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Expanding *Brady*: Pretrial Detainees' Rights to Exculpatory Information

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I. INTRODUCTION

On April 17, 2006, Wayne and Sharmon Stock were found murdered in their home by close-range shotgun blasts.[1] After interviewing some of the Stock's relatives, investigators quickly focused on the Stocks' nephew, Matthew Livers, as a suspect based on information that Livers had previously argued with the Stocks.[2] Investigators Schenck and Lambert spoke to Livers on April 17, and Livers agreed to take a polygraph examination to "clear his name."[3] On April 25, Investigators Schenck and Lambert drove Livers to the police station where they began to interview him around 9:00 a.m.[4] About two hours into the interview, Investigator O'Callaghan took Livers to a different room, advised him of his *Miranda* rights, and administered a polygraph examination regarding the murders.[5] When the exam was over, Investigator O'Callaghan accused Livers of murdering the Stocks and told him that the results of the exam "left no doubt."[6]

After O'Callaghan left the room, Schenck and Lambert returned and resumed questioning Livers.[7] They repeated that the polygraph showed that Livers committed the murders and repeatedly accused Livers of the crime while discounting Livers' assertions of innocence.[8] As the questioning continued, investigators also told Livers that he could not leave, told him that they would help him if he confessed, and suggested that he would be executed if they did not. At one point Schenck said "[i]f you don't admit to me exactly what you've done, I'm going to walk

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[1] Cara Pesek, *Consecutive Life Sentences Handed Down in Murdock Murders*, JOURNALSTAR.COM (Mar. 19, 2007), http://journalstar.com/news/local/consecutive-life-sentences-handed-down-in-murdock-murders/article_20d5f29f-d1ed-507d-8a94-a9aba1b3bd18.html.
[2] Livers v. Schenck, 700 F.3d 340, 344 (9th Cir. 2012).
[3] *Id*.
[4] *Id* at 344-45.
[5] *Id*. at 345.
[6] *Id*.
[7] *Id*.
[8] *Id*.

out that door and I am going to do my level best to hang your ass from the highest tree."[9] After denying involvement more than eighty times over the course of six and a half hours, Livers began to agree with investigators as they continued to ask him leading, yes or no questions that supplied information about the physical evidence.[10]

The investigators' questions led Livers to implicate Nicholas Sampson as an accomplice in the crime, and Sampson was later arrested.[11] Livers was arrested based on his "confession," and Schenck and Lambert resumed questioning him the following day.[12] Again the investigators used leading questions to obtain a revised confession that placed Sampson in the house during the murders.[13] Livers eventually recanted, telling O'Callaghan, "I was never on the scene. I don't know if [Sampson] is the actual person involved in this. I've been making things up to satisfy you guys and … basically, fitting an answer to what you guys have been asking."[14]

Prior to April 25, when Livers' questioning began, Schenck and Lambert had been told that Livers was "slow" and "immature for his age."[15] During his questioning, Livers told them that he was "dumb as a brick," and literally stood up from his chair when he was told to "'stand up' (confess) if he was a man."[16] Later Schenck admitted that Livers "appeared to be having some difficulty understanding some of the questions."[17] In fact, Livers' IQ measured in the bottom two percent of the adult population.[18]

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[9] *Id*. Cara Pesek, *Nephew of Slain Murdock Couple Files Wrongful Imprisonment Suit*, JOURNALSTAR.COM (March 11, 2008), http://journalstar.com/news/local/nephew-of-slain-murdock-couple-files-wrongful-imprisonment-suit/article_21d83824-f12c-5a21-8e09-a32e537e5527.html
[10] Livers, 700 F.3d at 345.
[11] *Id* at 346.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*. at 344.
[16] *Id*. at 346.
[17] *Id*.
[18] Id. at 362 n.2.

Commander Kofoed of the Douglas County Crime Scene Investigation Unit (DCCSI) was in charge of the forensic work for the investigation, and some of the physical evidence was not matching up with Livers' confession.[19] An April 19 examination of the car that was seen driving away from the Stocks' home on the night of the murder[20] yielded no evidence, however Kofoed later claimed that when he reexamined the car on April 27, he took a swab from under the dashboard that eventually tested positive for Wayne Stock's blood.[21] Kofoed did not report his April 27 swab until May 8 and falsely claimed that he took it on that day.[22] He also failed to mention a negative swab from the other investigator who reexamined the car with him.[23]

Another DCCSI employee claimed that she suspected Kofoed of planting fingerprints at crime scenes, and Kofoed was investigated for allegedly tampering with evidence.[24] Kofoed admitted that his positive swab in the Stocks' case may have resulted from cross-contamination from the crime scene inside the Stocks' house.[25] In March 2010, Kofoed was convicted of felony charges for tampering with evidence in the Stocks' murder case.[26]

In May 2006, a ring found at the crime scene linked two Wisconsin teenagers, Jessica Reid and Gregory Fester, to the murders.[27] Soon after, Reid and Fester confessed, and they later pled guilty and are both serving life sentences.[28]

Sampson and Livers remained incarcerated until charges against them were dismissed on October 6, 2006, and December 5, 2006, respectively.[29] The prosecutor said that the case had

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[19] *Id*. at 346-47.
[20] During Livers' "confession" he agreed that Sampson had given him the keys to the vehicle, which belonged to Sampson's brother. Livers, 700 F.3d at 346.
[21] Livers, 700 F.3d at 347.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 348.
[25] *Id*.
[26] *Id*. at 349. Geoff Martz, Was Nebraska Couple's Murder Revenge or Random?, ABCNEWS (Sept. 3, 2010), http://abcnews.go.com/2020/murder-mystery-killed-wayne-sharmon-stock/story?id=11523512#.UViTjxycdXx.
[27] Livers, 700 F.3d at 347.
[28] *Consecutive Life Sentences*, *supra* note 1.

rested on Commander Kofoed's claim of finding Wayne Stock's blood in the car and on Livers' confession, which she noted may have been coerced.[30]

