

PAYING FOR SILENCE: THE LIABILITY OF POLICE OFFICERS UNDER SECTION 1983 FOR SUPPRESSING EXCULPATORY EVIDENCE

by MICHAEL AVERY*

INTRODUCTION

In the last several years it has been well documented that a large number of innocent persons have been convicted of serious crimes, an alarming number of whom were sentenced to death.¹ There are, of course, many reasons why innocent people may be prosecuted and convicted of crimes they did not commit.² The most disturbing cases, in terms of the integrity of the criminal justice system, are those in which police have caused the prosecution of an innocent person by manufacturing or fabricating evidence of guilt, and/or by suppressing evidence of the innocence of the defendant.³

Both manufacturing evidence and the suppression of evidence indicating innocence have long been held to violate the constitutional due process rights of a criminal defendant.⁴ It is clearly established that a defendant wrongfully convicted as a result of such misconduct may be entitled to a reversal of his conviction and to a new trial. This Article explores the question of under what circumstances a person who has suffered a deprivation of liberty as a result of the suppression of exculpatory evidence by police officers is also entitled to a remedy in damages under 42 U.S.C. § 1983.⁵ The United States Supreme Court has never considered a

* Associate Professor, Suffolk Law School; B.A., Yale College; L.L.B., Yale Law School. The author appreciates the assistance of his colleague, Professor Marie Ashe of Suffolk Law School, his research assistant, Lee Peterson, and the Deans of Suffolk Law School for their assistance with summer writing stipends which made this work possible.

1. Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 1-3 (Fall, 2002). Although the focus of his Article is Massachusetts, Fisher collects the scholarly and popular literature documenting these cases nationally. *Id.* at notes 1-5.

2. See BARRY SCHECK, ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (Doubleday 2000) (providing a systematic review of the reasons why innocent people get convicted).

3. See Stanley Z. Fisher, *Just the Facts, Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1 (1993) (suggesting that the scope of the problem is aggravated by the fact that police are not encouraged by their training and supervision to report exculpatory facts in their reports); see generally Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1413-25 (2000) (comparing the American experience with the English statute that attempts to insure access by prosecutors to exculpatory evidence gathered by police).

4. See *Mooney v. Hollohan*, 294 U.S. 103, 112-13 (1935) (holding that knowing use of perjured testimony violates due process); *Brady v. Maryland*, 373 U.S. 83, 86 (1963) (noting failure to disclose material exculpatory evidence upon request violates due process).

5. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

civil rights claim against a police officer based on the failure to disclose exculpatory evidence. Nor have a number of important issues that bear on the problem been resolved by the Supreme Court in its decisions in both criminal appeal and habeas corpus cases.

The lower federal courts are in agreement that where the suppression of exculpatory evidence by police officers results in a conviction and a period of incarceration a defendant may have a cause of action under § 1983. However, many decisions do not supply detailed analysis of the nature of the cause of action, and there are inconsistent analyses supplied by other courts. Moreover, there is also substantial disagreement and confusion about whether the pretrial deprivation of liberty is actionable.

The plight of George Jones illustrates the nature of the problem. George Jones was prosecuted for the rape and murder of a 12-year-old victim and for beating her 10-year-old brother to a state of unconsciousness.⁶ Jones was a high school senior, the editor of his school newspaper, and the son of a Chicago policeman; he planned to join the Air Force after graduation; and he was known to his classmates as “Bookworm.”⁷ The case against Jones was based on an equivocal identification made in a one person show-up when Jones was brought before the 10-year-old victim in his hospital bed.⁸ Prior to the show-up, the victim had failed to make an identification of Jones’s picture during his first interview.⁹ He had also given the name “Anderson” to the detectives.¹⁰ The detectives did not place in their regular files their report of this information and the failure of the victim to make a photographic identification. Instead they put it in the department’s “street files.”¹¹ These “street files” were never turned over to the prosecutor’s office.¹²

The officers’ official report was characterized by the Seventh Circuit Court of Appeals as “full of falsehoods.”¹³ The report did not mention that the victim had described his attacker as a gang member (which Jones was not); that the victim

party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. Federal officers are not liable under § 1983, but may be sued directly under the Constitution. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971). The Supreme Court has held consistently that the same standards of liability apply in § 1983 cases and *Bivens* actions. In the course of this Article the references to § 1983 liability should be understood to apply equally to *Bivens* actions. See generally MICHAEL AVERY, DAVID RUDOVSKY AND KAREN BLUM, *POLICE MISCONDUCT: LAW AND LITIGATION* (Clark Boardman Co., 3d ed. 1999) (discussing civil rights claims against law enforcement officers).

6. *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988).

7. *Id.* at 988.

8. *Id.* at 989-90. Jones was brought to the hospital where officers asked the victim whether Jones was the person who had beaten him. The victim calmly answered, “No, that’s not the man, that’s not the man, no, no, no.” Officers then ordered Jones to remove his glasses and turned up the lights and repeated the question to the victim. He replied, “No,” then “Yes, that’s him, yes;” then “Yes, no, yes, no” over and over.

9. *Id.* at 989.

10. *Id.*

11. *Id.*

12. *Jones*, 856 F.2d at 989.

13. *Id.* at 990.

stated the assailant was lighter skinned than he himself was (Jones was darker); or that the assailant had a name like “Anderson.” The report also omitted the fact that doctors had warned the officers that the victim’s head injury left him with serious memory problems.¹⁴ The prosecutor used the official police report to persuade the court to set bail at \$250,000 which the Jones family could not post.¹⁵ In jail, Jones was subject to an attempted rape, was beaten by gang members, and was forced to undergo a brutal initiation rite to join a gang for self-protection.¹⁶ It was only after a month of jail detention that his bond was reduced and Jones was released.¹⁷

While the case was pending, in an interview with a different police official, Detective Laverty, the victim stated for the first time that there had been two assailants, both masked with stockings, one of whom had been George Anderson, a gang member.¹⁸ Laverty became convinced that the wrong man was being prosecuted. The other detectives threatened to destroy his career if he interfered with their case.¹⁹ One of these detectives took Laverty’s official report and rewrote it to state that no further investigation was warranted.²⁰ Laverty then prepared another report and deposited it in the “street files.”²¹

Shortly after these police actions had occurred, another victim was raped and bludgeoned to death, and the perpetrator confessed.²² This man was a much closer match to the description that had been given by the victim of the crime on which Jones was being held.²³ When Laverty questioned him, this suspect stated that it was possible he had committed the crime with which Jones was charged, but that he could not be sure because he had frequent blackouts.²⁴ Laverty requested his superior for a line up with this man in it; he was refused.²⁵ Three months later a lab technician discovered that George Jones had different semen and blood types from those found in the murdered girl’s vagina.²⁶ The technician, however, failed to include this information in the lab report prepared for the prosecution of Jones.²⁷

Detective Laverty had been led to believe that the prosecution against Jones had been dropped.²⁸ He learned that the trial was in fact underway only after reading about it in the newspaper.²⁹ Laverty then located Jones’ lawyer and told him about the exculpatory information in the “street files.”³⁰ The court declared a

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Jones*, 856 F.2d at 990.

