I. Introduction

An interesting scenario to begin with: the District Attorney that headed the Duke University lacrosse case, Mike Nifong, a twenty-nine-year veteran prosecutor was disbarred by the North Carolina State Bar for his actions, among them, the failure to disclose exculpatory evidence. It was alleged that Nifong intentionally withheld results of DNA testing and that he misled both the defense and the trial court regarding the significance of the results obtained from the testing. In letters to the state bar defending his actions, Nifong stated he believed the results to be "non-inculpatory" as opposed to exculpatory. Furthermore, he asserted, he was concerned about the privacy of the other (unknown) contributors.

According to testimony in a highly publicized state bar disciplinary hearing, Nifong first learned of the DNA results on April 10th and did not provide the results to the defense until October 27th, some five months later, and then, only following a court order. Although, intuitively, it seems pretty clear that not handing over the results was unfair to the defense, under *Brady*, it is not entirely clear that Nifong's conduct raised a viable due process claim because the trial for the Duke lacrosse players was still months away. Thus, the defendants would have been able to effectively use the evidence at trial. In fact, the new prosecutor, the State Attorney General, who took over the case after Nifong recused himself, dismissed all charges against the lacrosse players citing the DNA results as critical to his determination that the players were actually innocent of the charges. The North Carolina State Bar commission, however, took precious little time concluding that Nifong committed numerous violations of the state's Rules of Professional Conduct and imposed the harshest of penalties–disbarment. Nifong resigned his elected office of District Attorney and stated he has no intentions of appealing the disciplinary decision.

This paper is intended to aid the prosecutor in avoiding the pitfalls that befell Mr. Nifong and give the defense bar a glimpse of the uphill battle one faces when raising a *Brady* claim. We have set out the applicable standards for determining whether and when certain information or evidence should be divulged to the defense, and what consequence may occur when the evidence is either inadvertently or intentionally not disclosed. Additionally, we provide the reader with the standards for reversal employed by the Courts when reviewing *Brady* claims. Lastly, we discuss the State Bar rule on exculpatory evidence and some practical tips on how to avoid *Brady* violations and accusations of prosecutorial misconduct.[1]

II. Brief History of a Defendant's Constitutional Right to Exculpatory Evidence

In *Thomas v. State*, Judge Baird, formerly of the Court of Criminal Appeals, briefly summarized the history of a defendant's constitutional right to exculpatory evidence as laid out through *Brady* and its progeny. *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).

[1] I would like to give appropriate credit to my law clerk, Angela North, who did all the research for this paper and a great deal of the writing. Angie is a recent graduate of the University of Texas School of Law. Also, I would like to thank my "editor", Giselle Horton, Director, Appellate Division, Travis County Attorney's Office.

The State's duty to disclose evidence favorable to the defendant is an extension of *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). In *Mooney*, the Supreme Court established the general rule that a prosecutor's knowing use of perjured testimony violated the defendant's right to due process under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Mooney*, 294 U.S. at 112, 55 S. Ct. at 342. *See also, Pyle v. Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942). In *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957), the Supreme Court expanded the rule in *Mooney* and held the prosecutor's knowing failure to correct a witness' perjured testimony, which would have supported the defendant's theory of mitigating circumstances, prevented the defendant from effectively corroborating his own defensive theory. *Alcorta*, 355 U.S. at 31, 78 S. Ct. at 105. The Supreme Court expanded the prosecutorial duty to correct perjured testimony which related to the witness' credibility and not just the facts of the case. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959).

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court recognized the underlying principle of *Mooney* was

> ...not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. *Id.*

> [Subsequent to *Brady*,] [t]he Supreme Court, in *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972), interpreted *Brady* as establishing a three prong test for when nondisclosure of evidence favorable to the accused violated the Due Process Clause. Under this test, the accused had to establish: 1) suppression by the prosecution after a request by the defense; 2) the evidence's favorable character for the defense; and 3) the materiality of the evidence. *Moore*, 408 U.S. at 797-795, 92 S.Ct. at 2568. . . .
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> In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L. Ed. 2d 342 (1976), the Supreme Court was called upon to determine whether the prosecutor has a duty, in the absence of a specific request, to disclose exculpatory evidence to the defense, and if so, what standard of materiality gives rise to that duty. *Agurs*, 427 U.S. at 107, 96 S.Ct. at 2399. . . . [I]n the case of a specific request, the Court noted: . . . Although there is, of course no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable. *Agurs*, 427 U.S. at 106, 96 S. Ct. at 2399.
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> In *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), the Supreme Court expanded the definition of favorable evidence to include both exculpatory evidence and impeachment evidence, because "such evidence is 'favorable to the accused' [citation omitted], so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380.

Thomas v. State, 841 S.W.2d 399, 402-05 (Tex. Crim. App. 1992).

