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FUTILITY OF EXHAUSTION: WHY *BRADY* CLAIMS SHOULD TRUMP FEDERAL EXHAUSTION REQUIREMENTS

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A defendant's Fourteenth Amendment due process rights are violated when a state agency fails to disclose crucial exculpatory or impeachment evidence—so-called Brady *violations. When this happens, the defendant should be provided the means not only to locate this evidence, but also to fully develop it in state post-conviction processes. When the state system prohibits both the means and legal mechanism to develop* Brady *claims, the defendant should be immune to any procedural penalties in either state or federal court. In other words, the defendant should not be required to return to state court to exhaust such a claim. Instead, once the federal court finds a viable claim, the court should be allowed to review the claim on the merits and grant relief. Because these claims arise from the failure of state actors to perform their duties properly, the federal courts should forfeit their right to demand adherence to the federal exhaustion requirement. Requiring a defendant to return to state court for exhaustion penalizes the defendant unjustly for a constitutional violation created solely by the state.*

Introduction

John Tennison lost over thirteen years of his life in prison for a crime he did not commit. The police and prosecution knew their case contained serious flaws. The case rested on two supposed eyewitnesses who were eleven and fourteen years old.[1] Despite this, the prosecution moved forward with the case and successfully convicted Tennison and his co-defendant, Antoine Goff, of first-degree murder.[2] At the age of seventeen, Tennison faced spending most of his life in prison. After exhausting his state direct and post-conviction appeals, Tennison sought review in federal habeas corpus.[3] It was during this appeal that he obtained discovery illustrating numerous counts of police and prosecutorial misconduct resulting in violations of his due process rights under the Fourteenth Amendment.[4]

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1. Tennison v. Henry, No. 98-3842 CW, 2003 U.S. Dist. LEXIS 27886, at *4 (N.D. Cal. Aug. 26, 2003).
2. Tennison v. Henry, 203 F.R.D. 435, 437 (N.D. Cal. 2001).
3. *Tennison*, 2003 U.S. Dist. LEXIS 27886, at *7–8.
4. *See Tennison*, 203 F.R.D. 435.

He also found out that the exculpatory and impeachment evidence establishing his innocence, as well as the identity of the true perpetrator, was impermissibly withheld from his trial attorneys.

The discovery of a failure to disclose exculpatory or impeachment evidence, also known as a *Brady* violation, results in forty-two percent of the exonerations in this country.[5] However, because of state court rules governing the criminal appellate process, uncovering exculpatory or impeachment evidence usually does not occur until the prisoner has started state post-conviction proceedings.[6] Moreover, because state court judges are loath to grant post-conviction discovery, many *Brady* violations are not uncovered until the state prisoner pursues federal habeas relief in federal court.[7]

Tennison suffered this fate. He was diligent in his pleadings and in requesting additional evidence to prove his innocence,[8] but the state continually withheld evidence that would have revealed the actual perpetrator and proved Tennison's innocence.[9] The police took a statement from the shooter but failed to disclose it until well after the defense could utilize the information during the state proceedings.[10] The state court denied Tennison's motion for new trial, direct appeal, and state post-conviction,[11] and the state appellate courts affirmed his convictions.[12] Federal habeas corpus provided Tennison with the only avenue of discovery that could allow him to establish both his *Brady* claim and his police and prosecutorial misconduct claims.[13] Yet, because his new *Brady* and misconduct claims were unexhausted, as he had been unable to bring them in state court, Tennison was required to stay his federal habeas corpus proceedings in order to present the California state courts the opportunity to grant him relief.[14] The state court summarily denied

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5. *See generally* Brady v. Maryland, 373 U.S. 83 (1963); SAMUEL R. GROSS & MICHAEL SHAFER, EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 67 (2012).

6. *See generally* Harrington v. Richter, 131 S. Ct. 770 (2011); Cullen v. Pinholster, 131 S. Ct. 1388 (2011) (highlighting that state courts are the proper forum to fully develop and litigate constitutional claims); *see also* Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH & LEE L. REV. 85, 113 (2012) (explaining the Supreme Court's emphasis on developing *Brady* claims in state court).

7. *See generally* BRANDON GARRETT, CONVICTING THE INNOCENT (2011).

8. *Tennison*, 2003 U.S. Dist. LEXIS 27886, at *108–09, *139–40.

9. *Id.* at *108–09.

10. *Id.*

11. *Id.* at *7–9.

12. *Id.* at *7.

13. *See id.* at *6–9 (following the Court's discovery order, defense counsel found, for example, that a woman had contacted the police prior to the trial and told them that she knew that someone else had committed the murder)

14. *Id.* at *9.

his appeals without permitting any discovery.[15] Only upon returning to federal court did Tennison obtain the relief to which he was entitled.[16]

When state prisoners uncover meritorious *Brady* evidence in federal habeas proceedings, they can generally overcome the procedural barriers preventing substantive review of their constitutional claims.[17] However, due to federalism concerns and the Supreme Court's byzantine habeas jurisprudence, state prisoners normally must return to state court to give the state courts the first opportunity to consider the prisoner's new facts and adjudicate his *Brady* claims.[18] In other words, the state prisoner must "exhaust"[19] his *Brady* claims before the very state courts that initially denied his post-conviction discovery request and affirmed his conviction.

This Article's primary objective is to explain why the futility doctrine[20] should recognize an exception to the exhaustion rule where a state prisoner diligently pursued, but was arbitrarily denied, discovery in state court and nevertheless obtained discovery in federal habeas proceedings that revealed the very *Brady* violations the prisoner alleged during his initial state post-conviction proceedings. In these situations, the federal habeas court should have the authority to substantively review the prisoner's constitutional claims without forcing the state prisoner to return to state court so he may "fairly present"[21] his new facts and claims to the state courts. Requiring exhaustion rewards the prosecution for withholding material evidence prior to trial, during state post-conviction, and during federal habeas proceedings.[22] Likewise, it rewards the state courts

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15. *Id.* at *10.

16. *Id.* at *139–40.

17. *See, e.g.*, Banks v. Dretke, 540 U.S. 668 (2004); Strickler v. Greene, 527 U.S. 263 (1999); Amadeo v. Zant, 486 U.S. 214 (1988).

18. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) ("[T]he state courts should have the first opportunity to review [a defendant's federal] claim[s] and provide any necessary relief.").

19. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 510 (1982).

20. The futility doctrine allows certain claims to bypass the exhaustion requirement if the defendant is able to demonstrate that returning to state court for exhaustion is not possible or would not result in substantive review of the claim.

21. *See Rose*, 455 U.S. at 523 (quoting Picard v. Connor, 404 U.S. 270, 275 (1971)); *see also* Rhine v. Webber, 544 U.S. 269, 273–74 (2005) (explaining the necessity of exhaustion of all claims in state direct appeal or collateral proceedings before a federal court may review the merits of these claims).

22. There is often little to no discipline for improper actions by prosecutors on either a state or federal level. *See generally* Jordan Smith, *Panel Emphasizes Need for Prosecutorial Oversight*, AUSTIN CHRON., Apr. 6, 2012, *available at* http://www.austinchronicle.com/news/2012-04-06/panel-emphasizes-need-for-prosecutorial-oversight/. Prosecutors with repeated *Brady* or *Napue* violations cannot face civil suit due to their absolute immunity. *See generally* Imbler v. Pachtman, 424 U.S. 409 (1976); Connick v. Thompson, 131 S. Ct. 1350 (2011). Most state bar

for failing to provide the fundamentally adequate[23] processes necessary to expose the *Brady* violations that the state courts initially concluded did not exist. The obstacles facing defendants asserting such claims are made even more complicated by the Supreme Court's recent holding in *Cullen v. Pinholster*[24] limiting federal habeas review under 28 U.S.C. § 2254(d) to the state court record on both direct appeal and state post-conviction or similar collateral proceedings, which occur after direct appeal.

This Article seeks to show the problems plaguing defendants who have potentially meritorious claims of prosecutorial misconduct when the state fails to divulge key evidence and the state judicial system provides little means for the factual development of these claims. Part I of this Article details the evolution of *Brady* claims and their treatment in direct appeal, state post-conviction, and federal habeas corpus proceedings. Part II discusses the various state court avenues available to defendants to locate *Brady* materials, including the current limitations of these systems. Part III advocates for and explains why *Brady* violations should be excused from exhaustion requirements. This Part also remarks on *Brady* claims' unsettled treatment in light of the Supreme Court's ruling in *Cullen v. Pinholster* and several other cases currently before the Court.

I. THE ROLE OF THE PROSECUTOR: PROTECTING DUE PROCESS

The prosecutor's obligation is first and foremost to seek justice. The Supreme Court explains that prosecutors must "prosecute with earnestness," but must know that their duty is equally "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[25] The understanding that "it is better that ten guilty persons escape than that one innocent suffer[s]" often gets lost in the day-to-day evaluation of criminal cases.[26] Due to the significant amount of power prosecutors have to arrest, charge, and incarcerate the

associations do little to dissuade known abuses by prosecutors. *See infra* note 133. The lack of any official oversight gives prosecutors a free pass for due process violations with little to no incentive to improve the quality of their practice.

23. *See* Marceau, *supra* note 6, at 140; *see also* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 69 (2009) (explaining that federal courts may only overturn state holdings if the state appellate process is "fundamentally inadequate").

24. 131 S. Ct. 1388 (2011).

25. Berger v. United States, 295 U.S. 78, 88 (1935).

26. *See* Coffin v. U.S., 156 U.S. 432, 456 (1895) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *358).

accused, the Supreme Court provided them with guidelines to ensure that defendants receive a fair trial. Specifically, prosecutors have two primary responsibilities: one involves the disclosure of evidence pre-trial, and the other involves ensuring the truthfulness of trial testimony. Part A discusses the scope of a *Brady* violation, while Part B delves into a prosecutor's obligations before the court. Finally, Parts C and D explain how *Brady* claims are treated in state post-conviction and federal habeas corpus, respectively.

A. Defining Brady *Violations*

Brady violations occur when a prosecutor fails to disclose, prior to trial, exculpatory or impeachment evidence favorable to the accused.[27] Finding such evidence is the duty of the prosecutor since he is responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police."[28] Therefore, he must monitor any state or federal agencies that are involved in the investigation, the evaluation of evidence, and any other aspects of the state's case. Whether the prosecutor had knowledge of the withheld evidence is irrelevant when considering if a *Brady* violation occurred and its impact on a defendant.[29] Qualifying evidence comes in many forms, including a confidential informant's prior criminal history, an eyewitness's identification of another person, or a plea deal with a key state witness that was never disclosed.[30]

The Supreme Court first recognized this claim in *Brady v. Maryland*, where the Court overturned the penalty phase conviction

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27. Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Imbler v. Pachtman, 424 U.S. 409, 447 (1976) (noting that a prosecutor is obligated to disclose evidence or mitigation).

