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Brady Violations and the Due Diligence Rule in Montana

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NOTES

BRADY VIOLATIONS AND THE DUE DILIGENCE RULE IN MONTANA

Kathryn Brautigam*

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.[1]

I. Introduction

In 1963, the Supreme Court of the United States established what many consider to be "the ultimate guarantor of fairness in our criminal justice system"[2] by holding that defendants have a constitutional right to the pretrial discovery of exculpatory evidence.[3] The Court's landmark decision in *Brady v. Maryland*[4] occurred amidst the criminal procedure revolution of the Warren Court. Alongside cases such as *Gideon v. Wainwright*[5] and *Miranda v. Arizona*,[6] *Brady* stood for the principle that our Constitution safeguards the rights of the accused.[7] Balancing our adversarial system of jus-

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1. Brady v. Maryland, 373 U.S. 83, 87 (1963).

2. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxxii (2015).

3. Timothy A. Scott & Larry A. Burns, Ninth Circuit Criminal Handbook § 4.02[1] (7th ed. 2017).

4. *Brady*, 373 U.S. at 87.

5. 372 U.S. 335 (1963).

6. 384 U.S. 436 (1966).

7. Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 Conn. L. Rev. 1, 3, 14 (2010).

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tice with fundamental fairness and defendants' due process rights, the *Brady* doctrine requires prosecutors to disclose material, exculpatory evidence to defendants in criminal trials.[8]

In the decades since *Brady*, the doctrine has deviated from the Supreme Court's original holding and is now applied inconsistently by lower courts.[9] In particular, many state courts, including Montana's, have limited the doctrine by invoking an extra element not considered in *Brady* or its progeny.[10] Known as the due diligence rule, this additional element considers whether the defendant had knowledge of or access to the evidence in question.[11]

Three recent cases in Montana illustrate the due diligence rule and the due process issues it creates. Using *State v. Root*,[12] *State v. Colvin*,[13] and *State v. Weisbarth*[14] as examples, this note will demonstrate that the due diligence rule departs sharply from the principles underlying *Brady* by shifting the burden from the government—the party with significantly more power and responsibility—to the defendant—the party whose constitutional rights are implicated but frequently lacks the resources necessary to defend those same rights. Part II discusses two cases leading up to *Brady*, provides an overview of *Brady* and its progeny, compares a traditional *Brady* analysis with the due diligence rule, examines the federal circuit courts of appeals' treatment of the due diligence rule, and explores the origins of the rule. Part III summarizes the factual and procedural background of *State v. Root*, *State v. Colvin*, and *State v. Weisbarth*, concluding with a synthesis of the three cases. Part IV argues that the due diligence rule is problematic and should no longer be applied in Montana. First, Montana inconsistently applies the rule. Second, the rule erodes prosecutors' disclosure obligations under *Brady*. Third, the due diligence rule is fundamentally unfair to defendants. The note concludes with a suggestion for the future application of *Brady* in Montana.

8. *Brady*, 373 U.S. at 87.

9. Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 533–34 (2007).

10. *See, e.g.*, State v. Parrish, 241 P.3d 1041, 1044 (Mont. 2010); State v. James, 237 P.3d 672, 678 (Mont. 2010).

11. Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 148 (2012).

12. 359 P.3d 1088 (Mont. 2015).

13. 372 P.3d 471 (Mont. 2016).

14. 378 P.3d 1195 (Mont. 2016).

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II. *Brady v. Maryland* and Constitutional Basis

A. Pre-Brady

The *Brady* decision followed a line of Supreme Court cases which established that nondisclosure of evidence by the prosecution violates due process because it deprives "a defendant of liberty through the deliberate deception of the court and jury . . . ."[15] These cases suggested that prosecutors could no longer withhold evidence as a part of trial strategy.[16] The Court was primarily concerned with prosecutorial ethics and determining the truth at trial.[17]

In *Mooney v. Holohan*,[18] the first prosecutorial suppression case considered by the Supreme Court, the Court considered when a prosecutor's nondisclosure amounted to a violation of due process.[19] In *Mooney*, the prosecution presented perjured testimony at trial but failed to disclose evidence that would have allowed the defendant to impeach the witness who had given perjured testimony.[20] This perjured testimony was presented at trial as part of the state's strategy to ensure the defendant's conviction.[21] The defendant, then serving a life sentence for murder, sought federal habeas relief on the grounds that he was denied due process by the prosecution's knowing use of perjured testimony and suppression of evidence that would have impeached that testimony.[22]

Convinced by the defendant's due process argument, the Court held that a criminal conviction secured by a prosecutor's knowing use of perjured testimony results in a denial of due process in violation of the Fourteenth Amendment.[23] The Court explained the importance of due process, stating that it is rooted in fundamental concepts of justice and protects citi-

15. Mooney v. Holohan, 294 U.S. 103, 112 (1935); Pyle v. Kansas, 317 U.S. 213, 216 (1942).

16. David E. Singleton, Brady *Violations: An In-Depth Look at "Higher Standard" Sanctions for a High-Standard Profession*, 15 Wyo. L. Rev. 139, 139 (2015); *see also* United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995) ("The gravity of the prosecutors' misconduct . . . may support, but it can never compel, an inference that the prosecutors resorted to improper tactics because they were justifiably fearful that without such tactics the defendants might be acquitted.").

17. Weisburd, *supra* note 11, at 145; *Mooney*, 294 U.S. at 112: **R**

> [Due process] 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.

18. 294 U.S. 103, 112 (1935).

19. *Brady*, 373 U.S. at 86.

20. *Mooney*, 294 U.S. at 110.

21. *Id.*

22. *Id.* at 109–10.

23. *Mooney*, 294 U.S. at 112–13.

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zens' liberty from government infringement.[24] The Court further held that due process cannot be satisfied when the prosecution withholds evidence of known perjured testimony from the defense and later presents it as truthful at trial, stating that such an action is "inconsistent with the rudimentary demands of justice."[25]

In *Pyle v. Kansas*,[26] another pre-*Brady* decision that considered prosecutorial evidence suppression, a prisoner serving a sentence for convictions of murder and robbery sought habeas relief because his imprisonment resulted from perjured testimony that was knowingly used by the prosecution to obtain his conviction. The defendant further alleged that the prosecution suppressed the testimony of three witnesses who were material to his case.[27] Reversing the lower court's decision which denied the defendant relief, the Supreme Court stated that the defendant's allegations demonstrated he had been denied due process, and, if proven at trial, would allow for the defendant's release.[28] The Court relied on its decision in *Mooney*, reasoning that the prosecution's use of perjured testimony and the subsequent suppression of evidence amounted to a due process violation.[29]

B. Brady v. Maryland *and Progeny*

In *Brady*, relying on *Mooney* and *Pyle*, the Court established that the suppression of evidence material to guilt or punishment violates the Fourteenth Amendment's prohibition against action depriving a defendant of their liberty without due process.[30]

In *Brady*, two men named Brady and Boblit were convicted of first-degree murder committed in the perpetration of a robbery.[31] In Maryland, this crime is punishable by life imprisonment or death.[32] At trial, Brady testified that while he participated in the crime, Boblit was the one who carried out the homicide.[33]

Before trial, Brady's counsel asked the prosecutor to disclose any extrajudicial statements that Boblit had made.[34] Some of these statements

24. *Id.* at 112 (citing Hebert v. Louisiana, 272 U.S. 312, 316–17 (1926)).

