

## Help Wanted: Seeking One Good Appellate Brief That Forces the Arkansas Supreme Court to Clarify Its Criminal Discovery Jurisprudence



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Assume a prosecutor here in Arkansas is interested in prosecuting a bank officer for fraud.<sup>1</sup> He has little evidence against the officer, Smith, but a cooperating witness claims to know Smith and offers to help. This witness, Jones, has already been charged with four counts of tax evasion and offers to plead to guilty if the state agrees not to prosecute his company, its affiliates, or his family for their involvement in his tax schemes. The prosecutor accepts his plea on the condition that he provides all information about bribes he paid to Smith in connection with the tax scheme. Jones agrees and the prosecutor schedules a debriefing session with Jones and his attorney.

At the debriefing session, the prosecutor tells Jones that he must provide all relevant information about both his tax evasion scheme and any personal knowledge about Mr. Smith's

improprieties. Knowing that his wife was intimately involved in the tax scheme, the prosecutor begins the session by asking Jones the following "softball": "did your wife help you facilitate your tax evasion scheme?" To the prosecutor's surprise, Jones lies by emphatically answering "no." "Could we have a minute," counsel for Jones then asks. "Of course," the prosecutor replies. After a break, Jones acknowledges his wife's involvement in the tax scheme and the prosecutor agrees to give him a "fresh start." Jones then proceeds to provide intimate incriminating details about Smith's involvement in the criminal endeavor. Now, the question: at a subsequent prosecution of Smith where Jones is the sole witness against Smith, must the prosecutor—in response to counsel for Smith's specific discovery request for "inconsistent witness statements"—turn over the fact that Jones lied before incrimi-

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1. The hypothetical is loosely based on the facts of *United States v. Brechner*, 99 F.3d 96 (2d Cir. 1996). Although the issue in *Brechner* focused on whether the government breached its obligations pursuant to a plea agreement, the facts nicely raise collateral questions about its discovery obligations. *Id.* at 97-100 (providing facts relevant to the above hypothetical).

nating Smith?<sup>2</sup> If the prosecutor elects not to disclose the fact of Jones' lie, has he violated Smith's federal or state constitutional rights? Alternatively, has he violated any of the Arkansas Rules of Criminal Procedure?

This Essay first points out that Arkansas has yet to conclusively provide an answer to these important questions. More importantly, however, this Essay contends that, in answering these questions, the Arkansas Supreme Court should require prosecutors to turn over all statements in response to a specific discovery request even if those statements are only arguably "material" and "favorable to the accused." Doing so would provide to defendants more protection pursuant to the Arkansas Constitution than they now enjoy under the Federal Constitution. Part I outlines current Arkansas discovery practice pursuant to state rules of criminal procedure, the Federal Constitution, and pertinent judicial pronouncements addressing relevant discovery issues. Part II then briefly suggests to defense counsel a conceptual map designed to force the Arkansas Supreme Court to plug the numerous and ambiguous holes in its criminal discovery jurisprudence. The Essay concludes by arguing that Arkansas prosecutors should turn over to defense counsel all arguably favorable evidence where there is a reasonable *possibility* that non-disclosure could be outcome determinative.

## I.

In response to a specific defense request for discovery, prosecutors everywhere must consider their response in the context of both federal constitutional principles and governing state procedural rules. This section considers those principles and their impact on an intentional or negligent prosecutorial failure to, in keeping with the Smith/Jones hypothetical, turn over the fact of Jones' lie during the debriefing to counsel for Smith. Part A considers what role the federal constitution, via the Due Process Clause of the Fourteenth Amendment, plays in this context. Part B then analyzes what place state rules occupy in prosecutorial discovery responses. Finally, Part C explores what the Arkansas State Supreme Court might say about the state's suppression of Jones' lie.

### A. Federal Constitutional Discovery

Wholly apart from the discovery obligations imposed upon the government by the Arkansas Rules of Criminal Procedure, the Due Process Clause of the Fourteenth Amendment obligates the prosecution to disclose evidence that is "material" either to the guilt or punishment of the accused.<sup>3</sup> The prosecutor in every case must therefore make an objective threshold determination of whether it is appropriate to turn over a certain piece of evidence.<sup>4</sup>

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2. Notably, the constitutional rules of criminal discovery apply to requests for impeachment evidence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the] general rule [of Brady]." (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959))); *accord Smith v. State*, 932 S.W.2d 753, 754 (Ark. 1996) ("[Rule 17.1(d)] applies to exculpatory and impeachment evidence." (citing *Yates v. State*, 794 S.W.2d 133 (Ark. 1990))).

3. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963).

4. On this point, one scholar observed that it will perhaps be the rare case when a prosecutor possesses evidence of a defendant's innocence and yet seeks to pursue a conviction. Scott Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 659 (2002). But perhaps the better point is that, regardless of the good or bad faith of the prosecutor, the defendant will learn about the prosecutor's erroneous decision, if ever, only later in the appellate context.

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Now, regardless of his subjective motivations,<sup>5</sup> let's assume that the prosecutor decides not to disclose the fact of Jones' lie at the debriefing to counsel for Smith. Smith is subsequently convicted and learns about Jones' lie from counsel for Jones. On appeal, counsel for Smith contends that the prosecutor violated his client's due process rights by failing to disclose Jones' lie. Did the prosecutor have a constitutional obligation to disclose the lie? Probably not, although it depends on the definition of "material."

At first, the 1963 decision in *Brady v. Maryland*<sup>6</sup> appeared to define "material" broadly. Although the definition lacked precision, the Court suggested that "material" evidence is that "which, if made available, would tend to exculpate [the defendant] or reduce the penalty."<sup>7</sup> In 1976, the Supreme Court in *United States v. Agurs*<sup>8</sup> seemingly narrowed that definition by characterizing "material" evidence as evidence of "obviously exculpatory character"; in other words, evidence that "creates a reasonable doubt that did not oth-

erwise exist."<sup>9</sup> Given that such evidence will so clearly support a defendant's innocence, the Court reasoned "no significant difference [exists] between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all."<sup>10</sup> Yet, the Court cautioned that the government's refusal to disclose exculpatory material in response to defense counsel's specific request is "seldom, if ever, excusable."<sup>11</sup>

Perhaps, then, we must examine the nature of counsel for Smith's discovery request more closely. For example, is it constitutionally significant if counsel requested "all *Brady* material" as opposed to the request in this hypothetical for "all contradictory witness statements"? Although *Agurs* would emphatically answer "yes,"<sup>12</sup> the Supreme Court's answer now is undoubtedly "no."

In 1985, a badly fractured Supreme Court held, in *United States v. Bagley*,<sup>13</sup> that in all *Brady*-type cases—regardless of the nature of defense counsel's discovery request—appel-

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5. The Court has thematically indicated that the good or bad faith of the prosecution in the context of evidence suppressed by the prosecution at the discovery phase is irrelevant. *E.g.*, *Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*" (emphasis added)). Indeed, the bad faith of the state plays a role only if it fails to preserve evidence. *See* *Youngblood v. Arizona*, 488 U.S. 51, 58 (1988) (holding that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law").

6. 373 U.S. 83 (1963).

7. *Id.* at 87-88.

8. 427 U.S. 97 (1978).

9. *Id.* at 112.

10. *Id.* at 107.

11. *Id.* at 106.

12. *Id.* ("The test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made.").

13. 473 U.S. 667 (1985).

late courts should apply the *Agurs* standard.<sup>14</sup> Thus, even in cases where defense counsel has made a specific discovery request, reviewing courts need only ask whether “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”<sup>15</sup> No longer relevant, then, is *Brady*’s sweeping definition of “material” or *Agurs*’ caution that the prosecutorial failure to disclose exculpatory evidence in response to a specific request is “seldom ever excusable.” Perhaps, then, Justice Stevens in dissent rightly accused the *Bagley* majority of re-writing *Brady*.<sup>16</sup>

Justice Stevens’ criticisms aside, we are now ready to answer the question posed at the outset: has our hypothetical prosecutor violated Smith’s federal due process rights by suppressing evidence that Jones lied at the debriefing? In other words, is there a reasonable *probability* that the result of the proceed-

ing would have been different had counsel for Smith known that Jones lied? Unlikely. Keep in mind that whether counsel for Smith made a specific discovery request for “inconsistent witness statements”—as opposed to a general request for “all *Brady* material”—is immaterial.<sup>17</sup> Given that Jones was charged with tax *evasion*, counsel for Smith already had plenty of ammunition to discredit Jones’ testimony in the eyes of *Bagley*.

