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BRADY, ARKANSAS RULE 17.1, AND DISCLOSURE OF SCIENTIFIC EVIDENCE AND EXPERT OPINION

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I. INTRODUCTION

> On the eve of a court-ordered deadline, defense attorneys for Jason Baldwin—one of three men convicted 15 years ago in the killing of three young boys in West Memphis—fired a new volley of allegations Thursday in separate filings at the Arkansas Supreme Court and the Craighead County Circuit Court.
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> In the Supreme Court filing, attorneys contend that prosecutors withheld material evidence from the defense teams representing Baldwin, then 16; Damien Echols, 18; and Jessie Misskelley, 17.
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> In 2007, six forensic pathologists and odontologists hired by defense attorneys concluded that the three 8-year-old victims—Steve Branch, Michael Moore and Chris Byers—suffered injuries caused by animals preying on the boys' bodies after death.
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> Prosecutors had argued during Echols and Baldwin's trial that the wounds were inflicted by a knife during satanic and sexual rituals. Those two were tried together; Misskelley was tried separately.
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> In Thursday's filing, defense attorneys say they recently learned that during the murder investigation, West Memphis police consulted with San Diego police about the possibility that animal predation had caused the injuries.
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> If the state considered animal predation a possible reason for the children's wounds, the state should have made that known to Baldwin's trial attorneys, the defense's court filing states.
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> [1]

The continuing—and recently concluded—story of perhaps the most notorious case in Arkansas history—the West Memphis Three murder case, popularly known as WM3[2]—is one in which the protections afforded criminal defendants prove especially significant in ensuring not only the right of

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the accused to a fair trial, but also public confidence in the ability of the justice system to respond to the need for security against criminal activity.[3] In WM3, the need for both was heightened because of the horrible nature of the crimes—murder and apparent mutilation of the bodies of three young boys—and the sensational claims made that the crimes were related to Satanic cult activity.

The ultimate disposition of the charges against Damien Echols, Jason Baldwin, and Jessie Misskelley will always prove unsatisfactory for many. The resolution of the case rests on "*Alford* pleas"[4] entered by the three defendants. Their *Alford* pleas permitted them to plead guilty, while publically maintaining their innocence, and obtain their immediate release from prison based on time served.[5]

At the conclusion of the *Alford* plea process, the State announced that the guilt of the three defendants was certain for prosecutors; the defendants countered that they entered guilty pleas in order to end their incarceration, including Echols's confinement on death row awaiting execution.[6] While the process resulted in a formal resolution of the criminal charges, it will undoubtedly fail to conclusively establish responsibility for the horrible murders of the three children, suggesting that expediency was the key factor for the prosecution in closing the case.

In a broader sense, of course, the apparently flawed investigation conducted by police, dictating much in the conduct of the trial and lengthy post-trial litigation, must be troubling to many in the legal and greater community who hold conflicting opinions as to the factual guilt of the three defendants. The West Memphis Three case illustrates the threat to the integrity of the criminal justice system when police or prosecutors fail to comply with constitutional obligations designed to ensure fairness in the prosecution of individuals charged with criminal offenses.

The failure of prosecutors to comply with duties to disclose evidence to the defense under federal constitutional protections and state procedural rules has proved a recurring problem for ensuring the integrity of convictions obtained when the defense has not been fully advised prior to trial. The fact that prosecutorial misconduct claims have been substantiated in even the highest profile trials illustrates the strength of the temptation for prosecutors not to disclose evidence that might prove damaging to the prosecution at trial, or it illustrates the possibility for investigators to fail to disclose information obtained during the course of investigation to prosecuting attorneys who would otherwise faithfully comply with their disclosure duties. In

such cases, there is often the greatest likelihood that discovery of suppressed evidence will ultimately expose the prosecution to public embarrassment and require that the defendants be afforded relief by way of new trial or dismissal.

Perhaps the highest profile case in recent memory to inflict injury on the reputation of the prosecuting authority involves the tainted prosecution of the late United States Senator Ted Stevens. In *Untied States v. Stevens*, the Justice Department itself moved to vacate the Alaska Republican's conviction for official misconduct based on suppression of evidence that would have impeached the testimony of its key witness at trial.[7] The *Stevens* case is, regrettably, not the only incidence of misconduct in the suppression of evidence favorable to the accused in recent history. For instance, the United States Supreme Court granted relief in *Smith v. Cain*,[8] a death penalty case[9] in which the court found that New Orleans prosecutors had failed to disclose prior inconsistent statements of a key witness. Specifically, the witness had once denied being able to identify Smith as the perpetrator. Similarly, in *Green v. State*, the Arkansas Supreme Court acknowledged prosecutorial misconduct in a failure to disclose the fact that its key witness in a capital murder prosecution had not only implicated his father in the quadruple murder of an entire family as a result of a dispute over stolen marihuana plants, but also that he had given a statement implicating himself in the murders and exculpating his father.[10] More recently, the federal prosecution of an Arkansas attorney charged with Social Security fraud was terminated in the middle of trial based on the discovery that materials potentially favorable to the defense had not been disclosed by the government.[11]

In light of the recurring failure of some prosecutors to disclose evidence to the defense, the disclosure duty, especially in the context of scientific evidence or expert opinion, is reexamined in this article. Part II of this article begins by outlining the duty to disclose under *Brady v. Maryland*[12] and then compares that duty to Rule 17.1 of the Arkansas Rules of Criminal Procedure. The significance of scientific evidence in criminal cases is discussed in Part III, also highlighting egregious examples of such evidence being suppressed. Arkansas's prosecutorial duty to disclose is explored in Part IV. Before concluding in Part VI, the problem of remedy for violating the duty to disclose is illustrated in Part V.

II. THE DISCLOSURE DUTY

The history of misconduct on the part of prosecuting attorneys in failing to disclose evidence to which the accused is entitled—in order to prepare the defense at trial—indicates not only that the applicable rules are not universally followed, but also that the importance of understanding the operation of the disclosure principles cannot be underestimated. The two basic sources of disclosure rules are the federal constitutional requirement for disclosure of exculpatory or favorable evidence as a matter of due process under the Fifth and Fourteenth Amendments and the operation of federal and state procedural rules often imposing broader disclosure duties on prosecuting attorneys.

A. The *Brady* Principle Governing Discovery Rights in Criminal Cases

The United States Supreme Court's 1963 decision in *Brady v. Maryland*[13] formalized a rule of disclosure that emerged from its prior decisions condemning the prosecution's knowing reliance on perjured testimony in order to secure conviction[14] and failure to correct false testimony offered by its witnesses at trial.[15] *Brady* established the duty to disclose exculpatory evidence to the defense, whether relevant to either the accused's guilt or his culpability for purposes of sentencing.[16] Moreover, *Brady* expressly rejected any requirement of proof that the prosecutor acted in bad faith or intentionally withheld evidence favorable to the accused in order to establish a due process violation based on the failure to disclose exculpatory evidence.[17]

And, perhaps most importantly, the *Brady* Court articulated the standard of proof required to demonstrate a due process violation warranting relief resulting from nondisclosure of evidence subject to the disclosure rule. The defendant is not required to show that he would have been acquitted or actually obtained a more favorable outcome had the exculpatory evidence been disclosed prior to trial, but only that there exists a reasonable probability of a more favorable outcome. The Court recently reiterated this controlling principle in *Smith v. Cain*: "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'"[18]

In a series of post-*Brady* decisions, the Court answered important questions about the parameters of the operation of the disclosure duty imposed as

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a matter of due process. It held that disclosure was required even when defense counsel did not specifically move for disclosure in *United States v. Agurs*.[19] In *United States v. Bagley*, the Court held that not only does the disclosure duty include exculpatory evidence, but also impeachment evidence.[20] And in *Strickler v. Greene*, the Court held that a prosecutor's open file policy permitting defense counsel to inspect all evidence in the prosecutor's possession does not absolve the prosecutor of the disclosure duty when the file contains inaccuracies or significant omissions.[21]

The Court subsequently offered a comprehensive discussion of the parameters of the disclosure duty in practice in *Kyles v. Whitley*, providing important answers to questions not specifically addressed in *Brady*.[22] First, the Court explained that the disclosure duty was not limited to evidence actually in the possession of the prosecutor, but extended to all members of the prosecution team, including investigators involved in the case—requiring the prosecutor to inquire the entire prosecution team about the existence of favorable evidence in its possession not previously forwarded to the prosecutor.[23] This rule is particularly appropriate because it recognizes that failure of the police to forward evidence obtained during the investigation to the prosecuting attorney can result in a failure on the part of prosecutors to comply with their duty to disclose. Law enforcement officers and investigators may otherwise sense that their suppression of favorable evidence is preferable to disclosure to prosecutors who are duty-bound to then disclose the evidence to defense counsel. This creates an incentive for unethical police to simply hide evidence as a means of preventing disclosures that might assist the defense in avoiding conviction or arguing for leniency in sentencing.

Second, *Kyles* established that multiple disclosure violations are to be considered cumulatively, rather than individually, in assessing whether discovery violations by the prosecution meet the requirement for showing that there was a reasonable probability of a different outcome in the proceeding had the suppressed evidence been available to the defense—the *Brady* test for due process violation requiring relief.[24]

In addition, *Kyles* affirmed that the test does not require proof that the disclosure of the suppressed evidence would have necessarily led to a different result, involve a showing of insufficient evidence resulting from the nondisclosure,[25] or require any additional harmless error analysis in assessing a disclosure violation. Instead, once the *Brady* test for nondisclosure has been met, the due process violation requires relief.[26]

Finally, *Kyles* affirmed that, as the leader of the "prosecution team," the prosecutor bears the burden in determining whether evidence is favorable, and thus, subject to the disclosure requirement.[27] *Kyles* makes clear that it is the prosecuting attorney's obligation to make this determination, and in light of the Court's reiteration of the *Brady* principle, it is clear that the Court assumed that the prosecutor must be trusted with this burden.[28]

This allocation of the burden for decision-making presupposes, of course, that prosecutors will act ethically—perhaps a reasonable assumption for the Court to make, unless of course, the actual history of *Brady* litigation in the state and federal courts is considered. But even if the Court's assumption is reasonable, it presupposes that prosecutors—not necessarily experienced in developing defensive theories for trial, nor fully informed of the facts upon which defense counsel's strategic and tactical decisions will be based—are capable of correctly assessing what evidence is actually favorable to the accused. In many cases, it may be quite obvious, but in others, particularly cases in which a defense strategy is atypical or especially creative, the prosecutor may not be reasonably capable of making the decision regarding the exculpable nature of evidence. The *Kyles* court resolved this point by admonishing prosecutors: "This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."[29] Whether the majority's reliance on this bit of guidance is sufficient to ensure compliance with the mandate of the *Brady*/*Kyles* doctrine is questionable in light of the history of nondisclosure litigation.

The Court's consistent approach to disclosure recognizes that the defense has a right to disclosure of all favorable evidence within the possession of the prosecutor or members of the prosecution team. And failure to disclose, regardless of the intent or good or bad faith on the part of the prosecution team, will require relief if the defendant can meet the burden of showing a reasonable probability that he or she has been prejudiced by the nondisclosure. But the continuing evidence of violations, as demonstrated by the Court's recent decision in *Smith v. Cain*,[30] raises questions about the reliance on the prosecution—at least in certain cases or offices[31]—to act ethically and intelligently in discharging the disclosure duty.

B. Discovery Under the Arkansas Rules of Criminal Procedure

There is no general right to discovery in criminal cases as a matter of federal constitutional protection.[32] However, states and federal courts oper-

ate under rules that may expand discovery rights and disclosure duties that were adopted with a goal of expediting litigation or ensuring fairness to litigants.[33] This may prove particularly important with respect to discovery required relating to scientific evidence and expert opinion. In the federal system, for instance, Rule 16 of the Federal Rules of Criminal Procedure authorizes reciprocal discovery of scientific test results and reports prepared by expert witnesses that the parties intend to use at trial.[34] If the defendant requests disclosure, the government has the reciprocal right to obtain the same information relating to the experts or scientific evidence the defendant intends to call at trial.[35] While disclosure in the federal system is contingent upon the defendant's agreement to participate in the process by disclosing comparable information, the procedure under Arkansas rules is tactically more favorable for defendants. Arkansas Criminal Procedure Rule 17.1(a)(iv), for instance, provides the following:

> (a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:
>
> . . . .
>
> (iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons . . . .[36]

However, Arkansas does impose disclosure obligations on the defense that are not tied to reciprocal discovery. The defense is required, upon the State's request, to disclose with specificity, information relating to the nature of the defense that will be asserted at trial and identity of witnesses who will be called to testify for the defense.[37] The applicable rule provides the following:

> Subject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof. [38]

The failure of defense counsel to disclose the requested information may result in sanctions, including most importantly, exclusion of the witness's testimony from trial.[39]

Further, Rule 18.2 of the Arkansas Rules of Criminal Procedure also expressly provides for required disclosure of defense experts, again subject to constitutional limitations and upon motion by the State:

> Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations scientific tests, experiments or comparisons.[40]

With respect to either disclosure requirement, the rules fail to explain the reference to the constitutional limitations that limit the duty imposed on defense counsel. Moreover, the Arkansas rules do not provide for reciprocal discovery and thus, apparently fail under the requirement imposed by the Court in *Wardius v. Oregon*[41]: the prosecution must be required to respond to compelled defense disclosures with disclosures of its rebuttal evidence as a matter of due process.[42]

Rule 17.1 is broader in terms of discovery of scientific evidence or expert opinion than the disclosure duty required under *Brady*.[43] It does not require that this type of evidence be exculpatory in order for the defendant to be entitled to its discovery.[44] It also specifically addressed *Brady* concerns, requiring disclosure consistent with constitutional requirements:

> (d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.[45]

The rules also impose the duty on the prosecution to determine whether discoverable information is available through other members of the "prosecution team."[46] The reference to Rule 19.4 recognizes the restriction on immediate disclosure that may be imposed by a protective order entered by the circuit court. Moreover, Rule 17.2 requires the prosecutor to make the disclosures required by Rule 17.1 "as soon as practicable."[47]

With respect to discovery of scientific evidence, test results, or expert opinion reduced to written reports, the controlling Arkansas procedural rules

afford defendants greater flexibility with respect to understanding the prosecution's theory of the case and preparing the defense for trial. The *Brady* disclosure duty serves only to require the State to disclose evidence that is favorable to the defense. With respect to expert testimony, however, the more likely scenario for the defense involves the need to counter prosecution testimony with defense experts, assuming that there is a legitimate basis for disagreement as to the conclusions different experts reach.

