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Constitutional Law - Tipping the Scale: Extending Scope of Brady Application for the Sentencing Phase in Post-Conviction Cases - United States v. Hampton, 109 F. Supp.3D 431 (D. Mass. 2015)

Natasha A. Desa
Suffolk University Law School

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**CONSTITUTIONAL LAW—TIPPING THE SCALE:
EXTENDING SCOPE OF BRADY APPLICATION
FOR THE SENTENCING PHASE IN POST-
CONVICTION CASES—*UNITED STATES V.
HAMPTON*, 109 F. SUPP. 3D 431 (D. MASS. 2015).**

Under 28 U.S.C. § 2255, a federal prisoner has the right to collaterally attack his or her sentence if it was imposed unconstitutionally.¹

¹ See 28 U.S.C. § 2255 (2008). Section 2255 in relevant part states:

- (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.
- (b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction . . . or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
- (c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
- (d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.
- (e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief . . . shall not be entertained if it appears that the applicant has failed to apply for relief . . . to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.
- (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
 - (1) the date on which the judgment of conviction becomes final;
 - (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
 - (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.
- (g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the

Generally, post-conviction motions are analyzed under the Due Process standard established in the landmark case of *Brady v. Maryland*, where the defendant claimed constitutional violations because the government suppressed evidence favorable to the accused.² In *United States v. Hampton* the court considered whether a defendant's right to Due Process was violated because the mandatory minimum sentence was imposed based on a state lab chemist's willful tampering of evidence.³ The United States District Court held, as a matter of first impression, that although egregious government misconduct did not support the motion for post-conviction relief, the state lab chemist's willful tampering of evidence was a Brady violation.⁴

court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

- (1) newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Id. This statute provides fundamental rights for all citizens. *Id.* See also U.S. CONST. amend. V. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law" *Id.* The defendant's right to a fair trial in federal court under the Fifth Amendment's Due Process Clause is similarly guaranteed in state court under the Due Process Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV §11.

² See *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963) (establishing that integral part of fair trial includes prosecution's duty to disclose exculpatory evidence). Generally, section 2255 does not apply to errors in application of the Sentencing Guidelines unless such errors constitute a miscarriage of justice. See, e.g., *Cofsky v. United States*, 290 F.3d 437, 441 (1st Cir. 2002) (finding application of Sentencing Guidelines error not cognizable absent "complete miscarriage of justice"); *United States v. Pregent*, 190 F.3d 279, 283-84 (4th Cir. 1999) (holding relief only available under section 2255 if sentence exceeds statutory maximum); *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999) (explaining section 2255 applicable when raising constitutional issues resulting in miscarriage of justice); *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999) (finding no error in application of Sentencing Guidelines "absent a complete miscarriage of justice"); *United States v. Wisch*, 275 F.3d 620, 625 (7th Cir. 2001) (holding error in Sentencing Guidelines generally not reviewable under section 2255); *Hunter v. United States*, 559 F.3d 1188, 1191 (11th Cir. 2009) (finding errors in sentencing "generally not cognizable in a collateral attack"), *vacated*, 558 U.S. 1143 (2010). But see *Thunder v. United States*, 810 F.2d 817, 822-23 (8th Cir. 1987) (finding section 2255 claim valid based on court's reliance on factually inaccurate presentence investigation report); *United States v. Garfield*, 987 F.2d 1424, 1426-28 (9th Cir. 1993) (holding cognizable section 2255 claim of failure to resolve factual dispute in petitioner's presentence report).

³ See *Hampton*, 109 F. Supp. 3d at 438 (holding state lab chemist's willful tampering of evidence violated Due Process).

⁴ See *id.* The court found no egregious government misconduct because defendant did not indicate he would have plead guilty had he known the state lab chemist had tampered with

Defendant, Dewayne Hampton, was convicted on one count of knowingly and intentionally conspiring to distribute fifty or more grams of cocaine base.⁵ The government asserted the indictment was premised on a ten-month investigation, during which Hampton was involved in twenty sales of approximately twenty-eight grams and approximately fourteen grams of crack cocaine to a cooperating witness, and one sale involving approximately six grams of crack cocaine, each transaction secretly recorded on video and audio.⁶ “An additional fifty grams of crack cocaine were seized from Hampton’s residence during his arrest.”⁷ Eighteen of the purchases were tested at the Hinton State Laboratory (“state lab”) in Jamaica Plain, where Annie Dookhan worked and was the primary or secondary chemist for fourteen samples.⁸ All samples tested positive for cocaine.⁹

In June 2011, Dookhan’s supervisors discovered, that without authorization, she took evidence from a safe, removed ninety drug samples from the office, and forged a co-worker’s initials on the evidence log.¹⁰

numerous drug samples, and defendant did not involuntarily plead guilty to quantity of drugs for which he was charged. *Id.*

