BRADY V. MARYLAND, ATTORNEY DISCIPLINE, AND MATERIALITY: FAILED INVESTIGATIONS, LONG-CHAIN EVIDENCE, AND BEYOND

*David Crump**

I. INTRODUCTION

In *Brady v. Maryland*,[1] the Supreme Court set the basic outlines of what has become known as the "*Brady* doctrine."[2] The government, according to this principle, has a general duty to disclose information in its possession that is favorable to the defense.[3] The concept, at least in its rough outlines, is largely noncontroversial. In other words, almost everyone would agree that the government has such a duty.[4] The application of the *Brady* doctrine, however, is both controversial and dependent on perceptions and prejudices of the individual interpreter.[5]

A requirement of what the Court has called "materiality" is at the heart of the doctrine.[6] But the significance of this requirement is different from the meaning of materiality in other contexts.[7] Loosely, materiality as an element of a *Brady* violation is intended to

* A.B., Harvard College; J.D., University of Texas School of Law; John B. Neibel Professor of Law, University of Houston.

1. 373 U.S. 83 (1963).

2. *See id.* at 87.

3. *Id.*

4. There is a substantial body of literature mentioning the duty created by *Brady* favorably. *E.g.*, Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 708-09 (2006); Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 644 (2012); Enrico B. Valdez, *Practical Ethics for the Professional Prosecutor*, 1 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 250, 257-59 (2011).

5. *See infra* Part II.B; *see also* Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593, 599-600 (2007) (discussing the ambiguity of the *Brady* doctrine).

6. *See infra* Part II.B.

7. For example, "materiality" for purposes of rules of evidence refers to the relationship between an item of evidence and a contested issue, without regard to its importance, which corresponds instead to its probative value. *See* PAUL F. ROTHSTEIN ET AL., EVIDENCE: CASES, MATERIALS, AND PROBLEMS 65 (2013).

correspond to a kind of importance.[8] The idea is that information not at all likely to affect the outcome at trial is not the kind of information with which *Brady* is concerned.[9] Just as the *Brady* doctrine is intuitively appealing, so is the materiality requirement because information that is unimportant does not seem an appropriate subject of a constitutional mandate.

On the other hand, some statutes or rules omit materiality as a requirement.[10] For example, Rule 3.8(e) of the *D.C. Rules of Professional Conduct*,[11] which is similar to rules adopted in many other jurisdictions,[12] does not include the materiality element as a limit on the government's duty.[13] The literal meaning of the Rule and others like it is that the government attorney is required to disclose information that is favorable to the defense, irrespective of its importance.[14] The Rule may (or may not) reflect an intention to go beyond the *Brady* doctrine and to place a higher and more onerous duty on the government.[15] Literally, the Rule can be read to mean that favorable information of the slightest importance, even if of infinitesimally small relevance, must be disclosed to the defense.[16] In turn, this reading means that an attorney can be disbarred for having missed an issue that was immaterial—and therefore difficult to recognize.[17]

Part II of this Article develops the meaning of the *Brady* doctrine, including varying statements of its contours.[18] Part III explores the meaning of Rule 3.8(e) and rules like it.[19] Part IV provides some examples of the borderland of the *Brady* doctrine.[20] Then, it deals with what can be described as failed investigations, diffusion, and long-chain circumstantial evidence, all of which are conceptually distinct flora and fauna in the borderland of the *Brady* biota.[21]

---

8. *See infra* Part II.A.
9. Cone v. Bell, 556 U.S. 449, 469-71 (2009).
10. *See infra* Part III.
11. D.C. RULES OF PROF'L CONDUCT r. 3.8(e) (D.C. BAR 2007).
12. *See infra* notes 104-11 and accompanying text.
13. D.C. RULES OF PROF'L CONDUCT r. 3.8(e); *see In re* Kline, 113 A.3d 202, 212-13 (D.C. 2015).
14. *In re Kline*, 113 A.3d at 213.
15. *Id.* at 212-13.
16. *Id.*
17. *See id.* at 215-16.
18. *See infra* Part II.
19. *See infra* Part III.
20. *See infra* Part IV.
21. *See infra* Part IV.A–C.

Part V explains why there must be some requirement that the information be important: the requirement that is supplied in the *Brady* doctrine by the materiality concept and that is omitted from the text of Rule 3.8(e).[22] If it is not explicit, in other words, some notion of materiality will necessarily be inferred from the general concept that it is "favorable" information that must be supplied to the defense.[23] The final Part sets out the author's conclusions, which include the idea that if interpreted to remove the materiality concept, Rule 3.8(e) may unfortunately make the government's duty more ambiguous, more unfair, and perhaps more unachievable, than it otherwise might be.[24]

II. THE *BRADY* DOCTRINE

A. Expressing the Brady *Principle*

Smith v. Cain[25] is a recent statement of the *Brady* doctrine in an opinion that eight members of the Supreme Court joined, and it therefore can be taken as a representative sample of the varying statements of the concept.[26] The case was a horrifying one, involving a home invasion robbery that included five murders by strangers.[27] A detective's notes contained the assertion that the sole eyewitness "could not . . . supply a description of the perpetrators other then [sic] they were black males."[28] The eyewitness identified the defendant at trial.[29] The notes were not provided to the defense, and consequently, the defense did not use the detective's statement as a means of impeaching the identification.[30] Later, the notes surfaced, and the defendant predicated a claim of a *Brady* violation on the nondisclosure.[31]

The Supreme Court expressed the *Brady* doctrine in simple terms: "[T]he State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's

22. *See infra* Part V.
23. *See infra* Part V.
24. *See infra* Part VI.
25. 132 S. Ct. 627 (2012).
26. *Id.* at 629-30.
27. *Id.*
28. *Id.* at 629 (alteration in original). There was also a typed report with a sentence of similar effect and importance. *Id.* at 630.
29. *Id.* at 629.
30. *Id.* at 630.
31. *Id.* The notes came to light as a result of discovery in post-conviction proceedings. *Id.* at 629.

