Constitutional Law—Ninth Circuit Effectively Precludes Future Findings of *Brady* Violations in the Absence of a Conviction—*Smith v. Almada*, 640 F.3d 931 (9th Cir. 2011)

When analyzing a claim under 42 U.S.C § 1983 that the government withheld exculpatory evidence from a criminal defendant, courts typically use the Fifth or Fourteenth Amendment's due process standard as articulated in the iconic 1963 case of *Brady v. Maryland*.[1] In *Smith v. Almada*,[2] the Court of Appeals for the Ninth Circuit considered whether a police officer's failure to disclose exculpatory evidence violated the plaintiff's due process right to a fair trial—thereby exposing the officer to civil liability under *Brady*—where the plaintiff had spent over seventeen months in jail but had never been convicted.[3] The Ninth Circuit initially answered that question very broadly, holding that relief under *Brady* is unavailable entirely in the absence of a conviction.[4] On plaintiff's motion for rehearing, however, the court superseded its original decision, transcribing the former majority's opinion into a special concurrence, which, because of the court's maneuverings, effectively remains as *Smith*'s de facto holding.[5]

1. *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1; 42 U.S.C. § 1983 (2006) (providing federal civil relief for claims involving constitutional violations committed by government officials); Brady v. Maryland, 373 U.S. 83, 87 (1963) (establishing prosecution's duty to disclose exculpatory evidence as integral part of right to fair trial). The defendant's right to a fair trial in federal court under the Fifth Amendment's Due Process Clause is similarly guaranteed in state court under the Due Process Clause of the Fourteenth Amendment. *See* United States v. Agurs, 427 U.S. 97, 107 (1976); Ams. for Effective Law Enforcement, *Civil Liability for Police Failure to Disclose Exculpatory Evidence*, AELE MONTHLY L.J. (AELE Law Enforcement Legal Ctr., Chi., Ill.), Sept. 2009, http://www.aele.org/law/2009all09/2009-09MLJ101.pdf (explaining *Brady* characterizes government's suppression of exculpatory evidence as due process violation).

2. 640 F.3d 931 (9th Cir. 2011).

3. *Id.* at 933-34.

4. Smith v. Almada, 623 F.3d 1078, 1085-89 (9th Cir. 2010) (declining to permit *Brady*-based § 1983 claims by plaintiffs not convicted at trial), *withdrawn and superseded*, 640 F.3d 931 (9th Cir. 2011). Judge Gould admitted his personal inclination "to follow the united view of all circuits" and prohibit *Brady*-based § 1983 claims without a conviction, but nonetheless declined to rule on that issue on Smith's motion for rehearing. 640 F.3d at 940-41 (Gould, J., concurring).

5. *See* 640 F.3d at 933 (ordering withdrawal and superseding of opinion and dissent published at 623 F.3d 1078). *Compare* Smith v. Almada, 623 F.3d 1078, 1085-89 (9th Cir. 2010) (holding plaintiffs cannot state *Brady*-based § 1983 claims without previous conviction), *withdrawn and superseded*, 640 F.3d 931 (9th Cir. 2011), *with* 640 F.3d at 940-41 (Gould, J., concurring) (reasoning issue of prerequisite convictions unnecessary to deciding case), *and* 640 F.3d at 941-45 (Gwin, J., specially concurring) (defending reasons for prohibiting *Brady*-based § 1983 claims without conviction). *See generally* Bennett L. Gershman, *Now You See It, Now You Don't: Depublication and Nonpublication of Opinions Raise Motive Questions*, N.Y. ST. B. ASS'N J., Oct. 2001, at 36, *available at* http://digitalcommons.pace.edu/lawfaculty/59 (opining on reasons for withdrawal, excision, and redaction of judicial opinions).

On February 13, 2003, an arsonist set fire to the inside of Simply Sofas, a furniture and consignment shop owned by Marilyn Nelson, destroying the store and much of its inventory to the tune of $2.8 million.[6] Because of his familiarity with four recent arson attacks near Simply Sofas, Sergeant Robert Almada of the Santa Monica Police Department assumed the role of lead investigator and immediately focused his efforts on one of Nelson's former customers, Anthony Smith.[7] After obtaining an arrest warrant, Sergeant Almada took Smith into custody and charged him with arson.[8] The State of California tried Smith twice, with both cases resulting in a mistrial.[9] Despite "strong inferences" of Smith's guilt, the prosecution twice failed to convince the jury of his participation in the arson beyond a reasonable doubt, prompting the trial judge to dismiss the case at the end of the State's second attempt.[10] Having spent over seventeen months in jail from arrest to dismissal, Smith filed a civil lawsuit against Sergeant Almada under 42 U.S.C. § 1983 for, among other things, failure to disclose exculpatory evidence in violation of Smith's due process rights under *Brady v. Maryland*.[11]

Smith's *Brady* claim hinged on Sergeant Almada's nondisclosure of two key items of evidence: the four previous fires and Marilyn Nelson's demonstrably false testimony that she had witnessed Smith gloating outside the charred remains of her store several months after the fire.[12] In granting Sergeant

6. 640 F.3d at 934.