Although faithful to the Supreme Court’s jurisprudence, the suggestion that our hypothetical prosecutor engaged in constitutionally acceptable behavior by ignoring defense counsel’s request seems uncomfortable at best and, if intentional, unethical at worst. If indeed the disputed evidence—Jones’ lie—is cumulative in light of the charges, then that should clearly suggest the better practice: disclosure, not suppression. Regardless, Smith finds no constitutional remedy in the federal Constitution’s due process clause for the prosecutor’s conduct in this case.

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14. *Id.* at 682 (“We find the *Strickland* [*v. Washington*] formulation of the *Agurs* test for materiality sufficiently flexible to cover the ‘no request,’ ‘general request,’ and ‘specific request’ cases of prosecutorial failure to disclose evidence favorable to the accused.”).

15. *Id.* The Court has since purportedly clarified the definition of “materiality” on two subsequent occasions. See *Strickler v. Greene*, 527 U.S. 263, 299-300 (1999); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

In *Kyles*, the Court observed, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” 514 U.S. at 434. The *Kyles* Court further articulated that (1) a defendant shows a *Brady-Bagley* violation by demonstrating that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” *id.*; (2) harmless error review is inappropriate because no *Brady-Bagley* error could ever be harmless, *id.* at 435; and (3) materiality considers the totality of suppressed evidence, not item-by-item, *id.* at 436-37. *Accord Greene*, 527 U.S. at 290 (reaffirming that the question for “materiality” is “whether ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’” (quoting *Kyles*, 514 U.S. at 435)).

16. *Bagley*, 473 U.S. at 709 (Stevens, J., dissenting).

17. *Id.* at 682.

## B. State Discovery Practice

Arkansas Rule of Criminal Procedure 17.1 governs the government's disclosure obligations. At the outset, it bears noting Rule 17.1 provides defendants with significantly broader discovery rights than does its federal counterpart.<sup>18</sup> Indeed, pursuant to Rule 17.1(a), the *government* "shall disclose" (1) the names of potential witnesses, (2) statements made by either the defendant or his co-defendant(s), (3) grand jury minutes pertaining to defendant's testimony, (4) expert reports, (5) tangible objects belonging to the defendant, and (6) whether any of its witnesses have a criminal record.<sup>19</sup>

Assuming defense counsel makes a timely request, Rule 17.1(b) further obligates the government to inform the defense of "the substance of any relevant grand jury testimony,"<sup>20</sup> whether law enforcement has performed any electronic surveillance of defendant or his property,<sup>21</sup> and the nature of prospective witnesses' relationship to the prosecutor.<sup>22</sup> And, Rule 17.1(c) requires the state to allow "inspection, testing, copying, and photocopying"

by the defendant "of any relevant material regarding: (i) any specific searches and seizures; [and] (ii) the acquisition of specified statements from the defendant."<sup>23</sup>

Most relevant to our hypothetical, however, is Rule 17.1(d), which requires the prosecutor to "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 therefore."<sup>24</sup>

With this primer on Arkansas state discovery in mind, has our hypothetical prosecutor violated non-constitutional discovery principles? Certainly, the failure to disclose Jones' lie in the debriefing to counsel for Smith does not implicate any portion of either Rules 17.1(a) or 17.1(b). If anything, the government's decision to suppress Jones' lie arguably implicates only Rule 17.1(d), which again obligates the government to disclose *anything* that tends to negate Smith's guilt or innocence—language that incorporates the Supreme Court's holding in *Brady*.<sup>25</sup> We are left, then, to wonder how much Rule 17.1(d)

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18. In contrast to Rule 17.1 of the Arkansas Rules of Criminal Procedure, Rule 16 of the Federal Rules of Criminal Procedure demands little from the government. Pursuant to Rule 16, federal defendants are entitled to (1) any oral statements defendant made to a government agent, FED. R. CRIM. P. 16(a)(1)(A); (2) any statements defendant made post-arrest or to the grand jury, FED. R. CRIM. P. 16(a)(1)(B)(i)-(iii); (3) a copy of defendant's own criminal record, FED. R. CRIM. P. 16(a)(1)(D); (4) any of defendant's documents in the government's possession that are "material" and that the government intends to use at trial, FED. R. CRIM. P. 16(a)(1)(E)(i)-(iii); (5) copies of scientific tests that are "material" to preparing defendant's defense, FED. R. CRIM. P. 16(a)(1)(F)(i)-(iii); and (6) copies of any written summaries of expert testimony that the government intends to use in its case-in-chief, FED. R. CRIM. P. 16(a)(1)(G).