It is critically important that when the State's theory rests on the results of scientific evidence or the opinion of expert witnesses, the defense be apprised of exculpatory—or favorable—evidence, subject to disclosure under *Brady*. It is also critically important, in many cases, that the theory the prosecution will advance based upon unfavorable testimony is also disclosed so that it be countered. When possible, the defense may be able to counter prosecution expert testimony with contrasting conclusions developed through defense experts or—and often more significantly—through skilled cross-examination that may serve to question the conclusions testified to by the State's expert witnesses. Disclosure of the State's case serves to permit defense counsel to seek other expert opinion, retesting of evidence, and education with respect to the nature of the science relied upon by the prosecution expert that facilitates skillful cross-examination.

One important point that arises in discovery issues under the Rules is that the State is not obligated to undertake any particular scientific testing or examination that might produce evidence favorable to the defense. In *Thomerson v. State*, the court confirmed that disclosure of such test results is required under Rule 17.1(a) but declined to hold that the prosecution is required to engage in any particular investigative technique that might produce exculpatory evidence.[48] The court then admonished the defense:

> Appellant speculates here, however, that if tests had been made on various tangible items, they might be exculpatory in nature. While this might be true, appellant has cited no authority imposing a duty on the state to make tests on all materials seized. A defendant in a criminal case *cannot rely upon discovery as a total substitute for his own investigation*.[49]

The defense specifically sought disclosure of any items seized from the defendant that had been sent to the state crime lab for testing.[50] However, no tests on the items were ever actually conducted, according to the record.[51] The court was thus able to conclude that the State had actually disclosed everything required by the Rule.[52]

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Thomerson demonstrates that while the scope of the Arkansas rule governing mandatory disclosures is broad, its application, in practice, is likely dependent on specific facts that may serve to excuse compliance. Conversely, Arkansas trial courts will be upheld on appeal for imposing even the extreme sanction of exclusion of evidence or witnesses when there is a technical noncompliance with the disclosure duty imposed on defense counsel by Rule 18.2.[53] Disparity in treatment accorded to the prosecution and defense for discovery violations may suggest unfairness but may also reflect a suspicion that defendants can benefit from noncompliance that results in the State being sandbagged (surprised) at trial and unable to respond adequately to prevent an unwarranted acquittal barring retrial.

Finally, Rule 17.1(d) seemingly incorporates the *Brady* disclosure duty in the context of the prosecutor's responsibilities under Rule 17.1.[54] However, it imposes the *Brady* disclosure duty upon learning of favorable evidence, providing "the prosecuting attorney shall, promptly [disclose] upon discovering the matter."[55] This formulation would presumably excuse disclosure violations when the favorable evidence was in the possession of investigators but had not been disclosed to the prosecutor. Because *Brady*, as explained in *Kyles*, treats investigators as members of the prosecuting team[56] and imputes information known to them upon the prosecuting attorney, subsection (d) fails to accurately instruct prosecutors as to the full extent of the their constitutional disclosure duty.

III. THE DISCLOSURE DUTY: SCIENTIFIC EVIDENCE AND EXPERT OPINION

Disclosure of scientific evidence or expert opinion favorable to the defense is particularly significant in the criminal process precisely because such evidence often suggests a greater degree of reliability than eyewitness testimony,[57] confessions,[58] or testimony offered through witnesses having personal interests in the outcome of the litigation, such as jailhouse informants and accomplices[59] whose testimony is often the product of inducements designed to reward cooperation with the prosecution.[60] The authority of scientific evidence and expert opinion is so important, and its public profile so widespread—perhaps due to the recent proliferation of fact-based investigative documentaries and fictional television programs, such as CSI, CSI Miami, CSI New York, Crossing Jordan, Diagnosis Murder, and Quincy—that many prosecutors may now include questioning about juror expectations of scientific evidence during voir dire. This is possible in even routine prosecu-

tions where the likelihood of application of sophisticated high-tech investigative techniques is neither warranted nor fiscally feasible.[61] The power of both these investigative tools and public perceptions can hardly be underestimated.

A. The Power of Scientific Evidence or Expert Opinion in the Fact-Finding Process

The strength of scientific evidence and expert opinion testimony often overpowers other forms of evidence typically offered in a criminal trial.[62] This is perhaps most evident in the reliance on DNA evidence to establish the actual innocence of individuals convicted on the basis of eyewitness testimony or other nonscience based evidence. The Third Circuit observed this in *United States v. Brownlee*:

> The recent availability of post-conviction DNA tests demonstrate that there have been an overwhelming number of false convictions stemming from uninformed reliance on eyewitness misidentifications. In 209 out of 328 cases (64%) of wrongful convictions identified by a recent exoneration study, at least one eyewitness misidentified the defendant. In fact, "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." "[E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, *is among the least reliable forms of evidence.*"[63]

Ironically, the exclusion of scientific testimony is often based on the same concern—its potential for overwhelming lay jurors, which could lead to verdicts based on unsubstantiated "science" or the improper use of scientific evidence.[64] This theme lies at the heart of the Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[65]

Moreover, flawed science and inaccurate expert opinion may prove to be strong tools for either the prosecution or the defense.[66] For example, in the Texas case of *Willingham v. State*, Texas executed Cameron Willingham on the basis of expert testimony that the fire that destroyed his home and killed his wife and children was caused by arson.[67] At trial, the prosecution's expert witness testified that Willingham had committed arson, which resulted in the death of his children.[68] A *Chicago Tribune* investigation resulted in a scientific disagreement with this expert's opinion. The *Tribune* reported that the expert testimony supporting the conviction had been reviewed by four arson experts consulted by the newspaper; their conclusions confirmed

that the original investigation was flawed, and the fire was possibly even accidental.[69] However, Texas courts and the governor refused to act on a report from a "prominent fire scientist questioning the conviction," permitting Willingham's execution to proceed.[70] According to the *Tribune*,

> Even Edward Cheever, one of the state deputy fire marshals who had assisted in the original investigation of the 1991 fire, acknowledged that [the report of the experts consulted by the newspaper] was valid. "At the time of the Corsicana fire, we were still testifying to things that aren't accurate today," [Cheever] said. "They were true then, but they aren't now. . . . We know now not to make those same assumptions."[71]

Thus, the expert testimony relied upon to convict Willingham was later shown to have been wrong, as it was based on the testifying expert's incorrect assumption that the burn pattern proved that an accelerant had been used to start the fire, which was consistent with arson.[72]

Willingham represents the danger inherent in reliance on expert opinion based on faulty or incomplete science.[73] Later, new expert evidence repudiating the testimony supporting Willingham's conviction served to exonerate another Texas death row inmate, Ernest Willis.[74] Willis was also convicted on testimony that a house fire, which caused the victim's death, was the result of arson.[75] His conviction and death sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals, which rejected his challenge that the evidence was insufficient.[76] Later, at the state court post-conviction hearing on Willis's claims, expert testimony on the origin of the fire contradicted the prosecution's expert testimony presented at trial; but, the state court denied relief.[77] In the federal habeas corpus process, however, the district court granted relief that relied on the new expert evidence and noted that other evidence was consistent with Willis's version of the fire, including the absence of evidence of any accelerant on the clothes he was wearing on that night examined by the state crime lab.[78]

Once the case returned to the trial court, the prosecutor consulted sources used by the *Chicago Tribune* in its investigation in Willingham's case. When the same experts rejected the prosecution's theory of the cause of the fire, the Pecos County (Texas) District Attorney dropped the charges, citing the convincing conclusions that led the experts to exclude arson as a theory for the homicide.[79]

The power of incorrect expert opinion to influence jurors to convict is apparent. But, the power of scientifically sound expert opinion also offers

the prospect that wrongful convictions will be averted.[80] And, when science offers newly available evidence that may unravel convictions that were obtained with evidence subsequently disproved by the scientific advance, there is a necessarily complex public response to a system that has erred. Exonerations may fuel lack of confidence in the fairness or integrity of convictions, particularly when jury verdicts have been reviewed by multiple layers of state and federal courts. Conversely, the exonerations also demonstrate that the criminal justice system does have the capacity to recognize and correct errors resulting in wrongful convictions, particularly when the correction is attributable to scientific advances. Even in capital cases, the system offers a process for correcting errors, although exoneration after execution is the most troubling problem for the criminal justice system.

The Arkansas General Assembly has recognized the need to provide a remedy for defendants able to offer newly discovered or newly available scientific evidence that would establish their actual innocence of the offenses for which they have been convicted. The legislature adopted a provision creating a new post-conviction remedy for litigation of these types of claims:

> (a) Except when direct appeal is available, a person convicted of a crime may commence a proceeding to secure relief by filing a petition in the court in which the conviction was entered to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate, if the person claims under penalty of perjury that:
>
> (1) Scientific evidence not available at trial establishes the petitioner's actual innocence; or
>
> (2) The scientific predicate for the claim could not have been previously discovered through the exercise of due diligence and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would find the petitioner guilty of the underlying offense.
>
> (b) Nothing contained in this subchapter shall prevent the Arkansas Supreme Court or the Arkansas Court of Appeals, upon application by a party, from granting a stay of an appeal to allow an application to the trial court for an evidentiary hearing under this subchapter.[81]

The Arkansas habeas remedy provided the basis for the final round of litigation pursued by the WM3 defendants and, perhaps, led the State to agree to the resolution by entry of the *Alford* pleas, resulting in termination of the proceedings prior to the hearing scheduled on their petitions.[82] In remanding the cause, the Arkansas Supreme Court explained the significance of the DNA test results:

> The results of the testing established that neither Echols, Baldwin, nor Misskelley was the source of any of the biological material tested, which included a foreign allele from a penile swab of victim Steven Branch; a hair from the ligature used to bind victim Michael Moore; and a hair recovered from a tree stump, near where the bodies were recovered. In addition, the DNA material from the hair found in the ligature used to bind Moore was found to be consistent with Terry Hobbs, Branch's stepfather. The hair found on the tree stump was consistent with the DNA of David Jacoby, a friend of Terry Hobbs.[83]

While the DNA results did not necessarily exculpate the WM3 defendants, the testing certainly suggested that other individuals were either responsible for the murders or involved to some extent—a theory wholly inconsistent with the prosecution's theory at trial. The DNA results likely increased pressure on the prosecution to recognize that if the defendants prevailed at the hearing, it would have been difficult to retry the case. Thus, the disposition by Alford pleas was acceptable and preferable to a retrial that could have resulted in their acquittals.

B. Suppression of Scientific Evidence or Expert Opinion: Horror Stories

In a highly-publicized Illinois capital murder case, co-defendants Rolando Cruz[84] and Alejandro Hernandez[85] were convicted and sentenced to death for the murder, kidnapping, and rape of ten-year-old Jeanine Nicarico during the burglary of her home in DuPage County in 1983. Their convictions were initially reversed based on improper admission of hearsay relating to their purported inculpatory statements.[86] They were eventually freed based on another individual's confession of his commission of the capital crime.[87]

A third individual, Stephen Buckley, was also charged with capital murder and tried in a separate trial. After the state prosecuting attorney dismissed the criminal charges against Buckley, the Supreme Court recounted the proceedings again in Buckley's civil rights action in *Buckley v. Fitzsim-*

mons.[88] At Buckley's criminal trial, the prosecution called an expert who testified that a boot print discovered on the front door of the victim's family's home not only matched Buckley's boot, but that it had definitely been made by Buckley during his forced entry into the home.[89] Buckley's capital murder trial ended in a mistrial due to the inability of jurors to reach a unanimous verdict.[90] The expert died following the mistrial, leading the prosecutors to dismiss their case against Buckley, while making public announcements affirming their belief in his involvement in the murder and guilt.[91]

Buckley subsequently sued the prosecutors and investigators in the case, alleging prosecutors committed misconduct when they deliberately disregarded and suppressed expert opinion that the bootprint could not reliably be matched to his boots.[92] Further, Buckley claimed that prosecutors had deliberately employed an unreliable expert known to offer opinion and conclusions favorable to prosecutors.[93] The majority summarized Buckley's claim that prosecutors had acted egregiously in building their case, particularly the expert testimony regarding the bootprint:

> The fabricated evidence related to a bootprint on the door of the Nicarico home apparently left by the killer when he kicked in the door. After three separate studies by experts from the Du Page County Crime Lab, the Illinois Department of Law Enforcement, and the Kansas Bureau of Identification, all of whom were unable to make a reliable connection between the print and a pair of boots that petitioner had voluntarily supplied, respondents obtained a "positive identification" from one Louise Robbins, an anthropologist in North Carolina who was allegedly well known for her willingness to fabricate unreliable expert testimony. Her opinion was obtained during the early stages of the investigation, which was being conducted under the joint supervision and direction of the sheriff and respondent Fitzsimmons, whose police officers and assistant prosecutors were performing essentially the same investigatory function.[94]

The *Buckley* Court explained that while prosecutors are not always shielded from civil liability by the doctrine of absolute immunity, such as when they are advising police in the investigation of criminal activity, they were, nonetheless, not necessarily liable for all possible misconduct and virtually always remain shielded by the less comprehensive protection afforded by the doctrine of qualified immunity.[95] On remand, the Seventh Circuit, considering the prosecutor's tactics in securing the testimony of an unreliable expert to testify against the co-defendants, concluded that the

tactic did not amount to a violation of constitutional rights outside the qualified immunity protection enjoyed by public officials.[96] Instead, the circuit court observed, "Neither shopping for a favorable witness nor hiring a practitioner of junk science is actionable, although it may lead to devastating cross-examination if the judge permits the witness to testify."[97]

The Seventh Circuit in the Nicarico murder case recognized that the prosecutors' rejection of other expert opinions in favor of an expert whose questionable conclusions placed Buckley at the scene of the crime with Cruz and Hernandez may have ethical implications. Despite this, prosecutors were still protected from civil liability by application of the "absolute immunity" doctrine.[98] For defense counsel, the litigation demonstrates the danger in assuming that expert testimony offered by the State at trial is the only opinion offered by experts contacted by prosecutors during case preparation. In fact, other experts consulted by the State may disagree with those eventually called by the prosecution to testify at trial, experts whose conflicting opinions might provide a strong basis for impeachment or rebuttal for the defense.