II. Duty to Disclose

A. Affirmative duty

The *Brady* court imposed an affirmative duty on the State in criminal prosecutions to timely disclose evidence

that is favorable to an accused. *Brady*, 373 U.S. at 87. A prosecutor should go out of his or her way to be certain that all *Brady* material is provided to the defense at the earliest possible date. *Johnston v. State*, 917 S.W.2d 135 (Tex. App.–Ft. Worth 1996, pet. ref'd).

The Constitution demands that prosecutors be held responsible for failing to disclose *Brady* evidence, whether the failure was negligent or intentional. *Banks v. Dredtke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 1272, 157 L. E d. 2d

B. Possession/Knowledge

1. What constitutes possession or knowledge?

In general, there is no constitutional obligation to disclose evidence that the State does not possess and does not know to exist. *Hafdahl v. State*, 805 S.W.2d 396, 399 n.3 (Tex. Crim. App. 1990). The *Brady* duty only attaches if and when the State *possesses* the evidence. And, as a general rule, the duty only attaches if the State has exclusive possession; that is, if the evidence could have been uncovered by the defendant or defense counsel by exercising due diligence, it is not subject to *Brady*.

Thus, the State has an affirmative duty to disclose evidence *only if* it is in their possession and if the defense could not have obtained it on their own through the exercise of due or reasonable diligence. *Parr v. Quarterman*, 472 F.3d 245, 254 (5th Cir. 2006). This duty requires disclosure of favorable evidence known only to the police. Consequently, prosecutors have a duty to learn of favorable evidence known to others acting on the State's behalf in a particular case. *Kyles v. Whitley*, 514 U.S. at 437, 115 S. Ct. at 1567, 131 L. Ed. 2d at 507.

a. The "prosecutorial team"

As a result of the Court's interpretation of "prosecutorial team", the State can possess evidence whether or not the prosecutor has actual possession or knowledge of the evidence. The Supreme Court has decided that the State is deemed to possess evidence that is in the possession of any part of the "prosecutorial team." *Kyles v. Whitley*, 514 U.S. at 437, 115 S. Ct. at 1567, 131 L. Ed. 2d at 507. In other words, knowledge of the evidence is imputed to the prosecutor if anyone on the "prosecutorial team" has knowledge of the evidence. Most often, this is used to extend to evidence in the hands of the police or police agencies.

1166, 1189 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 281-282, 114 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). It's important to be aware that the State can violate *Brady* by suppressing evidence even if the defendant has made no request for discovery or for specific evidence. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Harm v. State*, 183 S.W.3d 403 (Tex. Crim. App. 2006).

Accordingly, the United States Supreme Court in *Kyles* held that the State's failure to disclose statements made only to the police by two eye-witnesses violated *Brady* even though the statements were only known to the police and not to the prosecutor. The statements cast doubt on the previous identifications made by those witnesses and so were useful for impeachment. *Id.* The Court justified the affirmative obligation by stating that ultimately, it is the responsibility of the prosecutor to "**learn of any favorable evidence known to others acting on the government's behalf in the case**." 514 U.S. at 437, 115 S. Ct. at 1567, 131 L. Ed. 2d at 507 (emphasis added).

b. Participation on the "prosecutorial team"

To be part of the "prosecutorial team" the agency or employees of the agency must have participated in the investigation of the defendant on the prosecutor's behalf. Governmental agencies, both criminal justice agencies and others , that investigate defendants, but not on behalf of the prosecution in a given case are not considered a part of the "prosecutorial team."

(1) In *Hafdahl v. State*, 805 S.W.2d 399 (Tex. Crim. App. 2002), information that the FBI had dropped its investigation of the defendant was not required to be disclosed under *Brady*.

(2) In *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000), information in the file of a pathologist's investigator was held not in the possession of the State.

(3) In *Shanks v. State*, 13 S.W.3d 83, 86 (Tex. App.–Texarkana 2000, no pet.), the Department of Criminal Justice was not part of the prosecutorial team.

(4) In *Harm v. State*, 183 S.W.3d 403 (Tex. Crim. App. 2006), CPS held not to be a part of the "prosecutorial

team."

(5) In *Fox v. State*, 175 S.W.3d 475, 489 (Tex. App.–Texarkana 2005, pet. ref'd), the court held that CPS records were not *Brady* material because CPS was not part of the investigation.

An entity must participate in the current criminal investigation of the defendant to be deemed part of the "prosecutorial team." Evidence obtained in previous investigations or unrelated investigations conducted by someone other than the prosecutor's office, if unknown to the prosecutor, is generally not considered *Brady* evidence.

c. Experts reports made on behalf of the State.