guilt or punishment."[32] Evidence is material within the meaning of this principle "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[33] But materiality is a far lower standard than a first reading of this definition might imply, because a reasonable probability "does not mean that the defendant 'would more likely than not have received a different verdict with the evidence.'"[34] It requires "only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'"[35]

The application of this standard will always differ from case to case because it depends on the rest of the evidence.[36] Suspected *Brady* material may not be material "if the State's other evidence is strong enough to sustain confidence in the verdict."[37] Thus, ironically, although the government's duty is to disclose the information when it can be useful, a *Brady* violation may be identifiable only after conviction, if there is sufficient evidence of guilt.[38] In *Smith v. Cain*, there was substantial other evidence that could have been taken to corroborate the witness's identification.[39] For example, the witness's other contemporaneous statements confirmed that his uncertainty about identification referred to the other participants in the crime, not to the one he identified.[40] His statements immediately after the incident also explained the reason: he was able to look closely and for more time at this defendant.[41] Furthermore, he did not identify any image later in a large photographic spread that did not include this defendant, and he quickly identified this defendant in another photographic spread.[42] Nevertheless, the Supreme Court held that the other evidence could not sustain the result sufficiently to meet the standard.[43] The Court noted that there was only one eyewitness who testified and that the undisclosed statement, if taken alone, impeached that witness directly.[44]

---

32. *Id.* at 630.
33. *Id.* (quoting Cone v. Bell, 556 U.S. 449, 470 (2009)).
34. *Id.* (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).
35. *Id.* (alteration in original) (quoting *Kyles*, 514 U.S. at 434).
36. *See id.*
37. *Id.* (citing United States v. Agurs, 427 U.S. 97, 112-13, 112 n.21 (1976)).
38. *See id.*
39. *Id.* at 630, 632, 634.
40. *Id.* at 630.
41. *Id.* at 634 (Thomas, J., dissenting).
42. *Id.* at 632.
43. *Id.* at 630-31 (majority opinion).
44. *Id.* at 630.

Justice Thomas dissented.[45] He reasoned that the materiality requirement meant that this defense must show a "reasonable probability" of a different result made "in the context of the entire record."[46] This statement of the standard could have fit within the majority opinion without disturbing it. Justice Thomas's application of the standard, however, seems to have envisioned a higher level of probability than the majority's application of the standard.[47] It also implied a narrower application of the doctrine, because Justice Thomas parsed the record to conclude that the witness must have intended his expression of uncertainty to attach to the other participant in the crime, not to the present defendant.[48] In fact, Justice Thomas's opinion suggests that a reasonable observer would not have considered the alleged *Brady* information at issue as undermining the result at all.[49]

B. Variances, Ambiguities, and Uncertainties in the Brady *Concept*

"*Brady* has gray areas and some *Brady* decisions are difficult,"[50] said the Supreme Court in *Connick v. Thompson*,[51] which was a civil case for damages under 42 U.S.C. § 1983 based on an alleged *Brady* violation.[52] But the decision reflected a deep disagreement within the Court.[53] The majority consisted of five justices who reversed a jury verdict awarding damages.[54] But the dissent by four members of the Court concluded that the members of the district attorney's office that prosecuted the case had "[f]rom the top down . . . misperceived *Brady*'s compass."[55] This sharp difference is emblematic of the vagaries of application that are found in different decision-makers' views of the line that *Brady* draws.[56]

---

45. *Id.* at 631 (Thomas, J., dissenting).

46. *Id.* (first quoting United States v. Bagley, 473 U.S. 667, 682 (1985); and then quoting United States v. Agurs, 427 U.S. 97, 112 (1976)).

47. *Id.* at 633-35.

48. *Id.* at 631-41.

49. *See id.* at 640-41. Justice Thomas's opinion details reasons to conclude that the witness could not reasonably be understood as saying that he could not identify the defendant, as opposed to the other participants. *See id.* at 632-40.

50. Connick v. Thompson, 563 U.S. 51, 71 (2011).

51. *Id.*

52. *Id.* at 56-57.

53. *See id.* at 68-70.

54. *Id.* at 53-54, 72.

55. *Id.* at 79 (Ginsburg, J., dissenting).

56. *See id.* at 68-70 (majority opinion).

Even seemingly small differences in the statement of the *Brady* principle can create big differences in meaning. In *Strickler v. Greene*,[57] for example, the Court wrote that materiality requires a violation "so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[58] The insertion of the phrase, "so serious" may not change the logic of the sentence,[59] but it implies that the violation must be relatively big and obvious.[60] In addition, the basis of the violation must be "evidence" in this formulation, with the implication that it must appear in an admissible form, not as a mere lead; in other cases, in contrast, the basis of a violation has been "information," with the implication that it need not be evidence.[61] True to these suggestions, the Court in *Strickler* held that other evidence in the record provided sufficient support for the verdict, and therefore that the violation was not material.[62]

The differences between the opinion of the majority in *Smith v. Cain* and the dissent of Justice Thomas in that case illustrate other variances in interpretation. Justice Thomas's close inspection of the evidence contrasts sharply with the more intuitive conclusion of the majority.[63] One might speculate that these different points of view could reflect the contrasting views of a justice, on the one hand, who defines materiality by considering how a holistically reasoning jury might value a discrepancy, and another justice who reasons on a case-by-case basis, as an appellate court traditionally evaluates the sufficiency of the evidence.[64]

Then, too, one might ask just how weighty the questioned information must be to be considered material?[65] Must it create a twenty percent probability of a different outcome? A forty percent probability? Or, in the other direction, a mere five percent, or even a reasonable doubt about the verdict? Alternatively, since the Supreme Court seems unlikely to put the definition of materiality in terms of a numerical

57. 527 U.S. 263 (1999).

58. *Id.* at 281.

59. The idea of materiality as undermining confidence in the verdict reflects a degree of seriousness, and thus the "so serious" remark can be seen as unnecessary rhetoric.

60. Even if the phrase can be read as surplusage, see *supra* note 59, it is an intensifier that seems to elevate the standard.

61. *See, e.g.*, *Strickler*, 527 U.S. at 281; Giglio v. United States, 405 U.S. 150, 154 (1972).

62. 527 U.S. at 294-96.

