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Brady-Based Prosecutorial Misconduct Claims, *Buckley*, and the Arkansas *Coram Nobis* Remedy

J. Thomas Sullivan*

On November 1, 2010, Gyronne Buckley was released from the custody of the Arkansas Department of Correction, having spent some eleven and a half years in prison. Convicted and given life sentences by a Clark County jury for two minor drug offenses he allegedly committed in 1999, Buckley was discharged based on the circuit court's order finding that the State had failed to disclose favorable evidence to his trial attorney in violation of the disclosure duty imposed upon prosecuting attorneys as a matter of due process of law. Buckley's circuitous and often frustrating litigation journey through state and federal courts is related here, intertwined with federal and state judicial decisions that bear directly on the problems posed for Arkansas defendants in pursuing the right to a fair trial.[1]

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*Professor of Law, University of Arkansas at Little Rock, William H. Bowen School of Law. The author was involved in the representation of Arkansas inmate Gyronne Buckley for some ten years. This article examines his litigation strategy in light of federal and state decisions; errors in professional judgment were solely his responsibility. The author expresses his appreciation for the generous research support provided by the University of Arkansas at Little Rock, William H. Bowen School of Law.

1. The *Buckley* litigation includes six different decisions relating to the merits of Buckley's claims rendered by the Arkansas Supreme Court: Buckley v. State (*Buckley VI*), 2010 Ark. 154, 2010 WL 1255763, at *3 (granting leave to file motion to reinvest the circuit court with jurisdiction to consider a petition for writ of error *coram nobis*); Buckley v. State (*Buckley V*), No. CR 01-644, 2007 WL 2955980 (Ark. Oct. 11, 2007) (denying leave to file a petition for writ of error *coram nobis*); Buckley v. State (*Buckley IV*), No. CR 06-172, 2007 WL 1509323 (Ark. May 24, 2007), *cert. denied*, 552 U.S. 1206 (2008) (upholding denial of post-conviction relief); Buckley v. State (*Buckley III*), No. CR 04-554, 2005 WL 1411654, at *2 (Ark. June 16, 2005) (remanding for evidentiary hearing on petition for post-conviction relief); Buckley v. State (*Buckley II*), 349 Ark. 53, 76 S.W.3d 825 (2002), *cert. denied*, 537 U.S. 1058 (2002) (affirming sentence imposed after case reversed for sentencing error and remanded for resentencing); Buckley v. State (*Buckley I*), 341 Ark. 864, 20 S.W.3d 331 (2000). The case concluded in November 2010: Buckley v. State, No. CR 99-13, at *1-2 (Ark. Cir. Ct. Nov. 1, 2010) (granting petition for writ of error *coram nobis* and ordering the convictions vacated and that petitioner be released from the custody of the

I. INTRODUCTION: DUE PROCESS AND THE PROSECUTOR'S DUTY TO DISCLOSE EVIDENCE FAVORABLE TO THE ACCUSED

Prosecuting attorneys are duty bound to disclose evidence favorable to the accused as a matter of constitutional due process[2] and, in Arkansas, by rule.[3] Although the Constitution does not impose general rules or policies regarding discovery,[4] the United States Supreme Court has imposed the duty to disclose exculpatory evidence in a series of cases originating with its 1963 decision in *Brady v. Maryland*.[5] The underlying principle leading to *Brady* and its progeny is of critical importance in the fair operation of the criminal-justice system because the duty to disclose is designed to afford the criminal defendant a full opportunity to contest the prosecution's case.[6] However, enforcement of the rules emanating from the principle proves troubling and difficult in practice.[7] Often missed in the

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Arkansas Department of Correction based on prosecutorial misconduct in failing to disclose exculpatory or impeachment evidence).

2. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." A similar guarantee is made in the Fourteenth Amendment, restricting the authority of the States. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

3. ARK. R. CRIM. P. 17.1(d) provides, in pertinent part: "[T]he prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor."

4. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

5. 373 U.S. 83, 87 (1963).

6. *See, e.g.*, State v. Salmons, 509 S.E.2d 842, 853 (W. Va. 1998) ("In the context of criminal trials, it is without question that it is a constitutional violation of a defendant's right to a fair trial for a prosecutor to withhold or suppress exculpatory evidence.") (quoting Lawyer Disciplinary Bd. v. Hatcher, 483 S.E.2d 810, 815 (W. Va. 1997)).

7. Enforcement is troubling in the sense that discovery of a disclosure violation after trial, conviction, and sentencing ultimately requires a reviewing court to consider the impact of the non-disclosure in light of the totality of the trial's record. But disclosure in many cases would result in a changed trial strategy that would have shaped the trial, and the record of the trial, differently. The reviewing court, however, is forced to speculate on that possibility in light of the actual trial record, imposing a significant burden on a defendant trying to demonstrate that the non-disclosure impaired his defense. The problem of enforcement is complicated by the fact that discovery of the non-disclosure is likely to be inadvertent and, in a real sense, untimely. To address a violation, whether the result of negligence or intentional suppression by police or prosecutors, the remedy must be shaped by the fact that discovery of a violation is not likely to occur in the normal course of litigation if it occurs at all. Moreover, in *Imbler v. Pachtman*, the Supreme Court of the United States held that the traditional doctrine of prosecutorial immunity shields

Brady analysis is the impact that suppression of favorable evidence can have on trial counsel's ability to effectively represent the defendant at trial, yet *Brady* claims are not analyzed in terms of the Sixth Amendment effective-assistance guarantee. Defense counsel can hardly develop appropriate strategic or tactical options without having access to favorable evidence. Instead of focusing on the likelihood of prejudice to the accused, the Sixth Amendment effective-assistance guarantee focuses on impairment of representation.[8]

In *Buckley IV*, the Arkansas Supreme Court held that *Brady* violations can no longer be litigated in post-conviction actions under Rule 37 of the Arkansas Rules of Criminal Procedure (Rule 37), the rule originally designed for redress of federal constitutional-rights violations.[9] Prosecutorial-misconduct claims for the suppression of, or failure to, disclose exculpatory evidence in state proceedings are based on the due-process guarantee included in the Fourteenth Amendment.[10] Thus, it would appear that such claims should be cognizable in the state post-conviction process authorized by Rule 37.1; yet, in *Buckley IV*, the court announced that *Brady* claims are no longer cognizable in Rule 37 actions but must be asserted in an action pleading for extraordinary relief, i.e., the petition for writ of error *coram nobis*.[11] The court's implementation of this approach in *Buckley* suggests a decision to subordinate the

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prosecutors from civil liability, even when the non-disclosure of exculpatory evidence is designed to prejudice the defense. 424 U.S. 409, 431 & n.34 (1976).

8. *See, e.g.*, Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (finding that defense counsel's effectiveness was compromised by a state procedural rule requiring the defendant to testify prior to all other witnesses called by the defense because the rule impaired counsel's ability to advise the defendant on the need or desirability of testifying based upon the relative strength of testimony offered by other defense witnesses).

9. *Buckley IV*, No. CR 06-172, 2007 WL 1509323, at *2 (Ark. May 24, 2007), *cert. denied*, 552 U.S. 1206 (2008). Arkansas Rule of Criminal Procedure 37.1(a)(i) provides a remedy for claims if the "sentence was imposed in violation of the Constitution and laws of the United States or this state . . . ."

10. *See Brady*, 373 U.S. at 86-87.

11. *Buckley IV*, No. CR 06-172, 2007 WL 1509323, at *2. The court retroactively applied the intervening decision in *Howard v. State* to bar consideration of Buckley's claims raised in his Rule 37.1 petition. 367 Ark. 18, 238 S.W.3d 24 (2006). In *Howard*, the court held that the misconduct claim could have been raised at trial and resolved on direct appeal and, consequently, could not be raised in a post-conviction action under Rule 37.5, the parallel provision to Rule 37.1 used in capital cases in which a death sentence has been imposed. *Id.* at 27, 238 S.W.3d at 32.

interests of justice and fair trials to expedience and finality. Buckley ultimately obtained relief, however, through the *coram nobis* process.[12] The greater flexibility afforded for asserting misconduct claims through *coram nobis*, rather than Rule 37 proceedings, also suggests that the Arkansas Supreme Court's approach will benefit many, but not all, defendants with meritorious prosecutorial-misconduct claims over the long run. The following analysis explains why that should be cause for concern.

II. *BRADY*

In *Brady*, a capital prosecution, the prosecution withheld from Brady's trial counsel the fact that the co-defendant had admitted that he, rather than Brady, had killed the victim, which would have corroborated Brady's trial testimony.[13] The failure to disclose existence of this confession compromised the fairness of the capital-sentencing proceeding by depriving Brady of the opportunity to show that his culpability was less severe than that of his accomplice, who was responsible for the victim's death. Thus, *Brady* established the significant principle that evidence may be exculpatory not only if it implicates the issue of guilt, but also if it bears on the ultimate issue of punishment by indicating the defendant's actual level of culpability.

Brady represents a watershed rule of constitutional criminal procedure in the United States Supreme Court's construction of the due-process guarantee, but it was not a revolutionary development because it rested on strong precedential support. Instead, the Court's active assessment of the role of constitutional protections in state proceedings marked the Warren Court era and established—along with dramatic changes in constitutional views of racial and ethnic prejudice—that Court's legacy in the middle of the past century.

12. *See supra* note 1.
13. 373 U.S. at 84.

A. The Landscape of Due Process and Disclosure before *Brady*

Brady did not announce a revolutionary approach to prosecutorial responsibility within the criminal-justice system. Instead, *Brady* built on precedent such as *Mooney v. Holohan*, in which the Court held that the knowing use of perjured testimony by a prosecuting attorney violates due process.[14] The Court explained that "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."[15]

Later, in both *Alcorta v. Texas* and *Napue v. Illinois*, the Court extended the protection afforded by the Due Process Clause to require prosecutors to correct misrepresentations made by a witness in testifying.[16] In *Alcorta*, the key prosecution witness denied having a sexual relationship with the accused's wife.[17] The accused relied on a "heat of passion" defense, potentially reducing a murder charge to manslaughter—based upon Alcorta's discovery of the relationship in observing the witness with his wife.[18] The witness subsequently recanted his denial of the relationship during his trial testimony and disclosed that the prosecutor was aware that his trial testimony was false.[19] The significance of the recanted testimony is remarkable: Alcorta was sentenced to death; had jurors believed his defense, the maximum sentence that could have been imposed for murder without malice was five-years confinement in the penitentiary.[20] The Court held that the prosecutor's admission that he knew that the witness had committed perjury while testifying in the state-court proceedings violated Alcorta's right to due process.[21]

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14. 294 U.S. 103, 112 (1935). The *Brady* Court relied upon *Mooney* in its opinion. *Brady*, 373 U.S. at 86 (citing *Mooney*, 294 U.S. at 112).

15. *Mooney*, 294 U.S. at 112-13. *Accord* Pyle v. Kansas, 317 U.S. 213, 215-16 (1942) (reaffirming *Mooney* due-process protection against state-sponsored perjured testimony).

16. Napue v. Illinois, 360 U.S. 264, 272 (1959); Alcorta v. Texas (*Alcorta II*), 355 U.S. 28, 31 (1957).

17. *Alcorta II*, 355 U.S. at 30.

18. *Id.* at 28-29.

19. *Id.* at 30-31.

20. *Id.* at 29.

21. *Id.* at 31. On remand, the Court of Criminal Appeals of Texas reversed the conviction and remanded the case. Alcorta v. Texas (*Alcorta III*), 308 S.W.2d 519 (Tex.

Napue involved a different sort of perjury, but one of common concern to defense counsel in criminal trials. A key witness for the prosecution made a deal with the prosecution for his testimony that was not disclosed to the defense prior to trial and thus was not available to the defense as a basis for impeachment.[22] Moreover, during his testimony, Hamer, a co-defendant who had been tried and sentenced to a term of 199 years, denied that he had been promised anything for his testimony against Napue.[23] In a rather bizarre circumstance, Napue later learned that Hamer had been promised assistance by an assistant prosecutor who, having left the prosecutor's office for private practice, filed an application for writ of error *coram nobis* on behalf of Hamer to enforce the agreement he had made with Hamer while prosecuting Napue.[24] At the hearing on Napue's claim for post-conviction relief, the assistant state attorney admitted he knew that Hamer had lied and that he had failed to correct the false testimony at trial.[25] Nevertheless, the Illinois Supreme Court denied relief, essentially holding that because the jury was advised that someone else—a "public defender"—had promised to help Hamer, he had been impeached at trial with the motive to testify falsely against Napue.[26] The United States Supreme Court reversed, finding that the assistant state attorney's knowing use of Hamer's perjured testimony violated Napue's right to due process.[27]

The line of decisions running from *Mooney* through *Napue* is significant for two reasons: first, it provides a foundation for the Court's recognition of the more expansive disclosure obligations imposed in *Brady* and subsequent decisions; and second, it does so by addressing the most obvious violation of

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Crim. App. 1957). That court never explained why it permitted the conviction to stand on direct appeal. *See* Alcorta v. State (*Alcorta I*), 284 S.W.2d 112, 115 (Tex. Crim. App. 1956). This was despite the prosecutor's admission that he knew his witness had lied with respect to the most material issue in the case. *See Alcorta III*, 308 S.W.2d at 519.

22. Napue v. Illinois, 360 U.S. 264, 265 (1959). In *Giglio v. United States*, the Court subsequently held that the prosecutor was required to disclose a plea-bargain agreement or any other agreement promising leniency in return for the witness's testimony against the accused. 405 U.S. 150, 153-54 (1972).

23. *Napue*, 360 U.S. at 265-66.

24. *Id.* at 266-67.

25. *Id.* at 267.

26. Napue v. People, 150 N.E.2d 613, 615 (Ill. 1958).

27. Napue v. Illinois, 360 U.S. 264, 269-71 (1959).

the prosecutor's ethical duties in recognizing the corruption implicit in reliance on perjured or false testimony at trial.[28] The ethical norms for the legal profession, reflected in the Arkansas Rules of Professional Conduct, condemn the use of perjured or false testimony by an attorney[29] and require counsel to disclose knowledge of a witness's false testimony.[30] The precepts underlying these ethical rules reflect the same considerations that were addressed by the United States Supreme Court as matters or questions of due process in *Mooney*, *Alcorta*, and *Napue*.

B. The Articulation of the Disclosure Duty in *Brady*

In *Brady*, the Court effectively expanded the duty imposed upon prosecutors by addressing tactics less brazen than reliance on perjury. *Brady* and later cases also view prosecutorial non-disclosure as implicating due process when the State, through its prosecutor or other agents, suppresses or fails to disclose evidence that undermines the credibility of the prosecution's case or its witnesses or casts doubt on the reliability of its position at trial.[31]

Brady established that the prosecutor's tacit, rather than active, reliance on evidence creating a false impression of guilt or culpability will also implicate due-process concerns. In

28. *See, e.g.*, ARK. RULES OF PROF'L CONDUCT R. 3.8 (2011) (setting forth specific obligations for prosecuting attorneys). The commentary to the rule explains: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." ARK. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

29. ARK. RULES OF PROF'L CONDUCT R. 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal . . . ."). Similarly, Rule 3.4(b) provides: "A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law . . . ." ARK. RULES OF PROF'L CONDUCT R. 3.4(b).

30. ARK. RULES OF PROF'L CONDUCT R. 3.3(a)(3) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer . . . has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures . . . .").

31. The *Brady* Court relied on *Mooney* and *Alcorta II* and directly quoted language from *Napue* describing a broader duty than suborning perjury: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Brady v. Maryland, 373 U.S. 83, 87 (1963) (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

Brady, the prosecutor may well not have known whether Brady or his co-defendant actually killed the victim. Certainly, the prosecutor was not required to credit the co-defendant's admission of personal culpability; often, individuals assume responsibility for criminal acts for reasons other than legitimate admissions of guilt—whether to protect another individual, or out of some sense of personal moral outrage over involvement in the crime, or in an effort simply to manipulate the criminal-justice system. But in failing to disclose the existence of the co-defendant's confession to the actual killing of the victim, the prosecutor in *Brady* deprived the defense of significant evidence mitigating Brady's culpability for the offense, which might well have led to a life sentence rather than the death penalty.[32]

Brady's counsel requested disclosure of his co-defendant's statements to police.[33] He had been shown all but one statement; in that undisclosed statement, Boblit, his accomplice, admitted to strangling the victim.[34] The admission was consistent with Brady's defense that he had participated in the offense, but that his accomplice had actually killed the victim.[35] His trial counsel conceded guilt before the jury and argued for a sentence of life "without capital punishment."[36] Brady never learned of his accomplice's confession until after he had been tried, convicted, sentenced, and had his conviction affirmed on appeal.[37]

In upholding the state court's grant of relief to Brady,[38] the United States Supreme Court reasoned that the failure to disclose material evidence, even without a showing of the prosecutor's personal culpability, violated the accused's right to

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32. *Id.* at 84-85.

33. *Id.* at 84.

34. *Id.*

35. *Id.*

36. *Brady*, 373 U.S. at 84.

37. *Id.*

38. Brady v. State, 174 A.2d 167, 167, 172 (Md. 1961) (reversing the death sentence and remanding for a new sentencing proceeding). The Court of Appeals of Maryland concluded, two years in advance of the Supreme Court's holding, that the prosecutor had a duty to disclose the co-defendant's confession to the defense, and that withholding material evidence, even without guilt, denies the defendant due process. *Id.* at 169 (citing Napue v. Illinois, 360 U.S. 264 (1959); *Alcorta II*, 355 U.S. 28 (1957)).

due process.[39] Thus, *Brady* expanded the due-process disclosure principle beyond knowing or intentional use of perjury to include failure to disclose evidence, which bears on guilt or on the accused's culpability for purposes of sentencing, when disclosure is requested by the defense.

The direct application of *Brady* in Arkansas prosecutions is illustrated by the state supreme court's recent consideration of a similar claim in *Green v. State*.[40] The defendant was convicted and sentenced to death on four counts of capital murder in the killing of a couple and their two children.[41] His conviction was reversed on direct appeal, based on the improper admission of evidence of his bad reputation and character during the guilt-innocence phase of the capital trial.[42] Following the reversal, defense counsel learned that the defendant's son, who had testified for the prosecution pursuant to a plea agreement in which he was to receive a twenty-year sentence for his involvement in the murder, had also made a statement in which he admitted that he alone had committed the crimes, fully exculpating his father.[43]

The statement had not been disclosed prior to trial, preventing defense counsel from cross-examining the son.[44] Because Green had already been granted a new trial as a result of the reversal of his conviction on direct appeal, he moved for dismissal of the case based upon double-jeopardy grounds because there was no appropriate remedy for the State's misconduct.[45] The court denied the motion, but the majority

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39. *Brady*, 373 U.S. at 87 (noting that the violation occurs "irrespective of the good faith or bad faith of the prosecution.").

40. 2011 Ark. 92, ___ S.W.3d ___.

41. *Id.* at 1, ___ S.W.3d at ___.

42. Green v. State, 365 Ark. 478, 484, 231 S.W.3d 638, 643-44 (2006). The supreme court found that the trial court erroneously permitted, or failed to grant a mistrial, with respect to the testimony of five witnesses, including the defendant's son, who testified to extraneous criminal acts committed by the defendant. *See id.* at 495-99, 231 S.W.3d at 652-55.

43. *Green*, 2011 Ark. 92, at 2, ___ S.W.3d at ___. Not only was this inculpatory statement made by the defendant's son subject to the mandatory disclosure rule under *Brady* because it supported the argument or inference that someone other than the accused actually committed the offense, it was also subject to disclosure as a prior inconsistent statement upon which the witness could be properly cross-examined. *See* Giles v. Maryland, 386 U.S. 66, 75-76 (1967).

44. *Green*, 2011 Ark. 92, at 2-3, ___ S.W.3d at ___.

45. *Id.* at 2, ___ S.W.3d at ___.

referred the matter to the Arkansas Committee on Professional Conduct, declining to extend the remedy for a *Brady* violation under Arkansas law beyond the grant of a new trial.[46]

Green reflects a more significant violation of due process than *Brady*, even though both involved a failure to disclose an incriminating statement made by a co-defendant. In *Brady*, the co-defendant's statement mitigated the evidence against Brady because the co-defendant admitted to killing the victim. Brady remained culpable in the commission of the underlying felony and, thus, the capital felony, but the co-defendant's confession supported the argument that Brady had not intended the victim's death and, presumably, would have justified a more lenient sentence. In contrast, in *Green*, the State used the son's testimony at trial to incriminate his father, and his prior, undisclosed statement completely exonerated his father in the commission of the capital crimes. Not only did the State fail to disclose the exculpatory statement, but the negotiated agreement with the son was a critical component of the State's case. The State proceeded to trial, never disclosing to the defense the important fact that the son had already admitted to committing the murders.

C. The Expansion and Application of *Brady*

As with any pivotal case in the development of constitutional doctrine, *Brady* raised questions that led to additional litigation and resulted in the refinement of its doctrinal core. First, several lines of examination were left open in *Brady*, the most important perhaps being a precise understanding of the exact scope of exculpatory evidence. A second difficult question that *Brady* left unresolved was whether a defendant must request disclosure of specific exculpatory evidence, even when the defendant has no way to know what evidence might be in the possession of the prosecution. There were also unanswered questions concerning the actual operation of the disclosure duty in practice. Finally, and perhaps most telling, the opinion did not provide a bright-line rule delineating

46. *Id.* at 12, ___ S.W.3d at ___ (citing Cloird v. State, 349 Ark. 33, 76 S.W.3d 813 (2002); Larimore v. State, 327 Ark. 271, 938 S.W.2d 818 (1997)). Both *Cloird* and *Larimore* held that the remedy for a *Brady* violation is a new trial. *Id.*

the showing of prejudice that would have to be met in order to obtain relief for a disclosure violation.

1. Agurs*: Disclosure Without the Requirement of Specific Defense Request*

The United States Supreme Court's consideration of the disclosure duty in *United States v. Agurs* provided a starting point for the refinement of the *Brady* doctrine.[47] In *Brady*, defense counsel made a specific request for disclosure of the co-defendant's statements; the prosecutor disclosed all but one in response. The one undisclosed statement included the co-defendant's confession that he, not Brady, had actually strangled the victim, an admission consistent with Brady's trial theory and inconsistent with the co-defendant's testimony in his own trial. In a sense, the suppression of the only helpful statement suggests far greater culpability on the part of the prosecutor than a refusal to disclose any of the statements because suppressing the inconsistent statement suggested to the jury that the co-defendant was consistent in blaming Brady for the actual murder. But the *Brady* Court did not rest its holding on any conclusion concerning the prosecutor's bad faith.

The *Agurs* Court noted three different scenarios in which failure to disclose exculpatory evidence may require relief: (1) when the prosecution benefits from use of perjured testimony;[48] (2) when defense counsel has made a specific request for discovery;[49] and (3) when the prosecutor has access to exculpatory evidence not disclosed to the defense.[50] The evidence in *Agurs* was the deceased's prior criminal record for assault and carrying a weapon, which was relevant to the

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47. 427 U.S. 97 (1976).

48. *See id.* at 103. *But see* Strickler v. Greene, 527 U.S. 263 (1999). In *Strickler*, the Court held that defense counsel was not required to assume that prosecution witnesses would testify falsely or inconsistently with prior statements. *Id.* at 286. There, the prosecutor had relied on an open-file policy to comply with disclosure obligations. *Id.* at 276 n.13. Defense counsel availed themselves of the policy, not filing a formal *Brady* motion. *Id.* at 276 n.14. The Court held that because counsel had been provided with the prosecutor's open file, they were entitled to rely on the file to contain all exculpatory or impeachment evidence subject to the disclosure requirement, particularly since the witness who could have been impeached with inconsistent statements held by the police refused to speak with defense counsel. *Id.* at 285 & n.27.

49. *Agurs*, 427 U.S. at 103.

50. *See id.* at 106-07.

defense's theory that the stabbing occurred in self-defense.[51] The victim's record was not disclosed prior to trial, but the reviewing courts rejected the argument that this omission was prejudicial.[52]

In *Agurs*, no specific request for disclosure was made by defense counsel, but the Court was not persuaded that the lack of a specific request should be dispositive of the performance of the disclosure obligation as a matter of due process. Although a specific request serves to put the prosecutor on notice,[53] the Court noted, "[i]n many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel."[54] The Court concluded that the disclosure duty is not dependent on defense counsel's request for the exculpatory information or evidence.[55]

Further, with respect to reliance on perjured testimony, the Court observed that the prejudice test for showing a due-process violation is whether the "omitted evidence creates a reasonable doubt that did not otherwise exist . . . ."[56] In *United States v. Bagley*, the Court supplanted the language of this formulation with a comprehensive test for use in cases of non-disclosure not involving use of perjured testimony.[57]

51. *Id.* at 99-101.

