Notes

Fulfilling the Promise of *Brady*: The Need for Open Files and Complete Disclosure Between the Prosecution and the Police

Kevin Lipscomb*

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I. INTRODUCTION

Jurisprudence on *Brady v. Maryland* and its applicability to police action leaves criminal defendants with little chance of success in civil court and without meaningful remedies in criminal court. This jurisprudence does not encourage police agencies to be thorough with their *Brady* compliance. Therefore, new approaches must be taken to ensure *Brady* compliance by law enforcement. This paper will argue that the best approach to ensuring *Brady* compliance is an open file policy between the police and the prosecution, including police personnel records. Further, this paper recognizes that a change in police culture may be necessary to ensure full compliance, and that police chiefs may be best situated to create this change.

Imagine a criminal defendant who maintains his innocence to his attorney, to the police, to the prosecutor, and to the court. His attorney investigates the matter and is unable to expose any exculpatory evidence. He requests that the prosecutor turn over any such evidence in the state's file, and the prosecutor does so. This evidence includes police reports, witness statements, photographs, and DNA tests. The one thing that is not turned over, that the attorney believes exists, is the police officer's dash cam video. The defense attorney makes another request, specifically asking for the dash cam, and the prosecutor realizes it is not in the file. The prosecutor asks the police to turn it over and then realizes that it does not exist. The officer failed to turn the dash cam video over in time, and it has been erased.

The video is the only real evidence of what happened during the stop. It contains what the officer and the defendant said to each other, how they behaved, and when the stop happened. It could give rise to Fourth or Fifth Amendment suppression issues. It could support a much more viable defense than the attorney currently believes can be proven. Without the video, all of this is unavailable to the defendant, and the potential harm is immense.

Seemingly, the prosecutor complied with the duties on the state for the purposes of *Brady v. Maryland*, and yet, a piece of exculpatory evidence has gone missing. This paper will first establish that the police's failure to turn over the video was still a violation under *Brady v. Maryland*. It will then assert that *Brady* violations occur as a result of both intentional and negligent acts by the police. Next, it will analyze what remedies are available to criminal defendants who find themselves in this

situation and establish that these remedies are inadequate for ensuring police compliance. Finally, it will call for an open file policy between police and prosecutors, and analyze and recommend approaches for this policy's implementation.

II. *BRADY* IMPOSES A DUTY TO DISCLOSE EXCULPATORY AND IMPEACHMENT MATERIAL ON THE ENTIRE PROSECUTION TEAM

In 1963, the Supreme Court decided *Brady v. Maryland*, holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution."[1] This holding established several crucial things. First, the defense must request that favorable evidence be turned over.[2] Second, the favorable evidence must be material.[3] Third, if there is material evidence favorable to the accused—for either guilt or punishment—in the prosecution's possession, the prosecution must turn it over.[4] Finally, *any* failure to do so is a violation of due process, regardless of whether or not the prosecution was acting in good faith.[5] This holding establishes the prosecution's duty to do justice in discovery procedures.[6] If they possess any material exculpatory evidence, it is their duty to turn it over.[7] To hide, destroy, or ignore such evidence would hinder a defendant's ability to put on his best defense, violating due process and the prosecution's duty to pursue justice instead of convictions.[8]

Since *Brady*, the Court's holding has been expanded and explained over the course of several cases. In *Giglio v. United States*, the Supreme Court clarified that a state witness's credibility is a material issue, and any promises made to witnesses in exchange for testimony is favorable to the defense, and therefore, must be turned over to the defense.[9] Further, any such promises made by a prosecutor are imputed to the entire

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1 Brady v. Maryland, 373 U.S. 83, 87 (1963).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *See Brady*, 373 U.S. at 88 (explaining that by withholding exculpatory evidence from a defendant, a prosecutor fails to comport with standards of justice).

7 *Id.* at 87.

8 *See id.* at 87–88 ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.").

9 Giglio v. United States, 405 U.S. 150, 154–55 (1972).

government; the entire entity should have knowledge of the promise and any failure to disclose the promise is a violation of due process.[10]

Although the requirements of *Brady* have been broadly applied to the prosecution, the Court has been less willing to apply such broad requirements to the police. *Brady* requires that prosecutors turn over all material exculpatory evidence in the state's file, but that file is built through the investigatory efforts of the police. In *Arizona v. Youngblood*, the Supreme Court again held that the good faith of the state is irrelevant when the state fails to disclose to the defendant material exculpatory evidence.[11] However, the Court limited what ought to be considered exculpatory evidence, and it also limited the type of evidence that police must preserve.[12] The Court held that due process does not require the preservation of evidence that *may* result in exoneration if future tests are conducted.[13] The Court was unwilling to impose a duty on police to preserve *all* evidence that might be conceivably significant to a prosecution.[14] In doing so, they required that defendants must show the police acted in bad faith in order to show a violation of due process.[15] In so holding, the Court harmed both the prosecution and the defense. The same type of evidence that may be exculpatory in one case could be inculpatory in another. For example, the results of a DNA test may inculpate one defendant and exculpate another.

Finally, in *Kyles v. Whitley*, the Supreme Court addressed the responsibility of the prosecution when material exculpatory evidence is in the hands of the police.[16] Holding that the police are part of the same government body as the prosecution, the Court found that if someone in law enforcement has the evidence, it is a *Brady* violation if the evidence never reaches the defendant.[17] If the evidence is known to the police, the prosecutor has a duty to disclose it.[18] However, rather than establishing an affirmative duty of the police to turn over *Brady* material, the Court suggested that prosecutors should establish procedures through which the police can inform the prosecution of anything that tends to prove the innocence of the defendant.[19] Although the Court suggested the implementation of new procedures, it did not obligate prosecutors to personally

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[10] *Id.* at 154.
[11] Arizona v. Youngblood, 488 U.S. 51, 55 (1988).
[12] *Id.* at 58.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Kyles v. Whitley, 514 U.S. 419, 437–38 (1995).
[17] *Id.*
[18] *Id.*
[19] *Id.* at 438 (quoting *Giglio*, 405 U.S. at 154).

review police files in search of exculpatory information.[20]

III. WHY MIGHT POLICE OFFICERS VIOLATE THEIR DUTY UNDER *BRADY*?

When police officers fail to turn over exculpatory evidence, these failures can be boiled down into two categories: negligent failures and intentional failures. Intentional failures can be explained by what this paper will refer to as "conviction-minded officers." These officers feel that the right suspect has been arrested, and with that in mind, they want to give the prosecution the strongest version of the case, protect victims, avoid a harmful cross-examination, and be sure that criminals do not avoid punishment.[21] Each and every one of these goals puts pressure on officers to violate *Brady* because doing so keeps useful exculpatory evidence out of the defendant's hands.

