ARTICLE

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Practical Ethics for the Professional Prosecutor

Abstract. In *Brady v. Maryland*, the United States Supreme Court held that the prosecution's withholding of material exculpatory evidence violated the defendant's due process rights regardless of the absence of bad faith. The implications of this duty can be seen in the case of John Thompson, a man who was convicted of murder in Louisiana in 1985 after the prosecution failed to turn over exculpatory evidence. Thompson was able to get his conviction reversed and subsequently sued the district attorney's office. This Article analyzes *Brady* and the decisions that followed it to outline the obligations of prosecutors who are in possession of *Brady* evidence. This Article then suggests several steps that district attorneys' offices can take to ensure that employees are properly trained and that *Brady* evidence is disclosed when required by law.

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I. INTRODUCTION

Most civil practitioners likely assume that the ethical responsibilities of prosecutors in Texas are governed solely by the Texas Disciplinary Rules of Professional Conduct.[1] After all, the Rules detail the special responsibilities of prosecutors.[2] But those of us who spend our days in the criminal courts know that in addition to the Rules promulgated by the Texas Bar, the ethical obligations of prosecutors come from the United States and Texas Constitutions and the Texas legislature. We also know that a violation of these ethical rules can result in much more than sanctions by the State Bar, as evidenced by the case of John Thompson.

For fourteen years, John Thompson sat in a cell in solitary confinement in Louisiana's Angola Prison awaiting his execution.[3] He was convicted in 1985 of murdering Raymond T. Liuzza, Jr.[4] "[A] few weeks before his murder trial" began, "he was tried and convicted of attempted armed robbery."[5] As a result of this earlier conviction, Thompson did not testify on his own behalf during the murder trial.[6]

In 1999, an investigator working for Thompson discovered a crime lab report that the prosecution had failed to turn over during the attempted armed robbery case.[7] The "lab report indicated that the perpetrator" of the attempted armed robbery had a different blood type than Thompson.[8] With this information, Thompson was able to get the attempted armed robbery conviction vacated.[9]

Later that same year, Thompson sought relief from the trial court in his murder case contending that:

1. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9).

2. *See id.* (delineating the specific responsibilities required of prosecutors admitted to the Texas Bar).

3. Jonathan Tilove, *Supreme Court Hears Ex-Inmate's Appeal: He Was Wrongly Convicted of Murder*, NEW ORLEANS TIMES-PICAYUNE, Oct. 7, 2010, at A1.

4. Thompson v. Connick (*Connick II*), 578 F.3d 293, 296 (5th Cir. 2009) (Jones, C.J., dissenting), *cert. granted*, 130 S. Ct. 1880 (2010).

5. *Id.*

6. *Id.*; *see also* LA. CODE EVID. ANN. art. 609.1(A) (2006) (providing, in criminal cases, that every testifying witness subjects himself to examination relating to prior criminal convictions).

7. *Connick II*, 578 F.3d at 296.

8. *Id.*

9. *Id.*

> (1) he was denied his right to testify at trial because of the existence of the prior attempted armed robbery conviction, which had been the product of misconduct by the State; (2) he was denied his right to present a defense because he could not testify due to the existence of the attempted armed robbery conviction; (3) the State withheld exculpatory evidence; (4) his due process rights had been violated due to the egregious conduct of the State; and (5) at a minimum, his death sentence should be vacated because it was based upon his attempted armed robbery conviction, which had been set aside.[10]

Two years later, in May of 2001, the trial court granted relief on the fifth claim, set aside his death sentence, "and imposed a sentence of life imprisonment."[11]

Thompson appealed the trial court's denial of relief on the remaining claims.[12] The Louisiana Fourth Circuit Court of Appeals, recognizing that "'the most important witness for the defense in many criminal cases is the defendant himself,'" granted relief and vacated Thompson's murder conviction and remanded the case for further proceedings.[13] At the retrial, Thompson was found not guilty.[14]

After his acquittal, Thompson filed suit in federal court under 42 U.S.C. §§ 1983, 1985, and 1986 against Harry Connick, the District Attorney of Orleans Parish at the time of his trial, several assistant district attorneys, and the Orleans Parish District Attorney's Office.[15] Only one claim proceeded to trial—"a claim under § 1983 for wrongful suppression of exculpatory evidence."[16] The jury found this *Brady v. Maryland*[17] violation resulted from a failure to train and awarded Thompson fourteen million dollars in damages.[18]

The defendants sought to have the judgment set aside and the trial court denied their motions.[19] Sitting en banc, the United States Court of

10. State v. Thompson, 2002-0361, p. 2–3 (La. App. 4 Cir. 7/17/02); 825 So. 2d 552, 553.

11. *Id.*

12. *Id.*

13. *Id.* at 556–57 (quoting State v. Dauzart, 99-3471, p. 7 (La. 10/30/00); 769 So. 2d 1206, 1210).

14. *Connick II*, 578 F.3d at 296.

15. Thompson v. Connick (*Connick I*), No. 03-2045, 2007 U.S. Dist. LEXIS 29717, at *2 (E.D. La. Apr. 23, 2007).

16. *Connick II*, 578 F.3d at 296.

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

18. *Connick II*, 578 F.3d at 297.

19. *Connick I*, 2007 U.S. Dist. LEXIS 29717, at *5–6.

Appeals for the Fifth Circuit was equally divided and therefore affirmed the district court's holding.[20] The United States Supreme Court granted certiorari to decide "[w]hether failure-to-train liability may be imposed on a district attorney's office for a prosecutor's deliberate violation of *Brady v. Maryland* despite no history of similar violations in the office."[21] On October 6, 2010, the Supreme Court heard arguments—the Court's decision should be issued before the end of the term.[22]

The issue facing all prosecutors is how to be a zealous advocate on behalf of the State while avoiding the problems facing the Orleans Parish District Attorney's Office. This Article will first examine the legal basis for the prosecutor's ethical obligations. It will examine the development and scope of the constitutional duty to disclose, as well as address the specific obligations imposed on prosecutors by the legislature and the State Bar. It will also address some of the causes of ethical problems while suggesting some pragmatic approaches to preventing them.

II. THE DEVELOPMENT OF THE PROSECUTORIAL DUTY TO DISCLOSE

A. *Constitutional Due Process*

The ethical responsibilities of a prosecutor begin with the Fifth Amendment of the United States Constitution, which mandates that no person "be deprived of life, liberty, or property, without due process of law."[23] The Fourteenth Amendment expands this duty to the states and provides similarly that "no state shall . . . deprive any person of life, liberty, or property, without due process of law."[24] As a practical matter, there is no substantive difference between the due process rights guaranteed by the Fifth and Fourteenth Amendments.[25] The Due Process Clause applies to

20. *Connick II*, 578 F.3d at 293.

21. Brief for Petitioner at i, Connick v. Thompson, 130 S. Ct. 1880 (2010) (No. 09-571).

22. Jonathan Tilove, *Supreme Court Hears Ex-Inmate's Appeal; He Was Wrongly Convicted of Murder*, THE NEW ORLEANS TIMES-PICAYUNE, Oct. 7, 2010, at 1.

23. U.S. CONST. amend. V.

24. U.S. CONST. amend. XIV, § 1.

25. *Cf.* Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 156–57 (1919) ("If the nature and conditions of a restriction upon the use or disposition of property is such that a state could . . . impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation . . . .").

all government action, whether civil or criminal in nature.[26] At its most fundamental level, due process requires notice and an opportunity to be heard.[27]

Over time, the Supreme Court has expanded what due process requires of prosecutors. In criminal prosecutions, the Due Process Clause operates "not to protect an accused" from a proper conviction, but rather to protect an accused from an unfair conviction.[28] It is not surprising that what began in early cases as a prohibition on certain types of prosecutorial conduct has developed into an affirmative duty to disclose certain types of information. This duty "exists to ensure that the accused receives a fair trial, i.e., that an impartial party's assessment of the defendant's guilt is based on all the available evidence."[29] An examination of this development provides a better understanding of *Brady* itself.

