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Smith v. Cain132 S. Ct. 627 (2012)

Sarah L. Shilvock

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I. INTRODUCTION

Smith v. Cain[1] emphasizes the importance of prosecutorial conformity to the requirements of due process ensured under the Fourteenth Amendment of the Constitution of the United States.[2] The critical role that prosecutors play in the conviction of defendants in criminal trials is indisputable, yet the judiciary has recognized significant constitutional obligations that accompany prosecutors throughout the adversarial process.[3] Beginning with the landmark case of *Brady v. Maryland*[4] and its progeny, the Supreme Court of the United States has drawn the parameters for the minimum conduct required by prosecutors in the disclosure of evidence to the defense.[5] *Brady* provides that the State's suppression of evidence favorable to a defendant violates due process when the evidence is material to the defendant's guilt or punishment, regardless of the prosecution's intent.[6]

In *Smith*, the Supreme Court considered whether the State's failure to disclose conflicting statements made by the prosecution's sole eyewitness constituted a *Brady* violation when Petitioner Juan Smith was convicted based upon the eyewitness testimony at trial.[7] The Court held that nondisclosure of the evidence was a clear violation of *Brady* because the eyewitness's statements were material to the determination of Smith's guilt and undermined confidence in his conviction.[8] The Court's decision represents an important development in the line of recent cases under *Brady*. While the Court's scant opinion left the state of *Brady* virtually unchanged, a clear message was sent by the Court that continual prosecutorial misconduct will not be tolerated.[9] The case suggests a shift from earlier, increasingly narrow cases involving *Brady* violations to an acknowledgment of public outcry resulting from the growing discovery of

1. 132 S. Ct. 627 (2012).
2. *See generally id. See also* U.S. CONST. amend. XIV, § 1.
3. *See, e.g.*, Brady v. Maryland, 373 U.S. 83 (1963).
4. 373 U.S. 83 (1963).
5. *See generally* Cone v. Bell, 556 U.S. 449, 469-76 (2009); Strickler v. Greene, 527 U.S. 263, 280-96 (1999); Kyles v. Whitley, 514 U.S. 419, 432-41 (1995); United States v. Bagley, 473 U.S. 667, 674-83 (1985); United States v. Agurs, 427 U.S. 97 (1976)
6. *Brady*, 373 U.S. at 87.
7. Smith v. Cain, 132 S. Ct. at 629-30.
8. *Id.* at 630-31.
9. *See id.*

prosecutorial misconduct involving the withholding of evidence determinative of a defendant's guilt.[10]

II. STATEMENT OF FACTUAL AND PROCEDURAL HISTORY

In 1995, Smith was charged with five counts of first-degree murder during an armed robbery that occurred in New Orleans, Louisiana.[11] At Smith's trial, Larry Boatner took the stand as the sole eyewitness for the prosecution.[12] Boatner testified that he and several friends were present at the home of a friend when armed gunmen burst into the house, demanding drugs and money.[13] The gunmen began shooting shortly thereafter and killed five people.[14]

Boatner told the jury that he was in the kitchen when he heard a loud noise resembling the sound of a car without a muffler.[15] He went to investigate and opened the front door, at which point the gunmen rushed into the house.[16] Boatner said the first man through the door, "forced him to the floor," and then "struck him on the head."[17] However, Boatner stated that in those seconds he saw the face of the first gunman because he was not wearing a mask.[18] Boatner "further testified that he had told the police that the man had a low-cut haircut and 'golds in his mouth.'"[19] At trial, Boatner identified Smith as the first gunman to enter the house.[20] No other witnesses came forward and no physical evidence was presented to incriminate Smith in the perpetration of the crime.[21]

The jury convicted Smith of five counts of first-degree murder.[22] The Louisiana Fourth Circuit Court of Appeal affirmed the conviction.[23] The Louisiana Supreme Court denied review.[24] Smith then sought post-conviction relief and acquired files from the lead investigator of the case,

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10. *See generally* David Keenan et al., *The Myth of Prosecutorial Accountability after* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011), http://yalelawjournal.org/images/pdfs/1018.pdf.
11. *Smith*, 132 S. Ct. at 629.
12. *Id.*
13. *Id.*
14. *Id.*
15. Brief for Petitioner at 5, *Smith*, 132 S. Ct. 627 (No. 10-8145), 2011 WL 3608728, at *5.
16. *Id.*, 2011 WL 3608728, at *5.
17. *Id.*, 2011 WL 3608728, at *5.
18. *Id.* at 5-6, 2011 WL 3608728, at *6.
19. *Id.*, 2011 WL 3608728, at *6.
20. *Smith*, 132 S. Ct. at 629.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

Detective John Ronquillo.[25] Within the files, Smith discovered "statements by Boatner that conflict[ed] with his testimony identifying Smith as [the] perpetrator."[26] Notes transcribed by Ronquillo on the night of the murder revealed that Boatner could not provide a description of the perpetrators except as being African-American males.[27] Five days after the murder, Ronquillo documented his conversation with Boatner, who said he was unable to identify any of the perpetrators because he had not seen their faces and "would not know them if [he] saw them."[28]

