

**BEYOND THE STORY OF A MAN NAMED BRADY:
THE PROSECUTORIAL DUTY TO DISCLOSE
UNDER THE DUE PROCESS CLAUSE**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. CONSTITUTIONAL PROVISIONS..... 1

 A. United States Constitution 1

 B. Texas Constitution 1

III. DUE PROCESS & PROSECUTORIAL CONDUCT 1

 A. Pre-*Brady* Due Process Requirements 1

 B. Duty to Disclose 2

 1. Upon Request of the Defendant: 2

 2. Disclosure without Request: 2

 3. Three-part Brady Test..... 2

IV. EXAMINING THE PROSECUTORIAL DUTY TO DISCLOSE 3

 A. Favorable Evidence 3

 B. Materiality 3

 C. Duty to Disclose 4

 1. Duty is Ongoing 4

 2. Duty to Discover 4

 3. Duty to Preserve..... 5

V. REMEDIES FOR A *BRADY* VIOLATION 5

VI. LIMITS ON DUTY TO DISCLOSE..... 5

 A. No general Right to Discovery..... 5

 B. No Duty to Assist the Defense..... 5

 C. Guilty Pleas..... 6

 D. Cumulative Evidence..... 6

 E. Inadmissible Evidence 6

 F. Attorney Work Product..... 6

VII. STATUTORY DISCOVERY 6

VIII. CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Adamson v. California, 332 U.S. 46 (1944) 1

Amos v. State, 819 S.W.2d 156 (Tex. Crim. App. 1991) 4

Arizona v. Youngblood, 488 U.S. 51 (1988) 6

Arroyo v. State, 117 S.W.3d 795 (Tex. Crim. App. 2003) 5

Banks v. Dretke, 540 U.S. 668 (2004) 4

Berger v. United States, 295 U.S. 78 (1935) 5

Bowels v. Willingham, 321 U.S. 503 (1944) 1

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

California v. Trombetta, 467 U.S. 479 (1984) 6

DiLosa v. Cain, 279 F.3d 259 (2002) 4

Dufour v. Mississippi, 479 U.S. 891 (1986) 7

Duncan v. Cain, 278 F.3d 537 (2002) 4

East v. Johnson, 123 F.3d 235 (5th Cir. 1997) 5, 7

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

Ex parte Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989) 6

Ex parte Dutchover, 779 S.W.2d 76 (Tex. Crim. App. 1989) 1

Felder v. Johnson, 180 F.3d 206 (5th Cir. 1999) 7

Fulford v. Maggio, 692 F.2d 354 (5th Cir. 1982) 5

Giglio v. United States, 405 U.S. 150 (1972) 3

Goodwin v. Johnson, 132 F.3d 162 (5th Cir. 1998) 3

Granviel v. State, 552 S.W.2d 107 (Tex. Crim. App. 1976) 5

Gray v. Netherland, 518 U.S. 152 (1996) 6

Hafdahl v. State, 805 S.W.2d 396 (Tex. Crim. App. 1990) 5

Hamdi v. Rumsfeld, 124 S.Ct. 2633 (2004) 1

Hampton v. State, 86 S.W.3d 603 (Tex. Crim. App. 2002) 4, 9

Illinois v. Fisher, 124 S.Ct. 1200 (2004) 6

Iness v. State, 606 S.W.2d 306 (Tex. Crim. App. 1980) 7

Jamail v. State, 787 S.W.2d 380 (Tex. Crim. App. 1990) 1

James v. Whitley, 926 F.2d 1433 (5th Cir. 1991) 4

Johnson v. Scott, 68 F.3d 106 (5th Cir. 1995) 4

Johnson v. State, 43 S.W.3d 1 (Tex. Crim. App. 2001) 4, 9

Juarez v. State, 439 S.W.2d 346 (Tex. Crim. App. 1969) 3

Knox v. Johnson, 224 F.3d 470 (5th Cir. 2000) 3

Kopycinski v. Scott, 64 F.3d 223 (5th Cir. 1995) 7

Kyles v. Whitley, 514 U.S. 419 (1995) 3, 4, 5, 9

Lagrone v. Cockrell, 2003 U.S. App. LEXIS 18150, at *45 (5th Cir. September 2, 2003) 7