28. Kyles v. Whitley, 514 U.S. 419, 437 (1995); *see also A Call For Congress to Reform Federal Criminal Discovery*, THE CONSTITUTION PROJECT, Mar. 8, 2012 (requesting Congress to revise the federal discovery provisions to give prosecutors more guidance of what must be disclosed to defendants pretrial to ensure *Brady v. Maryland* and its progeny are followed); William M. Welch II & William W. Taylor III, *The Brady Problem: Time to Face Reality*, NAT'L L.J. & LEGAL TIMES, July 16, 2012, at 44 (explaining the need to expand the federal disclosure requirement under *Brady v. Maryland* in light of the former Senator Ted Stevens's wrongful conviction based on police and prosecutorial misconduct: "At a minimum, the rule must require prosecutors to disclose all interviews of witnesses, whether they are to be called or not, and all grand jury testimony, well in advance of trial.").

29. United States v. Agurs, 427 U.S. 97, 110 (1976) (holding that the good or bad faith of the prosecutor is irrelevant in determining the prejudice incurred to the defendant).

30. *See, e.g.*, Banks v. Dretke, 540 U.S. 668 (2004) (involving a situation where the State paid a key witness in their case against Banks); Giglio v. United States, 405 U.S. 150 (1972) (involving a situation where the State dismissed a witness' charges in exchange for his testimony without disclosing it to the defense).

based upon the prosecution's failure to turn over evidence mitigating Brady's involvement in a murder.[31] The Court later expanded the scope of the *Brady* doctrine to mandate the disclosure of any deals or benefits given to prosecution witnesses for their testimony against the defendant,[32] including any benefits received by the witness, payments made by the witness, or the state dropping a witness' criminal charges.[33] Additionally, the Court held that the prosecution may not withhold other kinds of impeachment evidence that would aid in a thorough cross-examination.[34]

Asserting a meritorious claim under *Brady* and its progeny requires the defendant to make the following showing: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[35] Prejudice occurs when a defendant demonstrates a reasonable probability of a different result based upon a cumulative assessment of the undisclosed evidence along with what was presented at trial.[36] Most claims fail on the prejudice, or materiality, prong because the defendant is unable to demonstrate that the decision to withhold evidence caused actual harm leading to the conviction.[37] Additionally, specificity is required to establish actual prejudice, which is extremely difficult since most claims are raised with only partial evidence of a violation.[38] When the withheld evidence *is* provided, courts weigh the evidence in light of what the state presented at trial to determine whether withholding the evidence was in fact prejudicial to the defendant.[39]

The *Brady* doctrine focuses on the harm suffered by the defendant when deprived of evidence that is vital to his defense.[40] The failure to disclose such evidence deprives a defendant of his Fourteenth Amendment due process rights to a fair trial because it impairs defense counsel's ability to properly prepare and challenge the state's case.[41] Specifically, the defendant is limited in his ability

31. *Brady*, 373 U.S. at 89–90 (1963).

32. *See Giglio*, 405 U.S. at 154–55.

33. *Id.*; *see also Banks*, 540 U.S. 668 (2004).

34. United States v. Bagley, 473 U.S. 667, 678 (1985).

35. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

36. *See* Kyles v. Whitley, 514 U.S. 419 (1995); *Strickler*, 527 U.S. at 289–90.

37. *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

38. *See Banks*, 540 U.S. at 692 (showing how Banks' counsel had limited evidence of deals with witnesses without finding state documents showing violation).

39. *See* United States v. Agurs, 427 U.S. 97, 112–14 (1976); *see also Banks*, 540 U.S. at 700.

40. *See Agurs*, 427 U.S. at 107; *Bagley*, 473 U.S. at 674–76.

41. *Bagley*, 473 U.S. at 675–76.

to present evidence that may render charges against him meaningless, to hire experts to challenge an aspect of the prosecution's case, or to find witnesses who refute the state's allegations.

The Tenth Circuit's reversal of Yancy Douglas and Paris Powell's convictions demonstrates how *Brady* claims often come about through random luck.[42] That court found that the Assistant District Attorney improperly withheld an arrangement between himself and Derrick Smith, the sole eyewitness to the shooting the defendants were convicted of, concerning his numerous prison sentences, which were reduced in return for his cooperation during the trials.[43] The drive-by shooting death of Shauna Farrow left the surviving witness, Derrick Smith, to identify those he saw flee the scene in a grey Datsun.[44] After numerous inconsistent statements, Smith told Oklahoma City Police Detectives that Yancy Douglas and Paris Powell were the shooters. Both were charged and convicted of first-degree murder and sentenced to death based primarily on Smith's testimony.[45] Assistant District Attorney Brad Miller asked Smith on direct examination if Smith benefited from his testimony. Smith denied receiving any benefits. Further, Miller's closing argument emphasized the lack of any deals.[46]

After Douglas and Powell's direct appeals and state post-conviction efforts were denied, they sought relief through federal habeas corpus.[47] After the denial of Douglas' initial habeas petition, but while Powell's case was still pending before the federal court, Smith recanted his testimony, "asserting that he had received Miller's assistance in exchange for his testimony, contrary to his denials at both trials."[48] According to Smith's affidavit, Miller went to great lengths to protect his informant while also preserving the convictions of both defendants. Smith received early parole for his testimony and continued to benefit from Miller's protection even after being charged and convicted of additional crimes in Texas and Oklahoma.[49] Miller contacted prosecutors in both states after

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42. Douglas v. Workman, 560 F.3d 1156, 1167 (2009) (discussing that Smith, the prosecution's star witness, wrote a handwritten affidavit recanting his identification of Powell and Douglas).

43. *Id.* at 1187.

44. *See id.* at 1161.

45. *Id.* at 1163–64.

46. *Id.* The prosecutor's actions also constituted a violation of due process under *Napue v. Illinois*. *Id.*; *see also supra* note 62.

47. *Id.* at 1166–67.

48. *Id.* at 1167.

49. *See id.*

he left the district attorney's office and assisted Smith in obtaining minimal jail time or quicker parole.[50]

Upon learning of Smith's confession, Douglas and Powell requested the right to amend their habeas petitions based upon this newly discovered evidence. Douglas was allowed to file a successive petition, while Powell was able to include the claim in his initial petition, as his habeas case was filed after Douglas's.[51] However, both defendants were required to exhaust their newly discovered *Brady* claims in state court before the federal courts could substantively evaluate their claims.[52] In both cases, the Oklahoma courts denied the successive state petitions on procedural grounds without allowing any further factual development or permitting an evidentiary hearing to determine the viability of the constitutional claims with regard to the newly discovered evidence.[53] Only after returning to federal court did Douglas and Powell receive full discovery of the prosecution's file, which substantiated their prosecutorial misconduct claims. Additionally, the district court granted an evidentiary hearing where Smith, Miller, and other witnesses testified, establishing more misconduct than originally alleged by either defendant.[54]

The Tenth Circuit found that Miller's actions in failing to divulge the extent of the agreement amounted to a fraud on the Court:

> [T]he prosecutor's misconduct in Mr. Douglas's case was not merely inadvertent, but was instead willful and intentional. . . .
>
> The prosecutor's conduct at issue here, then, is akin to a fraud on the federal habeas courts; that is, the prosecutor took affirmative actions to conceal his tacit agreement with the state's key witness until it was too late, procedurally, for Mr.

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50. *Id.*

51. Under 28 U.S.C. § 2244(b)(3)(c), Douglas must request and receive permission from the court of appeals to file a successor federal habeas corpus petition.

52. Douglas v. Workman, 560 F.3d 1156, 1168 (2009); *see also* Rhines v. Weber, 544 U.S. 269 (2005) (allowing for federal habeas petitioners to stay their federal habeas corpus litigation while they return to state courts to exhaust their claims).

53. *Workman*, 560 F.3d at 1168; *see also* Douglas v. State, 953 P.2d 349 (1998); Powell v. State, 995 P.2d 510 (2000). The Tenth Circuit Court of Appeals further stated that the procedural bar the state courts used was not adequate and independent, the standard for maintaining deference to state court rulings, thereby allowing the appeals court to review the claim on the merits without any deference to the state court's ruling. *Workman*, 560 F.3d at 1172.

54. *Id.* at 1168 (allowing both petitioners to review the entire Oklahoma County District Attorney's file on both cases). Complicating matters further is the shift in federal habeas corpus review, which now mandates that all such evidence be fully developed and litigated in state court before a federal court will substantively review the claim. A defendant must exhaust his constitutional claim along with the underlying facts supporting it in state court prior to any federal court substantive review. Vasquez v. Hillery, 474 U.S. 254, 257–58 (1986); *see also* 28 U.S.C. § 2254(b).

> Douglas to use that undisclosed agreement successfully to challenge his capital conviction.[55]

On those grounds, the Court granted both Powell and Douglas a writ of habeas corpus, which overturned their capital convictions.[56] Cases similar to those of Douglas, Powell, and Tennison occur frequently, but unfortunately often are unsuccessful because defendants are unable to navigate the state and federal criminal appellate processes.

However, since Douglas and Powell were capital defendants, their counsel was able to investigate their constitutional claims and help them navigate through the mire of state post-conviction and federal habeas corpus proceedings.[57] As the courts consistently explain how "death is different," the requirements of counsel throughout the process ensures some protections not available to those sentenced to Life Without the Possibility of Parole or a term of years.[58] Even with such competent counsel, however, mandatory exhaustion in state court resulted in delayed justice for both men. The Oklahoma state courts failed to provide any substantive review and instead imposed procedural defaults[59] that had to be dealt with in federal court.[60] Had they received a non-capital sentence, there is a strong likelihood that these due process violations would never have come to light or been remedied, and that both men would still be incarcerated.[61]

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55. *Workman*, 560 F.3d at 1192–93.

56. *Id.* at 1196.

57. The Court requires counsel throughout criminal appellate proceedings for capital cases. The Supreme Court considers capital cases under a heightened level of scrutiny, often described as "death is different." Harmelin v. Michigan, 501 U.S. 957, 994 (1991); *see also* Maples v. Thomas, 132 S. Ct. 912 (2012) (holding that abandonment of a capital defendant allows cause and prejudice to be met for ineffective assistance of counsel claim).

58. *Id.*

59. Procedural defaults occur when a constitutional claim fails to comply with a state procedural requirement. Here, the procedural default prevented the federal court from reviewing the claim on the merits.

60. The Oklahoma Court of Criminal Appeals denied Douglas's successive state post-conviction application on procedural grounds that the appeal was not timely filed in accordance with Oklahoma Court of Criminal Appeals Rule 9.7(G)(3). *Workman*, 560 F.3d at 1171. This procedural bar prevented the state court from reaching the merits of Douglas's claim and would prevent a federal court from substantively reviewing the claim absent a finding of cause and prejudice or actual innocence. *See generally* Murray v. Carrier, 477 U.S. 478 (1986); Schlup v. Delo, 513 U.S. 298 (1995).