Reports and opinions of experts are usually considered part of the investigation effort. This means that information received from an expert, even if outside the usual group of State's experts, is also deemed to be possessed by the State once someone on the "prosecutorial team" receives the expert's reports. *Ex parte Mowbray*, 943 S.W.2d 461 (Tex. Crim. App. 1996).

C. Reasonable diligence exception

The duty to disclose is limited to information that the defendant or the defendant's counsel could not have obtained exercising reasonable or due diligence. *Parr v. Quarterman*, 472 F.3d 245, 254 (5th Cir. 2006). Hence, there is no duty to disclose information that is known or reasonably available to the defendant. Courts have generally relied on the accessibility of the information to determine whether or not due diligence would have been enough. **If the evidence was equally accessible to the defendant, it is not subject to *Brady*.** *Banks v. Dredtke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 1272, 157 L. Ed. 2d 1166, 1189 (2004)**.** If the non-disclosed evidence is significantly favorable and material, courts have usually analyzed the accessibility of the evidence narrowly.

1. Evidence known to defendant

Statements and previous testimony of the defendant's girlfriend in a capital murder case showing the defendant's jealous nature were not considered

(6) In *Kuhns v. State*, No. 03-01-00063-CR, 2002 Tex. App. LEXIS 2229 (Tex. App.–Austin 2002 March 28, 2002, pet ref'd) (not designated for publication), DPS information was not subject to *Brady* duty.

suppressed. The statements were favorable to the defendant as evidence of a passion killing but because the information was known to the defendant, the State was not obligated to disclose it. *Blackmon v. Scott*, 22 F.3d 560 (5th Cir. 1994); *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (letter written by the defendant to victim's mother expressing remorse for having committed the murder–not *Brady*).

In another case, the State's failure to disclose the psychiatric history of the victim in a sexual assault of a child case was not a *Brady* violation, since the record revealed that defense counsel had actual knowledge of the substance of the evidence he complained was suppressed. Defense counsel cross-examined several witnesses about the victim's psychiatric history, thereby indicating that the defendant had sufficient knowledge of the evidence it was seeking under *Brady*. *Fox v. State*, 175 S.W.3d 475, 489 (Tex. App.–Texarkana 2005, pet. ref'd).

However, if the defendant's knowledge of the evidence is attenuated or uncertain, the duty to disclose may, in fact, extend to that evidence. And so, the State violated *Brady* by failing to disclose exculpatory statements made by the defendant's neighbor. The State's argument that the defendant could have, by reasonable diligence, interviewed her own neighbor was rejected by the court. *Flores v. State*, 940 S.W.2d 189, 190 (Tex. App–San Antonio 1996, no pet.).

2. Evidence available to defendant

The State is not required to seek out exculpatory evidence for the defendant or to furnish such evidence if it is fully accessible to the defendant. *Jackson v. State*, 552 S.W.2d 798, 804 (Tex. Crim. App. 1976) (affidavits in the file of a welfare worker that were favorable to the defendant did not constitute *Brady* evidence because the defendant had subpoenaed the file but had not examined it thoroughly).

a. Equally accessible evidence

There is no duty to disclose information that is equally accessible to the defendant. *Taylor v.* State, 93 S.W.3d 487, 499 (Tex. App.–Texarkana 2002, pet. ref'd); *Cepeda v. State*, 2006 Tex. App. LEXIS 2143 (Tex. App.–San Antonio 2006, no pet.) (not designated for publication). A victim's medical records from the hospital were not unconstitutionally withheld since they were accessible to the defendant. *Id.*

But if the prosecutor has represented or stated to the defense that the State has disclosed all material and favorable evidence, by having an open-file policy for example, the defendant is not expected to find material evidence that is equally accessible by the defense. *Banks v. Dredtke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 1272, 157 L. Ed. 2d 1166, 1189 (2004). The U.S. Supreme Court decisions "lend no support to the notion that the defendant must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695.

b. Evidence not yet compiled

Furthermore, there is no duty to facilitate in the compilation of evidence that is accessible to the defense for compiling. For example, pornographic pictures on the defendant's computer that the defendant knew existed were not *Brady* evidence, since the computer was available to the defendant for examination and testing throughout and before the trial. *United States v. Runyan*, 290 F.3d 223, 245-246 (5th Cir. 2002).

But, to the extent that favorable evidence arises from the fact that the State, upon compiling it, mishandled the evidence, the mere existence of the facts from which the defense could deduce the mishandling does not suffice. The State must help compile the information that shows that it mishandled the evidence. *Taylor v.* State, 93 S.W.3d 487, 499 (Tex. App.–Texarkana 2002, pet. ref'd).

III. Decision to Disclose

The decision to disclose a given piece of evidence requires the prosecutor to make a judgment about the favorability and the materiality of the evidence. Again, this is because the *Brady* duty is limited to disclosure of favorable and material evidence.