Little v. State, 991 S.W.2d 864 (Tex. Crim. App. 1999) 3, 4, 5, 6

Martin v. Cain, 246 F.3d 471 (5th Cir. 2001) 4

Mathew v. Johnson, 201 F.3d 353 (5th Cir. 2000) 1, 7

May v. Collins, 904 F.2d 228, 231 (5th Cir. 1990) 5

May v. State, 738 S.W.2d 261 (Tex. Crim. App. 1987) 4

Mincey v. State, 206 F.3d 1106 (11th Cir. 2000) 8

Moawad v. Anderson, 143 F.3d 942 (5th Cir. 1998) 7

Mooney v. Holohan, 294 U.S. 103 (1935) 1

Napue v. Illinois, 360 U.S. 264 (1959) 2

Orman v. Cain, 228 F.3d 616 (5th Cir. 2000) 7

Ovalle v. State, 13 S.W.3d 774 (Tex. Crim. App. 2000) 4, 9

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 6

Pyle v. Kansas, 317 U.S. 213 (1942) 2

Rector v. Johnson, 120 F.3d 551 (5th Cir. 1997) 7

Sosa v. Dretke, U.S. App. LEXIS 10032 (5th Cir. May 31, 2005) 4

Spence v. Johnson, 80 F.3d 989 (5th Cir. 1996) 7

Strickland v. Washington, 466 U.S. 668 (1984) 4

Strickler v. Greene, 527 U.S. 263 (1999) 5

Tennessee v. Lane, 541 U.S. 509 (2004) 1

Thomas v. State, 841 S.W.2d 399 (Tex. Crim. App. 1992) 1

Thompson v. Cain, 161 F.3d 802 (5th Cir. 1998) 7

Turpin v. State, 606 S.W.2d 907 (Tex. Crim. App. 1980) 4

United States v. Augrs, 426 U.S. 97 (1976) 2, 4, 8, 9

United States v. Avellino, 136 F.3d 249 (2nd Cir. 1998) 7

United States v. Bagely, 473 U.S. 667 (1985) 3, 4

United States v. Berma, 30 F.3d 1539 (5th Cir. 1994) 3

United States v. Binker, 795 F.2d 1218 (5th Cir. 1986) 6

United States v. Davis, 752 F.2d 963 (5th Cir. 1985) 6

United States v. Garza, 165 F.3d 312 (5th Cir. 1999) 7

United States v. Green, 46 F.3d 461 (5th Cir. 1995) 7

United States v. Greer, 939 F.2d 1076 (5th Cir. 1991) 8

United States v. Infante, 404 F.3d 376 (2005) 7

United States v. Johnson, 872 F.2d 612 (5th Cir. 1989) 6

United States v. Jordan, 316 F.3d 1215 (11th Cir. 2003) 6

United States v. Kates, 174 F.3d 580 (5th Cir. 1999) 7

United States v. Maloof, 205 F.3d 819 (5th Cir. 2000) 7, 8

United States v. Marrero, 904 F.2d 251 (5th Cir. 1990) 5

United States v. McKinney, 758 F.2d 1036 (5th Cir. 1985)5, 7
United States v. Morrison, 449 U.S. 361 (1981) 6
United States v. Nixon, 881 F.2d 1305 (5th Cir. 1989) 4
United States v. O’Keefe, 128 F.3d 885 (5th Cir. 1997) 5
United States v. Ruiz, 536 U.S. 622 (2002) 3, 6, 7
United States v. Runyan, 290 F.3d 223 (5th Cir. 2002) 7
United States v. Villafranca, 260 F.3d 374 (5th Cir. 2001) 3
United States v. Walters, 351 F.3d 159 (5th Cir. 2003) 5
United States v. Webster, 392 F.3d 787 (2004) 5
United States v. Weintraub, 871 F.2d 1257 (5th Cir. 1989) 6, 9
United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987) 3
Vega v. State, 898 S.W.2d 359 (Tex. App.—San Antonio 1995, pet. ref’d) 9
Virgin Islands v. Fahie, 304 F.Supp.2d 279 (U.S. Dist. V.I. 2003) 6
Wardius v. Oregon, 412 U.S. 470 (1973) 6, 8
Weatherford v. Bursey, 429 U.S. 545 (1977) 6
Williams v. Florida, 399 U.S. 78 (1970) 8
Williamson v. Moore, 221 F.3d 1177 (11th Cir. 2000) 8
Wilson v. Whitley, 28 F.3d 433 (5th Cir. 1994) 4

STATUTES

18 U.S.C. § 3500(e)(1) 8
TEX. CODE CRIM. PROC. ANN. art. 39.14(a)(Vernon 1979) 8
TEX. CRIM. PROC. CODE ANN. art. 2.01 (Vernon 1977) 5, 9

OTHER:

Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, WASH.U.L.Q. 279 (1963) 8
Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to the Accused*, 158 A.L.R. 401 (2005) 3

RULES

FED R. CRIM. P. 57(b) 8
TEX. R. APP. P. 44.2(a) 4
TEX. R. EVID. 612 8

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 1, 9
U.S. CONST. amend. XIV 1, 9
TEX. CONST. art. I, § 19 1

BEYOND THE STORY OF A MAN NAMED BRADY: THE PROSECUTORIAL DUTY TO DISCLOSE UNDER THE DUE PROCESS CLAUSE

I. INTRODUCTION

There is probably no single case more frequently relied on by criminal lawyers than *Brady v. Maryland*, 373 U.S. 83 (1963). Yet, many lawyers know little about the case beyond its central holding. That is, the withholding of favorable and material evidence by the prosecution, upon request by the accused, violates of due process. *Id.* at 87. Despite the belief that a prosecutor's ethical duties begin and end with the Supreme Court's opinion in *Brady v. Maryland*, the reality is that the duties have gradually developed over time and continue to evolve. To fully understand a prosecutor's ethical duties under the Due Process Clause requires more than just knowing the story of a man named Brady.