52. *Id.* at 101-02.

53. *See id.* at 106. The Court stated:

> In *Brady* the request was specific. It gave the prosecutor notice of exactly what the defense desired. Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. *When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.*

Id. (emphasis added).

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

55. *Id.* at 107.

56. *Id.* at 112.

57. 473 U.S. 667, 682 (1985).

2. Bagley: *Impeachment Evidence as "Exculpatory" Evidence*

The question of what constitutes "exculpatory" evidence that is material and requires disclosure, even in the absence of defense request, was raised in *United States v. Bagley*.[58] Clearly, suppression of the co-defendant's confession in *Brady* was exculpatory because, if believed, jurors could only have concluded that Brady was less culpable than his accomplice. There was a reasonable probability that jurors would have imposed a less onerous sentence than death at Brady's sentencing trial had they known that Boblit actually strangled the victim. But the question of the significance of suppressed evidence is less certain when the evidence does not directly show that the accused did not commit the crime. In *Bagley*, the Court focused on the problem of evidence having value for impeachment of testimony inculpating the accused, but not necessarily exculpating him.[59]

Bagley asserted his non-disclosure claim with reference to the government's failure to disclose agreements its agents had made with testifying witnesses.[60] The agreements promised the payment of unspecified sums of money based on the usefulness of the testimony.[61] The Court reaffirmed its position in *Agurs*, that the duty to disclose exculpatory evidence is not dependent on the defendant's request for disclosure.[62]

The *Bagley* Court held that the test for determining when non-disclosure of impeachment evidence constitutes a due-process violation depends on its materiality. The Court concluded: "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense,

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58. *Id.* at 669.

59. *Id.* at 676.

60. *Id.* at 671; *see also* Giglio v. United States, 405 U.S. 150 (1972) (requiring the prosecution to "reveal the deal" made with a witness in return for his agreement to testify against the defendant at trial, affording the defense the opportunity to explore the possibility that the witness's testimony was influenced by promises of leniency).

61. *Bagley*, 473 U.S. at 671; *see generally* Samuel A. Perroni & Mona J. McNutt, *Criminal Contingency Fee Agreements: How Fair are They?*, 16 U. ARK. LITTLE ROCK L.J. 211 (1994) (exploring the questionable ethical basis for use of agreements in which the benefit for the testifying witness is dependent on the "quality" or usefulness of the testimony).

62. *See Bagley*, 473 U.S. at 682.

the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[63]

This formulation essentially harmonized the test for prejudice left unresolved in *Agurs* by adopting a single test of materiality for non-disclosure violations regardless of the reason for the failure to disclose (except when the issue concerns reliance on perjured testimony).[64] And the Court harmonized the non-disclosure prejudice test with the test used for assessing ineffective-assistance claims under *Strickland v. Washington*.[65]

Where the claimed due-process violation is predicated on the prosecution's reliance on perjured testimony, *Bagley* retains the relaxed prejudice standard of earlier decisions by requiring relief upon a showing that the false testimony "may have had an effect on the outcome of the trial."[66]

3. Kyles: *Enforcement of the Disclosure Obligation*

Kyles v. Whitley represents a seminal point in the metamorphosis of the *Brady* disclosure doctrine.[67] Both the nature of the evidence and the fact that Kyles was sentenced to death in a second trial after the initial trial resulted in a hung jury, served to demonstrate the importance of undisclosed exculpatory evidence in a trial.[68] In the Fifth Circuit Court of Appeals, Judge Carolyn Dineen King dissented from the majority's denial of habeas relief, candidly admitting: "For the first time in my fourteen years on this court—during which I have participated in the decision of literally dozens of capital habeas cases—I have serious reservations about whether the State has sentenced to death the right man."[69]

63. *Id.*

64. *See id.*; *see also* Hughes v. Bowers, 711 F. Supp. 1574, 1579-80 (N.D. Ga. 1989) (explaining that *Bagley* left intact the *Agurs* formulation for prejudice applied to claims of use of perjured testimony by prosecutors).

65. 466 U.S. 668, 694 (1984).

66. Napue v. Illinois, 360 U.S. 264, 272 (1959).

67. 514 U.S. 419 (1995).

68. *See id.* at 429-31.

69. Kyles v. Whitley, 5 F.3d 806, 820 (5th Cir. 1993) (King, J., dissenting), *rev'd*, 514 U.S. 419, 454 (1995).

a. Standard of Proof for Violation Affirmed

While there are different categories of evidence that may prove exculpatory and are, thus, included within the *Brady* disclosure duty, the *Kyles* Court made clear that to establish a due-process violation the defendant must show a reasonable probability that the required disclosure would have made a difference in the outcome of the proceedings.[70] Thus, *Kyles* essentially obliterated distinctions between impeachment evidence and other forms of directly exculpatory evidence,[71] while leaving intact the *Agurs* prejudice formulation for claims based on use of perjured testimony.[72]

The undisclosed evidence in *Kyles* virtually ran the gamut of evidence that may be characterized as exculpatory, with the exception of the confession to the crime by another (as in *Brady*) or scientific evidence (such as DNA evidence) essentially exonerating the accused. The evidence included non-disclosure of prior inconsistent statements by witnesses describing the suspect.[73] It also included impeaching police testimony; here, a list of license plates found at the scene of the robbery and recorded by police did not include the plate from Kyles's car, undermining the police theory that he had driven to the location.[74] The police relied extensively on information supplied by an informant, Beanie, who used different names in his discussions with police.[75] This witness was potentially biased based on his romantic interest in Kyles's wife,[76] and that information led to the discovery of the murder weapon and the

70. Kyles v. Whitley, 514 U.S. 419, 421-22 (1995).

71. *Id.* at 433; *see also* Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 555 (4th Cir. 1999) (noting that for a *Brady* violation, "the evidence at issue must be favorable to the defendant, *whether directly exculpatory or of impeachment value* . . . .") (emphasis added).

72. *See Kyles*, 514 U.S. at 433 n.7.

73. *Id.* at 423. The descriptions of the suspect given by the six eyewitnesses were inconsistent as to age, height, build, facial hair, and hair style. *Id.* All six described the suspect as black. *Id.*

74. *Id.* at 423-24.

75. *Id.* at 424 & n.3. The Court noted that the witness had used "so many aliases" that he would be referred to as "Beanie" throughout the opinion. *Id.* at 424 n.3.

76. *Id.* at 429. The defense contended that Beanie's romantic interest in Kyles's common-law wife gave Beanie a motive to implicate Kyles and remove him as an "impediment" to establishing a relationship with her. *Id.* at 428.

victim's purse.[77] Beanie was also a suspect in a similar crime,[78] and he admitted to officers that he thought he might be suspected in the crime for which Kyles was later prosecuted.[79]

The *Kyles* majority noted this extensive list of items not disclosed by the prosecution prior to trial that were in the possession of the prosecuting attorney or police, while denying that the prosecution had failed to disclose exculpatory evidence.[80] The majority also noted that the prosecutor had failed to disclose significant factual inconsistencies in the many statements Beanie gave to the police, including variations from his original statements made during a post-trial interview.[81]

In her dissent in the Fifth Circuit, Judge King listed the five factors that led her to conclude that non-disclosure of exculpatory evidence contributed to the conviction:

> (i) Kyles' first jury, hearing evidence essentially identical to that offered at the second trial, was deadlocked on the question of guilt;
>
> (ii) Beanie Wallace's various statements not only reveal numerous material inconsistencies that suggest that the State's informant was not credible, but also are directly exculpatory in numerous ways;
>
> (iii) the undisclosed contemporaneous witness statements not only undermine the eyewitness testimony at trial, but also contain information that suggests that Kyles was not the killer;
>
> (iv) the remainder of the *Brady* evidence is significant; and
>
> (v) the remainder of the State's case not only fails to support the prosecution's theory, but in fact bolsters the defense's theory.[82]

77. *Kyles*, 514 U.S. at 426. Beanie told police that if Kyles were "smart" he would discard the purse in his garbage the following day. Perhaps not surprisingly, police recovered the victim's purse from Kyles's garbage. *Id.* at 427-28.

78. *Id.* at 442 n.18.

79. *Id.* at 425. Beanie's concern was apparently grounded in the fact that he had been driving the car owned by the victim of the murder. He claimed that he had purchased the car from Kyles. *Id.*

80. *Id.* at 428-29.

81. *Id.* at 429-30.

82. Kyles v. Whitley, 5 F.3d 806, 832 (5th Cir. 1993) (King, J., dissenting), *rev'd*, 514 U.S. 419 (1995).

Further, Judge King explained how the cumulative effect of non-disclosure of exculpatory evidence would have impacted trial counsel's performance.[83] Judge King did not assume, as the two judges voting to affirm the conviction did, that counsel would not have acted aggressively on the information subsequently learned about the prosecution's case.[84] She concluded:

> My analysis assumes that trial counsel would have utilized such evidence to support the theory of the defense at Kyles' actual trial: namely, that Curtis Lee Kyles had nothing to do with Mrs. Dye's murder and that the eyewitnesses were mistaken or being untruthful; that Beanie Wallace "framed" Kyles not only by falsely informing police that Kyles had sold Mrs. Dye's car to Beanie and that Kyles had retrieved his own car from the Schwegmann Bros. parking lot after the murder, but also by planting various pieces of incriminating evidence at Pinky Burnes' apartment; and, finally, that Wallace himself possibly had some role in the Dye murder.[85]

In sharp contrast to Judge King's conclusion, the dissenting justices on the United States Supreme Court found that the State had introduced a "massive core of evidence" that could only have been "chip[ped] away at" by the non-disclosed *Brady* material.[86]

Justice Antonin Scalia, writing for the dissent, initially criticized the majority's decision to review the conviction and death sentence in the first place, arguing that the lower courts had applied correct principles of law in rejecting Kyles's claims and that the majority simply disagreed with the application of the rules to the facts by those courts.[87] But he then, somewhat curiously, took up the challenge to argue those same interpretations in an exhaustive rebuttal of the majority's view of the trial evidence and the facts known to the prosecution but

83. *Id.* at 832.

84. *Id.* at 833.

85. *Id.* at 832-33; *see also supra* note 8 and accompanying text, discussing interplay between suppression of exculpatory evidence and effectiveness of trial counsel's representation in light of *Brooks v. Tennessee*, 406 U.S. 605 (1972).

86. Kyles v. Whitley, 514 U.S. 433, 475 (1995) (Scalia, J., dissenting).

87. *Id.* at 456-60.

not disclosed to the defense,[88] attacking the majority's methodology in the process.[89]

The extended argument advanced by Justice Scalia, joined by Chief Justice William Rehnquist and Justices Clarence Thomas and Anthony Kennedy, might well convince any reader that the theory that Kyles was framed by Beanie was "desperate[ly] implausi[ble]."[90] But the extent of the refutation alone suggests the credibility of the contrary view—if the claims of suppressed evidence were so insubstantial, there would appear to be little need for such a forceful reply. And in the end, Justice Scalia's impassioned response still did not carry the day. In fact, the failure of his argument in dissent demonstrates the very significance of the standard of proof required to establish a *Brady* violation—the reasonable probability of a different result at trial. Most importantly, *Kyles* reaffirms the underlying principle of *Brady* that the accused need not prove either his actual innocence or that he would have prevailed in order show a violation of due process.[91]

b. Cumulative Error Applies to Claims of Non-Disclosure Misconduct

The multiple non-disclosures in *Kyles* also raise another important factor in the disclosure-duty equation. Any single item of undisclosed exculpatory evidence, standing alone, may not be sufficient to demonstrate a reasonable probability of a different result. In order to meet the reasonable-probability test applied to due-process violations for non-disclosure, the significance of the undisclosed evidence must ultimately be evaluated against the entire case. The non-disclosed evidence in *Kyles* demonstrates the problem posed by a test that does not consider the cumulative impact of multiple non-disclosures. Each undisclosed evidentiary item in *Kyles* might not have been strong enough to warrant the conclusion that its disclosure

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88. *Id.* at 460-75.

89. *Id.* at 460-61.

90. *Id.* at 461.

91. *Kyles*, 514 U.S. at 434 (citing United States v. Bagley, 473 U.S. 667, 682 (1985)) ("[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . .").

would have created a reasonable probability of a different result. This is clearly true when one considers that the four *Kyles* dissenters concluded that no due process had been demonstrated on the basis of the entire record.

The *Kyles* majority made clear that non-disclosures must be viewed collectively, or cumulatively, in order to assess the impact of the prosecution's failure to disclose.[92] Clearly, the cumulative impact of all of the undisclosed evidence in *Kyles* was far more significant than the impact from any one item of undisclosed evidence. Taken together, they served to impugn the overall credibility of the prosecution's case, particularly in terms of the reliance of investigators on information supplied by Beanie. Without any item of suppressed evidence actually inculpating Beanie in the commission of the murder, the overall impact is to suggest the weakness in the prosecution's case against Kyles and the distinct possibility that the State's case against him rested primarily on Beanie's efforts to implicate Kyles in the capital crime.

c. Acts of Investigators are Imputed to the Prosecutor

Kyles resolved a troubling point for the evaluation of some *Brady* claims by holding that, not only is the prosecutor not absolved of a duty to disclose when she has no knowledge of the existence of exculpatory evidence, but that there is an affirmative duty to determine the existence of potentially exculpatory evidence in the possession of the police. The majority held:

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.[93]

92. *Id.* at 436-37.

93. *Id.* at 437-38. Rule 17.3(a) of the Arkansas Rules of Criminal Procedure requires the prosecutor to make a diligent effort to determine the existence of evidence in the possession of law-enforcement officers and governmental personnel, but couches this requirement in terms of a specific request by defense counsel. The rule would appear contrary to the Court's holding in *Kyles* unless it is read *in pari materia* with Rule 17.1(d),

Thus, the knowledge of police or other investigators, as members of the "prosecution team," is imputed to the prosecutor herself in a *Brady* analysis of a non-disclosure claim.

d. Responsibility for the Determination of Whether Evidence is Exculpatory

Kyles also placed the primary duty for evaluation of the potentially exculpatory nature of the evidence on the prosecutor. The majority explained that "the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."[94] In so holding, the Court sought a middle ground for enforcement of the prosecutor's obligations by not permitting the police or investigators themselves to determine whether evidence is exculpatory,[95] and not requiring that a neutral party make the determination—such as the trial court acting in camera—but also not requiring disclosure of all information to the defense regardless of its exculpatory value.[96]

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requiring disclosure of exculpatory evidence within the prosecutor's knowledge. An Arkansas prosecutor asserting a good-faith defense for failure to disclose exculpatory evidence known to investigators, but not to the prosecutor personally, would not be able to rely on the lack of a specific request for disclosure to show lack of bad faith, consistent with *Kyles*.

94. *Kyles*, 514 U.S. at 437.

95. *See* Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006). The *Youngblood* Court vacated and remanded the case to the state court where a potentially exculpatory note written to the defendants by the purported victims of a kidnapping and rape taunted the defendants, saying that they had been "played for fools," that the purported victims had vandalized the house where they had been taken, and mockingly thanked one of the defendants for performing oral sex. *Id.* at 868. When the note was shown to the investigating officer, he directed that it be destroyed. *Id.* It was not destroyed, and it formed the basis for the *Brady* suppression claim in state court. *Id.* at 688-69. The state trial court found that the prosecutor had not intentionally suppressed the note and the state supreme court majority did not discuss the claim in terms of *Brady* in its *per curiam* order. *Id.* at 869. The state supreme court dissenting judge complained that suppression of the note implicated due process. State v. Youngblood, 618 S.E.2d 544, 559 (W. Va. 2005) (Davis, J., dissenting).

96. For a more proactive approach that addresses *Brady* disclosure as a requirement for full disclosure prior to trial, rather than as a case-by-case determination for proof that a violation resulted in a reasonable probability of a different outcome, see Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 426 (1984). This approach would increase the burden on trial courts to review prosecution evidence but afford defendants far more favorable opportunities for using favorable evidence at trial, likely resulting in

The significance of non-disclosure of exculpatory evidence cannot be understated. It is often the reason for conviction of a defendant who may be guilty, but not morally guilty, of the offense charged, or for imposition of a sentence that would not have been inflicted had the evidence been available to the accused. Kyles, for instance, was ultimately released from custody after spending fifty months on Louisiana's death row, following three hung-jury mistrials in the aftermath of the Supreme Court's decision in his case.[97]

III. TO *BUCKLEY*

Brady-based prosecutorial misconduct claims typically arise in circumstances outside the scope of the trial and, consequently, require reference to facts beyond the trial record and more litigation in the post-conviction process.[98] That is true of the claims raised in the *Buckley* litigation. But in *Buckley*, the process was complicated by the abrupt position taken by the Arkansas Supreme Court to the litigation process through which *Brady* claims must be presented following trial. The *Buckley* litigation represents the rather rare circumstance in which claims of *Brady* violations have resulted in relief in Arkansas courts and also serves to demonstrate how difficult vindication of those violations may be in the litigation process.

Buckley initially focused significantly on claims of prosecutorial misconduct implicating perjury of officers involved in drug prosecutions in state cases. These claims were developed in Buckley's petition for post-conviction relief

substantial benefits to the defense in many cases where post-trial review simply fails to appreciate the impact of slight evidence when skillfully used before jurors. A similar proposal is advanced in Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009), where the author discusses due-process problems associated with the use of DNA evidence that supports innocence claims and the tension flowing from ethical conflicts for prosecutors faced with both the disclosure duty and the professional obligation to punish the guilty.

97. *See Center on Wrongful Convictions: Curtis Kyles*, NORTHWESTERN LAW, http://www.law.northwestern.edu/wrongfulconvictions/exonerations/laKylescSummary.html (last visited Sept. 21, 2011).

98. The exception occurs when the suppression is disclosed soon after the trial and conviction, permitting the defendant to raise the *Brady* claim by motion for a new trial within the thirty-day period from the entry of judgment, which is authorized by Arkansas Rule of Criminal Procedure 33.3.

brought pursuant to Rule 37.1,[99] which sets out the general procedure for attacking felony convictions based upon violation of federal and state constitutional rights.[100]

A. The History Underlying Buckley's Claims of Misconduct

The *Brady*-based claims of prosecutorial misconduct advanced in the *Buckley* litigation are tied by a common thread to the prosecution of another individual, Rodney Bragg, some six years earlier in Nevada County, Arkansas. The common thread or link is that both cases were investigated by South Central Drug Task Force Agent Keith Ray, whose trial testimony was critical to the convictions of both Bragg and, later, Buckley.

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99. Rules 37.1 through 37.4 of the Arkansas Rules of Criminal Procedure define the post-conviction remedy for relief for constitutional violations in Arkansas felony prosecutions in which a death sentence has not been imposed. Capital defendants against whom a death sentence has been imposed proceed in post-conviction litigation pursuant to the much more extensive provisions of Rule 37.5.

100. Rule 37.1(a) of the Arkansas Rules of Criminal Procedure provides, in pertinent part:

> A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:
>
> (i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
>
> (ii) that the court imposing the sentence was without jurisdiction to do so; or
>
> (iii) that the sentence was in excess of the maximum sentence authorized by law; or
>
> (iv) that the sentence is otherwise subject to collateral attack;
>
> may file a verified petition in the court that imposed the sentence, praying that the sentence be vacated or corrected.

ARK. R. CRIM. P. 37.1(a).

Although the rule refers to correction of a "sentence" imposed in violation of the federal or state constitutions or Arkansas law, errors in the guilt-innocence determination are cognizable and the scope of relief is not limited to infractions implicating the lawfulness of the sentence imposed. This is made apparent in the language of Rule 37.4, which provides that when the circuit court finds the petitioner entitled to relief, it "may set aside the original judgment, discharge the petitioner, resentence him or her, grant a new trial, or otherwise correct the sentence, as may appear appropriate in the proceedings." ARK. R. CRIM. P. 37.4.

1. The Buckley Prosecution

The case against Gyronne Buckley was made as a result of Agent Ray's investigation in January 1999, based on two controlled buys of crack cocaine purportedly made by an undercover informant from Buckley.[101] Buckley was charged with two counts of delivery of cocaine, a Class Y felony under Arkansas law.[102]

The informant, Livsey, had three prior felony convictions resulting in prison terms in Illinois. When he was arrested for shoplifting at Walmart, Arkadelphia police threatened to prosecute him for burglary,[103] so he agreed to assist officers in an undercover drug purchase in return for their agreement not to prosecute him.[104] Ray, assisted by another Drug Task Force agent, Linda Card, and an Arkadelphia police officer, wired Livsey and directed him to make a drug buy from Buckley at Buckley's residence using Drug Task Force money and after being searched to ensure that he did not already possess cocaine.[105]

Ray supervised two purchases of crack cocaine by Livsey from Buckley on consecutive days, January 12 and 13, while the other two officers reportedly observed the action from their police vehicle parked some distance away from Buckley's

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101. *Buckley I*, 341 Ark. 864, 866, 20 S.W.3d 331, 333 (2000).

102. *Id.* At the time of Buckley's conviction, delivery of any amount of cocaine was punishable as a Class Y felony. *Id.* A Class Y felony is punishable by imprisonment for ten to forty years or life under Arkansas law. ARK. CODE ANN. § 5-4-401(a) (Repl. 2006). In 2011, the Code was amended to reduce the penalty for delivery of less than two grams of cocaine to a Class C felony, punishable by a term of three to ten years. ARK. CODE ANN. § 5-64-422 (Supp. 2011). Buckley purportedly sold less than a quarter of a gram of crack cocaine.

103. Livsey testified at trial that officers told him he would be charged with burglary because he attempted to run. Abstract of the Record at AB-5, *Buckley I*, 341 Ark. 864, 20 S.W.3d 331 (2000) (No. CR 99-1081). Burglary is a felony offense, punishable by imprisonment under Arkansas law. ARK. CODE ANN. § 5-39-201 (Repl. 2006). Burglary contains no element of flight and requires proof of an illegal entry into a residence or a "commercial occupiable structure." ARK. CODE ANN. § 5-39-201. Theft, however, is punishable as a misdemeanor or felony, depending upon the value of property. ARK. CODE ANN. § 5-36-103(b)(1) (Repl. 2006). Theft of property valued at less than $500, the usual shoplifting case, would have been punished as a Class A misdemeanor at the time of Livsey's arrest. ARK. CODE ANN. § 5-36-103(b)(4).

104. *Buckley I*, 341 Ark. 864, 866, 20 S.W.3d 331, 333 (2000).

105. *Id.* at 867, 20 S.W.3d at 333-34.

residence.[106] On both occasions, Livsey reported that he purchased forty dollars worth of crack cocaine from Buckley but also testified that he never discussed drugs or money during the conversations that were taped and recorded by the officers.[107] Card testified that while she and the other officer observed the transactions, she operated the recording device.[108]

The officers obtained a warrant for a search of Buckley's residence based on Livsey's reported drug buys and executed it on January 14, recovering a small quantity of cocaine residue on items outside Buckley's residence, but no substantial amount of drugs or money.[109] Moreover, they did not recover the marked money reportedly used by Livsey in the two transactions. The tape recording was barely audible and contained no references to drugs or drug transactions.[110] Clark County Prosecuting Attorney Henry Morgan prosecuted the case.[111]

Based primarily on the trial testimony of Ray, Livsey, Card, and the Arkadelphia officer, Buckley was convicted at trial and sentenced to two life sentences for delivery of the controlled substance in the January 12 and 13 drug transactions.[112] The trial court ordered the terms served consecutively.[113] Although he had no prior history of arrests or convictions for drug offenses, Buckley was ordered to spend the remainder of his life in prison.[114]

On direct appeal, the Arkansas Supreme Court vacated the consecutive life sentences imposed by the circuit court and remanded for a resentencing proceeding based on improper admission of hearsay evidence during the punishment hearing.[115]

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106. *Id.* at 866-67, 20 S.W.3d at 333-34.

107. *Id.*

108. *Id.* at 868, 20 S.W.3d at 333.

109. *Buckley I*, 341 Ark. at 867, 20 S.W.3d at 334.

110. *Id.* at 866-67, 20 S.W.3d at 833 ("The audio tape, however, itself contained *no conversation clearly indicating that a drug transaction was taking place.*") (emphasis added). The court drew the same conclusion in its later order affirming the denial of post-conviction relief by stating, "Livsey testified that he made the buys using slang terms, *but the tape did not contain conversation clearly indicating that a drug transaction was taking place.*" *Buckley IV*, No. CR 06-172, 2007 WL 1509323, at *3 (Ark. May 24, 2007) (emphasis added), *cert. denied*, 552 U.S. 1206 (2008).

111. *See Buckley IV*, 2007 WL 1509323, at *1 n.1.

