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The prosecutor's duty to disclose exculpatory evidence to the defense and the method and timing of such disclosure

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE SPECIAL COURT FOR SIERRA LEONE

ISSUE 7: THE PROSECUTOR'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE TO THE DEFENSE AND THE METHOD AND TIMING OF SUCH DISCLOSURE

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS[*]

A. Issues

This memorandum performs a comparative analysis of United States ("US") law, International Criminal Tribunal for the Former Yugoslavia ("ICTY") rules and precedent, and International Criminal Tribunal for Rwanda ("ICTR") rules and precedent relating to the prosecution's duty to disclose exculpatory evidence to the defense.[1] In particular, this memorandum addresses (1) whether the prosecution must specifically identify the exculpatory nature of material being disclosed and (2) the time at which such disclosure must be made.[2]

The following analysis will aid in clarifying the obligations of the Prosecutor under Rule 68 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("SCSL").

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[*] SCSL ISSUE 7: "Is the Prosecutor required to bring to the attention of the Defense the "exculpatory" nature of material being disclosed or is he simply required to disclose material without pointing out that it is exculpatory? When should disclosure be made? Is it immediately [when] the material comes to the knowledge of the Prosecutor?"

[1] Initially, the author of this memorandum set out to do a comparative analysis of several English-speaking jurisdictions. Although a majority, if not all, of such jurisdictions recognize a prosecutorial duty to disclose exculpatory evidence to the defense, most of them have not addressed the specific issue relating to the identification of material as exculpatory. Upon discovery that the US Supreme Court has not decided the issue, that there is a split among US federal courts, and that the ICTY and ICTR have marginally dealt with the issue, the focus shifted exclusively to those three jurisdictions. Therefore, this work is limited to an analysis of US law and a combination of ICTY and ICTR law. For more information on the prosecutor's duty to disclose exculpatory evidence in other English-speaking jurisdictions, *see Regina v. Stinchcomb*, 68 C.C.C. (3d) 1 (S.C. Can. 1991) [Reproduced in accompanying notebooks at Tab 100]; David Watt, *General Principles of Prosecutorial Disclosure*, Watt's Manual Crim. Evid. § 24.01 [Reproduced in accompanying notebooks at Tab 110]; John Sprack, *The Criminal Procedure and Investigations Act 1996: Part I: The Duty of Disclosure*, Crim. L.R. 1997, May, pp. 308-20 (UK) [Reproduced in accompanying notebooks at Tab 109]; Edwards *v. United Kingdom*, 15 E.H.R.R. 417 (E.C.H.R. 1993) [Reproduced in accompanying notebooks at Tab 99]; *Solvay et Cie SA v. Commission of the European Communities*, (1995) E.C.R.II-1775 (European Union C.F.I. (1st Chamber)) [Reproduced in accompanying notebooks at Tab 102]; *Regina v. TSR*, 133 A. Crim. R. 54, Pars. 70-89 (Aus. App. Victoria 2002) [Reproduced in accompanying notebooks at Tab 101].

[2] This memorandum deals with the above issues under the law, not according to custom or ethical obligations. The conclusion reached in this memorandum is strictly based on whether US, ICTY, and ICTR laws require the prosecution in criminal matters to identify the exculpatory nature of material when disclosing it and whether such disclosure must occur immediately when the material becomes known to the prosecution. Aside from mentioning that ethical rules do generally require more of a prosecutor than does the law, no ethical opinions are rendered on the two issues raised. In the US, federal prosecutors often make personal decisions to specifically identify exculpatory evidence, but such decisions are made in the name of professionalism, not legal requirements.

Rule 68 outlines the duty of the SCSL Prosecutor to disclose to the defense exculpatory evidence which is known to the Prosecutor.[3] The obligation generally extends to evidence which is material to guilt or punishment or which may affect the credibility of prosecution evidence, and it is a continuing one. In sum, this memorandum addresses an equivalent duty found within the US, the ICTY, and the ICTR, focusing on the procedural method and timing of the prosecution's disclosure of exculpatory information.

Section II of this memorandum discusses US law governing the prosecution's duty to disclose exculpatory evidence to the defense. Part A of that section covers the general rule, Part B covers the method of disclosure, and Part C covers the time of disclosure. Section III of this memorandum collectively discusses ICTY and ICTR rules and precedent governing the prosecution's duty to disclose exculpatory evidence to the defense. Part A of that section covers the general rule, Part B covers the method of disclosure, and Part C covers the time of disclosure. Section IV of this memorandum provides an argument in favor of the rule which should be applied in the SCSL to each of the two issues presented. Section V briefly summarizes the material contained in this memorandum.

[3] Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 68, "Disclosure of Exculpatory Evidence" (2003):

> (A) The Prosecutor shall, within 14 days of receipt of the Defence Case Statement, disclose to the defence the existence of evidence known to the Prosecutor which may be relevant to issues raised in the Defence Case Statement.
>
> (B) The Prosecutor shall, within 30 days of the initial appearance of the accused, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Prosecutor shall be under a continuing obligation to disclose any such exculpatory material.

B. Summary of Conclusions

The purpose of this memorandum has been to thoroughly examine the existing law and establish the rule which should be followed by the SCSL. Based on the available US, ICTY, and ICTR rules and precedent, the following conclusions are propounded:

> (1) The SCSL Prosecutor's duty to disclose exculpatory evidence to the defense under Rule 68 should not include the duty to specifically identify the exculpatory nature of the material disclosed; and
>
> (2) Disclosure under Rule 68 should occur in the absence of prejudicial delay; in other words, disclosure should occur in sufficient time for the defense to use the material effectively at trial.

These conclusions are based on legal rules and precedent, not on preferred lawyering practice or ethics. Nor are they based on bright-line rules. However, the conclusions are supported by a majority of the available case law. There is contrary authority on the issues, but it is largely problematic in its administration and unsupported by substantial case law, and therefore should not be applied.

II. UNITED STATES LAW[4]

A. General Rule – *Brady v. Maryland* and its Progeny[5]

In the landmark case of *Brady v. Maryland*, the US Supreme Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment.[6] A due process violation can exist regardless of whether the suppression was a result of the good faith or bad faith of the prosecution.[7] The *Brady* rule has been modified by several courts, but the general duty it establishes is an important aspect of the defendant's constitutional due process rights. *Brady*, the foundation of US law governing the disclosure of exculpatory evidence to the defense, merits detailed discussion.

In *Brady* the petitioner and a companion, Boblit, were convicted of first-degree murder in state court and sentenced to death. Their convictions subsequently were affirmed on appeal. Their trials were held separately, with petitioner Brady's taking place first. At his trial Brady testified that he participated in the crime but that Boblit did the actual killing. He thus admitted

[4] It is important to observe that the identification and disclosure of exculpatory evidence is a problematic issue considering the other laws applicable to disclosure. Like Rule 66 of the SCSL, which requires the prosecution to provide the defense access to relevant material and witness statements, there are other US laws which govern potentially exculpatory material. Rule 16 of the Federal Rules of Criminal Procedure requires the prosecution to disclose relevant evidence to the defense. Furthermore, the Jencks Act requires US prosecutors to disclose evidence relating to government witnesses. The time limit of such disclosures varies from those required by *Brady* and SCSL Rule 68. The result in the US is that most of the exculpatory evidence is provided to the defense as Rule 16 or Jencks material, and little *Brady* material remains to be disclosed. If evidence is obviously exculpatory, it will be disclosed preliminarily under Rule 16, as such material is usually involved in the decision to prosecute. If evidence could potentially be exculpatory, it is nearly impossible for the prosecution to identify it as such, as it likely does not have the necessary information to develop an argument for the defense. Thus, a pure *Brady* problem often never arises unless certain material is withheld from the defense.

[5] For a general overview of US law concerning the prosecutor's duty to disclose exculpatory evidence to the defense, *see* Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to Accused*, 158 A.L.R. Fed. 401 (1999) [Reproduced in accompanying notebooks at Tab 108]; 21A Am. Jur. 2d *Criminal Law* §§ 979, 1253, 1269-74 (2003) [Reproduced in accompanying notebooks at Tab 103]; 63C Am. Jur. 2d *Prosecuting Attorney* § 24 (2003) [Reproduced in accompanying notebooks at Tab 104].

[6] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) [Reproduced in the accompanying notebooks at Tab 14]. *See also Strickler v. Greene*, 527 U.S. 263 (1999) [Reproduced in the accompanying notebooks at Tab 27] (general summary of law).

[7] *Id.*

his guilt of first-degree murder but asked that the jury convict him "without capital punishment." During the pre-trial stages Brady's counsel requested from the prosecution Boblit's extrajudicial statements. The government showed several such statements to the defense but withheld one in which Boblit admitted the actual homicide. The defense did not become aware of the suppressed statements until after Brady had already been tried, convicted, and sentenced, and his conviction had been affirmed.

Brady petitioned the trial court for post-conviction relief, moving for a new trial based on the discovery of the suppressed evidence. The trial court dismissed the petition. The appeals court held that the suppression denied Brady due process of law, remanding the case for a retrial on the question of punishment but not guilt. The US Supreme Court, with two Justices dissenting, agreed with the appeals court and held that suppression of the confession was a violation of due process. In the majority opinion, Justice Douglas stated:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.[8]

[8] *Brady*, 373 U.S. at 87-88 [Reproduced in the accompanying notebooks at Tab 14] (*referring to Mooney v. Holohan*, 294 U.S. 103 (1935) [Reproduced in accompanying notebooks at Tab 22]; *citing Brady v. State*, 174 A.2d 167, 169 (Md. App. 1961) [Reproduced in accompanying notebooks at Tab 15]).

In the US federal system the prosecutor's interest in a criminal proceeding is not to win the case but to ensure that justice is done.[9] The Fifth and Fourteenth Amendments to the US Constitution provide that no person shall be deprived of life, liberty, or property without due process of law.[10] A denial of due process has been described as the failure to observe that fundamental fairness essential to the very concept of justice.[11] Thus, the constitutional duty to disclose exculpatory evidence in criminal proceedings is based on the need to establish the truth in criminal proceedings, to make certain that justice is served, and to ensure that the defendant's trial is a fair one.[12]

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[9] *Strickler*, 527 U.S. at 281 [Reproduced in accompanying notebooks at Tab 27] (*citing Berger v. United States*, 295 U.S. 78, 88 (1935) [Reproduced in accompanying notebooks at Tab 13]). *See also Brady*, 373 U.S. at 87-88 [Reproduced in accompanying notebooks at Tab 14].

[10] U.S. CONST. amend. V; U.S. CONST. amend. XIV.

