Dream Team Or Evidentiary Nightmare: Defining When a Government Agency Is Part of the Prosecution Team

Carole Gordon Rapoport
Suffolk University Law School

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DREAM TEAM OR EVIDENTIARY NIGHTMARE?
DEFINING WHEN A GOVERNMENT AGENCY IS PART
OF THE PROSECUTION TEAM

I. INTRODUCTION

In October 2002, a serial sniper terrorized the greater Washington, D.C. area. The sniper murdered ten people and wounded three more in Maryland, Virginia, and Washington, D.C. Investigators from local and state police, the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco and Firearms (ATF), and the Pentagon participated in the extensive manhunt that led to the apprehension of the suspected murderers at a rest stop in Maryland. The investigation of suspects John Muhammad and Lee Malvo revealed links to shootings and miscellaneous crimes in Alabama, Georgia, Louisiana, Texas, Washington, and Antigua. By the time the Commonwealth of Virginia tried and convicted both Muhammad and Malvo for capital murder, the list of states, countries, and agencies involved in some aspect of the investigation included approximately eleven states, two foreign countries, and five federal agencies. The prosecution faced an enormous problem determining how many of these participants

3 See id.; see also Kornblut and Washington, supra note 1 (mentioning unprecedented use of manpower from federal and state agencies in sniper hunt).
4 See supra notes 1-3; see also Andrew Jacobs, Witness Recalls Days Spent With the Sniper Defendants, N.Y. TIMES, Nov. 15, 2002, at A26 (stating snipers also considered suspects in shootings in four other states); Dean E. Murphy, Officials Also Suspect Pair in Earlier West Coast Case, N.Y. TIMES, Oct. 29, 2002, at A28 (detailing snipers’ connection to Tacoma, Washington shootings).
5 See supra note 4. The participants in the investigation were Alabama, Georgia, Louisiana, Maryland, Michigan, Oregon, Texas, Virginia, Washington, Washington, D.C., Antigua, Jamaica, the FBI, the ATF, the Immigration and Naturalization Service (INS), the United States Army, and the Pentagon. Id. See also Stephen Braun, Mark Fineman, and Ralph Vartabedian, In a Sniper’s Grip, L.A. TIMES, Oct. 24, 2002, at A1, available at 2002 WL 2512878 (mentioning several agencies involved in hunt for snipers).
were actually part of the prosecution team. If an agency is a team member, the prosecution must request and review any material exculpatory evidence contained in the team member's files. The prosecution must then produce this evidence to the defense.

In the sniper case, the prosecution faced the daunting task of reviewing and producing evidence provided by the numerous agencies that assisted with the investigation. The cause of this vast production process is the expansion of the responsibilities of federal and state prosecutors by the Supreme Court of the United States in its landmark decision *Brady v. Maryland* nearly 40 years ago. The Warren Court held in *Brady* that, under the Due Process Clause, the prosecution must disclose all material exculpatory evidence in its possession upon the request of the defense. The expansion of this ruling over the years has created a confusing mix of decisions from the circuit courts regarding the production of documents not in the files of the prosecution, but in the possession of other agencies.

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6 The prosecution faced a situation similar to that of the sniper prosecution in the cases against Terry Nichols and Timothy McVeigh for the bombing of the Murrah Building in Oklahoma City in 1995. See generally United States v. Nichols, 67 F. Supp. 2d 1198 (D. Colo. 1999); United States v. McVeigh, 945 F. Supp. 1441 (D. Colo. 1997). In *McVeigh*, the court ordered the prosecution to request and review information from the CIA, Defense Intelligence Agency and the National Security Agency for exculpatory material in response to motions from the defense. *McVeigh*, 954 F. Supp. 2d at 1443-44. The court described the prosecution's burden under *Brady v. Maryland*, 373 U.S. 83 (1963), as informing "themselves about everything that is known in all of the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial." *Id.* at 1450. In *Nichols*, the defense moved for a new trial because the prosecution did not examine 50,000 information control sheets created by the FBI as it investigated the Oklahoma City bombing. *Nichols*, 67 F. Supp. 2d at 1198. These sheets contained information pertaining to the investigation and conversations between agents. *Id.* Although the court ordered that 12,000 pages be turned over to the defense, it also stated that "a complete review of every piece of paper generated by the many offices and agents concerned with this matter is an impossible task." *Id.* at 1202. The court found that the defense's requests exceeded realistic limits on searching for evidence. *Id.*


8 See *id.*


10 *Id.* at 87 (declaring prosecution's suppression of confession violated Due Process Clause of Fourteenth Amendment); see also U.S. CONST. amend. XIV, section 1, stating in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." The Fifth Amendment applies the same restrictive language to the federal government. See U.S. CONST. amend. V.

11 See infra notes 70-96 and accompanying text (discussing varied decisions from First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits); United States v. Combs, 267 F.3d 1167, 1175 (10th Cir. 2001) (noting circuits split on applying broad interpretation of *Brady* to other agencies related to prosecution). The Tenth Circuit applied its analysis from *Smith v. Secretary of N.M. Dep't of Corr.*, 50 F.3d 801 (10th Cir. 1995), a case of first impression for the court, on the issue of imputing knowl-
The Tenth Circuit’s analysis in *United States v. Combs* illustrates the division existing among the circuit courts on the production of evidence in the possession of other agencies. The court examined the different positions of the circuits as revealed by their decisions. The Tenth Circuit noted that the First and Third Circuits construed *Brady* broadly, the Fifth Circuit applied a more moderate approach, the Sixth Circuit interpreted *Brady* narrowly, and the District of Columbia and Ninth Circuits employed an unclear approach.

edge possessed by different arms of the government to the prosecution. See *Combs*, 267 F.3d at 1174.

12 267 F.3d at 1174-75 (discussing, but not weighing in on, split between circuits on constitutional duty to disclose material evidence). The court found it necessary to discuss the circuit split because both parties cited cases from different circuits to support their positions. Id. at 1173-74. The court relied on its holding in *Smith* in which it imputed knowledge of a separate murder investigation conducted by Torrance County authorities to the Bernalillo County prosecution, because the prosecution had actual knowledge of the separate investigations. Id. at 1174. The prosecution’s actual knowledge allowed the court to avoid addressing the full extent of imputing knowledge to the prosecution when possessed by an agency or arm of the state. Id. In *Combs*, the defendant appealed his conviction on conspiracy to distribute and possession of marijuana charges on the grounds that Pretrial Services was “an agency of the United States government” and its knowledge was imputable to the prosecution. Id. at 1170-72. The prosecution’s key witness claimed to be an innocent dupe of the defendant; however, after the trial, the prosecution learned from Pretrial Services that the witness failed seven drug tests by testing positive for marijuana. Id. at 1171-72. The prosecution immediately notified the defendant of the test results, which led to this appeal. Id. at 1172. The court found that the evidence was immaterial so it did not need to resolve the issue of whether or not Pretrial Services was an agency related to the prosecution. *Combs*, 267 F.3d at 1175. The court did state, however, that the prosecution could have easily checked with Pretrial Services before the trial. Id.