⁵ See *Hampton*, 109 F. Supp. 3d at 431. “Hampton, along with co-defendants Willie Brown (“Brown”) and Ashley Clark (“Clark”), was a member of a drug distribution conspiracy.” *Id.* at 432. On September 3, 2009, all three defendants were arrested. *Id.* at 434. “All defendants were indicted on one count of knowingly and intentionally conspiring to distribute fifty or more grams of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A).” *Id.* Clark and Brown pled guilty on February 10, 2011. *Id.* “Clark was sentenced to time served (four days) plus twenty-four months of supervised release. Brown was sentenced to a term of imprisonment of sixty months, followed by four years of supervised release.” *Id.*

⁶ *Id.* at 433. Under the direction of law enforcement, a cooperating witness “allegedly purchased the 350 grams of crack cocaine from three defendants during the twenty-one controlled sales,” all of which were monitored by police and surveillance. *Id.* at 432.

⁷ *Id.* at 433. See Opp’n to Dewayne Hampton’s Mot. to Vacate (“Govt. Br.”) at 7, *United States v. Hampton*, 109 F. Supp. 3d 431 (D. Mass. 2015) (No. 09-10281). However, no testing was conducted on the fifty grams of substance seized from Hampton’s residence during his arrest. *Id.*

⁸ See *Hampton*, 109 F. Supp. 3d at 433. Dookhan performed the role of both primary and confirmatory chemist during her time at the state lab. The state lab used two levels of testing. *Id.* The primary chemist was responsible for performing simple bench top tests, and then prepared a sample of the substance for the “confirmatory chemist.” *Id.* The confirmatory chemist ran the substance through a machine that produced instrument-generated documentation of gas results, which was then conferred by both chemists to confirm consistent results. *Id.* After these two levels of testing were completed, the primary chemist prepared a drug certificate that included notarized signatures by both chemists. *Id.* See also *Commonwealth v. Scott*, 5 N.E.3d 530, 538 (Mass. 2014) (stating drug lab issued drug certificate identifying substance).

⁹ See *Hampton*, 109 F. Supp. 3d at 433 (discussing Hampton’s arrest and substance testing). In addition to the substances that were tested by a Drug Enforcement Agency, law enforcement agents field tested the substances received, which on at least one occasion, also brought about a positive result for cocaine. *Id.*

¹⁰ See Petitioner’s Supplemental Memorandum, *United States v. Hampton*, 109 F. Supp. 3d 431 (D. Mass. 2015) (No. 09-10281). The incident was reported to the Norfolk District Attorney in February 2012, and Dookhan went on administrative leave in February 2012, and resigned on

Dookhan was charged in the Massachusetts Superior Court with twenty-nine crimes, including perjury, obstruction of justice, tampering with evidence, and falsely claiming to hold a degree.¹¹ In November 2013, Dookhan pled guilty to twenty-seven counts and was sentenced to three to five years in prison, followed by two years of probation.¹² Hampton claimed that due to the case brought against Annie Dookhan, and related evidence tampering, he should be entitled to relief.¹³ However, Hampton was unable to provide any evidence that Dookhan tampered in any way with the samples submitted to the laboratory from his case.¹⁴

On April 27, 2011, Hampton pled guilty to one count of knowingly and intentionally conspiring to distribute fifty or more grams of cocaine.¹⁵ Even though Hampton pled guilty to the conspiracy, his counsel emphasized that this was not specific to “any particular transaction or any particular amount [of cocaine base] at this point.”¹⁶ “At the sentencing, Judge Gertner accepted the computations of crack cocaine from the Presentence Report, which calculated the substance attributable to Hampton to exceed 280 grams.”¹⁷ “Judge Gertner sentenced Hampton to the mandatory minimum

March 9, 2012. *See* Ex. A, Investigation Drug Lab. William A. Hinton State Lab. Inst. 2002–2012 63, 65, ECF No. 113–1. The lab eventually closed after further investigation. *Id.*

¹¹ *See Hampton*, 109 F. Supp. 3d at 433 (highlighting twenty-seven counts Dookhan was charged with and subsequently pled to). A judge ordered Dookhan to serve three to five years in prison, followed by two years of probation. *Id.*

¹² *See id.* Discovery in the case revealed that Dookhan breached lab protocol by:

[C]ertifying, without testing, that a substance was the suspected drug; placing samples from different cases together on her bench; ‘batching’ samples together and testing some but not others; intentionally contaminating a sample by using a known drug from a completed test; falsifying other chemists’ initials on quality control/confirmatory documents; falsely certifying having run quality control/confirmatory test samples; failing to properly calibrate her scales to ensure the accuracy of the drug weights measured by the chemist; and communicating directly with prosecutors about specific cases.

Id. at 433–34.

¹³ *See Hampton*, 109 F. Supp. 3d at 432 (alleging Dookhan’s misconduct in drug testing requires resentencing).

¹⁴ *See id.* at 434. Although the previous case against Dookhan led to discovery of breached protocol, there was no evidence produced in the current case of any tampering of samples submitted to the laboratory from the sales by Hampton. *Id.*

¹⁵ *Id.* (indicating Hampton initially pleaded not guilty before changing his plea).