> Fifth Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall 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; nor shall private property be taken for public use, without just compensation.
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> Fourteenth Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[11] *California v. Trombetta*, 467 U.S. 479, 485 (1984) [Reproduced in accompanying notebooks at Tab 16] (*citing United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) [Reproduced in accompanying notebooks at Tab 79] (Due process requires that criminal prosecutions "comport with prevailing notions of fundamental fairness," or that "defendants be afforded a meaningful opportunity to present a complete defense."); *Lisenba v. California*, 314 U.S. 219, 236 (1941) [Reproduced in accompanying notebooks at Tab 20].

[12] *See generally Brady*, 373 U.S. 83 [Reproduced in accompanying notebooks at Tab 14]; *Strickler*, 527 U.S. 263 [Reproduced in accompanying notebooks at Tab 27]*; United States v. Agurs*, 427 U.S. 97 (1976) [Reproduced in accompanying notebooks at Tab 28]; *Berger*, 295 U.S. 78 [Reproduced in accompanying notebooks at Tab 13]; *Mooney*, 294 U.S. 103 [Reproduced in accompanying notebooks at Tab 22]; *Pyle v. Kansas*, 317 U.S. 213 (1942) [Reproduced in accompanying notebooks at Tab 24] (reaffirming *Mooney v. Holohan*).

The purpose of the *Brady* requirement is to "ensure that a miscarriage of justice does not occur, 'not to displace the adversary system as the primary means by which truth is uncovered.'"[13] As stated in *Bagley*,

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.[14] Thus, the prosecutor is not required to deliver his entire file to defense counsel,[15] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial:
>
> > "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose . . . But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[16]

The Supreme Court clearly intended to make the suppression or withholding of material, exculpatory evidence from the defense a constitutional violation. Thus the prosecution certainly must provide access to or make available such material to the defense. However, whether due

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[13] *United States v. Aubin*, 87 F.3d 141, 148-49 (5th Cir. 1996) [Reproduced in accompanying notebooks at Tab 31] (*citing United States v. Johnson*, 872 F.2d 612, 619 (5th Cir. 1989) [Reproduced in accompanying notebooks at Tab 54] (*quoting United States v. Bagley*, 473 U.S. 667, 675 (1985) [Reproduced in accompanying notebooks at Tab 32])).

[14] *Bagley*, 473 U.S. at 675 n.6 [Reproduced in accompanying notebooks at Tab 32]. Original footnote 6 reads: "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Berger*, 295 U.S. at 88 [Reproduced in accompanying notebooks at Tab 13]; *see Brady*, 373 U.S. at 87-88 [Reproduced in accompanying notebooks at Tab 14]. (Original citations modified.)

[15] *Id.* at 675 n.7. Original footnote 7 reads: *See Agurs*, 427 U.S. at 106 [Reproduced in accompanying notebooks at Tab 28]; *Moore v. Illinois*, 408 U.S. 786, 795 (1972) [Reproduced in accompanying notebooks at Tab 23]. *See also Trombetta*, 467 U.S. at 488, n.8 [Reproduced in accompanying notebooks at Tab 16]. "An interpretation of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.'" *Giles v. Maryland*, 386 U.S. 66, 117, 87 S. Ct. 793 (dissenting opinion). "Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." (Original citations modified.)

[16] *Id.* at 675-76 (*citing Agurs*, 427 U.S. at 108 [Reproduced in the accompanying notebooks at Tab 28]).

process disclosure or access necessarily includes the duty to identify the exculpatory nature of material being disclosed is debatable. This debate will be revisited in Part B below.

The prosecutorial duty to disclose exculpatory evidence outlined in *Brady* exists even in the absence of a specific request by the defense for such material.[17] The duty to disclose exculpatory information is an ongoing one, as the government has a continuous obligation to provide material, exculpatory evidence whenever it discovers such evidence in its possession, even after the trial has been completed.[18] A defendant's constitutional rights are violated, and a legitimate *Brady* claim exists, where favorable evidence material to the defense is suppressed or withheld.[19]

Evidence is material for *Brady* purposes if a reasonable probability exists that had the evidence been disclosed to the defense, the result of the proceeding would have been different.[20] The question is whether, in the absence of the undisclosed evidence, the defendant received a fair trial, i.e., a trial resulting in a verdict worthy of confidence.[21] Courts have held that *Brady* applies to both exculpatory and impeachment evidence[22] but not to inadmissible evidence,[23]

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[17] *Agurs*, 427 U.S. 97 [Reproduced in the accompanying notebooks at Tab 28]; *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) [Reproduced in accompanying notebooks at Tab 19].

[18] *Bagley*, 473 U.S. 667 [Reproduced in accompanying notebooks at Tab 32].

[19] *Brady*, 373 U.S. 83 [Reproduced in accompanying notebooks at Tab 14]. *See also Moore*, 408 U.S. 786 [Reproduced in accompanying notebooks at Tab 23]; *United States v. Payne*, 63 F.3d 1200 (2d Cir. 1995) [Reproduced in accompanying notebooks at Tab 69].

[20] *Bagley*, 473 U.S. at 682-83 [Reproduced in accompanying notebooks at Tab 32].

[21] *Kyles*, 514 U.S. at 433 [Reproduced in accompanying notebooks at Tab 19]; *Bagley*, 473 U.S. at 679 [Reproduced in accompanying notebooks at Tab 32].

[22] *Bagley*, 473 U.S. at 676 [Reproduced in accompanying notebooks at Tab 32]; *Giglio v. United States*, 405 U.S. 150 (1972) [Reproduced in accompanying notebooks at Tab 17].

[23] *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) [Reproduced in accompanying notebooks at Tab 70]; *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) [Reproduced in accompanying notebooks at Tab 55] (*citing Brady*, 373 U.S. at 89-90 [Reproduced in accompanying notebooks at Tab 14]; *United States v. Oxman*, 740

inculpatory evidence,[24] neutral evidence,[25] or cumulative evidence.[26] The suppressed evidence is to be considered collectively with all of the other evidence available, and where prosecutorial suppression undermines confidence in the outcome of the trial, a reasonable probability of a different result is accordingly shown.[27]

In determining that suppressed evidence should be considered collectively with all other evidence rather than item by item, the Supreme Court in *Kyles v. Whitley* pointed out that the Constitution is not violated every time the prosecution fails or chooses not to disclose evidence that may be favorable to the defense.[28] To determine whether a constitutional violation has occurred, the reviewing court must make a specific factual inquiry, post-judgment, to ascertain whether the proceedings would have been different had the suppressed information been available along with all of the other evidence.[29] The Court further held that the Constitution does not require the prosecution to employ an "open file" policy, as it need not disclose every scintilla of potentially relevant information in its possession.[30] Finally, the *Kyles* Court noted that the

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F.2d 1298, 1311 (3d Cir. 1984) [Reproduced in accompanying notebooks at Tab 67]; *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983) [Reproduced in accompanying notebooks at Tab 74]).

[24] *United States v. Gonzales*, 90 F.3d 1363, 1368 (8th Cir. 1996) [Reproduced in accompanying notebooks at Tab 49].

[25] *United States v. Flores-Mireles*, 112 F.3d 337, 340 (8th Cir. 1997) [Reproduced in accompanying notebooks at Tab 47]. (Prosecution has no duty to disclose evidence which is neutral, speculative or inculpatory, or which is available to the defense from other sources, or which is not in the prosecution's control or possession.)

[26] *Kyles*, 514 U.S. 419 [Reproduced in accompanying notebooks at Tab 19]; *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996) [Reproduced in accompanying notebooks at Tab 21]; *Spence v. Johnson*, 80 F.3d 989, 995 (5th Cir. 1996) [Reproduced in accompanying notebooks at Tab 25]; *Gonzales*, 90 F.3d 1363 [Reproduced in accompanying notebooks at Tab 49].

[27] *Id.* at 434.

[28] *Id.* at 436-37.

[29] *See generally Id.*

[30] *Id.* at 437.

Bagley and *Brady* rules require less of the prosecution than the American Bar Association Standards for Criminal Justice, which require disclosure of any evidence tending to exculpate or mitigate.[31]

B. Method of Disclosure

The Supreme Court has never established the procedure for the disclosures required by *Brady*.[32] As a result, there is conflicting authority in the US as to whether the government must specifically identify *Brady* material when disclosing it.[33] Some courts have held that the government cannot meet its *Brady* obligations simply by providing the defense with the relevant material. Rather, the government must specifically identify information which it knows constitutes *Brady* material.[34] To the contrary, other courts have held that there is no authority for the proposition that the government must specify *Brady* material within a larger mass of disclosed information.[35] Underlying this theory is the reasoning that the government is not

[31] *Kyles*, 514 U.S. at 436-37 [Reproduced in accompanying notebooks at Tab 19] (*citing* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall … make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense…"). *See also* ABA Model Rule of Professional Conduct 3.8(d) (2003) ("The prosecutor in a criminal case shall…make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense…") [Reproduced in accompanying notebooks at Tab 106]. *See also supra* note 2.

[32] *United States v. McVeigh*, 954 F. Supp. 1441, 1443 (D. Colo. 1997) [Reproduced in accompanying notebooks at Tab 61].

[33] *United States v. Polishan*, 2001 WL 848583, p. 13 (M.D. Pa. 2001) [Reproduced in accompanying notebooks at Tab 71].

[34] *See United States v. Hsia*, 24 F. Supp. 2d 14, 29-30 (D. D.C. 1998) [Reproduced in accompanying notebooks at Tab 53]; *McVeigh*, 954 F. Supp. 1441 [Reproduced in accompanying notebooks at Tab 61]; *Polishan*, 2001 WL 848583 [Reproduced in accompanying notebooks at Tab 71].

[35] *See United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997) [Reproduced in accompanying notebooks at Tab 63]; *United States v. Eisenberg*, 773 F. Supp. 662, 687-88 (D. N.J. 1991) [Reproduced in accompanying notebooks at Tab 46]; *United States v. Bloom*, 78 F.R.D. 591, 617 (E.D. Pa. 1977) [Reproduced in accompanying notebooks at Tab 39]; *Polishan*, 2001 WL 848583 [Reproduced in accompanying notebooks at Tab 71]; *United States v.*

obliged under *Brady* to provide information which the defense already has or which it can obtain with reasonable diligence,[36] and the identification of *Brady* material is information which the defense can obtain through reasonable diligence.[37] A discussion of the conflicting US court decisions follows.

1. The *Hsia*/*McVeigh* Line of Cases – Identification of Exculpatory Material Required

The US cases which require the government to specifically identify *Brady* material are based on broad interpretations of *Brady* obligations.[38] Such decisions lack detailed reasoning and do not cite any case law supporting the identification requirements being imposed. The courts base their judgments on due process principles of fairness and justice,[39] but their decisions go against contrary case law rejecting the identification requirement.[40] Two cases which have required specific identification of *Brady* material by the prosecution, *Hsia* and *McVeigh*, are described below.