63. Smith v. Cain, 132 S. Ct. 627, 630-41 (2012).

64. *See* Kyles v. Whitley, 514 U.S. 419, 435 (1995).

65. *See* Gershman, *supra* note 4, at 706-07.

percentage, must the probability be "significant" or "slight?"[66] The Supreme Court has not told us, except to say that it must "undermine confidence in the verdict."[67] Perhaps this is all that can be expected of an interpretation of a constitutional doctrine, but it produces the likelihood of wide swings in results from decision-makers with different points of view.[68]

The background of the decision-maker becomes more important with such an amorphous standard.[69] For example, there is a wide difference between the perceptions of assistant district attorney about the meaning of the *Brady* doctrine and the counterpart perceptions of defense lawyers.[70] The latter group tends to view the *Brady* principle as much more far-reaching than the former, so that it includes even distantly related circumstantial leads that a more government-minded observer might regard as immaterial (or not even recognize as favorable to the defense).[71] Moreover, a civil litigator, who spends the bulk of his or her time in discovery, might be more familiar with the duty to disclose evidence than most criminal lawyers, who work where discovery is limited.[72]

Perhaps, from this set of conclusions, the judge who will be hardest on the government is a former civil lawyer who never practiced criminal law, with the criminal defense lawyer closely behind, and the former assistant district attorney giving the least scope to *Brady*. The split between the majority and the dissent in *Connick v. Thompson*,[73] where the majority found no 42 U.S.C. § 1983 liability and the dissent lambasted the entire government team from the district attorney on down, may reflect a difference in point of view of this kind.[74]

---

66. *See id.*

67. *See Kyles*, 514 U.S. at 435.

68. *See infra* Part IV.

69. *See infra* Part IV.

70. *See, e.g.*, Brian Rogers, *Famed Prosecutor Defends Actions in Murder Trial*, HOUS. CHRON. (Dec. 23, 2014, 12:02 PM), http://www.chron.com/news/houston-texas/houston/article/Famed-prosecutor-defends-actions-in-murder-trial-5975822.php [hereinafter Rogers, *Famed Prosecutor Defends Actions*]; Brian Rogers, *Special Prosecutor Sought in Katy Murder Case*, HOUS. CHRON. (July 14, 2015), http://www.pressreader.com/usa/houston0chronicle/20150714/281672548622328/TextView [hereinafter Rogers, *Special Prosecutor Sought*].

71. *See, e.g.*, Rogers, *Famed Prosecutor Defends Actions*, *supra* note 70; Rogers, *Special Prosecutor Sought*, *supra* note 70.

72. *See* Gershman, *supra* note 4, at 725.

73. *See* Connick v. Thompson, 563 U.S. 51, 71-72, 79-80 (2011).

74. *Id.*

III. RULE 3.8(E): *BRADY* WITHOUT AN EXPLICIT MATERIALITY REQUIREMENT

The cases are full of precatory statements addressed to "anxious" prosecutors, to the effect that they should err on the side of disclosure.[75] In the context of a concept as ambiguous as the *Brady* doctrine, it is difficult to define the contours of a careful application of the duty. If the alleged *Brady* material is relatively unimportant, the allegedly anxious prosecutor is less likely to recognize it as invoking *Brady*.[76] In some contexts, however, the meaning of these statements is clear. They might be translated as: "If you are considering a piece of information and wondering whether it is sufficiently important to be material, stop wondering and disclose the information."[77]

In the District of Columbia's Rule 3.8(e),[78] this approach has been made the foundation of a rule of professional conduct that is differently worded from *Brady*.[79] The Rule truncates the statement of the duty by omitting any express requirement of materiality.[80] A rough statement of the Rule, taken literally and to its logical extent, is that the duty to disclose extends to all information that is favorable to the defense, even if it has the smallest possible importance.[81] The relevant portions of the Rule, as set out in the *D.C. Rules of Professional Conduct*, are as follows[82]:

> The prosecutor in a criminal case shall not . . . [i]ntentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense . . . .[83]

Although it does not use the *Brady* terminology, the simple translation is that it is *Brady* without an explicit requirement of materiality.[84]

The interpretation of the Rule, however, is not so simple. The Rule is accompanied by a comment that seems to reinsert the materiality

---

75. *E.g.*, *In re* Kline, 113 A.3d 202, 210-11 (D.C. 2015) (citing Kyles v. Whitley, 514 U.S. 419, 439 (1995)).
76. *See Kyles*, 514 U.S. at 439.
77. *See id.*; *In re Kline*, 113 A.3d at 210-11.
78. D.C. RULES OF PROF'L CONDUCT r. 3.8(e) (D.C. BAR 2007).
79. *Id*; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963).
80. D.C. RULES OF PROF'L CONDUCT r. 3.8(e).
81. *See id.*
82. *Id.*
83. *Id.*
84. *See Brady*, 373 U.S. at 87; D.C. RULES OF PROF'L CONDUCT r. 3.8(e).

requirement.[85] The comment provides that the Rule "is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution" or from governing statutes or other court rules.[86] If this comment is taken literally, the Rule is not intended to create any duty that does not exist under *Brady* or comparable local laws.[87] There is a contradiction between the literal language of the Rule and the interpretive note that accompanies it.[88]

In the disciplinary case of *In re Kline*,[89] the D.C. Court of Appeals decided in favor of the literal statement of the Rule and against the interpretation suggested by the comment.[90] Kline was a former Assistant U.S. Attorney who had prosecuted the accused on the basis of eyewitness testimony.[91] Although he had notes from an interviewing officer to the effect that one of the eyewitnesses, the victim, had said he "did not know who shot him," Kline answered a *Brady* request by stating that the government was not "in possession of any truly exculpatory information."[92] Kline disclosed other *Brady* material, but not this item.[93] The case was tried to a hung jury.[94] Later, another Assistant U.S. Attorney disclosed the victim's statement to the defense, but the new evidence turned out to be of little importance, because this time the jury convicted the defendant while knowing of the questioned statement.[95] The Board on Professional Responsibility ultimately found a violation of Rule 3.8(e) and recommended that Kline be subjected to a thirty-day suspension.[96]

