

The Keta Taylor Colby Death Penalty Project

The *Brady* Solution: A Due Process Remedy for Those Convicted with Evidence from Faulty Crime Labs

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IN 1998, FRANKLIN ALIX was convicted of capital murder and sentenced to death for a crime that it now appears he did not commit.¹ The jury convicted him primarily based on the testimony of a Houston Police Department (“HPD”) crime lab analyst who told jurors that blood found at the scene contained both Alix’s and the victim’s DNA.² When questions arose about the accuracy of the HPD crime lab’s data in 2003, an independent lab analyst retested the same evidence and determined that the blood found at the scene was not Alix’s.³ Alix is in the process of seeking exoneration.⁴

* Class of 2005; B.A., Brown University (1998). Symposium Editor, *U.S.F. Law Review*, Volume 39. This Comment is dedicated to the memory of my father, Ira Gorman, Ph.D., who always inspired me to succeed. Thank you to Professor Steven Shatz for his endless dedication to this Comment and commitment to fighting the death penalty. Thank you also to the Texas Defender Service, Professor Henry Brown, and to my editors, Christina Luini, Laura McKibbin, Kristen Bauer, and Megan Rosichan, for their patience and wise editing.

This Comment is the third in an occasional series of comments written by law students who have participated in the University of San Francisco School of Law’s Keta Taylor Colby Death Penalty Project (“KTC Project”). The KTC Project funds, trains, and sends law students to spend a summer working with capital defense lawyers in the South. See Steven F. Shatz, *The Keta Taylor Colby Death Penalty Project: Prologue*, 38 U.S.F. L. REV. 747 (2004). This Comment arises from the author’s work as a part of the KTC Project in Texas during the summer of 2003.

1. Associated Press, *DNA Retests Entangle Another Death-Row Case*, Dec. 16, 2003, at http://www.khou.com/crimelab/stories/khou031216_jw_crimelabretests.aa31e67b.html (last accessed Apr. 2, 2004) (on file with U.S.F. Law Review).

2. *Id.*

3. *Id.*

4. *Id.*

Alix's story is one example of a larger problem—the use of faulty crime lab data to obtain convictions. Like many of the accused in Houston, Texas, Alix was convicted using erroneous DNA test results from the HPD crime lab. The HPD crime lab is widely believed to be one of the nation's most poorly run crime labs.⁵ Reports have revealed many deficiencies at the lab, including that biological materials at the HPD crime lab are sometimes improperly stored, the HPD crime lab employees are untrained and underqualified, and employees have misrepresented lab results at trial.⁶ The HPD crime lab is also located in Harris County, which sends more defendants to death row than any other county in the United States.⁷ Although a small number of defendants convicted based on evidence tested at the HPD crime lab are in the process of getting new trials, numerous others remain in prison—some awaiting death—either because lab samples used in their trials were not properly stored for retesting⁸ or because the dis-

5. See Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003, at A14 (“Legal experts say the laboratory is the worst in the country, but troubles there are also seen in other crime laboratories.”).

6. See discussion *infra* Part I.

7. See Roma Khanna, *Legislators Urge Audit of HPD Lab: Woes Cited in Call for State Regulation*, HOUS. CHRON., Mar. 26, 2003, at A31 [hereinafter Khanna, *Legislators Urge Audit*]; see also Liptak, *supra* note 5. As of April 13, 2005, 159 of the 445 inmates currently on death row in Texas were convicted in Harris County. See TEX. DEP'T OF CRIMINAL JUSTICE, COUNTY OF CONVICTION FOR OFFENDERS ON DEATH ROW (2005), at <http://www.tdcj.state.tx.us/stat/countyconviction.htm> (last accessed Apr. 24, 2005). A total of 280 offenders have been sentenced to death in Harris County. TEX. DEP'T OF CRIMINAL JUSTICE, TOTAL NUMBER OF OFFENDERS SENTENCED TO DEATH FROM EACH COUNTY (2005), at <http://www.tdcj.state.tx.us/stat/countysentenced.htm> (last accessed Apr. 24, 2005). Eighty of these offenders have been executed. TEX. DEP'T OF CRIMINAL JUSTICE, COUNTY OF CONVICTION FOR EXECUTED OFFENDERS (2005), at <http://www.tdcj.state.tx.us/stat/countyexecuted.htm> (last accessed Apr. 24, 2005).

8. The case of Ronald Cantrell provides one example of where a private laboratory could not duplicate the results of a DNA test performed by analysts at the HPD crime lab, raising questions not only about the man's guilt, but also about the way the HPD crime lab analyzed and stored DNA evidence. See James Kimberly, Steve McVicker & Roma Khanna, *HPD Crime Lab Takes Another Hit; Shoddy Handling, Storing of DNA Raises Doubts About Rape Conviction*, HOUS. CHRON., May 10, 2003, at A1 [hereinafter Kimberly, McVicker & Khanna, *HPD Crime Lab Takes Another Hit*]. In December 2001, Cantrell was charged and pled guilty to the sexual assault of an eight-year-old, accepting a relatively light six year sentence, because results from the HPD crime lab indicated Cantrell's semen was on the girl's shirt. See *id.*; Steve McVicker & Roma Khanna, *HPD Begins In-House Investigations of 2 Cases With Questionable Lab Work*, HOUS. CHRON., June 13, 2003, at A8. An independent lab retested the shirt and could not locate any semen on the blouse or any other DNA evidence that would implicate or exonerate Cantrell. Kimberly, McVicker & Khanna, *HPD Crime Lab Takes Another Hit*, *supra*. The independent lab then attempted to retest the sample that the HPD crime lab had used, but it was “so deteriorated that a new test could not implicate Cantrell either.” *Id.* (quoting the Harris County District Attorney's Office). According to an independent forensic expert, properly dried DNA samples should last more than a year. *Id.* The

strict attorney did not order retesting.⁹ These defendants may have been unfairly convicted because they were not able to fully test the evidence that the prosecution used against them.

The deficiencies at the HPD crime lab are not unique. Problems have been reported at crime labs in seventeen states.¹⁰ In two of the most egregious cases, lab chemists in West Virginia and Oklahoma City were accused of falsifying testimony in hundreds of cases.¹¹ These cases are still being reviewed; so far ten defendants have been exonerated.¹² Indeed, it is not just state crime labs that have been implicated. The integrity of the FBI crime lab has also been called into question.¹³ In the mid-1990s an FBI whistleblower revealed that evidence had been handled improperly, leading to the firing of several lab officials.¹⁴ More recently, in May 2004, FBI analyst Jacqueline Blake plead guilty to a misdemeanor charge of making false statements about following protocol in 100 DNA reports.¹⁵ Again, the integrity of convictions obtained using data from these crime labs is questionable.

Nevertheless, a remedy exists for defendants who have been convicted using evidence from deficient crime labs. The Fourteenth Amendment to the United States Constitution requires that “[n]o State . . . deprive any person of life, liberty, or property, without due

Brady claim asserted in this Comment is essential to cases where retesting of evidence proves inconclusive. Although proving innocence through retesting in these cases is difficult, defendants who took their cases before a jury still deserve a remedy because their first trial was unfair as they were unable to fully test the crime lab evidence used against them.

9. See *infra* notes 121–125 and accompanying text.

10. See Maurice Possley, Steve Mills & Flynn McRoberts, *Scandal Touches Even Elite Labs; Flawed Work, Resistance to Scrutiny Seen Across U.S.*, CHI. TRIB., Oct. 21, 2004, at C1.

11. *Id.*

12. *Id.* Similar problems have been reported at other state crime labs. In Arizona, police crime lab technicians used erroneous DNA calculations in nine cases, including a homicide that resulted in a conviction and lead to two other investigations in which suspects pled guilty. See Robert Tanner, *Stained by a Shadow of Doubt; Although Only a Few Convictions Have Been Overturned Because of Errors, Critics Want Facilities to be Accredited*, L.A. TIMES, July 13, 2003, at A1. Furthermore, in Montana, a state crime lab examiner, Arnold Melnikoff, gave erroneous testimony about hair comparisons that contributed to three wrongful convictions. See Possley, Mills, & McRoberts, *supra* note 10. The problems at state crime labs do not just involve the presentation of false testimony at trial. In Maryland, a police chemist resigned after admitting that she did not understand the basic blood typing science involved in her work; the analyst handled about 480 cases, but the police decided not to review them. *Id.* Moreover, in Kansas, a man was released from custody because a blood sample was mislabeled. See Tanner, *supra*. He has now been charged in a string of rapes and a 2002 murder. *Id.*

13. See *id.*

14. *Id.*

15. *Id.*

process of law.”¹⁶ In *Brady v. Maryland*,¹⁷ the United States Supreme Court held that a due process violation occurs when prosecutors fail to disclose material evidence that will exculpate the defendant or impeach testimony.¹⁸ Inadequate lab conditions, such as lack of technician training and improper storage of biological materials, constitute material evidence in cases where crime lab data is introduced to prove the defendant’s guilt. Without knowledge of these problems, the defense cannot fully test the prosecution’s case. In these cases, therefore, a prosecutor’s failure to disclose systemic crime lab errors to the defense compromises the defendant’s right to a fair trial in violation of due process. Under *Brady*, these defendants are entitled to a new trial.

This Comment demonstrates how *Brady* provides a due process remedy for those defendants convicted using evidence from faulty crime labs. While problems exist at many crime labs, this Comment focuses on the problems at the HPD crime lab as a case study because experts have characterized it as “the worst in the country” and because the consequences in Harris County are often severe.¹⁹ This application of *Brady* is, however, valid for any case nationwide where the prosecution failed to disclose material evidence of problems at a government-run crime lab to the defense team before trial.

Part I of this Comment describes the problems discovered at the HPD crime lab. Part II discusses the legal requirements a defendant must show in order to claim a due process violation under *Brady*. Part III applies the facts of the HPD crime lab to *Brady* law in order to illustrate the legal remedy for convicted defendants who were prosecuted with evidence obtained from the HPD crime lab that was material to their conviction. This Comment concludes that if a prosecutor uses evidence from a problematic crime lab to obtain a conviction and fails to disclose the crime lab’s problems to the defense, the Constitution demands that the defendant receive a new trial—a fair trial.

I. Behind the Doors of the HPD Crime Lab

After local news reporters raised questions about the HPD crime lab’s procedures and results in 2002, the Department of Public Safety (“DPS”) decided to investigate the lab.²⁰ Its audit of the lab exposed

16. U.S. CONST. amend. XIV, § 1.

17. 373 U.S. 83 (1963).

18. *Id.* at 86.