The *Buckley* prosecution demonstrates the strategic importance of scientific or forensic evidence at trial, particularly when the case rests in whole or in part on circumstantial evidence relating to the facts of the offense charged. It also demonstrates the threat to the fairness of trial if a prosecutor suppresses expert opinion helpful to the defense or engages in direct or indirect fabrication of evidence it plans to offer at trial. This is particularly true with respect to scientific evidence because it often tends to overwhelm lay witness testimony. This leads to conflicting juror views because of the questionable credibility and reliability of the witness.[99]

Another example of prosecutorial misconduct is illustrated by the litigation history in *Connick v. Thompson*, a § 1983 action in which the Supreme Court vacated a fourteen million dollar jury verdict.[100] The Court's reasoning in vacating the jury award demonstrates the difficulty in circumventing the application of the doctrine of absolute immunity. The difficulty emerged from the argument that the prosecutors were negligently trained or supervised. Because the deputy actually committing the disclosure violation could not be held directly liable due to the shield of absolute immunity, the plaintiff was forced to argue that the violation resulted from negligence in the administration of the prosecutor's office. The plaintiff argued that the training and supervision of deputies were not subject to absolute immunity because they did not arise directly in the course of the prosecutors' function

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in the course of prosecuting the individual criminal case.[101] Thompson had been convicted of robbery in New Orleans in which a deputy prosecutor deliberately suppressed blood-type evidence that would have excluded him as a suspect in the crime.[102] Thereafter, when charged with murder, he elected not to testify on his own behalf at trial because of the availability of the robbery conviction to the prosecution to impeach his trial testimony.[103] He was convicted and spent fourteen years on death row before being exonerated when an investigator discovered the report of the suppressed blood-type evidence from the preceding prosecution.[104] Upon being diagnosed with terminal cancer, the culpable deputy had confessed to another deputy prosecutor that he had hidden the exculpatory evidence.[105]

Thompson was afforded relief on the capital conviction and, upon retrial, he testified and was acquitted.[106] He then filed his civil rights action, arguing that the failure to disclose the exonerating blood-type evidence was the result of negligence on the part of the prosecutor's office. He claimed that the office failed to properly train their deputy prosecutors about the proper scope of the *Brady* disclosure duty. The Court, in a five-to-four decision, concluded that a single act of misconduct or negligence was insufficient to establish the pattern of violations necessary to demonstrate a policy on the part of local officials reflecting deliberate indifference to individual rights amounting to a deprivation.[107] Because Thompson relied on the suppression of the blood-type evidence to show that the prosecutor's office should have essentially anticipated that deputies would need training with respect to their *Brady* disclosure duty, suppression of the blood-type report should have been addressed with proper training, and the prosecutor was liable for his fourteen-year stint on death row.

In the recent high profile and extensively covered capital murder of Casey Anthony, the state of Florida relied on the conclusions of an expert software designer. This expert's data reportedly showed that Anthony conducted eighty-four computer searches of the word "chloroform." The prosecutors later used this opinion at trial as evidence of her intent to kill her daughter, Caylee.[108] After her acquittal, the prosecution's expert disclosed to the media that he had reformulated the program used to track Anthony's computer activity and that the revised evaluation of the data showed that, in fact, she had only searched for "chloroform" a single time.[109] Although the software designer reported the discrepancy to the prosecutors and an investigator, the revised conclusions were never reported to the jury during the trial.[110]

These anecdotes illustrate the potential for corruption of the trial process. Failing to disclose favorable evidence required by *Brady* and its progeny could lead to jurors to rely on the false impressions created by the prosecution's pert witnesses—this is true even in the most serious cases involving capital sentences and execution.

With respect to the WM3 prosecution, the claim that investigators failed to disclose their consultations with San Diego police concerning animal predation as an explanation for the mutilated bodies of the three victims also highlights potential weakness in the enforcement of the *Brady* duty. Both the U.S. Constitution and Arkansas's procedural rules that govern the disclosure of exculpatory evidence presumably ensure a fair trial. Although there was evidence that the police considered the victims' wounds were possibly caused by animal predation, that fact alone might not constitute exculpatory evidence or subject matter likely to lead to exculpatory evidence. However, if the police had obtained an expert opinion that animal predation was a cause consistent with the additional evidence, that opinion should have been disclosed because it would have created a doubt not otherwise raised by evidence adduced at trial. Or, if an officer denied under oath having explored the possibility of animal predation on cross-examination, the prosecutor would have been obligated to correct the false impression created by the denial.[111]

In WM3 co-defendant Misskelley's case, the evidence might have been corroborated by expert opinion he offered in support of his motion for new trial.[112] A forensic pathologist in the state medical examiner's office testified at the hearing on the new trial motion that the type of cuts suffered by the victims likely required "some skill and precision."[113] This suggests that the cuts would unlikely have been made by the teenage defendants and poses a reasonable alternative theory of the crime. The Misskelley defense, however, did not have Dr. Peretti's opinion available at his trial; the fact became known when he testified later at the Echols/Baldwin joint trial.[114] The motion for new trial was denied, and the trial court's ruling was upheld on appeal. The supreme court concluded that the newly discovered evidence, which included the pathologist's revised time of death, would have been insufficient to change the outcome of the proceedings.[115] Subsequently, the supreme court rejected Baldwin and Misskelley's motions for leave to file coram nobis petitions.[116] The eventual disposition of the WM3 charges rendered the three defendants' procedural hurdles moot.

* Please refer to original version with footnotes for accurate page numbers

IV. DISCLOSURE IN ARKANSAS

Arkansas courts treatment of discovery violations appear inconsistent but rather promising. The Arkansas Supreme Court has shown assertiveness in moving to remedy *Brady* violations.[117] This assertiveness was, perhaps, sparked, to some degree, by the WM3's long struggle in post-conviction litigation in which they sought to obtain relief from the sentences imposed following their 1994 convictions. The court has, for instance, clarified that the only procedural remedy available for challenging disclosure failures discovered following the trial and direct appeal process is by petition for writ of error coram nobis,[118] finally rejecting any reliance on Rule 37 proceedings as means for raising these claims.[119] The coram nobis remedy will actually prove far more favorable for many defendants than Rule 37 because, thus far, the court has imposed less onerous restrictions in pleading and, more importantly, due diligence, rather than the strict limitations period imposed by Rule 37.2, is the standard for timely assertion of a claim.[120]

Further, the court clearly recognizes the significance of scientific evidence and expert opinion in criminal trials, suggesting that vigorous enforcement of disclosure obligations can be expected in the appellate courts. That is assuming, of course, that the necessary showing of probable prejudice is made in support of the claim of violation. This means, of course, that counsel raising the claim in the post-trial process, or during the course of trial if a belated disclosure compromises the defense's theory, must clearly articulate a theory of prejudice resulting from the failure to disclose.

In a notorious case, *Dumond v. State*,[121] the court considered defense counsel's claim that the State failed to disclose fingerprint evidence that a police officer mentioned during his testimony.[122] Defense counsel moved for mistrial, claiming that it had no knowledge of the report in question; the prosecutor claimed lack of knowledge.[123] After a search for the fingerprint report was made at the state crime lab, the lab's chief latent fingerprint examiner testified that the prints lifted from the victim's automobile could not be matched due to a lack of points or characteristics.[124] Prior to trial, defense counsel had moved for disclosure of scientific test results, objecting to the prosecutor's purported reliance on its "open file" policy. The court observed that the "open file" policy did not relieve the state of its disclosure burden because evidence known to investigators is imputed to the prosecutor.[125] The prosecution argued that the accused could have conducted his own tests on the prints from the car, but the court rejected this argument as dispositive:

> However, the state's argument that appellant could have made his own investigation does not suffice. Rather, the defendant is entitled to the opportunity, apart from his own investigations, to challenge conclusions drawn from tests undertaken by the state. Here, the state could not determine from its tests whether appellant had been in the car. It would be as important for the defense preparation to study what the state was going to present as well as anything the appellant might have prepared. It relates not to the right to investigate, but to the effective preparation of a defense and rebuttal.[126]
>
> . . . .
>
> Here, appellant made the appropriate request under Rule 17.1 and sought the basis of the results of any tests. While the information testified to by the expert was neutral and nonprejudicial, appellant was entitled to challenge the state's conclusion by having his own tests performed.[127]

However, the court declined to reverse Dumond's conviction because trial counsel, having made the specific request for disclosure to which he was entitled under the rule, failed to properly preserve error in not moving for mistrial until after additional testimony had been elicited following the officer's reference to "fingerprint" evidence.[128] The court explained its reasoning behind declining reversal:

> [A]ppellant's mistrial request was untimely. *His objection was that the defense was entitled to have the report.* There was a recess with no further comments by the defense. *The expert's testimony ostensibly cured the problem as there was no objection before, during or after the fingerprint expert testified and no further discussion of the matter.* The appellant must make known to the court the action he wishes the court to take. Here the appellant's initial objection and request related only to being entitled to see the report and the record shows this was resolved. Appellant was given all the relief requested.
>
> Appellant did not make his objection at the first opportunity, he waited until after the testimony of the last witness and the state had rested. The defendant cannot wait to see the full strength of the state's case before bringing his request to the attention of the trial court.[129]

Dumond demonstrates two important points. First, proper preservation of error is required in order to establish a discovery violation. The second relates to the value to the defense of the disclosure requirement under Rule 17.1. The fact that the print results were insufficient for identification of the

assailant likely means that these results would not have constituted exculpatory evidence under *Brady*. Unless the undisclosed prints would have raised a reasonable doubt as to Dumond's guilt, the disclosure failure would fail to support a finding of a due process violation. Assuming other evidence was sufficient to establish Dumond's guilt, the failure to disclose would not have warranted relief because the undisclosed fingerprints would not have met the *Brady* standard for exculpatory evidence.

However, because Rule 17.1(a)(iv) does not limit disclosure of scientific tests or reports of experts to exculpatory material, Dumond was entitled to the report. Counsel might have been able to use the report to raise doubt about the adequacy of the prosecution's case, which rested on the rape victim's eyewitness identification.[130] The supreme court clearly recognized the potential significance of the lack of fingerprint evidence that implicated Dumond as a tactical point for the defense. But, as usual, it applied its error preservation policy and refused to order relief. It explained that the defense defaulted the claim procedurally by delaying its mistrial motion until hearing the prosecution's entire case, effectively hedging its bets rather than complying with the rule requiring contemporary objection to preserve error.[131]

An older example of the court's recognition of the significance of discovery can be seen in *Westbrook v. State*.[132] In *Westbrook*, the accused asserted an insanity defense and sought access to his medical records by written motion. The trial court granted the motion, but the records were not made available to counsel.[133] Despite repeated requests through subpoena duces tecum and a renewed motion for production, the records were never provided to the defense.[134] The court concluded that the defendant should have been given the records:

> *Due to the nature of the defense we feel it was necessary that appellant have these records, if they exist, in order to fully prepare his defense*. We note that Dr. Buford allegedly testified before the same prosecutor and trial judge on April 16 or 17, 1978. Even if the prosecuting attorney did not have the material requested in his possession, there was no reason why more compulsory processes could not have been utilized to obtain these vital records. *It may be that something in these records would have enabled appellant to furnish stronger proof on his behalf*.[135]

Westbrook, like *Dumond*, reflects the court's appreciation for the value a scientific test result or expert opinion has for the accused in developing a defense, even if the evidence is not wholly exculpatory.

However, the court is skeptical with regard to the potential use of claims that must be adjudicated on the basis of the federal due process disclosure duty. For example, in *Sanders v. State*,[136] the defendant sought leave to file the petition for writ of error coram nobis in the trial court, arguing that he had only recently learned of the exculpatory value of evidence that apparently had not been disclosed to the defense prior to trial.[137] The evidence involved various articles seized from the crime scene that had been lost before they could be subject to scientific testing or evaluation.[138]

The court rejected his argument that scientific testing would have demonstrated a reasonable probability of a different outcome, particularly in light of other evidence supporting conviction. The court rested its conclusion based on the testimony of three witnesses who testified that defendant had admitted to the killings and circumstantial evidence that was consistent with his guilt on the two counts of capital murder.[139] In response to his theory for coram nobis relief, the court found that there was no *Brady* violation:

> Petitioner offers no documentation or factual substantiation to establish that any of the articles even if subjected to extensive forensic testing would have had any exculpatory or impeachment value. At best, the testing might have bolstered the defense claim that there was no scientific evidence to place him at the scene. *This alone, however, does not rise to a Brady violation.*[140]

The court's disposition reflects that the accused has an even more difficult burden in raising a due process claim based on the *Brady* disclosure duty than in raising a discovery violation arising in the context of Rule 17.1(a)'s mandatory disclosure duty. The significant problem for defendants lies in the fact that unless the undisclosed evidence meets the probable prejudice requirements of *Brady*, relief after the trial process will not be available. The coram nobis remedy is phrased in terms of *exculpatory* evidence under *Brady* but would not appear to encompass a Rule 17.1(a) disclosure violation where the evidence—which might admittedly lead to exculpatory evidence or suggest a viable line for cross-examination—is not itself exculpatory or impeaching.

Although the motion for new trial would logically be a vehicle for preserving error with respect to a claimed violation, Rule 17.1(a) violations are typically asserted in the trial, rather than post-trial, process. For instance, in *Burton v. State*,[141] defense counsel filed a motion for discovery of items covered under the rule. The motion requested the names of the prosecution's

witnesses, one of whom was a chemical analyst with the state crime lab, and the laboratory report on testing of the suspected controlled substance, cocaine.[142] The prosecution responded by claiming the evidence would be available through its "open file" policy, but the information was not located in the file.[143] The defense complained that the prosecutor failed to engage in timely disclosure of the requested information, including the laboratory report, which had become known to the prosecutor.[144] The court affirmed the defendant's right to discovery, but held that reversal would be proper only upon a showing of prejudice.[145] Because the laboratory report was not introduced in evidence, the court held that no prejudice could be shown from the discovery failure.[146] The court did, however, note that the trial court had the authority to exclude evidence not properly disclosed and suggested that alternative remedies, such as permitting defense counsel to interview the undisclosed witness, as the trial court ordered, were also available.[147]

The problem of demonstrating prejudice to the trial court was undoubtedly made more difficult for Burton because he denied that he had neither active nor constructive possession of the contraband.[148] Consequently, the issue of the laboratory report might be seen as a "red herring" because the defense was predicated on a theory of complete denial. The court has recognized that in some cases additional testing by defense experts might lead to an alternative defensive theory. Additional testing could result in a more definitive defensive posture if, for example it showed that the substance was not cocaine at all. In *Burton*, however, the trial testimony showed that the substance tested was eighty-four percent cocaine base.[149] There was no real possibility that additional testing would have changed the nature of the prosecution's in the defendant's favor.