Anzeulotto, 1996 WL 31233, p. 5 (E.D. N.Y. 1996) [Reproduced in accompanying notebooks at Tab 30]; *United States v. Davis*, 673 F. Supp. 252 (N.D. Ill. 1987) [Reproduced in accompanying notebooks at Tab 44].

[36] *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980) [Reproduced in accompanying notebooks at Tab 42] (*citing United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979) [Reproduced in accompanying notebooks at Tab 43]; *United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir. 1977) [Reproduced in accompanying notebooks at Tab 73]; *Giles v. Maryland*, 386 U.S. at 98 (Fortas, J., concurring) (nondisclosure of information that is merely repetitious, cumulative, or embellishing of facts otherwise known to defense should not result in conviction reversal) [Reproduced in accompanying notebooks at Tab 18]). *Accord United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1991) [Reproduced in accompanying notebooks at Tab 82]; *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989) [Reproduced in accompanying notebooks at Tab 62]; *Williams v. United States*, 503 F.2d 995 (2d Cir. 1974) [Reproduced in accompanying notebooks at Tab 84]; *Wallace v. Hocker*, 441 F.2d 219 (9th Cir. 1971) [Reproduced in accompanying notebooks at Tab 83]; *United States v. Brawer*, 367 F.Supp. 156 (S.D. N.Y. 1973) [Reproduced in accompanying notebooks at Tab 41]; *Mmahat*, 106 F.3d 89 [Reproduced in accompanying notebooks at Tab 63]; *Eisenberg*, 773 F. Supp. 662 [Reproduced in accompanying notebooks at Tab 46]; *Anzeulotto*, 1996 WL 31233 [Reproduced in accompanying notebooks at Tab 30]; *Polishan*, 2001 WL 848583 [Reproduced in accompanying notebooks at Tab 71].

[37] *See cases cited supra* note 35.

[38] *See Hsia*, 24 F. Supp. 2d 14 [Reproduced in accompanying notebooks at Tab 53]; *McVeigh*, 954 F. Supp. 1441 [Reproduced in accompanying notebooks at Tab 61].

[39] *See Id.*

[40] *See* cases cited *supra* note 35.

a. The *McVeigh* Case[41]

The *McVeigh* case was a complicated one in which the defendant was charged with offenses relating to the bombing of a federal office building. McVeigh filed a pre-trial motion to compel discovery. The court began its opinion by discussing the original discovery plan outlined for the case. At an earlier discovery conference, the prosecution said that it intended to follow an "open file" discovery policy and that it would not identify *Brady* material when disclosing information.[42] The ruling judge disapproved of that approach, stating, "I don't consider that the government has met . . . its obligations under those authorities with respect to due process by simply saying, 'This is open discovery; go fish and find what you want, and if there's anything there that's exculpatory, you're welcome to it.'"[43]

The *McVeigh* court approved its previous discovery order, in which it found, among other things, that open file discovery was insufficient and the government must specifically identify *Brady* material.[44] The potential problem with open file discovery in a complex case is that the prosecution can overwhelm the defense with disclosed material and, whether purposefully or not, conceal the importance of a particular exculpatory document in the mass of files. The *McVeigh* court attempted to avoid such concealment by requiring the prosecution to specifically identify *Brady* material when disclosing it.

The court then discussed the disclosure required by *Brady* and the materiality standard outlined in *Kyles*. It also noted that "[t]here is no established procedure for the due process

[41] *McVeigh*, 954 F. Supp. 1441 [Reproduced in accompanying notebooks at Tab 61].

[42] *Id.*

[43] *Id.* (citing *McVeigh* Transcript of Hearing, pps. 44-45 (Dec. 13, 1995).

[44] *Id.*

disclosures required by *Brady*."[45] However, the remainder of the opinion failed to discuss the identification requirement that was previously ordered and affirmed. Presumably the court's reasoning on this issue is based solely on its interpretation of due process with no reliance on precedent which deals with the specific issue of identification. The court focused on making criminal proceedings as fair as possible, and in its view fairness is best served by requiring the prosecution to identify *Brady* material to the defense. However, the court's means of achieving its goal are questionable and go against several US cases which have held that the prosecution need not identify exculpatory material.[46] That said, the *McVeigh* case is not alone, as *Hsia* is another in which a court enforced the specific identification requirement on the prosecution.

b. The *Hsia* Case[47]

In *Hsia* the defendant was charged with conspiracy and causing false statements to be made to the Federal Election Commission in connection with an illegal campaign contributions scheme. Hsia filed various pre-trial motions to dismiss the charges, in part claiming that the government failed to meet its *Brady* obligations. Initially the prosecution made available to the defense "open file" discovery. The government provided Hsia and her counsel with access to over 600,000 documents which were in the government's possession. The defense complained that it was impossible for it to examine all the documents and identify potentially exculpatory material and requested that the prosecution identify such material within the documents.

The court began by outlining some "general warnings" or "basic propositions of *Brady* jurisprudence."[48] It noted that the government has a duty to disclose any evidence in its

[45] *McVeigh*, 954 F. Supp. at 1449 [Reproduced in accompanying notebooks at Tab 61].

[46] *See* cases cited *supra* note 35.

[47] *Hsia*, 24 F. Supp. 2d 14 [Reproduced in accompanying notebooks at Tab 53].

[48] *Id.* at 29-30.

possession that is favorable to the accused and material to guilt or punishment.[49] It recognized that favorable evidence includes exculpatory or impeachment evidence[50] and that the government must disclose *Brady* evidence in adequate time for the defense to "use the favorable material effectively in the preparation and presentation of its case."[51]

The *Hsia* court then stated summarily that "open-file discovery does not relieve the government of its *Brady* obligations."[52] In making this particular statement, the court cited no supporting case law.[53] It continued by stating that the government cannot satisfy its obligations by providing the defendant "with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack."[54] It also noted that courts in its jurisdiction disfavor "narrow readings" of the government's *Brady* obligations: "it simply is insufficient for the government to offer 'niggling excuses' for its failure to provide potentially exculpatory evidence to the defendant, and it does so at its peril."[55] In the words of the court,

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[49] *Hsia*, 24 F. Supp. 2d at 29-30 [Reproduced in accompanying notebooks at Tab 53] (*citing Brady*, 373 U.S. 83 [Reproduced in accompanying notebooks at Tab 14]).

[50] *Id.* (*citing Bagley*, 473 U.S. 667 [Reproduced in accompanying notebooks at Tab 32]).

[51] *Id.* (*citing United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) [Reproduced in accompanying notebooks at Tab 72]).

[52] *Id.*

[53] *Id.* It seems a curious occurrence that the *Hsia* court supports the majority of its other "general warnings" or "basic propositions" with precedent. As a result of its failure to do so with regard to its imposition of the identification requirement, the source of the court's statement is unclear and left to speculation. The court later cites *McVeigh* for a separate proposition but does not mention it as authority for the identification requirement. The only apparent justifications mentioned are to promote fairness and justice and to broadly interpret the government's *Brady* obligations. Courts often rely on principles of fairness and balance in meeting out justice, but *Hsia* and *McVeigh* are in the minority in holding that such principles require the specific identification of *Brady* materials.

[54] *Id.*

[55] *Id.* (*citing United States v. Paxson*, 861 F.2d 730, 737 (D.C. Cir. 1988) [Reproduced in accompanying notebooks at Tab 68]).

"To the extent that the government knows of any documents or statements that constitute *Brady* material, it must identify that material to Ms. Hsia."[56]

The court then noted that the prosecution need not "deliver [its] entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."[57] Furthermore, it is the prosecution's duty in the first place to determine whether information in its possession is *Brady* material.[58] The role of the court, according to *Hsia*, was not to "referee . . . disagreements about materiality and supervise the exchange of information," and it accepted the government's concession that it would immediately disclose *Brady* material which it had in its possession.[59]

Finally, the court warned the prosecution that it had an "affirmative duty to resolve doubtful questions in favor of disclosure," and that "if the sword of Damocles is hanging over the head of one of the two parties, it is hanging over the head of the [government]."[60] The *Hsia* court concluded by stating that "the prosecutor's role transcends that of an adversary: he [or she] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"[61] In sum, the court "generally warned," in the interest of justice, that the government should identify material it "knows" constitutes *Brady* material when disclosing information to

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[56] *Hsia*, 24 F. Supp. 2d at 29-30 [Reproduced in accompanying notebooks at Tab 53].

[57] *Id.* (*citing Bagley*, 473 U.S. at 675 [Reproduced in accompanying notebooks at Tab 32]).

[58] *Id.*

[59] *Id.* (*citing McVeigh*, 954 F. Supp. at 1451 [Reproduced in accompanying notebooks at Tab 61]).

[60] *Id.* (*citing United States v. Blackley*, 986 F. Supp. 600, 607 (D.C. Cir. 1997) (internal quotations omitted) [Reproduced in accompanying notebooks at Tab 38]).

[61] *Id.* (*citing Bagley*, 473 U.S. at 675 n.6 [Reproduced in accompanying notebooks at Tab 32] (*quoting Berger*, 295 U.S. at 88 [Reproduced in accompanying notebooks at Tab 13])).

the defense. The court's ruling, however, is inherently fraught with numerous problems and is contrary to the holdings of many other courts.[62]

Save for its statements regarding the promotion of fairness and justice, the *Hsia* court made no link between the due process "disclosure" required by *Brady* and the "specific identification" *Hsia* required. As many courts have found that "disclosure" means mere "access" or "availability," the court's "specific identification" requirement might be viewed as more than a "limited departure" from the adversary system.[63] Furthermore, many courts have found that the prosecution's failure to identify exculpatory material, viewed in retrospect, was not a due process violation, as the defendant had access to the information and could identify it as exculpatory through due diligence.[64]

Several questions remain unanswered by the court:

> (1) What if the prosecution did not comply? If the prosecution "knew" of exculpatory information and disclosed it without specific identification, would a reviewing court say that is enough to establish a due process violation, even where the defense could have identified the exculpatory material through due diligence? Would relief be granted to the defendant, or punishment imposed on the prosecution, or both?
>
> (2) What standard is to be applied to the prosecution's knowledge? Is the prosecution supposed to know the defense strategy?
>
> (3) Why does the court find, as a preliminary matter, that due process requires the prosecution to identify *Brady* material, when a court reviewing the prosecution's failure to do so would probably not find that a due process violation occurred, as the defense had access to the information and could identify it as exculpatory through due diligence? In other words, if the defendant's right to a fair trial is usually not violated by the prosecution's failure to identify exculpatory material, why does fairness require such identification as a preliminary matter?

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[62] *Hsia*, 24 F. Supp. 2d at 29-30 [Reproduced in accompanying notebooks at Tab 53].

