Stare Decisis and the *Brady* Doctrine

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Introduction

The trial judge plays a uniquely challenging role in our criminal justice system. Her dual obligation to seek truth while dutifully applying the law forces her to confront the normative limitations of those Supreme Court precedents that are premised upon constitutional principle rather than public policy. Even though the constitutional safeguards that the Court's landmark criminal procedure decisions afford a criminal defendant may ensure that the protections of the Bill of Rights are met, such safeguards may nonetheless fall short of providing judges with normatively desirable truth-seeking tools. In these instances, the trial judge may be forced to navigate between the Scylla of imperfect justice and the Charybdis of abrogating stare decisis.[1] This unfortunate situation, often lacking any clear solution, is at the heart of the enduring struggle between the judiciary and the Department of Justice over the government's pretrial disclosure obligation under the Supreme Court's *Brady* doctrine.

In *Brady v. Maryland*, the Supreme Court held that a prosecutor is constitutionally obligated to disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[2] This proposition is the foundation of the *Brady* doctrine. When the Court first decided *Brady*, many hoped it would join the ranks of the Warren Court's other

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[1] Literally, "to stand by things decided." Black's Law Dictionary 1537 (9th ed. 2009). Stare decisis is synonymous with the doctrine of precedent, under which a court follows earlier judicial decisions when the same points arise again in litigation. *Id.* Stare decisis can be either "horizontal" or "vertical." Horizontal stare decisis dictates that a court must adhere to its own decisions, unless it finds compelling reasons to overrule itself. *Id.* For this reason, horizontal stare decisis is not considered to be "strict." On the other hand, vertical stare decisis—which is the focus of this paper, and to which I refer when using the term "stare decisis"—dictates that a court must strictly follow the decisions handed down by hierarchically superior courts within the same jurisdiction. *Id.*; *see also* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. Pa. J. Const. L. 155, 156 (2006) ("Whereas a three-judge panel of the United States Court of Appeal is bound to follow circuit precedent and the lower federal courts are bound to follow the decisions of the United States Supreme Court, the Supreme Court considers its own prior decisions as entitled to deference or a presumption of correctness but not as binding." (footnote omitted)).

[2] 373 U.S. 83, 87 (1963).

groundbreaking constitutional decisions[3] by providing defendants with access to wide-ranging exculpatory evidence while simultaneously embodying the "prosecutor's ethical duty to pursue 'justice.'"[4] However, as the Court's post-*Brady* jurisprudence expanded the *Brady* doctrine beyond its original holding by applying it to new contexts and different types of evidence, the Court curtailed its impact by construing the doctrine's materiality requirement quite narrowly. By the time the Court issued its opinion in *United States v. Bagley*, it had limited the government's *Brady* obligation to evidence so essential to the defendant's case that nondisclosure would create a "reasonable probability" of a different outcome.[5] In the end, this construction of the materiality requirement proved that the "Olympian perspective" from which many had viewed *Brady* was founded upon little more than a mirage.[6]

Thus, while *Brady*'s materiality requirement gives prosecutors a substantial amount of discretion, it concomitantly limits trial judges' ability to order constitutionally mandated discovery of favorable evidence that does not rise to the level of materiality. As a result, many trial judges who seek to ensure that defendants receive broad access to evidence revile this restraint, and it has created a significant amount of tension within the criminal justice system, leading to high-profile discovery conflicts and pronounced calls for reform.[7] The academy has responded in kind, filling the pages of law reviews with wide-ranging proposals that might remedy the problems caused by *Brady*'s materiality requirement.[8] However, after decades of legal scholarship and judicial outcry, fundamental change has yet to be implemented, while the materiality requirement remains in place—at least insofar as Supreme Court precedent is concerned.

Notably, however, one group of federal district court judges frustrated with *Brady*'s limited scope has reinterpreted the *Brady* doctrine so as to eliminate the materiality requirement in the pretrial context.[9] After witnessing the prosecutorial abuse and chronic underdisclosure that *Brady*'s materiality requirement invites, as well as observing the failure of discovery reformers to remedy the doctrine's shortcomings through other channels,

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[3] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[4] Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 McGeorge L. Rev. 643, 644 (2002).

[5] United States v. Bagley, 473 U.S. 667, 682 (1985).

[6] *See* Sundby, *supra* note 4, at 644 (noting that "if academia, the courts, and lawyers are pointing to *Brady* as a means of ensuring that defendants are receiving 'favorable' evidence prior to trial, they are largely pointing to a mirage").

[7] *See infra* notes 34–42 and accompanying text.

[8] *See infra* notes 34–42 and accompanying text.

[9] As I explain in Part I of this Essay, the materiality requirement applies in two contexts: before and during trial as the standard by which the government determines whether a piece of evidence favorable to the accused must be disclosed, and after trial as the standard by which an appellate court determines whether nondisclosure rises to the level of reversible error. *See infra* notes 14–16 and accompanying text.

these judges have provided a judicial solution by ignoring Supreme Court precedent in order to avoid the limitation on the government's disclosure obligation that the materiality requirement creates. This practice amounts to nothing less than an abrogation of stare decisis based on the view that policy concerns necessitate this much-needed reform of the criminal discovery system. The question that remains is whether the instrumentalism underlying their decisions is acceptable, or even desirable, in light of the constitutional and normative foundations upon which stare decisis rests.