19. See *supra* notes 5–8 and accompanying text.

20. See Roma Khanna & Steve McVicker, *State Might Overhaul Crime Labs; Legislators Look at Oversight Panel, Regional Facilities*, HOUS. CHRON., Feb. 20, 2005, at B1 [hereinafter

deficiencies in procedure, training, and interpretation and documentation of results at the lab. Indeed, the lab received failing grades in practically every category in which it was evaluated.²¹ The report detailed a range of lapses, including that evidence had potentially been contaminated and that vital equipment had not been calibrated.²² Moreover, auditors noted that lab technicians had a tendency to “use up evidence,” making it impossible to retest.²³ These errors call into question the validity of all testing conducted at the lab.

The HPD’s response to the media reports illustrates the gravity of the problems at the crime lab. After the first reports of mismanagement in December 2002, the police department shut down the DNA division of the lab.²⁴ In January 2003, the district attorney’s office ordered retesting of approximately 380 samples of DNA evidence used to obtain criminal convictions.²⁵ Subsequently, irregularities were discovered in other lab divisions; the police department temporarily closed the toxicology division in October 2003 because the supervisor failed a competency test, placing thousands of DWI and narcotics cases in jeopardy.²⁶ Houston Police Chief C.O. Bradford admitted that he had known about the poor lab conditions for years.²⁷ In June 2003, after documents showed that analysts had also complained to him about the lab conditions several years earlier, he announced plans to retire.²⁸ After internal investigators uncovered evidence from approxi-

Khanna & McVicker, *State Might Overhaul Crime Labs*]; Anna Werner, *HPD Crime Lab Audit Uncovers a Range of Problems*, Jan 22, 2003, at http://www.khou.com/topstories/stories/khou030122_mh_HPDCrimelabaudit.4b993918.html (last accessed Apr. 8, 2004) (on file with U.S.F. Law Review) [hereinafter Werner, *HPD Crime Lab Audit*].

21. See Werner, *HPD Crime Lab Audit*, *supra* note 20.

22. See *id.*

23. *Id.*

24. Steve McVicker & Roma Khanna, *Independent Review Sought for HPD Lab; Chief Makes Call After the Discovery of More Case Files*, HOUS. CHRON., Sept. 1, 2004, at A1 [hereinafter McVicker & Khanna, *Independent Review Sought*]. The DNA division remains closed. See Steve McVicker, *Regional Crime Lab Measure Is DOA; House Member Says Last-Minute Demands by Hurtt Killed His Bill*, HOUS. CHRON., Apr. 17, 2005, at B1. The HPD contracted with Identigene, a private laboratory in Houston, to perform new DNA. Kimberly, McVicker & Khanna, *HPD Crime Lab Takes Another Hit*, *supra* note 8. The current director of the HPD crime lab, Irma Rios, expects it to reopen in December 2005. See *id.*

25. See McVicker & Khanna, *Independent Review Sought*, *supra* note 24. The HPD originally sent more than 1,300 cases to the district attorney for review and possible retesting. *Id.*

26. *Id.* The toxicology division partially reopened in February 2004. *Id.*

27. See Steve McVicker & Roma Khanna, *Police Chief Shakes Up Crime Lab; Two Officials Quit, Others Disciplined*, HOUS. CHRON., June 17, 2003, at A1 [hereinafter McVicker & Khanna, *Police Chief Shakes Up Crime Lab*].

28. See McVicker & Khanna, *Independent Review Sought*, *supra* note 24.

mately 8,000 cases that was improperly tagged and stored, as well as fourteen more case files that needed to be reviewed for possible retesting, the new police chief, Harold Hurtt, suspended the internal investigation and called for a probe by independent investigators.²⁹ Additionally, Hurtt ordered another comprehensive review of DNA division cases that might require retesting and, along with state senators Rodney Ellis and John Witmore, called for a moratorium on executions in Harris County until the misplaced evidence had been catalogued.³⁰ The Texas Legislature is also considering a number of proposed crime lab reforms because of the controversy.³¹

What exactly did the audits by forensic examiners reveal about the HPD crime lab that led to these actions? Audits have shown that employees both at the management and analyst levels made fundamental mistakes. The types of problems affecting the validity of the physical testing in the HPD crime lab can be divided into three categories: (1) poor storage of evidence, (2) a lack of standards for lab employees, and (3) criminalists' misrepresentations.

A. Improper Storage of Biological Materials

Evidence storage problems at the HPD crime lab included a leaky roof and mislabeled boxes of evidence.³² A former criminalist and DNA analyst at the lab described the leaky roof's condition and the problems it caused in her resignation letter:

"[The] leaking of water has forced the employees on the 26th floor (of HPD headquarters) to work in hazardous conditions. These hazardous conditions include uncontrollable puddles of water, water leaking . . . onto biological materials such as blood-soaked items. This water containment problem has at times, in my opin-

29. See Roma Khanna, *HPD Errors Spark New Review of DNA Cases; DA Considering Charges For Some Crime Lab Analysts*, HOUS. CHRON., Aug. 28, 2004, at A1 [hereinafter Khanna, *HPD Errors Spark New Review of DNA Cases*]; McVicker & Khanna, *Independent Review Sought*, *supra* note 24. Nevertheless, the *Houston Chronicle* noted in February 2005 that the independent probe had not yet begun. See Khanna & McVicker, *State Might Overhaul Crime Labs*, *supra* note 20.

30. See Khanna, *HPD Errors Spark New Review of DNA Cases*, *supra* note 29; Khanna & McVicker, *State Might Overhaul Crime Labs*, *supra* note 20. Harris County District Attorney, Chuck Rosenthal, did not support the moratorium on executions. See Roma Khanna, *Lawmakers Address Crime Lab Problems: Committee Looks at Reforms, Says Local Officials Have Dragged Their Feet*, HOUS. CHRON., Jan. 5, 2005, at A1 [hereinafter Khanna, *Lawmakers Address Crime Lab Problems*].

31. See Khanna, *Lawmakers Address Crime Lab Problems*, *supra* note 30; Khanna & McVicker, *State Might Overhaul Crime Labs*, *supra* note 20.

32. See Liptak, *supra* note 5; Khanna, *HPD Errors Spark New Review of DNA Cases*, *supra* note 29.

ion, compromised the integrity of biological evidence stored in our facility.”³³

When City Councilwoman Carol Alvarado toured the facility on June 11, 2002, she was surprised by the conditions.³⁴ She admitted to reporters that she failed to appreciate the problem when lab employees first reported to her that the lab had a leaky roof, but the gravity of the problem became apparent when she saw that there “were holes in the ceiling right over or near evidence” as well as in the “analysis area.”³⁵ A team of forensic scientists who audited the lab described the serious impact of the leakage problem.³⁶ They noted that it can cause contamination or deleterious change to evidence, or both.³⁷ Moreover, water can cause cross-contamination of samples or the loss of DNA, which degrades quickly when wet.³⁸ The leaky roof, therefore, calls into question the reliability of all tests that were conducted on evidence in this part of the lab.

Furthermore, evidence dating back more than two decades was improperly tagged and lost in the HPD’s property room.³⁹ In August 2003, the 280 mislabeled boxes containing this evidence were discovered, but they sat unopened for almost a year.⁴⁰ The boxes, many of them splitting apart, currently fill an entire room on the HPD’s twenty-fourth floor.⁴¹ Investigators opened the boxes in August 2004 and found evidence from approximately 8,000 cases dating from 1979 to 1991.⁴² The evidence contained in the boxes “ranged from a fetus and human body parts to clothes and a bag of Cheetos.”⁴³ The full implications of this evidence are currently unclear—when the boxes were discovered officials had no idea whether the evidence belonged to open or closed cases or whether it had ever been tested.⁴⁴ The evi-

33. Roma Khanna & Steve McVicker, *Mayor Knew of Lab Woes, Others Contradict Brown’s Benign Assessment*, HOUS. CHRON., Feb. 27, 2003, at 21A (quoting Letter of Resignation from Jennifer LaCross, Criminalist and DNA Analyst, Houston Police Department, to Assistant Chief M.C. Simmons, Captain R.W. Robertson; Donald R. Krueger, and James R. Bolding, Houston Police Department (May 28, 2002)).

34. *See id.*

35. *Id.* (quoting Houston City Councilperson Carol Alvarado).

36. *Id.*

37. *Id.*

38. *Id.*

39. *See* Roma Khanna, *New Evidence Furor Hits HPD; Mislabeled Boxes May Be Final Straw for Full-Scale Probe*, HOUS. CHRON., Aug. 27, 2004, at A1.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

dence could affect cases of convicted defendants who are permitted to seek DNA testing under state law and, while Assistant District Attorney Roe Wilson stated she was not aware of any cases where missing evidence was a problem, she said that she could not rule out that this issue will arise.⁴⁵ To address the real possibility that some of the discovered evidence has never been examined or used at trial, HPD personnel have been working two shifts a day, seven days a week since August 2004 to catalog the evidence, a process which is estimated will take a year to complete.⁴⁶

Problems like these at the HPD crime lab are not a new revelation. Rather, as far back as 1999, lab employees complained to the Chief of Police about the lab conditions, saying parts of the lab were a "total disaster" and that "an overwhelming build-up of DNA cases" resulted from criminalists' lack of DNA analysis skills.⁴⁷ In March 2003, Police Chief C.O. Bradford told the *Houston Chronicle* that he had known that the roof over the crime lab leaked for more than five years, adding that "'there is always a concern about evidence contamination when you have a structural problem.'"⁴⁸ The HPD confirmed this in a press release, admitting that, among other things, there were problems with the facilities and evidence control.⁴⁹

Evidence of a leaky roof and improperly stored evidence in and of itself would seem fodder for impeachment in any case in which crime lab evidence was introduced, yet the Houston District Attorney never revealed these problems to defense attorneys. Moreover, these problems at the HPD crime lab were just the beginning.

B. Lack of Structure and Oversight

After the DNA division closed in December 2002, audits revealed a variety of problems related to the educational qualifications and training of lab employees, both at the management and the analyst levels. Other revelations have shown that lab employees sometimes

45. *See id.*

46. *See id.*

47. *See* Anna Werner, *When Did Bradford Know of Crime Lab Problems: Investigating Evidence of Errors in the Lab*, (June 19, 2003), at http://www.khou.com/news/defenders/investigate/stories/khou030619_ds_CrimeLabPoliceChief.bc2a754.html (last accessed Apr. 12, 2004) (on file with U.S.F. Law Review).

48. McVicker & Khanna, *Police Chief Shakes Up Crime Lab*, *supra* note 27 (quoting the statement of Bradford's spokesperson to the *Houston Chronicle*).

49. *See* News Release, Houston Police Department, *Discipline in HPD Crime Lab Investigation* (June 12, 2003) (available upon request through HPD Media Relations, hpdmedia@cityofhouston.net) (on file with U.S.F. Law Review).

utilize questionable methods. The lack of structure and oversight at the HPD crime lab has led to known errors in a number of cases.

