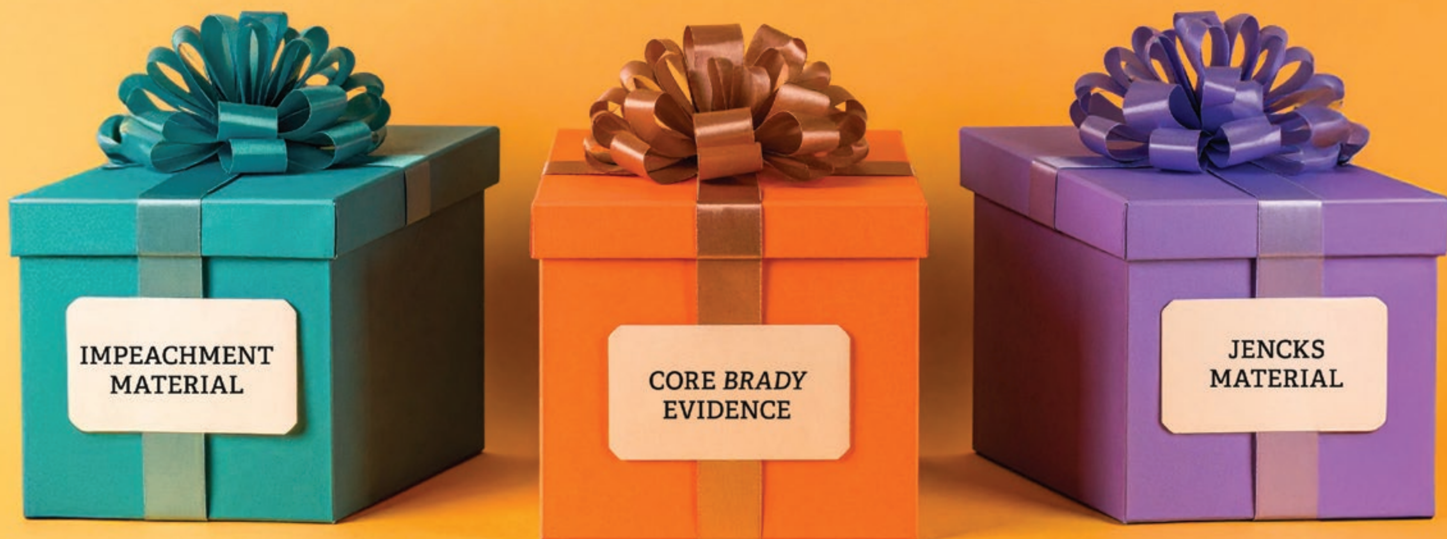

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‘*Brady* Wrapped in Jencks Packaging’

How Categories of Exculpatory Evidence Can Be Conflated to Delay Production, and How Defense Counsel Can Fight Back

I. Introduction

Rooted in the due process clauses of the Fifth and Fourteenth Amendments, *Brady* requires the government to disclose exculpatory evidence, that is, “evidence favorable to the accused” which is “material to either guilt or punishment.”[1] Numerous decisions, many local rules, and even Justice Department policy recognize two basic categories of exculpatory information: (1) “core” *Brady* material; and (2) impeachment material. Jencks[2] material — statements of a witness that “relates to the subject matter as to which the witness testified” — is a separate category of discovery that can, and often does, contain core *Brady*, impeachment material, both, or neither.

Both core *Brady* and impeachment material must be produced in time for the defendant to make effective use of the information at trial. By contrast, Jencks material need not be produced “until after the witness has testified on direct examination in the trial of the case.”[3] Because the character of the exculpatory evidence categories — and the time needed to make effective use of them — differs, so too does the required timing of disclosure. But too often — particularly in jurisdictions where “Jencks trumps *Brady*” — prosecutors attempt to lump all exculpatory evidence together, producing core *Brady* on an impeachment timeline. By wrapping core *Brady* in “Jencks packaging” — interview memoranda and grand jury transcripts — prosecutors can utilize “Jencks trumps *Brady*” authorities to justify delaying production. In so doing, prosecutors sometimes claim benevolence by producing “early Jencks,” even while potentially producing tardy impeachment material and late core *Brady*. Defense counsel unfamiliar with these tactics are often challenged to overcome the blending of these categories and their repackaging, typically when judges rely on decisions that fail to make clear the difference between the two categories of exculpatory information.

“Core” *Brady* evidence is evidence that can be used directly to exonerate the defendant. This category includes information suggesting that the charged offense did not occur, was committed by another individual, or tends to show the defendant lacked the requisite mental state. Impeachment material includes information that can be used to attack the credibility of witnesses to support the inference that the government’s proof is insufficient. It includes prior inconsistent statements, evidence of a witness’s difficulty in perceiving, articulating or

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remembering certain events, and information demonstrating a witness's bias, whether based on financial interest, racial, religious, gender or other animus, or some additional factor.