II. CONSTITUTIONAL PROVISIONS

A. United States Constitution

The Fifth Amendment of the United States Constitution mandates that no person "be deprived of life, liberty, or property, without due process of law... ." U.S. CONST. amend. V. The Fourteenth Amendment expands this duty to the States and provides that no State shall "deprive any person of life, liberty, or property, without due process of law... ." U.S. CONST. amend. XIV. As a practical matter, there is no substantive difference between the due process rights guaranteed by the Fifth and Fourteenth Amendments. See *Bowels v. Willingham*, 321 U.S. 503, 518 (1944)(citation omitted). The Due Process Clause applies to all government action, whether civil or criminal in nature. See *Tennessee v. Lane*, 541 U.S. 509, 523 (2004)(citations omitted). At its most fundamental level, due process requires notice and opportunity to be heard. See *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2648-49 (2004)(citations omitted).

Over time, the Supreme Court has expanded what due process requires—particularly in regard to criminal cases and the ethical obligations of prosecutors. In criminal prosecutions, the Due Process Clause operates not to protect an accused from a proper conviction, but rather to protect an accused from an unfair conviction. See *Adamson v. California*, 332 U.S. 46, 57 (1944). It is not surprising that what began in early cases as a prohibition on certain types of prosecutorial conduct has developed into an affirmative duty to disclose certain types of information. This duty "exists to ensure that the accused receives a fair trial, i.e., that an

impartial party's assessment of the defendant's guilt is based on all the available evidence." *Mathew v. Johnson*, 201 F.3d 353, 360 (5th Cir. 2000). An examination of this development gives a better understanding of *Brady* itself.

B. Texas Constitution

The Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19. A violation under the Texas Constitution is generally reviewed under the same standards applied to violations of due process under the United States Constitution. See, e.g., *Thomas v. State*, 841 S.W.2d 399, 402-03 (Tex. Crim. App. 1992); *Jamail v. State*, 787 S.W.2d 380, 381-82 (Tex. Crim. App. 1990). However, there are some procedural differences. For example, a due process complaint under the Texas Constitution that is subject to harm analysis² under the Rules of Appellate Procedure cannot be collaterally attacked by writ of habeas corpus. See *Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989).

III. DUE PROCESS & PROSECUTORIAL CONDUCT

A. Pre-*Brady* Due Process Requirements

In 1935, in the case of *Mooney v. Holohan*, 294 U.S. 103 (1935), the Supreme Court explained that due process in a criminal prosecution requires more than just notice and a hearing to protect an accused against an unfair conviction. *Id.* at 103. When the prosecution utilizes perjured testimony to secure a conviction, as it did in *Mooney*, the trial becomes nothing more than a pretense. *Id.* at 112. The use of perjured testimony is "inconsistent with the rudimentary demands of justice... ." *Id.* at 112.

The Supreme Court reiterated this holding seven years later in the case of *Pyle v. Kansas*, 317 U.S. 213 (1942). In this case, Pyle contended that the prosecution utilized perjured testimony and added that the government suppressed testimony that was favorable to him in order to secure a conviction. *Id.* at 214. The Court wrote that the failure of the Kansas courts to consider these allegations was error since the allegations sufficiently raised "a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle [Pyle] to release" from prison. *Id.* at 215-16.

²As explained later in this paper, a *Brady* violation is not subject to harm analysis under the appellate rules. See *infra* at 5.

The Court went even further in 1959 in the case of *Napue v. Illinois*, 360 U.S. 264 (1959). During testimony, a State's witness falsely denied that he was promised consideration by the prosecution for his testimony. *Id.* at 267-68. Although the false testimony did not directly concern the guilt or innocence of Napue, it did bear on the credibility of the witness. *Id.* at 269. The Court reiterated that the State could not knowingly use false evidence and stressed that it did not matter that the false testimony only went to the credibility of the witness. *Id.* at 269. As the Court stated: "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Id.* at 269.

While these cases represented a significant development in the applicability of the Due Process clause to the conduct of the prosecution, they stopped short of creating a specific duty to disclose. In each of the cases, the due process violation arose from the prosecution's actual use of, or acquiescence in the use of, false evidence. It was this conduct that rendered the convictions unfair and resulted in the due process violation. Nonetheless, the reasoning behind these holdings laid the foundation for the Court's later holding in *Brady*.

