

THE NEED FOR LEGISLATION TO REFORM BRADY PRACTICES IN UTAH: REQUIRING PROSECUTORS TO DISCLOSE ALL FAVORABLE EVIDENCE TO THE DEFENSE

KENT R. HART¹ AND TROY RAWLINGS²

I. Introduction: Significant Misunderstanding and Confusion Permeates Prosecutors' Duty to Disclose Exculpatory Evidence.

The year 2013 marked the 50th anniversary of the seminal United States Supreme Court decision in *Brady v. Maryland* which established a constitutional due process right for criminal defendants to receive all material exculpatory evidence that the government possesses against them.³ That decision has been hailed as a “hallmark of due process” that distinguishes the American criminal justice system from others.⁴ But, despite the criminal justice system’s long experience with *Brady*, problems persist with prosecutors withholding evidence that should be disclosed to the defense. In recent years, numerous high profile exonerations of wrongfully convicted persons through DNA testing reveal persistent *Brady* violations.⁵

Both locally and nationally, confusion surrounds what appears on the surface to be a fairly simple and well-accepted principle of constitutional law. *Brady* held that “the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, . . .”⁶ Contrary to this seemingly plain ruling, prosecutors have asserted various exceptions to disclosure. As an example, some prosecutors, including those at the United States Department of Justice, justify refusals to disclose favorable evidence to the accused by arguing that *Brady*’s reference to material evidence does not require them to disclose evidence that would not be admissible at trial, is privileged, or that would not result in an acquittal.⁷ Other prosecutors rely on the absence of a specific time requirement for disclosing *Brady* material to delay disclosure until trial as opposed to disclosing it much earlier when

¹ Executive Director, Utah Association of Criminal Defense Lawyers and Research and Writing Attorney, Utah Federal Defender Office.

² County Attorney, Davis County, Utah. The authors would like to thank Veronica Davis for her extraordinary assistance in completing this article.

³ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁴ Hope Metcalf and Judith Resnik, *Gideon at Guantanamo: Democratic and Despotism Detention*, 122 YALE L.J. 2504, 2509 n. 15 (2013) (quoting *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting)).

⁵ See Ellen Yaroshesky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 278, 285 (2004).

⁶ *Brady*, 373 U.S. at 87.

⁷ U.S. Attorneys’ Manual 9-5.001(B)(1), (C) (Dep’t of Justice Oct. 2006).

the defense has a better opportunity to employ the evidence or to investigate its usefulness.⁸ Criminal defense lawyers further report that despite *Brady*'s affirmative duty to seek out exculpatory evidence, prosecutors commonly respond to discovery requests with nonresponsive statements such as that they do not "possess" any exculpatory evidence or that they "have no knowledge" of any such material.⁹ Appellate courts' extreme reluctance to find *Brady* violations absent a showing of prejudice to the defense fuel these kinds of prosecutorial rationalizing.¹⁰

In defense of prosecutors, current *Brady* law is confounding, based on false premises, and fails to account for the human tendency to confirm one's own initial conclusions. Specifically, the materiality test that has evolved for identifying what evidence must be turned over to the defense is hopelessly confusing and impossible to apply in practice. Ambiguity over the exact meaning of the term "material evidence" has injected "uncertainty as to what information [i]s covered, when it ha[s] to be disclosed, and what remedies appl[y] for a violation."¹¹ More specifically, the *Brady* test asks the impossible--prosecutors must determine whether evidence is both favorable and material prospectively, in the abstract, and without the benefit of knowing for certain the defense theory or the significance of particular pieces of evidence.¹² For instance, evidence that may be favorable for the defense case, or even dispositive, may be considered innocuous by the prosecutor since the prosecutor does not know the defense theory or investigation.

Moreover, *Brady* law is founded on the false presumption that prosecutors have the ability to control police officers and can readily gain access to police investigative files.¹³ In actual practice, police agencies are separate entities over which prosecutors exercise no supervisory control.¹⁴ Even if prosecutors could exercise some authority over the police, police officers are reluctant to turn over evidence that may end up derailing their own determination about who committed a crime. Locally, prosecutors have expressed frustrations themselves with their own investigators and with police officers who withhold exculpatory evidence.¹⁵

⁸ Examples of pleadings on file with the authors.

⁹ Examples on file with UACDL (available upon request).

¹⁰ See Sonja N.Y. Kawasaki, *Uncle Ted Teaches A Lesson: The Fairness in Disclosure Act Challenges A Flawed Exculpatory Evidence Disclosure System*, 39 U. DAY. L. REV. 413, 436 (2015).

¹¹ NAT'L ASS'N OF CRIMINAL DEFENSE LAWYER, NOTES ON PROPOSED 18 U.S. § 3014 DUTY TO DISCLOSE FAVORABLE INFORMATION AND COMMENTARY 1 (2011).

¹² Fred Klein, *A View From Inside the Ropes: A Prosecutor's Viewpoint on Disclosing Exculpatory Evidence*, 38 HOF. L. REV. 867, 879-81 (2010); *United States v. Safavian*, 233 F.R.D. 150, 153, (D.D.C. 2005).

¹³ Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1382 (2000).

¹⁴ *Id.*

¹⁵ Sim Gill, Jared Eldridge, Kent Hart, and Monte Sleight, *Utah Fails to Track, Disclose Police Officers' Discipline Records*, Salt Lake Tribune (May 16, 2015), <http://www.sltrib.com/opinion/2513529-155/op-ed-utah-fails-to-track-disclose>.

Adding to these difficulties, prosecutors must fight human nature when determining whether to disclose evidence to the defense. Rather than being rooted in malice, withholding evidence that favors an opponent is rooted in cognitive processing. Social science research explains that even the most well-intentioned prosecutors have subconscious biases and motivations that influence their decisions to withhold favorable evidence.¹⁶ Adding to these complexities, strong competing interests to solve crime while also administering justice constantly nip at prosecutors' heels.¹⁷ In sum, as currently constituted, *Brady* law and practice is confusing and ineffective.

Regardless of *Brady*'s failings, prosecutors, indisputably, have an enormous influence over the fairness of criminal proceedings because only they, either by themselves or vicariously through their law enforcement colleagues, possess potentially exculpatory evidence. When favorable evidence is not disclosed to the defense, no one will ever know about the very existence of the evidence. Moreover, in the vast majority of criminal cases, the criminal justice system includes no checks on prosecutors' *Brady* deliberations because no one reviews decisions not to disclose exculpatory evidence.¹⁸ The integrity of the entire criminal justice process hinges on prosecutors scrupulously fulfilling their duties under *Brady*.

To ensure that all participants in Utah's criminal justice system fully comprehend and appreciate prosecutors' constitutional and ethical duties of disclosure, this article details *Brady*'s requirements and then explains the failures in the current state of the law. After detailing this background, the article summarizes the major proposals currently suggested for reform and critically addresses each one's strengths and weaknesses. Finally, the article proposes a legislative solution that would require police officers to hand over evidence to prosecutors and defines when prosecutors must disclose that evidence to the defense. To ensure that Utah prosecutors adopt the highest ethical and professional standards, the proposed legislation requires the disclosure of all evidence related to the accused whether or not it meets the technical legal definitions that have evolved since *Brady* was decided.

Discarding the materiality requirement and employing a presumption that all evidence must be disclosed will eliminate the confusion that plagues current law and practice. Legislation offers numerous advantages over court rules or internal office policies because a statute would apply to all parties in the criminal process including prosecutors, police officers, and judges alike. A statute will ensure that prosecutors comply with their constitutional and ethical obligations and promote the fair administration of justice. The results would be fairer criminal proceedings and more certain convictions that

¹⁶ Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542 (2010).

¹⁷ Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 57 (1991).

¹⁸ See Medwed, 67 WASH. & LEE L. REV. *supra* note 16 at 1542.

would be more likely to survive unwarranted attacks on appeal or during post-conviction proceedings. To realize these benefits, prosecutors should embrace the legislation and even begin to follow the proposal voluntarily before a statute is enacted.

II. The Scope of Prosecutors' Constitutional Obligations Under Brady: The Duty to Disclose All Evidence That Tends to Exculpate the Accused, Including Impeachment Evidence.

To understand the prosecution's constitutional duty to disclose exculpatory evidence, practitioners must first know the scope of the right that has evolved since the Supreme Court decided *Brady* 50 years ago. *Brady* initially announced a broad framework for determining what evidence is exculpatory and must be disclosed to the defense. Later decisions applied the right to specific types of evidence that prosecutors had withheld. Eventually, the Supreme Court concluded that prosecutors are not only responsible for evidence of which they are aware but must also actively seek out evidence about which they are unaware but that their law enforcement agents possess. This affirmative duty to actively solicit evidence from others has created frustration among prosecutors and defense lawyers alike.

A. *Brady Requires Prosecutors to Disclose Material, Exculpatory Evidence.*

For the first time, the Supreme Court in *Brady* established a criminal defendant's due process right to receive all exculpatory evidence in the prosecutor's possession. *Brady* simply held that "[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, . . ." ¹⁹ Further, the Court applied the duty throughout the life of a criminal case, from the initial filing of charges through trial, sentencing, and beyond. ²⁰

The Court founded its reasoning on several previous cases in which it had barred prosecutors from obtaining convictions based on false evidence. The court not only applied this ruling to prosecutors' deliberate deceptions, such as soliciting perjured testimony, but also to failing to disclose to the defense false statements and allowing false testimony to be offered. ²¹ The overriding theme of the *Brady* decision was that prosecutors' main duty is to see that justice is done. ²²

¹⁹ *Brady*, 373 U.S. at 87.

²⁰ *Id.*

²¹ *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (failing to correct false testimony); *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942) (suppressing false statements); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (soliciting perjured testimony).

²² *Brady*, 373 U.S. at 87.

Despite the Court's use of the term "suppression," the Court explicitly applied its ruling regardless of a prosecutor's subjective intent. Specifically, the Court explained that the duty to disclose exculpatory evidence applies "irrespective of the good faith or bad faith of the prosecution."²³ In applying the right regardless of the prosecutor's intent, the Court clarified that its decision was not designed to punish "society for misdeeds of a prosecutor"²⁴ Rather, the only purpose motivating the Court's ruling was to avoid "an unfair trial to the accused."²⁵ Under the Court's reasoning, society, as well as the defendant, suffers when a conviction results from the unfair withholding of evidence of innocence.²⁶ Specifically, an innocent person is not only convicted but the guilty escape justice.

B. *Subsequent Supreme Court Decisions Struggle to Define Materiality*

In the wake of *Brady*, prosecutors and defense counsel tested the scope of the Supreme Court's framework for determining prosecutors' duty to disclose exculpatory evidence.²⁷ First, in *Giglio v. United States*,²⁸ the Supreme Court extended *Brady* to any materials that the defense could use to establish bias on the part of a government witness.²⁹ Examples of bias include promises of leniency, rewards, or inducements made in exchange for testimony, and anything else that could impeach the credibility of those witnesses on the stand.³⁰ In addition, the *Giglio* Court added an important extension of the *Brady* doctrine--information held by one prosecutor is attributable to the entire "prosecutor's office" as a single entity.³¹ Thus, consistent with the irrelevance of good or bad faith, prosecutors are not immune from *Brady*'s requirements simply because other prosecutors withhold evidence.

Despite *Giglio*'s clarifications, courts continued to struggle with the

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ The Utah Supreme Court has specifically adopted these requirements of the *Brady* doctrine. See *Tillman v. State*, 2005 UT 56, 1131-32, 128 P.3d 1123 (arguing that *Brady* applies to impeachment evidence); *State v. Hay*, 879 P.2d 1, 7 (Utah 1993) (prosecution violates due process when withholding evidence that tends to negate guilt or mitigates guilt); *State v. Knight*, 734 P.2d 913, 917 (Utah 1987) (requiring continual disclosure of exculpatory materials to the defense); *State v. Shabata*, 678 P.2d 785, 788 (Utah 1984) (requiring prosecutors and officers working on a case not to withhold exculpatory evidence or evidence valuable to the defendant).

²⁸ 405 U.S. 150, 154 (1972).

²⁹ *Id.*; *Tillman v. State*, 2005 UT 56, ¶ 27, 128 P.3d 1123.

³⁰ See Medwed, 67 WASH. & LEE L. REV., *supra* note 16 at 1537.

³¹ *Giglio*, 405 U.S. at 154.

meaning of the term “material.” Eventually, the Supreme Court settled on a definition in *United States v. Bagley*.³² The Court weighed various formulations of the materiality requirement and eventually adopted the same standard for ineffective assistance of counsel as set forth in *Strickland v. Washington*.³³ In particular, the court defined material as “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”³⁴ Further, the Court defined a reasonable probability as one that is “sufficient to undermine confidence in the outcome.”³⁵

Continued court frustration with the application of the materiality requirement resulted in the Supreme Court further expounding the concept of materiality in *Kyles v. Whitley*.³⁶ There, the Court distinguished materiality from the preponderance of the evidence standard commonly employed in the law.³⁷ In particular, the Court held that *Bagley*’s materiality test “does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal”³⁸ Rather, *Bagley* only requires a “reasonable probability” of a different result³⁹

In an effort to be even more precise, but ultimately creating a good deal of ambiguity, the Court created a rather subjective value judgment on determining materiality:

The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence in the outcome of the trial.”⁴⁰

Although the wording of this standard allows for relief based on less than a likelihood of a different result, the application of that standard is

³² 473 U.S. at 682.

³³ *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

³⁴ *Bagley*, 473 U.S. at 682.

