leading target of interna-
tional terrorism, and government officials expect the use of terrorism against the United 
States and its interests to continue both domestically and abroad. See supra note 1.

234 See Pillar, supra note 1, at 20–21; David Tucker, Combating International Terrorism, in 
The Terrorism Threat and U.S. Government Response, supra note 292, at 129, 131. One
only to the fact that terrorists increasingly are attacking civilians or other less-defended or undefended targets, but also to the growing lethality of the weapons available to them. International terrorists with access to biological weapons, for example—which more than ten countries reportedly have or are developing—are capable of inflicting billions of dollars in losses and of taking hundreds of thousands of lives in a single attack.

The clandestine and networked nature of modern international terrorist organizations requires the government to expend substantial resources on detection efforts. Because terrorist operations must

analyist has constructed a lethality index for all terrorist attacks occurring between 1969 and 1998 that indicates a 20% increase in the lethality of terrorist attacks during this period. See Tucker, supra, at 135-36. Recent events appear to support the conclusion that terrorism is becoming a more deadly crime. Between 1995 and 2001, four attacks—the Aum Shinriko’s sarin gas attack in the Tokyo subways, the Tamil Tiger truck bombing of the Central Bank in Colombo, the truck bombing of the U.S. Embassy in Nairobi, and the attacks on the World Trade Center and Pentagon—accounted for over 14,000 injuries and deaths. See Patterns of Global Terrorism, supra note 1, app. I, at 173; Tucker, supra, at 136.

Policy makers expect that future terrorist attacks will be directed mainly at civilians or other less-defended or undefended targets. See Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence, 105th Cong. 60 (1997) (responses of the Defense Intelligence Agency to questions regarding global threats and challenges to the Unites States and its interests abroad).

George Tenet, director of the Central Intelligence Agency, remarked in a prepared statement to the Senate Select Committee on Intelligence that “[a]lthough terrorists we’ve preempted still appear to be relying on conventional weapons, we know that a number of these groups are seeking chemical, biological, radiological, or nuclear . . . agents.” Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence, 106th Cong. 12 (2000) (statement of George J. Tenet, Director of Central Intelligence).

One report has indicated that if a biological agent such as anthrax were used on an urban population of approximately 5 million people in an economically developed country such as the United States, an attack on a large city from a single plane disseminating 50 kg of the dried agent in a suitable aerosol form would affect an area far in excess of 20 km downwind, with approximately 100,000 deaths and 250,000 being incapacitated or dying.

Caudle, supra note 237, at 456. Such a large-scale bioterrorist attack could have economic consequences ranging from $477.7 million per 100,000 persons exposed up to $26.2 billion per 100,000 persons exposed, depending on the biological agent used. Arnold F. Kaufmann et al., The Economic Impact of a Bioterrorist Attack: Are Prevention and Postattack Intervention Programs Justifiable?, 3 Emerging Infectious Diseases 83, 91 (1997).

be covert to succeed, terrorist organizations have sought, with some success, to avoid detection.\textsuperscript{240} Therefore, information about the actual operations of international terrorist networks is sparse. This reality, of course, makes it difficult to create a model of terrorist activity\textsuperscript{241}.

\textsuperscript{240} See David E. Long, The Anatomy of Terrorism 7 (1990).

\textsuperscript{241} Although the world will continue to witness the emergence of hierarchical, state-sponsored terrorist organizations, experts predict that modern terrorist networks are likely to operate in chain, hub (centrifugal), or all-channel (full-matrix) networks. See John Arquilla & David Ronfeldt, The Advent of Netwar (Revisited), in Networks and Netwars: The Future of Terror, Crime, and Militancy 1, 6–10 (John Arquilla & David Ronfeldt eds., 2001); J.K. Zawodny, Infrastructures of Terrorist Organizations, in Perspectives on Terrorism 61, 61–63 (Lawrence Zelic Freedman & Yonah Alexander eds., 1983). Active Middle Eastern terrorist groups Hizbollah, al-Qaeda, and Hamas employ the network model. Michele Zanini & Sean J.A. Edwards, The Networking of Terror in the Information Age, in Networks and Netwars, supra, at 29, 32–33. Under the network model, satellite cells need not have specific organizational ties to any larger organization, nor are they necessarily dependent on some level of support from any larger organization. See Sloan, supra note 232, at 63.

A significant implication of the network model that makes international terror networks difficult investigative targets is the network's tendency to inspire intensely personalized loyalties. This reality is due in part to the fact that movement leaders act as direct participants in actions, see Zawodny, supra, at 65, and also to the indoctrination and intimidation that terrorists experience both before and after they join a terrorist group. Leaders of underground movements strive to maintain a collective belief system that urges the moral necessity of apolitical resistance. See Martha Crenshaw, Decisions to Use Terrorism: Psychological Constraints on Instrumental Reasoning, in 4 International Social Movement Research: Social Movements and Violence: Participation in Underground Organizations 29, 30–36 (Donatella della Porta ed., 1992). They characterize their opposition as external forces foreign to their own ethnic, regional, or religious group, with which members identify deeply. See Donatella della Porta, On Individual Motivations in Underground Political Organizations, in 4 International Social Movement Research, supra, at 3, 12. Religious fundamentalists who propagate these radical religious belief systems may draw support from religious texts. For example, because some Muslims believe that the Koran enjoins the faithful from engaging in espionage, a radical Muslim terrorist organization might draw from the following text from the Koran to encourage operational secrecy:

\begin{quote}
O believers! Above all hold yourself from suspicion, for even a little suspicion is criminal. Do not spy on one another, or cut down another, for would anyone from among you desire to eat the flesh of his departed brother? Of course, you would feel horror at this. Fear God: God the Redeemer, the Merciful.
\end{quote}

See Nikolas K. Gvosdev, Espionage and the Ecclesia, 42 J. Church & Soc. 803, 816 (2000). Once members join terrorist organizations, they are dissuaded from violating their loyalty to the group by a group dynamic of isolation, fear, and guilt. See Crenshaw, supra, at 30–36 (discussing the role of group dynamics and the creation and maintenance of a group belief system in solidifying group loyalty); della Porta, supra, at 6–25 (discussing the central role of adolescent peer group construction and political context in determining personal motivations to join terrorist organizations). For example, in the 1970s, the Abu Nidal Organization, a group still listed as a foreign terrorist organization by the State Department, see Patterns of Global Terrorism, supra note 1, app. B, at 85, tested each new recruit by making him commit an outrageous act, like a bank robbery or murder—something that the organization could use later to keep the individual in check. See Duane R. Clarridge, A Spy for All Seasons: My Life in the CIA 332 (1997). The group loyalty created by these practices makes it extremely unlikely that any cell members will agree to spy on their terrorist network for the U.S. government. A former CIA operative notes that "[u]nless one
that would permit the government to investigate and interdict terrorist conspiracies.\textsuperscript{242}

The FBI is the branch of the federal government primarily responsible for investigating acts of international terrorism on behalf of federal prosecutors.\textsuperscript{243} It does so primarily to collect evidence to bring suspected terrorists to trial,\textsuperscript{244} but also for the

of bin Laden's foot soldiers walks through the door of a U.S. consulate or embassy, the odds that a CIA counterterrorist officer will ever see one are extremely poor." Reuel Marc Gerecht, \textit{The Counterterrorist Myth}, ATLANTIC MONTHLY, July-Aug. 2001, at 38, 41. A former CIA case officer told a \textit{Newsweek} reporter that "[y]ou don't get walk-ins from terror cells." Evan Thomas, \textit{Handbook for the New War}, NEWSWEEK, Oct. 8, 2001, at 34, 35. As counterintelligence expert Randy Scheunemann observes, "How does the CIA propose to penetrate cells made up of individuals who forged their ties over decades in the dust of Palestinian refugee camps, the chaos of Beirut or the killing fields of Afghanistan?" Andrew Roberts, \textit{Bring Back 007}, SPECTATOR, Oct. 6, 2001, at 20, 21.

\textsuperscript{242} One analyst identifies two realities that make forecasting the nature of terrorist threats and operations difficult: (1) terrorism is the result of evolving social, economic, or political forces that change over time, which makes it difficult to identify the next source of terrorism; and (2) terrorism is greatly impacted by technology, but changes in technology are difficult to predict. See Sloan, supra note 232, at 52. Peter Probst observes that the government's failure to deter terrorism can be traced in part to its failure to develop a model of terrorist behavior:

\begin{quote}
In my view, the greatest threat to our security remains problems of mindset and perception. We fail to appreciate how phenomena such as mindset and perception impact on terrorist thinking and operations. . . .

. . . .

We need to understand on a group-specific basis how the terrorists think, how they plan, how they collect intelligence, select targets, weigh options, and adapt to operational adversity.

. . . [If we develop such an understanding], when there is no hard intelligence as to the venue or timing of the next attack, we can more intelligently game out the terrorists [sic] available options and how the terrorist will most likely play his hand.
\end{quote}


\textsuperscript{243} The authority for the FBI's investigative efforts derives from federal law providing that the Attorney General may appoint officials "to detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." 28 U.S.C. § 533 (2000). The Attorney General has delegated this authority to the FBI: federal regulations describe the FBI as having lead agency responsibility in investigating all crimes . . . which involve terrorist activities or acts in preparation of terrorist activities . . . . Within the United States, this would include the collection, coordination, analysis, management and dissemination of intelligence and criminal information as appropriate." 28 C.F.R. § 0.85(1) (2002).

\textsuperscript{244} See 18 U.S.C. § 3107 (2000) (empowering the FBI to execute seizures under warrant for violation of U.S. laws); id. § 3052 (authorizing FBI officials to serve warrants and subpoenas and to make arrests without a warrant for any offense against the United States committed in their presence or for any felony if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony); Arthur S. Hulnick, \textit{Intelligence and Law Enforcement: The "Spies Are Not Cops" Problem}, 10\textsuperscript{th} J. INTELLIGENCE & COUNTERINTELLIGENCE 269, 276–77 (1997) (stating that the FBI uses its informers and collaborators to collect information to be used by prosecutors at trial).
purpose of disrupting, weakening, and eliminating terrorist networks.\textsuperscript{245}

Although law enforcement efforts to investigate, apprehend, and prosecute international terrorists are increasing,\textsuperscript{246} the difficulty of investigating secretive international terror networks that operate mostly overseas dramatically impedes those efforts. The FBI conducts international terrorism investigations in accordance with the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, a classified document.\textsuperscript{247} Under these guidelines, the FBI may conduct investigations, participate with foreign officials in investigations abroad, or otherwise conduct activities outside the United States only with the approval of the Director of Central Intelligence and the Attorney General.\textsuperscript{248} Despite the FBI’s growing international presence\textsuperscript{249} and authority under U.S. law to investigate terrorist conspiracies abroad,\textsuperscript{250} the FBI’s investigative efforts are hampered by the fact that international law prohibits law enforce-


\textsuperscript{246} See supra note 3.