The lines of demarcation among these categories are not always clear. For example, evidence that an eyewitness initially picked a different individual out of a lineup constitutes core *Brady* to the extent it shows that someone other than the defendant could have committed the offense. But such evidence could also constitute impeachment material if the witness later changed her story and identified the defendant as the culprit.

As articulated in this article, core *Brady* should always drive production schedules because more time is needed to effectively make use of that material. Since core *Brady* can be used directly to exonerate the defendant, the government seldom includes it in its case-in-chief or rebuttal. Instead, the defendant must make affirmative use of the information, and that often requires defense counsel further investigate to understand the full scope and import of the evidence, locate and subpoena all relevant witnesses and documents, and fully integrate the evidence into the defense theory to make effective use of that information.

In this context, timing of production matters greatly: the longer the government waits to produce core *Brady*, the less likely defense counsel will be able to utilize it fully and properly. But unless defense counsel understands the legal issues in time to avert the delayed production of blended discovery, a prosecutor and an uninformed court can combine to deprive the defendant of the right to make effective use of core *Brady*. Lumping the two categories together and producing both on an impeachment timeline creates a façade of compliance with the effective use standard. Even worse, combining both categories with other witness statements produced as "early Jencks" enables the government to portray itself as being overly generous to the defense. Particularly in jurisdictions where "Jencks trumps *Brady*," this tactic can serve to inoculate the government from later allegations of discovery violations on a range of issues. This article seeks to help defense counsel better understand how those problems can unfold, and how to challenge this unfair disclosure tactic.

II. Categories of Exculpatory Evidence

There is a clear difference between core *Brady* and impeachment material. Defense counsel advancing some of the arguments and strategies reviewed below should expect to encounter a threshold challenge: convincing the government, and often the court, that such a distinction exists. In a dispute over that question, prosecutors might rely on *United States v. Bagley*, in which the Court recognized that "impeachment evidence … as well as exculpatory evidence, falls within the *Brady* rule."[4]

Read without context, *Bagley*'s language including impeachment within the *Brady* rule might be interpreted as precedent that both categories may be produced on the same schedule. But timing was not at issue in *Bagley*. Instead, the case turned on whether to grant relief where the government submitted affidavits that two significant government witnesses had not been given a benefit for their testimony when in fact each received a cash payment. On appeal, the Ninth Circuit deemed the failure to disclose this information — which was clearly impeachment material — as "even more egregious" than the deprivation of exculpatory evidence i.e., *Brady*.[5] The Supreme Court disagreed, but nevertheless acknowledged the significance of the evidence. *Bagley* simply holds that both exculpatory and impeachment evidence can have substantial value — not that both should be turned over at the same time.[6]

Numerous cases recognize the distinction between core *Brady* and impeachment material with regard to the timing of production, either explicitly or implicitly. Courts sometimes use different terms to define these categories but adhere to the same basic distinctions.[7] In addition, numerous local rules differentiate between core *Brady* and impeachment material when setting discovery production deadlines.[8] The Justice Manual — while not creating any enforceable rights — also distinguishes exculpatory evidence from impeachment material when considering the timing of production.[9]

No Supreme Court case dictates exactly when exculpatory evidence — whether core *Brady* or impeachment material — must be produced. Even so, virtually every circuit adheres to the "effective use" standard.[10] As applied to the two categories of exculpatory evidence, this standard should produce an adjustable touchstone. In theory, because core *Brady* may require significant pretrial investigation for the defendant to use it effectively, earlier production is required. By contrast, impeachment material is typically witness-specific, and thus a shorter lead time might be sufficient to make effective use.

But a standard of flexibility can foster subjective interpretations by prosecutors, some of which could be conveniently disingenuous. Regardless, the effective use standard gives counsel a foothold to argue for earlier production, and voice objection — with a request for proportionate sanctions — when insufficient lead time compromises a defendant's right to utilize the exculpatory evidence effectively.

III. Jencks Trumps *Brady* — But Under What Circumstances?

The Jencks Act covers statements that relate to the subject matter of the witness's testimony — whether those statements are exculpatory is irrelevant. As a result, Jencks material is almost always broader than the range of exculpatory evidence required to be produced. When the statement is neither exculpatory nor impeaching, however, courts lack statutory authority to order disclosure before the witness testifies.

Most courts recognize that strict adherence to the Jencks Act would disrupt trials. Defense counsel presented with hundreds of pages of Jencks material would need a continuance to read and utilize its contents. Thus, the government routinely provides "early Jencks," producing statements for anticipated witnesses often 7-10 days before trial.