[63] *See supra* note 14.

[64] *See* cases cited *supra* note 35.

> (4) If due process only requires "disclosure" or "access," which is meant to remedy "suppression" or "withholding," why is this court requiring "specific identification"?
>
> (5) Could the prosecution fulfill the identification requirement by determining that a large portion of its material is potentially exculpatory and simply identify that large portion as "*Brady* material" when disclosing it, essentially placing the defense in the same position it was in without the identification?
>
> (6) What is more important to the criminal justice system– that the prosecution be "fair" and identify *Brady* material, or that the court encourage a "limited departure" from the adversary system and require the defense to develop its own case?
>
> (7) If the court is not to act as a "referee" and "supervise the exchange of information," how can it enforce the identification requirement?

It is not surprising that the two cases which require prosecutorial identification of exculpatory material are decisions on pre-trial motions, as opposed to most of the contrary cases, which are decisions on appeal. It is much easier for a court to initially require identification out of fairness than to grapple with the materiality and diligence standards to enforce such a requirement after the trial has been completed. However justifiable the *Hsia* court's desires are, there is very little case law to support its requirement and a significant amount which rejects it.[65] As noted throughout this memorandum, one thing is clear – the specific identification of *Brady* material has never been required by the US Supreme Court.

2. <u>The *Mmahat*/*Eisenberg* Line of Cases – Identification of Exculpatory Material Not Required</u>

The opposing view is based on the belief that *Brady* does not require the prosecution "to conduct a defendant's investigation or to assist in the presentation of the defense's case."[66] In other words, to establish a valid *Brady* violation in many courts, the defense must show that the

[65] *See* cases cited *supra* note 35.

[66] *Id.*

suppressed information was not available to it through due diligence.[67] The identification of exculpatory information by the defense within a large mass of disclosed material is considered information which the defense can obtain through due diligence.[68]

Again, many courts have held that the purpose of the *Brady* requirement is to "ensure that a miscarriage of justice does not occur, 'not to displace the adversary system as the primary means by which truth is uncovered.'"[69] Courts have accordingly held that the prosecution's disclosure of a large mass of information containing unspecified *Brady* material was not a violation of due process where the exculpatory material was available to the defense through due diligence.[70] Such a holding, according to courts, fulfills the aims of *Brady* in ensuring that the defendant receives a fair trial and has access to exculpatory material in the prosecution's possession, but does not significantly interfere with the adversary system which US courts employ.[71]

As stated in *United States v. Davis*,

> The Due Process Clause of the Fifth Amendment does not require the government first to peruse through all its evidence with an eye to the defendant's theory of the case and then to *specify* to the defendant the evidence which supports that theory. Instead, the [F]ifth [A]mendment prohibits "the *suppression* by the prosecution of evidence favorable to an accused." *Brady v. Maryland*, 373 U.S. 83, 87 … (1963) (emphasis added). Stated alternatively, the [F]ifth [A]mendment requires the government "to *disclose* to criminal defendants favorable evidence that is material

[67] *See cases cited supra* note 35.

[68] *Id.*

[69] *Aubin*, 87 F.3d 141 [Reproduced in accompanying notebooks at Tab 31] (*citing Johnson*, 872 F.2d 612 [Reproduced in accompanying notebooks at Tab 54]; *Bagley*, 473 U.S. 667 [Reproduced in accompanying notebooks at Tab 32]).

[70] *See cases cited supra* note 35.

[71] *See Eisenberg*, 773 F. Supp. 662 [Reproduced in accompanying notebooks at Tab 46] (*citing United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) [Reproduced in accompanying notebooks at Tab 50] (*quoting United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982) (emphasis added) [Reproduced in accompanying notebooks at Tab 57])); *Anzeulotto*, 1996 WL 31233 [Reproduced in accompanying notebooks at Tab 30]; *Polishan*, 2001 WL 848583 [Reproduced in accompanying notebooks at Tab 71].

> either to guilt or to punishment." *California v. Trombetta*, 467 U.S 479, 480 . . . (1984) (emphasis added) (citations omitted). This disclosure requirement is satisfied once the government makes the relevant evidence available to the defendant. *See Nassar v. Sissel*, 792 F.2d 119, 121 (8th Cir. 1986) . . . .[72]

The cases which similarly have held that specific identification of *Brady* material is not required are largely based on a narrow view of "disclosure" and application of the due diligence standard, which was first revealed in *Giles v. Maryland*.[73]

a. <u>The "Due Diligence" Standard and Justice Fortas' Concurrence in *Giles v. Maryland*</u>[74]

As previously mentioned, numerous cases have held that due process does not require the government to furnish the defense with information it already has or, with any reasonable diligence, can obtain itself.[75] Courts have further reasoned that the identification of exculpatory information by the defense within a large mass of material disclosed to it is information which the defense can obtain through due diligence.[76] The origin of this language can be traced to Justice Fortas' concurring opinion in *Giles v. Maryland*.[77] There, the defendants were convicted of rape and appealed, claiming that they were denied due process by the government's suppression of favorable evidence. The Supreme Court remanded the case to allow the state court to determine whether further hearings on the suppressed evidence were necessary.

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[72] *Davis*, 673 F. Supp. at 256 [Reproduced in accompanying notebooks at Tab 44]. (Original citations modified.)

[73] *See* cases cited *supra* note 35.

[74] *Giles*, 386 U.S. at 98 [Reproduced in accompanying notebooks at Tab 18].

[75] *See* cases cited *supra* note 35.

[76] *Id.*

[77] *Giles*, 386 U.S. at 98 [Reproduced in accompanying notebooks at Tab 18].

Justice Fortas concurred in the order to remand the case but did so for separate reasons – he felt the defendants' due process rights were violated by the suppression. In his concurring opinion, Justice Fortas stated:

> The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses. This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information.[78]

In response to this statement, courts have held that the identification of *Brady* material among documents disclosed by the government is information which the defense could obtain through due diligence.[79] In such circumstances, the facts have been made available to the defense, which itself is arguably in as good a position as the government to ascertain the potential exculpatory value of the disclosed information. Forcing the prosecution to identify such material would impose more than a "limited departure" from the adversary system currently in place and would require the prosecution to speculate as to the value of certain material where the defense is able to do so itself. Finally, according to some courts, due process only requires disclosure, which is akin to access or availability, and not the specific identification of exculpatory material "with an eye to the defendant's theory of the case."[80]

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[78] *Giles*, 386 U.S. at 98 [Reproduced in accompanying notebooks at Tab 18]. (Original footnote omitted.)

[79] *See* cases cited *supra* note 35.

[80] *See Davis*, 673 F. Supp. at 256 [Reproduced in accompanying notebooks at Tab 44].

b. The *Mmahat* Case[81]

One case enforcing the due diligence standard is *Mmahat*, where the defendants were convicted of various offenses relating to the misapplication of bank funds. The defendants made several post-trial motions which were denied and subsequently appealed. The Mmahats claimed that the government violated its *Brady* obligations by failing to specifically identify allegedly exculpatory material that was disclosed to the defense within a large mass of information. In order to show a constitutional *Brady* violation, the court held that the defense must demonstrate that the information allegedly withheld was not available to it through due diligence.[82]

Early on in the proceedings, the government provided the defense with access to some 500,000 documents relating to the case, with the most important portions indexed. After the trial was over, the defense discovered exculpatory material within the mass of documents for which it had previously been searching – two board resolutions favorable to the defense. The defense subsequently claimed that the government should have specifically alerted it to the resolutions in response to the defense's *Brady* request. The prosecution argued that it had fulfilled its *Brady* obligations simply by disclosing the documents.

The government acknowledged that it was aware of the two resolutions. The defense did not dispute the fact that it had personal knowledge of the existence of the resolutions and had access to them before trial, though it was not aware of this fact at the time. The court held that because the defense could have located the resolutions using due diligence, there was no *Brady* violation.[83] It concluded by stating that "there is no authority for the proposition that the

[81] *Mmahat*, 106 F.3d 89 [Reproduced in accompanying notebooks at Tab 63].

[82] *Id.* (*citing Aubin*, 87 F.3d at 148-49 [Reproduced in accompanying notebooks at Tab 31]; *Brown*, 628 F.2d at 473 [Reproduced in accompanying notebooks at Tab 42]).

[83] *Id.*

government's *Brady* obligations require it to point the defense to specific documents within the larger mass of material that it has already turned over."[84]

The Fifth Circuit decided the *Mulderig* case shortly after it decided *Mmahat*.[85] Mulderig was charged with the same crimes as the Mmahats, namely various offenses relating to the misapplication of bank funds. Mulderig argued that the government violated its *Brady* obligations by failing to specify the exculpatory nature of the same two resolutions discussed in *Mmahat*. The court's ruling on this issue essentially mirrored its decision in the *Mmahat* case, but it also held that "when information is fully available to a defendant at the time of his trial and his only reason for not obtaining and presenting the evidence to the court is his lack of reasonable diligence, the defendant has no *Brady* claim."[86]

c. The *Eisenberg* Case[87]

Eisenberg is another of the cases which held that the prosecution need not specifically identify *Brady* material disclosed to the defense. In *Eisenberg* the defendants were charged with racketeering and various counts of conspiracy. They filed numerous pre-trial motions, including one requesting the identification of *Brady* material among documents previously produced by the government. The government responded by arguing that it had no duty under *Brady* to identify exculpatory material among documents produced. It claimed that it had the duty only to make available to the defense *Brady* material in its possession to which the defense did not have access or to which it could not obtain access through the exercise of reasonable diligence. The

[84] *Mmahat*, 106 F.3d 89 [Reproduced in accompanying notebooks at Tab 63].

[85] *Mulderig*, 120 F.3d 534 [Reproduced in accompanying notebooks at Tab 64].

[86] *Id.* (*citing United States v. Marrero*, 904 F.2d 251, at 261 (5th Cir. 1990) [Reproduced in accompanying notebooks at Tab 59]).

[87] *Eisenberg*, 773 F. Supp. 662 [Reproduced in accompanying notebooks at Tab 46].

identification of *Brady* material, it claimed, was information the defense could ascertain through the exercise of reasonable diligence.

The court held that *Brady* is "designed to 'assure that the defendant will not be denied *access* to exculpatory evidence *only known to the [g]overnment.*'"[88] Quoting the Third Circuit Court of Appeals, the *Eisenberg* Court further held that "the [g]overnment is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself," and the identification of *Brady* material is information the defense can obtain itself through the exercise of due diligence.[89] The court concluded that the government should not have to expend the effort required to determine whether its material contains exculpatory evidence where the defense can do so itself through reasonable diligence.[90]

d. The *Anzeulotto* Case[91]

The *Anzeulotto* court also noted that no bright-line rule controls the scope of the government's duty to focus the defense's attention on the exculpatory nature of disclosed material.[92] In *Anzeulotto* the defendants were convicted of various crimes involving extortion and moved for a new trial, claiming that the government failed to meet its *Brady* obligations. While reiterating that *Brady* is designed to provide the defense *access* to exculpatory information

[88] *Eisenberg*, 773 F. Supp. 662 [Reproduced in accompanying notebooks at Tab 46] (*citing Grossman*, 843 F.2d at 85 [Reproduced in accompanying notebooks at Tab 50] (*quoting LeRoy*, 687 F.2d at 619 (emphasis added) [Reproduced in accompanying notebooks at Tab 57])).