This Essay proceeds in three parts. Part I provides a brief introduction to the *Brady* doctrine with a particular emphasis on the problems caused by the materiality standard's application in the pretrial context, and then discusses the unsuccessful efforts that have been made to reform the rules of discovery governing the pretrial disclosure of evidence in criminal cases. Part II first contrasts the Supreme Court's post-*Brady* cases with the doctrinal approach that some trial judges have taken to eliminate *Brady*'s materiality requirement in the pretrial context, and then concludes with a discussion of several federal district and appellate court decisions that have rejected this approach to *Brady* reform. Part III presents the doctrine of stare decisis and discusses its constitutional foundations as well as the rule of law and judicial economy benefits it redounds to our legal system. With these benefits in mind, I then explore the viability of the instrumentalist approach to stare decisis employed by the trial judges who have eliminated the materiality requirement. I conclude that it is not viable, and that criminal discovery reform must therefore proceed through other means.

I. The Challenges of "Materiality"

A. *The* Brady *Doctrine*

In 1963, the Supreme Court decided the landmark case *Brady v. Maryland*, establishing the government's obligation to disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[10] In subsequent years, the Court has expanded the *Brady* doctrine far beyond its original holding. In addition to exculpatory evidence, *Brady* now requires the government to disclose impeachment evidence and evidence that the accused has not specifically requested,[11] while imposing an affirmative duty on the prosecution to learn "of any favorable evidence known to the others acting on the government's behalf . . . including the police."[12] Thus, in many ways, the Court's post-*Brady* jurisprudence led to a marked expansion of the constitutional rights of the accused.

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[10] 373 U.S. at 87.

[11] *See* United States v. Bagley, 473 U.S. 667, 676 (1985) (impeachment evidence); United States v. Agurs, 427 U.S. 97, 107 (1976) (evidence that an accused has not specifically requested).

[12] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

However, while the Court's post-*Brady* cases have extended the *Brady* doctrine to new contexts, the impact of these decisions is limited by the manner in which the Court has construed the materiality requirement.[13] In *United States v. Agurs*, the first major post-*Brady* case to analyze the contours of materiality, the Court focused on the dual application of the *Brady* doctrine, noting how it first applies before trial and during trial when "the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel"; and second, on appeal, when appellate judges must "decide whether a nondisclosure deprived the defendant of his right to due process."[14] The Court reasoned that because this dual application is derived from the materiality requirement's constitutional foundations, the same standard should apply both to a prosecutor's pretrial determination and to an appellate court's post-trial review.[15] For as the *Agurs* Court explained, "[U]nless the omission [of disclosure] 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."[16]

The next major post-*Brady* case, *United States v. Bagley*, further reiterated this point, noting that the *Brady* doctrine is only intended to safeguard against "miscarriage[s] of justice," rather than to "displace the adversary system as the primary means by which truth is uncovered."[17] As a result, *Brady* only requires the government to disclose evidence that "if suppressed, would deprive the defendant of a fair trial."[18] From the Court's perspective, then, evidence is material—and therefore must be disclosed—only if nondisclosure would create a "reasonable probability" of a different outcome.[19] A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."[20]

In defining materiality in this way, the Court has severely limited the impact of the *Brady* doctrine, since it leaves prosecutors with the discretion to "gauge the likely net effect" of evidence before trial in order to justify the nondisclosure of favorable evidence to the accused.[21] The *Agurs* Court acknowledged the potential problems that such a narrow construction of materiality can cause, noting that because the impact a piece of evidence will have during trial "can seldom be predicted accurately" before trial, the pretrial application of the materiality requirement creates an "inevitably impre-

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[13] As Professor Scott E. Sundby explains, "[T]he Court's materiality decisions . . . have [essentially] robbed *Brady* of any pre-trial superhero powers and transformed the doctrine from a pre-trial discovery right into a post-trial remedy for government misconduct." Sundby, *supra* note 4, at 645.

[14] *Agurs*, 427 U.S. at 107–08.

[15] *Id.*

[16] *Id.* at 108.

[17] United States v. Bagley, 473 U.S. 667, 675 (1985).

[18] *Id.*

[19] *Id.* at 682.

[20] *Id.*

[21] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

cise standard."[22] To counter that problem, the Court instructed that a "prudent prosecutor will resolve doubtful questions in favor of disclosure"[23]—a point the Court has reiterated several times.[24] However, the Court has also made clear that a prudent prosecutor's best practices are not constitutionally binding, whereas the government's *Brady* obligation is. Thus, as the *Agurs* Court noted, the "critical point" of *Brady* is that its "constitutional duty of disclosure" has not been violated unless the prosecutor's "omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[25] This iteration of materiality is the understanding of the *Brady* doctrine that governs today.[26]

B. Materiality as a Matter of Policy

Due to the limited scope of the government's constitutional disclosure obligation and the highly discretionary analysis that it enables prosecutors to conduct, a sizeable group of criminal defense attorneys, trial judges, and legal academics revile the *Brady* doctrine.[27] One district court judge has criticized *Brady* by explaining that it essentially asks the prosecutor "to look at the case pretrial through the end of the telescope an appellate court would use post-trial."[28] Professor John G. Douglass has similarly noted the problematic nature of obligating a prosecutor "to disclose a category of information that cannot be defined until after trial."[29] Indeed, as *Brady*'s critics point out, the various institutional pressures[30] and substantial levels of cogni-

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[22] United States v. Agurs, 427 U.S. 97, 108 (1976).