³⁵ *Id.*

³⁶ 514 U.S. 419 (1995).

³⁷ *Id.* at 434.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (quoting *Bagley*, 473 U.S. at 678).

unclear. For example, unlike a preponderance standard that suggests more than 50 percent in terms of percentages, *Kyles* injects uncertainty in determining whether evidence is material. As Justice Souter aptly observed in a post-*Kyles* dissenting opinion, the use of the term “probability” while claiming at the same time that the materiality test requires less than a preponderance of the evidence “raises an unjustifiable risk of misleading courts [and prosecutors] into treating” the test as requiring a more likely than not standard.⁴¹

C. *The Supreme Court Defines the Scope of Prosecutors’ Duty to Disclose Exculpatory Evidence But Fails to Specify When Such Evidence Must Be Disclosed.*

The duty to disclose established under *Brady* begged numerous questions about how far the duty reached and the procedures to be followed to comply with that case. In particular, prosecutors wondered whether the defense must do something to trigger the duty to disclose. The Supreme Court later clarified that criminal defendants need not specifically request the disclosure of exculpatory evidence.⁴² In *United States v. Agurs*, the Supreme Court found “no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all.”⁴³ As the Court noted, because criminal defendants have a due process right to access exculpatory evidence, defense counsel cannot be expected to request specific pieces of evidence of which counsel has no knowledge.⁴⁴ Rather, “the exculpatory character” of the evidence itself triggers the duty to disclose.⁴⁵ In essence, *Agurs* created a burden on prosecutors to actively review their case files and evidence to determine for themselves whether any evidence is potentially exculpatory.⁴⁶

This affirmative duty to seek out exculpatory evidence presented an obvious practical difficulty—should prosecutors be held responsible when team members such as police officers or investigators withhold exculpatory evidence. The Supreme Court unequivocally answered this question in the affirmative in *Kyles* and expanded prosecutors’ affirmative duty to search for exculpatory evidence.⁴⁷ By necessity, prosecutors are “assigned” the duty to “gauge the likely net effect of” exculpatory evidence because they “alone can know what is undisclosed”⁴⁸ Given this reality, prosecutors have “a

⁴¹ *Strickler v. Greene*, 527 U.S. 263, 298 (1999) (Souter, J. dissenting).

⁴² *United States v. Agurs*, 427 U.S. 97, 106-07 (1976).

⁴³ *Id.* at 107.

⁴⁴ *Id.* at 106-07.

⁴⁵ *Id.* at 107.

⁴⁶ *Id.*

⁴⁷ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

⁴⁸ *Id.*

duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."⁴⁹ The inescapable conclusion to this reasoning is that prosecutors are responsible for *Brady* violations even when exculpatory evidence "is known only to police investigators and not to the prosecutor."⁵⁰

This expansion of prosecutors' responsibility over exculpatory evidence placed an affirmative duty on prosecutors to actively determine what evidence their investigators have uncovered in a criminal case. In other words, in addition to eliminating ignorance as an excuse for not disclosing favorable evidence, *Kyles* affirmatively obligates prosecutors to review police and investigator files to assess the value of the evidence contained in those files.⁵¹ As a result of this "affirmative duty," prosecutors may not rely on police officers' and investigators' determinations that evidence is or is not favorable.⁵² Instead, prosecutors must determine for themselves the nature and value of evidence that their investigators have collected.

The Supreme Court's *Brady* jurisprudence has left open one major question concerning when prosecutors must disclose favorable evidence to the defense. Nevertheless, lower courts and academics broadly agree that *Brady* implicitly established a "constitutional right to timely disclosure of exculpatory information."⁵³ Courts agree that "the government has a constitutional duty to disclose material evidence to a criminal defendant in time for the defendant to make use of it at trial."⁵⁴ The Utah Supreme Court, for example, has endorsed the conclusion that *Brady* requires prosecutors to disclose exculpatory evidence "in time for the defendant to make use of it."⁵⁵ In addition, ethical requirements demand that prosecutors "make timely disclosures to the defense of all evidence . . . that tends to negate the guilt of the accused or mitigates the offense" or the sentence

⁴⁹ *Id.*

⁵⁰ *Id.* at 438.

⁵¹ R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 69 VAND. L. REV. 1429, 1434 (2011).

⁵² *Id.*

⁵³ Cynthia E. Jones, *The Right Remedy for the Wrongfully Convicted: Judicial Sanctions for the Destruction of DNA Evidence*, 77 FORD. L. REV. 2893, 2901 (2009).

⁵⁴ See, e.g., *Boyd v. United States*, 908 A.2d 39, 57 (D.C. 2006) (internal quotation omitted).

⁵⁵ *State v. Bisner*, 2001 UT 99, ¶ 37, 37 P.3d 1073 (quoting *United States v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001)); see also *State v. Hay*, 879 P.2d 1, 7 (Utah 1993) (quoting Utah Rule of Professional Conduct 3.8(d), court rules that due process requires prosecution to timely disclose evidence that tends to negate guilt or mitigates guilt). Similarly, the Utah Supreme Court has specifically adopted the Supreme Court's general jurisprudence regarding *Brady*. See *Tillman*, 2005 UT 56, ¶ 27 (arguing that *Brady* applies to impeachment evidence); see also *State v. Knight*, 734 P.2d 913, 917 (Utah 1987) (requiring the continue disclosure of exculpatory materials to the defense); *State v. Shabata*, 678 P.2d 785, 788 (Utah 1984) (requiring prosecutors and officers working on a case not to withhold exculpatory evidence or evidence valuable to the defendant).

imposed.⁵⁶

III. Brady's Unrealized Promise: The Confounding Materiality Requirement, Competing Interests and Duties, and the Realities of Human Nature Have Defeated the Goal of Disclosure.

Despite the seemingly straight-forward rule announced in *Brady*, numerous practical and conceptual barriers have thwarted the goal of disclosure from being realized. Even given the Supreme Court's repeated admonishments to prosecutors to err on the side of disclosing evidence, recent high profile examples of withheld exculpatory evidence demonstrate that current standards under *Brady* have proven ineffective. Although intentional prosecutorial misconduct contributes to *Brady*'s failure, even the most well-intentioned prosecutors find current *Brady* doctrine confounding and ambiguous. At the heart of this problem is the unworkable materiality requirement. Because the test for materiality is "speculative, backward-looking and confusing," even well-meaning prosecutors do not know when evidence must be disclosed.⁵⁷ Likewise, the theory underlying *Brady* that prosecutors can control police officers and routinely gather investigative materials from them is illusory. Further aggravating this situation, the absence of meaningful consequences for not disclosing favorable evidence combined with defense attorneys' unawareness of the existence of that evidence result in a climate of nondisclosure. Prosecutors face extremely low risk of both judicial accountability or bar disciplinary sanctions in response to *Brady* violations when they are uncovered.

Each of these explanations presupposes that prosecutors mean well but that internal and external pressures create a climate of winning as opposed to securing justice, especially in high profile or egregious criminal cases. Emerging research on human cognitive thought processing supports this conclusion—social scientists have uncovered subconscious forces that impel prosecutors to withhold favorable evidence from the defense. Vague notions of justice provide no guidance either because prosecutors have strong competing duties to criminal defendants, crime victims, and the public alike. Arguably, current *Brady* law and actual practice actually discourage prosecutors from disclosing favorable evidence, inoculate them from error, and even encourage them to conceal it.⁵⁸

⁵⁶ Utah R. Prof. Cond. 3.8(d); see also *Hay*, 879 P.2d at 7 (quoting Utah Rule of Professional Conduct 3.8(d)).

⁵⁷ Bennett L. Gersham, *Reflections on Brady v. Maryland*, 47 SO. TEX. L. REV. 685, 713 (2006).

⁵⁸ *Id.* at 712.

A. *The Materiality Test is Ill-Defined and Ill-Suited To Determine Standards of Disclosure Pretrial.*

The confusing, ambiguous definition for materiality has prevented the realization of the Supreme Court's oft-repeated assumption that prosecutors will err on the side of disclosure in many instances. In discussing the materiality test in *Agurs*, the Supreme Court presumed that "the prudent prosecutor will resolve doubtful questions in favor of disclosure."⁵⁹ Similarly, in *Kyles v. Whitley*, the Court rested its decision on the premise that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."⁶⁰ Indeed, long before deciding *Brady*, the Court defined prosecutors' sole interest "in a criminal prosecution [a]s not that it shall win a case, but that justice shall be done."⁶¹

Contrary to these assumptions, the materiality requirement encourages prosecutors to withhold favorable evidence rather than disclosing it. That test has proven ineffective because it has created a climate of "well-intentioned lawyers struggling to apply an unworkable standard."⁶² Assessing whether evidence would have established a "reasonable probability" of a different result is ill-suited to a pretrial prediction of the relative value of evidence because that test embodies an appellate standard of review of a trial court record.⁶³ Retrospectively determining the likelihood of a different result on appeal provides little guidance to prosecutors who must assess the relevance of evidence prospectively and without fully comprehending how the defense may view evidence differently.⁶⁴ Evidence that may seem innocuous or neutral to a reasonable prosecutor, may be decisive to a defense attorney who may know of additional exculpatory evidence or who reasonably views the evidence in context with other facts.

Instead of clarifying prosecutors' obligations, the materiality requirement asks prosecutors to perform an impossible task:

By its own terms, the materiality standard requires a prosecutor to compare the evidence at issue to "the whole case"

⁵⁹ *United States v. Agurs*, 427 U.S. 97, 108 (1976).

⁶⁰ 514 U.S. 419, 439 (1995).

⁶¹ *Berger v. United States*, 295 U.S. 78, 88 (1935); see also *State v. Saunders*, 1999 UT 71, ¶ 31, 992 P.2d 951 (quoting *Berger* and holding that "prosecutors have duties that rise above those of privately retained attorneys.").

⁶² Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L. REV. 481, 491-92 (2009).

⁶³ Klein, 38 HOF. L. REV., *supra* note 12 at 879-81; *United States v. Safavian*, 233 F.R.D. 150, 153, (D.D.C. 2005).

⁶⁴ Klein, 38 HOF. L. REV., *supra* note 12 at 879-81.

absent that evidence (even though the case has not yet been tried), and then determine whether the evidence is significant enough to undermine confidence in a conviction based on that case (even though a conviction has not yet been obtained). Because the doctrine requires prosecutors making a prospective decision to apply a retrospective standard, even well-intentioned prosecutors can have difficulties following the law.⁶⁵

In essence, the materiality test asks prosecutors to conduct an appellate-style harmless error analysis before a case has gone to trial, without knowing the relevance of the evidence.⁶⁶ As a result of the presumption of regularity inherent in this test, error seldom results.

The United States Supreme Court has compounded prosecutors' difficulty in applying the materiality test because its decisions since *Brady* have parsed the meaning of materiality and regularly upheld prosecutors' decisions to withhold favorable evidence. The Supreme Court's emphasis on the likelihood of a different outcome essentially inoculates prosecutors from error.⁶⁷ The Court's strict interpretation of materiality coupled with its refusal to find error has resulted in prosecutors looking for reasons not to disclose potentially exculpatory evidence.⁶⁸ In the absence of any real consequences to withholding favorable evidence from the accused, prosecutors lack accountability.

The Supreme Court's hands off approach raises enormous concerns because the extent of prosecutors' *Brady* violations is impossible to know. "[T]he vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day."⁶⁹ Without any real threat of exposure under existing Supreme Court precedent, prosecutors are free to err on the side of nondisclosure. Ironically, this environment is the direct opposite result that the Supreme Court envisioned when it decided *Brady* and its progeny.⁷⁰

⁶⁵Burke, 84 IND. L. REV., *supra* note 62 at 492.

⁶⁶*Id.* at 486-87.

⁶⁷ See Medwed, 67 WASH. & LEE L. REV., *supra* note 16 at 1540-41; see, e.g., *United States v. Agurs*, 427 U.S. 97, 104 (1972) ("implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.");

⁶⁸ Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Take of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 647 (2002).

⁶⁹ Medwed, 67 WASH. & LEE L. REV., *supra* note 16 at 1540.

⁷⁰ *Kyles v. Whitley*, 514 U.S. 419, 439; *Agurs*, 427 U.S. at 108.

B. *Prosecutors' Vague Duty to Serve Justice Compounds Their Difficulty in Applying the Materiality Test.*

Adding to the complexity of the materiality standard is prosecutors' equally "nebulous obligation to do justice."⁷¹ As alluded to above, the Supreme Court pronounced in 1935, long before *Brady*, that prosecutors have an overarching duty to promote justice as opposed to achieving convictions:

[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocent suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.⁷²

Despite the grand ideals pronounced in this statement, serving justice is as ill-defined or more so than the materiality requirement. Prosecutors have competing interests that render justice an elusive concept, at best. The demands of crime victims, political constituents, supervisors, and society as a whole have been explored in depth.⁷³ So have the competing theories underlying punishment; namely, retribution, deterrence, incapacitation, and rehabilitation.⁷⁴ As these varying interests point out, both internal pressures to solve crimes and external pressures to achieve just results create a cloudy environment with few clear choices.

On top of these vague notions of justice and competing pressures to resolve criminal prosecutions successfully is the post hoc determination

⁷¹ See Medwed, 67 WASH. & LEE L. REV., *supra* note 16 1533, 1542.

⁷² *Berger*, 295 U.S. at 88.

⁷³ See, e.g., Zacharias, 44 VAND. L. REV., *supra* note 17 at 57.