Livers and Sampson each brought several claims under 42 U.S.C. § 1983 against several defendants, including Investigators Schenck, Lambert, and O'Callaghan, and Commander Kofoed.[31] One of these was a claim alleging that all of the defendants were liable for failing to disclose exculpatory evidence, including information about Livers' confession and recantation and Commander Kofoed's handling of the blood evidence, in violation of Livers and Sampson's *Brady* rights.[32] The case made it to the Eighth Circuit where the court held that there could not have been a *Brady* violation because Livers and Sampson were never convicted.[33] The court noted a circuit split regarding whether there is a pretrial right to disclosure of exculpatory evidence and concluded that, due to this split, the defendants were entitled to qualified immunity on claims based on any failure to disclose evidence.[34]

This case illustrates how the current state of the *Brady* doctrine can fail to protect citizens who are wrongfully accused and detained merely because they are not ultimately convicted. While Livers avoiding conviction may seem like a prize in itself, it is no more than a just result for an innocent man, and does not compensate for the fact that seven of the eight months he spent in jail came after the ring was linked to Reid and Fester and after they had confessed.[35] From the beginning of the investigation, investigators focused on Livers and engaged in serious police misconduct in an effort to build a case against him, including ignoring, withholding, and

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[29] Livers, 700 F.3d at 348.
[30] *Id*.
[31] *Id*. at 349.
[32] *Id*. at 359.
[33] *Id*. The court allowed certain of Livers and Sampson's other claims to go forward.
[34] *Id*. at 359-60.
[35] The link to Reid and Fester was discovered in May 2006, but Livers was not released until December 5, 2006. Reid and Fester both confessed to being involved in the murders at first. After Investigators Schenck and Lambert promised them leniency if they admitted others were involved, both Reid and Fester changed their stories to implicate Livers and Sampson. Reid recanted the latter version within forty-eight hours. Livers, 700F.3d at 347.

interfering with evidence that showed his innocence. Livers should not have been denied recourse through *Brady* for the very conduct that *Brady* was meant to prohibit simply because the charges against him were dropped.

Many scholars have analyzed the *Brady* doctrine and, specifically, its materiality standard.[36] Some have even focused on the difficulties of applying that standard in the pretrial context and offered a wide range of proposed solutions.[37] Few have attempted to make sense of *Brady's* timing requirements for disclosure of exculpatory evidence.[38] However, commentary on *Brady* protection for pretrial detainees who are never convicted is scarce at best. This paper attempts to fill that void by addressing the current state of *Brady* rights as they pertain to this group of people and how those rights should be adjusted going forward.

This paper asserts that pretrial detainees who are not ultimately convicted can be penalized for their lack of conviction under the current *Brady* jurisprudence and argues that this penalty could be avoided by recognition of a right to disclosure of exculpatory evidence when there is a reasonable probability that withholding the evidence would undermine confidence in the continued detention of the detainee. Part II outlines the current Supreme Court framework under which *Brady* claims are analyzed, and then explains how two circuit courts have addressed the rights of pretrial detainees with opposite results. Part III explores the pitfalls of trying to apply the current understanding of *Brady* to pretrial detainees. Part IV argues for the "reasonable probability" standard articulated above and points to arguments the courts could use to arrive at such a standard.

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[36] *See, e.g.*, Beth Brennan & Andrew King-Ries, *A Fall From Grace: United States v. W.R. Grace and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313, (2010); Christopher Deal, *Brady Materiality Before Trial: The Scope of the Duty to Disclose and the Right to A Trial by Jury*, 82 N.Y.U. L. REV. 1780 (2007); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415 (2010); Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POL'Y REV. 415, 422 (2011); Robert S. Mahler, *Extracting the Gate Key: Litigating Brady Issues*, CHAMPION, May 2001, at 14.
[37] *See, e.g.*, Deal, *supra* note 36; Jones, *supra* note 36.
[38] *See, e.g.*, Mahler, *supra* note 36, at 19-20.

II. THE *BRADY* FRAMEWORK TODAY

A. The Brady *Doctrine*

In *Brady v. Maryland* in 1963, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecutor."[39] Thus arose the prosecutor's duty to disclose favorable material evidence in a criminal trial, however this duty would be both expanded and narrowed by the decisions that interpreted the original *Brady* right.[40]

In 1976 in *United States v. Agurs*, the first major case to interpret *Brady*, the Court did away with the requirement that evidence must be requested, expanding the prosecutor's obligation so that he must turn over favorable material evidence even when it has not been specifically requested.[41] The Court also emphasized the dual nature of the *Brady* doctrine; it applies first before and during trial when the prosecutor is tasked with deciding what must be turned over to the defense, and then again on appeal when an appellate judge must decide whether the withholding of evidence deprived the defendant of due process.[42] The Court determined that the same materiality standard should apply during both phases of *Brady* consideration.[43] The Court defined materiality when it explained that the prosecutor only violates his constitutional duty of disclosure when "his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[44]

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[39] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[40] Serota, *supra* note 36, at 422.
[41] United States v. Agurs, 427 U.S. 97, 107 (1976).
[42] *Id*. at 107-08.
[43] *Id* at 108.
[44] *Id*.

In 1972, the Court held that the prosecutor was obliged to disclose evidence that could have undermined the testimony of the government's star witness in *Giglio v. United States*.[45] The Court later affirmed *Giglio's* holding in *United States v. Bagley*, in which it explicitly stated that *Brady's* disclosure requirement includes impeachment evidence.[46] In 1995, in *Kyles v. Whitley*, the Court again expanded the prosecutor's obligation by imposing on her an affirmative duty to learn of any favorable evidence known to a government actor, including the police.[47] Throughout these expansions in subject matter, the Court has continued to stand firm in its narrow view of materiality, maintaining that evidence is only material when withholding it "undermines confidence in the outcome of the trial."[48] This standard forces prosecutors to attempt to determine what will be material to a trial before the trial even begins.[49] In order to minimize the risk of incorrect determinations, the Court has repeatedly instructed prosecutors to resolve doubt in favor of disclosure.[50]