[23] *Id.*

[24] *See, e.g.*, Cone v. Bell, 129 S. Ct. 1769, 1783 n.15 (2009) (noting that the prudent prosecutor will "err on the side of transparency, resolving doubtful questions in favor of disclosure"); *Kyles*, 514 U.S. at 439; United States v. Bagley, 473 U.S. 667, 711 n.4 (1985) (Stevens, J., dissenting).

[25] *Agurs*, 427 U.S. at 108.

[26] *See Cone*, 129 S. Ct. at 1783 (citing *Bagley* and *Kyles* for this iteration of materiality).

[27] *See, e.g.*, United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) (criticizing the materiality requirement); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 488 (2009) (noting that *Brady*'s materiality standard allows "overzealous prosecutors to avoid their constitutional and ethical obligations to disclose exculpatory evidence to the defense"); Irwin H. Schwartz, *Beyond* Brady*: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, CHAMPION MAG., Mar. 2010, at 34 (noting the various problems caused by *Brady*'s materiality requirement).

[28] *Safavian*, 233 F.R.D. at 16.

[29] John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 471 (2001).

[30] *See* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 141 (Carol S. Steiker ed., 2006) (noting that the discretion created by the materiality standard is highly susceptible to abuse because prosecutors have strong incentives, such as job promotions and better jobs, to establish a favorable win-loss record and secure as many convictions as possible); Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1801 (2007) (noting that the transitory nature of prosecutors makes them "likely to act to maximize their personal professional gain"); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 900 (1995) (noting the role that a favorable trial

tive bias[31] facing prosecutors make the substantial discretion they are afforded highly susceptible to abuse.

It is therefore unsurprising that problems with the *Brady* doctrine have led to a series of high-profile conflicts between the federal trial bench and federal prosecutors,[32] leading one judge to go so far as to call into question the Department of Justice's overarching dedication to justice.[33] Scholars have responded to these episodes by offering a variety of proposals intended to cure *Brady*'s shortcomings, including reforms such as open-file discovery,[34] trial remedies,[35] professional and conviction integrity programs,[36] strict enforcement of ethical rules requiring disclosure of all favorable evidence,[37]

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record and securing convictions play in earning the respect and admiration of the rest of one's office); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 108 (1991) ("Prosecutors who restrain themselves may convict at a lower rate and thus appear less competent to their superiors."); *see also* United States v. Bagley, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) ("At worst, the [materiality] standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive.").

[31] *See Bagley*, 473 U.S. at 702 (Marshall, J., dissenting) (noting that the prosecutor "may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question"); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 329 (noting that "even for the most ethical prosecutors, those most committed to the ideal of doing justice, the prosecutorial role inevitably fosters tunnel vision"); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002) (noting that investigators "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt").

[32] *See, e.g.*, United States v. Jones, 620 F. Supp. 2d 163, 168 (D. Mass. 2009); United States v. Shaygan, 661 F. Supp. 2d 1289, 1320–23 (S.D. Fla. 2009); Beth Brennan & Andrew King-Ries, *A Fall from Grace:* United States v. W.R. Grace *and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313, 327 (2010); Editorial, *The Ted Stevens Scandal*, WALL ST. J., Apr. 2, 2009, at A18; Jordan Weissmann, *Prosecutors in Kidnapping Case Rebuked over* Brady, BLT: THE BLOG OF LEGAL TIMES (June 24, 2009), http://legaltimes.typepad.com/blt/2009/06/prosecutors-in-kidnapping-case-rebuked-over-brady.html (on file with the Harvard Law School Library).

[33] *See Jones*, 620 F. Supp. 2d. at 184 (noting that "it has taken many disturbing experiences over many years to erode this court's trust in the Department of Justice's dedication to the principle that 'the United States wins . . . whenever justice is done its citizens in the courts'").

[34] *See* Robert M. Cary, *Exculpatory Evidence: A Call for Reform After the Unlawful Prosecution of Senator Ted Stevens*, LITIG., Summer 2010, at 39.

[35] *See* Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1456 (2006) (proposing that "when suppressed favorable evidence comes to light during or shortly before a trial, the trial court should consider instructing the jury on *Brady* law and allowing the defendant to argue that the government's failure to disclose the evidence raises a reasonable doubt about the defendant's guilt").

[36] *See* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2215 (2010).