13 See id. at 1174-75 (discussing viewpoints of First, Third, Fifth, Sixth, Ninth, and D.C. Circuits regarding imputability of knowledge possessed by other agencies to prosecution).

14 See id. (analyzing decisions reached by other courts). Cases cited by the Tenth Circuit as interpreting *Brady* broadly are *United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993) (stating prosecution must inquire of all enforcement agencies potentially connected to witnesses); *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991) (holding prosecution “duty bound to demand compliance with disclosure responsibilities by all relevant dimensions of the government”); and *United States v. Perdomo*, 929 F.2d 967, 969 (3d Cir. 1991) (holding evidence in actual or constructive possession producible by prosecution). See *Smith*, 50 F.3d at 825 n.36. An example of the Fifth Circuit’s moderate approach is *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991) (deciding prosecution had access to easily available information and thus possessed knowledge of it). See *Smith*, 50 F.3d at 825 n.36. The Tenth Circuit illustrated the undefined approach of the D.C. Circuit and Ninth Circuit by citing *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (stating prosecution’s disclosure duties extend to information possessed by agencies “closely aligned with the prosecution”) and *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (holding obligation on prosecution to produce materials even if possessed by another agency). See *Smith*, 50 F.3d at 825 n.36. The narrow approach, which suggests that *Brady* does not apply to all agencies, is demonstrated by *United States v. Sherlin*, 67 F.3d 1208, 1218 (6th Cir. 1995) (holding *Brady* did not apply to Pretrial Services report as not evidence pos-
This note focuses on the difficulties faced by the courts in defining when a government agency or representative is a member of the prosecution team. Part II covers the history of Brady and its expansion. Part III discusses the different approaches developed by the circuits to define who is a member of the prosecution team and how far the prosecution must go in searching for Brady documents in the possession of team members. Part IV addresses the problems with these approaches and the need for the Supreme Court to establish guidelines for determining membership on the prosecution team.

II. BRADY AND ITS PROGENY

The Brady rule imposes a constitutional duty on the prosecution to disclose exculpatory evidence. In addition, state and federal rules of criminal procedure, as well as statutes, impose similar requirements for prosecutorial disclosure of information in response to a defendant’s request. These other disclosure statutes and rules, however, do not work together with Brady in determining who is a member of the prosecution team.

A. Brady v. Maryland

The foundation of the Brady rule is that withholding material exculpatory evidence is a violation of a defendant’s due process right to a fair trial. In 1963, the Court examined whether the prosecution deprived John

15 See Brady, 373 U.S. at 87 (holding that due process violated by prosecution’s withholding of favorable evidence).


18 See Smith v. Sec’y of New Mexico Dep’t of Corr., 50 F.3d 801, 823 (10th Cir. 1995) (explaining Brady claim based on due process argument).
Brady of his Fourteenth Amendment right to due process by suppressing the actual murderer's confession. The Court based its holding on its earlier decision in *Mooney v. Holohan.* In *Mooney,* the prosecution intentionally introduced perjured testimony to obtain a conviction. The *Mooney* Court focused primarily on the intentional misbehavior of the prosecutor. In contrast, the *Brady* Court focused on the injury suffered by the defendant because the prosecution withheld evidence. The shift in emphasis between the two decisions shows a growing interest by the Court to avoid convictions at any price, especially those that result in unfair treatment to an accused.

The Due Process Clause provides the framework for the Court's holding in *Brady.* The Due Process Clause guarantees one of the most important and basic rights possessed by an individual - the right to a fair trial. Due process is comprised of two separate functions: substantive

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19 See *Brady,* 373 U.S. at 84-86. Petitioner learned of the suppressed statement after his own trial, conviction and sentencing, and affirmance of his conviction. *Id.* at 84.

20 294 U.S. 103, 112 (1935) (ruling nondisclosure of perjured testimony incompatible with basic requirements of justice). In *Mooney,* the Court stated that the due process requirement was unsatisfied when the state intentionally deceived the court and jury by knowingly using perjured testimony to obtain a conviction. *Id.* See also *Pyle v. Kansas,* 317 U.S. 213, 216 (1942) (holding suppressed evidence and use of perjured testimony sufficient for due process violation).

21 See *Mooney,* 294 U.S. at 110 (discussing petitioner's claim based on deliberate actions of prosecution). Convicted of murder, the defendant in *Mooney* claimed that the prosecution knowingly used perjured testimony to convict him and withhold impeachment evidence. *Id.* The Court stated that "such a contrivance by a state to procure the conviction and imprisonment of a defendant is inconsistent with the rudimentary demands of justice...." *Id.* at 112.

22 See *United States v. Agurs,* 427 U.S. 97, 104 n.10 (1976) (discussing difference in emphasis between *Mooney* and *Brady* decisions).

23 See *id.* at 104 (analyzing *Brady*'s holding as concerned that trial's result unfairly influenced by withheld evidence).

24 See *Kyles v. Whitley,* 514 U.S. 419, 440 (1995) (declaring disclosure important in preserving criminal trial as selected forum for learning truth); *United States v. Bagley,* 473 U.S. 667, 678 (1985) (holding prosecution's nonproduction of evidence violates constitutional due process if defendant deprived of fair trial); *Agurs,* 427 U.S. at 103 (stating conviction obtained by deliberate use of false evidence basically unfair); *Brady,* 373 U.S. at 87-88 (discussing justice tarnished when criminal trials unfair).

25 See *Bagley,* 473 U.S. at 678 (mandating due process violated if suppression of evidence results in depriving defendant of fair trial); *Agurs,* 427 U.S. at 107 (applying due process to withholding of evidence as interfering with defendant's right to equitable trial); *Brady,* 373 U.S. at 86 (agreeing with Appeals Court that suppression of confession violated due process); *Smith,* 50 F.3d at 823 (explaining *Brady* holding based on due process argument).

and procedural due process. Procedural due process requires that the government adheres to set procedures when taking away an individual's liberty. The Brady rule encompasses procedural due process when actions by the prosecution interfere with a defendant's fair trial. The Brady Court thus obligated the prosecution to make a reasonable attempt to discover the truth for the defendant's benefit and to ensure a fair trial. By emphasizing fairness of trials and standards of justice, Brady altered the view of criminal trials as a contest between the prosecutor and the defense. Writing for the Court, Justice Douglas stated that fair criminal trials are as important to society as convicting the guilty. The courts interpret Brady by breaking down its holding into three elements necessary for a successful claim. First, courts examine whether the prosecution suppressed evidence. Second, courts analyze whether the evidence favored the defendant. Third, courts decide whether the evidence provided material support for either guilt or punishment. The prosecution's failure


28 See id. (discussing uses of Due Process Clause and focus of procedural due process).

29 See Brady, 373 U.S. at 87-88 (stating that prosecution's failure to produce exculpatory evidence or penalty reducing evidence it creates a "proceeding that does not comport with the standards of justice").