¹⁶ *Id.* Judge Gertner told Hampton, “the ‘precise amounts [of crack cocaine] that you’re responsible for . . . will be something we will figure out at sentencing.’” *Id.*

¹⁷ *Id.* at 434–35. “The government attributed nearly 400 grams to Hampton. Fifty were taken from his home upon his arrest and were not tested. Almost 270 grams were tested by Dookhan. 52 grams were tested and stored by other chemists at the state lab. 28 grams were tested by the DEA laboratory.” *See* Mot. Vacate, Set Aside, or Correct Sentence Person Federal Custody, Ex. 1, Mot. Vac. Plea Alternative, Vacate Sentence, Pursuant 28 U.S.C. § 2255 (“Def. Br.”), *United States v.*

of ten years, followed by sixty months of supervised release.”¹⁸ On August 10, 2011, Hampton appealed his sentence to the United States Court of Appeals for the First Circuit, moved to dismiss his appeal, and the First Circuit granted the motion.¹⁹ Hampton filed the instant petition on August 21, 2013, arguing that the court should vacate his sentence because the prosecutor’s failure to disclose Dookhan’s misconduct was in violation of his right to Due Process under the *Brady* standard.²⁰

Hampton, (No. 09-10281-WGY) (arguing grounds for relief under violation of Sixth Amendment). The motion argues that Hampton’s Sixth Amendment rights were violated because he was convicted and sentenced for an offense for which he was not indicted, and which was not proved beyond a reasonable doubt. *Id.* Furthermore, because the government failed to disclose exculpatory evidence, Hampton’s right to Due Process was violated and, thus, he is entitled to resentencing. *Id.* Finally, the motion argues that in the alternative, Hampton has the right to be resentenced because egregious government misconduct tainted the sentence that Judge Gertner imposed. *Id.*

¹⁸ *Hampton*, 109 F. Supp. 3d at 434-35. In *Hampton*, the court stated:

[J]udge Gertner began with a sentencing level of thirty-two for the amount of cocaine base. She added two levels for being an organizer/leader and subtracted three levels for acceptance of responsibility, resulting in a sentencing level of thirty-one. Hampton had a criminal history of V, which resulted in a sentencing guidelines range of 168–210 months. Judge Gertner nevertheless sentenced Hampton to the statutory minimum of 120 months.

Id. at 435 n.4.

¹⁹ *See id.* at 435 (explaining procedural history of case).

²⁰ *See id.* A section 2255 motion is the proper means to challenge the validity or lawfulness of a conviction. *See* 28 U.S.C. § 2255(a) (2008); *see, e.g.*, *Glover v. United States*, 531 U.S. 198, 203 (2001) (holding section 2255 constitutional violation for ineffective assistance of counsel led to sentencing error); *see also*, *Mateo v. United States*, 398 F.3d 126, 136 (1st Cir. 2005) (finding section 2255 claims for unknowing and involuntary guilty plea); *Guerrero v. United States*, 186 F.3d 275, 277 (2nd Cir. 1999) (contending Sixth Amendment violation of *per se* ineffective assistance of counsel under section 2255); *United States v. Booth*, 432 F.3d 542, 550 (3rd Cir. 2005) (discussing ineffective assistance of counsel allowed under section 2255); *United States v. Brown*, 155 F.3d 431, 433 (4th Cir. 1998) (finding double jeopardy violation cognizable under section 2255); *United States v. Grammas*, 376 F.3d 433, 436-37 (5th Cir. 2004) (noting ineffective assistance of counsel claim appropriately brought in section 2255 motion); *Dunham v. United States*, 486 F.3d 931, 933 (6th Cir. 2007) (finding claims of double jeopardy and ineffective assistance of counsel brought in section 2255 motion); *Coleman v. United States*, 318 F.3d 754, 758 (7th Cir. 2003) (holding same); *Bear Heels v. United States*, 993 F.2d 1325, 1325 (8th Cir. 1993) (holding double jeopardy violation cognizable under section 2255); *Shukwit v. United States*, 973 F.2d 903, 904 (11th Cir. 1992) (ruling petitioner sentenced because of false information in presentence report cognizable under section 2255). *But see* *Nichols v. United States*, 563 F.3d 240, 250-51 (6th Cir. 2009) (finding defendant had no 6th Amendment right to counsel in discretionary appeals).

I. BACKGROUND

A. Title 28 U.S.C. § 2255

In 1948, Congress passed Title 28 U.S.C. § 2255,²¹ which is the principal statutory basis for relief for prisoners challenging the legality of his or her sentence.²² To obtain relief under section 2255, the petitioner must prove exceptional circumstances demanding redress to successfully vacate, set aside, or correct a sentence.²³ Specifically, claims arising from the government withholding exculpatory evidence, fall under violations of the

²¹ See 62 Stat. 869, 869, 967-68 (codified as amended at 28 U.S.C. § 2255 (2016)) (June 25, 1948) (stating that to “revise, codify, and enact into law title 28 of the United States Code entitled ‘Judicial Code and Judiciary’”). Section 2255 was one of several post-conviction reforms passed in this Act pursuant to the recommendations of the Judicial Conference Committee, which was formed in 1942 to address the increase in post-conviction appeals. See also Hon. John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 173-74 (1948-1949) (discussing creation of Judicial Conference Committee and petitions for habeas corpus).