\textsuperscript{247} Some parts of the document, however, have been released. See U.S. Dep’t of Justice, Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (1995), http://www.usdoj.gov/ag/readingroom/terrorismintel2.pdf.


\textsuperscript{249} As of late 2000, the FBI had agents stationed in forty-four foreign countries—twice as many as only seven years earlier. See Pillar, supra note 1, at 80.

ment officers of the United States from exercising their functions abroad without the permission of the host state. In addition, some foreign laws forbid host governments from entering into agreements to permit such activities. Therefore, the FBI's overseas agents, known as legal attachés, typically do not investigate criminal matters personally, but instead work with local law enforcement agencies in countries that have agreed to cooperate with U.S. law enforcement efforts. Attaches have the authority to prepare evidence-gathering requests, assist in the negotiation of treaties, transmit information to other countries on new legislation and important cases, and organize training.

Because of these restraints, the FBI cannot fulfill its investigative function in relation to clandestine international terrorist conspiracies without the cooperation of foreign countries. Although some terrorists operate in countries that assist the United States in investigating and apprehending terrorist organizations, international

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Most problems associated with international evidence gathering revolve around the concept of sovereignty. Virtually every nation vests responsibility for enforcing criminal laws in the sovereign. The other nation may regard an effort by an American investigator or prosecutor to investigate a crime or gather evidence within its borders as a violation of sovereignty. Even such seemingly innocuous acts as a telephone call, a letter, or an unauthorized visit to a witness overseas may fall within this stricture. A violation of sovereignty can generate diplomatic protests and result in denial of access to the evidence or even the arrest of the agent or Assistant United States Attorney who acts overseas.

The solution is usually to invoke the aid of the foreign sovereign in obtaining the evidence.

252 For example, the Iranian Constitution provides that "[a]ny form of agreement resulting in foreign control over the natural resources, economy, army, or culture of the country, as well as other aspects of the national life, is forbidden." Iran Const. ch. X, art. 153, available at http://www.netiran.com/laws.html (last visited Apr. 9, 2003).


254 Zagaris, supra note 253, at 1419.

255 Cf. David A. Vise, New Global Role Puts FBI in Unseavory Company, Wash. Post, Ocl 29, 2000, at A1 ("FBI officials say they need relationships with the Saudis, Yemenis and others in the Middle East to fight terrorism effectively. . . . [T]he FBI depends upon 'friendly foreign governments,' not only to arrest and extradite fugitives but also to permit the bureau to operate on their soil."). In 1995, the FBI helped create the International Law Enforcement Academy to assist foreign law enforcement agencies train their officers. See Gregory F. Treverton, Reshaping National Intelligence in an Age of Information 170 (2001).

256 For example, after the embassy bombings in Kenya and Tanzania, local authorities helped the FBI conduct interviews and searches and permitted the FBI to remove evidence and suspects to the United States. See David Johnston, A Painstaking Search for Answers, N.Y. Times, Aug. 12, 1998, at A8. Since September 11, 2001 at least forty countries have made
terrorists operate predominantly in countries governed by regimes either unable or unwilling to assist the FBI in investigating and apprehending suspected terrorists. Currently, only a small group of countries have signed mutual legal assistance treaties with the United States. These realities render the FBI unable to investigate international terrorism effectively without the assistance of the intelligence community.

B. The Intelligence Community's Role in Investigating International Terrorism

Many arms of the federal government participate in the investigation of international terrorism. The Office of Homeland Security is responsible for coordinating executive branch efforts to detect, prevent, and respond to terrorist threats and attacks within the United States, and for coordinating the collection of intelligence outside the


U.S. law enforcement agents operating abroad may find that investigative techniques used in the United States are not permitted in foreign countries. For example, several drug enforcement techniques regarded as essential in the United States—such as undercover operations, electronic surveillance, telephone taps, and informant recruitment methods—are forbidden or severely circumscribed elsewhere. See NAELMANN, supra note 253, at 200.

For example, the Yemeni government did not permit a full FBI investigation after the U.S.S. Cole was attacked near Yemen. See Peter Slevin & Alan Sipress, Tests Ahead for Cooperation on Terrorism, WASH. POST, Dec. 31, 2001, at A10. Relations eventually deteriorated to the point that FBI agents left the country temporarily. Id. Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria are listed by the State Department as state sponsors of terrorism, see PATTERNS OF GLOBAL TERRORISM, supra note 1, at 63–68, and cannot be expected to cooperate with FBI efforts to interdict terrorist conspiracies. However, even nations allied with the United States sometimes are reluctant to cooperate with an FBI investigation. See, e.g., John Crewdson, Belgian Authorities Reluctant to Help with Probe of Bomb Plot, CII. TRIB., Oct. 14, 2001, at 15. A nation may simply not want the public to know that it is cooperating with the United States to apprehend terrorists within its territory, or it may be unwilling to help the United States build a case because of its opposition to the death penalty, which is available for some terrorist crimes. See PILLAR, supra note 1, at 84–85.

The State Department reports that mutual legal assistance treaties are currently in force with the following countries: Anguilla, Antigua/Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Brazil, British Virgin Islands, Canada, Cayman Islands, Cyprus, Czech Republic, Dominica, Egypt, Estonia, Greece, Grenada, Hong Kong, Hungary, Israel, Italy, Jamaica, South Korea, Latvia, Lithuania, Luxembourg, Mexico, Montserrat, Morocco, Netherlands, Panama, Philippines, Poland, Romania, St. Kitts-Nevis, St. Lucia, St. Vincent, Spain, Switzerland, Thailand, Trinidad, Turkey, Turks and Caicos Islands, Ukraine, United Kingdom, and Uruguay. U.S. DEP'T OF STATE, DEPARTMENT OF STATE CIRCULAR ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TREATIES, http://travel.state.gov/mlat.html (last visited Apr. 9, 2003).
United States regarding these threats of terrorism. The Office of Homeland Security also oversees the federal government's larger effort to detect, prevent, and respond to terrorist attacks on the United States, an effort that in one way or another draws support from dozens of federal departments and agencies. The federal government may also enlist the help of state and local authorities in its investigative efforts if necessary. The multi-agency nature of the government's investigation of international terrorism is evidenced by the fact that, since September 11, 2001, federal prosecutors have identified several investigative groups other than the FBI as the "lead agency" in cases of international terrorism referred to the Department of Justice for prosecution, including the Immigration and Naturalization Service, Secret Service, Customs Service, Internal Revenue Service, Postal Service, and Bureau of Alcohol, Tobacco, and Firearms, as well as various parts of the Departments of Agriculture, Commerce, Labor, State, Transportation, and Treasury.

Of all the branches of the federal government that assist the FBI in its efforts to detect, investigate, and apprehend suspected international terrorists, the CIA, which has been monitoring international terrorism for decades, is uniquely positioned to assist law enforcement.

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261 These departments and agencies include the Department of Treasury, the Department of Defense, the Department of Justice, the Department of Health and Human Services, the Department of Transportation, the Department of State, the Department of the Interior, the Department of Energy, the Department of Labor, the Department of Commerce, the Department of Veterans Affairs, the Department of Agriculture, the Coast Guard, the Immigration and Naturalization Service and Border Patrol, the Transportation Security Administration, the Customs Service, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco and Firearms, the Federal Emergency Management Agency, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, and the Environmental Protection Agency. See generally Office of the President, The Department of Homeland Security (2002) [hereinafter Department of Homeland Security], http://www.whitehouse.gov/deptofhomeland/book.pdf (describing the organization and function of the newly created Department of Homeland Security); Office of Homeland Security, National Strategy for Homeland Security 13–14 (2002) [hereinafter National Strategy for Homeland Security], http://www.whitehouse.gov/home-land/book/nat_strat_hls.pdf (outlining the Department of Homeland Security's approach to detection and prevention of terrorism).
Human intelligence (HUMINT), the collection of which is primarily the responsibility of the CIA, promises to be the most valuable form of intelligence in the war on terrorism. Legislators and policy makers have long been aware of the value of HUMINT in investigating and preventing international terrorism. Former CIA Director James Woolsey has observed that

[i]t is not as if there are a large number of ways to find out what terrorists are going to do . . . . Espionage in this arena is really all we have going for us . . . . If you want to learn what Hizbollah is going to target next, you have to learn it the old fashioned way—you have to spy on them.


266 See, e.g., Report of the National Commission on Terrorism: Hearing Before the S. Select Comm. on Intelligence, 106th Cong. 2 (2000) (statement of Sen. Richard C. Shelby) (observing that “intelligence, particularly human intelligence, [plays a crucial role] in countering international terrorism”); id. at 17 (statement of Ambassador L. Paul Bremer, III, Chairman, National Commission on Terrorism) (noting that “[y]ou have to have a program which is not too risk-adverse, which tries, first of all, of course, to prevent the [terrorist] attacks, which largely depends on good intelligence . . . Human intelligence. It’s number one, number two. It’s about number one through nine”); Terrorism and Intelligence Operations: Hearing Before the J. Econ. Comm., 105th Cong. 80 (1998) (statement of Brian P. Fairchild) (explaining that “[m]any argue that technical intelligence is easier to collect, more accurate, and much more straightforward than human intelligence. Nothing could be further from the truth. The fact of the matter is, because of emerging encryption technologies, technical intelligence has become very difficult, and sometimes, impossible to collect”); COMM’N ON THE ROLES AND CAPABILITIES OF THE U.S. INTELLIGENCE CMTY., 103rd CONG., PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE 61 (Comm. Print 1996) [hereinafter PREPARING FOR THE 21ST CENTURY], available at http://www.gpo.gov/su_docs/dpos/epubs/int/pdf/report.html. In 1996, a Staff Study by the Permanent Select Committee on Intelligence reported that Strategic Intelligence Reviews conducted by the National Security Council found that HUMINT would be of critical importance in providing information on terrorism:

Within several important specific subject areas, HUMINT’s contribution is particularly strong, such as in reporting on the transnational issues that are now among the highest priorities of the [intelligence community]: terrorism, narcotics, proliferation, and international economics. In providing information on terrorism, HUMINT garnered the grade “of critical value” almost 75 percent of the time it was given . . . .

. . . . Thus, of all the intelligence collection techniques, clandestine operations have a comparative advantage in collecting on most transnational issues.