25. *Id.* at 112.

26. 317 U.S. 213, 213–14 (1942).

27. *Id.* at 214.

28. *Id.* at 216.

29. *Id.*

30. *Brady*, 373 U.S. at 86 (citing *Mooney*, 294 U.S. at 112; *Pyle*, 317 U.S. at 215–16; U.S. CONST. amend. XIV, § 1).

31. *Brady*, 373 U.S. at 84–85.

32. *Id.* at 85.

33. *Id.* at 84.

34. *Id.*

were disclosed to Brady's counsel, but the prosecution suppressed one.[35] The suppressed statement contained Boblit's confession that he, not Brady, had committed the actual homicide.[36] Brady's counsel discovered this statement after trial, at which Brady was convicted and sentenced to death.[37] After the Court of Appeals of Maryland affirmed his conviction, Brady moved for a new trial based on his discovery of Boblit's suppressed statement.[38] The court of appeals granted a retrial, holding that the suppression of Boblit's statement violated the Fourteenth Amendment's Due Process Clause.[39] However, because Brady would be culpable for the charged crime even if he had not pulled the trigger, the court restricted the new trial to the question of punishment—whether Brady should still be sentenced to death in light of Boblit's confession—and not whether Brady was guilty of committing murder.[40] Brady petitioned for certiorari to the Supreme Court.[41]

The Supreme Court granted certiorari and held in favor of Brady, stating that "the suppression by the prosecution of evidence favorable to an accused upon request[42] violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[43]

Giglio v. United States,[44] the first Supreme Court case after *Brady* to address prosecutorial disclosure, expanded the scope of a prosecutor's disclosure obligation to include witness credibility "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence . . . .'" In *United States v. Agurs*,[45] the Court held that a prosecutor's disclosure obligation still exists absent a specific request by the defendant. Although the Court in *Brady* used the words "upon request"[46] when discussing the prosecutor's disclosure obligation, *Agurs* explicitly removed this requirement.[47] The Court stated that "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should arise equally even if no request is made."[48] The Court further main-

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 85.
40. *Brady*, 373 U.S. at 85.
41. *Id.*
42. The Supreme Court of the United States has subsequently held that the "upon request" language is no longer operative. The *Brady* obligation is now self-executing, so the defendant does not need to request. *See* United States v. Agurs, 427 U.S. 97, 106–07 (1976).
43. *Brady*, 373 U.S. at 87.
44. 405 U.S. 150, 154–55 (1972) (citing Napue v. Illinois, 360 U.S. 264, 269 (1959)).
45. 427 U.S. at 106–07, 110–11.
46. *Brady*, 373 U.S. at 87.
47. *Agurs*, 427 U.S. at 106–07.
48. *Id.* at 107.

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tained that a prudent prosecutor would err on the side of disclosure.[49] *Agurs* thus made a prosecutor's disclosure obligations under *Brady* absolute in that disclosure of evidence that would deprive the defendant of a fair trial does not depend on a request by the defendant.[50] In *United States v. Bagley*,[51] the Court held that defendants do not have a general pretrial right of discovery to all the evidence a prosecutor possesses; accordingly, prosecutors do not have to disclose their entire files to the defense, but only evidence that is favorable or prejudicial to defendants. Additionally, *Bagley* expanded a prosecutor's disclosure obligation to include impeachment evidence, which is evidence that can be used to show the unreliability of a witness due to their bias or interest.[52] In *Kyles v. Whitley*,[53] the Court extended the *Brady* doctrine to evidence in the hands of state actors other than the prosecutor, including police.

In *Strickler v. Greene*,[54] the Supreme Court affirmed that there are three elements of a "true" *Brady* violation: "The 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." Notably missing from these three elements of a "true" *Brady* violation is any suggestion of a fourth element requiring due diligence on behalf of the defense.

More recently, in *Banks v. Dretke*,[55] the Supreme Court rejected a prosecutor's argument that the defendant had a burden to discover material, exculpatory evidence. Despite telling the defendant that all material evidence had been disclosed, the prosecution in *Banks* suppressed evidence that a key witness was a paid informant and then knowingly allowed this witness to testify falsely against the defendant at trial.[56] The prosecution argued that the defendant "should have asked to interview" witnesses who could have furnished the exculpatory evidence suppressed by the prosecutor.[57] The Court rejected this argument, stating that "defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.'"[58]

In contrast, the Court explained that when police or prosecutors suppress significant exculpatory or impeaching material in the State's posses-

49. *Id.* at 108.
50. *Agurs*, 427 U.S. at 108.
51. 473 U.S. 667, 675 (1985).
52. *Bagley*, 473 U.S. at 676.
53. 514 U.S. 419, 437–38 (1995).
54. 527 U.S. 263, 280–82 (1999).
55. 540 U.S. 668, 695 (2004).
56. *Id.* at 674–75.
57. *Id.* at 688.
58. *Id.* at 695–96 (quoting *Strickler*, 527 U.S. at 286–87).

sion, "it is ordinarily incumbent on the State to set the record straight."[59] Courts, litigants, and juries may properly assume that prosecutors have honored their constitutional obligation to refrain from using improper methods to secure a conviction, and thus, prosecutorial concealment should attract no judicial approbation.[60] Because the prosecutors had represented that all material, exculpatory evidence had been disclosed, "[i]t was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful."[61] The Court maintained that a rule declaring "'prosecutor may hide, defendant must seek,'" cannot be justified "in a system constitutionally bound to accord defendants due process."[62] The Court reversed and remanded.[63]

C. Brady *Elements and the Due Diligence Rule*

The *Brady* decision placed a constitutional safeguard on defendants' due process rights by allowing them to allege a *Brady* violation if the prosecution suppressed exculpatory evidence.[64] There are three essential elements of a *Brady* claim, developed within *Brady*'s progeny, with the burden on the defendant to prove each.[65] First, the evidence must be favorable to the defense.[66] Evidence is favorable if it has exculpatory value or could impeach a witness for the prosecution.[67] Second, the evidence must have been suppressed—whether willfully or inadvertently—by the prosecution.[68] Third, the suppression of the evidence must have prejudiced the defendant, meaning that it was material to his guilt or punishment.[69] Evidence is material if it reasonably could have changed the outcome of the trial.[70] Although there is no element concerning the timing for the disclosure of *Brady* evidence, the Court in *Agurs* considered this separately, stating that prosecutors must decide what evidence to voluntarily disclose "in advance of trial."[71] The Court also added the words "and perhaps during the course of a trial" to clarify that new evidence discovered during trial should be voluntarily disclosed to the defense.[72]

59. *Id.* at 675–76.
60. *Id.* at 696 (referencing *Berger*, 295 U.S. at 88; *Kyles*, 514 U.S. at 440).
61. *Id.* at 698.
62. *Id.* at 696.
63. *Id.* at 705–06.
64. *Brady*, 373 U.S. at 87.
65. *Strickler*, 527 U.S. at 281–82.
66. *Id*. at 281.
67. *See Giglio*, 405 U.S. at 154; *Bagley*, 473 U.S. at 676.
68. *Strickler*, 527 U.S. at 282.
69. *Kyles*, 514 U.S. at 433; *Strickler*, 527 U.S. at 281–82.
70. *Agurs*, 427 U.S. at 104; *Strickler*, 527 U.S. at 281–82; *Bagley*, 473 U.S. at 682.
71. *Agurs*, 427 U.S. at 107.
72. *Id.*