61. *See* OKLA. STAT. tit. 22, § 1082 (2011) (stating that counsel is appointed in non-capital cases only at the discretion of the court).

B. Napue *Violations*

In addition to his pre-trial duties, a prosecutor is responsible for preventing any known false testimony from reaching the trier of fact, whether it is the judge or jury.[62] This requirement was established in *Napue v. Illinois*, where the prosecutor failed to correct a witness who lied about a plea deal he received for his trial testimony; this was found to be improper.[63] Similar to *Brady*, the underlying goal of this requirement of prosecutors is to ensure a fair trial through the reliability of the evidence presented.[64] In numerous *Brady* cases, prosecutors are often found to have committed *Napue* violations, and the Court's analysis of both constitutional violations is intertwined.[65] As the Court said, "A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth."[66]

The harm associated with a *Napue* violation is not limited to a specific defendant, but instead undermines the credibility of the criminal justice system as a whole. Fairness remains a bedrock principle of the criminal justice system, requiring ethical behavior as prosecutors pursue their cases:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[67]

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62. *Napue v. Illinois*, 360 U.S. 264 (1959) (overturning the conviction based upon the prosecutor's unconstitutional actions resulting in a Fourteenth Amendment due process violation).

63. *Id.; see also Agurs*, 427 U.S. at 103 (holding that it is fundamentally unfair to use perjured testimony to obtain a conviction).

64. *See* Kyles v. Whitley, 514 U.S. 419, 434 (discussing how the third element of *Brady*—materiality—is satisfied).

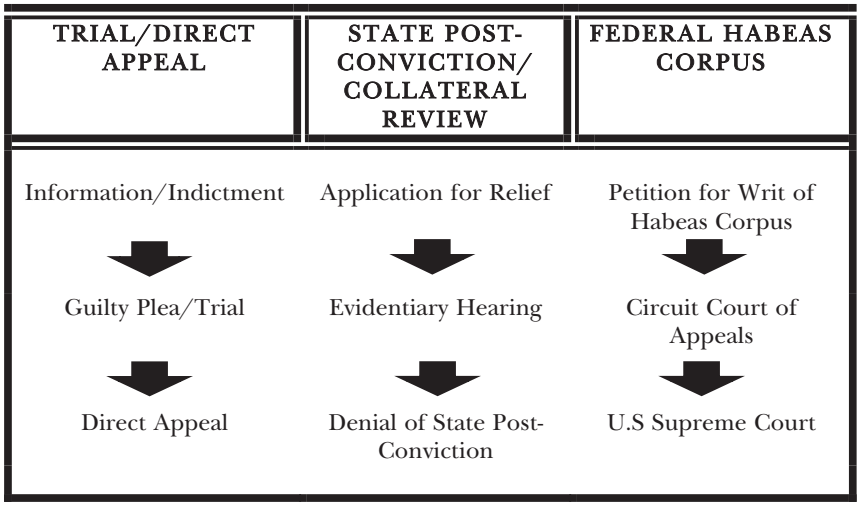
65. *See id.* at 441–44; Banks v. Dretke, 540 U.S. 668, 668 (2004).

66. *Napue*, 360 U.S. at 269–70 (quoting People v. Savvides, 1 N.Y.2d 554, 557 (1956)).

67. Mooney v. Holohan, 294 U.S. 103, 112 (1935); *see also* Brady v. Maryland, 373 U.S. 83, 86 (1963) (including the prosecution's failure to correct knowingly false testimony as a Fourteenth Amendment due process violation).

Even if the failure to correct is inadvertent, the end result is the same: a due process violation depriving the defendant of a fair trial.[68]

C. Treatment of Claims in State Post-Conviction



The three levels of review for felony convictions—direct appeal, state post-conviction, and federal habeas corpus—allow state prisoners to challenge their convictions in both state and federal court. Substantive claims raised in each appeal vary considerably depending on the state criminal code. In many states, direct appeal is limited to the four corners of the trial record, which means that only the errors appearing in the transcript may be raised.[69] Because of the complexity of both state post-conviction and federal habeas corpus, the failure to properly raise the legal basis along with all supporting facts can result in both systems dismissing the case on procedural grounds. Similar to *Brady* claims, constitutional claims regarding ineffective assistance of counsel, eyewitness identification, forensic science challenges, and police and prosecutorial misconduct requiring evidence beyond the trial transcript must be raised in state post-conviction where the defendant does not have

68. *See also Kyles*, 514 U.S. at 437–38; *Banks*, 540 U.S. at 691 (discussing where the prosecution failed to correcting knowingly false evidence and also violated *Brady* in not disclosing exculpatory evidence).

69. Martinez v. Ryan, 132 S. Ct. 1309, 1317–18 (2012) (discussing the difficulty in presenting a thoroughly investigated and pled ineffective assistance of counsel claim in state post-conviction without the aid of counsel).

the Sixth Amendment's right to counsel.[70] Therefore, state prisoners often are expected to develop and litigate all relevant constitutional claims without counsel or investigators.[71] State post-conviction courts consider any claims not properly asserted in the initial petition to be waived,[72] meaning state inmates must assert such claims with minimal legal assistance.

The Supreme Court has made clear that constitutional claims exceeding the scope of the trial record, such as some ineffective assistance of counsel claims, must be brought at the first available opportunity, i.e. either on direct appeal or state post-conviction proceedings.[73] Recently, the Supreme Court, in *Martinez v. Ryan*, re-emphasized the importance of state collateral proceedings for reviewing bedrock constitutional claims.[74] For those constitutional claims requiring investigation or factual development beyond the record, the state post-conviction process may represent the only opportunity for an inmate to develop the claim and ensure proper review. However, the state criminal appellate process often curtails the inmate's factual development of claims with little or no justification.[75] Further exacerbating the problem are the legislative and judicial efforts to confine most of the substantive review of constitutional claims to the state courts.[76] As the Supreme Court becomes more deferential to state direct and collateral proceedings, it is of paramount importance to ensure those proceedings permit the full development of evidence necessary to support constitutional claims.[77]

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70. *See* Douglas v. California, 372 U.S. 353 (1963) (holding that direct appeal counsel must be effective under the Sixth Amendment); *see also* Coleman v. Thompson, 501 U.S. 722 (1991) (holding there is no right to effective assistance of counsel in state post-conviction).

71. Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 973 (2012) (describing the difficulties *pro se* inmates have in properly litigating their claims in state post-conviction in order to avail themselves of substantive review in federal habeas corpus).

72. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963) (allowing procedural bar to federal habeas corpus if an inmate bypasses state post-conviction process); Wainwright v. Sykes, 433 U.S. 72 (1977); *see also* Marceau, *supra* note 6, at 147–48.

73. *See* Trevino v. Thaler, 133 S.Ct. 1911 (2013).

74. *Martinez*, 132 S. Ct. at 1317 (holding that ineffective assistance of counsel claims may meet the cause and prejudice standard for defeating a procedural default where a counsel's ineffectiveness precludes proper claim development in the initial collateral review). Justice Kennedy also emphasized that, for claims of ineffective assistance of counsel and the like, state court is the proper venue for full investigation, litigation, and substantive review to evaluate whether any rights were violated.

75. *See* Harrington v. Richter, 131 S. Ct. 770, 785 (2011).

76. *See, e.g.*, 28 U.S.C. § 2254(d)(1)–(8) (1966), *amended by* 28 U.S.C. § 2254(d)(1)–(2) (1996); Brecht v. Abrahamson, 507 U.S. 619, 636 (1993); Coleman v. Thompson, 501 U.S. 722, 730–32 (1991); Cullen v. Pinholster, 131 S. Ct. 1388, 1398–99 (2011).

77. 28 U.S.C. § 2254 (d)(1) & (d)(2); *see also Richter,* 131 S. Ct. at 784; *Pinholster*, 131 S. Ct. at 1398–99.

Since state collateral proceedings are the first and, in many cases, the only opportunity a defendant may have for a complete review of constitutional claims, a defendant's margin of error in the development and litigation of these cases is slim.[78] However, the level of substantive review provided by state courts in collateral proceedings can be minimal.[79] Moreover, a defendant who fails to present all his factual support for every constitutional violation at the first available opportunity may even further curtail his substantive review in state court, and will feel the sting of extreme deference to state court determinations in federal habeas corpus proceedings.[80]

This places a significant burden on an incarcerated defendant to conduct a full investigation into both the records and witnesses necessary to substantiate a constitutional claim.[81] Even in states where post-conviction counsel is provided, there are little to no investigative resources or funds for experts or forensic testing to develop the merits of a claim.[82] Yet, failure to properly raise a claim consisting of both the legal basis and all relevant facts and supporting documentation results in either (1) a state court review on the merits despite the incomplete record, which then mandates deferential review by the federal court,[83] or (2) a procedural bar that prevents substantive review in federal habeas.[84]

D. Brady *Claims in Federal Habeas Corpus: Cause and Prejudice*

A state court finding of procedural default often precludes any federal substantive review. The Supreme Court has emphasized to defendants the importance of complying with state procedural rules during trial, during direct appeal, and throughout collateral proceedings. It has done so by repeatedly upholding the state procedural bars that prevent federal review.[85] Procedural bars can

78. *See* Wiseman, *supra* note 71, at 972.

79. *See Richter*, 131 S. Ct. at 784 (holding that state courts are not required to draft full opinions stating their reasons for their holdings for 2254(d) deference standard to apply in federal habeas).

80. *Id.*

81. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012); *see also* Hash v. Johnson, 845 F. Supp. 2d 711, 741 (W.D. Va. 2012) (explaining defendant's need to conduct an independent investigation separate from the police investigation).

82. Wiseman, *supra* note 71, at 973 (discussing the difficulties state post-conviction litigants face in building a proper record for review in federal habeas corpus when state courts refuse to provide necessary resources like experts, investigation funding, or discovery).

83. *See* 28 U.S.C. § 2254(d)(1).

84. *See* Murray v. Carrier, 477 U.S. 478 (1986).

85. Murray v. Carrier, 477 U.S. 478, 490–91 (1986); *see also* Wainwright v. Sykes, 433 U.S. 72 (1977).

result from a defendant's failure to object at trial, to properly litigate every potential claim at the first available opportunity, or even to sign an acknowledgment. Any deviation may prevent the state court from reviewing a potentially meritorious claim,[86] which may also preclude federal courts from conducting a comprehensive review.[87]

Procedural bar rules allow state courts to have the first crack at fixing any problems with their convictions: "In the context of federal habeas proceedings, the independent and adequate state ground doctrine is designed to 'ensur[e] that the States' interests in correcting their own mistakes is respected in all federal habeas cases.'"[88] Similar to the exhaustion requirement,[89] the purpose of federal courts' deference to state courts is to provide the latter the first opportunity to conduct a full review of a defendant's claims both on their factual and constitutional bases.[90]

Provided a state procedural bar passes constitutional muster, a defendant who has failed to comply with state procedural rules may still be able to preserve his constitutional claim if he can prove "cause and prejudice" in violating the state rule.[91] A showing of cause and prejudice requires an explanation as to why the constitutional claim could not be properly raised in accordance with state procedural law and how dismissing the constitutional claim hurts the defendant.[92] The defendant satisfies the "cause" prong by showing "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[93] In

86. *See* Justin Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudication*, 62 HASTINGS L.J. 1, 33–34 (2010) [hereinafter Marceau, *Don't Forget Due Process*].