"Smith requested his conviction be vacated," arguing the prosecution had violated *Brady* by failing to disclose the files containing Boatner's conflicting testimony.[29] Smith's claim was rejected by the trial court without issuance of a written opinion.[30] Review was summarily denied by the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court.[31] Smith petitioned the Supreme Court of the United States for a writ of certiorari.[32]

In his petition for a writ of certiorari, Smith alleged that the Orleans Parish District Attorney's Office committed multiple *Brady* violations that prejudicially affected Smith's murder trial.[33] Post-conviction evidentiary hearings were conducted at the behest of the Orleans Parish Criminal District Court.[34] Among the witnesses called to testify was a neighbor who stated that on the night of the murder, he heard numerous gunshots, and then saw four African-American males leaving the scene in a vehicle, carrying rifles and wearing masks.[35] Smith noted that the declaration made by victim Shelita Russell, who was fatally injured during the shooting, was also suppressed by the State.[36] "Russell told the police at the crime scene that she was in the kitchen and that the first gunm[an] who entered the house" was masked.[37]

Smith's trial lawyer "testified that he could have used . . . Russell's statement to impeach . . . Boatner's testimony that . . . Smith was not

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25. *Smith*, 132 S. Ct. at 629.
26. *Id.*
27. *Id.*
28. *Id.* at 629-30.
29. *Id.* at 630.
30. Petition for Writ of Certiorari at 4, *Smith*, 132 S. Ct. 627 (No. 10-8145), 2010 WL 6774629, at *4.
31. *Smith*, 132 S. Ct. at 630.
32. *Id.*
33. *See* Petition for Writ of Certiorari, *supra* note 30, at 12, 2010 WL 6774629, at *7.
34. *Id.* at 14, 2010 WL 6774629, at *8.
35. *Id.*, 2010 WL 6774629, at *8.
36. *Id.* at 15, 2010 WL 6774629, at *8.
37. *Id.*, 2010 WL 6774629, at *8.

wearing a mask" when Boatner claimed he was able to identify Smith as the initial gunman who entered the premises.[38] Further, the State did not disclose the confession of convicted felon Robert Trackling, who told his cellmate about his involvement in the murder.[39] Trackling was never charged with the murder and allegedly entered into an agreement with the assistant district attorney to testify against Smith.[40]

In response to Smith's allegations, the State contended the evidence was not suppressed nor was it favorable to the defense.[41] The State further claimed the majority of the undisclosed evidence was not admissible in court.[42] The Supreme Court of the United States subsequently granted Smith's petition for writ of certiorari.[43]

III. THE COURT'S DECISION AND RATIONALE

A. The Majority Opinion

Writing for the majority, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, succinctly traced the development of *Brady* and the subsequent cases that fleshed out the fundamental rule: a defendant's right to due process is violated by the nondisclosure of evidence favorable to the defense and material to guilt or punishment.[44] The majority considered the materiality of the undisclosed eyewitness statements transcribed by the detective to be determinative of the issue of Smith's guilt.[45] Chief Justice Roberts explained that evidence is material when a "reasonable probability" exists that if the evidence had been disclosed, a different result would have occurred.[46] Such reasonable probability exists when the likelihood of a different result is great enough to undermine confidence in the verdict.[47]

While the majority acknowledged "that evidence impeaching an eyewitness may not be material if the State's other evidence" supports a finding of guilt, the present case was supported only by a single eyewitness identifying Smith as the perpetrator.[48] More significantly, the witness's

38. Petition for Writ of Certiorari, *supra* note 30, at 8, 2010 WL 6774629, at *8-9.
39. *Id.* at 7, 2010 WL 6774629, at *5.
40. *Id.*, 2010 WL 6774629, at *5.
41. Respondent's Brief at 27, *Smith*, 132 S. Ct. 127 (No. 10-8145), 2011 WL 4500689, at *11.
42. *Id.*, 2011 WL 4500689, at *11.
43. *Smith*, 132 S. Ct. at 630.
44. *Id.*
45. *See id.* at 630-31.
46. *See id.* at 630 (quoting *Cone*, 556 U.S. at 469-70).
47. *Id.* (quoting *Kyles*, 514 U.S. at 434).
48. *Smith*, 132 S. Ct. at 630 (citing *Agurs*, 427 U.S. at 112-13).

undisclosed statements contradicted his testimony at trial that he had "no doubt" that Smith was the gunman he saw "face to face" on the night of the murder.[49] The Court brusquely stated that the undisclosed statements were "plainly material."[50]

Chief Justice Roberts then addressed the dissent's argument that the jury may have disregarded the eyewitness statements because he made other remarks indicating he could identify the gunman.[51] However, he dismissed this argument as "speculative" in attempting to determine what the jury would have believed.[52] He also refuted the State's argument that the eyewitness's contradictory statements could be explained by fear of retaliation, noting that what the jury would have believed could not be decided with confidence.[53]

