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Brady Misconduct Remedies: Prior Jeopardy and Ethical Discipline of Prosecutors

J. Thomas Sullivan*

In an Arkansas capital murder prosecution that resulted in conviction and sentences of death based on the killing of a family of four, defense counsel learned after the conviction had been reversed that a key prosecution witness, the defendant’s son, who testified against his father, implicating him in the murders at trial, had also given prosecutors a statement in which he claimed responsibility for the crimes and exculpated his father. Defense counsel moved to dismiss the prosecution on the ground of prosecutorial misconduct, then raised a prior jeopardy claim in an effort to bar retrial by taking an interlocutory appeal to the Arkansas Supreme Court. The court rejected the prior jeopardy claim and permitted the retrial to proceed, while referring the prosecutors involved to the Committee on Professional Conduct for consideration of possible ethical violations. On retrial, the defendant was again convicted, although his son did not testify against him at this proceeding. This article examines issues of prosecutorial misconduct in this case and remedies for misconduct.

I. THE BILLY DALE GREEN CAPITAL MURDER CASE

When Billy Dale Green was first sentenced to death for the capital murders of four members of an Arkansas family in 2004, one of the prosecution’s key witnesses was his son, Chad.¹

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¹ See Green v. State, 365 Ark. 478, 483-84, 231 S.W.3d 638, 644-45 (2006) [hereinafter Green I]. Defendant appealed and, in 2006, the Arkansas Supreme Court reversed and remanded the case back to the circuit court for a new trial. Id. at 482-83, 231 S.W.3d at 643-44. Green was again convicted on all four charges and, in 2011, he again appealed to the Arkansas Supreme Court, which affirmed his convictions. Green v. State, 2011 Ark. 92, at 1, 380 S.W.3d 368, 369 [hereinafter Green II]. In 2013, he appealed once more to the Arkansas Supreme Court. Green v. State, 2013 Ark. 497, 430 S.W.3d 729 [hereinafter Green III]. For clarity, as the brackets indicate, this article will refer to the
Chad was charged as an accomplice to the murder. Having pleaded guilty to a reduced charge in return for a twenty-year sentence, Chad testified that he and his father smoked methamphetamine together before his father killed the entire family, apparently motivated by the alleged theft of ten marijuana plants from Green by Carl Elliott, the father of the family. On direct appeal, the Arkansas Supreme Court reversed the convictions and death sentences on the four capital counts and remanded the case for a new trial based on improper admission of reputation evidence at trial. In light of the evidence summarized by the Arkansas Supreme Court in reviewing Green’s conviction and death sentence, the propriety of capital punishment on these facts could hardly be questioned unless, of course, Green did not actually commit those four heinous murders.

Arkansas Supreme Court decision from 2006 as “Green I,” from 2011 as “Green II,” and from 2013 as “Green III.”

2. Green III, 2013 Ark. at 2, 430 S.W.3d at 735.
3. Id.
5. Id. at 483, 231 S.W.3d at 643-44. The court’s review of capital sentences expressly includes review of unpreserved error pursuant to Rule 10 of the Arkansas Rules of Appellate Procedure—Criminal. Id. at 492-93, 231 S.W.3d at 650. Pursuant to Rule 10, the court is required to consider, inter alia:
   (iv) whether the trial court failed in its obligation to intervene without objection to correct a serious error by admonition or declaring a mistrial;
   (v) whether the trial court erred in failing to take notice of an evidentiary error that affected a substantial right of the defendant.

Id. at 493, 231 S.W.3d at 650-51.

The court remanded because the admission of the reputation evidence violated Green’s right to a fair trial. Id. at 483, 231 S.W.3d at 643-44. Arkansas generally does not, however, recognize claims of unpreserved error as plain or fundamental error. See, e.g., Buckley v. State, 349 Ark. 53, 65, S.W.3d 825, 832 (2002) (“[I]n Arkansas, an argument for reversal will not be considered in the absence of an appropriate objection.”). But the Arkansas Supreme Court has also excused procedural default occurring in a death sentence case because of the perceived severity and finality of death. See Howard v. State, 366 Ark. 453, 455, 236 S.W.3d 508, 509 (2006) (granting leave to file amended petition for post-conviction relief in compliance with the rule requiring petitioner’s verification by personal signature because petitioner was sentenced to death).

7. In Green III, the majority upheld Green’s conviction on all four counts of capital murder. Green III, 2013 Ark. 497, at 39-40, 430 S.W.3d at 754. Then-Chief Justice Hannah, joined by Justices Corbin and Danielson, dissented in part, stating that the evidence adduced at trial was insufficient to support Green’s conviction on three of the four murder counts. Id. at 40, 430 S.W.3d at 754 (Hannah, C.J., concurring in part and dissenting in part).
Chad Green’s testimony was particularly important because, as an accomplice to the murders, his testimony required corroboration under Arkansas law. Much of the State’s most compelling corroborating evidence was elicited from Scott Moffitt, Billy Green’s cellmate in the county jail. Moffitt testified about Green’s admissions made to him while in custody concerning the murder and his extensive efforts to cover up the crime, including cleaning an impounded car, hiding the .22 rifle used in the killings, scattering the body parts of the little girl, and burning his own clothes. Moffitt also testified that Green explained his motive after saying he should not have killed the family: “If you don’t pay the dope man, your ass is took down.”

On appeal, Green’s counsel argued that Moffitt’s testimony should have been scrutinized more strictly based on his status as a “jailhouse snitch,” but the court rejected the argument because it had not been preserved by objection or requested instruction at trial. The court noted that “[t]he State did not offer Moffitt leniency in exchange for his testimony.” Traditionally, of course, the testimony of jailhouse informants, like that of accomplices, is considered highly dubious—precisely because of the likelihood that the informant may fabricate the information in order to obtain favorable treatment or in retaliation against the claimed declarant.

8. ARK. CODE ANN. § 16-89-111(e)(1) (Supp. 2013) provides:

(A) A conviction . . . cannot be had in any case of felony upon the testimony of an accomplice . . . unless corroborated by other evidence tending to connect the defendant . . . with the commission of the offense.

(B) The corroboration under subdivision (e)(1)(A) of this section is not sufficient if it merely shows that the offense was committed and the circumstances of the offense.

10. Id. at 489-90, 231 S.W.3d at 648.
11. Id. at 490, 231 S.W.3d at 648.
12. Id. at 485, 231 S.W.3d at 645. Another informant, Phillip Shockey, also testified that Green admitted killing Felicia Elliott. Green III, 2013 Ark. 497, at 4, 430 S.W.3d at 736.
13. Green I, 365 Ark. at 489 n.5, 231 S.W.3d at 648 n.5.
14. See, e.g., Lilly v. Virginia, 527 U.S. 116, 139 (1999) (assessing reliability of accomplice’s statement to police incriminating accused in terms of the “natural motive for him to attempt to exculpate himself as much as possible”) (emphasis added); see also Dodd v. State, 993 P.2d 778, 784 (Okla. 2000) (adopting mandatory procedure in state criminal trials for evaluating credibility of jailhouse-informant testimony relating to admissions purportedly made by accused while in custody). In Myers v. State, 133 P.3d 312 (Okla.
The *Green* trilogy would be rather straightforward were it not for the fact that, following the reversal of the conviction and remand for new trial, another development cast even more doubt on the reliability of Chad Green’s testimony. Following remand, defense counsel learned that Green not only provided authorities with statements incriminating his father in the commission of the four capital murders, but also made another statement in the possession of the State in which he fully exculpated his father and solely implicated himself in the crimes.\(^\text{15}\) The prosecuting attorneys did not disclose this exculpatory statement to the defense prior to Green’s capital trial.\(^\text{16}\) When the nondisclosure was brought to the attention of the Arkansas Supreme Court, it noted that both parties agreed that the nondisclosure violated the prosecution’s duty under *Brady v. Maryland*, the landmark United States Supreme Court case regarding the accused’s due process right to be made aware of exculpatory evidence.\(^\text{17}\)

Green’s counsel petitioned for relief upon discovering the prosecutor’s violation of the disclosure duty.\(^\text{18}\) He moved to bar

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\(^{15}\) Id. at 321.

\(^{16}\) Id. at 2-3, 380 S.W.3d at 369-70.

\(^{18}\) Id. at 1, 380 S.W.3d at 369-70.
retrial based on the Double Jeopardy Clause, arguing that the prosecutor’s misconduct contributing to the conviction should bar retrial. The court rejected his double jeopardy claim based on its earlier remand for a new trial, illustrating one of the major problems in the enforcement of the State’s federally protected disclosure duty.

II. THE PROSECUTION’S CONSTITUTIONAL DUTY TO DISCLOSE EVIDENCE FAVORABLE TO THE DEFENSE

The prosecution’s failure to disclose Chad Green’s statement inculpating himself and exculpating his father is precisely the type of misconduct that Brady and its progeny were designed to prevent. Brady requires the disclosure of exculpatory evidence that is material to the accused’s guilt or punishment. In Brady, the undisclosed evidence was co-defendant Boblit’s confession that he, not Brady, actually killed the victim in the capital murder prosecution. There was a reasonable probability that Boblit’s admission would have led to imposition of a life sentence rather than the death penalty for Brady, and thus, the Court upheld the Maryland court’s conclusion that failure to disclose the confession to Brady’s counsel violated due process.

Brady’s requirement for disclosure of exculpatory evidence extends beyond discovery of evidence that would necessarily establish the accused’s innocence by showing that he could not

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20. Id. at 12, 380 S.W.3d at 375.
21. For a thorough discussion of the Supreme Court’s decisions relating to disclosure duties prior to Brady v. Maryland and subsequent decisions expanding upon Brady, see J. Thomas Sullivan, Brady-Based Prosecutorial Misconduct Claims, Buckley, and the Arkansas Coram Nobis Remedy, 64 ARK. L. REV. 561, 562-81 (2011).
22. Brady v. Maryland, 373 U.S. 83, 87-88 (1963). The disclosure duty is incorporated in Arkansas’s ethical rules governing attorney conduct, which require, in relevant part, that the prosecuting attorney:

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 . . . .

ARK. MODEL RULES OF PROF’L CONDUCT r. 3.8(d).
23. Brady, 373 U.S. at 84.
24. Id. at 86.
have committed the crime, or that someone else did, in fact, commit the offense. In *Giles v. Maryland*, the Court concluded that failure to disclose prior inconsistencies in the statements given by the complainant warranted remand.\(^{25}\) Giles was convicted of rape after testifying that the complainant consented to sex, but warned him that she would have to claim rape if their sexual encounter was discovered because she was on probation and “in trouble”—a claim that led the state appellate court to observe that the credibility of the witnesses was an important factor in the conviction.\(^{26}\) The Court reviewed evidence in the record showing that the complainant had a significant history of promiscuity and of making false allegations of rape, including recanting a claimed rape by two men charged on the basis of her initial statements to law enforcement officers after being confined in a hospital psychiatric ward following a suicide attempt.\(^{27}\)

The undisclosed evidence also included prior statements from the complainant and the boy she was with on the night of the alleged assault in which they told officers that they were engaging in sex when Giles and two other men approached their parked vehicle.\(^{28}\) At trial, they testified that they were merely sitting in the back seat of the car when the others approached.\(^{29}\) Given the particular nature of the undisclosed information concerning the complainant’s history and admission of previous false claims of rape, the undisclosed prior inconsistent statements she had given were likely far more relevant because of the consent defense raised at trial, even despite the fact that fanciful consent claims are not uncommon in rape prosecutions.\(^{30}\) The inconsistent statements in *Giles* are especially significant because they involve the circumstances of the offense itself and the credibility of the complaining witness, as the Court explained: “[T]o the extent credibility could have been effectively attacked in this case, resolution of the issue of consent necessarily would have been affected since it turned wholly on credibility.”\(^{31}\)


\(^{26}\) *Id.* at 69-70.

\(^{27}\) *Id.* at 70.

\(^{28}\) *Id.* at 74-75.

\(^{29}\) *Id.* at 75.

\(^{30}\) *Giles*, 386 U.S. at 75-76.