In 1996, a congressional commission charged with reviewing the efficacy and appropriateness of U.S. intelligence activities in the post-Cold War global environment reported that

the function of collecting human intelligence is essential. Signals intelligence and other forms of technical collection are extremely valuable and frequently are the best source of information about some targets. Such forms of collection also are less likely to cause diplomatic and political flaps. They do not, however, provide sufficient access to targets such as terrorists or drug dealers who undertake their activities in secret or to the plans and intentions of foreign governments that are deliberately concealed from the outside world. Recruiting human sources—as difficult, imperfect, and risky as it is—often provides the only means of such access.\textsuperscript{268}

The CIA can provide various forms of assistance in the context of international terrorism, but it assists law enforcement’s investigative efforts primarily by providing tips and investigative leads to the FBI.\textsuperscript{269} Occasionally, the information regards specific threats, but more often it consists of names, phone numbers, and information about commercial transactions or other information that may be useful to the FBI.\textsuperscript{270} Regular communication between the FBI and CIA is assured by the operation of the FBI Counterterrorism Center, which was established in 1996 to enhance cooperation among and integration of law enforcement and elements of the intelligence community, including the CIA, in the war on international terrorism.\textsuperscript{271} The FBI Counterterrorism Center employs several resources to accomplish its goals, including multi-agency task forces, ongoing liaison with federal, state, and local law enforcement agencies, and its Legal Attaché program.\textsuperscript{272} Analysts from over a dozen federal agencies working at the Center, including a CIA analyst with access to the CIA’s foreign networks, operate special computers that permit them to tap into their home federal agencies’ intelligence databases and pull up information for the FBI.\textsuperscript{273} Oftentimes, law enforcement is able to follow up on intelligence leads by “asking fresh questions of intelligence assets in the

\textsuperscript{268} \textit{PREPARING FOR THE 21ST CENTURY, supra note 266, at 64.}

\textsuperscript{269} \textit{See PILLAR, supra note 1, at 117. Prior to 1995, pursuant to a Memorandum of Understanding between the Justice Department and the intelligence community, the intelligence community reported information discovered during the course of intelligence collection relating to observed criminal activities by third parties. See \textit{PREPARING FOR THE 21ST CENTURY, supra note 266, at 282-83. However, the intelligence community now reports only “suspected significant criminal misconduct” violations committed by its officers, employees, contractors, or agents. See \textit{id. at 283.}}

\textsuperscript{270} \textit{PILLAR, supra note 1, at 117.}

\textsuperscript{271} \textit{For additional background information on the FBI’s Counterterrorism Center, see John F. Lewis, Jr., Fighting Terrorism in the 21st Century, FBI L. ENFORCEMENT BULL., Mar. 1999, at 3, 7-8.}

\textsuperscript{272} \textit{Id. at 8.}

\textsuperscript{273} Jim McGee, \textit{The Rise of the FBI, WASH. POST MAG., July 20, 1997, at 10, 26.}
The FBI and CIA frequently swap low-level personnel under this program, allowing FBI agents to work in the CIA's centers, such as the Center for International Terrorism, and allowing CIA employees to work at law enforcement agencies. The level of CIA cooperation is enhanced by laws authorizing the FBI to "task" the omnipresent clandestine intelligence apparatus to identify potential informants who may have information about the plans and activities of foreign terrorists, and also to investigate the international activities of specific suspected terrorists. Previous investigations suggest that this authority has been used before. Specifically, § 403-5a permits the CIA, upon request, to collect information abroad on noncitizens in connection with an investigation, providing in relevant part:

(a) authority to provide assistance. . . . [E]lements of the intelligence community may, upon the request of a United States law enforcement agency, collect information outside the United States about individuals who are not United States persons. Such elements may collect such information notwithstanding that the law enforcement agency intends to use the information collected for purposes

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274 Pillar, supra note 1, at 118.
276 The "intelligence community" is a conglomerate of government offices and agencies, including the CIA, the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the National Imagery and Mapping Agency (NIMA), and the intelligence elements of the Army, the Navy, the Air Force, the Marine Corps, the Federal Bureau of Investigation, the Department of Treasury, the Department of Energy, and the Coast Guard. See 50 U.S.C. § 401a(4) (2000). The CIA and DIA are the important producers of "finished" intelligence—single reports that bring together separate pieces of specialized analysis and paint a comprehensive picture of a particular circumstance. See Lowenthal, supra note 265, at 54.
278 See Investigation of September 11 Intelligence Failures: J. Hearing Before the S. Intelligence Comm. and House Permanent Select Comm. on Intelligence, 107th Cong., LEXIS, News Library, Poltrn File (remarks by Louis Freeh, Former Director, FBI) ("As these committees have known for several years, the FBI and the CIA have carried out joint operations around the world to disrupt, exploit and recover evidence on Al Qaida operatives who have targeted the United States. These operations [are] in part designed to obtain admissible evidence . . . .") [hereinafter Investigation of September 11 Intelligence Failures]. After the 1993 World Trade Center bombing, the CIA gathered information on persons connected with Osama bin Laden in Kenya and Tanzania. See Gregory L. Vistica & Daniel Klaidman, Tracking Terror: Inside the FBI and CIA's Joint Battle to Roll up Osama bin Laden's International Network, NEWSWEEK, Oct. 19, 1998, at 46, 48. When the U.S. embassies in these countries were bombed in 1995, FBI investigators relied on information provided by the CIA. See id. "When agents hit the ground in Africa they had names, places and telephone numbers," said one senior FBI official. Id.
Section 403-5a was part of a larger bill that sought to counter the perceived lack of interagency coordination in the federal government's response to transnational threats such as terrorism. The Senate concluded that law enforcement could not effectively combat international terrorism without the assistance of the intelligence community, noting in its report accompanying the legislation that "the need to combat terrorism ... and other transnational threats effectively requires that the capabilities of the Intelligence Community be harnessed to support law enforcement agencies as efficiently as possible." The legislation also created the Committee on Transnational Threats of the National Security Council, which is designed, in part, to "develop policies and procedures to ensure the effective sharing of information among federal departments and agencies, including between the law enforcement and foreign policy communities; and develop guidelines for coordination of federal law enforcement and intelligence activities overseas."
C. The Prosecutor’s Duty to Search the Intelligence Community Under the Circuit Approaches

Considering the relationship between law enforcement and the intelligence community in the federal government’s investigation of international terrorism, it is not difficult to see how the courts of appeals’ standards regarding a prosecutor’s duty to search other arms of the government for Brady material could be construed to require federal prosecutors to search the intelligence community during criminal prosecutions of international terrorists. The availability/accessibility standard, regardless of whether the trial court imposes the same-sovereignty requirement, the same-jurisdiction requirement, or recognizes the good-faith search exception, considers only whether a prosecutor has access to the Brady material. The federal government’s primary law enforcement entity, the FBI, is undoubtedly a part of the same sovereign as the federal government’s intelligence community and is within the same jurisdiction. The prosecution team standard, on the other hand, focuses on the relationship between the government entity and the prosecutor’s office, looking at the nature of the assistance provided and the extent of cooperation on a particular investigation. As discussed in Part II.A, the circuits are split on whether a prosecutor’s duty to search for Brady material extends to agencies that have no interest in the prosecution, extends only to law enforcement entities, extends only to persons acting under the direction or control of a prosecutor, or extends to Brady material outside a prosecutor’s jurisdiction. Despite this split, one can imagine a trial court accepting any or all of the following arguments to conclude that a prosecutor, under any of the standards, must search the intelligence community for Brady material when prosecuting an international terrorist: (1) The intelligence community, which has an interest in preventing international terrorism, has an interest in the prosecution of international terrorists because the prosecutions have the effect of preventing terrorism; (2) The intelligence community is acting as a quasi-law-enforcement entity insofar as it is cooperating extensively with law enforcement to provide invaluable assistance in the apprehension and prosecution of suspected international terrorists; and (3) The intelligence community is acting at the direction and

283 See supra Part II.B.
284 See supra Part II.A.
285 See supra Part II.A.
286 See supra note 263.
287 See supra Part III.B; see also Investigation of September 11 Intelligence Failures, supra note 278 (statement of Louis Freeh, Former Director, FBI) (“The cases that were worked in New York, again, we have dedicated FBI, CIA teams working overseas, exploiting information, conducting counterterrorism operations for intelligence purposes and simultaneously obtaining evidence, maintaining chains of custody and using it in evidence.”).
control of the prosecution insofar as federal law empowers law
enforcement to task the intelligence community to investigate the activi-
ties of suspected international terrorists on its behalf.\footnote{288}

Perhaps anticipating these judicial determinations, the U.S. At-
torneys' Manual acknowledges that prosecutors could in certain cases
be called upon to search the intelligence community for Brady mate-
rial under either the prosecution team or availability/accessibility
standard. The Manual provides that, "[a]s a general rule, a prosecu-
tor should not seek access to [intelligence community] files except
when . . . the facts of the case [create] an affirmative obligation to do
so."\footnote{289} However, the Manual identifies four situations in which a pros-
ecutor must search the intelligence community for Brady material, in-
cluding instances in which the intelligence community has been an
active participant in the investigation or prosecution of a case, and
instances in which known facts and the nature of a case suggest that
there may be Brady material within the intelligence community.\footnote{290}
The search requirements in these situations are based on the Depart-
ment of Justice's understanding of the search requirements imposed
by the circuits' prosecution team and availability/accessibility stan-
dards described in Part II.\footnote{291}

A prosecutorial duty to search the intelligence community's files
in international terrorism prosecutions, under any of the circuit ap-
proaches, could paralyze the government's efforts to investigate inter-
national terrorism. Although the intelligence community can gather
some HUMINT through non-clandestine activities,\footnote{292} its collection
largely involves sending officers to foreign countries where they at-

\footnote{288}{See supra notes 276–82 and accompanying text.}
\footnote{290}{Id. Another situation in which a prosecutor must search the intelligence community for Brady material arises in a case in which the prosecution believes that the defendant may have had, or as part of her defense at trial will assert that he has had, contacts with the intelligence community. Id. This situation normally arises if the defendant claims that his actions were authorized by the intelligence community. See id. The final situation is a case in which the facts of a case lead a prosecutor to conclude that he should initiate a "prudential search" of intelligence community files—a search based not upon a known duty to the defendant or to a known nexus to national security matters, but rather on the fact that the case meets a certain profile of cases likely to implicate such issues. See id. In these types of cases, which may involve international terrorism, the search is designed to assist the prosecution in identifying and managing potential classified information problems before indictment and trial. See id.}
\footnote{291}{See id. The Criminal Resource Manual relies on the Fifth, Seventh, and D.C. Circuits' Antone, Fairman, and Brooks decisions for its discussion of the prosecution team standard, and it relies on the Third Circuit's Perdomo and the Fifth Circuit's Deutsch decisions for its discussion of the availability/accessibility standard. See id.}
\footnote{292}{See PAT M. HOLT, SECRET INTELLIGENCE AND PUBLIC POLICY 68 (1995).}
tempt to recruit foreign nationals—also known as “agents”—to spy.\(^\text{293}\)

Spying provides the greatest access to information about the identities, plans, activities, exact locations, planned targets, and, if possible, information about the vulnerabilities of technologically advanced\(^\text{294}\) and covert international terror networks.\(^\text{295}\) The intelligence community considers HUMINT sources to be extremely fragile because they take so long to recruit and develop\(^\text{296}\) and because HUMINT opera-

\(^\text{293}\) Lowenthal, supra note 265, at 67. An agent is someone who accepts a clandestine mission from an American representative even though he is not employed in a staff capacity by the CIA. See Breckinridge, supra note 265, at 123. Not all agents are “primary sources of intelligence.” Id. Agents are often access points to other sources—people who do not have a formalized relationship with the CIA but who occasionally are willing to tell CIA officers (full-time career employees at CIA headquarters or at CIA stations around the world) or agents some of what they know. See id.; Holt, supra note 292, at 69.