²² See *David v. United States*, 134 F.3d 470, 474 (1st Cir. 1998). Section 2255 “provides for post-conviction relief in four instances, namely, if the [defendant’s] sentence (1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3) exceeded the statutory maximum, or (4) was otherwise subject to collateral attack.” *Id.* (citing *Hill v. United States*, 368 U.S. 424, 426-27 (1962)). The “fourth category includes only assignments of error that reveal ‘fundamental defects’ which, if uncorrected, will ‘result[] in a complete miscarriage of justice,’ or irregularities that are ‘inconsistent with the rudimentary demands of fair procedure.’” *Id.* at 474. Simply put, “apart from claims of constitutional or jurisdictional nature, a cognizable section 2255 claim must reveal ‘exceptional circumstances’ that make the need for redress evident.” *Id.* See also DONALD E. WILKES, JR., *FEDERAL POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS* § 1:15 (2016). As previously mentioned, Due Process violations, violations of the Confrontation Clause, and inadequate representation by counsel are all grounds for post-conviction appeals. See *id.* § 1:15 at 12-13. See also CHARLES ALAN WRIGHT, NANCY J. KING, AND SUSAN R. KLEIN, 3 *FEDERAL PRACTICE AND PROCEDURE* § 594 at 701-710 (West 3rd ed. 2004) (listing grounds under bringing section 2255 petitions for federal post-conviction appeals).

²³ See 28 U.S.C.A. § 2255 (2017). The statute in relevant part provides: “[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him” *Id.*; see also *Rules Governing Section 2255 Proceedings for the United States District Courts*, R. 1 (2010), available at www.uscourts.gov/file/rules-governing-section-2254-and-section-2255-proceedings (citing section 2255 motions granted to district court judge from movant’s trial and sentencing). See, e.g., *United States v. Barrett*, 178 F.3d 34, 50 n.10 (1st Cir. 1999) (filing section 2255 motion in sentencing court); *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) (holding section 2255 motions attacking sentencing errors must be filed in sentencing court); *Nichols v. Symmes*, 553 F.3d 647, 649 (8th Cir. 2009) (noting section 2255 motion attacking validity of conviction must be filed in sentencing court); *Harrison v. Ollison*, 519 F.3d 952, 956 (9th Cir. 2008) (ruling section 2255 motions contesting legality of sentence should be filed in sentencing court); *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996) (emphasizing if court previously denied, then section 2255 motions should not be reheard).

Due Process standard established in the iconic decision of *Brady v. Maryland*.²⁴

B. Prosecutor's Duty to Disclose Exculpatory Evidence (Brady v. Maryland)

In 1963, the United States Supreme Court specified the prosecutorial role in promoting constitutional Due Process in the critical case of *Brady v. Maryland*.²⁵ The *Brady* Court held that a criminal defendant's right to Due Process is violated when the government suppresses exculpatory evidence that is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution.²⁶ Effectively, the Court announced a new rule that the defendant or reduce the penalty.²⁷ To establish a *Brady* violation, the defendant must show: 1) that the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; 2) that evidence was purposefully or inadvertently suppressed by the State; and 3)

²⁴ *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The *Brady* rule imposes a constitutional duty on the prosecution to disclose exculpatory evidence. *Id.* See also Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 696 (1987) (explaining ethical rules requiring prosecutor to disclose exculpatory evidence). "Exculpatory evidence" is defined as:

[A] statement or other evidence which tends to justify, excuse or clear the defendant from alleged fault or guilt. Declarations against declarant's interest which indicate that defendant is not responsible for crimes charged. Evidence which extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which although favorable, is merely collateral or impeaching. For purposes of rule constraining State from disposing of potentially exculpatory evidence, is evidence which clears or tends to clear accused person from alleged guilt.

BLACK'S LAW DICTIONARY (6th ed. 1991).

²⁵ 373 U.S. at 87 (establishing prosecution's duty to disclose exculpatory evidence as integral part of right to fair trial); see also Rosen, *supra* note 24, at 695. A prosecutor has an obligation to ensure the results of a trial have been accurately determined, especially when a guilty verdict is rendered. *Id.*

²⁶ See *Brady*, 373 U.S. at 88. Petitioner Brady and a co-defendant were both convicted of first-degree murder and sentenced to death. *Id.* at 84. The co-defendant made several statements, one of which he confessed that he, and not the petitioner, committed the murder by himself. *Id.* Prosecutors withheld the co-defendant's statement that exculpated the petitioner. *Id.* The United States Supreme Court held that Brady was entitled to resentencing because suppression of evidence favorable to the accused by the prosecution violates Due Process "where the evidence is material either to guilt or to punishment, regardless of the good faith or bad faith of the prosecution." *Id.* at 87. The Supreme Court affirmed the state court's ruling that Brady was not entitled to a new guilt-innocence trial. *Id.* at 90.