The Arkansas Supreme Court's approach to mandatory disclosure, under either federal constitutional protections or state court rules, clearly recognizes the potential value of scientific test results and expert opinion reports to the defense's preparation for trial. In assessing the likelihood for relief after a disclosure violation, a key factor that suggests the showing of prejudice necessary to gain relief is the quality of the scientific or expert evidence involved and its potential for negating the guilt of the accused. Two decisions illustrate the significance of the quality of scientific evidence or expert opinion.

In *Yates v. State*, the court held that the defendant was entitled to disclosure of his polygraph test results administered by the police.[150] At the conclusion of the test, the administering officer had advised Yates that he

failed the test, and Yates consequently confessed to committing two rapes of his twelve-year-old daughter.[151] The defense moved to suppress the confession on the ground that it had been obtained as a result of improper conduct.[152] After disclosure of his written statement, he filed a supplemental motion for disclosure "of the polygraph tapes, in which Officer Beall questioned Yates, and the questions asked before and after Yates's polygraph examination."[153] The State refused to disclose this information and contended that the materials constituted work product.[154]

The issue of disclosure of polygraph test results as a matter of due process was considered by the United States Supreme Court in *Wood v. Bartholomew* in which defendant's brother testified against him at trial and denied his own involvement in the robberies and multiple homicides.[155] The brother had, in fact, failed a polygraph test given prior to trial where he also had denied involvement in the robbery.[156] The Court held that the prosecutor's failure to disclose these results did not result in a *Brady* violation because the polygraph results were inadmissible under state law.[157] The Court rejected the circuit court's speculation that the disclosure might have led to deposition of the defendant's brother, which could then have led to admissible, favorable evidence.[158] The majority held that it was "not 'reasonably likely' that disclosure of the polygraph . . . results would have resulted in a different outcome at trial."[159]

The *Yates* court, however, viewed the polygraph test results as falling within the reference to "scientific tests" in Rule 17.1(a)(iv)[160] and, regardless of the admissibility of the test results at trial, subject to disclosure under the rule.[161] Moreover, the court noted that use in suppression hearings was the primary purpose for obtaining test results and evidence of surrounding circumstances:[162]

> Yates specifically advised the trial court that his primary reason for requesting the disclosure of the polygraph materials was to impeach Officer Beall at the suppression hearing. Yates was entitled to the opportunity, apart from his own investigations, to challenge conclusions drawn from tests undertaken by the State. The importance of the circumstances surrounding the examination, and the validity of its results, cannot be minimized in this situation.[163]

The court then explained that Yates was prejudiced in his inability to fully impeach the officer who performed the test that led to his confession:

> Yates was prejudiced in this case because, from the very beginning of trial, it was critical for him to evaluate the circumstances under which his polygraph examination was administered and upon which Beall's conclusions were based. The State knew that its case depended primarily upon Yates's confession, ostensibly obtained due to the outcome of the polygraph examination. Yates's defense was based on destroying Beall's credibility and establishing the involuntariness of his confession. *Questions were raised about the circumstances under which Yates's confession was obtained; consequently, the trial judge might have ruled differently in several instances if the truth were known*.[164]

The *Yates* court relied on the state discovery rule and the particularized need for the evidence in holding that the polygraph test results and circumstances surrounding the test should have been disclosed.[165] Because the critical evidence in the case was the defendant's confession—which, if suppressed by the trial court, would have left the State's case in serious doubt—nondisclosure resulted in prejudice warranting relief.

Finally, without specifically holding that the disclosure duty necessarily overrules the State's assertion that evidence sought constitutes work product, the *Yates* majority found that disclosure of the polygraph test was implicit in the rule's reference to "scientific test."[166] But its implicit conclusion rejecting the work product argument was also supported by the circumstances by which the evidence was obtained:

> We further point out that, in this case, there was no valid policy reason for the State's failure to disclose the polygraph examination results to Yates; there was no confidentiality to be protected. Indeed, the State orchestrated the examination, Yates participated in the examination, and Yates allegedly confessed as a result of being told that he had failed the examination.[167]

Perhaps oddly, the issue of whether the *Brady* disclosure duty trumps work product as a matter of federal constitutional principle apparently remains unresolved.[168]

A second and more direct decision involves claimed suppression of DNA evidence that would exclude the defendant.[169] In *Cloird v. State*, the defendant sought relief through coram nobis,[170] and the court noted the compelling nature of his claim:

> In the instant case, petitioner has appended to the petition a laboratory report on forensic testing by the Federal Bureau of Investigation (FBI)

> dated July 23, 1992. (Petitioner's trial was held August 24, 1992.) The report, which is addressed to a serologist with the Arkansas State Crime Laboratory, reflects that the FBI lab received the following items for testing: vaginal swabs obtained from the victim, a cutting from the victim's jeans, and a cutting from the victim's underwear. It also received samples of the blood of five men, including petitioner, who had been identified by the authorities as the persons who sexually assaulted the victim. According to the report, DNA comparisons indicated that petitioner was excluded from having contributed to the samples taken from the victim. Petitioner contends that he was unable to present the evidence earlier because heretofore he had been unable to obtain a copy of the DNA test results.[171]

The defense's theory was that there was no scientific evidence supporting the prosecution's claim that Cloird had committed the rape for which he was convicted.[172] The relief ordered by the court permitted the defendant to petition the trial court for relief by writ of error coram nobis. However, in ordering the relief, the court directed the trial court to consider whether the exculpatory DNA evidence was in the State's possession prior to trial and, if so, whether the evidence was favorable to the defense, thus requiring relief from his conviction.[173] The court's reference to the test results demonstrates a high probability that Cloird was not the perpetrator, but regardless, it clearly supported Clorid's defensive theory at trial, which was that there was no scientific evidence to establish his culpability.[174] In fact, it supported his theory directly. Thus, the second of the issues almost certainly have to have been answered in the affirmative.

But the first question, which concerns the timing of the test results, presents an intriguing issue. Assuming that the FBI tested the clothing at the request of the investigators or state crime lab, a reasonable conclusion since the report was addressed to a serologist at the lab, the FBI arguably became a member of the "prosecution team." Evidence known to the FBI lab in July 1992 should have been imputed to the prosecution prior to commencement of Cloird's trial the following month.[175] Because *Brady* violations do not require proof of bad faith or intentional misconduct on the part of prosecutors who do not disclose exculpatory evidence, this situation certainly suggests that imputed knowledge is consistent with the goals of the rule grounded in federal constitutional due process. However, the extent to which the principle of imputed knowledge should be extended is not fully resolved at this point.

Yates demonstrates the potential for creative reliance on evidence of a scientific nature that can assist the defense in responding to the prosecution's theory of the case. *Yates* also demonstrates that Rule 17.1(a)(iv) contains rather broad and favorable language that requires disclosure.[176] *Cloird* reflects the power of scientific evidence to directly rebut other evidence of guilt, including eyewitness testimony and the potential for relief from non-disclosure.[177] These decisions also suggest the potential for well-developed arguments advanced in the pre-trial and trial processes for later challenging convictions based on disclosure failures.

V. THE PROBLEM OF REMEDY

The enforcement of disclosure duties imposed under both *Brady* and Rule 17 is complicated by the fact that successful suppression of evidence by state actors serves to frustrate enforcement possibilities under traditional remedies. In order to establish a claim that the State has violated *Brady*, the accused has to gain access to the suppressed, undisclosed material. For instance, in *Buckley v. State*,[178] the supreme court denied the motion to reopen the case through the writ of coram nobis because the petitioning defendant, who had learned of existence of a previously undisclosed videotaped interview with an undercover informant, had been unable to actually obtain the tape.[179] Although the petitioner requested the supreme court remand the case to the trial court to permit counsel to review the taped interview, [180] the court denied the motion for leave to file the petition.[181]

The frustration of Buckley's coram nobis effort results from the same approach to post-trial discovery previously taken by the supreme court with respect to Rule 37 actions.[182] The court has consistently held that Rule 37 proceedings could not be used as discovery vehicles for determining the existence of exculpatory evidence that had not been disclosed to the defense. Thus, in *Weaver v. State*[183] and *Arnold v. State*,[184] the court rejected the use of this post-conviction remedy in attempting to develop evidence supporting a *Brady/Kyles* violation claim. In *Weaver*, the court explained its reasoning for rejecting defendant's post-conviction claim:

> The list of persons, if any, now sought by Weaver, was available at his original trial, but he never sought the information, nor did he claim a right to such information on direct appeal. Weaver does not use this post-conviction proceeding to claim his counsel at trial and on appeal were ineffective for failing to obtain the list of names, but instead, he seeks to

> obtain that information in this post-conviction proceeding, saying he is entitled to it as exculpatory evidence. Rule 37 does not provide for such discovery, and Weaver fails to cite any authority for the proposition. Neither does the Rule provide a remedy when an issue could have been raised in the trial or argued on appeal.[185]

The court's explanation is clear—where the post-conviction litigant does not have supporting evidence to demonstrate the existence of favorable evidence, Rule 37 cannot be used simply as a discovery tool.[186] Instead, counsel's failure to seek discovery at trial was apparently deemed a failure in representation that should have been raised as an ineffective assistance claim. Of course, since the disclosure duty is not dependent upon a request under either *Agurs*[187] or Rule 17.1(d),[188] counsel's failure to request disclosure of exculpatory evidence would not, itself, necessarily constitute ineffective assistance since counsel should reasonably be able to expect the prosecutor to perform the constitutionally imposed obligation to disclose.[189]

Weaver addressed the post-conviction discovery issue in terms of Rule 37 procedure. The supreme court subsequently clarified its position on enforcement of *Brady* discovery duties in *Buckley*. The court unequivocally required that claims involving prosecutorial misconduct in the suppression of favorable evidence be brought in the coram nobis process rather than by Rule 37.[190] The coram nobis process exists, in most instances, to provide a vehicle for reinvesting the trial court with jurisdiction to entertain the petition alleging the violation of the prosecutor's duty to disclose exculpatory or favorable evidence.[191] Because the trial court loses jurisdiction once the case is appealed or time for appeal following the conviction has run, the defendant must petition the Arkansas Supreme Court for leave to file the petition in the trial court once the supreme court finds that the petition affords a colorable basis for relief.[192]

Relief is available only when the defendant can show a due process violation, using the *Brady* Court's formula for relief. The supreme court explained this further in *Dansby v. State*:

> When determining whether a petitioner is entitled to relief as a result of material evidence withheld by the prosecutor, the petitioner must demonstrate that there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the evidence been disclosed at trial.[193]

Application of the federal standard requires the petitioning defendant to make a sufficient factual showing of a violation that warrants reopening the case in the trial court. This requirement appears reasonable, except for the underlying problem that the remedy must address—suppression of the favorable evidence by the prosecutor or law enforcement agents that serve as members of the prosecution team.

Because the evidence has not been disclosed—particularly if the nondisclosure is deliberate, but even if inadvertent—the petitioner cannot be expected to make the required showing unless the suppressed evidence is discovered through investigation apart from the disclosure contemplated by Rule 17.1. Aside from inadvertent discovery or the defendant's knowledge of the existence of scientific testing that would have produced results subject to disclosure under the rule, as in *Yates*, where the defendant knew that he had been given a polygraph examination, the process for determining whether there has been a discovery violation is compromised by the fact of nondisclosure itself.[194]

In fact, the Arkansas decisions involving Rule 17.1(a)(iv)'s requirement that scientific test results and expert opinion have typically resulted from disclosures of evidence in the State's possession during pretrial hearings on discovery motions filed by the defense or during trial testimony. When violations of the Rule 17.1 disclosure requirement are disclosed prior to the conclusion of trial, the defense is in a much more favorable position to raise the issue of the violation before the trial court. This permits defense counsel to develop a theory of prejudice to the defense resulting from the nondisclosure that may be argued on direct appeal in the event of conviction.

One option may be for the defense to explore the range of evidence within the possession of prosecutors or law enforcement agencies relating to the case through the use of a Freedom of Information Act request under Arkansas law[195] once the case has been concluded[196] with conviction, or, by acquittal. This approach requires the discovery process to be commenced only after the case has been resolved, which effectively deprives the defendant of access to the material subject to mandatory disclosure under Rule 17.1(a)(iv) for use in developing the defense at trial and deprives defense counsel of a complete basis for advising the client in light of all information necessary for proper evaluation of the case against his client. Of course, if discovery of the disclosure violation occurs within the time for filing a motion for new trial under the rules, within thirty days following entry of the

judgment,[197] the defense may raise the violation in the motion for relief from the judgment.[198]

Alternatively, if the disclosure failure under Rule 17.1 also implicates a due process violation under *Brady* because the undisclosed or suppressed evidence is either exculpatory or constitutes material impeachment evidence, the Arkansas coram nobis procedure arguably permits, and perhaps requires, as a matter of due diligence, that the defendant file for leave to petition the trial court to review the claim while the appeal is pending. Thus, a post-trial discovery of the suppressed evidence may provide a basis for new trial if the evidence is discovered before the time to file the new trial motion has passed. If the discovery occurs after the trial court has lost jurisdiction, once notice of appeal has been given,[199] and while the case is pending on direct appeal, *Penn v. State*[200] recognizes that jurisdiction may be reinvested in the trial court prior to conclusion of the appeal.