7. *Id.* at 934-35. Almada focused his investigation on Smith because several pieces of mail bearing Smith's home address were used as incendiary wicks in the Simply Sofas fire. *Id.* at 935. When Almada initially interviewed Simply Sofas' owner, Marilyn Nelson, however, Nelson did not mention Smith's name when Almada asked her if she could think of anyone with any reason to set fire to her store. *Id.* Almada later learned from Smith of a "minor issue" Smith had with Nelson over a broken item of furniture. *Id.* It was only after Almada informed Nelson that Smith was a suspect that Nelson stated that Smith "intimidate[d] her" after during their disagreement over the broken furniture. *Id.* Nelson also perjured herself during Smith's second trial by testifying falsely that she had seen Smith pointing and laughing outside the charred remains of Simply Sofas. *Id.* Almada knew that Nelson's testimony was entirely fraudulent: during his investigation, he discovered that Smith was at home on the day Nelson claimed to have seen Smith gloating outside her store. *Id.*

8. *See id.* at 935-37. Sergeant Almada met with deputy district attorney Jean Daly to discuss the case against Smith and obtained a recommendation to seek an arrest warrant. *Id.* at 935.

9. *See id.* at 936. Only five of the twelve jurors voted "guilty" at the end of Smith's first trial, and only one voted "guilty" at the end of his second trial. *Id.*

10. *See* 640 F.3d at 936. The trial court explained its decision, stating, "[T]he prosecution would never be able to obtain a unanimous verdict." *Id.*

11. 373 U.S. 83, 87 (1963) (mandating disclosure of material exculpatory evidence in criminal prosecutions); 640 F.3d at 936 (summarizing Smith's civil claims against Almada); 640 F.3d at 945 (Nelson, J., dissenting) (noting length of Smith's incarceration). Smith did not assert his *Brady* claim until after discovery, over Almada's objections. 640 F.3d at 936.

12. *See* 640 F.3d at 939-40. The court affirmed the trial court's dismissal of Smith's complaint, reasoning that the undisclosed evidence was not material. *See id.* at 939. The court explained that the outcome of the case would not have been any different had Smith known about the previous fires because the existence of the fires did "nothing to undermine the strong pieces of evidence—i.e., the numerous pieces of mail—linking

Almada's motion for summary judgment, the district court found that Almada was not liable under *Brady* because the evidence that was allegedly withheld "would not have materially affected the outcome of the prosecution."[13] On appeal, the Ninth Circuit expanded significantly the district court's ruling, holding that a *Brady*-based claim under § 1983 could never succeed unless the plaintiff had actually been convicted at his criminal trial.[14] On Smith's motion for rehearing, however, Circuit Judge Ronald Gould reconsidered his support for the court's sweeping prohibition, and the three-judge panel ordered the withdrawal of its original opinion.[15] In its superseding opinion, the Ninth Circuit held that the undisclosed evidence forming the basis of Smith's claim failed to meet *Brady*'s materiality standard, technically removing any precedential weight from its wholesale prohibition of *Brady* claims absent a conviction.[16] Nevertheless, because both concurring judges wrote unambiguously of their intentions to issue the same holding in future cases, the Ninth Circuit Court of Appeals became, in effect, the fourth federal circuit to prohibit *Brady* claims under § 1983 in the absence of a criminal conviction.[17]

During Reconstruction, the Forty-Second Congress passed the Civil Rights Act of 1871 to provide recently freed slaves with a civil remedy for the

Smith" to the arson, each fire possessed slightly different characteristics, and because any evidence of the fires was likely inadmissible under the California Rules of Evidence. *Id.* at 939-40. The court similarly held that Nelson's false statements were not material, as her testimony was not crucial at trial and, even though her false statements were admitted into evidence, they could not explain the presence of Smith's mail at the scene of the fire. *Id.* at 940.