31 See id. at 1673-74 (explaining Brady shifted focus of trials from conviction to administration of justice); Gregory S. Seador, Note, A Search for Truth or a Game of Strategy? The Circuit Split Over the Prosecutor's Obligation to Disclose Inadmissible Exculpatory Information to the Accused, 51 Syracuse L. Rev. 139, 143-44 (2001) (noting Brady's emphasis on fairness and justice); Andrew E. Taslitz, Wrongful Rights, 18-SPG CRIM. JUST. 4, 7 (2003) (identifying Supreme Court's reliance on truth as necessary to fair trial).

32 See Brady, 373 U.S. at 87. Justice Douglas wrote, "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." Id.

33 See Moore v. Illinois, 408 U.S. 786, 794-95 (1972) (analyzing central issues of Brady holding as made up of three parts); United States v. Joseph, 996 F.2d 36, 39 (3d Cir. 1993) (describing three Brady requirements); United States v. Brooks, 966 F.2d 1500, 1502 (D.C. Cir. 1992) (quoting Moore's identification of heart of Brady holding as containing three factors); United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991) (identifying three components included in Brady complaint); United States v. Auten, 632 F.2d 478, 481 (5th Cir.1980) (describing factors necessary for valid complaint under Brady); Hochman, supra note 30, at 1674 (explaining development of Brady analysis).

34 See Hochman, supra note 30, at 1674 (asserting suppression terminology evolved from Mooney).

35 See Hochman, supra note 30 at 1674 (describing nature of evidence as supporting defendant's claim of innocence if evidence tends to exculpate or reduce penalty).

36 See Brady, 373 U.S. at 87 (stating due process violated by withholding evidence
to provide the defendant with such evidence could result in reversible error after the defendant’s conviction. The Brady decision presented the lower courts with a number of questions to answer relating to possession of evidence, requests for evidence, the meaning of “material,” and whether the favorable or exculpatory evidence must prove the innocence of the defendant. The Court addressed these questions itself in three cases that broadened the scope of Brady.

B. Expansion of Brady

The Court initially considered the prosecutor’s duty to voluntarily disclose exculpatory evidence to the defense and defined the standard of materiality in United States v. Agurs. In Agurs, the Court discussed three distinct scenarios to determine the materiality of evidence and whether disclosure of that evidence was required. The first scenario involved the use of perjured testimony by the prosecution and required setting aside the conviction if the testimony likely affected the jury’s decision-making process. The second scenario involved how the prosecution’s failure to re-

relevant to defendant’s guilt or punishment). The Brady Court stated “[w]e now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Id.

37 See Fredman, supra note 17, at 340 (analyzing Brady as imposing duty on prosecution to produce favorable evidence or risk overturned verdict).


39 See Kyles, 514 U.S. at 437 (holding prosecutor bears duty to discover favorable evidence known to those working for government’s benefit including police); Bagley, 473 U.S. at 682 (deciding withheld evidence material if different trial result reasonably likely with evidence’s disclosure); Agurs, 427 U.S. at 107 (holding material exculpatory evidence gives prosecution notice of duty to provide even when defense makes no request); see also 5 LAFAVE, supra note 38, § 24.3(b), at 475-76 (referring to most influential Brady progeny cases decided by Supreme Court).

40 427 U.S. at 107 (holding prosecutor’s duty to produce material exculpatory evidence not limited to specific requests). The defendant claimed self-defense in her conviction for the second-degree murder of Sewall with his own knife following intimate relations at a motel. Id. at 98-99. Defense counsel later learned that Sewall possessed a criminal record for assault and carrying dangerous weapons (knives), which supported defendant’s claim of self-defense. Id. at 100. The prosecution argued, in part, that the lack of a specific request for the evidence and the lack of materiality of the evidence left it with no duty to produce the criminal record. Id. at 101.


42 See Agurs, 427 U.S. at 103 (applying strict standard of materiality to perjured testimony cases); see also Corcoran, supra note 26, at 847-48 (discussing Court’s establishment of three standards of materiality); Felice F. Guerrieri, Comment, Law & Order: Rede-
spond to a specific request for evidence required setting aside a conviction if production of the suppressed evidence might have changed the trial’s outcome. The third scenario, as exemplified by Agurs, involved the duty to respond to a general request or nonrequest for exculpatory evidence. In this instance, the obligation to disclose originates from the nature of the evidence itself. If the evidence clearly supports an assertion of innocence, the prosecution must produce it even without a specific request.

The difference in the three situations presented by Agurs is that the standard of materiality used for the nonrequest or general request is higher than the standard used in the specific request cases. This higher standard requires a finding of guilt based on proof beyond a reasonable doubt. If the omitted evidence gives rise to a reasonable doubt that previously did not exist, a constitutional error exists. The judge must then review the total evidentiary record to determine the importance of the omitted evidence. The existence of reasonable doubt in the judge’s mind as to a finding of guilt justifies a new trial, especially if the validity of a verdict is already uncertain.

Nine years later, the Court collapsed the Agurs three-part materiality test into one test for failure to disclose favorable evidence by the prose-

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43 See Agurs, 427 U.S. at 104 (analyzing Brady as example of second disclosure situation because of specific evidence request before trial). The Court emphasized, “[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” Id. at 106.

44 See id. at 107 (finding no difference between general request and no request).

45 See id. (explaining exculpatory nature of evidence signals prosecution of duty to produce).

46 See id. (discussing equal need for production of exculpatory evidence whether general request or no request made).

47 See Agurs, 427 U.S. at 107 (explaining materiality standard different between specific request, no request and general request situations). The materiality standard applies to the level of review required of the evidence not disclosed to the defendant. Id. at 106-08. The Court explained that where the defendant makes no specific request for evidence, the standard is stricter than the harmless-error standard (an error that does not effect the case’s outcome) but more lenient to the defense than the burden imposed by the newly discovered evidence standard (evidence would probably produce a different verdict at a new trial). Id. at 111-12. Where there is a specific request, the Court suggested that a standard more lenient towards the defense might apply as the prosecution’s “failure to make any response is seldom, if ever, excusable.” Id. at 106.

48 See id. at 112 (describing need for evidence clearly supporting guilty finding).

49 See id. (finding nondisclosure of material evidence creates constitutional error by violating due process).

50 See id. at 112 (evaluating omitted evidence to weigh its effect on trial’s outcome when combined with other evidence).