Negligent violations of *Brady* occur when officers fail to recognize a piece of evidence as *Brady* material. This sort of failure can be explained by a failure to train on the requirements of *Brady*, but it can also be explained by the phenomenon of tunnel vision.[22] Tunnel vision is a natural human tendency that can lead investigators to "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."[23] In effect, evidence that supports an officer's theory of the case becomes significant, relevant, and probative.[24] Evidence that does not fit the theory is overlooked or dismissed because it is not relevant or reliable.[25] Tunnel vision's impact under *Brady* is severe; even if an officer understands the

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[20] *See generally id.* (explaining that police should implement procedures to disclose all exculpatory evidence, but never suggesting that prosecutors should review police files themselves).

[21] *See* TEX. DIST. & CTY. ATTORNEYS ASS'N., *BRADY* AND LAW ENFORCEMENT: TIPS FOR WORKING WITH LOCAL POLICE 2 (2014), http://www.tdcaa.com/sites/default/files/Brady%20and%20Law%20Enforcement%20REV.pdf [https://perma.cc/TS86-KELK] (listing reasons an officer may not turn over *Brady* evidence); *see also* Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 429-30 (2010) ("More disturbing however, is the undisputed fact that intentional *Brady* violations have resulted in near executions in numerous death penalty cases."); *see also Government Misconduct*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/government-misconduct [https://perma.cc/SDG9-2ZR5] (listing "failing to turn over exculpatory evidence to prosecutors" as a common form of misconduct by law enforcement officials).

[22] *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (providing multiple cases where tunnel vision affected the outcomes of a case).

[23] *Id.* at 292.

[24] *Id.*

[25] *Id.*

duty imposed by *Brady*, exculpatory evidence might not be turned over because it has mistakenly been deemed irrelevant or unreliable.[26]

In order to curb intentional violations of *Brady* and overcome the harmful effects of tunnel vision, pressure needs to be put on police officers and their departments to learn what *Brady* requires, to always comply with *Brady*, and to turn over all evidence gathered in an investigation—even if the officer has mistakenly decided it is irrelevant. Unfortunately, *Brady* doctrine does not apply this pressure.

IV. REMEDIES IN CRIMINAL COURT DO NOT INCENTIVIZE POLICE DISCLOSURE UNDER *BRADY*

Most remedies in criminal court do little to pressure the police towards *Brady* compliance. Although this duty is established in case law, as shown in the foregoing cases, the majority of remedies do not actually incentivize disclosure. For conviction-minded officers, there are few, if any, doctrinal incentives for turning over their *Brady* materials. Further, these remedies are nowhere near meaningful enough to encourage officers to keep an open mind and avoid tunnel vision.

For the purposes of criminal court, a *Brady* violation occurs if exculpatory evidence is known to either the police or the prosecution, and it does not wind up in the hands of the defendant.[27] Whether or not the violation is the result of the good or bad faith of the police is irrelevant.[28] It is still a violation. In order to reduce such violations, the remedy should be tailored to incentivize disclosure from the police.

As it stands, the law provides no such incentive. If it comes to light—during or after a trial—that exculpatory evidence has been withheld, the typical remedy is a new trial in which the exculpatory evidence is made available.[29] If the evidence is discovered pre-trial, then it is turned over to the defendant.[30] If the defense needs more time to build its case, given that there is new evidence to incorporate, it may get a continuance in order to do so.[31] These remedies are nothing more than

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[26] *See generally* Janet C. Hoeffela & Stephen I. Singer, *Activating a* Brady *Pretrial Duty to Disclose: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467, 475–76 (2014) (presenting research on cognitive bias that demonstrates even prosecutors acting in good faith will underestimate the potential exculpatory value of evidence).

[27] *Kyles*, 514 U.S. at 437; *Brady*, 373 U.S. at 87.

[28] *Kyles*, 514 U.S. at 437–38.

[29] Jones, *supra* note 21, at 443.

[30] *Id.*

[31] *Id. See generally* United States v. Kelly, 14 F.3d 1169, 1176 (7th Cir. 1994) (finding that "[i]n

what *Brady* already requires.[32] They allow the defendant access to exculpatory evidence in time for its effective use at trial.[33] In short, these remedies provide delayed compliance with *Brady*, rather than encouraging compliance from the outset.

What makes this problematic is that the defense has to recognize that there has been a *Brady* violation before petitioning the court for a remedy.[34] Since it is unlikely that a defense attorney will ever learn that the *Brady* material exists, most violations will never be remedied.[35] In situations where a *Brady* violation occurs but is never noticed, the evidence will never be used at trial.[36] A conviction-minded officer may want to gamble on these outcomes. Either the violation is never noticed, and the defendant is forced to put on a weaker case, or the violation *is* noticed, and the officer merely has to fulfill the duty that was already imposed.[37] Further, the proceedings are delayed, and if a defendant is waiting in jail or forced to continue complying with burdensome bond conditions, the pressures to accept a plea are increased.[38]

Although dismissal of the case is a potential remedy, its use is rare.[39] This remedy would certainly incentivize disclosure for the conviction-minded officer, but because it is typically only used for egregious violations or when the evidence is completely unavailable, the remedy is not likely to encourage compliance in an officer who wants to suppress evidence or ignore its exculpatory value.[40] Another remedy, the *Brady* instruction, allows for the absence of evidence to be used against the

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situations such as this, in which a *Brady* disclosure is made during trial, the defendant can seek a continuance of the trial to allow the defense to examine or investigate, if the nature or quantity of the disclosed *Brady* material makes an investigation necessary").

[32] Jones, *supra* note 21, at 443 ("[T]he consequences of noncompliance with *Brady* are identical to the consequences of compliance—disclosure of favorable evidence to the defense.").

[33] *Id.*

[34] *See id.* at 433–34 (explaining the unlikelihood of a defense attorney uncovering a *Brady* violation).

[35] *See id.* ("In the overwhelming majority of cases, the defense learns of *Brady* evidence by pure accident."); *see also* Hoeffela & Singer, *supra* note 26, at 477 ("If a prosecutor does not disclose favorable evidence, he or she is aware chances are good it will never be discovered."); *see also* Elizabeth Napier Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1453–54 (2006) ("Defendants only rarely unearth suppressions. And, even when they do, their convictions are rarely overturned because they face a tremendous burden on appeal.").

[36] *See* Jones, *supra* note 21, at 433 (explaining that a defendant cannot compel disclosure of favorable evidence withheld by the prosecution if he does not know the evidence exists).