13. Transcript of In Chambers Minutes at 5, Smith v. Nelson, CV 06-1626 (C.D. Cal. Jan. 21, 2009), *aff'd sub nom.* Smith v. Almada, 623 F.3d 1078 (9th Cir. 2010), *withdrawn and superseded*, 640 F.3d 931 (9th Cir. 2011).

14. *See* Smith v. Almada, 623 F.3d 1078, 1089 (9th Cir. 2010) (affirming district court's grant of summary judgment), *withdrawn and superseded*, 640 F.3d 931 (9th Cir. 2011); *id.* at 1088 (holding allowance of *Brady*-based § 1983 claim without conviction inconsistent with "central purpose of *Brady*"). *Compare* Transcript of In Chambers Minutes at 5, Smith v. Nelson, CV 06-1626 (C.D. Cal. Jan. 21, 2009), *aff'd sub nom.* Smith v. Almada, 623 F.3d 1078 (9th Cir. 2010), *withdrawn and superseded*, 640 F.3d 931 (9th Cir. 2011), *with* Smith v. Almada, 623 F.3d 1078, 1088 (holding plaintiffs can never state *Brady*-based § 1983 claim without conviction), *withdrawn and superseded*, 640 F.3d 931 (9th Cir. 2011). *But see* 640 F.3d at 939 (agreeing with trial court's materiality finding on Smith's *Brady* claim).

15. 640 F.3d at 933; *id.* at 941 (Gould, J., concurring) (withdrawing precedential support for holding prohibiting *Brady* claims with no conviction). Although Judge Gould withdrew his precedential support for the prior holding, he maintained his agreement with it as sound legal argument, stating that he would once again vote to prohibit such claims in the future. *Id.* at 941 (Gould, J., concurring).

16. *See id.* at 940 (majority opinion) (affirming district court's grant of summary judgment for Almada based on evidence's immateriality).

17. *See id.* at 940-41 (Gould, J., concurring) (describing support for eventual prohibition of *Brady* claims under § 1983 in absence of conviction). Although the court narrowed its holding to the issue of materiality, it is significant that the withdrawn opinion's majority judges expressed their support for eventually prohibiting *Brady* claims under § 1983 in the absence of a conviction. *See id.* at 945 (Gwin, J., specially concurring) (summarizing exact argument of withdrawn opinion's majority). When a "fresh slate" in a similar case presents itself to the court, it will likely issue the same holding—effectively and creatively making the prohibition on such claims the Ninth Circuit's de facto precedent going forward. *See id.* at 940-41 (Gould, J., concurring).

systematic, state-sponsored deprivation of their constitutional rights.[18] Now codified at 42 U.S.C § 1983, the Act has become the principal statutory basis for relief from the denial of any citizen's constitutional rights by those acting "under color of" law.[19] In the landmark case of *Brady v. Maryland*,[20] the United States Supreme Court recognized that a criminal defendant's constitutional right to a fair trial is deprived when the government withholds exculpatory evidence, thereafter imposing on the prosecution a duty to disclose such evidence as an inseparable component of that right.[21] Commonly referred to as "*Brady* material" or "*Brady* evidence," the doctrine underwent significant expansion and development in the decades following its inception.[22]

18. *See* Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)); *see also* Monroe v. Pape, 365 U.S. 167, 173-76 (1961) (identifying denial of civil rights to newly freed slaves as primary motivation for statute's enactment); Jan Yarborough Bostic, Comment, *Due Process and Section 1983: Policemen's Duty to Expose Exculpatory Information*, 22 WAKE FOREST L. REV. 235, 237-38 (1987) (summarizing historical background of Civil Rights Act of 1871).

19. *See* 42 U.S.C. § 1983 (2006) (authorizing private claims against anyone acting "under color of" law for violating claimant's constitutional rights); *see also* Bostic, *supra* note 18, at 235-36 (discussing prevalence of civil suits filed under § 1983).

20. 373 U.S. 83 (1963).

21. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). Although *Brady* has taken on iconic status as one of the Warren Court's most celebrated cases, Justice Douglas based his opinion in large part on *Mooney v. Holohan*, where the Court held that a defendant's due process rights are violated when the prosecution knowingly uses perjured testimony, and *Pyle v. Kansas*, where the Court held that a defendant is deprived of his "rights guaranteed by the Federal Constitution" when the prosecution deliberately suppresses exculpatory evidence. *See id.* at 86-88 (invoking *Mooney* and *Pyle* to support *Brady*'s reasoning); Pyle v. Kansas, 317 U.S. 213, 215-16 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935) ("[C]ontrivance by a State to procure the conviction . . . is . . . inconsistent with the rudimentary demands of justice."); *see also* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 693 & n.36 (2006) (detailing *Brady* Court's reliance on prior cases to arrive at its holding); Maitri Klinkosum & Brad Bannon, Brady v. Maryland *and Its Legacy—Forging a Path for Disclosure*, N.C. ST. B.J., Summer 2006, at 8-9 (summarizing *Brady*'s history and reliance on prior cases); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643 (2002) (declaring *Brady* possesses "superhero status" in modern constitutional law history).

22. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (imposing duty on prosecution to "learn of any favorable evidence known" by others helping investigation); United States v. Bagley, 473 U.S. 667, 676-78 (1985) (treating impeachment evidence as constitutionally synonymous with exculpatory evidence); United States v. Agurs, 427 U.S. 97, 110 (1976) (discussing government's obligation to disclose material exculpatory evidence); Giglio v. United States, 405 U.S. 150, 153-55 (1972) (placing affirmative duty on government to share relevant information with all interested parties); *see also* Banks v. Dretke, 540 U.S. 668, 675-77 (2004). The *Banks* Court reversed a denial of a "certificate of appealability" because the prosecution allowed two witnesses to commit perjury and failed to disclose material exculpatory evidence bearing heavily on the government's star witnesses. Banks v. Dretke, 540 U.S. 668, 675-76 (2004); *see also* Strickler v. Greene, 527 U.S. 263, 281 (1999) (emphasizing prosecution's "special role" and "broad duty" to disclose exculpatory evidence). *But see* Kyles v. Whitley, 514 U.S. 419, 460-61 (1995) (Scalia, J., dissenting) (asserting defendant's burden to prove exculpatory evidence creates reasonable doubt). "It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to 'destroy' the particular prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates." *Id.* at 460 (quoting *id.* at 441 (majority opinion)); *see also* United States v. Bagley, 473 U.S. 667, 685 (1985) (White, J., concurring in part) (opposing expansion of materiality standard to specific requests for disclosure by defendant).

Nevertheless, the Supreme Court has yet to consider *Brady*'s application to civil claims arising under § 1983, thus far declining to articulate any meaningful framework for determining the scope of civil liability for law enforcement agents failing to disclose exculpatory evidence.[23] Numerous lower court decisions on the matter have therefore produced contradictory holdings and widely inconsistent analyses of some of the most critical issues involved.[24]

In its criminal procedure jurisprudence since *Brady*, however, the Supreme Court has developed a robust body of case law in an effort to broaden both the nature and scope of the government's disclosure obligations under *Brady*.[25] In the 1976 case of *United States v. Agurs*,[26] the Court significantly expanded the prosecution's responsibilities under the *Brady* doctrine by imposing an affirmative duty on the government to disclose material exculpatory evidence, even if the defense had never requested disclosure.[27] Additionally, in *Kyles v.*

23. *See* Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 1-2 (2003) (noting Supreme Court left unresolved issues critical to resolution of civil rights claims under *Brady*).

> The United States Supreme Court has never considered a civil rights claim against a police officer based on the failure to disclose exculpatory evidence. Nor have a number of important issues that bear on the problem been resolved by the Supreme Court in its decisions in both criminal appeal and habeas corpus cases.

Id.; *see also* Gershman, *supra* note 21, at 694 (noting many undefined terms and vagaries surrounding *Brady*'s holding).

24. *See* Morgan v. Gertz, 166 F.3d 1307, 1310 (10th Cir. 1999) (holding right to fair trial not implicated when defendant escapes conviction); Flores v. Satz, 137 F.3d 1275, 1278 (11th Cir. 1998) (reasoning plaintiff not entitled to relief under *Brady* because of acquittal); McCune v. City of Grand Rapids, 842 F.2d 903, 907 (6th Cir. 1988) (holding acquitted plaintiff not eligible for relief under § 1983); *see also* Bielanski v. Cnty. of Kane, 550 F.3d 632, 644-45 (7th Cir. 2008). The Seventh Circuit allows plaintiffs to state § 1983 *Brady* claims without having been convicted where "the decision to go to trial would not have been affected" if the prosecutor knew of allegedly suppressed exculpatory evidence. Bielanski v. Cnty. of Kane, 550 F.3d 632, 644-45 (7th Cir. 2008); *see also* Taylor v. Waters, 81 F.3d 429, 435-36 (4th Cir. 1996) (holding police not required to disclose exculpatory evidence where plaintiff never actually put on trial); Williams v. Krystopa, No. Civ.A. 98-CV-1119, 1998 WL 961375, at *4 (E.D. Pa. Dec. 16, 1998) (finding no *Brady* violation where plaintiff uncovered exculpatory evidence before conclusion of trial and acquitted). *But see* Haupt v. Dillard, 17 F.3d 285, 287 (9th Cir. 1994) (holding acquitted plaintiff maintained claim under *Brady* because outcome "irrelevant" to due process violations); Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988) (allowing *Brady* claim despite no conviction). The Seventh Circuit held that relief under § 1983 was available to the plaintiff because of the investigation team's consistent and systematic obstruction of justice. *See* Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988). The court reasoned, "If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability." *Id.*

25. *See supra* note 22 and accompanying text (discussing judicial development of *Brady* doctrine since *Brady*'s publication).