\(^{31}\) *Id.*
The *Giles* plurality, however, did not resolve the questions of factual credibility or prejudice. Having examined the entire record, including information not previously available to the state court, the Court remanded the case for consideration of the scope of the disclosure duty applicable to the evidence not provided to trial counsel and determination of prejudice to Giles's right to due process.\(^{32}\)

The Court's post-*Giles* decisions reflect less hesitance to affirm the prosecution's duty to disclose evidence usable at trial to impeach its witnesses. Commonly, nondisclosure involves potential sources of bias, such as the circumstances under which the prosecution's witness has been induced to testify. Particularly common in these situations is the existence of an undisclosed agreement or denial of an agreement by which the witness can expect to better his own situation in some way in return for testifying against the accused at trial. In *Giglio v. United States*, for instance, the Court held that the prosecutor was required to disclose any plea-bargain agreement or agreement otherwise promising leniency contingent on the witness's testimony against the accused.\(^{33}\)

Later, in *United States v. Bagley*, the Court addressed the general significance of impeachment evidence,\(^{34}\) expanding upon *Giglio* and *United States v. Agurs*, in which the undisclosed evidence was the victim's prior conviction for assault that the defense argued was relevant to the issue of self defense.\(^{35}\) In more broadly holding that any impeachment evidence, if material, must be disclosed to the defense for use at trial, the *Bagley* Court effectively recognized that the disclosure duty applies not only to evidence showing or suggesting the accused's innocence or reduced culpability, but also to other

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32. *Id.* at 80-81.
35. 427 U.S. 97, 100 (1976). The most important aspect of the Court's decision in *Agurs* is its holding that disclosure of favorable evidence is mandatory and not contingent on a request for disclosure by the defense, recognizing that, "[i]n many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel." *Id.* at 106-07. The Court rejected the alleged prejudice from nondisclosure of the victim's prior conviction because, as the Court noted, the victim was armed at the time of the attack and Agurs had no defensive wounds. *Id.* at 113-14. Thus, the uncontroverted evidence that the victim was armed with a knife rendered the evidence of the prior conviction cumulative, adding nothing substantial to the defense theory that Agurs killed in self-defense.
favorable evidence that simply casts doubt on the credibility of the prosecution’s case. Bagley, like Giglio, involved a failure to disclose the full extent of agreements made with a testifying witness supplying key trial evidence.

Brady, as extended by Bagley, effectively encompasses claims that would support the defendant’s factual innocence or legal innocence. The standard for determining whether disclosure is required focuses on the “materiality” of the impeachment evidence suppressed or inadvertently not disclosed. Not all potentially impeaching evidence is necessarily material in light of the prosecution’s theory of the case; similarly, not all nondisclosures will require relief when the likely effect of nondisclosure is insignificant. The Bagley Court thus reaffirmed that the materiality of impeachment evidence determines whether nondisclosure constitutes a due process violation. It concluded 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,” and then explained that “[a] ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”

36. Bagley, 473 U.S. at 676-78.
37. Id. at 671-72. On the questionable ethical basis for use of agreements in which the benefit for the testifying witness depends on the “quality” or usefulness of the testimony, see Samuel A. Perroni & Janey McNutt, Criminal Contingency Fee Arrangements: How Fair are They?, 16 U. ARK. LITTLE ROCK L.J. 211 (1994); see also Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994). In Buckley, the Seventh Circuit observed:

The exchange of money for information may be a regrettable way of securing evidence, but it is common. So too with promises to go easy (the complaint alleges that a prosecutor implied that Cruz and Hernandez might escape the death penalty by talking freely). Buckley does not cite any case holding that this practice violates the Constitution. Concealing the payments at trial would have violated his rights; a defendant is entitled to know what the prosecutor paid for a statement (whether in cash or in lenience and related promises) so that he may expose to the jury the witness’s shortcomings and bias. . . . His contention that the payments themselves violate the due process clause does not state a claim on which relief may be granted.

Buckley, 20 F.3d at 794 (citations omitted).
38. See Bagley, 473 U.S. at 674-78.
39. Id. at 678-83.
40. See id. at 682.
41. Id. at 678.
42. Id. at 682.
In *Kyles v. Whitley*, the Court confirmed that the *Brady* disclosure duty has developed over thirty years through various decisions. 43 Significant among the summary conclusions of the *Kyles* Court are:

The requirement that the defendant demonstrate only that the nondisclosure of material subject to the duty showed a reasonable probability that, but-for the nondisclosure, the outcome of the proceedings would be favorable. The defendant is not required to prove that he would have been acquitted had the required disclosure been made. 44

There is no requirement for proof of prosecutorial bad faith or deliberate intent to violate the accused’s rights because the due process issue concerns only the defendant’s ability to respond to the prosecution’s case and not the culpability of the prosecutor in not making a required disclosure. 45

Evidence subject to the disclosure duty may be exculpatory—disproving defendant’s guilt—or impeaching—casting doubt on the credibility of the prosecution’s case. 46

The disclosure duty is not dependent upon a specific request for discovery by the defense. 47

The actions of law enforcement officers and investigators, in failing to disclose the existence of favorable evidence to the prosecuting attorney, are imputed to the prosecutor, as members of the prosecution team. 48

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44. *Id.* at 434 (citing United States v. Bagley, 473 U.S. 667 (1985)).
45. *Id.* at 432. The *Kyles* Court traced the rule directly to *Brady*, noting that it held there “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).
46. *Id.* at 433 (citing United States v. Bagley, 473 U.S. 667 (1985)).
The prosecutor has the responsibility of determining whether evidence in the possession of the prosecution is, in fact, favorable and subject to disclosure;\textsuperscript{49}

Where multiple instances of nondisclosure are shown, they are to be assessed cumulatively in determining whether the nondisclosures meet the reasonable probability standard.\textsuperscript{50}

The failure to disclose the exculpatory and clearly inconsistent prior statement in \textit{Green} highlights the most salient point in the Court's \textit{Brady} jurisprudence when the actions of the prosecutor are directly called into question. The motivation or bad faith of the individual prosecutor in failing to disclose favorable evidence to the defense is typically not an element of the due process claim because the issue focuses on the likelihood that the nondisclosure has prejudiced the defendant.\textsuperscript{51} The damage done to the defense occurs irrespective of the prosecutor's intent, assuming that the accused can demonstrate that disclosure could reasonably have resulted in a likelihood that he would have obtained a more favorable result in the proceedings.\textsuperscript{52} The violation is predicated on likelihood of injury to the accused, rather than the need for sanctions to promote compliance with the disclosure obligation.\textsuperscript{53}

\textsuperscript{49} \textit{Kyles}, 514 U.S. at 437 (stating that "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached").

\textsuperscript{50} \textit{Id.} at 436-37 (citing United States v. Bagley, 473 U.S. 667 (1985)).

\textsuperscript{51} \textit{E.g.}, Illinois v. Fisher, 540 U.S. 544, 547 (2004) (per curiam) (citing United States v. Agurs, 427 U.S. 97 (1976)); Brady v. Maryland, 373 U.S. 83 (1963) (stating that "when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld").

\textsuperscript{52} \textit{See, e.g.}, United States v. Agurs, 427 U.S. 97, 110 (1976). In \textit{Agurs}, the Court reiterated the focus of its concern for due process: "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." \textit{Id.}

\textsuperscript{53} \textit{See id.; see also Brady}, 373 U.S. at 87 (stating the principle underlying mandatory disclosure of favorable evidence is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair"). As noted earlier, the \textit{Agurs} Court observed that in many cases, "exculpatory information in the possession of the prosecutor may be unknown to defense counsel." \textit{Agurs}, 427 U.S. at 110. This observation seems almost unnecessary, of course, since if the information is actually known to defense counsel, there would be no need for disclosure and, consequently, no violation for failure to disclose. But the existence of the evidence might well be known, yet without complete
Green reflects a more significant violation of due process than Brady, even though both involved a failure to disclose the incriminating statement of an accomplice co-defendant that would have cast the accused in a more favorable light before the capital trial jury. In Brady, co-defendant Boblit admitted that he committed the murder, and this statement was withheld from the defense by the prosecution. This statement, though favorable to the defendant, did not completely exonerate him; Brady remained culpable in the commission of the underlying felony and, thus, the capital felony murder.

In contrast, in Green, the State used the son’s testimony at trial to incriminate his father while his prior statement—undisclosed—completely exonerated the father in the commission of the capital crimes. Not only did the State fail to disclose the exculpatory statement, but its negotiated agreement with the son was a critical component of its case; the State proceeded to trial without ever admitting its own knowledge of the accused’s innocence.

III. REMEDIES FOR BRADY MISCONDUCT IN LIGHT OF GREEN

In limited circumstances, tort remedies are available for official misconduct that violates civil rights protected by federal or state law, or by basic common law principles in the disclosure, defense counsel might be compromised by her inability to use the exculpatory evidence for further investigation, or unable to lay a foundation necessary for its admission at trial.

54. Compare Brady, 373 U.S. at 84 (discussing a defendant’s admission to participating in the underlying crime, and the prosecution’s nondisclosure of a co-defendant’s admission that he committed the actual homicide), with Green II, 2011 Ark. 92, at 2-3, 380 S.W.3d 368, 370-71 (discussing the prosecution’s nondisclosure of a witness’s admission that he committed murder, and that defendant took no part in the crime).

55. Brady, 373 U.S. at 84.
56. Id.
58. Id.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or
absence of statutory protection. However, while civil rights litigation can be potentially productive for redressing violations of individual rights by state actors, the absolute immunity of prosecutors engaged in the prosecutorial function shields them from virtually any civil liability for Brady-based misconduct. In Imbler v. Pachtman, the Court applied the immunity doctrine to bar recovery in a civil suit alleging that the prosecutor in a capital murder trial had knowingly relied on misleading or false evidence in obtaining the conviction and death sentence. Imbler eventually obtained habeas relief on his misconduct claim, and then brought a Section 1983 action against Pachtman, the prosecutor who voluntarily disclosed evidence developed after the trial and appeal which casted doubt on the credibility of the state’s key fact witness at Imbler’s trial.

The doctrine of absolute immunity for prosecutors engaging in the prosecution function insulates prosecutors from civil liability for even egregious acts of misconduct, such as deliberate suppression of evidence clearly exculpating an accused. For instance, in Buckley v. Fitzsimmons, the Court

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .


60. Ark. Code Ann. § 16-123-105(a) (Repl. 2006), for example, provides:

(a) Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.


64. Id. at 415; see also Imbler v. Craven, 298 F. Supp. 795, 812 (C.D. Cal. 1969), aff’d, Imbler v. California, 424 F.2d 631 (9th Cir. 1970) (granting habeas relief). Imbler’s death sentence for capital murder had earlier been vacated in another post-conviction proceeding. In re Imbler, 393 P.2d 687, 688 (Cal. 1964) (en banc).


67. Arkansas has adopted the doctrine of absolute immunity for the prosecutor’s performance of duties associated or arising from the prosecution of criminal cases. Culpepper v. Smith, 302 Ark. 558, 572, 792 S.W.2d 293, 300 (1990). However, the doctrine is limited to only those functions and not, for instance, where the prosecutor
affirmed the applicability of the doctrine to actions during the actual prosecution process, while limiting the immunity theory to qualified immunity for other actions by prosecutors, such as in making statements to the press.\textsuperscript{68} In \textit{Buckley}, the defendant was effectively exonerated on a capital murder charge when prosecutors used unreliable forensic testimony to match the defendant's footprint with one recovered from the murder scene.\textsuperscript{69} The Court concluded that the involvement of prosecutors in obtaining the questionable expert opinion, predating the indictment against Buckley, would not qualify for absolute immunity, but they might nevertheless be entitled to the qualified immunity provided to all public officials.\textsuperscript{70} The net result of the litigation was the Seventh Circuit's conclusion on remand that prosecutorial misconduct in the course of the actual prosecution of the case would receive absolute immunity, apparently including even the knowing use of perjured testimony to obtain a conviction.\textsuperscript{71}

A. Green's Double Jeopardy Claim

In response to the discovery of Chad Green's previously undisclosed statement that completely contradicted his trial testimony, defense counsel sought relief from the retrial ordered by the Arkansas Supreme Court by filing a motion to dismiss the pending capital charges based upon prior jeopardy protection.\textsuperscript{72}

\textit{swears to an affidavit in a fashion similar to a witness. Newton v. Etoch, 332 Ark. 325, 338-39, 965 S.W.2d 96, 102-03 (1998).} 
\textsuperscript{68} 509 U.S. 259, 269-70, 276-78 (1993).
\textsuperscript{69} \textit{Id.} at 262.
\textsuperscript{70} The Court explained:

\textit{[T]he prosecutors' conduct occurred well before they could properly claim to be acting as advocates. Respondents have not cited any authority that supports an argument that a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law, either in 1871 or at any date before the enactment of § 1983. It therefore remains protected only by qualified immunity.}

\textit{Id. at 275 (emphasis added).}

In contrast, the prosecutors in \textit{Green} did not disclose to defense counsel the prior inconsistent statement of Chad Green, exculpating his father, until after the case against Billy Dale Green had been filed. Green \textit{II}, 2011 Ark. 92, at 2, 380 S.W.3d 368, 370.