[37] *Id.* at 443.

[38] *See id.* ("First, defendants that have been detained pretrial are forced to endure a more prolonged loss of liberty if a continuance of the trial date is necessitated by the government's failure to comply with its *Brady* disclosure duty. In jurisdictions with crowded court dockets, the length of the delay could extend for several months.").

[39] *Id.* at 443.

[40] *See id.* at 444–46 (explaining that dismissal as a sanction for *Brady* violations is typically used only when "there is a pattern of egregious *Brady* violations or when *Brady* evidence has been permanently lost or destroyed").

prosecution in its case.[41] The jury is instructed that it may take note of the absence of such evidence, and hold it against the state in its deliberations.[42] However, this again requires the knowledge that a *Brady* violation occurred. If no one ever notices the violation, then the instruction never happens. If the violation *is* noticed, then the defense has to proceed through trial without the exculpatory evidence to which it is entitled.[43] Although the harm may be remedied to an extent, the probative value of the instruction cannot be the same as the evidence itself.[44]

Unfortunately, the jurisprudence on *Brady* and the disclosure of exculpatory evidence is linked only to the evidence's use at trial.[45] This is problematic for two reasons. First, evidence might not be turned over until the night before trial, severely hindering a defense team's ability to prepare.[46] Second, a defendant may enter into a plea agreement without ever knowing about exculpatory evidence.[47] The Supreme Court has refused to extend the *Brady* right to pre-trial negotiations and plea deals.[48] In *United States v. Ruiz*, the defendant, Angela Ruiz, was offered a plea bargain for a downward departure under the sentencing guidelines.[49] Part of her pleading guilty involved a waiver of the *Brady* right to disclosure of impeachment evidence. Because of that waiver, Ruiz refused to agree to the deal, but still pleaded guilty, asking the judge to grant the same reduced sentence.[50] The government opposed her request, and the judge refused to downgrade Ruiz's punishment.[51] Arguing that the Constitution

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[41] *Id.* at 447.

[42] Jones, *supra* note 21, at 447–48.

[43] *Id.* at 447.

[44] *See id.* (explaining that a jury may infer that if the absent evidence had been produced, it would have been damaging to the party that failed to produce the evidence, but an instruction to the jury will likely never have the exact effect as a piece of evidence).

[45] *Id.* at 432. *But see* Crim. Prac. Guides, *Timing of* Brady *Disclosure*, 15(3) CRIM. PRAC. GUIDE NL 6 (2014) (explaining that some lower courts have held that some exculpatory evidence must be turned over for its effective use at plea proceedings or trial.).

[46] Jones, *supra* note 21, at 432. ("[P]rosecutors can (and do) purposely withhold *Brady* evidence until the last possible minute . . . ."). *See* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 560 (2007) ("Assuming that a prosecutor is aware of the significance of the evidence to the defense, and that for different reasons it must be disclosed, a prosecutor strategically may wait as long as she can until the trial actually commences before making the disclosure."); *see also* John G. Douglass, *Fatal Attraction: The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 454 (2001) ("It is quite typical, for example, for prosecutors to delay disclosure of *Brady* material relating to the impeachment of government witnesses—so-called 'Giglio material'—until the eve of trial.").

[47] United States v. Ruiz, 536 U.S. 622, 633 (2002) ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.").

[48] *Id.*

[49] *Id.* at 625.

[50] *Id.* at 626.

[51] *Id.*

requires prosecutors to turn over exculpatory evidence before a plea agreement is entered, Ruiz challenged her sentence.[52]

The Supreme Court held that the sentence and the practice of waiving the *Brady* right were Constitutional.[53] The Court explained that "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees."[54] These guarantees include the privilege against self-incrimination, the right to confront one's accusers, and the right to trial by jury.[55] The balance against these waivers is that a plea and the requisite waivers must be made knowingly and voluntarily.[56] According to the Court, the *Brady* right is inherent to the fairness of a trial, not plea negotiations; therefore, the defendant is not guaranteed disclosure of material impeachment information prior to entering a plea agreement.[57]

This holding is problematic to say the least. Although the court has established a right to impeachment and exculpatory evidence, *Ruiz* stands for the proposition that it is not necessary to disclose the evidence prior to a plea agreement.[58] This holding allows for an unnecessary and unjust imposition of pressure on criminal defendants to accept plea deals that might be unfavorable to them. Much more than guilt and innocence go into the decision to plea.[59] Pleading to a crime is the result of risk analysis between the possible outcomes at trial and the possible outcomes of a plea.[60] For that reason, *Alford* pleas exist to allow defendants to enter into an agreement without admitting guilt.[61] The risk of greater punishment at trial explains why a defendant would take a plea bargain while still maintaining innocence.[62] It also explains why between 90% and 95% of criminal cases result in plea bargaining.[63] In such a system, where the pressure and tendency to accept a plea bargain are so high, a defendant's knowledge about exculpatory evidence can aid in negotiations, if not convince the defendant to go to trial.[64]

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[52] *Id.*

[53] *Id.* at 633.

[54] *Id.* at 628

[55] *Id.* at 628–29.

[56] *Id.* at 629.

[57] *Id.* at 633.

[58] *Id.*

[59] Curtis J. Shipley, *The* Alford *Plea: A Necessary But Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1063 (1987).

[60] *Id.*

[61] *Id.*

[62] LINDSEY DEVERS, U.S. DEPT. OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 3 (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf [https://perma.cc/6NGM-NUU2].

[63] *Id.*

[64] *See generally* Douglass, *supra* note 46, at 461 ("[R]isk assessment is at the heart of most plea

Without knowledge of all exculpatory evidence, it is impossible to fully evaluate the merits of a defense case and actually be able to balance the risks of a trial against the value of an agreement. However, the Court allows plea deals to be entered in this exact situation. For a conviction-minded officer, this means that some exculpatory evidence does not need to be turned over immediately, and it is in fact beneficial to withhold the evidence until it is certain that the case is going to trial. In doing so, the pressure to accept a conviction is heightened for the defendant. For those cases that do make it to trial, the officer can then turn over the evidence without fear of violating the defendant's rights.[65] In doing so, the officer has still turned over the evidence "in time for its effective use at trial."[66]

V. CIVIL LITIGATION DOES NOT INCENTIVIZE POLICE DISCLOSURE UNDER *BRADY*

In civil court, it is possible to hold individual police officers directly responsible for *Brady* violations.[67] Because of the harms that *Brady* violations impose, courts have allowed for damages to be awarded to plaintiffs who successfully prove a police violation of *Brady* under § 1983.[68] However, the Circuits take different approaches to imposing liability based on the good or bad faith of the police officer.[69]

In *Jean v. Collins*, Lesly Jean brought a § 1983 action against police officers who had failed to turn over exculpatory and impeachment evidence to the prosecutor.[70] The state accused Jean of committing rape, and

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bargaining and information is at the heart of that risk assessment. At present, however, our system has few, if any, clear rules regarding disclosure of information to a defendant before he pleads guilty.").