⁷⁴ Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 982 (2009).

prosecutors must make when applying *Brady*'s materiality requirement. In addition to assessing the many competing interests involved in a criminal prosecution, prosecutors must apply the materiality test in the abstract without knowing the actual relevance of the undisclosed evidence in the context of the entire case. Given the fog under which materiality and justice must be assessed, even ethical prosecutors are apt to error.⁷⁵

The catastrophic result is that innocent persons are convicted as illustrated by the significant number of exonerations that the media reports regularly.⁷⁶ This result is understandable given the competing interests on prosecutors. A prosecutor who seeks to balance all of the applicable interests in an effort to do justice may rationally conclude that justice requires "suppressing exculpatory evidence that does not appear to meet the [Supreme] Court's definition of materiality."⁷⁷

C. *Given Prosecutors' Cognitive Biases That Prevent Prosecutors From Disclosing Exculpatory Evidence, Brady's Materiality Requirement Fails.*

Adding to these forces that encourage nondisclosure, current research on prosecutors' cognitive thought processing explains that strong subconscious biases influence prosecutors to withhold evidence because numerous forces impel them to confirm the initial decision to prosecute. Just as the factors discussed above presume that prosecutors are well meaning and ethical, this research into cognitive reasoning reveals that human nature itself promotes nondisclosure. In other words, even the most ethical prosecutor can err given the strong subconscious forces that influence human beings. Although this research presumes prosecutors' good intentions, it cries out for reform. *Brady*'s current iteration defies human nature as well as the reality that the materiality test is unworkable and must be abandoned.

Research into cognitive reasoning has identified confirmation bias which is simply the tendency to confirm one's working hypothesis.⁷⁸ In the law enforcement context, prosecutors tend to review case files with the assumption that the person is guilty because an arrest has been made.⁷⁹ Even though prosecutors may decline a fair number of prosecutions, research shows that the fact that a police officer has already concluded that a crime has been committed influences charging decisions. The result is that prosecutors tend to emphasize evidence that confirms guilt to the exclusion of "exculpatory evidence that might disprove the working hypothesis."⁸⁰

⁷⁵ Burke, 84 IND. L. REV., *supra* note 62 at 492.

⁷⁶ Yaroshefsky, 8 D.C. L. REV. at 285, *supra* note 5; Medwed, 67 WASH. & LEE L. REV., *supra* note 16 at 1539-40.

⁷⁷ Burke, 84 IND. L. REV., *supra* note 62 at 483.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

Confirmation bias may, for example, cause a prosecutor to give undue weight to an eyewitness identification even though the circumstances suggest that the witness is mistaken.⁸¹

Once the prosecutor has confirmed the initial assumption of guilt, selective information processing influences the prosecutor to accept at face value evidence consistent with guilt while devaluing contradictory evidence.⁸² Under selective information processing, great weight is placed on evidence that supports guilt as it surfaces and while exculpatory evidence is minimized.⁸³ These factors result in devaluing even significant evidence that supports innocence and dismissing it as irrelevant, unreliable, or inadmissible.⁸⁴ Witnesses who contradict the prosecution's theory become biased or insignificant to the overall case.⁸⁵

Next, like humans generally, resistance to cognitive dissonance or internal guilt causes prosecutors to justify their conclusions and decisions.⁸⁶ Cognitive dissonance occurs when a person's actions are inconsistent with that person's beliefs or morals.⁸⁷ To avoid dissonance such as feelings of guilt, research has shown that people commonly adjust their beliefs to resolve the dissonant thoughts.⁸⁸ Prosecutors, in particular, when confronted with evidence that they may have charged an innocent person tend to discount the evidence supporting innocence and overvalue the evidence supporting guilt.⁸⁹

Research has replicated other cognitive biases that aggravate this resistance to change one's conclusions. Belief perseverance or resistance is the natural disinclination "to relinquish initial conclusions or beliefs, even when the bases for those initial beliefs are undermined."⁹⁰ A vivid illustration of this human tendency occurs when prosecutors refuse to admit a wrongful conviction even when confronted with DNA evidence that proves that a person could not have committed the crime charged.⁹¹

These cognitive biases hamper prosecutors' ability to independently evaluate whether evidence is exculpatory and must be disclosed under *Brady*. For example, even the most fair-minded prosecutor may reason that the initial judgment call to proceed with a prosecution in the face of evidence favorable to the accused obviates any need to disclose that evidence:

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 495-96.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹⁰ Keith A. Findley & Michael S. Scott, *Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WISC. L. REV. 291, 314.

⁹¹ *Id.* at 315.

If a conscientious prosecutor faces exculpatory evidence that would shake her faith in any conviction she might obtain without the evidence, then she will presumably dismiss charges against the defendant. This would render disclosure of the evidence, and Brady itself, irrelevant. On the other hand, if the exculpatory evidence does not undermine her belief in the defendant's guilt, she is likely to conclude that the evidence will not affect the jury's determination either. Accordingly, she would treat the evidence as immaterial and therefore not within her Brady obligation.⁹²

Again, it bears repeating that these kinds of thought processes do not reflect the general character or ethics of individual prosecutors. Rather, the research demonstrates that humans tend to confirm their initial beliefs regardless of personal ethics, logic, or rationality. Further, this phenomenon occurs regardless of the strength of countervailing evidence. Just as with any other value judgment, the decision whether evidence is exculpatory is subject to human error and judgment.

D. *Brady Is Founded on the False Premise That Prosecutors Control and Supervise the Police and Operate As a Single Entity.*

In addition to these forces, numerous false assumptions about the relationship between prosecutors and the police prevent realizing the promise of *Brady*. As explained previously, the Supreme Court views prosecutors as having constructive knowledge of all information within the control of police officers and investigators working for the prosecution.⁹³ Prosecutors have “a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.”⁹⁴ This holding establishes an affirmative duty on prosecutors to actively seek out exculpatory evidence rather than relying on the police or investigators to disclose it.

The Supreme Court’s imposition of an agency-type of relationship between prosecutors and law enforcement officers is based on an overlooked, false premise—the assumption that prosecutors and the police form “a

⁹² Burke, 84 IND. L.J., *supra* note 62 at 488.

⁹³ *Kyles*, 514 U.S. at 437.

⁹⁴ *Id.*

cohesive team.”⁹⁵ Indeed, *Kyles* presumes that “the prosecutor has the means to discharge the government’s *Brady* responsibility if he will” by implementing “procedures and regulations” that will require the police to disclose exculpatory evidence.⁹⁶ To the contrary, in actual practice, prosecutors do not control or even supervise police officers. “According to the [Supreme] Court’s reasoning, because the prosecutor has the *ability* to learn of exculpatory evidence in the hands of police, she bears the *responsibility* under *Brady* to ensure disclosure to the defense.”⁹⁷ Rather, police departments constitute separate agencies that are led by a chief who may or may not understand or support *Brady*.⁹⁸ *Brady* and its progeny fail to acknowledge these complexities and, instead, affirmatively obligate prosecutors to seek out and locate exculpatory evidence.⁹⁹

Even assuming that prosecutors and police are on good terms, serious practical difficulties interfere with prosecutors’ abilities to obtain evidence from police officers. Most obviously, police officers battle their own competing views of justice and may value solving specific crimes above broad notions of fairness. Further, police officers may risk discipline at work or lost advancements in employment for disclosing evidence that may well result in an accused person walking free.¹⁰⁰

Brady further fails to appreciate the possibility that police officers and investigators may be actively concealing evidence from prosecutors. Even more troubling is the possibility that the police may not document the evidence at all by memorializing or cataloging it in official repositories.¹⁰¹ Thus, prosecutors may have no ability to locate the evidence even if they wanted to. Accordingly, if police “cooperation is not forthcoming, the prosecutor’s ability to comply with *Brady* is fatally compromised.”¹⁰² Even the most honest, ethical prosecutor cannot comply with *Brady* when the police are intentionally withholding evidence.

Practical difficulties plague *Brady* on the prosecution side as well. The Supreme Court’s decision does not address what prosecutors must actually do to fulfill their constitutional obligation to search for favorable evidence to the defense. Even if prosecutors routinely request police officers to turn over all evidence collected in criminal cases, what if the police withholds evidence? Is merely asking the police enough or must prosecutors search through police files and locate exculpatory evidence? The Supreme Court has not specified; rather, it has globally ruled that prosecutors are

⁹⁵ Jonathon Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 *Stan. L. Rev.* 743 (2015) (internal quotation omitted).

⁹⁶ *Kyles*, 514 U.S. at 438.

⁹⁷ Fisher, 68 *FORDHAM L. REV.*, *supra* note 13 at 1379, 1382.

⁹⁸ *Id.*; Medwed, 67 *WASH. & LEE L. REV.*, *supra* note 16 at 1563.

⁹⁹ Medwed, 67 *WASH. & LEE L. REV.*, *supra* note 16 at 1563.

¹⁰⁰ Abel, 67 *STAN. L. REV.*, *supra* note 95 at 779.

¹⁰¹ Medwed, 67 *WASH. & LEE L. REV.*, *supra* note 16 at 1564.

¹⁰² Fisher, 68 *FORDHAM L. REV.*, *supra* note 13 at 1384.

responsible for their agents' actions.¹⁰³

Prosecutors understandably protest that they lack the time and resources to regularly peruse police files for exculpatory evidence. Most prosecutors are overworked and underpaid.¹⁰⁴ Heaping more time consuming responsibility upon them is not only unrealistic but also increases the chances that they may make other mistakes that could lead to injustices.¹⁰⁵ Increased prosecution budgets may be required before such demands could be implemented.¹⁰⁶ In turn, requiring an exhaustive search of every police officer's files in every criminal case could "condemn the prosecution of criminal cases to a state of paralysis."¹⁰⁷

E. *Courts Have Demonstrated that They are Unwilling to Reform the Current Formulation of the Brady Doctrine.*

This bleak picture of current disclosure practice presents a compelling case for abandoning the *Brady* doctrine. The unworkable nature of the materiality requirement, vague notions of justice, cognitive bias, practical impediments to enforcing *Brady* on the police, and the absence of any real consequences for withholding exculpatory evidence conspire to prevent disclosure of favorable evidence to the accused. But, despite numerous high profile examples of *Brady* violations, the Supreme Court has repeatedly endorsed the materiality standard and has exhibited an extreme reticence to sustain *Brady* violations.

As a result, little incentive currently exists for reform. Indeed, as cognitive bias demonstrates, prosecutors can all too easily justify withholding favorable evidence by weighing it "in a fashion that suggests it is immaterial."¹⁰⁸ Even when defendants learn of potential *Brady* violations, the materiality standard almost guarantees that appellate courts hold prosecutors harmless. The few studies that have been performed on the reversal rate for *Brady* violations indicate that courts find prejudice in less than 12% of cases.¹⁰⁹ The "high burden" created by the materiality standard largely accounts for this paltry reversal rate.¹¹⁰ As a result, prosecutors have

¹⁰³ *Kyles*, 514 U.S. at 437-38.

¹⁰⁴ Brian P. Fox, *An Argument Against An Open File Policy in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 448 (2013).

¹⁰⁵ *Imbler v. Patchman*, 424 U.S. 409, 425-26 (1976).

¹⁰⁶ See Terri Langford, *Costs and Questions as Texas Implements New Discovery Law*, Texas Tribune (May 29, 2014) (available at <http://www.texastribune.org/2014/05/29/michael-morton-act-driving-evidence-costs-das/>) (detailing need for funding following passage of Michael Morton Act that requires prosecutors to disclose specific items of evidence to defense in all criminal cases).

¹⁰⁷ Abel, 67 STAN. L. REV., *supra* note 95 at 755.

¹⁰⁸ Medwed, 67 WASH. & LEE L. REV., *supra* note 16 at 1543.

¹⁰⁹ Medwed, *supra* note 16, at 1543-44.

¹¹⁰ *Supra* note 16, at 1543-44.

little to fear in erring on the side of nondisclosure.

If the materiality standard were the only culprit in explaining prosecutors' reticence to disclose favorable evidence to the defense, the impetus for reform would likely rest with the judicial branch to alter the standard under *Brady*. However, the Supreme Court has shown no indication of altering course. If anything, the *Brady* doctrine is firmly entrenched in judges' minds throughout the nation. Thus, reform must come from other sources.

IV. The Search for Reform: Numerous Reforms Proposals Have Failed to Produce Any Meaningful Change.

Despite numerous pushes for *Brady* reform, few proposals have taken root, mainly because of practical difficulties and prosecutors' legitimate objections. Reform proposals include enforcing ethical rules to deter *Brady* violations, implementing internal office procedures and policies such as open file policies, amending court rules to require disclosure of favorable evidence, and statutory mandates. So far, all of these proposals have failed. The reasons for failure strike a common theme—the unwillingness of disciplinary bodies, appellate courts, legislators, and prosecutors themselves to hold prosecutors and police accountable for withholding constitutionally required disclosures.

A. *Ethics Disciplinary Bodies Fail to Sanction Prosecutors for Brady Violations.*

Scholars have commonly focused on punishing prosecutors for *Brady* violations in an effort to motivate prosecutors to disclose favorable evidence regardless of the materiality standard.¹¹¹ Despite these calls for action, experience has shown that state disciplinary bodies rarely punish prosecutors for withholding exculpatory evidence.¹¹² In fact, bar disciplinary complaints for possible *Brady* violations are so rare that most disciplinary bodies report never having considered a claim for misconduct for failing to disclose evidence.¹¹³

Practical realities account for the infrequency of ethical complaints. The absence of bar complaints means, by definition, that judges and criminal defense lawyers do not report possible unethical conduct to disciplinary authorities. Criminal defense lawyers are extremely loath to file bar complaints because they commonly work with the same prosecutors in

¹¹¹ *Supra* note 16, at 1544.