87. Such prohibitions will only be given effect, however, if the bar (1) gives adequate notice to defendants that noncompliance will disallow review and (2) is independent of any federal law or constitutional provision. *Wainwright*, 433 U.S. at 81 (stating that only those procedural bars complying with both requirements will be honored in federal court). Furthermore, if a state court deviates in its handling of a state procedural rule, federal courts are not obliged to honor that bar in federal habeas corpus review. Coleman v. Thompson, 501 U.S. 722, 729–31 (1991).

88. Cone v. Bell, 556 U.S. 449, 465 (2009) (quoting *Coleman*, 501 U.S. at 732); *see also* Marceau, *Don't Forget Due Process*, *supra* note 86, at 12 (explaining the Supreme Court's requirement of a state collateral process to satisfy due process "full and fair" review).

89. *See infra* note 160.

90. *See* 28 U.S.C. § 2254(d)(1)–(2) (2006); *see also* Marceau, *supra* note 6, at 113–15 (explaining that even with clear prosecutorial misconduct claims, federal courts under the Antiterrorism and Effective Death Penalty Act (AEDPA) must give deference to state court holdings). *But see* Wiseman, *supra* note 71, at 954–56 (explaining the complications of the *Pinholster* decision on deference to state court decisions with the lack of proper ability to build a complete record).

91. *Coleman*, 501 U.S. at 729; *see also* Murray v. Carrier, 477 U.S. 478, 479 (1986).

92. *Coleman*, 501 U.S. at 730; *Carrier*, 477 U.S. at 478.

93. *Carrier*, 477 U.S. at 488.

other words, the defendant must show that either the courts or the state have infringed on his ability to properly abide by state procedural rules.[94] *Brady* claims, by their nature, fit this criterion, since it is state malfeasance that causes *Brady* violations. [95] Prejudice, on the other hand, is met when a defendant shows the actual harm suffered from courts not substantively reviewing his constitutional claim concerning withheld evidence. The defendant must present specific evidence in the form of witness statements, further forensic testing, or other documentation explaining how the withheld evidence unconstitutionally harmed the defendant's case.[96]

Therefore, if they are able to show prejudice, defendants with viable *Brady* claims that have been procedurally barred by state courts may still obtain substantive review in federal courts. Indeed, the Supreme Court has recognized the parallel elements of *Brady* claims and the cause and prejudice standard,[97] so a defendant with a meritorious *Brady* claim satisfies the cause and prejudice standard, allowing federal courts to reach the merits of the constitutional violation and grant a writ of habeas corpus. The Court's rationale for waiving the procedural bar on a *Brady* claim is the state prosecutor's failure to comply with Fourteenth Amendment Due Process requirements. Because the federal courts recognize that these violations often continue through state post-conviction, they permit a potentially underdeveloped, procedurally barred claim to have a full merits review in federal habeas corpus. The state's failure to provide evidence favorable to the defendant at trial may therefore also excuse the defendant's state post-conviction counsel's failure to raise a claim properly in state collateral proceedings:

> If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we

94. *Id. But see* Trevino v. Thaler, 133 S. Ct. 1911 (2013) (allowing ineffective assistance of counsel for failure to investigate to satisfy the cause and prejudice standard in certain situations); Martinez v. Ryan, 132 S. Ct. 1309, 1318 (2012). Both *Martinez and Trevino* are narrow exceptions to the Court's holding in *Coleman v. Thompson* that a defendant's own actions, or those of his attorney, cannot satisfy the "cause" prong.

95. Strickler v. Greene, 527 U.S. 263, 282 (1999).

96. *See* Banks v. Dretke, 540 U.S. 668, 691 (2004); *Strickler*, 527 U.S. at 289–90; *Carrier*, 477 U.S. at 493–94.

97. *Banks*, 540 U.S. at 691; *Strickler*, 527 U.S. at 582.

> think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable.[98]

The prejudice prong of the cause and prejudice standard is satisfied by the same showing as the materiality element of a *Brady* claim. The synonymous standards for materiality and prejudice require a defendant to articulate the harm suffered from the state's improper action.[99] In *Strickler v. Greene,* the Supreme Court explained how a viable *Brady* claim aligns with the long-standing requirements of cause and prejudice.[100] The Court understood that, when the State withholds relevant records, it has a significant ripple effect on the ability of the defendant to properly raise and fully litigate claims in both state post-conviction and federal habeas corpus. Therefore, this reprieve from state procedural bars is necessary to restore fairness to the criminal process. Once an inmate satisfies all elements of *Brady* in federal habeas, the court will excuse any procedural bars imposed by the state courts on the claim. This allows the federal court to grant relief despite the procedural defects.

Although the defendant's *Brady* claim was unsuccessful in *Strickler*, the pathway was cleared for other defendants with meritorious claims to obtain relief.[101] For instance, in *Banks v. Dretke*, the Supreme Court found that Banks satisfied the "cause and prejudice" standard, thereby allowing him to bypass the procedural defaults that would otherwise have been imposed on him for failing to fully litigate his claim in state court.[102]

Banks was convicted for murdering Richard Whitehead and sentenced to death. Based on the prosecution's assertion of open-file

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98. *Strickler*, 527 U.S. at 284 (explaining that materiality satisfies prejudice, which allows for a substantive review of the claim).

99. This was addressed in *Banks*:

> "[C]ause and prejudice" in this case "parallel two of the three components of the alleged *Brady* violation itself." Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the context of the "cause and prejudice" exists when the suppressed evidence is "material" for *Brady* purposes.

Banks, 540 U.S. at 691 (citing *Strickler*, 527 U.S. at 282) (internal citation omitted).

100. *Strickler*, 527 U.S. at 282–83.

101. *See* Slutzker v. Johnson, 393 F.3d 373, 384–86 (3rd Cir. 2004); *see also* Ward v. Hall, 592 F.3d 1144, 1173, 1176 (11th Cir. 2010); Crawford v. Head, 311 F.3d 1288, 1327 (11th Cir. 2002) (applying the "cause and prejudice" standard to procedurally defaulted claims but ultimately denying the petitions for habeas).

102. *Banks*, 540 U.S. at 700–03.

discovery, the defense did not file any discovery motions.[103] The State's case against Banks rested largely on the testimony of two witnesses: Charles Cook and Robert Farr. Cook, a confidential informant, told Deputy Sheriff Willie Huff of Banks's meeting with the victim, which led police to a gun that was later determined to be the murder weapon.[104] Farr corroborated Cook's explanation about the murder weapon to police. When asked if he ever received money or benefits for his testimony, Farr denied any deals.[105] Defense counsel's request for documents relating to the confidential informant were denied on the theory that the information was, according to the police department, privileged.[106] Both men received benefits; Farr received payments for his testimony, and Cook was not prosecuted after his testimony against Banks.[107]

After his first two state post-conviction appeals were denied, Banks filed a third appeal alleging, for the first time, that Farr was a police informant, that Cook received a "generous deal" from the prosecution, and that the concealment of this information violated his Fourteenth Amendment rights.[108] The prosecution repeatedly argued that all claims be denied on the assertion that "nothing was kept secret from the defense."[109] Supporting the prosecution's argument were affidavits from Deputy Sheriff Huff and the trial prosecutors, which refuted Banks's allegations.[110] The state post-conviction court denied relief on the basis that there was no hidden deal with Cook but made no comment on allegations regarding Farr.[111]

In Banks's federal habeas corpus petition, he again raised similar claims of *Brady* violations. The magistrate judge granted limited discovery in regards to Cook as well as an evidentiary hearing to prove the merits of Banks's constitutional claims. Banks renewed his request for full discovery based upon affidavits from both Cook and Farr regarding their deals with the prosecution at trial.[112] Specifically, both men explained:

> Farr had "set Delma up" by proposing the drive to Dallas and informing Deputy Sheriff Huff of the trip. Accounting for his

103. *Id.* at 677, 692.
104. *Id.* at 676.
105. *Id.* at 678.
106. *Id.* at 676–77.
107. *Id.* at 685.
108. *Id.* at 682–83.
109. *Id.* at 683.
110. *Id.*
111. *Id.*
112. *Id.* at 684.

> unavailability earlier, Farr stated that less than a year after the Banks trial, he had left Texarkana, first for Oklahoma, then for California, because his police-informant work endangered his life. Cook recalled that in preparation for his Banks trial testimony, he had participated in "three or four . . . practice sessions" at which prosecutors told him to testify "as they wanted [him] to, and that [he] would spend the rest of [his] life in prison if [he] did not."[113]

Based upon this newly discovered evidence showing substantial police and prosecutorial misconduct, the magistrate ordered full disclosure by the Bowie County District Attorney.[114] The disclosed files included transcripts of Cook's interrogation, which showed the great lengths the prosecution went through to rehearse Cook's testimony shortly before trial.[115] Further, Deputy Sheriff Huff admitted for the first time at the evidentiary hearing that Farr was paid 200 dollars pretrial after the State denied the point in prior state trial and appellate proceedings.[116]

The Supreme Court found that Banks established cause and prejudice through his *Brady* claim concerning Farr. Specifically, with regard to the cause prong, the Court focused on the deceptive nature of the prosecution's actions through the pretrial, trial, and post-conviction phases of litigation.[117] The Court explained that a defendant is not required to keep hunting for relevant records or interviews when the State offers open discovery or explains that such evidence does not exist.[118] The Court dismissed the State's approach that the lack of disclosures in state collateral proceedings prevents the grant of relief when the prosecution improperly withholds evidence:[119] "Banks had little to proffer in support of a request for assistance from the state post-conviction court. We assign no overriding significance to Banks's failure to invoke state-

113. *Id.*
114. *Id.* at 685.
115. *Id.*
116. *Id.*
117. *Id.* at 696–98.
118. *Id.* at 698. "In summary, Banks's prosecutors represented at trial and in state post-conviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim." *Id.* (internal citation omitted).
119. *Id.* at 696–97 (describing the State's argument that the defendant must avail himself of state post-conviction discovery to find potential *Brady* evidence and that the failure to do so should negate the "cause" prong for avoiding procedural default).

court assistance to which he had no clear entitlement."[120] Furthermore, the Court found that the prejudice prong was satisfied based on the weight the prosecution put on Farr's testimony in both the guilt and penalty phases of Banks's trial.[121]

The Court's benchmark holdings in both *Strickler* and *Banks* shed light on a fundamental reality of how *Brady* materials are uncovered in the criminal appeals process. Often, the state post-conviction process provides very little, if any, means to request or obtain files from law enforcement or prosecuting agencies.[122] Even when defense attorneys find alternate means to locate vital evidence, such as open records laws, the disclosures may come well after post-conviction statutes of limitation have passed or an initial post-conviction petition has been filed.[123] Consequently, the evidence is often unexhausted through state courts.[124] Therefore, submission of these materials in a successor state collateral action will result in procedural bars, which then prevent meaningful federal review. The cause and prejudice standard serves as the only means whereby meritorious *Brady* claims can receive substantive review in federal habeas corpus when procedural bars would otherwise deny such review. Excusing procedural defects in these claims on account of the state's misconduct gives the defendant a forum, and the federal courts the opportunity, to rectify the constitutional violation.