B. Relevant Federal Statutes

In addition to the *Brady* disclosure requirements, there are two federal statutes that deal directly with discovery in federal criminal cases. The first is Federal Rule of Criminal Procedure 16, which requires the government to disclose any oral, written, or recorded statement made by the defendant,[51] the defendant's prior criminal record,[52] certain categories of documents and

[45] Giglio v. United States, 405 U.S. 150, 154-55 (1972).
[46] United States v. Bagley, 473 U.S. 667, 676 (1985).
[47] Kyles v. Whitley, 514 U.S. 419, 437 (1995).
[48] *Id*. at 434 (citing Bagley, 473 U.S. at 678).
[49] Agurs, 417 U.S. at 108.
[50] *Id*.; Kyles, 514 U.S. at 439.
[51] Fed. R. Crim. P. 16 (a)(1)(A)-(B).
[52] Fed. R. Crim. P. 16 (a)(1)(D).

objects,[53] reports of medical or scientific tests or examinations,[54] and summaries of expert testimony.[55]

The second federal statute, and the one that more often interacts directly with *Brady*, is the Jencks Act.[56] The Jencks Act pertains to pretrial statements of government witnesses or potential witnesses, and prohibits discovery of those statements until after the witness testifies on direct examination.[57] After the direct examination concludes, if the defendant requests it, the court is required to order the government to disclose any of the witness' pretrial statements "which relate[] to the subject matter as to which the witness has testified."[58]

Occasionally situations arise where evidence is both subject to the *Brady* disclosure requirements and protected by the Jencks Act. When the pretrial statements of a government witness are also material under *Brady* the Second Circuit, among others, has held that the *Brady* doctrine trumps, which means that the statements are not shielded from disclosure until after the witness testifies on direct examination.[59] In contrast, other circuits, including the Sixth and Ninth have held that the Jencks Act trumps and the evidence need not be disclosed before trial.[60]

C. The Disagreement Among Circuits Over Rights When There is No Trial

Most *Brady* cases deal with situations where the defendant has been tried and convicted and is claiming on appeal that the prosecutor should have turned over one or more pieces of

[53] A document or object must be disclosed if it is "within the government's possession, custody, or control, and (i) the items is material to preparing the defense; (ii) the government intends t use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." Fed. R. Crim. P. 16 (a)(1)(E).
[54] Fed. R. Crim. P. 16 (a)(1)(F).
[55] Fed. R. Crim. P. 16 (a)(1)(G).
[56] 18 U.S.C. § 3500 (2012).
[57] 18 U.S.C. § 3500 (a)-(b).
[58] 18 U.S.C. § 3500 (b).
[59] United States v. Rittweger, 524 F.3d 171, 183 n.4 (2d Cir. 2008).
[60] United States v. Brazil, 395 F. App'x 205, 215 (6th Cir. 2010); United States v. Alvarez, 358 F.3d 1194, 1121 (9th Cir. (2004).

evidence because they were favorable and material.[61] However, occasionally someone who was never tried nor convicted will assert a claim based on a failure to disclose exculpatory evidence, and the three circuits that have dealt with this situation relatively recently have all done so differently.[62]

The Fifth Circuit considered this issue in *Sanders v. English* when Floyd Sanders III was accused of robbing Herman Sandifer at gunpoint.[63] Lieutenant Curtis McCoy led the investigation, which began with several weeks' worth of phone calls suggesting that Sanders matched the description and sketch of the robber.[64] While in court one day, Lt. McCoy noticed Sanders, and instead of conducting a formal lineup, had Sandifer come to the courthouse where he identified Sanders by name as his attacker.[65] Lt. McCoy was informed on the day of Sanders' courthouse arrest that Sanders and Sandifer were related, but later stated that he did not find it strange that Sandifer could not identify Sanders as the culprit until three weeks after the robbery at the courthouse.[66] Further, within a few days of Sanders' arrest, a witness to the Sandifer robbery as well as other victims of similar robberies told Lt. McCoy that Sanders was not the assailant.[67] Importantly, during that same period, three credible witnesses approached Lt. McCoy and provided an alibi for Sanders, who had been with them in another town at the time of the attack.[68] One of those witnesses, a reserve police officer and a friend of Lt. McCoy, later stated that Lt. McCoy never expressed any concern for the truth or the idea that an innocent man might

[61] *See, e.g.*, Kyles, 514 U.S. 419; Bagley, 473 U.S. 667; Agurs, 427 U.S. 97.
[62] *See* Livers, 700 F.3d 340; Taylor v. Waters, 81 F.3d 429 (4th Cir. 1996); Sanders v. English, 950 F.2d 1152 (5th Cir. 1992).
[63] Sanders, 950 F.2d at 1155.
[64] *Id*.
[65] *Id*.
[66] *Id*. at 1156.
[67] *Id.*
[68] *Id*.

have been in jail.[69] Lt. McCoy failed to follow up on any of the investigative leads outside of Sanders and failed to pass information that called Sanders' guilt into question, including the alibi statements and the relationship between Sanders and Sandifer.[70]

Sanders spent fifty days in jail, the large majority of which came after Lt. McCoy was advised of the several pieces of exculpatory evidence.[71] A grand jury later decided that there was no probable cause to indict Sanders and the court dismissed the charges.[72] Sanders filed a § 1983 action alleging claims for false arrest, illegal detention, and malicious prosecution against several defendants including Lt. McCoy.[73] In denying Lt. McCoy summary judgment as to the illegal detention and malicious prosecution claims, the Fifth Circuit held that his "deliberate failure to disclose . . . undeniably credible and patently exculpatory evidence to the prosecuting attorney's office plainly exposes him to liability under §1983."[74] In doing so, it cited its holding in *Geter v. Fortenberry* that deliberate concealment of exculpatory evidence violates "clearly established constitutional principles" and extended that principle to the pretrial context.[75]

The Fourth Circuit also addressed a pretrial detainee's right to exculpatory evidence in *Taylor v. Waters*, where Taylor was charged with conspiracy to distribute cocaine.[76] Investigator Waters originally arrested Taylor's roommate who then admitted to dealing cocaine, and based on the roommate's information, Investigator Waters obtained a search warrant for Taylor's