26. 427 U.S. 97 (1976).

27. *Compare* United States v. Agurs, 427 U.S. 97, 110 (1976) (requiring government to proactively disclose all material exculpatory evidence), *with* Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring disclosure of material exculpatory evidence upon defendant's request).

Whitley,[28] a 1995 habeas decision, the Court extended *Agurs* to include the disclosure of all exculpatory evidence known by anyone "acting on the government's behalf" in a criminal investigation, including police officers.[29] Although *Kyles* seems to suggest that the result of a criminal proceeding determines whether a *Brady* violation has occurred, the Court's evaluation in *Kyles* and subsequent cases has conformed largely to a balancing of public and private interests typical of traditional procedural due process analysis.[30] But despite its consistent, albeit implicit, interest-balancing throughout the *Brady* line of cases, the Court has yet to explicitly characterize *Brady* violations as violations of a criminal defendant's right to procedural due process, an anomaly that has undoubtedly contributed to the lack of uniformity within *Brady*'s corner of constitutional jurisprudence.[31]

The lower federal courts have generally held police officers liable under § 1983 for the deliberate suppression of exculpatory evidence.[32] Nevertheless, the lower courts still struggle to apply consistently *Brady*'s criminal law principles to civil actions in which plaintiffs seek relief for deprivation of their constitutional rights by the police.[33] Although an officer's withholding of

28. 514 U.S. 419 (1995).

29. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (requiring prosecution to disclose material exculpatory evidence acquired by entire investigation team). The *Kyles* Court declared the prosecutor thenceforth had a "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case" as a component of defendant's due process right to fair trial under *Brady*. *Id.*

30. *See* Kyles v. Whitley, 514 U.S. 419, 454 (1995) (discussing aspects of fair trial, including "confidence in the verdict"); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (describing criteria used to evaluate procedural due process violations). The *Kyles* Court stated, "[T]he government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." Kyles v. Whitley, 514 U.S. 419, 439 (1995); *see* United States v. Bagley, 473 U.S. 667, 677-78 (1985) (treating impeachment evidence as constitutionally synonymous with exculpatory evidence); Avery, *supra* note 23, at 24-25 (concluding *Brady* claims implicate procedural, not substantive due process); Avery, *supra* note 23, at 25 (concluding words "fair trial" associated with procedural due process rights under Fifth and Fourteenth Amendments).

31. *See* Avery, *supra* note 23, at 24-29 (discussing effect of Supreme Court's failure to identify nature of due process right involved in *Brady* cases); *see also supra* note 24 and accompanying text (discussing vast differences in lower court decisions).

32. *See, e.g.*, Tennison v. City & Cnty. of San Francisco, 570 F.3d 1078, 1087 (9th Cir. 2009) (holding police liable under *Brady* where plaintiff incarcerated for thirteen years and declared innocent); Steidl v. Fermon, 494 F.3d 623, 632 (7th Cir. 2007) (reasoning plaintiff suffered constitutional violation because "supervisors perpetuated other officers' misconduct"); Jones v. City of Chicago, 856 F.2d 985, 995-96 (7th Cir. 1988) (holding police liable for maintaining clandestine "street files" and failing to disclose files to prosecutors). *But see* Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (imposing "bad faith" element for § 1983 claims involving police failure to disclose exculpatory evidence).

33. *See supra* note 24 and accompanying text (discussing vast differences in lower court decisions); *see also* Avery, *supra* note 23, at 29 (noting lack of "consistency and doctrinal clarity" in federal decisions). Avery contends that the federal courts must resolve three critical issues in order to establish consistency in § 1983 *Brady* claims: the nature of the constitutional violation, the basis for imposing liability, and the "level of culpability" necessary to show a *Brady* violation under § 1983. Avery, *supra* note 23, at 30; *see also* Robert G. Morvillo & Robert J. Anello, *Renewing Efforts to Enforce* Brady v. Maryland, N.Y. L.J., Feb. 2, 2010, at 3 (referring to country-wide rules for *Brady* compliance as "disparate" and "often nonexistent").