Similar to the United States Constitution, the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."[30] A violation under the Texas Constitution is generally reviewed under the same standards applied to violations of due process under the United States Constitution.[31]

B. *Pre-*Brady *Due Process Requirements*

In the 1935 case of *Mooney v. Holohan*,[32] the Supreme Court explained that due process in a criminal prosecution requires more than just notice and a hearing to protect an accused against an unfair conviction.[33] When the prosecution used perjured testimony to secure a conviction as it did in

26. *See* Tennessee v. Lane, 541 U.S. 509, 523 (2004) (recognizing that the Due Process Clause provides certain guarantees to defendants as well as civil litigants).

27. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (stating that "[a]n essential principle of due process" is notice and an opportunity to be heard (citation & internal quotation marks omitted)).

28. Adamson v. California, 332 U.S. 46, 57 (1947).

29. Matthew v. Johnson, 201 F.3d 353, 360 (5th Cir. 2000).

30. TEX. CONST. art. I, § 19.

31. *See* Thomas v. State, 841 S.W.2d 399, 402–04 (Tex. Crim. App. 1992) (en banc) (detailing the standards and tests implemented by the United States Supreme Court and applying the same approach); Jamail v. State, 787 S.W.2d 380, 381–82 (Tex. Crim. App. 1990) (analyzing the defendant's arguments under both the United States and Texas Constitutions).

32. Mooney v. Holohan, 294 U.S. 103 (1935).

33. *Id.* at 112.

Mooney, the trial becomes nothing more than a pretense.[34] The use of perjured testimony is "inconsistent with the rudimentary demands of justice."[35]

The Supreme Court reiterated this holding seven years later in the case of *Pyle v. Kansas*.[36] Pyle contended that the prosecution utilized perjured testimony and added that the government suppressed testimony that was favorable to him in order to secure a conviction.[37] The Court wrote that the failure of the Kansas courts to consider these allegations was error since the allegations sufficiently raised "a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle [Pyle] to release" from prison.[38]

In 1959, the Court went even further in the case of *Napue v. Illinois*.[39] During testimony, a State's witness falsely denied that he was promised consideration by the prosecution for his testimony.[40] Although the false testimony did not directly concern the guilt or innocence of Napue, it did bear on the credibility of the witness.[41] The Court reiterated that the State could not knowingly use false evidence and stressed that it did not matter that the false testimony only went to the credibility of the witness.[42] The Court explained, "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness."[43]

While these cases represent a significant development in the applicability of the Due Process Clause to the conduct of the prosecution, they stopped short of creating a specific duty to disclose. In each of the cases, the due process violation arose from the prosecution's actual use of, or

34. *Id.*
35. *Id.*
36. Pyle v. Kansas, 317 U.S. 213 (1942).
37. *Id.* at 214.
38. *Id.* at 215–16.
39. Napue v. Illinois, 360 U.S. 264 (1959).
40. *Id.* at 267–68.
41. *Id.* at 269.
42. *Id.*
43. *Id.*

acquiescence in the use of, false evidence.[44] It was this conduct that rendered the convictions unfair and resulted in the due process violation. Nonetheless, the reasoning behind these holdings laid the foundation for the Court's later holding in *Brady*.

C. *Creation of the Duty*

1. *Brady v. Maryland*, 373 U.S. 83 (1947)

Brady and a co-defendant were convicted of first-degree murder—murder in the perpetration of a robbery—and sentenced to death.[45] Prior to trial, Brady's counsel asked to review the co-defendant's extra-judicial statements.[46] Although several of the statements were provided to the defense, the prosecution withheld a statement in which the co-defendant admitted to committing the actual murder.[47] At trial, Brady testified and admitted participating in the robbery but claimed that his co-defendant did the actual killing.[48] After the trial was over, the co-defendant's statement came to the attention of the defense.[49]

Brady then moved for a new trial based on the newly discovered evidence, alleging that the prosecution had suppressed the evidence.[50] The trial court dismissed the pleading and Brady appealed.[51] The Maryland Court of Appeals concluded that the suppression of the evidence by the prosecution was a violation of Brady's due process rights and remanded the case for a retrial on punishment.[52] The Supreme Court granted certiorari to consider the issue.[53]

44. *See id*. at 267–68 (stating that the prosecutor stood idle even though he knew a witness lied on the stand); Pyle v. Kansas, 317 U.S. 213, 215–16 (1942) (responding to allegations that the prosecution presented testimony they knew to be perjured); Mooney v. Holohan, 294 U.S. 103, 113 (1935) (explaining that the conviction was achieved through deliberate presentation of testimony which was known to be perjured).

45. Brady v. Maryland, 373 U.S. 83, 84–85 (1963).

46. *Id.* at 84.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 85 (citing Brady v. Maryland, 174 A.2d 167, 169–70 (Md. 1961)).

52. *Id.*

53. *Id.*

The Supreme Court agreed with the lower court's reasoning and held, for the first time, 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 faith or bad faith of the prosecution."[54] The Court noted that this holding was an extension of its earlier rulings dealing with false evidence.[55]

In *Brady*, the Supreme Court added new elements to the due process equation. The good or bad faith of the prosecutor in suppressing evidence is irrelevant.[56] Since the due process goal is a fair trial, and not to punish the prosecutor for withholding evidence, the reason the information was not disclosed is irrelevant.[57]

2. *United States v. Agurs*, 427 U.S. 97 (1976)

In *Brady*, the Supreme Court was asked to review a case in which the defendant had requested the evidence prior to trial.[58] In *United States v. Agurs*,[59] the Court was given the opportunity to address whether the prosecution had to disclose exculpatory evidence even in the absence of a specific defense request.[60] In concluding the disclosure of favorable evidence should not be predicated upon a defendant's request, the Court focused on the nature of the evidence in question.[61] According to the Court, "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."[62] Thus, disclosure is required irrespective of the actions of the defense.[63] With this new piece in place, the duty to disclose under the Due Process Clause was firmly established.

54. *Id*. at 87.
55. Brady v. Maryland, 373 U.S. 83, 86 (1963).
56. *Id.* at 87.
57. *See id.* (stating that the withholding of evidence favorable to the defendant by the prosecution deprives the defendant of due process regardless "of the good faith or bad faith of the prosecution").
58. *Id.* at 84.
59. United States v. Agurs, 427 U.S. 97 (1976).
60. *Id.* at 106–07.
61. *Id.* at 107.
62. *Id.*
63. *Id.*

3. Three-Part *Brady* Test

From *Brady* and its progeny, a three-part test has been developed to determine whether the actions of the prosecution have violated the due process rights of the accused.[64] The due process rights of the accused are violated when the prosecutor (1) fails to disclose evidence, (2) the evidence is favorable to the accused, and (3) the evidence is material.[65] While this basic test is easy to set out, it is not always easily understood. A more comprehensive examination is necessary to understand the limits of the prosecutorial duty to disclose.

III. EXAMINING THE PROSECUTORIAL DUTY TO DISCLOSE

A. *Favorable Evidence*

The Supreme Court has made it clear that the prosecution is required to disclose exculpatory evidence.[66] As used in this context, exculpatory evidence must be disclosed when it would "undermine confidence in the verdict."[67] As one commentator has explained: "Evidence can be exculpatory, for purposes of compelling disclosure under *Brady*, although the evidence is not directly about the defendant; there are many cases where impeachment evidence concerning a witness or codefendants leads to reasonable doubt about the defendant's guilt or innocence."[68] For this reason, the Supreme Court has specifically held that the disclosure of impeachment evidence is required when the witness's testimony is likely

64. *See* Kyles v. Whitley, 514 U.S. 419, 433–34 (1995) (explaining the three requirements under *Brady* that would lead to a finding that a defendant's due process rights were violated); United States v. Bagley, 473 U.S. 667, 682 (1985) (detailing the test used to determine if a defendant's due process rights have been violated when a prosecutor withholds evidence); *see also* Little v. State, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (applying the three-part *Brady* test to determine if the prosecutor's actions violated the defendant's due-process rights).