Although the majority recognized the existence of other evidence claimed by Smith to be favorable to him and material to the verdict, the Court held it was unnecessary to consider such evidence because the eyewitness's undisclosed statements alone were sufficient to undermine confidence in Smith's conviction.[54] In an eight-to-one decision, the Court reversed the judgment of the Orleans Parish Criminal District Court of Louisiana and remanded the case for further proceedings.[55]

B. Dissenting Opinion by Justice Thomas

Justice Thomas was the sole dissenter and argued that Smith had not shown a "reasonable probability" that the undisclosed evidence would have impacted the decision of the jury.[56] Justice Thomas stressed that, in the context of the entire record, the undisclosed evidence was not material to the determination of Smith's guilt.[57] Justice Thomas proceeded to examine the record as presented by the State to support his position.[58]

First, Justice Thomas pointed to the statements of several persons present at the scene of the crime.[59] Justice Thomas presented the testimony of the police officer who first responded to the scene and testified that the

49. *Id.*
50. *See id.*
51. *Id.*
52. *Id.*
53. *Smith*, 132 S. Ct. at 630.
54. *Id.* at 630-31.
55. *Id.* at 629, 631.
56. *Id.* at 631 (Thomas, J., dissenting).
57. *See id.* (Thomas, J., dissenting) (quoting *Agurs*, 427 U.S. at 112).
58. *Smith*, 132 S. Ct. at 631-33.
59. *Id.*

eyewitness, Boatner, had seen the gunman and provided a description.[60] However, the officer could not recall the specific details regarding Boatner's description of the perpetrator.[61] Justice Thomas also noted the testimony of Detective Ronquillo, who interviewed the eyewitness multiple times.[62] Ronquillo testified that the eyewitness had identified the perpetrator numerous times, and three weeks after the shooting, had presented Boatner with a photographic array in which Boatner noted physical similarities to the perpetrator while not incriminating any other suspect.[63] Further, four months after the shooting, Boatner identified Smith in another photographic array.[64] Smith's photograph was the only one identified.[65] Justice Thomas then noted Boatner's direct identification of Smith as the perpetrator at the trial.[66] Justice Thomas emphasized that Smith did not establish reasonable probability that the undisclosed evidence would outweigh the "cumulative effect" of the evidence at trial.[67]

Second, Justice Thomas refuted additional undisclosed evidence that was presented by Smith as favorable and material to the outcome of the trial.[68] Regarding the undisclosed eyewitness statements transcribed in the detective's notes, Justice Thomas admitted that the evidence could have been used to impeach Boatner's and Ronquillo's testimony during the trial.[69] However, he argued the statements were not material within the context of *Brady* because the evidence would not have "'put the . . . case in such a different light as to undermine confidence in the verdict.'"[70] The eyewitness had the opportunity to view the perpetrator, provided multiple accurate descriptions of the perpetrator at different occasions, and positively identified the perpetrator as Smith in photographic arrays.[71]

Furthermore, Justice Thomas argued that the majority improperly shifted the burden of proof from the defense to the State.[72] He stated the majority erred by requiring the State to show that the jury would have given no weight to the undisclosed evidence, thus shifting the burden from Smith

60. *Id.* at 632.
61. *Id.*
62. *Id.* at 632.
63. *Smith*, 132 S. Ct. at 632 (Thomas, J., dissenting).
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 633.
68. *Smith*, 132 S. Ct. at 633-41 (Thomas, J., dissenting).
69. *Id.* at 633.
70. *Id.* (quoting *Kyles*, 514 U.S. at 435).
71. *Id.* at 634-35.
72. *Id.* at 635.

to demonstrate reasonable probability of a different outcome.[73] Moreover, a "*possibility* of a different verdict [was] insufficient to establish a *Brady* violation," and Smith failed to show the jury would have given sufficient weight to the undisclosed evidence to alter the outcome.[74]

Next, the dissent considered further undisclosed evidence that Smith contended was material under *Brady*.[75] Smith offered statements of onlookers who said the perpetrators all wore masks covering their faces, thereby conflicting with Boatner's eyewitness testimony that he was able to see the face of the gunman.[76] However, Justice Thomas argued the evidence only showed that some of the perpetrators wore masks, which did not undermine Boatner's testimony that the perpetrator he saw was unmasked.[77]

An ammunitions expert also presented conflicting testimony concerning the type of weapon used by the perpetrator and seen by Boatner.[78] The expert noted that ammunition confiscated from the scene matched a semi-automatic weapon, but Boatner had identified the weapon used by the perpetrator as a handgun.[79] The dissent rejected Smith's contention that these conflicting statements impeached Boatner's testimony, noting that the term "handgun" merely referred to a firearm that could be carried with one hand, and a semi-automatic weapon fell within this category.[80] Thus, the expert's statement was not impeaching or exculpatory and could not form the basis of a *Brady* violation.[81]