The coram nobis remedy offers certain advantages over the Rule 37 post-conviction process for Arkansas defendants. Most importantly, the remedy is not controlled by a fixed time limit for filing—sixty days following issuance of the mandate on direct appeal, ninety days following entry of judgment when the conviction is based on a plea of guilty[201]—but instead requires that the claim be brought forward with due diligence.[202] Consequently, the discovery of a disclosure violation, even a lengthy period after conviction and the time for post-conviction litigation has run, is still cognizable if the defendant can make the requisite showing to the Arkansas Supreme Court to warrant leave for litigation of the claim in the trial court of conviction.

In considering the disclosure duty for scientific evidence and expert opinion that would not clearly fit within the Supreme Court's views of favorable evidence that must be disclosed to the defense under *Brady*, the question of remedy under Arkansas law is uncertain. The reason is that coram nobis does not provide a remedy for claims that do not directly involve prosecutorial misconduct in the suppression or failure to disclose evidence subject to mandatory disclosure under the *Brady* line of Supreme Court decisions. Thus, for instance, in *Sanders v. State*,[203] the supreme court granted leave to file the coram nobis petition based on the prosecutors' failure to disclose a deal made with a key witness in the defendant's capital murder prosecution, which resulted in the defendant's death sentence.[204] However, a second claim, relating to the witness's recantation of his trial testimony inculpating the defendant, was not cognizable in coram nobis. The court ar-

rived at this conclusion [205] despite the fact that it arose from the same factual scenario and both claims reflected the witness's dishonesty. Nevertheless, the recantation would clearly be relevant to the question of the potential prejudice to the accused resulting from the failure of the prosecutor to disclose the agreement and the witness's uncorrected denial that he was testifying because of the deal. *Sanders* suggests that a violation of Rule 17.1(a)(iv) in suppression of scientific test results or expert opinion that does not amount to nondisclosure of evidence favorable to the accused is not cognizable in coram nobis.

If the coram nobis remedy is not available for a discovery failure by the prosecuting attorney because the scientific evidence or expert opinion does not constitute exculpatory evidence or material impeachment, enforcement of the disclosure duty would appear dependent upon the timing of the eventual discovery of the previously undisclosed evidence. Discovery during trial would appear to afford the defendant the best possibility for a remedy for the violation. First, trial counsel would be in a position to explain precisely why the nondisclosure has prejudiced the defense in its trial preparation. Second, it would afford the trial court, in an appropriate case, an opportunity to order relief during the proceedings, such as by granting a continuance to permit the defense to use the newly-discovered evidence in either presenting its defense or in responding to the State's theory of the case.

However, in some cases, the failure to disclose the evidence prior to trial might preclude a reasonable opportunity for the defense to address the State's case in light of the undisclosed evidence. Moreover, if the suppressed evidence is at the heart of the prosecution's case, the failure to disclose prior to trial would most likely prevent the defense from properly preparing a defense, violating either the defendant's confrontation or compulsory process rights under the Sixth Amendment.[206] It also compromises counsel's effectiveness in representing the accused because counsel does not have information necessary to properly advise the defendant with respect to alternatives in proceeding to trial or waiving trial and entering a plea of guilty, accepting a plea offer, or in formulating the most credible theory of defense when the accused decides to proceed to trial.[207] Where this is arguable, of course, the nondisclosure results in a federal constitutional violation subject to challenge in the trial and direct appeal process.

If the nondisclosure fails to provide a basis for arguing actual prejudice to the defendant in the preparation of the defense or decision-making regarding the defendant's exercise of the jury trial right, it is probable that lack of

prejudice will prove controlling on appeal.[208] Typically, reversal is predicated on injury to the party's right to a fair trial[209] unless the error is one of such structural significance that harm and harmlessness cannot be determined from the record.[210] Arguably, in the proper circumstance, nondisclosure may well so compromise the defendant's ability to offer a credible defense at trial as to require relief. The nondisclosure could result in surprise in the presentation of evidence not fairly anticipated by the defense. Or, it could prejudice the accused due to the suppression of evidence that would have afforded the defense a viable alternative theory or approach to addressing the State's case. Thus, even though the undisclosed evidence would not, itself, be subject to constitutional disclosure as exculpatory or material impeachment evidence under *Brady* and *Bagley* respectively, the State's failure to disclose evidence required by Rule 17.1 might still require relief in the form of mistrial or reversal on appeal.[211]

The safest course of action for defense counsel confronted by a prosecutor's case resting in whole or in part on scientific evidence will actually lie in filing a formal motion for discovery that specifically requests the disclosure of all scientific test results or expert opinion obtained by the prosecutor, investigators, or members of the prosecution team. Requiring the State to respond—on the record or, preferably, in open court—that no additional material subject to the mandatory disclosure requirement of Rule 17.1 exists will serve to preserve the claimed violation. But, defense counsel should also be able to offer a reasonable argument that the undisclosed evidence would have proved favorable to the defense at trial, would have aided counsel an in advising the client, or in preparing a different defensive strategy for use at trial. This will often require considerable creative thinking on the part of defense counsel, but like many other aspects of criminal defense, it may be necessary to protect the client's right to a fair trial or to ensure that a client knowingly and intelligently waives a jury or enters a plea of guilty.

VI. CONCLUSION

Application of federal constitutional and state procedural rules regarding disclosure to matters of scientific evidence, test results, or expert opinion is particularly important because this type of evidence often provides a critical structure in the prosecution's theory of the case. Unlike cases resting on eyewitness testimony, confessions, or other inculpatory statements, the State's reliance on scientific evidence suggests reliance on objectively

proved grounds for concluding that the defendant has committed the offense charged rather than on questionable testimony, bias, or other reliability factors. As a consequence, contradictory conclusions or test results are particularly significant for either excluding the accused's guilt altogether or raising a reasonable doubt about the prosecution's theory as to the way in which the offense occurred or the reliability of its conclusion that the accused committed the crime.

The recent history of DNA has advanced the role of science in criminal trials and serves to demonstrate the power of scientific evidence as exculpatory in nature. Unlike impeachment evidence, subject to disclosure under *Bagley*,[212] scientific evidence and expert opinion testimony possess an inherently powerful potential for negating guilt directly, rather than simply serving to undermine the credibility of prosecution's witnesses. The ultimate success of *Brady*-based disclosure, however, remains in the willingness of appellate courts to entertain arguments focusing on the necessary elements for proof of violations—particularly proof of prejudice. The quality of those arguments is, of course, dependent on the skill with which they are made in light of controlling principles and procedural rules.[213]

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1. Cathy Frye, *Baldwin Lawyers File Salvo of Papers*, ARK. DEMOCRAT-GAZETTE, May 30, 2008, at B1. The next day the same reporter filed a second story, reporting that defense lawyers filed a post-conviction pleading alleging that the Craighead County Sheriff and a local school principal had both intimidated employees who would have testified in support of Baldwin, but who instead did not do so for fear of reprisals. Cathy Frye, *Filing Contends Evidence Held Back in Killings*, ARK. DEMOCRAT-GAZETTE, May 31, 2008, at B1.

2. Echols v. State, 326 Ark. 917, 936 S.W.2d 509 (1996). During the trial, the State offered evidence that the motivation for the capital crime, the murder of a child, was related to Echols's interest in the occult. *Id.* at 940, 954–60, 936 S.W.2d at 519, 527–31. Baldwin's counsel consistently sought to distance his client from any evidence of involvement or shared interest in the occult. *Id.*, 936 S.W.2d at 519, 527–29; *see also* Misskelley v. State, 323 Ark. 449, 915 S.W.2d 702 (1996). The prosecution has drawn national attention, including two books and three documentaries. *See generally* MARA LEVERITT, DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE (2002); GUY REEL, MARC PERRUSQUIA & BARTHOLOMEW SULLIVAN, BLOOD OF INNOCENTS: THE TRUE STORY OF MULTIPLE MURDER IN WEST MEMPHIS, ARKANSAS (1995); DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE (Dimension Films 2013) (screenplay by Scott Derrickson and directed by Atom Egoyan; focusing on the issue of the teen defendants' guilt and conduct of the prosecution

and defense in the case); PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS (HBO 1996) (Emmy award winning documentary directed and produced by Joe Berlinger and Bruce Sinofsky); PARADISE LOST 2: REVELATIONS (HBO 2001) (directed and produced by Joe Berlinger and Bruce Sinofsky). The Free the West Memphis Three website reported that 5,342,300 visits had been made to the site at the time of the recent defense filings. EXONERATE THE WM3 OFFICIAL BLOG, http://www.wm3.org (last visited May 31, 2008).

3. *See* Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES, Aug. 19, 2011, http://www.nytimes.com/2011/08/20/us/20arkansas.html?pagewanted=all. "In keeping with the tenor of this case since its first horrific hours, the circumstances of the release were bizarre, divisive and bewildering even to some of those who were directly involved." *Id.*

4. The "*Alford* plea" is based on the United States Supreme Court's decision in *North Carolina v. Alford*, 400 U.S. 25 (1970), in which the Court held that an accused's protestation of his innocence of the offense for which he pleaded guilty in order to avoid possible imposition of a capital sentence would not provide a constitutionally-required basis for setting aside his conviction. The Court explained that an accused who is likely facing conviction and a death sentence, in light of a realistic view of the evidence available to the prosecution, might rationally opt to enter a plea guilty to avoid the possibility of execution while still believing in his or her own moral innocence. *Id.* at 37–38. The Court previously held in *Brady v. United States*, 397 U.S. 742, 748 (1970), a federal prosecution, that the accused's decision to plead guilty to avoid the possible imposition of a death sentence was not impermissibly compelled in violation of the Fifth Amendment.

5. *See, e.g.*, Mara Leveritt, *The 'Big Ask'*, ARK. TIMES, Aug. 24, 2011, at 10, *available at* http://www.arktimes.com/arkansas/the-big-ask/Content?oid=1888389 (reporting negotiations leading to the entry of *Alford* pleas by the WM3 and their immediate release from custody).

6. It is unlikely that the resolution of the West Memphis murders with the *Alford* pleas negotiated with the three defendants will ever convince many that the actual killers of the three young boys will conclusively be identified. In March 2013, Pam Hicks, the mother of one victim filed an action for release of investigative reports relating to information identifying four other individuals, including her ex-husband, as the actual killers of the children. Her action was joined with another parent's action and was based on an affidavit given by an Arkansas prison inmate that prosecutors argued had been investigated and rejected by investigators during the initial investigation of the crimes in 1993. *See* Kenneth Heard, *Filings in Lawsuit Claim Four Killed Three Boys in '93*, ARK. DEMOCRAT-GAZETTE, Mar. 28, 2013, at 4B. Following a hearing on the parents' claims, the circuit court dismissed the action, holding that the Arkansas Freedom of Information Act provides only for disclosure of documents—not physical evidence—and rejecting the lawsuit as an attempt to collaterally attack the "concluded criminal case." The plaintiffs' counsel announced that his clients would not appeal the circuit court's ruling, explaining that they were "satisfied" that they knew "what happened in the woods." *See* Kenneth Heard, *Judge: Parents Can't See '93 Evidence*, ARK. DEMOCRAT-GAZETTE, Apr. 4, 2013, at 5B.

7. *See* United States v. Stevens, 715 F. Supp. 2d 1 (D.D.C. 2009) (Senator Stevens's conviction was set aside as a result of the trial court's findings of discovery violations by the government); *see also* United States v. Stevens, 744 F. Supp. 2d 253, 256 (D.D.C. 2010) (referencing the court's opinion in granting relief), *aff'd*, 663 F.3d 1270 (D.C. Cir. 2011). The

Stevens court's subsequent opinion focuses on the contempt citation imposed against the prosecutors in the case. Editorial, *When Prosecutors Step over the Line*, N.Y. TIMES, Apr. 1, 2009, 4:34 PM, http://roomfordebate.blogs.nytimes.com/2009/04/01/when-prosecutors-step-over-the-line (discussing Attorney General Holder's decision to move for trial court to set aside the verdict).

8. 132 S. Ct. 627, 630 (2012). "No other witnesses and no physical evidence implicated Smith in the crime." *Id.* at 629.

9. Smith was sentenced to life imprisonment on his conviction for five counts of murder in a first trial. The case ultimately reversed by the United States Supreme Court. He was subsequently tried on another murder charge, convicted, and sentenced to death. His conviction and sentence were upheld on direct appeal, with the prosecution relying on evidence from the first trial in its punishment case. Smith v. State, 793 So. 2d 1199, 1208 (La. 2001). The state courts stayed post-conviction proceedings pending disposition of *Smith v. Cain*. Brief for Petitioner at 10–12 & n.5, Smith v. Cain, 132 S. Ct. 627 (2012) (No. 10-8145).

10. 365 Ark. 478, 231 S.W.3d 638 (2006). The convictions were reversed on other grounds and the defense sought to impose the bar of prior jeopardy to the retrial based on the prosecutors' failure to disclose the son's exculpatory statement prior to trial. *Id.* The state supreme court rejected reliance on the proposed prior jeopardy remedy but referred the prosecuting attorneys to the Committee on Professional Conduct for investigation of the misconduct claim. Green v. State, 2011 Ark. 92, 380 S.W.3d 368.

11. *See* Letter Order, United States v. Easley, No. 4:10-CR-00240-BRW (E.D. Ark. Mar. 22, 2012), ECF No. 105 (granting the government's motion to dismiss); *see also* Motion to Dismiss, *Easley*, No. 4:10-CR-00240-BRW (E.D. Ark. Mar. 22, 2012), ECF No. 104 (government's motion to dismiss); Letter Order, *Easley*, No. 4:10-CR-00240-BRW (E.D. Ark. Mar. 22, 2012), ECF No. 103 (trial court's letter to government requesting explanation for disclosure failure); Email Communication from Defense Counsel to Trial Court, *Easley*, No. 4:10-CR-00240-BRW (E.D. Ark. Mar. 22, 2012), ECF No. 102 (defense counsel's explanation of failure of disclosure by government); Linda Satter, *Charge Against Lawyer Dropped Midtrial After Agency Withheld Data*, ARK. DEMOCRAT-GAZETTE, Mar. 23, 2012, *available at* http://iw.newsbank.com/iw-search/we/InfoWeb?p_action=doc&p_theme=aggdocs&p_topdoc=1&p_docnum=1&p_sort=YMD_date:D&p_product=NewsBank&p_docid=13DB2570DA577050&p_text_direct-0=document_id=(%2013DB2570DA577050%20)&p_multi=ADGL&s_lang=en-US&p_nbid=W55R4AHEMTM2ODc1NzY1Ny44MTk3NDI6MToxMToxNDQuMTY3LjAuMA.