19. *Id.*

20. *Id.* at 991.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Jones*, 856 F.2d at 991.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Jones*, 856 F.2d at 991.

mistrial, and shortly thereafter the prosecutor dropped all charges against Jones.³¹

The Seventh Circuit afforded George Jones a remedy under § 1983 against the police officers who had suppressed the exculpatory evidence.³² The defendant officers in this case, however, conceded that to prosecute a person when there was no reasonable ground for believing that he committed a crime would violate the Constitution.³³ The court noted that this made it unnecessary “to examine the difficult question whether malicious prosecution can ever count as a deprivation of liberty without due process of law when the defendant is not imprisoned.”³⁴ This difficult question, in one form or another, has remained the subject of controversy.³⁵ As a result, some of the lower federal courts would deny someone in Jones’s position relief in a § 1983 action.

In order to answer whether a person who was arrested and held for trial suffers a constitutional deprivation that is actionable under § 1983, even if ultimately he has not been wrongly convicted, it is necessary to grapple with a number of difficult questions. The defining issue is the question of precisely what constitutional right is violated by the suppression of exculpatory evidence at particular stages of criminal proceedings. In cases dealing with post-conviction remedies, the Supreme Court has repeatedly held that “due process” is violated by the failure of the prosecution to disclose exculpatory evidence. The issue remains, however, whether “due process” is similarly violated when there is no conviction.

First, it is necessary to determine whether the violation is a procedural or substantive due process violation. The answer to this question is rather straightforward, despite the fact that the Supreme Court has failed to address it explicitly and there is confusion and disagreement about it among the lower federal courts. This Article concludes that procedural due process rights are violated by the failure to disclose exculpatory evidence. Second, it is important to clarify what criteria must be employed to determine if there is a procedural due process violation in a given case at a particular stage of criminal proceedings. This Article concludes that the balancing test of *Mathews v. Eldridge*³⁶ should be used to determine if procedural due process requires the government to disclose exculpatory evidence to criminal defendants. Third, it must be determined whether these procedural due process principles govern the period between arrest and conviction, or whether the failure to disclose exculpatory evidence during this period should be analyzed under the Fourth Amendment. Fourth, we must examine what responsibility police officers, as distinct from prosecutors, have for the

31. *Id.*

32. *Id.* at 995.

33. *Id.* at 992.

34. *Id.*

35. Subsequent to *Jones v. City of Chicago*, the Supreme Court decided that there was no constitutional claim for a malicious prosecution based on a substantive due process theory. *Albright v. Oliver*, 510 U.S. 266, 274-75 (1994). Although lower federal courts are split on the issue, the Seventh Circuit has held that there is no constitutional claim for malicious prosecution based on the Fourth Amendment. *Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001), *reh'g. denied*, 260 F.3d 824 (2001), *reaffirmed after remand and trial*, 319 F.3d 301 (2003). These decisions are discussed in detail *infra*, notes and accompanying text 198-203.

36. 424 U.S. 319, 334-35 (1976).

disclosure of exculpatory evidence.

Section I analyzes and critiques several lower court cases based on deprivations of liberty where the underlying criminal case against the claimant was terminated prior to conviction. The discussion points out that these decisions are inconsistent and that, for the most part, the analyses the courts have used are incomplete and unsatisfactory. This section explains the Fourth Amendment principles that govern the suppression of exculpatory evidence prior to an arrest. This section then analyzes the question of whether deprivations of liberty between arrest and trial should be analyzed according to Fourth Amendment principles or due process principles, and concludes that a procedural due process analysis should be employed during this period.

Section II briefly reviews the decisions of the United States Supreme Court that have established an obligation on the part of the government to disclose exculpatory evidence to criminal defendants and the leading decisions establishing the standard for determining when such evidence is “material.” The principal problem addressed in this section is the fact that the Court has never explicitly agreed upon the precise nature of the constitutional right that is violated by the failure to disclose exculpatory evidence. This section argues that it is procedural due process rights, rather than substantive due process rights that are impacted by the suppression of exculpatory evidence. This section concludes by identifying the constitutional questions left unanswered in the Supreme Court’s opinions on exculpatory evidence. These include the nature of an officer’s obligation to disclose exculpatory evidence to prosecutors, the level of culpability that might be required to impose civil liability on an officer who fails to disclose such evidence, and whether the government has any obligation to disclose exculpatory evidence prior to trial.

Section III explores the lower federal court cases that have recognized a civil rights damages claim against police officers for failing to disclose exculpatory evidence to prosecutors in criminal cases that proceeded to trial and conviction. It further explores the difference between a substantive due process analysis of such misconduct and a procedural due process analysis, in the context of the decided cases. This section inquires into the basis for imposing liability on police officers for failing to furnish exculpatory evidence to prosecutors, and locates this basis in fundamental principles of § 1983 liability. Additionally, it explores the question of whether any particular level of culpability must be established to impose liability on officers for their failure to disclose exculpatory evidence, and concludes that all that should be required is proof of intentional suppression of exculpatory evidence; proof of “bad faith” should not be required.

Section IV returns to cases terminated prior to obtaining a conviction of a defendant, exploring how § 1983 claims should be analyzed when they are based on police failures to disclose exculpatory evidence in those circumstances. It examines deprivations of liberty that occur post-arrest and that continue, because of police failure to disclose exculpatory evidence, until a case is terminated prior to conviction. This section demonstrates that a proper analysis of these claims – as procedural due process violations – leads to the conclusion that claims based on a

pretrial failure to disclose exculpatory evidence are actionable when due process requires such disclosure under the criteria established in *Mathews v. Eldridge*.³⁷ This section briefly identifies the issues that arise under *Parratt v. Taylor*³⁸ and its progeny with respect to whether procedural due process violations can be litigated under § 1983 where state law may provide post-deprivation remedies for deprivations of liberty. This section also briefly discusses the qualified immunity defense to claims for the failure to disclose exculpatory evidence.

This Article concludes that a proper analysis, characterizing police failure to disclose exculpatory evidence to prosecutors as constituting a denial of procedural due process rights, will justify a § 1983 remedy not only for wrongful convictions, but also for pretrial deprivations of liberty.