²⁷ See *id.* at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

caused prejudice.²⁸ The *Brady* materiality requirement is highly probative evidence that could have had an impact to either guilt or punishment.²⁹ Since the inception of the *Brady* doctrine, which is commonly referred to as “*Brady* evidence” or “*Brady* material,” case law, statutes, and various state and federal rules of criminal procedure have significantly expanded and progressed the doctrine.³⁰

²⁸ See *id.* at 86-87. Exculpatory evidence must be disclosed even if the prosecutor does not find the information credible or has other contradictory information. *Id.* at 87-88. This extends to evidence tending to exculpate due only to its tendency to impeach the credibility of government witnesses. *Id.* See also *United States v. Bagley*, 473 U.S. 667, 675 (1985) (discussing evidence suppressed must have affected punishment not conviction). The Court reflected on a prosecutor’s obligation of fairness and stated, “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 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). “[D]ue process requires fairness, integrity and honor in the operation of the criminal justice system’ and, therefore, standards of professional conduct for prosecutors may help in determining when a defendant’s Due Process rights have been violated.” *Moran v. Burbine*, 475 U.S. 412, 467 (1986) (Stevens, J., dissenting). “When a prosecutor intentionally defies the standards set forth to govern his or her behavior, such conduct cannot be tolerated because it undermines the integrity and honor encompassed within Due Process.” *Id.*

²⁹ See *Brady*, 373 U.S. at 87 (describing importance of materiality). The *Brady* materiality requirement is satisfied by a showing of “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (Scalia, J., dissenting). The defense must also show that the withheld evidence was noncumulative, highly probative evidence that could have had an impact to either guilt or punishment. *Id.* at 469-70. The Court has stated that a defendant does not have to prove that he would have been acquitted had the *Brady* evidence been presented at trial but must show that, in the absence of the evidence, he did not receive a fair trial “resulting in a verdict worthy of confidence.” *Id.* at 434.

³⁰ See *Kyles*, 514 U.S. at 437 (imposing duty on prosecution to “learn of any favorable evidence known” by others helping investigation); *Bagley*, 473 U.S. at 676 (finding impeachment evidence as constitutionally equivalent to exculpatory evidence); *United States v. Agurs*, 427 U.S. 97, 110 (1976) (discussing government’s obligation to disclose material exculpatory evidence); *Giglio v. United States*, 405 U.S. 150, 153-55 (1972) (placing affirmative duty on government to share relevant information with all interested parties); see also *Banks v. Dretke*, 540 U.S. 668, 675-77 (2004) (reversing because prosecution failed to disclose exculpatory evidence that allow two witnesses to commit perjury); *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (emphasizing prosecution’s crucial role and duty to disclose exculpatory evidence). But see *Kyles*, 514 U.S. at 460-61 (Scalia, J., dissenting) (declaring defendant’s burden of proof that exculpatory evidence creates reasonable doubt). “It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to ‘destroy’ . . . the particular prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates.” *Id.* at 460; *Bagley*, 473 U.S. at 685 (White, J., concurring in part) (opposing expansion of materiality standard to specific requests for disclosure by defendant). In Massachusetts, “a defendant seeking a new trial because of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction.” *Commonwealth v. Pike*, 726 N.E.2d 940, 945 (Mass. 2000). The evidence must be material, credible, and “carry a measure of strength in support of the defendant’s position.” See *Commonwealth v. Grace*, 491 N.E.2d 246, 248 (Mass. 1986). “A defendant must also show that the evidence was unknown to the defendant or the

II. BRADY DEVELOPMENT

A. *United States v. Agurs*

Following the *Brady* decision, several Supreme Court cases have expanded the nature and scope of prosecutorial disclosure obligations.³¹ In 1976, the *Agurs* court determined that even when a defendant has not made a specific request for exculpatory evidence, it may still be a Due Process violation for a prosecutor to suppress such evidence.³² In turn, the

defendant's counsel, and not discoverable through 'reasonable pretrial diligence' at the time of trial or at the time of the presentation of any earlier motion for a new trial." *Pike*, 726 N.E.2d at 945-46.

The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations . . . This process of judicial analysis requires a thorough knowledge of the trial proceedings, and can, of course, be aided by a trial judge's observation of events at trial.

Commonwealth v. Moore, 556 N.E.2d 392, 399 (Mass. 1990) (quoting *Commonwealth v. Grace*, 491 N.E.2d 246, 248 (Mass. 1986)).

³¹ See *Agurs*, 427 U.S. at 110 (placing affirmative duty on prosecution to disclose *Brady* evidence); *Whitley*, 514 U.S. at 436-38 (requiring prosecution "learn of any favorable evidence known" by anyone acting for government helping investigation); *Bagley*, 473 U.S. at 676 (extending exculpatory *Brady* evidence to any evidence tending to impeach credibility of government witnesses). The Court also clarified the materiality prong of *Brady*, stating that 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." *Id.* at 682.