\textsuperscript{71} Buckley v. Fitzsimmons, 20 F.3d 789, 794 (7th Cir. 1994) ("But Buckley does not allege concealment [of an agreement by the Government to pay for witness testimony] at trial, which would in any event be comfortably within the scope of absolute prosecutorial immunity . . . .").

\textsuperscript{72} \textit{Green II}, 2011 Ark. 92, at 2-3, 380 S.W.3d at 370.
Counsel argued that the prosecution’s failure to disclose Chad Green’s prior inconsistent statement critical to impeach his trial testimony was such an egregious violation that the defendant should not be subject to retrial. Arguably, of course, Billy Dale Green might have been acquitted had jurors concluded that the prosecution’s entire case was based on Chad Green’s self-interest in accusing his father of a murder that he, himself, had committed, and testimony from other witnesses whose self-interest or antagonism toward Green would lead them to falsely accuse him. Viewed in this light, Billy Dale Green was effectively deprived of an opportunity for acquittal that would have freed him finally from jeopardy.

A second, and more subtle, consideration for applying double jeopardy protection in circumstances such as these addresses the integrity of the criminal process, rather than speculating on the potential acquittal—or life sentences, rather than death—that might have resulted had the defense been able to use Chad Green’s prior, inconsistent, and self-inculpatory statement to impeach his trial testimony. Here, the overriding concern lies in protecting individuals from oppressive tactics used by the State, through its prosecuting attorneys, in order to obtain convictions, especially for particularly heinous criminal acts. Similarly, unethical or unfair prosecution tactics should not be tolerated simply because the accused’s character or prior history of bad or violent acts, or advocacy of unpopular beliefs or positions, may contribute to that misconduct.

A third consideration is that underlying the Supreme Court’s decision in Abney v. United States—the stress felt by the accused while awaiting disposition of a criminal charge. This

73. Id. at 2, 380 S.W.3d at 370.

74. By analogy, in Von Moltke v. Gillies, the Court applied the constitutional right to assistance of counsel for a German defendant charged with espionage during World War II, holding that “[t]his Court has been particularly solicitous to see that this right was carefully preserved where the accused was ignorant and uneducated, was kept under close surveillance, and was the object of widespread public hostility.” 332 U.S. 708, 720 (1948). In granting relief, the majority pointed to the need to protect the right to counsel, “even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.” Id. at 726.

75. 431 U.S. 651, 661 (1977) (“[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction.”).
is a particularly important factor warranting against twice being
tried, not simply convicted multiple times,\textsuperscript{76} or convicted after
being acquitted,\textsuperscript{77} or being subjected to repeated prosecutions or
trials resulting in inconsistent verdicts.\textsuperscript{78}

B. Federal Double Jeopardy Protection in Light of \textit{Oregon v. Kennedy}

Because Billy Dale Green had already obtained a new trial
as a result of the court’s reversal of his conviction and sentences
due to the admission of inadmissible evidence of his reputation
for violence, he was afforded the most basic relief required for
redress of a \textit{Brady} violation.\textsuperscript{79} Despite the Supreme Court’s
obvious concern for the stress suffered by defendants,\textsuperscript{80} it has
only viewed prosecutor or police misconduct as warranting
double jeopardy protection to bar further prosecution in one
instance. In \textit{Oregon v. Kennedy}, the Court held that when the
prosecution goads the defense into moving for mistrial through
deliberate and repeated misconduct, the mistrial, if granted, does

\textsuperscript{76} Conviction on a greater offense bars retrial on lesser-included offenses. \textit{See}
\textit{Harris v. Oklahoma}, 433 U.S. 682, 682 (1977) (per curiam); \textit{see also Payne v. Virginia},
468 U.S. 1062 (1984) (per curiam) (conviction for felony murder bars retrial for an
underlying felony); \textit{Brown v. Ohio}, 432 U.S. 161, 169 (1977) (conviction on a lesser-
included offense bars successive prosecution for a greater offense when the facts necessary
to prove the greater-included offense were the same as those of the lesser-included
offense).

\textsuperscript{77} An acquittal terminates jeopardy on the charges tried. An acquittal may occur by
court decree or jury verdict, as in \textit{Smith v. Massachusetts}, 543 U.S. 462, 466-67 (2005), or
where a trial is terminated because of lack of evidence, as in \textit{United States v. Martin Linen
Supply Co.}, 430 U.S. 564, 565-66 (1977), or where a conviction is reversed on appeal due
to insufficient evidence, as in \textit{Burks v. United States}, 437 U.S. 1, 18 (1978) and \textit{Greene v.
Massey}, 437 U.S. 24, 24 (1978) (applying \textit{Burks}). The double jeopardy protection afforded
by the Fifth Amendment was made applicable in state prosecutions in \textit{Benton v. Maryland},
395 U.S. 784, 793-96 (1969). Prior to that, a state-court defendant acquitted at trial could
be retried and convicted without protection from multiple prosecutions. \textit{Palko v.
Connecticut}, 302 U.S. 319, 321-22 (1937). \textit{Palko} was convicted of second-degree murder,
an implicit acquittal on the charge of first-degree murder, at his first trial. \textit{Id.} at 320-21.

\textsuperscript{78} See \textit{Turner v. Arkansas}, 407 U.S. 366, 368-70 (1972) (per curiam) (showing that
acquittal on the greater offense of murder bars subsequent prosecution for an included
offense of robbery where acquittal is based on a fact issue common to both charges); \textit{Ashe
successive prosecutions following acquittal on a common issue of fact).

\textsuperscript{79} \textit{Green II}, 2011 Ark. 92, at 1-2, 380 S.W.3d 368, 369-70.

trigger the bar. The majority rejected the argument that other misconduct requires similar treatment.

The Court's very limited application of the prior jeopardy bar in Oregon v. Kennedy effectively barred Green's reliance on the double jeopardy protection. Since a motion for mistrial typically involves waiver of the prior jeopardy claim when made by the accused, the Court's exception in Kennedy addressed the rare situation in which the motion made by the accused can be traced to deliberate action by the prosecution designed to force termination of the proceedings had the State, itself, moved for mistrial. But mistrial made on motion of the accused may result from repeated, egregious action by the prosecution that is so prejudicial to the accused's right to fair trial that the trial court's rulings could not effectively protect him from the prosecutor's misconduct. The Kennedy majority, however, refused to endorse an extension of double jeopardy protection to cover such situations, finding there were no standards by which courts could be guided in determining when prosecutorial misconduct warrants barring further proceedings.

82. Id.
83. Green II, 2011 Ark. 92, at 9-12, 380 S.W.3d at 373-75.
84. Kennedy, 456 U.S. at 672.
85. Id. at 675-76. In such circumstances, the Court's concern is that the prosecution has goaded the accused into moving for mistrial out of fear that the jury will acquit. See United States v. Dinitz, 424 U.S. 600, 611 (1976); United States v. Tateo, 377 U.S. 463, 468 n.3 (1964). In general, mistrial granted on the State's motion bars further proceedings unless manifestly necessary for the mistrial. Dinitz, 424 U.S. at 606-07. Although the trial court has discretion to order mistrial, the improvident exercise of that discretion based on misunderstanding of controlling legal principles may trigger the protection afforded by constitutional protection against double jeopardy. E.g., Jaynes v. State, 66 Ark. App. 43, 47-48, 987 S.W.2d 751, 754 (1999) ("[A] manifestly incorrect decision to grant a mistrial will bar subsequent prosecution."). In Jaynes, the Arkansas Court of Appeals applied the prior jeopardy doctrine where the trial court ordered a mistrial based on the State's objection to defense counsel's opening statement that included counsel's reference to the anticipated evidence that would be offered at trial. Id. at 44-45, 48, 987 S.W.3d at 752-54. The Arkansas Court of Appeals agreed that mistrial had been improvidently ordered and that a retrial of Jaynes on the same charge violated the protection against prior or double jeopardy. Id. at 48, 987 S.W.2d at 754.
86. E.g., Berger v. United States, 295 U.S. 78, 85 (1935) ("The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken.").
Stevens, dissenting, argued for a more expansive view of the protection:

A broader objection to the Court’s limitation of the exception is that the rationale for the exception extends beyond the situation in which the prosecutor intends to provoke a mistrial. There are other situations in which the defendant’s double jeopardy interests outweigh society’s interest in obtaining a judgment on the merits even though the defendant has moved for a mistrial. For example, a prosecutor may be interested in putting the defendant through the embarrassment, expense, and ordeal of criminal proceedings even if he cannot obtain a conviction. In such a case, with the purpose of harassing the defendant the prosecutor may commit repeated prejudicial errors and be indifferent between a mistrial or mistrials and an unsustainable conviction or convictions. Another example is when the prosecutor seeks to inject enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction. This kind of overreaching would not be covered by the Court’s standard because, by hypothesis, the prosecutor’s intent is to obtain a conviction, not to provoke a mistrial. Yet the defendant’s choice—to continue the tainted proceeding or to abort it and begin anew—can be just as “hollow” in this situation as when the prosecutor intends to provoke a mistrial.88

In moving for relief for the prosecution’s failure to disclose Chad Green’s statement exculpating his father, Green’s counsel on interlocutory appeal sought to expand upon the relief provided by Oregon v. Kennedy.89 While not expressly advancing state constitutional law in support of the prior jeopardy claims, Green’s counsel offered significant decisions from other jurisdictions in arguing for a bar to retrial.90 In addressing the double jeopardy claim, the Arkansas Supreme Court noted Green’s reliance on decisions from state courts in Arizona, Hawaii, New Mexico, Oregon, and Pennsylvania, in which the basis for the prior jeopardy bar had been extended beyond the doctrinal confines of Oregon v. Kennedy, including

88. Id. at 689 (Stevens, J., concurring) (footnotes omitted).
90. Id. at 4-5, 380 S.W.3d at 371.
the Oregon Supreme Court’s decision on remand from the Supreme Court in *Kennedy*.  

C. State Constitutional Double Jeopardy Protection

On remand from the Supreme Court’s decision in *Oregon v. Kennedy*, the Oregon Supreme Court engaged in a lengthy analysis of the proper application of state constitutional law. The court addressed arguments that certain state constitutional protections are, in some instances, more expansive than those afforded by the federal constitution. Then, addressing the scope of the protection afforded individuals by the Oregon provision barring successive prosecutions in light of the jeopardy principle, the court concluded:

[A] retrial is barred by article I, section 12, of the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. When this occurs, it is clear that the burden of a second trial is not attributable to the defendant’s preference for a new trial over completing the trial infected by an error. Rather, it results from the state’s readiness, though perhaps not calculated intent, to force the defendant to such a choice.

D. Expanded Double Jeopardy Protection Under the Arkansas Constitution?

Green’s counsel cited to decisions from other jurisdictions that expanded upon the protection against double jeopardy in an attempt to influence the Arkansas Supreme Court to do the

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91. *Id.* at 4-6, 380 S.W.3d at 371.
92. *State v. Kennedy*, 666 P.2d 1316, 1322-26 (Or. 1983). Oregon has traditionally been one of the most active jurisdictions in the development of state constitutional law. The activist approach taken by the Oregon Supreme Court has generated a substantial body of scholarly comment addressing the impact of its decisions. See, for example, Hans A. Linde, *What is a Constitution, What is Not, and Why Does it Matter?*, 87 OR. L. REV. 717 (2008), authored by a former Oregon Supreme Court Justice who was at the forefront of much of the development of state constitutional law theory. See also Jack L. Landau, *Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law*, 43 WILLAMETTE L. REV. 251 (2007) (documenting Justice Linde’s contributions to the development of Oregon constitutional law).
94. *Id.* at 1326.
same. However, in arguing for this more expansive interpretation, Green's counsel apparently did not advance a separate argument phrased in terms of the double jeopardy protection afforded by the state constitution. Nevertheless, two different sources of support for a more expansive reading of the state constitution were relevant to the disposition of the claim. First, the Arkansas Supreme Court developed state constitutional law theory in the recent past, expanding, for instance, upon federal constitutional protections afforded criminal defendants. Second, Arkansas law already afforded

95. For a general discussion of the use of the Arkansas Constitution in developing a theory of state law that may afford defendants greater protection than that afforded by the federal constitution, at least in some contexts, see Robert L. Brown, Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way, 4 J. APP. PRAC. & PROCESS 499 (2002).