I. SECTION 1983 CLAIMS AGAINST POLICE OFFICERS FOR WITHHOLDING EXCULPATORY EVIDENCE IN CASES RESOLVED PRIOR TO TRIAL

Although there is confusion and disagreement about the precise nature of the constitutional right involved, the lower federal courts are in agreement that when a police officer fails to disclose exculpatory evidence to the prosecutor and a criminal defendant is convicted at a trial as a result, the convicted defendant may make a claim for damages against the officer under § 1983. When the case terminates prior to the conclusion of a trial, however, the courts disagree about whether the defendant has a cause of action for a violation of his or her constitutional rights. It is in this area that the significance of how the constitutional right should be characterized becomes most apparent.

To analyze the obligations of a police officer with respect to evidence pointing toward innocence, or at least undermining proof of guilt, it is necessary to consider separately three different stages of an investigation and prosecution: (1) the activities of the police prior to an arrest; (2) the responsibility of the police for information in their possession between arrest and trial; and (3) the responsibility of the police for information in their possession at trial. The cases that fall in the last category are discussed in Section III.

Before turning to the liability of police officers, it is important to understand that prosecutors are generally absolutely immune from claims that exculpatory evidence was suppressed.³⁹ In *Imbler v. Pachtman*,⁴⁰ the Supreme Court held that absolute immunity protects a prosecutor from suit under § 1983 for “initiating a prosecution and in presenting the state’s case.”⁴¹ The Court ruled that a prosecutor

37. 424 U.S. 319.

38. 451 U.S. 527 (1981).

39. See generally AVERY ET AL., *supra* note 5, § 3:3 (discussing cases where prosecutors were entitled to absolute immunity from suit); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, §§ 7:42 – 7:60 (Shepard's McGraw-Hill, 4th ed. 2003) (discussing prosecutorial immunity); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT, § 14:14 (West, 2d ed. 1999) (discussing absolute immunity for advocacy activities).

40. 424 U.S. 409 (1976).

41. *Id.* at 431. See also *Burns v. Reed*, 500 U.S. 478 (1991) (granting absolute immunity to prosecutors in connection with the presentation of false and misleading evidence at a probable cause hearing leading to the issuance of a search warrant).

was protected by absolute immunity from a claim that he had used perjured testimony at trial.⁴² The language of the case compels the conclusion that absolute immunity applies to decisions about disclosing exculpatory evidence.⁴³ There is a narrow exception that denies absolute immunity to prosecutors for actions they take during the investigatory stages of a criminal case.⁴⁴ Consistent with these principles, courts have rejected most § 1983 actions against prosecutors for failing to disclose exculpatory evidence to the defense in a criminal case.⁴⁵ Thus, in a

42. *Id.* at 431.

43. The concurring opinion would have distinguished between the use by a prosecutor of perjured testimony and the suppression by a prosecutor of exculpatory information, and would have denied absolute immunity in the latter instance. *Imbler*, 424 U.S. at 433 (Justices White, Brennan and Marshall, concurring). The majority, however, explicitly rejected this distinction and indicated that absolute immunity applies to the suppression of exculpatory evidence. *Id.* at 431 n.34.

44. In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), plaintiff alleged that the prosecutor obtained a bogus “positive identification” between a footprint apparently left by the killer when he kicked in the door and a pair of boots that plaintiff had voluntarily supplied, from a forensic scientist who was allegedly well known for willingness to fabricate unreliable expert testimony. *Id.* at 259. The Court held that a prosecutor who manufactured evidence before there was sufficient probable cause to warrant an arrest would not be protected by absolute immunity. *Id.* at 275. The essential question that determines whether a prosecutor is entitled to absolute immunity is whether she is acting as an advocate in connection with a judicial proceeding. There are, of course, cases in which a prosecutor’s entitlement to absolute immunity is a close question. A complete explication of this issue is beyond the scope of this Article.

45. *See* Long v. Satz, 181 F.3d 1275, 1279 (11th Cir. 1999) (holding absolute immunity for prosecutors includes immunity for suppressing exculpatory information acquired after trial – “[t]he task of evaluating the credibility of the alleged exculpatory information, and of determining its bearing on the trial and the prosecutor’s decision whether to confess error and agree to have the verdict set aside, no doubt requires the exercise of prosecutorial discretion.”); Reid v. New Hampshire, 56 F.3d 332, 336 (1st Cir. 1995) (holding prosecutors could not be liable for knowing suppression of exculpatory evidence); Carter v. Burch, 34 F.3d 257, 263 (4th Cir. 1994) (holding prosecutor had absolute immunity from claims brought by a prisoner); Casey-El v. Hazel, 863 F.2d 29, 30 (8th Cir. 1988) (holding prosecutor’s failure to obtain and furnish to defense potentially exculpatory ballistics results was protected by absolute immunity); Myers v. Morris, 810 F.2d 1437, 1446-47 (8th Cir. 1987) (holding prosecutor absolutely immune from liability for alleged violations committed in initiating prosecution); Jones v. Shankland, 800 F.2d 77, 80 (6th Cir. 1986) (holding prosecutor absolutely immune from damages); Hilliard v. Williams, 540 F.2d 220, 221-22 (6th Cir. 1976) (finding a prosecutor who withheld exculpatory evidence absolutely immune from § 1983 action after remand by the Supreme Court for reconsideration in light of *Imbler*); Hauptmann v. Wilentz, 570 F. Supp. 351, 362, 366 (D.N.J. 1983) (involving a suit filed years after conviction by the widow of defendant in the Lindbergh kidnapping case). As noted, where the prosecutor’s actions can be distinguished from advocacy in connection with judicial proceedings, absolute immunity may be denied. *See* Henderson v. Fisher, 631 F.2d 1115, 1117 (3d Cir. 1980), where the plaintiff had been convicted of rape. The victim described her attacker as dressed in “jeans,” but at the time of his arrest the plaintiff was wearing red pants. Plaintiff alleged that on the day of his trial an officer signed to remove the red pants from the evidence locker but they were never brought to court, nor returned. *Id.* Plaintiff alleged that the prosecutors knew that his clothing had been removed, that it was exculpatory and that they took no corrective action. *Id.* The court noted that the handling of evidence is clearly within the sweep of “initiating and presenting the State’s case,” but that it was a more difficult question whether preserving exculpatory evidence that was removed would be within the scope of “presenting the State’s case.” *Id.* at 1120. The Court concluded that “although the facts here present a very close question, it is difficult to characterize a prosecutor’s knowing failure to stop the removal of exculpatory material as ‘presenting the State’s case.’” *Id.* It thus held that the prosecutors were not entitled to absolute immunity. *But see* Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680 (9th Cir. 1984) (explicitly rejecting the reasoning in *Henderson*, *supra*, and

typical case the possibility of recovering damages against individuals responsible for suppressing exculpatory evidence arises only where law enforcement agents fail to disclose the exculpatory evidence to the prosecutors.⁴⁶