¹¹² Bennett L. Gershman, *Prosecutorial Misconduct* 568 (2d ed. 2006); Cassidy, 69 *VAND. L. REV.*, *supra* note 51 at 1460-61.

¹¹³ Medwed, 67 *WASH. & LEE L. REV.*, *supra* note 16, at 1546.

multiple adversarial proceedings. Engendering prosecutors' anger is counterproductive for defense lawyers who must cooperate with prosecutors to secure favorable plea bargains, sentencing outcomes, and evidentiary resolutions.¹¹⁴ More importantly, defense attorneys know that their clients are the ones who truly suffer when counsel creates friction with a prosecutor as a result of bar complaints. Alleging potentially serious ethical allegations is simply bad business for defense lawyers and is, thus, self-defeating.

In the rare instance when a bar complaint is filed against a prosecutor, disciplinary bodies infrequently impose any discipline. Prosecutors, as representatives of "the People" enjoy great latitude in pursuing criminal conduct and protecting the public.¹¹⁵ As a result, "ethical codes [and those who enforce them] treat prosecutors deferentially, formulating generous boundaries for what comprises a legitimate exercise of discretion." Disciplinary bodies appear to view withholding exculpatory evidence as honest mistakes or prosecutors just doing their jobs.

Recent attempts to promote ethical solutions to *Brady* violations have likewise failed. In 2009, the American Bar Association issued Formal Opinion 09-454 that called for interpreting Model Rule of Professional Conduct 3.8 more broadly than constitutional requirements under *Brady*.¹¹⁶ That rule imposes on prosecutors the special obligation to disclose evidence that tends to negate the defendant's guilt or mitigate the sentence:

The prosecutor in a criminal case shall:

...

(d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor . . .¹¹⁷

The ABA Opinion concluded that this rule imposes an ethical duty on prosecutors to disclose evidence that does not necessarily fall under *Brady* jurisprudence. Essentially, the rule does not embody the materiality

¹¹⁴Monroe Freedman, *The Use of Unethical and Unconstitutional Practices and Policies By Prosecutors' Offices* 52 WASH. L. J. 1, 10-11 (2012); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 735 (1987).

¹¹⁵Medwed, 67 WASH. & LEE L. REV., *supra* note 16, at 1547-48.

¹¹⁶ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, FORMAL Op. 454 (2009).

¹¹⁷MODEL RULES OF PROF'L CONDUCT R. 3.8(d); *See also* UTAH RULES OF PROF'L CONDUCT 3.8(d). (Utah has adopted this rule verbatim).

test and, instead, applies regardless of whether a different result would be likely. According to the ABA, “Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome.”¹¹⁸

Only a few state courts have construed Model Rule 3.8 since the ABA issued opinion 09-454 and those states have reached mixed results. The Supreme Courts of Ohio and Wisconsin have opted to interpret Rule 3.8 coextensively with *Brady*’s requirements.¹¹⁹ These courts reason that applying different standards under the court rule and constitutional requirements would be too confusing.¹²⁰ In contrast, the Court of Appeals for the District of Columbia and the North Dakota Supreme Court have interpreted Rule 3.8(d) as providing greater protection to criminal defendants than *Brady*.¹²¹ These courts have discounted any concern for confusion and have concluded that the due process right to a fair trial demands a broad interpretation of Rule 3.8.¹²²

As these conflicting approaches demonstrate, rather than clarifying prosecutors’ duties under ethical rules, opinion 09-454 has led to more disagreement. Thus, that opinion, so far, serves as a poor model to follow in remedying *Brady*’s many flaws.

Further, since opinion 09-454 was issued, few, if any, state disciplinary bodies have adopted the ABA’s interpretation.¹²³ More importantly, bar complaints against prosecutors have not increased nor has the incidence of sanctions for *Brady* violations. Among state bar disciplinary bodies, Formal Opinion 09-454 has largely fallen on deaf ears.

Other commentators have called for various other types of more robust discipline to combat prosecutorial misconduct such as the formation of special misconduct panels devoted to prosecutors.¹²⁴ But, such proposals are misplaced because they falsely presume that all prosecutors who withhold favorable evidence are “bad actors” who engage in “gamesmanship to dodge their obligations to disclose.”¹²⁵ The research on

¹¹⁸ ABA COMM. ON ETHICS & PROF’L RESPONSIBILITY, FORMAL Op. 454 (2009).

¹¹⁹ *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125 (Ohio 2010); *In re Riek*, 834 N.W.2d 384 (Wisc. 2013); see also *In re Attorney C*, 47 P.3d 1167 (Colo. 2002) (reaching a similar conclusion before Opinion 09-454 was issued).

¹²⁰ *Kellogg-Martin*, 923 N.E.2d at 130; *Riek*, 834 N.W.2d at 390-91.

¹²¹ *In re Kline*, No. 13-BG-851 (D.C. April 4, 2015); *In re Disciplinary Action Against Feland*, 820 N.W.2d 672 (N.D. 2012); see also *In re Jordan*, 913 So. 2d 775 (La. 2005) (adopting this reasoning before the ABA issued Opinion 09-454).

¹²² *Kline*, No. 13-BG-851, slip. Op. at 21-22; *Feland*, 820 N.W.2d at 678.

¹²³ Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847, 860-64 (2010).

¹²⁴ Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463-64 (2001); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 278, 297-99 (2004)..

¹²⁵ Medwed, 67 WASH. & LEE L. REV., *supra* note 16 at 1548.

cognitive bias refutes this presumption. Rather, more commonly, well-meaning prosecutors underdisclose favorable evidence because of natural human tendencies to confirm their own conclusions. More pressing than intentional prosecutorial misconduct is “how well-meaning prosecutors tend to interpret their constitutional disclosure obligations in a way that all too often leads to withholding.”¹²⁶ Reliance on bar disciplinary sanctions to promote compliance with *Brady*, entirely fails to capture this more common type of noncompliance.

B. *Establishing Internal Prosecutorial Office Policies and Procedures Are Doomed to Fail Because They Rely on the Same False Premises Underlying Brady.*

Another frequently touted proposal to improve *Brady* compliance is requiring prosecutors to implement internal office policies and procedures. But, such self-policing efforts alone are unrealistic and would be ineffective as long as current *Brady* law remains in place. Office policies do not address the confounding materiality requirement, confront cognitive biases, or clarify competing notions of justice that plague current *Brady* doctrine. Likewise, this approach overlooks prosecutors’ lack of control and influence over police officers. In sum, no policy or procedure addresses the dynamics that shape prosecutorial reticence to disclose evidence.

Various internal office procedures have been suggested to ensure compliance with *Brady*. These suggestions include regular training on *Brady*’s requirements, establishing clear guidelines for disclosure, supervisory follow up to ensure compliance, latitude for mistakes and later disclosures, and rewards for disclosing favorable evidence in close calls.¹²⁷ An even more radical proposal is to create a *Brady* Review Board or compliance division that would actively promote disclosure and review decisions after the fact.¹²⁸ Such bodies would conduct random reviews that would determine the correctness of decisions.¹²⁹

Despite these reform efforts, numerous obstacles prevent real change from being realized. First, policies or even a review board cannot resuscitate the incomprehensible materiality requirement. As detailed previously, the materiality requirement befuddles even the most scrupulous prosecutor. “It is hard for even the most fair-minded prosecutor to apply a doctrine

¹²⁶ Medwed, *supra* note 16 at 1551.

¹²⁷ Medwed, *supra* note 16. at 1551-53.

¹²⁸ See Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA J. SOC. POL’Y & L. 305, 317 n.69 (2001); Bennett L. Gersham, *Reflections on Brady v. Maryland*, 47 SO. TEX. L. REV. 685, 687 n. 10 (2006).

¹²⁹ Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463-64 (2001).

dominated by the muddled concept of materiality.”¹³⁰ Often, prosecutors themselves cannot agree upon the meaning of materiality.¹³¹ A review board would be superfluous and ineffectual because materiality is largely in the eye of the beholder. As long as materiality is the test for when to disclose evidence, any internal policy or review board will fail.

Second, internal policies and procedures do not account for cognitive bias. The human tendency to affirm one’s own decisions remains at issue even under clearer policies and procedures.¹³² The same is true of prosecutors reviewing the decisions of their fellow prosecutors. Absent “external voices,” prosecutors, like any other group of people, are apt to engage in “group think.”¹³³ “Prosecutors alone, whether individually or in groups, . . . may not provide the diversity of viewpoint necessary to foster neutral decision-making.”¹³⁴ Prosecutors themselves report that they commonly conclude that accused persons routinely lie, are corrupt, and are, therefore, guilty.¹³⁵ Absent some external, independent reviewer, prosecutors are likely to ratify fellow prosecutors’ charging decisions.

Third, as explained previously, the *Brady* doctrine itself, as well as most reform proposals, fail to account for prosecutors’ lack of control over police officers would gather the very evidence that is constitutionally required to be disclosed. This article has already debunked the Supreme Court’s notion that that “the prosecutor has the means to discharge the government’s *Brady* responsibility if he will” by implementing “procedures and regulations” that will require the police to disclose exculpatory evidence.¹³⁶ Prosecution policies and procedures hold no sway over police officers. Rather, “police agencies generally operate independently of prosecutors, and answer to different constituencies.”¹³⁷

Fourth, on a more practical level, prosecutorial “ambivalence” toward *Brady* poses a large barrier to reform.¹³⁸ Given courts’ repeated endorsement of *Brady*, the infrequency of reversals on appeal, and the near absence of bar complaints, prosecutors have little motivation to implement review boards or internal policies. This attitude is especially understandable given budget cuts in the wake of the Great Recession of the past few years. Recent funding deficits have left large holes in prosecution budgets that

¹³⁰ Medwed, 67 Wash. & Lee L. Rev., *supra* note 16 at 1551.

¹³¹ Medwed, *supra* note 16. at 1551-52.

¹³² Burke, 84 Ind. L.J., *supra* note 62 at 495.

¹³³ Alafair Burke, *Prosecution (Is) Complex*, OHIO ST. J. CRIM. L. 703, 712 (2013) (reviewing Daniel S. Medwed’s seminal book on prosecutorial thought processes, *Prosecution Complex: America’s Race to Convict and Its Impact on the Innocent* (New York Univ. Press 2012)).

¹³⁴ *Id.*

¹³⁵ Burke, *supra* note 133 (citing Mark Baker, D.A., *Prosecutor’s in Their Own Words* 47 (1999)).

¹³⁶ *Kyles*, 514 U.S. at 438.

¹³⁷ Fisher, 68 FORDHAM L. REV. *supra* note 13 at 1382-83.

¹³⁸ Medwed, 67 WASH. & LEE L. REV., *supra* note 16 at 1553.

remain unresolved even in more prosperous economic times. Prioritizing procedures that would complicate prosecutors' jobs instead of easing their workloads would be a nonstarter. In light of these financial realities, setting up additional barriers to efficiencies when resources are already limited is unrealistic and impractical.

C. *Open File Policies Provide Some Promise, But They Are Subject to the Same Abuses as Brady.*

One specific iteration of an internal prosecution policy for remedying *Brady's* vagaries is the adoption of prosecutorial open file policies. In theory, under an open file policy, prosecutors agree to provide criminal defense lawyers access to all non-privileged evidence in the prosecution file including witness statements, witness names, police reports, and physical evidence.¹³⁹ Supporters of this approach laud its simplicity and compare it to civil practice in which attorneys routinely disclose all evidence in their files under the Rules of Civil Procedure except for privileged information.¹⁴⁰ Proponents also note that full defense access to evidence increases efficiencies because criminal defendants are more likely to plead guilty when they know the full strength of the evidence against them.¹⁴¹

Traditionally, open file policies have been adopted voluntarily by prosecutors on a jurisdiction by jurisdiction basis.¹⁴² The result has been an ad hoc application of the policy that varies among prosecution offices.¹⁴³ Thus, depending on how an office interpreted the policy, access to evidence was unpredictable and applied unevenly.¹⁴⁴ Moreover, because defendants have no legal right to enforce voluntary office policies and no one else outside the prosecution office enforces such policies, prosecutors have viewed the disclosure of evidence as a privilege that can be withdrawn at will.¹⁴⁵

Given these inherent weaknesses in open file policies, two states have changed their discovery laws to require prosecutors to disclose all non-privileged information to the defense. In 2004, North Carolina was the first state to adopt a true open file policy as a matter of statutory duty.¹⁴⁶ Then, in

¹³⁹ Brian Gregory, *Brady is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 89 U.S.F. L. REV. 819, 846 (2012).

¹⁴⁰ *Id.*

¹⁴¹ Brian P. Fox, *An Argument Against An Open File Policy in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 429-30 (2013).

¹⁴² MIKE KLINKOSUM, PURSUING DISCOVERY IN CRIMINAL CASES: OPEN THE PROSECUTION'S FILES, THE CHAMPION 26 (May 2013).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ S.L. 2004-154, S.B. No. 52 (N.C. 2004) (enacted as N.C. Gen. Stat. § 15A-903 (2014)).

2010, Ohio amended its Rule of Criminal Procedure 16 to require prosecutors to disclose witness statements and police reports in advance of trial.¹⁴⁷

Despite these positive steps toward reform, significant drawbacks continue to plague open file policies. Like current *Brady* practices, open file policies are subject to abuse. Prosecutors and police officers may still hide evidence or decide that evidence is not required to be disclosed even under a statutory or court rule-mandated open file policy.¹⁴⁸ Although the risk of unethical or even illegal practices are possible under any discovery reform proposal, it bears reminding that open file policies are no panacea as the term “open file” might suggest.