However, while the cause and prejudice standard gives *Brady* claims a way to avoid some procedural pitfalls, such claims are not immune from other procedural requirements. For instance, exhaustion prevents federal courts from adjudicating claims when the legal bases and underlying facts of the claim have not been "fairly presented" through the state appellate or collateral procedures.[125]

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120. *Id.* at 697.

121. *Id.* at 702–03.

122. *See, e.g.*, Milke v. Ryan, 711 F.3d 998, 1003–04 (9th Cir. 2013) (finding that the state's post-conviction ruling was contrary to or an unreasonable application of existing Supreme Court precedent because Milke repeatedly requested impeachment evidence, which was denied by the state post-conviction court).

123. Many state post-conviction laws require an application or state habeas petition to be filed no later than one year after the direct appeal is finalized. *E.g.*, WASH. REV. CODE § 10.73.090 (2012) (providing one year). Further, many states have much shorter time periods, making compliance difficult given the open records timing. *E.g.*, N.C. GEN. STAT. § 15A-1415(a) (2012) (requiring a capital defendant to file a motion for post-conviction relief within 120 days).

124. *See* 28 U.S.C. § 2254(b)(1)(A) (2006) (requiring a prisoner to exhaust "the remedies available in the courts of the State"); *see also* Rose v. Lundy, 455 U.S. 509 (1982) (discussing the exhaustion requirement in light of the fact that many prisoners tend to submit mixed federal habeas petitions containing both exhausted and unexhausted claims).

125. *Rose*, 455 U.S. at 523; *see also* Wainwright v. Sykes, 433 U.S. 72, 82–83 (1977).

Existing or new constitutional claims supported by evidence uncovered after state post-conviction proceedings must be presented to the state courts before a federal court may substantively review them.[126] This includes *Brady* violations where the state appellate process appears to provide a means for substantive review.

The Court's recent decision in *Cullen v. Pinholster* may take the exhaustion principle further and deny state prisoners the opportunity to have their claims decided on the merits.[127] As discussed later, federal courts, may be prohibited from ever considering evidence that was not before the state court during collateral proceedings, even when the state collateral process provided no mechanism to find such evidence.

II. HOW *BRADY* CLAIMS ARE USUALLY UNCOVERED IN POST-CONVICTION

Brady materials are often discovered fortuitously during the page-by-page review of police reports, reading a district attorney's files disclosed through post-conviction discovery, or through an open records request.[128] The relevant information can be uncovered through something as random as a prosecutor's notation about an undisclosed plea deal or forensic testing results that show the defendant's samples do not match the crime scene samples.[129] This is evidence which, had it been disclosed, would have provided ample material for impeachment or exculpatory testimony. However, it is difficult to locate these materials in the relevant state or federal agencies.

Part of the difficulty for a defendant in finding such evidence after a direct appeal is the lack of a continuing obligation on the part of the prosecution to disclose *Brady* material. Prior to conviction, a prosecutor is obligated to locate and disclose any impeachment or exculpatory evidence held by any state or federal

126. Rhine v. Webber, 544 U.S. 269 (2005); *see also* Mayle v. Felix, 545 U.S. 644, 646–47 (2005).

127. Cullen v. Pinholster, 131 S. Ct. 1388 (2011).

128. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 671–72 (1985) (describing how respondent uncovered *Brady* materials uncovered from Freedom of Information Act and Privacy Act requests); Slutzker v. Johnson, 343 F.3d 373, 377–79 (3d Cir. 2004) (describing how petitioner subpoenaed the police department post-conviction and received twenty-one previously undisclosed police reports related to the murder investigation); White v. Helling, 194 F.3d 937, 943 (8th Cir. 1999) (describing how petitioner uncovered six new exhibits in discovery during habeas proceedings).

129. GARRETT, *supra* note 7, at 84–89, 127–30.

agency that participated in the investigation or evaluation of evidence.[130] However, once a defendant is convicted, this duty evaporates.[131] While almost every state's ethical rules contain a continuing obligation to disclose evidence that may show innocence,[132] there is little to no legal precedent mandating such a duty, and state bar associations are reluctant to hold errant prosecutors liable.[133] Therefore, any impetus to locate evidence that substantiates a misconduct claim falls to the defendant. This burden would not be problematic if state systems provided mechanisms to locate, plead, and litigate these misconduct claims. However, without a system in place to find and review files from law enforcement and the prosecution, defendants are hamstrung in their ability to meet state and federal procedural requirements for presenting both the legal basis and all relevant factual support for their constitutional claims.

There are two methods a defendant can pursue to locate records that may be used for constitutional claims in a state collateral proceeding: post-conviction discovery provisions and open records acts. Defendants will often avail themselves of both strategies, given the current limitations of each system. A defendant's ability to successfully obtain records under either method depends on the openness of the state system. States provide different levels of access to records. The key for any defendant to successfully navigate either state post-conviction discovery or open records is a thorough understanding of the limits of both systems and what information is discoverable from each.

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130. Kyles v. Whitley, 514 U.S. 419, 437 (1995) (quoting the ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEF. FUNCTION 3-3.11(a) (3d ed. 1993) and the MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1984)).

131. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009) (finding no continuing obligation to disclose evidence once a defendant is convicted).

132. *See* Brief for American Bar Association as Amicus Curiae for Petitioner at 7–8, Smith v. Cain, 132 S. Ct. 627 (2012) (No. 10-8145). Model Rule 3.8(d) reflects the legal community's long-standing consensus, first expressed in the ABA's CANONS OF PROF'L ETHICS ("ABA 1908 Canons"), that it would be "highly reprehensible" to allow prosecutors to withhold evidence that might establish a defendant's innocence. *Id.* at n. 13. Model Rule 3.8(d)'s widespread acceptance is reflected in the fact that forty-nine states, as well as the District of Columbia, the United States Virgin Islands, and Guam, have adopted ethics rules that include a provision identical or substantially similar to it. *Id.*

133. MODEL RULES OF PROF'L CONDUCT R. 3.8; *see also* 28 U.S.C. § 530B. Only a handful of prosecutors are ever punished for violating *Brady*. *But see* Maurice Chammah, *Anderson Appeals, Citing Statute of Limitations*, TEXAS TRIBUNE, April 23, 2013 (describing how a state court judge issued an arrest warrant for the prosecutor who unconstitutionally withheld exculpatory and impeachment evidence in the Michael Morton wrongful conviction case. Mr. Morton was incarcerated for almost twenty-five years); *CA: Bar Judge Recommends Jon Alexander Be Disbarred, Would Be First District Attorney to Be Disbarred in History of California*, THE OPEN FILE (Apr. 8, 2013) (California bar judge recommended disbarment after finding the prosecutor violated three rules of professional conduct, including the suppression of evidence).

A. State Post-Conviction Discovery Provisions

States' post-conviction systems differ as to the types of claims which can be asserted, the statute of limitations for filing such claims, and whether representation will be provided.[134] Similarly, there is a great deal of variance concerning discovery of records and evidence relevant to the constitutional claims asserted. For example, some states allow access only in certain types of cases, like capital cases or post-conviction DNA testing challenges.[135] Indiana provides for post-conviction discovery on the same grounds as would be available in civil actions.[136] North Carolina mandates reciprocal discovery during collateral proceedings.[137] However, twenty-four states lack any state or court rule whatsoever that would allow defendants to pursue discovery during their state collateral proceeding.[138] These defendants are thus obligated to fully plead in collateral proceedings the underlying factual basis for all constitutional violations occurring during their pretrial and trial proceedings, even though they lack the records necessary to meet the elements of the claims.

The nine states with the broadest discovery statutes have provisions that mirror the federal habeas corpus standard of "good cause," which allows the defendant access to records if he is able to make out a prima facie case as to how the requested information would help substantiate his constitutional claim.[139] The defendant must plead specific details with supporting evidence in the form of

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134. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1319 (2012) (discussing which states allow post-conviction counsel and which do not as well as when substantive claims can be raised in these states); *see also* Trevino v. Thaler, 133 S. Ct. 1911, 1914–16 (2013) (discussing the specific requirements of the Texas system).

135. ALASKA STAT. § 12.72.010(4) (1962); HAW. REV. STAT. § 844D-125 (2007); IDAHO CODE ANN. § 19-4902 (2004); VT. STAT. ANN. tit. 13, § 5564 (2009) (addressing DNA discovery cases); OKLA. CT. R.P. 9.7 (addressing capital cases).

136. INDIANA R. POST-CONVICTION 1 § 5.

137. N.C. GEN. STAT. § 15A-1415 (2007).

138. These states include Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Washington, and Wyoming.

139. ALA. R. CRIM. P. 32.2(b), 32.3, 32.4; LA. R. CRIM. PROC. ANN. art. 929 (clarified by State ex rel. Tassin v. Whitley, 602 So. 2d 721 (La. 1992)); MISS. CODE ANN. § 99-39-15 (1972); NEV. REV. STAT. § 34.780 (2006); N.D. CENT. CODE § 29-32.1-08 (2013); PA. R. CRIM. P. 902 (allowing discovery in capital cases or extraordinary circumstances in non-capital cases); S.C. CODE ANN. § 17-27-150 (1976); UTAH R. CIV. P. 65C(n); W. VA. POST-CONVICTION HABEAS CORPUS R. 7.

affidavits, records, etc. to satisfy the good cause standard.[140] Similarly, several other states place the burden on defendants to articulate a concrete basis for believing that the police or prosecution withheld evidence that would put the case in a different light.[141]

One of the primary difficulties in satisfying the good cause standard, especially when the defendant does not have access to counsel, is providing enough evidence to justify the request for additional discovery. This is easier with constitutional claims where the need for further discovery is clear from the trial transcripts, such as claims of ineffective assistance of counsel or faulty forensics.[142] In the *Brady* context, on the other hand, a defendant is often arguing a theory: the state acted improperly during trial because a witness recanted, or there appears to be some prior convictions not disclosed, and there may be more evidence the prosecution failed to divulge. Problems can arise in locating that information. For an *incarcerated* defendant without counsel, it is almost impossible to get the affidavits supporting the recantation or an expert opinion showing faulty forensics. For example, Banks produced affidavits from an ex-girlfriend and the declarations of Cook and Farr, which were gathered by the capital defense team and not by Banks.[143] Similarly, Douglas and Powell had counsel assist in providing affidavits concerning the prosecution's withheld evidence.[144]

An obvious benefit of allowing discovery in state post-conviction or collateral review is that it helps the courts to determine whether

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140. *See* RULES GOVERNING SECTION 2254 PROCEEDINGS IN THE U.S. DISTRICT COURTS, Rule 6, 28 U.S.C. § 2254 (2012); *see also* Bracy v. Gramley, 520 U.S. 899, 908–09 (1997).