65. *Bagley*, 473 U.S. at 682; *see also* Juarez v. State, 439 S.W.2d 346, 348 (Tex. Crim. App. 1969) ("*Brady* . . . appl[ies] to situations where evidence favorable to the accused is not turned over to the accused prior to or during trial, thus depriving him of the opportunity to use it in his defense.").

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

67. *See Kyles*, 514 U.S. at 435 (stating that a violation under *Brady* is demonstrated "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict").

68. Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose* Brady *Evidence Favorable to Accused*, 158 A.L.R. FED. 401 (1999).

determinative of guilt.[69]

An obvious case of required disclosure involves the payment for witness testimony. While it is not impermissible to pay a witness for her testimony,[70] the prosecution must disclose this to the defense pursuant to *Brady*.[71] The "defense must be allowed to fully explore the compensation arrangement on cross-examination," and the trial judge "must give specific instructions to the jury about the credibility of paid witnesses."[72] This special instruction should point out to the jury the inherent "suspect credibility of paid witnesses."[73]

There are limits on what types of impeachment evidence must be disclosed. For example, even where there is the possibility that the witness anticipates something favorable from the government in return for his testimony, there is no duty to disclose. According to the Fifth Circuit: "nebulous expectation of help from the state . . . is not *Brady* material."[74]

B. *Materiality*

In the context of the duty to disclose, "material" simply means that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[75] In assessing materiality, there are four criteria that have been emphasized by the

69. *Bagley*, 473 U.S. at 676; Giglio v. United States, 405 U.S. 150, 154 (1972).

70. The prosecution, obviously, has a duty not to deliberately use or encourage perjured testimony. United States v. Villafranca, 260 F.3d 374, 378–79 (5th Cir. 2001).

71. *See id.* at 378–79 (conditioning the admission of testimony of paid witnesses on compliance with *Brady*, which requires disclosure of evidence that would be useful for impeachment); *see also* United States v. Bermea, 30 F.3d 1539, 1552 (5th Cir. 1994) (stating that, in accordance with *Brady*, any fee arrangement the prosecution has with a witness must be fully and timely disclosed to the accused).

72. *Villafranca*, 260 F.3d at 378.

73. *Bermea*, 30 F.3d at 1552 (citing Unites States v. Cervantes-Pacheco, 826 F.2d 310, 315–16 (5th Cir. 1987)).

74. Goodwin v. Johnson, 132 F.3d 162, 187 (5th Cir. 1998); *see also* Knox v. Johnson, 224 F.3d 470, 482 (5th Cir. 2000) (finding that a witness's unilateral hope that the State would help him if he testified did not require disclosure under *Brady*); United States v. Nixon, 881 F.2d 1305, 1311 (5th Cir. 1989) (holding that a witness's impression that the government would help him obtain a pardon in exchange for his testimony, in the absence of a "specific promise to help," was not *Brady* material).

75. Kyles v. Whitley, 514 U.S. 419, 435 (1995); *see also* Little v. State, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (explaining materiality as meaning that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

Supreme Court to help understand the materiality standard.[76] First, there is no need to establish by a preponderance of the evidence that the disclosure of the evidence would have resulted in an acquittal in order for the evidence to be material.[77] Second, materiality is assessed under a sufficiency-of-the-evidence test.[78] Next, materiality is assessed collectively, not item-by-item.[79] Finally, a harmless error test is inappropriate once materiality has been established.[80] Rather, the materiality standard under *Brady* is assessed under the same prejudice standard used in a *Strickland v. Washington*[81] ineffective assistance of counsel claim.[82]

The materiality test is not the same as harm analysis under the Texas Rules of Appellate Procedure. The Texas Rules of Appellate Procedure set out the standard of harm generally applied to constitutional errors.[83] Rule 44.2(a) provides that if the constitutional error is subject to harmless error review, "the court of appeals must reverse the judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment."[84] This standard is completely different from the standard utilized under *United States v. Bagley*[85] and *Brady*.[86] Under Rule 44.2(a), the reviewing court has the responsibility of deciding whether the error had some adverse effect on the proceedings.[87] Under this standard the defendant has no burden to show harm.[88] In contrast, under the harm standard articulated in

76. *See* DiLosa v. Cain, 279 F.3d 259, 263 (5th Cir. 2002) (listing the criteria set forth by the Supreme Court to determine if evidence is material).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Strickland v. Washington, 466 U.S. 668 (1984).

82. *See* Martin v. Cain, 246 F.3d 471, 477 (5th Cir. 2001) (acknowledging the similarities between the *Brady* and *Strickland* standards); *see also* Johnson v. Scott, 68 F.3d 106, 109–10 (5th Cir. 1995) ("The materiality standard under *Brady v. Maryland* is identical to the prejudice standard under *Strickland*.") (footnote omitted).

83. TEX. R. APP. P. 44.2(a).

84. *Id.*

85. United States v. Bagley, 473 U.S. 667 (1985).

86. *See* Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) ("The three-pronged test for reversible error for a *Brady* violation is entirely different from the constitutional harmless error standard set out in [Texas Rule of Appellate Procedure] 44.2(a).").

87. TEX. R. APP. P. 44.2(a).

88. Johnson v. State, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001) (en banc); *see also* Ovalle v. State, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000) ("We do not resolve the issue by asking whether the

Brady, "the defendant bears the burden of" establishing he was harmed.[89]

While the state is always under an obligation to disclose exculpatory material regardless of whether the defense has made a specific request, the fact that the defense did make a specific request does have a bearing on the trial court's assessment of the materiality of the nondisclosure.[90] "[A]n incomplete response [from the prosecution] to a specific request [from the defense] not only deprives the defense of certain evide[nce, but it] also has the effect of representing to the defense that certain evidence does not exist."[91] As a result, "it may be proper to weigh in favor of the accused 'the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value.'"[92]

C. *Scope of the Duty to Disclose*

1. Duty Is Ongoing

The duty to disclose continues throughout the course of the proceedings.[93] Untimely disclosure can violate due process: "The Fifth Circuit has elaborated on this concept, holding that when the evidence is disclosed at trial, the issue is whether the tardy disclosure prejudiced the defendant."[94] If the disclosure is made during trial and the defense gets it in time to effectively utilize it at trial, then the conviction will not be reversed.[95] In such cases, the defendant is not entitled to a new trial.[96]

appellant met a burden of proof to persuade us that he suffered some actual harm . . . .").

89. *Hampton*, 86 S.W.3d at 612 (citing *Bagley*, 473 U.S. at 682; United States v. Agurs, 426 U.S. 97 (1976); Amos v. State, 819 S.W.2d 156, 159–60 (Tex. Crim. App. 1991); Turpin v. State, 606 S.W.2d 907, 916 (Tex. Crim. App. 1980)).

90. *See* Wilson v. Whitley, 28 F.3d 433, 438 (5th Cir. 1994) (noting that *Brady* applies whether the defense makes "a specific request, a general request, or no request at all," but the specificity of a request can "weigh in favor of the accused").

91. *Bagley*, 473 U.S. at 682.