A specific abuse that some prosecutors have employed is to remove evidence from prosecution files under the work product doctrine. “At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he [or she] can analyze and prepare his client's case.”¹⁴⁹ In the civil context, the doctrine has developed into the theory that each side should do their own legwork” of interviewing witnesses themselves.¹⁵⁰

Such reasoning has no application in criminal cases where personal liberty is at issue. Indeed, it is controverted that due process requires prosecutors to disclose evidence known to the prosecution that tends to negate guilt or mitigate the sentence.¹⁵¹ Civil doctrines of discovery practice have no application to constitutional mandates.¹⁵² Allowing the work product doctrine to shelter prosecutors from required *Brady* disclosures would endorse prosecution gamesmanship and approve of prosecutors’ knowingly withholding evidence that could acquit defendants or reduce their criminal liability. Due process obligates prosecutors to volunteer evidence as opposed to shielding it from view.¹⁵³

In any event, prosecutors’ affirmative duty to produce exculpatory evidence to the defense even if the defense fails to request the evidence rejects a broad application of the work product doctrine in criminal cases.¹⁵⁴ As the Supreme Court held in *Bagley*, “an incomplete response to a specific [discovery] request . . . has the effect of representing to the defense that the

¹⁴⁷ OHIO R. CRIM. P. 16; see Charles L. Grove, *Criminal Discovery in Ohio: ‘Civilizing’ Criminal Rule 16*, 36 U. DAYTON L. REV. 143, 149 (2011) (analyzing the rule change).

¹⁴⁸ Brian P. Fox, *An Argument Against An Open File Policy in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 443 (2013).

¹⁴⁹ *United States v. Nobles*, 422 U.S. 225, 238 (1975).

¹⁵⁰ Anne Shaver, *United States v. Fort and the Future of Work Product in Criminal Discovery*, 44 CAL. W. L. REV. 127, 143 (2007).

¹⁵¹ *Brady*, 373 U.S. 87.

¹⁵² Shaver, 44 CAL. W. L. REV. *supra* note 150 at 144

¹⁵³ *Id.*

¹⁵⁴ *Kyles*, 514 U.S. at 437.

evidence does not exist.”¹⁵⁵ The same is true when the prosecution represents that its files are open but fails to inform the defense that additional information has been removed. Absent complete communication to the contrary, the defense could reasonably conclude that no other evidence exists and may “abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.”¹⁵⁶ Thus, the work product doctrine lulls defense attorneys into a false sense of security and “misleading” the defense about the existence or nonexistence of evidence.¹⁵⁷

Nevertheless, some prosecutors have invoked the work product doctrine to remove notes of witness interviews even in supposedly open file offices. Such an approach not only violates *Brady*’s constitutional mandate but also misinterprets the work product doctrine itself. Police officers’ and prosecution investigators’ notes of witness interviews do not encompass the prosecutor’s mental impressions in anticipation of trial.¹⁵⁸ Further, in criminal cases, the prosecution has far more resources and greater access than the defense. Because the playing field is unlevel, prosecutors’ reliance on the work product doctrine is misplaced.¹⁵⁹

Further, abuses in civil discovery practice serve as a cautionary tale for proponents of open file policies. Gamesmanship in civil practice occurs, for example, when one party seeks to hide damaging evidence by burying it in a mountain of irrelevant documents.¹⁶⁰ Such document dumps allow civil practitioners to claim that they have fully complied with discovery rules while intentionally increasing their opponents’ workload.¹⁶¹ The same is true in the criminal context. A prosecutor could claim to be providing required information under an open file policy while burying favorable evidence among stacks of irrelevant information.¹⁶²

This tactic is particularly disturbing in the criminal arena where the vast majority of criminal defendants are represented by underfunded and overworked public defenders.¹⁶³ The nation’s indigent defense funding crisis has been well-documented and has suffered even further setbacks in the wake of the Great Recession of 2009.¹⁶⁴ Open file policies risk aggravating this funding crisis because prosecutors could comply with such policies simply by making their files available to defense lawyers without making any affirmative effort to produce the evidence for the defense.¹⁶⁵ Instead, prosecutors could shift the burden of reproducing documents onto the

¹⁵⁵ *United States v. Bagley*, 473 U.S. 687, 682 (1985).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 143-44.

¹⁵⁹ *Id.*

¹⁶⁰ Fox, 89 Notre Dame L. Rev., *supra* note 148 at 443.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

defense.¹⁶⁶ The resulting cost to indigent defense providers in terms of time expended and additional resources devoted to reproducing information would place even more strain on public defender budgets. In any event, given technological advancements along with the Utah court systems' recent move toward electronic filing of pleadings, prosecutors have no excuse for burdening defense counsel with reproducing discovery.

D. *Court Rulemaking Bodies Have Failed in Their Efforts to Expand Disclosure Requirements.*

Various attempts to reform prosecutorial disclosure practices by amending the Federal Rules of Criminal Procedure have failed, largely because of prosecutorial opposition. For the past ten years, the U.S. Department of Justice ("DOJ") has derailed rule reform efforts with promises of changes from within the agency itself. Instead of rule changes, DOJ has successfully headed off calls for rule amendments by adopting changes to the *United States Attorney Manual*. In the end, this alternative has failed as exhibited by several high profile instances of prosecutorial misconduct in recent years. In any event, DOJ's continued opposition appears to stand in the way of any meaningful court rule changes.

1. After 40 Years of Failed Case Law, Proposals to Reform the Federal Rules of Criminal Procedure Gain Traction.

Talk of amending the Federal Rules of Criminal Procedure began as far back as 1968 when the Judicial Conference Advisory Committee ("Advisory Committee") to those rules discussed whether to create a court rule that embodied the holding in *Brady*.¹⁶⁷ Ultimately, the Advisory Committee declined to recommend a rule change and, instead, opted to rely on case law to develop disclosure requirements.¹⁶⁸ But, as detailed above, Supreme Court case law muddied the waters rather than clarifying prosecutors' duties to disclose evidence.

After 40 years of confusing case law and the lack of clear disclosure requirements, the American College of Trial Lawyers ("ACTL") in 2003 adopted a proposal to codify *Brady* in the Federal Rules of Criminal Procedure, specify which evidence prosecutors must disclose, and when they

¹⁶⁶ *Id.*

¹⁶⁷ Laurel Hooper et al., Final Report to the Advisory Comm. on Criminal Rules: A Summary of Responses to a Nat'l Survey of Rule 16 of the Fed. Rules of Criminal Procedure and Disclosure Practices in Criminal Cases at 3 (Fed. Judicial Center Feb. 2011) (hereinafter National Survey) (available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/Rule16Rep.pdf>).

¹⁶⁸ *Id.*

must disclose it.¹⁶⁹ ACTL agreed that the materiality requirement encouraged prosecutors to withhold evidence because it was devoid of clear standards that prosecutors could follow.¹⁷⁰ As a result, disclosure was left largely to the whim of each individual prosecutor.¹⁷¹

Also of great concern to ACTL, the timeliness of disclosure was often an afterthought because over 90% of all criminal cases are resolved by guilty plea.¹⁷² Further, many cases are pleaded out early in the criminal process before disclosure of favorable evidence ever occurs.¹⁷³ Timely disclosure in guilty plea cases is particularly vexing in light of the United States Supreme Court's decision in *United States v. Ruiz*.¹⁷⁴ In particular, the Court held that the Federal Constitution did not require prosecutors to disclose impeachment evidence before criminal defendants entered guilty pleas.¹⁷⁵ This holding does not disturb prosecutors' duties under *Brady* to disclose all other types of exculpatory evidence prior to the guilty plea process.¹⁷⁶ ACTL refuted this holding because "a defendant cannot knowingly waive something that has not been made known to him [or her] and that may be exclusively in the possession of the government."¹⁷⁷

ACTL also concluded that reform was needed because of sentencing considerations.¹⁷⁸ Under many sentencing schemes, including the Federal Sentencing Guidelines, prosecutors need only prove facts that support sentencing enhancements by a preponderance of the evidence.¹⁷⁹ Because prosecutors have access to the evidence that addresses whether or not sentencing enhancements apply, ACTL called for a rule change that required timely disclosure of any evidence that could be used to justify a lesser sentence.¹⁸⁰

¹⁶⁹ American College of Trial Lawyers, Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16 (March 2003) (hereinafter ACTL Report) (available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62).

¹⁷⁰ *Id.* at 8-10.

¹⁷¹ *Id.* at 10-11.

¹⁷² *Id.* at 13-14.

¹⁷³ *Id.* at 7-8.

¹⁷⁴ 536 U.S. 622 (2002).

¹⁷⁵ *Id.* at 629-33.

¹⁷⁶ The Utah Supreme Court has cast doubt of the reach of *Ruiz*. In *Medel v. State*, 2008 UT 32, ¶ 32, 184 P.3d 1226, the court cited *Ruiz*, for the general proposition rule that there is no right to impeachment evidence in the context of plea bargaining. However, the *Medel* court noted that the "prosecution will always have a constitutional obligation to disclose" evidence suggesting factual innocence "to the defendant before plea bargaining begins." *Id.* Thus, defendants can challenge a guilty plea obtained in violation *Brady* when they can "establish that the evidence withheld by the prosecution was material exculpatory evidence." *Id.* at ¶ 33.

¹⁷⁷ ACTL Report, *supra* note 169 at 15.

¹⁷⁸ *Id.* at 16.

¹⁷⁹ *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

¹⁸⁰ *Id.* at 17.

2. The Department of Justice Thwarts Reform Efforts and Receives a Reprieve to Implement Internal Policies.

In the wake of the ACTL report, the Advisory Committee to the Federal Rules of Criminal Procedure reopened debate about amending Rule 16.¹⁸¹ On September 5, 2006, the Advisory Committee voted to recommend amending Rule 16 to include specific disclosure requirements and to embody *Brady*.¹⁸² In response to this recommendation, the Department of Justice (“DOJ”) strongly objected to any rule amendments. DOJ “has consistently opposed any proposed amendment to Rule 16, generally contending that . . . the government’s *Brady* obligations are ‘clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule.’”¹⁸³ DOJ further maintained that disclosure violations are not widespread and that no rule changes are needed.¹⁸⁴

Instead, DOJ worked with the Advisory Committee to revise the *U.S. Attorney’s Manual* which details the official policies and procedures for federal prosecutors.¹⁸⁵ On October 19, 2006, DOJ issued revised guidelines to its prosecutors that included a broad reading of the materiality requirement and encouraged prosecutors to err on the side of disclosure.¹⁸⁶ Given this response, DOJ persuaded the Standing Committee on the Federal Rules of Evidence in June of 2007 to reject the proposed amendments to Rule 16.¹⁸⁷ The Standing Committee reasoned that it should give DOJ time to train its prosecutors in light of the changes to the *U.S. Attorney’s Manual*.¹⁸⁸

Since 2007, several high profile *Brady* violations occurred despite the amendments to the *U.S. Attorney’s Manual*.¹⁸⁹ Most notably, the prosecution of Alaska Senator Ted Stevens demonstrated egregious violations of *Brady* in an attempt to earn a conviction. This misconduct was not discovered until five months after a jury convicted Sen. Stevens.¹⁹⁰ Other high profile violations have shown that despite increased training and encouragement to disclose favorable evidence, DOJ continues to violate *Brady*.¹⁹¹ It should be kept in mind that these examples are only the ones

¹⁸¹ National Survey, *supra* note 167 at 3.

¹⁸² Letter of April 28, 2009 by Judge Emmet G. Sullivan to the Chair of the Judicial Conference Advisory Comm. on the Rules of Criminal Procedure at 1 (hereinafter “Sullivan Letter”), available at http://nacdl.org/discovery_reform/.

¹⁸³ National Survey, *supra* note 167 at 3 (quoting DOJ Memorandum dated April 26, 2004 at 2).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 3-4.

¹⁸⁶ *Id.* at 4.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 5;

¹⁹⁰ Sullivan Letter, *supra* note 182 at 2.

¹⁹¹ National Survey, *supra* note 167 at 5 (listing specific examples).

that have been uncovered since 2007. But, in truth, no one actually knows how many instances of withheld exculpatory evidence occur because *Brady* violations may never be disclosed to the defense.

Following the Stevens case, DOJ sought to bolster its compliance with *Brady* even further. Assistant Attorney General David Ogden issued two memoranda in 2009 that provided additional guidance on federal prosecutors' *Brady* violations.¹⁹² Both memoranda outlined prosecutors' duty to see that justice prevails as opposed to winning cases.¹⁹³ DOJ also announced that it was establishing a national discovery coordinator and that each U.S. Attorney Office would appoint a local coordinator to train prosecutors in each U.S. Attorney Office.¹⁹⁴ Mr. Ogden further pledged to develop additional training resources and to employ technology to promote discovery practices.¹⁹⁵

Despite these very public *Brady* violations since amending the *U.S. Attorney's Manual*, DOJ continues to oppose amendments to Rule 16. DOJ has officially rejected "any type of amendment to Rule 16" because: (1) "there has been no demonstrated need for change; (2) the current remedies for prosecutorial misconduct are sufficient; and (3) the recent reforms put into by the Department of Justice will decrease disclosure violations so that the need for an amendment to Rule 16 is negated."¹⁹⁶ Given DOJ's continued resistance, reform through a rule change appears to be unlikely.