The court of appeals upheld the finding of a violation but concluded that sanctioning Kline would be unwarranted.[97] There was other evidence that supported the defendant's guilt, and the same notes that included the victim's non-identification explained the discrepancy in terms of the victim not wanting to cooperate, due to having been arrested for possession of a machine gun as well as being in pain.[98] The court

85. *See* D.C. RULES OF PROF'L CONDUCT r. 3.8(e) cmt. 1.
86. *Id.*
87. *See id.*
88. *See id.* r. 3.8(e) & cmt. 1.
89. 113 A.3d 202 (D.C. 2015).
90. *Id.* at 206-13.
91. *Id.* at 204-05.
92. *Id.* at 205.
93. *Id.*
94. *Id.*
95. *Id.* at 205-06.
96. *Id.* at 206.
97. *Id.* at 215-16.
98. *Id.* at 205.

considered Kline's argument that the information was not material, as the comment implicitly requires it to be, but disagreed with that interpretation of the Rule.[99]

The court reasoned that the text of the Rule was superior in interpretation to the comment and also that the constitutional basis of *Brady* was not designed, as disciplinary rules are, to guide behavior.[100] Its reasoning led the court to uphold the Board on Professional Responsibility's conclusion that Kline had "intentionally withheld the statement because he did not think it was exculpatory."[101] Nevertheless, Kline's understanding that materiality was required was "wrong but . . . not unreasonable," and he was "not found to have been dishonest."[102] Therefore, "sanctioning Kline would [have] be[en] unwarranted."[103]

Other jurisdictions with similar rules are divided on the materiality question. The Supreme Court of Louisiana[104] and North Dakota[105] agree with the D.C. Court of Appeals in interpreting similar disciplinary rules as dispensing with any requirement of materiality.[106] On the other hand, the Supreme Court of Colorado,[107] Ohio,[108] and Wisconsin[109] have reasoned that multiple standards would create confusion,[110] a conclusion that seems supported by the ambiguity in the *Brady* doctrine itself.[111] This Article reaches the same conclusion but on the different ground that application of a disciplinary rule that does not include some sort of requirement that the "favorable" information be minimally important, or, in other words, material, is unworkable.[112]

---

99. *Id.* at 209-10.

100. *Id.* The court also advanced other reasons for its holding, including (1) that *Brady* questions depend on the entire record and can be judged definitively only after trial, whereas the Rule also operated before trial; (2) that a rule erring in favor of disclosure would benefit defendants; (3) that state courts construing similar rules in this manner were more persuasive; and (4) other arguments. *Id.* at 210-13.

101. *Id.* at 214.

102. *Id.* at 215-16.

103. *Id.* at 204.

104. *In re* Jordan, 913 So. 2d 775, 781-82 (La. 2005).

105. *In re* Feland, 820 N.W.2d 672, 678 (N.D. 2012).

106. 913 So. 2d at 781-82; 820 N.W.2d at 678.

107. *In re* Attorney C, 47 P.3d 1167, 1170-71 (Colo. 2002).

108. Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010).

109. *In re* Riek, 834 N.W.2d 384, 390-91 (Wis. 2013).

110. 47 P.3d at 1170-71; 923 N.E.2d at 130; 834 N.W.2d at 390-91.

111. *See* Giannelli, *supra* note 5, at 599-600.

112. *See infra* Part V.

IV. THE BORDERLAND OF THE *BRADY* DOCTRINE

State v. Temple[113] is a case in the author's jurisdiction that illustrates controversies that fall into what might be called the borderland of *Brady*—and perhaps the borderland of Rule 3.8(e) as well.[114] The *Temple* case has been repeatedly described in newspapers, although its appellate ending has not yet played out.[115] The assistant district attorney who tried the case turned over *Brady* material but explained that she had not disclosed every "rabbit trail" or "kooky lead."[116] These terms show the difficulty of the *Brady* doctrine—not of its fundamental concept, but of its application.[117] What an assistant district attorney may honestly see as a rabbit trail or kooky lead may look to a defense attorney like *Brady* material.[118] It is no answer to say that the careful prosecutor would turn it over, because the prosecutor may have difficulty even seeing it as potential *Brady* information, and it may be seen differently in the twenty-twenty vision of hindsight.

A. Rabbit Trails, Dead Ends, and Kooky Leads

These are not technical terms, but perhaps in the *Brady* universe they ought to be. To establish a concrete meaning for them, let us say that a rabbit trail is a lead that actually leads nowhere discernible, just as a rabbit trail in a grassland may do. The proverbial hearsay clue overheard[119] in a crowded bar is the archetype.[120] A more realistic example is the anonymous suggestion that "someone thought" that a "homeless individual" who sometimes might be found near the intersection of Seventy-Fourth Street and Seventh Avenue might have been "the real killer." An effort to follow this dubious lead will disclose

---

113. *See* Rogers, *Special Prosecutor Sought*, *supra* note 70.

114. *See id.*

115. *Id.*; *see* Rogers, *Famed Prosecutor Defends Actions*, *supra* note 70. These reports show vigorous disagreement between defense attorneys and prosecutors regarding the scope of the *Brady* doctrine. *See* Rogers, *Famed Prosecutor Defends Actions*, *supra* note 70; Rogers, *Special Prosecutor Sought*, *supra* note 70.

116. *See* Brian Rogers, *Prosecutor Defends Her Actions in Temple Case*, HOUS. CHRON. (Dec. 22, 2014, 8:54 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Prosecutor-defends-her-actions-in-Temple-case-5974462.php.

117. *See* Giannelli, *supra* note 5, at 599-600.

118. *See* Rogers, *Special Prosecutor Sought*, *supra* note 70 (reporting defense attorney's highly critical remarks about information withheld by the prosecution).

119. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 51 (2004) (referring to an "off-hand, overheard remark").