92. James v. Whitley, 926 F.2d 1433, 1439 (5th Cir. 1991) (quoting *Bagley*, 473 U.S. at 682).

93. *See* May v. State, 738 S.W.2d 261, 273 (Tex. Crim. App. 1987) (recognizing the continuing duty of prosecutors to make disclosures even after initial compliance with discovery orders); Granviel v. State, 552 S.W.2d 107, 119 (Tex. Crim. App. 1976) (noting that the prosecution has a continuing duty to disclose evidence that comes into its possession).

94. Little v. State, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (citing United States v. McKinney, 758 F.2d 1036, 1050 (5th Cir. 1985)).

95. *Id.*; *see also* United States v. Walters, 351 F.3d 159, 169 (5th Cir. 2003) (holding that the prosecution's disclosure of evidence four weeks before trial did not constitute a *Brady* violation).

96. *See McKinney*, 758 F.2d at 1050 ("If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early

2. Duty to Discover

Although *Brady* is properly understood as creating a duty to disclose favorable information, this duty does not fully describe the role of the prosecution in a criminal case under *Brady*. Under *Brady*, a prosecutor also "has a duty to learn of any favorable evidence known to the others acting on the government's behalf."[97] In a criminal case, the prosecutor has a special role.[98] Rather than represent a specific client, the prosecutor represents "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."[99] Therefore, the duty to disclose is placed not just upon the prosecutor, but rather "on the State as a whole, including [all of] its investigative agencies."[100]

Under this duty, the prosecutor is presumed to have knowledge of a witness's criminal history that could be revealed with a routine check of the FBI and state crime databases.[101] Therefore, the State has the burden of obtaining and disclosing the criminal history of its witnesses.[102] When the prosecution does provide a witness's criminal history for purposes of impeachment, the Texas Court of Criminal Appeals has held that the State is estopped from challenging the admission of the impeachment evidence on the basis that it is not sufficiently linked to the witness.[103]

While the prosecutor does have a duty to discover favorable evidence that is already in the possession of others acting for the government, there is no affirmative duty to discover favorable evidence that is not already

as it . . . should have been." (citing United States v. Nixon, 634 F.2d 306, 311–12 (5th Cir. 1981))); *see also* United States v. O'Keefe, 128 F.3d 885, 898 (5th Cir. 1997) (explaining that even if evidence was not disclosed as early as it should have been, a new trial may not be granted when the jury's function has not "been corrupted by a material falsehood").

97. Kyles v. Whitley, 514 U.S. 419, 437 (1995); *see also* Strickler v. Greene, 527 U.S. 193, 281 (1999) (noting the duty of the prosecutor to discover favorable evidence known by those working for him or on his behalf).

98. *Strickler*, 527 U.S. at 281.

99. Berger v. United States, 295 U.S. 78, 88 (1935).

100. Fulford v. Maggio, 692 F.2d 354, 358 n.2 (5th Cir. 1982) (explaining the State's duty of disclosure), *rev'd on other grounds*, 462 U.S. 111 (1983). *But see* United States v. Webster, 392 F.3d 787, 798 (2004) ("Although 'the prosecution' for *Brady* purposes does encompass more than the individual prosecutor or group of prosecutors trying the case, and the prosecution may be deemed, in limited circumstances, to be in 'constructive possession' of *Brady* material, . . . there are limits on the imputation of knowledge from one arm of the government to prosecutors." (citation omitted)).

101. East v. Scott, 55 F.3d 996, 1003 (5th Cir. 1995).

102. *Id.*

103. Arroyo v. State, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003).

known to the State.[104] And even if the information is in the possession of those parties acting for the government and is available to the defendant, or through reasonable diligence could be obtained by the defendant, *Brady* does not require disclosure.[105]

3. Duty to Preserve

In certain circumstances, the government is also under a duty to preserve evidence. The Supreme Court has stated that evidence that can be expected to play a significant role in the defense of the accused should be preserved.[106] However, if the evidence is destroyed or lost, there is no constitutional violation unless the evidence was destroyed in bad faith.[107] For example in *Illinois v. Fisher*,[108] evidence (cocaine) was destroyed pursuant to established police procedures.[109] Even though this evidence was critical to the defendant's case—test results could have exonerated the defendant—there was no due process violation because the evidence was not destroyed in bad faith.[110] Moreover, even the negligent destruction of evidence does not violate due process.[111]

IV. LIMITS ON THE DUTY TO DISCLOSE

A. *No General Right to Discovery*

Even though the prosecution has a duty to disclose, "[t]here is no

104. *See* Hafdahl v. State, 805 S.W.2d 396, 399 n.3 (Tex. Crim. App. 1990) (noting that neither *Brady* nor any of the cases that followed it require the prosecutor to turn over exculpatory evidence that the prosecutor does not possess or know to exist).

105. May v. Collins, 904 F.2d 228, 231 (5th Cir. 1990); United States v. Marrero, 904 F.2d 251, 261 (5th Cir. 1990).

106. *See* Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988) (implying that there is a duty to preserve evidence in cases where "the evidence could form a basis for exonerating the defendant"); California v. Trombetta, 467 U.S. 479, 488 (1984) (discussing the "duty the Constitution imposes on the States to preserve evidence"); *see also* United States v. Binker, 795 F.2d 1218, 1230 (5th Cir. 1986) (noting that the government is required to preserve evidence that could be important to the defense); Little v. State, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999) (acknowledging the state's constitutional duty to preserve evidence that could be important to the suspect's defense).

107. *Youngblood*, 488 U.S. at 58.

108. Illinois v. Fisher, 540 U.S. 544 (2004).

109. *Id.* at 546.

110. *Id.* at 547–48.

111. *Cf. Youngblood*, 488 U.S. at 58 (refusing to find a constitutional violation where police activity was possibly negligent).

general constitutional right to discovery in a criminal case."[112] Neither *Brady* nor its progeny creates a general right to discovery.[113] The government is under no duty to disclose neutral or inculpatory information to the defendant.[114] The prosecution is under no duty to share all useful information with the defense.[115] And a court is under no constitutional obligation to order such disclosure.[116] "The interests of judicial economy militate against granting such open ended requests, absent a constitutional basis that compels such access."[117] Therefore, the government is under no obligation to provide the identity of potential witnesses to the defense, even if the witnesses will testify.[118]

Unless the defense is aware of material that has not been disclosed and brings it to the court's attention, the defendant must rely on the prosecutor's decision regarding what matters need to be disclosed. The Constitution does not allow the defense to conduct its own search through the State's files.[119] When the defendant makes a specific request for documents for possible substantive use rather than just for impeachment, and the prosecution refuses to produce the documents, a trial court errs by refusing to review them in camera and making a determination of whether the documents should be disclosed.[120]

B. *No Duty to Assist the Defense*

Just as there is no general right to discovery, the prosecutor is under no duty to provide the defendant with information that the defense already has or, with reasonable diligence, can be obtained.[121] The prosecution is

112. Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

113. *Id.* "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Id.* at 559–60 (citing Wardius v. Oregon, 412 U.S. 470, 474 (1973)).

114. *See* United States v. Johnson, 872 F.2d 612, 619 (5th Cir. 1989) ("Neutral or inculpating evidence is not within the purview of *Brady*." (citing United States v. Cochran, 697 F.2d 600, 605 (5th Cir. 1983))).

115. United States v. Ruiz, 536 U.S. 622, 630 (2002).

116. Gray v. Netherland, 518 U.S. 152, 168 (1996).

117. United States v. Davis, 752 F.2d 963, 976 (5th Cir. 1985).

118. *Weatherford*, 429 U.S. at 559.

119. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 59–60 (1987) (noting that the defendant had no right to unsupervised access to the State's files).

120. *Cf. id.* at 61 (ordering in camera review by a trial court to determine whether evidence should be disclosed).