Justice Thomas then examined the testimony of Robert Trackling, who confessed his involvement in the murder while denying that Smith played a role in the crime.[82] However, Justice Thomas stated that the testimony was conflicting and would have incriminated Smith rather than exculpate him since Trackling's description of one of the perpetrators matched Boatner's description of Smith.[83] Further, Trackling later identified Smith as one of the gunmen.[84]

The dissent also dismissed the detective's notes from an interview conducted with one of the perpetrators who was severely injured at the

73. *Smith*, 132 S. Ct. at 635 (Thomas, J., dissenting).
74. *Id.* (emphasis in original) (citing *Strickler*, 527 U.S. at 291; *Agurs*, 427 U.S. at 109-10).
75. *Id.* at 635-40.
76. *Id.* at 635-36.
77. *Id.* at 636-37.
78. *Smith*, 132 S. Ct. at 637 (Thomas, J., dissenting).
79. *Id.*
80. *Id.* at 637-38.
81. *Id.* (citing *Strickler*, 527 U.S. at 281-82).
82. *See id.* at 638.
83. *Smith*, 132 S. Ct. at 638 (Thomas, J., dissenting).
84. *Id.*

scene of the crime and hospitalized.[85] Smith said the notes indicated that he was not involved in the shootings, but Justice Thomas found that the material had "unclear exculpatory value."[86] Considering the cumulative effect of the evidence, the jury still would have reached the same verdict.[87] Thus, Smith failed to show a "reasonable probability" that the undisclosed evidence undermined his verdict.[88]

Finally, the dissent concluded by stressing that the issue was not whether the evidence should have been disclosed; rather, the issue was whether the "cumulative effect" of all the evidence undermined confidence in the verdict.[89] Justice Thomas chastised the majority for failing to review all pertinent facts of the record and assuming the evidence would merely support Smith's claims.[90] He insisted that the entire record implicated Smith in the perpetration of the crime.[91] Therefore, the State did not violate *Brady* because the undisclosed evidence was neither favorable nor material to the determination of Smith's guilt.[92]

IV. ANALYSIS

A. Introduction

The Supreme Court's ruling that the State's nondisclosure of contradictory statements from the sole eyewitness constituted a *Brady* violation was correct because it is consistent with the history of cases defining *Brady*.[93] While the Court's cursory opinion did not expand upon *Brady*, the Court's unusual brevity itself is arguably a message that prosecutorial misconduct would result in a swift and decisive judicial response.[94] The Court's consideration of a case concerning a *Brady* violation came just one year after its infamous decision in *Connick v. Thompson*,[95] which was met with great disapproval, as commentators bemoaned the increasing trend of the Court to restrict the remedies available

85. *Id.* at 639.
86. *Id.* at 640.
87. *Id.*
88. *Smith*, 132 S. Ct. at 640 (Thomas, J., dissenting).
89. *Id.* (quoting *Kyles*, 514 U.S. at 435).
90. *Id.* (citing *Kyles*, 514 U.S. at 456).
91. *Id.* at 640-41.
92. *Id.* at 641.
93. *See generally Cone*, 556 U.S. at 469-76; *Strickler*, 527 U.S. at 280-96; *Kyles*, 514 U.S. at 432-41; *Bagley*, 473 U.S. at 674-83; *Agurs*, 427 U.S. at 103-14.
94. *See Smith*, 132 S. Ct. at 630 (majority opinion).
95. 131 S. Ct. 1350 (2011).

for prosecutorial misconduct.[96] In particular, the history of *Brady* violations committed by the Orleans Parish District Attorney's Office in Louisiana is notably egregious.[97] The Supreme Court's reversal of yet another case originating from the Orleans Parish demonstrates that the Court will not allow the complexities of the *Brady* doctrine to excuse prosecutorial misconduct.[98] Unfortunately, however, the state of *Brady* remains unchanged because the Court failed to clarify the intricacies surrounding the materiality determination that lies at the heart of the *Brady* doctrine.[99] Moreover, the remedies available for prosecutorial misconduct remain limited.[100]

B. Discussion

1. Examination of the Evidence

The underlying tension between the majority and the dissent in *Smith* concerns the appropriate level with which the evidence must be evaluated.[101] While *Brady* set forth the foundational rule that the prosecution must disclose evidence that is favorable and material to the determination of guilt or punishment of the defendant,[102] the principle was fleshed out by subsequent decisions. The Court, in *United States v. Agurs*,[103] expanded upon *Brady* by noting that undisclosed evidence must be considered "in the context of the entire record" when determining the materiality of the omitted evidence.[104]

The Court, in *Giglio v. United States*,[105] held that evidence impeaching a witness falls within the *Brady* rule.[106] In *United States v. Bagley*,[107] the Court provided a needed, albeit malleable, standard of materiality by

96. *See* David Rittgers, Connick v. Thompson*: An Immunity that Admits of (Almost) No Liabilities*, *in* CATO SUPREME COURT REVIEW 203, 203 (10th ed. 2011); Harvard Law Review Ass'n, *Leading Cases*, 125 HARV. L. REV. 331, 331, 340 (2011); Keenan et al., *supra* note 10, at 204, 211; Symposium, *Panel on Prosecutorial Immunity: Deconstructing* Connick v. Thompson, 13 LOY. J. PUB. INT. L. 331, 340 (2012).