19. ARK. R. CRIM. P. 17.1(a)(i)-(vi).

20. ARK. R. CRIM. P. 17.1(b)(i).

21. ARK. R. CRIM. P. 17.1(b)(ii).

22. ARK. R. CRIM. P. 17.1(b)(iii).

23. ARK. R. CRIM. P. 17.1(c)(i)-(ii).

24. ARK. R. CRIM. P. 17.1(d) (emphasis added).

25. *Yates v. State*, 794 S.W.2d 133, 136 (Ark. 1990) ("Rule 17.1(d) incorporates the due process requirement that evidence favorable to a defendant on issues of guilt or punishment be disclosed by the prosecutor." (citing *Brady v. Maryland*, 373 U.S. 83 (1963))).

obligates the prosecution to disclose to defense counsel and whether, in answering that question, it depends on the *specificity* of counsel's request.

Of course, that raises a collateral question: wholly apart from Rule 17.1, what role does the due process clause of the Arkansas Constitution play? Given that a criminal defendant is always entitled to argue that his state's constitution provides to him more protection than does its federal counterpart,<sup>26</sup> perhaps Arkansas appellate courts apply different standards to claims of prosecutorial non-compliance with specific, as opposed to general, defense requests for discovery. Stated differently, does Arkansas apply the *Bagley* "reasonable probability" standard regardless of the nature of defense counsel's discovery request? Let's take each question in turn.

### C. Where do Arkansas courts stand?

By way of background, several courts unsatisfied with *Bagley*'s "reasonable probability" appellate standard for judging prosecutorial suppression of exculpatory evidence in response to specific defense requests have relied on their own state constitutions to reject the standard.<sup>27</sup> In *People v. Vilardi*,<sup>28</sup> for example, the New York Court of Appeals relied on *Agurs* to expressly adopt a "reasonable possibility" standard as the appropriate standard to use when the defense makes a specific discovery request.<sup>29</sup> In doing so, the court reasoned that applying *Bagley* both to the specific and general request cases diminishes the prosecutor's incentive, first, to respond at all and, second, to "thoroughly . . . review files for exculpatory material, or to err on the side of disclosure where exculpatory value is

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26. ARK. CONST. art. 2, § 8 ("[N]or shall any person be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law."); see *Oregon v. Haas*, 420 U.S. 714, 719 (1975) (observing that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards" (citing *Cooper v. California*, 386 U.S. 58, 62 (1967))). The Arkansas Supreme Court has, on several occasions, granted to its citizens more rights under the state due process clause than are granted by the federal due process clause. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332, 351 (Ark. 2002) (recognizing homosexuals as "a separate and identifiable class for purposes of equal-protection analysis"); *State v. Sullivan*, 74 S.W.3d 215, 221 (Ark. 2002) (holding that the exclusionary rule applies to pretextual arrests); *Box v. State*, 71 S.W.3d 552, 557 (Ark. 2002) (holding that a defendant has the right not to appear in prison garb, which includes county-jail clothing); *Griffin v. State*, 67 S.W.3d 582, 589-91 (Ark. 2002) (holding that officers' "knock and search" of defendant's home using flashlights to look inside defendant's sliding glass door was unconstitutional).

27. See, e.g., *Jimenez v. State*, 918 P.2d 687, 692 (Nev. 1996); *State v. Kaiser*, 486 N.W.2d 384, 386 (Minn. 1992); *State v. Engel*, 592 A.2d 572, 599 (N.J. App. Div. 1991); *Commonwealth v. Gallarelli*, 502 N.E.2d 516, 519 n.5 (Mass. 1987).

28. 555 N.E.2d 915 (N.Y. 1990).

29. *Id.* at 919 ("In accordance with our long-standing State concerns, in cases involving failure to disclose material specifically requested by a defendant, we have described the standard as one premised on *Agurs*, and that has been understood and cited again and again as the governing standard throughout the State." (citations omitted)).

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debatable.”<sup>30</sup> Thus, in New York, “a showing of a ‘reasonable *possibility*’ that the failure to disclose the exculpatory [evidence] contributed to the verdict remains the appropriate standard to measure materiality, where the prosecutor was made aware by a specific discovery request that defendant considered the material important to the defense.”<sup>31</sup>

Whether Arkansas has, for *state* constitutional due process discovery purposes, adopted the *Bagley* standard is hardly clear. Indeed, the few published Arkansas cases to consider the issue hopelessly blend federal and state constitutional standards without distinction and without regard to the nature of defense counsel’s discovery request. In doing so, Arkansas appellate courts also problematically interweave the non-constitutional discovery standards imposed by Rule 17.1. In short, the courts appear to treat constitutional discovery and non-constitutional discovery identically while disregarding the presence or absence of a defendant’s specific discovery request at trial.