121. *See* Thompson v. Cain, 161 F.3d 802, 807 (5th Cir. 1998) ("[T]he prosecution is under no duty to furnish defendant with information that is readily accessible to the defense." (citing

not required to disclose all of the investigatory work that the prosecution has performed.[122] Nor is the State required to conduct an investigation or make a case for the defendant.[123] The prosecution cannot be required to anticipate all possible defenses and provide the defendant with information to bolster those defenses.[124]

Although the Supreme Court has concluded that the defendant need not make a request to be entitled to favorable evidence in the State's possession, the defendant's lawyer still has an obligation to make an independent investigation of the case.[125] Thus, if the defense has equal access to the information and the failure to discover the evidence was from a failure to use reasonable diligence, there is no *Brady* violation.[126]

C. *Applicability of* Brady *to Guilty Pleas*

In 1979, the Texas Court of Criminal Appeals held the failure to disclose favorable information to the defense before the entry of a guilty plea violated due process.[127] This holding has been followed by Texas courts of appeals.[128] In 2002, the United States Supreme Court determined that since *Brady* seeks to ensure that the defendant receives a fair trial, the duty to disclose impeachment evidence does not apply to guilty pleas.[129] Likewise, the Fifth Circuit has held that *Brady* does not apply in the context of guilty pleas[130] or pleas of *nolo contendere*.[131]

Herrera v. Collins, 954 F.2d 1029, 1032 (5th Cir. 1992))); *see also* United States v. Maloof, 205 F.3d 819, 827 (5th Cir. 2000) (refusing to reverse a conviction when the prosecution failed to turn over evidence because the defense had received the evidence from another source).

122. Moore v. Illinois, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.").

123. United States v. Garza, 165 F.3d 312, 315 (5th Cir. 1999).

124. *See* United States v. Runyan, 290 F.3d 223, 246 (5th Cir. 2002) (stating that the government is not required to facilitate the gathering of exculpatory information that the defense should be compiling on its own).

125. *See generally* Moawad v. Anderson, 143 F.3d 942, 948 (5th Cir. 1998) (discussing the duty of a defense attorney to adequately investigate the facts of the case).

126. United States v. Infante, 404 F.3d 376, 386–87 (2005).

127. *Ex parte* Lewis, 587 S.W.2d 697, 700 (Tex. Crim. App. 1979).

128. State v. Masonheimer, 154 S.W.3d 247, 255 (Tex. App.—Eastland 2005, pet. granted), *rev'd sub nom. Ex parte* Masonheimer, 220 S.W.3d 494 (Tex. Crim. App. 2007).

129. United States v. Ruiz, 536 U.S. 622, 633 (2002).

130. *See* Orman v. Cain, 228 F.3d 616, 617 (5th Cir. 2000) (stating *Brady* does not apply when a defendant pleads guilty and waives his right to trial); Matthew v. Johnson, 201 F.3d 353, 361–62 (5th Cir. 2000) (noting that a prosecutor is not required to disclose exculpatory information

Since the Supreme Court's holding in *United States v. Ruiz*,[132] the Court of Criminal Appeals has not addressed whether its earlier holding in *Ex parte Lewis*[133] has been affected by *Ruiz*. The closest the court has come is a concurrence authored by Judge Cochran in *Ex parte Johnson*.[134] In her concurrence, she recognized the Supreme Court's earlier holding in *Lewis* and asserted that post-*Ruiz*, "the applicant for habeas corpus relief must show that the evidence is actually exculpatory (not merely mitigating or of impeaching value) because such evidence tends to support a claim of factual innocence."[135] She further contends that "the applicant must also show, by a preponderance of the evidence, that, had this material exculpatory evidence been divulged, he would not have entered a plea, but would have gone to trial because of the objective likelihood of being found not guilty."[136] Assuming Judge Cochran's understanding of the law is adopted by the court, only "actually exculpatory" evidence must be disclosed to the defense prior to the entry of a guilty plea.[137]

D. *Cumulative and Inadmissible Evidence*

Just because the withheld information might have helped the defense, or even might have affected the outcome of the trial, does not mean that the prosecutor is required to disclose the information.[138] When the information that was not disclosed is merely cumulative of other evidence,

when an accused waives his right to trial). *But see* United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (concluding that the withholding of *Brady* evidence can invalidate a guilty plea).

131. *Matthew*, 201 F.3d at 360. Under Texas law, a criminal defendant can chose to enter a plea of *nolo contendere* to a charge. TEX. CODE CRIM. PROC. ANN. art. 27.02(5) (West 2006). The effect of this plea is the same as that of a guilty plea in a criminal case, but it cannot be used as an admission in a civil proceeding. *Id.*

132. United States v. Ruiz, 536 U.S. 622 (2002).

133. *Ex parte* Lewis, 587 S.W.2d 697 (Tex. Crim. App. 1979).

134. *See Ex Parte* Johnson, No. AP–76,153, 2009 WL 1396807, at *2–3 (Tex. Crim. App. May 20, 2009) (Cochran, J., concurring) ("*Ruiz*, by its terms, applies only to material *impeachment* evidence . . . .").

135. *Id.* (citing *Ruiz*, 536 U.S. at 631; McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003); Medel v. State, 184 P.3d 1226, 1234 (Utah 2008)).

136. *Id.* (citing Tate v. Wood, 963 F.2d 20, 24 (2d Cir. 1992); Miller v. Angliker, 848 F.2d 1312, 1322 (2d Cir. 1988); United States v. Hammer, 404 F. Supp. 2d 676, 795–96 (M.D. Pa. 2005); Taylor v. State, 848 So. 2d 410, 412 (Fla. Dist. Ct. App. 2003); Roeder v. State, 162 P.3d 794, 797–98 (Idaho Ct. App. 2007)).

137. *Id.* at *2.

138. United States v. Kates, 174 F.3d 580, 583 (5th Cir. 1999) (per curiam).

there is no *Brady* violation.[139] The same is true of evidence that only provides an additional basis on which to impeach a witness whose credibility has already been attacked.[140] Additionally, even if the information could have been used to impeach a witness, if the witness's testimony is strongly corroborated by other evidence, it will usually be found to have not been material.[141] For example, the Fifth Circuit found no *Brady* violation in a case where the prosecutor failed to disclose that an eyewitness had misidentified the defendant, but three law enforcement witnesses testified and were credible in identifying the defendant.[142]

Similarly, the disclosure of inadmissible evidence is not required under *Brady*.[143] For example, the State is not required to disclose "prior bad acts" evidence of a government witness when that evidence is not admissible to attack the witness's credibility.[144]

V. ETHICAL OBLIGATIONS CREATED BY STATUTES AND RULES

A. *Statutory Obligations*

The ethical obligation of Texas prosecutors goes beyond those imposed by the state and federal constitutions. The Texas legislature has mandated that "[i]t shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done."[145] While the concept of justice may be a nebulous one,[146] at a minimum, article 2.01 of the Texas Code of Criminal Procedure includes a "duty to see that the innocent are not convicted and, where appropriate, that the

139. *See* Spence v. Johnson, 80 F.3d 989, 999–1000 (5th Cir. 1996) (refusing to reverse a conviction because the evidence withheld was not "reasonably likely to have affected the jury verdict").

140. *See* Felder v. Johnson, 180 F.3d 206, 213 (5th Cir. 1999) (finding that the introduction of impeachment evidence against a key witness would not have changed the outcome for the defendant).