[37] *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 736 (1987); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 297–98 (2004); Michael E. Gardner, Note, *An Affair to Remember: Further Refinement of the Prosecutor's Duty to Disclose Exculpatory Evidence*, 68 MO. L. REV. 469, 480 (2003).

enhanced judicial oversight of prosecutorial disclosure,[38] and the creation of a system of financial incentives to encourage the disclosure of exculpatory information.[39] In addition to these proposals, there has been a strong movement—spearheaded by the American College of Trial Lawyers, and strongly supported by a group of federal trial judges—to amend Rule 16 of the Federal Rules of Criminal Procedure to codify a pretrial prosecutorial obligation that would require the government to disclose *all* exculpatory evidence without regard to materiality.[40] The proposed amendment would not only create a disclosure obligation broader than *Brady*, but would also provide a judicially enforceable remedy through which to seek compliance with this obligation.[41] Although this amendment was nearly adopted, it was ultimately rejected due to the Department of Justice's opposition.[42]

Since comprehensive criminal discovery reform has yet to be implemented, the Supreme Court's limited view of the government's *Brady* disclosure obligation remains in place. In light of this tepid state of affairs and their enduring frustration with the materiality standard's limitations, one group of federal judges has essentially said "no more" and has taken discovery matters into their own hands. Faced with constitutional doctrine founded upon legal principle rather than the realities of the courtroom, these trial judges have reinterpreted the Court's post-*Brady* precedent and created an approach that would eliminate the application of the materiality requirement in the pretrial context entirely. The question that remains—and on which I focus in the next Part—is whether their approach is viable in light of the Court's statements to the contrary.

II. Confronting Materiality

A. *The* Sudikoff *Standard*

The district court trend toward eliminating the materiality requirement began in the Central District of California with *United States v. Sudikoff*.[43] In *Sudikoff*, defendants Jeffrey Sudikoff and Michael Cheramy were charged with multiple securities violations.[44] One of Sudikoff's associates, Phil McInnes, received immunity from the government in exchange for testifying

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[38] *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Calif. L. Rev. 1585, 1636–38 (2005); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391, 427–28 (1984).

[39] *See* Meares, *supra* note 30, at 910.

[40] *See* Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 Am. Crim. L. Rev. 93, 102–03 (2004).

[41] *See* United States v. Jones, 620 F. Supp. 2d 163, 172–74 (D. Mass. 2009).

[42] *See id.* at 173.

[43] 36 F. Supp. 2d 1196 (C.D. Cal. 1999).

[44] *Id.* at 1197.

against Sudikoff.[45] As part of the government's *Brady* obligation, the prosecutors disclosed some of the information relating to McInnes's testimony, but left out written documents regarding McInnes's immunity deal.[46] Specifically, the government withheld evidence—which Sudikoff had expressly requested—dating back to when McInnes first began communicating with the government regarding the possibility of immunity.[47] In response, Sudikoff brought a motion for discovery, petitioning the court to compel disclosure of "all notes or other evidence of any communication between the government and Phil McInnes or his counsel—including materials relating to 'proffer sessions' that occurred" early in the criminal investigation.[48]

In order to rule on Sudikoff's motion, the district court had to determine whether the accused was constitutionally entitled to this evidence, which in turn required a determination of the proper legal standard governing the government's constitutional pretrial disclosure obligation. The *Sudikoff* judge began his order by asserting that "the standard . . . evidence must meet to fall within the scope of *Brady* and require pretrial discoverability has not been clearly stated,"[49] and then proceeded to develop his own standard. Working from what he considered a blank precedential slate,[50] the judge explained the detrimental impact that applying the post-trial materiality analysis to the prosecutor's pretrial disclosure obligation would have: "Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material."[51] Although *Brady*'s materiality standard undoubtedly "determines prejudice from admittedly improper conduct," it should nonetheless not "be considered as approving all conduct that does not fail its test."[52] Based on this analysis, *Sudikoff* concluded that the materiality requirement "is only appropriate, and thus applicable, in the context of appellate review,"[53] and that therefore, the *Brady* doctrine requires the government to disclose *all* evidence favorable to an accused without regard to materiality.[54] The court then granted Sudikoff's motion to compel disclosure.[55]

In the span of one relatively brief discovery order, the *Sudikoff* decision appears to resolve an otherwise intractable conflict between trial judges and the Department of Justice over the limits of the government's *Brady* obligation. To be sure, though, the simplicity of *Sudikoff* is deceiving; a closer analysis of the court's reasoning reveals that the decision stands in direct

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1198.
[50] Insofar as precedent regarding *Brady*'s application in the pretrial context was concerned. *See id.*
[51] *Id.* at 1198–99.
[52] *Id.* at 1199.
[53] *Id.* at 1198.
[54] *Id.*
[55] *See id.* at 1206.

opposition to the Supreme Court's statements regarding materiality in the pretrial context. Indeed, the entire foundation of the *Sudikoff* approach rests upon the mistaken premise that "the standard that evidence must meet to fall within the scope of *Brady* and require pretrial discoverability has not been clearly stated."[56] As the Supreme Court explained in *Kyles v. Whitley*—just four years prior to the *Sudikoff* decision—the prosecution has the affirmative "responsibility to gauge the likely net effect of all . . . [exculpatory] evidence and make the disclosure when the point of 'reasonable probability' is reached."[57] Similarly, in *Bagley*, the Court expressly rejected a *Sudikoff*-like standard, reasoning that:

> [a]n 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." 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.[58]

But the *Sudikoff* decision ignores this, and instead fashions a new standard in light of what it considers to be effective legal policy. Thus, the heart of *Sudikoff*'s reasoning is instrumental; that is, because the materiality standard is not "appropriate" (i.e., desirable as a matter of policy) in the pretrial context, it therefore is not "applicable" as a matter of law. This type of approach is problematic, though, given that the Supreme Court's approach to *Brady* was founded upon constitutional principle rather than legal policy.[59] As a result, trial courts have no basis for applying or interpreting the *Brady* doctrine in any way other than that established by the Court.