³² *Agurs*, 427 U.S. at 112 (finding prosecution must disclose exculpatory evidence that "creates reasonable doubt that did not otherwise exist"). Petitioner was convicted of murder after a trial in which he argued that he had acted in self-defense. *Id.* at 98-99. Subsequently, petitioner sought a new trial because the state had failed to disclose the victim's criminal record. *Id.* at 100. The United States Supreme Court held that there was little difference between a general request by defense counsel for *Brady* material and the absence of a request altogether, and it also found that prosecutors are obligated to turn over exculpatory evidence regardless of whether defense counsel asks for it. *Id.* at 117. See *id.* at 103 (discussing applicability of *Brady v. Maryland*). The *Agurs* Court noted three different scenarios in which failure to disclose exculpatory evidence may require relief: (1) when the prosecution benefits from use of perjured testimony; (2) when defense counsel has made a specific request for discovery; and (3) when the prosecutor has access to exculpatory evidence not disclosed to the defense. See *id.* The Court stated, "[a prosecutor] must always be faithful to his client's overriding interest that 'justice shall be done,'" even if it is detrimental to the State's overall case. *Id.* at 111 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); see also *Bagley*, 473 U.S. at 676 (holding *Brady* requires disclosure of impeachment evidence). In *Bagley*, the defendant was indicted on firearms and narcotics charges. *Id.* at 669. Prior to trial, he requested that the prosecution disclose any "deals, promises, or inducements made to witnesses in exchange for their testimony." *Id.* (White, J., concurring in part and concurring in judgment). The prosecution withheld information that its two principal witnesses worked with the Bureau of Alcohol, Tobacco, and Firearms ("ATF") in an undercover investigation of respondent. *Id.* Respondent sought a new trial under *Brady*. *Id.* at 688. The Court reversed the order and remanded for a determination of whether the prosecutor's withholding of evidence was material in that it would have affected the outcome of the trial. *Id.* at 684 (majority opinion).

Court further defined the prosecution's responsibilities by imposing an affirmative duty on the government to disclose material exculpatory evidence, even if the defense has not specifically requested such evidence.³³ Thus, it is no longer relevant for defense counsel to request exculpatory evidence if the state has evidence that would be beneficial to the accused; rather, the prosecutor has a constitutional duty to disclose it.³⁴

B. Kyles v. Whitley

In *Kyles v. Whitley*,³⁵ the Supreme Court considered whether a defendant's Fourteenth Amendment right was violated when the State failed to disclose exculpatory evidence to a criminal defendant.³⁶ The Court extended *Agurs* to include the disclosure of all exculpatory evidence known by anyone "acting on the government's behalf" in a criminal investigation.³⁷ The Court held that compliance with *Brady* imposes a duty on the individual prosecutor to learn of any favorable evidence and disclose it to the defense.³⁸

³³ Compare *Agurs*, 427 U.S. at 110 (requiring government to proactively disclose all material exculpatory evidence), with *Brady*, 373 U.S. at 87 (requiring disclosure of material exculpatory evidence upon defendant's request).

³⁴ See *Agurs*, 427 U.S. at 107-11 (stating under materiality standard, prosecutor's duty not limited to when defendant has requested favorable evidence).

³⁵ 514 U.S. 419 (1995) (holding prosecution's duty to disclose exculpatory evidence acquired by entire investigation team). Petitioner was convicted of first-degree murder and sentenced to death. *Id.* at 421. Prior to trial, police had collected eyewitness statements containing physical descriptions of the attacker which were inconsistent with characteristics of the petitioner. *Id.* at 423. These statements were not disclosed to the defense. *Id.* at 428. The Court imposed an affirmative duty on prosecutors to become aware of, and to disclose any favorable evidence held by others acting on the government's behalf, including the police. *Id.* at 437.

³⁶ See *id.* at 421-22. (holding prosecution's duty to disclose exculpatory evidence acquired by entire investigation team). Petitioner was convicted of first-degree murder and sentenced to death. *Id.* at 421. Prior to trial, police had collected eyewitness statements containing physical descriptions of the attacker, which were inconsistent with characteristics of the petitioner. *Id.* at 423. These statements were not disclosed to the defense. *Id.* at 428. The court imposed an affirmative duty on prosecutors to become aware of, and to disclose, any favorable evidence held by others acting on the government's behalf, including the police. *Id.* at 437. The Court also scrutinized the State's actions to determine whether the State violated the principle articulated in *Brady*. *Id.* Both the nature of the evidence and the fact that Kyles was sentenced to death in a second trial after the initial trial resulted in a hung jury, served to demonstrate the importance of undisclosed exculpatory evidence in a trial. *Id.* at 421-22.