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In contrast, a court applying the due diligence rule retains the three elements of a traditional *Brady* claim but additionally requires that defendants act with reasonable diligence to obtain the evidence against them.[73] For example, the Montana Supreme Court has interpreted the rule from *Brady* as follows:

> In order to establish a *Brady* violation, defendant must show (1) the State possessed evidence favorable to the defense; (2) the defendant did not possess the evidence nor could he have obtained it with reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed, a reasonable probability exists that the outcome of the proceedings would have been different . . . . [N]o *Brady* violation exists where both parties are aware of the existence of specific evidence and defense counsel could uncover the evidence with reasonable diligence.[74]

Montana is not the only jurisdiction that applies the due diligence rule. Many state courts and federal district courts are split on their application of the rule, sometimes applying it, and other times not.[75] Additionally, all federal circuit courts, except the Tenth Circuit and D.C. Circuit, have applied some form of the due diligence rule.[76] For example, the First, Second, and Fifth Circuits clearly and consistently apply the rule, considering if the defendant knew or should have known of the evidence.[77] The Fourth, Seventh, and Eighth Circuits differ slightly in that they choose to focus only on what information the defendant could have obtained through "reasonable diligence."[78] The Eleventh Circuit wavers between applying the rule and not applying it.[79] The Third, Sixth, and Ninth Circuits have applied the rule in the past, but have since explicitly rejected it.[80]

Within the last year, the Court of Appeals for the First, Tenth, and Eleventh Circuits all applied the due diligence rule in considering whether a

73. *Parrish*, 241 P.3d at 1044.

74. *Id.* (citing State v. James, 237 P.3d 672, 678 (Mont. 2010)).

75. Weisburd, *supra* note 11, at 153–54. **R**

76. *Id.* at 153.

77. Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 10–11 (2015).

78. *Id.* at 10.

79. *Id.* at 11.

80. *See* Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 291 (3d Cir. 2016) ("[T]he concept of 'due diligence' plays no role in the *Brady* analysis."); Amado v. Gonzalez, 758 F.3d 1119, 1136–37 (9th Cir. 2014) (finding that the due diligence rule "is contrary to federal law as clearly established by the Supreme Court . . . and unsound public policy."); United States v. Tavera, 719 F.3d 705, 711 (6th Cir. 2013):

> This 'due diligence' defense places the burden of discovering exculpatory information on the defendant and releases the prosecutor from the duty of disclosure. It relieves the government of its *Brady* obligations. In its latest case on the issue [*Banks v. Dretke*, 540 U.S. 668 (2004)], however, the Supreme Court rebuked the Court of Appeals [for the Fifth Circuit] for relying on such a due diligence requirement to undermine the *Brady* rule . . . . [T]he clear holding in *Banks* should have ended that practice.

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Brady violation had occurred.[81] Given the rule's ongoing application, it is worth considering where it came from.

First, the due diligence rule likely evolved from holdings in two cases that followed the Court's opinion in *Brady*.[82] In *Kyles* and *Agurs*, the Court stated that prosecutors have a duty to disclose evidence that is "unknown to the defense."[83] Although the Court was not defining the scope of *Brady* evidence in using this phrase, lower courts interpreted the words to mean that no *Brady* violation occurs if the defense "knew or should have known about the evidence at the time of trial."[84]

Second, the due diligence rule also likely morphed from other due diligence requirements within criminal law.[85] For example, defendants' due diligence is often discussed by courts in the context of procedural default in federal habeas proceedings.[86] More specifically, the doctrine of newly discovered evidence in state and federal habeas proceedings considers a defendant's diligence if the defendant raises claims based on new evidence.[87] Although procedural default has a distinct analysis from a *Brady* claim, lower courts have lifted the due diligence language from federal habeas and applied it when considering *Brady* claims.[88] Because many *Brady* claims occur in post-conviction habeas proceedings, it is unsurprising that courts have conflated the due diligence analysis in this way.[89]

On the one hand, the due diligence requirement makes sense: prosecutors should not have to make defendants' cases for them.[90] Additionally, defendants can allege an ineffective assistance of counsel claim if their counsel is not diligent in discovering exculpatory evidence.[91] On the other hand, the requirement subverts due process rights by not allowing defendants access to evidence that they otherwise would be entitled to under

81. *See, e.g.*, United States v. Webb, 651 F. App'x 740, 744 (10th Cir. 2016); United States v. McCoy, 636 F. App'x 996, 999 (11th Cir. 2016); United States v. Stein, 846 F.3d 1135, 1145–46 (11th Cir. 2017); United States v. Therrien, 847 F.3d 9, 16 (1st Cir. 2017).

82. Weisburd, *supra* note 11, at 142–43. **R**

83. *Kyles*, 514 U.S. at 437 ("On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more."); *Agurs*, 427 U.S. at 103 ("The rule of *Brady* v. *Maryland*, 373 U.S. 83, arguably applies in three quite different situations. Each involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.").

84. Weisburd, *supra* note 11, at 143. **R**

85. *Id.*

86. *Id.*

87. *Id.* at 151.

88. *Id.* at 143.

89. *Id.* at 151.

90. *Id.* at 141.

91. *Id.*

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Brady.[92] This tension is illustrated by the Montana Supreme Court's application of the due diligence rule in *Root*, *Weisbarth*, and *Colvin*.

III. Montana's Application of the Due Diligence Rule

The following three cases—*State v. Root*, *State v. Colvin*, and *State v. Weisbarth*—demonstrate Montana's use of the due diligence rule. In all three cases, the prosecution failed to disclose evidence favorable to the defendants.[93] On appeal, instead of determining the defendants' *Brady* claims on the merits, the Montana Supreme Court considered whether the defendants knew or should have known of the evidence or attempted to retrieve the evidence themselves.[94]

A. State v. Root

Montana resident Michael Jeffery Root was charged with attempted deliberate homicide for the July 27, 2012 stabbing of Lawrence Lee.[95] Root was riding in a truck with Lee and a minor named S.R. when an argument broke out.[96] Lee was subsequently stabbed in the arm and neck.[97] At Root's trial, both Lee and S.R. testified that Root stabbed Lee.[98] Root testified that S.R. stabbed Lee.[99]

In December 2012, before the trial began, Root filed a motion in limine seeking to admit testimony of a police detective who had interviewed Lonnie Boyd.[100] Boyd was a witness for the State and had told police that S.R. admitted that he, not Root, had stabbed Lee.[101] Although Root had met with police and the prosecution about Boyd, they did not inform Root what Boyd said in this statement.[102] Because Root knew that Boyd made a statement to police but did not know the content of that statement, Root sought admission of testimony of the police officer who interviewed Boyd in case Boyd was unavailable for trial.[103] The State objected to this admission on grounds of hearsay and the trial court sustained.[104] The

92. *Id.* at 142.
93. *Root*, 359 P.3d at 1092; *Colvin*, 372 P.3d at 478–79; *Weisbarth*, 378 P.3d at 1200–01.
94. *Root*, 359 P.3d at 1093; *Colvin*, 372 P.3d at 475; *Weisbarth*, 378 P.3d at 1202.
95. *Root*, 359 P.3d at 1090.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 1092.
101. *Root*, 359 P.3d at 1092.
102. Reply Brief of Appellant, *State v. Root*, 2015 WL 5178631 at *16 (Mont. July 17, 2015) (No. DA 13-0667).
103. Reply Brief of Appellant, *supra* note 102, at *16; *Root*, 359 P.3d at 1093.
104. *Root*, 359 P.3d at 1093.