96. Green II, 2011 Ark. 92, at 12, 380 S.W.3d at 375 ("[W]hile appellant asks this court to follow other states that have expanded their double jeopardy protections in this context, appellant has failed to articulate an argument based on this state's double jeopardy jurisprudence and does not even cite to the Arkansas Constitution in his argument."). The relevant provision in the Arkansas Constitution states, "[N]o person, for the same offense, shall be twice put in jeopardy of life or liberty." ARK. CONST. art. 2, § 8.

97. For example, the Arkansas Supreme Court recognized the rights of consenting adults to engage in homosexual relations under the Arkansas Constitution by striking down the state's sodomy law in Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002), prior to the United States Supreme Court's same result in Lawrence v. Texas, 539 U.S. 558 (2003).

98. In Rikard v. State, the court summarized its development of state constitutional doctrine diverging from federal constitutional protection, stating:

This court has recently imposed greater restrictions on police activities than the United States Constitution in three cases based on our own state law. See, e.g., Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002) (sodomy statute infringes on right to privacy under various sections of Arkansas Constitution); State v. Sullivan, 348 Ark. 647, 74 S.W.3d 215 (2002) (pretextual arrest illegal under Art. 2, § 15, of Arkansas Constitution); Griffin v. State, 347 Ark. 788, 67 S.W.3d 582 (2002) (nighttime incursions on a defendant's curtilage illegal under Art. 2, § 15, of Arkansas Constitution). Despite doing so, this court noted in Sullivan, that "there are occasions and contexts in which federal Fourth Amendment interpretation provides adequate protections against unreasonable law enforcement conduct; however, there are also occasions when this court will provide more protection under the Arkansas Constitution than that provided by the federal courts." 348 Ark. at 652, 74 S.W.3d at 218. Furthermore, we observed in Sullivan that one "pivotal inquiry" is "whether this court has traditionally viewed an issue differently than the federal courts." Id., 74 S.W.3d at 218.

354 Ark. 345, 353, 123 S.W.3d 114, 118-19 (2003). The court also relied on the state constitution in expanding protection of the home during nighttime searches, requiring police to engage in a more restrictive "knock and talk" procedure than that required by the Fourth Amendment. State v. Brown, 356 Ark. 460, 467-74, 156 S.W.3d 722, 727-32 (2004). However, the Brown court also admitted a need to exercise caution in expanding reliance on state constitutional protections in departing from United States Supreme Court
greater protection than the Supreme Court for an accused’s right to avoid multiple prosecutions. By statute, Arkansas bars subsequent prosecution in state court following prosecutions in federal court or courts of other states that are not precluded as a matter of “dual sovereignty” under the Fifth Amendment.99

In assessing the petitioner’s claim, the Green II court discussed the Pennsylvania Supreme Court’s reliance on its state constitution to apply the prior jeopardy bar.100 Similar to Green II, in Commonwealth v. Smith, the Pennsylvania court addressed a double jeopardy claim in a murder prosecution, albeit one in which the reviewing court found what might be seen as far more egregious violations of the disclosure duty than apparent in Green.101 Interestingly, the procedural histories of the two cases are parallel; in both, the conviction rested on improperly admitted hearsay and only after the new trial was ordered did the defense learn of the prosecutor’s suppression of favorable evidence.102 In Smith, both the State and its key witness denied the existence of an agreement exchanging testimony for lenient sentencing for the witness’s unrelated crimes.103 Such an agreement did, in fact, exist, and the State’s denial precluded the defense from impeaching the witness’s “veracity by exposing his motivation to testify falsely against [the defendant] in order to minimize his own punishment.”104

99. ARK. CODE ANN. § 5-1-114(1) (Repl. 2013). The Dual Sovereignty Doctrine permits successive prosecutions by different sovereigns for the same offense or conduct as an exception to the double jeopardy bar. See Bartkus v. Illinois, 359 U.S. 121, 136-38 (1959) (stating an acquittal on a bank robbery charge, in federal court, does not bar prosecution for the same crime in state court); see also Heath v. Alabama, 474 U.S. 82, 91-94 (1985) (holding a prosecution and imposition of death sentence in Alabama was not barred by prior conviction for capital murder on negotiated plea of life sentence in Georgia where capital offense commenced with kidnapping in Alabama and concluded with murder-for-hire in Georgia); Abbate v. United States, 359 U.S. 187, 193-94 (1959).


103. Smith, 615 A.2d at 322-23.

104. Id. at 323. The court found that the failure to correct the witness’s false testimony was intentional, not inadvertent. Id. ("[T]he Commonwealth deliberately denied
In addition to the failure to correct the false testimony of its cooperating witness, the prosecution in *Smith* also suppressed physical evidence: sand located on the body of the deceased, which could have substantiated the defense’s theory regarding the location of the murder and undermined the prosecution’s theory of the crime. Because the discovery of the favorable evidence was made only after new trial had been ordered on direct appeal, Smith sought the protection of the double jeopardy bar to correct the prosecutor’s violation.

In contrast to *Green*, the prosecution’s misconduct in *Smith* extended beyond the initial disclosure failure to an extended cover-up that was itself so egregious as to constitute misconduct warranting relief from continued jeopardy for the defendant. Prosecutors denied the existence of the “sand” evidence, advancing the theory that the state trooper who testified at Smith’s trial that he had “lifted” the sand from the body had actually lied about the evidence, suggesting that he might be subject to prosecution for perjury. Later, during the course of trial, when the missing “lifters” (which the trooper had testified he used to recover what he believed to be sand from the victim’s body) were discovered in the police evidence locker, prosecutors suppressed the discovery of the physical evidence.

Despite Pennsylvania precedent holding that the double jeopardy remedy was circumscribed by the Supreme Court’s opinion in *Kennedy*, the *Smith* court ruled that the egregious misconduct by the prosecution warranted application of the bar
as a matter of Pennsylvania constitutional protection. The Smith court rested its reasoning, at least in part, on the Kennedy decision’s retraction of its previous and more expansive view of the protection afforded based on prior jeopardy. It noted that under United States v. Dinitz, the Court explained:

The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where bad-faith conduct by judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant.

The Smith court noted that Pennsylvania courts followed the Supreme Court’s lead in Dinitz, then characterized the Kennedy Court’s limitation of the federal constitutional bar to situations in which the prosecution deliberately goaded the defense into moving for mistrial caustically as done under the “guise of simplifying and clarifying the principle.” Finding that the prosecutor’s misconduct in the case “violates all principles of justice and fairness embodied in the Pennsylvania Constitution’s double jeopardy clause,” the court held that the state constitution’s double jeopardy clause precluded a retrial.

The Arkansas court, however, declined Green’s invitation to broaden double jeopardy protection beyond that afforded in Kennedy. Instead of following the lead of those state courts that applied state law more broadly, and while clearly acknowledging the Pennsylvania court’s rationale for doing so on the facts in Smith, the Green court chose to remain consistent with Kennedy in its application of double jeopardy principles, noting that other jurisdictions had done so, even when facing facts comparable to those in Smith. Moreover, the court

111. Smith, 615 A.2d at 324.
112. 424 U.S. 600 (1976) (citation omitted).
113. Smith, 615 A.2d at 324 (citing Commonwealth v. Starks, 416 A.2d 498, 500 (Pa. 1980)).
114. Id.
115. Id. at 324-25.
116. Green II, 2011 Ark. 92, at 5, 9-12, 380 S.W.3d 368, 371, 373-75. The court noted that the Alabama Court of Criminal Appeals reversed a trial court order barring retrial of a death penalty conviction in State v. Moore, 969 So. 2d 169 (Ala. Crim. App. 2006), where the prosecutor had suppressed exculpatory evidence and had lied to the trial

...
observed that it had expressly committed to the *Kennedy* test in prior decisions, including *Jackson v. State*, where the court cited *Kennedy* in declining to extend the double jeopardy bar based on a mistrial granted on the basis of the prosecution’s misconduct in making a prejudicial comment during its opening statement.\textsuperscript{117} While the defense in *Jackson* argued that the prosecutor’s misconduct was necessary to obtain a mistrial when it needed another continuance, the Arkansas Supreme Court accepted the trial court’s findings that the mistrial was not the result of bad faith or intention to provoke the defense into moving for mistrial.\textsuperscript{118}

Given that other jurisdictions continued to recognize *Kennedy* as controlling on the question of the scope of double jeopardy protection when the record shows misconduct by the prosecutor that cannot be shown to have resulted from deliberate intention of goading the accused into moving for mistrial, the *Green* court found it appropriate to adopt a conservative tack in holding that the new trial already ordered on direct appeal adequately addressed the question of misconduct.\textsuperscript{119} But there was likely an additional factor that cautioned against a departure from the usual remedy in such cases: unlike the facts in *Smith* which prompted the Pennsylvania court to not feel constrained by *Kennedy*, there was not sufficient certainty that the misconduct in failing to disclose Chad Green’s prior inconsistent court by denying the existence of the evidence. *Green II*, 2011 Ark. 92, at 9, 380 S.W.3d at 373. The court held that because there was no suggestion that the prosecutor goaded the state into moving for mistrial, there was no authority to expand the protection beyond that recognized in *Kennedy*. *Id.* (citing State v. Moore, 969 So. 2d 169, 180-81 (Ala. Crim. App. 2006)). The Alabama court concluded that “[t]he prosecutor’s withholding of exculpatory evidence from the defendant may only be characterized as an overzealous effort to gain a conviction from the first jury and not as an attempt to subvert [the defendant’s] ‘valued right’ by bringing the case before a second jury.” *Id.* at 9-10, 380 S.W.3d at 373 (alteration in original) (quoting State v. Moore, 969 So. 2d 169, 180-81 (Ala. Crim. App. 2006)); see also State v. Morton, 153 P.3d 532, 538-39 (Kan. 2007) (holding that *Kennedy* requires proof of the prosecutor’s intention in provoking mistrial to force the accused into “sacrificing his or her choice to live with the outcome from the first jury”); State v. Barton, 240 S.W.3d 693, 702 (Mo. 2007) (en banc) (refusing to bar retrial where the prosecutor failed to disclose the criminal history of its witness and also failed to correct perjured testimony).

\textsuperscript{117} *Green II*, 2011 Ark. 92, at 6-7, 380 S.W.3d at 372 (citing Jackson v. State, 322 Ark. 710, 911 S.W.2d 578 (1995)).

\textsuperscript{118} *Id.*

\textsuperscript{119} *Id.* at 12, 380 S.W.3d at 375 (“Appellant has received a new trial and thus has received the relief to which he is entitled.”).
The statement was deliberate or reflected bad faith. The majority noted that “there was disagreement between the parties over whether the prosecution acted intentionally or the non-disclosure was inadvertent, or in the words of the State, a ‘slip-up.’”

Justice Paul Danielson dissented. He agreed with the Pennsylvania court in Smith and observed that, regardless of the intent of the prosecutors in not disclosing Chad Green’s prior inconsistent statement, their action “[a]t the absolute least . . . prevented Green from a possible acquittal. For this, the sole remedy, I believe, would be a dismissal of the charges.”

The divide between the majority and Justice Danielson illustrates the significant policy implications of the double jeopardy protection in particularly serious criminal cases. In fact, the Smith court referred to the murder involved there as an “infamous murder case” and phrased its grant of relief as “compelled.” Similarly, the capital charge in the Green trilogy involved the murders of parents and their six-year old son and eight-year old daughter. Under Arkansas law, these facts would support affirmative findings on at least two aggravating circumstances necessary for imposition of a capital sentence.

The imposition of the prior jeopardy bar to preclude retrial or further prosecution in any criminal action necessarily means that the individual defendant’s right to protection from multiple prosecutions will override the public’s legitimate expectation that criminal acts be punished and, at least in theory, that prosecution, conviction, and punishment will deter others from committing crimes. This is a particularly difficult trade-off when the accused will not face retrial—and therefore the

120. Id.
121. Id.
123. Id. at 16, 380 S.W.3d at 377.
126. ARK. CODE ANN. § 5-4-603(a)(1)-(3) (Repl. 2013) (authorizing the death sentence only if aggravating circumstances, as found by the jury, outweigh all mitigating circumstances and justify the death sentence); ARK. CODE ANN. § 5-4-604(4) (Repl. 2013) (death of more than one person in same criminal episode); ARK. CODE ANN. § 5-4-604(10)(B) (Repl. 2013) (victim “twelve (12) years of age or younger”).
127. For a thoughtful discussion of the “balanc[ing] [of] two primary and sometimes countervailing interests underlying double jeopardy—defendants’ interests and societal interests,” see State v. Rogan, 984 P.2d 1231, 1242-44 (Haw. 1999).
possibility of punishment—for a violent offense or one where the circumstances, such as the age or infirmity of the victim or sheer brutality of the crime, not only implicate a critical need for deterrence, but also a legitimate public and private demand for retribution. Capital crimes, virtually by definition, involve the greatest demand for both deterrence and retribution precisely because they are reserved for the use of the death penalty.