51 See id. at 113 (granting new trial if omission leads to reasonable doubt); see also Guerrieri, supra note 42, at 358-59 (explaining reasonable doubt should guide disclosure and ordering of new trials).
cution, regardless of the existence of a request by the defense.\textsuperscript{52} The Court held that whether there is no request, a general request, or a specific request, "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."\textsuperscript{53} The Court defined reasonable probability as "a probability sufficient to undermine confidence in the outcome."\textsuperscript{54} Justice Blackmun, writing for the Court, also disclaimed any difference between impeachment and exculpatory evidence for \textit{Brady} purposes, contrary to the lower court's findings below.\textsuperscript{55} Interpreting \textit{Brady}, the \textit{Bagley} Court extended the prosecution's obligation to disclose materials possessed by an investigative branch of the prosecution, even if the prosecution lacked knowledge of the documents.\textsuperscript{56} Holding the prosecution responsible for documents it does not possess is based on the Court's doctrine of imputed knowledge, or constructive possession, first seen in \textit{Giglio v. United States}.\textsuperscript{57} In \textit{Giglio}, the Supreme Court attributed one United States Attorney's promise of immunity given to a grand jury witness to another United States Attorney who used the same witness during the trial of the case, even though the second United States Attorney had no knowledge of the promise.\textsuperscript{58}

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Bagley}, 473 U.S. at 682 (holding evidence material only if reasonable probability of different outcome if produced). In \textit{Bagley}, the defendant filed a pretrial discovery request seeking any evidence regarding compensation given to the government's witnesses for their testimony. \textit{Id.} at 669-70. After his conviction on narcotics charges, defendant learned that the government failed to disclose contracts paying two key witnesses for their testimony. \textit{Id.} at 671-72. See also Corcoran, supra note 26, at 851 (examining formulation of new materiality standard); Guerrieri, \textit{supra} note 42, at 359 (describing reworking of test for materiality of exculpatory evidence by Court).
\item \textit{Bagley}, 473 U.S. at 682.
\item See \textit{Bagley}, 473 U.S. at 676-77 (following Court's precedents, rejecting any distinction between impeachment and exculpatory evidence); see also \textit{Giglio v. United States}, 405 U.S. 150, 154 (1972) (holding nondisclosure of evidence pertaining to witness' credibility falls under \textit{Brady} rule).
\item See \textit{Bagley}, 473 U.S. at 672 n.4 (acknowledging Assistant U.S. Attorney lacked knowledge of contracts made by other government agencies with witnesses); Mark D. Villaverde, \textit{Note, Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material}, 88 \textit{Cornell L. Rev.} 1471, 1489-90 (2003) (discussing application of constructive possession/imputed knowledge doctrine).
\item 405 U.S. at 154 (1972) (holding since prosecution speaks for government, act of one of its agents also attributable to government); Villaverde, \textit{supra} note 56, at 1489 (discussing first application of doctrine in \textit{Giglio}).
\item \textit{Giglio}, 405 U.S. at 151-52 (describing government's failure to disclose promise of leniency to key witness in return for testimony).
\end{enumerate}
\end{footnotesize}
The Supreme Court expressly extended the Giglio concept of constructive possession to all government agencies in Kyles v. Whitley,\(^5\) holding that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police."\(^6\) Evidentiary nondisclosure results in a due process violation only if the favorable evidence satisfies the materiality standard established in Bagley, regardless of whether the prosecution or other government actors possess it.\(^6\) The Court stressed that under the Bagley materiality standard, the government bears the burden of disclosing favorable evidence when the cumulative effect of the suppressed evidence leads to a “reasonable probability” of the disclosure producing a different result.\(^\)\(^6\)

In conclusion, Brady and its progeny established that for a Brady violation to exist, the prosecution must suppress, either willfully or inadvertently, exculpatory or impeachment evidence.\(^6\) Brady and the cases it generated also established that the prosecution must disclose material evidence whether or not the defense specifically requests it.\(^6\) Evidence is now considered material if withholding it creates a reasonable probability of doubt in the result of the proceeding.\(^6\) Additionally, the prosecution bears the burden of discovering any favorable evidence and disclosing it to the defense, even evidence known to others working for the government but unknown to the prosecution.\(^6\)

None of these cases, however, specifically addresses the extent of the prosecution’s obligation to search for evidence in the possession of other government agencies based on their membership on the prosecution.

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\(^6\) Id. at 437.
\(^6\) See id. at 437-38 (emphasizing materiality standard affects consideration of due process violation); Todd E. Jaworsky, Note & Comment, A Defendant’s Right to Exculpatory Evidence: Does the Constitutional Duty to Disclose Exculpatory Evidence Extend to New Evidence Discovered Post-Conviction?, 15 ST. THOMAS L. REV. 245, 250 (2002) (describing effect of Court’s decision in Kyles as broadening constructive possession doctrine).
\(^\) In Kyles, the jury convicted the defendant of murder and sentenced him to death without hearing inconsistent statements by an informant, statements by eyewitnesses, and other evidence favorable to the defendant. 514 U.S. at 428-29. Kyles’ first trial resulted in a hung jury and a mistrial. Id. at 421-22. The second trial resulted in his conviction for first-degree murder and a death sentence. Id. at 431.
\(^6\) Kyles, 514 U.S. at 437 (comparing government’s “degree of discretion” with burden of evaluating and producing evidence).
\(^6\) See Brady, 373 U.S. at 87 (broadening framework for production of evidence by prosecution).
\(^6\) See Agurs, 427 U.S. at 107 (requiring prosecution to produce exculpatory evidence to avoid harm to defendant).
\(^6\) See Bagley, 473 U.S. at 682 (holding that if suppressed evidence lacks materiality, than its suppression does not necessitate new trial).
\(^6\) See Kyles, 514 U.S. at 437 (deciding failure of other government agents to provide information to prosecution no excuse for nondisclosure of exculpatory evidence).
The current disparity of approaches found among the federal circuit courts provides a strong incentive for the Supreme Court to reassess this issue. The Court's overriding concern should be the consistent application of the law to ensure a fair and just trial for all criminal defendants.

III. DEFINING MEMBERSHIP ON THE PROSECUTION'S TEAM

In general, the circuit courts agree that considering a governmental agency a member of the prosecution team requires some level of participation in the investigation or prosecution in question. The challenge for the courts lies in recognizing cases in which an agency engages in activities distinct from the investigation, such as merely providing information, as opposed to actively participating in the investigation at issue. Three ap-

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67 See Hochman, supra note 30, at 1679 (discussing Supreme Court's failure to clarify scope of prosecutor's obligation to search for evidence).
68 See Thomure, Jr., supra note 16, at 553 (discussing application of Ninth Circuit's broader standard of disclosure in Seventh Circuit). The Ninth Circuit's standard requires the government to review the personnel files of officers or agents for impeachment or exculpatory evidence upon the defendant's discovery request. See id. at 562. The Seventh Circuit, however, places the burden on the defendant to show that impeachment evidence exists in the personnel file of the officer before mandating a review by the government. See id. at 567. The disparity exemplified by the Ninth and Seventh Circuits results in inequitable treatment of defendants from circuit to circuit. See id. at 571. In the Seventh Circuit, a defendant may never learn of impeachment or exculpatory evidence contained in an officer's file because of the inability of the defendant to show such evidence existed. See id. In the Ninth Circuit, however, a defendant could receive a reduced sentence because the prosecutor chose not to use an agent based on the impeachment evidence discovered in his file. See Thomure, Jr., supra note 16, at 571.
69 See Agurs, 427 U.S. at 110-11 (stating government's dominant concern to achieve justice). The Court stated that, "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.'" Id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
70 See United States v. Morris, 80 F.3d 1151, 1169-70 (7th Cir. 1996) (refusing to impute knowledge of various agencies to prosecution when not part of investigation); Odle v. Calderon, 65 F. Supp. 2d 1065, 1072 (N.D. Cal. 1999) (outlining case law limiting disclosure to agencies involved in investigation); 22A C.J.S. Criminal Law § 489, at 70 (1989 & Supp. 2002) (extending disclosure to agencies participating in investigation and reporting to prosecution); Fredman, supra note 17, at 347 (noting agency member of prosecution team when it participates in investigation or prosecution); Robert S. Mahler, Extracting the Gate Key: Litigating Brady Issues, 25-MAY CHAMPION 14, 17-18 (2003) (noting prosecution must establish that review of all files possessed by participating agencies has occurred); Thomure, Jr. supra note 16, at 571 (analyzing Seventh Circuit's rule requiring participation in investigation or prosecution).
71 See Fredman, supra note 17, at 348 (outlining difficulties in deciding alignment issues).