[89] *Id.* (*citing United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) [Reproduced in accompanying notebooks at Tab 78] (*quoting Campagnuolo*, 592 F.2d at 861 [Reproduced in accompanying notebooks at Tab 43]); *Wilson*, 901 F.2d at 381 [Reproduced in accompanying notebooks at Tab 82]; *Meros*, 866 F.2d at 1309 [Reproduced in accompanying notebooks at Tab 62]; *United States v. Newman*, 849 F.2d 156, 161 (5th Cir. 1988) [Reproduced in accompanying notebooks at Tab 65]).

[90] *Id.*

[91] *Anzeulotto*, 1996 WL 31233 [Reproduced in accompanying notebooks at Tab 30].

[92] *Id.*

in the prosecution's possession, the court also held that "[t]he government is not required to draw inferences from evidence which defense counsel is in an equal position to draw."[93] Furthermore, it quoted the *Gaggi* court, which held that "the government need not supply a map" to the defense.[94]

According to the *Anzeulotto* court, the government is not required to turn over exculpatory material "if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence."[95] Where the government has made information available to the defense, the defense is in as good a position as the government to ascertain whether it contains *Brady* material. However, the government is not permitted to mislead the defense, e.g., by disclosing evidence and indicating that it is of no value and subsequently claiming its *Brady* obligations have been met.[96]

e. The *Polishan* Case[97]

Another helpful case which has addressed this issue is *United States v. Polishan*. There, the defendant was convicted of 18 counts related to a financial accounting fraud. Polishan subsequently moved for an acquittal or, alternatively, a new trial, in part claiming that the Magistrate Judge erred in making certain discovery rulings. The defense had a period of over two years to review an estimated 650,000 to 1.2 million pages of documents made available by the prosecution. Polishan claimed that "access" to these documents was inadequate, and

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[93] *Anzeulotto*, 1996 WL 31233 [Reproduced in accompanying notebooks at Tab 30] (*citing United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987) [Reproduced in accompanying notebooks at Tab 48])).

[94] *Id.*

[95] *Id.* (*quoting Grossman*, 843 F.2d 78 [Reproduced in accompanying notebooks at Tab 50]).

[96] *Id.* (*citing United States v. Shaffer*, 789 F.2d 682, 685 (9th Cir. 1986) [Reproduced in accompanying notebooks at Tab 76]).

[97] *Polishan*, 2001 WL 848583 [Reproduced in accompanying notebooks at Tab 71].

requested that a "document repository" be created and that the government specifically identify "any evidence in [its] hands . . . which is favorable to the defendant and material to [the] question of his alleged guilt."[98] In a previous ruling on discovery-related issues, a Magistrate Judge denied the defense's request to require the prosecution to specifically identify *Brady* material, finding that "the Government has complied with its *Brady* obligations by providing a complete open file to the Defendant for more than two (2) years."[99] Polishan did not appeal the discovery rulings.

On appeal of his conviction, Polishan argued that his ability to prepare for trial was unfairly inhibited by the need to review the massive amount of documents made accessible by the prosecution. The court found that Polishan waived further judicial consideration of the discovery issues by not timely requesting review of the Magistrate Judge's rulings and that, at any rate, his complaints concerning the government's compliance with the *Brady* rule were unfounded.[100] The court discussed conflicting case law addressing this particular issue. It noted that "there is indeed some authority to support the proposition that an open-file policy does not relieve the government of the obligation to identify *Brady* material."[101] However, it also noted contrary case law, i.e., that "[t]here is no authority for the proposition that the government's

[98] *Polishan*, 2001 WL 848583 [Reproduced in accompanying notebooks at Tab 71].

[99] *Id.*

[100] *Id.*

[101] *Id.* (*citing Hsia*, 24 F. Supp. 2d 14 [Reproduced in accompanying notebooks at Tab 53]; *McVeigh*, 954 F. Supp. 1441 [Reproduced in accompanying notebooks at Tab 61]).

Brady obligations require it to point the defense to specific documents within the larger mass of material that it has already turned over."[102]

The court then went on to quote the *Eisenberg* case, stating that *Brady* is "designed to 'assure that the defendant will not be denied *access* to exculpatory evidence only known to the [g]overnment.'"[103] It also repeated what many courts previously had held and stated, "The [g]overnment is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself."[104] The court concluded that under the circumstances of this case, where the defendant had considerable access to the information, sufficient time to review it, and the ability to identify *Brady* material using due diligence, the government committed no violation by failing to identify the exculpatory nature of the disclosed material.[105]

C. <u>Time of Disclosure</u>

As with the procedural methods for disclosing exculpatory evidence, the Supreme Court has never explicitly determined the time at which disclosure of *Brady* materials must occur.[106] In general, the government has a continuing duty to disclose *Brady* material and must do so

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[102] *Polishan*, 2001 WL 848583 [Reproduced in accompanying notebooks at Tab 71] (*citing Mmahat*, 106 F.3d 89 [Reproduced in accompanying notebooks at Tab 63]; *Eisenberg*, 773 F. Supp. 662 [Reproduced in accompanying notebooks at Tab 46]; *Bloom*, 78 F.R.D. 591 [Reproduced in accompanying notebooks at Tab 39]).

[103] *Id.* (*quoting Eisenberg*, 773 F. Supp. 662 [Reproduced in accompanying notebooks at Tab 46] (*quoting Grossman*, 843 F.2d 78 [Reproduced in accompanying notebooks at Tab 50] (quoting *LeRoy*, 687 F.2d 610 [Reproduced in accompanying notebooks at Tab 57]))).

[104] *Id.* (*citing Eisenberg*, 773 F. Supp. 662 [Reproduced in accompanying notebooks at Tab 46] (*citing Starusko*, 729 F.2d 256 [Reproduced in accompanying notebooks at Tab 78] (*citing Campagnuolo*, 592 F.2d 852 [Reproduced in accompanying notebooks at Tab 43]))).

[105] *Id.* The *Polishan* court's weighing of factual circumstances suggests that prosecutorial identification of exculpatory material may be required where there is not sufficient time and opportunity for the defense to discover disclosed *Brady* material. Such factors may be amplified in cases where the defendant's resources are severely limited and there is not sufficient time to evaluate the disclosed material. This memorandum does not address the characteristics of representation provided defendants in the SCSL, and it is unclear whether identification should be required simply because of imbalanced resources available to the parties.

[106] *United States v. Beckford*, 962 F.Supp. 780 (E.D. Va. 1997) [Reproduced in accompanying notebooks at Tab 35].

whenever such material comes into its possession.[107] Some courts have held that there can be no *Brady* violation where there is no suppression and the exculpatory material is made available to the defendant during trial.[108] Other courts have held that where *Brady* material is made available at trial in time for it to be effectively used by the defense, a new trial will not be granted simply because of a delay.[109] Pursuant to such decisions, the defendant must show prejudice to obtain relief.[110]

Under these decisions the *Brady* materiality standards found in *Bagley* and *Kyles* appear to apply to delayed disclosures. The question seemingly remains whether a reasonable probability exists that the result of the proceeding would have been different had the evidence been disclosed earlier.[111] It remains important to determine whether the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence, considering the delayed

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[107] *Bagley*, 473 U.S. 667 [Reproduced in accompanying notebooks at Tab 32].

[108] *See Gonzales*, 90 F.3d 1363 [Reproduced in accompanying notebooks at Tab 49] (In the 8th Circuit the *Brady* rule is limited to the after-trial discovery of information which had been known to the prosecutor but unknown to the defense). *Accord United States v. Manthei*, 979 F.2d 124 (8th Cir. 1992) [Reproduced in accompanying notebooks at Tab 58]; *United States v. Boykin*, 986 F.2d 270 (8th Cir. 1993) [Reproduced in accompanying notebooks at Tab 40]; *United States v. Scarborough*, 128 F.3d 1373 (10th Cir. 1997) [Reproduced in accompanying notebooks at Tab 75]. *See also Agurs*, 427 U.S. at 103-04 [Reproduced in accompanying notebooks at Tab 28] (According to *Agurs*, the *Brady* rule arguably applies in three quite different situations, each involving "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.").

[109] *See United States v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997) [Reproduced in accompanying notebooks at Tab 66]; *United States v. Walsh*, 75 F.3d 1 (1st Cir. 1996) [Reproduced in accompanying notebooks at Tab 81]; *United States v. Diaz*, 922 F.2d 998 (2d Cir. 1990) [Reproduced in accompanying notebooks at Tab 45]; *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527 (4th Cir. 1985) [Reproduced in accompanying notebooks at Tab 77]; *United States v. McKinney*, 758 F.2d 1036 (5th Cir. 1985) [Reproduced in accompanying notebooks at Tab 60]; *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994) [Reproduced in accompanying notebooks at Tab 36]; *United States v. Bailey*, 123 F.3d 1381 (11th Cir. 1997) [Reproduced in accompanying notebooks at Tab 33].

[110] *See infra* note 113.

[111] *Bagley*, 473 U.S. at 682-83 [Reproduced in accompanying notebooks at Tab 32].

disclosure collectively with the other evidence.[112] The applicable standard in the context of timing, however, has been alternatively described by courts.

According to various courts, a *Brady* violation can occur if the prosecution delays in disclosing evidence during trial and the defense can show prejudice, e.g., that the information came so late that it could not be effectively used.[113] The standard is whether the delay prevented the accused from receiving a fair trial, and due process requirements are fulfilled provided that disclosure occurs before it is too late for the defendant to make use of any benefits of the material at trial,[114] or provided that the disclosure remains of value to the defendant.[115] It has also been stated that the prosecution's failure to timely disclose *Brady* information warrants reversal only if there is a reasonable probability that had the evidence been disclosed earlier, the result of the proceeding would have been different.[116]

In sum, US law generally does not require the prosecution to disclose exculpatory information immediately when it comes to its knowledge. The prosecution is permitted to delay disclosure, whether purposefully or not, so long as the defense receives the information in sufficient time for it to effectively make use of the material at trial. Thus, for example, courts

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[112] *Kyles*, 514 U.S. at 433 [Reproduced in accompanying notebooks at Tab 19]; *Bagley*, 473 U.S. at 679 [Reproduced in accompanying notebooks at Tab 32].