B. Duty to Disclose

1. Upon Request of the Defendant:

***Brady v. Maryland*, 473 U.S. 83 (1974)**

Brady and a co-defendant were convicted of first-degree murder—murder in the perpetration of a robbery—and sentenced to death. *Brady*, 373 U.S. at 84. Prior to trial Brady's counsel asked to review the co-defendant's extra judicial statements. *Id.* at 84. Although several of the statements were provided to the defense, the prosecution withheld a statement in which the co-defendant admitted to committing the actual murder. *Id.* At trial, Brady testified and admitted participating in the robbery but claimed that his co-defendant did the actual killing. *Id.* at 84. After the trial was over, the co-defendant's statement came to the attention of the defense. *Id.* at 84.

Brady then moved for a new trial based on the newly discovered evidence, alleging that the prosecution had suppressed the evidence. *Id.* at 84. The trial court dismissed the pleading and Brady appealed. *Id.* at 85. The Maryland Court of Appeals concluded that the suppression of the evidence by the prosecution was a violation of Brady's due process rights and remanded the case for a retrial on

punishment. *Id.* at 85. The Supreme Court granted certiorari to consider the issue. *Id.*

The Supreme Court agreed with the lower court's reasoning and held, for the first time, that "the suppression of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." *Id.* at 87. The Court noted that this holding was an extension of its earlier rulings dealing with false evidence. *Id.* at 86.

With *Brady* the Supreme Court added new elements to the due process equation. The good or bad faith of the prosecutor in suppressing the evidence was irrelevant. *Id.* at 87. Since the due process goal is a fair trial, and not to punish the prosecutor for withholding evidence, the reason the information was not disclosed is irrelevant. *See id.*

2. Disclosure without Request:

***United States v. Augrs*, 426 U.S. 97 (1976)**

In *Brady*, the Supreme Court was asked to review a case in which the defendant had requested the evidence prior trial. *Brady*, at 84. In *United States v. Augrs*, the Court was given the opportunity to address whether the prosecution had to disclose exculpatory evidence even if there is no specific defense request. 426 U.S. 97, 106-07 (1976). In concluding that the disclosure of favorable evidence should not be predicated on a defendant's request, the Court focused on the nature of the evidence in question. *Id.* at 107. According to the Court, "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." *Id.* Thus, disclosure is required irrespective of the actions of the defendant. *Id.* With this new piece in place, the duty to disclose under the Due Process Clause was firmly established.

3. Three-part Brady Test

From *Brady* and its progeny, a three-part test has been developed to determine whether the actions of the prosecution have violated the due process rights of the accused. *See United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *see also, Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). The due process rights of the accused are violated when the prosecutor (1) fails to disclose evidence, (2) the evidence is favorable to the accused, and (3) the evidence is material. *Bagley*, at 682; *see also Juarez v. State*, 439 S.W.2d 346, 348 (Tex. Crim. App. 1969).

While this basic test is easy to set out, it is not always easily understood. A more comprehensive

examination is necessary to understand the limits of the prosecutorial duty to disclose.

IV. EXAMINING THE PROSECUTORIAL DUTY TO DISCLOSE

A. Favorable Evidence

The Supreme Court has made it clear that the prosecution is required to disclose exculpatory evidence. *Brady*, at 87. As used in this context, exculpatory evidence is any evidence that would undermine confidence in the verdict. *See Kyles v. Whitley*, 514 U.S. at 435; *see also United States v. Ruiz*, 536 U.S. 622, 628 (2002). As one commentator has explained: “Evidence can be exculpatory, for purposes of compelling disclosure under *Brady*, although the evidence is not directly about the defendant; there are many cases where impeachment evidence concerning a witness or codefendants leads to a reasonable doubt about the defendant’s guilt or innocence.” Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to the Accused*, 158 A.L.R. 401 (2005). For this reason, the Supreme Court has specifically held that the disclosure of impeachment evidence is required when the witness’ testimony is likely determinative of guilt. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Bagley*, 473 U.S. at 676.

An obvious case of required disclosure involves the payment for witness testimony. While it is not impermissible to pay³ a witness for their testimony, the prosecution must disclose this to the defense pursuant to *Brady*. *See United States v. Villafranca*, 260 F.3d 374, 378-79 (5th Cir. 2001); *see also United States v. Berma*, 30 F.3d 1539, 1552 (5th Cir. 1994). The defense must be allowed to fully explore the compensation during cross-examination and the trial judge must give a specific instruction on the credibility of paid witnesses. *Id.* at 780. This special instruction should point out to the jury the inherent suspect credibility of a paid witness’ testimony. *United States v. Berma*, 30 F.3d at 1552 (citing *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315-16 (5th Cir. 1987)).

There are limits on what types of impeachment evidence must be disclosed. For example, even where there is the possibility that the witness anticipates something favorable from the government in return for their testimony, there is no duty to disclose. According to the Fifth Circuit: “As we held in *Goodwin v. Johnson*, 132 F.3d 162, 187 (5th Cir. 1998), ‘nebulous

expectation of help from the state . . . is not Brady material.’” *Knox v. Johnson*, 224 F.3d 470, 482 (5th Cir. 2000); *see also United States v. Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989)(holding that a witness’ impression that the government would help him obtain a pardon in exchange for his testimony in the absence of a “specific promise to help” was not Brady material).