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[69] *Id*. at 1157.
[70] *Id*.
[71] *See id*. at 1158.
[72] *Id*.
[73] *Id*.
[74] *Id*. at 1162.
[75] Geter v. Fortenberry, 882 F.2d 167, 170 (5th Cir. 1989) (holding that there was a violation of a clearly established constitutional right such that Officer Fortenberry was not entitled to qualified immunity against Geter's § 1983 claims stemming from a failure to disclose exculpatory evidence where Geter was tried and convicted, granted a new trial, and then released when the true culprit was found).
[76] Taylor, 81 F.3d at 432.

apartment.[77] When Investigator Waters arrived at the apartment, he encountered Taylor for the first time, and Taylor told him he did not know his roommate's occupation despite living with him for twelve years.[78] In the kitchen, Investigator Waters found a pot and strainer with a white power on it, common packaging material for cocaine, and a brown envelope with white powder on it.[79] Taylor was arrested on April 29, 1992, but further investigation during May and June cast doubt on Taylor's guilt; his roommate told Investigator Waters that Taylor was not involved, a search of Taylor's apartment and car turned up no evidence, and lab tests showed that the only cocaine residue found in the apartment came from the brown envelope found in the trash.[80]

The charges against Taylor were dropped on July 3, 1992, and Taylor subsequently brought a § 1983 action against Investigator Waters claiming that the investigator violated his Fourth, Fifth, and Fourteenth Amendment rights.[81]Despite the similarity in facts between *Sanders* and *Taylor*, unlike the Fifth Circuit, the Fourth Circuit declined to recognize any right to exculpatory evidence for pretrial detainees, holding that: (1) the Due Process Clause of the Fourteenth Amendment does not guarantee a right to disclosure of exculpatory evidence in Taylor's case,[82] and (2) "failure of an officer to disclose exculpatory evidence after a determination of probable cause has been made by a neutral detached magistrate does not render the continuing pretrial seizure of a criminal suspect unreasonable under the Fourth Amendment."[83] The court indicated that the right to a speedy trial is the proper right to protect the accused because it ensures he will not be detained indefinitely.[84]

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[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*. at 432-33.
[81] *Id*. at 433.
[82] *Id*. at 436. The *Taylor* court also noted that *Brady* did not apply due to the fact that Taylor never endured a trial. *Id*. at 437.
[83] *Id*. at 437.
[84] *Id*.

III. THE HARM OF THE CURRENT STATE OF *BRADY* CONFUSION IN THE PRETRIAL CONTEXT

The *Brady* doctrine has faced criticism from courts[85] as well as commentators largely based on the complications that the materiality standard poses.[86] The most vexing of these complications is the fact that whether evidence would have "undermine[d] confidence in the outcome of a trial"[87] can only be determined after the trial is completed.[88] Because the standard relies on hindsight, it frustrates both defendants and prosecutors due to the fact that there is no real way to know what must be disclosed until an appellate court reviews the case.[89] Despite the flaws of the materiality standard, it remains a workable standard in cases where a defendant has been convicted because appellate courts in those cases have a trial which they can use to evaluate and determine materiality. This is not so in cases where a pretrial detainee is never tried nor convicted.

A. The Current Brady *Doctrine Means Failure for Pretrial Detainees*

1. Materiality Necessarily Fails When There is No Proceeding.

The materiality standard faces an additional timing problem in the pretrial context; instead of relief being delayed until after appellate review, no pretrial detainee who was released before a trial occurred will ever receive relief because relief is dependent on the materiality of the undisclosed evidence, which can only be determined by an appellate review of a trial. In every major *Brady* case to reach the Supreme Court since *Brady* itself, the Court has clung tightly to the idea that only favorable material evidence – that which would undermine

[85] *See, e.g.*, United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199-201 (C.D. Cal. 1999).
[86] *See, e.g.,* Serota, *supra* note 36, at 419-21; Brennan & King-Ries, *supra* note 36, at 324-30; Deal, *supra* note 36.
[87] Kyles, 514 U.S. at 434 (explaining the standard for what evidence is material and, thus, subject to the disclosure requirement).
[88] Sudikoff, 36 F. Supp. 2d at 1198.
[89] See Brennan & King-Ries, supra note 36, at 313.

confidence in the outcome of a trial – is subject to the disclosure requirement.[90] Thus any *Brady* claim brought by a pretrial detainee who was never convicted would necessarily fail for lack of materiality.

Despite these reiterations of the materiality requirement, the Fifth Circuit in *Sanders* was able to recognize the suppression of exculpatory evidence as a constitutional violation even though there was no trial to review.[91] The *Sanders* court did not provide a detailed explanation of how it arrived at this result, but it cited two previous cases, one from the Fifth Circuit[92] and one from the Tenth Circuit,[93] with similar results.[94] This indicates that the *Sanders* court simply recognized more expressly a right related to the traditional *Brady* right that had operated to some extent without the materiality requirement in at least two other cases.

However, more than twenty years after *Sanders*, the Fifth Circuit is the only Circuit Court that has plainly extended any semblance of the *Brady* right to the pretrial context, and it did not base that extension directly on *Brady*.[95] Though some circuits show small signs of willingness to move away from the *Brady* doctrine's strict materiality standard,[96] the vast majority of pretrial detainees are not afforded any type of remedy based on any type of right to disclosure of exculpatory evidence.[97]

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[90] *See* Kyles, 514 U.S. at 434; Bagley, 437 U.S. at; Agurs, 427 U.S. at 112-13.
[91] Sanders, 950 F.2d at 1162.
[92] Geter, 882 F.2d at 170.
[93] DeLoach v. Bevers, 922 F.2d 618, 621 (10th Cir. 1990).
[94] Sanders, 950 F.2d at 1162.
[95] *Id*.
[96] *See* Livers, 700 F.3d at 359-60 (The fact that the court proceeded to analyze whether a pretrial right to disclosure of exculpatory evidence and note the circuit split after determining that there could be no *Brady* violation because there was no trial indicates that it might be willing to entertain the idea that the right exists outside of *Brady*.); United States v. Price, 566 F.3d 900, 914 n.14 (2009) (The Ninth Circuit noted *Sudikoff's* argument for removing the materiality requirement favorably.)
[97] *See, e.g.*, Kyles, 524 U.S. at 434; Taylor, 81 F.3d at 436-37.