While early Jencks helps the defense when the statements contain neither exculpatory nor impeaching material, problems arise when prosecutors blend these categories and produce them both as "early Jencks." Later production of core *Brady* and even some impeachment material — even if provided earlier than the Jencks Act requires — can compromise a defendant's ability to make effective use of that exculpatory evidence.

To deal with this serious dilemma, defense counsel must recognize the conditions that foster its creation. At the outset, understanding controlling law is essential. Clear lines exist among

circuits on the issue of whether "Jencks trumps *Brady*." Three circuits (the Fifth, Sixth and Ninth) expressly hold that Jencks trumps *Brady*;[11] three others (the Second, Third and D.C. Circuits) expressly hold that *Brady* trumps Jencks;[12] and the remaining six circuits (the First, Fourth, Seventh, Eighth, Tenth, and Eleventh) have not ruled on the matter.[13] A deeper analysis, however, produces a more nuanced conclusion.

Before attacking the underlying ambiguity, counsel practicing in "Jencks trumps *Brady*" jurisdictions should, as an initial matter, challenge the primary proposition. To be sure, adverse precedent at the circuit level all but ensures that these efforts will fail in the district court. Nevertheless, the existing circuit split makes the issue ripe for Supreme Court review, and parties seeking to take advantage of any subsequent ruling overturning that adverse precedent must have preserved the issue.

To do so, counsel must cite the adverse controlling precedent at the outset. In addition, counsel should at least advance the primary argument in support of the "*Brady* trumps Jencks" view: that it "is inconceivable that a statutory obligation should supersede a constitutional one, especially where even the statutory obligations [have] a constitutional Due Process basis."[14]

Once that objection is preserved, counsel should address the relatively limited impact of Jencks trumps *Brady* decisions decided in the impeachment — as opposed to core *Brady* — context. The type of *Brady* matters, and most, if not all, of the holdings asserting that principle arise from cases where the *Brady* material was impeachment material, not core *Brady*; some circuits even note that fact and limit their holdings accordingly.[15] When prosecutors endeavor to read Jencks trumps *Brady* cases broadly, defense counsel should hold the line and make sure the court distinguishes the factual settings underlying those rulings.

In addition, weighing the import of a "Jencks trumps *Brady*" ruling requires a determination of whether and to what extent the purposes underlying the Jencks Act are implicated in a given scenario. Among other purposes, the Jencks Act seeks to protect potential government witnesses from threats, harm, or intimidation before trial.[16] Decisions allowing the government to withhold production of impeachment material often rest on the risk of such harm.[17] When that risk does not exist — such as in most white collar cases — no need exists to delay production of Jencks material, especially that which may also be impeachment material, to effectuate the statute's purpose. Ultimately, the most helpful decisions are those recognizing the need to balance the defendant's right to exculpatory evidence with the potential dangers the Jencks Act seeks to minimize.[18]

IV. Effect on Discovery Production Methodology

The Supreme Court has long recognized that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[19] Counsel seeking discovery of any type should expect the government to note that "[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [government's] files."[20] At the same time, prosecutors are cognizant of their obligation to disclose exculpatory evidence, and most take heed of the Supreme Court's expectation that when application of the "inevitably imprecise standard" for identifying exculpatory evidence fails to identify clearly that which must be turned over, "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[21]

The manner and timing of that disclosure runs a wide spectrum among — and sometimes within — different prosecutorial offices. There is a range of approaches by prosecutors making exculpatory evidence available. In order of the greatest to least transparency, those options include the following:

1. *Full and immediate production of everything* — Under this approach, the government simply provides copies of all grand jury transcripts and all interview memoranda generated during the investigation. The government makes no effort to sift through the materials to determine which is core *Brady*, which is impeachment material, which is Jencks, and which is none of the above. Instead, if the transcript or memoranda was generated during the investigation, the government produces a copy to defense counsel.

2. *Production on "viewer" basis on USAfx* — Here, the government utilizes a feature of USAfx, the file sharing tool typically used, to allow defense counsel to review all grand jury transcripts and all interview memoranda generated during the investigation, but not to download or print copies. Under this approach, defense counsel are permitted to spend as much time as they want reading the materials. Their ability to do so efficiently is constrained, however, because they can only look at the documents — not download or print them. To make more extensive use of the information contained, counsel would have to dictate the contents of the documents and generate their own copies or make notes. Additionally, depending on the government's attention to detail when uploading the documents on an ongoing basis, creating a spreadsheet of which documents were made available can help counsel keep track of which materials have already been reviewed and which are new.