120. *See id.*

little, because the location is within Central Park,[121] for one thing, and the individual is no one in particular, for another. The rabbit trail narrows quickly to nothing. A dead end, according to a similar definitional effort, is entirely different: the alleged culprit is identifiable, but a little investigation shows that he is not and could not have been the real killer. The man so accused is an air traffic controller, perhaps, and unimpeachable evidence at his highly technological place of employment shows that he did not commit the crime because he was on the job.[122]

A kooky lead, as the term might have been used, is one that on its face is absurd. Justice Souter referred to the possibility of pleadings that blame "little green men" or that tell the story of a trip to another planet.[123] One might hypothesize a case in which a witness suggests that voodoo killed the victim or that the perpetrator is hiding in a fourth or sixth dimension.

Could these kinds of leads appear in serious criminal cases? At first blush, they all seem like silly examples: the kind of information that does not sound material, in the nomenclature of the *Brady* doctrine, and that does not even appear favorable to the defense, if one applies the standard of Rule 3.8(e).[124] The rabbit trail involving the homeless man likely does not provide a basis for claiming that evidence exists, because it is multiple-level hearsay, and some *Brady* cases indicate that inadmissible evidence is not *Brady* information.[125] The dead end involving the ironclad alibi cannot really help the accused because it carries its own refutation, and to parade this kind of theory before the jury diminishes the credibility of the defense. Some cases have held that a witness's failure to identify the defendant in a photographic spread is not *Brady* material,[126] presumably because it was a dead end under the

---

121. *See* Search Results for "Central Park, NY," MAPQUEST, https://www.mapquest.com (follow "Find Places" hyperlink; then search "Central Park, N.Y.").

122. An event closely similar to this example occurred during a capital murder trial. *See* DAVID CRUMP & GEORGE JACOBS, A CAPITAL CASE IN AMERICA: HOW TODAY'S JUSTICE SYSTEM HANDLES DEATH PENALTY CASES FROM CRIME SCENE TO ULTIMATE EXECUTION OF SENTENCE 120-21 (2000).

123. Ashcroft v. Iqbal, 556 U.S. 662, 696 (2009) (Souter, J., dissenting).

124. *See* D.C. RULES OF PROF'L CONDUCT r. 3.8(e) (D.C. BAR 2007); Valdez, *supra* note 4, at 260-61.

125. *E.g.*, United States v. Greer, 939 F.2d 1076, 1097-98 (5th Cir. 1991); Iness v. State, 606 S.W.2d 306, 310 (Tex. Crim. App. 1980) (en banc); *see also* Valdez, *supra* note 4, at 269.

126. Johnson v. United States, 544 A.2d 270, 275 (D.C. 1988). *Contra* United States v. Jernigan, 492 F.3d 1050, 1056 (9th Cir. 2007).

circumstances.[127] A defense asserting that voodoo was the weapon of the alleged real killer does not seem likely to claim the jury's credence.[128]

But this analysis ignores the yawning ambiguity of the *Brady* doctrine. A series of little twists in these pieces of information could make them into real leads that one might consider the stuff of a disclosure duty. For example, a bit of further information coming from an eyewitness who can describe a shabbily dressed individual who ran from the scene begins to make the rabbit trail into something more concrete.[129] Imagine that this information is at first unknown to all, but is discovered by the defense after conviction. A defense lawyer might well argue that he would have called the witness and challenged the government to prove beyond a reasonable doubt that the fleeing suspect was not the perpetrator. Now, the controversy becomes a debate about whether a reasonable prosecutor would have sufficiently set aside his own view of the case (a frequent prerequisite for recognizing *Brady* information)[130] to have foreseen this fleeing subject's evidence as a consequence of the earlier misinformed, unknown, and doubtful eyewitness.

As for the identified individual with the solid alibi, the defendant might call such a person and suggest that he could have left the job site for a period of time and committed the crime, then slinked back into the airport control tower.[131] Again, the prosecutor would recognize this avenue of defense only by setting aside his view of the case and considering a dubious line of defense. The defense lawyer who uses this evidence on this theory risks tarnishing every other defensive theory, including the argument that eyewitnesses are subject to reasonable doubt, and this consideration reduces the significance of the theory further. But like the fleeing homeless subject, this possibility depends on all of the evidence, and it probably depends even more on the prejudices of the beholder.

The voodoo example is harder to fit within a reasonable example of *Brady* information, but perhaps even this odd claim could qualify in peculiar circumstances. One need only imagine that there is an

---

127. For example, the photograph may be a poor likeness, or it may be obscured by (or in the absence of) major facial hair different from the defendant's appearance at the time of trial and crime, or other facts may cause the event. Most cases, however, hold that non-identifications are *Brady* material. *See Jernigan*, 492 F.3d at 1056.

128. *But see infra* note 132.

129. For the discussion of a homeless individual often found at a certain intersection, see *supra* Part IV.A.

130. *See* Rogers, *Special Prosecutor Sought*, *supra* note 70.

131. *See* CRUMP & JACOBS, *supra* note 122, at 121 (hypothesizing a similar but different case).

alternative subject whom the defense might accuse, and we might suppose that the alternate was so filled with animosity that he attacked a voodoo doll made to resemble the victim.[132] There might be advocates who would claim that this additional piece of information is favorable to the defendant because it helps to demonstrate motive on the part of someone else. Whether a reasonable prosecutor would put these facts together depends, again, on everything else in the case—and on who is judging the prosecutor.