[113] *See United States v. Beale*, 921 F.2d 1412 (11th Cir. 1991) [Reproduced in accompanying notebooks at Tab 34]; *Walsh*, 75 F.3d 1 [Reproduced in accompanying notebooks at Tab 81]; *Diaz*, 922 F.2d 998 [Reproduced in accompanying notebooks at Tab 45]; *Smith Grading and Paving*, 760 F.2d 527 [Reproduced in accompanying notebooks at Tab 77]; *McKinney*, 758 F.2d 1036 [Reproduced in accompanying notebooks at Tab 60]; *Bencs*, 28 F.3d 555 [Reproduced in accompanying notebooks at Tab 36]; *Bailey*, 123 F.3d 1381 [Reproduced in accompanying notebooks at Tab 33]; *United States v. Holloway*, 740 F.2d 1373, 1381 (6th Cir. 1988) [Reproduced in accompanying notebooks at Tab 52].

[114] *See United States v. Allain*, 671 F.2d 248 (7th Cir. 1982) [Reproduced in accompanying notebooks at Tab 29]; *United States v. Kime*, 99 F.3d 870 (8th Cir. 1996) [Reproduced in accompanying notebooks at Tab 56].

[115] *See United States v. Vgeri*, 51 F.3d 876 (9th Cir. 1995) [Reproduced in accompanying notebooks at Tab 80].

[116] *See Sterling v. United States*, 691 A.2d 126 (D.C. 1997) [Reproduced in accompanying notebooks at Tab 26].

have found that the defendant's due process rights are not violated where impeachment evidence relating to a prosecution witness is disclosed on the day the witness testifies.[117] But if the delayed disclosure undermines confidence in the verdict and a reasonable probability exists that the result of the trial would have been different absent the delay, then the defendant's constitutional rights have been violated.

III. ICTY AND ICTR RULES AND PRECEDENT[118]

A. General Rule – Rule 68 and its Interpretation

Rule 68 of the Rules of Procedure and Evidence governs the disclosure of exculpatory material for both the ICTY and the ICTR.[119] Rule 68 is identical in the two tribunals but differs from the language of SCSL Rule 68.[120] Under Rule 68 of the ICTY and ICTR, the prosecution must, "as soon as practicable, disclose to the defence the existence of material known to the prosecution which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."[121]

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[117] *United States v. Bissell*, 954 F. Supp. 841, 869 (D. N.J. 1996) [Reproduced in accompanying notebooks at Tab 37] (quoting *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983) [Reproduced in accompanying notebooks at Tab 51]).

[118] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 68 (2003); International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 68 (2003):

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

[119] Because the rule governing the disclosure of exculpatory evidence is identical in both the ICTY and ICTR (Rule 68), the law of the two tribunals has been consolidated into the same section in this memorandum. The ICTR decisions on Rule 68 cite ICTY cases as their authority, and there is no indication of any fundamental differences between the rulings of the two tribunals. Most of the rulings to be discussed in this section originated in the ICTY, but there are some ICTR decisions of relevance. *See supra* note 118.

[120] *See supra* notes 3, 118. There is no "as soon as practicable" language in SCSL Rule 68.

[121] *See supra* note 118.

Not only must the Prosecutor disclose the existence of exculpatory material known to it, but it must actually disclose to the defense any such evidence in its control or possession.[122] Unlike the law of several US jurisdictions, Rule 68 evidence is not restricted to material which would be admissible at trial, but encompasses "all information in any form which falls within the quoted description."[123] The obligation to disclose is an ongoing one that continues after judgment,[124] but relief for a violation of that obligation will not necessarily be granted where it is shown that the evidence is already accessible to the accused.[125]

The above rule was at issue in *Prosecutor v. Blaskic*. There the defendant was convicted of various war crimes and crimes against humanity. On appeal the defendant sought production of certain Rule 68 materials in the possession of the prosecution. The Tribunal found that "Rule 68 provides a tool for [the] disclosure of evidence."[126] The rule places the Prosecutor under a continuing legal obligation to disclose exculpatory evidence, as "[t]he application of Rule 68 is not confined to the trial process."[127] The Appeals Chamber then stated that "the Prosecution may still be relieved of the obligation under Rule 68, if the existence of the relevant exculpatory

[122] *Prosecutor v. Nzirorera et al.*, 2003 WL 22735927, No. ICTR-98-44-I, Par. 8 (Oct. 7, 2003) [Reproduced in accompanying notebooks at Tab 88].

[123] *Prosecutor v. Kordic & Cerkez*, 2001 WL 1793881, No. IT-95-14/2-A, Par. 9 (May 11, 2001) [Reproduced in accompanying notebooks at Tab 94] (*citing Prosecutor v. Brdanin & Talic*, 2000 WL 33705584, No. IT-99-36-PT, Par. 8 (Jun. 27, 2000) [Reproduced in accompanying notebooks at Tab 92].

[124] *Id.* (*citing Prosecutor v. Blaskic*, 2000 WL 33705569, No. IT-95-14-A, Par. 32 (Sep. 26, 2000) [Reproduced in accompanying notebooks at Tab 91]). *See also Prosecutor v. Niyitegeka*, 2003 WL 23192558, No. ICTR-96-14-A, Par. 12 (Sep. 26, 2003) [Reproduced in accompanying notebooks at Tab 86].

[125] *Id.*

[126] *Blaskic*, 2000 WL 33705569, Pars. 38-39 (Sep. 26, 2000) [Reproduced in accompanying notebooks at Tab 91].

[127] *Id.*

evidence is known and the evidence is accessible to the [defendant], as the [defendant] would not be prejudiced materially by this violation."[128]

The prosecution's duty to disclose exculpatory information is supported by the principles underlying an adversarial system of justice and the need for a balanced and fair trial.[129] The ICTY has acknowledged the "considerable strain" which the required searches for exculpatory information have placed on the resources of the prosecution but maintains that Rule 68 serves an "important function."[130] Because of the prosecution's "superior access" to potentially exculpatory material, it is required to perform these searches.[131] Part of the prosecution's duty is to serve as "ministers of justice assisting in the administration of justice" and to thereby assist the accused through the disclosure of exculpatory material.[132] Finally, the obligation under Rule 68 is not a secondary one but is as important as the obligation to prosecute.[133]

The initial decision as to whether material in its custody or control is exculpatory or potentially exculpatory must be made by the prosecution, which is presumed to have acted in good faith in exercising its discretion.[134] When the existence of such material comes to the

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[128] *Blaskic*, 2000 WL 33705569, Pars. 38-39 (Sep. 26, 2000) [Reproduced in accompanying notebooks at Tab 91].

[129] *Prosecutor v. Blaskic*, 1998 WL 2013758, No. IT-95-14-PT, Par. 16 (Apr. 29, 1998) [Reproduced in accompanying notebooks at Tab 90].

[130] *Kordic & Cerkez*, 2001 WL 1793881, Par. 14 [Reproduced in accompanying notebooks at Tab 94].

[131] *Id.*

[132] *Id.* (The phrase "ministers of justice assisting in the administration of justice" was considered by the Appeals Chamber to be an apt one in this regard: *Blaskic*, 26 September 2000, par. 32, footnote 23. In fact, the application of the phrase "a minister of justice" to prosecuting counsel can be traced as far back as 1865: *Regina v. Puddick* (1865), 4 Foster & Finlayson 497, 499, S176 E.R. 662, 663C. There is an earlier reference to counsel for the prosecution being an "assistant to the court in the furtherance of justice": *Regina v. Thursfield* (1838), Carrington & Payne 269, 269-70, S173 E.R. 490, 490-491C).

[133] *Id.*

[134] *Niyitegeka*, 2003 WL 23192558, Par. 12 [Reproduced in accompanying notebooks at Tab 86]. *See also Blaskic*, 1998 WL 2013758, Pars. 16-21 (Apr. 29, 1998) [Reproduced in accompanying notebooks at Tab 90].

prosecution's notice, the Prosecutor is to disclose it as soon as practicable.[135] In order for the Tribunal to intervene, the defense must establish that the prosecution has abused its discretion and suppressed exculpatory evidence by prima facie establishing the exculpatory nature of the material requested and that it is in the prosecution's possession.[136] However, the defense's request need not be so specific as to precisely identify the documents sought.[137]

B. Method of Disclosure

The ICTY and ICTR have yet to make any specific rulings outlining the procedural methods which govern the disclosure of exculpatory material. The ICTY, as mentioned, has held that relief for a Rule 68 violation will not necessarily be granted where it is shown that the evidence is already accessible to the accused.[138] This finding, announced in *Blaskic*, is similar to the US line of cases which have held that due process does not require the government to furnish the defense with information the defense already has or, with any reasonable diligence, can obtain itself.[139] It would not be a stretch to assume that the ICTY would follow the approach of these US cases by reasoning that the identification of exculpatory material within information disclosed to the defense is information which the defense can obtain through the exercise of due diligence.

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[135] *Nzirorera*, 2003 WL 22735927, Par. 10 [Reproduced in accompanying notebooks at Tab 88].

[136] *Prosecutor v. Ndayambaje*, 2001 WL 34050223, No. ICTR-96-8-T, Par. 5 (Sep. 25, 2001) [Reproduced in accompanying notebooks at Tab 85]; *Prosecutor v. Blaskic*, 1997 WL 33125674, No. IT-95-14-PT, Pars. 49-50 (Jan. 27, 1997) [Reproduced in accompanying notebooks at Tab 89]; *Prosecutor v. Delalic et al.*, 1997 WL 33341396, No. IT-96-21-T, Pars. 12-14 (Jun. 24, 1997) [Reproduced in accompanying notebooks at Tab 93]; *Prosecutor v. Nyiramasuhuko et al.*, 2001 WL 34050284, No. ICTR-97-21-T, Pars. 14-17 (Sep. 18, 2001) [Reproduced in accompanying notebooks at Tab 87]; *Niyitegeka*, 2003 WL 23192558, Par. 12 [Reproduced in accompanying notebooks at Tab 86].

[137] *Blaskic*, 2000 WL 33705569 , Par. 40 (Sep. 26, 2000) [Reproduced in accompanying notebooks at Tab 91].

[138] *Kordic & Cerkez*, 2001 WL 1793881, Par. 14 [Reproduced in accompanying notebooks at Tab 94] (*citing Blaskic*, No. IT-95-14-A, Pars. 38-39 (Sep. 26, 2000) [Reproduced in accompanying notebooks at Tab 91]).

[139] *See* cases cited *supra* note 35.

In fact, the ICTY did make this determination in *Krajisnik & Plavsic*, finding that the defendant was not harmed by the prosecution's failure to identify exculpatory material where the defense had access to the material and could identify its relevance through due diligence.[140] However, in the same decision, the ICTY also held that "as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule."[141] The *Krajisnik & Plavsic* decision, and its inherent confusion, will be addressed presently.