112. *See Buckley I*, 341 Ark. at 868, 870-71, 20 S.W.3d at 334, 336.

113. *Id.* at 871, 20 S.W.3d at 336.

114. *Id.* at 867, 871, 20 S.W.3d at 334, 336.

115. *Id.* at 866, 20 S.W.3d at 333.

The hearsay at issue had been elicited during the sentencing phase through Agent Ray, who testified that Buckley had been under surveillance by drug investigators for a number of years.[116]

Following resentencing, Buckley again appealed and the supreme court upheld the fifty-six-year sentence—twenty-eight-year sentences imposed by the resentencing jury on each count—ordered to be served consecutively by the trial court.[117] Buckley then filed for post-conviction relief pursuant to Rule 37.1, alleging claims of prosecutorial misconduct arising in the conduct of his original trial and from ineffective assistance of counsel at the resentencing proceeding.[118] Two misconduct claims, relating to the State's failure to disclose Ray's perjury in another prosecution and the alleged false testimony of the officers who claimed to have observed the transactions, provided the primary focus in the post-conviction litigation.[119]

2. The Misconduct of Drug Task Force Agent Keith Ray

The Arkansas Supreme Court's treatment of claims of prosecutorial misconduct in *Buckley* can only be understood in light of the unusual factual scenario in which the claims arose, i.e., Agent Ray's conduct in the *Bragg* case in 1994.[120]

a. Agent Ray and the Bragg Prosecution

The case against Rodney Bragg was made entirely through the testimony of Agent Ray, who testified that he personally purchased less than a quarter of a gram of crack cocaine for fifty dollars from Bragg in March 1993.[121] Ray claimed that he was

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116. *Id.* at 874-75, 20 S.W.3d at 338. Ray testified that Buckley had been under the surveillance of the Drug Task Force during the entire eight years that Ray had been employed and that other "controlled buys" had been made by informants from Buckley in 1988, 1994, 1995 and 1996, before the Livsey "buys" in 1999. *Id.* at 871, 20 S.W.3d at 330. Trial counsel objected twice to admission of this evidence, and on cross-examination Ray admitted that Buckley had never been prosecuted for these offenses and had no prior convictions. *Id.* at 871-74, 20 S.W.3d at 336-38.

117. *Buckley II*, 349 Ark. 53, 60, 71, 76 S.W.3d 825, 829, 836 (2002), *cert. denied*, 537 U.S. 1058 (2002).

118. *See Buckley IV*, No. CR 06-172, 2007 WL 1509323, at *1 (Ark. May 24, 2007), *cert. denied*, 552 U.S. 1206 (2008).

119. *Id.*

120. *See* Bragg v. State, 328 Ark. 613, 946 S.W.2d 654 (1997).

121. *Id.* at 618, 946 S.W.2d at 657.

unable to positively identify Bragg at the time of the purchase or thereafter, but made an identification the following year, while supervising another undercover drug buy, this time in Arkadelphia, Clark County.[122] Ray claimed that, at the time, he noted the license plate number on a vehicle driven by the individual he remembered having bought crack cocaine from a year earlier in Nevada County.[123]

Ray testified that he ran the license plate number through state automobile-registration records and the automobile was linked to Bragg.[124] Based on that information, he then claimed that he identified Bragg from a police photograph taken as a result of Bragg's intervening arrest on a domestic-battery charge.[125] Bragg was tried on the drug charge and convicted on the basis of Ray's identification and testimony concerning the 1993 drug transaction.[126] The jury sentenced him to life imprisonment.[127] His direct appeal was affirmed by the Arkansas Supreme Court.[128]

Bragg was also charged with delivery of cocaine in the Clark County drug transaction based on Ray's report of the undercover drug buy he supposedly supervised. But the prosecuting attorney dismissed the case by *nolle prosequi* based on his representation that the informant who actually made the purchase refused to testify against Bragg at trial.[129]

b. Bragg's Conviction Unravels

Bragg was not content to serve his life sentence procured on the basis of Agent Ray's testimony. Instead, he proceeded to attack his conviction in a Rule 37 proceeding, appearing pro se.[130] He timely filed his petition, which was denied by the trial court, and moved for an extension of time for the filing of the record on appeal when it appeared that the record would not be lodged with the clerk of the supreme court within the ninety-day

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Bragg*, 328 Ark. at 618-19, 946 S.W.2d at 657.
126. *See id.*
127. *Id.* at 617, 946 S.W.2d at 657.
128. *Id.*
129. Bragg v. Norris, 128 F. Supp. 2d 587, 595 (E.D. Ark. 2000).
130. Bragg v. State, No. CR 98-341, 1998 WL 262598, at *1 (Ark. May 21, 1998).

period required by rule.[131] Because the trial court did not rule on the requested extension and the record was not tendered until 120 days after Bragg's notice of appeal was given, the supreme court dismissed the appeal, rejecting his argument that the failure to obtain the necessary extension authorization was attributable to the circuit clerk or trial court.[132]

The denial of Bragg's post-conviction-relief action did not deter Bragg or end the litigation. He filed a replevin action, again pro se, seeking the return of his car that had been forfeited as a result of his arrest in Clark County on the May 1, 1994 drug charge.[133] However, the circuit court held that his action was barred because he had failed to timely contest the original notice of forfeiture, bringing his action only after the prosecutor filed an amended action three years later to correct a typographical error in the original forfeiture order.[134] The court of appeals upheld the trial court's grant of summary judgment based on the untimely challenge to the forfeiture.[135] The forfeiture of Bragg's vehicle by Clark County authorities ultimately led the United States District Court for the Eastern District of Arkansas to vacate his Nevada County drug conviction and life sentence.[136]

Bragg filed a federal habeas action challenging his state-court conviction and life sentence.[137] Among his claims of constitutional error were allegations of use of perjured testimony and *Brady* violations.[138] The district court focused on Agent Ray's identification of Bragg as the individual who purportedly sold him crack cocaine in March 1993.[139] Because Ray testified that he did not know this individual, he attempted to identify him through information provided by an informant who had directed him to the residence where he claimed he made the

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131. *Id.* The then-applicable rule was Rule 5(a) of the Arkansas Rules of Appellate Procedure. Subsequently, the court promulgated separate sets of rules for civil and criminal appeals.

132. *Bragg*, 1998 WL 262598, at *1.

133. Bragg v. Morgan, No. CA 99-1135, 2000 WL 1456929, at *1 (Ark. Ct. App. Sept. 27, 2000). Bragg's vehicle had been forfeited in an uncontested proceeding in 1994, after his arrest, pursuant to section 5-64-509 of the Arkansas Code. *Id.*

134. *Id.*

135. *Id.* at *2-3.

136. Bragg v. Norris, 128 F. Supp. 2d 587, 594 (E.D. Ark. 2000).

137. *Id.* at 591.

138. *Id.*

139. *Id.* at 594.

drug buy, but the named individual—"Rodney Mitchel"—proved not to be the purported seller when Ray looked at his mugshot.[140] Yet, evidence showed that Ray claimed to make the identification of Bragg based on observations at the undercover drug buy he supervised a year later in Arkadelphia, Clark County.[141] At that time, Ray claimed to have recognized Bragg from the drug transaction a year earlier and, after checking the license plate on the car driven by the individual involved in the drug transaction, found it to be registered to Bragg.[142] Ray then claimed to have located a police photograph of Bragg and positively identified him as the seller in the March 1993, Nevada County drug transaction.[143]

Ray's testimony was undone by documentary evidence uncovered by Bragg, himself, in preparing his unsuccessful pro se replevin action.[144] The district court opinion noted information from Agent Ray's reports substantiating his testimony against Bragg.[145] Contrary to Ray's reports and testimony, the documentary evidence produced by Bragg showed that he had purchased the automobile, which Ray claimed to have observed Bragg driving at the Arkadelphia drug transaction, some three weeks after the date of the purported drug buy.[146] The car was purchased on March 22, 1994, and registered the next day, based on the record of the Arkansas Department of Finance and Administration showing issuance of the license tag on March 23.[147]

Although Ray was called to testify at Bragg's federal habeas hearing, his testimony did not rebut Bragg's evidence demonstrating falsification of Ray's report of the Arkadelphia drug transaction. Ray admitted that he had not actually ruled out Rodney Mitchel, the suspect identified by his informant, by viewing Mitchel's mugshot on file at the Nevada County Sheriff's Office only after the sheriff's office confirmed that

140. *Id.* at 592.
141. *Bragg*, 128 F. Supp. 2d at 594.
142. *Id.*
143. *Id.* at 595.
144. *Id.* at 594.
145. *Id.* at 594-95.
146. *Bragg*, 128 F. Supp. 2d at 595.
147. *Id.*

there were no photographs on file of Mitchel.[148] The district court found that "Agent Ray unquestionably tainted the criminal trial by deceiving jurors with his admittedly false testimony that he excluded Rodney Mitchel as a suspect through photographs."[149] Additionally, Ray admitted that he had testified falsely on this point at Bragg's trial.[150]

Prosecuting Attorney Henry Morgan testified that he learned of discrepancies in Agent Ray's reports (concerning the Arkadelphia case in which Bragg was charged) as a result of the replevin action.[151] Morgan admitted that his investigation did not produce an acceptable explanation for the discrepancies in Ray's reports concerning Bragg's possession of the vehicle, which was the subject of the replevin action, and that Ray's identification of the vehicle by its license plate number, XOM 157, was "crucial" to his case against Bragg.[152] Consequently, Morgan testified that he confronted Ray and his supervisor, Rip Wiggins, with the discrepancy, and when Ray was not able to offer a credible explanation, Morgan told Ray that "he would no longer use Ray's testimony to prosecute cases."[153] Ray was never prosecuted for filing the false report, a felony under Arkansas law.[154]

Ultimately, the federal district court concluded that Ray had committed perjury and ordered Bragg released,[155] a ruling that was not appealed by the Arkansas Attorney General.

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148. *Id.*

149. *Id.* at 596. Moreover, the court noted that Ray had positively concluded at one point in his investigation notes that Rodney Mitchel and Rodney Bragg were the same person. *Id.* Thus, his trial testimony that he had excluded Mitchel as the suspect based on the photograph he claimed to have viewed was also misleading. *Id.*

150. *Id.* ("Agent Ray further admitted that, when he stated at trial that he excluded Mitchel, he knew that testimony was false.").

151. *Bragg*, 128 F. Supp. 2d at 596.

152. *Id.* at 596-97.

153. *Id.* at 597.

154. "A person commits the offense of filing a false report if he or she files a report with any law enforcement agency or prosecuting attorney's office of any alleged criminal wrongdoing on the part of another person knowing that the report is false." ARK. CODE ANN. § 5-54-122(b) (Supp. 2011). The offense is a Class D felony if the reported crime is a capital offense or Class Y, A or B felony under subsection (c)(1)(A). ARK. CODE ANN. § 5-54-122(c)(1)(A).

155. *Bragg*, 128 F. Supp. 2d at 605.

3. *False Testimony of Officers at Buckley's Trial*

The second significant claim of misconduct in Buckley's prosecution was that officers testified falsely at trial in their corroboration of testimony given by Agent Ray and his informant, Livsey.

At trial, the two officers positioned to observe the controlled drug buys on January 12 and 13, 1999 testified as to their observations.[156] One stated that he saw Livsey enter Buckley's front door on January 12 through his binoculars, and the same procedure was followed on January 13.[157] Card testified specifically that she observed Buckley reach up to the rafters on his front porch on January 12 and withdraw something.[158] She testified at trial and at resentencing that she recovered a pill bottle from this same area during the January 14 search of his residence.[159] Both officers reiterated their trial testimony at resentencing.[160]

B. Buckley's Claim of *Brady* Non-Disclosure Misconduct

Buckley asserted two general claims of misconduct in his application for relief pursuant to Rule 37.1 following affirmance on direct appeal from the resentencing proceeding and denial of certiorari.[161] The misconduct claims were based on Ray's perjury in the *Bragg* case and false testimony by officers claiming to have witnessed the first controlled buy made by Livsey, the undercover informant, at Buckley's residence on January 12, 1999.

Buckley learned of Ray's perjury in Bragg's trial only after reversal of Bragg's life sentences.[162] Prior to the resentencing

156. Abstract, Addendum and Brief for the Appellant at AB 2-3, 10-11, *Buckley IV*, No. CR 06-172, 2007 WL 1509323 (Ark. May 24, 2007), 2006 WL 6614910 [hereinafter Brief for Appellant].

157. *Id.* at AB 2-3.

158. *Id.* at AB 10-11.

159. *Id.* at AB 10-11, 36-37.

160. *Id.* at AB 21-25, 32-33.

161. *See Buckley II*, 349 Ark. 53, 76 S.W.3d 825 (2002), *cert. denied*, 537 U.S. 1058 (2002).

162. The opinion on Buckley's direct appeal was issued by the court on July 7, 2000. *Buckley I*, 341 Ark. 864, 20 S.W.3d 331 (2000). The opinion of the United States District Court granting federal habeas relief to Bragg was issued on December 8, 2000. Bragg v. Norris, 128 F. Supp. 2d 587 (E.D. Ark. 2000).

proceeding, Buckley personally moved the trial court to permit him to call Ray to expose Ray's perjury in *Bragg*, before the resentencing jury.[163] On appeal from the resentencing proceeding, the supreme court concluded that no error had occurred in the proceeding, despite Buckley's argument that he should have been entitled to develop evidence relating to Ray's perjured testimony in *Bragg*.[164] Instead, the supreme court found that the trial court had permitted both sides to call Ray as a witness, but that Buckley failed to call him to testify.[165] The supreme court also rejected Buckley's claims of error in the sentencing process, most of which were unpreserved claims of fundamental error.[166]

Buckley then filed the Rule 37.1 petition, alleging four claims based on evidence undermining confidence in his conviction for the two counts of delivery of cocaine.[167] First, Buckley argued that the prosecuting attorney knew or should have known that Ray committed perjury at Bragg's trial, based on the replevin action filed by Bragg for the return of his forfeited vehicle.[168] The federal court relied significantly on evidence in the replevin action challenging Ray's claim that he had observed Bragg's car at the time of the alleged drug transaction in Arkadelphia.[169] The replevin action was filed in the Clark County Circuit Court on March 10, 1998, and served upon the prosecuting attorney.[170] Thus, Buckley argued that the prosecuting attorney was on notice that Ray's credibility was

163. Conflict with counsel representing him in the resentencing hearing with respect to Buckley's desire to call Ray as a witness ultimately led to another change in counsel. *See* Buckley v. State, 345 Ark. 570, 571, 48 S.W.3d 534, 535 (2001).

164. *Buckley II*, 349 Ark. at 60, 70-71, 76 S.W.3d at 829, 836.

165. *Id.* at 60, 64, 76 S.W.3d at 829, 831.

166. The court rejected Buckley's reliance on *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), the leading Arkansas decision both recognizing and limiting the doctrine of fundamental error in the review of unpreserved claims of trial error. *See Buckley II*, 349 Ark. at 64-71, 48 S.W.3d at 832-36.

167. Petition for Relief Pursuant to Rule 37.1, at 2-10, Buckley v. State, No. CR 99-13 (Ark. Cir. Ct. Feb. 10, 2003) [hereinafter Rule 37.1 Petition].

168. *Id.* at 8.

169. Bragg v. Norris, 128 F. Supp. 2d 587, 596-97 (2000).

170. Bragg v. Morgan, No. CA 99-1135, 2000 WL 1456929, at *1 (Ark. Ct. App. Sept. 27, 2000). Prosecuting Attorney Morgan was the lead named defendant in the replevin action. *Id.*

being challenged in another case.[171] However, Morgan never disclosed his knowledge of Ray's perjury in the *Bragg* case to Buckley's trial counsel,[172] despite being served with the replevin action months before Buckley's trial and advising Ray and Ray's supervisor that he would no longer call Ray as a witness in criminal trials only a few weeks after Buckley's conviction.[173]

Buckley also asserted that Ray's subsequently discovered perjury constituted newly discovered evidence that would have provided a basis for impeachment of his trial testimony,[174] relying on Arkansas cases holding that the credibility of a witness is always an issue at trial,[175] and affirming the right of the accused to cross-examine witnesses before the jury.[176] He specifically relied on *Bennett v. State*, where evidence of perjury on the part of an undercover officer required reversal of the conviction.[177] The undercover officer in *Bennett* lied about not having a sexual relationship with the defendant at trial, and there was evidence that strongly suggested she had also lied about having previously purchased drugs from the defendant.[178]

Although Ray's perjury occurred in the *Bragg* prosecution and Buckley was not able to show that Ray had committed perjury at his own trial, the *Bennett* litigation afforded a comparable circumstance for impeachment of Ray from his perjury in *Bragg*. The same undercover agent who committed

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171. *Bragg*, 128 F. Supp. 2d at 596-97. The state supreme court subsequently referenced the federal court's conclusion relating to Prosecuting Attorney Morgan's testimony in *Bragg v. Norris*. *Buckley III*, No. CR 04-554, 2005 WL 1411654, at *2 (Ark. June 16, 2005) ("In *Bragg*, the prosecuting attorney at trial, who was also the prosecuting attorney in appellant's trial, indicated that, prior to the date of appellant's trial, he had at least become aware through a replevin action of evidence of misconduct by the police officer in the *Bragg* case.").

172. *See* Rule 37.1 Petition, *supra* note 167, at 7-8.

173. *Bragg*, 128 F. Supp. 2d at 596-97.

174. Rule 37.1 Petition, *supra* note 167, at 11. Newly discovered evidence is often characterized as one of the "least favored grounds" for a new trial under Arkansas law. *See, e.g.*, Williams v. State, 252 Ark. 1289, 1292, 482 S.W.2d 810, 812 (1972).

175. Rule 37.1 Petition, *supra* note 167, at 11; *see also* Fowler v. State, 339 Ark. 207, 220-21, 5 S.W.3d 10, 17 (1999) (citing ARK. R. EVID. 401; Davis v. Alaska, 415 U.S. 308, 316 (1974)).

176. Rule 37.1 Petition, *supra* note 167, at 12; *see also* Bowden v. State, 301 Ark. 303, 308-09, 783 S.W.2d 842, 844 (1990) (citing ARK. CONST. art. II, § 10; Delaware v. Fensterer, 474 U.S. 15 (1985)).

177. Rule 37.1 Petition, *supra* note 167, at 12-13; *see also* Bennett v. State, 307 Ark. 400, 403, 821 S.W.2d 13, 14 (1991).

178. *Bennett*, 307 Ark. at 404, 821 S.W.2d at 15.

perjury requiring a new trial in Bennett also testified against a different defendant in *Goff v. State*.[179] The agent, Wilhite, testified that she made an undercover buy from the defendant, who contended at trial that Wilhite fabricated the transaction.[180] The defense presented extensive evidence concerning Wilhite's perjury in the *Bennett* case, but the trial court refused to permit its use before the jury for purposes of impeachment.[181] The court of appeals reversed, holding that the evidence of perjury in an extrinsic case is admissible to demonstrate the bias of the witness, which is not a collateral matter.[182] The court concluded that the accused's right to confrontation is violated by exclusion of the impeachment evidence.[183]

Buckley also alleged that the other officers involved in the controlled buys Livsey purportedly made testified falsely at his trial.[184] He offered affidavit evidence that they would not have been physically capable of observing events that they claimed to have seen on Buckley's front porch during the first of the two transactions—the January 12, 1999 controlled buy—from the location where they were reportedly parked.[185] These events included Card's claimed observations that led to the issuance of the search warrant of Buckley's residence on January 14.[186]

Finally, Buckley claimed that the cumulative impact of the prosecutor's failure to disclose Ray's perjury in *Bragg* and the false testimony offered through law-enforcement officers acting as members of the prosecution's team required relief.[187]

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179. No. CA CR 91-260, 1992 WL 162839 (Ark. Ct. App. July 1, 1992).

180. *Id.* at *1, *4.

181. *Id.* at *1-5.

182. *Id.* at *6.

183. *Goff*, 1992 WL 162839, at *9. The court relied on *Bennett v. State*, 307 Ark. 400, 821 S.W.2d 13 (1991), and *West v. State*, 290 Ark. 329, 719 S.W.2d 684 (1986). *Id.* at *5-6. Although *Bennett* and *West* appear to have been abrogated by legislative expansion of the rape-shield statute, the underlying principle is not compromised by the legislative action, which addresses prior misconduct in false reporting by victims of an alleged sexual assault. *See* Ridling v. State, 348 Ark. 213, 224, 72 S.W.3d 466, 472-73 (2002).

184. Rule 37.1 Petition, *supra* note 167, at 2-4.

185. *Id.* at 3.

186. *Id.* at 2-4.

187. *Id.* at 9-10 (citing Kyles v. Whitley, 514 U.S. 419, 421 (1995) (holding that *Brady* claims must be evaluated cumulatively)); *see also* Lacy v. State, 2010 Ark. 388, ___ S.W.3d ___ (applying cumulative analysis in assessing multiple claims of violation and

C. The Arkansas Courts' Treatment of Buckley's *Brady* Claims

Despite the fact that Buckley actively sought to litigate his claims for post-conviction relief since filing the Rule 37.1 petition in February 2003, the Arkansas Supreme Court never reviewed the claims or supporting evidence on the merits.

1. The Post-Conviction Court's Initial Summary Denial of Relief

The circuit court of conviction initially denied relief without written findings on Buckley's Rule 37.1 claims for relief, including his *Brady* claims.[188] On appeal, the supreme court found the circuit court failed to comply with the requirement for entry of written findings when post-conviction relief is denied with an evidentiary hearing.[189] On remand, the state trial court conducted an evidentiary hearing over a three-day period, addressing all claims presented in the application for post-conviction relief.[190]

Significantly, the supreme court not only noted the trial court's failure to enter written findings of fact, but also rejected the State's argument that the Rule 37 process was not appropriate for consideration of prosecutorial misconduct claims like those advanced by Buckley in his petition.[191] For example, the State argued that Buckley's claims relating to the alleged false testimony of the officers witnessing the drug transactions

finding no due-process violation because of the absence of reasonable probability that disclosure would have resulted in a different outcome of a capital murder case).

188. *Buckley III*, No. CR 04-554, 2005 WL 1411654, at *1 (Ark. June 16, 2005).

189. *Id.* at *1-3.

190. *Buckley IV*, No. CR 06-172, 2007 WL 1509323, at *1 (Ark. May 24, 2007), *cert. denied*, 552 U.S. 1206 (2008). The state supreme court's remand order did not require the trial court to hear evidence on the ineffective-assistance claims. *See Buckley III*, 2005 WL 1411654, at *3 ("While we find appellant is entitled to a hearing on these first four points, the trial court may determine a hearing is not required on all issues presented in appellant's petition.").

191. *Buckley III*, 2005 WL 1411654, at *2 ("An evidentiary hearing should be held in a post-conviction proceeding unless the files and the records of the case conclusively show that the prisoner is entitled to no relief.") (citing Sanders v. State, 352 Ark. 16, 98 S.W.3d 35 (2003)).

were attacks on witness credibility that could not be asserted post-conviction.[192]

The court rejected the State's argument: "None of those cases [cited by the State] are dispositive of the claims here."[193] Instead, the court characterized the claims relating to reliance on false testimony as claims of prosecutorial misconduct for the reliance on perjury at trial, claims cognizable in Rule 37.1 proceedings.[194] In looking to the potential merits of Buckley's arguments, the court concluded "that the appellant's petition raised more than the mere specter of improper conduct by the prosecutor and the police officers who were alleged to have provided perjured testimony."[195] Consequently, the supreme court rejected the trial court's dismissal of the claim because the trial court neither conducted an evidentiary hearing nor entered specific written findings.[196]

The Arkansas Supreme Court also addressed the claimed misconduct in light of the United States Supreme Court's decision in *Bracy v. Gramley*.[197] In *Bracy*, the Court held that misconduct by the petitioner's trial judge in accepting bribes in other cases bore sufficient relevance to the judge's possible bias in the petitioner's own case and that the defense was entitled to disclosure of information uncovered during the investigation of the judge relating to his misconduct in those cases.[198] Here, Agent Ray engaged in misconduct in the *Bragg* prosecution, a fact so conclusively established in Bragg's federal habeas litigation that the attorney general did not even appeal the district court's findings when it ordered Bragg released.[199]

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192. *Id.* at *1 (noting that the State relied on Beulah v. State, 352 Ark. 472, 101 S.W.3d 802 (2003); Cigainero v. State, 321 Ark. 533, 906 S.W.2d 282 (1995); Gunn v. State, 291 Ark. 548, 726 S.W.2d 278 (1987) (per curiam); Malone v. State, 294 Ark. 127, 741 S.W.2d 246 (1987)).