97. *See generally* Connick v. Thompson, 131 S. Ct. 1350 (2011); *Kyles*, 514 U.S. 419; State v. Bright, 2002-2793 (La. 5/25/04), 875 So. 2d 37; State v. Cousin, 96-2973 (La. 4/14/98); 710 So. 2d 1065.

98. *See Smith*, 132 S. Ct. at 631.

99. *See generally Smith*, 132 S. Ct. 627.

100. Keenan et al., *supra* note 10, at 213-15.

101. *See Smith*, 132 S. Ct. at 631 (Thomas, J., dissenting).

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

103. 427 U.S. 97 (1976).

104. *Id.* at 112.

105. 405 U.S. 150 (1972).

106. *See id.* at 154.

107. 473 U.S. 667 (1985).

holding that evidence is material under the purposes of *Brady* when there is a "reasonable probability" that the outcome of the proceeding would have been different.[108] The Court noted that a "reasonable probability" is one which is "sufficient to undermine confidence in the outcome."[109] In *Kyles v. Whitley*,[110] the Court emphasized that the *Bagley* materiality standard requires courts to consider evidence "collectively" rather than "item by item."[111]

Therefore, the point of disagreement between the majority and the dissent falls upon whether Smith adequately demonstrated "reasonable probability" that the undisclosed evidence would have undermined confidence in the outcome of the trial.[112] The dissent argued that Smith did not show "reasonable probability" because the entirety of the record demonstrated that the eyewitness "consistently described" Smith as the perpetrator.[113] To the dissent, the additional evidence presented by the State was sufficient to counterbalance the contradictory statements of the eyewitness.[114] Thus, the undisclosed evidence was not material because confidence in the outcome was not undermined.[115]

Arguably, however, the majority did consider the facts, but emphasized instead the fact that the single eyewitness account was dispositive to the outcome of the trial.[116] The majority correctly placed great weight upon the undisclosed evidence that impeached the eyewitness by directly contradicting his statements that identified Smith as the perpetrator.[117] To the majority, to further examine the record was unnecessary because the strength of the prosecution's evidence was drastically weakened.[118] To examine the record further would simply be to "speculate" upon what evidence the jury would have believed.[119] Thus, because the eyewitness testimony was the linchpin of the prosecution's argument, the nondisclosure of contradictory statements that undermined the witness's description of Smith "plainly" met the materiality standard of *Brady*.[120]

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108. *Id.* at 682 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).
109. *Id.*
110. 514 U.S. 419 (1995).
111. *Id.* at 436.
112. *See Smith*, 132 S. Ct. at 640 (Thomas, J., dissenting) (quoting *Kyles*, 514 U.S. at 435, 456).
113. *See id.*
114. *Id.* at 640-41.
115. *See id.*
116. *Id.* at 630 (majority opinion) (citing *Agurs*, 427 U.S. at 112-13 & n.21).
117. *See Smith*, 132 S. Ct. at 630.
118. *See id.* at 630-31.
119. *Id.*
120. *Id.*

The tension between the proper level of examination of individual evidence and the collective record is not new to the Supreme Court. An analogous issue confronted the Court in *Kyles* when the State did not disclose pertinent eyewitness statements that cast doubt upon the guilt of the defendant.[121] The Court held in a five-to-four decision that the State's nondisclosure of the evidence constituted a *Brady* violation because a reasonable probability existed that disclosure would have resulted in a different outcome.[122] The Court reasoned that "'the essence of the State's case'" was the testimony of eyewitnesses who identified the defendant as the perpetrator.[123] Disclosure of the evidence would have substantially weakened the prosecution's argument and therefore should have been revealed to the defense.[124]

As in *Smith*, Justice Thomas joined the dissent in *Kyles*.[125] The dissent argued that the *Kyles* Court failed to consider the evidence "as a whole."[126] The dissent then proceeded to evaluate the additional evidence presented by the State to discount the materiality of the undisclosed evidence held material by the majority.[127]

The conflict arose yet again in *Cone v. Bell*[128] when the Court considered whether the State's non-disclosure of eyewitness statements corroborating the defendant's insanity defense constituted a *Brady* violation.[129] The majority held that the suppressed evidence, which included eyewitness accounts supporting the contention that the defendant suffered from drug addiction, may have been material to the mitigation of the defendant's punishment.[130] Reasoning that a "reasonable probability" could exist which may have altered the jury's assessment of the appropriate penalty for the defendant, the Court remanded the case to the district court.[131] Justice Thomas again dissented, writing that the defense failed to establish a "reasonable probability" that the undisclosed evidence would have altered the outcome of the trial.[132] Justice Thomas argued that, in