In *State v. Temple*, it is possible the prosecutor can credibly assert an absence of any known *Brady* violation in the fact that she did not turn over information about some kinds of "rabbit trail[s]" or "kooky lead[s]."[133] This claim may be believable, especially in the context of a case in which the defense advances a large number of theories without disclosing any of them prior to trial—as is the usual defensive approach. The difficulty is that an advocate with a different point of view, one engendered by a career spent in criminal defense, is likely to disagree, and will perceive a *Brady* violation in these examples. The *Brady* doctrine produces clearer cases than these, and of course, in those cases the duty to disclose is clearer.[134] But it also produces many dilemmas like those discussed.[135]

B. Diffusion: Does the Mud Stick to the Wall?

In the same homicide case, *Temple*, the prosecutor asserted that the *Brady* doctrine, if it is strictly and broadly applied, creates an unworkable burden when the defense asserts many different and contradictory theories[136]: "When the defense is to just throw mud at the wall and see what sticks, . . . Brady is an impossible burden."[137] And this kind of defense is common, especially with skillful defense attorneys. Defense lawyer Richard "Racehorse" Haynes says "this is my defense,"

---

132. A variation on this theme appeared in a murder prosecution in West Palm Beach, Florida, where the defendant was accused of committing the killing because he thought the victim had "put voodoo" on him. *See* Daphne Duret, *Jury Convicts Man of Second Degree Murder, Attempt in "Voodoo" Case*, PALMBEACHPOST.COM (Feb. 20, 2015, 6:13 PM), http://www.palmbeachpost.com/news/jury-convicts-man-second-degree-murder-attempt-voodoo-case/Sz9wy19rrlysQ3FwblItRO. The evidence was certainly "material," because it supplied the prosecution with a motive. The jury reduced the crime to second-degree murder, suggesting that the voodoo information may indeed have been *Brady* material. *See id.*

133. *See* Rogers, *supra* note 116.

134. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 152-55 (1972).

135. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 100-02, 112-14 (1976).

136. *See* Rogers, *supra* note 116.

137. *Id.*

if he is sued for having allowed his dog to bite a victim, and mentions four different and inconsistent possibilities.[138] They might be summed as saying, first, that "[m]y dog doesn't bite"; second, that the dog was "tied up that night"; third, "I don't believe you really got bit"; and finally, "I don't *have* a dog."[139]

This kind of see-whether-it-sticks approach can work, at least in the hands of a skillful defense lawyer who knows how to make it work, because the government has the highest burden of proof known to the law: proof beyond a reasonable doubt. The defense lawyer who succeeds in this approach is adept at persuading the jury that the prosecutor's burden is extraordinarily high and that it requires acquittal if there is the smallest doubt. The successful lawyer is also good at presenting inconsistent defenses without appearing to dissemble, by advancing each of them as a possibility that the prosecution must conclusively negate.

This diffusion of defenses often can appear for the first time during the latter half of a trial. The defendant has the obligation to give notice of alibi or of insanity[140] in some jurisdictions, but there is no such general duty to disclose defensive theories,[141] and if there were, the privilege against self-incrimination might be construed as destroying it. The government then is required to provide *Brady* material on each of the separate defensive theories in the middle of the trial and is subject to claims that it has violated *Brady* by not having foreseen these theories.[142] The *Brady* doctrine presumably applies from a perspective that takes into account what the prosecution knows or should learn, but inevitably, it can only be judged by hindsight.[143]

C. Long-Chain Circumstantial Evidence

In the same homicide case, *Temple*, one of the later-claimed pieces of *Brady* information was to the effect that a teenage neighbor was one of the people whom the victim's dog knew and at whom the dog did not bark.[144] The *Brady* argument was that this teenager was a likely perpetrator of the homicide in question, and his acquaintance with the

---

138. Gary Cartwright, *How Cullen Davis Beat the Rap*, TEX. MONTHLY (May 1979), https://www.texasmonthly.com/articles/how-cullen-davis-beat-the-rap-2.

139. *Id.* (emphasis in original).

140. *E.g.*, FED. R. CRIM. P. 12.1–.2 (requiring provision of notice of alibi and insanity, respectively).

141. *Contra id.*

142. *See* Valdez, *supra* note 4, at 263.

143. *See* Green, *supra* note 4, at 646-47.

144. *See* Rogers, *Special Prosecutor Sought*, *supra* note 70; *see also* Rogers, *Famed Prosecutor Defends Actions*, *supra* note 70; Rogers, *supra* note 116.

dog would have made it more likely that he could have committed the crime.[145] There is a Sherlock Holmes story in which one of the clues was provided by a dog that did not bark,[146] and the great detective was able to solve the case from this absence of evidence.[147] The story is an entertaining one, partly because the clue eluded everyone else, but that was what made Sherlock Holmes who he was.[148]

This problem might be called the issue of long-chain circumstantial evidence. It should not require the fictional perspicacity of Sherlock Holmes for a government lawyer to perceive the significance of a piece of *Brady* material, but failure to disclose the dog's familiarity with the teenager was claimed as one of the grounds for a new trial.[149] It should be added that the defense, true to the diffusion approach, also included accusations against other people as the real killer(s),[150] so that the burden of identifying every piece of long-chain circumstantial evidence must have been high. But again, it was viewed in hindsight.

There is one commentator who has flatly stated that the prosecutor's duty under *Brady* includes reviewing personnel files for all relevant law enforcement individuals.[151] Assuming such a "review" is plausible, the prospect of admissible evidence developing from it in most cases will be small. Rules 404 and 405 of the *Federal Rules of Evidence* exclude almost all of the information that would likely result.[152] But the admissibility concern is less obvious than the fact that in some jurisdictions, an assistant district attorney who routinely requested personnel files from the local police department would be greeted by a surprised reaction. A court in such a jurisdiction reviewing a subpoena by an assistant district attorney for this purpose would likely be surprised too. In some jurisdictions, on the other hand, this duty does exist under *Brady*.[153] But the information being sought is very long-

145. *See* Rogers, *Special Prosecutor Sought*, *supra* note 70.

146. SIR ARTHUR CONAN DOYLE, *Adventure I—Silver Blaze*, *in* THE MEMOIRS OF SHERLOCK HOLMES 41, 48 (The Floating Press 2009) (1892).

147. *Id.* at 48-52.

148. *Id.* at 16-17, 41, 48.

149. Rogers, *Special Prosecutor Sought*, *supra* note 70.

150. *See* Rogers, *supra* note 116.

151. Gershman, *supra* note 4, at 699-700.

152. *See* FED. R. EVID. 404–405 (stating that, generally, attempting to prove character based on previous actions is inadmissible).

153. *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745, 773-75, 779 (2015) (noting, however, that "even well-meaning prosecutors" are often unable to discover or disclose law enforcement personnel files, and this, according to the author, is *Brady*'s "blind spot"). But some jurisdictions allow disclosure. *Id.* at 773-75. Abel also provides some of the reasons for nondisclosure. *Id.* at 783-89.

chain circumstantial evidence, which is one reason that Rules 404 and 405 almost always exclude it.[154] This commentator's suggestion shows how strangely far apart different viewers are in considering the borderland of the *Brady* doctrine.