\(^\text{294}\) Intelligence specialists believe that Osama bin Laden has the necessary technology to avoid attempts to track his movements and conversations. See Dreyfuss, supra note 239, at 11. For example, terrorists can “encrypt cell phone transmissions, steal cell phone numbers and program them into a single phone, or use prepaid cell phone cards purchased anonymously to keep their communications secure.” Zanini & Edwards, supra note 241, at 38. Observers believe that “[c]ommercial programmers have already written encryption software that is, for all practical purposes, unbreakable.” Bruce D. Berkowitz & Allan E. Goodman, Best Truth: Intelligence in the Information Age 19 (2000); see Treverton, supra note 255, at 88. Some terrorist organizations may already possess such technology:

Rumors persist that the French police have been unable to decrypt the hard disk on a portable computer belonging to a captured member of the Spanish/Basque organization ETA. It has also been suggested that Israeli security forces were unsuccessful in their attempts at cracking the codes used by Hamas to send instructions for terrorist attacks over the Internet. Zanini & Edwards, supra note 241, at 38 (citations omitted).

\(^\text{295}\) See Hulnick, supra note 244, at 277.

\(^\text{296}\) One of the most difficult aspects of collecting HUMINT is the recruitment of foreign agents. Holt, supra note 292, at 69. After identifying groups of people who are likely to have valuable information, the CIA must then identify persons within this group who are likely to be vulnerable to recruitment. Id. A variety of characteristics can make a target vulnerable, including any financial difficulties, political sympathies, or personal grudges he might have that make him easy prey for blackmail. Id.

Case officers must carefully cultivate potential agents without revealing their CIA connection because successful clandestine collection of foreign intelligence requires that officers responsible for developing agents maintain the secrecy of their true identity. See Breckinridge, supra note 265, at 120. They must have some plausible cover—some reason for being in the foreign nation—that deflects special attention. Id. at 121. Cover may be official (e.g., holding a government job outside of the embassy) or non-official (often an ostensibly position with a CIA-created and controlled business). Id. Although official cover makes contact with the government easier, it also makes discovery of one’s true identity easier. See id. at 122. Cultivating potential agents is a process that can take years before the CIA decides either to recruit or abandon them. Holt, supra note 292, at 69. For a description of the two-step interview and recruitment approach once used by one station in the former West Germany, see George G. Bull, The Elicitation Interview, in Inside CIA’s Private World: Declassified Articles from the Agency's Internal Journal, 1955–1992, at 63 (H. Bradford Westerfield ed., 1995).

Should the potential agent agree to spy for the CIA, indoctrination or even training will follow, depending on the maturity and experience of the agent. Breckinridge, supra note 265, at 123. The officer may, for example, provide training to enable the agent to mask his relationship with the officer. Arthur S. Hulnick, Fixing the Spy Machine 35
tions involve so much risk to both case officers and potential agents. Due to the value of agents’ contributions to intelligence gathering, the identities of agents are some of the most sensitive secrets of the intelligence community. If a source were disclosed, the organization that the source had penetrated could take steps to eliminate the source or to turn the source into a means of counterintelligence. Subjecting the intelligence community’s files to a prosecutor’s disclosure obligation could force the government to reveal to international terrorist networks its sources and methods of surveilling terrorist organizations. This disclosure could, in turn, permit these groups to eliminate agents and engage in effective counterintelligence.

Despite the vast amount of money spent investigating international terrorism, intelligence on international terrorist networks is, and promises to remain, difficult to obtain. The CIA has had extreme difficulty in collecting such information thus far. Several obstacles stand in the way. One obstacle is the steady decline of HUMINT collectors over the past decade: between 1990 and 1996, the CIA reduced the number of “core HUMINT collectors” by over thirty percent. Current and former intelligence officers report that the CIA now possesses a “deteriorated human-intelligence capability that makes it almost impossible to penetrate key targets such as terrorist organizations and cripples U.S. efforts to detect and prevent terrorist

(1999). The case officer may train the agent how to use photographic and recording equipment, how to conceal documents, and how to communicate with the officer. Id. Lowenthal, supra note 265, at 68. Gregory Treverton, senior policy analyst at RAND and former Vice Chair of the National Intelligence Council, observed that spying... is a target-of-opportunity enterprise. What spies may hear or steal today, or be able to communicate to their American case officers, they may not hear or see or be able to get out tomorrow. What is decisive today may be unobtainable tomorrow. Worse, the crisis moments when information from spies is most valuable to us may be precisely when they are most exposed, when to communicate with them is to run the greatest risk of disclosing their connection to us.

TREVERTON, supra note 255, at 152.

HOLT, supra note 292, at 73.

See id.

See supra note 239.

Vice Admiral Thomas Wilson, the Director of the Defense Intelligence Agency, testified before the Senate Select Committee on Intelligence that “[t]he characteristics of the most effective terrorist organizations—highly compartmented operations planning, good cover and security, extreme suspicion of outsiders, and ruthlessness—make them very hard intelligence targets.” Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence, 106th Cong. 24 (2000) (statement of Vice Admiral Thomas R. Wilson, Director, Defense Intelligence Agency).


See INTELLIGENCE COMMUNITY IN THE 21ST CENTURY, supra note 266, at 193.
attacks."\textsuperscript{304} Another obstacle is the fact that the CIA’s HUMINT operations rely heavily on case officers operating under official cover,\textsuperscript{305} a designation that makes it virtually impossible for them to recruit agents with connections to terrorist organizations.\textsuperscript{306} However, even if the CIA were to attempt to modify its cover operations to penetrate international terrorist networks,\textsuperscript{307} it might not be able to find case officers willing to take the assignments under non-official cover.\textsuperscript{308} Moreover, even if case officers were willing to serve under non-official cover, virtually none of the case officers and agents remaining in the CIA has the appropriate cover or language training to penetrate terrorist cells or to recruit agents in foreign countries.\textsuperscript{309}

\textsuperscript{304} J. Michael Waller, \textit{Ground Down CIA Still in the Pit}, \textit{Insight on the News}, Oct. 1, 2001, at 19, 20. Congress has taken steps to remove limitations on source recruitment. President Bush signed legislation on December 28, 2001 directing the current Director of Intelligence to rescind guidelines previously established in 1995 by then Director of Intelligence John Deutch governing the use of foreign assets or sources with criminal or human rights concerns. \textit{See Intelligence Authorization Act for Fiscal Year 2002, Pub. L. No. 107-108, § 403, 115 Stat. 1394, 1403; Tim Weiner, CIA Re-examines Hiring of Ex-Terrorist as Agent, N.Y. Times, Aug. 21, 1995, at A1. These guidelines apparently led to the removal of hundreds of foreign agents from the CIA payroll, causing what one reporter described as a “devastating effect on anti-terrorist operations in the Middle East.” Hersh, \textit{supra} note 302, at 40. In instructing the CIA director to rescind these rules, Congress stated that the previous guidelines failed to fully address the “challenges of both existing and long-term threats to United States security.” \textit{Intelligence Authorization Act for Fiscal Year 2002} § 403, 115 Stat. at 1403. The legislation directed the CIA director to issue new guidelines that

\textsuperscript{305} \textit{See Codevilla, supra note 264, at 306-09.}

\textsuperscript{306} \textit{See Gerecht, supra note 241, at 40. Reuel Marc Gerecht, a former CIA operative experienced in Middle Eastern matters, argues that “[t]he only effective way to run offensive counterterrorist operations against Islamic radicals in more or less hostile territory is with ‘non-official-cover’ officers—operatives who are in no way openly attached to the U.S. government.” Id.}

\textsuperscript{307} There is no indication yet that the CIA has altered these operations. \textit{See id. (“But as of late 1999 no program to insert NOCs [non-official-cover officers] into an Islamic fundamentalist organization abroad had been implemented, according to one . . . officer who has served in the Middle East.”).}

\textsuperscript{308} \textit{Treverton, supra note 255, at 155 (“The disadvantages of unofficial cover are that it is expensive and time-consuming to implement, and given the lack of diplomatic immunity, it is potentially dangerous.”).}

\textsuperscript{309} For example, although the CIA does not disclose the number of specialists who speak a specific language, CIA sources with knowledge of the agency’s language capabilities say that there are approximately only four or five competent Arabic speakers in the entire CIA. Claire Berlinski, \textit{English Only Spoken Here}, \textit{Wkly. Standard}, Dec. 3, 2001, at 22, 22. Part of the problem appears to be that case officers who study Arabic in the United States often serve only a single two- to three-year tour before being rotated elsewhere, where they lose their language capabilities. \textit{Id.} at 29.
barrier compounds the CIA's official-cover problem and severely restricts HUMINT capabilities in critical locations.\textsuperscript{310} It will take time for the intelligence community to produce tangible results in improving its ability to monitor international terrorism.\textsuperscript{311}

IV

A Proposal for a Limited Prosecutorial Duty to Search the Government for Brady Material in International Terrorist Prosecutions

The previous two Parts of this Note described the various standards that the courts of appeals have applied to determine the scope of a prosecutor's duty to search for \textit{Brady} material. They further explained how, in light of the extensive interagency cooperation in the federal government's investigation of international terrorism, these standards could be construed to require a federal prosecutor to search the intelligence community's files in prosecutions of international terrorists. Responding to the disclosure threat posed by the circuit approaches, this Part sets out a standard for determining the scope of a prosecutor's duty to search the government for \textit{Brady} material. The standard serves the government's interests in protecting classified information related to international terrorism investigations better than the current circuit approaches. This Part also explains how the proposed standard conforms to existing Supreme Court case law and implements all the policies that prosecutorial disclosure is intended to serve.