121. *See Kyles*, 514 U.S. at 423-32.
122. *Id.* at 421, 441.
123. *Id.* at 441 (quoting Kyles v. Whitley, 5 F.3d 806, 853 (5th Cir. 1993)).
124. *Id.*
125. *Id.* at 456; *see also Smith*, 132 S. Ct. at 631.
126. *Kyles*, 514 U.S. at 459 (Scalia, J., dissenting).
127. *See id.* at 460-75.
128. 556 U.S. 449 (2009).
129. *See id.* at 451-52.
130. *Id.* at 452.
131. *Id.*
132. *See id.* at 489 (Thomas, J., dissenting) (quoting *Kyles*, 514 U.S. at 433-34).

"[v]iewing the record as a whole," it was apparent the defendant failed to establish that the undisclosed evidence was material under *Brady*.[133]

Based upon the repeated pattern displayed in the aforementioned cases, it is evident that a major contention exists within the Supreme Court regarding the appropriate extent to which evidence must be examined.[134] Precedent suggests that when a conviction rests upon eyewitness testimony, the Court is likely to place great weight upon such evidence in evaluating its materiality under *Brady*.[135] Thus, the nature of the evidence presented is an important factor in determining whether a *Brady* violation has been committed.[136]

2. History of Brady Violations

The decision in *Smith* addressing prosecutorial misconduct is yet another in a long line of cases recently reviewed by the Supreme Court.[137] Unfortunately, the history of *Brady* violations committed by prosecutors is disheartening.[138] In particular, the Orleans Parish District Attorney's Office has a disturbing trend of continually committing *Brady* violations.[139] The prosecuting attorneys' discomfiting ignorance of *Brady* has been noted not only by the legal profession, but also by the general public.[140]

In Petitioner's Brief to the Supreme Court, counsel for Smith stated the case was "the latest in a series of cases in which the Orleans Parish district attorney's office ha[d] failed to disclose information material to a criminal defendant's guilt" in violation of *Brady*.[141] Smith noted the reputation of the District Attorney's Office was "unrivaled . . . for its disregard of *Brady's* requirements."[142] Smith pointed to numerous cases[143] in which

133. *Id.* at 498.

134. *See supra* notes 102-132 and accompanying text.

135. *See supra* notes 102-132 and accompanying text.

136. *See supra* notes 102-132 and accompanying text.

137. *See generally Connick*, 131 S. Ct. 1350; *Cone*, 556 U.S. 449; *Strickler*, 527 U.S. 263; *Kyles*, 514 U.S. 419.

138. *See* Keenan et al., *supra* note 10, at 211 (discussing a 2003 study by the Center for Public Integrity that discovered more than two thousand appellate cases since 1970 in which prosecutorial misconduct resulted in dismissals, sentence reductions, or reversals).

139. *See generally Smith*, 132 S. Ct. 627; *Connick*, 131 S. Ct. 1350; *Kyles*, 514 U.S. 419; *Bright*, 2002-2793 (La. 5/25/04); 875 So. 2d 37; *Cousin*, 96-2973 (La. 4/14/98); 710 So. 2d 1065.

140. *See, e.g.*, Campbell Robertson & Adam Liptak, *Supreme Court Looks Again at Methods of D.A.'s Office in Louisiana*, N.Y. TIMES, Nov. 2, 2001, http://www.nytimes.com/2011/11/03/us/orleans-district-attorneys-office-faces-us-supreme-court.html?pagewanted=all&_r=0.

141. Brief for Petitioner, *supra* note 15, at 26, 2011 WL 3608728, at *14.

142. *Id.* at 32, 2011 WL 3608728, at *16.

143. *See, e.g.*, State v. Knapper, 579 So. 2d 956, 957, 961 (La. 1991); State v. Rosiere, 488 So. 2d 965, 969-71 (La. 1986); State v. Perkins, 423 So. 2d 1103, 1107-08 (La. 1982); State v. Curtis, 384 So. 2d 396, 398 (La. 1980); State v. Lindsey, 2002-2363 (La. App. 4 Cir. 4/2/03); 844 So. 2d 961, 969-70.

appellate courts vacated convictions for *Brady* violations.[144] Although Smith admitted that "the long history of misconduct by the Orleans Parish district attorney's office [did] not compel reversal" of Smith's conviction, the extensive history of *Brady* violations "underscore[d] the need for rigorous enforcement of *Brady's* requirements[.]"[145]