Brady evidence has typically been held actionable under § 1983 as a denial of due process when nondisclosure contributes to the defendant's conviction, the circuits are split when no conviction results.[34] A minority of courts hold that an acquitted defendant has no constitutional claim, and is therefore due no further process, regardless of the amount of time he has spent in jail before or during trial.[35] Doctrinal disagreement among the circuits exists mainly because the Supreme Court's *Brady* jurisprudence is unclear both as to the specific nature of the constitutional right violated by the failure to disclose exculpatory evidence, and as to the proper constitutional analysis associated with a deprivation of that right.[36]

In *Smith v. Almada*, the Ninth Circuit considered whether a police officer's suppression of exculpatory evidence constituted a *Brady* violation where the plaintiff had been incarcerated for over seventeen months through two mistrials but ultimately escaped conviction.[37] Relying heavily on case law from other circuits and taking a "results-oriented" approach to the *Brady* analysis, the Ninth Circuit concluded that suppression of exculpatory evidence could never constitute a denial of due process because a trial resulting in an acquittal cannot be considered unfair.[38] Although the court briefly acknowledged that the purpose of *Brady* was to "ensure a fair trial," the court narrowly interpreted the *Brady* bloodline by concluding that a "reasonable probability of a different result" referred only to the situation in which the result happened to be a conviction.[39]

34. *See supra* note 32 (summarizing lower court decisions imposing liability on police officers for failure to disclose exculpatory evidence); *supra* note 24 and accompanying text (detailing decisions prohibiting police liability without conviction and decisions holding police liability without conviction).

35. *See* Morgan v. Gertz, 166 F.3d 1307, 1310 (10th Cir. 1999) (dismissing claim due to defendant's acquittal); Flores v. Satz, 137 F.3d 1275, 1278 (11th Cir. 1998) (dismissing claim due to acquittal verdict at trial); McCune v. City of Grand Rapids, 842 F.2d 903, 906 (6th Cir. 1988) ("Because the underlying criminal proceeding terminated in appellant's favor, he has not been injured by the act of wrongful suppression of exculpatory evidence."). *But see* Haupt v. Dillard, 17 F.3d 285, 288 (9th Cir. 1994) (allowing § 1983 claim despite no conviction because trial judge improperly intimidated by police); Jones v. City of Chicago, 856 F.2d 985, 995-96 (7th Cir. 1988) (affirming police liability for egregious violations of plaintiff's constitutional rights despite lack of conviction).

36. *See* Avery, *supra* note 23, at 29-30 (explaining why lower courts consistently apply incorrect constitutional analysis to *Brady* cases); *id.* at 25-26 (proposing *Mathews* test to clarify § 1983 claims under *Brady*).

37. *See* 640 F.3d at 933-34.

38. *See id.* at 941-42 (Gwin, J., specially concurring) (praising logic of "sister circuits" holding inability to maintain *Brady* claim absent conviction); *id.* at 942 n.1 (criticizing dissent for relying only on cases resulting in conviction); *id.* at 943 (distinguishing *Haupt* because precedent overruled and involved only general due process claim); *id.* at 944 (characterizing *Brady* as "post-conviction right" not accorded recognition without conviction). According to the dissent, the special concurrence's "approach is based . . . on the logical fallacy that the lack of a conviction necessitates the conclusion that the trial was 'fair' for purposes of *Brady*." *Id.* at 947 (Nelson, J., dissenting) (criticizing special concurrence for "results-oriented test").

39. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995). The *Kyles* Court adopted Justice Blackmun's formulation of materiality, stating, "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting

Confronted with the choice between creating a bright-line rule through a "cursory analysis" of legal and policy arguments on the propriety of allowing *Brady* violations without a conviction, or attempting to extrapolate doctrinally correct answers from incongruent precedent, the Ninth Circuit chose incorrectly in manufacturing a de facto bright-line rule.[40] In the constitutional arena, *Brady* and its progeny symbolize the Supreme Court's ongoing effort to preserve the virtues upon which the criminal justice system is based.[41] But because the Court has never clarified whether the due process standard of *Brady* is procedural or substantive, the Ninth Circuit wrongly assumed that justice always prevails when a criminal defendant escapes conviction.[42] To avoid such erroneous assumptions, the *Smith* court should have analyzed the withholding of exculpatory evidence as a violation of procedural due process in accordance with the traditional *Mathews* balancing test.[43]

At the outset, *Mathews* is appropriate because the *Brady* doctrine is based on the text of the Fifth and Fourteenth Amendments, which not only implicitly

United States v. Bagley, 473 U.S. 667, 678 (1985)); *cf.* 640 F.3d at 947 (Nelson, J., dissenting) ("[T]he lack of a conviction [does not] necessitate the conclusion that the trial was 'fair' for purposes of *Brady*."); 640 F.3d at 942 (Gwin, J., specially concurring) (stating decisions from "sister circuits" reflect *Brady*'s underlying purpose); 640 F.3d at 941 (Gould, J., concurring) (supporting special concurrence's arguments prohibiting *Brady*-based § 1983 claims without conviction).