One of the factors that courts may well consider in deciding whether to expand upon *Kennedy* and fashion a double jeopardy remedy under state law for *Brady* or other misconduct could arguably be the strength of the prosecution’s case. But the problem with this approach is that the remedy for a *Brady* violation itself requires an evaluation of the strength (though not the sufficiency) of the prosecution’s case, since relief is required only if the defense can demonstrate that disclosure would have resulted in a reasonable probability of a different outcome. Where, for instance, nondisclosure might lead to a compelling inference that the prosecutor or police failed to disclose for fear that the undisclosed evidence might have compromised the chances for conviction or a substantial sentence, such as a statutory maximum term of imprisonment or a death sentence, the evidentiary calculation should almost certainly result in relief.

Yet, this very approach suggests that prosecutors could rationally risk new trial in the long run—particularly if

128. The law recognizes the private nature of an offense and reasonable need for those intimately affected by the crime to express their personal sense of loss and outrage through victim impact testimony in the sentencing phase of trial. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 825, 827 (1991).

129. In *Rogan*, for instance, the misconduct did not involve a *Brady* violation, but the deliberate interjection of race-baiting in a prosecution of an African American defendant for the alleged sexual assault of a twelve-year old girl. *Rogan*, 984 P.2d at 1235, 1238. During closing arguments, the prosecutor argued, in part: “This is every mother's nightmare. Leave your daughter for an hour and a half, and you walk back in, and here's some black, military guy on top of your daughter.” *Id.* at 1238 (emphasis omitted). The court rejected any claim that the argument amounted to an acceptable response to the defense theory at trial because Rogan’s identity was not an issue in the case and, consequently, race was not a factor in the identification of the alleged perpetrator. *Id.* at 1240. Instead, the court condemned the argument in harsh terms, finding that such statements “represent a brazen attempt to subvert a criminal defendant’s right to trial by an impartial jury . . . . Such arguments foster jury bias through racial stereotypes and group predilections, thereby promoting an atmosphere that is inimical to the consideration of the evidence adduced at trial.” *Id.*

continuing suppression can be ensured—in favor of a conviction in the short run. Here, then, the issue of intent might be the critical factor since in a close case, the prosecution’s nondisclosure would be calculated to obtain conviction at the expense of the defendant’s right to due process. Where the evidence available to support the State’s theory of the case is not substantial, nondisclosure necessarily suggests, as Justice Danielson argued in his dissent in Green, that the prosecution’s intent was deliberately to obtain conviction at the cost of fairness to the defendant. Affording the prosecution a second opportunity to trial after disclosure and litigation of the issue in post-trial process fails to protect the accused’s right to fair trial by transforming the disclosure decision from one of constitutional duty to chance.

Moreover, if the defense never discovers the suppression or nondisclosure of the favorable evidence, it may never obtain relief from the unfair trial—a trial that might have resulted in acquittal had the evidence been disclosed—and the resulting sentence which never would have been imposed. It is here where the Kennedy limitation undermines the federal prior jeopardy guarantee—such a limitation may offer an incentive for prosecutors and police not to disclose evidence favorable to the accused in implicitly accepting the burden that eventual disclosure could lead to relief and, thus, retrial. A fair reading of the Fifth Amendment protection would lead one to conclude that the prosecution should not benefit from its own constitutional violation and still be permitted to proceed with successive prosecutions, but Kennedy opens the door to strategic decisions to approach the weak case in precisely such a manner.

On the other hand, misconduct might prove so egregious, such as the prosecution’s blatant appeal to racial prejudice of jurors, that even in the context of overwhelming evidence, the court should intervene to terminate the prosecution. In this situation, however, the application of the prior jeopardy bar

133. See id. at 689 (Stevens, J., concurring) (providing hypotheticals to illustrate the drawbacks of the majority opinion’s limited approach).
134. See Rogan, 984 P.2d at 1238-40.
would not reflect concern that the accused had been denied a fair chance for acquittal, but instead results from the need to address misconduct as a matter of maintaining the integrity of the judicial system. When retrial is barred for a nonviolent or relatively minor offense, the system’s interest in internal policing might well outweigh the public’s interests in retribution and deterrence. Much the same thing routinely happens during the plea bargaining process when cases are disposed of with little or no actual punishment when compared to the statutorily authorized maximum sentences that could be imposed because other factors, such as scarcity of judicial resources or prison space, weigh against trials or lengthy periods of incarceration. It also happens when the evidence supporting conviction is of questionable probative value or simply lacking, or the accused otherwise represents a less significant threat to public safety and order than other defendants.135

In a case involving a more severe crime, however, where the evidence supporting the accused’s guilt is overwhelming or substantial and the nondisclosure would not otherwise violate due process because of the “reasonable probability” of a different outcome requirement, the public’s interest in conviction may be unfairly compromised by the use of the double jeopardy protection to address the prosecutor’s misconduct indirectly. The problem posed by the conflicting interests of public expectation of punishment for crimes and ethical conduct of prosecutors is one that, almost necessarily, should focus on the prosecutor’s intent in the nondisclosure as a primary consideration for whether jeopardy should be terminated. To the contrary, however, Brady and later cases focus on the likely effect of nondisclosure and do not depend on any showing of bad faith or intent on the part of the prosecution.136

135. Some internal “policing” of the criminal justice system is likely essential to promote respect for the courts, even when the misconduct does not reflect major or substantial injustice. For instance, in Glover v. United States, the Court held that due to a mistake in calculating the sentencing range under then-mandatory federal sentencing guidelines, an ineffective assistance of counsel claim could rest on an error that amounted only to a matter of months in terms of the difference in sentence. 531 U.S. 198, 200, 204 (2001).

IV. THE GREEN COURT'S REMEDY: REFERRAL TO THE COMMITTEE ON PROFESSIONAL CONDUCT

The Green majority addressed the problem posed by the prosecutors' questionable intent, or bad faith, by referring those attorneys to the Committee on Professional Conduct "to determine whether any disciplinary action is warranted."\(^{137}\) The court did so questioning whether the Brady violation was merely a "slip-up," as the State argued.\(^{138}\) It did not personally condemn the prosecutors' failure to disclose Chad Green's inconsistent statement as deliberate or reflecting bad faith on their part, in contrast to the Pennsylvania court's assessment in Smith that "the record establishes the bad faith of the prosecution beyond any possibility of doubt; indeed, it would be hard to imagine more egregious prosecutorial tactics."\(^{139}\)

One additional consideration should be noted in evaluating the prosecutors' failure to disclose the exculpatory statement given by Chad Green. There is often an argument advanced that a prosecutor simply misinterpreted evidence in concluding that it was not exculpatory, or misunderstood the Brady test in concluding that the evidence could not have altered the outcome of the case and, thus, was not subject to disclosure. Regardless of any excuse for nondisclosure based on misunderstanding Brady, Rule 17.1 of the Arkansas Rules of Criminal Procedure unequivocally required the Green prosecutors to disclose all of Chad Green's statements. The rule requires prosecutors to disclose to the defense "any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant" that are in the prosecutor's possession, control, or knowledge.\(^{140}\) Chad Green was both a co-defendant and a witness the prosecutor intended to call at trial.\(^{141}\) Even assuming that the prosecutors were unaware of their duty under Brady, the state discovery rule unambiguously required disclosure upon counsel's request.\(^{142}\)

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138. Id.
140. ARK. R. CRIM. P. 17.1(a)(ii).
142. See ARK. R. CRIM. P. 17.1(a)(ii).
A. Justice Brown's Dissent Complaining of the Discipline Committee Referral

The referral of the Green prosecutors for disciplinary evaluation drew a dissent from Justice Robert Brown. While conceding that the disclosure failure was serious and warranted retrial, he still found the majority's referral ill advised. But unlike the majority, he included explanations from the prosecutors themselves to support his disagreement over the referral:

The prosecutor admitted that his failure to disclose was a Brady violation but then said “as an officer of the Court” that the failure was “a slip up” and “inadvertent” and was not intentional. The trial judge then found that he did not believe the prosecutor “hid the evidence.”

Later, a second prosecutor told the judge that when he read the second Chad Green statement, “it did not comport with his previous versions of the case” and was not helpful to the prosecution of Billy Dale Green. The prosecutor said once the proffer was made by Chad Green's attorney, he “simply forgot about it” and “it went out of my mind.”

This explanation of the facts is incomplete, however, because Justice Brown never fully explained the “proffer made by Chad Green’s attorney.” It likely relates directly to the proffer made in connection with Chad Green’s guilty plea in which he agreed to accept a lesser sentence in return for his testimony that would incriminate his father in the four capital murders. But it is not clear whether Chad Green's counsel referenced the prior inconsistent statement during the guilty-plea proceeding, or, in fact, why he would, since Arkansas law requires only that there be a factual basis for the plea, and compliance would only require a proffer, stipulation, or the

143. Green II, 2011 Ark. 92, at 12, 380 S.W.3d at 375 (Brown, J., concurring in part and dissenting in part).
144. Id. at 12-13, 380 S.W.3d at 375.
145. Id. at 13, 380 S.W.3d at 375.
146. Id.
147. Id. at 2-3, 380 S.W.3d at 370.
defendant's testimony confirming his guilt on the offense charged.\textsuperscript{148}

If, in fact, there was no reference to the prior inconsistent statement during Chad Green's plea, then it might be more reasonable to credit the prosecutor's testimony that he "simply forgot about it" in concentrating on the evidence Chad Green would be offering at trial.\textsuperscript{149} On the other hand, if it had been mentioned during the plea, it would seem far more difficult to credit the prosecutor's claimed defect of memory. In fairness to Justice Brown, he did not simply accept the prosecutors' explanations or trial court's finding that they had not engaged in intentional misconduct in "hiding of evidence."\textsuperscript{150} He explained:

The majority's opinion opens the door to referrals to the Committee for disciplinary action even for unintentional mistakes made by prosecutors during investigations. If the majority is referring the two prosecutors in this case to the Committee for negligence, will this court, henceforth, be referring all prosecutors involved in \emph{Brady} violations to the Committee for discipline, even when the conduct equates only to negligence? I dissent on this single point because it is an important one. Referring conduct to the Committee is a serious matter. The point needs to be clarified.\textsuperscript{151}

This explanation suggests that professional discipline is never appropriate for misconduct that "equates only to negligence," and therefore the court should not even consider referral to the Committee for negligent prosecutorial conduct.\textsuperscript{152} In suggesting that negligence should be insulated from review as unintentional deviation from professional norms, Justice Brown rests his apparent concern on the relevant standard adopted by the American Bar Association governing the conduct of prosecutors. That standard provides:

A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible

\begin{itemize}
\item \textsuperscript{148} Ark. R. Crim. P. 24.6 ("The court shall not enter a judgment upon a plea of guilty or nolo contendere without making such inquiry as will establish that there is a factual basis for the plea.").
\item \textsuperscript{149} \textit{Green II}, 2011 Ark. 92, at 13, 380 S.W.3d at 375.
\item \textsuperscript{150} \textit{ld.}
\item \textsuperscript{151} \textit{ld.} at 14-15, 380 S.W.3d at 376.
\item \textsuperscript{152} \textit{ld.}
\end{itemize}
opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.\textsuperscript{153}

While the ABA standard is couched in terms of intentional misconduct, it does not address the problem of negligent misconduct. Justice Brown found persuasive the Colorado Supreme Court's opinion in \textit{In re Attorney C}, an action involving discipline imposed upon a prosecutor for failing to timely disclose \textit{Brady} material.\textsuperscript{154} However, both the facts and nature of the violation involved in \textit{Attorney C} undermine Justice Brown's reliance on the Colorado decision when viewed in light of the nondisclosure in \textit{Green}.