The HPD crime lab did not hold potential employees to rigorous standards or subject current employees to regular evaluation. Based on national standards and a *Houston Chronicle* review of personnel files, none of the analysts working in the DNA division of the HPD crime lab were qualified by education or training to do their jobs.⁵⁰ The DNA Advisory Board Quality Assurance Standards⁵¹ require employees to take statistics, genetics, biochemistry, and molecular biology or to be formally trained to meet those standards.⁵² According to the *Houston Chronicle* survey, of the eleven employees in the lab's DNA division, only one of the analysts had completed all of the required college courses.⁵³ Furthermore, none of them had been formally trained to meet those standards.⁵⁴

Moreover, the lab did not always comply with its own minimal standards. For jobs in the DNA section, the city required only a bachelor's degree in biology, molecular biology, biochemistry, genetics, or a

50. See Lise Olsen & Roma Khanna, *DNA Lab Analysts Unqualified: Review Finds Education, Training Lacking*, HOUS. CHRON., Sept. 7, 2003, at A1 [hereinafter *DNA Lab Analysts Unqualified*]. At the time the problems at the lab surfaced, it was not accredited by the American Society of Crime Lab Directors/ Laboratory Accreditation Board ("ASCLD/LAB"). See Peggy O'Hare, *HPD to Review Crime Lab's Work; Investigation by Channel 11 Questioned Whether Errors Led to Jailing of Innocent*, HOUS. CHRON. Nov. 16, 2002, at A35. The ASCLD/LAB is a voluntary program in which any crime lab may participate to demonstrate that its management, operations, personnel procedures, equipment, physical plant, security, and personnel safety procedures meet established standards. See AM. SOC'Y OF CRIME LAB. DIRS., ACCREDITATION (2003), available at <http://www.asclcd.org/accreditation.html> (last accessed May 16, 2005). There are approximately 600 crime labs across the country; as of March 2004, less than half of them were accredited. See AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., HISTORY (2004), available at <http://www.asclcd-lab.org/dual/aslabdualhistory.html> (last accessed May 16, 2005); O'Hare, *supra*. Houston's lab is currently in the process of obtaining accreditation. See *More DPS Labs Flawed; DNA Testing Woes Across State Threaten Thousands of Cases*, HOUS. CHRON., Mar. 28, 2004, at A1. The fact that many crime labs across the United States are not accredited demonstrates the gravity of the problem—a lack of standards creates more room for error.

51. The Director of the Federal Bureau of Investigation established the DNA Advisory Board under the DNA Identification Act of 1994, 42 U.S.C. §§ 14131–14134 (2000), as a separate and distinct advisory board administered by the FBI. See ARTHUR EISENBERG, *DNA ADVISORY BOARD UPDATE*, available at <http://www.promega.com/geneticidproc/us-symp10proc/content/04Eisenberg.pdf> (last accessed May 5, 2005). The Director of the FBI, in accordance with the DNA Identification Act of 1994, specified that the Board may develop, revise, and recommend standards for quality assurance, including standards for testing the proficiency of forensic laboratories, and forensic analysts in conducting analysis of DNA. *Id.*

52. See Olsen & Khanna, *DNA Lab Analysts Unqualified*, *supra* note 50.

53. *Id.*

54. *Id.*

“related field”; no experience was necessary.⁵⁵ Jobs, however, were given to graduates with other, questionably related science degrees such as chemistry and zoology.⁵⁶ For instance, those hired to perform DNA testing included two workers from the city zoo, including one who most recently had been cleaning elephant’s cages and had a degree in zoology.⁵⁷

Also among the staff were some individuals who had flunked basic science classes in college, although they eventually earned their degrees.⁵⁸ While these individuals may have technically met the prerequisites to work at the lab, their competency was questionable in light of their academic achievements. Compounding this problem was that the lab lacked formal on-the-job training and evaluation.⁵⁹ While the lab possessed an informal peer-mentoring program, it was undocumented and analysts were not regularly tested to ensure that they had mastered the skills learned from their colleagues.⁶⁰

The case of Josiah Sutton demonstrates the disturbing outcome that may result when crime lab employees do not meet minimum educational standards and receive no formal training. According to the transcript in her file, Christy Kim, a long-term DNA analyst who started work as a criminalist at the HPD crime lab in 1989, never took statistics.⁶¹ An understanding of statistics is vital to interpreting and explaining the significance of DNA tests.⁶² Consequently, statistical errors have been found in evidence that Kim analyzed for three cases, including teenager Josiah Sutton’s rape trial in which her statistical errors had major consequences.⁶³

During Sutton’s 1999 trial, prosecutors had little evidence—the victim was the only eyewitness and her recollection was faulty.⁶⁴ Kim, however, testified at trial that she detected Sutton’s DNA pattern in the rape kit.⁶⁵ Moreover, her report stated that this pattern was only

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See* Liptak, *supra* note 5.

65. *See* Olsen & Khanna, *DNA Lab Analysts Unqualified*, *supra* note 50; Anna Werner, *HPD Crime Lab May Have Sent an Innocent Teen to Prison*, (Jan. 30, 2003), at http://www.khou.com/news/local/stories/khou030130_mh_hpdlabsutton.7c36b06.html (last ac-

found in one out of 694,000 African-Americans.⁶⁶ The jury convicted Sutton of rape and sentenced him to twenty-five years in state prison.⁶⁷ The state appellate court noted at trial that Sutton was “convicted in large part on the results of a DNA test.”⁶⁸ Unfortunately, Kim had improperly analyzed a semen sample that would have excluded Sutton as one of the two rapists and then badly miscalculated the odds that his DNA could have matched the sample by mere chance.⁶⁹ Sutton served four years of his twenty-five year sentence before a recent DNA retest from an independent lab exonerated him.⁷⁰ He has now been released from prison and pardoned.⁷¹ DNA expert William Thompson examined the HPD crime lab’s test work and concluded that if police had taken any two black men off of the street the chance of one of them having the DNA pattern that could be found in the rape samples of Sutton’s case was not one in 694,000, as Kim testified, but actually one in eight.⁷² Sutton’s case is but one example of the unfairness that may result when crime lab employees charged with testing sensitive DNA evidence are not qualified. Had Kim’s questionable qualifications been disclosed to Sutton’s defense team, it would have provided important impeachment evidence that could have been used to attack Kim’s testimony at trial.

Many of the problems at the analyst level of the DNA division may have stemmed from poor direction and oversight by management level employees. For example, independent auditors from the DPS found that James Bolding, the founder and former head of the DNA division, was not qualified to be a supervisor, nor was he even qualified to be an accredited DNA analyst.⁷³ Like Kim, he had not taken courses in statistics—education that, as demonstrated by Josiah Sutton’s case, is essential to understanding DNA results.⁷⁴ Moreover, although Bolding possessed both a bachelor’s degree and a master’s

cessed Apr. 12, 2004) (on file with U.S.F. Law Review) [hereinafter Werner, *Innocent Teen to Prison*].

66. See Olsen & Khanna, *DNA Lab Analysts Unqualified*, *supra* note 50; Werner, *Innocent Teen to Prison*, *supra* note 65.

67. Liptak, *supra* note 5.

68. Sutton v. State, No. 14-99-00951, 2001 WL 40349, at *1 (Tex. Crim. App. Jan. 18, 2001).

69. See Olsen & Khanna, *DNA Lab Analysts Unqualified*, *supra* note 50.

70. See Liptak, *supra* note 5; Olsen & Khanna, *DNA Lab Analysts Unqualified*, *supra* note 50.

71. See Olsen & Khanna, *DNA Lab Analysts Unqualified*, *supra* note 50.

72. See Werner, *Innocent Teen to Prison*, *supra* note 65.

73. See Olsen & Khanna, *DNA Lab Analysts Unqualified*, *supra* note 50.

74. See *id.* Bolding responded to the audit by stating that he had attended a statistics seminar through a forensic science group that he thought satisfied the requirement. *Id.*

degree in biology from Texas Southern University, he was academically dismissed from a University of Texas Ph.D. program.⁷⁵

Even more problematic than Bolding's academic shortcomings was the lack of structure he provided to the DNA division of the lab. An investigation by the Internal Affairs Division found that Bolding had generally failed to provide adequate oversight to the operations of the DNA section of the crime lab.⁷⁶ Among other violations, Bolding failed to ensure that employees assigned to conduct DNA analysis attended training courses, failed to require compliance with FBI guidelines governing the operation of the Combined DNA Indexing System, and failed to mandate that the DNA section of the crime lab had a viable case management system after being notified in 1996 and 1997 that the lab had no such system.⁷⁷ Furthermore, he failed to conduct annual inspections of the DNA section of the crime lab and failed to ensure that damaged evidence from thirty-four sexual assault and homicide cases was properly documented.⁷⁸ This lack of organization and oversight at the lab jeopardizes the integrity of all evidence tested at the lab because a lack of uniform standards leads to questionable results.

Similar to the DNA division, the ballistics division of the crime lab employed individuals who utilized questionable methodology and perhaps lacked proper training. The work of Robert Baldwin, the current ballistics lab chief, is at issue in two capital murder cases.⁷⁹ Baldwin testified at Nanon Williams's trial that the victim of a 1992 shooting during a drug deal was shot in the head with a .25-caliber bullet—the caliber of Williams's gun.⁸⁰ Williams was convicted of murder and sentenced to death.⁸¹ Six years later, Baldwin retracted his first statement, and concluded that, upon review, it was clear that a .22-caliber bullet killed the victim.⁸² Williams's co-defendant had carried a .22-caliber

75. *Id.*

76. See News Release, Houston Police Department, *supra* note 49. After the IAD completed its investigation, several committees reviewed the investigation's findings and recommended that Bolding be terminated. See *id.* Bolding was placed on indefinite suspension instead and submitted his retirement paperwork on June 11, 2003. *Id.*

77. *Id.*

78. *Id.*

79. See Steve McVicker, *Ballistics Lab Results Questioned in Three Cases: Judicial Rulings Raise Concerns Death Sentences May Rest on Faulty Police Analysis*, HOUS. CHRON., Mar. 14, 2005, at A1 [hereinafter McVicker, *Ballistics Lab Results Questioned in Three Cases*].

80. *Id.*

81. See Khanna, *Legislators Urge Audit*, *supra* note 7.

82. See McVicker, *Ballistics Lab Results Questioned in Three Cases*, *supra* note 79.

gun, but it was never tested.⁸³ Although a state district judge recommended a new trial for Williams based on this evidence, the state court of criminal appeals rejected that idea.⁸⁴ Williams's appeal is now pending in federal court.⁸⁵ Baldwin's clear error the first time he performed testing and his complete failure to even test the co-defendant's gun suggests that he lacked proper training in ballistics and that there are insufficient safeguards in place at the HPD crime lab to ensure that employees perform accurate tests.