A. The Responsibility of Police Officers with Respect to Exculpatory Evidence Prior to Arrest

The constitutional protection against the deprivation of liberty in connection with an arrest is provided by the Fourth Amendment, which protects against unreasonable seizures of one's person.⁴⁷ A cause of action under the Fourth Amendment for the failure to disclose exculpatory information to a prosecutor prior to arrest was recognized by the Third Circuit Court of Appeals in *Gallo v. Philadelphia*.⁴⁸ However, the court did not explicitly discuss whether the officers' misconduct in wrongfully withholding exculpatory evidence prior to trial might violate constitutional rights in addition to those protected by the Fourth Amendment.⁴⁹ Although *Gallo* is clear authority for the proposition that the failure

holding that a prosecutor who returned exculpatory physical evidence to its owner rather than preserving it for trial was entitled to absolute immunity).

46. It may be possible to bring an action against a government defendant, such as a municipality, on the ground that the government maintained a policy or custom that caused the suppression of exculpatory evidence, for example, failing to train officers and/or prosecutors with respect to their *Brady* obligations. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978); *AVERY ET AL.*, *supra* note 5, §§ 4:15 – 4:24. A suit against a chief prosecutor in her official capacity is treated as a suit against the government entity. Claims made against chief prosecutors in their official capacities are thus subject to the policy and custom requirements of *Monell* actions. Such claims may be based on the failure of the prosecuting authority to train prosecutors adequately with respect to their *Brady* obligations. *See Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992); *Wardell v. City of Chicago*, 75 F. Supp. 2d 851, 855 (N.D. Ill. 1999); *Carter v. Harrison*, 612 F. Supp. 749, 756 (E.D.N.Y. 1985) (all holding that there is no absolute immunity available to government entities or to policymaking officials sued in their official capacity).

47. *Baker v. McCollan*, 443 U.S. 137, 142-143 (1979); *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975).

48. 161 F.3d 217, 225 (3d Cir. 1998). Plaintiff was tried for arson. *Id.* at 218. Prior to trial he was released on condition that he not travel beyond New Jersey and Pennsylvania, that he contact Pretrial Services weekly and that he make all court appearances. *Id.* at 219. For five months the investigators did not disclose the original incident report, which was exculpatory in that it did not include important details added in later reports. *Id.* The exculpatory report was disclosed two months before trial and plaintiff's attorney successfully employed it at trial to impeach the investigator. *Id.* Plaintiff was acquitted at the criminal trial. Plaintiff filed a *Bivens* claim against federal officers on the ground that the officers had failed to turn over exculpatory evidence to the prosecutor. *Id.* at 218. The court ruled that the unlawful actions of the federal officers occurred when they failed to provide exculpatory information to the prosecutor a number of years prior to the indictment and arrest. *Id.* at 220 n.4.

49. *Id.* at 220. On the appeal from dismissal on defendants' motions, the court analyzed the claim as a malicious prosecution Fourth Amendment claim dependent upon evidence that plaintiff was "seized." *Id.* The court found the release conditions sufficient to constitute a seizure. *Id.* at 222. The court also reasoned that the requirements of a seizure are met by analogy to the "in custody" provision of the habeas corpus statute, which is met by the conditions of a release on personal recognizance, per Justices of *Boston Mun. Court v. Lydon*, 466 U.S. 294, 300-01 (1984). *Gallo*, 161 F.3d at 222. The court reversed the dismissals over the federal officers' argument that failure to turn over exculpatory evidence does not cause a constitutional injury. *Id.* at 221. The court noted that *Albright* held that a malicious prosecution claim could not be brought on a *substantive* due process theory, and also noted that the plaintiff in *Albright* had not made procedural due process or Fourth Amendment claims, and

to turn over exculpatory evidence may constitute a Fourth Amendment violation, it does not explicitly preclude an argument that either substantive or procedural due process rights may be violated by such a failure.

The fact that officers are aware of some exculpatory evidence prior to arrest does not necessarily render the arrest unconstitutional under Fourth Amendment standards, where the officers have enough trustworthy incriminating information to establish probable cause. At the same time, the existence of exculpatory evidence is clearly relevant to a determination of whether probable cause exists. As the court reasoned in *Kuehl v. Burris*:⁵⁰ because the *totality* of circumstances determines the existence of probable cause, evidence that tends to negate the possibility that a suspect has committed a crime is relevant to whether the officer has probable cause. An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists.⁵¹

Cases discussing the handling of exculpatory information and/or the failure to investigate to find further exculpatory information prior to arrest appear to be decided on a very fact specific basis. Where courts have held an arrest to be valid, they have concluded that officers do not have to investigate every claim of innocence, exhaust every potentially exculpatory lead, or resolve every doubt about a suspect's innocence before making an arrest.⁵² On the other hand, where courts have found an arrest violated the Fourth Amendment, courts have reasoned that when officers are in the process of determining whether probable cause exists, they cannot turn a blind eye toward potentially exculpatory evidence known to them.⁵³

evidently assumed that the failure to provide exculpatory evidence should be analyzed as a malicious prosecution claim. *Id.* at 222.

50. 173 F.3d 646, 650 (8th Cir. 1999). The plaintiff, a store owner, got into an argument with a customer who claimed that she followed him around the store afraid that he would steal because he was an African-American. *Id.* at 648. There was conflicting testimony about who started the physical altercation. *Id.* at 648-49. The arresting officer ignored an eyewitness's attempt to recant the statement that plaintiff had slapped the customer, and refused to consider plaintiff's own statements or those of another witness favorable to her. *Id.* The court held that the officer was not entitled to qualified immunity, based on the plaintiff's allegations. *Id.* at 651.

51. *Id.* at 650 (emphasis in original).

52. *See, e.g.,* *Brown v. Wiita*, 7 Fed. Appx. 275, 279-80 (4th Cir. 2001) (unpublished) (holding that an officer is not required to wait for photograph from motor vehicle department to confirm suspect's identity before making arrest, where he had name, physical description and location of suspect); *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) (finding probable cause where officer properly relied on victim's identification and had no reason to believe that her identification was untruthful or unreliable, and concluding that officers were not obliged to investigate further); *Mensh v. Dyer*, 956 F.2d 36, 38, 40 (4th Cir. 1991) (holding that arrest was objectively reasonable although officers mistakenly arrested suspect's father, even though they could have waited for clearer photographs or secured additional physical description of suspect before executing warrant); *Torchinsky v. Siwinski*, 942 F.2d 257, 263-64 (4th Cir. 1991) (finding that officers were not required to interview suspect named by victim prior to making an arrest).