1. The *Krajisnik & Plavsic* Case (In Light of the *Blaskic* Case)

In its pre-trial "Decision on Motion from Momcilo Krajisnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68," the ICTY in *Prosecutor v. Krajisnik & Plavsic* held that "the Prosecution is not obliged to indicate whether material previously disclosed falls under Rule 68 or not, but that it will be required to do so for all material disclosed from the date of this Decision."[142] The decision is brief and does not cite any precedent. In one respect, it appears to follow the principles outlined in *Blaskic*. In another respect, however, it appears to contradict *Blaskic* and adopt a contrary view of the law. It might even be described as a combination of both the *Mmahat* and *Hsia* decisions described above, two US decisions which espouse fundamentally opposite positions.[143]

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[140] *Prosecutor v. Krajisnik & Plavsic*, 2001 WL 1793903, Nos. IT-00-39-T & IT-00-40-T (Jul. 19, 2001) [Reproduced in accompanying notebooks at Tab 95].

[141] *Id.*

[142] *Id.*

[143] *See generally Mmahat*, 106 F.3d 89 [Reproduced in accompanying notebooks at Tab 63] (prosecution's duty to disclose exculpatory evidence does not include the duty to identify the exculpatory nature of disclosed material); *Hsia*, 24 F. Supp. 2d 14 [Reproduced in accompanying notebooks at Tab 53] (prosecution's duty to disclose exculpatory evidence also includes the duty to identify the exculpatory nature of disclosed material, where such material is known to the prosecution).

In *Krajisnik & Plavsic* the defendants were accused of various war crimes and moved to compel the disclosure of exculpatory evidence pursuant to Rule 68. The prosecution had an estimated one to three million documents in its possession to evaluate in order to determine whether they were relevant to the case.[144] As the prosecution was evaluating these documents, it turned over any relevant material to the defense as it was discovered, pursuant to its obligations under Rules 66 and 68, and did not specify the nature of each document's relevancy to the case.

In July of 2001 the defense, after stating that it had reviewed the materials disclosed, requested that the prosecution go back and evaluate the documents, specifically identify any potentially exculpatory information, and specifically identify such information in all future disclosures. The defense argued that the word "disclose" includes "an affirmative showing rather than a delivery of the thousands of pages of paper."[145] It also argued that "as a matter of principle," the prosecution has an obligation under Rule 68 to identify exculpatory material rather than to merely turn over thousands of documents.[146]

In response, the prosecution argued:

> (a) the plain meaning of Rule 68 does not require the Prosecution to characterise discovered material as inculpatory or exculpatory, it is for the Defence to define the character of the evidence discovered to it;
>
> (b) the Motion is redundant as the Defence has indicated that it has reviewed the material already disclosed to it and has therefore been able to identify exculpatory material for itself; and
>
> (c) the Defence is in the best position to identify what material disclosed to it is exculpatory, not the Prosecution.[147]

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[144] *See Krajisnik & Plavsic* Transcript (May 23, 2001) [Reproduced in accompanying notebooks at Tab 98].

[145] *Id*.

[146] *Id.*

[147] *Krajisnik & Plavsic*, 2001 WL 1793903 [Reproduced in accompanying notebooks at Tab 95].

In its decision on the motion, the Trial Chamber stated the following:

> Considering (a) that while Rule 68 does not specifically require the Prosecution to identify the relevant material, but merely to disclose it;
>
> (b) nonetheless, as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule and it is no answer to say that the Defence are in a better position to identify it;
>
> (c) however, in the instant case, the material has been disclosed and the Defence has had the opportunity of reviewing it and, therefore, no injustice is done to the Defence; and
>
> (d) therefore, given the resources expended already and the stage of pre-trial development, it would not be efficient or reasonable to order the Prosecution to identify material that has already been disclosed in this way.[148]

The first principle enumerated by the Trial Chamber is quite clear, as Rule 68 obviously does not per se require the prosecution to identify exculpatory material when disclosing it.[149] Likewise, the third principle is logical, as the defense was able to ascertain the relevance of the material through due diligence and therefore was not harmed by the prosecution's failure to specifically identify exculpatory material. Similarly, the fourth principle makes sense, as an order requiring the prosecution to go back and identify potentially exculpatory material already disclosed would inhibit the trial from progressing. That leaves the second principle yet to be discussed, and therein lies the problem with the ruling.

Again, part (b) under the Trial Chamber's considerations states, "nonetheless, as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule and it is no answer to say that the Defence

[148] *Krajisnik & Plavsic*, 2001 WL 1793903 [Reproduced in accompanying notebooks at Tab 95].

[149] *See supra* note 118.

are in a better position to identify it."[150] This statement, read in light of the other three considerations, creates a conundrum for anyone attempting to apply the law of the case. Within the same discovery ruling, the Trial Chamber found (1) that the prosecution's failure to identify the exculpatory nature of previously disclosed material was *not unfair* because Rule 68 does not explicitly require such identification, the defense had the opportunity to review the material and therefore no injustice was committed, and it would be a waste of resources to force the prosecution to go back and identify the material; yet (2) that it is *unfair* for the prosecution not to indicate the material which it is disclosing under Rule 68.[151]

In one respect the Trial Chamber seems to be following the *Blaskic* decision in holding that relief for a violation of the prosecution's Rule 68 obligation will not necessarily be granted where it is shown that the evidence is already accessible to the accused.[152] Here, the defense was provided access to the unidentified exculpatory material and was able to identify it. The prosecution's previous failure to identify the material thus was not unfair. However, the Trial Chamber also made a conclusive, and seemingly contradictory, determination that principles of fairness require the prosecution to normally identify exculpatory information. This determination is puzzling in light of the Trial Chamber and *Blaskic* findings that the failure to do so would not necessarily result in unfairness.

As occurred in light of the *Hsia* decision, the *Krajisnik & Plavsic* decision raises several unanswered questions:

(1) Is a "matter of practice" the same as a legal "obligation" or "duty"?

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[150] *Krajisnik & Plavsic*, 2001 WL 1793903 [Reproduced in accompanying notebooks at Tab 95].

[151] *Id.*

[152] *Id*. *See also* cases cited *supra* note 138.

> (2) If the prosecution "should normally" indicate Rule 68 material, when exactly is it required or not required to do so?
>
> (3) Must the prosecution identify Rule 68 material only when it "knows" the material falls under the rule? If so, when is the prosecution deemed to have such "knowledge"?
>
> (4) What will be the result if the prosecution does not comply with the order to identify Rule 68 material? Would a reviewing court apply the *Blaskic* and, indeed, the *Krajisnik & Plavsic* standards and find that no material violation of the defendant's rights occurred and no relief shall be granted? Would the prosecution be punished for such failure?
>
> (5) Could the prosecution simply identify a large mass of information as "Rule 68 material" and essentially leave the defense in the same position it would have been in without such identification?
>
> (6) If the rule merely requires "disclosure," "access," or "availability," why does the court believe that fairness also requires it to include "specific identification"?
>
> (7) What is more important – that the prosecution be "fair" and identify exculpatory material, or that the court encourage a "limited departure" from the adversary system and require the defense to develop its own case?
>
> (8) Would an "open file" policy relieve the prosecution of the identification requirement? Could the prosecution satisfy the court's ruling in future cases by initially providing access to all of the information in its possession? Or, in the process of developing its case, would the prosecution have to identify exculpatory material as it came to the prosecution's knowledge?

The issue has not since been addressed by the Tribunals and it is not clear how they would respond to the above questions.

2. <u>The *Galic* Transcript</u>

Also pertinent to the subject is the *Galic* transcript from a status conference held on October 18, 2000.[153] When asked by ICTY Judge Rodrigues about the disclosure of Rule 68 material, the prosecution stated:

[153] *See Galic* Transcript, 2000 WL 33705664 (Oct. 18, 2000) [Reproduced in accompanying notebooks at Tab 97]. Galic was charged and convicted of various war crimes and crimes against humanity. Pre-trial discovery was a difficult task in the *Galic* case, and the status conference held on October 18, 2000 addressed the difficulties experienced by the parties.

> With regard to Rule 68, at this time we are undertaking searches with that very specifically in mind. I understand, if my understanding of the Rules is correct, that our duty is to disclose, not necessarily to sort of put up a flag that it's Rule 68 that we're doing, but where this is sufficiently clear, I think it is perhaps appropriate, to assist my friend, that we would do so, and I think we will do so. In appropriate cases, we will try and batch this together and let him have it under that guise. But we are conscious that this is an obligation that runs, and it will simply, if we come across such evidence, it will be served as it is found.[154]

An important point to be made is that neither Judge Rodrigues nor the defense objected to the prosecution's statements. In fact, defense counsel later stated "pretty much what [the Prosecutor] has reported to you just now he and I discussed at that time, so I am appreciative of the fact that he is making the effort to supply the Defence with the Rule 66 material, as well as the 68."[155] So, not only does one aspect of the *Krajisnik & Plavsic* ruling appear to contradict its own findings and those of *Blaskic*, but it also contradicts the principles discussed in the *Galic* transcript, i.e., that there is no affirmative "duty" to "put up a flag" that it is Rule 68 material which is being disclosed.[156]

C. <u>Time of Disclosure</u>

Under Rule 68 of the ICTY and ICTR, the prosecution is required to disclose exculpatory information to the defense "as soon as practicable."[157] The duty to disclose is of an ongoing nature and continues after judgment has been entered.[158] Rule 68 places the Prosecutor under a

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[154] *See supra* note 153 (emphasis added).

[155] *Id.*

[156] *Id*. The *Galic* transcript suggests that the prosecution is not obligated to specifically identify exculpatory material but that it might do so out of general practice or custom. As stated above, *Krajisnik & Plavsic* held that, "as a matter of practice and in order to secure a fair and expeditious trial, the [p]rosecution should normally indicate which material it is disclosing under the Rule." Is *Krajisnik & Plavsic* meant to warn the prosecution that the general practice has become the law? If so, its ruling did not thoroughly espouse the new obligation or its sources.

[157] *See supra* note 118.