2. The *Sudikoff* Solution to the General Materiality Problem

In 1999, the District Court for the Central District of California took a stand against the traditional *Brady* materiality standard, holding that it was only appropriate in the context of appellate review of a conviction, and not in the pretrial discovery context.[98] The court opted instead for a standard that required the government to disclose "all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case."[99] The court reasoned that appellate review only determines whether suppression of evidence violated a defendant's due process rights, but merely because the suppression was not severe enough to violate due process does not mean it should be allowed.[100]

Law instructor and commentator Michael Serota discounts the validity of the *Sudikoff* standard because it clashes with the Supreme Court's continued endorsement of the materiality standard.[101] He asserts that "trial courts have no basis for applying or interpreting the *Brady* doctrine in any way other than that established by the Court."[102] However, *stare decisis* has not prevented multiple federal trial courts from adopting the *Sudikoff* standard.[103] Even the Ninth Circuit "noted favorably" an analysis of the *Sudikoff* test as an instruction to trial prosecutors.[104]

While *Sudikoff* presents a clearer and easier to use standard for what prosecutors should disclose, it does not contemplate application to a situation where a pretrial detainee never goes to trial. The court also fails to specify what type of appellate relief is available for instances of suppression which are improper but do not rise to the level of due process violations. For these

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[98] *See* Sudikoff, 36 F. Supp. 2d at 1198-99.
[99] *Id*. at 1199. The court further defined "evidence," stating that "Brady requires disclosure of exculpatory information that is either admissible or is reasonably likely to lead to admissible evidence." Sudikoff, 36 F. Supp. 2d at 1200.
[100] *Id*. at 1199.
[101] *See* Serota, *supra* note 36, at 423.
[102] *Id*.
[103] *See, e.g.*, Safavian, 233 F.R.D. at 12; United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004).
[104] Price, 566 F.3d at 914 n.14 (citing an analysis of the Sudikoff standard undertaken in United States v. Acosta, F. Supp. 2d 1228, 1239-40 (D. Nev. 2005).

reasons, the *Sudikoff* standard does not offer a definitive solution to the materiality problem that impedes pretrial detainees who are never tried.

B. Confusion Means Failure for Defendants

Cases like *Livers*, *Sanders*, and *Taylor* do not fit nicely into the existing *Brady* framework mainly due to the materiality problems outlined in part III.A, *supra*. Plaintiffs, perhaps recognizing that a true *Brady* claim is unlikely to succeed, often turn to civil suits under § 1983. However, as demonstrated by *Livers*, a §1983 claim can be defeated by qualified immunity where no clear constitutional right has been established.[105]

Section 1983 of Title 42 of the United States Code provides a cause of action against those who subject another to a deprivation of "rights, privileges, or immunities secured by the Constitution and laws."[106] A police officer, for example, is entitled to qualified immunity for his actions in his capacity as an officer unless he violates a federal constitutional or statutory right that was clearly established at the time of the violation such that a reasonable officer in his position would have known that he was violating that right.[107]

Theoretically, in a §1983 case where the petitioner was convicted and harmed by the suppression of exculpatory evidence at trial, his claim could rest on the deprivation of his traditional *Brady* rights, and the case could proceed over claims of qualified immunity because the *Brady* rights have been clearly established. However, in cases where pretrial detainees are released before a trial occurs, traditional *Brady* rights do not attach,[108] and only the Fifth Circuit has indicated that there may be a right to exculpatory information for the detainee to be deprived

[105] Livers, 700 F.3d at 359-60.
[106] 42 U.S.C. § 1983 (2012).
[107] Livers, 700 F.3d at 350 (citing Saucier v. Katz, 533 U.S. 194, 201-02 (2001)).
[108] *See* Part III.A, *supra*.

of.[109] One circuit is certainly not enough for a constitutional right to be considered established, especially in the face of another circuit's opposition to the same right[110] and silence from the Supreme Court. The most that can be said is that there is confusion regarding the state of a pretrial detainee's right to disclosure of exculpatory information. This means that in addition to being denied relief through a *Brady* claim, a pretrial detainee is also likely to be denied relief under §1983 due to the lack of a clearly established constitutional right.

The divergence in the results from the Fourth and Fifth Circuits presents an opportunity for the Supreme Court to address the gap in protection that the current *Brady* regime leaves. This divergence was the primary reason that the Eighth Circuit denied Livers the ability to recover based on any failure to disclose evidence.[111] Livers, Sanders, and Taylor all faced similar situations where they suffered at the hands of police officials who turned a blind eye to exculpatory evidence, however only Sanders was allowed to pursue a remedy based on the officer's failure to disclose that evidence.[112] The Court should follow the Fifth Circuit's path toward closing that gap so that a single, recognizable standard can be used to ensure that future pretrial detainees do not endure fates similar to Livers.

IV. THE PATH TO A CLEAR RIGHT TO EXCULPATORY EVIDENCE FOR PRETRIAL DETAINEES

The current *Brady* doctrine is focused on the potential harm of an unfair trial,[113] but an unfair trial is not the only harm that pretrial detainees face. Because of the Supreme Court's strict adherence to the materiality standard for *Brady* violations and that standard's inapplicability to the pretrial context, a pretrial detainee's right to the disclosure of exculpatory evidence is best

[109] *See* Sanders, 950 F.2d at 1162.
[110] *See* Taylor, 81 F.3d at 437.
[111] Livers, 700 F.3d at 359-60.
[112] *Compare* Sanders, 950 F.2d at 1162, *with* Livers, 700 F.3d at 360, *and* Taylor, 81 F.3d at 437.
[113] *See* Kyles, 514 U.S. at 434. A *Brady* violation is a violation of due process, and the proper remedy is a reversal of the conviction. *See* Bagley, 473 U.S. at 678.

suited as a parallel right that would work alongside *Brady*, but would not be evaluated using the materiality standard. Recognizing a separate right to the disclosure of exculpatory evidence for detainees who never make it to trial will allow defendants § 1983 recourse for harms suffered as a result of faulty investigations and suppression of exculpatory evidence before a trial occurs. The following sections outline the parameters of the proposed right and discuss the constitutional, case law, and policy arguments the Court should use in creating such a right.