The first Arkansas case to deal with the *Brady-Agurs-Bagley* line of cases in any substance was the 1988 decision in *Strobbe v. State*.<sup>32</sup> In *Strobbe*, defendant made a spe-

cific discovery request that, in part, sought “the substance of any oral statement by any person expected to give evidence at the trial and any other evidence now known or which through the exercise of due diligence could be learned by the prosecution which otherwise reflects upon the credibility, competency, bias or motive of the prosecution’s witnesses.”<sup>33</sup> Notwithstanding that request, the defense did not learn until after trial that a key state witness had changed his story and admitted involvement in the charged offense.<sup>34</sup>

Somewhat confusingly, the state argued on appeal that disclosure was not required either by Rule 17.1, *Brady*, or *Bagley*.<sup>35</sup> The court disagreed and, in doing so, awarded to defendant a new trial.<sup>36</sup> Although the court reasoned, “the impeachment evidence that [the witness] was in fact a participant in the crime falls within the realm of information subject to discovery and the rule enunciated in *Brady* and *Bagley*,”<sup>37</sup> it thereafter only analyzed whether the state’s suppression denied to defendant a fair trial.<sup>38</sup> Significantly, the court neither addressed the state’s Rule 17 argument, nor indicated whether its discussion of *Brady* and *Bagley* related to federal or state due process standards.

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30. *Id.* at 920.

31. *Id.* (emphasis added).

32. 752 S.W.2d 29 (Ark. 1988). Other earlier Arkansas cases mentioned *Bagley* after its issuance, but never discussed its impact on criminal discovery practice in any meaningful depth. *See, e.g.*, *Wilson v. State*, No. CR 86-51, 1986 Ark. LEXIS 1957, \*12 (Ark. June 16, 1986) (unpublished); *Alfay v. State*, No. CR 86-1, 1986 Ark. LEXIS 1762, \*2 (Ark. Feb. 18, 1986) (unpublished); *McClendon v. State*, No. CR 86-1, 1986 Ark. LEXIS 1692, \*2 (Ark. Jan. 13, 1986) (unpublished); *Orsini v. State*, 701 S.W.2d 114, 117 (Ark. 1985).

33. *Strobbe*, 752 S.W.2d at 31.

34. *Id.* at 30.

35. *Id.* at 31.

36. *Id.* at 32-33.

37. *Id.* at 32.

38. *Id.* (“The error consisted of the withholding of significant evidence which denied [defendant] a fair trial.”).

The court in *Yates v. State*<sup>39</sup> did little to clarify the issue two years later. In *Yates*, defendant was convicted of two counts of rape and, on appeal, contended in part that the trial court erred in denying his motion to require disclosure of his polygraph test results.<sup>40</sup> His motion stemmed from the state's refusal to disclose those results after he served a discovery request on the state seeking "any oral statements made by him, as well as any reports or statements made by experts relating to the results of physical or mental examinations, scientific tests, experiments, or comparisons."<sup>41</sup> In rejecting the state's argument that polygraph test results were "work product," the court held that Rule 17.1(d) obligated prosecutorial disclosure of the polygraph results.<sup>42</sup>

Far more importantly than the holding, the court reasoned, "Rule 17.1(d) incorporates the [*Brady*] due process requirement that evidence favorable to a defendant on issues of guilt or punishment be disclosed by the prosecutor."<sup>43</sup> The court continued by noting that it viewed Rule 17.1(d) as "an extension of the *Brady* mandate."<sup>44</sup> Although such language seemingly suggested that the

court recognized the importance of separating non-constitutional (rule-based) discovery from constitutional discovery, it then quizzically relied on *Bagley* to insist that defendant "demonstrate a reasonable probability that the result would have been different had he had the information."<sup>45</sup> The *Yates* decision therefore seemed only to confuse further the issues of whether (1) Arkansas adopted *Bagley* as a matter of state constitutional law, and (2) whether Rule 17.1(d) imposed upon the state any different or additional discovery obligations.