Notwithstanding the apparent contradiction between the Supreme Court's *Brady* line of cases and *Sudikoff*, the decision has been adopted by multiple federal trial judges across the country, including judges in the Northern District of Illinois,[60] the Eastern District of Wisconsin,[61] and the

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[56] *Id.* at 1198.

[57] Kyles v. Whitley, 514 U.S. 419, 437 (1995). Indeed, the Court even went so far as to explicitly distinguish the *Brady* obligation from the ABA ethical rules, which require the government to disclose all favorable evidence without regard to materiality. *See id.* (stating that "the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate"); *see also* Cone v. Bell, 129 S. Ct. 1769, 1783 n.15 (2009) (noting that "[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady,* only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations").

[58] United States v. Bagley, 473 U.S. 667, 715 (1985) (citation omitted).

[59] *See* Sundby, *supra* note 4, at 651 (noting that the Court's "refusal to extend *Brady*'s constitutional obligation" to all favorable evidence is premised upon constitutional principle rather than legal policy).

[60] *See* United States v. Peitz, No. 01 CR 852, 2002 U.S. Dist. LEXIS 2338, at *7–8 (N.D. Ill. Feb. 13, 2002).

[61] *See* United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004).

District of Columbia.[62] For example, in *United States v. Safavian*, a judge on the U.S. District Court for the District of Columbia was presented with a defense discovery request, which, like that in *Sudikoff*, raised the question of just how far the government's pretrial *Brady* obligation extended.[63] The prosecutors in *Safavian* argued that their *Brady* obligation was limited to the disclosure of material exculpatory evidence, as defined by the Supreme Court.[64] However, the judge rejected that argument on policy grounds, explaining that to adopt it would allow "prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the trial."[65] However, "[m]ost prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins."[66] Therefore, the judge held that "the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial."[67] As authority for its decision, *Safavian* cites to *Sudikoff*; however, like *Sudikoff*, it too fails to sufficiently resolve the apparent conflict with Supreme Court precedent.[68]

This conflict with Supreme Court precedent has led other courts, both state and federal, to reject the *Sudikoff* standard. For example, in *United States v. Acosta*, a magistrate judge on the U.S. District Court for the District of Nevada analyzed the Court's *Brady* precedent and found that the *Sudikoff* approach indeed constituted "a significant departure from the Supreme Court's articulation of a prosecutor's constitutional *Brady* obligation."[69] She further argued that the Supreme Court would clearly reject the position that all favorable evidence is subject to mandatory pretrial disclosure under *Brady*, without regard to materiality.[70] In sum, she concluded that although "[t]he prosecutor's responsibility to make judgment calls about what information constitutes *Brady* [material] . . . may cause defense counsel some angst," this practice is the same as the "duty imposed on counsel for litigants in both civil and criminal litigation to exercise their professional judgment in making discovery disclosures."[71]

Similarly, in *United States v. Coppa*, the U.S. Court of Appeals for the Second Circuit also rejected an invitation to adopt a *Sudikoff*-like standard.[72] In so doing, the Second Circuit looked to the Court's landmark *Brady* deci-

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[62] *See* United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005).
[63] *See id.*
[64] *See id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *See id.*
[69] United States v. Acosta, 357 F. Supp. 2d 1228, 1243 (D. Nev. 2005).
[70] *See id.*
[71] *Id.* at 1244.
[72] United States v. Coppa, 267 F.3d 132, 139 (2d Cir. 2001).

sions—*Agurs*, *Bagley*, and *Kyles*—and concluded that under those cases, the *Brady* doctrine simply could not be interpreted to require the disclosure of all exculpatory evidence.[73] The *Coppa* court's decision was premised upon *Brady*'s constitutional foundations: "Because *Brady* and its progeny are grounded in the Due Process Clauses of the Constitution, the essential purpose of the rules enunciated in these cases is to protect a defendant's right to a fair trial by ensuring the reliability of any criminal verdict against him."[74] Therefore, "the scope of the government's constitutional duty—and, concomitantly, the scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial."[75] Other federal and state courts have applied similar lines of reasoning to reach the same conclusion.[76]

The decisions of courts rejecting the *Sudikoff* standard are premised upon two interrelated propositions. The first is that the government's pretrial disclosure obligation under the Supreme Court's articulation of the *Brady* doctrine is limited by the materiality requirement. The second proposition—which is the focus of the next Part—is that trial judges are therefore constrained from expanding the government's *Brady* obligation beyond those limits, despite the benefits those judges perceive in doing so.