A. What constitutes "favorable" evidence?

1. Exculpatory and impeaching evidence

The *Brady* duty requires prosecutors to disclose evidence that is materially favorable to a criminal defendant for purposes of impeachment or exculpation. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985).

Exculpatory evidence is "evidence which tends to justify, excuse, or clear the defendant from alleged fault or guilt." *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992); *Michaelwicz v. State*, 186 S.W.3d 601, 616 (Tex. App.–Austin 2006, no pet.) (DNA profiles that had not been examined were only potentially favorable since they had not been examined and so not subject to *Brady*).

Impeachment evidence is that "evidence offered to dispute, disparage, deny or contradict." *Thomas v. State*, 841 S.W.2d at 404; *Ex parte Kimes*, 872 S.W.2d 700, 702-03 (Tex. Crim. App. 1993). In *Kimes*, there was no *Brady* duty to disclose evidence that the defendant claimed to show bias of a State witness because that evidence had no legitimate tendency to show bias. *Id.*

Evidence of a deal between a State's witness and the State is generally considered favorable impeachment evidence. The deal need not be formal or express; rather it suffices that there is some understanding between the witness and the State whereby the witness is assured of leniency in future relations with the State. *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989) (citing *Giglio v. U.S.*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)). However, providing security to a State's witness prior to trial does not constitute a "deal" sufficient to implicate *Brady*. *Ortiz v. State*, 93 S.W.3d 79, 92 (Tex. Crim. App. 2002).

2. Inadmissible evidence

Evidence that would be *inadmissible* at trial under the rules of evidence cannot be favorable to the defendant and so is not subject to *Brady*.

(a) CPS records related to previous, unrelated incidents would have been inadmissible hearsay and so had no impeachment value. *Harm v. State*, 183 S.W.3d 403 (Tex. Crim. App. 2006).

(b) The defendant used the victim's statement in her victim impact statement that her "mind wandered" after the incident to attempt to prove that victim's withdrawal from a crack cocaine addiction prevented her from accurately identifying the defendant. The evidence was not disclosed by the prosecutor, but the court held that since it was inadmissible evidence of prior drug use, it was not subject to *Brady*. *Lagrone v. State*, 942 S.W.2d 602, 615 (Tex. Crim. App 1997).

(c) The testimony of a nurse that attended to the victim of a sexual assault in the hospital was inadmissible hearsay not subject to *Brady*. *Iness v. State*, 606 S.W.2d 306, 310 (Tex. Crim. App. 1980).

(d) A prior inconsistent statement made by a State witness during another investigation would be inadmissible as an immaterial or collateral matter so it was not subject to *Brady*. *Ramos v. State*, No. 13-03-00217-CR, 2005 Tex. App. LEXIS 6617 at *5 (Tex. App.–Corpus Christi Aug. 18, 2005, no pet.) (not designated for publication).

(e) The personnel record of a testifying police officer indicated that the officer was dismissed from his job for reasons which included lying. The record was not subject to *Brady* because it was inadmissible as impeachment evidence of specific instances of conduct. *Dalbosco v. State*, 978 S.W.2d 236 (Tex. App.–Texarkana 1998, pet. ref'd).

(f) A CPS report that included statements by the victim of previous and similar sexual assault allegations was disclosed to the defense a day before trial, but because the contents of the report would have been inadmissible at trial, the late disclosure did not prejudice the defendant. *Lempar v. State*, 191 S.W.3d 230 (Tex. App.–San Antonio 2005, pet. ref'd).

(g) Polygraph results of a key witness held not to be *Brady* material by the U.S. Supreme Court for two reasons. First, the results, short of a stipulation by the parties, are not admissible; and secondly, the defendant failed to establish that disclosure of the results would have resulted in a different outcome at trial. *Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995). Remember, however, that the trial court determines the admissibility of the evidence. So, if the admissibility of evidence is unclear, the State should tender the evidence to the court for an *in camera* inspection.

However, a prosecutor cannot protect himself from a *Brady* violation by claiming that material and favorable evidence was inadmissible hearsay if he made no effort to verify its truth or falsity. A prosecutor may not create a wall of ignorance in order to protect himself from the obligations of *Brady*. *Johnston v. State*, 917 S.W.2d 135 (Tex. App.–Ft. Worth 1996, no pet.). In *Johnston*, inadmissible hearsay evidence regarding an arrest warrant for the complainant that could have been used for impeachment was subject to *Brady*. Here, the prosecutor made no effort to verify the existence of a hearsay statement that the complainant had an outstanding warrant. *Johnston v. State*, 917 S.W.2d at 138.