3. *Limiting counsel to review onsite* — While less common in the wake of COVID and with the advent of file-sharing services, defense counsel in past cases have been limited to reviewing transcripts and memoranda onsite at the U.S. Attorney's Office. This method of production combines the worst aspects of viewing materials on USAfx and adds time constraints — counsel can only conduct the review during normal business hours. In addition, prosecutors employing this approach frequently have a paralegal or agent in the room during the review to prevent counsel from dictating or taking pictures of the materials. When counsel conducts the review with the client, this arrangement hinders the ability to discuss the significance of particular items. Depending on the prosecution's approach, counsel operating under this arrangement are sometimes limited to "attorney notes" lest defense teams simply send over support staff or others to recopy the materials on a verbatim or near- verbatim basis.

4. *Selected production of certain materials* — Under this method, prosecutors endeavor to make qualitative judgments about which parts of the information in the transcripts and interview memoranda they need to produce. This approach is fraught with peril for several reasons, including the subjective nature of determining whether information qualifies as exculpatory. To be sure, some universally applicable definitions exist, and some information is

readily identifiable. The devil is often in the details, however, and prosecutors unfamiliar with the nuances of defending cases — and perhaps uninterested in learning them — often fail to appreciate the significance of certain information. In the eyes of too many prosecutors, exculpatory information must have two components: (1) it must unequivocally state that the defendant did not commit the offense; and (2) the prosecutor must find the information genuine or, at least, credible. Most times, very little information meets that standard.[22]

5. *Withholding of everything under production made as "early Jencks"* — In "Jencks trumps *Brady*" jurisdictions, this is the most common method prosecutors use to produce exculpatory evidence. Under this approach, production of core *Brady* is delayed until disclosed as early Jencks. Because the material is ultimately produced, the prosecution has limited exposure for violating its discovery obligations — particularly when no hard and firm deadlines exist for the production of such information. As a result, defense counsel has limited remedies beyond seeking a continuance of the trial.[23] As a practical matter, this approach can throw trial preparation into upheaval by taxing defense resources needed to both review the newly produced material and integrate changes as necessary into the defense theory.

In our experience, and in our primary district, prosecutors as of late typically employ approach number 1 or number 2. In other districts, however, prosecutors consistently utilize approach 4 and approach 5. Because those approaches can significantly impact defense strategies, we focus our discussion below on those latter categories.[24]

V. What Counsel Should Do When the Government Delays Production of Core *Brady*

When prosecutors conflate core *Brady* and impeachment material — whether intentionally or otherwise — counsel must take affirmative measures early. First, counsel should memorialize any concerns in a letter to the government. Absent further evidence, counsel should not assume that prosecutors understand the significance of mixing the two categories of exculpatory evidence. Almost all courts expect the parties to try to resolve these issues on their own, and offering prosecutors an opportunity to directly address the issue serves as a prudent starting point.

If the government remains steadfast in the view that core *Brady* and impeachment material are not only meant to be combined but also produced together closer to trial than is adequate for effective use, counsel's next step should be a motion to compel. In the early stages of that process, the motion should endeavor to educate rather than attack. The motion should recognize that even if convincing prosecutors of the errors of conflating categories is a lost cause, the court may be unaccustomed to such a motion that rests on the distinction.[25]

In addition to these measures, we suggest the additional steps below.

A. Make Specific Requests Under *Agurs*

In *United States v. Agurs*, the Court held that when a defendant makes a "specific and relevant" discovery request for information that is "material" or even "if a substantial basis for claiming materiality exists," the government's "failure to make any response is seldom, if ever, excusable."[26] As *Agurs* held, in that situation "it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge."[27]

Defense counsel faced with the government's refusal to produce core *Brady* should pose *Agurs* inquires. Among other requests (including those seeking impeachment material), counsel should consider asking for information which shows:

- ❖ the defendant's good faith with respect to any of the allegations in the indictment;
- ❖ the defendant's lack of involvement in any criminal activity alleged in the indictment;
- ❖ the involvement of others in the charged criminal activity, even if just to show the relative degree of involvement by the defendant;
- ❖ the defendant's lack of knowledge or intent of any criminal activity alleged in the indictment, including alleged criminal activity engaged in by others; and
- ❖ the legitimacy of the defendant's business or other activities.