Amici briefs presented on Smith's behalf also pointed to the history of *Brady* violations by the Orleans Parish District Attorney's Office.[146] The amici briefs demonstrated a realization within the legal community of the significance of repeated *Brady* violations committed by the Orleans Parish District Attorney's Office.[147] The general public also recognized the pattern of prosecutorial misconduct. Noting the Supreme Court's decision in *Smith*, one commentator stated the opinion "was the latest in a series of Supreme Court decisions suggesting a pattern of prosecutorial misconduct in the Orleans Parish District Attorney's Office."[148] Another commentator characterized the Supreme Court's decision in *Smith* as a "sharp rebuke to New Orleans prosecutors."[149] The American Bar Association acknowledged that many speculated that the Supreme Court decided to grant certiorari in *Smith* in order to "focus on New Orleans prosecutors."[150] However, some were disappointed that the Supreme Court did not "issue a broader statement about the Orleans district attorney's office" in the opinion.[151]

Although the Supreme Court in *Smith* did not explicitly target the Orleans Parish District Attorney's Office in its opinion, the Court was relentless in its questioning of the State during oral argument.[152] In one

144. Brief for Petitioner, *supra* note 15, at 32, 2011 WL 3608728, at *16-17.

145. *Id.* at 33, 2011 WL 3608728, at *17.

146. *See generally* Brief of the Innocence Network as Amicus Curiae in Support of Petitioner, *Smith*, 132 S. Ct. 627 (No. 10-8145), 2011 WL 3678809; Brief for the Orleans Public Defender's Office as Amicus Curiae Supporting Petitioner, *Smith*, 132 S. Ct. 627 (No. 10-8145), 2011 WL 3706111[hereinafter Brief for the Orleans Public Defender's Office].

147. *See, e.g.*, Brief for the Orleans Public Defender's Office, *supra* note 146, at 2-4, 2011 WL 3706111, at *4.

148. Adam Liptak, *High Court Reverses Conviction in Killings*, N.Y. TIMES, Jan. 10, 2012, http://www.nytimes.com/2012/01/11/us/supreme-court-cites-withheld-evidence-in-reversing-conviction.html?_r=0.

149. David G. Savage, *Supreme Court Orders New Trial for Convicted New Orleans Killer*, L.A. TIMES, Jan. 10, 2012, http://latimesblogs.latimes.com/nationnow/2012/01/supreme-court-orders-new-trial-convicted-new-orleans-killer.html.

150. Debra Cassens Weiss, *Supreme Court Tosses Murder Conviction for Brady Violation by New Orleans DA*, A.B.A. J. (Jan. 10, 2012), www.abajournal.com/news/article/supreme_court_tosses_murder_conviction_for_brady_violations_by_new_orleans_/.

151. John Simerman, *U.S. Supreme Court Sets Aside Conviction in 1995 Massacre*, TIMES-PICAYUNE, Jan. 10, 2012, www.nola.com/crime/index.ssf/2012/01/us_supreme_court_sets_aside_co.html.

152. *See, e.g.*, Transcript of Oral Argument at 50-52, *Smith*, 132 S. Ct. 627 (No. 10-8145).

instance, Justice Kagan pointedly asked the assistant district attorney if her office had "ever consider[ed] just confessing error" in the case.[153] Justice Scalia emphatically declared that the undisclosed evidence "should have been turned over"[154] while Justice Sotomayor noted the "serious accusations" leveled against the practices of the Orleans Parish District Attorney's Office.[155]

The broad recognition of the disturbing trend of *Brady* violations by the Orleans Parish District Attorney's Office suggests the Court had a twofold purpose in granting certiorari to not only decide whether a wrongful conviction occurred under *Brady*, but also to emphasize that flagrant obstructions of a defendant's due process rights will not be tolerated.[156] At the very least, the public exposure of the Orleans Parish District Attorney's Office highlights the continuing problem that prosecutors face in determining what constitutes material evidence under *Brady*. Unfortunately, the Court's opinion did not clarify the murky waters of the materiality standard, leaving prosecutors no guidance except to "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."[157]

3. Discipline for Prosecutorial Misconduct

The precedential history leading up to the Supreme Court's decision in *Smith v. Cain* is directly relevant to the issue of disciplinary measures for prosecutorial misconduct. One year prior to the Supreme Court's decision in *Smith*, the Court considered in *Connick* whether the Orleans Parish District Attorney's Office was liable for failure to train its prosecutors concerning the requirements of *Brady*.[158] The Orleans Parish District Attorney's Office had prosecuted Thompson for attempted armed robbery.[159] He was convicted and subsequently chose not to testify in his own defense in his later murder trial.[160] Thompson was again convicted and sentenced to death.[161] Thompson spent eighteen years in prison, fourteen of which were served on death row.[162] One month before his scheduled execution, a private investigator discovered an undisclosed blood sample

153. *See id.* at 50.
154. *See id.* at 51-52.
155. *See id.* at 52.
156. *See* Robertson & Liptak, *supra* note 140.
157. *See Kyles*, 514 U.S. at 437.
158. *Connick*, 131 S. Ct. at 1355-56.
159. *Id.*
160. *Id.* at 1355.
161. *Id.*
162. *Id.*

that exonerated Thompson from involvement in the attempted robbery.[163] Both of Thompson's convictions were then vacated.[164]