State also responded that the defense had been given "all pertinent information" related to the statements Boyd gave police during the investigation.[105] In January 2013, the State proceeded to secure Boyd as a witness for its case against Root.[106]

On the last night before the final day of trial, the State provided the defense with a DVD copy of the interview between the police and Boyd.[107] On the DVD, Boyd relayed that S.R. admitted to stabbing Lee and said that S.R. showed Boyd the knife he used in the stabbing.[108] Boyd also described S.R.'s proclivity toward violence in great detail, describing S.R. as "satanic, sadistic" and stating that he had seen S.R. use guns and pull them on women.[109]

This was the first time that Root was made aware of this evidence implicating S.R.[110] Root could have used this evidence in his cross-examination of S.R. at trial to impeach S.R.'s testimony that Root had stabbed Lee.[111] But Root had already cross-examined S.R. before he knew the content of Boyd's statement, so by the time the prosecution released the statement to Root, it was too late to be used effectively in trial.[112]

Given the prejudicial impact of this evidence, the morning after receiving the prosecution's disclosure, on the final day of trial, the defense moved the district court to dismiss the charges against Root, arguing that the late disclosure of the interview was a *Brady* violation.[113] The district court denied Root's motion to dismiss on the grounds that the interview of Boyd was cumulative evidence and that the defense knew about Boyd prior to the disclosure of the recording: the defense knew that Boyd made a statement to the police, and Boyd was available to testify at trial.[114] Following this, the jury convicted Root of attempted deliberate homicide.[115] His appeal followed.[116]

The primary issue on appeal was whether the district court erred in denying Root's motion to dismiss based upon the State's failure to disclose pretrial the video statement between the police and Boyd.[117] In a four-three

105. *Id.* at 1092–93.
106. *Id.* at 1093.
107. Brief of Appellee, *State v. Root*, 2015 WL 2159931 at *20 (Mont. April 29, 2015) (No. DA 13-0667).
108. Reply Brief of Appellant, *supra* note 102, at *17, *19.
109. *Id.* at *18.
110. *Id.* at *17.
111. *Id.* at *17–20.
112. *Root*, 359 P.3d at 1093.
113. *Id.* at 1092.
114. *Id*.
115. *Id.* at 1090.
116. *Id.*
117. *Id.* at 1092.

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opinion, the divided Supreme Court found for the State, holding that no *Brady* violation occurred.[118]

In analyzing Root's *Brady* claim, the Court applied a three-pronged *Brady* test, relying upon *State v. Fish*[119] and *Kyles v. Whitley*.[120] After finding the State's suppression violated the first two prongs of *Brady*—the State suppressed evidence favorable to Root—the Court concluded that Root could not satisfy the third prong of *Brady* because Root obtained the Boyd interview before the conclusion of the trial and was able to use the statement in his defense.[121] Furthermore, Boyd testified at trial after the disclosure of his recorded statement, so the jury heard his account that S.R. claimed he had stabbed Lee, not Root.[122] Because the jury heard this exculpatory and impeachment evidence, the Court determined that the suppression of evidence did not prejudice Root.[123] Even if the State had disclosed the evidence to Root prior to trial, it was not enough to change the outcome of the trial.[124] Thus, the Court held Root failed to demonstrate "that the impeachment value of Boyd's recorded statement was sufficient to undermine confidence in the verdict"; therefore, the suppression of the evidence did not prejudice Root such as to deny him a fair trial.[125]

Three justices dissented from the Court's majority opinion. Justices Cotter, McKinnon, and Shea disagreed that the district court had not erred in denying Root's motion to dismiss based upon the State's failure to disclose the Boyd interview to the defense prior to trial.[126] This suppression constituted a *Brady* violation which resulted in an unfair trial.[127] Applying the same three-pronged *Brady* analysis as the majority, the dissent reached the same conclusion on elements one and two, but departed from the majority as to element three, finding that the suppressed evidence prejudiced Root.[128]

According to the dissent, although Root was able to cross-examine Boyd about the suppressed interview on day three of trial, the State's suppression of the evidence "completely deprived" Root of the opportunity to use Boyd's interview to undermine the jury's confidence in S.R. during the State's presentation of its case.[129] If the State had disclosed the evidence in

118. *Id.* at 1094.
119. 204 P.3d 681, 683 (Mont. 2009).
120. *Id.* at 1092 (citing *Fish*, 204 P.3d at 683; *Kyles*, 514 U.S. at 435, 437).
121. *Root*, 359 P.3d at 1093–94.
122. *Id.* at 1092.
123. *Id.* at 1094.
124. *Id.*
125. *Id.*
126. *Id.* (Cotter, J., with McKinnon and Shea, JJ., dissenting).
127. *Id.* at 1094–95.
128. *Id.* at 1094.
129. *Id.*

a timely manner, Root could have used the evidence to impeach S.R. at the outset of the trial, effectively undermining S.R.'s credibility, which was central to the State's case.[130] Root could have used the evidence to show that S.R. was the one who committed the stabbing by demonstrating that S.R.'s testimony at trial contradicted what he told Boyd about the stabbing, that S.R. had knowledge of where the weapon was hidden, and that S.R. had violent tendencies.[131] Instead, by the time Root received the evidence, S.R. had been permanently released from his subpoena according to the State's request, so Root could not use the content of the evidence to cross examine or impeach S.R. on the stand.[132]

The dissent disagreed with the majority's reasoning that Root could have used the evidence in his defense on the last day of trial or that Root could have uncovered the contents of the evidence himself before the last day of trial—"Root's inability to present his most persuasive case is not his fault; the fall lies clearly with the State."[133] The dissent explicitly rejected the due diligence rule, stating that '"[t]he prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence."'[134]

The dissent concluded that had the suppressed evidence been properly disclosed, there was a possibility that the result of the trial could have been different because the evidence could have been used to undermine the jury's confidence in the State's star witness.[135] As a result, Root did not receive a fair trial.[136]

B. State v. Colvin

Daniel Joseph Colvin was charged with attempted deliberate homicide on October 9, 2014, for the shooting of Michael Aja.[137] The incident occurred in Aja's Jeep, where Colvin claimed to have been holding the pistol inside the driver's side window. According to Colvin, the pistol accidentally misfired and hit Aja.[138] Aja's blood was spattered on the inside of the Jeep.[139] On the same day that the shooting occurred, the police collected and impounded the Jeep as evidence.[140] Both the prosecution and defense

130. *Id.* at 1095.
131. Reply Brief of Appellant, *supra* note 102, at **17–18.
132. *Root*, 359 P.3d at 1095 (Cotter, J., with McKinnon and Shea, JJ., dissenting).
133. *Id.*
134. *Id.* (quoting *Amado*, 758 F.3d at 1135).
135. *Id.* at 1095.
136. *Id.*
137. *Colvin*, 372 P.3d at 472.
138. *Id.*
139. *Id. at* 474–75.
140. *Id.* at 472.