12. 373 U.S. 83 (1963).

13. *Id.*

14. The Court's decisions in *Napue*, *Pyle*, and *Mooney* all arose in the context of use of perjured testimony in the prosecution's case. Napue v. Illinois, 360 U.S. 264, 265–67 (1959); Pyle v. Kansas, 317 U.S. 213, 215–16 (1942); Mooney v. Holohan, 294 U.S. 103, 112–13 (1935). The *Brady* Court relied on these decisions and *Alcorta v. Texas*, 355 U.S. 28 (1957), to affirm, as a general principle, the disclosure duty as a matter of due process. *Brady*, 373 U.S. at 87.

15. *Alcorta*, 355 U.S. at 29–30. In *Alcorta*, defense counsel's theory in the murder trial was that the defendant was guilty only of the lesser-included offense of manslaughter based on the theory that he killed while under the influence of "heat of passion." *Id.* The Court held

prosecutor's failure to correct witness's denial that he had had sexual relationship with defendant's wife violated due process. *Id.*

16. *Brady*, 373 U.S. at 84–85.

17. *Id.* at 87. "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*; *see also* Illinois v. Fisher, 540 U.S. 544, 547 (2004) ("We have held 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.").

18. 132 S. Ct. 627, 630 (2012) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)) .

19. 427 U.S. 97, 106 (1976).

20. 473 U.S. 667, 676 (1985).

21. 527 U.S. 263, 276 & nn.13–14 (1999).

22. 514 U.S. 419 (1995).

23. *Id.* at 437–38.

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id. Arkansas adopted this approach even before the Court's decision in *Kyles*. Lewis v. State, 286 Ark. 372, 691 S.W.2d 864 (1985); Williams v. State, 267 Ark. 527, 593 S.W.2d 8 (1980).

24. *Kyles*, 514 U.S. at 460–61.

25. *Id.* at 434–35 & n.8.

26. *Id.* at 435 (citing Chapman v. California, 386 U.S. 18 (1967)). Under *Chapman*, constitutional error can be deemed harmless only if the error can be shown to be harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. Proof of a *Brady* violation, however, requires the defendant to shoulder the burden of proving a reasonable probability of prejudice to the accused.

27. *Kyles*, 514 U.S. at 437–38.

28. *Id.* at 439.

29. *Id.*

30. 132 S. Ct. 627 (2012).

31. For instance, the track record of the Orleans Parish (Louisiana) District Attorney's Office on *Brady* issues suggests an ongoing pattern of failure to comply with *Brady*. *See generally Smith*, 132 S. Ct. 627; *Kyles*, 514 U.S. 419; Monroe v. Butler, 485 U.S. 1024, 1028 (1988) (Marshall, J., dissenting); Monroe v. Blackburn, 476 U.S. 1145, 1149–50 (1986) (Marshall, J., dissenting); Monroe v. Blackburn, 607 F.2d 148 (5th Cir. 1979); Davis v. Heyd, 479 F.2d 446 (5th Cir. 1973); State v. Bright, 2002-2793 (La. 5/25/04); 875 So. 2d 37; State v. Cousin, 96-2973 (La. 4/14/98); 710 So. 2d 1065; State v. Marshall, 94-0461 (La. 9/5/95); 660 So. 2d 819; State v. Knapper, 579 So. 2d 956 (La. 1991); State v. Rosiere, 488 So. 2d 965 (La. 1986); State v. Evans, 463 So. 2d 673 (La. 1985); State v. Perkins, 423 So. 2d 1103 (La. 1982); State v. Peters, 406 So. 2d 189 (La. 1981); State v. Curtis, 384 So. 2d 396 (La.

1980); State v. Parker, 361 So. 2d 226 (La. 1978); State v. Falkins, 356 So. 2d 415 (La. 1978); State v. Carney, 334 So. 2d 415 (La. 1976); State v. Lindsey, 2002-2363 (La. App. 4 Cir. 4/2/03); 844 So. 2d 961; State v. Thompson, 2002-0361 (La. App. 4 Cir. 7/17/02); 825 So. 2d 552; State v. Lee, 2000-2429 (La. App. 4 Cir. 1/4/01); 778 So. 2d 656; State v. Oliver, 94-1642 (La. App. 4 Cir. 10/9/96); 682 So. 2d 301; State v. Mims, 94-K-0333 (La. App. 4 Cir. 5/26/94); 637 So. 2d 1253; State v. Dozier, 553 So. 2d 931 (La. Ct. App. 1989); State v. Felton, 522 So. 2d 626 (La. Ct. App. 1988); State v. Walter, 514 So. 2d 620 (La. Ct. App. 1987); State v. Dawson, 490 So. 2d 560 (La. Ct. App. 1986).

32. Weatherford v. Bursey, 429 U.S. 545, 546, 559 (1977).

33. The Commentary to Article V of the Arkansas Rules of Criminal Procedure, which relates to pretrial rules governing discovery, notes the following:

> Broad pretrial disclosure would seem to be not only desirable but also necessary. By encouraging guilty pleas, reducing delays during trial, and in general lending more finality to the disposition of criminal cases, disclosure alleviates docket congestion and permits a more economical use of resources.

34. FED. R. CRIM. P. 16(a)(1)(F)–(G). These sections provide the following:

> (F) Reports of Examinations and Tests**.** Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:
>
> (i) the item is within the government's possession, custody, or control;
>
> (ii) the attorney for the government knows—or through due diligence could know—that the item exists; and
>
> (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.
>
> (G) Expert witnesses.—At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Id.

35. Federal Rules of Criminal Procedure 16(b)(1)(B) and (C) require the defendant to supply comparable material to the government in the event the prosecution has first complied with the defendant's discovery request.

36. ARK. R. CRIM. P. 17.1(a)(iv).

37. ARK. R. CRIM. P. 18.3.

38. *Id.*

39. *See* Neal v. State, 375 Ark. 389, 393–94, 291 S.W.3d 160, 163–64 (2009) (holding that exclusion of a witness whose identity was not disclosed until the jury had been seated did not constitute an abuse of discretion). The *Neal* court upheld the trial court's action despite the fact that the witness was not known to defense counsel until after the jury had been selected but before any testimony had been taken before the jurors immediately before trial. The State objected on the ground that jurors had not been questioned about whether they knew this witness. *Id.* at 393, 291 S.W.3d at 163. Although the State did not rely on Rule 18.3 at trial to argue for exclusion of the witness, the court relied on the underlying principle of the rule and held that the trial court did not abuse its discretion. *Id.* at 392, 291 S.W.3d at 162. However, the court never discussed whether the exclusion of the witness would violate constitutional protections. *See id.* In the circumstances of this case, particularly in light of the opportunity for the prosecution to voir dire the witness prior to the trial court's ruling, mitigating the chances of encountering surprise before the jury, it is not clear that excluding the witness did not intrude on the Sixth Amendment guarantee of compulsory process--the right to call witnesses and present a defense. Here, the trial court excluded the witness based in part on her lack of credibility, an admittedly impermissible basis for its action. *Id.* at 394, 291 S.W.3d at 164. The only remaining basis for upholding the trial court's action was the need to protect the State from unfairness in permitting the defense to call the witness without giving the state the opportunity to question jurors about their possible familiarity or knowledge of her beforehand. A less drastic procedure would have simply been for the trial court to advise the seated jury of the previously unidentified witness and then individually inquire any juror who might have personal knowledge of her, substituting an alternate in the event a juror disclosed any bias that would disqualify the juror from service.

40. ARK. R. CRIM. P. 18.2.

41. 412 U.S. 470 (1973).

42. *Id.* at 475–76.

43. *See* ARK. R. CRIM. P. 17.1.

44. *See id.*

45. ARK. R. CRIM. P. 17.1(d).

46. Arkansas Rule of Criminal Procedure 17.3 provides the following:

> (a) The prosecuting attorney shall use diligent, good faith efforts to obtain material in the possession of other governmental personnel which would be discoverable if in the possession or control of the prosecuting attorney, upon timely request and designation of material or information by defense counsel.
>
> (b) If the prosecuting attorney's efforts are unsuccessful, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel where the material or other governmental personnel are subject to the jurisdiction of the court.

47. ARK. R. CRIM. P. 17.2(a). The rule also provides for alternative ways in which the disclosure may be made, authorizing, in pertinent part,

> (b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:
>
> (i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, recorded or photographed, during specified reasonable times; or
>
> (ii) making available to defense counsel at a time specified such material and information, and suitable facilities and arrangements for inspection, testing, copying, recording or photographing of such material and information.
>
> (c) The prosecuting attorney may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this Article.

ARK. R. CRIM. P. 17.2(b)–(c).

48. 274 Ark. 17, 19–20, 621 S.W.2d 690, 691–92 (1981).
49. *Id.* at 20, 621 S.W.2d at 692 (emphasis added).
50. *Id.* at 19, 621 S.W.2d at 691.
51. *Id.*, 621 S.W.2d at 691.
52. *Id.*
53. *See* Neal v. State, 375 Ark. 389, 393–94, 291 S.W.3d 160, 163–64 (2009).
54. ARK. R. CRIM. P. 17.1(d).
55. *Id.*
56. Kyles v. Whitley, 514 U.S. 419 (1995).
57. Eyewitness identification testimony is considered so problematic that some courts have found that expert testimony concerning the common failures of human perception is admissible to challenge such identification in appropriate cases. *See* United States v. Brownlee, 454 F.3d 131, 141 (3d Cir. 2006). "It is widely accepted by courts, psychologists and commentators that '[t]he identification of strangers is proverbially untrustworthy.'" *Id.* (citations omitted). Other courts have concluded to the contrary—including the Eighth Circuit and Arkansas Court of Appeals—holding that the common experience of jurors was sufficient to permit them to fully appreciate the factors influencing the reliability of eyewitness identification. *See* United States v. Martin, 393 F.3d 949, 953–54 (8th Cir. 2004); Caldwell v. State, 267 Ark. 1053, 1059–61, 594 S.W.2d 24, 28–29 (Ark. App. 1980).
58. Confessions or inculpatory admissions, when made to police, are likely to prove particularly influential with jurors precisely because the accused's statement essentially may serve to negate any inference of factual innocence. Yet, the admission itself may be the product of improper influences or coercion, requiring that the defendant be permitted to offer evidence concerning the circumstances under which the statement was made in order to impeach its reliability. *See* Crane v. Kentucky, 476 U.S. 683 (1986).

59. *See, e.g.*, Dodd v. State, 784, 2000 OK 2, ¶ 25, 993 P.2d 778 (adopting mandatory procedure in state criminal trials for evaluating the credibility of testimony offered by inmates that relate admissions purportedly made by the accused while in custody). The Oklahoma court, in a later case, explained the purpose of its approach in *Dodd*:

> The point of *Dodd* was to require more thorough examination of informant evidence and complete and full disclosure of information relating to an informant's motivation to fabricate testimony. In this case, the trial court did not abuse its discretion by allowing the witness to testify. Any conflict or inconsistency in the witness's testimony goes to the weight and credibility of that testimony and are issues properly addressed on cross-examination.

Myers v. State, 2006 OK 12, ¶ 14, 133 P.3d 312, 322.

60. The Supreme Court has consistently characterized accomplice testimony as inherently suspect because of the motivation of accomplices to shift blame for their culpability and seek favorable treatment for their testimony. *E.g.*, Lilly v. Virginia, 527 U.S. 116, 133–34, 137 (1999); Lee v. Illinois, 476 U.S. 530, 541 (1992); Bruton v. United States, 391 U.S. 123, 135–36 (1968). Because of the potential for improper influence, including inducing witnesses to testify falsely to implicate the accused at trial, the Court has consistently held that prosecutors must disclose to the defense any "deal" or benefit extended to the witness in exchange for testimony. Giglio v. United States, 405 U.S. 150, 153–54 (1972); *see also* Windsor v. State, 338 Ark. 649, 653, 1 S.W.3d 20, 22–23 (1999) "It is *routine* in criminal prosecutions for the State to use accessories to testify under a plea bargain that promises a request for a reduced sentence." *Id.*, 1 S.W.3d 20, 22–23 (emphasis added).

61. *See, e.g.*, AMERICAN PROSECUTORS RESEARCH INSTITUTE, *Basic Trial Techniques for Prosecutors* (2005), *available at* http://www.ndaa.org/pdf/basic_trial_techniques_05.pdf. The trial techniques tell prosecutors about juror behavior:

> Jurors are inundated by crime-dramas in the popular media that create unrealistic expectations of police officers, prosecutors and judges. Many truly believe that crime scene investigators solve crimes in 60 minutes or less using high tech scientific techniques. Obviously, this is not the case. Still, you should strive to meet the jurors' expectations whenever possible.

Id. at 5.

62. *See* Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 FED. Rules Decisions 631, 632 (1991) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.").

63. 454 F.3d 131, 141–42 (3d Cir. 2006) (alterations in original) (footnote omitted) (citations omitted); *see also* Penny White, *Newly Available, Not Newly Discovered*, 2 J. APP. PRAC. & PROCESS 7, 17–18 (2000) (arguing for broader authority for courts to consider DNA and other scientific evidence not available at trial).

> Appellate judges faced with the appeals of dismissals of late-filed motions for new trial based on newly available DNA evidence have an obligation to assess whether adherence to long-standing principles applicable to such motions is appropriate when the evidence is not newly discovered in the traditional sense, but rather newly available as a result of recent technological advances. In those cases in which the evidence could actually exonerate a wrongfully convicted defendant, strict time limitations should not impede the courts from accomplishing justice.

Id.; *see also* Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629 (2000) (arguing for an effective remedy for litigating claims of actual innocence based on newly available scientific evidence).

64. For example, in *Barefoot v. Estelle*, 463 U.S. 880, 880–91 (1983), the Court sanctioned reliance on the expert testimony of a forensic psychiatrist, forecasting the likelihood that a capital defendant would commit further acts of criminal violence in the future, a key finding required for imposition of a death sentence under Texas law. Justice Blackmun, in his dissent, took issue with the qualitative reliability of the opinion:

> The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result—even in a capital case—because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail. *In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.*

Id. at 916 (Blackmun, Brennen, and Marshall, JJ., dissenting) (emphasis added).