A. The Proposed Standard and Its Requirements

A federal prosecutor's duty to discover and disclose \textit{Brady} material should extend to materials possessed by other arms of the federal government only if the following conditions are met: First, the government entity must have engaged in law enforcement activity under a prosecutor's direction and control in relation to the federal government's criminal investigation of the defendant. Second, if the first condition is met, then a prosecutor need search only those files containing materials produced as a result of the entity's law enforcement


\textsuperscript{311} Perhaps being optimistic, a retired CIA case officer experienced in Middle East affairs recently told a \textit{Newsweek} reporter that it would take the CIA "six years to build an intelligence service capable of 'seeding' agents into the radical Islamic underworld." Thomas, \textit{supra} note 241, at 36.
activity. Third, if the government entity engaged in law enforcement activities under the direction and control of a prosecutor’s law enforcement investigative arm (as opposed to the prosecutor himself), then the defendant must request the exculpatory or impeachment material with enough specificity to indicate to the prosecutor both the material’s location within the federal government and its nature.\textsuperscript{312}

These three conditions serve several valuable purposes. The first condition of the proposed standard requires that the material subject to a prosecutor’s disclosure obligation be the product of law enforcement activity conducted under a prosecutor’s direction and control.\textsuperscript{313} This condition is designed both to ensure that a prosecutor has actual notice of the likelihood that another government entity may possess \textit{Brady} material, and to create safe harbors for government agencies that do not wish to be subject to a prosecutor’s disclosure obligation. The “direction and control” element of this condition recognizes that certain activities (e.g., intercepting electronic and telephonic communications, recording statements, and collecting materials for analysis) conducted by government entities not acting under a prosecutor’s direction and control should not subject the entity to a prosecutor’s disclosure obligation merely because its investigative activities in relation to someone who is or may become a criminal defendant resemble law enforcement activity designed to support a criminal investigation and prosecution. Unless the government entity conducts law enforcement activity under the direction and control of a prosecutor, there is no reasonable basis for concluding that the

\textsuperscript{312} One should not confuse this proposed standard with the prosecution team standard. The prosecution team standard gives no indication that a prosecutor need search only those files containing materials produced as a result of law enforcement activity conducted under the direction and control of a prosecutor. \textit{See supra} Part II.A. Second, the prosecution team standard does not impose a specific request requirement in cases in which the government entity has not engaged in law enforcement activity under the direction and control of a prosecutor. \textit{See supra} Part II.A. Thus, unlike the proposed standard, the prosecution team standard does not require that a prosecutor have actual notice in these circumstances as to the location and nature of the files that he is supposed to discover and disclose to the defendant.

\textsuperscript{313} The “law enforcement” element of this condition recognizes that not all investigative activity conducted by a government entity in relation to someone who is or may become a criminal defendant is “law enforcement activity”—activity that is designed to assist in the prosecution of the defendant. Only that activity designed either to assist in the collection of evidence for use in a criminal prosecution or to provide trial assistance is “law enforcement activity.” Such activities might include identifying and interviewing potential trial witnesses; taking witness statements for a prosecutor; contacting persons for the purpose of securing their testimony; conducting searches and seizures; collecting and analyzing demonstrative evidence; taking persons into custody for interrogation; discussing matters with federal prosecutors; and participating in a defendant’s trial by providing testimonial, documentary, or demonstrative evidence. Of course, investigative activity conducted under the direction and control of a prosecutor almost certainly will be “law enforcement activity,” for a prosecutor would have no other purpose in directing and controlling the activity than the furtherance of a criminal investigation or prosecution.
prosecution has notice that the entity might have evidence that qualifies as *Brady* material. In addition, the condition permits a government entity that wishes to avoid being subject to a prosecutor’s disclosure obligations to a specific defendant (because, for example, it is itself investigating the defendant) to do so by avoiding a specific relationship with a prosecutor or by declining to engage in specific forms of investigative conduct under the prosecutor’s direction and control.

The second condition of the proposed standard limits a prosecutor’s search obligation to those files containing materials produced as a result of law enforcement activity conducted under a prosecutor’s direction and control. This condition is designed to ensure that criminal defendants are not permitted (through a prosecutor) to search sensitive government documents indiscriminately. Limiting a prosecutor’s search obligation to files containing materials produced as a result of directed and controlled law enforcement activity shields from a prosecutor’s discovery and disclosure obligations those files not containing materials produced under those circumstances. Thus, under the proposed standard, if a government entity engages in both investigative activity under the direction and control of a prosecutor and also independent and undirected investigative activity, a prosecutor need search only those files containing materials produced as a result of the directed and controlled activity. In the context of the government’s investigation of international terrorism, the proposed standard would permit elements of the intelligence community to structure their record retention procedures so that they could assist in an investigation without thereby exposing all of their materials relating to the target of a criminal investigation to a prosecutor’s disclosure obligation.

The third condition requires defendants, in those cases in which a government entity has engaged in investigative activity on behalf of law enforcement but not under a prosecutor’s direction and control, to bring the material within the prosecution’s search obligation by requesting the material with sufficient specificity to indicate both its location within government and nature. The requirement is designed to limit the burden imposed by the *Brady* search duty by requiring that prosecutors be given some notice as to which arm of the government may possess *Brady* material. As noted in Part III.B, dozens of federal agencies are involved in the federal government’s general investigation of international terrorism, and even greater numbers of state and local law enforcement agencies may be involved in a particular federal investigation. Although a federal prosecutor likely would

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314 See *supra* notes 260–63 and accompanying text.
315 See *supra* note 262 and accompanying text.
know which arm of the government has taken the lead in investigating and collecting evidence on his behalf and under his direction and control,\textsuperscript{316} he likely would not know the nature and extent of each and every federal, state, and local government entity's involvement in the federal investigation of a defendant, even if those entities engaged in activity under the direction and control of his law enforcement investigative arm. Consider the consequences, for example, if the FBI were to receive four hundred tips from anonymous sources, eleven different federal entities, and six foreign agencies in response to a public request for assistance during the course of a three-year FBI investigation of an international terrorist network. A general request for \textit{Brady} material, alone, would not provide a prosecutor with sufficient notice of the potential existence of \textit{Brady} material within the government. Unless the defendant directs the prosecution's attention toward a particular government entity and toward specific files within that entity, a general \textit{Brady} request would be unreasonably burdensome. The prosecutor would be forced to devote his limited resources to searching indiscriminately each and every federal or state entity with a possible connection to the government's investigation of the defendant, and to identifying each of the thousands of records within those entities that may contain \textit{Brady}—as opposed to merely relevant—material.\textsuperscript{317}

\textbf{B. The Proposed Standard's Fidelity to Supreme Court Precedent}

The scope of the prosecutorial duty to search for \textit{Brady} material proposed in Part IV.A is consistent with \textit{Brady} and its Supreme Court progeny. Because the specific request requirement that the proposed

\begin{footnotesize}
\textsuperscript{316} For a listing of all federal agencies making international terrorism referrals—495 referrals in all—to federal prosecutors between October 2001 and March 2002, see Transactional Records Access Clearinghouse, \textit{supra} note 263. Attorney General guidelines provide that special agents heading any FBI investigation must maintain periodic contact with the appropriate federal prosecutor as circumstances require and as requested by the prosecutor, and must present all relevant facts to the federal prosecutor if an investigation warrants prosecution. \textit{U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS} \textit{1} (2002), http://www.usdoj.gov/olp/generalcrimes2.pdf. These guidelines also provide that if an investigation produces credible information concerning criminal activity outside the FBI's investigative jurisdiction, the FBI field office must, subject to some exceptions, transmit the information or refer the complaint to law enforcement agencies having jurisdiction. \textit{Id.} at 11--12. A similar prosecutorial notice requirement applies when the FBI conducts a terrorism enterprise investigation, which is designed to obtain information concerning the nature and structure of a specific terrorist enterprise. \textit{See id.} at 17.

\textsuperscript{317} Recall that \textit{Brady} material is evidence that is material to guilt or punishment; only evidence whose nondisclosure would undermine confidence in a trial result is \textit{Brady} material. \textit{See} \textit{Kyles v. Whitley}, 514 U.S. 419, 433--34 (1995); \textit{United States v. Bagley}, 473 U.S. 667, 682 (1985).
\end{footnotesize}
standard imposes in certain circumstances is likely to arise often,\textsuperscript{318} and because, on its face, the requirement is the one most likely to be characterized as inconsistent with Supreme Court precedent, this subpart discusses it first. Section 2 discusses the fidelity of the other limitations to Supreme Court precedent.

1. \textit{The Specific Request Requirement}

Supreme Court precedent does not foreclose the imposition of a specific request requirement in cases in which a government entity has engaged in law enforcement activity not under a prosecutor’s direction and control, but rather on behalf of law enforcement entities. \textit{Brady} itself held that “the suppression by the prosecution of evidence favorable to an accused \textit{upon request} violates due process where the evidence is material either to guilt or to punishment.”\textsuperscript{319} Nevertheless, in \textit{Agurs}, the Supreme Court held that a prosecutor must disclose \textit{Brady} material even if he receives no \textit{Brady} request at all. However, the \textit{Agurs} opinion clearly indicates that the Court understood this duty to be limited to materials in a prosecutor’s actual possession:

In many cases, . . . exculpatory information \textit{in the possession of the prosecutor} may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for “all \textit{Brady} material” or for “anything exculpatory.” Such a request really gives the prosecutor no better \textit{notice} than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence \textit{in the hands of the prosecutor}. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.\textsuperscript{320}

One could fairly construe \textit{Agurs} to require that a prosecutor disclose \textit{Brady} material in his possession even absent a specific request, given that \textit{Agurs} involved \textit{Brady} material knowingly possessed by a prosecutor.\textsuperscript{321} One cannot, however, fairly construe \textit{Agurs} to require that a prosecutor search also for \textit{Brady} material not in his knowledge or possession in the absence of a specific \textit{Brady} request. In other words, a

\textsuperscript{318} As one may imagine, in the context of an international terrorism investigation (and perhaps any investigation), the intelligence community likely would be involved long before the investigation reaches the point at which the lead investigative entity—most likely the FBI—would refer the matter to a prosecutor. Thus, in any given terrorism investigation, the intelligence community’s involvement might be limited to pre-referral liaisons with a federal law enforcement agency, not a federal prosecutor.

\textsuperscript{319} \textit{Brady v. Maryland}, 373 U.S. 83, 87 (1963) (emphasis added).


\textsuperscript{321} \textit{See id.} at 101 (noting that although the government argued on appeal only that the prosecutor had no duty to disclose absent a request, it apparently did not argue that the prosecutor lacked knowledge or possession of \textit{Brady} material).
fair reading of Agurs compels the conclusion that the Court did not require a Brady request in that case for the sole reason that the prosecution already had notice of the Brady materials in its possession.\textsuperscript{322}

Although its Agurs opinion appeared to limit the circumstances in which a prosecutor must produce Brady material absent a request, the Supreme Court subsequently, and without justification, construed Agurs to require that a prosecutor search for Brady material not within his knowledge or possession even in the absence of a specific Brady request. In Bagley, which found that a prosecutor had suppressed evidence, the Court relied on Agurs for the proposition that a prosecutor violates his Brady obligations regardless of whether the defendant has made a request for Brady material "if there is a reasonable probability that, had the evidence [possessed by the government] been disclosed to the defense, the result of the proceeding would have been different."\textsuperscript{323} For two reasons, however, one should not construe Bagley as controlling law on the specific request issue in cases in which the government entity to be searched is not the prosecution's investigative arm. First, because the defendant in Bagley had in fact made a specific request for the undisclosed material,\textsuperscript{324} the issue of whether a defendant must make a specific Brady request in cases in which the prosecution has neither knowledge nor possession of Brady material was not before the Court. Therefore, the Court's broad assertion is mere dictum. Second, even if the Court's dictum were binding, because the alleged prosecutorial nondisclosure in Bagley involved evidence known only to and held by the prosecutor's law enforcement investigative arm,\textsuperscript{325} it is not clear how Bagley's enunciated rule—that a pros-

\textsuperscript{322} The Supreme Court's Giglio opinion also failed to indicate whether a defendant is required to make a specific request for Brady material. See Giglio v. United States, 405 U.S. 150 (1972). However, Giglio does not provide any inferential guidance on this issue because, like Agurs, Giglio involved Brady material in the actual possession of the prosecution. Id. at 150–51.