141. East v. Johnson, 123 F.3d 235, 240 (5th Cir. 1997); Kopycinski v. Scott, 64 F.3d 223, 226 (5th Cir. 1995).

142. United States v. Green, 46 F.3d 461, 466 (5th Cir. 1995).

143. Iness v. State, 606 S.W.2d 306, 310 (Tex. Crim. App. 1980) (en banc).

144. United States v. Greer, 939 F.2d 1076, 1097 (5th Cir. 1991).

145. TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2005).

146. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 493 (1991) (replacing the nebulous and discretionary "ends of justice" standard with a more concretely defined prejudice standard borrowed from procedural default law).

minimum punishment is assessed."[147] The Court of Criminal Appeals has described the prosecutor's duty thusly: "As a trustee of the State's interest in providing fair trials, the prosecutor is obliged to illuminate the court with the truth of the cause, so that the judge and jury may properly render justice."[148] Judge Cathy Cochran went even further contending that "the prosecutor is obliged to always be forthcoming as well as honest, to ensure that the truth will always prevail and the judge and jury may properly render justice."[149] A prosecutor's obligations under this article are so serious that it is impermissible to construe the Code of Professional Responsibility in a way that conflicts with the duties prescribed by the article.[150]

The Code of Criminal Procedure also prohibits the prosecution from suppressing facts or secreting witnesses that are capable of establishing the accused's innocence.[151] While this formulation is narrower than the duties imposed under the United States Constitution, article 2.01 is often used in addition to the Constitution when addressing the prosecution's ethical responsibilities.[152] This duty does not go so far as to require the prosecution to introduce exculpatory evidence during an actual trial.[153]

Another limitation placed on prosecutors comes from article 2.01's prohibition on district attorneys representing the State in cases where the district attorney, prior to election, had been "employed adversely."[154] Disqualification requires more than just a conflict of interest—it requires that the elected district attorney have actually represented the accused in the prosecution.[155]

In addition to those obligations specifically directed at the prosecution, the legislature has made it the responsibility of all of the officials involved

147. Morrow v. State, 910 S.W.2d 471, 474 (Tex. Crim. App. 1995) (per curiam) (citing Nethery v. State, 692 S.W.2d 686, 691 (Tex. Crim. App. 1985)).

148. Duggan v. State, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989).

149. Jaubert v. State, 74 S.W.3d 1, 5 n.4 (Tex. Crim. App. 2002) (Cochran, J., concurring).

150. Randell v. State, 770 S.W.2d 644, 647 (Tex. App.—Amarillo 1998, no pet.).

151. TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2005).

152. *See Duggan*, 778 S.W.2d at 468 (concluding that the prosecution's constitutional duty to correct false evidence is also a requirement of article 2.01); Ortega v. State, 863 S.W.2d 238, 239 (Tex. App.—Eastland 1992, writ ref'd) (addressing a complaint that the suppression of favorable evidence violated both *Brady* and article 2.01).

153. Johnson v. State, 810 S.W.2d 785, 786 (Tex. App.—Waco 1991, writ ref'd).

154. TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2005).

155. *In re* Guerra, 235 S.W.3d 392, 410–11 (Tex. App.—Corpus Christi 2007, no pet.).

in a criminal prosecution, including the attorneys and judges, to "conduct themselves as to insure a fair trial for both the state and the defendant, not impair the presumption of innocence, and at the same time afford the public the benefits of a free press."[156]

B. *Obligations Imposed by the Rules of Professional Conduct*

In addition to the duties imposed by the Constitution and by the Texas legislature, the Texas Disciplinary Rules of Professional Conduct impose a duty on prosecutors to disclose certain types of evidence.[157] Specifically, Rule 3.09(d) requires that the prosecutor:

> [M]ake 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.[158]

Rule 3.09 also provides: "The prosecutor in a criminal case shall . . . refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause."[159] This prohibition does not apply, however, when a grand jury has determined that a crime has been committed.[160] In fact, a prosecutor who has doubts as to what, if any, offense has been committed may still present the matter to a grand jury so long as he or she "believes that the grand jury could reasonably conclude that some charge is proper."[161] The obligations of a prosecutor under this Rule are satisfied once a grand jury returns a true bill "unless the prosecutor believes that material inculpatory information presented to the grand jury was false."[162]

Other conduct prohibited by the rules include "conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made

156. TEX. CODE CRIM. PROC. ANN. art. 2.03(b) (West 2005).

157. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9).

158. *Id.* R. 3.09(d).

159. *Id.* R. 3.09(a).

160. *Id.* R. 3.09 cmt. 2.

161. *Id.*

162. *Id.* R. 3.09 cmt. 2.

reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[163] This does not prohibit the questioning of a person who has lawfully waived his right to counsel and to remain silent.[164] "[N]or does it forbid such questioning of any unrepresented person who has not stated that he wishes to retain a lawyer and who is not entitled to appointed counsel."[165]

Similarly, a prosecutor should "not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights."[166] This Rule does not apply to persons who have lawfully waived their rights in open court or to persons who are proceeding pro se with the approval of the court.[167] A prosecutor is also permitted to advise a defendant of his pre-trial, trial, and post-trial rights when the defendant has indicated his desire to plead guilty in open court, does not wish counsel, and is not entitled to appointed counsel.[168] Obviously, any advice given must be accurate and given with the knowledge and approval of the court.[169]

A violation of any Rule 3.09 prohibitions can result in disciplinary action against the prosecutor who violated the Rule.[170] Nonetheless, neither Rule 3.09 nor any other Rule of Professional Conduct creates substantive rights for criminal defendants.[171] Rather, it is only when the conduct rises to the level of a due-process violation or otherwise affects a substantial right that the defendant may be entitled to relief.[172]

163. *Id.* R. 3.09(b).

164. *Id.* R. 3.09 cmt. 3.

165. *Id.*

166. *Id.* R. 3.09(c).

167. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.09 cmt. 4, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (TEX. STATE BAR R. art. X, § 9).

168. *Id.*

169. *See id.* (stating that the advice given must be accurate).

170. *See id.* R. 3.09 (regulating the conduct of prosecutors); *see also* TEX. STATE BAR R. art. II, § 3, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) ("These Rules are adopted for the operation, maintenance and conduct of the State Bar and for disciplining its members.").

171. *See* House v. State, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997) ("The [disciplinary] rules do not grant a defendant standing or some 'systemic' right to complain about an opposing party's alleged disciplinary rule violations that do not result in 'actual prejudice' to the defendant." (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08 cmt. 10)).

172. *See, e.g.*, Landers v. State, 256 S.W.3d 295, 310 (Tex. Crim. App. 2008) ("The

VI. ADDRESSING THE LEGAL AND ETHICAL RESPONSIBILITIES OF PROSECUTORS

A. *Recognizing Potential Issues*

Before procedures can be implemented to ensure that prosecutors comply with all constitutional and statutory obligations, a brief examination of how violations occur is helpful. After all, given the potential sanctions for violating these duties, why would a prosecutor violate his or her ethical obligations? In John Thompson's case, the prosecutor, First Assistant District Attorney Bruce Whittaker, who records show was provided the lab report, claimed that he had left it on the desk of the attorney actually prosecuting the case.[173]

While there does not appear to be a comprehensive study that analyzes the causes of *Brady* or other ethical lapses, at least one noted commentator, Barry Scheck, has suggested three top causes for *Brady* violations.[174] First, the *Brady* information never makes it into the prosecutions file.[175] Next, the material is in the file, but the prosecutor failed to recognize it as *Brady* material and, therefore, failed to disclose it.[176] Finally, the prosecutor recognized the evidence as *Brady* material but failed to turn it over out of fear.[177]

In the first category, there are a number of reasons, ranging from mistake to failure by law enforcement to fully investigate, as to why the *Brady* material may not make it into the prosecution's file.[178] Scheck himself identifies at least twenty-seven potential reasons.[179] While he proposes some procedures and techniques for dealing with these problems,

disciplinary rules cannot be turned into a tactical weapon to disqualify opposing counsel unless the defendant can show that the alleged rule violations deprived him of a fair trial or otherwise affected his substantial rights." (citing *House*, 974 S.W.2d at 253)).