Thompson brought charges against the Orleans Parish District Attorney's Office under 42 U.S.C. § 1983, alleging that District Attorney Harry Connick "failed to train his prosecutors adequately" regarding the requirements under *Brady*.[165] The jury awarded Thompson $14,000,000 in damages, and the Fifth Circuit Court of Appeals affirmed.[166] When the case reached the Supreme Court, the judgment of the lower court was reversed in a five-to-four decision.[167] The Court held the district attorney's office was not liable for failure to train based on a single *Brady* violation.[168] Writing for the majority, Justice Thomas reasoned that Connick did not demonstrate deliberate indifference to the need to train his prosecutors.[169] Justice Thomas stated that four prior reversals of criminal convictions by Louisiana courts for *Brady* violations did not put the Orleans Parish District Attorney's Office on notice that specific training about *Brady* was necessary because none of the cases involved failure to disclose physical evidence.[170]

The *Connick* Court stated that attorneys undergo extensive training in law school to equip them to practice the law and effectively exercise legal judgment while operating within constitutional limits.[171] The Court stated that if an attorney violates ethical obligations, that attorney faces "professional discipline," including sanctions and suspension.[172]

The dissent rigorously contested the majority's conclusion, arguing that the Orleans Parish District Attorney's Office demonstrated "long-concealed prosecutorial transgressions [that] were neither isolated nor atypical."[173] According to the dissent, "the evidence demonstrated that misperception and disregard of *Brady*'s . . . requirements [was] 'pervasive' in [the] Orleans Parish" District Attorney's Office and "established persistent, deliberately indifferent conduct."[174]

The Supreme Court's decision in *Connick* caused shockwaves as critics saw it as a restriction on available remedies for holding prosecutors civilly

163. *Connick*, 131 S. Ct. at 1356.
164. *Id.* at 1355.
165. *Id.*
166. *Id.* at 1355-56.
167. *Id.*
168. *Connick*, 131 S. Ct. at 1356.
169. *Id.* at 1360 (quoting Bd. of Comm'r's Cty. v. Brown, 520 U.S. 397, 409 (1997)).
170. *Id.*
171. *Id.* at 1361.
172. *Id.* at 1362-63.
173. *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).
174. *Id.*

liable for official misconduct.[175] The Court was condemned for hampering prosecutorial training and discipline reforms, thereby weakening prosecutorial accountability.[176] Others noted that while ethical sanctions and criminal prosecution provided theoretical accountability measures for prosecutorial misconduct, such measures were ineffective because they only shielded prosecutors from civil liability.[177] After the Court's reversal in *Connick*, Thompson himself expressed frustration that the Court's ruling hindered civil and criminal charges from being brought against the prosecutors involved in his case.[178]

Prosecutorial misconduct is seen as a serious problem and no effective methods are currently in place to provide punishment for such behavior.[179] Criminal sanctions are rare and bar disciplinary procedures have proven unfruitful.[180] While state disciplinary authorities are seen as potential tools to harness prosecutorial misconduct, some scholars argue that states must "adopt ethics rules with bite" in order for such measures to be successful.[181]

Thus, the Court's decision in *Smith* one year later begs the question of whether the Court responded to the public outcry raised by *Connick*.[182] Arguably, the Court's holding in *Smith* is narrow and does little to affect the current status of *Brady*.[183] However, the Court's rapid consideration of yet another case involving *Brady* and its succinct holding suggest an eagerness by the Court to demonstrate that it is not oblivious to public disapproval of continuous instances of prosecutorial misconduct.

V. CONCLUSION

The Supreme Court's decision in *Smith* leaves the law surrounding *Brady* virtually unchanged. The materiality standard under *Brady* remains difficult to ascertain since the Court did not clarify the confusion that leads to repeated *Brady* violations. Further, the tension between the appropriate evaluation of individual evidence and the collective record is not resolved. However, the Court's decision indicates judicial awareness of the problem that repeated commissions of *Brady* violations by prosecutors pose to the integrity of the adversarial process. Meanwhile, disciplinary measures for

175. Keenan et al., *supra* note 10, at 204.
176. *See* Harvard Law Review Ass'n, *supra* note 96, at 331.
177. Rittgers, *supra* note 96, at 203.
178. John Thompson, *The Prosecution Rests, But I Can't*, N.Y. TIMES, Apr. 10, 2011, http://query.nytimes.com/gst/fullpage.html?res=9C03EEDD1039F933A25757C0A9679D8B63.
179. Keenan et al., *supra* note 10, at 204, 211.
180. *Id.* at 217-19.
181. *Id.* at 227.
182. *See generally Smith*, 132 S. Ct. 627.
183. *Smith*, 132 S. Ct. at 630-31. *See generally* Keenan et al., *supra* note 10.

prosecutorial misconduct remain limited in the wake of the Court's decision in *Connick*, and were not addressed by the Court in *Smith*. Whether the Court's decision will lead to a greater level of scrutiny of cases involving prosecutorial misconduct remains to be seen.

SARAH L. SHILVOCK