141. CAL. PENAL CODE § 1054.9 (2008); DEL. SUPER. CT. CRIM. R. 61 (clarified by Dawson v. State, 673 A.2d 1186 (Del. 1996)); ME. R. CRIM. P. 72; MASS. R. CRIM. P. 30(c)(4) (where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order); MINN. STAT. ANN. § 590.01 (West 2010); MONT. CODE. ANN. § 46-21-201(4) (2011); TENN. SUP. CT. R. 28, §§ 6(c)(7), 7; TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2005 & Supp. 1A 2012); People v. Smith, 817 N.E.2d 982 (Ill. App. Ct. 2004); Collison v. Underwood, 339 S.E.2d 897 (Va. Ct. App. 1986) (allowing depositions when factual dispute remains in habeas petition).

142. Under *Brady* and Rule 6 of the Rules Governing Section 2245, it is of paramount importance to be specific with the discovery request. Thus, the request should have factual support in the form of affidavits, court records, expert reports, and similar documentary support so as to determine whether the constitutional claim has merit or is frivolous. In the context of ineffective assistance of counsel or faulty scientific evidence, there are often records or expert reports accompanying such a discovery request providing clear support for the discovery grant. However, *Brady* claims suffer due to the absence of adequate documentary proof to meet the good cause standard. *See* Blackledge v. Allison, 431 U.S. 63 (1977).

143. Banks v. Dretke, 540 U.S. 668, 682–84 (2004).

144. Douglas v. Workman, 560 F.3d 1156, 1163 n.7 (10th Cir. 2009).

the suspected state materials substantiate misconduct claims or not. Handling these claims at this juncture is what both the state and federal courts hoped would be achieved with the changes in federal habeas corpus jurisprudence.[145] When the state system allows for such discovery, these claims can be litigated and adjudicated with full examination in state appellate or collateral proceedings. Further, if police or prosecutorial misconduct occurred, it can be rectified in a state forum as intended by the Antiterrorism and Effective Death Penalty Act (AEDPA). If a retrial should be necessary, then it can happen with less delay and minimum prejudice to either the state or defense. Such prompt action restores faith in the integrity of the criminal justice system overall.

B. Utilizing Open Records Laws to Find Brady *Materials*

The other avenue for locating records in state and federal custody are open records acts. These acts allow citizens to request various records from internal state agencies under the auspices of governmental transparency. Each state's open records law differs with respect to what a person may request and which files are open for or exempted from review.[146] Additionally, each law specifies copy fees and other administrative requirements.[147] Some states prohibit requests from anyone who is not a resident of the state where the records are requested.[148]

The defendant who is pursuing an open records request must first get a clear understanding of what records are designated as open. Knowing whether records are opened or closed can be the difference between whether the records are obtained or not, as anecdotal evidence suggests that some state agency employees lack a clear understanding of their state's statutes.[149] Therefore, it is imperative that the defendant knows what he can obtain when seeking records because the defendant may have to explain to an agency's records custodian what the law deems an open record.[150] There

145. *See supra* notes 75–76 (discussing the Supreme Court's recent emphasis on deferring to state court decisions in federal habeas corpus review).

146. *See* THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, A REPORTER'S STATE-BY-STATE ACCESS GUIDE TO LAW ENFORCEMENT RECORDS (2008).

147. *See generally* FLA STAT. § 119.07(4)(A)1 (West 2007) (giving the default fees for Florida's Sunshine Provision); 65 PA. STAT. ANN. § 1307 (2009) (setting out Pennsylvania's fee schedule for open records).

148. *See* McBurney v. Young, 133 S. Ct. 1709 (2013) (finding that there is no constitutional right to information provided by FOIA requests).

149. *See* REPORTERS COMM., *supra* note 146, at 4.

150. *Id.*

may be dispute over which files are obtainable and which redactions must be made; privacy concerns are balanced with the goals of transparency.[151]

Even when state post-conviction rules provide for discovery, the defendant may run up against closed law enforcement records, which are exempt from records requests.[152] How a state designates each group is solely within the legislature's province.[153] The legislature also decides whether the police investigation is ongoing or completed after the defendant has been convicted or acquitted, which matters since a case must be completed for a defendant to have access to the records. In some states, the police investigation counts as completed for most purposes, and related records may be accessible depending on the state's aforementioned classification.[154] Other states classify police files as exempt or open only after a certain level of criminal appeals has concluded.[155] In other words, some open records acts will allow requests for these records, while others will not. Numerous states exempt all law enforcement records from disclosure regardless of whether the case is open or closed.[156]

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151. From past experiences, obtaining public records under state open records laws varies greatly based on the agency, knowledge of the staff, and persistence. *See* NAT'L FREEDOM OF INFO. COAL., STATES FAILING FOI RESPONSIVENESS (Oct. 2007), *available at* http://www.nfoic.org/states-failing-foi-responsiveness. "This national study shows that in the vast majority of states, citizens have little to no recourse when faced with unlawful denial of access under their state's FOI laws," said Charles N. Davis, executive director of the National Freedom of Information Coalition, based at the University of Missouri School of Journalism. "It's a cry for reform of FOI laws nationwide." *Id.*

152. *See, e.g.*, *infra* note 156 and accompanying text.

153. *See* Brooke Barnett, *Use of Public Record Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557, 560 (2001) (discussing the change in open records law from state legislatures); *see also* McBurney v. Young, 133 S. Ct. 1709 (2013) (holding that state statute restricting access to FOIA records to state residents only is not a violation of the U.S. Constitution).

154. *See* REPORTERS COMMITTEE, *supra* note 146, at 3.

155. *See* ALASKA STAT. § 40.25.120(a)(6)(A) (2012); GA. CODE ANN. § 50-18-72(a)(4) (2009); Idaho Code Ann. § 9-335(2) (2004); Ky. Rev. Stat. Ann. § 61.878(1)(h) (LexisNexis 2004); LA. REV. STAT. ANN. § 44:3(A)(1) (2007); MINN. STAT. ANN. § 13.82, subd. 7 (West 2013); MO. REV. STAT. § 610.100.2 (1999); N.D. CENT. CODE § 44-04-18.7 (2001); VT. STAT. ANN. tit. 1, §§ 315–20 (2010); State ex rel. Steckman v. Jackson, 639 N.E.2d 83 (Ohio 1994); Martin v. Musteen, 799 S.W.2d 540 (Ark. 1990); State v. Kokal, 562 So.2d 324 (Fla. 1990).

156. *See* 5 ILL. COMP. STAT. 140/7(1)(d)(i)–(vii) (2012); IOWA CODE §§ 22.75(5), 321.271 (2013); MISS. CODE ANN. § 45-29-1 (2004); MONT. CODE ANN. §§ 44-5-101 to 515 (2010); NEB. REV. STAT. ANN. §§ 29-3506, 29-3520 (LexisNexis 2008); N.M. STAT. ANN. § 14-2-1(D) (LexisNexis 2003); OKLA. STAT ANN. tit. 51 § 24A.8.B (2012); 65 PA. STAT. ANN. § 1307 (2009); R.I. Gen. Laws § 38-2-2(4)(i)(D) (2010); S.D. CODIFIED LAWS § 23-5-10 (2013); TENN. R. CRIM. P. 16; TEX. GOV'T CODE ANN. § 552.108 (West 2005); *see also* Williams v. Superior Court, 852 P.2d 377 (Cal. 1993).

For those states that classify law enforcement records as open, either because the law enforcement records have passed the investigative phase or the agency has the discretion to disclose, timing is still an issue.[157] Although a state may require the state agency to *respond* to the request within a given timeframe, *delivery* of those records is a different story. It may take months to obtain records even if the agency fully complies with the request without any objection.[158] This is true even among states with strict statutes of limitation for their post-conviction systems.[159] The timing places defendants in a bind because newly discovered evidence (i.e. the undisclosed records) must be presented to the state court in order to exhaust the constitutional claim and the factual basis of the claim. If a defendant files a state collateral motion inside the statute of limitations, but finds his records after the lower state court has decided the claim adversely, then he will be procedurally barred for failing to observe the state court rules. If a defendant raises the evidence in federal court, he will likely satisfy the cause and prejudice standard, thereby defeating the procedural bar and allowing the federal court to review the claim on the merits. However, the inmate will still be required to return to state court to satisfy the exhaustion requirement under federal habeas rules.[160]

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157. Most state discovery rules require that the case be deemed closed, i.e. successful conviction, end of appeals, etc. *See, e.g.*, ALASKA STAT. § 40.25.120(a)(6)(A) (2012); ARK. CODE ANN. § 29-19-105(b)(6) (2011). *But see* Hengel v. City of Pine Bluff, 821 S.W.2d 761 (Ark. 1991); Fla. Stat. § 119.07(3)(f) (West 2007); GA. CODE ANN. § 50-18-72(a)(4) (2009); IDAHO CODE ANN. § 9-335(2) (2004); KY. REV. STAT. ANN. § 61.878(1)(h) (LexisNexis 2004); LA. REV. STAT. ANN. § 44:3(A)(1) (2007); Fioretti v. Bd. of Dental Exam'rs, 716 A.2d 258 (Md. 1998); Evening News Ass'n v. City of Troy, 339 N.W.2d 421 (Mich. 1983); MINN. STAT. ANN. § 13.82, subd. 7 (West 2013); MO. REV. STAT. §§ 610.100.1(3), 610.100.2 (1999); Lodge v. Knowlton, 391 A.2d 893 (N.H. 1978); N.D. Cent. Code § 44-04-18.7 (2001); VT. STAT. ANN. tit. 1, §§ 315–20 (2010); VA. CODE ANN. § 15.2-1722(A) (2012); Hearst Corp. v. Hoppe, 580 P.2d 246 (Wash. 1978); Linzmeyer v. Forcey, 646 N.W.2d 811 (Wis. 2002).

The release of records in some states is based on discretion/good cause. *See, e.g.*, COLO. REV. STAT. § 24-72-305(5) (1982); Prestash v. City of Leadville, 715 P.2d 1272 (Colo. App. 1986); D.C. CODE § 5-113.06 (LexisNexis 2001); IND. CODE ANN. § 5-14-3-4(b)(1) (West 2008); KAN. STAT. ANN. § 45-221(a)(10) (2000); ME. REV. STAT. tit. 25, § 2929 (2012); WYO. STAT. ANN. § 16-4-203(b) (2013); Bd. of Managers of Del. Justice Info. Sys. v. Gannett Co., 808 A.2d 453 (Del. Super. Ct. 2002); Donrey of Nev., Inc. v. Bradshaw, 798 P.2d 144 (Nev. 1990); Newberry Pub. Co., Inc., v. Newberry Cnty. Comm'n on Alcohol and Drug Abuse, 417 S.E.2d 870 (S.C. 1992).