Confused yet? Things seemingly got more confusing in 1998 when the court handed down *Harrell v. State*.<sup>46</sup> In *Harrell*, defendant appealed from multiple felony convictions, including rape, by asserting that he deserved a new trial because the state declined to disclose the victim's previous plea of guilty to cocaine possession, notwithstanding defendant's pretrial discovery motion.<sup>47</sup> Defendant cited *Brady* and argued that the victim's prior guilty plea undermined her credibility and was therefore properly discoverable as exculpatory impeachment evidence.<sup>48</sup> Without mention of Rule 17.1, the state constitution,

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39. 794 S.W.2d 133 (Ark. 1990).

40. *Id.* at 133.

41. *Id.* at 133-34.

42. *Id.* at 135.

43. *Id.* at 136 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). The court has often summarily inter-woven the *Brady* decision with Rule 17.1(d). *See, e.g.*, *Perroni v. State*, 186 S.W.3d 206, 214 (Ark. 2004); *Esmeyer v. State*, 930 S.W.2d 302, 306 (Ark. 1996); *Newberry v. State*, 557 S.W.2d 864, 866 (Ark. 1977).

44. *Id.*

45. *Yates*, 794 S.W.2d at 136.

46. 962 S.W.2d 325 (Ark. 1998).

47. *See id.* at 327. More specifically, defendant contended that the trial court erred in denying his motion for a new trial based on the state's non-disclosure of the victim's prior guilty plea. *Id.*

48. *Id.* at 328.

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or the specificity of defendant's discovery request, the court summarily relied on *Bagley's* "reasonable probability" standard and held that no error occurred.<sup>49</sup>

Things remained fuzzy in the court's most recent pronouncement on the issue nine years ago. In *Lee v. State*,<sup>50</sup> wherein defendant appealed his conviction for, *inter alia*, capital murder, by contending that the trial court erroneously refused to grant his motion for a new trial based on the state's failure to disclose exculpatory impeachment information.<sup>51</sup> Prior to trial, defendant twice filed discovery motions seeking the criminal histories of state witnesses, yet defendant never learned that three state witnesses in fact either had prior felony arrests or convictions.<sup>52</sup> This information, defendant asserted, would have aided him in impeaching the state's witnesses at trial.<sup>53</sup>

Although the court recognized that then-enacted Rule 17.1(a)(vi) governed the state's obligation to disclose the criminal histories of its witnesses,<sup>54</sup> it addressed Rule 17.1(d) and *Brady-Bagley* collectively as a "corollary issue."<sup>55</sup> In doing so, the court for the first time adopted the "same reasoning" as *Bagley*,<sup>56</sup> yet declined to tie *Bagley's* reasoning to the due process clause of the Arkansas Constitution.

Equally as analytically problematic, the court cited Rule 17.1(d) without elaborating on its suggestion in *Yates* that Rule 17.1(d) is "an extension of the *Brady* mandate." Against that somewhat bewildering backdrop, the court characterized the state's witnesses' criminal histories as "material," but found no reversible error because it could not say there existed "a reasonable probability that the results of this trial would have been different even were we to exclude the testimony of [the three challenged state's witnesses]."<sup>57</sup>

## II.

After *Lee*, litigants are left to wonder (1) whether *Bagley* governs the state's suppression of exculpatory evidence as a matter of state constitutional law; (2) whether it is constitutionally significant if the state suppresses exculpatory evidence in response to defense counsel's specific discovery request; and (3) whether Rule 17.1(d) imposes any additional or different discovery obligations on the state.

As to the first point, although it is hardly clear from the foregoing discussion of Arkansas criminal discovery jurisprudence, it appears that Arkansas is a "*Bagley* juris-

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49. *Id.* at 328-29.

50. 11 S.W.3d 553 (Ark. 2000).

51. *Id.* at 555.

52. *Id.* at 556.

53. *Id.*

54. *Id.* In 2000, Rule 17.1(a)(vi) obligated the state to disclose "any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information." *Id.* (quoting ARK. R. CRIM. P. 17.1(a)(vi) (2000)).

55. *Lee*, 11 S.W.3d at 557 ("The corollary issue under this point is whether the prosecution was required to disclose any criminal information regarding [its witnesses], even if that information did not solely relate to criminal convictions.").

56. *Id.*

57. *Id.*

diction.” Admittedly, the court at no point expressly adopts *Bagley* as the governing standard for purposes of *state* constitutional due process.<sup>58</sup> Perhaps, then, it is more accurate to say that Arkansas is a *Bagley* jurisdiction by default.<sup>59</sup> Regardless, as to the second point, let us be clear: the Arkansas Supreme Court at no point has addressed the state constitutional significance, if any, between governmental suppression of exculpatory evidence in response to defense counsel’s specific or general discovery request.