173. Rhonda Bell & Walt Philbin, *Connick Urges Judges to Delay Execution*, THE NEW ORLEANS TIMES-PICAYUNE, May 1, 1999, at A1.

174. Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2227–28 (2010).

175. *Id.* at 2228.

176. *Id.* at 2233.

177. *Id.* at 2236.

178. *See id.* at 2228–31 (listing reasons why police might not disclose evidence to the prosecutor).

179. *Id.*

he recognizes that there are likely "better fixes that could be devised" and acknowledges that the real point of his thought exercise "is to orient policymakers and administrators in district attorney offices and police departments to think systematically about re-designing their systems 'to respect human limits.'"[180]

Under the second category, Scheck recognizes a variety of causes, such as missing the evidence because of time, workload pressures, and confusion as to what constitutes *Brady* material.[181] In addition to the use of a good checklist, Scheck contends that "training, skilled supervision, clear office-wide definitions, and 'office culture'" are essential safeguards.[182]

The final category—the failure of a prosecutor to turn over the *Brady* material out of fear—is also worth examining. Scheck identifies several scenarios in which fear might operate on the mind of a prosecutor, preventing him from fulfilling his ethical obligations.[183] Among these reasons is fear that untimely disclosure will result in a reprimand from the court or the district attorney's office.[184] There is also the prosecutor's fear of losing the case and the related fear that a person guilty of a crime will go free.[185] Scheck astutely observes, the "fear of losing cases can powerfully subvert the better natures of both prosecutors and defense lawyers engaged in an adversary system."[186] With these categories in mind, we can turn to an examination of mechanisms to help eliminate the problems.

B. *Pragmatic Approaches to Address the Issues*

1. Open-File Policy

Perhaps the easiest way to avoid ethical dilemmas is to eliminate discretion on the part of prosecutors by adopting an open file policy. Under such a policy, all materials in possession of the district attorney's

180. *Id.* at 2232–33.

181. *Id.* at 2233–34.

182. *Id.* at 2236.

183. *See id.* at 2236–37 (discussing why fear may discourage prosecutors from turning over *Brady* material).

184. Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2236 (2010).

185. *Id.* at 2236–37.

186. *Id.* at 2237.

office are made available for inspection by the defense. In some cases, the file is actually copied and provided to the defense. While the State is under no obligation to disclose everything in the State's file,[187] courts have recognized that an "open file" policy can satisfy the State's burden under *Brady* and is an easy mechanism to employ.[188] In order to fully comply with *Brady*, the file would need to be made available to the defense in a timely fashion.[189]

Even with an open file policy, however, there are still potential problems. First, there is the issue of the attorney work-product privilege.[190] The privilege exists "to stimulate the production of information for trials, and it rewards an attorney's creative efforts by giving his work product a qualified privilege from being shared with others."[191] There are legitimate and ethical reasons that prosecutors do not want to share their work product with the defense. As of yet, the Supreme Court has not decided whether there is any requirement under *Brady* to turn over attorney work product.[192]

There is also the problem of *Brady* information not making it into the

187. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 675 (1985) ("The prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . ."). This is even true in a post-conviction habeas proceeding. *See* Lagrone v. Cockrell, No. 02-10976, 2003 U.S. App. LEXIS 18150, at *45 (5th Cir. Sept. 2, 2003) (noting that the State does not have to open its files to a defendant in a habeas proceeding).

188. *See*, *e.g.*, Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)."); *see also* Vega v. State, 898 S.W.2d 359, 362 (Tex. App.—San Antonio 1995, writ ref'd) (noting that the State had an open file policy and that this put the burden on the defendant to obtain the evidence).

189. *See* Hampton v. State, 86 S.W.3d 603, 612 n.26 (Tex. Crim. App. 2002) (noting the requirements the defendant must meet when arguing that the State failed to disclose evidence in a timely manner).

190. *See* Wilson v. State, 311 S.W.3d 452, 464 n.47 (Tex. Crim. App. 2010) ("The 'work product' of an attorney or party to litigation is material that is created for the sole use of the attorney or party in anticipation of litigation and is not to be shared with anyone else, especially the opposing party." (citing TEX. R. CIV. P. 192.5)).

191. Pope v. State, 207 S.W.3d 352, 357–58 (Tex. Crim. App. 2006) (citing Occidental Chem. Corp. v. Banales, 907 S.W.2d 488, 490 (Tex. 1995) (orig. proceeding)); Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19, 37–38 (1990).

192. *See, e.g.*, Williamson v. Moore, 221 F.3d 1177, 1182 (11th Cir. 2000) ("'[T]he Supreme Court . . . has [not] decided whether *Brady* requires a prosecutor to turn over his work product.'" (quoting Mincey v. Head, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000))).

prosecution's file, as identified by Scheck. Since the prosecution is responsible for turning over the information, even if it is in the possession of other law enforcement agencies, the failure to disclose the information still violates *Brady*.[193] Obviously, permitting the defense to review the entire prosecution file is of no consequence if the critical information is not there.[194]

2. Flow of Information from Law Enforcement to Prosecutors

Because information that remains in the hands of law enforcement can result in a *Brady* violation by the prosecutor, it is critical that procedures be implemented to encourage that all information is forwarded to the prosecution. Some have suggested that "each jurisdiction should adopt a rule requiring the use of checklists to ensure full and timely transfer of all relevant information from police to prosecutors."[195] Once a prosecutor has received a case, she should immediately provide a checklist to each law enforcement agency involved in the investigation of the case.[196]

Such a checklist would presumably include all reports and notes by law enforcement and leave the door open for additional requests and further investigation.[197] This should be an ongoing obligation, and any new reports created by law enforcement should be immediately sent to the prosecution.[198] "To aid in this process, prosecutors can and should make clear to police what their investigative files should look like, and should then provide feedback to police on their compliance."[199] It might also be helpful to have offense-specific checklists.[200] The same is true for cases

193. *See Kyles*, 514 U.S. at 437 (acknowledging that the prosecutor has a duty to learn of unfavorable evidence that is known by others acting on the government's behalf).

194. *See* Harm v. State, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006) ("Although appellant's counsel reviewed the state's files on at least two separate occasions, according to the trial-court record, the records in question were not contained in those files.").

195. Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1974 (2010).

196. *Id.*

197. *See id.* ("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 the police . . . memorializing the additional information the prosecutor needs from the police.").

198. *Id.*

199. *Id.* at 1975.

200. *Id.*

involving special types of witnesses.[201]

Another significant problem concerning the flow of information from various law enforcement agencies to the prosecution is the failure to document the information.[202] "Too often, police fail to make a report or other record of information they receive on a case—from hotline tips that are not pursued to interviews or canvasses that produce no apparently incriminating evidence against a suspect."[203] It is incumbent on prosecutors to make law enforcement officials "understand that they must write down even negative results from their investigations."[204]

3. Obligations of the Defense

Although this Article focuses on the ethical responsibilities of the prosecutor, it is important to remember that criminal prosecutions are adversarial proceedings. Just as the prosecutor has ethical obligations, defense counsel has a responsibility to zealously represent his client.[205] To this end, he should not simply rely on the prosecutor's ethical obligations to turn over information and instead should formally request the information from the State. Not only will this encourage the prosecution to review its file for such information, it can also help the defense establish that the withheld information was material.[206]

The defense should also avail itself of any statutory mechanisms available to obtain information. Although not constitutionally required, Congress and state legislatures are free to create laws governing discovery in criminal cases.[207] In the federal system, defense lawyers should

201. *See id.* at 1976 ("A case involving an informant or a jailhouse snitch, for example, might uniquely require inquiry into information such as prior cases in which the witness acted as an informant, prior deals bestowed upon the witness in other cases, prior record and dispositions in earlier cases, any recorded communications between the informant and others, and other such information related to the witness's incentives and veracity.").