65. 509 U.S. 579 (1993). The plaintiffs brought a products liability action alleging that birth defects suffered by children of mothers who had taken Bendectin, "a prescription antinausea drug marketed by Merrell Dow," were caused by the drug. *Id.* The Court reviewed the Ninth Circuit's rejection of the plaintiff's expert opinion:

> The court emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalyses of epidemiological studies that had been neither published nor subjected to peer review. Those courts had found unpublished reanalyses "particularly problematic in light of the massive weight of the original published studies supporting [respondent's] position, all of which had undergone full scrutiny from the scientific community." Contending that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected petitioners' reanalyses as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." The court concluded that peti-

> tioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.

Id. at 584–85 (citations omitted). The Court then imposed a more comprehensive test for admission of expert testimony at trial, rejecting the exclusive reliance on the *Frye* test of general acceptability within the relevant scientific community that had traditionally been used in federal litigation. *Id.* at 585, 597–98. For an Arkansas decision discussing *Daubert* and admissibility of scientific evidence at trial, see *Moore v. State*, 323 Ark. 529, 543–48, 915 S.W.2d 284, 293–95 (1996).

66. Similarly, improper use of scientific evidence can prejudice an accused in another way. In *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992), the accused asserted an insanity defense in a double murder case in which he was charged with murdering his ex-girlfriend and her mother with a machete. The prosecution called a forensic odontologist who examined a dog bite sustained by the defendant and attempted to compare the bite pattern to the teeth of the victims' pet dog, "Scooter." *Id.* at 166–68, 823 S.W.2d at 870–71. The expert, who had compared the dog's teeth to the wound, was unable to offer an opinion that Scooter had, in fact, bitten his owners' killer; he was only able to say that the comparison did not exclude Scooter as the dog who inflicted the wound. *Id.* In short, this opinion had no probative value at all, yet the supreme court held that the trial court had not abused its discretion in permitting the jury to hear this testimony. *Id.* at 167–68, 823 S.W.2d at 870–71. The majority concluded that the expert testimony met the test for admissibility because "[t]he evidence was helpful in determining whether it could have occurred. The fact that Dr. Glass could not positively state that Scooter bit Davasher goes only to the weight of the evidence, not its admissibility." *Id.* at 168; 823 S.W.2d at 871. The fact that the defendant had suffered a bite was a physical fact, but the odontologist's testimony merely offered jurors a basis for speculating that Scooter had inflicted the bite in an effort to defend his owners. It is nearly certain that the majority was swayed by passion when reviewing the case, as suggested by its recitation of the facts surrounding the discovery of the bodies of the two victims in the case: "After searching the rooms, [Officer Hoover] went to the back door and saw the bodies of Hamilton and Hignight lying side by side in the back yard. He further observed severe cut wounds on the victims' heads and bodies. *The family dog, Scooter, was found between the bodies, whimpering.*" *Id.* at 158, 823 S.W.2d at 868 (emphasis added). While the picture painted by the majority is undoubtedly heart-rending, this appeal to the readers' emotions—and at trial, the jurors'—simply serves to incite passion in an effort to support the majority's conclusion—that despite uncontroverted testimony offered by forensic experts from the Arkansas State Hospital that the defendant was insane, his conviction was rational. *See id.* at 172, 823 S.W.2d at 873 (Brown, J., dissenting) ("Over the years the insanity defense has been whittled away until, with this case, virtually nothing is left.").

67. Willingham v. State, 897 S.W.2d 351, 354–55 (Tex. Crim. App. 1995).

68. Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB., Dec. 9, 2004, http://www.chicagotribune.com/news/nationworld/na/chi-0412090169dec09,0,7244555.story.

69. *Id.* The *Tribune* noted that the National Fire Protection Association's NFPA 921 was initially published in February, 1992—less than two months after the fire at the Willingham residence. *Id.* Contributors to this standard work advised the *Tribune* in its investigation of

the *Willingham* case. *Id.* For information on the new edition of NFPA 921, see Dennis W. Smith, *NFPA 921 Overview*, NAT'L FIRE PROTECTION ASS'N J. (2008).

70. Mills & Possley, *supra* note 68.

71. *Id.* One of those assumptions made by expert witnesses testifying at Willingham's trial involved "crazed glass":

> [T]he intricate, weblike cracks through glass. For years arson investigators believed it was a clear indication that an accelerant had been used to fuel a fire that became exceedingly hot. Now, analysts have established that it is created when hot glass is sprayed with water, as when the fire is put out. It was just such evidence that helped convict Willingham.

Id. Similarly, the *Tribune* continued, "Just as . . . consultants dismissed the "crazed glass," they also said other so-called indicators—floor burn patterns and the charring of wood under the aluminum threshold—were just as unreliable." *Id.* The experts said evidence indicated the fire advanced to flashover, a phenomenon that occurs when a fire gets so hot that gas builds up and causes an explosion. After flashover, "it becomes impossible to visually identify accelerant patterns." *Id.* Finally, the story quoted the lead investigator as disagreeing with trial testimony that charring of the wood was attributable to an accelerant under the threshold. The investigator stated that that "is clearly impossible. Liquid accelerants can no more burn under an aluminum threshold than grease can burn in a skillet, even with a loose-fitting lid." *Id.*

72. *Id.* For a compelling perspective on the *Willingham* case, see David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, *available at* http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann.

73. Willingham was executed on February 17, 2004. *Executed but Possibly Innocent*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/executed-possibly-innocent (last visited June 26, 2008).

74. Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698, at *35 (W.D. Tex. Aug. 9, 2004). The federal habeas court granted relief on multiple claims, including ineffective assistance in both the guilt/innocence and punishment phases of trial; suppression of favorable evidence on the issue of punishment by the prosecution; and improper administration of antipsychotic medication during trial. *Id.* Almost incredibly, the evidence developed in the federal habeas proceeding included a confession to the offense, corroborated on some potentially important points by another death row inmate who was subsequently executed on his unrelated crime. *Id.* at *8–10.

75. *See* Willis v. State, 785 S.W.2d 378, 380 (Tex. Crim. App. 1989) (en banc).

76. *Id.* at 382.

77. *Cockrell*, 2004 WL 1812698, at *10.

78. *Id.*

79. Mills & Possley, *supra* note 68. The *Tribune* reporters also noted that out of a total of 944 inmates executed, only Willingham has been executed for an arson-based capital murder since the Supreme Court upheld state death penalty statutes following its 1972 decision in *Furman*. *See id.*

80. *See, e.g.*, EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER

TRIAL (1996), *available at* https://www.ncjrs.gov/pdffiles/dnaevid.pdf (presenting case studies of convicted individuals exonerated by newly-available DNA evidence).

81. ARK. CODE ANN. § 16-112-201 to -208 (LEXIS Repl. 2006). The statute is strictly construed with respect to the requirement that the testing be sufficient to prove the convicted defendant's actual innocence of the crime for which he or she has been convicted. *See* Tillman v. State, No. CR 05-624, 2006 WL 1516414 (Ark. June 1, 2006) (citing Graham v. State, 358 Ark. 296, 188 S.W.3d 893 (2004)) (holding that where defendant pleads guilty and admitted he was the person charged, habeas relief is unavailable because he cannot make a prima facie showing that identity was an issue at trial if he contends that post-trial scientific testing will prove his actual innocence).

82. The Arkansas Supreme Court remanded the case for evidentiary hearing on the DNA/actual innocence motion in *Echols v. State*, 2010 Ark. 417, 373 S.W.3d 892, after reviewing the recent history in the case.

> In 2002, while his other petitions for postconviction relief were pending, Echols filed a motion in the circuit court for DNA testing under Arkansas Code Annotated section 16–112–202 (Supp. 2001). The circuit court entered a testing order on June 2, 2004, after the parties agreed to the terms of the order. On February 23, 2005, an amended order for DNA testing was entered. The DNA testing was conducted between December 2005, and September 2007.

Id. at 3, 373 S.W.3d at 895–96 (footnote omitted).

83. *Id.*, 373 S.W.3d at 895–96.

84. People v. Cruz, 521 N.E.2d 18, 19 (Ill. 1988).

85. People v. Hernandez, 521 N.E.2d 25, 26 (Ill. 1988).

86. *Cruz*, 521 N.E.2d at 22–23; *Hernandez*, 521 N.E.2d at 35–37.

87. People v. Cruz, 643 N.E.2d 636, 664 (Ill. 1994). The *Cruz* case was the subject of a true crime television documentary. *See generally American Justice: Presumed Guilty* (A&E television broadcast May 21, 1997). This movie can be viewed at http://movies.nytimes.com/movie/245535/American-Justice-Presumed-Guilty/overview.

88. 509 U.S. 259, 263 (1993).

89. *Id.* at 262.

90. *Id.* at 264.

91. *Id.*

92. *Id.* at 261–62.

93. *Id.*

94. *Buckley*, 509 U.S. at 262–63.

95. *Id.* at 271–72. While prosecutors are absolutely immune from actions undertaken while performing their duties in the actual prosecution of a criminal case, they do not enjoy this level of immunity when involved in investigation prior to the charging of a defendant. *Id.* at 272–73. When assisting other law enforcement agents in the investigation process, they are only entitled to qualified immunity. *Id.* at 273. "Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 268 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

96. Buckley v. Fitzsimmons, 20 F.3d 789, 796–97 (7th Cir. 1994).

97. *Id.* at 796. The circuit court noted, as well, that there was disagreement among courts concerning the reliability of the expert, Robbins. *Id.* at 796 n.1.

98. *See id.* at 796–97.

99. In an interesting contrast to the reliance on expert testimony in *Buckley* regarding the bootprint recovered from the scene of the murder, the Arkansas Supreme Court upheld a trial court's admission of an officer's testimony regarding comparison of the shoeprint found at the crime scene of a capital murder and the accused's shoes in *Moore v. State*, 323 Ark. 529, 548–50, 915 S.W.2d 284, 295. The officer testified that he was not an expert on such prints but was permitted to offer lay opinion regarding the shoe's sole pattern. *Id.*, 915 S.W.2d at 295.

100. 131 S. Ct. 1350, 1355–56 (2011).

101. *Id.* at 1356.

102. *Id.*

103. *Id.*

104. *Id.*

105. The deputy who received the confession, but took no action to disclose the violation, was subsequently disciplined. *In re* Riehlmann, 2004–0680 (La. 1/19/05); 891 So. 2d 1239.

106. *Connick*, 131 S. Ct. at 1357.

107. *Id.* at 1359 (citing Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658, 691–92 (1978)) ("Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury.").

108. *See* Lizette Alvarez, *Software Designer Reports Error in Anthony Trial*, N.Y. TIMES, July 19, 2011, at A4, *available at* http://www.nytimes.com/2011/07/19/us/19casey.html.

109. *Id.*

110. *Id.*

> A former Canadian police sergeant who specializes in computer forensic analysis, Mr. Bradley said he first became suspicious of the data after he testified on June 8. He said he had been called to testify by the prosecution about his CacheBack software. Instead, he was asked repeatedly about the Sheriff's Office report detailing the 84 search hits on "chloroform," which he had not seen. "I had translated the data into something meaningful for the police," he said. "Then I turned it over to them. The No. 1 principle for them is to validate the data, and they had the tools and resources to do it. They chose not to."

Id. The post-trial revelation that the revised conclusions had not been disclosed to the defense led to one of Anthony's trial attorneys terming the prosecution's nondisclosure "outrageous." *Id.*

111. *See* Alcorta v. Texas, 355 U.S. 28 (1957); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)) ("The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.").

112. Misskelley v. State, 323 Ark. 449, 478, 915 S.W.2d 702, 717 (1996).

113. *Id.*, 915 S.W.2d at 717.

114. *Id.*, 915 S.W.2d at 717.

115. *Id.* at 478–79, 915 S.W.2d at 717–18.

116. Formal Order, Baldwin v. State, 326 Ark. 917, 936 S.W.2d 509 (1996) (No. CR94-928), *available at* http://callahan.8k.com/pdf/jb_habeas_rule37/11_formal_order.pdf (June 26, 2008 order denying, without prejudice, Baldwin's petition to proceed in the trial court with a writ of error coram nobis); Formal Order, Misskelley v. State, 323 Ark. 449, 915 S.W.2d 702 (1996) (No. CR94-848) (June 5, 2008, order denying without prejudice Baldwin's petition to proceed in the trial court with a writ of error coram nobis).

117. *E.g.*, Buckley v. State, 2010 Ark. 154, at 6–7, 2010 WL 1255763 (granting leave to file petition for writ of error coram nobis in circuit court where investigators failed to disclose prior inconsistent statements by confidential informant); Sanders v. State, 374 Ark. 70, 71–73, 285 S.W.3d 630, 632–33 (2008) (granting leave to file petition for writ of error coram nobis in circuit court where evidence showed that the State failed to disclose a deal with witness for testimony and did not correct testimony when the witness denied the deal); *see also* Cloird v. State, 349 Ark. 33, 76 S.W.3d 813 (2002); State v. Larimore, 341 Ark. 397, 17 S.W.3d 87 (2000); Larimore v. State, 327 Ark. 271, 938 S.W.2d 818 (1997).

118. In *State v. Larimore*, the court set out the standard for relief through the remedy of coram nobis:

> Specifically, we hold that in our review of the granting of a petition for a writ of error *coram nobis* in this case and all future cases we will determine whether there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the exculpatory evidence been disclosed at trial.

341 Ark. at 408, 17 S.W.3d at 94.

119. Buckley v. State, No. CR06-172, 2007 WL 1509323, at *4–5 (Ark. May 24, 2007); Howard v. State, 367 Ark. 18, 26–27, 238 S.W.3d 24, 31–32 (2006) (appeal from the denial of post-conviction relief).

120. "Although there is no specific time limit for seeking a writ of error *coram nobis*, due diligence is required in making an application for relief." Echols v. State, 360 Ark. 332, 338, 361 Ark. 15, 201 S.W.3d 890, 894 (2005) (citing Echols, 354 Ark. 414, 419, 125 S.W.3d 153, 157 (2003); *Larimore*, 327 Ark. at 281–82, 938 S.W.2d at 822–23). In contrast, the time limits for filing for post-conviction relief under Rule 37 are sixty days from issuance of the appellate court's mandate in cases appealed, and ninety days from entry of judgment or sentencing if the judgment was not entered within ten days of sentencing if the case was not appealed. ARK. R. CRIM. PRO. 37.2(c). For discussion of procedural limitations on coram nobis, see J. Thomas Sullivan, Brady-*Based Prosecutorial Misconduct Claims,* Buckley, *and the Arkansas Coram Nobis Remedy*, 64 ARK. L. REV. 561, 620–27 (2011).