40. *See* 640 F.3d at 945 (Gwin, J., specially concurring) (summarizing reasons why court should disallow *Brady*-based § 1983 claims absent convictions); *see also id.* at 940-41 (Gould, J., concurring) (supporting special concurrence's argument prohibiting *Brady*-based § 1983 claims absent convictions). Although the court ultimately withdrew its original holding prohibiting *Brady*-based § 1983 claims without a prior conviction, the holding essentially remains intact because of Judge Gould's foreshadowing that the court would hold similarly in another case when the time is right. *See id.* at 933 (majority opinion) (issuing order withdrawing previous majority and dissenting opinions); *id.* at 940-41 (Gould, J., concurring) ("I add this separate concurrence to point out that I think the substantive idea in Judge Gwin's separate concurrence is a good one, and that I would personally be inclined to follow the united view of all circuits to have reached that issue."); *see also supra* note 17 and accompanying text (discussing withdrawn opinion and effect of superseding decision on future litigants).

41. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281 (1999) (emphasizing "special role" of prosecution involves "search for truth"); United States v. Agurs, 427 U.S. 97, 110-11 (1976) ("For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'"); Brady v. Maryland, 373 U.S. 83, 87 (1963) ("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."); *see also* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (affirming *Brady*'s importance to both prosecutors and defendants). "*Brady*'s announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather than victory." Gershman, *supra*.

42. *See* Avery, *supra* note 23, at 30 (discussing why lower courts consistently contradict themselves and apply incorrect constitutional doctrines); *see also supra* note 24 and accompanying text (summarizing inconsistent and doctrinally incorrect decisions in lower courts); *supra* note 31 (providing further explanation for inconsistencies in lower courts).

43. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (articulating three-factor test for procedural due process); Avery, *supra* note 23, at 24-29 (reviewing relevant case law and concluding *Brady*'s due process standard refers to procedural due process); Avery, *supra* note 23, at 31-35 (finding more support for procedural due process rights after reviewing decisions of lower courts).

protect the right to a "fair trial," but expressly shelter the individual against *any* denial of liberty without due process of law.[44] Traditional procedural due process analysis also comports with the factual and legal scenarios surrounding *Brady* violations; as the *Mathews* test illuminates, perhaps the greatest likelihood for wrongful deprivation of a criminal defendant's liberty interest occurs when the government suppresses evidence favorable to him.[45] Furthermore, the Court has consistently acknowledged that any procedural requirements mandating disclosure of material exculpatory evidence rarely, as a matter of law, outweigh the risk of erroneously depriving a defendant of his liberty interests perilously at stake in criminal trials.[46] It therefore follows that if the *Smith* court had chosen to delve into the precise nature of the rights involved with *Brady* violations and employed the proper constitutional analysis for a deprivation of those rights, the court would have likely concluded that a given *procedure's* fairness is completely independent of the *outcome* of the proceeding in which it is used.[47] The court would have thus downplayed Smith's acquittal, and instead would have placed more emphasis on the causal link between Almada's suppression of exculpatory evidence and the seventeen-month denial of Smith's freedom from bodily restraint.[48]

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44. *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1; Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding suppression of exculpatory evidence unfair and violates due process); *see also* Avery, *supra* note 23, at 43 (distinguishing right to "fair trial" from Due Process Clauses in constitutional text). Avery explains, "The Constitution does not mention a 'fair trial,' and a 'fair trial' is but one example of a procedural safeguard designed to avoid a wrongful deprivation of liberty." Avery, *supra* note 23, at 43.

45. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (explaining traditional procedural due process test). The *Mathews* Court articulated the procedural due process test by balancing three general factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335; *see also* Avery, *supra* note 23, at 45 ("If the *Mathews* analysis were explicitly employed by the courts in determining whether the failure to disclose exculpatory evidence caused a procedural due process violation, it would bring both greater clarity and consistency to this body of law.").

46. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) (implying prosecution's burden to disclose much lower than corresponding risk to defendant's liberty interest).

47. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (explaining traditional procedural due process test). The *Mathews* test mentions nothing about procedural due process violations being outcome determinative, but instead recognizes that, if the government uses procedures that place one's liberty interest at high risk of erroneous deprivation, the entire procedure itself violates the Due Process Clause of the Fifth and Fourteenth Amendments, regardless of the actual outcome of the proceeding. *Id.*; *see also* 640 F.3d at 948 (Nelson, J., dissenting) (criticizing special concurrence for concluding fairness automatically follows from acquittal). The dissent also recognized that *Brady* claims have internal limitations—that the evidence met the materiality requirement and was in fact exculpatory or impeaching, and that the evidence was actually suppressed by the government—so allowing relief in the absence of a conviction would have no bearing on "keep[ing] the floodgates shut" against a plethora of new lawsuits. 640 F.3d at 948 (Nelson, J., dissenting).

48. *See* 640 F.3d at 948 (Nelson, J., dissenting) (recognizing deprivation of Smith's liberty during

By thus far declining to hear any § 1983 claims arising out of a police officer's violation of his responsibilities under *Brady v. Maryland*,[49] and by refusing to answer some of *Brady*'s basic, doctrinal questions, the Supreme Court is increasingly curtailing the ability of plaintiffs to formally redress the deprivation of their constitutional rights under the *Brady* doctrine.[50] As illustrated by the Ninth Circuit's misguided decision in *Smith*, the lower courts are drifting further apart on some of the most fundamental issues involved in *Brady* claims.[51] Until the Supreme Court provides clarification of the exact nature of the due process right—substantive or procedural—denied by *Brady* violations, as well as the proper method for analyzing a denial of that right, the circuits will continue to be split in *Brady*-based civil actions brought under § 1983, especially in the absence of a criminal conviction.[52]

In *Smith v. Almada*, the Ninth Circuit ordered the withdrawal of its initial holding prohibiting plaintiffs from filing suit under § 1983 for *Brady* violations if they had not suffered a conviction. In its superseding opinion, the *Smith* court seemingly overruled itself on that issue, but because both concurring judges explicitly stated their intentions to again hold similarly, the court's initial prohibition ingeniously remains de facto law in the Ninth Circuit. The consequence of the court's de facto holding, however, is an erosion of *Brady*'s transcendent principles of justice and fairness; principles that serve as a guidepost to the government's constitutional obligation to ensure all criminal defendants are accorded full and fair trials. Unfortunately, the Supreme Court must take most of the blame for this erosion; the Court has failed to articulate answers to some of the most basic doctrinal questions involved in *Brady* cases, and has passively forced the lower courts to rely on criminal-law principles for § 1983-based civil actions involving *Brady* violations. Combined, these two

seventeen-month incarceration from arrest to dismissal). The dissent vehemently opposed the concurring judges' views, stating multiple times that the result of a proceeding is completely irrelevant to the process used in arriving at that result. *Id.* at 947-48; *see also id.* at 941 (Gwin, J., specially concurring) (referring to length of Smith's jail time only once).

49. 373 U.S. 83 (1963).

50. *See* Morvillo & Anello, *supra* note 33, at 243 (referring to country-wide rules for *Brady* compliance as "disparate" and "often nonexistent"); *see also* Avery, *supra* note 23, at 30 (exploring why lower courts contradict themselves and apply inappropriate doctrinal analyses).

51. *Compare* Morgan v. Gertz, 166 F.3d 1307, 1310 (10th Cir. 1999) (holding right to fair trial not implicated when defendant acquitted), *and* Flores v. Satz, 137 F.3d 1275, 1278 (11th Cir. 1998) (holding because plaintiff acquitted, not entitled to relief under *Brady*), *with* Haupt v. Dillard, 17 F.3d 285, 287 (9th Cir. 1994) (holding acquitted plaintiff maintained cause of action under *Brady* because outcome "irrelevant" to *Brady* claim), *and* Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988) (explaining egregiousness of police actions violated *Brady* even without plaintiff's conviction). The court in *Jones* reasoned, "If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability." Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988).

52. *See supra* note 51 (comparing vastly different *Brady* analyses across federal circuits); *see also* Avery, *supra* note 23, at 45 (noting *Mathews* analysis would alleviate inconsistencies among lower courts' *Brady* jurisprudence).

supreme oversights have placed the Court's *Brady* jurisprudence on untenable grounds and, until resolved, will continue to be a major source of doctrinally unsound constitutional analysis throughout the lower courts.

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