193. *Id.*

194. *Id.* at *2. The court noted the State's concession that claims of perjury are subject to litigation in post-conviction proceedings and that Buckley had not attacked the sufficiency of the evidence to support his conviction, a type of claim committed to the direct-appeal process. *Id.*

195. *Id.* at *3.

196. *Buckley III*, 2005 WL 1411654, at *3.

197. *Id.* (citing Bracy v. Gramley, 520 U.S. 899 (1997)).

198. *See Bracy*, 520 U.S. at 909.

199. *See* Bragg v. Norris, 128 F. Supp. 2d 587, 593-99, 603, 605 (E.D. Ark. 2000).

The Arkansas Supreme Court alluded to *Bracy* as support in remanding the case for a hearing.[200] The court analogized the facts in *Bracy*, relating to misconduct by public officials, noting: "Here, there are allegations that the police officer who falsified evidence against another defendant may have done the same in this case, as well as allegations that other members of the prosecution team participated in that process."[201] The tie between Ray's misconduct and Buckley's prosecution appears far stronger, in fact, than that demonstrated between Bracy and his trial judge, because Ray's perjury was disclosed in a case originally filed, then dismissed, by Prosecuting Attorney Morgan, who subsequently used Ray's testimony to convict and sentence Buckley. Only after Ray provided this testimony did Morgan proceed to repudiate him for his illegal actions in filing a false report against Bragg.

If due-process considerations compelled disclosure of the judicial misconduct in *Bracy*, then those considerations would certainly argue for the disclosure to the defense of perjury committed by a member of the prosecution team in another case.

The Arkansas Supreme Court's preliminary conclusion in remanding the case for an evidentiary hearing is significant because it reflects its concern that Buckley suffered a serious due-process violation as a result of the State's alleged misconduct in failing to disclose favorable evidence. Yet, this conclusion contrasts sharply with the supreme court's treatment of these claims following the evidentiary hearing.

2. The Post-Conviction Court's Treatment of Buckley's Brady-Kyles *Claims*

In the evidentiary hearing conducted on remand from the Arkansas Supreme Court's order in *Buckley III*, the state trial court, sitting as the post-conviction court, addressed not only the *Brady-Kyles* claims, but also Buckley's allegations that counsel

200. *Buckley III*, 2005 WL 1411654, at *3. The court noted that it had previously recognized the relevance of *Bracy v. Gramley* to claims of misconduct in *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003).

201. *Buckley III*, 2005 WL 1411654, at *3.

representing him in the resentencing order in *Buckley I* had failed to provide effective assistance.[202]

a. Allegations of False Testimony by Officers Monitoring the Drug Transactions

At the post-conviction hearing, Buckley called four attorneys who testified concerning the accuracy of trial testimony related by the officers who claimed to have observed the drug transactions from their vantage point while parked blocks from Buckley's residence.[203] Each attorney testified that it was not physically possible to duplicate the observations claimed by the officers monitoring the controlled buys based on the distance at which the officers said they observed the interaction between Livsey and Buckley on the front porch of Buckley's residence.[204]

Buckley's evidence showed that the distance between the location of the officers and the Buckley residence was at least 240 yards, measured by an electronic range finder. One officer testified that he did not have binoculars when he made his observations; Carculars, but also testified that she was operating the tape recorder receiving the transmission from the wire worn by Livsey at the same time.[205] Each of the attorney-witnesses called by Buckley also testified that they attempted to duplicate Card's observations using binoculars, but were unable to do so at the distance involved.[206] Further, the trial court took judicial

202. *Buckley IV*, No. CR 06-172, 2007 WL 1509323, at *1 (Ark. May 24, 2007), *cert. denied*, 552 U.S. 1206 (2008). The state supreme court's remand order did not require the trial court to hear evidence on the ineffective-assistance claims. *See Buckley III*, 2005 WL 1411654, at *3 ("While we find appellant is entitled to a hearing on these first four points, the trial court may determine a hearing is not required on all issues presented in appellant's petition.").

203. *Buckley V*, No. CR 01-644, 2007 WL 2955980, at *2 (Ark. Oct. 11, 2007).

204. *Id.*

205. *See* Transcript of Rule 37.1 Hearing, at 115-16, State v. Buckley, No. CR 93-14 (Sullivan testimony); *id.* at 248 (Lloyd testimony). J. Thomas Sullivan is a professor of law at the UALR William H. Bowen School of Law and author of this article. Louis Lloyd, an attorney practicing in Malvern, Arkansas, was lead counsel in the Rule 37.1 proceeding. Both Sullivan and Lloyd withdrew from representation in order to testify at the evidentiary hearing. Little Rock attorney Patrick J. Benca conducted the evidentiary hearing on behalf of Buckley.

206. Transcript of Rule 37.1 Hearing, at 303-04, 316-17, State v. Buckley, No. CR 93-14 (Vinett testimony); *id.* at 208-09 (Porter testimony). Erin Vinett was a Deputy Public Defender in the Pulaski County Public Defender's Office at the time of the hearing.

notice of United States Naval Observatory data showing that the controlled buy and observations made by the officers occurred after sundown on the date of the first claimed transaction.[207] The testimony also showed that the sunset occurred behind the Buckley residence, so that the front porch was totally shaded at the time of sunset on that date.[208]

Based on the testimony of the four attorneys, Buckley argued that the officers had testified falsely at trial and at the resentencing hearing concerning their claimed observations corroborating Livsey's testimony about the drug buys he made from Buckley.[209]

The trial court rejected Buckley's claims for relief with written findings.[210] Nevertheless, the trial court, sitting as the post-conviction court in the Rule 37 proceedings, concluded that "[c]onsidering the passage of time from May 25, 1999, to September, 2005," when the post-conviction hearing was held, Buckley failed to prove that the officers' "view of the scene was not as they testified at the original trial and the subsequent hearings."[211] Thus, the state post-conviction court denied relief on the specific claims raised with regard to general allegations that the State had violated Buckley's right to due process by relying on false testimony at trial.

b. The Court's Constitutionally Flawed Conclusions as to Claims Relating to Agent Ray's Misconduct in the Bragg Prosecution

The trial court also rejected Buckley's arguments directed at Prosecutor Morgan's failure to disclose his knowledge of Agent Ray's misconduct in filing a false report of a drug trafficking violation allegedly committed by Bragg. The court concluded that Morgan did not actually confirm the allegations in Bragg's replevin action until after the hearing held on July 12,

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Austin Porter, Jr., an attorney practicing in Little Rock, served as Buckley's trial counsel in the May 1999 jury trial.

207. Transcript of Rule 37.1 Hearing, at 472, State v. Buckley, No. CR 93-14 (trial court took judicial notice of records for the U.S. Naval Observatory).

208. *Id.*; *see also id.* at 472-76 (Sullivan testimony).

209. Brief for Appellant, *supra* note 156, at ARG. 1-2.

210. *See* Findings entered by Clark County Circuit Court in Buckley v. State, No. CR 99-13, at ¶ 7 [hereinafter Findings].

211. *Id.*

1999.[212] Finding that proof of Bragg's allegations was not "conclusive" without an investigation of official records, the court held that Morgan "did not know of this false statement by Agent Ray until after the trial of the Defendant, Gyrone [sic] Buckley."[213] The court noted that Morgan informed the defense counsel of Ray's misconduct prior to the resentencing proceeding.[214]

Buckley argued that Ray's perjury in *Bragg* was material to Ray's credibility at Buckley's trial and that the State violated his right to due process of law by failing to disclose evidence of Ray's perjury. The state post-conviction court recognized that, while the filing of the false report in the *Bragg* prosecution did not constitute "exculpatory information, [it] would certainly have been used for impeachment purposes by the Defendant's [a]ttorney."[215] Thus, the trial court's conclusion demonstrated that this information would have been subject to the disclosure requirement of *Bagley*.[216]

Nevertheless, the state post-conviction court denied relief for two reasons. First, it concluded that Prosecutor Morgan did not actually learn that Ray filed a false report until he investigated Bragg's claims in Bragg's replevin action following Buckley's conviction.[217] Second, the court concluded that, while evidence of Ray's false report could have been used to impeach Ray's trial testimony, the non-disclosure was not harmful because the jury also heard evidence from Livsey, the officers who monitored the controlled buys, and the tape recordings of the purported drug transactions.[218] The court concluded with respect to Morgan's nondisclosure that Buckley's "due process was not violated at trial, that the State did not willfully or intentionally suppress or withhold impeachment evidence; and there was sufficient credible evidence presented at the trial independent of Agent Ray's

212. *See* Bragg v. Norris, 128 F. Supp. 2d 587, 594-95 (E.D. Ark. 2000); Findings, *supra* note 210, at ¶ 3.

213. Findings, *supra* note 210, at ¶¶ 3-5.

214. Findings, *supra* note 210, at ¶ 5.

215. Findings, *supra* note 210, at ¶ 8.

216. *See* United States v. Bagley, 473 U.S. 667, 682-83 (1985).

217. Findings, *supra* note 210, at ¶¶ 3-5.

218. Findings, *supra* note 210, at ¶ 8.

testimony to sustain the jury's verdict and the sentence of the [c]ourt."[219]

The trial court misconstrued the appellate court's determinations regarding the due-process requirement for disclosure of favorable evidence, reflecting an almost total misreading of key components of the prosecutor's duty to disclose favorable evidence to the defense articulated in *Brady* and reiterated in *Kyles.*

i. Error in Evaluating the Disclosure Duty

The court's conclusion reflects three critical flaws in its application of the general prosecutorial duty to disclose to Morgan's actual failure to disclose Agent Ray's misconduct in the *Bragg* prosecution.

First, the trial court found that there was no willfulness in the failure to disclose evidence relating to Ray's perjury in *Bragg* that would have been relevant to impeach his trial testimony against Buckley. But the Supreme Court held in *Brady* that the prosecutor's bad faith, or lack thereof, is not necessarily an issue in the determination as to whether a failure to disclose evidence favorable to the defense violates due process.[220] A due-process violation is not dependent upon a showing that the prosecutor acted in bad faith in failing to comply with the constitutional disclosure duty.[221]

Second, the trial court found that Prosecutor Morgan did not have actual knowledge of Ray's perjury in *Bragg* until he investigated the underlying claim and documentary evidence developed in Bragg's replevin action.[222] Proof of the prosecutor's actual knowledge of the evidence subject to disclosure is not required under the Supreme Court's decision in *Kyles v. Whitley*,[223] because evidence known to the police, as members of the prosecution team, is imputed to the prosecutor. Arkansas adopted this rule prior to the Court's decision in

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219. Findings, *supra* note 210, at 6.

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

221. *See* Illinois v. Fisher, 540 U.S. 544, 547 (2004) ("[W]hen the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld.").

222. Findings, *supra* note 210, at ¶¶ 3-5.

223. 514 U.S. 419, 437-38 (1995).

Kyles.[224] Here, Ray clearly knew of his own perjury in the *Bragg* case, as the court concluded in summarizing his admissions of false testimony in *Bragg v. Norris*;[225] as the only investigator in the case, Ray was undoubtedly a member of the prosecution team. Thus, under the Court's reasoning in *Kyles*, Ray's own knowledge was subject to being imputed to the prosecutor, Morgan, regardless of Morgan's actual knowledge of Ray's perjury.

Third, the trial court never discussed the prosecutor's duty to investigate Ray's misconduct in the *Bragg* case once the prosecutor had been served with Bragg's replevin action. Buckley argued that the prosecutor was under a duty to determine whether there was evidence subject to disclosure, having been made aware of the allegations in Bragg's replevin action that would have established Ray's culpability in filing the false report that lead to Bragg's arrest for a drug offense in Clark County.[226] The record in the post-conviction court showed that Bragg served copies of the documentary evidence that established Ray's misrepresentations in filing the false report on Morgan in the replevin action in September 1998, some four months before Buckley's arrest in the sting supervised by Ray.[227] Buckley argued that the prosecuting attorney, like any other party personally served in a civil action, could not simply plead that he did not have constructive notice of Bragg's documentary evidence until he investigated the case after Buckley's trial and the trial on Bragg's replevin action in July 1999.[228]

Instead, Buckley argued that the prosecutor was under a duty to investigate allegations concerning Agent Ray once he was placed on notice of Ray's falsification of an official

224. *See, e.g.*, Lewis v. State, 286 Ark. 372, 374, 691 S.W.2d 864, 865 (1985); Williams v. State, 267 Ark. 527, 531, 593 S.W.2d 8, 10 (1980) (stating that the knowledge of the police is imputed to the prosecutor because the police are part of the prosecution team).

225. 128 F. Supp. 2d 587, 595-98 (E.D. Ark. 2000).

226. Buckley offered Morgan's testimony from Bragg's federal habeas hearing as an exhibit at the evidentiary hearing conducted on his Rule 37.1 petition. Transcript of Rule 37.1 Hearing at 46, 54-55, 517, State v. Buckley, No. CR 99-13 (Ark. Cir. Ct. Oct. 18, 2005).

227. *Id.* at 74-76.

228. Petition for Relief Pursuant to Rule 37.1 at 6-7, State v. Buckley, No. CR 99-13 (Ark. Cir. Ct. Oct. 18, 2005).

report.[229] The post-conviction court did not address the argument that the prosecutor was under an affirmative duty to investigate Ray's misconduct in *Bragg*, despite having been placed on notice of that misconduct in Bragg's replevin action. Nor did it address the argument that the exercise of diligence by the prosecutor would have led to actual knowledge of Ray's misconduct that would then have triggered the disclosure duty based on that actual knowledge.

ii. The Post-Conviction Court's Prejudice Analysis Was Flawed

At the outset, the post-conviction court applied an incorrect standard in finding that Buckley suffered no prejudice as a result of the State's failure to disclose Ray's perjury in the *Bragg* case. The court concluded that "there was sufficient credible evidence presented at the trial independent of Agent Ray's testimony to sustain the jury's verdict and the sentence of the [c]ourt."[230]

The prejudice requirement for demonstrating a due-process violation, however, is not couched in terms of sufficiency of evidence to support conviction, and the United States Supreme Court expressly rejected any showing of evidentiary insufficiency as a requirement in *Kyles*.[231] The fact that the evidence otherwise supported conviction does not negate the inference that there was a reasonable probability that disclosure of Ray's falsification of the record in *Bragg* would have resulted in a different outcome had Buckley's trial counsel impeached Ray's trial testimony with that information. Similarly, disclosure of Ray's perjury during Bragg's state drug trial would have likely impacted the verdict or sentence, if any, imposed against Buckley.[232]

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229. *See* Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (requiring the prosecutor to determine existence of favorable evidence). Moreover, Rule 17.3 of the Arkansas Rules of Criminal Procedure expressly directs the prosecuting attorney to make a diligent effort to determine the existence of favorable evidence in the possession of law-enforcement officials or other governmental personnel. ARK. R. CRIM. P. 17.3(a).

230. Findings, *supra* note 210, at 6.

231. 514 U.S. at 434-35 & n.8.

232. Consider the fact that the jury at Buckley's 1999 trial imposed a life sentence for both counts and that the trial court ordered the life sentences stacked based on the prosecutor's motion. *Buckley I*, 341 Ark. 864, 870-71, 20 S.W.3d 331, 336 (2000). Ray testified in the sentencing phase that Buckley had been under surveillance for eight years—

The post-conviction court wholly failed to apply the "reasonable probability" test consistently used by the United States Supreme Court to determine whether nondisclosure violates an accused's right to due process.[233] The fact that other evidence might have supported conviction, even had Ray been impeached by his misconduct in the *Bragg* case, does not negate the likelihood that the impeachment would have made a difference in the outcome of Buckley's own case.

Moreover, the state post-conviction court's conclusion that the nondisclosure was not prejudicial was highly questionable in light of the facts. The court concluded that the testimony of Livsey and the officers monitoring the controlled buys, and the tape recording of the drug buys were sufficient to support the jury verdict. The court found that the trial jury was able to hear the taped recordings of the drug transactions, holding that "[t]he tape recording of the drug buys, which was monitored by the [sic] Officers Bethel and Card, supports the credibility of their testimony."[234]

But, in fact, the supporting evidence relied upon by the post-conviction court was so flimsy that its rulings are wholly lacking in credibility. For example, the court's prejudice analysis was dependent on the claimed corroboration provided by the tape recording of the purported transactions that was admitted in evidence at trial. The court concluded that the tape recording corroborated the testimony of Livsey and the officers monitoring the transactions. But the tape contained no references to drugs or money, as the informant, Livsey, testified at trial.[235] Moreover, the court's reliance on the tape recording as

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testimony that required reversal and remand for resentencing because Ray's reference to prior drug investigations involving Buckley was based on hearsay. *Id.* at 875, 20 S.W.3d at 338-39. If Ray's perjury in *Bragg* had been known to Buckley's trial jury, it is difficult to believe that his prior misconduct would not have raised doubt on the question of guilt; even had jurors been persuaded by the testimony of the informant and other officers that Buckley had sold drugs, the prospect that another first-time drug offender would be unjustly sentenced to life would almost certainly have caused residual doubt for some jurors. To the extent that jurors were impressed with the claim that Buckley had been the subject of an investigation by the Drug Task Force for over eight years, as Ray testified, his perjury in *Bragg* would have undermined the credibility of his reference to the lengthy investigation of Buckley.

233. *See e.g.*, *Kyles*, 514 U.S. at 437; United States v. Bagley, 473 U.S. 667, 682 (1985).

234. Findings, *supra* note 210, at ¶ 8.

235. Brief for Appellant, *supra* note 156, at AB 4-5.

credible evidence supporting the live testimony is contrary to the state supreme court's conclusions. On the initial direct appeal, the supreme court noted: "According to Livsey, he pulled forty dollars from his pocket and asked to buy crack cocaine, using slang terms to ask for the drugs. *The audio tape, however, itself contained no conversation clearly indicating that a drug transaction was taking place.*"[236] The supreme court drew the same conclusion later in its order affirming the denial of post-conviction relief: "Livsey testified that he made the buys using slang terms, *but the tape did not contain conversation clearly indicating that a drug transaction was taking place.*"[237] Thus, the post-conviction court's reliance on the tape recording evidence offered at trial is impeached by the state supreme court's view of that same evidence, yet neither court seems to have identified this inconsistency.

Additionally, the trial and post-conviction hearing transcripts also cast doubt on the accuracy and reliability of the post-conviction court's findings. For example, in rejecting the testimony of four attorneys called by Buckley to testify about the physical impossibility the two officers' observance of the events that purportedly occurred on Buckley's front porch, the trial court ignored inconsistencies in the testimony of the officers and the informant, Livsey. While the two officers both testified concerning events that occurred on the front porch, Livsey himself testified that the transaction actually occurred inside the residence.[238] The officers offered no testimony relating to the purported drug transaction based on direct observations of the transaction. Moreover, in her testimony at the post-conviction evidentiary hearing, Card admitted that while she testified at trial that she observed Buckley himself on the porch, relying on her observations in her affidavit for the search warrant executed on January 14, she actually only saw a large person on the porch whom she assumed was Buckley.[239]

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236. *Buckley I*, 341 Ark. at 866-67, 20 S.W.3d at 333 (emphasis added).

237. *Buckley IV*, 2007 WL 1509323, at *3 (emphasis added).

238. *Buckley I*, 341 Ark. at 866, 20 S.W.3d at 333; Transcript of Post-Conviction Evidentiary Hearing at 410-11, 453-55, State v. Buckley, No. CR 99-13 (Ark. Cir. Ct. 1999).

239. Transcript of Post-Conviction Evidentiary Hearing at 410-11, 453-55, State v. Buckley, No. CR 99-13 (Ark. Cir. Ct. 1999).

Thus, Livsey provided the only direct evidence concerning Buckley's purported involvement in the drug transactions upon which the prosecution was based, yet Livsey was significantly impeached. He admitted that he participated in the buys because he had been arrested for shoplifting and the police agreed to drop the charges in return for his help; that in addition he was paid $100 to participate; and that he had prior felony convictions in Illinois and pending felony charges at the time of trial.[240]

Nonetheless, the post-conviction court concluded that Buckley was not prejudiced by the State's failure to disclose evidence relating to Agent Ray's misconduct in the *Bragg* case, despite recognizing its potential use as impeachment evidence at Buckley's trial.[241]

3. The Arkansas Supreme Court's Disposition on Appeal

On appeal from the denial of post-conviction relief by the trial court, the Arkansas Supreme Court expressly upheld the trial court's findings and conclusions rejecting Buckley's arguments on his claims of prosecutorial misconduct.[242] The supreme court's decision on the merits would appear sufficient to resolve the controversy regarding the State's failure to disclose Ray's misconduct in *Bragg* without additional

240. Brief for Appellant, *supra* note 156, at AB-5.

241. An additional potential problem in Agent Ray's conduct in the Buckley drug transaction itself surfaced in the post-conviction hearing. The amount of cocaine purportedly purchased in the two undercover buys reported by Livsey would have been approximately eight-tenths of a gram of cocaine, with each ten dollars spent representing the purchase of one-tenth of a gram. Livsey claimed to have made two different forty-dollar buys. But the state crime lab reported that Agent Ray turned in less than one-half the amount supposedly purchased—two-tenths of a gram on one buy and less than two-tenths of a gram on the other. Transcript of Post-Conviction Evidentiary Hearing at 89-91, State v. Buckley, No. CR 99-13 (Ark. Cir. Ct. 1999). Thus, Ray actually sent less than one-half of the amount of cocaine Livsey purportedly purchased from Buckley to the crime lab. Card explained that narcotics officers routinely kept part of drugs seized during an arrest or transaction for later use in supplying informants with drugs and that she was aware of Agent Ray's conduct. She concluded that "[e]verybody sitting in this courtroom has got access to cocaine." *Id.* at 448. This means that Agent Ray could well have supplied his informant Livsey with cocaine from another arrest and together fabricated all evidence relating to Buckley's purported sale of cocaine to Livsey. This scenario is rendered less speculative by the findings of the federal habeas court in *Bragg v. Norris*, where Agent Ray was found to have fabricated the case against Rodney Bragg.

242. *Buckley IV*, 2007 WL 1509323, at *7 ("The trial court was not clearly erroneous in denying appellant's claims of prosecutorial misconduct or newly discovered evidence, or in finding that counsel was not ineffective.").

comment. The court did not limit its disposition this clearly, however. Instead, the court proceeded to rule that all misconduct claims relating to Ray or the trial testimony of the officers monitoring the drug transactions were not properly before the court on appeal because they had been raised in a Rule 37 petition, rather than by petition for writ of error *coram nobis*.[243]

Despite the fact that the court itself had remanded the cause for an evidentiary hearing in its 2005 order in *Buckley III*, two years later it held in *Buckley IV* that the misconduct claims were not properly before it on appeal from denial of post-conviction relief by the trial court.[244] Instead, relying on the intervening opinion in *Howard v. State*, the court held that a claim of misconduct by the prosecution in failing to meet its constitutional disclosure obligation must be brought by writ of error *coram nobis*, an extraordinary remedy, rather than by seeking post-conviction relief pursuant to Rule 37.1.[245]

The application of *Howard* to deprive Buckley of a remedy for the claimed misconduct, which prompted the court to reverse and remand the cause for an evidentiary hearing in *Buckley III*, effectively foreclosed review of those claims on the merits. Even though the claims suggested sufficient potential merit to require remand for an evidentiary hearing in 2005—prior to the court's decision in *Howard*—the court's disposition in *Buckley IV* frustrated his reliance on the prior history of litigation. The change in law barring litigation of *Brady*-based misconduct claims in Rule 37 litigation was not merely a procedural change and it certainly was not designed as an enhancement of the remedy for enforcing existing claims. Instead, it represented a retroactive change to the process previously available under Rule 37.1 for addressing substantive *Brady*-based misconduct claims. The court candidly admitted the irregularity in holding that Buckley's claims had not been properly presented in his Rule 37.1 petition:

> [O]ur decision in *Howard v. State*, 367 Ark. 18, 238 S.W.3d 24 (2006), clearly holds that claims of prosecutorial

243. *Id.* at *2 ("[C]laims of prosecutorial misconduct are not cognizable in a proceeding pursuant to Rule 37.1.").

244. *Id.*

245. *Id.* (citing Howard v. State, 367 Ark. 18, 26-27, 238 S.W.3d 24, 32 (2006)).