53. *See, e.g.,* *Ahlers*, 188 F.3d at 372 (finding probable cause on basis of information known to police); *Womack v. City of Bellefontaine Neighbors*, 193 F.3d 1028, 1031 (8th Cir. 1999) (finding no probable cause where officers ignored "plainly exculpatory evidence"); *Kuehl*, 173 F.3d at 651 (requiring officer to conduct reasonable thorough investigation prior to arrest where exculpatory evidence is present and the investigation would not unduly hamper law enforcement); *Sevigny v. Dicksey*, 846 F.2d 953, 957 (4th Cir. 1988) (noting that because an objective test is to be used to

There is greater clarity about the failure to disclose exculpatory evidence where plaintiff's claim is that an officer has misrepresented facts in order to obtain a warrant to make an arrest or conduct a search. The law is clearly established that making material false statements in and/or excluding material exculpatory information from an affidavit in support of a warrant will violate the subject's constitutional rights, as the Supreme Court held in *Franks v. Delaware*.⁵⁴ The basis of the decision was the language of the Fourth Amendment itself, which requires that warrants be issued only upon a finding of probable cause. The Court reasoned that the probable cause requirement demanded an honest presentation in support of a warrant application:

In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: '[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation' Judge Frankel . . . put the matter simply: '[W]hen the Fourth Amendment demands a factual showing sufficient to comprise "probable cause," the obvious assumption is that there will be a *truthful* showing.'⁵⁵

The *Franks* Court concluded that the warrant requirement would be "reduced to a nullity" if an officer were permitted to use deliberately false allegations to demonstrate probable cause.⁵⁶ Similarly, it is well established that police officers may be liable under § 1983 for material affirmative misrepresentations in affidavits that support arrest or search warrants.⁵⁷

determine whether there is probable cause for an arrest, the calculation should be made as a police officer acting reasonably under the circumstances would have perceived it – this may require further investigation); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) (holding that in child neglect investigation officer should have made further inquiry of available witnesses which would have disclosed that no child neglect was present); *Clipper v. Takoma Park*, 876 F.2d 17, 19 (4th Cir. 1989) (stating officer's failure to investigate readily available exculpatory evidence substantiated jury's conclusion that officer acted without probable cause); and cases cited in *AVERY ET AL.*, *supra* note 5, § 2:12.

54. 438 U.S. 154 (1978). In *Franks*, the Court held that probable cause based on an affidavit presupposes *truthful* statements be made in the affidavit. *Id.* at 155-56. The Court held that where the officer lies or is reckless with regard to the truth, probable cause cannot be based upon the false statements. *Id.*

55. *Id.* at 164-65 (emphasis in original, citation omitted).

56. *Id.* at 168.

57. *See, e.g.*, *Hunter v. Namanny*, 219 F.3d 825, 829 (8th Cir. 2000) (holding that police officer is not entitled to qualified immunity where he obtained a search warrant through false information or omission of material facts); *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 187 (1st Cir. 1998) (holding that if an officer lies to obtain a search warrant, he is not entitled to qualified immunity); *Clanton v. Cooper*, 129 F.3d 1147, 1154-55 (10th Cir. 1997) (holding that a fire marshal who intentionally swore as part of an affidavit to untrue facts to support an arrest warrant was not entitled to qualified immunity); *Kelly v. Curtis*, 21 F.3d 1544, 1555 (11th Cir. 1994) (holding that an officer who obtained arrest warrant on strength of false information does not enjoy qualified immunity); *Cartier v. Lussier*, 955 F.2d 841, 845-46 (2d Cir. 1992) (finding that factual omissions may not strip officer of immunity if probable cause exists regardless of the omissions); *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985) (holding that if an

The lower federal courts have also held that officers may be liable under § 1983 for material omissions of exculpatory information from warrant affidavits.⁵⁸ Because the standard that governs such cases is a Fourth Amendment probable cause standard, where probable cause exists even after the missing exculpatory information has been taken into account, there is no constitutional violation and no liability for the omission.⁵⁹

B. The Responsibility of Police Officers with Respect to Exculpatory Evidence Between Arrest and Trial

Once a criminal defendant has been arrested and is awaiting trial, but before the trial is held, the question is whether it is still the Fourth Amendment that provides protection against the suppression of exculpatory evidence, or whether procedural due process is the appropriate method of analysis at this stage of the proceeding. That an accused suffers a deprivation of liberty during the pretrial phase of a criminal case is well recognized. If the defendant is held without bail, or

officer submits an affidavit containing statements he knew or should have known to be false, and no accurate information independently supported probable cause, he cannot be said to have acted in an objectively reasonable manner and will not be shielded by qualified immunity). *See generally* AVERY ET AL., *supra* note 5, §§ 2:10, 2:24 (noting that “if it is proved that the defendant purposely falsified material aspects of the warrant, his conduct may be subject to a § 1983 suit”).

58. *See, e.g.*, Liston v. County of Riverside, 120 F.3d 965, 973 (9th Cir. 1997) (holding that “whether the alleged judicial deception was brought about by material false statements or material omissions is of no consequence”); Madiwale v. Savaiko, 117 F.3d 1321, 1326-27 (11th Cir. 1997) (stating that a warrant is invalidated by the Fourth Amendment where it contains omissions “made intentionally or with a reckless disregard [of] . . . accuracy”). *See also* DeLoach v. Bevers, 922 F.2d 618, 622-23 (10th Cir. 1990) (holding detective liable for arrest where the detective omitted all mention of exculpatory medical opinions which contradicted her theory in a report to the district attorney). In Mays v. City of Dayton, 134 F.3d 809 (6th Cir. 1998), the Sixth Circuit held that there is a higher standard to establishing liability in cases based on the omission of exculpatory information than in cases based on affirmative misrepresentations. *Id.* at 816. The plaintiff was a doctor whose office was searched as part of a fraud investigation who sued under § 1983 alleging in part that the officer failed to disclose exculpatory information in the affidavit in support of the warrant. *Id.* at 811-12. The court of appeals, however, held that the lower court had improperly inferred that the due process protection provided under *Brady* applies to the warrant application process through the *Franks* analysis. *Id.* at 815-16. The court reasoned that the *Brady* due process rule “helps to ensure fair criminal trials, protecting the presumption of innocence for the accused, while forcing the state to present proof beyond a reasonable doubt.” *Id.* at 815. The court distinguished the arrest and search phase of criminal proceedings from a trial based on the argument that “the consequences of arrest or search are less severe and easier to remedy than the consequences of an adverse criminal verdict,” concluding that the duty to disclose exculpatory information is “less compelling” in the context of an application for a warrant. *Id.* at 816. The court also reasoned that police officers who obtain warrants “in the heat of a criminal investigation” should be subject to different standards than prosecutors who make decisions about exculpatory evidence on the basis of greater information and not subject to the time pressures inherent in the warrant process. *Id.* The court concluded that there should be liability for omissions of exculpatory evidence in warrant affidavits only where there is an intention to mislead. *Id.*