3. The Same Problems That Plague the Current *Brady* Doctrine Similarly Undermine the Department of Justice's Self-Policing Efforts.

DOJ's failure to prevent *Brady* violations following the amendments to the *U.S. Attorney's Manual* should be no surprise given the barriers to reform discussed above. The problems with *Brady* are inherent in the nature of the doctrine itself. As discussed above, self-policing and implementing internal office procedures are doomed to fail because of the confusing, incoherent nature of the materiality test. No degree of self-imposed diligence or training will remedy *Brady* violations as long as the materiality test remains intact. Similarly, vague notions of justice fail to guide prosecutors' actions sufficiently to guard against *Brady* violations. The materiality test leaves too much discretion to prosecutors to withhold evidence that should be disclosed to the defense.

Further, DOJ's failed reform efforts do not account for cognitive bias. As the research discussed above has proven, too much is at stake for

¹⁹² Beth Brennan & Andrew King-Ries, *A Fall From Grace: W.R. Grace and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313, 332-33 (2010).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 333.

¹⁹⁵ *Id.*

¹⁹⁶ National Survey, *supra* note 167 at 23.

prosecutors to free themselves of the human tendency to confirm one's own decisions when prosecuting crimes. Prosecutors' competing duties to administer justice to crime victims, the public, and to criminal defendants are no match for cognitive thought processing biases. Coupling cognitive biases with the internally inconsistent nature of the materiality test spells doom for any internal office policy or procedure.

Confirming the hold that cognitive biases have on prosecutors, DOJ's continued opposition to court rule changes and its insistence on self-policing appear to be products of cognitive bias itself. Despite repeated instances of *Brady* violations following the amendments to the *U.S. Attorney's Manual*, DOJ insists that no need for change exists and that the materiality test adequately guards against nondisclosure. In essence, DOJ has concluded, based on its own self-assessment, that it can adequately guard against the very biases that result in nondisclosure. Unwittingly, DOJ has demonstrated cognitive bias in action. The result of this intransigence is the unlikelihood of any amendments to the Federal Rules of Criminal Procedure.

Moreover, changes in court rules do not resolve the conundrum that prosecutors face when trying to persuade police officers to disclose evidence. Prosecutors may beg, plead, and cajole the police to cooperate, but, ultimately, they hold no sway over the police. In any event, the police are not subject to a court rule in a strict sense, only prosecutors are. Thus, the burden for disclosure remains on prosecutors even though they may have little or no influence over police officers who gather much of the evidence in a criminal case.

Of course, federal failures do not preclude changes to the Utah Rules of Criminal Procedure. States, like Utah, that follow the federal rule model "borrow heavily from the Federal Rules."¹⁹⁷ These states have commonly adopted amendments to the federal rules while opting not to "pick up an amendment here and there."¹⁹⁸ Thus, Utah is free to amend Rule 16 regardless of whether federal officials enact changes to the federal version of the rule.

E. *Legislation Provides Some Promise For Reform But Is No Panacea.*

Another more complicated approach to reforming *Brady* is legislation that would detail the requirements for disclosure. Like the rule change approach, legislation poses many opportunities for prosecutors and other interest groups to block reform. As DOJ's continued resistance to rule changes illustrates, significant and lengthy delays may be incurred in achieving the necessary consensus required to change the law. Legislation is subject to even more roadblocks than court rule changes given well-funded

¹⁹⁷ WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 1.3(e) (3rd ed. 2013).

¹⁹⁸ *Id.*

and well-positioned lobbying groups and stakeholders who are well-versed in the legislative process. Thus, delays are even more likely when pressing for a statutory solution.

1. Like Proposals to Amend the Federal Rules of Criminal Procedure, Proposed Federal Legislation is Stalled in Congress.

A more recent response to *Brady* reform has been legislation that clarifies prosecutors' disclosure duties irrespective of *Brady*. Nationally, in 2012, a coalition of groups endorsed Senate Bill 2197 entitled the "Fairness in Disclosure Act of 2012."¹⁹⁹ This bill is sponsored by a bipartisan group of Senators with the support of the National Association of Criminal Defense Lawyers, the American Civil Liberties Union, the Constitution Project, the United States Chamber of Commerce, and the United States Chamber Institute for Legal Reform.²⁰⁰ The proposal is similar to the ACTL amendments to Rule 16 including: (1) the elimination of the materiality requirement in favor of a more expansive definition of favorable evidence; (2) a "reasonable diligence" provision that requires prosecutors to seek out favorable evidence from police; (3) a directive that prosecutors disclose favorable evidence "without delay" and before a defendant pleads guilty; (4) enforcement provisions that allow judges to sanction violations; and, (5) the availability of protective orders to seal evidence that may jeopardize the administration of justice or endanger witnesses.²⁰¹

Despite widespread bipartisan support for this legislation, the bill has remained in committee since it was first introduced in March of 2012.²⁰² The current political climate in Congress certainly does not bode well for the bill. Between budget battles, executive appointments, and fights over filibuster rules, the Senate appears to be too distracted to address discovery reform. With a presidential election looming in 2016, bipartisan solutions will be difficult to produce nationally.

2. States Have Succeeded in Enacting Legislation that Increases Access to Evidence.

Successful legislative reform efforts have occurred on the state level providing some hope for change. Most prominently, on May 16, 2013, Texas passed Senate Bill 1611 entitled the Michael Morton Act.²⁰³ That law

¹⁹⁹ Fairness in Disclosure Act of 2012, S. Res. 2197, 112th Cong. § 3014 (2nd. Sess. 2012). Copy of the bill available at <https://www.govtrack.us/congress/bills/112/s2197>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ The Michael Morton Texas Act of 2013, S.B. 1611, 83 (R) Leg. Sess. (Tx. 2013). Available at

requires prosecutors to disclose evidence that is “material to any matter involved in the” criminal case.²⁰⁴ Likewise, prosecutors must turn over any evidence that “tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.”²⁰⁵

The Act allows for prosecutors to protect evidence but provides for a procedure to address disputes. Of particular note, if the prosecution wishes to withhold or redact documents from the defense, the prosecution must identify the documents or portions that have been withheld.²⁰⁶ Further, the defense may request a hearing before a judge to determine whether withholding or redaction is justified.²⁰⁷ Finally, the Act limits disclosure of information that would endanger witnesses.²⁰⁸

On the heels of the Michael Morton Act, Louisiana legislators passed a similar law just a few weeks later which the governor signed on June 12, 2013. House bill 371 requires prosecutors to disclose all statements made by the defendant including grand jury testimony, confessions by co-defendants, all other witness statements, and police reports to the defense.²⁰⁹ The prosecution must also inform the defense of any inducements provided to prosecution witnesses, including rebuttal witnesses.²¹⁰ Disclosure of all of these items is required irrespective of materiality under *Brady* or admissibility under the Rules of Evidence. In fact, the official summary of the Act specifically states that the new law “[r]emoves the requirement that documents and tangible objects be favorable to the defendant and be favorable and relevant to the issue of guilt or punishment.”²¹¹

To protect against potential witness retaliation, the Act allows prosecutors to redact the names of witnesses when a “witness’s safety may be compromised by the disclosure.”²¹² The defendant may challenge redactions by filing a motion with the court to disclose witness identities.²¹³ The Act requires prosecutors to show a safety risk under a probable cause standard and details the procedures that courts must follow in determining whether witness safety is an issue.²¹⁴

<http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1611> (codified as TEXAS CRIMINAL CODE § 39.14 (effective January 1, 2014)).

²⁰⁴ See section 2(a).

²⁰⁵ See section 2(h).

²⁰⁶ See section 2(c).

²⁰⁷ *Id.*

²⁰⁸ See sections 2(e), (f), and (g).

²⁰⁹ H.R. 371, 13th Reg. Sess. (La. 2013). Available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=833957> (codified as LA. CODE CRIM. PROC. ANN. art. 716-723 (2014))

²¹⁰ LA. CODE CRIM. PROC. ANN. art. 717 (A), (C).

²¹¹ H.R. 371, 13th Reg. Sess. (La. 2013). Available at <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=833957> (Digest at 9).

²¹² LA. CODE CRIM. PROC. ANN art. 716.1(A).

²¹³ *Id.*

²¹⁴ *Id.*

Although these statutes have only been in place for just over two years, early experience has indicated that the flow of discovery has increased without major fiscal costs. In response to Texas prosecutors' claims in media reports that expenses had risen significantly in light of the Michael Morton Act, the Texas Criminal Defense Lawyer Association (TCDLA²¹⁵) conducted a study to determine how the law was being implemented and at what costs.²¹⁵ The report found that more than fifty percent of prosecution offices across the state incurred no additional expenses following the law in the form of reallocating personnel, developing new procedures and policies, hiring additional staff, purchasing new equipment, etc.²¹⁶ The offices that were still relying on paper filings and transmittals reported the highest costs.²¹⁷ However, the majority of offices reported no additional expenditures because they were already transitioning to new computer systems and software to facilitate electronic discovery.²¹⁸ Others secured grants to pay for needed upgrades.²¹⁹

The report further revealed that prosecutors received much more discovery from police agencies following the Act.²²⁰ Some prosecution offices that were not routinely collecting evidence from police agencies began to do so.²²¹ Also, the police started sending more evidence to prosecutors.²²² In addition, compliance with the Act varied across the state and additional education and enforcement is needed.²²³

3. The Potential for Prosecutorial Abuse and the Risk of False Convictions Demands Immediate Action As Opposed to The Time-Consuming Legislative Process.

Despite these promising developments in other states, relying on legislative action to reform current *Brady* practices in Utah would result in unjustified delays. Utah's Legislature meets once a year for 45 days from the end of January through the middle of March. Even assuming that legislators reach a consensus immediately, the earliest that Utah could adopt legislation would be the 2016 legislative session. In the meantime, the multi-faceted problems detailed above with the *Brady* doctrine would continue

²¹⁵ TEXAS CRIMINAL DEFENSE LAWYER ASS'N, THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROCESS CHANGES OF THE MICHAEL MORTON ACT (2013) (hereinafter referred to as "TCDLA Report"). Available at <http://www.tcdla.com/Images/TCDLA/%20Temporary%20art/MMA%20Final%20Report.pdf>

²¹⁶ *Id.* at 48.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 50.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 48-52.

unabated. Well-meaning prosecutors would continue to grapple with the internally inconsistent materiality test as well as the inherent incentives that prosecutors currently have not to disclose favorable evidence to the accused. Cognitive biases would also persist and remain barriers to disclosure. Police officers may withhold evidence from prosecutors or not record it at all. The result would be continued prosecutorial missteps and the risk of false convictions.

Even under the best of circumstances, forming a legislative consensus that would complicate, and possibly delay, the prosecution of crimes could conceivably take longer than one year. In Louisiana, for example, HB 371 took many years of negotiation and compromise to pass.²²⁴ These delays occurred despite numerous high profile instances of prosecutorial misconduct and blatant *Brady* violations.²²⁵ In the meantime, additional abuses occurred while prosecutors continued to battle with their competing duties to serve justice while solving crimes, *Brady*'s untenable materiality test, and the human tendency to conform one's own conclusions. Action is needed sooner than the legislative process can deliver.

These laws also suffer from another major defect—they fail to address the problem of police noncompliance with *Brady* requirements. Despite the best efforts of these legislative reforms, the fact remains that prosecutors still lack authority to require police officers to disclose exculpatory information. Nevertheless, prosecutors are still held constitutionally responsible for police officer's actions. Without addressing this gaping hole, any proposed legislation would be inadequate.

V. A Utah Standard For Disclosing Favorable Evidence to the Defense.

This review of the various reform proposals reveals no clear solution to remedying *Brady* violations in Utah but does offer some broad principles upon which both defense counsel and prosecutors can agree. Specifically, all parties should agree that the failure of the materiality test demands its elimination. It is simply incapable of providing prosecutors adequate guidance, especially when viewing the exculpatory value of evidence prospectively and in light of a criminal defendant's perspective. Given the competing interests that prosecutors must balance between crime victims, the public, and the preeminent duty to serve justice, prosecutors must have clear rules to follow. The role of cognitive bias reinforces this need and demands that the law emphasizes clarity over idiosyncratic decision-making. Any reform proposal must also be directed at police officers as opposed to obligating prosecutors to obtain evidence from police officers over whom

²²⁴The Advocate, July 13, 2013 (article available at <http://theadvocate.com/news/neworleans/6250364-148/sea-change-in-criminal-jurisprudence>).

²²⁵*Id.*

they do not supervise. Finally, a process for resolving disputes by an independent arbiter is necessary to ensure that fairness prevails and judicial review occurs. Because current practices under the materiality test create too much potential for false convictions and unfairness, change is urgent and cannot wait for police makers or elected officials to debate. Rather, prosecutors need to take action immediately.

A. *Legislation Offers the Best Solution For Reforming Brady Given The Need for Clarity, Uniform Application Across the State, and Potential for Building Consensus.*

A statutory solution is optimal for reforming *Brady* because legislation provides the clarity needed that is currently lacking under the materiality test and only a statute would apply to all participants in the law enforcement community. The materiality requirement is not only inherently unworkable but allows for broad interpretation among prosecution offices. Currently, disclosure practices differ from county to county and even municipality to municipality. To avoid disparate application of disclosure practices, a uniform statewide standard of disclosure is required.

