



THE SENATE OF MARYLAND  
ANNAPOLIS, MARYLAND 21401

**Testimony for SB 590**  
**Criminal Procedure – Required Disclosures – Brady Material**  
**Before the Judicial Proceedings Committee**  
**On February 17, 2021**

Good afternoon Mr. Chairman, members of the Judicial Proceedings Committee,

Senate Bill 590 will help prosecutors by making it easier to do their job: ensuring that justice be done. While Brady Rule obligations now rest squarely on prosecutors,<sup>1</sup> SB 590 will lighten prosecutors' burdens by spelling out their duties by statute – that they must disclose information tending to show the innocence of the accused. SB 590 will give firm statutory guidance to prosecutors and it will ensure that defendants' are given due process, and that the prosecutor's role is one of administering justice.

In 1963, the Supreme Court held:

The suppression by the prosecution of evidence favorable to an accused person upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . .

. . . .

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.<sup>2</sup>

*Brady v. Maryland* is the basis of the Brady Rule: that when prosecution has information that tends to prove the innocence of the accused, fairness requires that the prosecution turn it over.<sup>3</sup> Not only is it fair to the individual accused, but justice demands it.

---

<sup>1</sup> Jason Kreag, *The Jury's Brady Right*, 98 B.U.L. REV. 345, 353 (2018).

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>3</sup> See *United States v. Agurs*, 427 U.S. 97, 107 (1976) (“[We] conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all.”); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (“[T]he duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress . . .”).

The Brady Rule stands for two fundamental values in our Constitutional order: first, that people accused of crimes will have due process. But just as important, if not more so, the Brady Rule commands prosecutors to remember that their job is not to win convictions any way they can within the rules. Brining justice to the State does not mean setting off a train that only stops at conviction. When a conviction is wrong, the prosecutor has the duty to put on the brakes.

In Maryland, the special responsibilities of a prosecutor are reflected in our attorney rules of professional conduct:

The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. . .<sup>4</sup>

Since its landmark decision 58 years ago, the Supreme Court has narrowed prosecutors' obligations under the Brady doctrine by focusing less on justice and more on process.<sup>5</sup> By 1985, the Court had announced "evidence is material [to guilt or punishment] only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>6</sup>

As it stands today, while prosecutors must turn over to defense material evidence that shows innocence, this rule is weaker than the Brady Rule announced in 1963. This is because the prosecutor gets to decide what evidence might tend to show innocence. So the prosecutor is burdened with competing tasks – he must vigorously prosecute the case "while simultaneously evaluating the information the State possesses dispassionately and from the defendant's perspective."<sup>7</sup> This dual burden not only makes prosecutors' jobs harder but has at times made justice more elusive.

When a prosecutor fails their duty to disclose exculpatory material, this "Brady misconduct" results in conviction of innocent people and ruining lives. But because there are no effective tools available for holding prosecutors accountable, Brady misconduct is pervasive throughout the country.<sup>8</sup> Senate Bill 590 is intended to help address this.

Senate Bill 590 would ensure the prosecution makes good-faith efforts to disclose information favorable to the accused as early as the defendant's initial arraignment or appearance and continuing through the proceeding. This information would include not just admissible

---

<sup>4</sup> MD. RULE 19-303.8. Special Responsibilities of a Prosecutor.

<sup>5</sup> See Colin Starger, *Expanding Stare Decicis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 LOY. L. A. L. REV. 77, 86 (2012).

<sup>6</sup> United States v. Bagley, 473 U.S. 667, 682 (1985).

<sup>7</sup> Kreag, *supra* note 1, at 353.

<sup>8</sup> See Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 297 (2019).

"The responses to Brady violations range from doing nothing other than ordering relief for the defendant to the often prohibitively costly comprehensive, independent investigation of the prosecutors responsible for the misconduct." *Id.* at 308.

information, but all information, including: (1) information that is inconsistent with the defendant's guilt; (2) information that tends to mitigate a charge; (3) information that demonstrates defendant had an affirmative defense; (4) information that casts doubt on the accuracy of any evidence, and (5) information that would call into question the credibility of witnesses against the accused, such as the witness's background and any promises or inducements made by the state's attorney to the witness.

Of most importance to enforce the prosecutor's duty, SB 590 will empower the trial court to order production of exculpatory information, grant a continuance, impose sanctions, or issue any other order that is just under the circumstances.

Our criminal justice system must be centered on justice, not simply convictions. Senate Bill 590 will move our system toward justice and for that reason I urge you to vote favorably for SB 590.