In addition to these examples, counsel should make a specific request for any "negative exculpatory information" relating to the defendant. While decisions on this topic are not widespread, clear and compelling authority supports the proposition that when a witness in a position to know of the defendant's participation in wrongdoing fails to confirm the defendant's illegal involvement, the statement is exculpatory.[28]

It may be that the information is also impeachment material if the witness later changes his story and implicates the defendant. Even if that never occurs, the information is due to be produced for a simple reason: a witness who fails to implicate the defendant — despite having knowledge of the relevant activity — is highly unlikely to be called by the government, and thus the information will not be produced to or discoverable by the defendant. Impeachment material is not produced for witnesses the government does not call.[29]

Used effectively, *Agurs* requests achieve one of two purposes: (1) acquiring evidence that can be used affirmatively to attack the government's case; or (2) forcing the government to effectively declare that no such evidence exists. The value of the latter outcome is clear: no prosecutor wants to be seen as having made a misrepresentation to the court. If required to attest that the *Agurs* information sought does not exist, a prudent prosecutor will recognize the risk of later being proven wrong. Even a good faith mistake by the prosecutor can look problematic in that context — where the prosecutor made a conscious choice not to disclose interview memoranda and grand jury transcripts — and that concern may well prompt the prosecutor to expand the scope of disclosed evidence.

While *Agurs* requests can create leverage in some situations, defense lawyers should be mindful of the temptation to overplay their hand. It is often enticing for counsel to make a formal request that the government "certify" that it has produced all responsive material, or that no such material exists. No specific authority mandates such a certification, however. Courts are hesitant to require prosecutors to provide such a guarantee, particularly in larger cases (where full knowledge of all available discovery can be difficult).

As a practical matter, obtaining a certification provides little additional advantage since even if the prosecutor's representation is later proven incorrect, most courts would afford the

government the benefit of the doubt. The disadvantage is obvious: a court might deem the request an attempt to trap the government and reject not only the certification component but the request entirely. Moreover, a certification is often unnecessary because pressing *Agurs* requests achieves the primary goal: ensuring that the prosecutor has conducted a thorough review of available evidence to determine whether it contains material that should be produced. Accordingly, we do not recommend counsel demand a certification in response to *Agurs* requests.

B. Avoid Categorizing Requests as Seeking "Early" *Brady* or Jencks

Discussion of Jencks issues inevitably triggers the government or the court to note that the timing of production contained in the statute cannot be overridden by the court. Similarly, counsel should expect substantial resistance when demanding the immediate production of impeachment material. In this context — where courts often lack the formal authority or at least obligation to order immediate production of certain discovery — counsel should avoid framing requests for "early" production of any category of discovery, including core *Brady*. Such an approach potentially suggests that the timing of Jencks production should be a factor in determining *Brady* production. The risk is heightened in jurisdictions lacking specific disclosure deadlines, as the argument threatens to cloud the governing standard: whether production occurs on a schedule that allows for "effective use."

But while effective use of impeachment evidence requires a much shorter lead time, core *Brady* differs entirely. Even if a prior inconsistent statement or evidence of a government witness's bias can be used effectively against a witness relatively soon after receipt, information regarding the defendant's lack of involvement in the offense, or lack of criminal intent, requires thorough investigation and development in order to be used effectively. Indeed, some witnesses may be scrutinized less closely — or perhaps not at all — absent some hint that keener analysis is necessary.

Everyone understands that the government's disclosure that a different individual committed the offense or affirmative proof of the defendant's good faith cannot be instantly integrated into an existing theory of defense. Time is needed to investigate fully such evidence and maximize its value. But a prosecutor or a judge — even those acting in good faith but with a lack of understanding of the practical realties of defending a prosecution — may fail to understand how significantly late disclosure of core *Brady* can require a comprehensive reshaping of the defense case (or at least time to evaluate thoroughly whether to do so). To minimize that risk, counsel should emphasize the importance of core *Brady*, the manner in which it differs from Jencks material or impeachment evidence, and make clear that, as a result, the production of core *Brady* carries a much greater urgency and receiving it in an untimely manner carries significant consequences.[30]

C. Seek Affirmative Relief When Late Production Prevents Effective Use

Despite counsel's best efforts, core *Brady* is still often produced on an impeachment timeline. When that occurs, counsel's options are limited. No reported case (and no unreported case of which we are aware) holds that pretrial dismissal is the proper remedy in that scenario. Despite the absence of affirmative precedent on the point, counsel who receives core *Brady* late should still seek dismissal under the appropriate circumstances, particularly when prejudice has resulted, to preserve claims of error. Whether the delay in production deprived the defendant of the ability to make effective use of the material (e.g., where a witness has died, become unavailable or uncooperative, or when necessary related evidence has been destroyed or otherwise become unavailable) or caused the defendant to lose opportunities that might have otherwise existed (e.g., the expiring of deadlines to file certain motions), counsel should highlight the degree and manner to which the defendant's ability to present a defense has been undermined by the tardy production.