\textsuperscript{323} United States v. Bagley, 473 U.S. 667, 682 (1985). The Court relied on Bagley's search requirement language in two subsequent cases. In Pennsylvania v. Ritchie, the Court relied on Bagley for the proposition that "the obligation to disclose exculpatory material does not depend on the presence of a specific request." 480 U.S. 39, 58 n.15 (1987). The Ritchie Court came to this unwarranted conclusion even though the defendant in the case had made a specific request for material within the possession of an investigative agency (material that the agency sought to protect from disclosure), and even though the material was known only to and held by the prosecutor's investigative arm. See id. at 43, 44 n.4. The Court relied on Bagley again in Kyles v. Whitley for the proposition that "regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" 514 U.S. 419, 433-34 (1995) (quoting Bagley, 473 U.S. at 682). Like the Ritchie Court, the Kyles Court came to this conclusion even though the defendant made a general request for exculpatory and impeachment material, and even though the material was known only to and held by the prosecutor's investigative arm. See id. at 428, 438.

\textsuperscript{324} See Bagley, 473 U.S. at 669–70.

\textsuperscript{325} See id. at 669–71.
ecutor may be guilty of suppressing evidence not known to or
possessed by him even absent a specific request—follows from the
Court's holding in Agurs. Agurs eliminated Brady's specific request re-
quirement only in those cases in which obviously exculpatory material
is within a prosecutor's actual knowledge and possession, presum-
ably because it is only in this circumstance that a prosecutor already has
notice of the material. In Bagley, on the other hand, the prosecutor
did not know of or possess any obviously exculpatory material, and,
therefore, absent a specific request by the defendant, the prosecutor
could not have had notice of Brady material in the government's pos-
session. Thus, the universal no-request-needed rule announced in
Bagley does not, contrary to the Court's suggestion, follow from Agurs.
Moreover, if the Bagley Court meant to extend Agurs's scope, it offered
no rationale for the extension. For these reasons, the Court should
not construe Bagley as deciding the issue of whether a prosecutor vio-
lates his Brady obligations by failing to disclose Brady material not
known to or possessed by him or his investigative arm in cases in
which a defendant fails to give the prosecution notice of the material
by making a specific request.

2. The Law Enforcement Activity Under Prosecutorial Direction and
Control Limitation

Nor does Supreme Court precedent foreclose the proposed stan-
dard's condition that the prosecution need search only those govern-
ment entity files produced as a result of law enforcement activity
under the direction and control of the prosecution. Recall that in
Kyles, which involved a prosecutor's failure to discover and disclose
Brady material possessed by his investigative arm—the police—the
Court did not explain its statement that a prosecutor's duty to search
the government for Brady material extends to entities "acting on the
government's behalf." Certainly nothing in Kyles or in any other
Brady case compels the conclusion that a government entity surveil-
ling persons monitored also by law enforcement is "acting on the
government's behalf" for Brady purposes in those cases in which the
government entity is not acting under a prosecutor's direction and
control for the purpose of producing evidence for a criminal prosecu-

326 See supra notes 320–22 and accompanying text.
327 See Kyles, 514 U.S. at 438.
328 Id. at 437. Accord Moon v. Head, 285 F.3d 1301, 1309 (11th Cir. 2002).
All of the Supreme Court’s Brady cases, including Ritchie, involved Brady material possessed either by a prosecutor or by law enforcement entities acting in law enforcement capacities under the direction and control of a prosecutor—as agents for the collection of evidence on behalf of a prosecutor for use in criminal prosecutions. These important factual characteristics because the Court, in requiring the prosecutor in each of those cases to discover and disclose Brady materials not within her possession or knowledge, did not (1) compel a law enforcement agency to act in a capacity in which it was neither institutionally nor financially able or willing to act; (2) cre-

Assisting law enforcement in its investigation of a defendant absent a request or prosecutorial direction and control should not alone be sufficient to extend a prosecutor’s search obligation to the intelligence community. Without prosecutorial direction and control, any form of investigative assistance by the intelligence community related to the target of a law enforcement investigation, such as the provision of a single anonymous tip, could be construed as the kind of assistance that opens up all of the intelligence community’s files to the defendant.

The Court’s Ritchie opinion indicates that the outside agency—the Pennsylvania Children and Youth Services (CYS)—was the state entity responsible for investigating violations of laws against the mistreatment and neglect of children. See Pennsylvania v. Ritchie, 480 U.S. 39, 43 (1987). In Pennsylvania at the time the Court decided Ritchie, child mistreatment investigations were not handled by the police but instead were handed off to CYS. See id. (“The girl reported the incidents to the police, and the matter then was referred to the CYS.”). Then-existing Pennsylvania law suggests that CYS was in the habit of passing its investigative files on to the prosecution. See id. at 43–44 n.2. Thus, although CYS was not officially a law enforcement entity, CYS appeared to act as a law enforcement entity for Brady purposes because it regularly collected evidence on behalf of the prosecution for use in criminal prosecutions, a function which gave rise to an institutional relationship with the prosecution from which one could imply direction and control.

See Strickler v. Greene, 527 U.S. 263, 273–75 (1999); Kyles, 514 U.S. at 437–38; Ritchie, 480 U.S. at 43–44; United States v. Bagley, 473 U.S. 667, 669–72 (1985); United States v. Agurs, 427 U.S. 97, 100–01, 106–07 (1976); Moore v. Illinois, 408 U.S. 786, 791–95 (1972); Giglio v. United States, 405 U.S. 150, 152, 154 (1972); Brady v. Maryland, 373 U.S. 83, 84 (1963). In fact, unlike the intelligence community’s investigation of international terrorism, the law enforcement investigations in the Supreme Court’s Brady cases discussed in Part I would not have occurred but for the prosecution’s need for admissible evidence. The intelligence community, on the other hand, has a non-law-enforcement purpose for conducting its investigation of international terrorism that is independent of law enforcement’s need to obtain admissible evidence. See 50 U.S.C. § 403-3(d)(1) (2000) (providing that the Director of Central Intelligence Agency shall “collect intelligence through human sources and by other appropriate means”); id. § 401a (defining foreign intelligence as “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons”); Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981) (directing the intelligence community to “conduct intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States,” including the “[c]ollection of information concerning, and the conduct of activities to protect against, intelligence activities directed against the United States, international terrorist and international narcotics activities, and other hostile activities directed against the United States by foreign powers, organizations, persons, and their agents”).

For a comparison of the functions and methods of the intelligence community as opposed to that of law enforcement, see INTELLIGENCE COMMUNITY IN THE 21ST CENTURY, supra note 266, at 272–78. Treating the intelligence community as an arm of the prosecu-
ate a relationship between the prosecution and a law enforcement agency that did not previously exist;³³³ (3) require a law enforcement agency to produce materials that it had not already produced;³³⁴ or (4) jeopardize a law enforcement agency’s ability to fulfill its institutional purpose.³³⁵ With the exception of Ritchie, which discusses the fourth implication,³³⁶ none of the Court’s Brady cases discusses the above implications of extending a prosecutor’s duty to search for Brady material beyond his investigative arm. Thus, it is not clear that Kyles, or any other Supreme Court Brady case, would compel the courts to extend a prosecutor’s search obligation to the intelligence community in cases in which the conditions discussed in Part IV.A are not met; i.e., if the intelligence community is not acting as a law enforcement entity under a prosecutor’s direction and control in relation to a criminal investigation and prosecution.

³³³ Imposing on the intelligence community the same disclosure obligations as law enforcement regardless of the nature of its relationship with law enforcement would effectively treat spies like police—it would create the impression that the intelligence community is just another arm of the prosecution’s office. This would give the Attorney General an interest in influencing the intelligence community’s collection requirements and procedures—an interest presently reserved to the Director of Intelligence and the President.

³³⁴ If the courts were to extend a prosecutor’s discovery and disclosure obligation to the intelligence community, the intelligence community would no longer be solely in the business of gathering intelligence for use by the President: it would also be in the business of gathering evidence for prosecutors for use in criminal prosecutions. Thus, the intrinsic nature of the intelligence community’s work product would be altered.

³³⁵ Compelling a prosecutor to search his evidence-collecting arm does not jeopardize that arm’s ability to collect evidence in the future in the same way that forcing a prosecutor to search an intelligence-collecting arm of the federal government jeopardizes that arm’s ability to collect intelligence. The intelligence community relies on confidential informants for much of its information. See supra notes 293–94. A source would be less willing to relay intelligence were he to believe that his relationship with the intelligence community could be discovered and disclosed by a prosecutor searching through intelligence community files for information to pass on to criminal defendants.

³³⁶ See Ritchie, 480 U.S. at 60–61.
C. The Proposed Standard's Fidelity to the Policies Underlying Prosecutorial Disclosure

Not only is the proposed standard outlined in Part IV.A consistent with Supreme Court precedent, it is also better suited to serve the policies underlying prosecutorial disclosure than any of the existing circuit approaches. As discussed in Part I, the prosecution’s duty to search for and disclose exculpatory or impeachment evidence in the possession of some arm of the government is intended to implement several policies. These policies include the preservation of the adversarial system of justice, the prevention of prosecutorial misconduct, the provision of fair trials (i.e., preventing harm to defendants), the promotion of public confidence in criminal convictions, and the administration of accurate convictions.  

Any standard controlling the scope of a prosecutor's search duty must respect all of these policies. The circuit split discussed in Part II regarding the appropriate scope of a prosecutor's duty to search for Brady material possessed by some arm of the government reveals that the lower courts have no common understanding of the policies that Brady disclosure aims to effectuate. More specifically, the courts of appeals define the scope of Brady's search requirement in ways that effectively implement one policy to the neglect of other policies. The line of decisions following the prosecution team standard, for example, reflects those courts' implicit understanding that disclosure is intended primarily to prevent prosecutorial negligence. If these courts had understood Brady's search requirement also to be a mechanism for ensuring the accuracy of criminal convictions and for preventing harm to defendants, they would not have limited the prosecution's discovery and disclosure obligation only to those law enforcement entities acting under a prosecutor's direction and control in a particular criminal investigation.