121. 290 Ark. 595, 721 S.W.2d 663 (1986).

122. *Id.* at 597, 721 S.W.2d at 664.

123. *Id.*, 721 S.W.2d at 664.

124. *Id.*, 721 S.W.2d at 664.

125. *Id.*, 721 S.W.2d at 664. "The 'open file' policy has once again proved that it pays to hide things you do not want discovered." *Id.* at 601, 721 S.W.2d at 667 (Purtle, J., dissenting).

126. *Id.* at 598, 721 S.W.2d at 665 (citing ARK. R. CRIM. P. 17.1(a)(iv)).

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127. *Dumond*, 290 Ark. at 598, 721 S.W.2d at 665.
128. *Id.* at 599, 721 S.W.2d at 665.
129. *Id.*, 721 S.W.2d at 665 (emphasis added) (citations omitted).
130. *Id.* at 596, 721 S.W.2d at 664. The defense did not raise an evidentiary insufficiency challenge on appeal.
131. Of course, if mistrial was otherwise warranted by the reference to the fingerprints by the officer on the stand, arguably, there would be no justification in demanding that the defendant be forced to seek a termination of the proceedings before assessing the strength of the prosecution's case. In fact, the operation of the rule could, in some cases, lead to a deliberate attempt to interject prejudicial error by eliciting inadmissible evidence in order to force the accused to move for mistrial when prosecutors conclude that their case has developed into a particularly weak one. *See* United States v. Dinitz, 424 U.S. 600, 611 (1976). "[The Double Jeopardy Clause] bars retrials where 'bad-faith conduct by judge or prosecutor' threatens the '[h]arassment 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." *Id.* (citation omitted); United States v. Tateo, 377 U.S. 463, 468 n.3 (1964) ("If there were any intimation in a case that prosecutorial or judicial impropriety justifying a mistrial resulted from a fear that the jury was likely to acquit the accused, different considerations would, of course, obtain."). The defendant typically waives double jeopardy protection by moving for mistrial, the only exception being in a case in which the prosecution can be shown to have deliberately goaded the defense into moving for mistrial. *See* Oregon v. Kennedy, 456 U.S. 667, 672, 674–75 (1982). Arkansas adopted *Kennedy* in *Green v. State*, 2011 Ark. 92, 380 S.W.3d 368.
132. 265 Ark. 736, 580 S.W.2d 702 (1979).
133. *Id.* at 744–45, 580 S.W.2d at 706–07.
134. *Id.*, 580 S.W.2d at 706–07. Not only did the treating physicians fail to produce the requested records, the court related this rather amazing fact in the opinion:

> On April 14, 1978, appellant's counsel drove to Little Rock and was told by Dr. Whitehead that the other records did not exist but he could check at Benton where the records were supposed to be kept. Counsel was advised by the Benton unit that the records were probably in Little Rock. On this same date Dr. Whitehead told counsel that Dr. Buford, the treating physician or psychiatrist for the 1972 and 1974 commitments of appellant, was no longer there and might be dead. *In truth, Dr. Buford was still employed as a colleague of Dr. Whitehead*.

Id. at 744–45, 580 S.W.2d at 706 (emphasis added).
135. *Id.* at 745, 580 S.W.2d at 707 (emphasis added).
136. No. CR 99–628, 2004 WL 2549739 (Ark. Nov. 11, 2004).
137. *Id.* at *1–2.
138. *Id.* at *2.
139. *Id.* (referencing Sanders v. State, 340 Ark. 163, 8 S.W.3d 520 (2000)).
140. *Id.* (emphasis added).
141. 314 Ark. 317, 862 S.W.2d 252 (1993).
142. *Id.* at 318, 862 S.W.2d at 252–53.
143. *Id.*, 862 S.W.2d at 252.
144. *Id.* at 319, 862 S.W.2d at 253.

145. *Id.*, 862 S.W.2d at 253.
146. *Id.*, 862 S.W.2d at 253.
147. *Burton*, 314 Ark. at 319, 862 S.W.2d at 253.
148. *Id.*, 862 S.W.2d at 253.
149. *Id.*, 862 S.W.2d at 253.
150. 303 Ark. 79, 80, 794 S.W.2d 133, 133 (1990).
151. *Id.*, 794 S.W.2d at 133.
152. *Id.*, 794 S.W.2d at 133.
153. *Id.* at 80–81, 794 S.W.2d at 134.
154. *Id.*, 792 S.W.2d 143. Arkansas Rule of Criminal Procedure 17.5 excludes work product from the obligatory disclosure duty. Work product is defined under the rule as "research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his staff or other state agents." ARK. R. CRIM. P. 17.5(a).
155. 516 U.S. 1, 4, 6 (1995).
156. *Id.*
157. *Id.*
158. *Id.* at 6–7.
159. *Id.* at 8.
160. *Yates*, 303 Ark. at 82–83, 794 S.W.2d at 135.
161. *Id.* at 84, 794 S.W.2d at 135–36.
162. *Id.* at 86, 794 S.W.2d at 136.
163. *Id.*, 794 S.W.2d at 136–37 (citation omitted).
164. *Id.* at 86–87, 794 S.W.2d at 137 (emphasis added). A defendant is entitled to develop evidence of the circumstances surrounding his confession before the jury, even if the confession has been ruled admissible by the trial court in a pretrial hearing. Crane v. Kentucky, 476 U.S. 683 (1986) (holding admissibility of evidence protected by the Sixth Amendment Compulsory Process Clause).
165. *Id.* at 83–84, 794 S.W.2d at 135–36.
166. *See Yates*, 303 Ark. at 83–84, 794 S.W.2d at 135–36.
167. *Id.* at 82–83, 794 S.W.2d at 135.
168. *See* United States v. Armstrong, 517 U.S. 456, 468–70 (1996) (reversing the circuit court and holding that the work product doctrine is not overridden by defense's request for evidence necessary to prove a selective prosecution defense). In his concurrence, Justice Breyer argued that because Brady is a constitutional-based rule, the disclosure duty overrides court-made rules of procedure, including Federal Rule of Criminal Procedure 16. *Id.* at 471 (Breyer, J., concurring).
169. Cloird v. State, 349 Ark. 33, 76 S.W.3d 813 (2002).
170. *Id.* at 36–37, 76 S.W.3d at 815.
171. *Id.* at 38, 76 S.W.3d at 816.
172. *Id.* at 39, 76 S.W.3d at 816.
173. *Id.*, 76 S.W.3d at 816.
174. *Id.*, 76 S.W.3d at 816.
175. *See Cloird*, 349 Ark. at 38, 76 S.W.3d at 816.
176. Yates v. State, 303 Ark. 79, 749 S.W.2d 133 (1990).
177. *Cloird*, 349 Ark. at 38, 76 S.W.3d at 816.

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178. No. CR 01-644, 2007 WL 2955980 (Ark. Oct. 11, 2007).
179. *Id.* at *4.

> Because petitioner cannot show, at this time, that any exculpatory evidence was suppressed, he cannot make the required showing that his claim is meritorious. Until petitioner can point to specific exculpatory evidence in the videotape, petitioner cannot make a showing as to how the disclosure of any evidence could have prevented rendition of the judgment of conviction. We cannot say that he has as yet stated facts so as to justify reinvesting jurisdiction in the trial court to consider a petition for writ of error *coram nobis* on this claim.

Id.
180. *See* Buckley v. State, 2010 Ark. 154, at 2, 4, 2010 WL 1255763, at *1–2.
181. *Id.* at 2, 2010 WL 1255763, at *1.
182. *See* ARK. R. CRIM. P. 37. Rule 37 is the procedural device for raising post-conviction challenges to the criminal conviction or sentence imposed by a circuit court. *Id.* Challenges in capital cases in which a death sentence has been imposed are governed by the provisions of Rule 37.5; in all other cases, the provisions of Rule 37.1–4 apply. *Id.*
183. 339 Ark. 97, 3 S.W.3d 323 (1999).
184. No. CR 03-675, 2004 WL 2066874 (Ark. Sept. 16, 2004).
185. *Weaver*, 339 Ark. at 103, 3 S.W.3d at 328.
186. *Id.*, 3 S.W.3d at 328. The court applied similar reasoning in its later unpublished opinion in *Arnold*, 2004 WL 2066874, at *4.
187. 427 U.S. 97, 106 (1976).
188. ARK. R. CRIM. P. 17.1(d).
189. *See* Strickler v. Greene, 527 U.S. 263, 276 & nn.13–14 (1999).
190. Buckley v. State, 2010 Ark. 154, at 2–3, 2010 WL 1255763, at *1.
191. Dansby v. State, 343 Ark. 635, 637, 37 S.W.3d 599, 600 (2001).

> We have held that a writ of error *coram nobis* was available to address certain errors of the most fundamental nature that are found in one of four categories: insanity at the time of trial, a coerced guilty plea, material evidence withheld by the prosecutor, or a third-party confession to the crime during the time between conviction and appeal.

Id., 37 S.W.3d at 601. The first three categories of claims were originally held cognizable in coram nobis. *Id.*, 37 S.W.3d at 601. The supreme court expanded the writ to include litigation of claims based on a third-party's confession to the offense for which the defendant had been convicted when the issue was raised prior to disposition of the case on direct appeal. Penn v. State, 282 Ark. 571, 577, 670 S.W.2d 426, 430 (1984).
192. *Dansby*, 343 Ark. at 637, 37 S.W.3d at 601.
193. *Id.*, 37 S.W.3d at 601.
194. *See, e.g.*, Yates v. State, 303 Ark. 79, 84–87, 794 S.W.2d 133, 136 (1990).
195. ARK. CODE ANN. §§ 25-19-101 to -110 (LEXIS Repl. 2006). Records of criminal investigations are "public records" within the meaning of section 25-19-105(a). Martin v. Musteen, 303 Ark. 656, 657, 799 S.W.2d 540, 540–41 (1990).

196. Records of ongoing investigations are, obviously, excluded from disclosure under the Act. ARK. CODE ANN. § 25-19-105(b)(6) (LEXIS Repl. 2006); *see* Johninson v. Stodola, 316 Ark. 423, 425–26, 872 S.W.2d 374, 375 (1994) (explaining that the court should review relevant records in camera in order to determine if the ongoing investigation exemption should apply).

197. ARK. R. CRIM. P. 33.3(b).

198. ARK. R. CRIM. P. 33.3(a); Halfacre v. State, 265 Ark. 378, 383, 578 S.W.2d 237, 239 (1979).

199. Arkansas Rule of Appellate Criminal Procedure 2(a) provides that notice of appeal must be given within thirty days of entry of judgment or denial of relief on a post-trial motion.

200. 282 Ark. 571, 573–74, 670 S.W.2d 426, 427–28 (1984).

201. ARK. R. CRIM. P. 37.2(c). The exception to the filing period for post-conviction relief—contained in Rule 37.5(e)—for capital cases in which a death sentence has been imposed provides for filing within ninety days of entry of an order issued under Rule 37.5(b)(2). Before an order can be issued under Rule 37.5(b)(2), subsection (b)(1)(A) requires a circuit court to first conduct a hearing to determine whether the defendant under sentence of death desires appointment of counsel to represent him or her in a post-conviction challenge to his or her conviction or sentence of death.

202. Echols v. State, 360 Ark. 332, 338, 201 S.W.3d 890, 894 (2005).

203. 374 Ark. 70, 285 S.W.3d 630 (2008).

204. *Id.* at 72–73, 285 S.W.3d. at 633.

205. *Id.* at 73, 285 S.W.3d at 633.

206. The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." U.S. CONST. amend. VI.

207. *Id.* An ineffective defense theory might be predicated on the fact that the State's misconduct in failing to disclose evidence prevents defense counsel from properly evaluating the case and, thus, advising the client according to counsel's best professional judgment. By analogy, in *Brooks v. Tennessee*, 406 U.S. 605 (1972), for instance, a state procedural rule requiring the defendant to testify first on his own behalf compromised counsel's ability to properly advise the client about the wisdom of testifying by forcing the defendant to make the decision to testify or remain silent before other defense witnesses have testified. Because counsel is unable to advise the defendant in light of the strength of testimony of other defense witnesses before advising the client, the rule created a structural barrier to the exercise of the best professional judgment by the defense lawyer.

208. *E.g.*, Larimore v. State, 317 Ark. 111, 121, 877 S.W.2d 570, 575 (1994) ("Error may not be predicated upon a ruling admitting evidence unless a substantial right is affected, and we will not reverse in the absence of prejudice.").

209. Arkansas Rule of Appellate Procedure Criminal 15 provides, in pertinent part, "A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution or the laws of Arkansas, *or for any reason determines that the appellant did not have a fair trial*." ARK. R. CRIM. P. 15 (emphasis added).

210. *See, e.g.*, Teater v. State, 89 Ark. App. 215, 221–23, 201 S.W.3d 442, 446–47 (2005) (explaining that the doctrine of structural error requires reversal when error is not capable of

being analyzed for prejudice in terms of the totality of the trial record such that the reviewing court would be required to speculate on the impact of error on the proceedings).

211. *Id.* at 221–23, 201 S.W.3d at 446–47. Reversal might be required as a matter of structural error where the disclosure violation cannot be evaluated in terms of potential prejudice to the accused without speculation by the appellate court with respect to the potential impact that disclosure might have had in terms of the jury's assessment of the case. *Id.*, 201 S.W.3d at 446–47.

212. *Bagley* was recognized as compelling disclosure of impeachment evidence in *Yates*. Yates v. State, 303 Ark. 79, 86, 794 S.W.2d 79, 136 (1990).

213. Typically, this is directed at the skill of counsel, but the opinion in *Cloird* reflects that the petitioner brought his claim pro se. Cloird v. State, 349 Ark. 33, 36, 76 S.W.3d 813, 816 (2002); *see supra* notes 169–75 and accompanying text.