> misconduct are not cognizable in a proceeding pursuant to Rule 37.1. *Prior to that decision and our order remanding for findings of fact, we had disposed of a number of claims in Rule 37.1 proceedings without directly addressing that issue, and the State had conceded what was, at the time, the open possibility that we might entertain claims of prosecutorial misconduct in the form of perjury in a Rule 37.1 proceeding.*[246]

Nevertheless, in *Buckley IV*, the court held that *Howard* applied retroactively, barring consideration of those claims upon which the court had remanded the case for an evidentiary hearing. It concluded: "Our decision in *Howard now forecloses* further consideration of those claims in this proceeding."[247]

4. Rejection of Buckley's First Coram Nobis Petition

Following the state supreme court's refusal to consider Buckley's prosecutorial-misconduct claims on direct appeal,[248] Buckley filed a motion for leave to file a petition for writ of *coram nobis* in that court.[249] In the motion for leave to file, Buckley argued that because the supreme court retained jurisdiction over the case while his petition for rehearing remained pending and the record had already been developed in the post-conviction proceedings, the supreme court should proceed to adjudicate his claims relating to the alleged perjury at trial and non-disclosure of Ray's perjury.[250] The court rejected this position, instead electing to treat the motion for leave to file in the supreme court as a motion for leave to file the petition in the trial court.[251] It subsequently denied the motion for leave to file,[252] finding that because Buckley could have filed for *coram nobis* relief on the Ray perjury claim upon learning of it some six years earlier, he failed to exercise due diligence in not

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246. *Id.* (emphasis added).

247. *Buckley IV*, 2007 WL 1509323, at *2 (emphasis added).

248. Buckley advanced four different prosecutorial-misconduct claims on direct appeal. The first two addressed the issues involving the claimed false trial testimony and Ray misconduct claims, respectively. The third combined those two issues. *See id.* at *1. The fourth reasserted these claims as newly discovered evidence claims. *See id.* at *1-2.

249. *Buckley V*, No. CR 01-644, 2007 WL 2955980, at *1 (Ark. Oct. 11, 2007).

250. *Id.* at *1-3.

251. *Id.* at *1.

252. *Id.* at *5.

asserting the misconduct claim upon learning of Ray's perjury in *Bragg*.[253]

With respect to the misconduct claim relating to the officers who testified about their observations while monitoring the drug transactions, the court held that the question of their veracity was addressed at trial during cross-examination and, thus, not cognizable in post-conviction litigation.[254] Although trial counsel did question the accuracy of their observations at trial, however, the misconduct claim was based upon knowing the falsity of the testimony, a matter that counsel was not required to anticipate by assuming that prosecution witnesses—police officers—would testify falsely under oath.[255]

The supreme court's rejection of Buckley's claims that had been raised in his Rule 37.1 proceeding did not end its consideration of misconduct in his case. In addition to those claims, Buckley raised a claim for *coram nobis* relief that was only disclosed during the testimony of Officer Linda Card during the evidentiary hearing.[256] This claim involved a videotaped interview of the confidential informant, Livsey.[257] At the hearing, Card was not permitted to offer her opinion as to whether the tape contained any exculpatory information,[258] but the prosecuting attorney, Henry Morgan, denied that he had ever viewed the tape or knew of its existence prior to her disclosures.[259] Although he testified that he would have disclosed exculpatory information to trial counsel, Morgan could

253. *Id.* at *2-3. The court noted that because the *coram nobis* and Rule 37.1 remedies had not been treated as exclusive prior to *Howard*, Buckley could have elected to litigate his *Brady*-based misconduct claims by *coram nobis*, instead of proceeding under Rule 37.1.

254. *Buckley V*, 2007 WL 2955980, at *2.

255. *See* Stickler v. Greene, 527 U.S. 263, 285, 287 (1999).

256. *Buckley V*, No. CR 01-644, 2007 WL 2955980, at *4 (Ark. Oct. 11, 2007).

257. *Id.*

258. Transcript of Post-Conviction Evidentiary Hearing at 459, *Buckley V*, No. CR 01-644, 2007 WL 2955980 (Ark. Oct. 11, 2007). The trial court sustained defense counsel's objection to the prosecutor's question concerning Agent Card's opinion as to whether the tape contained exculpatory evidence. The state supreme court, however, concluded that Buckley failed to show that any exculpatory evidence existed. *Buckley V*, 2007 WL 2955980, at *4 ("While Officer Card testified that she did not believe that the tape included any exculpatory material, the prosecutor had not been provided a copy in order to make any assessment.").

259. Transcript of Post-Conviction Evidentiary Hearing at 465, 467-69, *Buckley V*, No. CR 01-644, 2007 WL 2955980.

not have evaluated its potential for use by the defense because police had not disclosed its existence to him.[260]

Post-conviction defense counsel's attempt to secure the videotape from the prosecutor's office had been unsuccessful prior to filing the motion for leave to file the petition, and consequently counsel was unable to make any specific claims regarding the contents of the videotape or its potential as exculpatory or impeachment evidence at trial.[261] The supreme court concluded that Buckley exercised due diligence in bringing the claim, but it held that the inability to actually point to discoverable material on the videotape or regarding Livsey resulted in a failure to establish that the videotape contained material evidence meeting the *Brady* disclosure requirement essential to a *coram nobis* claim.[262] Consequently, the court declined to grant leave to file the petition.[263]

With regard to the claimed suppression of the videotape, the court's disposition demonstrates one of the significant problems posed by the court's overall approach to prosecutorial-misconduct claims. In order to prevail, the defense must be able to produce the suppressed material. The prospects for doing so are, in a real sense, hit or miss at best, particularly when one considers that the essence of the claim is that the prosecutor or police, as members of the prosecution team, are already being accused of improperly suppressing the evidence.

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260. *See Buckley V*, 2007 WL 2955980, at *4; Transcript of Post-Conviction Evidentiary Hearing at 469, *Buckley V*, No. CR 01-644, 2007 WL 2955980.

261. Buckley offered the affidavit of counsel who presented his case at the Rule 37.1 hearing, Little Rock attorney Patrick J. Benca, who explained that while the deputy prosecuting attorney had agreed to provide a copy of the videotaped interview with Livsey to the defense, the videotape was never supplied to petitioner's counsel. *See* Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, Buckley v. Norris, No. 5-08-CV-0157 JLH/JTR (E.D. Ark. May 28, 2008).

262. *Buckley V*, 2007 WL 2955980, at *4. The supreme court explained:

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

Id.

263. *Id.* at *5.

The supreme court's retroactive application of its decision in *Howard* to hold Buckley's Rule 37.1 claims defunct clearly raises a question of basic fairness in the administration of the criminal-justice system. However, *Buckley IV* and *Buckley V* clarified that *Brady*-based misconduct claims must now be presented in *coram nobis* applications, removing any uncertainty or duplication from their prior consideration in Rule 37.1 post-conviction litigation. The *coram nobis* process, in fact, offers defendants certain significant advantages over Rule 37.1, albeit by substituting an extraordinary remedy for the *right* to litigate constitutional claims under the state post-conviction remedy.

IV. THE WRIT OF ERROR *CORAM NOBIS* IN ARKANSAS LAW

The writ of error *coram nobis* is a remedy recognized at the common law for correction of errors not appearing in the record that would have prevented or precluded rendition of judgment.[264] As many courts have imposed limitations on the use of more recent statutory or court-promulgated, post-conviction remedies, reliance on this extraordinary remedy has surfaced as an alternative litigation strategy.[265] Its potential value has been suggested for litigation of actual innocence claims when other remedies are unavailable.[266] For example, newly available scientific evidence that exonerates a defendant, such as DNA evidence, might arguably be an appropriate subject for litigation through an extraordinary writ, although the use of *coram nobis* for this purpose has been rejected by the Arkansas

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264. The United States Supreme Court addressed the continuing viability of the writ of *coram nobis* in federal litigation in *United States v. Morgan*, where the defendant, serving a state-court sentence and no longer in custody on his federal conviction, challenged that underlying conviction based upon denial of counsel. 346 U.S. 502, 507-13 (1954).

265. *See generally* Steven J. Mulroy, *The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent*, 11 VA. J. SOC. POL'Y & L. 1 (2003) (noting the increasing use of the writ by Tennessee inmates in recent years).

266. *See* Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629, 638-40 (2000) (determining that Arkansas's "post-trial procedures provide little opportunity for a prisoner to establish his or her actual innocence through newly discovered evidence.").

Supreme Court.[267] Or it might provide a remedy for litigation of claims based upon changes in substantive law that arguably would apply to undo an otherwise final conviction.[268]

Arkansas has long recognized the writ of error *coram nobis* as a remedy for extra-record factors that would prevent entry of judgment or execution of sentence.[269] In *Adler v. State*, for instance, the Arkansas Supreme Court recognized the propriety of reliance on the writ where relief was sought to prevent the

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267. *Id.* at 639; Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 676 n.157 (2005). Arkansas now provides an alternative post-conviction remedy in the nature of habeas corpus for actual innocence claims based on newly discovered or newly available DNA or other scientific evidence. ARK. CODE ANN. §§ 16-112-201, to -208 (Repl. 2006). Prior to adoption of the statute, the state supreme court had held that the proper avenue for relief from a conviction based on newly discovered DNA evidence was through an appeal for executive clemency. Pitts v. State, 336 Ark. 580, 584, 986 S.W.2d 407, 409-10 (1999); *see also* Odette B. Woods, *Annual Survey of Caselaw—Criminal Law*, 22 U. ARK. LITTLE ROCK L. REV. 793, 802 (2000) (discussing denial of *coram nobis* relief based on DNA evidence in *Pitts*). The *Pitts* case continues to cause problems. The Arkansas Democrat-Gazette reported on November 30, 2008, that the resolution of the writ filed pursuant to section 16-112-201 of the Arkansas Code was complicated because the hair sample Pitts sought to have tested for DNA had apparently been lost. *See* John Lynch, *Evidence Needed for New Trial Lost*, ARK. DEMOCRAT GAZETTE, Nov. 30, 2008, at B1. The Arkansas Supreme Court acknowledged the loss of the DNA evidence in its opinion rejecting Pitts's claim that the test results would exonerate him and require relief from his conviction. Pitts v. State, 2011 Ark. 322, at 1-2, 6, 2011 WL 3930396, at *1, *3 (per curiam).

268. This option has been proposed for federal litigants in Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1491-92 (2002), to avoid the bar for retroactive application of new rules under *Teague v. Lane*, 489 U.S. 288 (1989). But in *Burnett v. State*, No. CR 85-44, 2006 WL 246554, at *2 (Ark. Feb. 2, 2006), the Arkansas Supreme Court rejected a claim for relief in *coram nobis* where the defendant argued that legislative action in changing the elements of first-degree murder, on which her conviction rested, should be applied retroactively to her conviction. The court had overruled *Burnett v. State*, 287 Ark. 158, 697 S.W.2d 95 (1985) in *Midgett v. State*, 292 Ark. 278, 287, 729 S.W.2d 410, 414 (1987), *superseded by statute*, ARK. CODE ANN. § 5-10-101(a)(9) (Supp. 2011). The court had previously held that Burnett's prior post-conviction action constituted a direct attack on her conviction not cognizable in post-conviction. Burnett v. State, 293 Ark. 300, 303, 305, 307, 737 S.W.2d 631, 633-35 (1987). The court similarly held that Burnett's claim was not cognizable in *coram nobis*. Consequently, there is no remedy other than clemency for a conviction affirmed on direct appeal, but subsequently overruled in another case, under Arkansas law.

269. For the court's perspective on the development of post-conviction remedies in the state, see *Chisum v. State*, 274 Ark. 332, 333-34, 625 S.W.2d 448-49 (1981) (noting the initial development of the post-conviction writ with the adoption of Rule 1 of the Arkansas Rules of Criminal Procedure in 1965). For a history of the writ of *coram nobis* in Arkansas, see John H. Haley, Comment, *Coram Nobis and the Convicted Innocent*, 9 ARK. L. REV. 118 (1955).

execution of a defendant who was allegedly insane at the time of trial.[270] Prior to *Penn v. State*, the writ was available for litigation of only three types of claims: (1) the accused's "insanity"[271] at the time of trial;[272] (2) conviction based on a coerced plea of guilty;[273] and (3) prosecutorial misconduct in withholding evidence that might have resulted in a different verdict at trial.[274] Thus, extra-record violations resulting from suppression of exculpatory evidence were within the ambit of *coram nobis* relief before the court's decisions in *Howard* and *Buckley IV*. However, the writ has consistently been

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270. 35 Ark. 517, 518, 521-22, 1880 WL 1721, at *1 (1880); *accord* Linton v. State, 72 Ark. 532, 533-34, 81 S.W. 608, 609 (1904).

271. Use of the term "insanity" may be misleading since insanity, or lack of capacity under Arkansas law, actually relates to the state of mind or impairment of mental state at the time of commission of the offense, rather than at the time of trial. ARK. CODE ANN. § 5-2-313(a)(2) (Repl. 2006). The latter circumstance is typically referred to as "competency" or fitness to proceed under Arkansas law. ARK. CODE ANN. § 5-2-302 (Repl. 2006). The trial of an incompetent accused, rendered unable to comprehend the nature of the proceedings or assist counsel in the defense, violates federal due process. Medina v. California, 505 U.S. 437, 439 (1992). It is statutorily prohibited in Arkansas:

> No person who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.

ARK. CODE ANN. § 5-2-302(a).

272. *See* Hydrick v. State, 104 Ark. 43, 45, 148 S.W. 541, 541-42 (1912) (citing Johnson v. State, 97 Ark. 131, 133 S.W. 596 (1911)). More recently, in *Graham v. State*, the court held that an allegation that the petitioner was incompetent at the time he entered his plea of guilty is cognizable in *coram nobis*, but may not be raised under the habeas corpus remedy for newly discovered scientific evidence supporting a claim of actual innocence under Act 1780 of 2001. 358 Ark. 296, 297-98, 188 S.W.3d 893, 895 (2004).

273. *Coram nobis* traditionally permitted an attack on a guilty plea induced by coercion. *See, e.g.*, Pitts v. State, 336 Ark. 580, 583, 986 S.W.2d 407, 409 (1999). However, in *Bryant v. State*, the court rejected a post-conviction attack on a guilty plea allegedly obtained by "reprehensible methods of persuasion to gain the plea . . . ." 323 Ark. 130, 132, 913 S.W.2d 257, 258 (1996). The court rested its holding on inadequacy of supporting proof, rather than because the capital litigant had proceeded by Rule 37 action instead of *coram nobis*. *Id.*

274. Larimore v. State, 327 Ark. 271, 279-80, 938 S.W.2d 818, 822 (1997); Davis v. State, 325 Ark. 96, 109, 925 S.W.2d 768, 775 (1996); Taylor v. State, 303 Ark. 586, 594, 799 S.W.2d 519, 524 (1990).

characterized by the state supreme court as a "rare"[275] and "exceedingly narrow remedy."[276]

In 1984, in *Penn*, the court expanded use of *coram nobis*, recognizing its use to raise an issue of newly available or newly discovered exculpatory evidence based on the confession by another individual to the commission of the offense for which the defendant had been convicted.[277] In extending *coram nobis* to afford a remedy in this context, however, the *Penn* court limited reliance on the writ to situations in which the actual evidence of innocence is discovered and the writ is filed *prior to* disposition of the case on direct appeal.[278]

Moreover, even when the allegation of a third-party confession is timely asserted, these claims are viewed with skepticism, as the court's decision in *Clark v. State* demonstrates.[279] In *Clark* , the defendant's claim that he had been exonerated by a third-party confession was asserted in a petition for writ of error *coram nobis* filed directly in the trial court while it retained jurisdiction over the defendant's motion for a new trial.[280] The co-defendant had offered testimony in the

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275. *Larimore*, 327 Ark. at 279, 938 S.W.2d at 822; *Davis*, 325 Ark. at 109, 925 S.W.2d at 775; *Taylor*, 303 Ark. at 594, 799 S.W.2d at 524. The *coram nobis* remedy is criticized in Doug Ward, *Post Conviction Remedies in Arkansas: What's a Lawyer to Do?*, ARK. LAWYER 23, 25 (1994) ("This remedy is little used because it is rarely useful.").

276. Pitts v. State, 336 Ark. 580, 582, 986 S.W.2d 407, 409 (1999).

277. Penn v. State, 282 Ark. 571, 574, 576, 670 S.W.2d 426, 428-29 (1984) (overruling Gross v. State, 242 Ark. 142, 412 S.W.2d 279 (1967)). *See* John H. Haley, *supra* note 269, at 128 (arguing that Arkansas should permit litigation of newly discovered evidence claims based on third-party confessions, urging that "the court will endorse the 'rule of reason' in plugging a serious procedural gap and obviating possibilities of a miscarriage of justice.").

278. *Penn*, 282 Ark. at 577, 670 S.W.2d at 429-30. Newly discovered evidence is not a ground for *coram nobis*, except in the limited circumstances of a third-party confession surfacing prior to disposition of the case on direct appeal. Smith v. State, 301 Ark. 374, 375-76, 784 S.W.2d 595, 596 (1990). Newly discovered evidence may provide a ground for relief in a timely filed motion for new trial. *Penn*, 282 Ark. at 574, 670 S.W.2d at 428 (citing Halfacre v. State, 265 Ark. 378, 578 S.W.2d 237 (1979)). However, "newly discovered evidence is one of the least favored grounds to justify granting a new trial." Bennett v. State, 307 Ark. 400, 404, 821 S.W.2d 13, 15 (1991) (granting a new trial based on evidence of a witness's false testimony); Williams v. State, 252 Ark. 1289, 1292, 482 S.W.2d 810, 812 (1972). A new trial "will not be granted because of perjury on an immaterial issue, or on a collateral issue, nor generally where the false testimony may be eliminated without depriving the verdict of sufficient evidentiary support." Little v. State, 161 Ark. 245, 251, 255 S.W. 892, 894 (1923) (quoting 16 C.J.S. *Criminal Law* § 2715).

279. 358 Ark. 469, 192 S.W.3d 248 (2004).

280. *Id.* at 478, 192 S.W.3d at 254.

attempted capital murder prosecution that exculpated the defendant by denying that he had told the defendant that he intended to fire a weapon at a police officer and then throw the gun out.[281] The trial court denied relief and the supreme court, employing the abuse of discretion standard, upheld the trial court's ruling.[282] It reasoned that because counsel posed a compound question to the co-defendant, his negative response was ambiguous because it could have applied to both parts of the question, or either, in which case it would not have exculpated the accused.[283]

What is critical in understanding the court's traditional notion of *coram nobis* is that it is not a remedy designed to correct injustice from wrongful conviction, but one directed only at the carefully circumscribed categories of violations that the court has deemed "fundamental," implicating procedural unfairness in the process leading to conviction. Thus, in *Dansby v. State*, a capital murder conviction in which a death sentence was imposed, the court concluded that the defendant's evidence was not sufficient to warrant relief, even though it was exculpatory.[284] The court explained the difference between error of a fundamental character warranting relief through *coram nobis* and newly discovered evidence. *Coram nobis*, according to the court, is available only upon a showing of evidence or facts sufficient to show a reasonable probability that it would have prevented entry of judgment, "not that the newly discovered evidence *might* have produced a different result had it been known to judge and jury."[285] Dansby failed to show "that there was some deliberate suppression of exculpatory evidence by the State such that a fundamental error extrinsic to the record occurred."[286] Thus, *Dansby* reinforces the traditional

281. *Id.*

282. *Id.* at 481-82, 192 S.W.3d at 256.

283. *Id.* at 480, 192 S.W.3d at 255-56 n.3 (observing that even if the co-defendant's testimony exculpated Clark on the issue of the shooting, relief was properly denied on the theory that it did not exculpate Clark as to the allegation that he deliberately steered his car to strike the officer).

284. 343 Ark. 635, 637, 641, 37 S.W.3d 599, 600, 603 (2001).

285. *Id.* at 641, 37 S.W.3d at 603.

286. *Id.* One problem with the court's description of the standard for relief through *coram nobis* is the reference to the petitioner's burden of showing that there was a "deliberate suppression of exculpatory evidence . . . ." *Id.* This formulation is contrary to the *Brady* rule that intent is essentially irrelevant in assessing a suppression or non-

rule that *coram nobis* is not available to assert claims of newly discovered evidence, except when those claims involve the admission of culpability for the offense exculpating the defendant while the direct appeal remains pending from the conviction.[287]

The scope of *coram nobis* is limited to those categories precisely defined by prior decisions unless the supreme court expands the remedy, as it did in *Penn*, by holding that the confession of a third party produced prior to termination of appellate proceedings, warrants remand of the case to the trial court. In *Pacee v. State*, for instance, the court rejected *coram nobis* as a remedy to challenge counsel's effectiveness in representing the capital defendant based, at least in part, on limits imposed for compensation of capital counsel at the time.[288]

However, in *Echols v. State*, the court rejected the State's argument that *coram nobis* had essentially been superseded, for instance, by the statutory means of determining the defendant's competence to stand trial.[289] Instead, the court continued to affirm *coram nobis* as affording a remedy for this type of claim.[290] In striking contrast to its treatment of *Brady*-based prosecutorial misconduct in *Howard* and *Buckley IV*, the court did not hold that *coram nobis* was the exclusive remedy for Echols's claim that he was not fit to proceed at the time of his

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disclosure claim. *See* Illinois v. Fisher, 540 U.S. 544, 547 (2004) (prosecutor's good or bad faith irrelevant).

287. *See Dansby*, 343 Ark. at 641, 37 S.W.3d at 603; *see also* Smith v. State, 301 Ark. 374, 376, 784 S.W.2d 595, 596 (1990).

288. 332 Ark. 184, 185-86, 962 S.W.2d 808, 810 (1998).

289. 354 Ark. 414, 418-19, 125 S.W.3d 153, 156-57 (2003). Arkansas statutory law incorporates the federal due-process requirement that a criminal accused not be compromised in his understanding of the nature of the proceedings against him or to assist counsel in preparing and presenting his defense as a result of a mental disease or defect. *See* ARK. CODE ANN. § 5-2-302 (Repl. 2006); Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (constitutional requirement for competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."); Bishop v. United States, 350 U.S. 961, 961 (1956) (per curiam). The Arkansas Code also includes specific provisions setting out the procedures for making the initial competency determination and then subsequently proceeding. *See* ARK. CODE ANN. §§ 5-2-204 to -311 (Repl. 2006 & Supp. 2011).

290. *Echols*, 354 Ark. at 418-19, 125 S.W.3d at 156-57; *see also* Graham v. State, 358 Ark. 296, 298, 188 S.W.3d 893, 895 (2004) (citing *Echols*, 354 Ark. 414, 125 S.W.3d 153).

trial.[291] Instead, the court, considering the fact that Echols had not filed for *coram nobis* relief until well after he had filed for post-conviction relief pursuant to Rule 37, observed that he could have raised his fitness or competency issue "within the Rule 37 proceedings, either as part of his claim of ineffective assistance of counsel *or as a freestanding issue.*"[292]

Thus, the *Echols* court recognized that Rule 37 and *coram nobis* were not mutually exclusive remedies, but offered overlapping avenues for collateral relief on a claim that the accused suffered a mental impairment rendering him unfit for trial. Similarly, the court has not restricted claims addressed to convictions resulting from a coerced guilty plea to litigation by writ of *coram nobis*. In *Graham v. State*, a capital prosecution, the court rejected the claim for *coram nobis* relief, observing that the appellant could have challenged the voluntariness of his guilty plea as coerced by proceeding under Rule 37.[293]

In fact, the Arkansas Supreme Court has consistently held that an attack on a claim that a guilty plea was coerced is within the ambit of Rule 37. In an unpublished opinion issued in 2007, *Raifsnider v. State*, the court expressly noted that "[w]hen a defendant pleads guilty, the only claims cognizable in a proceeding pursuant to a Rule 37.1 petition are those which allege that the plea *was not made voluntarily* and intelligently or was entered without effective assistance of counsel."[294] *Raifsnider* recognized the long-standing history of treating claims of coerced guilty pleas on the merits in Rule 37 litigation.[295] The court simply has not subjected coerced guilty

291. Similarly, in *Pardue v. State*, 363 Ark. 567, 215 S.W.3d 650 (2005), the supreme court rejected a claim on the merits brought in Rule 37.1 that the defendant's plea of guilty had been entered while he was mentally unfit because he was taking prescribed medication at the time. The court did not even suggest that Rule 37.1 was an improper vehicle for asserting this type of claim, or that *coram nobis* was the proper procedural device for litigating the issue. *Id.* at 569-71, 215 S.W.3d at 653-54.

292. *Echols*, 354 Ark. at 420, 125 S.W.3d at 157 (emphasis added).

293. 358 Ark. 296, 298-99, 188 S.W.3d 893, 895-96 (2004) (citing Taylor v. State, 324 Ark. 532, 533, 922 S.W.2d 710, 710 (1996)) ("[T]here is a remedy in place for challenging a plea of guilty on the grounds advanced by appellant, that is, Criminal Procedure Rule 37.1.").