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based their cases on the position of the pistol and its distance from Aja when fired.[141] The blood spattering on the inside of the Jeep became the crucial evidence in the case.[142]

The State's theory was that the pistol was shot from several feet outside the vehicle, while Colvin contended that the shot came from very near the window or inside of it.[143] Colvin also argued that each eyewitness to the shooting, including Aja, supported his theory that the pistol was fired from very near the window or inside of it.[144]

On October 9, 2014, the same day the State charged Colvin, Colvin's attorney filed a motion for discovery.[145] Among other things, the motion specifically included the Jeep in which Aja was shot and "all material exculpatory or inculpatory of the defendant."[146] Obtaining the Jeep was key to Colvin's defense, because he believed it contained essential evidence such as Aja's blood spatter and the gunshot residue from the pistol.[147] On October 14, the district court entered an order granting the defense's motion, requiring the State to disclose "all materials known or discovered . . . pertinent to this case."[148] Despite this order, on November 9, 2014, the State returned the vehicle to Aja without notifying the defense or the district court.[149]

On November 21, 2014, the defense still had not learned of the vehicle's release and subsequently filed a motion to compel, which the district court granted.[150] Nearly three weeks later, the State finally notified the defense that the Jeep had been returned to Aja over a month earlier.[151] On February 26, 2015, Colvin moved to dismiss the charges against him on the basis that the State had failed to preserve the vehicle.[152] The district court granted Colvin's motion to dismiss based on *Brady*.[153] According to the district court, the State's release of the vehicle was "'negligent'" and a "'fundamental violation of due process'" because Colvin was deprived "'of

141. *Id.*
142. *Id.* at 472, 474–75.
143. *Id.* at 472.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 472–73.
151. *Id.* at 473.
152. *Id.*
153. *Id.*

the opportunity to investigate and prove [his] theory of the case.'"[154] The State appealed.[155]

On appeal, the issue was whether Colvin's charges were correctly dismissed based on the State's failure to preserve the vehicle.[156] The Court unanimously held in favor of Colvin, dismissing the charge.[157] After analyzing the first two elements of a traditional *Brady* analysis and finding them fulfilled, the Court then considered Colvin's motion for discovery within the third element of *Brady*, whether or not the evidence prejudiced Colvin.[158]

Without saying as much, this is where the Court analyzed the due diligence rule. If Colvin had not moved for discovery, it is questionable whether the Court would have found that the State's suppression prejudiced Colvin. This is because, according to the logic of the due diligence rule, if a defendant knew of evidence—but did not try to gain access to it—then the suppression of it could not have prejudiced him at trial.[159] But because Colvin performed due diligence to obtain the evidence himself and the State still suppressed it, the *Brady* claim was successful, and the charges were dismissed.[160]

C. State v. Weisbarth

David Weisbarth was charged with felony incest on February 7, 2013, for events occurring sometime between October 23, 2012, and December 13, 2012, when his five-year-old biological daughter, T.W., came to visit him.[161] Soon after this visit with her father, T.W. informed police that Weisbarth had sexually abused her.[162] Prior to this allegation, T.W. had been diagnosed with reactive attachment disorder, which has a tendency to affect a child's propensity for truthfulness.[163] T.W. sought treatment for the disorder from various medical professionals, including a neuropsychologist and a child psychologist.[164] Weisbarth filed a motion to compel the State to

154. *Id.*
155. Notice of Appeal, June 22, 2015, DA 15-0373.
156. *Colvin*, 372 P.3d at 473.
157. *Id.* at 476.
158. *Id.* at 475.
159. Weisburd, *supra* note 11, at 155–56. **R**
160. *Colvin*, 372 P.3d at 476.
161. *Weisbarth*, 378 P.3d at 1197.
162. *Id.* at 1196–97.
163. *Id.* at 1197.
164. *Id.*

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produce these medical records, which was granted.[165] The district court ordered the State to disclose the medical records directly to Weisbarth.[166]

On May 15, 2014, four days before trial, the State moved for an *in camera* review of T.W.'s medical records.[167] The State argued that the medical records could not be released to the defense without the district court first reviewing them because T.W.'s privacy rights had been implicated.[168] Although the medical records contained exculpatory evidence and were thus relevant to Weisbarth's defense, the State did not release this evidence to Weisbarth.[169] Instead, the State maintained that the evidence in T.W.'s medical records was not discoverable.

On May 16, 2014, the State moved to seal the medical records and argued that an *in camera* inspection was not possible because the trial was three days away.[170] Due to T.W.'s privacy interests, the State released a heavily redacted copy of the medical records containing only one sentence from a three-page report written by T.W.'s neuropsychologist.[171] The sentence that the defense was provided with stated, "We will go slowly with differential diagnoses; but at this time, I am convinced this young girl has reactive attachment disorder most likely based on early neglect or even possible abuse."[172] The district court sealed the records without reviewing them in chambers.[173] The State still had not informed the defense or the court that the medical records contained exculpatory evidence.[174]

At trial, the only direct evidence against Weisbarth was T.W.'s testimony.[175] Weisbarth had an expert witness testify that reactive attachment disorder manifests itself in behavioral issues such as lying.[176] The State attacked the witness's credibility and maintained there was little basis to conclude that T.W.'s reactive detachment disorder caused her to lie about being sexually assaulted.[177] The jury subsequently found Weisbarth guilty of felony incest.[178]

165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1198.
177. *Id.*
178. *Id.*

After the trial, Weisbarth gained access to T.W.'s sealed medical records.[179] The records stated that T.W. suffered from psychosis; that her disorder demonstrated itself through lying; that her living situation with her grandparents was unstable at the time of the alleged sexual assault, possibly exacerbating her symptoms; that her grandfather reduced her medication below the recommended dosage around the time the alleged assault occurred; and that T.W. had possibly made a previous allegation of sexual abuse against her mother and later recanted it.[180] Because this evidence was exculpatory and suppressed by the State, Weisbarth appealed, alleging a *Brady* violation.[181]

On appeal the issue was whether Weisbarth was entitled to a new trial based on the State's failure to disclose TW's medical records.[182] The unanimous Court held in favor of Weisbarth.[183] The Court began by explaining the State's obligation under *Brady* and the three elements of a *Brady* violation.[184] Immediately thereafter, the Court explicitly invoked the due diligence rule, stating, "We have further explained that even if the foregoing elements are satisfied, there is no *Brady* violation if the petitioner could have obtained the exculpatory evidence with reasonable diligence."[185]

The Court found that *Brady* applied to the medical records because they impugned T.W.'s credibility and "had substantial value to the defense given its potential to lead directly to admissible exculpatory evidence."[186]

After finding all three elements of a traditional *Brady* analysis fulfilled, the Court turned to the due diligence rule, conceding that it is "now seemingly at odds" with Ninth Circuit precedent.[187] Despite this, the Court declined "to address the apparent conflict or revisit [its] previous decisions" invoking the due diligence rule, deeming it "unnecessary to do so" because "Weibarth exercised reasonable diligence in this instance."[188] Concluding its due diligence analysis, the Court stated that Weisbarth had correctly exercised due diligence in moving to obtain the medical records, but the State "thwarted those efforts."[189] The Court reversed and remanded for a new trial so that Weisbarth could use the medical records in his defense.[190]

179. *Id.*
180. *Weisbarth*, 378 P.3d at 1198.
181. *Id.* at 1199.
182. *Id.*
183. *Id.* at 1203.
184. *Id.* at 1200.
185. *Id.*
186. *Id.* at 1201.
187. *Id.* at 1202.
188. *Id.*
189. *Id.*
190. *Id.* at 1203.