[158] *Id.*

continuing legal obligation to disclose exculpatory evidence, as "[t]he application of Rule 68 is not confined to the trial process."[159] When the existence of such material comes to the prosecution's notice, the Prosecutor is to disclose it as soon as practicable.[160] The question will be whether any alleged delay materially prejudiced the defendant, and where no such prejudice is shown, no relief will be granted.[161]

It should be noted that the "as soon as practicable" language suggests that any unreasonable delay by the prosecution will constitute a violation of Rule 68. The language of Rule 68 implies that disclosure should occur as soon as reasonably possible under the circumstances.[162] This is contrary to US and SCSL law, where there is no "as soon as practicable" requirement. US law requires disclosure in sufficient time for the defendant to make use of the information effectively at trial.[163] This requirement may suggest that, under US law, prosecution should disclose the information as soon as practicable so as to ensure that the defendant can make use of the information, but it is not necessarily required as it is in Rule 68 of the ICTY and ICTR.[164]

IV. ARGUMENT

Under US, ICTY, and ICTR law, the prosecution has the duty to disclose exculpatory evidence in its possession to the defense. This memorandum addresses two issues yet to be resolved by the above jurisdictions in relation to that duty. The first is whether the prosecution

[159] *Blaskic*, 2000 WL 33705569, Pars. 38-39 (Sep. 26, 2000) [Reproduced in accompanying notebooks at Tab 91].

[160] *Nzirorera*, 2003 WL 22735927, Par. 10 [Reproduced in accompanying notebooks at Tab 88].

[161] *Blaskic*, 2000 WL 33705569, Pars. 38-39 (Sep. 26, 2000) [Reproduced in accompanying notebooks at Tab 91].

[162] "Practicable" is defined as "reasonably capable of being accomplished; feasible." Black's Law Dicitonary.

[163] *See* cases cited *supra* notes 113-116.

[164] *Id. See also McVeigh*, 954 F. Supp. 1441 (Reproduced in accompanying notebooks at Tab 61].

must specifically identify the exculpatory nature of material being disclosed to the defense. The second involves the time at which the disclosure of exculpatory information must occur. Most problems have arisen with regard to the first issue. The method of disclosure will be addressed first, and it will be argued that the prosecution's duty to disclose does not include the duty to identify the exculpatory nature of material being disclosed.

A. <u>Method of Disclosure – Identification of Exculpatory Material Should Not Be Required</u>

As for the method of disclosure of exculpatory evidence, there are two basic ways in which the court will face the identification issue – pre-judgment or post-judgment. First, the court, as a preliminary discovery matter, could determine whether principles of fairness and justice require the prosecution to identify the exculpatory nature of material being disclosed to the defense.[165] Second, the court could review the prosecution's failure to identify the exculpatory nature of material already disclosed and determine whether the defendant's due process rights have been violated and, if so, whether the defendant is entitled to any relief as a result of said failure.[166]

Most courts hearing the issue in the second situation have held that the defendant's rights were not violated by the prosecution's failure to identify the exculpatory nature of material already disclosed where the defense had access to the material and could identify it as exculpatory through due diligence.[167] Thus, it is unlikely that any court within the US, ICTY, or ICTR would enforce the identification requirement in the second scenario, i.e., after disclosure of the material has already occurred and the material has become available to the defense, as long

[165] *See* cases cited *supra* note 34.

[166] *See* cases cited *supra* note 35.

[167] *Id.*

as the defense has had adequate time to perform its own investigation.[168] As far as the author has been able to ascertain, no courts have retrospectively found that the failure to identify exculpatory material violated the defendant's rights. To the contrary, a large number of courts have found that such a failure does not constitute a violation.[169] According to these courts, the government is not required to disclose information which is available to the defendant through due diligence, and the identification of exculpatory material is information which the defendant could ascertain through exercise of such diligence.[170]

As a result, the real problem arises in the first scenario, where the court is deciding, as a preliminary discovery matter, whether fairness and justice require the identification of exculpatory material. Some courts have found that the prosecution is required to identify the exculpatory nature of disclosed material in the interests of fairness and justice, while some courts have rejected such requirement.[171] There are several fundamental characteristics found in the US, ICTY, ICTR, and SCSL legal systems related to fairness and justice.[172] First, the defendant has the right to a fair trial. Second, the prosecutor's interest in a criminal proceeding is not to

[168] *But see supra* note 105. Particular traits of the SCSL system and deficiencies of defense resources might suggest otherwise, as it could be determined that the defense's lack of resources prevented it from being able to identify exculpatory material within thousands of documents through due diligence. Similar arguments have been made in the US, and only *McVeigh* and *Hsia*, both pre-judgment decisions on motions, required identification out of fairness.

[169] *Id.*

[170] *Id.*

[171] *See* cases cited *supra* note 34. *See also* cases cited *supra* note 35.

[172] *See* Statute of the Special Court for Sierra Leone, art. 17 (2000); Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 21 (2003); Statute of the International Criminal Tribunal for Rwanda, art. 20 (1994); European Court of Human Rights, art. 6; Rome Statute of the International Criminal Court, art. 67(2). *See also supra* note 10.

win the case but to ensure that justice is done.[173] Third, the above systems of justice are designed to establish the truth. Fourth, the above systems are based on the adversary model.[174]

The disclosure of exculpatory information is required "to ensure that a miscarriage of justice does not occur" and is based on the requirement that the defendant's trial be a fair one.[175] However, the requirement is not meant to "displace the adversary system as the primary means by which truth is uncovered."[176] The duty to disclose evidence favorable to the accused "represents a limited departure from a pure adversary model."[177] Finally, creation of a broad right of discovery "would entirely alter the character and balance of our present systems of criminal justice."[178] These fundamental principles have to be balanced and considered along with available case law in determining whether the identification requirement should be imposed.

Looking at all of the available authority on the subject, it appears that the cases which have rejected the identification requirement were correct in doing so. The prosecution's duty to disclose exculpatory evidence was clearly enforced to make available to the defendant, or provide the defendant access to, evidence in the prosecution's possession.[179] In post-judgment

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[173] *Strickler*, 527 U.S. at 281 [Reproduced in accompanying notebooks at Tab 27] (citing *Berger*, 295 U.S. at 88 [Reproduced in accompanying notebooks at Tab 13]). *See also Brady*, 373 U.S. at 87-88 [Reproduced in accompanying notebooks at Tab 14].

[174] An "adversary system" is "a procedural system, such as the Anglo-American legal system, involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker." Black's Law Dictionary.

[175] *See* cases cited *supra* note 13.

[176] *See* cases cited *supra* note 13.

[177] *See supra* note 14.

[178] *See supra* note 15.

[179] *See* cases cited *supra* note 35.

determinations, relief has only been granted where material, exculpatory evidence was suppressed or withheld, in other words, where the defendant was prejudiced by the prosecution's failure to provide access to the evidence.[180]

That is the "limited departure" from the adversary system which has been required. Further requiring the prosecution to sort through the material and alert the defense to its exculpatory nature would make that narrow, limited departure a broad, significant one. The prosecution is required to aid the defense in providing it equal access to material, exculpatory evidence; it is not required to help the defense in preparing and presenting its case.[181] It is true that the prosecution's interest in a criminal proceeding is to establish the truth and serve justice, but that is not meant to require the prosecution "to peruse through all its evidence with an eye to the defendant's theory of the case and then to *specify* to the defendant the evidence which supports that theory" or to require the prosecution to provide the defense a "map" to guide it through the proceeding.[182] Indeed, to impose such a requirement would force the prosecution to identify each and every possible defense theory.

The argument that the prosecution has more resources available to it does not support the finding that it should aid the defense by identifying exculpatory material. The prosecution's resources are available to develop its own case and to pursue truth and justice, not to take time out of its investigation to focus the defense's attention on the exculpatory nature of particular evidence.[183] Court-appointed counsel is available to the defendant as a guaranteed right, and

[180] *See* cases cited *supra* note 16.

[181] *See* cases cited *supra* note 35.

[182] *See Davis*, 673 F. Supp. 252 [Reproduced in accompanying notebooks at Tab 44]. *See also* cases cited *supra* note 91.

[183] *Id*. *See also* cases cited *supra* note 91.

such counsel is presumed competent to identify the exculpatory nature of information disclosed to it.[184] There are other existing remedies offered to the defense to provide it more resources, such as extensions of time, increased funding, or additional counsel, which might be preferred over requiring the prosecution to develop the defense's case. Also, there is nothing preventing the prosecution from identifying exculpatory material, but requiring it to do so would be extremely problematic.

The argument that the prosecution is better able to identify exculpatory material because only it knows the charges against the defendant, or that the defendant is better able to identify such material as only it knows the nature of its defense, is very circular. It should be sufficient that each side has the relevant material available to it. It is not that either side is better-able to make such identification but that the defense simply is capable of doing so. Where the exculpatory material is accessible to the defense and it can identify the nature of said material through due diligence, there is simply no justification for requiring the prosecution to do so instead.[185]

B. <u>Time of Disclosure – Exculpatory Material Should Be Disclosed in Sufficient Time for Defense to Effectively Use it at Trial</u>

As for the time at which the disclosure of exculpatory information must occur, the question is generally whether the defendant will be prejudiced by delayed disclosure. So long as the defendant has sufficient time to make effective use of the material, then delay does not cause prejudice. However, the problem which arises under ICTY and ICTR law is the requirement that the prosecution disclose the exculpatory evidence "as soon as practicable." To the author's

[184] The issue of ineffective assistance of counsel in the context of the *Brady* issue is beyond the scope of this memorandum.

[185] *See* cases cited *supra* note 35.

knowledge, there is no case law which has dealt with this issue. It might be suggested that the language would condone only a reasonable delay, as opposed to any non-prejudicial delay.[186]

The language of SCSL Rule 68 specifies that the prosecution must disclose, within 14 days of receipt of the Defence Case Statement, evidence known to it and which is relevant to issues raised in the statement.[187] Also, the prosecution must disclose, within 30 days of the defendant's initial appearance, any material known to it which tends to be exculpatory.[188] That duty is a continuing one.[189] There is no "as soon as practicable" language in SCSL Rule 68, which implies that a delay can be more than just reasonable. Rather, omission of the "as soon as practicable" language suggests that any non-prejudicial delay, whether purposeful or not, would be permitted under SCSL law.[190]

V. CONCLUSION

The purpose of this memorandum has been to thoroughly examine the existing law and establish the rule which should be followed by the SCSL. Based on the available US, ICTY, and ICTR rules and precedent, the following conclusions are propounded:

> (1) The SCSL Prosecutor's duty to disclose exculpatory evidence to the defense under Rule 68 should not include the duty to specifically identify the exculpatory nature of the material disclosed; and
>
> (2) Disclosure under Rule 68 should occur in the absence of material delay; in other words, disclosure should occur in sufficient time for the defense to use the material effectively at trial.

[186] *See supra* note 164.

[187] *See supra* note 3.

[188] *Id.*

[189] *Id.*

[190] *Id. See also supra* note 118.

These conclusions are based on legal rules and precedent, not on preferred lawyering practice or ethics. Nor are they based on bright-line rules. However, the conclusions are supported by a majority of the case law which is available. There is contrary authority on the issues, but it is largely problematic in its administration and unsupported by substantial case law, and therefore should not be applied.