B. Materiality

In the context of the duty to disclose, material simply means that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. at 435; *see also, Banks v. Dretke*, 540 U.S. 668, 698 (2004); *Little*, at 866. There are four criteria in assessing materiality that have been emphasized by the Supreme Court that help to understand the materiality standard. *See DiLosa v. Cain*, 279 F.3d 259, 263 (2002); *see also Sosa v. Dretke*, U.S. App. LEXIS 10032 (5th Cir. May 31, 2005). First, there is no need to establish by a preponderance of the evidence that the disclosure of the evidence would have resulted in an acquittal in order for the evidence to be material. *DiLosa v. Cain*, 279 F.3d at 263. Second, materiality is assessed under a sufficiency of the evidence test. *Id.* Next, materiality is assessed collectively, not item-by-item. *Id.*; *see also Duncan v. Cain*, 278 F.3d 537, 540 (2002). Finally, a harmless error test is inappropriate once materiality has been established. *Id.* at 263. The materiality standard under *Brady* is the same as the standard for prejudice in an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Martin v. Cain*, 246 F.3d 471, 477 (5th Cir. 2001); *see also Johnson v. Scott*, 68 F.3d 106, 109-10 (5th Cir. 1995).

While the State is always under an obligation to disclose exculpatory material regardless of whether the defense has made a specific request, the fact that the defense did make a specific request does have a bearing on the trial court’s assessment of the materiality of the nondisclosure. *See Wilson v. Whitley*, 28 F.3d 433, 438 (5th Cir. 1994). When the defense makes a specific request and the prosecution responds with an incomplete request, the defense is not only deprived of the specific evidence but is also left with the belief that no other evidence exists. *Id.* (discussing *Bagley*, 473 U.S. at 682-83 (opinion of Blackmun, J.)). As a result, “it may be proper to weigh in favor of the accused ‘the more specificity the defense requests certain evidence, thus putting the prosecutor on notice of its value’”. *James v. Whitley*, 926 F.2d 1433, 1439 (5th Cir. 1991)(quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.)).

³ Obviously, the prosecution has a duty to not deliberately use or encourage perjured testimony. *United States v. Villafranca*, 260 F.3d 374, 378-79 (5th Cir. 2001).

The materiality test is not the same as harm analysis under the Texas Rules of Appellate Procedure. Rule 44.2(a) of the Texas Rules of Appellate Procedure sets out the standard harm that is generally applied to constitutional errors. TEX. R. APP. P. 44.2(a). The rule provides that if the constitutional error is subject to harmless error review, “the court of appeals must reverse the judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.” *Id.* This standard is completely different from the standard utilized under *Bagley* and *Brady*. See *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). Under Rule 44.2(a), it is the responsibility of the reviewing court to decide whether the error had some adverse effect on the proceedings. *Johnson v. State*, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001). Under this standard the defendant has no burden to show harm. *Johnson v. State*, 43 S.W.3d at 4; see also *Ovalle v. State*, 13 S.W.3d 774, 787 (Tex. Crim. App. 2000). In contrast, under the harm standard articulated in *Brady* it the defendant who bears the burden of establishing that he was harmed. *Hampton v. State*, 86 S.W.3d at 612 (citing *Bagley*, 473 U.S. at 682; *Agurs*, 427 U.S. 97 (1976); *Amos v. State*, 819 S.W.2d 156, 159-60 (Tex. Crim. App. 1991); *Turpin v. State*, 606 S.W.2d 907, 916 (Tex. Crim. App. 1980).

C. Duty to Disclose

1. Duty is Ongoing

The duty to disclose continues throughout the course of the proceedings. See *May v. State*, 738 S.W.2d 261, 273 (Tex. Crim. App. 1987); *Granviel v. State*, 552 S.W.2d 107, 119 (Tex. Crim. App. 1976). Untimely disclosure can violate due process “The Fifth Circuit has elaborated on this concept, holding that when the evidence is disclosed at trial, the issue is whether the tardy disclosure prejudiced the defendant.” *Little v. State*, 991 S.W.2d at 866 (citing *United States v. McKinney*, 758 F.2d 1036, 1050 (5th Cir. 1985)). If the disclosure is made during trial and the defense gets it in time to effectively utilize it at trial, then the conviction will not be reversed. *Id.*; see also *United States v. Walters*, 351 F.3d 159 (5th Cir. 2003). In such cases, the defendant is not entitled to a new trial. See *United States v. McKinney*, 758 F.2d at 1050; see also *United States v. O’Keefe*, 128 F.3d 885, 898 (5th Cir. 1997).