III. Stare Decisis

To be sure, the *Brady* doctrine's materiality requirement has frustrated trial judges and defense attorneys alike for nearly half a century. History has all too often demonstrated how the substantial discretion afforded to the government under the Supreme Court's approach to materiality can invite un-

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[73] *See id.* at 140–42.

[74] *Id.* at 139.

[75] *Id.* at 140.

[76] For example, as one trial judge from the U.S. District Court for the Southern District of Texas explained in *United States v. Causey*: "*Brady* and its progeny neither establish nor govern a rule of discovery but, instead, a self-executing constitutional rule that due process requires the prosecutor to disclose evidence favorable to the accused that is material to guilt or punishment." 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005). Similarly, in *United States v. Padilla*, a trial judge from the U.S. District Court for the District of New Mexico specifically rejected the *Sudikoff* standard on the grounds that the standard "would effectively require the government to produce all information rather than conduct a materiality review; the Court believes that such an approach gets close to civil discovery rather than the standard the American courts have employed since *Brady v. Maryland*." No. CR 09-3598 JB, 2010 WL 4337819, at *5 (D.N.M. Sept. 3, 2010). State courts have adopted similar lines of reasoning in order to reject the *Sudikoff* standard. For example, in *In re Sassounian*, the California Supreme Court explained that "[i]t is plain that the federal constitutional provision requires disclosure *only* of evidence that is both favorable to the accused and material either to guilt or to punishment." 887 P.2d 527, 532 n.5 (Cal. 1995). Similarly, in *Boyd v. United States*, the D.C. Court of Appeals rejected the defendant's request that the court adopt the pretrial disclosure obligation established in *Sudikoff* and adopted by the D.C. District Court in *Safavian*. 908 A.2d 39, 61 (D.C. 2006). After analyzing the Supreme Court's *Brady* jurisprudence, the court concluded that interpreting *Brady* to eliminate the materiality analysis before trial is irreconcilable with the Court's statements to the contrary. *id.*

derdisclosure and prosecutorial abuse—a problem that has yet to be solved through comprehensive criminal discovery reform. In the absence of a solution, trial judges have an incentive to seek change through whatever means they deem necessary, even if it requires contravening Supreme Court precedent. What may be less clear to those judges who adopt the *Sudikoff* approach, however, is that there are significant risks inherent in adopting an approach to stare decisis that would authorize judges to ignore binding precedent so long as their "private judgment suggests that the advantages outweigh the disadvantages."[77] Indeed, no matter how compelling the argument to the contrary, this type of instrumentalist lower court decision making conflicts with the constitutional and normative foundations upon which our legal system rests.

As Alexander Hamilton explained in *Federalist 22*, "To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest . . . to settle and declare in the last resort, a uniform rule of civil justice."[78] The U.S. Constitution addresses Hamilton's observation; Article III establishes that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[79] As Professor Evan Caminker explains, Article III's text establishes a "supreme-inferior distinction," which, through the binding nature of hierarchical precedent, effectively subordinates lower federal courts to the Supreme Court.[80] Thus, "inferior courts are 'inferior to' the Supreme Court in that the former must obey the precedents set by the latter."[81]

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[77] Solum, *supra* note 1, at 183.

[78] THE FEDERALIST NO. 22, at 112 (Alexander Hamilton) (George W. Casey & James McClellan eds., 1990); *see also* THE FEDERALIST NO. 81, at 419 n.2 (Alexander Hamilton) (George W. Casey & James McClellan eds., 1990) (noting that Article I of the U.S. Constitution provides that Congress may "constitute tribunals inferior to the Supreme Court" and that "the evident design of the provision is to enable the institution of local courts subordinate to the supreme, either in states or larger district"); *cf.* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377, at 258 (Charles C. Little & James Brown, 2d ed. 1851) (noting that "judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it," and that "the principles of the decision are held, as precedents and authority, to bind future cases of the same nature").

[79] U.S. CONST. art. III, § 1. Article I similarly adds that "Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court." *Id.* at art. I, § 8, cl. 1, 9.

[80] Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 832 (1994).

[81] *Id.*; *see also* Hutto v. Davis, 454 U.S. 370, 374–75 (1982) (admonishing the lower court for derogating from "the hierarchy of the federal court system created by the Constitution and Congress"); Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1673 (1997) (noting that "when the United States Constitution speaks in terms of a 'supreme' court and 'inferior' courts, it arguably requires that all federal courts obey Supreme Court precedent"). *But see* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 254–59 (1985) (interpreting "supreme" to mean that the Supreme Court is the court of last resort, from which no further appeals are available); Steven G. Calabresi & Kevin H. Rhodes, *The Struc-*

To support this interpretation, Professor Caminker draws an analogy to the hierarchical structure of the executive branch, reasoning that because the "President cannot personally make and implement every decision necessary to execute the laws," proper functioning depends upon "inferior executive officials assum[ing] a general duty of obedience" to their superiors.[82] Similarly, lower courts owe this same "general duty of obedience" to the Supreme Court, which they demonstrate by adhering to the precedents issued by hierarchically superior courts. Moreover, Professor Caminker points to the judicial scheme described in the Constitution's drafting history to support this interpretation of Article III:

> The Framers generally viewed the Supreme Court as the ultimate arbiter of the meaning of federal law. However, . . . [g]iven the vast size of the original and foreseeable United States territory, resort to the Supreme Court by every losing party would strain the Court's resources and increase the likelihood of vexatious litigation. By creating inferior federal courts, Congress ensured litigants less costly access to Article III courts. Far from intending to diffuse the ultimate interpretive authority of the Supreme Court, the Framers hoped to bring the Supreme Court's unified authority closer to the people through local Article III courts while simultaneously avoiding the burden and expense of Supreme Court review of every case. The Framers apparently assumed that the widely dispersed inferior courts would defer to the Supreme Court's authority.[83]

Thus, according to Caminker, lower court adherence to the doctrine of vertical stare decisis is a constitutional imperative. As a result, when lower court judges contravene established Supreme Court precedent in order to achieve procedural reform—which occurred in *Sudikoff* and its progeny—they are acting outside of the constitutional limitations placed upon their judicial authority as "inferior" Article III courts. For this reason, the constitutional mandate of stare decisis justifies rejecting the *Sudikoff* approach as a matter of law.

In addition, there are strong normative considerations that counsel against an instrumentalist approach. As a variety of scholars have pointed out, strict adherence to vertical stare decisis contributes important values to our legal system. First and foremost, vertical stare decisis provides "maxi-

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tural Constitution: Unitary Executive, Plural Judiciary, 105 HARV. L. REV. 1155, 1180 n.139 (1992) (interpreting the terms "inferior" and "supreme" to refer to the size of geographical and subject matter jurisdiction); John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 529 (2000) (noting that the doctrine of stare decisis is not constitutionally compelled but rather is a principle of the common law).

[82] Caminker, *supra* note 80, at 832.

[83] *Id.* at 833*; see also* STORY, *supra* note 78, § 378, at 258–59 (asserting that the "conclusive effect of judicial adjudications"—which "was in the full view of the framers of the constitution"—suggests that "the judgments of the courts of the United States" were "plainly supposed to be of paramount and absolute obligation throughout all the states").

mal rule of law benefits,"[84] in that lower court adherence to Supreme Court precedent enables a uniform interpretation of federal statutory and constitutional provisions, making the law more predictable, stable, and certain.[85] In this regard, Justice Louis Brandeis once noted that "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."[86]

A stable and uniform body of jurisprudence is normatively desirable because it enables the law to better guide and organize human behavior. When the law is predictable, individuals can structure their private and public affairs so as to avoid a confrontation with the coercive power of the state.[87] Conversely, abrogation of stare decisis, resulting in unpredictable and unstable laws, chips away at the "sphere of autonomy within which individuals can act without fear of government interference."[88] Of course, even the uniform application of federal law cannot ensure *absolute* predictability; courts can abruptly overturn their own precedent, stable precedents cannot answer every legal issue likely to arise, the behavior of other legal actors is often unpredictable, and the interplay between federal law and state law means that instability in state law can make federal law unpredictable.[89] However, that some aspects of our legal system incorporate a certain amount of nonuniformity and instability does not undermine the fact that an absence of stare decisis "would make prediction even harder and severely undermine people's ability to order their affairs pursuant to law."[90]

In addition to the rule of law values supporting adherence to vertical stare decisis, another interrelated set of important values—which fall under the general heading of judicial economy—also counsel in favor of it. At its most basic level, stare decisis promotes "efficiency in the operation of the courts and the judicial system"[91] because it prevents the "constant reconsid-

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[84] Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1454 (2007).

[85] *See* Solum, *supra* note 1, at 165 (noting "the rule-of-law values of predictability, certainty, and stability"); Martin v. Hunter's Lessee, 14 U.S. 304, 347–48 (1816) (noting "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution").

[86] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932); *cf.* Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

[87] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) (noting the importance of people's understanding what behavior is expected of them based upon prior judgments of the courts).

[88] Lawrence B. Solum, Legal Theory Lexicon 017: Rule of Law, Legal Theory Lexicon, http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_3.html (on file with the Harvard Law School Library).

[89] *See* Caminker, *supra* note 80, at 851.

[90] *Id.* at 852; s*ee also* Solum, *supra* note 88 (noting that "[c]ertainty and predictability . . . would be undermined if each judge or official picked and chose among the laws, enforcing the ones that the judge thought were good and nullifying the ones the judge thought were bad").