A statute would also apply to prosecutors and police officers equally as opposed to *Brady* which only governs prosecutors' actions and falsely presumes that prosecutors supervise the police. Likewise, court rules and bar disciplinary measures do apply to police officers and, therefore, fail to address police practices that prevent compliance with *Brady*. In contrast, a law that required the police to maintain records and to disclose evidence to prosecutors would fill the current void caused by prosecutors' lack of authority to supervise police officers.

Moreover, the legislative process offers the added benefit of giving all three branches of government an opportunity to participate in the passage of the bill and to endorse its contents. Legislation would maximize involvement by all stakeholders because the legislative process is well-equipped to gather data and conduct hearings.²²⁶ Although the Legislative Branch would propose the statewide policy, the Executive and Judicial Branches would receive ample opportunities to lobby the Legislature, attend committee meetings, and provide formal input. Also, the public and prosecutors would receive notice of proposed changes and be able to raise concerns as the bill winds its way through the Legislature. The end result would be an open process that would require the buy in of all three branches before the bill would become law. In sum, legislation would maximize the "democratic legitimacy" of the proposal and "command the greatest respect" from all interest groups.²²⁷

²²⁶ Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 680 (2013).

²²⁷ *Id.*

The limitations inherent in the other approaches discussed above reinforce that legislation is the optimal tact to reform. In contrast to the public process in legislation, court rulemaking procedures tend to be more closed and limited to Judicial Branch rulemaking committees.²²⁸ Although advisory court rulemaking committees solicit input from the members of the State Bar, they typically do not invite public participation, hold public hearings, or formally solicit the Executive and Legislative Branch input. Rather, the legislative process is much better suited to accommodate all three branches as well as the public in the process.²²⁹ Thus, legislation provides the best prospects for gaining consensus and establishing a statewide policy that makes the disclosure of favorable evidence to the accused the accepted approach and expectation.

Legislation is also preferable because internal prosecutorial office policies, including open file approaches, continue to prove to be ineffective and subject to the weaknesses associated with unfettered discretion. Most prominently, despite DOJ's efforts to implement policies and to train its prosecutors, *Brady* violations have persisted over the past decade.²³⁰ Despite DOJ's best intentions, internal policies lack teeth and/or motivation to provide favorable evidence even under the limited mandates of *Brady*.²³¹ Absent some external review process to enforce internal policies, unfettered discretion will prevail and mistakes will recur.²³² A statute that spells out prosecutors' duties overcomes these problems and provides a mechanism for judicial review to address abuses.

B. The ACTL Proposal Provides Utah Prosecutors Clear Standards, and Establishes a Review Process.

The ACTL model court rule constitutes a broadly accepted, thoroughly vetted, and comprehensive approach to reforming *Brady*. But, enacting that proposal in the form of a statute overcomes the limited reach of court rules and establishes a statewide policy that all participants in the criminal justice process must follow. That proposal addresses each of the main criticisms of the current *Brady* doctrine and provides prosecutors clear instructions of their duties. In particular, it eliminates the unworkable materiality test, requires prompt disclosure of favorable evidence to the defense, and includes guilty plea cases in the disclosure requirements.

²²⁸ Jeffrey A. Parness and Sandra B. Freeman, *The Process of Factfinding in Judicial Rulemaking: "Some Kind of Hearing" on the Factual Premises Underlying Judicial Rules*, 5 PACE L. REV. 1, 3 (1984); Winfred Brown, *Federal Rulemaking: Problems and Possibilities* 41-47 (1981).

²²⁹ In any event, under the Utah Constitution, the Legislature may establish court rules whenever it musters a two-thirds majority in both houses Utah Const. art. VIII, § 4.

²³⁰ Green, 64 MERCER L. REV., *supra* note 226 at 677.

²³¹ *Id.*

²³² *Id.*

Although labeled a court rule, the ACTL proposal serves just as well as a statutory proposal that the Legislature may adopt. As a demonstration of the proposal's acceptance and amenability to be used as legislation, several draft bills that various groups have proposed before Congress are modeled after ACTL's framework.²³³

The ACTL proposal incorporates the following four initiatives to remedy *Brady's* ineffective, arbitrary, and confusing practices:

- Defines favorable evidence as all “information in any form, whether or not admissible, that tends to: 1) exculpate the defendant; 2) adversely impact the credibility of government witnesses or evidence; 3) mitigate the offense; or, 4) mitigate punishment.”²³⁴
- To establish clear standards, requires prosecutors to disclose all favorable evidence within 14 days of request.²³⁵
- Addressing the duty to uncover favorable evidence, imposes a duty on prosecutors to diligently seek out favorable evidence from investigators, police, and government agents.²³⁶
- To ensure disclosure before the entry of a guilty plea, requires disclosure of all favorable evidence 14 days in advance of a court accepting such a plea.²³⁷

The proposal also includes sanctions for disclosure violations that are currently lacking under existing *Brady* practices. To promote compliance with the proposal's provisions, judges are afforded discretion to respond to violations by continuing the proceedings, barring the admission of evidence, or imposing other sanctions that may be appropriate, including dismissal.²³⁸ Specifying the availability of these sanctions in the proposal itself emphasizes the importance of adhering to the proposal's requirements and communicates to judges and prosecutors alike that compliance is expected and will result in consequences when violations occur. Finally, including a provision that police officers must keep records, maintain evidence, and regularly disclose information to prosecutors will address prosecutors' current lack of control over police.

²³³ Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2d Sess. 2012); Federal Prosecutor Integrity Act (copy available at <http://www.prosecutorintegrity.org/wp-content/uploads/2014/06/Federal-Prosecutor-Integrity-Act.pdf>).

²³⁴ ACTL Report, *supra* note 169 at 21.

²³⁵ *Id.* at 22.

²³⁶ *Id.* at 23.

²³⁷ *Id.* at 26.

²³⁸ *Id.* at 25.

The proposal further addresses prosecutors' concerns about the release of sensitive information and witness safety. Under the proposal, prosecutors may seek protective or modifying orders when disclosure would "create an unacceptable risk of facilitating obstruction of justice or of discouraging the testimony of witnesses."²³⁹ This procedure obviously requires court participation and thereby diminishes the role that cognitive bias plays in withholding favorable evidence from the accused. By enlisting the trial judge's help and giving the court the responsibility to determine whether evidence must be disclosed to the defense, the proposal drastically reduces prosecutors' natural human tendency to confirm their initial conclusions. Rather, the trial judge, sitting as an independent arbiter, will determine whether evidence must be disclosed as opposed to a personally invested prosecutor.

Incorporating judges into the disclosure process also eases prosecutors' conflicting duties to crime victims, the public, and criminal defendants. Prosecutors can more easily fulfill their overarching duty to see that justice is done by presumptively disclosing all favorable evidence to the defense and then letting judges decide whether sensitive information may be withheld from the defense. The ACTL proposal eliminates the competing demands of justice that prosecutors routinely juggle now under current *Brady* practice.

The ACTL proposal further provides a mechanism for reviewing decisions to withhold evidence from the accused. Because prosecutors need not inform the defense when withholding evidence, judicial review never occurs under current the *Brady* doctrine. Instead, prosecutors decide in isolation and without the knowledge of defense counsel to keep sensitive evidence hidden. In contrast, under the ACTL proposal, disputed evidence is disclosed to the trial judge and is included in the court record, albeit under seal if the trial judge declines to disclose evidence. Then, the defense may appeal the judge's decision to withhold evidence. Case law would then result that would provide trial judges, prosecutors, and defense counsel standards for making similar decisions about sensitive evidence.

In sum, the ACTL proposal addresses all of the main objections to *Brady* while creating a presumption that defense counsel will have access to evidence without the unworkable strictures of the materiality test. Fairness results because criminal defendants will have access to arguably favorable evidence which, in turn, allows them and their attorneys to make fully informed decisions. Such decisions include whether to accept a plea offer, conducting additional investigation that may lead to other evidence, and testing the strength of the evidence at trial. Under current law, criminal defendants cannot make such informed decisions because prosecutors are deciding for them by withholding favorable evidence.

²³⁹ *Id.*

C. *Any Utah Legislative Solution Must Require The Police to Disclose Police Officer Impeachment Evidence.*

The ACTL proposal does not address one recurring problem in Utah that any legislation must address—disclosing impeachment evidence about police officers. As explained above, *Giglio* requires prosecutors to disclose all evidence that impeaches the credibility of a witness, including police officers.²⁴⁰ Examples of impeachment evidence include false testimony, misrepresentations made in court documents, false police reports, and internal police disciplinary proceedings.²⁴¹

Recently, several high profile examples of police agencies' failures to disclose dishonest police officers raise cause for concern. Specifically, the Utah Highway Patrol ("UHP") raised questions in an internal agency memorandum about Trooper Lisa Steed's honesty two years before prosecutors learned of any issues.²⁴² More recently, prosecutors objected when UHP did not pass along information about another trooper who had falsely testified under oath that he had administered field sobriety tests when dash camera video showed that he had not.²⁴³ Although UHP claims to have disclosed this evidence, the fact remains that Utah has no formal procedures in place to gather impeachment evidence about police officers.

Despite *Giglio*'s requirements, Utah has not even attempted to formalize the disclosure of police officer impeachment evidence. Rather, prosecutors generally request the police to disclose impeachment evidence but otherwise rely on the police to self-report. A few prosecuting agencies have begun to send police agencies letters reminding police agencies to disclose impeachment evidence whenever an officer plans to testify in court.²⁴⁴ DOJ and some other larger police agencies across the country employ similar use of such letters.²⁴⁵

²⁴⁰ *Giglio*, 405 U.S. at 154.

²⁴¹ *Id.*; See Medwed, *supra* note 13, at 1537.

²⁴² Nate Carlisle, *Memo Suggests Utah Trooper Steed Was Falsifying Arrest Reports*, Salt Lake Tribune, October 11, 2012 (article available at <http://www.sltrib.com/sltrib/news/55050948-78/steed-nixon-memo-uhp.html.csp>).

²⁴³ Erin Abernathy, *Suspension of Cases Involving Former UHP Trooper Reveals Communication Breakdown, "A Serious Problem in the State of Utah,"* Salt Lake Tribune, May 12, 2015 (article available at <http://www.sltrib.com/news/2505115-155/former-utah-troopers-credibility-questioned-prosecutions>).

²⁴⁴ The Salt Lake District Attorney Office and the Davis County Attorney Office have implemented this approach.

²⁴⁵ See U.S. Department of Justice, *Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")* (available at <http://www.justice.gov/ag/policy-regarding-disclosure-prosecutors-potential-impeachment-information-concerning-law>) (last visited June 2, 2015); see also Steve Cooley, Los Angeles County Deputy Attorney, Brady Protocol Memorandum, Special Directive 10-06 (September 20, 2010) (available at http://da.lacounty.gov/sites/default/files/policies/Brady_sd10-06.pdf).

In response to this void in Utah law, prosecutors and defense attorneys have called for legislation to require police agencies to turn over all impeachment evidence against police officers to a central repository where prosecutors can access the evidence.²⁴⁶ The actual form of this proposal would require additional thought and discussion. For example, questions abound about what level of proof is required before information is stored, who may access the database, whether any conclusions may be drawn about the absence of evidence in the database, etc. Regardless, any legislation must include a provision to ensure that police agencies disclose required impeachment evidence to prosecutors.

D. Reform Legislation Would Not Be Overly Burdensome to Prosecutors.

The common objections to the passage of an ACTL-like proposal are overstated and workable. Specifically, opponents, such as DOJ, have cited concerns about witness safety and intimidation.²⁴⁷ But, the ACTL proposal provides for a procedure for prosecutors to preserve witness safety. Further, such concerns would appear to be overstated because witness tampering is not much of an issue in the vast majority of criminal cases, criminal defendants have no reason to influence witnesses with exculpatory evidence, and opponents cite no empirical evidence to support their claims.²⁴⁸

An additional concern raised is the potential administrative costs in documenting, storing, and memorializing evidence, but these issues are overblown and manageable.²⁴⁹ Law enforcement investigators already must collect and store evidence that they receive.²⁵⁰ The only additional task required under the ACTL proposal is to provide the information to the defense.²⁵¹ Whether this task requires a photocopy or a report, the administrative burden appears to be minimal. In any event, electronic storage of documents have become the norm throughout law, business, and industry. Existing technologies are readily available, inexpensive, and commonplace.

Further, the preliminary reports from Texas' enactment of the Michael Morton Act support these conclusions. Less than fifty percent of prosecution offices in Texas incurred additional expenses following the implementation of the law, while most offices reported no additional expenditures because they were already transitioning to new computer

²⁴⁶ Sim Gill, Jared Eldridge, Kent Hart, and Monte Sleight, *Utah Fails to Track, Disclose Police Officers' Discipline Records*, Salt Lake Tribune (May 17, 2015), <http://www.sltrib.com/opinion/2513529-155/op-ed-utah-fails-to-track-disclose>.

²⁴⁷ Green, 64 MERCER L. REV. *supra* note 226 at 669.

²⁴⁸ *Id.* at 669-70.

²⁴⁹ *Id.* at 672.

²⁵⁰ *Id.*

²⁵¹ *Id.*

systems and software.²⁵² In addition, grants softened the fiscal impact for many offices.²⁵³ Only those offices that continue to rely on paper filings were burdened by financial costs.²⁵⁴

Regardless, as a constitutional matter, financial costs cannot stand in the way of implementing the ACTL proposal or any other reform for that matter. *Brady* is a constitutional mandate that states must follow.²⁵⁵ Utah is falling short of that mandate because current disclosure practices are founded on an impossible theoretical construct and false assumptions. If additional money is needed to correct current practices, due process demands the state to pay for them. The failure to do so essentially values money over fundamental constitutional liberty interests.