2. Duty to Discover

Although *Brady* is properly understood as creating a duty to disclose favorable information, this duty does not fully describe the role of the prosecution in a criminal case under *Brady*. Under *Brady*, a prosecutor also “has a duty to learn of any favorable evidence known to the others acting on the government’s

behalf... .” *Kyles v. Whitley*, 514 U.S. at 437; see also *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In a criminal case, the prosecutor has a special role. *Strickler v. Greene*, 527 U.S. at 281. Rather than represent a specific client, the prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all... .” *Berger v. United States*, 295 U.S. 78, 88 (1935). Because of this, the prosecutor’s duty is not to win a particular case, but rather to ensure that justice is done.⁴ *Id.*; see also, *Strickler v. Greene*, 527 U.S. at 281. Therefore, the duty to disclose is placed not just upon the prosecutor, but also rather on the State as a whole and includes all of its investigative agencies. See *Fulford v. Maggio*, 692 F.2d 354, 359 (5th Cir. 1982), *rev’d on other grounds*, 462 U.S. 111 (1983); but see *United States v. Webster*, 392 F.3d 787, 798 (2004)(citation omitted)(“Although ‘the prosecution’ for *Brady* purposes does encompass more than the individual prosecutor or group of prosecutors trying the case, and the prosecution may be deemed, in limited circumstances, to be in ‘constructive possession’ of *Brady* material, there are limits on the imputation of knowledge from one arm of the government to prosecutors.”).

Under this duty, the prosecutor is presumed to have knowledge of the criminal history of a witness that could be revealed with a routine check of the FBI and state crime databases. *East v. Scott*, 55 F.3d 996, 1003 (5th Cir. 1995). Therefore, the State has the burden of obtaining and disclosing the criminal history of its witnesses. *Id.* at 1003. When the prosecution does provide a witness’s criminal history for purposes of impeachment, the Texas Court of Criminal Appeals has held that the State is estopped from challenging the admission of the impeachment evidence on the basis that it is not sufficiently linked to the witness. *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003).

While the prosecutor does have a duty to discover favorable evidence that is already in the possession of others acting for the government, there is no affirmative duty to discover favorable evidence that is not already known to the State. See *Hafsdahl v. State*, 805 S.W.2d 396, 399 n.3 (Tex. Crim. App. 1990). And even if the information is in the possession of these parties, if the information is available to the defendant or, through reasonable diligence could be obtained by the defendant, *Brady* does not require disclosure. *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990), *cert*

⁴ This goal is so important to the fair and proper functioning of the criminal justice system, that the Texas legislature has even codified it. See TEX. CRIM. PROC. CODE ANN. art. 2.01 (Vernon 1977)(“It shall be the primary duty of all prosecuting attorneys... not to convict, but to see that justice is done.”).

denied, 498 U.S. 1055 (1991); *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990).

3. **Duty to Preserve**

In certain circumstances, the government is also under a duty to preserve evidence. The Supreme Court has said that the evidence that can be expected to play a significant role in the defense of the accused should be preserved. *See California v. Trombetta*, 467 U.S. 479, 486-87 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988); *see also, United States v. Binker*, 795 F.2d 1218 (5th Cir. 1986); *Little v. State*, 991 S.W.2d at 866. However, if the evidence is destroyed or lost there is no constitutional violation unless the evidence was destroyed in bad faith. *Arizona v. Youngblood*, 488 U.S. at 58. For example in *Illinois v. Fisher*, evidence (cocaine) was destroyed pursuant to established police procedures. 124 S.Ct. 1200, 1201 (2004). Even though this evidence was critical to the defendant's case—test results could have exonerated the defendant—there was no due process violation because the evidence was not destroyed in bad faith. *Illinois v. Fisher*, 124 S.Ct. 1200 (2004). Moreover, even the negligent destruction of evidence does not violate due process. *See Youngblood*, 488 U.S. at 58.

V. REMEDIES FOR A BRADY VIOLATION

Once a *Brady* violation has been found, the remedy employed by the court will depend on when the violation was discovered and which phase of the trial it impacted. When the violation is discovered after trial and withheld evidence affected the guilt/innocence phase of the trial, the remedy is to remand the case for a new trial. *See Ex parte Adams*, 768 S.W.2d 281, 293-94 (Tex. Crim. App. 1989). When the evidence that is not disclosed impacts only the punishment phase of the trial, the defendant is only entitled to have his sentence vacated and have the case remanded only for a new sentencing proceedings. *See e.g., United States v. Weintraub*, 871 F.2d 1257, 1265 (5th Cir. 1989)(vacating sentence and remanding for a new sentencing proceeding when withheld evidence impeachment evidence was material to the defendant's punishment). Normally, a *Brady* violation will not be remedied by a dismissal of the underlying charges. *See generally, Virgin Islands v. Fahie*, 304 F.Supp.2d 279, 485 (U.S. Dist. V.I. 2003). It is possible, however, that the actions of the prosecution are severe enough to warrant dismissal for prosecutorial misconduct. *See, e.g., United States v. Morrison*, 449 U.S. 361 (1981). Such a sanction, however, is extreme and should be utilized infrequently. *See United States v. Jordan*, 316 F.3d 1215, 1249 n.68 (11th Cir. 2003)(citations omitted).