Regardless of whether some meaningful sanction for late disclosure might be available, counsel should almost always consider requesting a continuance. The failure to do so has an outsized impact that reverberates post-trial: it is considered not simply a waiver of the need for more time but also an acknowledgement of the evidence's relative unimportance. That acknowledgment, in turn, serves as the basis to deny post-trial relief either because it amounts to a concession that the evidence was not particularly important, that additional time was not necessary to make meaningful use, or both. In other words, failing to seek a continuance fails to preserve the record establishing — or at least asserting — prejudice.

Some counsel might believe that requesting a continuance could effectively waive any objection to the late disclosure. To some extent, this could prove true. But the alternative is worse. Failing to object definitely forfeits the right to make that point. For that reason, unless truly compelling — and almost unique — reasons exist not to seek a continuance following late disclosure of core *Brady*, counsel should do so.

In addition to seeking a continuance, counsel should request additional relief for late disclosure. Particularly when the information disclosed falls within the specific *Agurs* requests made previously, counsel should highlight the fact that the late-produced information was readily identifiable as core *Brady* — either because of its obvious characteristics, because the defendant identified it as such in making a prior *Agurs* request, or both. In that scenario, counsel will be better positioned to obtain relief beyond a mere continuance (which seldom harms the government and can sometimes be welcomed by prosecutors). Such relief can include barring the government from offering certain witnesses or other evidence, making certain arguments in closing, or providing jurors with a curative instruction that highlights the government's failings. Undoubtedly, such remedies are challenging to obtain. But if counsel does not ask, the answer is always no.

VI. Conclusion

Criminal cases are challenging, even under the most favorable conditions. When defense counsel are deprived of the ability to review potentially relevant evidence — including that legally required to be produced — those difficulties are compounded. Ultimately, counsel operating in jurisdictions where wrapping *Brady* in Jencks packaging effectively delays production must embrace the challenge of making sure the prosecutor and the court understand that, at most, "Jencks trumps *Brady*" means "Jencks trumps *Brady* only when the discovery is impeachment material" and not "when the discovery is core *Brady*." By better understanding how the most well-intentioned prosecutors can

conflate core *Brady* and impeachment material, and how the worst-intentioned ones can weaponize a lack of clarity on those issues, counsel are best equipped to educate judges, advocate for remedial measures, and preserve claims of error. In the process, those efforts will better protect both counsel's current and future clients, as well as other defendants.

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Notes

1. Brady v. Maryland, 373 U.S. 83, 87 (1963). While *Brady* left the term "material" undefined, the Court later described it as that whose "suppression undermines confidence in the outcome of the trial." United States v. Bagley, 473 U.S. 667, 678 (1985); *see id*. ("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").

2. 18 U.S.C. § 3500.

3. 18 U.S.C. § 3500(a).

4. *Bagley*, 473 U.S. at 676 (1985).

5. Bagley v. Lumpkin, 719 F.2d. 1462, 1464 (9th Cir. 1983), *rev'd*, 473 U.S. 667 (1985).

6. While the Supreme Court has not spoken on the timing of core *Brady* versus impeachment material prior to trial, it has recognized a distinction in the context of a guilty plea. See United States v. Ruiz, 536 U.S. 622, 633 (2002) ("the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant").

7. *See, e.g.,* United States v. Lujan, 530 F. Supp. 2d 1224, 1255 (D. N.M. 2008) (recognizing that "exculpatory evidence will usually require significant pretrial investigation to be useful to a defendant at trial, and thus, disclosure should generally be required well before pure *Giglio* impeachment evidence, which usually does not require substantial time to prepare for its effective use at trial"); United States v. Beckford, 962 F. Supp.2d 780, 787-88 (E.D. Va. 1997) ("*Brady* material consists primarily of two types of evidence: (1) exculpatory evidence, which goes to the heart of the defendant's guilt or innocence, … and (2) impeachment evidence, which may affect the jury's assessment of the credibility of a prosecution witness"); United States v. Hart, 760 F. Supp. 653, 654 n.1 (E.D. Mich. 1991) (noting that "directly exculpatory evidence refers to evidence that would support a direct inference that the defendant is innocent" while "impeachment information [which] merely supports an inference that there may be insufficient evidence to find guilt beyond a reasonable doubt"). We use the terms "core *Brady*" and "impeachment material" herein.