D. An Unconvincing Excuse: The Information Is Not Credible

It should be added that there is one occasionally asserted consideration that does not avoid the *Brady* doctrine: that the government's lawyer did not consider the information to be true. If the information is favorable to the defense and material, it must be disclosed, even if it does not seem credible.[155] This issue arose in *In re Kline*,[156] and the trial judge immediately responded as follows:

> Because you are sure [sic] you have the guy, no one could conjure up a *Brady* argument? . . . That is why *Brady* doesn't leave it up to the prosecutor, for that very reason. You are always sure you have got the right guy or you wouldn't be prosecuting.[157]

This conclusion by the judge necessarily follows such an argument, because otherwise the government's belief in its evidence would swallow the *Brady* doctrine.[158]

On the other hand, allegedly favorable information that is so distant from direct evidence that its significance is difficult to recognize should not be the subject of a *Brady* duty. Genuine rabbit trails and the like may fit this description. If the information is alleged to be favorable but the prosecutor does not credit it because no reasonable juror would be likely to believe it either, the information may not be important enough to trigger a constitutional duty. This is the function of the materiality requirement in the *Brady* doctrine, and it is needed even more in a disciplinary rule that invokes sanctions, including disbarment.[159]

---

154. *See* FED. R. EVID. 404–405. And therefore the information may not be *Brady* material to begin with. *See* Valdez, *supra* note 4, at 268-69.

155. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

156. 113 A.3d 202, 205 (D.C. 2015).

157. *Id.* (alteration in original).

158. *See id.* The information also proved not to be credible to a later jury, which heard the evidence but still convicted the defendant. *Id.* at 205-06.

159. *See In re* Feland, 820 N.W.2d 672, 677-78 (N.D. 2012).

E. Why Does Any of This Matter?

In one recent celebrated case,[160] law enforcement officers received (or were flooded with) more than 500 tips that "[p]ull[ed] [i]n [a]ll [d]irections."[161] Many of these 500 items presumably included multiple pieces of information ranging from the tip itself to its source and quality, and investigation of each tip would have created countless more.[162] In the *Temple* case, paper in the district attorney's possession filled twenty file boxes,[163] and, again, this paper was the tip of the iceberg because more information undoubtedly existed in electronic files, field notes, oral statements, and similar sources.

In *Smith v. Cain*,[164] the critical item was a few sentences—mostly in handwriting among field notes—that a defense attorney could have used to impeach an important government witness.[165] The government's files in this quintuple murder case probably were enormous.[166] Justice Thomas's opinion shows how readily the alleged discrepancy could be viewed as irrelevant.[167] Every law student has had the experience of reading an appellate opinion and missing a crucial paragraph. In prosecuting the *Smith* case, it would have been easy for an Assistant U.S. Attorney to read right over the information at issue. It assumes much greater significance when viewed in isolation, especially in a Supreme Court opinion.

None of this discussion negates the government's duty under *Brady* to find and disclose favorable evidence.[168] The doctrine is unforgiving, in a sense, because the government lawyer's good faith does not avoid it.[169] But these considerations show the need for some kind of requirement that the information have a minimal degree of importance. Otherwise, the sideshow created by rabbit trails and similar information will take over the circus: the main objective, which is the *Brady*

---

160. *See* Joseph Rhee et al., *N.Y. Prison Break: The Final Hours Before Escapees Richard Matt and David Sweat Were Captured*, ABC NEWS (July 23, 2015, 2:03 PM), http://abcnews.go.com/US/ny-prison-break-final-hours-escapees-richard-matt/story?id=32639393.

161. *See* Simon McCormack, *Tips Pull Cops in All Directions for Escaped New York Murderers*, HUFFINGTON POST (June 10, 2015, 6:10 PM), http://www.huffingtonpost.com/2015/06/10/escaped-new-york-murderers_n_7556742.html.

162. *See id.*

163. Rogers, *supra* note 116.

164. 132 S. Ct. 627 (2012).

165. *Id.* at 629-31.

166. This conclusion follows from comparison to the *Temple* case, which concerned one homicide rather than five. *See supra* note 163 and accompanying text.

167. *See Smith*, 132 S. Ct. at 631-41 (Thomas, J., dissenting).

168. *Id.* at 630 (majority opinion).

169. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 153-54 (1972).

doctrine. And even more so, a minimum level of importance ought to be required in a rule that disciplines lawyers.

In addition, many people would be surprised by the variations in investigation and resources among different jurisdictions. The imaginary picture seen by many people may depict assistant district attorneys as having leisure to prepare their cases. The picture may be accurate in some places, but it is not in others. When the author of this Article was trying criminal cases, the police reports in serious cases might consist of a few pages—usually fewer than five. A robbery or rape case would have an on-scene report of perhaps two pages, and there would be a lineup report of another two pages. Typically, there was no further investigation of these kinds of cases. The assistant district attorney who tried a given case might have had little acquaintance with the reports other than in connection with plea negotiations. The assistant district attorney would meet for the first time with witnesses who appeared immediately before trial. This system worked because screening of cases, before they were filed, limited them to those with strong evidence. In some federal jurisdictions, available resources may be copious by comparison, and in fact they may be in some states. In some rural regions, contrary to the image of the bustling urban district attorney's office, there is one district attorney, who handles everything from small-amount drug cases to aggravated murders. These considerations do not affect the elements of the *Brady* doctrine, but they do affect an assistant district attorney's ability to recognize obscure *Brady* material as well as the extent of the government's knowledge.