proaches have developed over the years to address the challenge: narrow, broad, and moderate.\footnote{See Combs, 267 F.3d at 1174-75 (describing approaches of First and Third Circuits as broad, Fifth Circuit as moderate, and Sixth Circuit as narrow).}

A. The Narrow Approach

Circuits applying the narrow approach adhere to a less expansive interpretation of the \textit{Brady} rule.\footnote{See Chandras v. McGinnis, No. 01 Civ. 2519, 2002 WL 31946711, at *8 (E.D.N.Y. Nov. 13, 2002) (stating court never mandated prosecution to discover evidence in possession of other agencies uninvolved in investigation); United States v. Failla, No. CR-93-00294, 1993 WL 547419, at *5 (E.D.N.Y. Dec. 21, 1993) (explaining only when agencies cooperate closely is knowledge of exculpatory evidence justly imputable). In \textit{Failla}, the court determined that simply because various law enforcement agencies worked together on the prosecution of one case did not automatically mean that they cooperated on a related aspect of a different case.} Circuits that use this approach ascribe knowledge possessed by employees of a different government office to a prosecutor on a limited basis.\footnote{See Shakur v. U.S., 32 F. Supp. 2d 651, 658 (cautioning against imposing unlimited duty to disclose on prosecutor) (quoting United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998)).} The Second, Fourth, and Eighth Circuits follow this approach and refuse to impute the knowledge of a federal or state government entity to the federal prosecutors on the case without some connection between the two.\footnote{See United States v. Hawkins, 78 F.3d 348, 351 (8th Cir. 1996) (refusing to hold Missouri prosecutor accountable for information possessed by Illinois prosecutor); United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993) (refusing to attribute knowledge of Omaha police to federal prosecutor); United States v. Quinn, 445 F.2d 940, 944 (2d Cir. 1971) (rejecting attempt to assign knowledge of Florida prosecutor's information to Assistant U.S. Attorney); Berger v. Stinson, 97 F. Supp. 2d 359, 366-67 (W.D.N.Y. 2000) (refusing to impute awareness of Florida criminal proceedings against witness to prosecutor); \textit{Shakur}, 32 F. Supp. 2d at 665 (refusing to impute knowledge of NYPD undercover agent to federal prosecutors).} The Second Circuit fears that the limitless extension of the boundaries of the government's knowledge will result in the adoption of a "monolithic view of government," which would immobilize the criminal justice system.\footnote{See Avellino, 136 F.3d at 255 (noting need to limit prosecution's duty to seek evidence from other agencies not involved in prosecution of case) (quoting United States v. Gambino, 835 F. Supp. 74, 95 (E.D.N.Y. 1993)).} The Second Circuit emphasizes that the critical factor in any analysis is the extent of involvement between the prosecutor's office and other agencies, and the possible existence of a joint investigation.\footnote{See United States v. Upton, 856 F. Supp. 727, 749-50 (E.D.N.Y. 1994) (examining analysis used by court in determining relationship between agencies and prosecution). The court held that because no joint investigation occurred between the U.S. Attorney's Office and other federal agencies, the prosecutor need not produce materials from those agencies. \textit{Id. See also} Bell v. Poole, No. 00 CV 5214, 2003 WL 21244625, at *16 (E.D.N.Y. Apr. 10, 2003).} The Fourth and Eighth Circuits concur with the Second

\footnote{See Combs, 267 F.3d at 1174-75 (describing approaches of First and Third Circuits as broad, Fifth Circuit as moderate, and Sixth Circuit as narrow).}
Circuit and find untenable the presumption that the prosecution has constructive knowledge of all information known to any other federal or state government agency.  

B. The Broad Approach

In contrast to the narrow approach, the First, Third, and Ninth Circuits impute an extensive array of knowledge to the prosecution. The First Circuit views the government as a single entity and requires the prosecutor to search the files of the United States Attorney, the Justice Department and its subsidiary agencies, the DEA, the FBI, and all other government agencies. The court refuses to view the government as a “congery of independent hermetically sealed compartments” with each agency as a “separate sovereignty.” The rationale for such a broad policy is to prevent injustice. The Third Circuit follows suit in applying a theory of constructive knowledge between federal and state agencies. If,

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2003) (holding no duty to obtain Department of Corrections records as not under police or prosecution control); Chandras, 2002 WL 31946711, at *8 (stating stretching team concept too far if no ongoing connection between agencies); Failla, 1993 WL 547419, at *5 (holding cooperating agencies for one case not necessarily arms of prosecutor for connected case); People v. Santorelli, 718 N.Y.S. 2d 696, 700-01 (App. Div. 2000) (deciding no constructive possession by district attorney where federal agency conducts own parallel investigation); People v. Martin, 669 N.Y.S. 2d 268, 273 (App. Div. 1998) (determining district attorney did not possess knowledge of police department internal investigation unrelated to defendant’s arrest due to its confidential nature).

78 See Hawkins, 78 F.3d at 351 (refusing to hold Missouri prosecutor accountable for information possessed by Illinois prosecutor as “no duty to conduct fishing expedition in other jurisdictions”); United States v. Jones, 34 F.3d 596, 599-600 (8th Cir. 1994) (holding constructive possession by government based on failure to obtain all state conviction information); United States v. Kern, 12 F.3d 122, 126 (8th Cir. 1993) (declining to assign knowledge of Omaha police’s supplemental report to federal prosecutor as report never in prosecutor’s possession); United States v. Coleman, 11 F. Supp. 2d 689, 692 (W.D. Va. 1998) (holding knowledge of state prison officials not equivalent to knowledge of prosecution); Horton v. United States, 983 F. Supp. 650, 654-55 (E.D. Va. 1997) (stressing state agency not typically part of federal prosecution team).

79 See Smith, 50 F.3d at 825 n.36 (discussing circuits’ approach to imputing knowledge of different arms of state to prosecution).