It is certainly not difficult to imagine that a government entity unrelated to a particular criminal investigation and prosecution (or even a prosecutor's investigative arm) might possess Brady material related to a specific defendant's prosecution that is the product of a separate, unrelated investigation of the defendant, especially in cases involving repeat offenders or organized crime rings. That Brady disclosure is not intended solely to prevent prosecutorial misconduct, however, is evident from express language in the Supreme Court's opinions. If Brady's sole aim were to prevent prosecutorial misconduct, why would the Supreme Court have held that a prosecutor's good or bad faith in suppressing evidence is irrelevant? Under Brady, a prosecutor who innocently overlooks Brady material in his possession is no less culpable

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337 See supra Part I.A.
338 See supra Part II.A.
339 See supra Part II.A.
than a prosecutor who intentionally withholds exculpatory or impeach ment evidence from the defendant.\textsuperscript{340}

The line of decisions following the availability/accessibility standard,\textsuperscript{341} on the other hand, reflect those courts' implicit understanding that the disclosure rule is intended primarily to prevent harm to defendants and to ensure the accuracy of criminal convictions. These courts' lack of attention to the policy of preventing prosecutorial misconduct is apparent from the almost unlimited scope of the search duty they impose and from their failure to discuss the issues of notice and administrative burden in their opinions.\textsuperscript{342} That \textit{Brady} disclosure is not intended merely to ensure that defendants are not harmed and that criminal convictions are accurate, however, is evident from the express limits on the \textit{Brady} disclosure obligation. If \textit{Brady}'s sole aim were to prevent harm to defendants, why would the Supreme Court have limited the discovery and disclosure requirement to materials within the government's possession? Under \textit{Brady}, if a prosecutor were to suspect, for example, that a private third party might have information that corroborates some aspect of the defendant's theory, he would have no obligation to search for and subsequently disclose this information to the defendant.\textsuperscript{343} Moreover, why would the Supreme Court limit the prosecution's discovery and disclosure duties to \textit{material} evidence—evidence that, if disclosed, gives rise to a reasonable probability that the trial result would have been different?\textsuperscript{344} Under \textit{Brady}, if a prosecutor were aware of evidence in the possession of the police that could be used to undermine the state's theories of guilt but which is not so significant that its nondisclosure would undermine confidence in the trial's result, the prosecutor would have no obligation under \textit{Brady} to discover and disclose this evidence.\textsuperscript{345} \textit{Brady} imposes these limitations even though nondisclosure certainly harms a defendant deprived of the opportunity to use every shred of evidence to his advantage in these circumstances.

\textsuperscript{340} See supra note 51 and accompanying text; see also United States v. Agurs, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it." (footnote and citation omitted)).

\textsuperscript{341} See supra Part II.B.

\textsuperscript{342} See supra Part II.B.

\textsuperscript{343} Cf., e.g., United States v. Woodruff, 296 F.3d 1041, 1043 n.1 (11th Cir. 2002) ("To establish a \textit{Brady} violation, the defendant must show . . . that the government possessed evidence favorable to the defendant . . ."); United States v. Hughes, 211 F.3d 676, 688 (1st Cir. 2000) (holding that a prosecutor had no obligation to disclose evidence possessed by foreign entity because the government had no control over the evidence).

\textsuperscript{344} See supra notes 62–63, 67 and accompanying text.

\textsuperscript{345} See supra note 63 and accompanying text.
The search standard proposed in Part IV.A, which requires greater prosecutorial notice, minimizes the administrative burden posed by a prosecutor's *Brady* obligations and provides safe harbors for government entities not wishing to come under a prosecutor's disclosure duty. Moreover, the standard implements all the policies that disclosure is intended to serve—preserving the adversarial system of justice, preventing prosecutorial misconduct, preventing harm to defendants, promoting public confidence in criminal convictions, and ensuring the administration of accurate convictions.

1. **Preserving the Adversarial System of Justice**

By requiring that defendants make specific requests in those cases in which the government entity thought to possess *Brady* material has acted under the direction and control of law enforcement rather than a prosecutor, the proposed standard preserves the adversarial system of justice. The criminal justice system seeks to implement the criminal laws in a way that effectuates not only substantive goals but also process goals. Among these process goals is the preservation of the adversarial system of adjudication. Under the adversarial system of adjudication, each party is responsible for investigating the facts. It is commonly believed that adversaries will discover more facts and transmit more useful information to the fact finder using this approach. Indeed, the discovery process itself is adversarial in nature. For example, the federal discovery rules condition a prosecutor's right to discovery on the defendant's exercise of his rights to discovery (with the exception of cases involving the public alibi, insanity, or public-authority defense provisions). In addition, a prosecutor is not obligated to disclose to a defendant all evidence that might be helpful to him, but only that evidence which the

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346 For a discussion of the criminal law's process goals, see 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 1.6 (1984).
347 See id. § 1.6(a), at 37-42.
348 Id. § 1.6(a), at 38, 40; see also Zacharias, *supra* note 37, at 56 (describing various justifications for the adversarial model and observing that "when the various justifications for the adversary system are considered as a whole, one can see that the 'justice' it strives for has several elements" and that "[a]scertaining the true facts is not the only or paramount goal. Fairness and respect for client individuality play an equal part, even though full assertion of client rights may interfere with truth-seeking. Efficient fact-finding also is an important objective").
349 See Fed. R. Crim. P. 16(b)(1) (discussing information subject to disclosure by the defendant). For example, the Federal Rules of Evidence permit the prosecution to seek from the defense any scientific reports produced by the defense in connection with the case only after the defendant has exercised his right to obtain similar reports from the prosecution. See Fed. R. Crim. P. 16(b)(1)(B). For a discussion of reciprocal and conditional discovery, see 2 LaFave & Israel, *supra* note 346, § 19.4(d), at 517-19.
prosecution is statutorily and constitutionally required to disclose.\textsuperscript{351} Any other discovery approach would transform the American adversarial system of justice into an inquisitorial system, in which the development of relevant facts is primarily the state's responsibility.\textsuperscript{352} Therefore, to preserve the adversarial nature of the discovery process and to enable the parties to discover as many relevant facts as possible, courts should adopt a \textit{Brady} search standard that requires the participation of both parties. The standard proposed in Part IV.A seeks to achieve these goals by distributing the burden of discovering \textit{Brady} material not known to or possessed by a prosecutor or his investigative arm between both the prosecutor and the defendant. Moreover, not only does this standard make it more likely that the prosecution will discover \textit{Brady} material in the federal government's possession, the specific request requirement also limits a prosecutor's administrative burden by not imposing a duty to search every federal agency that may be involved in the government's general investigation of international terrorism.

2. Preventing Prosecutorial Misconduct

By clearly requiring that a prosecutor search a government entity for \textit{Brady} material only if the entity has engaged in law enforcement activity under her direction and control or if the defendant has made a specific request indicating the location and nature of the material, the proposed standard prevents prosecutorial misconduct. Prosecutors are held to the highest ethical standards. As the Supreme Court observed in \textit{Agurs}:

For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that "justice shall be done." He is the "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."\textsuperscript{353}

A prosecutor, though she is required to comply with various legal and ethical requirements in criminal proceedings,\textsuperscript{354} presumably could engage in a variety of forms of misconduct during the course of a prosecution, including knowingly using false testimony; delaying disclosure of, suppressing, manipulating, or fabricating evidence; coerc-

\textsuperscript{351} See 2 LaFave & Israel, supra note 346, § 19.3.
\textsuperscript{352} Cf 1 LaFave & Israel, supra note 346, § 1.6, at 38 (comparing the inquisitorial system of continental Europe with the American adversarial system).
ing witnesses; prosecuting baseless charges; or otherwise neglecting her legal and ethical obligations. Not only is preventing prosecutorial misconduct a worthy ethical goal in and of itself, preventing prosecutorial misconduct in the Brady context enables courts to implement the other policies underlying Brady—preserving the adversarial system of justice, ensuring the accuracy of convictions, promoting public confidence in trial results, and ensuring that defendants are treated fairly. If they wish to prevent prosecutorial misconduct, courts must minimize opportunities for prosecutors to neglect their obligation to discover and disclose Brady material not in their possession or knowledge. Because the proposed standard gives both the prosecution and the court a concrete standard for determining where the prosecutor must look and what she must look for, it is less likely that a prosecutor will intentionally or negligently fail to meet her prosecutorial disclosure obligations and thereby deceive both the defendant and the court. In other words, if confusion as to the scope and extent of the prosecution’s search duty is minimized, and the burden imposed by an unlimited prosecutorial search obligation is lessened, a prosecutor’s office will be less able to use confusion or administrative burden as an excuse for not disclosing information to a defendant.

3. Promoting Public Confidence in Criminal Convictions

By clearly requiring that a prosecutor search all government entities that have engaged in law enforcement activity under his direction and control, the proposed standard does not undermine public confidence in criminal convictions. The need to preserve the appearance of fairness in criminal trials is as important as providing fair procedures to defendants. As the Supreme Court has stated, “justice must satisfy the appearance of justice.” In the Brady context, preserving the appearance of fairness requires only that a prosecutor discover and disclose all Brady material known to and possessed by him or his investigative arm. The proposed standard promotes public confidence in the fairness of criminal trials and the accuracy of criminal convictions by requiring that a prosecutor search for and disclose all exculpatory or impeachment material known to and possessed by gov-

355 For a chart of the most common forms of police and prosecutorial misconduct leading to wrongful convictions, see Innocence Project, Police and Prosecutorial Misconduct, http://www.innocenceproject.org/causes/policemisconduct.php (last visited Apr. 9, 2009).
356 Offutt v. United States, 348 U.S. 11, 14 (1954); see also Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 n.19 (1951) (Frankfurter, J., concurring) (“In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done.” (quoting The Writings and Speeches of Daniel Webster)).
ernment entities that engage in law enforcement activities under a
prosecutor’s direction and control. The intelligence community is
generally understood not to serve the same law enforcement function
as the FBI, which collects evidence on behalf of federal prosecutors
for use in criminal prosecutions. Therefore, the public is unlikely
to lose confidence in criminal convictions simply because the prosecu-
tion is not (absent a specific request) required to search the files of
government entities, like those within the intelligence community,
that have not engaged in law enforcement activities under a prosecu-
tor’s direction and control.