294. No. CR 07-488, 2007 WL 4201157, at *1 (Ark. Nov. 29, 2007) (emphasis added).

295. *See, e.g.*, Pollard v. State, No. CR 06-423, 2006 WL 3515041, at *2 (Ark. Dec. 7, 2006) (trial court's findings were not clearly erroneous in rejecting testimony of petitioner and wife that he was coerced into pleading guilty to avoid exposing wife to

plea complaints, cognizable in *coram nobis*, to the requirement that defendants must resort to that remedy exclusively, precluding reliance on a post-conviction attack brought pursuant to Rule 37 and prior post-conviction remedies.

The unanswered question with respect to *Brady*-related prosecutorial-misconduct claims is why those claims—as opposed to other claims cognizable in *coram nobis*—were held barred from consideration in post-conviction proceedings under Rule 37 in *Howard* and *Buckley IV.* Neither decision offers any explanation for the disparate treatment given those claims in relegating them to litigation by writ of error *coram nobis,* while continuing to recognize *coram nobis* and Rule 37 as alternative remedies available to litigants attacking convictions obtained while the defendant lacked fitness to proceed due to mental impairment or obtained as a result of coerced guilty pleas. Nor does the court actually offer a compelling explanation as to why third-party confessions constituting newly-discovered evidence are cognizable during the pendency of the direct appeal in *coram nobis*,[296] but are wholly beyond the scope of Rule 37 relief.[297] Nonetheless, the court's position in *Buckley*, following *Howard*, is now clear: *Brady*-based misconduct violations must be litigated through the writ of error *coram nobis* process. And, *coram nobis* provides certain significant procedural advantages over Rule 37, provided the defendant makes the threshold

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adverse publicity); Barrigan v. State, No. CR 06-171, 2006 WL 2786850, at *1-2 (Ark. Sept. 28, 2006) (appeal from denial of Rule 37 relief failed where record did not include evidence that the guilty plea was coerced); Mills v. State, 338 Ark. 603, 606, 999 S.W.2d 674, 675 (1999) (sole issue in Rule 37 challenge to guilty plea relates to voluntariness of plea itself, not to coerced confession); State v. Herred, 332 Ark. 241, 251, 964 S.W.2d 391, 397 (1998) (reversing Rule 37 relief granted on a claim of a coerced plea based on a threat to prosecute family members and noting: "When a defendant pleads guilty, the only claims cognizable in Rule 37 proceedings are those which allege that the plea was not made voluntarily and intelligently or was entered without effective assistance of counsel."); Williams v. State, 273 Ark. 371, 374-75, 620 S.W.2d 277, 279 (1981) (plea of guilty induced by defendant's fear that sentence could be imposed at trial was not coerced); Renfro v. State, 264 Ark. 601, 602, 604-05, 573 S.W.2d 53, 55-56 (1978) (rejecting claim brought under previous Rule 37.3, alleging plea coerced by counsel and sheriff); Horn v. State, 254 Ark. 651, 655, 495 S.W.2d 152, 154-55 (1973) (rejecting claim that guilty plea coerced by counsel's ineffectiveness).

296. *See, e.g.*, State v. Scott, 289 Ark. 234, 234-35, 710 S.W.2d 212, 213 (1986) (granting new trial on *coram nobis* following discovery of third-party confession exculpating defendant while case pending on direct appeal).

297. *See* Cigainero v. State, 321 Ark. 533, 535-36, 906 S.W.2d 282, 284 (1995); Chisum v. State, 274 Ark. 332, 333-34, 625 S.W.2d 448, 449 (1981).

showing required for leave to file the petition for the writ of error.

A. The Jurisdictional Theory Underlying the Writ

Coram nobis provides a theoretically sound link in the structure of the criminal process. Claims cognizable in *coram nobis*, but known to the defense during the trial process, can typically be litigated both in the trial and on direct appeal. Once the trial court loses jurisdiction, either because the conviction results from a guilty plea or the case is appealed,[298] it cannot logically entertain a claim based on information not discovered by the defense until after the trial court has lost jurisdiction. Thus, once the trial court has lost jurisdiction, the Arkansas Supreme Court requires that a motion be filed in the supreme court for leave to file the petition for writ of error *coram nobis* in the trial court.[299] Consequently, if the defense becomes aware of a third-party confession of guilt exculpating the defendant after the time for filing a motion for a new trial, the court's holding in *Dansby* permits the claim to be raised by petitioning the supreme court to reinvest jurisdiction in the trial court while the case remains pending on appeal.

In contrast, under Rule 37, the trial court regains jurisdiction in felony cases once the post-conviction writ is properly filed. The only apparent exceptions exist in cases in which the defendant is not physically imprisoned—if the defendant is not sentenced to a term of imprisonment as a result of imposition of a probated or fully suspended sentence, or if only a fine has been imposed by punishment.[300] *Coram nobis* apparently provides the only remedy for litigation of a *Brady*-based misconduct claim in those cases in which a probated, fully

298. Under Arkansas law, no appeal lies from a guilty plea as a matter of right. Reeves v. State, 339 Ark. 304, 308-09, 5 S.W.3d 41, 43 (1999) (noting that Rule 1(a) of the Arkansas Rules of Appellate Procedure—Criminal does not afford the accused a right of appeal from a guilty plea except when based on a conditional plea of guilty, an appeal from a sentencing proceeding before a jury upon plea of guilty, or from a challenge to an illegal sentence). The court has recognized the right to appeal from a denial of the defendant's motion to withdraw his guilty plea. *See* Green v. State, 362 Ark. 459, 463, 209 S.W.3d 339, 341 (2005).

299. Dansby v. State, 343 Ark. 635, 637, 37 S.W.3d 599, 600 (2001).

300. *See* Scott v. State, No. CR 05-351, 2006 WL 302351, at *1 (Ark. Feb. 9, 2006); Bohanan v. State, 336 Ark. 367, 372, 985 S.W.2d 708, 710 (1999).

suspended or fine-only sentence precludes reliance on Rule 37 if the discovery of the suppression or non-disclosure does not occur while the defendant still has the option of filing a motion for a new trial.

The trial court does have jurisdiction to review issues arising outside the scope of trial and not disclosed prior to the time for filing a motion for a new trial in the post-conviction process.[301] But for those matters cognizable *only* in *coram nobis*, such as prosecutorial misconduct, the trial court cannot regain jurisdiction through the normal post-conviction process provided by Rule 37. The supreme court must reinvest the circuit court with jurisdiction by granting the defendant leave to file the petition for writ of error *coram nobis* in the trial court.

The *Buckley IV* court failed to address an apparent contradiction with respect to its jurisdictional analysis because the circuit court had jurisdiction to consider the ineffective assistance claims that Buckley had raised along with his *Brady* misconduct claims in his Rule 37 petition. The resolution likely lies in subject-matter jurisdiction instead of a general reference to jurisdiction. The *Howard-Buckley* rule simply precludes the circuit court from exercising subject-matter jurisdiction over a *Brady* misconduct claim raised in a conventional post-conviction action, requiring instead that the supreme court first evaluate the claim and determine whether it is potentially meritorious once the trial court has lost jurisdiction after the defendant has given notice of appeal.

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301. Rule 33 of the Arkansas Rules of Criminal Procedure defines the parameters of the motion for a trial remedy that may include claims not arising in the course of the pretrial and trial phases of litigation. Subsection (b) of the rule, however, limits the time for filing the motion for a new trial to a thirty-day period following entry of judgment. ARK. R. CRIM. P. 33(b). Some revelations warranting a new trial may be discovered by the defense during this period and are appropriate for the new trial motion. *See, e.g.*, Larimore v. State, 309 Ark. 414, 418-19, 421, 833 S.W.2d 358, 360-61 (1992) (case remanded for a new trial when evidence showed that jurors had inadvertent access to evidence that had been excluded or not admitted at trial that was prejudicial to the accused); Bennett v. State, 307 Ark. 400, 403-04, 821 S.W.2d 13, 14-15 (1991) (case remanded for a new trial based on newly discovered evidence of perjury by a prosecution witness, the investigating officer, at trial); Cantrell v. State, 265 Ark. 263, 265-66, 577 S.W.2d 605, 606-07 (1979) (presence of an alternate juror in jury room during deliberations warranted a new trial).

B. Procedural Aspects of *Coram Nobis*

The *coram nobis* remedy differs in important aspects from the post-conviction remedy afforded under Rule 37 and the differences offer distinct advantages to the use of *coram nobis* as a means to raise claims of prosecutorial misconduct in the suppression of favorable evidence. In particular, the lack of fixed time limits for filing and formal rules governing the petition and its contents are likely very beneficial in some circumstances for presentation of this type of claim when compared to comparable procedural rules in place for post-conviction applications under Rule 37.

1. Time for Asserting the Misconduct Claim

Most important, of course, is the fact that the writ is not governed by the restrictive time limits for asserting claims under Rule 37. Where the post-conviction action collaterally attacks a non-capital conviction obtained on a plea of guilty judgment or at trial that was not appealed, Rule 37.2 requires that the petition be filed within ninety days of the entry of judgment.[302] The filing period is sixty days when the case has been appealed and runs from issuance of the mandate from the appellate court.[303] The only exception to these filing periods applies in capital cases in which the sentence of death has been imposed. After an affirmance of a capital conviction and capital sentence by the Arkansas Supreme Court,[304] the circuit court must conduct a hearing, which must take place within twenty-one days after the issuance of the mandate, to consider appointing an attorney for post-conviction relief. Any post-conviction relief must be filed within ninety days after entry of the order.[305]

In contrast to the rigid filing periods governing petitions brought pursuant to Rules 37.2 and 37.5, there is no fixed time limit for asserting a claim in *coram nobis*. As the court again affirmed in *Buckley V*, the only requirement is that the petitioner exercise due diligence in petitioning for leave to reinvest the

302. ARK. R. CRIM. P. 37.2(c)(i).
303. ARK. R. CRIM. P. 37.2(c)(ii).
304. ARK. R. CRIM. P. 37.5(b)(1)(A).
305. ARK. R. CRIM. P. 37.5(e).

trial court with jurisdiction to hear the claim.[306] The obvious significance of the flexibility afforded by *coram nobis* is that those claims initially discovered past the time for filing a motion for a new trial or a petition for post-conviction relief under Rule 37 are not time-barred by the limits set by the court for reliance on those remedies. Thus, *coram nobis* is less restrictive in terms of setting fixed time limits for presentation of claims of misconduct, and a petitioner proceeding diligently is not disqualified as a result of the application of an arbitrary limitations period.

However, because the court has not set out the parameters for due diligence in the investigation and assertion of a misconduct claim, it is not clear whether some petitioners may be subject to default precisely because the undefined requirement for diligence is not met in individual cases. In *Echols v. State*, the court held that the claim that Echols was incompetent at the time of trial, supported by expert opinion offered by the defendant,[307] was rejected because it was untimely, asserted ten years after trial and conviction.[308] But, in holding that Echols had not demonstrated due diligence in asserting his challenge, the court considered his arguments that

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306. *Buckley V*, No. CR 01-644, 2007 WL 2955980, at *2 (Ark. Oct. 11, 2007).

307. 354 Ark. 414, 418, 125 S.W.3d 153, 156 (2009). In addition, Echols had alleged that he was involuntarily medicated while in custody awaiting trial, an allegation that the court accepted as evidence relating to his competence to stand trial, but not as an independent ground for relief in *coram nobis*. *Id.* at 417 n.1, 125 S.W.3d at 156 n.1. This distinction, based on counsel's explanation at oral argument, demonstrates one of the flaws in the strict application of the *coram nobis* remedy to the claims recognized as appropriate for extraordinary relief, because involuntary medication of a drug affecting an accused's ability to participate in trial, but not sufficient to impair him under the standard for fitness in section 5-2-302 of the Arkansas Code would not strictly demonstrate his insanity at the time of trial, but would certainly have implicated due-process considerations. *See* Riggins v. Nevada, 504 U.S. 127, 137-38 (1992) (forced medication of capital defendant with antipsychotic drugs at time of trial violated due process in absence of specific findings supporting necessity for medication and appropriateness of dosage ordered). In the unpublished 2003 opinion of *McDonald v. State*, for instance, the petitioner alleged that he was hallucinating and disoriented due to improper treatment of his hypoglycemic condition while in custody and was improperly coerced by a newly appointed public defender—having previously represented himself—to take a plea offer. No. CR 02-1317, 2003 WL 22510805, at *1 (Ark. Nov. 6, 2003). The court rejected his claim, arguing that he was aware of his condition at the time and failed to produce a record demonstrating that he did not voluntarily enter into the plea agreement despite his claimed impairment. *Id.* at *2. The court refused to order an evidentiary hearing on the claim. *Id.*

308. *Echols*, 354 Ark. at 419, 125 S.W.3d at 157.

he had not been "aware of the extent of the mental problems that he was facing at the time of trial, and that his illness actually prevented him from being aware of his incompetency."[309] Echols also argued that he had been administered drugs without his consent before and during his trial.[310] In rejecting his claim based on lack of due diligence, the court observed that the same medical records offered to support the claim of incompetence to stand trial had been available post-conviction for some six years prior to the filing of the Rule 37 petition in the case, and thus Echols could have filed for relief at that time.[311] Since there is no right to either post-conviction remedies[312] or to counsel for the prosecution of those remedies under the Sixth Amendment,[313] the fact that Rule 37 counsel failed to recognize and pursue Echols's claim that he was impaired due to his mental illness would have afforded him no basis for relief in any subsequent federal habeas action.[314]

Moreover, the court's treatment of the differing misconduct claims raised by Buckley in his application for relief through

309. *Id.* at 418, 125 S.W.3d at 156.

310. *Id.*

311. *Id.* at 419-20, 125 S.W.3d at 157. Similarly, in *Thomas v. State*, the court held that the petitioner failed to exercise due diligence where the record showed that he was apparently aware of the existence of evidence suppressed by the State—the recanting of testimony by key prosecution witnesses—at the time of trial and, in fact, had alluded to this evidence in the direct appeal, resulting in a five-year delay in asserting the claims in *coram nobis*. 367 Ark. 478, 483, 241 S.W.3d 247, 250 (2006); *see also* Early v. State, No. CR 93-189, 2006 WL 2899476, at *2 (Ark. Oct. 12, 2006) (rejecting *coram nobis* application where evidence allegedly suppressed by prosecution was known to defense counsel at the time of trial).

312. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) ("States have no obligation to provide this avenue of relief and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.") (citation omitted).

313. *See id.*; *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (holding that states are under no obligation to provide counsel to assist inmates under sentence of death in post-conviction challenges to their convictions or sentences).

314. "The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i) (2006). However, the Arkansas Supreme Court has found that counsel's ineffectiveness in Rule 37.5 post-conviction representation of capital defendants under sentence of death violates due process and warrants recall of its mandate to permit further consideration of the capital defendant's claims for relief. *See, e.g.*, Lee v. State, 367 Ark. 84, 88-89, 238 S.W.3d 52, 54-55 (2006) (holding that appointed post-conviction counsel's insobriety impairing performance warranted recall of mandate for further review).

coram nobis illustrates just how ill-defined the due diligence requirement is. For example, the *Buckley V* court held that the effort to assert misconduct claims based on the prosecutor's actual or imputed knowledge of Agent Ray's perjury and false reporting in the *Bragg* case should have been asserted six years earlier, when Ray's perjury was disclosed in Bragg's federal habeas action.[315] Regardless of whether it was reasonable to expect Buckley to be aware of the federal court's action in awarding Bragg relief at the time, it is clear from the record that Buckley had knowledge of the disposition in *Bragg* and findings relating to Ray at the time of his resentencing hearing. In fact, the opinion in *Buckley II* addressed Buckley's claim that he was deprived of an opportunity to challenge Ray's testimony because the case was remanded for resentencing only before the jury.[316]

In contrast, Buckley alleged the additional misconduct claim in his petition for writ of error *coram nobis* based on disclosure of the existence of the previously undisclosed videotape of the confidential informant, Livsey, during Agent Card's testimony at the post-conviction evidentiary hearing, after the case had been remanded in *Buckley III* for the hearing.[317] But the claim was not asserted immediately. Instead, Buckley's counsel raised the claim in the motion for leave to file and petition filed in the Arkansas Supreme Court after the court upheld the denial of post-conviction relief on appeal in *Buckley IV*.[318] Nevertheless, the court in *Buckley V* held that Buckley had met the test for due diligence for timely assertion of the claim, yet failed on substantive grounds because he could not demonstrate that the still-undisclosed videotape contained exculpatory or impeaching evidence that could have been used to impeach Livsey at trial.[319]

Consequently, the court's position in *Buckley V* raised an unresolved issue as to exactly what showing must be made to establish due diligence in the assertion of a misconduct claim based on suppression of favorable evidence. The absence of a

315. *Buckley V*, No. CR 01-644, 2007 WL 2955980, at *3 (Ark. Oct. 11, 2007).

316. *Buckley II*, 349 Ark. 53, 64, 76 S.W.3d 825, 831 (2002), *cert. denied*, 537 U.S. 1058 (2002).

317. *Buckley V*, 2007 WL 2955980, at *1, *4.

318. *Id.*

319. *Id.* at *4 ("Although petitioner's attempts to obtain the tape demonstrate diligence in pursuing this issue, he does not present a claim that is meritorious.").

fixed time limit for filing provides flexibility necessary for considerations of *Brady*-related claims not discovered, despite the exercise of due diligence, until after the time for filing relief under Rule 37 would have expired. But, the lack of a fixed time also means that the court must exercise discretion on the question of due diligence in each case.

Buckley's claim involving the videotape was not asserted until 2007, about two years after its disclosure during Agent Card's testimony at the evidentiary hearing, yet the court noted that counsel had exercised diligence in investigating the claim.[320] Does this mean that a delay of two years in presenting a *Brady*-based claim would be acceptable? Probably not in every case. Or, did the delay in presentation of this claim due to pending litigation in the Rule 37 proceeding and appeal justify the filing after resolution of the direct appeal in that litigation? If so, then the *Buckley V* court's position is internally inconsistent, as it concluded that his delay in presenting the claim relating to Agent Ray's perjury while he was litigating at resentencing and in the Rule 37 litigation was fatal in terms of the due-diligence requirement.[321]

The *coram nobis* remedy, an extraordinary remedy not precisely defined by rule or statute, thus affords flexibility in administration, but a flexibility that fails to provide precision in terms of notifying prospective litigants and counsel of its requirement for the exercise of due diligence in presenting claims within its scope.

2. Length of the Petition

In contrast to the very strict limitations imposed under Rule 37 for length and content of the post-conviction petition, the *coram nobis* remedy does not suffer from arbitrary limitations on the ability of the litigant or counsel to develop the argument for relief for a *Brady*-based violation. For example, the Rule 37 petition is limited to ten pages, by rule, with specific instructions for the number of lines per page and size of margins.[322] Circuit courts may have some discretion to grant leave to file a petition

320. *Id.* at *1, *4.

321. *Id.* at *3 ("The *Bragg* decision was handed down in 2000. Petitioner delayed filing his request for error coram nobis relief for over six years.").

322. Ark. R. Crim. P. 37.1(b).

in excess of the ten-page limitation,[323] but this page limit has been upheld in the past.[324]

Moreover, the lack of formal rules governing *coram nobis* petitions affords counsel additional flexibility in developing support for the claims, and it does so while not exhausting the ten-page limitation for petitions under Rule 37.1(e). For example, Buckley filed affidavits supporting his claims attached as exhibits to his Rule 37.1 petition.[325] Yet, Rule 37 makes no provision for supporting affidavits, nor does it provide that affidavits will not count toward the ten-page limitation on petitions. As a result, a post-conviction petitioner needing to raise a number of claims challenging his conviction or sentence may face a difficult decision in trying to properly assert all claims with sufficient supporting facts and authority to warrant review on their merits.

The unfairness of the ten-page length limitation can compromise a petitioner attempting to fully exhaust state remedies before proceeding with a federal habeas corpus claim. Because federal courts hearing a habeas corpus claim are precluded from considering constitutional claims raised by state court defendants unless they have first been presented to the

323. In *Bryant v. State*, the court seemed to recognize, by implication, that a circuit court may be able to grant some leave to file a petition in excess of the ten-page limit imposed by Rule 37.1(e), by noting: "In filing the twenty-three page document, the appellant *did not ask the court's permission to either file an overlength document or amend his original petition with the latter document.*" 323 Ark. 130, 132, 913 S.W.2d 257, 259 (1996) (emphasis added).

324. In *Rowbottom v. State*, the court held that the page limitation did not violate due process in improperly limiting the petition to ten pages in length. 341 Ark. 33, 35, 13 S.W.3d 904, 905-06 (2000). However, in a capital case where an eleventh page of a rejected petition contained only the certificate of service, the court in *Sanders v. State* held that the trial court abused its discretion in summarily dismissing the petition as not being in compliance with Rule 37.1. 352 Ark. 16, 22, 98 S.W.3d 35, 39 (2003). Nevertheless, the court also held that the trial court could properly refuse to consider defendant's tendered sixteen-page petition, despite the fact that the petitioner had been sentenced to death. *Id.* at 20, 22-23, 98 S.W.3d at 38-40. In *Hill v. Norris*, the Eighth Circuit held that an Arkansas petitioner could argue that the ten-page limitation deprived him of a fair opportunity to present his claims. 96 F.3d 1085, 1088 (8th Cir. 1996). The state supreme court, however, rejected the argument in *Weatherford v. State*, that a trial court's refusal to permit petitioner to file an expanded brief deprived him of a fair opportunity to develop his claims, noting that he did not attach affidavits or exhibits or explanation for the additional testimony that he argued supported his request for leave to file an expanded brief. 363 Ark. 579, 586, 215 S.W.3d 642, 648-49 (2005).

325. Petition for Relief Pursuant to Rule 37.1, Buckley v. State, No. CR 99-13 (Ark. Cir. Ct. 2002).

state courts in the direct appeal or state post-conviction process,[326] an Arkansas defendant is required to raise all federal constitutional claims through available state court remedies before litigating those claims in federal habeas proceedings. If the petitioner fails to develop the claim with adequate factual support within the ten-page limit, the claim may be defaulted by dismissal without an evidentiary hearing.[327] The proper application of a procedural default rule that bars ruling on the merits in the state proceedings thereafter precludes the federal habeas court from reviewing the claim.[328]

Because there is no length limitation, and use of affidavits in support of factual allegations does appear to be expressly accepted, if not required, for *coram nobis* petitions, the remedy is likely to be more suitable for developing extra-record claims, such as *Brady*-based prosecutorial-misconduct claims. Further, the availability of both *coram nobis* and Rule 37 remedies effectively permits the litigant to devote the entire ten pages afforded for the post-conviction petition, assuming the trial court refuses to permit expansion of the pleading, to issues other than *Brady*-misconduct claims.

3. Successive Petitions

One significant advantage to the *coram nobis* process suggested by the *Buckley* litigation is the fact that, at least thus far, there is no bar to the filing of a successor petition. In *Buckley*, the state supreme court granted leave to file a second *coram nobis* petition on the claim that Agents Ray and Card had not disclosed the videotaped interview of Livsey to the prosecutor, who, consequently, did not disclose it to defense counsel prior to trial.[329] In contrast, it is clear that the supreme

326. The federal habeas corpus statute bars consideration of claims not previously litigated in state proceedings. 28 U.S.C. §§ 2254(b)(1)(A), (C) (2006).

327. *See, e.g.*, *Weatherford*, 363 Ark. at 586, 215 S.W.3d at 647 ("[W]e will not grant post conviction relief for ineffective assistance of counsel where the petitioner fails to show what the omitted testimony or other evidence was and how it would have changed the outcome."); Jackson v. State, 352 Ark. 359, 371, 105 S.W.3d 352, 360 (2003) (conclusory statements insufficient to warrant post-conviction relief).

328. *See* Cagle v. Norris, 474 F.3d 1090, 1098-99 (8th Cir. 2007).

329. *Buckley VI*, 2010 Ark. 154, at 2, 2010 WL 1255763, at *2 (granting leave to file Motion to Reinvest Circuit Court with Jurisdiction to Consider Petition for Writ of Error

court has limited defendants to a single application for post-conviction relief pursuant to Rule 37 in the past.[330]

B. The Potential Weakness of *Coram Nobis* as an Effective Remedy for Litigating *Brady*-based Claims of Prosecutorial Misconduct

Two of the most valuable rights accorded criminal defendants are the right to effective assistance of counsel and the due-process right to have access to all favorable evidence in the possession of the prosecution prior to trial. The latter right affords counsel the best circumstances under which to prepare and present a defense or counsel the defendant with respect to waiving trial and pleading guilty. Claims of prosecutorial misconduct in the suppression of exculpatory or impeachment evidence are among the most difficult claims to prove, however, in part because the very act of suppression of favorable evidence means that neither the accused nor counsel has access to the evidence. Once the case is tried and the accused has been convicted, moreover, both the incentive to investigate and the relatively high burden of proving prejudice from the suppression make litigation of these claims difficult.