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The most important conclusion to be drawn here is the Court's implicit acknowledgement that even though all three elements of the *Brady* test were otherwise satisfied, Weisbarth's *Brady* claim would have failed if he had not acted with due diligence by moving to obtain the medical records.

D. The Due Diligence Rule in Root*,* Colvin*, and* Weisbarth

The Court employed an incorrect analysis in *Root*, *Colvin*, and *Weisbarth* by applying the due diligence rule, whether or not the rule was explicitly mentioned in the opinions. In *Root*, the majority found that no *Brady* violation occurred because Root had knowledge of the suppressed statement but did not exercise diligence to uncover the rest of it before the last day of trial when the State released it.[191] In *Colvin*, the Court found that a *Brady* violation had occurred because the defense moved to obtain the Jeep.[192] And in *Weisbarth*, the Court found that a *Brady* violation had occurred because the defense moved to obtain the medical records.[193]

According to the Court's logic in *Root*, Root's *Brady* claim failed because (1) Root knew of the existence of the suppressed evidence before trial and (2) learned of the content of that evidence on the night before the last day of trial.[194] Therefore, Root could have conceivably used the evidence in his defense on the last day of trial.[195] While not stated in the opinion, this is where the Court invoked the due diligence rule, considering that "no *Brady* violation exists where both parties are aware of the existence of specific evidence and defense counsel could uncover the evidence with reasonable diligence."[196] The Court implicitly applied the due diligence rule, but failed to explain what it is doing or its reason for considering Root's knowledge of the evidence.

The Court reasoned that no *Brady* violation existed because Root knew of the existence of the Boyd statement.[197] The Court's justification is straightforward: "so long as the defendant should be aware of the [evidence], there is no [*Brady*] violation."[198] But the Court incorrectly assumed that because Root had knowledge of this statement, he could have effectively used it in his defense. However, in reality, Root did not know of the content of the Boyd statement, and Root's attempt to uncover the evidence with reasonable diligence by moving in limine before trial began was re-

191. *Root*, 359 P.3d at 1093.
192. *Colvin*, 372 P.3d at 472–73.
193. *Weisbarth*, 378 P.3d at 1202.
194. *Root*, 359 P.3d at 1093–94.
195. *Id.* at 1094.
196. *Parrish*, 241 P.3d at 1044.
197. *Root*, 359 P.3d at 1092, 1094.
198. Weisburd, *supra* note 11, at 156. **R**

jected by the trial court.[199] But according to the Court's logic, because Root knew of the statement and learned of the contents of it on the night before the last day of trial, he had enough time to use the statement effectively in his defense.[200]

Whether or not the Court realized it was invoking the due diligence rule here by considering Root's knowledge, this consideration should have had no bearing on the Court's *Brady* analysis. Furthermore, Root surely could have used the evidence more effectively if the State had disclosed it before the last day of trial.[201] *Root*'s verdict was unreliable because the jury did not hear the evidence contained on the DVD until the last day of trial, and Root could not use the new evidence to cross-examine S.R. because S.R. had been released from his subpoena and could not be located.[202] Because it is possible that the jury would have reached a different verdict had the evidence on the DVD been disclosed earlier, the State's suppression prejudiced Root.[203]

Although the Court reached the right result in *Colvin* and *Weisbarth*, it did so for the wrong reason by applying an incorrect analysis. The defendants in both cases had successful *Brady* claims because the evidence clearly fulfilled all three elements of the *Brady* test,[204] and the cases should have been decided on those three elements alone. Yet the Court in both cases went a step further and invoked the due diligence analysis, finding the *Brady* claims successful because the defendants moved to obtain the evidence themselves.[205] This was the same analysis the Court applied to reach the incorrect result in *Root*—although the evidence in *Root* clearly fulfilled all three *Brady* elements, the Court conflated Root's knowledge of the evidence with the third *Brady* element, concluding that because Root had knowledge of the evidence, its late disclosure could not have been prejudicial.[206]

199. Reply Brief of Appellant, *supra* note 102, at *16:

> In the event this Court disagrees with Mr. Root's argument that no reasonable diligence is required, then Mr. Root contends his trial counsel acted with reasonable diligence in attempting to locate Boyd and by seeking admission of the limited facts known. Out of concern that Boyd would not be available at trial, Mr. Root filed a motion in limine specifically seeking admission of the limited facts known by Mr. Root.

200. *Root*, 359 P.3d at 1093–94.

201. *Id.* at 1094–95 (Cotter, J., with McKinnon and Shea, JJ., dissenting).

202. *Id.*

203. *Id.* at 1095.

204. *Colvin*, 372 P.3d at 476; *Weisbarth*, 378 P.3d at 1202.

205. *Colvin*, 372 P.3d at 472–73; *Weisbarth*, 378 P.3d at 1202.

206. *Root*, 359 P.3d at 1093.

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IV. Problems Associated with the Due Diligence Rule

Root, *Colvin*, and *Weisbarth* demonstrate a troubling application of *Brady* through the use of the due diligence rule. Although this is problematic in and of itself, it merely illustrates a trend by the Montana Supreme Court wherein the due diligence rule is inconsistently applied. As will be demonstrated below, the Court wavers between applying the rule and not applying it, invoking it in some cases but not in others. And as demonstrated by *Root*, *Colvin*, and *Weisbarth*, the Montana Supreme Court continues to apply the rule, even though the rule has no basis in *Brady* or its progeny.[207] The United States Supreme Court has never adopted the due diligence rule, nor has it hinted at its application in the context of a *Brady* claim.[208] Equally troubling, however, is that the due diligence rule relieves the prosecution of their constitutional disclosure obligation under *Brady* and is fundamentally unfair to defendants.

This section will explore why the Montana Supreme Court's use of the due diligence rule—whether express or implicit—is at odds with the constitutional principle at the heart of *Brady*. First, Montana inconsistently applies the rule. Second, the rule erodes prosecutors' disclosure obligations under *Brady*. Third, the due diligence rule is fundamentally unfair to defendants.

A. Montana's Inconsistent Application of the Due Diligence Rule

While Montana has adopted the *Brady* doctrine both by common law[209] and by statute,[210] its application of *Brady* has not been consistent. The Montana Supreme Court has wavered between the application of a three-pronged traditional *Brady* analysis[211] and a four-pronged due diligence analysis[212] in applying the *Brady* doctrine. For example, in a 2010 case considering a *Brady* violation, the Montana Supreme Court applied the

207. *See infra* Section II, Part B.

208. Weisburd, *supra* note 11, at 157; Johnson, *supra* note 77, at 8. **R**

209. *See, e.g.*, State v. Craig, 545 P.2d 649, 651–52 (Mont. 1976).

210. Mont. Code Ann. § 46–15–322 (2015) (the State's duty to disclose); § 46–15–327 (the State's ongoing duty to disclose); § 46–20–701(2)(b)–(c) (when the State's failure to disclose results in prejudicial error at trial).

211. *See, e.g.*, State v. Sullivan, 948 P.2d 215, 218 (Mont. 1997); State v. Kills On Top, 15 P.3d 422, 429 (Mont. 2000); State v. Thompson, 28 P.3d 1068, 1072 (Mont. 2001); Hiebert v. Cascade Cnty., 56 P.3d 848, 856 (Mont. 2002); *Colvin*, 372 P.3d at 474; *Fish*, 204 P.3d at 683; State v. St. Dennis, 244 P.3d 292, 301 (Mont. 2010).