\textbf{B. The Colorado Supreme Court's Requirement of Intentional Misconduct for Ethical Imposition of Ethical Sanctions}

At the outset, it should be noted that \textit{Attorney C} was a case of first impression in which the Colorado Supreme Court was called upon to determine at precisely what stage of the criminal process the prosecuting attorney must disclose evidence favorable to the accused.\textsuperscript{155} The court framed the issue as determining "the parameters of a prosecutor's ethical duty to disclose exculpatory material to the defense under Colo. RPC 3.8(d)."\textsuperscript{156} It held that the Colorado procedural rule "requires prosecutors to disclose exculpatory evidence to the defense in advance of any critical stage of the proceeding."\textsuperscript{157}

Thus, the sanction imposed in the prosecutor's case and ultimately overridden by the Colorado Supreme Court involved noncompliance with a state procedural rule.\textsuperscript{158} The prosecutor did not have the benefit of the court's interpretation of the rule requiring disclosure at any particular stage of the proceedings because the language of the rule itself refers only to "timely

\begin{thebibliography}{9}
\bibitem{153} \textit{Id.} at 14, 380 S.W.3d at 376 (citing Standard 3-3.11, in ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 81 (AM. BAR ASS'N, 3d ed. 1993)).
\bibitem{154} \textit{Green II}, 2011 Ark. 92, at 14, 380 S.W.3d at 376 (citing \textit{In re Attorney C}, 47 P.3d 1167, 1174 (Colo. 2002) (en banc)).
\bibitem{155} \textit{In re Attorney C}, 47 P.3d 1167, 1168 (Colo. 2002) (en banc).
\bibitem{156} \textit{Id.}
\bibitem{157} \textit{Id.}
\bibitem{158} \textit{Id.} at 1174-75.
\end{thebibliography}
disclosure.\textsuperscript{159} The court’s framing of the issue is critical to its holding the prosecutor liable for nondisclosure on the facts presented in the case. Attorney C’s misconduct is far different from that of the prosecutors in \textit{Green}, who failed to disclose the prior inconsistent statement of Chad Green prior to the capital trial, and who, in fact, conceded that they had violated the \textit{Brady} command.\textsuperscript{160}

Of particular importance, the prosecutor in \textit{Attorney C} disclosed the exculpatory evidence in both of the cases giving rise to her initial sanction by the disciplinary board prior to the defendants’ trials.\textsuperscript{161} In both cases, she failed to disclose exculpatory evidence prior to the preliminary hearing during which the accused was bound over for trial, but did so almost immediately after the hearings.\textsuperscript{162} In the first case, the prosecutor failed to disclose a handwritten recantation of the complainant’s claim that the accused had not pushed her to the ground, breaking her finger, but had merely bumped into her, which was consistent with the accused’s version of events.\textsuperscript{163}

In the second case, the trial court held that it would have bound the defendant over for trial even had it known of the complainant’s recantation of allegations that the defendant, her step brother, had engaged in oral/genital contact with her, because she testified at the hearing consistently with her allegations that her step brother had engaged in hand/genital and genital/genital contact.\textsuperscript{164} The prosecutor did not disclose the recantation prior to the preliminary hearing out of concern that her entire office might be disqualified from the case and her supervisor, notified of her concern, concurred in her decision.\textsuperscript{165} Even though the evidence was exculpatory, the trial court denied sanctions, reasoning that disclosure would not have altered the

\textsuperscript{159} \textit{COLO. RULES OF PROF’L CONDUCT} r. 3.8(d) (2015) (requiring criminal prosecutors to “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”).

\textsuperscript{160} \textit{Green II}, 2011 Ark. 92, at 2-3, 380 S.W.3d 368, 370.

\textsuperscript{161} \textit{Attorney C}, 47 P.3d at 1168-69.

\textsuperscript{162} \textit{Id}.

\textsuperscript{163} \textit{Id} at 1168.

\textsuperscript{164} \textit{Id} at 1169.

\textsuperscript{165} \textit{Id}.
outcome of the preliminary hearing.\textsuperscript{166} The Colorado court concluded that Attorney C’s actions were not intentional, and it adopted the language of the ABA Standard 3-3.11(a) in finding that discipline should not have been imposed absent her intent.\textsuperscript{167} Thus, even though the court specifically found that “the respondent made a conscious decision to delay disclosure in both cases until after those [preliminary hearings] concluded,” it did not find that Attorney C acted intentionally, as defined in the ABA Standards.\textsuperscript{168}

Proof of this standard for intent effectively insulates prosecutors from ethical sanctions for noncompliance with the Brady disclosure requirement because it requires proof that nondisclosure was not based on inadvertence or mistake in evaluating the exculpatory value of evidence, but actually calculated to result in conviction. Any dedicated prosecutor pursuing conviction and believing in the credibility of her witnesses, physical evidence, and theory of the case is likely to underestimate the potential for unfavorable evidence to influence jurors or trial judges in the outcome of the case. Despite the Kyles majority’s assumption that prosecutors will lean toward disclosure in close cases,\textsuperscript{169} the prosecutor herself may not find that unfavorable or conflicting evidence would meet the standard of probably resulting in a different outcome in the case if disclosed. In order to demonstrate sanctionable misconduct under the approach taken in Attorney C, there would almost certainly have to be an admission on the part of the

\textsuperscript{166} Attorney C, 47 P.3d at 1169. The Colorado Supreme Court rejected this approach and found, on the contrary:

We do not accept the argument that the evidence need only be disclosed in advance of a proceeding at which that evidence would be specifically determinative. Rather, we conclude that if evidence is material to the outcome of the trial, then the prosecutor must disclose that evidence in advance of the next critical stage of the proceeding—whether the evidence would particularly affect that hearing or not.

\textsuperscript{167} Id. at 1171.

\textsuperscript{168} Id. at 1173-74 (citing ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.11, which prohibit a prosecutor from “intentionally fail[ing] to make timely disclosure to the defense” of all exculpatory evidence). “Intentional” means having the “conscious objective or purpose to accomplish a particular result.” ABA STANDARDS FOR CRIMINAL JUSTICE § 6.2.

\textsuperscript{169} Attorney C, 47 P.3d at 1172, 1174.

prosecutor that her intent was to suppress evidence in order to obtain conviction.

Attorney C’s disclosure of the exculpatory evidence in the two cases before the Colorado disciplinary panel could hardly be calculated to obtain an unfair advantage at trial enhancing the prospects for conviction because she made the disclosures well in advance of trial.\textsuperscript{170} Only because the Colorado rule, as interpreted by the Colorado court, required disclosure at any “critical stage” in the proceedings—including the preliminary hearing—was the prosecutor in technical violation of the “timely” disclosure provision of the rule.\textsuperscript{171} The violation can be described as “technical” because, in lacking the required intent for imposition of sanctions, it could not be sustained.\textsuperscript{172}

Justice Brown’s reliance on Attorney C is, at best, premature because the Arkansas court had not articulated what level of culpability, negligence, knowledge or intent, must be demonstrated in order to establish an ethical breach by a prosecutor committing \textit{Brady} misconduct. He did characterize the problem he saw in the \textit{Green} majority’s referral to the disciplinary committee as inappropriate “when the conduct equates only to negligence,” however.\textsuperscript{173} He suggested that the referral itself amounts to discipline, apparently presupposing that a finding favorable to the prosecutors by the disciplinary authority would still amount to some type of sanction.\textsuperscript{174} But, then, how else could the appropriate authority, the disciplinary body in the jurisdiction, ever determine whether \textit{Brady} misconduct was the result of negligence, knowledge, or intent on the part of a non-disclosing prosecutor? To suggest that referrals should only be made when the prosecutor did not fail to act as a result of negligence, rather than with some greater degree of intent, would mean that the disciplinary process would not even be triggered unless the prosecutor had been shown to be more culpable than negligent in the nondisclosure. And, isn’t that the point of the investigative and, in appropriate cases,
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adjudication process in the first place—to make that determination?

C. Negligence and Ethical Violations

Apart from this procedural question, a substantive issue is raised by both Justice Brown’s dissent in *Green* and the opinion in *Attorney C*: why should discipline for ethical infractions relating to *Brady* misconduct be limited to proof of those reflecting intentional misconduct on the part of prosecutors? *Brady*-based due process violations are not predicated on proof of bad faith or intentional misconduct on the part of prosecutors, as the Supreme Court has consistently held. 175 This approach focuses on the injury to the accused’s right to fair trial and process, rather than serves as a basis for punishment of prosecutors resulting from their failures.

Once a *Brady* violation has been established—meaning that a nondisclosure has been found sufficiently prejudicial to warrant relief from a conviction or sentence imposed—the injury to the accused’s constitutional rights to fair trial and due process is implicit in that finding. A personal failure on the part of the prosecuting attorney, regardless of whether attributable to negligence or intent or an intermediate level of culpability, as opposed to a failure on the part of an investigator or other non-attorney member of the prosecuting team, has resulted in that constitutional violation. Certainly, in the process during which the nondisclosure claim is investigated and litigated, including the legal determination as to whether the nondisclosure was sufficiently prejudicial as to require relief, a finding that the prosecutor was not personally involved in the nondisclosure should not result in imposition of ethical sanctions against the prosecutor. This standard would preclude sanctions, so long as the responsible actor did not suppress the evidence at the direction of the prosecutor or in response to some directive suggesting that suppression by police would be tolerated. The difficulty in these latter circumstances would be to discern whether an unstated policy followed by the prosecutor’s office

promotes suppression of favorable evidence by non-attorney members of the prosecution team.\(^{176}\)

Not every negligent act on the part of a prosecuting attorney, even personally, should likely be subject to sanctions as an ethical violation through the jurisdiction’s disciplinary process, of course. Many instances of inadvertence or negligence by counsel in litigation simply do not suggest that the proceedings have been tainted, or that an opposing party has been treated so unfairly that the trial court’s curative action would be insufficient to address the problem. For instance, in criminal trials, an improper question posed to a witness or an improper line of argument during summation is typically subject to cure by timely and thorough instruction by the trial court and will not warrant termination of the trial.\(^{177}\) Sometimes, the prosecutor responds to defense counsel’s tactics at trial and,

\(^{176}\) In a sense, the prosecutor’s course of action in *In re Attorney C* suggests this scenario with respect to the second case reviewed—the prosecutor’s belated disclosure was itself approved by her supervisor, the district attorney. 47 P.3d at 1169. The court noted: “The respondent decided not to inform Buck of the changed version herself before the hearing because she was concerned that her whole office could be disqualified if Buck called her as a witness.” *Id.* She consulted her boss, the district attorney, who did not object to this course of action. *Id.* One could well argue that while Attorney C’s untimely disclosure should not warrant discipline, the supervisor’s conduct and decision-making should have been subjected to consideration by the disciplinary authority. *Id.* at 1173. The issue of office policy in the context of non-disclosure was the subject of a civil rights action in *Connick v. Thompson*, discussed in the next section of this article. 563 U.S. 51 (2011).

\(^{177}\) Even egregious misconduct in closing arguments may be cured by timely instruction by the trial court, particularly if the prosecutor’s improper argument has been suggested by the defense in its argument. *Darden*, the prosecutor engaged in a series of improprieties, including characterizing the defendant as an “animal,” stating that he wished the victim had “blown [the defendant’s] face off,” and that he could “see [the defendant] sitting here with no face, blown away by a shotgun.” *Id.* at 179-80 n.12. The *Darden* majority condemned the argument, but held that it was not sufficiently egregious to violate due process. *Id.* at 181. The trial court admonished jurors that the prosecutor’s argument did not constitute evidence, and the majority found it unlikely that the jury was unfairly influenced. *Id.* at 182. Finally the majority concluded that defense counsel was actually able to use the argument in a tactically sound manner in defusing jury passion against the accused. *Id.* at 182-83.

But, in *Caldwell v. Mississippi*, the Court vacated a death sentence based on the prosecutor’s improper argument that jurors should not worry about error in their sentencing decision because an appellate review would correct any impropriety. 472 U.S. 320, 323 (1985). The improper argument in *Caldwell* drew the majority’s attention because it undermined the credibility of the jury sentencing process itself in considering imposition of a death sentence. *Id.* at 340-41.
although the response might not otherwise be appropriate,\textsuperscript{178} it does not taint the proceedings such that termination of the trial is warranted, being characterized as having been invited by the defense.\textsuperscript{179} Or, the impropriety might simply reflect a lack of better judgment in a very passionate or hotly contested proceeding of the kind that we might expect from very seasoned and otherwise even-tempered lawyers because the reality of trial is that it is a form of intellectual and emotional combat.