1. Lack of Access to Counsel

Because there is no constitutional right to assistance of counsel in the state post-conviction process,[331] a convicted defendant—particularly if incarcerated—may have little in terms of resources to investigate the possibility that there was exculpatory evidence not disclosed by the State prior to trial. A defendant proceeding in post-conviction under Rule 37 *may* be provided with court-appointed counsel in the discretion of the circuit court in the event the petitioner is indigent.[332] Assistance of counsel is not required for disposition of the claims in the petition, however, and in any event, there is no guarantee—at least in post-conviction proceedings not challenging a capital

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Coram Nobis). *See supra* Part III.C.4 and notes 235-37 and accompanying text for discussion of Livsey taped interview.

330. Pitts v. State, No. CR 80-40, 2000 WL 640892, at *1 (Ark. May 18, 2000); *see* Williams v. State, 273 Ark. 315, 316, 619 S.W.2d 628, 629 (1981).

331. *See* ARK. R. CRIM. P. 37.3(b).

332. Ark. R. Crim. P. 37.3(b).

conviction resulting in a sentence of death—that counsel will perform effectively.

Because the writ of error *coram nobis* is purely a creature of judicial decision-making there is no statutory or rule-based mandate for appointment of counsel to assist the litigant petitioner pursuing relief through the writ. Consequently, the litigant whose claim involves a *Brady*-based prosecutorial-misconduct claim will be required to either retain private counsel or pursue relief without the assistance of retained counsel if indigent. Even if counsel is appointed pursuant to Rule 37.3 to represent the indigent petitioner in a post-conviction action, the rule gives counsel the discretion whether to raise a *Brady*-based misconduct claim through the now-exclusive *coram nobis* remedy.[333]

The additional problem for post-conviction petitioners explained earlier is that even though counsel may be appointed by the circuit court to provide representation in a Rule 37 proceeding, there is no guarantee that counsel will perform effectively. The United States Supreme Court has consistently held that the right to assistance of counsel afforded by the Sixth Amendment terminates with the conclusion of the appeal afforded as a matter of right.[334] Because there is no constitutional right to post-conviction relief, the Court has extended this principle to reject claims that the Sixth Amendment affords convicted state-court defendants the right to assistance of counsel in the state post-conviction process.[335] However, the Arkansas Supreme Court has concluded that due process requires effective representation in post-conviction

333. *See* ARK. R. CRIM. P. 37.3(b) (requiring appointed counsel to continue to represent the petitioner through the appeal from the circuit court's ruling on the petition, but neither requiring nor authorizing appointed counsel to pursue other collateral remedies).

334. *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 605 (1974) (no right to counsel in discretionary state appellate proceedings).

335. *See* Coleman v. Thompson, 501 U.S. 722, 752 (1991) (application of procedural default rule by state court barred federal habeas relief when post-conviction counsel failed to timely file an appeal from the denial of post-conviction relief); Murray v. Giarratano, 492 U.S. 1, 7-10 (1989) (no right to counsel in state post-conviction proceedings even when death penalty imposed); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (no right to counsel in state post-conviction proceedings). Deference to state procedural default attributable to post-conviction counsel's error is incorporated in the federal habeas corpus procedure for state inmates. 28 U.S.C. § 2254(i) (2006).

proceedings, but only those in which the death penalty has been imposed.[336]

The disparate treatment of the question of post-conviction counsel's effectiveness in capital cases in which the death penalty has been imposed, and all post-conviction actions, is clear, yet unexplained. In *Lee v. State*, for instance, the Arkansas Supreme Court held that counsel's ineffectiveness in representing the capital petitioner due to substance-abuse-related impairment, required the court to recall its mandate and appoint new counsel to pursue Lee's claims.[337] The court couched its holding in terms of the need for heightened scrutiny in cases in which the death penalty is imposed.[338]

The court rejected the State's argument that the post-conviction remedy, being civil in nature, did not require provision of counsel. Instead, it held that the "argument completely ignores our prior caselaw holding that while there is no constitutional right to a post-conviction proceeding, when a state undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair."[339] However, in support of its reasoning, the court cited two prior decisions that affirmed this principle, but did not involve a capital sentence.[340]

Conversely, the court's treatment of counsel's performance in non-capital, post-conviction litigation is reflected in a rather amazing decision, *Hutts v. State*.[341] In *Hutts*, the court upheld the denial of post-conviction relief where the petitioner, in support of his claim that trial counsel had failed to render effective assistance, offered the affidavit of a co-defendant exculpating him.[342] Although it is unclear whether the affidavit had been appended to the Rule 37.1 petition, it was offered in evidence at the evidentiary hearing conducted in the trial court.[343] The supreme court found that Hutts's reliance upon his

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336. *See* Porter v. State, 339 Ark. 15, 19, 2 S.W.3d 73, 76 (1999).

337. 367 Ark. 84, 89, 93, 238 S.W.3d 52, 55, 58 (2006).

338. *Id.* at 89, 238 S.W.3d at 55.

339. *Id.*

340. *Id.* (citing Engram v. State, 360 Ark. 140, 200 S.W.3d 367 (2004); Larimore v. State, 327 Ark. 271, 277, 938 S.W.2d 818, 820 (1997)); *see also Finley*, 481 U.S. at 555 (holding that there is no constitutional right to assistance of counsel in post-conviction litigation beyond the first appeal).

341. No. CR 02-964, 2004 WL 309056, at *2-3 (Ark. Feb. 19, 2004).

342. *Id.*

343. *Id.*

co-defendant's affidavit, in which he denied Hutts had "prior knowledge of intent to murder the victim," rather than calling him to testify at the hearing, denied the State an opportunity to cross-examine the witness.[344]

The affidavit raised a question of prosecutorial misconduct for influencing a witness to testify falsely against the accused, but the petition itself was predicated on counsel's failure to provide effective assistance at trial. The circuit court appointed counsel to represent Hutts in the Rule 37 proceeding and counsel conducted the evidentiary hearing.[345] At the hearing, Hutts testified personally, but the witness was not called to testify.[346] Consequently, the supreme court upheld the trial court's decision to exclude the affidavit as hearsay.[347]

Significantly, although the claim was termed as ineffective assistance, the substance of the claim made by Hutts regarding witness Riley was that the prosecutor had engaged in misconduct by influencing the witness to testify falsely.[348] The use of false testimony by the prosecution is, of course, traditionally viewed as a misconduct violation encompassed by the disclosure duty of *Brady* and *Alcorta v. Texas*.

When appointed counsel filed an *Anders* brief,[349] arguing that the appeal from denial of the Rule 37.1 petition was without merit and requested leave to withdraw, Hutts filed a brief in support of the appeal pro se.[350] He argued that the Rule 37.1 hearing was unfair and requested another hearing so that he could present the testimony of the witness, Riley, apparently to substantiate his claim that Riley's false trial testimony had prejudiced him.[351] The court dealt with his argument tersely, imputing counsel's failure to call the co-defendant at the hearing to Hutts, personally, and concluding: "Appellant could have

344. *Id.*

345. *Id.* at *1 (noting that appointed counsel was employed by the Arkansas Public Defender Commission).

346. *Hutts*, 2004 WL 309056, at *4.

347. *Id.* at *3.

348. *See id.* at 2. A strategy of couching a claim previously denied on direct appeal as an attack on counsel's representation was specifically rejected in *White v. State*, No. CR 07-1340, 2008 WL 5101514, at *2 (Ark. Dec. 4, 2008).

349. Anders v. California, 386 U.S. 738, 744 (1967).

350. *Hutts*, 2004 WL 309056, at *1.

351. *Id.* at *4.

presented other witnesses, including Mr. Riley, but he did not do so."[352]

Thus, even though the circuit court appointed counsel to represent Hutts and counsel had obviously been supplied with Riley's exculpatory affidavit, the court held that Hutts was personally responsible for failing to call Riley to testify.[353] The court effectively found that counsel had no duty or obligation to properly ascertain whether the affidavit would be admissible as evidence supporting the petitioner's claims.[354] In anticipation of any argument that Hutts was denied a fair hearing due to the ineffectiveness of counsel appointed for the very purpose of representing him in the post-conviction proceeding, the court noted: "If appellant is suggesting that his Rule 37 counsel was ineffective, it does not avail him relief. *It is well settled that there is no right to counsel in a post conviction proceeding.*"[355]

The value of effective representation in either Rule 37 or *coram nobis* proceedings is obvious. While the Rule 37 petitioner may be appointed counsel in the circuit court's discretion in non-capital cases, and is entitled to appointment of counsel in capital cases in which death has been imposed under Rule 37.5,[356] there is no provision for appointment of counsel in the *coram nobis* process. In *Newman v. State*, another capital case in which a death sentence had been imposed, representation provided by the Arkansas Federal Public Defender Capital Habeas Unit proved invaluable in reopening Newman's case through *coram nobis* on claims that he was not competent or fit to proceed at the time of trial and that the State had committed *Brady* violations.[357]

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352. *Id.*

353. *Id.*

354. *Id.* at *2-3.

355. *Hutts*, 2004 WL 309056, at *4 (emphasis added) (citing Coleman v. State, 338 Ark. 545, 548, 998 S.W.2d 748, 750 (1999) (citing Pennsylvania v. Finley, 481 U.S. 551 (1987))). Moreover, the Arkansas Supreme Court held in *Hill v. State*, that while a trial judge has an affirmative duty to advise the criminal defendant of his right to appeal following conviction at trial, no comparable duty is imposed on the trial court denying a petition for post-conviction relief. 293 Ark. 310, 311, 737 S.W.2d 636, 637 (1987). The court seems to have rested its conclusion on the fact that there is no constitutional right to post-conviction relief and no provision in Rule 37 directing the trial court to inform a post-conviction litigant of the right to appeal from denial of relief. *See id.*

356. ARK. R. CRIM. P. 37.5.

357. 2009 Ark. 539, at 18-19, ___ S.W.3d ___, ___. The supreme court also directed the Arkansas Federal Public Defender to continue representing Newman, thus authorizing

The fact that Arkansas guarantees effective post-conviction representation in capital cases in which the death sentence has been imposed, but not in other post-conviction litigation, is perhaps rationally explained by the court's logical desire to ensure that the death penalty is not obtained as a result of suppression of favorable evidence. Nevertheless, it was in a death-penalty prosecution, *Howard*, that the court announced that *Brady*-based misconduct claims cannot be litigated in Rule 37 proceedings, including Rule 37.5 litigation involving inmates sentenced to death. And, although the difference in treatment of death and non-death post-conviction litigation may make sense to the supreme court, it could hardly explain why a deprivation of liberty in the form of imprisonment—perhaps for a period of life with no possibility of parole—is a less serious violation of due process simply because the petitioner may die while incarcerated, rather than being executed.[358]

What may be more troubling than the disparity in treatment of capital and non-capital post-conviction litigation is the fact that Arkansas collateral process, whether in Rule 37 or *coram nobis*, often seems to ignore the significance of *Brady*-misconduct claims. Nothing taints the credibility of the criminal process so severely as the notion that the State has used its authority to pursue conviction by suppressing evidence that might have produced a result more favorable for the accused, except the subsequent exoneration of a wrongfully convicted defendant. Regrettably, suppression of exculpatory evidence threatens to produce wrongful convictions, yet the Arkansas

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the Federal Defender to proceed in the circuit court on the petition for writ of error *coram nobis*. *See id.* at 19, ___ S.W.3d at ___.

358. For instance, in *Tice v. State*, the supreme court rejected the pro se petitioner's application for leave to file the *coram nobis* petition, noting that a similar claim had been raised in his Rule 37.1 petition. No. CA CR 03-1314, 2008 WL 5191920, at *1-2 (Ark. Dec. 11, 2008). As in *Hutts*, the circuit court appointed counsel to represent Tice in the Rule 37 proceeding; following a remand from the supreme court with instructions, counsel filed an amended petition. *Id.* at *1. Tice claimed that the prosecution had suppressed a prior inconsistent statement by the complainant in which she had denied that Tice, her father, had raped her. *Id.* at *2. The supreme court upheld denial of relief because the amended petition, filed by counsel, had not been properly verified. *Id.* at *1 (citing Tice v. State, CR 07-731, 2008 WL 256586, at *1 (Ark. Jan. 31, 2008) (per curiam)). The supreme court then denied *coram nobis* relief, noting that Tice had previously asserted the same claims in the defaulted Rule 37.1 petition, despite the fact that it had never considered the misconduct claim on the merits as a result of counsel's failure to properly have the petition verified. *Id.* at *2.

post-conviction process creates unreasonably difficult burdens for convicted defendants asserting a *Brady*-based prosecutorial-misconduct claim.

2. Lack of Right to Evidentiary Hearing

Post-conviction actions brought pursuant to Rule 37 require the circuit court to conduct an evidentiary hearing and enter written findings of fact if the allegations state a colorable claim for relief.[359] However, *coram nobis* proceedings initiated once the trial court loses jurisdiction do not require an evidentiary hearing to resolve colorable claims. Rather, the supreme court assesses the merits of the petition for leave to proceed in the trial court on the basis of the petition itself.[360] Consequently, a petitioner asserting a *Brady*-based prosecutorial-misconduct claim is not entitled to an evidentiary hearing unless the petition and supporting allegations or proof is deemed sufficient to meet the test for a *Brady* violation.

In *Scott v. State*, the court explained that it makes the determination of "whether there is a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the claimed exculpatory evidence been disclosed at trial."[361] *Scott* demonstrates precisely why *coram nobis* is often an inadequate remedy to ensure that a defendant's federal constitutional right to disclosure is fully protected in the state courts. Scott filed pro se after previously litigating a number of claims on direct appeal and in Rule 37 proceedings.[362]

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359. The circuit court may dispose of the Rule 37 petition summarily only "[i]f the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings." ARK. R. CRIM. P. 37.3(a).

360. Under a previous incarnation of Rule 37—prior to its temporary abolition—the verified petition asserting a post-conviction claim of ineffective assistance of counsel had to initially be filed in the state supreme court following affirmance of the conviction if appealed. If the petition was properly filed, the court then granted relief for the circuit court to hear the petition on its merits. *See* Knappenberger v. State, 279 Ark. 453, 454, 652 S.W.2d 25, 25 (1983).

361. No. CR 98-1167, 2008 WL 5101516, at *2 (Ark. Dec. 4, 2008).

362. *Id.* at *1. The court related the procedural history of the case in its order denying Scott's most recent application. *Id.*; *see* Scott v. State, 372 Ark. 587, 587, 279 S.W.3d 66, 67 (2008) (per curiam) (dismissing appeal of denial of petition for writ of

In his most recent *coram nobis* filing, Scott, convicted of murder and sentenced to life imprisonment, contended that the prosecution had suppressed evidence that would have impeached the State's witnesses at trial, including a police report summarizing a statement relating to an argument between the murder victim and an "unidentified male."[363] Scott obtained the evidence as a result of a request directed to the Arkansas State Crime Laboratory after the prosecutor agreed to release of the information.[364] However, his pleading did not satisfy the supreme court that the evidence had, in fact, been suppressed. It observed that Scott did "not present any facts indicating that those documents were not contained in the lab's or prosecution's files at the time of the trial or that defense counsel was not made aware of the documents."[365]

The court then concluded that the evidence relied on by Scott in his application would not have been sufficient to change the outcome of the proceedings, finding little impeachment value, if any, in the reports he apparently appended to his petition. Instead, the court stated:

> Even if one of the investigating officers had documented a statement that was not entirely consistent with later accounts from a witness to the shooting, it is not apparent that the information presented here was in any way valuable for the purpose of impeaching any of the witnesses who appeared at trial, or would have discredited that testimony.[366]

The court's conclusion regarding the adequacy of Scott's allegations may have been entirely correct. However, the claim was rejected on the merits simply based upon his allegations and supporting documentation, rather than on findings made

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habeas corpus under Act 1780 of 2001); Scott v. State, CR 98-1167, 2006 WL 2895148, at *2 (Ark. Oct. 12, 2006) (per curiam) (denial of petition to reinvest jurisdiction in trial court to consider a petition for writ of error *coram nobis*); Scott v. State, CR 06-10, 2006 WL 200292, at *2 (Ark. Jan. 26, 2006) (per curiam) (denial of motion to proceed with appeal of motion to vacate judgment); Scott v. State, 355 Ark. 485, 488-89, 139 S.W.3d 511, 513 (2003) (affirming denial of relief on petition under Arkansas Rule of Criminal Procedure 37.1); Scott v. State, 337 Ark. 320, 321-22, 989 S.W.2d 891, 892 (1999) (affirming conviction on direct appeal).

363. Scott v. State, No. CR 98-1167, 2008 WL 5101516, at *2 (Ark. Dec. 4, 2008).

364. *Id.*

365. *Id.*

366. *Id.*

following an evidentiary hearing, or even responsive pleadings from the State. Scott, proceeding pro se and without the assistance of counsel while serving his life sentence, was able to offer some support for his claim, yet the court did not even inquire into whether or not counsel had the documentation available at the time of trial. Moreover, the court's initial observation—that Scott had not excluded the possibility that the crime lab and prosecution files contained the reports—shifted to him the burden of effectively disproving that the files did contain the reports and were, consequently, available for disclosure by the prosecutor to defense counsel prior to trial.

The supreme court's suggestion that Scott was required to prove that the reports were not in the files prior to trial misrepresents the applicable federal constitutional rule, however, as articulated in *Kyles*. The critical issue is not whether or not the files contained the evidence claimed subject to disclosure, but whether the prosecutor disclosed the material to defense counsel, or whether defense counsel otherwise had access to the material claimed to be favorable, regardless of whether the material had been independently discovered or disclosed by the prosecutor. But the *Scott* court's formula suggests something quite different—that Scott could not establish a disclosure violation if the reports were not included in the crime lab or prosecutor's files. Regardless of whether the crime lab or prosecutor's files contained the reports, the State was under a duty to disclose the evidence to defense counsel because the report had been generated or was in the possession of the investigators who were members of the prosecution team. As in the case of the circuit court's findings in *Buckley*, the state court arguably ruled based on a misperception of the scope of the disclosure duty under *Kyles*.

The process by which the *coram nobis* petition was evaluated by the supreme court—without the benefit of a full evidentiary hearing—disregards the function of the hearing in providing an opportunity to demonstrate the complete factual context in which the claim arises. Further, the appellate court itself has not heard the trial in making a decision regarding the likelihood that undisclosed evidence would have influenced the outcome of the proceedings. Although the court has consistently rejected claims that unfairness flows from the litigation of post-

conviction claims in the circuit court of conviction,[367] the rationale for having the convicting court consider those claims on the merits lies in the theoretical virtue of having prejudice determinations assessed in the first instance by the trial judge who actually heard the case. This is precisely the approach the supreme court has taken with regard to review of denial of mistrial motions in criminal cases.[368]

3. Lack of Discovery Rights in Coram Nobis

Finally, a critical flaw in reliance on *coram nobis* as a vehicle for vindicating the accused's due-process right to disclosure of favorable evidence in the possession of the prosecutor and other state actors is illustrated by the subsequent litigation history in Buckley's federal habeas action.[369]

First, regardless of whether *Brady*-based claims are litigated in Rule 37 post-conviction actions or in *coram nobis* actions, the fundamental problem posed by the Arkansas Supreme Court's attitude toward prosecutorial misconduct is that neither approach affords the criminal defendant an adequate procedure for ascertaining when a disclosure violation has occurred.

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367. *See, e.g.*, Meyers v. State, 252 Ark. 367, 371-72, 479 S.W.2d 238, 242 (1972). The court rejected the argument that the trial judge who presided over trial should not be assigned the task of reviewing claims made in collateral attack on the conviction. *Id.* (citing the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies § 1.4 (1968)). The standards examine the positions and further discuss the benefits and possible liabilities with regard to having the trial judge who presided over trial consider post-conviction claims without adopting either position. In *Meyers*, the court quoted from the commentary to the standards:

> The same judge brings to the post-conviction proceeding familiarity with the case or the applicant that may make for more efficient handling. The same judge may be more free in fact to consider or reconsider matters affecting his prior rulings than would a colleague on the bench. On the other hand, there are obvious disadvantages and risks in such a practice. There is a value in seeking determination from a mind not predisposed by prior incidents, and a significant related value that the arbiter appear not to be predisposed.

Id. at 371-72, 479 S.W.2d at 242 (quoting STANDARDS RELATING TO POST-CONVICTION REMEDIES § 1.4 (1967).

368. *E.g.*, Bullock v. State, 317 Ark. 204, 206, 876 S.W.2d 579, 580 (1994); Woodruff v. State, 313 Ark. 585, 592, 856 S.W.2d 299, 303 (1993) ("We have said many times that the trial court has discretion to control closing argument and is in a better position to determine the possibility of prejudice by observing the argument first hand.").

369. Buckley v. Norris, No. 5:08CV00157 JLH/JTR, 2010 WL 4788030, at *1 (E.D. Ark. Nov. 16, 2010) (petition dismissed on petitioner's motion).

The ability of the accused to develop evidence of misconduct by suppression of exculpatory or favorable evidence is restricted to post-trial investigation conducted by the defense or those fortuitous situations in which the defendant learns about suppressed evidence only as a result of chance, as in Buckley's case. No resources are made available to the defense to pursue investigation following trial when the defendant is an indigent, even when defense counsel has obtained investigative assistance prior to trial. Moreover, failure to investigate the case thoroughly prior to trial likely results in a default on any claim raised in a *coram nobis* application as a result of a due diligence failure.

Second, the disclosure of exculpatory or impeachment evidence subject to mandatory disclosure under *Brady/Kyles* is primarily dependent on the exercise of good faith by the prosecutor and members of the prosecution team. Although proof of a due-process violation does not rest on a showing of bad faith in failing to disclose exculpatory or impeachment evidence,[370] compliance with the prosecution's duty to disclose does rest on the good faith of the prosecutor and members of her team. The Arkansas court has evidenced its concern that post-conviction proceedings not provide a substitute for diligent discovery efforts and investigation in the course of pre-trial and trial proceedings,[371] and counsel's failure to properly investigate the case should provide a basis for an ineffective assistance claim cognizable in Rule 37 post-conviction proceedings.[372] But, the *Brady-Kyles* line of cases establishes that the duty to disclose exculpatory evidence is not dependent upon request by defense counsel, so that counsel's failure to pursue discovery does not relieve the State of the burden to produce exculpatory or, at a minimum, material impeachment evidence.[373]

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370. Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Illinois v. Fisher, 540 U.S. 544, 547 (2004); United States v. Agurs, 427 U.S. 97, 108 (1976).

371. *See* Weaver v. State, 339 Ark. 97, 103, 3 S.W.3d 323, 328 (1999) (holding that the Rule 37 process was not designed to permit discovery that should have been sought prior to trial and reiterating the principle that Rule 37 does not provide a remedy when an issue could have been raised and litigated at trial and on appeal).

372. *E.g.*, Rompilla v. Beard, 545 U.S. 374, 389 (2005) (holding that trial counsel rendered ineffective assistance in failing to examine file on defendant's prior conviction admitted at capital sentencing hearing); Schlup v. Delo, 912 F.Supp. 448, 449-50 (E.D. Mo. 1995).

373. United States v. Bagley, 473 U.S. 667, 682-83 (1985); *Agurs*, 427 U.S. at 108.

Third, and this situation is demonstrated by the facts accepted by the state supreme court in addressing Buckley's petition to reopen the case through *coram nobis*, defense counsel may well learn of suppressed evidence during the course of the Rule 37 hearing, itself, although the rule does not contemplate addition of new claims for relief once the petition is timely filed and answered.[374] However, disclosure of previously undisclosed evidence, such as Agent Card's disclosure of the videotaped interview with the informant, Livsey,[375] clearly triggered a potential claim for a *Brady-Kyles* violation frustrated by the fact that Buckley did not have access to the tape to demonstrate the actual violation.[376]

Once in federal habeas process, Buckley again sought disclosure of the videotape,[377] which was resisted by the attorney general on the ground that his claim to reopen his case through *coram nobis* had been rejected by the state supreme court. The federal habeas court, however, ordered production of the videotape,[378] and the attorney general complied.[379] Upon review of the videotaped interview, Buckley moved to expand his claim for relief in the federal action,[380] arguing that the

374. ARK. R. CRIM. P. 37.2(b) provides: "All grounds for relief available to a petitioner under this rule must be raised in his or her original petition unless the petition was denied without prejudice." The rule offers no guidance that suggests that a petitioner has a right to add newly discovered claims resulting from disclosure during the course of ongoing post-conviction proceedings, nor does it preclude the petitioner from seeking leave to amend the petition to include claims not previously known.

375. *See supra* notes 235-37 and accompanying text.