[65] *See* Jones, *supra* note 21, at 432 (explaining that prosecutors can and do purposely withhold evidence until the last possible minute without violating the current state of the law; because the same timing is applied to the police as the prosecution, the same motivations can result in the same behavior).

[66] Crim. Prac. Guides, *supra* note 45 (quoting United States v. Villa, Criminal No. 3:12cr40 (JBA), 2014 WL 280400, *3 (D. Conn. Jan. 24, 2014)).

[67] Robert Hochman, Brady v. Maryland *and the Search for the Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1698–99, 1703–04 (1996); Martin A. Schwartz, *The Supreme Court's Unfortunate Narrowing of the Section 1983 Remedy for* Brady *Violations*, CHAMPION (2013), https://www.nacdl.org/Champion.aspx?id=28482 [https://perma.cc/8C48-MKYH] ("It is well established that a § 1983 Brady due process claim may be asserted against a law enforcement officer based on the officer's failure to disclose favorable material to the prosecutor.").

[68] Andrew Case, *Protecting Rights by Rejecting Lawsuits: Using Immunity to Prevent Civil Litigation from Eroding Police Obligations Under* Brady v. Maryland, 42 COLUM. HUM. RTS. L. REV. 187, 208 (2010).

[69] *Id.* at 209 (discussing the circuit split with regard to whether an officer can be liable for unintentional actions).

[70] Jean v. Collins, 221 F.3d 656, 658 (4th Cir. 2000).

in the investigation the police had recorded several statements, hypnotized and unhypnotized, made by both the complaining witness and an officer who had encountered a suspect.[71] Despite multiple inconsistencies in these statements, in which identifying information of the suspect changed multiple times, the prosecution never provided the statements to Jean.[72] Jean alleged that the police officers violated his due process rights by failing to turn over exculpatory evidence to the prosecutor.[73]

The Fourth Circuit held that Jean had, at most, alleged a negligent miscommunication between the officers and the prosecutor.[74] Looking to *Brady*, the court determined that the disclosure rules established there were applicable to prosecutors, not the police.[75] Explaining that such material evidentiary concepts about "exculpatory" and "impeachment" value are not to be left to police officers, the Fourth Circuit determined it would be inappropriate to charge police with answering such legal questions.[76] Further, the court was not willing to hold police liable for § 1983 violations when the police acted in good faith while causing the unintended loss, withholding, or suppression of evidence.[77] Although unwilling to hold police liable for good-faith failures, the court determined that bad-faith failures must still be eligible for § 1983 damages.[78] To hold otherwise would fail to protect the innocent and the judicial process.[79]

In so holding, the Fourth Circuit established that § 1983 actions cannot lie where an officer has not "intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial."[80] Additionally, the court explained that by failing to claim the officers destroyed or failed to preserve evidence, Jean negated any inferences of bad faith.[81] Although Jean argued that the recordings were "patently exculpatory," the court found that there had been no "evidence showing that the officers actually knew of the significance of these items."[82] This holding leaves the door open for civil liability in only the narrowest of circumstances. It cannot reach the alleged behaviors of the officers in *Jean*, where multiple inconsistent descriptions were not

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[71] Jean v. Collins, 155 F.3d 701, 703 (4th Cir. 1998).

[72] *Id.* at 704.

[73] *Jean*, 221 F.3d at 658.

[74] *Id.*

[75] *Id.* at 660 ("[To] speak of the duty binding police officers as a *Brady* duty is simply incorrect. The Supreme Court has always defined the *Brady* duty as one that rests with the prosecution.").

[76] *Id.* at 660.

[77] *Id.*

[78] *Id.* at 663.

[79] *Jean*, 221 F.3d at 663.

[80] *Id.*

[81] *Id.* at 662.

[82] *Id.*

turned over to the prosecution.[83] Further, the court implied that in order to reach the bad faith threshold, there must be allegations that the evidence was destroyed or not preserved, as well as evidence that the officer *actually* knew of the evidence's *Brady* value.[84]

Although the court's stated purpose in *Jean* is to protect the innocent and the judicial process, its holding could have done more to ensure this goal.[85] Civil liability holds the potential to shape or encourage behavior, and with broader civil applicability of *Brady*, the court could have encouraged compliance in a much more meaningful way. Under *Jean*, civil liability only takes hold in cases where an officer intentionally withholds or suppresses evidence.[86] However, the harm to the defendant occurs regardless of the officer's intent. A broader, more proactive holding could have simply required an open file between the police department and the prosecutor's office. Some of the language in *Jean* already hinted at this result. Specifically, the court recognized that determining whether evidence has exculpatory or impeachment value is a decision better suited to the prosecutor's office.[87] Since prosecutors are equipped to make that decision, and police officers are not, it seems prudent to have only prosecutors make that decision.[88] Rather than evaluate evidence for its exculpatory value, police officers could turn over everything gathered in their investigation, and prosecutors would sift through the evidence to determine its *Brady* value.[89] However, *Jean* did not take the decision out of the police's hands.[90] It only stated that it would not blame police for the good-faith mistakes they might make when determining the answers to questions they are not equipped to answer.[91] This holding cannot meaningfully encourage the disclosure that *Brady* promised.

It must be stated that not every Circuit has decided to follow the reasoning employed in *Jean*. Most notably, the Sixth Circuit refused to apply *Jean* in *Moldowan v. City of Warren*, and held that bad faith is not

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[83] *Id.* at 663.

[84] *Id.* at 662.

[85] *See Jean*, 221 F.3d at 663 (holding that "what occurred [in *Jean*] was at worst a negligent miscommunication," rather than an act of bad faith that would amount to a *Brady* violation).

[86] *Id.*

[87] *See id.* at 660 (stating that "[t]he *Brady* duty is framed by the dictates of the adversary system and the prosecution's legal role therein").

[88] *See id.* (noting that the police officer's "job of gathering evidence is quite different from the prosecution's task of evaluating it"); *see also* Hochman, *supra* note 67, at 1700–01 ("There may be cases in which the exculpatory evidence was in the government's possession, but it was unreasonable for any state actor to realize its significance to a criminal trial.").

[89] *See Jean*, 221 F.3d at 660 (reasoning that "the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often only involved in one portion of the case, may lack necessary context").