V. THE NEED FOR A MATERIALITY ELEMENT: INTERPRETING RULE 3.8(E)

None of these examples displaces the undeniable existence of serious *Brady* material that ought to be disclosed. The description of these borderland possibilities, from rabbit trails to long chains, does not disturb the doctrine that important favorable information must be provided to the defense.[170] But the point is that some element of importance ought to be a part of this doctrine. The assertion that a crime might have been committed by a homeless man near the intersection of Seventy-fourth Street and Seventh Avenue[171] may be a useless rabbit trail, but if one ignores materiality and all other synonyms for importance, it is "favorable" to the defense. The fact that it is a rabbit

170. *See, e.g.*, *Smith*, 132 S. Ct. at 630.
171. *See supra* Part IV.A.

trail does not prevent it from being favorable. It just is not useful. But the concept that differentiates the rabbit trail from *Brady* information is precisely an element of usefulness, or significance, or importance. It is the element that is found in the doctrine in the form of the requirement of materiality: a degree of usefulness, or significance, or importance that creates the "reasonable probability" of a different result.[172] It is the element that is expressed by the concept that undisclosed *Brady* material "undermine[s] confidence" in the verdict.[173]

The interpretation of Rule 3.8(e) by the D.C. Court of Appeals dispenses with materiality.[174] But it seems a stretch to say that a true rabbit trail, the kind that rapidly leads nowhere, is "favorable" to the defense. The requirement that the information be favorable is, after all, still an element of Rule 3.8(e).[175] Perhaps the requirement that the information be minimally promising is inherent in the idea of favorable information, because information that has so little significance that it cannot be useful is not favorable. Thus, the possibility exists that even though Rule 3.8(e) has dispensed with an explicit requirement of materiality, some notion of materiality must be retained within the idea that *Brady* information, like Rule 3.8(e) material, is information that is favorable.

The trouble with this conclusion, if one reaches it, and if one applies the D.C. Court of Appeals's reasoning to it, is that the degree of materiality or importance that is necessary for information to be characterized as "favorable" is undefined. One cannot tell where the line is drawn, and its identification will wander up and down, depending on the reader. And in a rule of discipline, that sort of ambiguity is undesirable. If there is to be a disciplinary rule like Rule 3.8(e), as for serious *Brady* violations there should be, let it not be without a defined element that can make all the difference.

VI. CONCLUSION

The *Brady* doctrine is solidly expressed by the Supreme Court. The difficulty is in its application. Different lawyers, different jurisdictions, and different courts reach differing conclusions about its meaning. It would be helpful if the Supreme Court were to describe more specifically the concept of materiality: how important the piece of

172. *See* 132 S. Ct. at 630 (quoting Cone v. Bell, 556 U.S. 449, 470 (2009)).
173. *See id.* (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).
174. *See In re* Kline, 113 A.3d 202, 206-13 (D.C. 2015).
175. *See* D.C. RULES OF PROF'L CONDUCT r. 3.8(e) (D.C. BAR 2007).

information must be to trigger the *Brady* doctrine. But however helpful, this specification would be difficult to create.

And then, there is the separate issue of attorney discipline, which this Article has set out to analyze.[176] One might think that a rule, like 3.8(e),[177] that can lead to disbarment of an attorney would be relatively clear. Further, there should be such a rule, because otherwise there frequently would be no disadvantage to an attorney who violated *Brady* except the attorney's own concept of wrongfulness and the unlikely prospect of later discovery of the violation and a resulting reversal. But a rule of discipline should be applied so that attorneys can readily recognize when they are violating it.

The D.C. Court of Appeals's interpretation of Rule 3.8(e)[178] does not meet this standard. By dispensing with any element of materiality in the Rule, the D.C. Court of Appeals has made the disciplinary process ambiguous and unfair.[179] Removing the materiality requirement means that a government attorney must disclose even information that is not important to the outcome of the case.[180] The duty applies to everything that the government knows, including police officers, agents, and government employees; the attorney has a duty to learn about all of this information.[181] If the duty extended to information that was important, the duty would be less ambiguous, because an attorney can be expected to recognize *Brady* information—that is, information that is favorable and material. Extending the duty to immaterial information leaves the government attorney with unsatisfactory guidance in recognizing even what is favorable. In addition, the courts have left decision-makers with an amorphous standard in deciding whom to sanction. They have blurred the concept of "favorable" information because the information can be so unimportant that its favorable nature is not apparent.

Rule 3.8(e) contains a requirement that the government attorney act "intentionally" in failing to disclose the allegedly favorable information.[182] One might think that this element of the Rule could make the process fairer because a failure to disclose something unimportant enough that the attorney does not see it as favorable might mean that the attorney has acted unintentionally. The D.C. Court of Appeals, however,

176. *See supra* notes 17, 159 and accompanying text and Part V.
177. D.C. RULES OF PROF'L CONDUCT r. 3.8(e).
178. *See In re Kline*, 113 A.3d at 211-13.
179. *See id.* at 213.
180. *See id.* at 212-13.
181. *See* Brady v. Maryland, 373 U.S. 83, 87-88 (1963).
182. D.C. RULES OF PROF'L CONDUCT r. 3.8(e).

has read this possibility out of the Rule.[183] The court applied the element of intent only to the act of nondisclosure, not to the knowledge that the information is favorable.[184] The court concluded that the attorney in the case before it, Kline, had acted intentionally, even though he did not understand the information to be favorable.[185] The court's opinion stated that Kline had "intentionally withheld the statement because he did not think it was exculpatory."[186]

The D.C. Court of Appeals opinion is well-written and uses traditional means of statutory interpretation.[187] But there are other courts that have reached contrary results—again, by using traditional means of statutory interpretation.[188] The trouble is, to avoid investigating and sanctioning attorneys for nondisclosure of allegedly favorable information that is too unimportant to be thought exculpatory, the D.C. Court of Appeals will need to impose some sort of requirement of importance, or materiality. The D.C. Court of Appeals can do so by defining favorable information as that which could make a difference. It would be better, however, if the Rule were amended to provide a standard of importance or materiality.

183. *See In re Kline*, 113 A.3d at 213-14.
184. *Id.*
185. *Id.* at 214.
186. *Id.*
187. *See id.* at 206-13.
188. *See In re* Attorney C, 47 P.3d 1167, 1170-71 (Colo. 2002); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130-31 (Ohio 2010); *In re* Riek, 834 N.W.2d 384, 390-91 (Wis. 2013).