Baldwin also testified at Johnnie Bernal's capital murder trial that the fatal bullet came from Bernal's gun.⁸⁶ When conducting tests, however, Baldwin had to fire the gun twenty-five times and clean the barrel with solvent before he got a ballistics "match."⁸⁷ Several firearms experts have told the *Houston Chronicle* that most ballistics tests require no more than three shots.⁸⁸ Bernal currently waits on death row as his appeal is pending in federal court.⁸⁹ Baldwin's questionable methodology constituted impeachment evidence that would have called into question his important testimony linking Williams and Bernal to the murder weapons in these two cases.

If defense attorneys had been aware that HPD crime lab employees who testified in their clients' trials lacked essential qualifications and that the lab was not structured in a way to ensure the integrity of test results, they could have used this information to persuade jurors that seemingly sound scientific conclusions were, in fact, quite fallible.

C. Misrepresentations that Support the Prosecution's Case

At best, employees at the HPD crime lab were unqualified and poorly managed. At worst, they misrepresented information at trial in order to strengthen the prosecution's case. There are several known instances where HPD crime lab employees appear to have lied in court. This may indicate a pattern of perjury.

For example, at Frank Fanniel's aggravated robbery trial, HPD crime lab analyst Joseph Chu's testimony was crucial.⁹⁰ Fanniel was

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. See Steve McVicker, *Crime Lab's Standards Called "Figment": Convict's Lawyer Questions Truth Past Testimony*, HOUS. CHRON., Aug. 2, 2004, at B1 [hereinafter McVicker, *Crime Lab's Standards Called "Figment"*].

arrested while attempting to sell items stolen in a robbery and police found a stocking mask in the trunk of his car.⁹¹ Chu's analysis of saliva found on the mask linked Fanniel to the crime; without the DNA evidence there would have been a strong case for possession of stolen property, but not aggravated robbery.⁹² At trial, Chu testified that testing performed at the DNA division of the HPD crime lab was reliable.⁹³ He told jurors, "'Our laboratory is following the guidelines of the FBI' 'Every time the FBI has new rules of what the DNA laboratory has to do to perform DNA analysis, our laboratory follows their guidelines and achieves their goals.'"⁹⁴ He did not, however, state to the jury or the district attorney that seven months earlier he and five other DNA analysts had written to Police Chief Bradford venting their frustration about the conditions that they feared were jeopardizing the quality of their evidence processing.⁹⁵ Nor did he reveal that they had complained to Bradford that the lab was a "'total disaster'" and that it did not comply with national forensic guidelines.⁹⁶ Fanniel was convicted and sentenced to twenty-two years in prison.⁹⁷

Lower-level analysts were not the only employees who exaggerated the quality of tests performed at the HPD crime lab. In June 2004, State District Judge Jan Krockner ruled that there was probable cause to believe Bolding had committed aggravated perjury during the 2002 trial of Wilbur Grimes, who was convicted of sexual assault.⁹⁸ According to court transcripts, Bolding testified that he had obtained a doctorate in biochemistry from the University of Texas.⁹⁹ When confronted about this testimony in May 2004, Bolding admitted that he did not possess a doctorate.¹⁰⁰ He later told reporters that the court reporter must have made an error in the transcript.¹⁰¹ The perjury case was dropped, however, when the judge determined that the statute of limitations had run.¹⁰²

91. *Id.*

92. *Id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See* Steve McVicker, *Ex-crime Lab Leader Again Under Scrutiny: New Hearing Could Lead to Larger Probe*, Hous. CHRON., May 25, 2004, at A11 [hereinafter McVicker, *Ex-Crime Lab Leader*]; Steve McVicker, *Crime Lab's Standards Called "Figment"*, *supra* note 90.

99. McVicker, *Ex-Crime Lab Leader*, *supra* note 98.

100. *Id.*

101. *Id.*

102. *See* McVicker, *Crime Lab's Standards Called "Figment"*, *supra* note 90.

Even more suspect, Bolding interpreted identical scientific evidence of blood type configuration from two rape cases, occurring within a six year period, in conflicting ways.¹⁰³ In each case he offered testimony that bolstered the prosecution's theory of the case.¹⁰⁴ In the first case, George Rodriguez was convicted of rape based partly on Bolding's erroneous testimony that excluded another suspect as the perpetrator.¹⁰⁵ In seeking to convict Rodriguez, the police department chose not to prosecute another suspect, Isidro Yanez, despite evidence that implicated his involvement with the crime and suggested he had a history of sexual assault.¹⁰⁶ Although the victim had picked Rodriguez out of a lineup, other evidence showed that Yanez and Rodriguez looked alike, that the victim had also picked Yanez out of a photo spread, that the co-defendant had implicated Yanez, and that Rodriguez was at work during the time of the assault.¹⁰⁷ The defense argued at trial that Yanez committed the crime.¹⁰⁸ Nevertheless, when DNA Division Chief Bolding took the stand, he told jurors that it would be *scientifically impossible* for Yanez to have committed the crime because Yanez's blood type did not match that type found on the victim.¹⁰⁹ Rodriguez was sentenced to sixty years in prison.¹¹⁰

Six years after Rodriguez was convicted, however, Bolding came to the opposite conclusion under identical serological circumstances, testifying in a different case that defendant Abe McFarland could *not* be excluded as a contributor to biological samples from another rape because of his blood type.¹¹¹ The blood-type combination in this scenario was identical to that in the Rodriguez case.¹¹² After the *Houston Chronicle* detailed the two cases for her, forensic expert and HPD crime lab critic Libby Johnson confirmed that the two cases presented identical situations and, therefore, "there [wa]s nothing that should have made [Bolding] testify differently' 'He should have testified

103. See Roma Khanna, *HPD's Troubled Crime Lab: Similar Evidence, Different Opinions in Two Rape Cases; Supervisor's Inconsistent Takes Raise Doubts About His Testimony*, HOUS. CHRON., Aug. 29, 2004, at A1 [hereinafter Khanna, *HPD's Troubled Crime Lab*].

104. *Id.*

105. *Id.*

106. See Steve McVicker, *DNA Not Only Problem in Man's Rape Conviction; Review of Police Procedures Casts More Doubt in Case*, HOUS. CHRON., Aug. 22, 2004, at A1 [hereinafter McVicker, *DNA Not Only Problem*].

107. *Id.*

108. See Khanna, *HPD's Troubled Crime Lab*, *supra* note 103.

109. *Id.*

110. *Id.*

111. See *id.*

112. See *id.*

in both cases that he would not have been able to exclude either suspect.’”¹¹³ Forensic experts have suggested that this may point to a pattern of scientists from the HPD crime lab manipulating their findings to fit prosecutors’ theories of various crimes.¹¹⁴

Moreover, in 2004, at the request of the Innocence Project¹¹⁵ six forensic experts reviewed the evidence against Rodriguez.¹¹⁶ They found that Bolding was wrong to exclude Yanez and, in a report, called his conclusions “‘completely contrary to generally accepted scientific principles.’”¹¹⁷ They also stated that Bolding’s statements revealed that either he “‘lacked a fundamental understanding of the most basic principles of blood typing analysis or he knowingly gave false testimony to support the State’s case against George Rodriguez.’”¹¹⁸

New independent DNA retests of a hair found in the victim’s panties, a key piece of evidence in the case, actually exclude George Rodriguez as a contributor—seventeen years after he entered prison.¹¹⁹ “‘I’ve lost everything,’” Rodriguez said, “‘I got accused of a crime and I didn’t know nothing [sic] about it.’”¹²⁰ Had the defense been aware of a possible pattern of misrepresentations and inconsistent testimony, Bolding’s inaccurate statements could have been impeached, and perhaps the outcome of Rodriguez’s trial would have been different.

The problems at the HPD crime lab range from poor storage to inadequate qualifications to possible misrepresentation of evidence. The stories of Josiah Sutton, who served four years in prison for rape

113. *Id.*

114. *Id.*

115. The Innocence Project is a non-profit legal clinic at the Benjamin N. Cardozo School of Law that handles cases in which post-conviction DNA testing of evidence can yield conclusive proof of innocence. See INNOCENCE PROJECT, ABOUT THIS INNOCENCE PROJECT (2001), available at <http://www.innocenceproject.org/about/index.php> (last accessed May 6, 2005).

116. See McVicker, *DNA Not Only Problem*, *supra* note 106.

117. Roma Khanna, *More Tests Sought in 1987 Rape Case; Lawyers Debate the Legitimacy of Current Results From a DNA Lab*, HOUS. CHRON., Aug. 31, 2004, at B1 [hereinafter Khanna, *More Tests Sought*] (quoting the report provided by forensic experts to the Innocence Project).

118. Khanna, *HPD’s Troubled Crime Lab*, *supra* note 103 (quoting the report of forensic scientists submitted with Rodriguez’s motion to vacate his sentence).

119. See Khanna, *More Tests Sought*, *supra* note 117. While Rodriguez was released from prison in October 2004, the State is still unwilling to fully exonerate him. See Rosanna Ruiz, *He’s No Longer in Prison but Says, “I’m Still Not Free”: HPD Crime Lab Errors Might Have Affected his Case, but That Hasn’t Cleared His Name*, HOUS. CHRON., Mar. 15, 2005, at A1.

120. McVicker, *DNA Not Only Problem*, *supra* note 106 (quoting George Rodriguez).

before he was exonerated, and George Rodriguez, who has served seventeen years for a rape he likely did not commit, illustrate the consequences of using faulty scientific evidence tested at the HPD crime lab to convict when defendants are not made aware of the problems that surround the evidence until long after their trials.

Although a few defendants have been released or granted new trials as a result of the revelations, the majority of cases from the lab will not undergo retesting. For example, the police department sent the district attorney a list of 1,322 cases to review for possible retesting.¹²¹ Nevertheless, the district attorney ultimately decided to retest only 379 of these cases.¹²² The ramifications of failing to submit all cases for retesting are disconcerting. The results from those cases submitted for retesting are telling. In February 2005, the *Houston Chronicle* summarized the results in 288 retested cases.¹²³ It found that the private lab retests were unable to replicate the HPD crime lab's results in twenty-five cases, revealed statistical inaccuracies in the HPD crime lab's results in twelve cases, and wholly contradicted the HPD crime lab's work in two cases; thirty-one cases required further testing to determine whether results were consistent with HPD crime lab findings.¹²⁴

What about the other 1,000 cases on the HPD's list that were not selected for retesting? What about the 8,000 cases for which evidence was found in mislabeled boxes in the HPD crime lab? Although a few isolated people have been exonerated, there are thousands of others whose trials may have been tainted by evidence that was not properly handled or tested. Regardless of the guilt or innocence of these defendants, the issue is the same—in every case in which evidence tested at the HPD crime lab was material to a defendant's conviction, the defendant did not receive a fair trial. These individuals are entitled to a due process remedy under the law so that they have the opportunity to fully test the evidence used by the prosecution to convict them. *Brady* provides them a solution.¹²⁵

121. See McVicker & Khanna, *Independent Review Sought*, *supra* note 24.

122. *Id.* The district attorney has also admitted that he was concerned that the HPD's original list of 1,300 cases may not have been comprehensive. See Khanna, *HPD Errors Spark New Review of DNA Cases*, *supra* note 29.