80 United States v. Owens, 933 F. Supp. 76, 86 (D. Mass. 1996) (describing extent of search expected of prosecution); see also United States v. Osorio, 929 F.2d 753, 762 (1st Cir. 1991) (stating duty to ask all government personnel in position to know about material information); Commonwealth v. Donahue, 396 Mass. 590, 600, 487 N.E. 2d 1351, 1357 (1986) (holding where federal and state agencies both investigated case, prosecution obligated to request FBI reports).

81 Osorio, 929 F.2d at 762 (viewing activities of various government agencies in criminal prosecutions as having common purpose).


83 See Perdomo, 929 F.2d at 970 (holding evidence in actual or constructive possession producible by prosecution); Levan v. United States, 128 F. Supp. 2d 270, 284 (E.D. Pa. 2003).
however, a defendant has not specifically requested identifiable evidence, courts refuse to require the prosecution to search the files from an unrelated case.\(^{84}\) Both the Third and Ninth Circuits further oblige the prosecution to request information from all law enforcement agencies with some possible link to its witnesses.\(^{85}\) The prosecution must also search civil records when the government is pursuing civil and criminal actions against a defendant rooted in the same issue.\(^{86}\) The broad approach also considers any agency responsible for overseeing compliance with a statute and participating with the prosecution in an investigation as a prosecution team member that must disclose its information.\(^{87}\)

C. The Modified Approach

In applying the modified approach, the Fifth, Seventh, District of Columbia, and Eleventh Circuits review the degree of participation and cooperation between the agencies on a case-by-case basis rather than applying a per se rule.\(^{88}\) This allows the Seventh Circuit, for example, to draw on opinions from both the broad and narrow circuits in deciding its opinions.\(^{89}\) The Fifth Circuit explained that creating an inflexible division

\(^{84}\) See Joseph, 996 F.2d at 41 (refusing to send prosecutors on "open-ended fishing expeditions").

\(^{85}\) See Carriger v. Stewart, 132 F.3d 463, 480 (9th Cir. 1997) (stating prosecution obliged to obtain and produce prison records); United States v. Thornton, 1 F.3d 149, 158 (3d Cir. 1993) (maintaining government must inquire of all agencies with possible knowledge and establish procedures for disclosure); In re Brown, 952 F.2d 715, 719 (Cal. 1998) (holding county crime lab was member of prosecution team requiring District Attorney to disclose evidence); but see United States v. Mariani, 90 F. Supp. 2d 574, 594 (M.D. Pa. 2000) (finding prosecution not required to obtain information where no evidence of DEP participation).

\(^{86}\) See United States v. Hankins, 872 F. Supp. 170, 173 (D.N.J. 1995) (holding prosecution must search related civil and criminal files for exculpatory material when seeking civil and criminal charges against defendant).

\(^{87}\) See United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (finding FDA files in constructive possession of prosecutor).

\(^{88}\) See Brooks, 966 F.2d at 1503 (joining Third, Fifth, and Seventh Circuits in holding duty to search extends to other agencies' files); Auten, 632 F.2d at 481 (focusing on "prosecution team" rather than distinguishing between government agencies); United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979) (noting extensive cooperation between state and federal agencies during entire investigation); United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973) (applying a case-by-case analysis of relationship between agency and prosecution), overruled on other grounds by United States v. Henry, 749 F.2d 203, 206 n.2 (5th Cir. 1984).

\(^{89}\) Compare Crivens v. Roth, 172 F.3d 991, 997 (7th Cir. 1999) (agreeing with other circuits that information's availability hinges on its possession by arm of state), with United
between federal and state agencies that worked together from the beginning of an investigation "would artificially contort the determination of what is mandated by due process." Additionally, if the prosecution failed to seek out easily accessible information and the court condoned this failure, it "would be inviting and placing a premium on conduct unworthy of representatives of the United States Government. This [the court] decline[s] to do."

The District of Columbia Circuit reasoned that the courts are mainly concerned with balancing impartiality towards the defendant, on the one hand, and the ease with which the government can obtain the documents requested, on the other, versus whether the government actually physically possesses the documents. The court draws the line at defendants' requests for the prosecution to perform a government-wide investigation for documents useful to their defense. The court also held, however, that a prosecutor who has accessed the files of another agency during an investigation cannot avoid disclosing those documents by simply ignoring the materials after a review.

The Eleventh Circuit follows the Fifth Circuit's modified approach in its own case-by-case analysis. The court finds a case-by-case analysis rather than a per se rule more effective in reviewing the extent of involvement between state and federal agencies. Utilizing a case-by-case app-

States v. Young, 20 F.3d 758, 764-65 (7th Cir. 1994) (distinguishing Perdomo and Auten as witness' undiscovered criminal records not result of failure to search), and United States v. Peitz, No. 01 CR 852, 2002 WL 226865, at *3 (N.D. Ill. Feb. 14, 2002) (citing Second Circuit in holding possession applies to entire prosecution team, but not nonmember government agencies).

Antone, 603 F.2d at 570; United States v. Wilson, 237 F.3d 827, 832 (7th Cir. 2001) (finding U.S. Marshal's Service part of prosecution team making failed drug test evidence imputable, even though Marshall's role limited to holding defendants in custody).

Auten, 632 F.2d at 481 (concluding government knew of witness' criminal record possessed by other agencies); but see Brown v. Cain, No. 95-2250, 1995 WL 495890, at *6 (E.D. La. Aug. 18, 1995) (finding prosecution not required to locate information not contained in FBI and state criminal databases or possessed by unrelated agencies).


See id. at 1485 (discussing limitations on government's obligation to produce documents to defendant).

See id. at 1478 (pointing out decisions of other courts regarding documents in possession of other agencies).

See Moon v. Head, 285 F.3d 1301, 1310 (11th Cir. 2002) (stating necessary to analyze each case individually when determining level of cooperation and interaction between agencies) (citing United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979)).

See Moon, 285 F.3d at 1310 (refusing to assume Georgia prosecutor possessed Tennessee Bureau of Investigation file on second murder); McMillian v. Johnson, 88 F.3d 1554, 1567 (11th Cir. 1996) (finding investigators not required to disclose exculpatory evidence directly to defense as duty on prosecutor to produce); but see United States v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992) (holding evidence possessed by prosecutor for assault case involving same defendant equivalent to government's possession in narcot-
proach allows the court to assess the practice of other circuits, to weigh the level of involvement between the various government agencies, and to measure the degree of authority the prosecution has over that agency.\(^97\)

IV. SHORTCOMINGS AND SOLUTIONS

Courts face two competing but equally important concerns when defining who is a member of the prosecution team.\(^98\) Their first concern is to avoid unnecessarily burdening frequently understaffed and underfunded prosecutors with the task of reviewing and analyzing excessive amounts of documents from various agencies.\(^99\) Their second concern is possibly denying evidence to a defendant that could prove his innocence, thus impeding the search for truth.\(^100\) The sniper case reflects these two competing concerns.\(^101\) The prosecution had to review documents in the files of a vast array of state and federal agencies.\(^102\) This review required a huge investment of time and staff; however, there is no questioning the importance of the task to the defendants and to the criminal justice system.\(^103\)

A. Problems with the Broad Approach

Some courts dislike the broad approach because they find that an overly inclusive view of the prosecution team and disclosure requirements leads to limitless requests by defendants, numerous inefficiencies in the judicial system, increased costs to taxpayers, and risks of exposure to intelligence sources, operations, and investigations.\(^104\) One of the difficulties prosecutors face is the special role they play in the criminal justice proc-

\(^97\) See Moon, 285 F.3d at 1310-11 (discussing decisions by other courts and degree of involvement necessary between government agencies); Villaverde, supra note 56, at 1500-01 (analyzing Eleventh Circuit's approach).