B. Was the evidence material?

1. Standards for appellate review

While the standards by which the courts must assess materiality are reasonably clear, the application of them is more nebulous. This may be due to the fact that in the majority of *Brady* cases, the courts do not reach the materiality question, having answered one of the first two questions definitively. In those that have reached the materiality question, the following section examines the standards employed by courts to answer.

a. Reasonable probability

Assuming the court has found the State withheld evidence favorable to the defendant, it must then determine, prior to reversal, if it was material. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different." *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286, 301 (1999) *quoting United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

A "reasonable probability" is a probability sufficient to undermine the confidence in the outcome of the trial. *Id.* Mere speculation that the outcome would have been different does not suffice to prove materiality. *Dickson v. Quarterman*, 462 F.3d 470, 478 (5th Cir. 2006). In his dissent of the opinion in *Strickler v. Greene,* Justice Souter argued that the materiality test should be interpreted to require a "significant possibility" instead of a "reasonable probability." *Strickler v. Greene*, 527 U.S. at 298, 119 S. Ct. at 1957, 144 L. Ed. 2d at 313. However, so far, most courts closely adhere to the "reasonable probability" test.

b. Entirety of the record

Furthermore, materiality must be considered "in the context of the entire record." *United States v. Agurs*; *Turpin v. State*, 606 S.W.2d 907, 916 (Tex. Crim. App. 1980). So, when a police officer testified that the defendant had scratches on his face after the incident, a photo taken of the defendant the morning after the incident without any scratches on his face would have potentially been material. However, given that the police officer's testimony about the scratches had been impeached by other means, the photo was not material. *Boudreaux v. State*, 878 S.W.2d 701, 706 (Tex. App.–Beaumont 1994, no pet.).

The materiality of the evidence is also related to the strength or weakness of the surrounding case. *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992) ("a verdict which is only weakly supported by the record is more likely to be affected by [*Brady*] error than a verdict which is strongly supported"; *Gowan v. State*, 927 S.W.2d 246 (Tex. App.–Ft. Worth 1996, pet. ref'd) (any *Brady* error must be examined in the context of the overall strength of the state's case.).

The test for materiality "usually involves balancing the strength of the exculpatory evidence against the evidence supporting conviction." *Hampton v. State*, 86 S.W.3d 603, 613 (Tex. Crim. App. 2002).

2. Applications of materiality test

a. Reasonable probability

Failure to disclose *material* evidence necessarily prejudices the defendant, but the burden of proof is on the defendant to show prejudice. In other words, to prove materiality, the defendant must show that the evidence had a reasonable probability of affecting the outcome of the trial. However, compare *Dilosa v. Cain*, 279 F.3d 259 (5th Cir. 2002), where the court held that to show a due process violation when the State withholds evidence, a defendant need not prove that his trial necessarily would have had a different outcome; a lack of faith in the result is sufficient. *Id.* at 263.

In a case out of Texas, a defendant claimed that the State withheld evidence that one of its star witnesses was actually a paid police informant. The U.S. Supreme Court, reversing the Fifth Circuit's decision, held that the State had violated its *Brady* duty. Evidence that the witness was a paid police informant was materially favorable for impeachment purposes and created a reasonable probability of a different result had it been disclosed to the defense. *Banks v. Dredtke*, 540 U.S. 668, 703, 124 S. Ct. 1256, 1279, 157 L.Ed. 2d 1166, 1197 (2004) .

Conversely, the State's failure to disclose prior inconsistent statements by a witness in grand jury testimony did not violate *Brady*, since the defense failed to show any material inconsistencies. *Castillo v. Johnson*, 141 F.3d 218 (5th Cir. 1998).

Evidence, the disclosure of which would have permitted the defense to significantly undermine an important opposing witness, is material. This was the case when a diary kept by a policewoman who was assigned to the security of the State's star witness was not disclosed to the defense. *Ex parte Richardson*, 70 S.W.3d 865 (Tex. Crim. App. 2002). The diary tracked the dishonesty of the State's witness including several false accusations against the police officers made by the State's witness during the months that the police officer was assigned to protect her. *Id.* The diary was material even though the defense was able to impeach the credibility of that witness using other evidence because evidence that several police officers believe the witness to be dishonest would have significantly undermined the witness's credibility. *Id.*

But, if defense counsel was able to cross-examine the witness with essentially the same facts that she would have been able to with the non-disclosed evidence, the evidence is not material. *Wyatt v. State*, 23 S.W.3d 18 (Tex. Crim. App. 2003). A statement by the mother of the victim to an

investigator, that she didn't believe the defendant hurt her child, was not material because defense counsel cross-

Likewise, evidence that the defendant in a drug charge did not own the house where the drugs were found was not material in light of the overwhelming evidence that defendant rented and lived in the house. *Olivarez v. State*, 171 S.W.3d 283 (Tex. App.–Houston [14th Dist.] 2005, no pet.).