123. See Khanna & McVicker, *State Might Overhaul Crime Labs*, *supra* note 20.

124. *Id.*

125. It is worth noting, moreover, that even in those cases where retesting has confirmed the HPD crime lab's original analysis, the defendant still has a due process claim, because a test long after a trial is over cannot retroactively make the trial fair. As such, the defendant is still entitled to a new trial at which the prosecution's new test may be challenged. See discussion *infra* Part II.

II. The Development of the *Brady* Claim

United States Supreme Court Justice Douglas reasoned in the 1963 landmark case *Brady v. Maryland*, "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."¹²⁶ In *Brady*, the Supreme Court examined whether the due process rights of defendants are violated where the prosecution fails to turn over material evidence to defense attorneys.¹²⁷ In the landmark ruling, the Supreme Court held that a due process violation occurs when the prosecution fails to disclose to the defense exculpatory evidence that is "favorable to the accused" and material to guilt or to punishment.¹²⁸ Such disclosure, the Court reasoned, is essential to a criminal defendant's right to a fair trial.¹²⁹

This section first considers the precedent upon which the Supreme Court based its important decision in *Brady*. It then examines *Brady* and its progeny. This discussion provides the background necessary to understand why a due process violation occurs when the prosecution fails to disclose crime lab deficiencies to the defense prior to trial, preventing defendants from effectively impeaching the testimony of crime lab employees at trial.

A. The Prosecutor's Role in Ensuring a Defendant's Right to a Fair Trial

The Supreme Court's seminal decision in *Brady* was derived from a number of earlier decisions that also considered the American prosecutors' legal obligations under the due process clause and their "special role . . . in the search for truth in criminal trials."¹³⁰

These early cases focused on the use of perjured testimony at trial. In *Mooney v. Holohan*¹³¹ the Court considered whether the prosecution's knowing use of perjured testimony during trial, and its deliberate suppression of evidence that would have impeached that testimony, violated the defendant's due process rights.¹³² The Court rejected the Attorney General's narrow view that an act or omission of the prosecution only violates due process if it operates to deprive the

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

127. *See id.*

128. *See id.*

129. *See id.*

130. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

131. 294 U.S. 103 (1935).

132. *Id.* at 110.

defendant of notice or the opportunity to present evidence in his possession.¹³³ Rather, the Court stressed the importance of the due process requirement “in safeguarding the liberty of the citizen against deprivation through the action of the State” and declared that the requirement “embodies the fundamental conceptions of justice which lie at the base of [the United States’s] civil and political institutions.”¹³⁴ On the basis of this underlying tenet, the Court held that mere notice and hearing could not satisfy due process when the State “contrive[s]” a conviction through a deliberate deception of the court and jury through use of perjured testimony.¹³⁵ The Court reasoned that this type of “contrivance” was as “inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.”¹³⁶ *Mooney* thus imposed a duty on the prosecution to refrain from *offering* perjured testimony at trial.

The Court subsequently reiterated and expanded this duty. In *Pyle v. Kansas*¹³⁷ the Court again considered allegations that the State had knowingly solicited and used perjured testimony to obtain the accused’s conviction and had also deliberately suppressed evidence favorable to him.¹³⁸ It held that these allegations sufficiently charged a deprivation of due process that if proven would entitle the defendant to release from his present custody.¹³⁹ Next, in *Napue v. Illinois*,¹⁴⁰ the Court went a step further and considered whether it was a violation of due process for the prosecution to allow perjured testimony to go uncorrected.¹⁴¹ In *Napue*, the State’s witness lied by stating that he had not received any promise of consideration in exchange for testifying.¹⁴² Although the prosecutor did not solicit this false testimony, the Court nevertheless held that the prosecution’s failure to correct it violated due process.¹⁴³ The Court also recognized that it was irrelevant whether false testimony speaks to the defendant’s guilt or innocence or only to the witness’s credibility—“a lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the

133. *See id.* at 112.

134. *Id.*

135. *Id.*

136. *Id.*

137. 317 U.S. 213 (1942).

138. *Id.* at 214–15.

139. *See id.* at 215–16.

140. 360 U.S. 264 (1959).

141. *See id.* at 265.

142. *Id.*

143. *See id.* at 272.

[prosecution] has the responsibility and duty to correct what he knows to be false and elicit the truth.'"¹⁴⁴

These cases established that it is due process violation for the prosecution to knowingly offer or permit perjured testimony to stand at trial;¹⁴⁵ however, they never ruled explicitly on whether the prosecution's suppression of favorable evidence to the accused also violated due process. The Court addressed this issue explicitly in *Brady*. In *Brady*, the defendant challenged his first degree murder conviction when he learned that the prosecution had suppressed his co-defendant's extrajudicial admission that he had committed the actual killing.¹⁴⁶ This evidence would have corroborated Brady's trial testimony that he had participated in the crime but did not commit the actual murder.¹⁴⁷ Relying on *Mooney*, *Pyles*, and *Napue* the Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹⁴⁸ It then remanded the case for a retrial on the issue of punishment.¹⁴⁹ This outcome, the Court noted, was not to "punish[] . . . society for misdeeds of a prosecutor[.]" but rather required by due process to avoid an "unfair trial to the accused."¹⁵⁰ The Court reasoned that, where the prosecution withholds evidence that would tend to exculpate the accused or reduce his penalty, the prosecution plays a critical role in shaping the defendant's trial—a trial that will not comport with standards of justice unless all evidence material to the defendant's guilt or innocence is presented to the jury.¹⁵¹

144. *Id.* at 269–70 (quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956)).

145. These cases may also provide the basis for a due process claim in cases where it can be proven that crime lab employees intentionally misrepresented information on the witness stand and the prosecution knew of these misrepresentations. The focus of this Comment, however, is the *Brady* claim that results when prosecutors willfully or inadvertently fail to turn information about problematic crime labs over to the defense.

146. *See Brady v. Maryland*, 373 U.S. 83, 84 (1963).

147. *See id.* at 84–85.

148. *Id.* at 87.

149. *Id.* The Court upheld the Maryland Court of Appeals decision that nothing in the suppressed confession would have reduced the defendant's offense below first degree murder, reasoning that questions of admissibility of evidence are reserved for the state courts. *See id.* at 88–90. Therefore, the Court held it did not violate due process to limit the retrial to the issue of punishment rather than guilt. *See id.* at 90–91.

150. *Id.* at 87.

151. *See id.* Subsequent to *Brady*, in a related series of cases, the Court considered whether a due process violation occurs when police fail to preserve evidence favorable to the accused. *See California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1984). The Court held that unless a defendant can show that the government's failure to preserve the evidence was in "bad faith," no constitutional violation occurs. *See*

B. The Three Prong Test for *Brady* Violations

Subsequent cases have clarified what a defendant must prove to demonstrate a due process violation under *Brady*. First, the evidence must be favorable to the accused, either because it is exculpatory or impeaching.¹⁵² Second, the prosecution must have suppressed the evidence, either willfully or inadvertently.¹⁵³ Third, the defense must be prejudiced by the nondisclosure because the evidence was material to the defense.¹⁵⁴ This section explains these three elements.

1. The Evidence is Favorable to the Accused

To prove a due process violation under *Brady*, the defense must first demonstrate that the suppressed evidence is favorable to the accused. Evidence is favorable to the accused if it is either exculpatory or impeaching.¹⁵⁵ Exculpatory evidence suggests that the defendant may not have committed the crime.¹⁵⁶ Evidence is impeaching if it bears on the credibility of a significant witness in the case.¹⁵⁷

The suppressed evidence at issue in *Brady*, the confession of a co-defendant, constituted a form of exculpatory evidence.¹⁵⁸ *United States v. Bagley*¹⁵⁹ clarified that impeachment evidence may also serve as the basis for a due process claim under *Brady*. In *Bagley*, a federal district court convicted the defendant on narcotics charges.¹⁶⁰ After trial, the defense learned that the prosecutor failed to disclose that the government's witnesses were paid three hundred dollars for their testi-

Youngblood, 488 U.S. at 58. Moreover, the defendant must demonstrate that the evidence "possess[ed] an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant cannot obtain comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 489. Because the standard to show a due process violation in destruction of evidence cases is so high, *Brady*'s disclosure duty provides a better way to address the injustice that results when defendants are convicted using evidence from faulty crime labs.

152. See *Strickler v. Greene*, 527 U.S. 263, 282 (1999).

153. *Id.*

154. See *id.*; *United States v. Bagley*, 473 U.S. 667, 682 (1985).

155. See *Strickler*, 527 U.S. at 282; *Bagley*, 473 U.S. at 676 ("Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule.")

156. See *Black's Law Dictionary* 251 (2d Pocket ed. 2001).

157. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of *Brady*]."); *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1993) ("Evidence impeaching the testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence.")

158. See *id.* at 88.

159. 473 U.S. 667 (1985).

160. *Id.* at 671.

mony.¹⁶¹ The Supreme Court held that the defendant's due process rights may have been violated because the prosecution did not disclose that it had paid these key witnesses to testify.¹⁶² The Court reasoned that knowledge of the government's inducements could have been used to impeach the testimony of the witnesses on the basis of bias or interest.¹⁶³ This evidence could have lead the jury to distrust the witnesses' testimony, affecting the outcome of the case.¹⁶⁴ Therefore the nondisclosure may have violated due process.¹⁶⁵ Knowledge of problems at the HPD crime lab in some cases may have provided exculpatory evidence to the defense and in all cases could have been used to impeach the testimony of crime lab employees.

2. The Prosecution Willfully or Inadvertently Suppressed the Evidence

The second prong of a *Brady* claim requires that the defense show that the prosecution suppressed material evidence.¹⁶⁶ To satisfy this prong it is essential to consider what it means for the "prosecution" to "suppress" evidence. This question has been litigated since *Brady*.

Brady noted that the prosecution's suppression of material evidence violates due process regardless of the good faith or bad faith of the prosecution.¹⁶⁷ Subsequent cases have demonstrated that *Brady's* use of the term "suppress" is much broader than its usual connotation suggests because it does not require active concealment of the evidence. A *Brady* violation may occur even when the prosecution's failure to disclose the evidence is completely inadvertent.¹⁶⁸ The prosecution's duty to disclose material, exculpatory evidence arises even when there has been no request by the accused.¹⁶⁹ Indeed, a failure to disclose may result in a due process violation even when the

161. *Id.*

162. *Id.* at 682–84.