A. A Blueprint for a Pretrial Detainee's Right to Disclosure of Exculpatory Evidence

Given the Supreme Court's concern for the preservation of the adversarial system and its position that defendants are not entitled to all of the information in a prosecutor's file,[114] setting the boundaries for what information must be disclosed pursuant to this new right proves challenging. On one hand, prosecutors should not be forced to disclose non-material information, but on the other, a forward looking standard is necessary where a backward looking one is unworkable. One way to strike a balance between the interests of pretrial detainees and prosecutors would be to create a right to disclosure of exculpatory evidence at the point when there is a "reasonable probability" that withholding the evidence would undermine confidence in continued detention.

Admittedly, this standard faces similar guesswork challenges as the materiality standard; prosecutors would be tasked with using reason to decide what evidence is important enough that it would be likely to undermine confidence in continued detention. However, a broader standard would require prosecutors to disclose much more than the limited amount of information with which the Court seems comfortable.[115] The main difference between the "reasonable probability" standard and the materiality standard is in its application on review. Where the

[114] *See* Bagley, 473 U.S. at 675.
[115] *See id.*

materiality standard has been deemed to require review of the defendant's actual trial, reasonable probability would only require the court to review continued detention of an accused in light of the exculpatory evidence.

It is not prohibitively difficult for a court to evaluate what evidence would undermine confidence in furthered detention. As a starting point, the current *Brady* jurisprudence would apply, making the prosecutor responsible for disclosing exculpatory evidence known to any state actor, including impeachment evidence, even without a request from the detainee.[116] Doubt should still be resolved in favor of disclosure.[117] Beyond that, courts would outline what is or is not a violation of this right through their decisions in these cases. Certain information and evidence of things like coerced confessions, evidence tampering, and alibi witnesses are easily recognizable as game changers in the evolution of a case, and these types of evidence are the types courts are likely to recognize as subject to the disclosure requirement.

Furthermore, multiple circuits already engage in this type of "reasonable probability" analysis in a slightly different but still *Brady*-related context.[118] When a defendant enters a guilty plea but later alleges that the prosecutor withheld material information, the regular *Brady* materiality standard fails for the same reason it fails in pretrial detainee cases: there was never a trial. Instead, the standard that the reviewing courts use in guilty plea cases is that there is a violation when there is "a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial."[119] This requires the court to determine how persuasive the withheld evidence is and whether it was persuasive enough for there to be a reasonable probability that the defendant would have

[116] *See* Kyles, 514 U.S. at 437; Bagley, 473 U.S. at 676; Agurs, 427 U.S. at 107.
[117] *See* Kyles, 514 U.S. at 439
[118] *See, e.g.*, Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995); White v. United States, 858 F.2d 416, 424 (8th Cir. 1988); Miller v. Angliker, 848 F.2d 1312, 1322 (2d Cir. 1988).
[119] Sanchez, 50 F.3d at 1454.

changed his mind about pleading guilty.[120] If the court is capable of making this decision in guilty plea cases, it can also make decisions about whether evidence is important enough that there was a reasonable probability that furthered detention was inappropriate.

B. Constitutional Underpinnings

The *Brady* decision and those that followed it were all based on due process:[121] the idea that a person may not be deprived of life, liberty, or property without due process of law.[122] A violation of the *Brady* right is a violation of the defendant's right to due process.[123] Many more specific rights fall under the umbrella of due process, and these rights span the accused's entire period of contact with the justice system. As commentator Brendan Max notes, "at its core, due process requires a meaningful opportunity for private citizens to be heard."[124]

Max argues that defendants should have a right to disclosure of exculpatory evidence discovered after trial because the government has guaranteed basic fairness during the post conviction process, and allowing prosecutors to suppress exculpatory evidence merely because the trial is over contradicts any notion of fairness or due process.[125] The idea that where a liberty interest has been established through statutes or case law, due process requirements must be met before that liberty can be taken away is also directly applicable to the pretrial context. There are many due process requirements that apply before trial to protect liberty interests such as the warrant requirement, which directly attempts to prevent the detention of innocent people.[126] As Max asserts, protection of liberty interests should not be carried out in arbitrary or unfair

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[120] *See id*. (holding that "the test for whether a defendant would have gone to trial is an objective one that centers on 'the likely persuasiveness of the withheld information.'")
[121] Brady, 373 U.S. at 87.
[122] U.S. CONST. amend. V; U.S. CONST. amend XIV, § 1.
[123] Brady, 373 U.S. at 87.
[124] Brendan Max, *The Duty to Disclose Exculpatory Evidence Discovered After Trial*, 94 ILL. B.J. 138, 141 (2006) (citing Grannis v. Ordean, 234 U.S. 385, 394 (1914)).
[125] Max, *supra* note 124, at 148-49.
[126] *See* U.S. CONST. amend. IV.

ways.[127] Just as it is arbitrary to deny defendants recourse when prosecutors suppress evidence that surfaces after trial, it is arbitrary to deny defendants recourse because they do not reach trial. In both of these situations the defendant has still suffered harm due to the suppression of exculpatory evidence, which, given a different point in time or a different outcome, would have constituted a *Brady* violation. Surely the basic understanding of due process and fairness dictates that exculpatory evidence should be turned over promptly, and if it is not, the defendant should have some recourse regardless of when it is discovered in relation to the possibility of a trial.