212. *See, e.g.*, Gollehon v. State, 986 P.2d 395, 398 (Mont. 1999); State v. Ellenburg, 8 P.3d 801, 811 (Mont. 2000); State v. DuBray, 77 P.3d 247, 260 (Mont. 2003); State v. Field, 116 P.3d 813, 816 (Mont. 2005); State v. Giddings, 208 P.3d 363, 370 (Mont. 2009); Holliday v. State, 348 P.3d 169 (Mont. 2014); McGarvey v. State, 529 P.3d 576, 583 (Mont. 2014); *Seiffert*, 237 P.3d at 671; *James*, 237 P.3d at 678; *Parrish*, 241 P.3d at 1044.

traditional three-pronged *Brady* analysis, using the exact language from *Strickler*.[213] However, in two other cases from 2010, the Montana Supreme Court applied the four-pronged *Brady* analysis invoking the due diligence rule.[214]

This inconsistent application is a problem because in any given case involving a *Brady* violation one defendant's *Brady* claim may fail due to his lack of diligence, while another defendant may be granted a re-trial or have his charges dismissed because the Court did not expect him to discover the suppressed evidence through reasonable diligence. Thus, the Montana Supreme Court's inconsistent use of the due diligence rule presents an unequal application of the law. While the Court's use of the due diligence rule is arguably disjointed, it is troubling that defendants must be kept guessing about whether or not prosecutors will be held to their constitutional disclosure obligations in any given case or whether the defendants must uncover all exculpatory evidence themselves.

B. The Due Diligence Rule Removes the Prosecutor's Constitutional Disclosure Obligation

As previously discussed, *Brady* and its progeny place a "broad duty of disclosure"[215] on prosecutors to ensure fairness in criminal trials and compliance with a defendant's due process rights.[216] This obligation stems from "the special role played by the American prosecutor in the search for truth in criminal trials,"[217] in which prosecutors are representatives of the government.[218] Because of this special role, prosecutors are required to "govern impartially" and ensure that justice is done.[219]

However, the application of the due diligence rule removes a prosecutor's constitutionally required disclosure obligation. It circumvents the *Brady* doctrine as a whole, removing what may be the only mechanism forcing disclosure of exculpatory evidence.[220] This is because when the due diligence rule is invoked, a prosecutor caught in a *Brady* violation can simply allege that disclosure was not needed because the defendant should have found the evidence himself through due diligence.[221] This incentivizes pros-

213. *St. Dennis*, 244 P.3d at 301; *Strickler*, 527 U.S. at 281–82 ("The 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.").

214. *See, e.g.*, *James*, 237 P.3d at 678; *Parrish*, 241 P.3d at 1044.

215. *Strickler*, 527 U.S. at 281.

216. Weisburd, *supra* note 11, at 146; Johnson *supra* note 77, at 5. **R**

217. *Strickler*, 527 U.S. at 281.

218. *Giglio*, 405 U.S. at 154.

219. *Berger*, 295 U.S. at 88.

220. Johnson, *supra* note 77, at 7–8; *see* Kozinski, *supra* note 2, at xxii to xxvi. **R**

221. Weisburd, *supra* note 11, at 158. **R**

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ecutors to either delay the disclosure of evidence or completely suppress it.[222]

The Ninth Circuit, Sixth Circuit, and Third Circuit have rejected this burden-shifting framework. As the courts discussed in *Amado v. Gonzalez*,[223] *United States v. Tavera*,[224] and *Dennis v. Secretary, Pennsylvania Department of Corrections*,[225] the due diligence rule allows prosecutors to shift the burden of discovery to the defendant, thereby releasing their constitutionally mandated disclosure obligation. Even if a court determines that the prosecution suppressed evidence favorable to the defense, the due diligence rule shifts the burden from the prosecutor to the defendant to prove evidence of his knowledge, even when the prosecution "has ready access to that evidence."[226] According to the Third Circuit, this shift is especially problematic because "[s]ubjective speculation as to defense counsel's knowledge or access may be inaccurate, and it breathes uncertainty into an area that should be certain and sure."[227]

Additionally, the Ninth Circuit pointed out that this shifting is unfair to defendants because prosecutors often have more resources available for discovery, so it is fitting that they are the ones obligated to disclose evidence.[228] Indeed, prosecutors have a superior "investigatory apparatus" at their disposal, including a large staff of investigators and assistant prosecutors, the cooperation of the police, access to technology such as wiretaps, and government funding.[229] In contrast, defendants do not have access to these investigative benefits, which is one reason why *Brady* places an independent duty on the prosecution to assist the defendant by disclosing evidence favorable to her case.[230]

Furthermore, as the United States Supreme Court has explained, broad disclosure by the prosecution is "as it should be" because it "tend[s] to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. . . . The prudence of the careful prosecutor should not therefore be discouraged."[231] Additionally, broad disclosure will "serve to justify trust in

222. *Id.*

223. 758 F.3d at 1136–37.

224. 719 F.3d at 712.

225. 834 F.3d at 290.

226. Johnson, *supra* note 77, at 11. **R**

227. *Dennis*, 834 F.3d at 293 (citing Weisburd, *supra* note 11, at 164 ("[P]rosecutors . . . cannot accurately speculate about what a defendant or defense lawyer could discover through due diligence. Prosecutors are not privy to the investigation plan or the investigative resources of any given defendant or defense lawyer."). **R**

228. *Amado*, 758 F.3d at 1136–37.

229. *Tavera*, 719 F.3d at 712.

230. *Id.*

231. *Kyles*, 514 U.S. at 439–40.

the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.' "[232]

Thus, prosecutors owe both ethical and professional duties to the defendants they prosecute—including the duty to disclose exculpatory evidence—with the ultimate goal being a fair trial and just outcome.[233] The due diligence rule undermines both the duty and the end goal of prosecutors.

C. The Due Diligence Rule Is Fundamentally Unfair to Defendants

Brady's paramount concern was ensuring a fair trial for the accused.[234] As the *Brady* Court determined, the doctrine is grounded in the Due Process Clause of the Fourteenth Amendment, which provides that states shall not "deprive any person of life, liberty, or property, without due process of law."[235] Due process can be defined as the application of "law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights."[236] A fair trial is "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."[237]

For purposes of *Brady*, then, due process requires that material evidence favorable to a defendant be disclosed to ensure a fair trial in which the jury is given the ability to arrive at a fair verdict by considering all evidence that is relevant.[238] But the due diligence rule undermines this goal by keeping relevant evidence from the judge or jury, hindering their ability to determine the truth.[239] This is because "[w]hen favorable evidence is

232. *Id.* (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)).

233. H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 57 (2013).

234. *Brady*, 373 U.S. at 87.

235. U.S. CONST. amend. XIV, § 1.

236. Hurtado v. California, 110 U.S. 516, 521 (1884).

237. *Strickland*, 466 U.S. at 685.