VI. LIMITS ON DUTY TO DISCLOSE

A. No general Right to Discovery

Even though the prosecution has duty to disclose, there is not a general right to discovery in criminal cases. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Neither *Brady*, nor its progeny, creates a general right to discovery. *Id.*; *see also, United States v. Ruiz*, 536 U.S. at 630 (citation omitted); *Weatherford v. Bursey*, 429 U.S. at 559-60 ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one")(discussing *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). The government is under no duty to disclose neutral or inculpatory information to the defendant. *See United States v. Johnson*, 872 F.2d 612, 619 (5th Cir. 1989). The prosecution is under no duty to share all useful information with the defense. *United States v. Ruiz*, 536 U.S. at 630. And a court is under no constitutional obligation to order such disclosure. *Gray v. Netherland*, 518 U.S. 152, 168-69 (1996). "The interests of judicial economy militate against granting such open ended requests, absent a constitutional basis that compels such access." *United States v. Davis*, 752 F.2d 963, 976 (5th Cir. 1985). Therefore, the government is under no obligation to provide the identity of potential witnesses to the defense, even if the witnesses will testify. *See Weatherford v. Bursey*, 429 U.S. at 559-60.

Unless the defense is aware of material that has not been disclosed and brings it to the court's attention, the defendant must rely on the prosecutors decision of what matters need to be disclosed. The constitution does not allow him to conduct his own search through the State's files. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987). When the defendant does make a specific request for documents, not just for impeachment, but also for possible substantive use, and the prosecution refuses to produce the documents, a trial court errs by refusing to review them in camera and making a determination if the documents should be disclosed. *See Ritchie*, at 61; *United States v. McKinney*, 758 F.2d at 1051.

B. No Duty to Assist the Defense

Just as there is no general right to discovery, the prosecutor is under no duty to provide the defendant with information that the defense already has or, with reasonable diligence, can be obtained. *United States v. Maloof*, 205 F.3d 819, 828 (5th Cir. 2000); *Thompson v. Cain*, 161 F.3d 802, 807 (5th Cir. 1998). The prosecution is not required to disclose the investigatory work that the prosecution has done. *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997)(State need not disclose every piece of evidence in its possession). Nor is the State required to conduct an investigation for, or make a case for, the defendant. *United States v.*

Garza, 165 F.3d 312, 315 (5th Cir. 1999)(citing *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996)). The prosecution cannot be required to anticipate all possible defenses and provide the defendant with information to bolster those defenses. See *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir. 2002).

Although the Supreme Court has concluded that the defendant need not make a request to be entitled to favorable evidence in the State's possession, the defendant's lawyer still has an obligation to make independent investigation of the case. See generally *Moawad v. Anderson*, 143 F.3d 942, 948 (5th Cir. 1998); *Dufour v. Mississippi*, 479 U.S. 891, 893-94 (1986)(Marshall, J. dissenting). Thus, if the defense has equal access to the information and the failure to discover the evidence was from a lack of reasonable diligence, there is no *Brady* violation. See *United States v. Infante*, 404 F.3d 376, 386-87 (2005)(citation omitted).

C. Guilty Pleas

Since *Brady* seeks to ensure that the defendant receives a fair trial, the Supreme Court has concluded that the duty to disclose impeachment evidence does not apply to guilty pleas. *United States v. Ruiz*, 536 U.S. at 633. Likewise, the Fifth Circuit has held that *Brady* does not apply in the context of guilty pleas. See *Mathew v. Johnson*, 201 F.3d 361-62; *Orman v. Cain*, 228 F.3d 616, 617 (5th Cir. 2000); but see, *United States v. Avellino*, 136 F.3d 249 (2nd Cir. 1998)(concluding that the withholding of *Brady* evidence can invalidate a guilty plea).

D. Cumulative Evidence

Just because the withheld information might have helped the defense, or even might have affected the outcome of the trial, does not mean that the prosecutor is required to disclose the information. *United States v. Kates*, 174 F.3d 580, 583 (5th Cir. 1999). When the information that was not disclosed is merely cumulative of other evidence, there is no *Brady* violation. See *Spence v. Johnson*, 80 F.3d 989, 999 (5th Cir. 1996). The same is true of evidence that only provides an additional basis on which to impeach a witness whose credibility has already been attacked. See *Felder v. Johnson*, 180 F.3d 206, 213 (5th Cir. 1999). Additionally, even if the information could have been used to impeach a witness, if the witness's testimony is strongly corroborated by other evidence, it will usually be found to have not been material. *East v. Johnson*, 123 F.3d 235, 240 (5th Cir. 1997); *Kopycinski v. Scott*, 64 F.3d 223, 226 (5th Cir. 1995). For example, the Fifth Circuit found no *Brady* violation in a case where the prosecutor failed to disclose that an eyewitness had misidentified the defendant, where three law enforcement witnesses

testified and were credible in identifying the defendant. *United States v. Green*, 46 F.3d 461, 466 (5th Cir. 1995).