³⁷ *Id.* at 437 (requiring prosecutorial burden to learn of any favorable evidence for defendant's right to fair trial). *Whitley* explained this standard, stating "materiality" is met where "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

³⁸ See *id.* at 437 (discussing prosecutors' duty to learn and disclose exculpatory information). Moreover, Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct states, in pertinent part:

The prosecutor in a criminal case shall:

This requirement applies to evidence known by anyone acting for the government, even if it is unknown by the prosecution.³⁹ Although subsequent case law has refined the parameters of the *Brady* requirements, there is no bright-line rule for *Brady* violations that are material in sentencing the defendant.⁴⁰

C. Cone v. Bell

Applying the *Brady* standard to the sentencing phase is perhaps the most meaningful, yet least developed in case law; for example, in *Cone v. Bell*,⁴¹ the Court determined whether the State's suppression of evidence that corroborated the defendant's insanity was a *Brady* violation.⁴² The Supreme Court held that *Brady* includes information that may not exculpate, but nonetheless mitigates punishment.⁴³ The Court reasoned that "[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true, however . . ."⁴⁴ The Court in *Cone* emphasized this by vacating Cone's sentence.⁴⁵ The Court stated that a "reasonable probability" in the jury's deliberations at the sentencing phase

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

MODEL RULES OF PROF'L CONDUCT R. 3.12 (2014).

³⁹ See *Whitley*, 514 U.S. at 437-39 (noting prosecutor has duty to learn information from any state actors). The Court noted that the government's interest "'in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

⁴⁰ See *Holmes v. South Carolina*, 547 U.S. 319, 322-23 (2006) (finding officers that contaminated evidence to frame defendant is material *Brady* evidence). *Brady* misconduct evidence is particularly relevant in cases in which the defense asserts that the government's case is based on bias or other improper misconduct by all members of the prosecution team. *Id.* Defenses grounded in wrongful government conduct include claims that the police fabricated or planted evidence or that law enforcement officers plotted to "frame" or falsely implicate the defendant. *Id.*

⁴¹ 556 U.S. 449 (2009) (stating courts failed to adequately consider whether documents were material to sentencing).

⁴² See *id.* (including evidence of eyewitness statements supporting defendant's drug addiction contention).

⁴³ See *id.* at 475-76 (remanding for resentencing so jury's assessment of defendant's drug addiction defense would include suppressed evidence).

⁴⁴ *Id.* at 473 (discussing seminal case on release of prosecutorial evidence).

⁴⁵ See *Cone*, 556 U.S. at 476; but see *id.* at 489 (Thomas, J., dissenting) (writing defense failed to prove undisclosed evidence would have changed outcome of trial) (citing *Kyles v. Whitley*, 514 U.S. 419, 433-34). (1995)).

may have been compromised due to the suppressed witness statements, police reports, and interview notes relating to Cone's drug use.⁴⁶

D. United States v. Valenzuela

The duty for prosecutors to disclose impeachment information was reinforced in *United States v. Valenzuela*.⁴⁷ Here, the court held that the prosecutorial duty to supply defendants with impeachment information included benefits sought and received, relating to the victims upon whom the Probation Department and government relied to determine the applicable guideline range.⁴⁸

III. BRADY AND HAMPTON

Furthermore, the *Hampton* court considered whether a state lab chemist's willful tampering of evidence, including samples of cocaine allegedly attributable to defendant, constituted a *Brady* violation.⁴⁹ Relying on case law and a *Brady*-standard analysis, the court concluded that a *Brady* violation existed because Dookhan was part of the prosecution team in her role as the state lab chemist, and by tampering with the amount of cocaine, she had prejudiced the defendant in his sentencing phase.⁵⁰

The court found that if the sentencing judge had known of the Dookhan scandal and that Dookhan had worked on about two thirds of the 400 grams attributed to Hampton, there would be a reasonable probability that the outcome of Hampton's sentencing would have been different.⁵¹ Thus, the court held that Hampton successfully met the prejudice element.⁵² Next, the court considered whether the conduct of Dookhan was imputed to

⁴⁶ See *id.* at 469-72 (explaining evidence fell short of sustaining insanity defense).

⁴⁷ No. CR 07-00011 MMM, 2009 U.S. Dist. LEXIS 64070, at *1 (C.D. Cal. July 14, 2009) (stating government had greater ease of access to information).

⁴⁸ See *id.* at *13-15. Such information could include any doubt about government's calculations of drug quantity, or any factors relevant to defendant's role, responsibility, or sentencing discrepancies. *Id.*

⁴⁹ See *United States v. Hampton*, 109 F. Supp. 3d 431, 437 (D. Mass. 2015) (deciding whether *Brady* violation occurred if evidence considered favorable and material).

⁵⁰ See *id.* at 436-40 (analyzing case under *Brady*).

⁵¹ See *id.* at 18 (noting Judge Gertner imposed sentence reluctantly based on statutory mandatory minimum corresponding to 280 grams); see also Sentencing Transcript at 3, 18, 21, *United States v. Valenzuela*, (C. D. Cal. July 14, 2009) (ECF No. 76) (illustrating unfairness of disparity between mandatory sentences for selling crack cocaine and cocaine powder).