[90] *Id.*

[91] *Id.*

required to hold an officer liable for a failure to turn over evidence to the prosecution.[92] Looking to *Kyles*, where the Supreme Court imposed a duty on the prosecution to learn of any favorable evidence known to the police, the Sixth Circuit held that the obligation "applies to relevant evidence in the hands of the police, whether the prosecutors knew about it or not, whether they suppressed it intentionally or not, and whether the accused asked for it or not."[93] By applying this standard, rather than a bad-faith requirement, the Sixth Circuit sought to ensure fair trials for criminal defendants and *Brady* compliance from the police.[94] The police play a crucial role in providing defendants with *Brady* evidence, and although they are not prosecutors, they are a part of the prosecution team, and their compliance with *Brady* is every bit as important.[95]

The Sixth Circuit is not alone in holding that good faith *Brady* violations can still create liability for police officers.[96] However, of the circuits that have addressed the issue, the bad faith requirement has been the majority's holding.[97] For criminal defendants in these circuits, there can be no meaningful redress for an officer's negligent failure to comply with *Brady*, despite having suffered the associated harms: time in prison, loss of work, wrongful convictions, and harmful plea agreements. Therefore, these circuits are failing to take advantage of every means possible to ensure fair trials for criminal defendants, and they are failing to encourage proactive *Brady* compliance from the police. In circuits where there are no controlling cases on the issue, the bad faith requirement's status as the majority opinion holds persuasive weight, and may influence future outcomes of *Brady* litigation. Finally, wherever liability is found, it must be stated that civil remedies may not do enough to encourage the type of *Brady* compliance that the courts aim for.[98] The effectiveness of civil remedies as behavior modifiers begs analysis that is outside of the scope of this paper, but for municipalities that pay damages on behalf of the officers or for police departments with litigation insurance, the costs of the damages may never reach the officer responsible for the failure.[99] If those costs never reach the officers, there must be other ways to ensure compliance.

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[92] Moldowan v. City of Warren, 578 F.3d 351, 383 (6th Cir. 2009).

[93] *Id.* at 378 (quoting Harris v. Lafler, 553 F.3d 1028, 1033 (6th Cir. 2009) (citations omitted)).

[94] *Id.* at 381.

[95] *Id.*

[96] Case, *supra* note 68, at 209.

[97] *See id.* (explaining that the Fourth, Eleventh, and First Circuits require bad faith to hold officers liable, while the Ninth and Sixth Circuits do not).

[98] *Id.* at 208.

[99] *See* Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1507 (1993) (stating that individual officers are likely to be indemnified by their employers for any § 1983 judgment).

VI. AN OPEN FILE SHOULD BE REQUIRED BETWEEN THE POLICE AND THE PROSECUTION

This paper has identified the possible explanations for *Brady* violations. There are conviction-minded officers, who may hide or suppress evidence from the prosecution, in turn withholding it from the defense.[100] There are also negligent failures, which can be explained by failures to train, as well as tunnel vision in investigations.[101] Because *Brady* doctrine fails to impose adequate pressure on police officers to comply with *Brady*, there are three things that must happen to impose the adequate pressure and avoid intentional failures and negligent mistakes.

First, an open file between the police and prosecution must be implemented. The open file can be imposed and enforced by prosecutors, legislatures, or courts. Second, police personnel files need to be treated like all other *Brady* material, if not made subject to open records requests. Finally, police chiefs must make training on tunnel vision a priority, in addition to training on the importance of *Brady*.

A. Open File is the Best Practice

As shown in the foregoing, the promise of *Brady* often falls short when the failure is the fault of the police and not the prosecution. There are few remedies built into the case law to encourage or require compliance from officers, but nothing to encourage *timely* compliance. Therefore, in order to put the appropriate pressure on the police, other approaches must be taken to ensure that the promise of *Brady* is fulfilled. These approaches can be implemented by a prosecutor or prosecutor's office, state, local, or federal legislators, or proactive police departments.

As established in *Kyles*, the burden of disclosure is upon the prosecutor's office, and as such, the prosecutor's office should establish regular procedures with police departments to ensure compliance with *Brady*.[102] One procedure that would ensure regular compliance is the full flow of information between the two offices.[103] Although the full flow of

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[100] *See supra* Section IV.

[101] *See supra* Section V.

[102] *Kyles*, 514 U.S. at 437–38.

[103] *See* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1972 (2010) ("At the outset, the Working Group agreed on the principle that there should be a full flow of information from police

information may cause concerns for some officers and prosecutors who want to limit the materials that reach the defendant, a symposium at Cardozo School of Law, *New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, found that when all information flows freely, some material will be subject to *Brady* disclosure, but much of the information will be beneficial to the prosecution.[104] Without the open file, this helpful information would not have wound up in the hands of the prosecution.[105] When the determination of whether information is material or exculpatory is left to the police, the choice to only turn over some information is inherently risking failure to comply with *Brady*, while also risking that the prosecution will never see information that could be beneficial to their case.[106] In addition, it holds the potential to avoid all of the harms that defendants suffer from *Brady* violations resulting from negligent and intentional behavior by the police. In this way, the free flow of information benefits every actor in the criminal justice system.[107]

By suggesting an open file between the police and prosecutors, this paper does not seek to change the way that officers investigate their cases. Police should not have to pursue every possible theory of the case or travel down every rabbit hole that their investigation uncovers. Instead, open file would only ask officers to catalogue or memorialize what they uncover, and it would remove the *Brady* decision—determining a piece of evidence's exculpatory value—from the police's hands. In doing so, the existence of these rabbit holes, whether they be manifested in a photograph, a witness statement, or any other medium, could still be made known to a defendant. However, if they are never catalogued or disclosed, a defendant may never become aware of them. An open file could solve this problem.

Several jurisdictions have already implemented this approach. As seen in *Brady* materials hosted by the Texas District and County Attorney's Association, some prosecutors in Texas encourage police to turn over everything that results from their investigation.[108] Their materials make clear that prosecutors are better equipped to make the *Brady* deter-

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to prosecutors, so that prosecutors can ensure that they comply with their *Brady* obligations.").

[104] *Id.* at 1973.

[105] *Id.*

[106] *See id.* at 1972–73 ("[T]he withheld information is most often not *Brady* material, but inculpatory information that the State would like to use in its case.")