59. *Franks*, 438 U.S. at 171-72 (“[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.”); *Smith v. Edwards*, 175 F.3d 99, 105 (2d Cir. 1999); *Madiwale*, 117 F.3d at 1327; *Soares v. State*, 8 F.3d 917, 920 (2d Cir. 1993).

cannot post bail, the deprivation of liberty is obvious.⁶⁰ The Supreme Court has also acknowledged that even when a criminal defendant is released from custody while awaiting trial, the restraint of liberty is significant.⁶¹ Whether this liberty is protected from the threat posed by the suppression of exculpatory evidence by the Fourth Amendment or by procedural due process, however, is a controversial question.

The position that protection for this liberty is afforded solely by the Fourth Amendment was taken by the Fourth Circuit Court of Appeals in *Taylor v. Waters*,⁶² where the court rejected the contention that the failure to disclose exculpatory evidence prior to trial should be analyzed as a violation of either procedural or substantive due process.⁶³ The court concluded that it is the Fourth Amendment that defines the “process that is due” for seizures of persons and property in criminal cases, including the detention of suspects pending trial.⁶⁴ The court further concluded that there was no substantive due process right against prosecution on less than probable cause.⁶⁵

The *Taylor* court also held that the failure to disclose exculpatory evidence with the result that the plaintiff had been held for trial did not violate the Fourth Amendment.⁶⁶ The court reasoned that once probable cause has been established, the Fourth Amendment does not require further judicial oversight or reasonable investigation to render pretrial seizure reasonable.⁶⁷ The court noted that other constitutional guarantees, such as the speedy trial right, protect an accused from

60. In *Gerstein*, 420 U.S. at 114, the Supreme Court stated that, “[t]he consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.”

61. *Id.*

62. 81 F.3d 429 (4th Cir. 1996). While executing a search warrant in a drug investigation, officers arrested the plaintiff, the suspect’s roommate, believing him to be involved. *Id.* at 432. They later learned from the suspect himself that the plaintiff was not involved, which was corroborated by the informant and the fact that no inculpatory evidence was found against the plaintiff during a subsequent search of the apartment and his automobile. *Id.* at 432-33. The officers did not bring any of this exculpatory information to the attention of the prosecutor, and allowed charges to remain pending against plaintiff for two months until they were declared *nolle prosequi* just before the preliminary hearing. *Id.* at 433. The court held that there had been probable cause for plaintiff’s arrest and that no settled authority required the officers to furnish the exculpatory information during the time involved. *Id.* at 437.

63. *Id.* at 436.

64. *Id.* (relying on the authority of *Gerstein*, 420 U.S. at 125 n.27 and *Baker*, 443 U.S. at 142-46).

65. *Id.* (relying on *Albright*, 510 U.S. at 268-75, 287 (Souter, J., concurring in judgment)). The *Taylor* court reconsidered the Fourth Circuit’s earlier decision in *Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), which had provided a remedy for the failure to disclose exculpatory evidence between arrest and trial. *Id.* It concluded that the decision retained vitality after *Albright* only with respect to a claim that the suppression of exculpatory evidence interfered with the right to fair trial, and not with respect to detention prior to trial. *Id.* The court declared, “[t]o the extent that *Goodwin* bases its holding on a conclusion that the officer’s failure to disclose exculpatory evidence deprived the § 1983 plaintiffs of a liberty interest in avoiding prosecution on less than probable cause, that reasoning has been rejected in *Albright* But, to the extent that *Goodwin* ruled that the officer’s failure to disclose the exculpatory information deprived the § 1983 plaintiffs of their right to a fair trial, its holding is not affected by *Albright*. *Taylor*, 81 F.3d at 436 n.5.

66. *Taylor*, 81 F.3d at 436.

67. *Id.*

indefinite detention before his guilt or innocence is established at trial.⁶⁸ The *Taylor* court's conclusion that the Fourth Amendment requires no further protection after probable cause is established would leave many innocent people detained for trial, or forced to endure lengthy criminal proceedings short of trial, without a remedy for the suppression of exculpatory evidence, even if that suppression caused the detention or continuation of proceedings.⁶⁹

Analysis of the Supreme Court's opinions in *Baker* and *Gerstein* demonstrate that the Fourth Circuit was incorrect in *Taylor* in concluding that the Supreme Court has ruled out any role for procedural due process protection during the pretrial period of a criminal case. *Gerstein* held that a person arrested without a warrant is constitutionally entitled to a judicial determination of probable cause in order to justify the pretrial restraint of his liberty.⁷⁰ The Court also held that the Constitution does not require that the determination be made in a hearing with the full panoply of adversarial safeguards, such as counsel, confrontation, cross-examination and compulsory process for witnesses.⁷¹ The Court reasoned that the standard for determining whether there is probable cause for detaining an arrestee pending further proceedings is the same as for making the arrest in the first place, and this issue can be reliably determined without an adversary hearing.⁷² The Court, as the *Taylor* opinion emphasized, specifically elected to use Fourth Amendment rather than procedural due process criteria for making this decision.

In rejecting the plaintiff's claim in *Taylor*, the Fourth Circuit quoted this language from *Gerstein*: "[t]he Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial."⁷³ At first blush this language might appear to imply there is no role for procedural due process during pretrial criminal proceedings and as long as the probable cause requirements of the Fourth Amendment are met, there can be no constitutional violation based on the suppression of exculpatory evidence. But this conclusion puts too much weight on a portion of the Court's language. A fuller rendition of the footnote demonstrates that the matter is more complicated:

Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person

68. *Id.* at 436.

69. See *Carroccia v. Anderson*, 249 F. Supp. 2d 1016, 1025 (N.D. Ill. 2003) (denying relief for pretrial incarceration caused by concealment of exculpatory evidence).

70. *Gerstein*, 420 U.S. at 126.

71. *Id.*

72. *Id.* at 120.