4. **Ensuring the Administration of Accurate Convictions**

By removing from the scope of a prosecutor’s search obligation
(absent a specific request) any entity that has not engaged in law en-
forcement activities under her direction and control, the proposed
standard does not undermine courts’ ability to administer accurate
convictions. The Supreme Court has stated that “[t]he basic purpose
of a trial is the determination of truth,” and that “[d]iscovery, like
cross-examination, minimizes the risk that a judgment will be predi-
cated on incomplete, misleading, or even deliberately fabricated testi-
mony. [It serves] . . . the broader public interest in a full and truthful
disclosure of critical facts.” Yet one must understand a trial’s truth-
seeking purpose within the constraints imposed by the Constitution
and by criminal law, both of which provide various rules and proce-
dures that, when applied, functionally impede the truth-seeking func-
tion of a criminal trial. For example, the Constitution permits
defendants to refuse to testify at trial and constrains the prosecu-
tion’s power to search for relevant evidence. In addition, the Fed-
eral Rules of Criminal Procedure prevent prosecutors from
conducting discovery against defendants unless the defendant first at-
ttempts to discover evidence in the government’s possession. Moreover,
courts routinely suppress incriminating but unlawfully obtained

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357 For a discussion of the differences between the FBI’s and CIA’s functions, see IN-
TELLIGENCE COMMUNITY IN THE 21ST CENTURY, supra note 266, at 275–77.
358 Tehan v. United States ex rel. Shott, 382 U.S. 406, 416 (1966); see also Estes v. Texas,
381 U.S. 532, 540 (1965) (“Court proceedings are held for the solemn purpose of endeavor-
ing to ascertain the truth which is the sine qua non of a fair trial.”).
preme Court observed that “[t]he need to develop all relevant facts in the adversary system
is both fundamental and comprehensive.” Consequently, “[t]he ends of criminal justice
would be defeated if judgments were to be founded on a partial or speculative presenta-
tion of the facts. The very integrity of the judicial system and public confidence in the
system depend on full disclosure of all the facts.” 418 U.S. 683, 709 (1974).
360 See U.S. Const. amend. V.
361 See U.S. Const. amend. IV.
362 See Fed. R. Crim. P. 16(b).
demonstrative evidence under exclusionary rules, and often prevent the admission of highly relevant and probative testimonial evidence based on assertions of privilege. These constraints and exclusions demonstrate that courts must often decline to fully promote the truth-seeking function of a criminal trial in order to implement other important policies. In the Brady context, the judicial desire to ensure the accuracy of criminal convictions must be understood in light of the express limitations that the Supreme Court has placed on the prosecution's search duty—the materiality requirement and the requirement that the material be in the government's possession. The fact that courts do not require prosecutors to search for and disclose evidence that would be merely helpful to defendants, or to search for and disclose Brady material not in the government's possession, indicates that courts are not willing to disregard the other policy considerations underlying Brady in an effort to maximize accuracy in criminal convictions. It is no surprise, then, that the Kyles Court did not conclude that the accuracy of convictions would be threatened by its holding that a prosecutor's duty to search for Brady material is limited to entities that investigate crimes on her behalf. Therefore, one should not infer in cases in which the conditions of the proposed standard are not met and, therefore, in which the prosecution has no duty to search the intelligence community for Brady material, that the policy of ensuring the accurate administration of convictions has not been given effect. Rather, one should understand courts in these circumstances as merely giving limited effect to

364 See FED. R. EVID. 501.
365 One commentator questions whether the Supreme Court's Brady cases demonstrate any desire to ensure the accuracy of criminal convictions. Tom Stacy argues that any conception of accurate adjudication has two components, one relating to "error-avoidance," which concerns whether a given procedure minimizes the total number of erroneous verdicts, and one relating to "error-allocation," which concerns how a given procedure allocates errors between erroneous convictions and erroneous acquittals. Stacy, supra note 363, at 1406–07. Any conception of accurate adjudication, he argues, must decide whether and to what extent either of these two components—error-avoidance or error-allocation—will be more important. Id. at 1407. Stacy observes that criminal procedure traditionally has taken an innocence-weighted approach (which views erroneous convictions as worse than erroneous acquittals) to error-allocation that regards error-allocations as more important than error-avoidance. Id. at 1408. He observes, however, that the Supreme Court's materiality requirement in the Brady context deviates from criminal procedure's innocence-weighted approach: "[T]he [materiality] standard increases the number of erroneous verdicts and violates a conception of accuracy emphasizing either error-avoidance or an innocence-weighted approach to error-allocation." Id. at 1417 (footnote omitted).
366 See supra Part I.A.
367 See supra Part I.B.
368 Cf. supra note 119 and accompanying text (describing the search duty imposed by Kyles).
the policy due to a need to implement the other policies underlying the *Brady* decision.

5. Preventing Harm to Defendants

Finally, defendants are not harmed—in the sense that they are not deprived of a fair trial—simply because a prosecutor’s search obligation does not (absent a specific request) extend beyond those government entities that have engaged in law enforcement activities under his direction and control. As discussed in Part 1.A, the *Brady* Court understood harm to defendants in terms of prosecutorial misconduct, accuracy of convictions, and deception of the court. As discussed throughout this subpart, the proposed standard implements all of these policies. Moreover, because harm to defendants may also include unfair surprise at trial, it should be noted that the proposed standard does not increase the likelihood of unfair surprise because it does not deprive defendants of *Brady* material within a prosecutor’s possession or within the possession of the prosecution’s investigative arms. Prosecutors gain no evidentiary advantage by virtue of the limited search obligation, and neither defendants nor the courts are defrauded by prosecutors who may in fact have access to materials to which they claim to have no access.

**Conclusion**

Law enforcement’s ability to investigate international terrorism is in a precarious state. Thus, the effective investigation of international terrorism requires extensive cooperation among government agencies. Because disclosure of intelligence community files to suspected international terrorists could undermine the government’s ability to monitor and penetrate terrorist networks, imposing on prosecutors the duty to search for and disclose *Brady* material within intelligence community files, regardless of the nature of the intelligence community’s relationship to the prosecution, could eviscerate the government’s already limited ability to investigate international terrorism effectively. The *Brady* search standards adopted by the courts of appeals have the potential to do just that. For this reason, courts can and must adopt a construction of the Supreme Court’s line of *Brady*

369 *See supra* notes 47–53 and accompanying text.
370 *See supra* Part IV.C.2–4.
371 The purpose of discovery is, in part, to avoid unfair surprise. *See Fed. R. Crim. P. 16* advisory committee’s note (stating that “broad discovery contributes to the fair and efficient administration of criminal justice by... minimizing the undesirable effect of surprise at the trial”). Accordingly, the Supreme Court has stated that “the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.” *Taylor v. Illinois*, 484 U.S. 400, 411 n.16 (1988).
cases that limits a prosecutor’s duty to search government entities for exculpatory or impeachment material if the federal courts—as opposed to military tribunals—are to function as the appropriate forum for the prosecution of international terrorists. Such an approach would impose on a prosecutor a duty to search government entities not acting under his direction and control for *Brady* material only if a defendant requests the material with enough specificity to indicate both its location within government and its nature, and would require a prosecutor to search only those files that are the product of law enforcement activities conducted under his direction and control and in relation to a specific criminal investigation. In other words, a prosecutor should be required to search the files of government entities only if those entities have acted in a law enforcement capacity under his direction and control. Only this limited approach implements all of the policies that disclosure is intended to serve—preserving the adversarial system of justice, preventing prosecutorial misconduct, preventing harm to defendants, promoting public confidence in criminal convictions, and ensuring the administration of accurate convictions—while simultaneously serving the government’s interest in preventing the disclosure of classified information relating to suspected international terrorists.

The necessity of adopting a limited prosecutorial obligation to search the government for *Brady* material cannot be understated, for a government unable to prosecute certain classes of offenses in its courts is left with no other option but to attempt prosecution in another forum or to avoid prosecution altogether.\(^{372}\) Trying interna-

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\(^{372}\) The U.S. government could pursue a variety of extra-judicial strategies to prevent international terrorism. See Raphael F. Perl, Cong. Research Serv., Pub. No. IBRS5112, Terrorism, the Future, and U.S. Foreign Policy 4 (2001), http://www.fpc.gov/CRS_REPS/tf1217.pdf (discussing the policy framework through which past administrations have responded to terrorism and the dilemmas of these approaches). For example, the government could take diplomatic or economic action to persuade foreign states and organizations to assist in the war on terrorism. Congress already has granted the President authority to take such action. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 324, 110 Stat. 1214, 1255 (finding that because the United Nations has been an inadequate forum for the discussion of cooperative, multilateral responses to the threat of international terrorism, the President should continue to undertake efforts to increase the international isolation of state sponsors of international terrorism, including efforts to strengthen international sanctions, and should oppose any future initiatives to ease sanctions on Libya or other state sponsors of terrorism); see also International Security and Development Cooperation Act of 1985 § 505, 22 U.S.C. § 2349aa-9 (2000) (granting the President the power to ban the importation of any goods or services from any country that supports terrorism); International Emergency Economic Powers Act of 1978, 50 U.S.C. §§ 1701–1706 (empowering the President to regulate international financial transactions in times of emergency). Specifically, the United States could seek to persuade foreign nations to criminalize international terrorists activities, investigate them—with or without help from U.S. law enforcement—and then either prose-
tional terrorists in alternative fora is precisely what President Bush has proposed to do in creating military tribunals. However, this approach raises several concerns, the most significant of which is that secret trials may undermine the legitimacy of the war against terrorism. If other nations begin to perceive the tribunals as unjust mechanisms for exacting arbitrary retribution, they may be less willing to cooperate with the United States in the war on terrorism. In addition, trying non-citizens under different standards than those that Americans would face for similar crimes increases the chances that Americans tried abroad may face the same double standard in the future.

Finally, trying suspected international terrorists under rules inconsistent with traditional notions of due process undermines the authority of constitutional principles and sets a precedent for future prosecutions of other crimes in alternative fora whenever the nation faces unusual challenges. In light of the threat to the integrity of the criminal justice system posed by criminal prosecutions in military tribunals, the
cute terrorists themselves or extradite them to some nation that will. Alternatively, the government could initiate covert paramilitary operations—action designed to produce a particular result in a foreign country while concealing U.S. involvement. See Holt, supra note 292, at 135–67 (discussing the nature, benefits, and shortcomings of covert CIA action); Pillar, supra note 1, at 120; John B. Wolf, Antiterrorist Initiatives vii–xi, 18–19 (1989) (discussing the advantages of open paramilitary action coupled with an effective propaganda campaign). In 1996, Congress authorized the President to order covert action to prevent international terrorism. See Antiterrorism and Effective Death Penalty Act of 1996 § 324, 110 Stat. at 1255 (finding that "the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens"). In addition, the government could take full-scale, direct military action to hunt down and destroy international terrorist networks and the political regimes that harbor them. See Oscar Schachter, The Lawful Use of Force by a State Against Terrorists in Another Country, in Terrorism & Political Violence: Limits & Possibilities of Legal Control 245 (Henry H. Han ed., 1993). However, it is not clear that any of these alternatives is a viable method of preventing international terrorism both in the short and long term. See Pillar, supra note 1, at 85, 90–92 (discussing the advantages of permitting other states to prosecute terrorists but noting the obstacle posed by differing legal regimes); Richard Falk, Ending Terrorism, in Terrorism & Political Violence, supra, at 430 (observing that covert operations are "inherently more difficult to constrain within limits of law and morality"); Phil Williams, Combating Transnational Organized Crime, in Transnational Threats: Blending Law Enforcement and Military Strategies 197 (Carolyn W. Pumphrey ed., 2000) (observing the difficulty of distinguishing the good guys from the bad guys when militarily engaging criminals abroad). Moreover, although use of political, economic, and military force could conceivably prevent international terrorism, it appears to be no way for a government to enforce its criminal laws solely against those who would violate them.

Foreign nations have already expressed such sentiments. The Spanish, for example, flirted with the notion of refusing to extradite suspected al-Qaeda members because of the U.S. decision to employ military tribunals. See Jonah Goldberg, Europeans Save the World, Nat’l Rev., Nov. 30, 2001, http://www.nationalreview.com/goldberg/goldberg113001.shtml.

courts must adopt a construction of the prosecution's duty to search for *Brady* material that invites the government to prosecute in that forum—one that requires a search of intelligence community files only in instances in which the intelligence community has acted as a law enforcement entity under a prosecutor's direction and control.