[107] *See id.*

[108] TEX. DIST. & CNTY. ATTORNEYS ASS'N., *supra* note 21 (compiling *Brady* education materials, gathered from prosecutor offices in the state, for education purposes; these PowerPoints are intended for officer training, and encourage turning over everything in the police department's file).

mination, and therefore, the police should turn over every piece of evidence so that the prosecutor is able to make it.[109] Further, if *Brady* evidence is not turned over, the violation could result in a reversal, a damaged reputation, or a wrongful prosecution.[110] All of these are considerations should speak to a police officer interested not just in convictions, but also convictions of the right person.[111] By turning everything over to the prosecution, the prosecution will take the *Brady* decision-making out of the police's hands, avoiding problems with tunnel vision for both the prosecutors and the police, reducing *Brady* violations, and maintaining the legitimacy of the justice system.[112] The sentiment mirrors the reasoning employed in *Jean*.[113] However, rather than forgiving *Brady* mistakes made by the police, this solution seeks to avoid the mistakes altogether.

In other jurisdictions, concrete procedures have been implemented by prosecutors to ensure that everything gets turned over from the police to prosecutors. In Prince George's County, Maryland, a charging memo acts as an information checklist: a form that allows police and prosecutors to track what exists and what has been disclosed.[114] In Oregon, prosecutors use a paperless file system that allows documents to be identified by type of record and by whether the document has been given to the defense.[115] A similar system can be used by police. All materials gathered in an investigation can be stored in an electronic file—one for each case. All that the police would have to do is make that electronic file available to the prosecution through email, storage devices, or cloud storage. The prosecutors can aid in making these files complete by creating case information checklists similar to the charging memos in Prince George's County.[116] These checklists can provide general requirements that apply to every case (witness statements, photographs, physical evidence, etc.) and provide case-specific requirements (blood alcohol results in DWI cases, DNA samples for sexual assaults, and agreements made in cases using confidential informants).[117] If a prosecutor determines that something has not been provided, the checklist allows him to memorialize

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[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See Jean*, 221 F.3d at 660 (explaining that it would be inappropriate to charge police with answering legal questions such as whether an item of evidence has "exculpatory" or "impeachment" value).

[114] Symposium, *supra* note 108, at 1976.

[115] *Id.*

[116] *See id.*

[117] *See id.*

what is missing and request the missing information from the police.[118] This approach reduces the risk that material will not be turned over, it provides rules and guidelines to the police, and it eliminates the problem of tunnel vision for police officers conducting an investigation—if the checklists require that certain evidence be turned over, the officer's opinion about its relevance no longer enters into whether it gets turned over.[119] By utilizing both approaches, the police can be sure that their file is complete and that the file is easy to store and share with the prosecution.

If the prosecutor's office implements these procedures, the prosecutor's office also has the ability to enforce them. Because prosecutors have the discretion to decide which cases are pursued, they can decide to stop accepting cases from officers who refuse to maintain an open file. This trend has already surfaced under the term "*Brady* Cops."[120] Where an officer's conduct gives a prosecutor reason to worry about that officer's credibility on the stand, that officer may not be trusted to testify in any future cases.[121] By failing to maintain an open file, a police officer could give a prosecutor grounds for these worries.

Another crucial way to ensure compliance is to involve the court and defense counsel in discovery conversations. In Massachusetts, the rules of criminal procedure require that discovery discussions happen at pre-trial conferences with the court, the prosecution, and defense counsel in attendance.[122] By involving the courts in the discovery discussion, determinations about what must be turned over are given more weight because they are being made by the court, and the legitimacy of discovery requests are increased when the court agrees with them.[123] By having these conferences with the court, the prosecutors and police are also reminded "to double-check their due diligence to obtain and disclose *Brady* materials."[124] Although these conferences already serve as a reminder, the rules can go further by requiring attendance from police officers

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[118] *Id.* at 1974 ("If, upon completion of the checklist, prosecutors determine that they have not received everything that should be provided, prosecutors should then submit a formal request to police . . . memorializing the additional information the prosecutor needs from the police.").

[119] *Id.*

[120] *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 746 (2015) (referring to officers that cannot testify as "*Brady* Cops").

[121] *See id.* ("Officers whose credibility is called into question by police misconduct may not be able to testify in future cases.").

[122] MASS. R. CRIM. P. 11(a)(1) (2017).

[123] *See* Symposium, *supra* note 103, at 1979–80.

[124] *Id.* at 1979.

themselves.[125] With police in attendance, the officers would be accountable to courts and prosecutors alike, greatly increasing the likelihood of full cooperation and compliance.[126]

A regime like this—where defense counsel is inserted into the discovery conversation—is likely to benefit from the knowledge that only defense counsel and the defendant have. Because defense counsel will have spoken with the client about the facts of the case and what sort of *Brady* material should exist, giving defense counsel access to the police in a courtroom setting will allow for inquiries about *Brady* material that the prosecution may never think to make. Because a judge would be present for these inquiries, officers would be likely to turn over everything they think is *Brady* beforehand in order to avoid having their mistakes made known to the court.[127] For the officers that want to avoid this situation, an open file would remove the risk entirely.

Finally, legislatures have the ability to compel open file regimes. By enacting a statute that requires an open file between the police and the prosecution, legislators can remove *Brady* decision-making from the hands of the police and reduce the number of violations. State and local legislators have already taken steps to encourage meaningful *Brady* compliance. In North Carolina, for example, "discovery laws require the production of all field notes, documents, pictures, and reports in any media to the prosecution."[128] In Texas, the Michael Morton Act was passed to codify the defendant's right to relevant information.[129] The Act "provides the defense with the right to receive 'relevant [material and information] that may be helpful' in the preparation of its case."[130] These examples show that *Brady* compliance can be expanded and made more meaningful by legislatures that wish to do so. In creating an open file policy, legislatures can also create meaningful penalties for failures to comply. These could include fines, and in serious cases, suspension or firing.[131]

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[125] *See id.* at 1979–80 ("The Working Group also thought that it is important to provide feedback to police about their performance that extends beyond case clearance records based on arrest and charging. One way to do that might be to require that police, as well as prosecutors, participate in pretrial discovery consequences.").

[126] *Id.*

[127] *See* Symposium, *supra* note 103, at 1979–80 (explaining that officers are more likely to comply with *Brady* when made accountable to the court).

[128] Julie Risher, *Chief's Counsel:* Brady *is Middle-Aged—but is Compliance in its Infancy for Some Agencies?*, THE POLICE CHIEF (2008), http://iacpmag.wp.matrixdev.net/chiefs-counsel-brady-is-middle-agedbut-is-compliance-in-its-infancy-for-some-agencies/ [https://perma.cc/6A7L-BCJK].

[129] TEX. APPLESEED & TEX. DEFENDER SERV., TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR 9 (2015).