\(^98\) See Seador, supra note 31, at 154 (noting competing concerns as underlying reason for disclosure dilemma).

\(^99\) See Nichols, 67 F. Supp. 2d at 1202 (recognizing impossible for prosecution to review all documents created by numerous agencies involved in case and existence of reasonable limits); Seador, supra note 31, at 154 (noting courts worried about weighing down prosecution with additional obligations), Taslitz, supra note 31, at 11 (remarking on state budgetary restraints affecting prosecution's resources).

\(^100\) See Seador, supra note 31, at 154 (emphasizing finding of truth is mission of criminal justice process).

\(^101\) See supra notes 1-5 and accompanying text.

\(^102\) See id.

\(^103\) See McVeigh, 954 F. Supp. at 1450 (stating prosecution has duty to learn everything contained in archives and databanks of all agencies gathering information).

\(^104\) See Fredman, supra note 17, at 348 (detailing dangers of overly broad disclosure requirements); Jones, supra note 16, at 756 (explaining Brady does not entitle defendant to a fishing expedition).
ess. As officers of the court, they must manage conflicting obligations to seek convictions while achieving justice. This role creates constitutional, statutory, and ethical obligations to protect the honesty and equality of the criminal justice system. As one court noted, "an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure."

The broad approach requires overburdened prosecutors to spend excessive time objectively reviewing their files and other agencies' files in the search for relevant, admissible exculpatory evidence. The broad approach becomes unreasonably burdensome when it sends prosecutors on "open-ended fishing expeditions" searching through unrelated files for unspecified information. The broad approach encourages defense attorneys to rely solely on the evidence produced by the prosecution rather than conducting their own independent investigation.

In applying the broad approach, courts impute knowledge of other government agencies to the prosecution. Without some kind of routine contact or investigative participation by these other agencies, this imputation extends the phrase, "acting on the government's behalf," beyond reasonable bounds. In most cases, the jump from routine cooperation of an agency in areas of mutual interest to active knowledge of a specific case is too vast for such unlimited application. It is "reductio ad absurdum," or a ridiculous conclusion for defendants to argue that the prosecution knows what any other government agency or employee knows when the government has thousands of employees nationwide in various agencies.

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105 See Santorelli, 718 N.Y.S. 2d at 700 (describing role of prosecutors).
106 See id.
107 See id. (enumerating prosecutor's heightened responsibilities).
108 Brooks, 966 F.2d at 1503.
109 See Bagley, 473 U.S. at 696-97 (Marshall, J. dissenting) (explaining problems faced by prosecution); Seador, supra note 31, at 154-55 (discussing concern not to overburden prosecutors).
110 See Joseph, 996 F.2d at 41 (discussing need for specific requests to trigger searches of unrelated files); McVeigh, 954 F. Supp. at 1451 (finding fairness obligates defense counsel to make clear and informative requests for documents).
111 See Mahler, supra note 70, at 18 (emphasizing importance of defense to conduct own investigation).
112 See Chandras, 2002 WL 31946711, at *8 (analyzing various cases imputing knowledge to prosecution).
113 See id.
114 See Shakur, 32 F. Supp. 2d at 664 (holding knowledge of NYPD not imputable to federal prosecution team).
115 See Quinn, 445 F.2d at 944 (disposing of defense argument imputing knowledge of evidence in sealed Florida case to prosecution as "reductio ad absurdum").
B. Problems with the Narrow Approach

The major criticism that some courts have of the narrow approach is that it may hinder the search for truth.\(^{116}\) Courts that criticize the narrow approach explain that deprivation of a defendant’s due process rights occurs when the prosecution interprets its disclosure obligations too restrictively.\(^{117}\) Courts critical of this approach repeatedly state that the *Brady* rule is about more than guilt or trial strategy; it is about preventing a “miscarriage of justice.”\(^{118}\)

The narrow approach allows a prosecutor to easily avoid finding out what the government knows simply by declining to seek relevant information from those agencies likely to possess it.\(^{119}\) Prosecutors can suppress evidence by not searching for relevant information, such as a prior criminal record, that is easily accessible through a standard review of its internal files or the records of other government agencies.\(^{120}\) The government also possesses more resources than the defense to analyze evidence and persuade witnesses to aid the case or testify at trial.\(^{121}\) The government’s disclosure obligations affect every aspect of a defendant’s trial preparation, including any decision on whether to plead guilty.\(^{122}\) A defendant should make such a decision based on the same knowledge of favorable evidence as that possessed by the government.\(^{123}\)

C. The Modified Approach - Foundation for a Solution

The modified approach uses a case-by-case analysis to review the degree of participation and cooperation between the prosecution and an agency to determine whether that agency is part of the prosecution team.\(^{124}\) Using the modified approach as a foundation for solving the prosecution team dilemma involves creating criteria to better define the relationship

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117 See Fredman, *supra* note 17, at 348 (asserting that searching too narrowly affects due process rights).
118 See Bagley, 473 U.S. at 675; Lavallee, 239 F. Supp. 2d at 146 (asserting policy argument supporting *Brady* rule is prevention of injustice).
119 See Osorio, 929 F.2d at 761 (condemning as unacceptable prosecutor’s avoidance of searching for requested information).
120 See Chandras, 2002 WL 31946711, at *7 (discussing ways prosecution could avoid producing exculpatory evidence).
121 See Jones, *supra* note 16, at 744 (contending government in better position to obtain evidentiary information and witness testimony than defendant).
122 See Avellino, 136 F.3d at 255 (commenting on importance of prosecutor’s disclosure obligations to defendant).
123 See id. (maintaining defendant entitled to full disclosure of favorable evidence when deciding on guilty plea).
124 See *supra* notes 88-97 and accompanying text.
between the prosecution and other agencies.\textsuperscript{125} Defining what constitutes membership on the prosecution team provides a road map for the court, the prosecution, and the defense to follow in their pursuit of a fair trial.\textsuperscript{126}

Courts generally agree that considering an agency a team member requires a relationship between the agency and the prosecution.\textsuperscript{127} The relationship can combine agencies under the same sovereign, federal or state, or can consist of federal and state agencies pursuing a joint investigation.\textsuperscript{128} Where the combination is a state and federal agency or two different states, courts may need to determine on a case-by-case basis the extent of cooperation between the agency and the prosecution.\textsuperscript{129} For example, in \textit{United States v. Deutsch}, the court held that the Department of Justice could not avoid production of the personnel file of a Post Office employee used as a government witness in a bribery case.\textsuperscript{130} The court determined that the two agencies were too "closely connected" because the government's entire case involved bribery of a postal employee and that employee was the principal witness.\textsuperscript{131} Proving team membership by requiring a logical connection between the prosecution and another agency promotes fairness to the prosecution and the defense because a connection prerequisite reduces the number of agencies the prosecution must search and ensures a review of relevant materials for the defendant.\textsuperscript{132}

Establishing the closeness of the relationship between the prosecution and another agency also requires that the agency's role exceed merely providing tips or leads acquired during independent investigations.\textsuperscript{133} Requiring a greater role from the agency prevents an exhaustive search through unlimited agency files and protects sensitive information from

\textsuperscript{125} See Fredman, \textit{supra} note 17, at 348 (explaining no boundaries defined by courts or Congress between prosecution and other agencies).