163. *See id.* at 683.

164. *See id.* at 676, 678, 683–84.

165. *See id.* at 683–84. While the Court recognized that the undisclosed evidence was favorable to the accused within the meaning of *Brady*, it remanded the case to the court of appeals for a determination of whether there was a reasonable probability that, had the inducement offered by the government to the witnesses been disclosed, the result of the trial would have been different—*Brady's* materiality prong. *See id.* For a discussion of *Brady's* materiality prong, see *infra* Part II.B.3.

166. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

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

168. *See Strickler*, 527 U.S. at 282.

169. *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)).

prosecutor possessed no personal knowledge of the exculpatory evidence at the time of trial.¹⁷⁰

This result derives in part from the Court's decision in *Kyles v. Whitley*.¹⁷¹ In *Kyles*, the defense learned post-conviction of several pieces of information that would have been favorable to its case.¹⁷² This undisclosed information included a description by an eyewitness of the physical characteristics of the perpetrator that sounded more like the government's informant than the defendant Kyles.¹⁷³ The prosecutors also failed to disclose evidence that the police had implicated the informant in another murder.¹⁷⁴ They also did not tell the defense that eyewitnesses had given statements that conflicted with the prosecutor's story.¹⁷⁵ The State argued that it should not be held accountable for its failure to disclose this evidence because the police did not inform the prosecutor of it until after trial.¹⁷⁶ The Supreme Court, however, held that prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, *including the police*."¹⁷⁷ The Court reasoned that the police's knowledge could be imputed to the prosecutor because policies and procedures could be established between the two offices to ensure effective communication of all relevant information and proper execution of the prosecutor's disclosure duties.¹⁷⁸ It stated that "any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to insure fair trials."¹⁷⁹

The Court's ruling in *Kyles* makes clear that any knowledge that the police have is imputed to the prosecutors themselves; furthermore, prosecutors have a duty to use due diligence to inquire as to what information is in the police files.¹⁸⁰ This idea was confirmed in *Strickler v. Greene*.¹⁸¹ In *Strickler*, the Court considered a situation where

170. See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

171. 514 U.S. 419 (1995).

172. See *Kyles*, 514 U.S. at 422, 428–29.

173. See *id.* at 428.

174. See *id.* at 429.

175. See *id.*

176. See *id.* at 428.

177. *Id.* at 437 (emphasis added).

178. See *id.* at 438.

179. See *id.*

180. See *id.* at 437–38.

181. 527 U.S. 263 (1999).

despite the prosecution's "open file policy,"¹⁸² the defense learned post-conviction of undisclosed documents in the hands of detectives that would have impeached an eyewitness's trial testimony.¹⁸³ The Court held that the second *Brady* element was "unquestionably" established.¹⁸⁴

The Court, moreover, rejected the State's argument that the post-trial counsel had waived the defendant's *Brady* claim by failing to raise it during state habeas corpus proceedings.¹⁸⁵ The State based its argument on the fact that there were indications that the defense *should have known* that the file was incomplete and therefore should have made a new discovery request.¹⁸⁶ The Court, however, reasoned that while it was likely that counsel both at trial and in post-trial proceedings knew that the witness had been interviewed by the police multiple times, it did not follow that they would know that records pertaining to those interviews had been suppressed.¹⁸⁷ The prosecutor must have similarly known about these meetings, yet he did not assert that his file was incomplete.¹⁸⁸ Furthermore, when the evidence is in the hands of the State, the defense cannot be expected to conduct the "'reasonable and diligent'" investigation required to preclude a procedural default.¹⁸⁹ Again, this decision puts the responsibility in the hands of the prosecutor to learn of and disclose exculpatory evidence possessed by the police.¹⁹⁰ As the Court reiterated, "An inadvertent nondisclosure has the same impact on the fairness of the proceedings as a deliberate concealment."¹⁹¹ This basic principle seems to be the underlying force behind decisions like *Kyles*

182. Under an open file policy the prosecution presumably gives the defense access to all the evidence in its files. *See id.* at 276. The Court noted that the prosecution's use of an open file policy may increase the efficiency and fairness of the criminal process and that when the prosecution asserts that it complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials that the State is constitutionally obligated to disclose. *See id.* at 283 n.23.

183. *Id.* at 273, 282–83.

184. *Id.* at 282.

185. *See id.* at 284–89.

186. *See id.* 283–85. The State argued, for example, that an examination of the witness's trial testimony and a letter published in the local newspaper made it clear that the eyewitness had been interviewed by detectives several times. *See id.* at 284.

187. *See id.* at 285.

188. *Id.*

189. *Id.* at 287–88 (quoting *McClesky v. Zant*, 499 U.S. 467 (1991)).

190. Interpreting *Strickler*, the Court later noted, "Our decisions lend no support to the notion that defendant must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695 (2004).

191. *Strickler*, 527 U.S. at 288.

and *Strickler*, which enforce the link between the police and prosecution.¹⁹² It would also apply where knowledge is in the hands of government crime lab employees.¹⁹³

3. Prejudice Ensues Because the Suppressed Evidence Is Material

For the third prong of a *Brady* claim, the defense must show that it has been prejudiced by the nondisclosure because the evidence was material.¹⁹⁴ The Court articulated the test for materiality in *Bagley*.¹⁹⁵ Evidence is “material” if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”¹⁹⁶ The Court defined “reasonable probability” as a “probability sufficient to undermine confidence in the outcome of the trial.”¹⁹⁷

To understand the parameters of this test, it is imperative to understand what the test is not. The *Brady* standard of materiality does not require a demonstration that the suppressed evidence more likely than not would have resulted in the defendant’s acquittal.¹⁹⁸ Nor is it a sufficiency of the evidence test; a *Brady* violation does not require the defendant to show that after discounting the inculpatory evidence in light of the undisclosed evidence there would not have been

192. Various circuit court cases provide instruction regarding the lengths to which prosecutors must go to discharge their *Brady* duty of disclosure; they reinforce the idea that prosecutors have a duty to find out what the police know and disclose that information to the defense and provide instruction regarding the lengths prosecutors must go to discharge their *Brady* duty of disclosure. See, e.g., *United States v. Brooks*, 966 F.2d 1500, 1504 (D.C. Cir. 1992) (finding that the U.S. Attorney’s Office must review police department files that may contain exculpatory information when the policewoman was the only witness and her credibility was at issue); *United States v. Perdomo*, 929 F.2d 967, 970–71 (3d Cir. 1991) (holding that the U.S. Attorney’s Office had a duty under *Brady* to inquire into local police office records in the Virgin Islands to determine whether its witness had a criminal history); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) (finding that the U.S. Attorney had a responsibility to inquire about the star witness’s history as a drug dealer); *United States v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (determining that the prosecution had a duty to acquire and discipline officer’s firearms worksheet, which would have shown that the gun collected was inoperable); *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) (holding that police knowledge of ballistics reports and fingerprint tests that tended to exculpate the defendant were imputed to the prosecution and should have been disclosed to the defense).

193. See discussion *infra* Part III.B.

194. See *Strickler*, 527 U.S. at 282.

195. See generally *United States v. Bagley*, 473 U.S. 667, 682 (1985).

196. *Bagley*, 473 U.S. at 682.

197. *Id.* In *Bagley*, the Court remanded the case for a determination of whether there was a reasonable probability that, had the inducement offered by the government been disclosed to the defense, the result of the trial would have been different. *Id.* at 684.

198. See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

enough left to convict.¹⁹⁹ Rather, the test's focus is on whether, in the absence of the suppressed evidence, the defendant received a fair trial—"a trial resulting in a verdict worthy of confidence."²⁰⁰ This inquiry requires that the effect of the suppressed evidence on the trial be considered collectively, not item by item.²⁰¹ A court must consider whether all "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."²⁰² Finally, once a *Bagley* showing of materiality is made, a constitutional error results and there is no further inquiry into whether the error was harmless.²⁰³ This standard of materiality makes clear that not all failures by the prosecutor to disclose exculpatory evidence will result in a constitutional violation.²⁰⁴ The standard, however, raises the question of what impeachment evidence is material enough to warrant a new trial. The Court examined the materiality standard as applied to impeachment evidence in *Strickler* and, more recently, in *Banks v. Dretke*.²⁰⁵

In *Strickler*, the Court found that the first two prongs of *Brady* were satisfied because the prosecution had suppressed notes of police interviews with an eyewitness that would have cast serious doubt on significant portions of the witness's trial testimony.²⁰⁶ The Court, however, did not order a new trial.²⁰⁷ It came to this conclusion because the record contained ample, independent evidence of the defendant's

199. *Id.* at 434–35.

200. *Id.* at 434.

201. *Id.* at 436–37. For instance, in *Kyles* the Court did not consider whether the inconsistent statements of eyewitnesses alone would have made a different result reasonably probable. See 514 U.S. at 441–54. Rather, it considered whether confidence in the verdict could be maintained in light of all the undisclosed evidence. See *id.* The Court held that confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation it produced was insufficiently probing, and that the principal police witness was insufficiently informed or candid.

Id. at 454.

202. *Id.* at 435.

203. *Id.* at 436.

204. See *id.* at 439. Indeed, this standard leaves the government with a degree of discretion to decide whether exculpatory evidence must be disclosed and imposes upon the prosecutor the corresponding burden to "gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." *Id.* at 437. The Court, however, seemed to encourage the "careful prosecutor" to err on the side of disclosure. See *id.* at 339–440.

205. 540 U.S. 668 (2004).

206. See *Strickler v. Greene*, 527 U.S. 263, 282, 295 (1999).

207. See *id.* at 296.

guilt, as well as evidence sufficient to support the imposition of the death penalty.²⁰⁸ For example, even had the particular eyewitness's testimony been discredited completely, the jury could still have concluded that the defendant was the instigator and the leader in the victim's abduction and murder because he was seen by another witness driving the car near the location of the murder.²⁰⁹ Moreover, there was considerable forensic and other physical evidence linking the defendant to the crime.²¹⁰ Finally, the defendant's guilt of capital murder did not depend on him being the dominant participant in the crime, and the prosecutor did not rely upon the testimony at issue during closing argument at the penalty phase.²¹¹ Considering these factors, the Court was not convinced that the jury would have returned a different verdict had the eyewitness's testimony been severely impeached or excluded entirely by the suppressed evidence.²¹²

The Court came to a contrary conclusion in *Banks*.²¹³ In *Banks*, the defendant, convicted by a jury of capital murder and sentenced to death, learned post-conviction that the prosecution's key witness during both the guilt and punishment phases of his trial was a paid police informant named Farr, who assisted in setting up his arrest.²¹⁴ Farr's testimony was especially critical in the penalty phase because he was one of two witnesses who testified that Banks possessed a propensity toward violence—a finding necessary for the jury to impose the death penalty.²¹⁵ On cross-examination, Farr falsely denied that he was the person who had told police about Banks's trip to Dallas.²¹⁶ During closing argument for the sentencing, however, the prosecutor argued that Farr, who had been truthful with the jury about his own drug use, had also been honest to the jury in all other regards. Therefore, Farr's testimony demonstrated that Banks was "'a danger to friends and strangers, alike.'"²¹⁷ In its consideration of the materiality of Farr's informant status to Bank's sentence, the Court noted that because

208. *Id.* at 290.