With that said, however, the wake of confusion left behind by *Strobbe*, *Yates*, *Harrell*, and *Lee*, arguably bodes well for defense counsel. Consider, for example, the hypothetical raised at the outset of this Essay: given the prosecutor’s suppression of Jones’ lie at the debriefing notwithstanding a *specific* discovery request, appellate defense counsel should separately raise three arguments. First, appellate counsel for Smith should argue that our hypothetical prosecutor violated federal due process discovery standards by withholding Jones’ lie. This argument, for reasons posited earlier, is a likely loser.

More importantly, then, appellate counsel for Smith should argue that the due process clause in the Arkansas state constitution provides to its citizens more protection than does the federal due process clause.<sup>60</sup> Counsel should further argue that *Agurs*—not *Bagley*—governs cases involving prosecutorial suppression of exculpatory evidence following a

specific discovery request.<sup>61</sup> Moreover, sound policy favors requiring defendants to show, for example, only a “reasonable possibility” that the state’s failure to disclose exculpatory evidence or impeachment statements contributed to the verdict, particularly where the state knew from a specific discovery request that defendant considered the material important. This standard, borrowed from *Vilardi*, eliminates the disincentive created by *Bagley* for the prosecutor, in responding to a discovery request simply to undertake a casual review of files for exculpatory materials. In other words, distinguishing between specific and general defense discovery requests will encourage prosecutors to err on the side of disclosure where—as in our hypothetical—exculpatory value is debatable. After all, absent a move away from *Bagley*, how would counsel for Smith ever learn about Jones’ single oral statement made during a debriefing where neither counsel for Smith, nor Smith himself, were present?

As to the third and final point, counsel should, if all else fails, rely on the reasoning in *Yates* to assert that, even if Arkansas is a *Bagley* jurisdiction for state constitutional purposes, Rule 17.1(d) both incorporates the broader language of *Brady* and expands on it. Surely, then, counsel can correspondingly argue that the prosecutor’s failure to inform trial counsel of exculpatory impeachment evidence—Jones’ lie—denied “evidence favorable to a defendant on [an] issue[ ] of guilt or

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58. As noted, the court came closest in *Lee*, wherein it adopted the “same reasoning” as *Bagley*. *Id.*

59. See, e.g., *Lee*, 11 S.W.3d at 557 (requiring defendant to satisfy *Bagley*’s “reasonable probability” standard); *Harrell*, 962 S.W.2d at 328 (same); *Yates*, 794 S.W.2d at 136 (same).

60. See note 26, *supra*, and accompanying text.

61. The Arkansas Supreme Court has apparently never considered such an argument. In fact, the court has cited to *Agurs* only once in addressing a peripheral issue. See *Goodwin v. State*, 568 S.W.2d 3, 10 (Ark. 1978).

punishment,”<sup>62</sup> particularly given the shaky credibility of the prosecution’s sole witness.

Ideally, a defense brief that clearly provides for the court separate arguments related to the federal constitution, state constitution, and Rule 17.1(d) will produce an opinion that correspondingly provides separate rulings and analysis. And, regardless of which argument prompts the court to address discovery issues related to the suppression of exculpatory evidence, the court’s responsive message must be clear: state prosecutors should turn over to defense counsel all arguably favorable evidence where there is a reasonable *possibility* that non-disclosure could be outcome determinative.

### Conclusion

The foregoing brief analysis suggests that the Arkansas Supreme Court has its work

cut out for it. When, and if, the court will overhaul its criminal discovery jurisprudence remains to be seen. Given that the court has not meaningfully discussed *Bagley* in a published decision in nine years is simultaneously problematic and telling. When the time comes, however, the court must be unmistakably clear in its analysis in order to resolve (1) whether *Bagley* governs the prosecution’s suppression of exculpatory evidence as a matter of state constitutional law; (2) whether the state’s suppression of exculpatory evidence in response to defense counsel’s specific discovery request is “seldom, if ever, excusable;”<sup>63</sup> and (3) whether Rule 17.1(d) imposes any additional or different discovery obligations on the state. Until that time, counsel for Smith may never know that Jones lied at the debriefing.

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62. *Yates*, 794 S.W.2d at 136.

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