73. *Taylor*, 81 F.3d at 435-36 (citing *Gerstein*, 420 U.S. at 125 n. 27).

or property in criminal cases, including the detention of suspects pending trial. . . . Moreover, the Fourth Amendment probable cause determination is in fact only the first stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct.⁷⁴

Here, the Court specifically addressed only the “threshold right” that adheres to the “first stage of an elaborate system.” The Court recognized that there are “complex procedures” that follow to safeguard an accused’s rights.⁷⁵ This language does not rule out the argument that even after probable cause is established in a *Gerstein* hearing, procedural due process protections require that an officer in possession of exculpatory evidence furnish it to the prosecutor so that a defendant’s rights can be safeguarded with respect to other decisions that must be made prior to trial.

In *Baker v. McCollan*⁷⁶ the Court held that the procedural due process rights of an individual arrested on a warrant were not violated, even though he was not the person for whom the warrant was intended; he had protested his innocence; and the defendants had failed to adopt procedures that would have revealed his mistaken identity.⁷⁷ The Court relied upon *Gerstein* for the conclusion that the ex parte decision by the magistrate who issued the warrant was sufficient process to detain the person. The Court declared that the combination of the probable cause requirement and the speedy trial right meant that a sheriff executing a warrant does not have to “investigate independently every claim of innocence.”⁷⁸ The plaintiff in *Baker*, however, was held for only a few days before he was released.⁷⁹ Significantly, the Court left open the possibility that:

[D]epending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of ‘liberty . . . without due process of law.’⁸⁰

The Supreme Court has not had an opportunity to revisit this issue and to determine under what circumstances procedural due process might be violated by a longer detention of an arrestee in the face of protests of innocence, or actual evidence of innocence in the hands of the police.

Other lower federal courts have reached a different conclusion from *Taylor* and have not found that *Gerstein* and *Baker* are an impediment to a cause of action for the failure to disclose exculpatory evidence between arrest and trial. For

74. *Gerstein*, 420 U.S. at 125 n.27.

75. *Id.* at 141.

76. 443 U.S. 137 (1979).

77. *Id.* at 142.

78. *Id.* at 145-46.

79. *Gerstein*, 420 U.S. at 125 n.27.

80. *Id.* at 145.

example, in a Fifth Circuit case, *Sanders v. English*,⁸¹ plaintiff spent fifty days in jail after his arrest, although the investigating officer had come into possession of powerful exculpatory evidence within two days after the arrest.⁸² The court relied on the suggestion in *Baker* that detention in the face of repeated protests of innocence could deprive an accused of due process of law after a lapse of time.⁸³ The *Sanders* court found that a jury could find that the defendant “knowingly and willfully ignored substantial exculpatory evidence,” and that failing to disclose such evidence to the prosecutor “plainly exposes him to liability under § 1983.”⁸⁴ Unfortunately, the *Sanders* court did not analyze or specify whether the *Baker* detention without due process theory implicated procedural or substantive due process.

One of the earliest cases imposing § 1983 liability for the failure to disclose exculpatory evidence, and one of the most frequently cited, is *Jones v. City of Chicago*,⁸⁵ the “street files” case described in the Introduction. The case involved both the suppression of exculpatory information prior to plaintiff’s arrest and other exculpatory information developed after he was arrested. The defendants conceded both that arresting someone without probable cause and that prosecuting a person when there is no reasonable ground for believing that he committed a crime would violate the Constitution.⁸⁶ This concession made it unnecessary for the court to conduct a rigorous analysis of precisely which constitutional right was violated.

The plaintiff in *Jones* had been prosecuted for murder and rape. The case was

81. 950 F.2d 1152 (5th Cir. 1992).

82. *Id.* at 1156-57. A police lieutenant made an arrest of the plaintiff as someone he suspected was the “bicycle bandit,” a thief who assaulted and robbed several elderly victims. *Id.* at 1155-56. The lieutenant arranged for the press to be present to photograph him making the arrest. *Id.* Shortly after the arrest, he learned that the victim who originally identified the plaintiff was related to plaintiff (in a courtroom where plaintiff was appearing on an unrelated matter, the victim identified him by name, but gave no good reason why he had been unable to supply this name before), that a witness who had assisted the police in preparing a composite sketch of the suspect stated that plaintiff was not the bandit, that none of the other victims identified plaintiff as the bandit, and that three men with whom the lieutenant was acquainted, and whom he found credible, stated that they were with plaintiff on the morning of the robbery for which he was arrested, out of town. *Id.* at 1156-57. One of them later found a cancelled check for work they had done that morning, further corroborating the alibi. *Id.* The lieutenant informed neither his chief nor the prosecuting attorney of this exculpatory evidence. *Id.*

83. *Id.* at 1161.

84. *Id.* at 1162. The court treated the cause of action as unlawful detention and analyzed it separately from the plaintiff’s claims for false arrest and malicious prosecution. The court did, however, conclude that the suppression of exculpatory evidence had evidentiary significance for the malicious prosecution claim, and could form a basis for an inference that the officer had acted with malice in initiating and maintaining the prosecution. *Id.* at 1163.

85. 856 F.2d 985 (7th Cir. 1988).

86. *See id.* at 992 (noting that this made it unnecessary for it to determine whether there could be a malicious prosecution basis for a deprivation of liberty during the period of time that plaintiff was not held in jail prior to trial). The court also noted that at some point after arrest the question of whether continued confinement or prosecution would be unconstitutional passes over from a Fourth Amendment analysis to a due process analysis. *Id.* at 994. However, *Jones* was decided before *Albright*, and thus the Supreme Court had not yet made clear that there was no substantive due process malicious prosecution claim under § 1983. This specific issue was not addressed by the court in *Jones*, but the Seventh Circuit later rejected a malicious prosecution basis for a constitutional claim under § 1983 in *Newsome*, 256 F.3d at 751.

dropped during trial after exculpatory evidence was disclosed to the defense attorney by a police officer disenchanted with the efforts of his fellow officers to convict someone he believed to be innocent. Plaintiff then filed suit under § 1983, claiming that the individual defendants had denied plaintiff due process of law under the Fourteenth Amendment for false arrest, false imprisonment, intentional infliction of emotional distress and malicious prosecution.⁸⁷ Plaintiff proved that the officers had suppressed exculpatory evidence,⁸⁸ and that the officers had filed an official police report “full of falsehoods.”⁸⁹ Reports describing the exculpatory evidence had been filed by the officers in “street files” maintained by the police department but not turned over to the prosecutor’s office with the regular investigative files.⁹⁰ The opinion, however, did not specify under what § 1983 tort theory the plaintiff’s constitutional rights had been violated.