Evidence that two of the State's witnesses were on probation for misdemeanors, although potentially favorable to the defendant for impeachment purposes, was not material in light of the entire record. *Drew v. State*, 76 S.W.3d 436, 448 (Tex. App.–Houston [14th Dist.] 2002, pet. ref'd).

b. The materiality test is not a sufficiency of the evidence test.

Although materiality must be analyzed in the context of the entire record, it should not be analyzed with regard to the sufficiency of the inculpatory evidence. The court should not inquire whether undisclosed evidence was sufficient to create a possibility of acquittal. Rather, it should ask whether the undisclosed evidence undermines confidence in the conviction. *DiLosa v. Cain*, 279 F.3d 259, 264 (5th Cir. 2002).

Thus, a reviewing court should not evaluate the existing inculpatory evidence in determining whether the undisclosed evidence was material. *Id.* The correct analysis requires asking only whether the withheld evidence could, with a reasonable probability, put the case in a such a different light as to undermine confidence in the outcome. *Id.*

IV. Timing

The issue of when a prosecutor is compelled to disclose *Brady* material is subject to some debate. As with many legal issues, it appears to be decided on a case-by-case basis. The Duke lacrosse case mentioned earlier is a perfect example. There, the State Bar of North Carolina accuses the prosecution of violations of its Disciplinary Rules for not disclosing favorable DNA evidence even though a trial date was months away.

examined her on similar statements made to others. *Id.*

A. Does a late disclosure constitute suppression?

1. The defendant must have been prejudiced.

When materially favorable evidence is disclosed at trial, the issue is whether the tardy disclosure prejudiced the defendant. *Little v. State*, 991 S.W.2d 864 (Tex. Crim. App. 1999). In *Little*, the State's chemist admitted to the prosecutor right before testifying that he had misplaced the paper records of the tests he had performed even though he remembered the results. The prosecutor told defense counsel before cross-examination. The late disclosure did not prejudice the defendant because defense counsel was able, during cross-examination, to impeach the credibility of the State's chemist based on this information. *Id.*

The defendant bears the burden of proving prejudice. He can do this by showing that counsel was not able to make effective use of the newly-discovered evidence at trial.

a. Effective use at trial.

Late disclosure prejudices the defendant only if the defense didn't get the evidence in time to *make effective use* of it at trial. *Palmer v. State*, 902 S.W.2d 561 (Tex. App.–Houston [1st Dist.] 1995, no pet.). A defendant's loss of the opportunity to conduct voir dire or opening statement differently, had he known the undisclosed evidence, did not prejudice him since counsel was able to present the *Brady* evidence to the jury during the rest of the trial. *Id*.

A defendant's loss of the opportunity to choose a jury trial rather than a bench trial did not prejudice him since there was not a reasonable probability that the outcome of the trial would have been different. *Nelloms v. State*, 63 S.W.2d 887, 890-892 (Tex. App.–Ft. Worth 2001, pet ref'd).

In a sexual assault of a child case, there was no prejudice from a late disclosure of evidence that the victim wasn't sure about the extent of sexual assault since the court had found that earlier disclosure would not have changed the defendant's trial strategy. *Khoshayand v. State*, 179 S.W.3d 779, 783 (Tex. App.–Dallas 2005, no

pet.).

In *Mowbray v. State*, the State's disclosure of a favorable expert report produced two weeks prior to trial was considered untimely. 943 S.W.2d 461 (Tex. Crim. App. 1996). An out-of-state blood splatter expert completed a report based on the physical evidence whose results contradicted those in the report done by the State's expert and thus tended to exculpate the defendant. That report was disclosed to the defendant but not in a forthcoming way. *Id.* The court held that the defendant was prejudiced by the untimely and not forthcoming disclosure given the materiality of the expert's report. *Id.*

Defense counsel's need for time to "digest" the newly-discovered evidence did not suffice to show prejudice especially since counsel did not object to the *Brady* evidence when it was disclosed. To retain a *Brady* claim, the defendant must offer proof that he was not able to make effective use of the evidence at trial. When the defendant failed to ask for a recess or a continuance to look at the newly-discovered evidence, the reviewing court assumes that the evidence did not prejudice the defendant. *Adams v. State*, No. 01-05-00201-CR, 2006 Tex. App. LEXIS 2559 at *17 (Tex. App.–Houston [1st Dist.] 2006, no pet.); *Ray v. State*, No. 14-06-00205-CR, 2007 Tex. App. LEXIS 1131 (Tex. App.–Houston [14th Dist.] Feb. 15, 2007, no pet. h.); *State v. Fury*, 186 S.W.3d 67 (Tex. App.–Houston [1st Dist.] 2005, pet. ref'd).