209. *See id.* at 290–91.

210. *Id.* at 293.

211. *Id.* at 292.

212. *Id.* at 296.

213. *See Banks v. Dretke*, 540 U.S. 668 (2004).

214. *See id.* at 674–75, 678–80.

215. *See id.* at 679–80. Indeed, Banks had no criminal record, nor a history of violence or alcohol abuse that would indicate a particular risk of future violence. *Id.* at 699 n.17.

216. *See id.* at 680. The police apprehended Banks on his way to Dallas with Farr to retrieve the murder weapon. *See id.* at 676, 678.

217. *Id.* at 681 (quoting the prosecutor's closing statement at the penalty phase of Banks's trial).

Banks had no criminal record, Farr's testimony about Banks's propensity to commit violent acts was crucial to the prosecution.²¹⁸ The Court reasoned that, unlike the eyewitness's testimony in *Strickler* which was mainly cumulative, Farr's testimony was "the centerpiece" of the prosecution's penalty phase case.²¹⁹ Considering that Banks's defense did not have the opportunity to thoroughly probe the highly suspect testimony of an informant, the Court held it could not be confident that Banks received a fair trial on the issue of punishment.²²⁰

While *Strickler* and *Banks* do not provide definitive guidelines for determining whether evidence is material to the defense, they suggest that to satisfy the third prong of *Brady* courts must consider whether the non-disclosed evidence was cumulative and the importance of the unimpeached testimony to the case as a whole. Where crime lab evidence is central to a defendant's conviction, it is likely that evidence calling into question the propriety of that evidence would be considered "material."

III. When the State's Failure to Disclose the Problems at the HPD Crime Lab Constitutes a Due Process Violation

Defendants who have been unfairly convicted based on evidence analyzed at problematic crime labs are often left without a remedy. In Houston, the fact that State prosecutors did not disclose the problems at the lab to the defense implicates due process rights under *Brady*. To provide a concrete example of how *Brady* applies, this section demonstrates how the three prongs of *Brady* can be met in the context of the HPD crime lab. This application of *Brady*, however, is valid for any case from any government-run crime lab nationwide in which the prosecutor did not disclose evidence of problems at the lab to the defense team before trial and the crime lab evidence was material to the defendant's conviction.

A. Evidence of Problems at the HPD Crime Lab Such As Poor Storage of Evidence and Mismanagement Constitute Impeachment Evidence

The first prong of *Brady* requires that the evidence the prosecution failed to disclose was either exculpatory or impeaching.²²¹ Like

218. *Id.* at 700.

219. *Id.* at 701.

220. *See id.*

221. *See* discussion *supra* Part II.B.1.

the payments made to the witnesses in *Bagley*, disclosure of the problems at the HPD crime lab would have provided defendants with valuable impeachment evidence at trial.²²²

Take for example the fact that Police Chief Bradford allowed the problems at the HPD crime lab, such as the leaky roof that caused the destruction or contamination of evidence, to fester. This was powerful information that could have been used to impeach the testimony of lab employees by challenging the reliability of test results from the lab. Had the prosecution disclosed this information to defense counsel, the defendant could have queried on cross-examination whether analysts could be absolutely certain in light of a problem of this magnitude that any particular sample had not been contaminated. The fact that 280 boxes of mislabeled evidence from 8,000 cases were found could similarly be used to question the trustworthiness of data from the lab. Indeed, because this sort of mislabeling suggests disorganization of a larger scale at the HPD crime lab, the information could be used to question whether evidence in *any* particular case had been handled and labeled properly.

Defense lawyers also could have used information about the deficient educational qualifications and lack of clear standards and oversight at the lab to undermine the credibility of forensic scientists from the HPD crime lab, who served as the State's key witnesses in many trials. For example, when jurors wrongly convicted Josiah Sutton of rape, the jury convicted him based on the testimony of Christy Kim, a DNA analyst for the HPD who testified that Sutton's DNA matched that of the semen found in the rape victim.²²³ Police investigators cited Kim for incorrectly documenting the results of DNA profiles, failing to report the full use of DNA results, and making an incorrect data entry in a capital murder case.²²⁴ Information such as Kim's history of errors and her lack of a background in statistics would have

222. In some cases, the prosecution's failure to disclose evidence of problems at the HPD crime lab may have also been favorable to the accused because it was exculpatory. For example, in the case of Nanon Williams, the fact the fatal bullet actually came from a gun of the same caliber of Williams's co-defendant would have suggested that Williams did not commit the crime, or at least that he did not shoot the fatal bullet. See discussion *supra* notes 79–84 and accompanying text. Nevertheless, because general evidence of problems at the HPD crime lab could have been used to impeach witnesses in all cases where evidence tested at the lab was presented, impeachment evidence is the focus of this section. Williams's defense attorneys could have impeached Baldwin's testimony by bringing out on cross-examination that he never tested the co-defendant's gun—by failing to test the co-defendant's gun, the co-defendant could not be ruled out as the shooter.

223. See Khanna & McVicker, *Police Chief Shakes Up Crime Lab*, *supra* note 27.

224. *Id.*

been valuable impeachment material for any trial at which she testified. On cross-examination and in argument, her lack of qualifications and past mistakes could have been used to suggest to the jury that her results in that particular case were not reliable. Similarly, in any case in which Bolding testified, especially in cases where he testified regarding the results of tests conducted by subordinates in the DNA division, the evidence of his lack of oversight could be used to challenge the trustworthiness of his testimony.

Likewise, information about Robert Baldwin's past errors and questionable methodologies could have been used to impeach his testimony in cases where ballistics tests were at issue. For example, in Bernal's case defense attorneys could have questioned Baldwin about his need to shoot the gun twenty-five times and clean it with solvent before he obtained a "match." Defense attorneys could have argued to the jury that this questionable methodology substantially undermined the validity of Baldwin's testimony that the fatal bullet came from Bernal's gun.

Evidence of a pattern of misrepresentations would also have called the testimony of crime lab employees into serious doubt. Therefore, any evidence that a crime lab employee had testified in an inconsistent way in a previous case should have been disclosed to defense attorneys; the contradictory past testimony could be used to challenge the truthfulness of the employee's current conclusions.

Any information related to the mismanagement of the lab, including the poor storage of evidence, that lab employees were not properly qualified to perform the testing, and the general lack of oversight at the lab, is *favorable to the accused* and essential to conducting a proper cross-examination of prosecution witnesses. A defendant who did not have the opportunity to impeach prosecution witnesses using this information and who was convicted on the basis of the crime lab evidence may have been denied due process of law.

B. Employees of the HPD Crime Lab Are Part of the Prosecution Team, Therefore Their Knowledge of Problems at the Lab Is Imputed to Harris County Prosecutors

To meet the second prong of *Brady* the defendant must show that the prosecution suppressed evidence.²²⁵ To meet this prong it is important to determine which persons compose the prosecution team; the answer determines what evidence should have been turned over to

225. See discussion *supra* Part II.B.2.

the defense. Any information favorable to the accused in the hands of HPD crime lab employees will be imputed to the prosecutor, because HPD crime lab employees, as part of a government-run police operation, will be considered part of the prosecution team under *Kyles*. The information in police files in the *Kyles* case is similar to information that HPD crime lab employees knew because, in both instances, the police possessed the information that would have impeached key prosecution witnesses yet did not disclose it to the defense.

The California Supreme Court case *In re Brown*²²⁶ also supports the view that the prosecutor's failure to disclose the mismanagement and history of errors at the HPD crime lab constitutes suppression by the prosecution under *Brady*. John Brown was convicted of first degree murder of a police officer and sentenced to death.²²⁷ After his conviction, Brown sought a writ of habeas corpus, alleging that the prosecution committed a *Brady* error by failing to disclose the result of a crime lab test, which indicated that he had tested positive for PCP.²²⁸ The court vacated the conviction and remanded it for reconsideration of the petitioner's capacity to premeditate and deliberate, reasoning that, under *Kyles*, the test result was material evidence that would have helped the defense's theory of diminished capacity.²²⁹ Further, the court noted that "the lab 'worked closely with the District Attorney's Office in assisting it in the prosecution of cases'; and there is no serious dispute that in these circumstances, [the crime lab] was part of the investigative 'team.'"²³⁰ The court went on to state that "[t]he prosecutor thus had the obligation to determine if the lab's files contained any exculpatory evidence . . . and disclose it to the [defendant]."²³¹ *Brown*, therefore, stands for the proposition that government-run crime labs are part of the prosecution team and, consequently, the individual prosecutor is presumed to have knowledge of all information in their possession.

Like the evidence of drug test results suppressed by crime lab employees in *Brown*, the case of Jorge Villanueva provides an example of how the suppression of favorable evidence by HPD crime lab employees would constitute suppression by the prosecution. Villanueva was convicted of the murder of an elderly neighbor and sentenced to

226. 952 P.2d 715 (Cal. 1998).

227. *Id.* at 716-17.

228. *Id.* at 717.

229. *See id.* at 726-27.

230. *Id.* at 719 (quoting Frank Fitzpatrick, the chief criminalist responsible for management of the lab clerical staff at the time of Brown's case).

231. *Id.*

death.²³² At Villanueva's trial an HPD crime lab employee testified that pubic hairs found at the scene matched Villanueva's.²³³ What the lab employee did not tell the jury or disclose to the defense was that he had only tested one of up to seven genetic regions on the hair that could have been tested and that the limited identification offered by this test would have matched 136,000 people in Harris County.²³⁴ Nor did the lab employee reveal that he only reported statistics for the race of the suspect himself—while the tests performed on a hair may be consistent with only one in 100,000 Hispanics, they may also be consistent with one in twenty blacks.²³⁵ Failure to disclose the limitations of the testing performed made it appear to the jury that Villanueva was the only likely murderer.²³⁶ Similarly, the lab analysts stated that there was blood on Villanueva's shoe.²³⁷ They did not, however, disclose to the defense that the substance found on the suspect's shoe could just as likely have been organic fertilizer, fungicide, or bleach.²³⁸ Finally, crime lab employees did not disclose to the defense that they had failed to test two other pubic hairs found at the crime scene, which matched neither Villanueva nor the victim.²³⁹ This was all information favorable to Villanueva that was known by crime lab employees. Under *Kyles* and *Brown* this knowledge was imputed to Harris County prosecutors. Thus, the failure to disclose the favorable evidence constituted a suppression by the prosecution sufficient to satisfy *Brady's* second prong.