C. A Right Rooted in Case Law

1. *Brady's* Underlying Concern with Fairness

By stripping away the concerns over materiality that have dominated the Supreme Court's *Brady* jurisprudence and going back to the case that started it all, the *Brady* Court's driving concerns become evident. The *Brady* Court was interested in fairness to defendants.[128] The rule announced in *Brady* was based on a progression of rules from the Court's earlier cases,[129] and the Court explained that the principle behind these cases "is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused."[130] The Court went on to note that "our system of the administration of justice suffers when any accused is treated unfairly."[131] These statements demonstrate that the focus of any right to disclosure of exculpatory evidence should be on providing fair treatment to the accused. The articulation of the materiality standard that arose in subsequent *Brady* cases seems to lose sight of the idea that all accused persons deserve to be treated fairly, not only those who go to trial.

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[127] Max, *supra* note 124.
[128] Brady, 373 U.S. at 87.
[129] In *Naupe v. Illinois*,360 U.S. 264, 269 (1959), the Court extended its ruling from *Mooney v. Holohan*, 294 U.S. 103 (1935), and held that due process is denied "when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."
[130] Brady, 373 U.S. at 87.
[131] *Id*.

Along these same lines, since *Brady*, the Court has stressed the importance of the adversarial system.[132] The point of the adversarial system is that truth and justice should emerge.[133] When a pretrial detainee is denied a right to disclosure of exculpatory evidence, it gives state actors the ability to hide the truth for a period of time. So long as they release the detainee eventually, before a trial occurs, they face no consequences for what can only be described as injustice.[134]

Recognizing a right to disclosure of exculpatory evidence that uses the "reasonable probability" standard comports with the idea of fairness toward the accused that *Brady* stressed by allowing accused who do not reach trial to seek redress for denial of that evidence. The potential for § 1983 liability will also encourage fair dealing by state actors toward detainees from the start so as to avoid the need for redress altogether. Just as prosecutors seek to avoid overturned convictions due to *Brady* violations, they will presumably make better efforts to disclose exculpatory evidence as soon as the point of reasonable probability is reached in order to avoid a § 1983 claim.

2. The Point of Reasonable Probability of a Different Outcome

The proposed right also deals with the timing problem of when during the investigation exculpatory evidence should be disclosed by dictating that it should be disclosed at the point when there is a reasonable probability that withholding it would undermine confidence in continued detention of the accused. This gives the prosecutor the responsibility of evaluating evidence as he receives it and using his reason to determine whether or not it meets that threshold. If he determines that it should be disclosed, he should disclose it at that time. These ideas are not entirely new or foreign to the existing *Brad*y doctrine.

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[132] *See* Bagley, 473 U.S. at 766.
[133] *See id.*
[134] *See* Livers, 700 F.3d at 360; Taylor, 81 F.3d at 437.

The *Brady* right already exists for pretrial detainees leading up to trial, but it is unable to be enforced until after one occurs.[135] Accordingly, the prosecutor has a duty to decide what evidence should be disclosed prior to and possibly during a trial.[136] The Court has assigned to the prosecutor the "responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."[137] This indicates that the Court did not intend for prosecutors to wait until trial nears to disclose exculpatory evidence.[138] While exculpatory evidence is certainly important for a defendant's use at trial, it could be equally or more important for securing a pretrial detainee's release from jail or showing that the charges against him should be dismissed. Because prosecutors should already be evaluating evidence for *Brady* purposes, the burden of requiring them to disclose exculpatory evidence at the point where there is a reasonable probability that withholding the evidence would undermine confidence further detention is minimal compared to the benefit of the earliest possible receipt of this evidence to the detainee.

As with most standards based on reasonableness, the point of reasonable probability in this context is not a concrete; there is no date or time limitation, and its meaning would be further developed through case law. Though prosecutors may fear repercussions from failing to disclose exculpatory information as soon as they receive it, common sense dictates that there will be some period of continued detention in order to investigate the new information before a determination can be made as to whether it should be disclosed. So long as this period and the investigation of the new information are reasonable, it is unlikely that courts would find the point

[135] This is due to the materiality standard as explained in part III.A.1, *supra*.
[136] Agurs, 427 U.S. at 107-08.
[137] Kyles, 514 U.S. at 437.
[138] *See* Mahler, supra note 36, at 20 ("Withholding exculpatory evidence that is already known to the government until shortly before trial in order to obtain a litigative advantage is fundamentally inconsistent with *Brady's* underpinnings.").

of reasonable probability had passed and hold the government actor liable for a violation of this new right.

3. Honesty from the Outset

Several circuits have relied on the Supreme Court's decision in *Franks v. Delaware*[139] to hold that it is a violation of an accused's constitutional rights for an officer to knowingly or recklessly omit exculpatory evidence which tends to mitigate probable cause from an affidavit for an arrest warrant.[140] In other words, officers are required to disclose exculpatory information at the arrest warrant phase in order to avoid potential § 1983 liability. Taking this right in conjunction with the traditional *Brady* right, the accused are afforded protection against officials withholding exculpatory evidence at the beginning of an investigation and at the end, after a trial and conviction, but not necessarily in between.

The idea that officials are required to disclose exculpatory evidence that could undermine confidence in the guilt of the accused at the bookends of an investigation, but are allowed to withhold that information indefinitely in between is illogical. By endorsing disclosure as soon as the "reasonable probability" threshold has been met, the Court would be ensuring continuity throughout the process as it pertains to disclosure. This would also ensure uniformity in the sense that there would never be a point in the process where officers and prosecutors would be shielded from consequences for withholding information they should have disclosed.

D. Policy Arguments

1. Promoting Responsibility Among State Agents

Livers and Sanders are prime examples of pretrial detainees who suffered due to egregious errors on the part of police. Livers was held in jail for seven months in spite of a

[139] Franks v. Delaware, 438 U.S. 154 (1978).
[140] *See*, *e.g.*, Stewart v. Donges, 915 F.2d 572, 582-83 (10th Cir. 1990); United States v. Ippolito, 774 F.2d 1482, 1486-87 (9th Cir. 1985); Olson v. Tyler, 771 F.2d 277, 281 n.5 (7th Cir. 1985).

coerced confession, evidence tampering, and confessions from the true murderers.[141] Sanders spent fifty days in jail because the police officer on the case chose to ignore overwhelming evidence that showed that Sanders was not guilty, including three credible alibi witnesses and other victims who told the officer that Sanders was not the robber.[142] Despite the similar level of severity of the withheld evidence in these two cases, only Sanders was allowed to proceed with his claim.[143] Whether or not any future detainee in Livers' position is allowed to seek relief should not be based on whether he or she lives within the bounds of the Fifth Circuit.