B. Plea-Bargaining

1. Federal law

The duty to disclose materially favorable evidence does not necessarily extend to defendants who plead guilty. *United States v. Ruiz*, 536 U.S. 622, 122 S. Ct. 2950, 153 L. Ed. 2d. 586 (2002). A defendant can waive the *Brady* right by pleading guilty. In *Ruiz*, the defendant waived her *Brady* right when she pled guilty under a California statute permitting defendant's to fast-track a guilty plea. *See also Orman v. Cain*, 228 F.3d 616, 617 (5th Circ. 2002) (a defendant who pleads guilty waives her *Brady* rights).

Similarly, the duty does not extend to defendants who plead *nolo contendere*. *Matthew v. Johnson*, 201 F.3d 353, 360 (5th Circ. 2000) *cert. denied*, 531 U.S. 830 (2000).

2. Texas law

However, in Texas, there is some case law supporting the opposite conclusion. *Ex parte Lewis*, 587 S.W.2d 697 (Tex. Crim. App. 1979). In *Lewis*, the Texas Court of Criminal Appeals held that a showing of the State's failure to disclose favorable information before entry of a guilty plea leads, as a matter of law, to the conclusion that the plea was not knowingly and intelligently made. *Id* at 703. Therefore, the defendant cannot waive his *Brady* right. *Id.*

Also note that there is more recent precedent suggesting that the ability to waive *Brady* rights as recognized by the U.S. Supreme Court in *Ruiz* may not extend to "not very typical plea-type" situations. *Ex Parte Masonheimer*, No. PD-521-05, 2007 LEXIS 373, at n.22 (Tex. Crim. App. March 21, 2007). Because it was only dictum, the implications of the court's statement are unclear.

3. Grand jury indictments

In addition to the plea-bargaining context, the Supreme Court has suggested that there is no duty to disclose even "substantial exculpatory evidence" to a grand jury. *United States v. Williams*, 504 U.S. 36, 46, 112 S. Ct. 1735, 1741, 118 L. Ed. 2d 352, 369 (1992). "[R]equiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body." *Williams*, 504 U.S. at 51, 112 S. Ct. 1744, 118 L. Ed. 2d at 368. The decision reversed a holding in the appellate court that imposed a new rule for prosecutor misconduct in the grand jury context. Thus, while the Supreme Court's holding prohibiting such a rule is technically limited to federal courts, the constitutional interpretation extends to all jurisdictions: "Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system." *Williams*, 504 U.S. at 112 S. Ct. 1744.

V. Bar Disciplinary Rules

The Texas Disciplinary Rules of Professional Conduct impose a similar duty on prosecutors to disclose certain types of evidence. Rule 3.09(d) requires a prosecutor to:

> 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, shall disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Tex. Disc. R. Prof. Conduct 3.09(d)(1989). The duty imposed by the Texas bar, as you can see, is arguably broader than the constitutional duty. The Bar demands that the prosecutor turn over *evidence or information* that tends to negate guilt or mitigate the offense rather than evidence that is materially favorable. Thus, according to Rule 3.09(d), the prosecutor need not ask herself whether the evidence has any probability of affecting or undermining the outcome of the proceeding; rather, the prosecutor must only ask herself whether the evidence in question has any mitigating value. For a good discussion of this issue, s*ee* Edward Wilkinson, Brady and Ethics: A Prosecutor's Evidentiary Duties to the Defense Under the Due Process Clause and Their Relation to the State Bar Rules, 61 Tex. B. J. 435, 436 (May 1998).

Additionally, the Bar rule not only requires a prosecutor to disclose certain "evidence" but also "information." This implicates a greater body of knowledge than the constitutional duty to disclose only "evidence". Note also that the rule requires the prosecutor to disclose the relevant evidence to the defense and the tribunal on sentencing issues.

VI. Practical Tips for Prosecutors and Defense Counsel

A defendant can petition the court for an *in camera* review of the prosecutor's evidence if the defendant presents a plausible showing that material evidence exists. Thus, the Fifth Circuit has held that "a defendant seeking merely an *in camera* inspection to determine whether a particular source contains *Brady* material need only make a plausible showing that the file will produce material evidence." *United States v. Lowder*,

A. Tips for the State

1. Open-file policies

First, if it is possible, an open-file policy significantly decreases the risk of a *Brady* violation for a negligent failure to disclose. An intentional failure to disclose will be a violation regardless of implementation of an open-file policy. In general, an open-file policy indicates that there was no *Brady* violation. *Harm v. State*, 183 S.W.3d 403 (Tex. Crim. App. 2006); *Brewer v State*, 126 S.W.2d 295, 303-06 (Tex. App.–Beaumont 2004, pet. ref'd).

However, such an open-file policy does not preclude the possibility that *Brady* violations would still take place. *Vega v. State*, 898 S.W.2d 359 (Tex. App.–San Antonio 1995, pet. ref'd).