Further, the State of Utah has a largely abdicated its responsibility to fund indigent criminal defense. The United States Supreme Court has obligated state governments to provide for constitutionally adequate indigent defense services.²⁵⁶ Utah has opted to delegate responsibility over indigent defense to counties and local governments.²⁵⁷ This approach is constitutionally permissible if the system satisfies minimal constitutional standards.²⁵⁸ However, at the same time that the state has handed off its constitutional duties to local governments, Utah is one of only a handful of states nationally that provides no funding to support indigent defense services.²⁵⁹ Under this state of affairs, any argument against the state providing funds to comply with *Brady* would be inconceivable.

In any event, any local government office that still relies on paper filings in the current technology age should be working toward upgrading its filing and document management systems anyway. Low cost alternatives eliminate any excuse for not doing so. Long term cost savings in the form of efficiency and ready access to documents further defeat arguments based on fiscal concerns. In sum, prosecutors have no financial excuses for not adopting electronic solutions to their discovery obligations.

Finally, prosecutors have asserted that mini trials could result over discovery disputes that will complicate the criminal process and cost time and money.²⁶⁰ But, like the earlier objections, this concern is unfounded. As noted previously, many experts persuasively argue that the disclosure of more evidence to the accused will actually result in more guilty pleas and other case resolutions because both sides will know for certain the strengths

²⁵² TCDLA Report, *supra* note 215 at 48.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁵⁶ *Id.*

²⁵⁷ UTAH CODE ANN. § 77-32-101 (2015) et seq.

²⁵⁸ *See, e.g., Osmunson v. State*, 17 P.3d 236, 237-38 (Idaho 2000).

²⁵⁹ Phyllis E. Mann, *Ethical Obligations of Indigent Attorneys to Their Clients*, 75 MO. L. REV. 715, 724 (2015).

²⁶⁰ *Id.* at 674.

and weaknesses in the evidence.²⁶¹ Further, prosecutors' complaints about increased litigation costs lack force when the evidence that prosecutors must disclose under the legislation is favorable to the defense.²⁶² Defendants are extremely unlikely to object when they receive favorable evidence.

Because the supposed costs of the ACTL proposal are exaggerated or unfounded, few sound reasons support opposition to the proposal. The absence of legitimate concerns, coupled with Utah's stated policy of ensuring fairness in criminal proceedings, provide strong arguments to enact the ACTL proposal. More to the point, in the authors' experiences, prosecutors' motives in objecting to the disclosure of favorable evidence, whether it meets *Brady*'s requirements or not, appear to be questionable, at best. If the prosecutor's goal is the search for the truth and to serve the ends of justice, disclosing all favorable evidence should be the norm. Only in rare cases would prosecutors have any legitimate need not to inform the defense of favorable evidence. Such an approach not only cements fairness into the criminal process but is also the safest approach for prosecutors, legally, professionally, and ethically.

E. *Utah Criminal Discovery Law Reinforces the Viability of Reform Legislation.*

Lest anyone object that the ACTL proposal goes too far and is unnecessary, an examination of Utah discovery law reveals that prosecutors already have a duty to disclose favorable evidence to the accused even if *Brady* does not technically apply. Admittedly, discovery practice in Utah often does not follow the law as detailed by the Utah Supreme Court. Nevertheless, the law indisputably requires prosecutors to disclose broad categories of favorable evidence that does not meet the demands of *Brady*. Given these legal requirements, any opposition to the proposed reform legislation rings rather hollow.

The Utah Supreme Court has construed the Rules of Criminal Procedure as imposing broad disclosure demands on prosecutors. Under *State v. Pliego*,²⁶³ and *State v. Knight*,²⁶⁴ when the prosecution has access to evidence that a criminal defendant lacks, Rule of Criminal Procedure 16 requires the prosecution to supply the evidence to the defense.²⁶⁵ Stated differently, Rule 16 entitles the defendant to evidence that is within the prosecutor's control whether or not *Brady* applies.

That rule establishes several categories of evidence that prosecutors must supply to the defendant upon request:

²⁶¹ Fox, 89 NOTRE DAME L. REV., *supra* note 148 at 429-30..

²⁶² Green, 64 MERCER L. REV., *supra* note 226 at 674.

²⁶³ 1999 UT 8, 974 P.2d 279 (Utah 1999).

²⁶⁴ 734 P.2d 913 (Utah 1987).

²⁶⁵ *Pliego*, 1999 UT 8, ¶ 17; *Knight*, 734 at 917-918.

Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

(a)(1) relevant written or recorded statements of the defendant or codefendants;

(a)(2) the criminal record of the defendant;

(a)(3) physical evidence seized from the defendant or codefendant;

(a)(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and

(a)(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.²⁶⁶

Case law has extended these requirements beyond a strict reading of the terms of the rule. When referring to “the prosecutor's knowledge” under Rule 16, for example, that knowledge includes “the prosecutor's staff and the investigating police officers”²⁶⁷ Knowledge by these persons “is imputed to the prosecutor.”²⁶⁸ Further, a prosecutor’s disclosure duty arises “when he, his staff, or the investigating officers come across exculpatory materials during their investigation.”²⁶⁹ Prosecutors have an expanded duty to disclose evidence when they have “greater access” to the evidence than the defense.²⁷⁰

In addition, prosecutors must be careful not to mislead the defense when disclosing evidence under Rule 16. When prosecutors respond to a discovery request or spontaneously disclose evidence, two rules apply. “First, the prosecution either must produce all of the material requested or

²⁶⁶ UTAH R. CRIM. P. 16(a).

²⁶⁷ *Pliego*, 1999 UT 8, ¶ 13.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at ¶ 18.

²⁷⁰ *Id.* at ¶ 17 (citing *State v. Mickelson*, 848 P.2d 677, 689 n. 16 (Utah Ct.App.1992)).

must identify explicitly those portions of the request with respect to which no responsive material will be provided.”²⁷¹ An explanation is required so the defense does not mistakenly infer that evidence does not exist:

“[A]n incomplete response to a specific request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.”²⁷²

In a related context, the Utah Supreme Court held that prosecutors may fulfill this duty to explain omitted discovery by providing “an index or privilege log” whenever they disclose some evidence but withhold other evidence.²⁷³ This approach provides “a check on the prosecutor's and the judge's refusal to turn the documents over.”²⁷⁴ *Id.* Doing so also allows the defendant to challenge withheld evidence on appellate review.

The second requirement imposes a duty on prosecutors to disclose evidence that later comes into its possession or the possession of its agents:

Second, when the prosecution agrees to produce any of the material requested, it must continue to disclose such material on an ongoing basis to the defense. Therefore, if the prosecution agrees to produce certain specified material and it later comes into possession of additional material that falls within that same specification, it has to produce the later-acquired material.²⁷⁵

“This obligation was imposed to make criminal discovery a fair process.”²⁷⁶ These requirements “not only ensure that a trial is a real quest for truth, but also should increase confidence in informal discovery procedures by making the obligations of the parties more certain and thereby

²⁷¹ *Knight*, 734 P.2d at 916-917.

²⁷² *Id.* at 917 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

²⁷³ *State v. Martin*, 1999 UT 72, ¶ 19, 984 P.2d 975.

²⁷⁴ *Id.*

²⁷⁵ *Knight*, 734 P.2d at 917.

²⁷⁶ *Id.*

should reduce the need for court-ordered discovery in an already-burdened criminal justice system.”²⁷⁷

As these practices demonstrate, Utah law already requires the disclosure of many forms of favorable evidence in an effort to ensure the fairness of the proceedings. Through these statements, the Utah Supreme Court has articulated values for Utah criminal law practitioners to follow. These principles include a culture of disclosure, erring on the side of providing more rather than less information, fair play, rejecting gamesmanship, ethical conduct, and facilitating appellate review to decide disputes.

All of these policy statements are embodied in the ACTL proposal. That bill requires disclosure irrespective of the mechanical application of *Brady* in a conscious effort to ensure fairness and accuracy in criminal proceedings. The Utah Supreme Court has plainly asserted those values in its criminal discovery jurisprudence. They should also epitomize the handling of evidence under *Brady* especially considering that the term “favorable” under Utah discovery law connotes a more expansive need for disclosure than merely exculpatory under *Brady*. Any other result would be incongruent with constitutional requirements and Utah values.

F. Prosecutors Can Facilitate Reform By Adopting The ACTL Proposal Voluntarily Now.

The only remaining drawbacks to a legislative approach are the delay inherent in legislation and the potential for watered down proposals becoming law as a result of the give and take endemic to the legislative process. Despite the numerous benefits of the ACTL proposal, adopting the legislative approach will take time and will delay desperately needed reforms. While legislators, policy makers, law enforcement officials, and criminal defense lawyers wade their way through the legislative process, criminal defendants will be denied access to favorable evidence while *Brady* remains the standard of disclosure. And, compromise often typifies the legislative process which may result in some reforms outlined under the ACTL proposal to become casualties.

However, prosecutors can remediate both of these downsides by immediately adopting the requirements of the statutory solution on their own. Prosecutors’ immediate voluntary compliance would also speed up the passage of a statute. If prosecutors were already following the ACTL proposal, lawmakers would have little reason to balk at enacting the proposal into law. Voluntary compliance by prosecutors would also be in their own self-interest because they could determine their own fate as opposed to letting a court or the Legislature impose a solution upon them.

²⁷⁷ *Id.*

In any event, prosecutors' duty to see that justice is done provides a compelling reason to implement change now. The "interest in being free from physical detention by one's own government" is "the most elemental of liberty interests."²⁷⁸ This principle overrides all other governmental interests and must remain paramount under the American constitutional framework. Accordingly, prosecutors' paramount concern should be in getting it right, not simply in being right. If prosecutors truly believe in this principle, it is difficult to reconcile why they would not embrace the ACTL approach.

Voluntarily adopting ACTL is also in harmony with U.S. Supreme Court precedent. That Court has repeatedly counseled prosecutors to err on the side of disclosure.²⁷⁹ The ACTL proposal is consistent with this sentiment because it presumes that evidence must be disclosed to the defense absent some overriding reason. ACTL thoroughly accommodates the reasons that would support nondisclosure and provides for a procedure to resolve disputes. Thus, the proposed legislation addresses prosecutors' concerns while emphasizing that disclosure is the rule and not the exception.

Likewise, Utah discovery law embodies the same policy of erring on the side of disclosure. Specifically, disclosure prevails in Utah even when evidence does not necessarily satisfy *Brady's* internally inconsistent materiality test. In other words, as a policy matter, the Utah Supreme Court has endorsed the philosophy of the ACTL proposal. Stated differently, a Utah approach to reforming *Brady* already contemplates prosecutors' voluntarily instituting disclosure as the norm throughout the state.

Even if prosecutors were to voluntarily implement these reforms, the need for legislation remains. Absent official requirements, prosecutors would be free to make exceptions to normal procedures. As history has shown, voluntary compliance has proven ineffective. In addition, a statewide policy is needed to ensure uniformity. An accused person in Salt Lake County should expect the same rights and treatment as a person charged with a crime in Piute County. Arbitrary application of discovery practices is not only fundamentally unfair but could be grounds for a constitutional challenge.

Just as importantly, to establish true discovery reform in Utah, a cultural shift must occur among prosecutors, the police, and judges. If indeed a prosecutor's true calling is to see that justice is done as opposed to winning prosecutions,²⁸¹ Utah must establish a minimal level of practice that expects prosecutors to disclose evidence favorable to the defense even when doing so may lead to a guilty person going free. All too often, prosecutors are evaluated, judged, and promoted based on conviction rates as opposed to making the tough decisions that may lead to defeat.²⁸² True, abiding reform

²⁷⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

²⁷⁹ *See Kyles*, 514 U.S. at 439; *Agurs*, 427 U.S. at 108

²⁸¹ *Berger*, 295 U.S. at 88.

²⁸² George C. Thomas, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts That Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25, 32-34.

will only take root once prosecutors' job performance and opportunity for advancement are based on scrupulously following ethical standards and full compliance with discovery obligations. A statute that sets a high standard of conduct statewide for prosecutors would jump start that cultural change.

VI. Conclusion

The legislative proposal detailed above is the optimum solution to problems that have plagued *Brady* since its inception. Defense attorneys and prosecutors should begin now to combine their efforts to draft legislation that can be presented to the 2016 Utah Legislature. Broad agreement exists nationally that the ACTL proposal embodies best practices and would solve the major barriers to disclosing evidence to the defense. A statute is need to obligate all essential players in the criminal justice system to disclose evidence that tends to prove criminal defendants' innocence or mitigate punishment. Only a statute can apply equally to prosecutors, the police, and the courts. In contrast, court rules or internal office policies are easily circumvented, sporadically enforced, and fail to bind police officers.

Any statute must go a step further, however, than the ACTL proposal and require police agencies to disclose all impeachment evidence about their officers. Utah has made no attempt to adopt a system for collecting and disseminating police officer impeachment evidence. Accordingly, disclosing evidence of police dishonesty and disciplinary records remain subject to the whims of police agencies. To be sure, many questions surround the handling of police officer impeachment evidence but the conversation must begin because, to date, little discussion has occurred.

Irrespective of legislation, prosecutors should begin to follow the ACTL proposal immediately. Failure to do so would tacitly violate *Brady's* constitutional mandate to hand over favorable evidence to the defense and to err on the side of disclosure. Prosecutors' overriding duty to serve justice demands that they take action now without waiting to be required to do so when a statute is eventually passed.