⁵² See *Hampton*, 109 F. Supp. 3d at 438 (relying on lack of retesting and sentencing judge's decision).

the prosecution.⁵³ The court reasoned that given the unique facts of the case, Dookhan's conduct, and her impeaching evidence as a pivotal state-witness, it was the safer course to assume that duty attaches.⁵⁴ Thus, the court found that the ruling was reasonable and just, in light of the government's refusal to confront the issue through evidence, that Dookhan was a member of the prosecution team; therefore, ruled there was a *Brady* violation.⁵⁵

Although the court declined to vacate Hampton's guilty plea in his initial motion, it held that the *Brady* violation entitled Hampton to post-conviction relief in the form of resentencing.⁵⁶ Consequently, the court expanded *Brady's* application beyond the trial phase, acknowledging the importance of Due Process rights in the sentencing phase.⁵⁷ In explaining its decision, the court said, "Hampton's habeas petition is not about his own behavior in making a plea, but it is about the actual evidentiary basis provided by the government for the imposition of a mandatory minimum."⁵⁸ The *Brady* requirement of disclosure was not limited to exculpatory evidence used during the determination of guilt or innocence; at issue in *Brady* was exculpatory evidence that affected sentencing.⁵⁹ A specific *Brady* request should be made because the reliability of sentencing determinations made by the judge is undermined if there is no duty for the state to disclose exculpatory evidence to be used in the penalty phase.⁶⁰ The absence of a duty to disclose exculpatory evidence that the state will use in the penalty phase of the plea undermines the reliability of sentencing determinations; thus, such as when evidence that casts doubt on the government's calculations of drug quantity or unwarranted sentencing disparities would include impeachment material.⁶¹

In the sentencing phase, the threshold to determine material evidence is much lower than the pretrial or trial phase.⁶² While the trial phase

⁵³ See *id.* at 439 (noting *Brady* requirement of prosecutor to learn favorable evidence).

⁵⁴ See *id.*; see also *Commonwealth v. Scott*, 5 N.E. 3d 530, 535-36 (Mass. 2014) (finding Dookhan member of prosecution team in deciding whether to vacate guilty pleas).

⁵⁵ See *Hampton*, 109 F. Supp. 3d at 440 (finding including Dookhan as part of prosecution reasonable and fair).

⁵⁶ See *id.*

⁵⁷ See *id.* at 438-40 (imputing Dookhan's actions to prosecution team).

⁵⁸ See *id.* at 437 (distinguishing case from *Wilkens I.*)

⁵⁹ See *id.* (finding "evidence can be material either to guilt or punishment").

⁶⁰ See *State v. Hamilton*, 478 So. 2d 123, 125 (La. 1985) (requiring sentencing phase to be retried based on evidence that sufficiently prejudiced the defendant).

⁶¹ See *United States v. Weintraub*, 871 F.2d 1257, 1259 (5th Cir. 1989) (finding withholding material evidence pertaining to sentence to be vacated); see also *United States v. Quinn*, 537 F. Supp. 2d 99, 118 (D. D.C. 2008) (holding *Brady* violation occurred, but new trial unwarranted as remedy).

⁶² See *Cone v. Bell*, 556 U.S. 449, 474 (2009) (outlining less stringent standard at sentencing than guilt phase). Cf. *Cone v. Bell*, 556 U.S. 449, 474 (2009) ("There is a critical difference

requires materiality to impact a guilty finding beyond a reasonable doubt; in the sentencing phase a guideline enhancement or mitigating evidence is proved by preponderance of the evidence.⁶³ Here, the court correctly concluded that Hampton's due process rights were violated because the judge imposed the mandatory minimum sentence based on unreliable information provided by the government and their failure to disclose such exculpatory information.⁶⁴ Although the court failed to establish a specific remedy for future courts to follow in cases where sentences were unconstitutionally imposed, the remedy should adequately cure any prejudice caused by prosecutorial nondisclosure of post-conviction evidence.⁶⁵

In *Hampton*, the court held that the state's failure to disclose information of Dookhan's willful tampering of evidence amounted to a *Brady* violation. Effectively, the court acknowledged the importance of extending the scope of *Brady* to sentencing. Thus, the next step is to establish a constitutional duty to disclose exculpatory evidence discovered post-conviction to complete the *Brady* requirements. An extension of *Brady* would ensure justice and fairness for those seeking relief from constitutional violations.

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between the high standard Cone was required to satisfy to establish insanity as a matter of Tennessee law and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case.").

⁶³ See *id.* ("There is a critical difference between the high standard Cone was required to satisfy to establish insanity as a matter of Tennessee law and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case.").

⁶⁴ See *Hampton*, 109 F. Supp. 3d at 440 (finding Hampton's sentence unconstitutional based on *Brady* violation)

⁶⁵ See *id.* at 438-40 (outlining reasons for resentencing).