158. The FOIA timeline for response is twenty days with another ten days under special circumstances. However, this does not mean the requestor will receive the records within that timeframe if exemptions must be applied. *See* 5 U.S.C. § 552(a)(6)(B) (2006). States usually must respond within a reasonable amount of time, but such amount of time varies state-to-state. *See generally* REPORTERS COMMITTEE, *supra* note 146.

159. *See supra* note 142.

160. *See* Banks v. Dretke, 540 U.S. 668, 690–91 (2004) (indicating that exhaustion is still required even though other procedural hurdles are met).

III. WHY *BRADY* VIOLATIONS SHOULD BE EXEMPT FROM EXHAUSTION REQUIREMENTS

The goal of exhaustion is comity between the states and the federal government by allowing the states the first opportunity to correct any potential constitutional or legal errors that may occur within their jurisdiction before the federal courts intervene.[161] However, giving state courts the first opportunity to address fully substantiated *Brady* claims only serves the interests of comity when state courts conduct a substantive review. Unfortunately, in most cases, inmates are procedurally barred upon returning to state court, making the entire process simply a source of unnecessary delays.

A better alternative is to allow petitioners with *Brady* claims to bypass the exhaustion requirement under the futility doctrine. The federal habeas futility doctrine allows the state prisoner the opportunity to argue that review in state court will not be substantive in nature. Under AEDPA, if the prisoner makes this argument successfully, he may bypass the exhaustion requirement altogether.[162] Because most state reviews in *Brady* violations are not substantive in nature, the state inmate who has been diligent in pursuing evidence to substantiate his claim should be permitted to bypass exhaustion through the futility doctrine.

Unfortunately, the futility doctrine has been narrowly applied. It is given effect mostly in circumstances where there is no state post-conviction avenue to pursue successor claims. In other words, when the state's post-conviction law seems to provide a means for meaningful review, the federal courts require the state inmate to use that process even though these successor claims will be considered procedurally barred. In both *Tennison* and *Douglas*, the states had a legal mechanism for their newly discovered *Brady* evidence,[163] but neither defendant received any substantive review in state court. In both cases, the state post-conviction courts denied their claims on

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161. *See* Picard v. Connor, 404 U.S. 270, 277, 278 (1971) (noting exhaustion requires that "the substance of a federal habeas corpus claim must first be presented to the state courts" and that the substance may be the same "despite variations in the legal theory or factual allegations" urged in support of the claim); *see also* Rose v. Lundy, 455 U.S. 509 (1982); Wainwright v. Skyes, 433 U.S. 72 (1977).

162. *See* 28 U.S.C. 2254(b)(1)(B).

163. *See* Tennison v. Henry, 203 F.R.D. 435 (2001) (granting defendant's motion for discovery); Tennison v. Henry, No. 98-3842 CW, 2003 U.S. Dist. LEXIS 27886 (N.D. Cal. Aug. 26, 2003) (granting defendant's amended petition for writ of habeas corpus and denying motion for evidentiary hearing); Douglas v. Workman, 560 F.3d 1156, 1168–69 (10th Cir. 2009) *See generally* OKLA. CT. CRIM. APP. R. 9.7(G)(3).

procedural grounds, never reaching the issue of prosecutorial misconduct.[164]

The illusion of meritorious state review serves no purpose but to keep inmates with meritorious claims incarcerated and delay justice for years, during which time the case bounces back and forth between state and federal court.[165] Such delay is unnecessary and unjust when the federal courts have already recognized some viable ground for the claim (through its discovery grant) and have often recognized the ability to trump procedural bars through cause and prejudice. The existing futility doctrine permits state prisoners to explain why exhaustion should be waived.[166] *Brady* claims fitting within this factual context therefore should be given the same treatment.

Additionally, federal courts should be allowed to consider related claims flowing from the concealed *Brady* evidence. For instance, if the evidence shows that the prosecution failed to correct false evidence before the trier of fact,[167] or took some other action that broadened the scope of the originally litigated *Brady* claim, then any claim on such misconduct is likely unexhausted.[168] Current habeas corpus jurisprudence only allows claims to proceed with new facts if those new facts do not "fundamentally alter the legal claim already considered by the state court."[169] When the factual predicate of a constitutional claim dramatically changes or spawns a new claim, each circumstance requires exhaustion.[170] Permitting federal courts the ability to perform substantive review of any related claims, once cause and prejudice is satisfied on the original *Brady* claim, permits the federal court to evaluate the case without unnecessary delays. Such action coincides with the goals of judicial economy and vindicates the state prisoner's constitutional rights in a more expedient manner.

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164. *Tennison,* 2003 U.S. Dist. LEXIS 27886, at *139–40; Douglas v. Workman, 560 F.3d 1156, 1171 (10th Cir. 2009).

165. *See* Stone v. Powell, 428 U.S. 465 (1976) (holding that any state court review that is not "full and fair" is entitled to a complete review of federal habeas proceedings); *see also* Marceau, *Don't Forget Due Process, supra* note 86, at 51 (explaining that a state collateral process is not "full and fair" when it fails to provide inmates with the ability to properly develop and litigate their claims as required when they seek review in federal habeas corpus proceedings).

166. *See, e.g.*, 28 U.S.C. 2254(b)(1)(B); *see also* Woodform v. Ngo, 548 U.S. 81, 92–93 (2006) (explaining that lack of state review process may mean claims are exhausted).

167. *See* Napue v. Illinois, 360 U.S. 264 (1959).

168. *See* Vasquez v. Hillery, 474 U.S. 254, 260 (1986) (stating that a claim keeps its exhausted status so long as the newly developed facts do not fundamentally alter the claim reviewed by the state courts).

169. *Id.*

170. *Id.*

A. Cullen v. Pinholster *and the* Brady *Problem*

An additional complication for defendants with viable *Brady* claims occurs when the state court has made a determination on the merits either on direct appeal or in state collateral proceedings. An "on the merits" determination in state court triggers the deference standard in federal habeas corpus.[171] The Supreme Court's opinion in *Cullen v. Pinholster* changed the scope of the evidence a federal court may consider in determining whether a state court's adjudication was unreasonable. Prior to *Pinholster*, a petitioner who diligently sought to develop the factual basis for his constitutional claims was able to obtain discovery during federal habeas litigation while also presenting the factual evidence in a federal evidentiary hearing.[172] A federal court could evaluate a petitioner's diligence throughout state collateral proceedings and determine whether additional evidence obtained after those proceedings substantiated the claims.[173] The petitioner may still need to exhaust his claims, provided that the evidence either establishes a new claim or substantially changes the scope of an existing claim. [174] However, after *Pinholster*, a defendant in this same situation may suffer additional hurdles preventing relief.

Pinholster restricted a federal habeas court's scope of review when reviewing a state court decision that had been made on the merits in accordance with 28 U.S.C. § 2254(d)(1).[175] After the *Pinholster* decision, a federal court trying to determine whether it can grant the writ of habeas corpus under the strictures of § 2254(d) may consider only the evidence that the state court had before it at the time of the state court's decision.[176] This means that if the state

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171. 28 U.S.C. § 2254 (d)(1)–(2) (2006).

172. *See* Marceau, *supra* note 6, at 147.

173. *See* Williams v. Taylor, 529 U.S. 420, 435–36 (2000) (discussing why a diligent petitioner should not be penalized for not fully developing a constitutional claim).

174. *See* Pitchess v. Davis, 421 U.S. 482 (1975); *see also* Joyner v. King, 786 F.2d 1317 (5th Cir. 1986).

175. *See* Cullen v. Pinholster, 131 S.Ct. 1388, 1398 (2011).

176. Specifically, the federal court must make the determination pursuant to 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

court reviewed a *Brady* claim on the merits, a federal court is limited to the record that the state court relied upon at the time of its decision. Limiting a federal court's evaluation to the state court record ensures that evidence garnered after the state proceedings will never be considered in determining whether the state court's ruling was unreasonable or contrary to existing Supreme Court precedent.[177] This strict interpretation of 28 U.S.C. § 2254(d)(1) makes it almost impossible for a petitioner, often proceeding pro se, to properly assert his claims within the confines of the procedural labyrinth of federal habeas corpus and to explain why the merits review of the state court is unreasonable in light of *Brady*. Furthermore, a state court no longer needs to articulate the basis for its ruling before § (d)(1) applies.[178]

Justice Sotomayor's dissent in *Pinholster* focuses on the key problems with the majority's opinion regarding the exclusion of evidence beyond the state court record. First, the Court's ruling conflicts with the allowance of additional evidence permitted at an evidentiary hearing.[179] Under § 2254(e)(2), petitioners with additional factual evidence supporting their claims may present this evidence during a federal evidentiary hearing.[180] Once presented, the court could assess whether the petitioner satisfied § 2254(d)(1).

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177. *See Pinholster*, 131 S. Ct. at 1400.

178. *See* Harrington v. Richter, 131 S. Ct. 770, 783–85 (2011) (holding a state court's summary disposition results in a § 2254(d)(1) review in federal habeas corpus, and it is incumbent on a petitioner to articulate otherwise).

179. *Pinholster*, 131 S. Ct. at 1398. Habeas precedent permits petitioners who have been diligent to present evidence at a federal evidentiary hearing that they were unable to fully develop in state court.

180. 28 U.S.C. § 2254(e) provides:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

However, the Court's holding potentially makes § 2254(e)(2) irrelevant, as any evidence obtained either through federal discovery or presented at an evidentiary hearing is prohibited from being evaluated since it is beyond the scope of the state court record.[181] The Court's sudden shift thus strips out one of the main fact-finding avenues consistently available in federal habeas.[182]

Second, petitioners who are diligent in trying to develop their claims in state court, but are prohibited from doing so through no fault of their own, would still be prohibited from presenting any additional evidence obtained after state collateral proceedings concluded.[183] Justice Sotomayor emphasized the harm to diligent petitioners of the majority's opinion:

> As a result, the majority either has foreclosed habeas relief for diligent petitioners who, through no fault of their own, were unable to present exculpatory evidence to the state court that adjudicated their claims or has created a new set of procedural complexities for the lower courts to navigate to ensure the availability of the Great Writ for diligent petitioners.[184]

In either case, petitioners pursing *Brady* violations may be unable to fully substantiate their claims regardless of whether the exhaustion requirement applies.

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181. *Pinholster*, 131 S. Ct at 1419–20 (Sotomayor, J., dissenting).

182. *See supra* notes 140, 180.