238. Cynthia E. Jones, *Criminal Law: A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 422–23 (2010).

239. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, N.C.L. REV. 693, 731 (1987) ("By definition, *Brady*-type misconduct keeps relevant evidence away from the judge or jury."); *see also Bagley*, 473 U.S. at 702 (Marshall, J., with Brennan, J., dissenting):

> The Court's standard also encourages the prosecutor to assume the role of the jury, and to decide whether certain evidence will make a difference. In our system of justice, that decision properly and wholly belongs to the jury. The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question. Accordingly he will decide the evidence need not be disclosed. But the ideally neutral trier of fact, who approaches the case

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withheld, the factfinder is handicapped in his ability to discern what actually happened."[240] If a jury cannot determine what happened due to missing material evidence, the defendant does not receive a fair trial. This issue was addressed in Justice Thurgood Marshall's dissent in *Bagley*:

> When favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision. This grim reality, of course, poses a direct challenge to the traditional model of the adversary criminal process. . . . Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact.[241]

Furthermore, the due diligence rule is fundamentally unfair to defendants because it presumes that they have knowledge of the exculpatory evidence against them and can therefore discover it. However, this is not always the case. In both *Brady* and *Tavera*, the defendants did not know that their co-defendants had made exculpatory statements, nor could they discover these statements because they were in prison and presumably had no access to their co-defendants.[242] In both cases, the defendants did not discover the statements made by their co-defendants until after trial, once they had been convicted.[243] It is implausible to conclude that the prosecutors' duties to disclose in both cases were relieved because Brady and Tavera could have, or should have, uncovered their co-defendants' exculpatory statements while in prison.

Application of the due diligence rule creates another problem for defendants because the rule itself presents a vague and unclear standard. The courts in jurisdictions that apply the rule often fail to explain how much diligent discovery a defendant must undertake in order to fulfill a *Brady* claim.[244] Under what circumstances will a defendant's diligence be enough to qualify as "due diligence"? For example, is a motion by a defendant enough to qualify as due diligence? In *Colvin* and *Weisbarth*, discovery motions by the defense were enough to fulfill due diligence, but in *Root*, the defense's motion was not.[245] Similarly, is due diligence fulfilled when a

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> from a wholly different perspective, is by the prosecutor's decision denied the opportunity to consider the evidence. The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor.

240. Weisburd, *supra* note 11, at 159. **R**

241. *Bagley*, 473 U.S. at 694, 698 (Marshall, J., with Brennan, J., dissenting).

242. *Brady*, 373 U.S. at 84; *Tavera*, 719 F.3d at 710.

243. *Brady*, 373 U.S. at 84; *Tavera*, 719 F.3d at 710.

244. *See, e.g.*, *Root*, 359 P.3d at 1093; *Colvin*, 372 P.3d at 475; *Weisbarth*, 378 P.3d at 1202; Gollehon, 986 P.2d at 398; *Ellenburg*, 8 P.3d at 811; *DuBray*, 77 P.3d at 260; *Field*, 116 P.3d at 816; *Giddings*, 208 P.3d at 370; *Holliday*, 348 P.3d 169; *McGarvey*, 529 P.3d at 583; *Seiffert*, 237 P.3d at 671; *James*, 237 P.3d at 678; *Parrish*, 241 P.3d at 1044.

245. *Root*, 359 P.3d at 1092–93; *Colvin*, 372 P.3d at 476; *Weisbarth*, 378 P.3d at 1202.

prosecutor responds to a defendant's discovery request with a large volume of information, thus intentionally or unintentionally causing a defendant to believe that all exculpatory evidence was disclosed?[246]

The vagueness of the due diligence rule also affects the prosecutor, who must independently evaluate both the materiality of the evidence and whether the diligent defendant could have discovered it.[247] Instead of turning over all exculpatory evidence, a prosecutor must speculate and sort out the evidence that a defendant could have obtained on his or her own.[248] But the due diligence rule lacks any guidance or standard for the prosecutor engaging in this investigation. Not only does this create more work for the prosecutor and add a layer of inefficiency to criminal investigations, it also likely results in unfairness to the defendant as it gives individual prosecutors more discretion to determine a defendant's diligence and allows for more justifications to withhold exculpatory evidence.[249] In addition to these problems, it is also too vague and is applied inconsistently, making it extremely difficult for both prosecutors and defendants to comply with. Defendants are more likely to receive an unfair trial as a result.

V. Conclusion

Writing for the majority in *Brady*, Justice Douglas maintained that a suppression of material evidence favorable to the defense "violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[250] Echoed in *Brady*'s progeny, many state statutes, the Rules of Professional Conduct, and American Bar Association guidelines, a prosecutor's disclosure obligations under *Brady* are well established.[251] Notably absent is any requirement of due diligence on behalf of the defendant as required by the Montana Supreme Court.

As discussed above, the due diligence rule is problematic for a number of reasons. Most notably, it has no basis in precedent, it has been rejected by other courts, it unfairly burdens the defendant by shifting the prosecutor's disclosure obligation, and it keeps relevant evidence away from the

246. Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 Case W. Res. 531, 558 (2007).

247. Weisburd, *supra* note 11, at 159. **R**

248. *Id.*

249. *Id.*

250. *Brady*, 373 U.S. at 87.

251. *See, e.g.*, Model Rules of Prof'l Conduct R. 3.8(b) (2004) (requires that prosecutor make a "timely disclosure"); ABA Model Code of Prof'l Responsibility DR 7-103(B) (2004) (requires that prosecutor make a timely disclosure); ABA Standards Relating to the Administration of Criminal Justice: Prosecution and Defense Function, Standard 3-3.11(a) (1993) (requires disclosure "at the earliest feasible opportunity.").

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jury, hindering their ability to determine the truth at trial. Given the problems associated with the due diligence rule, courts should cease to apply it. And because the due diligence rule is a judicially created exception to the *Brady* doctrine, the courts are the only actors that can prevent its application. As the Honorable Judge Kozinski of the Court of Appeals for the Ninth Circuit concluded, only judges can put a stop to the "epidemic" of *Brady* violations that continue to occur in the United States.[252]

All of the above issues are illustrated in Montana's application of the due diligence rule, which the Montana Supreme Court has been invoking for some time.[253] *Root*, *Colvin*, and *Weisbarth* are merely the most recent illustrations of due diligence application in Montana. Montana can begin by abandoning the due diligence rule altogether. The Montana Supreme Court should analyze all future *Brady* claims under a three-pronged *Brady* analysis, omitting any consideration as to whether the defendant knew of the evidence or could have obtained the evidence himself through reasonable diligence.[254] In doing so, the Court would ensure defendants' due process rights are protected by holding the State responsible for its constitutionally mandated disclosure obligation.

252. United States v. Olson, 737 F.3d 625, 626 (9th Cir. 2013).

253. *See, e.g.*, *Johnson*, 848 P.2d 496; *Gollehon*, 986 P.2d at 398; *Ellenburg*, 8 P.3d at 811; *DuBray*, 77 P.3d at 260; *Field*, 116 P.3d at 816; *Giddings*, 208 P.3d at 370; *Holliday*, 348 P.3d 169; *McGarvey*, 529 P.3d at 583; *Seiffert*, 237 P.3d at 671; *James*, 237 P.3d at 678; *Parrish*, 241 P.3d at 1044 (applying the four-pronged *Brady* analysis invoking the due diligence rule).

254. *See, e.g.*, *Strickler*, 527 U.S. at 280–81; *Tavera*, 719 F.3d at 711–12; *Banks*, 540 U.S. at 696; *Amado*, 758 F.3d at 1119.