202. *Id.* at 1977.

203. *Id.*

204. *Id.* at 1978.

205. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT pmbl. ¶ 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

206. See *supra* Part IV(B) for a discussion on establishing materiality.

207. *See* United States v. Agurs, 426 U.S. 97, 109 (1976) ("Whether or not procedural rules authorizing . . . broad discovery might be desirable, the Constitution surely does not demand that much.").

consider using Rule 57(b)[208] and 18 U.S.C. § 3500[209] (the Jencks Act) to obtain information prior to and during the trial. Rule 57(b) can be used to get the trial court to exercise its inherent power to order discovery.[210] The Rule permits the trial court to order discovery, subject to Rule 16.[211] The Jencks Act requires the prosecution "to provide, upon request, any prior statements of government witnesses that relate to the subject matter of their testimony."[212]

Texas provides similar rights to criminal defendants. "If a witness uses a writing to refresh [his] memory," either before or while testifying, the opposing party is permitted to have the writing produced for inspection and use during cross-examination.[213] In addition, the Texas Code of Criminal Procedure requires a trial court to order discovery upon a showing of good cause by the defendant.[214] Attorney work product, however, is exempted from discovery.[215]

4. Obligations of the Prosecutor's Offices

a. Culture

This category is probably the most important. District attorney's offices must maintain a culture of ethical behavior. Like any other workplace, prosecutors' offices develop their own internal dynamics. There are innumerable written and unwritten rules that inform the actions of the prosecutors and their staffs. If these rules do not reinforce the constitutional and statutory obligations of the prosecutors, unethical behavior is more likely to occur.

This culture must be top-down. In order "for a compliance and ethics program to be effective, high-level personnel must be responsible for it."[216] "Offices that take compliance seriously must make sure that

208. FED. R. CRIM. P. 57(b).

209. 18 U.S.C. § 3500 (2006).

210. *See* FED. R. CRIM. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.").

211. *See generally* FED R. CRIM. P. 16 (regulating discovery in federal criminal cases).

212. United States v. Maloof, 205 F.3d 819, 825 (5th Cir. 2000) (citing 18 U.S.C. § 3500(b)).

213. TEX. R. EVID. 612.

214. TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West Supp. 2010).

215. *See id.* (excepting attorney work-product from the discovery statute).

216. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L.

supervisors convey the importance of disclosure obligations and monitor line attorneys to make sure they comply with their obligations."[217] It should be the supervisor's obligation to ensure compliance and proper training.[218] When it is clear that unethical behavior will not be tolerated, such behavior is unlikely to occur.

Indoctrination into the office's culture can begin during the hiring process.[219] "Interviewers could send out case law and statutes governing prosecutors' discovery obligations ahead of time and then pose hypotheticals during [the] interviews to see how candidates respond."[220] The interviewee's specific answer to any particular hypothetical is less important than gauging how he or she responds to questions with no right or wrong answer.[221] Ultimately, "[t]he focus in hiring on ethical disclosure and reputation speaks volumes about what the office stands for, far more than a sermon or uplifting speech would."[222]

b. Training

Hiring policies alone will not solve the problem. It is essential that prosecutors receive both formal and informal training[223] on *Brady* and other ethical responsibilities.[224] "Training programs should address not merely the strict rules of *Brady* compliance, but also highlight the ethical duties and appropriate values of the prosecutor."[225] Training should

REV. 2089, 2108 (2010) (citing U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(2)(B) (2009)).

217. *Id.* at 2109.

218. *Id.*

219. Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1987 (2010).

220. *Id.*

221. *Id.*

222. *Id.* at 1988.

223. On a practical note, not only does internal training help avoid ethical transgressions on the part of prosecutors, it also provides a means of cost savings to the district attorney's office. The State Bar of Texas has made it relatively easy to become Continuing Legal Education (CLE) Sponsors. It is also more cost effective to provide in-house CLE training for prosecutors than it is to send those same prosecutors to outside CLE courses. More information can be obtained at: http://www.texasbar.com/AM/Template.cfm?Section=CLE_Sponsors_and_Accreditation.

224. Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1989 (2010).

225. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2108 (2010).

begin as soon as new prosecutors begin their employment.[226] It should also occur at regular intervals to reinforce the training's importance.[227]

The training can be made more effective by incorporating real cases into the discussion.[228] By involving the trainees' real-world cases, the trainers can better tailor the training to their needs.[229] These cases can come from the office's jurisdiction or can be modeled after high-profile cases from other jurisdictions.[230] "Illustrating near-misses makes discovery issues more concrete, vivid, and clearly important."[231]

The training need not be formal to have an impact. There is much to be gained from an environment "that allows prosecutors to ask questions and admit mistakes."[232] There should be opportunities in a typical supervisory setting to engage in both feedback and learning.[233] Even outside of the formal supervisory setting, there are "opportunities to solicit and give advice."[234] It is important to recognize the value of developing a sense of community, as it is important in "fostering an office culture that values dialogue and reflection."[235] "Many management experts suggest creating spaces for employees to talk and interact, ranging from inviting lunchrooms and courtyards to water coolers and regular happy hours."[236] It is in these informal settings that "prosecutors may come to see discovery issues and ways of handling them that they had not considered on their own."[237]

c. Supervision

Although sometimes overlooked, supervision is an important tool that

226. Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1991 (2010).

227. *Id.*

228. *Id.* at 1990.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 1992.

233. *Id.*

234. *Id.*

235. *Id.*

236. Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1992 (2010).

237. *Id.*

can be utilized in improving prosecutorial discovery practices.[238] "While training on hypothetical and past cases is helpful, there is no substitute for monitoring performance in real, ongoing cases."[239] Supervisors should create "feedback loops" that allow prosecutors to learn from both their successes and mistakes.[240]

Feedback should be encouraged not only from supervisors, but from colleagues and subordinates as well.[241] In order to be effective, the "[f]eedback should be standardized, periodic, and routine (after each case ends, or every month or two) so that it does not single out particular prosecutors for blame."[242] Regular feedback not only allows supervisors to watch for patterns of problems, it also gives prosecutors an opportunity to realize how others perceive them.[243]

VII. CONCLUSION

The *Thompson* case demonstrates the critical importance of ethical behavior on the part of all prosecutors. If Thompson was truly not guilty of the murder, an innocent man was almost executed while the real killer remained free. If he was guilty,[244] then a murderer is now free because of the ethical lapses of the prosecutors handling his case. In either scenario, justice has not been served, and it is society that is ultimately punished because of the prosecutors' unethical behavior. Not only is a dangerous man free to hurt others, if the Supreme Court upholds the fourteen million dollar judgment, it is the citizens whom the prosecutor swore to protect that will ultimately have to pay.

It is the responsibility of every prosecutor to see that justice is done. Problems can be avoided if every prosecutor takes their ethical

238. *Id.*
239. *Id.* at 1993.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* at 1994.
244. The trial evidence supports Thompson's guilt. Among the prosecution's witnesses was Kevin Freeman, an acquaintance of Thompson's who lived in the same neighborhood. State v. Thompson, 2002-0361, p. 2–3 (La. App. 4 Cir. 7/17/02); 825 So. 2d 552, 553. Freeman testified that he was giving Thompson a ride home when he ran out of gas. *Id.* Not only did he hear Thompson make inculpatory statements prior to the murder, he saw Thompson grab Liuzza and throw him to the ground before hearing several gunshots. *Id.*

responsibilities seriously. This requires prosecutors to fully understand the laws that govern their behavior and that they work in an environment where the issues are regularly addressed. Ultimately, no set of policies or procedures will eliminate all problems. It is only by recognizing that the possibility for ethical violations exists in every case that steps can be taken to avoid them.