Consider the definition of "negligence" adopted in the ABA Standards and cited with approval by the court in Attorney C:

Negligence is defined as "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." Negligent violation of a court order or rule presumptively occasions a reprimand or admonition, depending upon whether the conduct causes injury or potential injury to a client or to a legal proceeding.\textsuperscript{180}

Applying this standard to the conduct of the prosecutors in Green, it would be difficult not to find that they should be sanctioned in the disciplinary process because their "conduct cause[d] injury or potential injury" to both a client and the legal proceeding. Here, the injury to the client could relate to the State or to the accused, although the Standards may actually contemplate only misconduct resulting in injury to counsel's own client. Regardless, the legal proceeding has suffered injury whenever a Brady violation requires relief from a judgment in favor of the accused. That is also true when a violation triggers the bar of prior jeopardy to preclude further prosecution, as in Smith.

\textsuperscript{178} For example, a prosecutor cannot comment on a defendant's decision to remain silent and not testify at trial. Griffin v. California, 380 U.S. 609, 615 (1965). The defense is entitled to an instruction advising the jury that the defendant's silence may not be considered as evidence against him or otherwise in arriving at the verdict. Carter v. Kentucky, 450 U.S. 288, 303 (1981). But the prosecution may respond to defense counsel's argument that the government had not given the defendant a chance to explain facts. United States v. Robinson, 485 U.S. 25, 32-33 (1988).

\textsuperscript{179} See, e.g., United States v. Young, 470 U.S. 1, 8 (1985) (finding that it is improper for a prosecutor to express his or her personal opinion as to the accused's guilt, but may respond to an argument of opposing counsel).

\textsuperscript{180} In re Attorney C, 47 P.3d 1167, 1173 (Pa. 2002) (citation omitted) (quoting ABA Standard 6.2).
In *Green*, the interests of the State, the accused, and the court were all implicated by the prosecutors' failure to disclose the exculpatory statement made by Chad Green.\(^{181}\) Even though retrial had already been ordered by the Arkansas Supreme Court based on the improper admission of evidence at the capital trial, the integrity of the State's case and the defendant's perception of the fairness of the proceedings were compromised by the subsequent discovery of the undisclosed statement.\(^{182}\) Moreover, the published opinion responding to the dismissal motion based on double jeopardy grounds casts the prosecution's integrity and, perhaps in an important sense, the very credibility of its case against Green, in doubt—and in a public forum.\(^{183}\)

The suppression of evidence of significant value for impeachment of Chad Green's testimony at a retrial, coupled with the fact that other prosecution evidence adduced before the jury was inadmissible, created some doubt as to whether Green was guilty of the capital offenses—a doubt that might linger for some despite his eventual conviction. Almost more troubling is the very real possibility that the State's case would have been so corrupted by the prosecutors' misconduct that Green might well have avoided conviction. Because the public has a reasonable expectation that offenders will be prosecuted and convicted, the public's interest in the conviction of an offender who committed four murders, including the murder of two children, will be compromised if the nondisclosure ultimately undermines the prosecution's position so severely that retrial, or conviction upon retrial, is frustrated. The public's confidence in the ability of the criminal process to accomplish its intended objective would then be damaged as an unintended consequence of the *Brady* violation. Similarly, had Green, in fact, actually been innocent rather than "not guilty" of the capital crimes, then any moral vindication he might expect in an acquittal at trial would also likely have been compromised by public perception that his acquittal was the result of technicalities or the prosecutors' mistake in mishandling Chad Green's prior inconsistent statement.

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182. *Id.*
183. *Id.* at 2-3, 380 S.W.3d at 370.
In this respect, the misconduct of the prosecutors in *Green* surely warrants sanctions under the negligence definition set out in ABA Standard 6.2, assuming that their conduct reflects "the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." Here, the standard sets out the duty of the prosecutor without ambiguity.

**V. MISCONDUCT AND JEOPARDY: THE PROBLEM OF REMEDY**

In light of the clear and consistently applied principle of *Brady* and successive cases—that evidence in the possession of the prosecution must be disclosed if favorable to the accused, and that nondisclosure or suppression will result in a due process violation if it was reasonably probable that the result of the proceedings would have been different had the evidence been disclosed—Standard 6.2 establishes a very reasonable standard of care to be exercised by prosecutors. The admonition by the *Kyles* majority that prosecutors should err on the side of disclosure implicitly recognizes the same guiding principle articulated in *In re Attorney C*—that the lawyer should "heed a substantial risk" that a course of action could lead to adverse consequences in noting the behavior of a "reasonable lawyer."

The New Mexico Supreme Court, in *State v. Breit*, noted:

> [T]he prosecutor is actually aware, or is presumed to be aware, of the potential consequences of his or her actions. The term connotes a conscious and purposeful decision by the prosecutor to dismiss any concern that his or her conduct may lead to a mistrial or reversal.

It then concluded:

> Though we indicate the official must know, or under certain circumstances is presumed to know, that the conduct is improper, we doubt a claim of lack of experience could lift the bar of double jeopardy. Rare are the instances

187. 47 P.3d 1167, 1173 (Colo. 2002) (citing STANDARDS FOR CRIMINAL JUSTICE § 6.2 (2011)).
188. 930 P.2d 792, 803 (N.M. 1996).
of misconduct that are not violations of rules that every legal professional, no matter how inexperienced, is charged with knowing.189

The New Mexico approach is consistent with addressing the proper scope of the protection afforded by prior jeopardy provisions in the federal and state constitutions and the need to ensure that prosecutors conform their practices to ethical norms. Clear violations of the ethical duties imposed upon prosecuting attorneys warrant discipline, but discipline itself does not redress a violation of the individual’s constitutional expectation that he will not be subjected to multiple trials for the same offense. Regardless of the personal culpability or lack of culpability on the part of the prosecutor, a violation of the prior jeopardy protection represents a significant intrusion upon the constitutional rights of the accused.190

While the Arkansas court rejected the double jeopardy argument advanced in Green,191 its determination does not necessarily suggest the type of injustice evident in cases of prosecutorial misconduct when the accused is subsequently shown to have been actually innocent of the charge upon which he has been convicted. The cost of a terminated proceeding in which an accused’s guilt—or innocence—may never be determined is part of the constitutional bargain that is struck by the protection of individual rights. In Shelton v. State, for instance, the same court held that the prosecutor’s successful motion for mistrial, based upon defense counsel’s claimed misstatement as to the nature of the defense in his opening statement, effectively barred retrial of the capital case.192 The court found there existed no “overruling or manifest necessity” for a mistrial because defense counsel’s opening merely responded to facts the prosecutor alluded to in his own opening statement.193

189. Id.
190. See, e.g., Brady v. Maryland, 383 U.S. 83 (1963); see also supra text accompanying notes 68-70.
193. Id. at 4-5, 326 S.W.3d at 432. In Koster v. State, the overruling or manifest necessity was the explosion of a bomb outside the courthouse during the defendant’s trial on a charge of (among other things) possession of a prohibited weapon, after defense counsel brought what appeared to be an explosive device into the courtroom and the trial
Shelton's retrial on a capital murder charge was barred by the trial court's decision to grant the prosecution's improvident motion for mistrial. The consequence of the State's action was that the public's reasonable expectation—that the prosecution would determine whether a capital or lesser crime had been committed by Shelton and that an appropriate punishment would be imposed in the event of conviction—was effectively and permanently frustrated. Yet, that is the necessary result in the event of violation of an accused's similarly legitimate expectation that the protection afforded by constitutional bars against multiple prosecution for the same offense will not be denied based upon the nature of the crime or the likelihood that the accused is culpable.

Continuing instances of prosecutorial misconduct in suppression of evidence favorable to the accused in criminal cases suggest that enforcement of the Brady disclosure obligation is compromised by a number of factors. First, because the remedy is wholly dependent upon the defense's discovery of the suppressed evidence or the prosecution's later disclosure, the remedy is, at best, sufficient only when the suppressed evidence is actually available for challenging a conviction obtained by the State in a proceeding in which the evidence could not be evaluated and used by the defense. If the accused has been acquitted, or pleaded guilty in a situation in which the undisclosed evidence would not have made any difference in the outcome of the proceedings, there is functionally no formal remedy for willful misconduct on the part of the non-disclosing prosecutor or members of the prosecution team.

Moreover, even if there is proof of egregious misconduct, such as deliberate suppression of exculpatory evidence, the

judge could not determine whether it had been disarmed. 374 Ark. 74, 78-79, 286 S.W.3d 152, 157-58 (2008).

194. Shelton, 2009 Ark. 388, at 1, 326 S.W.3d at 431.

195. It has recently been recognized that Brady violations remain a source of continuing problems in the prosecution of criminal cases. For instance, Ninth Circuit Chief Judge Alex Kozinski, in dissenting from the denial of rehearing en banc in United States v. Olsen, concluded: "There is an epidemic of Brady violations abroad in the land. Only judges can put a stop to it." 737 F.3d 625, 626 (9th Cir. 2013). Despite Chief Judge Kozinski's stirring characterization of the violation and the fact that four other Ninth Circuit judges joined in his dissent, the Supreme Court denied certiorari. Olsen v. United States, 134 S. Ct. 2711 (2014).
Brady formula for demonstrating a due process violation warranting relief is often—perhaps more often than not—difficult for the injured defendant to meet. It almost necessarily requires post-conviction or extraordinary litigation measures in which the convicted defendant has no constitutional right to counsel.\textsuperscript{196} The reality of criminal practice is that once a case has been closed by conviction on guilty plea, affirmance on appeal, or other final disposition, counsel may not be likely to continue pursuing relief on a claim of misconduct, particularly if the suppressed evidence is not readily provided from some other source.

Once the defendant has exhausted available state and federal post-conviction remedies, the subsequent discovery of exculpatory or impeachment evidence not disclosed in time to afford the defendant the option of challenging his conviction or sentence in the initial round of post-conviction proceedings may result in procedural burdens compromising even the relatively high standard of proof for establishing violations under Brady. For instance, if a state court defendant has exhausted federal habeas remedies provided for in Section 2254,\textsuperscript{197} subsequent discovery of suppressed evidence will not provide an additional round of litigation unless the defendant is able to show that the belated discovery has produced "clear and convincing evidence" that the defendant would not have been convicted by a rational fact finder had the suppressed evidence been available to him for use at trial.\textsuperscript{198} A more timely discovery permits the defendant to seek relief under Brady, in contrast, requiring a showing only that there is a reasonable probability that the evidence, if disclosed, would have resulted in a different outcome.\textsuperscript{199} Thus, continuing suppression of favorable evidence has the perhaps-

\textsuperscript{196} Ross v. Moffitt, 417 U.S. 600, 610-11 (1974) (Sixth Amendment right to assistance of counsel does not extend to discretionary review of proceedings following disposition of direct appeal, nor to petition for writ of certiorari to the Supreme Court); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (Sixth Amendment does not recognize right to state post-conviction process; therefore, no right to assistance of counsel in state post-conviction proceedings); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (neither Eighth Amendment, nor due process, require assistance of counsel for inmates challenging death sentences imposed in state post-conviction proceedings).

\textsuperscript{197} 28 U.S.C. § 2254 (2012) (affording defendants convicted in state court the right to pursue federal constitutional claims that have been exhausted in the state courts by filing a petition for federal habeas relief).


unintended consequence of making it more difficult for the defendant whose right to disclosure has been violated to obtain relief once the direct appeal and usual first round of post-conviction remedies have ended.\textsuperscript{200}

Second, the remedy for a proven \textit{Brady} violation—typically a new trial or resentencing proceeding—does not deter prosecutors or police who are willing to assume the risk of a later disclosure of a violation in order to improve the chance for conviction. Whatever theoretical deterrent effect the remedy may have, the likelihood that the violation will be discovered or that the defendant could meet the burden of establishing prejudice warranting relief under \textit{Brady} compromises the deterrent for those willing to violate the rule. For one thing, trial attorneys are often primarily concerned with the immediate results in a trial or other proceeding, rather than the longer-term ultimate disposition in a case. Consequently, the threat that disclosure of suppressed evidence will eventually require relief in the form of a new trial or a new sentencing proceeding well after the prosecutor has obtained a conviction based on a jury verdict or guilty plea may not really serve to deter misconduct calculated to obtain that conviction. This is particularly true in serious felony prosecutions, often high-profile in the community, in which the State’s case is precarious in light of supporting evidence, meaning that compliance with \textit{Brady} may serve to improve the defense’s position.\textsuperscript{201} In a close case, the

\textsuperscript{200} This is not universally true because some jurisdictions do not limit the number of applications that may be brought seeking post-conviction or habeas corpus relief. See, e.g., State v. Forbes, 119 P.3d 144 (N.M. 2005) (granting habeas relief to inmate convicted on testimonial statement of co-defendant not subject to cross-examination where direct appeal resulted in affirmance in 1987), \textit{cert. denied}, 549 U.S. 1274 (2007). The defendant was released from custody after twenty-four years of incarceration upon dismissal of capital murder charges following grant of state post-conviction relief. \textit{Id.} at 145.