376. *Buckley V*, No. CR 01-644, 2007 WL 2955980, at *4 (Ark. Oct. 11, 2007) ("Although petitioner's attempts to obtain the tape demonstrate diligence in pursuing this issue, he does not present a claim that is meritorious.").

377. Motion for Production of Physical Evidence, Buckley v. Norris, No. 5:08CV00157JLH-JTR (E.D. Ark. Aug. 7, 2008).

378. Order at 5-6, Buckley v. Norris, No. 5:08CV00157 JLH/JTR (E.D. Ark. Feb. 19, 2009).

379. The attorney general produced the tape, filing it with the federal court on March 18, 2009. Notice of Compliance at 1-2, Buckley v. Norris, No. 5:08CV00157 JLH/JTR (E.D. Ark. Mar. 18, 2009). The tape was turned over almost ten years to the day from the April 2, 1999, interview of Livsey by Agent Ray and Agent Card.

380. Motion for Leave to Supplement Federal Habeas Petition at 1, Buckley v. Norris, No. 5:08CV00157JLH-JTR (E.D. Ark. Apr. 21, 2009). Because Buckley could not demonstrate that the videotape actually contained exculpatory information, he framed his claim in the federal habeas petition as one involving a violation of the *Kyles* duty for the prosecutor to make the disclosure decision. Card testified that she could not remember providing the tape to the prosecutor. Transcript of Rule 37.1 Hearing at 421, 425, State v. Buckley, No. CR 99-13 (Ark. Cir. Ct. 1999). Card's testimony was corroborated in open

material included significant impeachment evidence, including a number of instances in which Livsey could not remember important details from the "controlled buys" and had to be corrected by Agent Ray.

The attorney general then moved the habeas court to order Buckley to return to the state courts to exhaust his *coram nobis* remedy a second time now that he was in actual possession of the purportedly exculpatory material.[381] In ordering the habeas action held in abeyance pending exhaustion of *coram nobis* in the state courts,[382] the court found that Buckley had identified some thirty-eight specific points during the taped interview which would have afforded trial counsel additional opportunities to impeach Livsey on cross-examination at trial.[383]

The production and disclosure of the videotaped interview with Livsey in the federal habeas proceeding demonstrates the problem created by the absence of any discovery procedure in the Arkansas *coram nobis* process. Because there is no right to an evidentiary hearing unless the petition to reopen is granted, the supreme court's holding in *Buckley V* that in the absence of the suppressed evidence, the petitioner cannot make the necessary showing to warrant reopening the case, forecloses the possibility that suppressed evidence will surface in the post-conviction process.[384] Yet, the State's successful suppression of the evidence itself frustrates enforcement of the federal constitutional guarantee of due process. Similarly, the Rule 37 process does not affirmatively afford a petitioner the right to discovery either, but an evidentiary hearing ordered on the

court by Prosecuting Attorney Morgan after the trial court sustained defense counsel's objection to Card being permitted to testify that the tape did not contain exculpatory information on redirect. *Id.* at 465, 467. Buckley argued that because Morgan had never made the determination as to the potential exculpatory information on the tape, the State had not complied with the *Brady-Kyles* duty to review the available evidence and disclose exculpatory material to the defense, as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

381. Response to Motion for Leave to Supplement Federal Habeas Petition at 3, Buckley v. Norris, No. 5:08CV00157 JLH/JTR (E.D. Ark. May 1, 2009).

382. Order at 1, Buckley v. Norris, No. 5:08CV00157 JLH/JTR, 2010 WL 419414 (E.D. Ark. Feb. 1, 2010). Abeyance, rather than dismissal of the habeas action, preserves the habeas petitioner's right to proceed on the original federal petition, avoiding the general statutory bar to a successive petition. *See* 28 U.S.C. § 2244(b)(1) (2006); Rhines v. Weber, 544 U.S. 269, 277-78 (2005).

383. Order at 1, Buckley v. Norris, No. 5:08CV00157 JLH/JTR, 2010 WL 419414.

384. *Buckley V*, No. CR 01-644, 2007 WL 2955980, at *4 (Ark. Oct. 11, 2007).

petition's merits does hold out the possibility of disclosure of the existence of exculpatory evidence. However, the prospect for relief would likely again be compromised by the fact that the petitioner would still have no option for adding a claim of prosecutorial misconduct in a pending action based on a timely filing of the post-conviction petition.

Whether in *coram nobis* or Rule 37, the critical problem is that *Brady* claims that arise only in the context of suppression or non-disclosure of evidence subject to disclosure as a matter of federal due process are effectively frustrated by the very fact of the disclosure failure, whether the result of a deliberate policy by the prosecutor, or members of the prosecution team, or mere negligence. Thus, these claims are only cognizable in *coram nobis* if the defendant himself fortuitously discovers the existence of the previously undisclosed evidence. Finally, in that event, there is no guarantee that the supreme court will not find that the defense failed to exercise due diligence in not discovering that same evidence through investigation conducted prior to trial.

C. Implications for Federal Habeas Litigation

Despite the fact that the United States Supreme Court has articulated a fully developed jurisprudence regarding the prosecutor's duty to disclose favorable evidence to the defense under the Due Process Clause of the Fourteenth Amendment,[385] the state courts remain critical actors in the enforcement of this constitutional protection. A defendant convicted in state proceedings seeking review of a *Brady*-based misconduct claim must litigate the issue in the state courts before pursuing the claim either by certiorari to the Supreme Court,[386] or by petitioning for federal habeas review.[387]

385. Brady v. Maryland, 373 U.S. 83, 86 (1963); *see also* discussion *supra* Part II.

386. 28 U.S.C. § 1257(a) (2006); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.").

387. The federal statute authorizing habeas corpus relief for state court defendants able to demonstrate federal constitutional violations tainting their convictions or sentences requires exhaustion of available state-court remedies before the federal habeas court can proceed to adjudication of the federal claims on the merits. 28 U.S.C. § 2254(b)(1)(A), (c) (2006).

1. Limitations and Tolling

The consequences of state-court determinations of *Brady* claims for federal habeas litigation are important because federal habeas actions must typically be brought within one year after conclusion of state court proceedings,[388] with the time being tolled during pending of properly filed state post-conviction proceedings.[389] However, the one-year time limit for filing may be excused when the petitioner is effectively deprived of an opportunity to assert his federal claim.[390] Because *Brady*-misconduct claims must be brought in *coram nobis* and because there is no filing limitations period for these claims, the interplay of the federal statute and Arkansas law requires all Arkansas litigants to assert their claims in state court before proceeding into federal habeas.[391] The one-year federal habeas limitations period would be excused because the reliance on *coram nobis*—exercised diligently—to establish the "factual predicate" for the federal claim would trigger the time for filing the federal petition, while the pendency of the *coram nobis* proceeding tolls the time for filing once the "factual predicate" was discovered.[392]

The federal habeas statute provides that the one-year statute of limitations for filing the federal habeas action may also be triggered by discovery of facts giving rise to federal claims. In such cases, the one-year statute runs from "the date on which the

388. 28 U.S.C. § 2244(d)(1)(A) (2006) (providing that the one-year limitation runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . .").

389. 28 U.S.C. § 2244(d)(2). On the question of when the filing of an Arkansas post-conviction action tolls the federal statute of limitations, see *Mills v. Norris*, 187 F.3d 881 (8th Cir. 1999).

390. 28 U.S.C. § 2244(d)(1)(B) (tolling the limitations period during any period when the petitioner was unable to file the petition due to an "impediment . . . created by State action . . . .").

391. 28 U.S.C. § 2254(c) (requiring the litigant to exhaust *any* available state remedy including, under Arkansas law, the filing of the petition for writ of error *coram nobis*).

392. For instance, in *Johnson v. United States*, where a federal habeas petitioner successfully attacked state convictions used to enhance his federal sentence, the United States Supreme Court held that the state court order granting relief on his challenge in state court would constitute a "fact" triggering the one-year federal habeas statute of limitations. 544 U.S. 295, 302 (2005). However, the Court also held that while the defendant filed the federal petition within the one-year period, he failed to exercise due diligence in challenging his state convictions; thus, the court upheld dismissal of his petition. *Id.* at 311.

factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[393] Because Arkansas *coram nobis* law requires that the accused exercise due diligence in asserting the claim, a logical construction of the filing time limit under state law—based on the exercise of due diligence—and the federal limitations and tolling provisions in the habeas statute, the one-year deadline for filing the federal habeas action should be tolled by a proper recourse to *coram nobis* in state courts.[394] Thus, a petitioner's failure to demonstrate due diligence in asserting the *Brady*-based claim in state courts through the *coram nobis* process would consequently preclude litigation of an otherwise time-barred claim in federal habeas.[395]

2. *Deference to State Court* Coram Nobis *Dispositions*

The disposition of a petition for writ of error *coram nobis* by the Arkansas courts will typically control the discretion of a federal habeas court when affording relief based on a *Brady*-based claim of suppression or non-disclosure of favorable evidence. In *Collier v. State*, following a conviction for first-degree murder resulting in a forty-year prison sentence[396] that had come before the Arkansas Court of Appeals, Collier raised *Brady* claims based on information from a key prosecution witness, Hinerman, that the witness had been promised $300 for his trial testimony by a Little Rock police officer and a $10,000 reward for cooperating in the investigation.[397] Collier petitioned the Arkansas Supreme Court for *coram nobis* relief, and submitted affidavits from two other witnesses, one of whom, Bell, recanted his trial testimony incriminating Collier, and the

393. 28 U.S.C. § 2244(d)(1)(D) (2006).

394. Similarly, if the discovery occurs after the filing of the initial federal habeas petition, permission to file a second or successive petition may be sought but will be granted only upon a showing that the newly discovered 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." 28 U.S.C. § 2244 (b)(2)(B)(ii).

395. *See* 28 U.S.C. § 2244(b)(2)(B)(i) (requiring exercise of "due diligence").

396. *See* Collier v. State, No. CACR 00-348, 2001 WL 196953, at *1 (Ark. Ct. App. Feb. 28, 2001).

397. Collier v. State, No. CACR 00-348, 2001 WL 1104764, at *2 (Ark. Sept. 20, 2001).

other, Griffin, who stated that Hinerman had coached Bell and himself regarding their testimony against Collier.[398]

However, the supreme court rejected Collier's argument to reopen the case because it found that although the offer of the reward to Hinerman would have constituted favorable evidence requiring disclosure under *Brady*, this impeachment evidence would not have altered the outcome of the case.[399] The court further noted that *coram nobis* would not lie for consideration of recantation by prosecution witnesses, when it relied on prior decisions precluding recourse to *coram nobis* for this type of claim.[400] In reaching this conclusion, the court incorrectly articulated the standard for establishing a *Brady* violation, which requires only that the suppressed evidence support a *reasonable probability* that the outcome would have been different, not that the actual outcome would have been different.[401]

Further, the rejection of Collier's motion for leave to file for *coram nobis* relief in the circuit court barred review of the same claim that he brought pursuant to Rule 37 in an action commenced before the court's *Howard-Buckley* rule. This is because *Brady*-based misconduct claims must be brought in *coram nobis* actions, rather than under Rule 37. Because the supreme court's rejection of Collier's motion for leave to file for *coram nobis* relief addressed the factual support of the evidence, and the court determined that the evidence would not have changed the outcome of the trial, that finding bound the circuit court in considering his Rule 37 petition.[402]

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398. *Id.* at *2.

399. *Id.* (citing Strickler v. Greene, 527 U.S. 263, 280 (1999)).

400. *Id.* at *2 (citing Taylor v. State, 303 Ark. 586, 799 S.W.2d 519 (1990); Smith v. State, 200 Ark. 767, 140 S.W.2d 675 (1940)).

401. *Collier*, 2001 WL 1104764, at *2. The court held:

> Even if Duke Hinerman's account of having been paid $300 and promised a reward for his testimony is truthful, we cannot say that this fact had it been known to the defense at trial *would have produced a different result* in light of the testimony of other witnesses who saw the shooting.

Id. (emphasis added). This formulation is contrary to the Supreme Court's consistent reference to a "reasonable probability" that disclosure would have resulted in a different outcome. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

402. Collier v. State, No. CR 02-780, 2004 WL 584903, at *1 (Ark. Mar. 25, 2004) ("[T]he circuit court concluded that our opinion established law of the case on certain facts and legal conclusions raised in the Rule 37 proceeding.").

Collier sought relief by filing a petition for federal habeas corpus.[403] Section 2254(d) restricts the power of federal habeas courts to grant relief, with narrow exceptions, only when a defendant convicted in state court can demonstrate that the state court's rejection of his federal constitutional 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.[404]

Once Collier brought his *Brady*-based claim in federal habeas, he faced the problem of overcoming the deference hurdles imposed by section 2254(d) in demonstrating not only that the Arkansas court had erred, but had basically reached an indefensible position in applying existing Supreme Court precedent to the facts in so doing. This task was virtually impossible, as the Eighth Circuit's opinion in upholding dismissal of his federal habeas action demonstrates, precisely because the state supreme court had found that he failed to show how he was prejudiced by the State's failure to disclose the promises made by police to Hinerman.[405]

The *Collier* litigation demonstrates that the Arkansas Supreme Court's decision to require litigants asserting *Brady*-

403. *See* 28 U.S.C. § 2254 (2006).

404. 28 U.S.C. § 2254(d).

405. Collier v. Norris, 485 F.3d 415, 423 (8th Cir. 2007). The federal court failed to appreciate the Arkansas Supreme Court's use of an incorrect standard of proof for determination of a *Brady* error. This error occurred when the Eighth Circuit failed to recognize that the Arkansas Supreme Court had used improper phrasing when it refused to reinvest the state court with jurisdiction to consider Collier's *coram nobis* petition. Instead, the Eighth Circuit characterized the basis for the state supreme court's holding in more general terms: "Collier failed to show how he was prejudiced from the prosecution's alleged suppression of evidence that Hinerman received $300 from Sergeant Hastings and was promised an additional $10,000 by Detective Knowles in exchange for his testimony at Collier's trial (collectively, 'the Hinerman impeachment evidence')." *Id.* at 420. *See supra* notes 401-03 and accompanying text for a discussion of the state court's apparent error in phrasing the standard of proof for a *Brady* violation. Whether the state court's misstatement would have been sufficient to demonstrate that its decision was "contrary to" Supreme Court precedent in *Brady*, *Bagley*, and *Kyles* would have required federal habeas relief because Collier would still have had the burden of demonstrating probable prejudice on the facts had the federal courts not viewed the Arkansas Supreme Court's denial of *coram nobis* relief binding.

based misconduct claims to pursue the extraordinary remedy of *coram nobis* has serious implications for review of adverse state court decisions in the federal habeas corpus process. Although the limitations upon relief imposed by section 2254(d) require deference to virtually all determinations of federal constitutional questions by state courts, the requirement that the *Brady* claimant show a sufficient evidentiary basis for relief before the trial court of conviction is re-invested with jurisdiction to consider the claim, means that many claims will be foreclosed by the state supreme court in denying leave to file the petition for writ of error *coram nobis* in the trial court. Thus, many claims that at least would have required an evidentiary hearing if brought as Rule 37 actions will now be resolved without any evidentiary hearing.

In Buckley's case, it was the evidentiary hearing ordered by the supreme court that led to discovery of the suppressed videotaped interview of the confidential informant which ultimately afforded him relief. A similar situation occurred in *Sanders v. State*, a capital case in which the death penalty had been imposed.[406] During the course of the evidentiary hearing ordered in the defendant's Rule 37.5 action, the defense uncovered evidence that the key prosecution witness had been offered favorable treatment by the prosecution that had not previously been disclosed, and the witness's admission that he had testified falsely.[407] The Arkansas Supreme Court found that the first claim was cognizable in *coram nobis*, granting leave for Sanders to file his petition seeking relief in the trial court.[408]

V. CONCLUSION

The court's decision in *Buckley* does not foreclose litigation of prosecutorial-misconduct claims based on *Brady* violations in Arkansas courts. In fact, the remedy has been successfully used to reopen cases, including capital cases in which death sentences were imposed in *Newman*[409] and *Sanders*.[410] Also, *coram nobis* offers distinct advantages to litigating those claims in Rule 37

406. 374 Ark. 70, 70-71, 285 S.W.3d 630, 631-32 (2008).
407. *Id.* at 71, 285 S.W.3d at 632.
408. *Id.* at 73, 285 S.W.3d at 633.
409. Newman v. State, 2009 Ark. 539, at 18-19, ___ S.W.3d ___, ___.
410. Sanders v. State, 374 Ark. 70, 72-73, 285 S.W.3d 630, 633 (2008).

proceedings, chief among these being the requirement that the claim be asserted diligently, rather than within the very limited time frame afforded for post-conviction actions under the rule.

Relegating *Brady* claims to petitions for extraordinary relief likely provides a more fruitful process in many cases than conventional post-conviction litigation through Rule 37 and its procedural limitations. By opening the door to investigation and prosecution of these claims beyond the usual sixty-day requirement for filing the petition when the case has been appealed, the court may have inadvertently recognized that these claims, by their very nature, are seldom easily discovered by litigants, much less advanced within the time frame provided for Rule 37.1 actions. This is particularly true for pro se litigants. However, if that were truly the court's intent, it simply would have established precedent for avoiding the Rule 37.1 filing period limitation by holding that claims discovered after the time for filing would nevertheless be cognizable in *coram nobis* applications. This alternative to the court's approach in *Howard-Buckley* is actually supported by *Larimore v. State*, where the petitioner had asserted a claim of prosecutorial misconduct in an untimely Rule 37 petition, and then reasserted the claim in his application for relief by way of writ of error *coram nobis*.[411] Although Larimore did not assert his claim in *coram nobis*, the supreme court implicitly accepted that both remedies were available to address the claimed due-process violation.[412]

Nevertheless, the *Howard-Buckley* rule now dictates that *coram nobis* is the only recognized remedy for asserting *Brady*-based misconduct claims in Arkansas cases. The most troubling aspects of the process by which such claims must be asserted is common to both remedies. The difficulties faced by criminal defendants, particularly when not represented by counsel, in attempting to discover whether evidence has been suppressed intentionally, or simply not disclosed as a result of inadvertence or error on the part of prosecutors or police, mean that many

411. 327 Ark. 271, 276, 938 S.W.2d 818, 820 (1997) (perjury warranting collateral relief if prejudice demonstrated).

412. *Id.* at 278, 938 S.W.2d at 821. The court subsequently upheld that trial court's grant of relief through *coram nobis*. State v. Larimore, 341 Ark. 397, 409, 17 S.W.3d 87, 94 (2000).

instances of misconduct will never be uncovered at all. In *Imbler v. Pachtman*, the Supreme Court held that prosecutors violating the disclosure duty imposed as a matter of due process by *Brady* are immune in civil rights violation actions, even when suppression of exculpatory evidence is intentional.[413] Concurring in that decision, Justice White observed: "It is apparent that the injury to a defendant which can be caused by an unconstitutional suppression of exculpatory evidence is substantial, particularly if the evidence is never uncovered."[414]

Given the lack of rights to assistance of counsel and evidentiary hearings in the *coram nobis* process, as presently constituted under Arkansas law, it is likely that many claims of misconduct that would require review for convicted defendants will never be discovered or properly presented for review in the state courts. Also, the often-haphazard consideration of *Brady*-based prosecutorial-misconduct claims by the state courts suggests a cavalier, if not hostile, attitude toward claims of misconduct by prosecutors and police. Yet, decisions in *Newman*, *Sanders*, and *Green* demonstrate that misconduct not only occurs, but occurs when defendants have faced the ultimate penalty of death. For Buckley, relief followed eleven and one-half years of imprisonment, but that relief was only granted because the United States District Court ordered the attorney general to disclose the videotape that had remained undisclosed since before his trial in 1999.

Buckley finally obtained relief from his convictions when the Arkansas Supreme Court reopened the case after confronting a second motion to reinvest the circuit court with jurisdiction to consider his petition for writ of error *coram nobis*, this time buttressed by the order of the United States District Court and multiple references to impeachment material contained in the videotaped deposition of the informant.[415] Once Buckley was able to return to circuit court to press his claim, he succeeded primarily because the special prosecutor appointed to represent the State conceded that his factual claims were accurate and his

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413. 424 U.S. 409, 427 (1976).

414. *Id.* at 444 (White, J., concurring).

415. *Buckley VI*, 2010 Ark. 154, at 5 n.2, 2010 WL 1255763, at *2 n.2 (granting the petition to reinvest jurisdiction in the trial court to consider petition for writ of error *coram nobis*).

claim for relief was meritorious.[416] More than five years after disclosure of the videotape at the Rule 37.1 hearing and three years following rejection of his initial *coram nobis* application by the state supreme court, he was granted relief on the newly discovered *Brady* claim.

Ironically, while Agent Ray's perjury in *Bragg* did not result in relief from Buckley's conviction, Ray's misconduct in failing to disclose the videotape to the prosecuting attorney did lead to his release from prison and dismissal of the felony charges on which he was prosecuted and convicted more than ten years earlier. Buckley was fortunate that Agent Card's disclosure during her cross-examination at the Rule 37.1 evidentiary hearing, likely inadvertent, led to relief, while Ray's history of perjury, never disclosed by the prosecution, apparently fell on deaf ears even though fully proved in the federal habeas action and conceded by the prosecution at the Rule 37.1 hearing.

VI. EPILOGUE

Henry Morgan was defeated in his bid for re-election when he lost the Democratic Primary for prosecuting attorney in 2006.[417]

Rodney Bragg was awarded $200,000 by the Arkansas Claims Commission for his wrongful confinement, which was paid by special appropriation by the Arkansas General Assembly in 2007.[418]

Keith Ray was never prosecuted for his perjury in the Nevada County prosecution of Rodney Bragg or for filing a false report—a felony under Arkansas law—in the Clark County case against Bragg dismissed by Prosecuting Attorney Henry Morgan that led to Ray's repudiation by Morgan and subsequent resignation from the South Central Drug Task Force.[419]

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416. Order Granting Petition for Writ of Error *Coram Nobis*, Buckley v. State, No. CR 99-13 (Ark. Cir. Ct. Nov. 1, 2010) (ordering convictions vacated and the petitioner released from custody of the Arkansas Department of Correction).

417. *See State Judiciary Sees Many Changes in the New Year*, FRIENDS OF THE COURT (Ark. Admin. Office of the Courts, Little Rock, Ark.), Jan. 2007, at 2, *available at* https://courts.arkansas.gov/newsletters/friendsofthecourt/2007/FOC_2007_JAN.pdf.

418. *See* Act 1419, 2007 Ark. Acts 7458, 7461.

419. *See* ARK. CODE ANN. § 5-54-122 (Repl. 2005).

Gyronne Buckley was released from the Arkansas Department of Correction on November 1, 2010.[420] Although he was serving a fifty-six-year sentence for delivery of cocaine at that point, the ADC release paper still indicated he was serving a life sentence.[421] He had been denied executive clemency by Governors Huckabee and Beebe, respectively, despite three favorable recommendations by the Arkansas Post Prison Transfer Board.[422] Also, his petition for federal habeas relief in the United States District Court for the Eastern District of Arkansas was dismissed following the grant of *coram nobis* relief in the Clark County Circuit Court and the special prosecutor's decision to dismiss the pending felony charges on his *nolle prosequi* motion.[423]

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420. Order of Discharge, OTRR621, State of Arkansas (Nov. 1, 2010).

421. *Id.*

422. Buckley's petition was denied by Governor Beebe in October 2008, despite a recommendation for relief from the Post Prison Transfer Board in December 2007. Governor Beebe's almost virtual rejection of clemency applications has been noted in the statewide press. Andy Davis, *Lone Commutation Sets Governor Apart*, ARK. DEMOCRAT-GAZETTE, May 9, 2011, at 1A. In contrast to Buckley's request for clemency regarding convictions for the sale of drugs, Governor Huckabee granted clemency to at least two individuals who subsequently committed capital murder. Wayne DuMond was convicted and sentenced to death for the murder of a Missouri woman. Arkansas Times Staff & Max Brantley, *Web Special: DuMond Case Revisited*, ARK. TIMES, Sept. 1, 2005, http://www.arktimes.com/arkansas/web-special-dumond-case-revisited/Content?oid=862759. Also, Maurice Clemons shot and killed four Tacoma, Washington, police officers following his commutation. *See* Scott Gutierrez et al., *Huckabee Commuted Sentence of Man Tied to Police Slayings*, Seattle Post-Intelligencer, Nov. 29, 2009 at http://www.seattlepi.com/local/article/Huckabee-commuted-sentence-of-an-tied-to-police-890436.php.

423. Order Granting Motion to Nolle Prosequi, State v. Buckley, No. CR 1999-0013 (Ark. Cir. Ct. Dec. 6, 2010).