Livers exemplifies the danger of continuing to operate without a clear right to disclosure of exculpatory evidence for pretrial detainees. While the court acknowledged the Fifth Circuit's decision in *Sanders*, it granted the officers qualified immunity on all claims based on any failure to disclose evidence.[144] This meant that officers faced no consequences for the seven months that Livers spent in jail after they knew about the exculpatory evidence.[145] It seems contrary to the basic idea of justice that state actors should be allowed to make errors so large and intentional without any repercussions. As one commentator noted, "[t]he constitutional command that the government disclose exculpatory evidence is grounded . . . in the prosecutor's overriding duty to seek justice rather than victory."[146] Establishing the right outlined in part IV.A., supra, at the Supreme Court level will, in turn, establish a duty for state actors to make timely disclosures of such evidence as well as a path to a remedy if that duty is ignored. Armed with a clearly established right, plaintiffs will not be thwarted by erring state actors' invocation of qualified immunity.

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[141] Livers, 700 F.3d at 347.
[142] Sanders, 950 F.2d at 1158.
[143] *See* Livers, 700 F.3d at 359-60; Sanders, 950 F.2d at 1162.
[144] Livers, 700 F.3d at 359-60.
[145] Because the court allowed certain other claims to go forward, the officers may have been liable for other aspects of their treatment of Livers and Sampson. *See* Livers 700 F.3d 340.
[146] Mahler, *supra* note 36, at 19-20.

2. Preventing Additional Harm to Pretrial Detainees

A common § 1983 claim for pretrial detainees seeking to avoid losing on a traditional *Brady* claim is a claim of illegal detention.[147] There is often interplay between disclosure of exculpatory evidence and illegal detention in the sense that even if a plaintiff is not alleging that he was arrested and initially detained illegally, he may allege that his continued detention after the exculpatory evidence was known to state actors was illegal.[148] The Fourth Circuit disagreed with this type of argument in *Taylor*, holding explicitly that once a determination of probable cause has been made, failing to disclose exculpatory evidence does not make continued detention unreasonable.[149] However, in *Baker v. McCollan*, the Supreme Court indicated that there may be some validity to such a claim under certain circumstances when it noted that

> depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will, after the lapse of a certain amount of time deprive the accused of liberty without due process of law.[150]

In *Baker*, the Court held that McCollan was not illegally detained when he was held for three days until the officers realized that the picture on file did not match McCollan.[151] McCollan claimed innocence the entire time, but the Court held that officers are not constitutionally required to investigate every claim of innocence, nor are they required to perform an "error-free" investigation if they do.[152] This holding should not preclude all plaintiffs from recovering for harm from continued detention after the point where officers knew of exculpatory evidence and failed to disclose it. The circumstances in *Livers*, for example, were

[147] *See*, *e.g.*, Livers, 700 F.3d at 357; Sanders, 950 F.2d at 1160.
[148] This was the case in *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992).
[149] Taylor, 81, F.3d at 437.
[150] Baker v. McCollan, 443 U.S. 137, 145 (1979).
[151] *Id*. at 140-42.
[152] *Id*. at 145-46.

drastically different in that there was no further investigation necessary; the officers knew of the exculpatory evidence and chose not to disclose it.[153]

Illegal detention is a serious harm within itself but it can also lead to other consequences for detainees. Most employers will not wait months or even weeks to determine whether the accused is actually guilty, so job loss is almost guaranteed. Additionally, the stigma that comes with being arrested and jailed can be hard to overcome even after the person is released. Allowing failure to disclose exculpatory evidence to serve as the basis for an illegal detention claim will help to avoid these harms by providing incentive for officials to disclose information, and, in the alternative, to provide a remedy for the harm.

V. CONCLUSION

Under the current interpretation of the *Brady* doctrine, there is a gap in protection that effectively prevents pretrial detainees who never face trial and conviction from succeeding on claims based on the state's failure to disclose exculpatory evidence. This issue mainly arises in § 1983 claims where the plaintiff needs to assert that he has been deprived of a constitutional or statutory right. Because these claims are often brought against police officers and prosecutors, the plaintiff must also overcome assertions of qualified immunity, and in order to do that, the right needs to be clearly established at the time of the violation. To date, only the Fifth Circuit has indicated that there may be a right to disclosure of exculpatory evidence in the pretrial context. One circuit is not enough to make a right clearly established.

This problem could be addressed by an explicit acknowledgement of a right for pretrial detainees to disclosure of exculpatory evidence at the point when there is a reasonable probability that withholding the evidence would undermine confidence in further detention of the accused. This right would have to exist outside of, but alongside, the traditional *Brady* right due

[153] *See* Livers, 700 F.3d 340.

to the Supreme Court's strict adherence to the materiality standard in *Brady* cases. Because the materiality standard is inherently unworkable in cases that never reach trial, the "reasonable probability" standard is a useful alternative. As evidenced by the alternative materiality test in guilty plea *Brady* cases, courts are capable of performing this type of reasonableness analysis in order to distinguish what evidence must be disclosed and when.

This right comports with the basic ideas of due process and fairness to the accused that underlie the entire *Brady* line of cases by ensuring that future detainees who suffer due to a state actor's failure to promptly disclose exculpatory evidence will have an available remedy. The right will also provide incentive for prosecutors in that they will seek to avoid liability, which will make them more likely to disclose exculpatory information up front. The Supreme Court should therefore act on the issue of the current lack of pretrial detainees' rights to disclosure of exculpatory evidence by recognizing such a right as outlined above so that future plaintiffs in Livers' position are able to avoid suffering ongoing harm without redress.