Similarly, jurisdictions may not impose time limits on claims based on newly available evidence previously suppressed or not disclosed by the prosecution. For instance, Arkansas recognizes that such claims must be brought by petitioning for \textit{writ of error coram nobis}, an ancient writ that provides a vehicle for reinvesting jurisdiction in the trial court to reopen the case for consideration of whether the defendant’s right to disclosure of favorable evidence has been violated by the prosecutor. Adler v. State, 35 Ark. 517, 524-26 (1880). For the history of the \textit{writ of coram nobis} in Arkansas, see John H. Haley, Comment, \textit{Coram Nobis and the Convicted Innocent}, 9 \textit{ARK. L. REV.} 118 (1955).

\textsuperscript{201} Consider allegations in the recent, high-profile, and highly sensationalized prosecution of Casey Anthony in Florida for the alleged capital murder of her daughter, Caylee. Lizette Alvarez, \textit{Software Designer Reports Error in Anthony Trial}, \textit{N.Y. TIMES}, July 19, 2011, at A14. Following Anthony’s acquittal, an expert witness relied on by the prosecution announced he provided incorrect data to the police supporting the claim made
incentive for noncompliance may overwhelm even the rational
instinct to comply relied upon by the *Kyles* Court when the
majority suggested that prosecutors would logically decide in
favor of disclosure when faced with a close question of whether
evidence is favorable to the defense. 202 This rather naïve view
of prosecutors fails to appreciate that prosecutors try cases to
win and to prosecute defendants typically because they believe
they are, in fact, guilty.

Moreover, the reality is that once a defendant has been
convicted, particularly after a jury verdict, a reversal on direct
appeal, or relief ordered on collateral review, the most likely
result is that the case will eventually be disposed of by a
negotiated guilty plea. The defense’s position is often
significantly improved by the vacation of the conviction.
Moreover, if the basis for the remand for further proceedings is a
*Brady* violation, the relief granted necessarily results from
discovery of evidence withheld by the prosecution that is
sufficiently strong to improve the defense’s position in a new
trial. Otherwise, of course, the defense will not have met its
burden of showing that the non-disclosed evidence offered a
reasonable probability of a different outcome had it been
disclosed for use by the defense at trial or in evaluating the
option of a guilty plea.

VI. CONCLUSION

The Arkansas Supreme Court’s referral of the prosecuting
attorneys to the Committee on Professional Conduct produced
no public record of action disciplining the two prosecutors for
their actions in failing to disclose Chad Green’s statement
exculpating his father, 203 perhaps suggesting that Justice
Brown’s concerns were overblown. This is not, however,
surprising in light of the historical evidence that ethical
discipline has rarely proved successful in addressing infractions.

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Moreover, the willingness of prosecutors to proceed in derogation of the constitutional disclosure duty, particularly in high-profile cases or cases involving especially heinous crimes, appears clear in light of the continuing revelations of misconduct. The dramatic action taken by the Department of Justice in moving to vacate the conviction of former United States Senator Ted Stevens from Alaska—obtained prior to disclosure by the Attorney General of significant misconduct of the Stevens prosecutors—demonstrates that the weakness of potential remedies for redress simply fails to impact prosecutorial decision-making with respect to Brady disclosure obligations. After Senator Stevens was convicted of lying in failing to report gifts on his Senate Financial Disclosure forms, the D.C. District Court vacated his conviction based on prosecutorial misconduct in failing to disclose discoverable evidence to the defense. This followed the disclosure by an F.B.I. agent claiming “whistleblower” status of irregularities in the investigation and pretrial phases committed by the Government. The prosecutors were removed from the case and the Government itself filed a motion to set aside the conviction and for dismissal of the charges against Senator Stevens with prejudice. Based on disclosures of misconduct in violating prior court orders and the prosecution’s obligations under Brady, the trial court ordered relief, setting aside the verdict.

The Stevens case was perhaps the highest-profile prosecution in recent history to be publicly tainted by misconduct of prosecutors in failing to disclose exculpatory evidence required by Brady and subsequent decisions of the Supreme Court. Despite the compelling evidence of misconduct by federal prosecutors in the case, a special prosecutor appointed by the trial judge nevertheless concluded

205. Id. at 256, 261-62.
206. Id. at 254.
207. Id. at 261.
208. Id. at 262.
that the lawyers responsible should not themselves be prosecuted for criminal contempt.\textsuperscript{210}

Professor Kevin McMunigal has observed that the enforcement of disciplinary rules in instances involving disclosure failures has been uneven, with some evidence of increasing vigilance on the part of courts and disciplinary bodies, but continuing lack of enforcement in some jurisdictions.\textsuperscript{211} He noted that while ABA Model Rule 3.8(d)—which requires disclosure consistent with \textit{Brady} and its progeny—was included in the 1983 version of the rules, as well as the predecessor provision, the 1969 ABA Model Code, few jurisdictions included this provision in their ethical standards over the forty-year period since.\textsuperscript{212}

There are likely a number of reasons why professional discipline appears less successful as a remedy for prosecutorial misconduct than one might expect in a profession obliged to defend the Constitution, including the protections it affords criminal defendants. Clearly, one reason is the leniency of officials in judging the actions of colleagues in the legal profession—particularly when the aggrieved party, like Billy Dale Green, has been convicted of a heinous party, like Billy Dale Green, has been convicted of a heinous offense, or is otherwise not blessed with pristine character, un tarnished reputation, or simply lack of recognized status within the community.

The late Professor Fred C. Zacharias offered one possible explanation for the reluctance of professional conduct bodies to discipline prosecutors in his important article reviewing the disciplinary process.\textsuperscript{213} He observed that, perhaps ironically, the leeway given to prosecutors might logically reflect the traditional recognition of defense counsel's obligation to aggressively represent the accused:

\begin{quote}
Apparently because of the heightened sense of combat that occurs in the criminal arena, disciplinary authorities are readier to adopt an “anything goes” attitude.
\end{quote}


212. Id. at 850-51.

Such leniency, of course, is consistent with the sense of many commentators that criminal defense lawyers have a higher than normal duty to press ethical boundaries to the limits when that is in the interests of their clients. If disciplinary agencies are extending the same reasoning to prosecutors, they probably are concluding either that aggressive defense lawyer conduct justifies reciprocation by prosecutors or that alternative remedies, such as judicial supervision, are adequate to discourage prosecutorial misconduct.\(^\text{214}\)

If this observation is correct, then the failure in the system of professional discipline lies in the perception that prosecutors’ liability for *Brady* violations should be excused because they are forced to litigate against defense counsel, who are ethically charged with the duty to aggressively represent their clients. This may reflect an unfortunate view of fairness in which constitutional rights of the accused are balanced against the general need for effective prosecution, disregarding both the incredible disparity in resources enjoyed by the State in criminal litigation and the express need to offset this advantage with procedural rights dedicated only to the accused in amendments to the Constitution.

VII. EPILOGUE

The authority given to the State in prosecuting the individual accused is awesome, to use a routinely overused word, and it can only be used fairly if the individuals charged with exercising the power to prosecute are subject to restraint by constitutional protections and ethical rules that address the relative disadvantages suffered by the accused. Justice Byron White explained defense counsel’s ethical duties toward the client in the American criminal justice system in his separate opinion in *United States v. Wade*:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor

\(^{214}\) Id.
should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.215

In the system described by Justice White, there must exist checks and balances to ensure that the constitutional protections expressly afforded individual criminal defendants are neither hollow, nor dependent upon the resources available to the accused in the individual case.216 The right to be tried fairly on the evidence requires that the defendant be afforded access to that evidence which is favorable to him and which may have been developed by the State in its investigation of the case.

Following the denial of Billy Dale Green's motion for double jeopardy relief by the Arkansas Supreme Court,217 Chad Green refused to testify against his father at the retrial ordered by the court in reversing the capital convictions.218 The

216. Id.
prosecutor revoked the agreement for Chad’s testimony that had resulted in a reduced sentence of forty years on one count of capital murder to run concurrently with sentences imposed on three other felony counts. Chad Green lost the benefit of his agreement—a reduced, twenty-year sentence—and was subsequently tried and convicted on all four counts of capital murder. He was sentenced to serve life sentences on all four capital counts, plus forty years on the kidnapping count.

Billy Dale Green’s conviction on all counts at the retrial, resulting in mandatory imposition of life sentences on the capital murder counts, may actually demonstrate that the State never needed to rely on Chad Green as a witness in the first capital trial. For some, the fact of his conviction will undoubtedly serve to reinforce the inappropriate conclusion that constitutional protections are only available for the truly innocent, and that upon proof of guilt, violation of the accused’s rights merits no consideration. For those holding that view, the fact that there has been no censure of the prosecutors for their misconduct in failing to disclose evidence favorable to Billy Dale Green’s counsel prior to his first trial is wholly consistent with their position that his guilt, now found by two capital juries, implicitly absolved the prosecutors of any failure to carry out their duties consistently with federal constitutional law, and the disclosure obligations imposed under Arkansas law and the Arkansas Rules of Criminal Procedure.

As for the prosecutors themselves, the deputy involved in the case died following the trial of Chad Green. Prosecuting Attorney Henry Boyce, the lead prosecutor in the Green cases, was honored by Arkansas prosecutors for his work in the cases, as a local news outlet reported:

219. The revocation of the negotiated agreement was upheld by the Arkansas Supreme Court in Green v. State, 2009 Ark. 113, at 11, 313 S.W.3d 521, 523.
221. Id. at 1-2, 423 S.W.3d 62, 64-65.
222. Id. at 1, 423 S.W.3d at 64.
223. Green III, 2013 Ark. 497, at 1, 430 S.W.3d 729, 734. The court noted that Chad Green did not testify in the retrial of his father on the capital murder charges. Id. at 2, 430 S.W.3d at 735.
The Arkansas Prosecuting Attorneys Association, in conjunction with Henderson State University, awarded the Sidney S. McMath Sword of Justice Award in Hot Springs recently. The award is presented to one prosecutor every two years for his efforts to promote justice and fulfill the goals of the Association. Third Judicial District Prosecuting Attorney and Association President, Henry H. Boyce, of Newport was presented the honor. Boyce told the *Hill 'n Holler Review* that he couldn't be more honored by his selection. He added that there could be no greater honor than to be recognized by his peers. Boyce has conducted the prolonged prosecution of accused Randolph County killers of a Dalton, Ark., family of four who were found brutally murdered in 1998. The son, Chad Green, was convicted on four counts of murder this August and sentenced to four consecutive life sentences plus 40 years for kidnapping. The father, Billy Green, will stand trial next April for the murders. Boyce will seek the death penalty.

To date, there is no record that Prosecuting Attorney Henry Boyce ever received any discipline for the *Brady* violation.

Sidney S. McMath, an outstanding trial lawyer and former Arkansas Governor, was highly regarded as a progressive reformer during his long history of public service in the state. Honoring a prosecutor who admittedly violated the rights of a capital defendant seems cynical and hardly consistent with Governor McMath’s legacy. It also betrays a flaw in Arkansas courts’ enforcement of constitutional protections.

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227. See Mara Leveritt, *Prosecutors Have All the Power but Little Oversight. Is a Violation Not a Violation if a Prosecutor Says, ‘I Didn’t Mean To’?*, *ARK. TIMES*, Sept. 11, 2014, at 14, 15-17. While the Office of Professional Conduct has reported lawyer sanctions since the suspension of President Bill Clinton’s Arkansas law license in 1992—a list comprised of nearly 750 published sanctions—Leveritt did not find a single prosecutor whose name she could recall included on that list. *Id.* Leveritt is a long-time Arkansas political reporter best known for her work in support of the defendants in the West Memphis murder case—the West Memphis Three. See Max Brantley, *Make That Dr. Mara Leveritt: UALR Honors a Famous Grad*, *ARK. BLOG* (May 17, 2014, 7:53 PM), http://www.arktimes.com/ArkansasBlog/archives/2014/05/17/make-that-dr-mara-leveritt-ualr-honors-a-famous-grad [http://perma.cc/FB2H-6T8B].