The HPD crime lab is an arm of the prosecution team and therefore any information it knows is imputed to the prosecution. Like the contradictory witness statements in *Kyles* and *Strickler*, the poor handling of evidence and error rates of the employees at the HPD crime lab would have impeached the credibility of crime lab evidence presented at hundreds of criminal trials in Harris County. Moreover, it is irrelevant under *Brady* law whether the defense specifically requested information regarding the integrity of testing at the HPD crime lab, or even whether the crime lab's failure to disclose the

232. McVicker & Khanna, *Case Gets 2nd Look After Lab Missteps; DNA Work, Police Tactics in Question*, HOUS. CHRON., May 4, 2003, at A1 [hereinafter McVicker & Khanna, *Case Gets Second Look*].

233. *Id.*

234. *Id.*

235. *Id.*

236. *See id.*

237. *Id.*

238. *Id.*

239. *Id.*

problems was purposeful or inadvertent.²⁴⁰ Rather, the mere fact that errors and problems at the HPD crime lab were concealed from defense attorneys is sufficient to constitute suppression—what matters is that in light of the lab’s problems many defendants’ trials may have been unfair.

C. The Suppression of Problems at the Lab Is Prejudicial When Evidence Tested at the HPD Crime Lab Played a Key Role in the Conviction or Sentencing of a Defendant

The final prong of *Brady* requires a showing that the prosecution’s failure to disclose favorable evidence prejudiced the defense because it was “material.”²⁴¹ This is the biggest obstacle to defendants who seek a due process remedy under *Brady* because they were convicted using HPD crime lab data. Under *Bagley*, to demonstrate materiality, individuals who were convicted based on physical evidence and testimony of analysts from the HPD crime lab must show that, had the lab’s problems been disclosed to the defense, there would have been a reasonable probability of a different result.²⁴² The reason this is the most difficult prong to meet in the situation of a questionable crime lab is that the failure to disclose information regarding the general problems at the HPD crime lab must have materially affected the way that a particular individual was tried. It must be shown that the jury might have changed its decision to convict if it had known about the history of lab errors and mismanagement.

Nevertheless, the materiality prong can be met for those cases in which evidence analyzed at problematic government crime labs was critical to the defendant’s conviction. As *Kyles* instructed, when judging materiality a court must consider the collective effect of all of the problems at the crime lab on the conviction, rather than each problem individually. In light of the Court’s holdings in *Strickler* and *Banks* this is most likely to be true in situations where (1) the crime lab data was the only evidence linking the defendant to a crime²⁴³ or (2) where the suppressed evidence about the errors would have provided the only basis for impeachment of a key government witness.²⁴⁴ In these situations evidence of problems at the crime lab is material—

240. See discussion *supra* Part II.B.2.

241. See discussion *supra* Part II.B.3.

242. See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

243. See *Giglio v. United States*, 405 U.S. 150 (1972).

244. See *United States v. Wallach*, 935 F.2d 445, 457–58 (2d Cir. 1991).

without the undisclosed impeachment evidence, the prosecution's case against the defendant goes untested. This undermines the defendant's right to a fair trial.

Case law supports the proposition that prejudice can be shown where the evidence that should have been impeached supplied the only proof linking a defendant to the crime. In *Giglio v. United States*²⁴⁵ the defendant was charged with forgery and only one witness linked the defendant to the crime.²⁴⁶ Prosecutors had promised the witness, who was also a co-conspirator, that they would not try him if he would testify against the defendant. The prosecution did not disclose this leniency to the defense.²⁴⁷ The Supreme Court found this to be material enough to warrant a new trial because the witness's testimony was the only evidence implicating the defendant.²⁴⁸

To compare the facts in *Giglio* with the HPD crime lab, in situations where the physical evidence analyzed at the lab was the sole evidence linking the defendant to the crime, it is essential evidence. The fact that its credibility could be impeached makes it factually similar to *Giglio*. Thus, a due process violation occurs when a defendant does not have the opportunity to cross-examine and impeach the crime lab witness.

Materiality can also be shown where the undisclosed matter would provide the only basis for impeachment.²⁴⁹ If nothing else is impeaching the testimony of a key witness, and the prosecution withholds the *only* evidence that would have impeached the witness, then it is material enough to create a due process challenge.²⁵⁰

In the HPD crime lab cases the evidence about each criminalist's prior errors and lack of academic qualifications was not disclosed to the defense. Jurors in Harris County did not know that the lab was so

245. 405 U.S. 150 (1972).

246. *Id.* at 150-51.

247. *Id.* at 151-52.

248. *Id.* at 154.

249. See *Wallach*, 935 F.2d at 457-58. In *Wallach*, the government's key witness perjured himself, yet the government did not correct his testimony. *Id.* at 457. The Court of Appeals reversed the defendant's conviction because that witness was "the centerpiece of the government's case." The court reasoned that had his lying been brought to the attention of the jury, his entire testimony would have been discounted and the jury would have acquitted the defendants. *Id.* at 457-58.

250. *Id.* See also *United States v. Rosner*, 516 F.2d 269, 278 (2d. Cir. 1975), in which the court found that when suppressed evidence only additionally impeaches a witness whose credibility has already been shown to be questionable, it is not material enough to warrant a new trial. As stated in *Wallach*, however, when the suppressed evidence is the only impeaching evidence, then it provides a basis for a new trial. See *Wallach*, 935 F.2d at 457-58.

severely mismanaged when they convicted defendants in hundreds of cases in which crime lab evidence played an important role in the juries' verdicts. In cases where the prosecution did not turn over any information about the manner in which the criminalist tested the physical evidence, the prosecution may have violated the *Brady* mandate. For example, consider a case where there are no eye witnesses and no weapon is recovered, yet an HPD crime lab employee testifies in a way that links the physical evidence of the crime to the accused. The jury returns a guilty verdict. Here, the crime lab evidence must have played a major role in the jury's formulation of its guilty verdict—it was the only evidence upon which the jury could convict the defendant. Thus, if the prosecution suppressed information that would question the integrity of the crime lab, it would likely be considered material.

Several of the cases discussed in this Comment also demonstrate how the failure to disclose problems at the HPD crime lab may have materially affected the outcome of the case. For example, in the case of Josiah Sutton, other than the testimony of an eyewitness whose recollection was faulty, the only evidence linking him to the crime was the testimony of crime lab employees that Sutton's DNA pattern matched that in the rape kit.²⁵¹ Had Sutton's attorneys known about the problems at the lab, and in particular the inadequate skills and training of the lab employees, they could have challenged the accuracy of the test results presented at Sutton's trial. During cross-examination, for instance, the crime lab witnesses could have been questioned thoroughly about whether they could be certain about the results of this particular test in light of their history of past mistakes and the possibility of contamination. This sort of cross-examination might have so undermined the reliability of the crime lab evidence in the jury's eyes that they would have returned a verdict of not guilty. Had the DNA sample used to convict Sutton not been preserved properly for retesting, the *Brady* claim presented here would have been critical to ensure that he received a new trial where the crime lab evidence could be fully tested.

Had the crime lab evidence presented at the trial of Jorge Villanueva been similarly challenged, the outcome of his trial might have also been different. Villanueva's trial differed slightly from Sutton's because at that trial the prosecution also possessed evidence that Villanueva had confessed to the murder.²⁵² Villanueva, however, re-

251. See discussion *supra* notes 61–78.

252. See *McVicker & Khanna, Case Gets Second Look*, *supra* note 232.

tracted the confession, stating that he confessed only after being struck in the mouth by a homicide detective—he pointed to a missing tooth as evidence that this was true.²⁵³ Had Villanueva's attorneys been able to question the crime lab evidence used against him by pointing out the lab's frequent use of selective testing and manipulation of statistics,²⁵⁴ Villanueva's story might have appeared more believable to the jury.

Furthermore, evidence of the questionable methodologies used by the ballistics section of the HPD crime lab and the lab's failure to test the co-defendant's gun may have materially affected the jury's decision to impose the death penalty upon Nanon Williams. At the sentencing stage in Texas, jurors are instructed to consider whether the defendant actually caused the death of the deceased or was merely an accomplice with no intent to kill.²⁵⁵ Had Williams's attorneys been aware of the problems in the ballistics section, they could have at least raised a doubt in the jurors' minds whether Williams shot the fatal bullet and perhaps convinced them to spare his life.

When crime lab evidence played an important role in the case, prosecutors who used evidence from the HPD crime lab had a duty to disclose any and all problems to the defense team prior to trial. Because Houston's district attorney failed to do so, those defendants are entitled to new trials where they will receive what due process requires—a full and fair opportunity to challenge the prosecution's case. Under a *Brady* analysis all three prongs are met, therefore this remedy is available. First, the HPD crime lab's history of mistakes is information favorable to the defense because it qualifies as impeachment material; second, the prosecution is responsible for the suppression of the evidence because the evidence was in the possession of the police crime lab; third, it is material to the defense because if juries knew of the conditions of the HPD crime lab there is a reasonable probability that their verdicts would be different. This argument can apply to any case across the country where the prosecution fails to disclose to the defense a history of errors at a state-run crime lab and where evidence from that lab played a crucial role in convicting a defendant.

253. *Id.*

254. See discussion *supra* notes 232–39.

255. See TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(2) (Vernon Supp. 2004–2005).

Conclusion

In jurisdictions where police departments are responsible for testing physical evidence, prosecutors have a duty under *Brady* and its progeny to disclose crime lab deficiencies to the defense. The prosecution team's effective performance of this duty ensures that criminal defendants receive fair trials. Disclosure of a government-run crime lab's problems is favorable impeachment evidence that may materially affect the outcome of an accused's trial.

Unfortunately, many people accused of crimes have already had their freedom taken away because a jury convicted them based on physical evidence analyzed at problematic labs. As shown in this Comment, these defendants have a *Brady* claim. Under *Brady* they are entitled to new trials—*fair* trials—where the crime lab evidence used against them may be fully tested using the information that was previously suppressed by the prosecution. The Due Process Clause of United States Constitution, and the fundamental principle of justice which it seeks to protect, demand nothing less. As stated in *Brady*, “the principle . . . is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused.”²⁵⁶ It is time for the many defendants convicted with evidence from faulty crime labs to receive the justice to which they are entitled. *Brady* provides the solution.

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