2. *In camera* review

When in doubt, a prosecutor can protect himself by tendering the evidence to the Court for an *in camera* review, thus placing the burden on the tribunal to determine if the evidence is material. This can be especially helpful when dealing with unflattering evidence regarding one of the State's witnesses. The prosecutor may be convinced that the evidence is not admissible, however, it is the court that ultimately determines admissibility. Therefore, the safer course is to produce the information to the trial court for a ruling on its disclosure and admissibility.

B. Tips for Defense

1. *In camera* review

148 F.3d 548, 551 (5th Cir. 1998); *Michaelwicz v. State*, 186 S.W.3d 601 (Tex. App.–Austin 2006, no pet.)

A defendant failed to make a plausible showing where the defense counsel was given full access to the State's file and the defense presented no other evidence that indicated that the State had not disclosed *Brady* information. *Garcia v. State*, No. 03-02-00416-CR, 2003 Tex. App. LEXIS 7913 (Tex. App.–Austin Sept. 11, 2003, pet. ref'd) (not designated for publication).

2. Defendant is entitled to a recess or continuance upon request once *Brady* evidence is disclosed.

When confronted with a late disclosure of favorable evidence, the defense should immediately make it known to the court and request a recess and/or a continuance. If the trial court denies the continuance, the defendant must show that the denial was prejudicial. Accordingly, an appellate court cannot reverse based only on speculation that the denial of the continuance was prejudicial. *Renteria v. State*, 206 S.W.3d 689 (Tex. Crim. App. 2006).

A defendant's failure to request a continuance indicates that tardy disclosure of evidence was not prejudicial. *State v. Fury*, 186 S.W.3d 67 (Tex. App.–Houston [1st Dist.] 2005, pet. ref'd); *see also Gutierrez v. State*, 85 S.W.3d 441, 452 (Tex. App.–Austin 2002, pet. ref'd). Likewise , when the defense requests a recess to obtain or review *Brady* material, the trial court should grant the request even if the defense did not make pretrial efforts to obtain the evidence. *Crawford v. State*, 892 S.W.2d 1 (Tex. Crim. App. 1994) (defendant not barred from getting a recess to obtain Crime Stoppers reports on account of defense counsel's failure to make pretrial efforts to obtain them.); *Delgado v. State*, No. 13-01-386, 2003 Tex. App. LEXIS 7374 at *33 (Tex. App.–Corpus Christi, Aug. 28, 2003, no pet.) (not designated for publication) (citing *Crawford v. State*, "when the State's failure to disclose *Brady* material is discovered at trial, the accused is entitled to a recess to obtain production of the material, even if the defense did not make pretrial efforts to obtain it.").

Defendant waives the *Brady* right by failing to ask for a continuance upon a late disclosure during trial. A defendant waives his *Brady* complaint by failing to make an objection at the time the newly-discovered evidence is disclosed. *Wilson v. State*, 7 S.W.3d 136, 145 (Tex. Crim. App. 1999).

Although the Texas Court of Criminal Appeals has never addressed the issue directly, most intermediate courts agree that the failure to ask for a continuance or recess once the existence of new evidence is disclosed also waives the defendant's right to a *Brady* complaint. *Ray v. State*, No. 14-06-00205-CR, 2007 Tex. App. LEXIS 1131 (Tex. App.–Houston [14th Dist.] Feb. 15, 2007, no pet h.); *State v. Fury*, 186 S.W.3d 67 (Tex. App.–Houston [1st Dist.] 2005) (pet. ref'd); *Taylor v. State*, 93 S.W.3d 487, 497 (Tex. App.–Texarkana 2002, no pet.); *Young v. State*, 183 S.W.3d 699, 705 (Tex. App.–Tyler 2005, pet. ref'd).

But at least one intermediate court disagrees with defendant's waiver of *Brady* by failing to ask for continuance. That court placed the defendant's right to discovery in the second *Marin* category of defendant's rights, making it protected unless expressly waived. *Moore v. State*, 143 S.W.3d 305, 316 (Tex. App.–Waco 2004, pet. ref'd) (referring to *Marin v. State*, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) (recognizing three categories of rights held by criminal defendants: rights that are implemented only upon request by the defendant; rights that are implemented unless waived; rights that must be implemented and cannot waived).

VII. Conclusion

The State bears a unique obligation to (1) balance the net effect of any given piece of favorable evidence in order to determine whether that evidence is material, and (2) disclose any evidence about which such a conclusion has been made. This is not an easy task and the prosecutor would be well-served by disclosing any evidence that he thinks is potentially favorable. It is better to disclose all the evidence than run the risk of being second-guessed on appeal, or worse, by a grievance panel!