8. Many districts' local rules do not address at all discovery in criminal matters, much less reference a distinction between what this article terms core *Brady* and impeachment materials. For those that at least recognize such a distinction, several fail to differentiate the timing for production. *See, e.g.*, District of New Hampshire L.Cr.R. 16.1 (requiring both categories be produced at least 21 days prior to trial); District of Connecticut, Standing Order o Discovery (a)(1) (both categories to be produced within 14 days of arraignment); Northern District of Florida, L.Cr.R.26.2 (both categories to be produced within 7 days of arraignment); Southern District of Alabama, L.Cr.R. 16 (both categories at arraignment "or on a date otherwise set by the Court for good cause shown"); Middle District of Alabama, L.Cr.R 16.1(a) (same); District of Columbia, L.Cr.R 5.1 (both categories to be produced "as soon as reasonably possible after its existence is known, so as to enable the defense to make effective use of the disclosed information in the preparation of its case"). Other districts not only recognize the distinction but order that core *Brady* be produced first — often at arraignment or soon thereafter. *See, e.g.*, District of Massachusetts, L.Cr.R 116.2(b) (core *Brady* to be produced within 28 days of arraignment; impeachment material at least 21 days prior to trial); District of Vermont, L.Cr.R 16 (core *Brady* produced within 14 days of arraignment; impeachment material not less than 14 days prior to jury selection); Northern District of New York, L.Cr.R. 14.1 (core *Brady* within 14 days of arraignment; impeachment material at least 14 days prior to jury selection); Northern District of West Virginia, L.Cr.R. 16.05, 16.06 (core *Brady* to be produced within 7 days of request, which may be made upon filing of charging document; impeachment material at least 14 days prior to trial); Southern District of Georgia, L.Cr.R. 16B (core *Brady* to be produced within 7 days of arraignment; impeachment material at least 14 days prior to trial); Middle District of Tennessee, L.Cr.R. 16.01(a)(3) (core *Brady* "must be disclosed reasonably promptly upon discovering it"; impeachment material "must be disclosed within a reasonable time before trial to allow the trial to proceed efficiently").

9. *Compare* Justice Manual, § 9-5.001.D.1 (directing that exculpatory evidence be disclosed "reasonably promptly after it is discovered") *with id*., § 9-5.001.D.2 (directing that impeachment material "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently").

10. *See* United States v. Cruz-Feliciano, 786 F.3d 78, 88 (1st Cir. 2015); United States v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001); United States v. Higgs, 713 F.2d 39, 44 (3rd Cir. 1983); United States v. Smith Grading & Paving, Inc., 760 F.2d 527, 532 (4th Cir. 1985); United States v. Walters, 351 F.3d 159, 169 (5th Cir. 2003); United States v. Crayton, 357 F.3d 560, 569 (6th Cir. 2004); United States v. Higgins, 75 F.3d 332, 335 (7th Cir. 1996); United States v. Taylor, 175 F.3d 1026 (8th Cir. 1999); United States v. Tyndall, 521 F.3d 877, 882 (8th Cir. 2008); United States v. Juvenile Male, 864 F.2d 641, 647 (9th Cir. 1988); United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976). Only the Tenth and Eleventh Circuits have yet to speak directly on this issue.

11. *See* United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988); United States v. Jones, 612 F.2d 453, 455 (9th Cir. 1979); United States v. Scott, 524 F.2d 465, 467 (5th Cir. 1975).

12. *See* United States v. Coppa, 267 F.3d 132, 145–46 (2d Cir. 2001); United States v. Tarantino, 846 F.2d 1384, 1414–15 & n.11 (D.C. Cir. 1988); United States v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984).

13. Some district courts within those circuits have also held that *Brady* trumps Jencks. *See, e.g.,* United States v. Owens, 933 F. Supp. 76, 84–85 (D. Mass. 1996); *Lujan*, 530 F. Supp. 2d at 1256; United States v. McVeigh, 923 F. Supp. 1310, 1315 (D. Colo. 1996); United States v. Thevis, 84 F.R.D. 47, 54 (N.D. Ga. 1979).

14. United States v. Snell, 899 F. Supp. 17, 21 (D. Mass. 1995); *see* United States v. Narciso, 446 F. Supp. 252, 270 (E.D. Mich. 1977) ("when two principles of law conflict with one another the criminal justice system demands that the principle favoring greater discovery in favor the accused must prevail, particularly where, as here, the principle favoring disclosure is of constitutional origin").

15. *See, e.g.,* United States v. Bencs, 28 F.3d 555, 560 (6th Cir. 1994) (Jencks trumps *Brady* ruling arising out of defendant's challenge to "the government's failure to respond to a pretrial discovery request by producing memoranda of interviews" with two witnesses who testified at trial). Later authority makes clear the point. *See* United States v. Brazil, 395 F. App'x 205, 216 (6th Cir. 2010) ("[p]ut another way: the Jencks Act trumps *Brady* where impeachment evidence is Jencks Act material").

16. *See, e.g.,* United States v. Coppa, 267

F.3d 132, 138 (2d Cir. 2001) ("early disclosure of the identities of potential witnesses could undermine undercover operations and ongoing investigations involving these witnesses"); United States v. Presser, 844 F.2d 1275, 1285 (6th Cir. 1988) ("the protection of potential government witnesses from threats of harm or other intimidation before the witnesses testify at trial").