[130] *Id.*

[131] *See* Cadene A. Russell, *When Justice is Done: Expanding a Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of* Brady v. Maryland, 58 HOW. L.J. 237, 268

B. Personnel Files Should Not be Treated Differently Than Other *Brady* Evidence

One area in which both best and worst practices are readily on display is the treatment of police personnel files under *Brady*. The value of police personnel files as impeachment or character evidence is clear. If an officer has received numerous sanctions for illegal searches and seizures, wrongful arrests, harassment or abuse of suspects, or any number of other wrongful behaviors, that evidence can be crucial to the defense.[132] In fact, a number of public defender offices keep "bad cop" files for this very purpose.[133] A defense case can be built entirely around the bad acts of a police officer, whether they involve a misidentification based on a faulty photo or in-person lineups, a false arrest based on officer prejudice or bias, or a wrongful arrest due to a less than thorough investigation.[134] An officer's personnel files can provide the defense with valuable information about the officer's past, and these files can provide a jury with reasonable doubt.[135]

Although the exculpatory nature of personnel files are clear, there are at least four approaches to their treatment under *Brady*.[136] The most harmful practice is one in which prosecutors and police are the only actors with access to personnel files; they do not see them as *Brady* evidence, and therefore, the files are never turned over to the defense.[137] The harm to defendants in such a situation should be clear: valuable evidence—around which a defense theory can be built—is turned over by neither the police nor the prosecutors, robbing defendants of their ability

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(2014) (arguing for fines or firing in the case of intentional *Brady* misconduct).

[132] Abel, *supra* note 120, at 743 ("These files contain valuable evidence of police misconduct that can be used to attack an officer's credibility on the witness stand and can make the difference between acquittal and conviction.").

[133] *See, e.g.*, Mark H. Moore et al, *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 67 (2004) (detailing how the Los Angeles County Public Defender began "a database which compiled evidence of misconduct and disciplinary actions against individual police officers").

[134] *See generally* Jones, *supra* note 21, at 460–61 ("[E]vidence of intentional *Brady* misconduct significantly bolsters the credibility of this defense theory because the jury learns that the government intentionally concealed exculpatory evidence and went to great lengths to keep the evidence hidden in violation of its disclosure duty. This kind of purposeful misconduct lends credence to defense claims that the government might have 'cut corners' or engaged in other acts of misconduct in the investigation and preparation of the case.").

[135] Abel, *supra* note 120, at 743.

[136] *Id.* at 762.

[137] *See id.* at 775 ("In some jurisdictions, even though prosecutors have special access to the personnel files, they do not put in place systems to seek out *Brady* material in the files.").

to put on a case.[138]

California considers police personnel files confidential, and the police do not make them available to prosecutors or defendants.[139] Therefore, acquiring them involves more effort than acquiring other *Brady* evidence. Defense attorneys must file a *Pitchess* motion,[140] which may require that a defendant allege fabrications by the police or excessive force,[141] in order to get a court order for the personnel files to be released. If granted, the defense receives information about officers such as prior uses of excessive force, citizen complaints, and background investigations of the officer.[142] The determination about what gets turned over is made by a judge in camera.[143]

Although the *Pitchess* approach is far from the worst practice, it illustrates a willingness to put roadblocks between the defendant and useful evidence.[144] Because the records are confidential, the *Pitchess* approach is the only way to acquire them. The process requires specific allegations, a motion, and a court order, which may be subject to a judge's discretion—meaning that the disclosure of this evidence is not guaranteed.[145] When compared to approaches taken in other jurisdictions, *Pitchess* is far from the best.

Reasonable minds can differ about the better practice between "access and disclosure" and "public access." In jurisdictions where the prosecutors and police are the only actors with access to personnel files and personnel files are considered to be *Brady* evidence, the police regularly give the files to the prosecution, who can turn them over to the defense without a court's permission.[146] The other approach, taken in eight states,

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[138] *See id.* ("[P]rosecutors, police, and the courts effectively ignore *Brady's* application to personnel files, leaving defendants to make do with whatever impeachment material they can scrounge from the files via subpoena.").

[139] *Id.* at 763.

[140] CAL. EVID. CODE §1043 (West 2016).

[141] MARK B. SIMMONS, SIMMONS CALIFORNIA EVIDENCE MANUAL § 5:79 (2017) ("Often, though not always, *Pitchess* motions are made in cases where the defendant is charged with a violent assault on a police officer.")

[142] *Id.* ("Personnel records that show acts of dishonesty, including a history of misstating or fabricating facts in police reports, are discoverable.").

[143] *See* Abel, *supra* note 120, at 763 ("If good cause is shown, the judge will review the files in camera to decide what must be disclosed. The officer and the officer's representative are the only ones allowed to attend this in camera review.").

[144] *See id.* ("The legislative history shows no indication that lawmakers were thinking of prosecutors or *Brady* when they passed the *Pitchess* laws; the legislation was designed to block discovery requests by defendants and civil litigants.").

[145] *See id.* ("By statute, law enforcement personnel records are 'confidential and shall not be disclosed in any criminal or civil proceeding' unless the party seeking the information shows 'good cause for the discovery or disclosure sought.'").

[146] *Id.* at 773.

is one where personnel files are subject to open records requests.[147] Rather than receiving the evidence through a discovery request, defense attorneys should make it a part of their investigation to obtain personnel files through a records request.

In an "access and disclosure" jurisdiction, prosecutors can access police personnel files and have the obligation to disclose *Brady* evidence in those files.[148] In a "public access" jurisdiction, the defense must make a separate request to a separate entity, and it may be the case that less-than-thorough defense attorneys will never make this request.[149] Because disclosure is not part of the police's *Brady* duty, evidence may never reach a defendant whose attorney is less than diligent. However, by making these records public, the *Brady* decision is still taken out of the police's hands; they will simply turn over everything. For the police, the burden is the same as in an open file, disclosure jurisdiction. Only the recipient of the records changes. Either of these regimes, "access and disclosure" or "open records," could satisfy the requirements of an open file jurisdiction. In "access and disclosure," the personnel records would be handed over to the prosecution with the rest of the materials. In "public access," the files are not subject to *Brady* requirements, but will still make it into the hands of the defense so long as the defense attorney acts with due diligence.[150]

C. Police Chiefs Can Encourage Disclosure and Help Avoid Tunnel Vision

Encouraging open file and compliance is not limited to courts or prosecutors' offices. Police departments themselves can be proactive about training their officers in the requirements of *Brady* and encouraging full disclosure.[151] Recognizing that mistakes in the investigation and prosecution of crimes are a system-wide problem in Texas, the Court of Criminal Appeals, the State Bar of Texas, and several Chiefs of Police

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[147] *Id.* at 770 ("Florida is the flagship for this public access group, which includes Texas, Minnesota, Arizona, Tennessee, Kentucky, Louisiana, and South Carolina.").