183. *See Pinholster,* 131 S. Ct at 1417–18 (Sotomayor, J., dissenting):

> Under our precedent, if the petitioner had not presented his *Brady* claim to the state court at all, his claim would be deemed defaulted and the petitioner could attempt to show cause and prejudice to overcome the default. If, however, the new evidence merely bolsters a *Brady* claim that was adjudicated on the merits in state court, it is unclear how the petitioner can obtain federal habeas relief after today's holding. What may have been a reasonable decision on the state-court record may no longer be reasonable in light of the new evidence. Because the state court adjudicated the petitioner's *Brady* claim on the merits, § 2254(d)(1) would still apply. Yet, under the majority's interpretation of § 2254(d)(1), a federal court is now prohibited from considering the new evidence in determining the reasonableness of the state-court decision.

Id. at 1418 (internal citations omitted).

184. *Id.* at 1419.

B. Aftermath of Pinholster *and* Brady *Complications*

The reaction of the federal courts to *Pinholster* has been mixed, especially in the *Brady* context. Justice Sotomayor's hypothetical regarding diligent *Brady* petitioners has borne out in various jurisdictions. *Gonzalez v. Wong* is a clear example of how both the state court appellate process and discovery provisions can fail to provide a full and fair review.[185] Gonzales was convicted of first-degree murder and sentenced to death for killing a police officer during the execution of an arrest warrant. His attorneys argued that he was unaware that the people he shot as they entered his home were police. They were not in uniform, and he believed that drug dealers were after him.[186] Statements made by him immediately after the shooting were introduced supporting his argument that he did not know the police were entering his home.[187] The State's key witness, William Acker, a jailhouse informant, testified that Gonzales told him he knew it was the police who were at his door and that he wanted to kill a cop.[188] Acker's testimony was the key piece of the prosecution's case in justifying a death sentence.[189] Gonzales was convicted of first-degree murder and later sentenced to death.[190]

Throughout Gonzales's case, his counsel requested *Brady* materials concerning the informant.[191] The prosecution provided evidence in pretrial proceedings, but no other evidence was disclosed during the state post-conviction litigation.[192] In state collateral proceedings, Gonzales's argument centered on the fact that the prosecution provided only part of Acker's criminal history and neglected to disclose several major felonies, as well as whether Acker was an informant in any other cases.[193] The state post-conviction court allowed discovery.[194] The prosecution appealed the ruling to the California Supreme Court, which overturned the discovery. The Court said that "we expect and assume that if the

185. Gonzalez v. Wong, 667 F.3d 965, 971 n.1 (9th Cir. 2011) (noting correct spelling of Gonzales), *cert. denied*, 133 S. Ct. 155 (2012).

186. *Id.* at 973–74.

187. *Id.* at 974.

188. *Id.* at 973.

189. *Id.* at 975.

190. *Id.* at 971.

191. *Id.* at 977–78.

192. *Id.* at 976.

193. *Id.*

194. *Id.*

People's lawyers have such information in this or any other case, they will disclose it promptly and fully."[195]

After being denied in state court, Gonzales pursued relief in federal habeas based on *Brady* and various other constitutional violations. The district court granted him additional discovery but denied his request for an evidentiary hearing. The new records revealed significant evidence regarding Acker's mental state.[196] They established "that Acker had a severe personality disorder, was mentally unstable, possibly schizophrenic, and had repeatedly lied and faked attempting suicide in order to obtain transfers to other facilities."[197] The district court denied a renewed motion for an evidentiary hearing and further found that Gonzales failed to meet the materiality prong for a successful *Brady* violation.[198]

The Supreme Court decided *Pinholster* while Gonzales's case was proceeding in the Ninth Circuit Court of Appeals.[199] The Ninth Circuit's three-judge panel split on how *Pinholster* impacted Gonzales's claims. The majority found a potentially meritorious *Brady* claim based upon the Acker mental health material but were bound by the Supreme Court's ruling, which restricted their ability to consider the new information:

> We cannot fault Gonzales for a lack of diligence with respect to the withheld reports. Responsibility for the late appearance of those documents lies with the state. Despite discovery requests by Gonzales's trial counsel and the inherent obligation of the prosecutor to turn over exculpatory material, these reports were withheld. Gonzales made further discovery requests while pursuing postconviction relief in state court, but the California Supreme Court granted the State's request to set aside the trial court's order permitting the discovery. That court did

195. *Id.* at 976 (citation omitted). *But see* CAL. PENAL CODE § 1054.9 (2008); *In re* Steele, 85 P.3d 444 (Cal. 2004):

> Section 1054.9 provides that if the defendant shows that good faith efforts to obtain the materials from trial counsel failed, the court should order the defendant be given access to "discovery materials," defined as "materials in the possession of the prosecution and law enforcement authorities to which the same defendant would have been entitled at time of trial." . . . Although permitting defendants to reobtain items they once possessed but have lost is one purpose, perhaps even the main purpose, of the statute, the statutory language is not so limited.

Id. at 450.

196. *Gonzales*, 667 F.3d at 976.

197. *Id.*

198. *Id.* at 976–77.

199. *Id.* at 978.

> so while expressing its expectation that prosecutors would voluntarily and promptly turn over any such evidence, but that expectation was not fulfilled. For us simply to ignore the materials that did not emerge until the federal habeas proceedings would be to reward the prosecutor for withholding them.[200]

The Ninth Circuit remanded the case to state court for exhaustion in hopes of expanding the scope of the state court record, thereby allowing for full federal habeas review of these records should the state court not grant Gonzales relief.[201]

The concurring opinion took a much different approach in light of *Pinholster*. It focused on the faults of the state court system and the district attorney's office's failure to provide Gonzales with the mechanisms necessary for a full and fair hearing as envisioned by AEDPA. *Pinholster*'s majority opinion did not address the situation raised by *Brady*-based claims when the state court obstructed the development of the factual basis of the claim, but Justice Sotomayor's dissent did draw attention to this problem.[202] She noted that a defendant in such a situation is unable to comply with the strict requirements of *Pinholster*. In the above example, as the concurrence in in the Ninth Circuit stated, Gonzales found himself:

> opposed on all fronts by the state, and rejected on all fronts by the California Supreme Court. Unlike Pinholster, who could have put the relevant evidence before the state court but failed to do so, Gonzales tried every means possible for putting the evidence before the state court, but was prevented from doing so by the combined actions of the prosecutor and the state Supreme Court.[203]

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200. *Id.* at 979–80.

201. *Id.* at 980 (citing Rhines v. Webber, 544 U.S. 269, 278 (2005) (providing for federal habeas cases to be stayed and held in abeyance while a petitioner exhausts his unexhausted claims)).

202. *See Pinholster,* 131 S. Ct at 1416 (Sotomayor, J., dissenting). In *Stokley v. Ryan*, 659 F.3d 802 (9th Cir. 2011), the court noted:

> *Pinholster* leaves open the question of how to distinguish between a claim that was exhausted in state court and a claim that is transformed by new evidence into a different and novel contention presented for the first time in federal court. The Court in *Pinholster* also had no occasion to speak to the role that new evidence plays in federal habeas proceedings on those rare occasions when an evidentiary hearing is proper.

Id. at 808; *see also* Milke v. Ryan, 711 F.3d 998, 1007 n.3 (9th Cir. 2013).

203. *Gonzalez*, 667 F.3d at 999 (Fletcher, J., concurring).

This combination of factors should exempt *Brady* claims from the requirements of being bound by the state court record when the state court reviews such claims on the merits.

The ripple effect of the circumstances like those in Gonzales's case places defendants in a position of asking federal courts to impose state procedural bars on their *Brady* claims in the hopes of avoiding an "on the merits" review in state post-conviction. Since *Pinholster* deference only applies when state courts have reviewed *Brady* claims on the merits, defendants are now arguing that their claims are procedurally barred whenever there is any plausible argument regarding the state court's ruling.[204] Justice Sotomayor's dissent warned of the possibility that defendants would attempt to thwart the aims of AEDPA because of *Pinholster*'s effect on *Brady* claims.[205] Specifically, Justice Sotomayor emphasized that the Court's approach would undermine the purpose of deference under 28 U.S.C. § 2254(d)(1).[206] Arguing that a state court did not adjudicate the merits of a claim will be the only avenue available to defendants if the Supreme Court finds that *Brady* claim reviews must also be limited to their state court record.

The Court must acknowledge the difficulties facing pro se defendants as they try to comply with AEDPA's restrictions. While the Supreme Court is broadening the scope of those claims that satisfy cause and prejudice,[207] the deference provision must also give way to diligent defendants who satisfy all other procedural hurdles to achieve substantive review. Expanding the futility doctrine to allow defendants to bypass exhaustion in cases of cause and prejudice would help solve the problem.

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204. Quezada v. Scribner, No. CV 04-7532-RSWL, 2011 U.S. Dist. LEXIS 92909, *8–9 (9th Cir. 2011).

205. *Pinholster,* 131 S. Ct at 1418–19 (Sotomayor, J., dissenting).

206. *Id.* ("The majority presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence if he can show cause and prejudice for his failure to present the 'new' claim to a state court. In that scenario, however, the federal court would review the purportedly 'new' claim de novo. The majority's approach thus threatens to replace deferential review of new evidence under § 2254(d)(1) with de novo review of new evidence in the form of 'new' claims. Because it is unlikely that Congress intended de novo review—the result suggested by the majority's opinion—it must have intended for district courts to consider newly discovered evidence in conducting the § 2254(d)(1) analysis.").

207. Supreme Court precedent now allows for ineffective assistance of counsel claims to meet the "cause and prejudice" standard when either direct appeal or state post-conviction counsel fail to properly investigate and litigate the claim at the first available opportunity. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012); Trevino v. Thaler, 133 S.Ct. 1911, 1921 (2013).

CONCLUSION

By their very nature, *Brady* claims distinguish themselves from other constitutional claims based on their reliance on the prosecution to do its job in seeking justice rather than just a conviction. Too often, prosecutors ignore their obligation, which results in innocent defendants and those with viable defenses being deprived of evidence known to the prosecutor and his agents. Although diligent in seeking access to evidence and requesting disclosure, these defendants' claims are stonewalled by a system that often does not provide adequate means to develop their constitutional claims. When a defendant's diligence in obtaining evidence to which he was entitled is not in question, and both the state appellate process and prosecution are at fault for the lack of timely compliance, he should be given expedited review in federal courts.

Allowing federal courts to handle these claims fits within the current confines of habeas jurisprudence. The futility doctrine already provides a mechanism where those who cannot avail themselves of a state process for various reasons may bypass the exhaustion requirement. Diligent inmates with *Brady* claims deserve the same treatment, regardless of whether the state process provides a mechanism for their successor claims. Moreover, when a merits review occurs at the state level without the exculpatory or impeachment evidence to which the state inmate was entitled, *Pinholster's* restriction of federal review to an incomplete state record punishes the inmate for unjust conduct beyond his control. Allowing federal courts to review these claims promptly and efficiently will prevent the injustices shared by Tennison, Douglas, and Powell from happening to others who will otherwise languish behind bars without access to evidence or the courts.