17. *See, e.g.,* United States v. Beckford, 962 F. Supp. 780, 794-95 (E.D. Va. 1997) ("the defendants here are alleged to be members of an extensive drug trafficking organization that routinely murdered those who impeded their drug trafficking objectives") *compare* United States v. Shifflett, 798 F. Supp. 354, 357 (W.D. Va. 1992) ("the witnesses are government agents … not likely candidates for threats or bribery").

18. *See, e.g.* United States v. Tarantino, 846 F.2d 1384, 1416–1417 (D.C. Cir. 1988) (recognizing overlap between *Brady* and Jencks in attempting to balance interests underlying both doctrines); United States v. Martino, 648 F.2d 367, 384 (5th Cir.1981) ("when alleged *Brady* material is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act"); United States v. Pollack, 534 F.2d 964, 973–74 (D.C. Cir. 1976) ("Disclosure [of *Brady* information] by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure"); *Shifflett*, 798 F. Supp. at 356-57 ("The rationale that emerges, therefore, is that the due process requirements of *Brady* must be met early enough to allow the defense to make effective use of the exculpatory statements at trial, while at the same time the dangers that the Jencks Act seeks to control must be minimized").

19. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

20. Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987).

21. United States v. Agurs, 427 U.S. 97, 108 (1976).

22. Some prosecutors use "summary letters" to produce exculpatory information. Because these derivative documents reflect the government's characterizations of statements made by witnesses — rather than simply producing the statements themselves — they are often helpful to the defendant only by accident. While we are not aware of any court that has prohibited the use of summary letters, authority exists that criticizes the practice. *See, e.g.*, United States v. Stevens, Case No. 1:08-cr-00231 (D.D.C.) Doc. 373 at 8-9 (April 7, 2009 Hearing Transcript); United States v. Poindexter, No. 88-0080, 1990 U.S. Dist. Lexis 2023 (D.D.C., Mar. 5, 1990).

23. We discuss further below the options counsel should consider when faced with the production of core *Brady* as early Jencks.

24. This is not to suggest that counsel handling a case in which the government employs number 2 or number 3 should concede defeat. Even if that form of production ultimately comports with the government's obligations, counsel may still find it beneficial to seek relief from the court. A significant number of judges are wholly unaware of the process by which the government makes discovery available. Most likely, courts assume if counsel does not voice complaint, the defendant is satisfied with the manner and timing of production. By detailing the way in which discovery has been provided — particularly when the government's approach rests on tenuous reasoning (such as nonexistent concerns about witness safety) — counsel can ensure that the court is fully aware of the government's approach. Most often, this is done in a motion to continue which explains that counsel needs more time to review available evidence — including that which the government is constitutionally obligated to produce — because prosecutors have employed a production methodology that would impress Rube Goldberg.

25. In this context, it is particularly important that defense counsel avoid framing the motion so that it can be interpreted as a request for "early" production of anything. *See* § V(B), *infra*. Judges see plenty of those types of motions, and nothing about them signals a need for an exhaustive review before a cursory denial.

26. *Agurs*, 427 U.S. at 106.

27. *Id.*

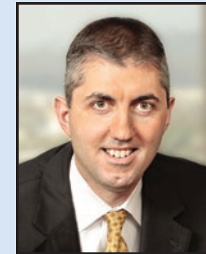
28. *See, e.g.,* Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir. 1978) (where government failed to disclose "[t]he statement of an eyewitness to a crime which makes no reference even to the presence of the defendant or his participation[,]" court granted habeas relief, deeming such evidence "potentially powerful exculpation"); United States v. Mansker, 240 F. Supp. 2d 902, 912 (N.D. Iowa 2003) (where nondisclosed interview reports contained statements of witnesses listing their drug suppliers and customers but notably failed to identify defendant, court excluded three government witnesses from testifying as sanction); United States v. Berchtold, No. 1:21-cr-39, 2024 WL 2834056, at *6 (W.D. Pa, June 3, 2024) (court recognized in health care fraud prosecution that "if a PT or PTA stated, or plainly suggested, that no one in the billing department instructed them how to document treatment services or told them what billing codes to use, that information would be favorable to Berchtold and should be produced").

29. Requests for negative exculpatory information are particularly important in two instances: (1) when the government's case relies on eyewitness testimony; (2) when defense rests to any degree on lack of knowledge.

30. When applicable local rules distinguish between core *Brady* and impeachment material, counsel may find success highlighting that fact. ■

About the Authors

Bill Athanas is a former federal prosecutor with 30 years' experience handling white collar matters. He has written extensively about the prosecution and defense of such cases, with a focus on issues arising during discovery and at trial.



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