

## Does Brady Apply After a Conviction?

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Everyone knows that under *Brady v. Maryland*, 373 U.S. 83 (1963), a prosecutor must disclose material exculpatory or mitigating evidence to the defense. But does *Brady* apply only prior to trial, or does the obligation continue after a defendant has been convicted? That's one of the questions raised by [this Washington Post](#) article, which reports that federal Department of Justice officials became concerned about certain practices in the FBI's forensic laboratory and conducted an investigation, but that while many prosecutors "made swift and full disclosures" of problems documented by the investigators, "many others did so incompletely, years late or not at all."

The United States Supreme Court recently held *Brady* inapplicable in the post-conviction setting. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (U.S. 2009) (holding that the Ninth Circuit "went too far" in applying *Brady* to post-conviction proceedings, because after a defendant is convicted at a fair trial, he has fewer procedural rights than a defendant who has not been convicted; the Court also stated that *Brady* is "the wrong framework" for post-conviction proceedings, though it acknowledged that defendants retain some due process rights even after conviction). See also *Imbler v. Pachtman*, 424 U.S. 409, 427 n. 25 (1976) (stating that "at trial" a prosecutor's duty to disclose evidence comes from the Due Process Clause, while "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction").

Prior to *Osborne*, some lower courts had held that *Brady* did apply in post-conviction. See, e.g., *Duckett v. State*, 918 So.2d 224 (Fla. 2005) (*Brady* creates a "continuing duty throughout all proceedings," including postconviction proceedings); *Monroe v. Butler*, 690 F.Supp. 521 (E.D.La. 1988) ("[N]othing in *Brady* or its progeny limits its doctrine of fact characterization to the pre-conviction context. *Brady* doctrinally stands for the notion that it is fundamentally unfair for the prosecution to withhold material, exculpatory evidence from the defendant and that the proceeding in which the unfairness occurred should be overturned so that the merit of the *Brady* facts can be considered. Clearly, such nondisclosure is as unfair where it prevents a defendant from taking full advantage of post-conviction relief as it is when it results in the forfeiture of the defendant's right to a fair trial. The prosecutor's duty to disclose material, exculpatory evidence continues through the period allowed by the State for post-conviction relief."). See generally Fred C. Zacharias, *The Role of Prosecutors in Serving Justice after Convictions*, 58 Vand. L. Rev. 171 (2005) (characterizing the issue as unsettled).

Even though *Osborne* has settled the *Brady* issue, a prosecutor may be bound by the requirements of legal ethics to disclose exculpatory evidence obtained after conviction. [Rule 3.8\(g\)](#) of the ABA's Model Rules of Professional Conduct provides that when a prosecutor "knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted," he or she must disclose the information to a court, and normally to the defendant as well. [North Carolina's Rule 3.8](#) doesn't contain a specific provision about post-conviction disclosure of exculpatory evidence, but its general requirement that a prosecutor disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" is not limited to the pretrial stages of a case and might therefore apply. Other ethical rules may also come into play.

Finally, even in cases where there is no legal or ethical requirement of disclosure, a prosecutor may choose to provide

potentially exculpatory evidence to a convicted defendant in the interest of justice. In other words, even when disclosure is not required, it is not forbidden.