[91] See BLACK'S LAW DICTIONARY 923 (9th ed. 2009) for this definition of "judicial economy."

eration of settled legal questions."[92] In addition to ensuring a manageable workload for judges, vertical stare decisis also promotes efficient judicial administration by preventing the endless trail of appeals that would occur if lower court judges failed to follow the decisions of courts with appellate jurisdiction over their judgments.[93] Indeed, lower court judges waste judicial and litigant resources by ruling contrary to a precedent issued by a hierarchically superior court, since on appeal, the higher court is likely to reverse the lower court's judgment.[94] Finally, stare decisis also conserves judges' intellectual resources, since relying on precedent allows them to "economiz[e][ ] on information"[95] by avoiding the need to repeatedly analyze the merits of a given legal doctrine.[96] As Justice Benjamin Cardozo once noted, "[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[97]

In short, the benefits of stare decisis are foundational to the successful operation of our legal system and, therefore, counsel against adopting the instrumentalist approach to precedent evidenced by the *Sudikoff* line of cases. From a rule of law perspective, a policy-based district court abrogation of stare decisis is problematic because it can lead to "the tyranny of small decisions."[98] Although the impact of a single decision in derogation of stare decisis will not eviscerate the rule of law, it can lead to a "real slippery slope—once we start to slide, it really is hard to stop."[99] This slippery slope is apparent from the growth of the *Sudikoff* approach, which began with a policy-based standard applied by one district court judge in California but which has now been adopted by a group of district courts across the nation, giving it an imprimatur of legitimacy. In this way, accepting instrumentalism in one context positively reinforces embracing it in the future, which, over time, can detrimentally impact the rule of law values of stability, uniformity, and predictability.

The instrumentalist approach employed in the *Sudikoff* line of cases is also problematic because of the extent to which it detracts from the judicial

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[92] Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924).

[93] *See* Camp, *supra* note 81, at 1668.

[94] *See id.* This concern is particularly pronounced at the district court level, given that a court of appeals is more likely to review a trial court decision than the Supreme Court is to grant certiorari to review a court of appeals decision. *See* Caminker, *supra* note 80, at 841. Although the U.S. Supreme Court receives approximately 10,000 petitions for writ of certiorari each year, the Court only grants and hears oral argument in about seventy-five to eighty cases. The Supreme Court of the United States Frequently Asked Questions, http://www.supremecourt.gov/faq.aspx#faqgi9 (on file with the Harvard Law School Library).

[95] Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 423 (1988).

[96] *See* Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93, 102 (1989).

[97] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

[98] Solum, *supra* note 1, at 183.

[99] *Id.*

economy values of stare decisis. One can only imagine the impact a widespread instrumentalist approach to stare decisis could have on the ability of the already overburdened federal trial bench to adjudicate cases efficiently. At the district court level, this approach could lead litigants to ask judges to revisit otherwise well-established precedent in every case where a cognizable policy argument could be made against applying a Supreme Court precedent. It is also worth noting that even if courts had the time and resources necessary to administer a cost-benefit analysis of stare decisis, there would be no guarantee that the rules adopted would in fact make for better policy. As others have noted, the judiciary—and lower courts in particular—lack the information-gathering resources and institutional structure that characterize law-making bodies.[100]

Finally, instrumentalist lower court decision making, and the *Sudikoff* standard in particular, may have the unintended effect of stifling legitimate efforts at legal reform. This is because the partial acceptance of the *Sudikoff* standard may have "obscure[d] a clear-eyed evaluation of whether current discovery standards are effectively granting defendants access to exculpatory evidence."[101] Failing to "recognize *Brady*'s limitations as a discovery doctrine" may result in either the dismissal or downplaying of "complaints that discovery rules are inadequate because of a misguided belief that *Brady* ultimately will ensure that nothing important slips through."[102]

Of course, lower court adherence to Supreme Court precedent that favors constitutional principle over legal policy undoubtedly comes at a price. As the problems described in Part I of this Essay reveal, adhering to the Court's materiality standard can, and does, negatively impact the trial process. But as this Essay has demonstrated, both the constitutional command of Article III and the normative values that underlie it are simply too important to ignore and should result in the rejection of an instrumentalist approach to the materiality standard. The movement to amend the Federal Rules of Criminal Procedure, in addition to the various academic proposals thus far advanced, demonstrates that a *Sudikoff*-like level of disclosure can be accomplished through legitimate extra-judicial channels. Therefore, future courts confronted with the *Brady* doctrine should decline to adopt the *Sudikoff* materiality standard—and the instrumentalist approach that underlies it—in the face of binding precedent to the contrary.

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[100] *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting) ("Courts are ill-equipped to make the investigations which should precede [legislation]."); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1260–61 (2006) (noting that given the judiciary's "structure and manner of operation, courts lack the ability to perform [legislative] tasks").

[101] Sundby, *supra* note 4, at 645.

[102] *Id.*

Conclusion

Sudikoff and its progeny are based upon the assumption that the pretrial standard underlying the government's required *Brady* disclosures "has not been clearly stated."[103] In light of the Court's *Brady* jurisprudence, though, it is clear that this assertion is mistaken. The question raised by the *Sudikoff* line of cases is not whether criminal justice reform is necessary, but rather whether such reform should be achieved through a policy-based approach to stare decisis. I conclude here that abrogating stare decisis is an unconstitutional and normatively undesirable way to achieve reform. Rewriting the *Brady* doctrine to eliminate its materiality evaluation before trial is not only foreclosed by the constitutional mandate of stare decisis, but should also be rejected after considering the important rule of law and judicial economy values that support it. Our legal system requires nothing less.

[103] United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999).