[148] *Id.* at 773 ("Prosecutors have access to police personnel files while defendants do not, which places a *Brady* obligation on the prosecutors to learn of and disclose material from these files.").

[149] *See* Abel, *supra* note 120, at 770 ("The fact that these records are public eliminates the prosecutor's obligation to discover and disclose them under *Brady*. That is because, under the reasonably diligent defendant doctrine, the prosecutor does not have to learn of or disclose any information that a reasonably diligent defendant could have accessed on his own.").

[150] *Id.*

[151] *See, e.g.*, TEX. DIST. & CNTY. ATTORNEYS ASS'N., *supra* note 21, at 3–12 (presentation demonstrating how law enforcement can be trained to comply with *Brady* and ensure fairness).

worked together to produce a training video to address this issue.[152]

The first segment of the video addresses the dangerous effects of tunnel vision and the importance of keeping an open mind.[153] The speaker, then-Brownwood Chief of Police Mike Corley, spoke about a case in which a man was convicted after a photo-lineup identification.[154] After 23 years in prison, it was revealed through DNA evidence that the convicted man was innocent.[155] Chief Corley emphasized how crucial it is to continue learning about the best investigatory procedures.[156]

The video continues with then-Austin Chief of Police Art Acevedo explaining the law governing disclosure.[157] Chief Acevedo makes clear that *Brady* overrides any work-product privilege applied to investigative reports, which must still be turned over.[158] Further, Chief Acevedo explains that there is no "good faith" exception to the duty to disclose, and that the duty to disclose continues past conviction.[159]

This training video was the first of its kind in the nation, and it has the potential to set the tone for investigations and disclosure in police departments.[160] By stressing the importance of *Brady* compliance, Texas's police chiefs have taken meaningful steps towards ensuring that all material evidence gets turned over to the prosecutors and defendants. Police chiefs have the ability to shape the culture of their offices through hiring, firing, and training, and by making open-mindedness and disclosure a priority.[161]

Texas's chiefs are not alone in making meaningful *Brady* compliance a priority. In *Police Chief Magazine*, it is again stated how detrimental tunnel vision can be to a criminal investigation.[162] If an officer's focus is narrowed on a single suspect, all evidence suddenly becomes

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[152] Barbara Hervey & Sadie Fitzpatrick, *Full Disclosure: Using* Brady v. Maryland *to Train Law Enforcement Officers*, 76 TEX. B.J. 427, 428 (2013).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Hervey & Fitzpatrick, *supra* note 152, at 428.

[158] *Id.*

[159] *Id.* at 428–29.

[160] *Id.*

[161] *See* Findley & Scott, *supra* note 22, at 396–97 ("Cognitive distortions such as confirmation bias, hindsight bias, outcome bias, and a host of other psychological phenomena make some degree of tunnel vision inevitable. . . . Yet, instead of countering those pressures and tendencies, normative features of the criminal justice system, from police training to legal doctrine, institutionalize them . . . . We have suggested a range of tangible measures that can be taken to mitigate the effects of tunnel vision, but perhaps the most important factor toward that end is one that cannot be prescribed merely by rule: creating and sustaining an ethical organization and ethical culture.").

[162] Risher, *supra* note 128.

incriminating or irrelevant.[163] Evidence that would be exculpatory is ignored because the officer has already made a decision about the truth. Although the officer may not willfully choose to ignore the requirements of *Brady*, defendants do not receive the exculpatory evidence that they are entitled to.[164] For that reason, police chiefs everywhere should encourage open minds and a refusal to characterize anything as irrelevant until well into the investigation.[165] Coupled with an open file, this free flow of information policy would substantially limit the likelihood of a *Brady* violation.

Looking to the materials created by Texas's District and County Attorney Association and its police chiefs, it is clear that Texas views *Brady* compliance as an important part of investigation and prosecution. However, like in many jurisdictions, the *Brady* determination in Texas is often still left to police officers. In Austin, the Police Department manual has no policy requiring officers to turn over all investigative materials.[166] Further, police personnel files are confidential in Texas, and the manual makes it clear that the *Brady* determination regarding these files, absent a court order, is made by the police.[167] For a state that prides itself on leading the charge in police reform, it is clear that police compliance under *Brady* is ripe for change.[168]

VII. CONCLUSION

Brady v. Maryland established a crucial right for criminal defendants—access to exculpatory information. Tied directly to the defendant's ability to put on a case, the ability to cross-examine witnesses, and her decision to testify, this right levels the playing field between the prosecution and defense, and gives defendants access to materials that even the most thorough investigator may never find.

However, the lack of pressure on police to turn over *Brady* materials raises serious concerns about the effectiveness of current *Brady* jurisprudence. Although the duty placed on the prosecution team is clear, the remedies for violations do nothing to encourage compliance. Instead, the

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[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *See* Austin Police Department Policy Manual (2015), https://lintvkxan.files.wordpress.com/2015/11/apd-body-camera-policy-2015.pdf [https://perma.cc/5M2M-TZP4] (containing no policies about turning over *Brady* materials, save for police personnel files).

[167] *Id.* at § 910.7 (2015).

[168] *See* Hervey & Fitzpatrick, *supra* note 152.

remedies only order that *Brady* be complied with. Absent an outright dismissal—the rarest remedy for *Brady* violations—there is no legal remedy in criminal court to encourage *Brady* compliance from the police.

In civil court, if a defendant seeks damages for a *Brady* violation under § 1983, a negligent *Brady* violation in certain circuits will never be enough to redress the harm done to a defendant because the violation did not occur in bad faith. In any circuit, even if liability is found, it is likely that individual officers will never have to pay the costs themselves. Since cities indemnify their officers, the costs will not reach those responsible for *Brady* violations, and the deterrent effect of civil litigation is wasted.

With the lack of meaningful remedies, pressure must be exerted on the police to comply with *Brady*, and if this happens, the defense, the prosecution, the police, and the courts will all benefit. The best way to ensure this type of compliance is with open file policies between the police and the prosecution, as well as training to prevent tunnel vision and negligent violations. These approaches can be implemented by prosecutors, courts, legislators, and police chiefs to fulfill the promise of *Brady* and ensure fairer trials for criminal defendants. "The constitutional right of criminal defendants to acquire exculpatory evidence for use at trial should not depend on sheer luck or the industriousness of the defense investigative team."[169]

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[169] Jones, *supra* note 21, at 434.