E. Inadmissible Evidence

Disclosure of inadmissible evidence is not required under *Brady*. *Iness v. State*, 606 S.W.2d 306, 310 (Tex. Crim. App. 1980). For example, the State is not required to disclose bad act evidence of a government witness when that evidence is not admissible to attack the witness's credibility. *United States v. Greer*, 939 F.2d 1076, 1097 (5th Cir. 1991)(citations omitted).

F. Attorney Work Product

As of yet, the Supreme Court has not decided whether there is any requirement under *Brady* to turn over attorney work-product. See e.g., *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000)(quoting *Mincey v. State*, 206 F.3d 1106, 1133 n.63 (11th Cir. 2000))("the Supreme Court... has [not] decided whether *Brady* requires a prosecutor to turn over his work product.").

VII. STATUTORY DISCOVERY

Although not constitutionally required, Congress and state Legislatures are free to create laws governing discovery in criminal cases. See e.g., *Augrs*, 427 U.S. at 109. If the legislature does create a pretrial discovery process, the process must be a two-way street unless there is a strong showing of the state interest to the contrary. *Wardius v. Oregon*, 412 U.S. at 475-76. Therefore, even the defense may be required to reveal information to the prosecution. For example, the Supreme Court upheld a Florida rule that required the defense to provide notice of alibi to the prosecution. *Williams v. Florida*, 399 U.S. 78, 81 (1970). After noting that Florida law provided for liberal discovery from the State by the defendant, the Court stated: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Id.* at 82 (citing Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, WASH.U.L.Q. 279, 292 (1963)).

In the Federal system, defense lawyers should consider using Rule 57(b) and 18 USCS § 3500—the Jencks Act—to obtain some information prior to and during the trial. Rule 57(b) can be used to get the trial court to exercise its inherent power to order discovery. See FED R. CRIM. P. 57(b). The rule permits the trial court to proceed in lawful manner and permits the trial court to order discovery, subject to Rule 16. *Id.* The Jencks Act requires the prosecution "to provide, upon request, prior statements of government witnesses that relate to the subject matter of their testimony." *United*

States v. Maloof, 205 F.3d at 825 (citing 18 U.S.C. § 3500(e)(1)).

Texas provides similar rights to criminal defendants. If a witness uses a writing to refresh his memory either before or while testifying, the opposing party is permitted to have the writing produced for inspection and use during cross-examination. TEX. R. EVID. 612. In addition, the Texas Code of Criminal Procedure permits a trial court to order discovery upon a showing of good cause by the defendant. TEX. CODE CRIM. PROC. ANN. art. 39.14(a)(Vernon 1979). The Texas Legislature has recently amended the Texas Code of Criminal Procedure to make discovery easier for criminal defendants. The change, which goes into effect September 2005, would no longer give the trial discretion to order the discovery. See House Research Organization, Bill Analysis H.B. 969, available at <http://www.capitol.state.tx.us/hrofr/frame2.htm>. By removing the trial court's discretion to order to discovery, the change seeks to "expedite cases and ensure that the defendant could obtain all discoverable material allowed by law." *Id.* Of course, the defendant must still establish good cause. *Id.*

VIII. CONCLUSION

Ultimately, *Brady* and its progeny need to be understood as doing more than just imposing procedural duties on the prosecution to disclose favorable evidence. These cases should serve as reminders that prosecutors have a higher responsibility. Because they represent the government, they have a duty to seek justice above all else. A fair trial cannot happen when the prosecutor fails to disclose evidence that is favorable and material to the defense.

It is often difficult to ascertain whether a particular piece of information should be disclosed and even the most careful prosecutor can inadvertently violate *Brady*. While the State is under no obligation to disclose everything in the State's file⁵, an "open file" policy can satisfy the State's burden under *Brady* and is an easy mechanism to employ. See, e.g., *Kyles v. Whitley*, 514 U.S. at 437 ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)"); see also *Vega v. State*, 898 S.W.2d 359, 362 (Tex. App.—San Antonio 1995, pet. ref'd). At a minimum, every prosecutor should disclose any information he or she

believes might be favorable to the defense. As Justice Stevens astutely observed: "Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Augrs*, 427 U.S. at 109.

⁵ See e.g., *United States v. Bagley*, 473 U.S. at 675 ("The prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."). This is even true in a post-conviction habeas proceeding. See *Lagrone v. Cockrell*, 2003 U.S. App. LEXIS 18150, at *45 (5th Cir. September 2, 2003) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).