\textsuperscript{126} See Taslitz, \textit{supra} note 31, at 13 (suggesting court should offer "road maps" to participants in criminal justice system).

\textsuperscript{127} See Brooks, 966 F.2d at 1503 (finding duty to search where branches of government "closely aligned"); \textit{Antone}, 603 F.2d at 569-70 (commenting on combined effort between state and federal agencies investigating case).

\textsuperscript{128} See \textit{Antone}, 603 F.2d at 569-70 (refusing to distinguish between federal and state agencies that have cooperated closely from beginning of investigation).

\textsuperscript{129} See id. (preferring case-by-case analysis of relationship between two separate sovereigns); see also \textit{Moon}, 285 F.3d at 1310 (agreeing with \textit{Antone} analysis in holding no joint investigation between Georgia prosecutor and Tennessee investigator).

\textsuperscript{130} See \textit{Deutsch}, 475 F.2d at 57 (deciding government cannot deny accessibility of Post Office files when entities "closely connected").

\textsuperscript{131} See id. (holding government cannot narrowly categorize the Department of Justice to avoid relationship with other government agency).

\textsuperscript{132} See \textit{Poinder}, 727 F. Supp. at 1487 (determining its holding protects defendant's right to evidence and government from extensive search).

\textsuperscript{133} See Fredman, \textit{supra} note 17, at 367 (describing when agency actively participates in case); see also \textit{supra} notes 73-78 and accompanying text (discussing need for agencies to participate in investigations).
unnecessary disclosure. These types of requirements help both the prosecutor and the defendant by focusing the search for exculpatory evidence on those agencies that might actually possess information rather than randomly searching agencies only marginally related to the case.

Another means for determining team membership requires defendants to make specific discovery requests for exculpatory evidence or other information that is only available to the defense from the government. Precisely written requests submitted by a defendant notify the prosecution of possible exculpatory material contained in a file in its office or that of another agency. Specific requests also signal the likelihood that evidence actually exists and the prosecution is not engaged in a “fishing expedition.” A specific request is like a road map that guides the prosecution quickly to the files that need review and allows the prosecution to easily comply with its Brady obligations.

Using the modified approach also serves society’s compelling interest in ensuring a fair and balanced criminal justice system. A fair criminal justice system prevents prosecutorial misconduct and unjust convictions, safeguards the individual’s due process rights, and protects intelligence sources and methods. A criminal justice system with a level playing field for all promotes public confidence in criminal convictions. As criminal investigations become more complex because of advances in technology and the involvement of greater numbers of agencies, including

134 See McVeigh, 923 F. Supp. at 1312 (explaining defendant seeking tangential information obtained by security agencies investigating terrorist groups); Fredman, supra note 17, at 348 (stating broad response could endanger intelligence sources and methods).
135 See Fredman, supra note 17, at 366 (proposing delineating scope of search by “knowledge, access and relationship” with agency).
136 See Fredman, supra note 17, at 366 (stating need for specific requests to trigger searches of unrelated files).
137 See id (stressing importance of defense’s providing precise requests as guide for prosecution to exculpatory evidence).
138 See Moon, 285 F.3d at 1310 (stating no obligation to undertake aimless search to discover evidence) (quoting United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989)).
139 See id.; Joseph, 996 F.2d at 41 (discussing need for specific requests to trigger searches of unrelated files).
140 See Brady, 373 U.S. at 87 (stating society benefits when justice system operates equitably); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1988) (commenting on ethical duty of prosecution to seek justice as representative of society); Corcoran, supra note 26, at 865 (expressing interest of society in fairness and justice); Fredman, supra note 17, at 340 (analyzing goals of discovery rules to ensure evenhanded trial).
141 See Brady, 373 U.S. at 87 (reiterating the importance of fair trials to society); Jones, supra note 16, at 740 (stating “true mechanism for justice is a fair process”); Taslitz, supra note 31, at 7 (remarking on importance of preventing wrongful convictions to preserve public confidence in trials); Villaverde, supra note 56, at 1538 (analyzing disclosure by prosecution intended to implement societal policies beneficial to judicial system).
142 See Jones, supra note 16, at 736 (assessing judicial system as based on adversarial relationship between two similarly situated opponents).
international investigative agencies, new public safety issues arise. Protecting intelligence sources and the methods used by intelligence agencies while still apprehending criminals also serves the public’s interest. Using the modified approach allows courts to balance the response necessary by the government with the defendant’s due process rights without promoting inefficiency or endangering intelligence sources. “It is desirable for the guilty to be convicted, but not at the expense of a fair process.”

V. CONCLUSION

The Supreme Court should address the confusion among the circuits concerning how to define a member of the prosecution team and to what extent the prosecution must search the files of other government agencies for exculpatory evidence. The Court should provide specific guidance and requirements based on a refined modified approach. This approach should allow for flexibility when needed, yet also provide the kind of specificity that the courts, prosecutors, and defense counsel need in preparing for and trying cases. As computers and technology make the global community smaller, criminal cases grow more complex and involve more agencies in their investigation. The sniper case exemplifies this new type of criminal case and demonstrates the need for guidance from the Court.

Some standard for weighing the involvement of an agency in a criminal investigation needs development. Striking a balance between reasonable discovery requests and assertions of remote connections between records in the hands of another agency is imperative. The time has come for the Supreme Court to provide assistance in establishing guidance and procedures for fairly and equitably identifying members of the prosecution team.

Carole Gordon Rapoport

143 See generally Nichols, 67 F. Supp. 2d 1198, 1202 (discussing investigation of case by numerous local and federal agencies); McVeigh, 945 F. Supp. 1441, 1443-46 (analyzing complexity of cases based on investigations by multiple agencies and defense requests for classified information); Fredman, supra note 17, at 332-37 (analyzing changes in criminal investigations and effects on prosecution); Villaverde, supra note 56, at 1472-75 (discussing prosecution’s difficulties in disclosing evidence due to development of international terrorism investigations).

144 See sources cited supra note 143.

145 See id.

146 Kurcias, supra note 16, at 1228.

147 This note is dedicated to my husband Michael for providing unconditional love and support throughout my law school journey.