The plaintiff in *Jones* also made a claim against the City of Chicago based on the argument that maintaining the street files was a custom or policy of the City that violated the plaintiff’s constitutional rights.⁹¹ The City did not challenge the conclusion that maintaining the street files denied criminal defendants due process of law.⁹² The court itself did not treat the proposition that such conduct would violate the Constitution as novel or controversial. Rather the court condemned the conduct in harsh terms and congratulated the City of Chicago for its good sense in not defending the practice:

Brady v. Maryland does not require the police to keep written records of all their investigatory activities; but attempts to circumvent the rule of that case by retaining records in clandestine files deliberately concealed from prosecutors and defense counsel cannot be tolerated. The City sensibly does not attempt to defend such behavior in this court.⁹³

The recognition by the Fifth and Seventh Circuit in *Sanders* and *Jones*, respectively, that the Constitution requires the disclosure of material exculpatory evidence prior to trial, is more defensible than the conclusion of the Fourth Circuit in *Taylor* that there is no further constitutional protection after a Fourth Amendment probable cause determination has been made. *Gerstein* and *Baker* do not compel the conclusion that there is no procedural due process protection during the period between arrest and trial. Indeed, *Baker* affirmatively suggests that after the lapse of some time, detention in the face of protests of innocence may deprive an accused of liberty without due process of law if the State does not afford defendants procedural protections following arrest and prior to actual trial.

The Fourth Amendment probable cause protection was designed to provide

87. *Jones*, 856 F.2d at 988.

88. *Id.* at 989-91. This included the fact that the victim’s identification of plaintiff was equivocal at best and that there was another suspect who admitted he might have committed the crime and who more closely fit the victim’s initial description of his attacker.

89. *Id.* at 990.

90. *Id.* at 989.

91. *Id.* at 995.

92. *Id.*

93. *Jones*, 856 F.2d at 995.

protection against arbitrary action by government at the moment when one is arrested and taken into custody, when one's person is "seized" in Fourth Amendment terms. It may be that the Fourth Amendment continues to provide protection from a continuing unreasonable seizure in the absence of probable cause, although the Supreme Court has never held that it does.⁹⁴ Whether the Fourth Amendment provides that protection or not, however, the failure to disclose exculpatory evidence raises separate problems. Exculpatory evidence that was suppressed may have been powerful enough to result in a different decision with respect to detention and bail, even though the evidence as a whole continues to meet the minimal probable cause threshold. A prosecutor may have decided to forego prosecution of a case if she had learned of suppressed exculpatory evidence, even though there was enough evidence to establish probable cause. In both situations there is a risk of erroneous deprivation of liberty which could be substantially reduced by affording the procedural protection of requiring the disclosure of exculpatory evidence. Pretrial proceedings may be extensive and a deprivation of liberty during this period may be prolonged. As discussed in the next section, these are precisely the circumstances in which the principles of *Mathews* would require that procedural safeguards be afforded.

II. THE GOVERNMENT'S DUTY TO DISCLOSE EXCULPATORY EVIDENCE IN CRIMINAL CASES

In *Brady v. Maryland*⁹⁵ the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁹⁶ The decision and its progeny impose an affirmative duty on the prosecution to disclose to the defense material exculpatory evidence. The Supreme Court has repeatedly held that "due process" requires this disclosure. The Court has never, however, explicitly declared whether it is *substantive* or *procedural* due process that imposes the obligation.⁹⁷ In 1994, in *Albright v. Oliver*,⁹⁸ Chief Justice Rehnquist, joined by Justices O'Connor, Scalia and Ginsburg, suggested that the *Brady* line of cases protected procedural due

94. See *Albright*, 510 U.S. at 276-81 (Ginsburg, J., concurring) (arguing for a continuing seizure theory). See also *id.* at 287 (Souter, J., concurring) (arguing against a continuing seizure theory). A majority did not address the continuing seizure theory in *Albright*, and the Court has yet to adopt it.

95. 373 U.S. 83 (1963).

96. *Id.* at 87. In *Brady* the defendant was convicted of murder. *Id.* at 84. He testified at trial that he had participated in the crime, but claimed that his codefendant had actually killed the victim. In summation, the defense attorney acknowledged that Brady was guilty of first degree murder, but sought to avoid the death penalty on the basis that Brady was not the killer. *Id.* Prior to trial, the defense had requested an opportunity to examine the codefendant's statements. *Id.* The prosecution withheld a statement in which the codefendant had admitted that he committed the homicide. *Id.* The Court had little difficulty in determining that the defendant's due process rights had been violated by this suppression. *Id.* at 86.

97. The lower federal courts are divided on what characterization is appropriate, with most of the decisions ignoring the issue altogether. See the discussion *infra* in Section III.

98. 510 U.S. 266 (1994).

process rights.⁹⁹ In the same case, Justices Stevens and Blackmun described the *Brady* line of cases as standing for the proposition that the Due Process Clause is violated by the suppression of exculpatory evidence, “procedural regularity notwithstanding.”¹⁰⁰ These Justices noted that there is “only one Due Process Clause” and that, while it may sometimes be helpful as a matter of doctrine to distinguish between substantive and procedural due process, “the two concepts are not mutually exclusive, and their protections often overlap.”¹⁰¹ Subsequent cases have not explicitly clarified the issue further.

Answering the question of what precise constitutional right is implicated by these cases is essential to understanding the circumstances under which a civil remedy should be afforded under § 1983.¹⁰² There are at least two significant consequences that flow from whether the violation is characterized as substantive or procedural due process. First, if the failure to disclose exculpatory evidence were to be described as a substantive due process violation, the Supreme Court’s decision in *Albright v. Oliver*¹⁰³ might be read to imply that there is no such cause of action for pretrial failures to disclose.¹⁰⁴ This bar would not apply to a procedural due process claim, although it might be argued that there is no cause of action under § 1983 for a procedural due process violation where there is an adequate remedy under state law.¹⁰⁵ Second, to establish a substantive due process violation a plaintiff must show that an official’s conduct was “shocking to the conscience.”¹⁰⁶ No such requirement is imposed on an action for a violation of procedural due process rights. Resolution of the question of whether substantive or procedural due process principles apply in these cases requires a preliminary review of the history of the criminal appellate and habeas corpus cases that preceded and followed *Brady*.

A. *The Prosecution’s General Duty to Disclose Exculpatory Evidence*

Although *Brady* is an icon in constitutional criminal procedure, the decision

99. The opinion noted that in *In re Winship*, 397 U.S. 358 (1970), the Court had recognized that the reasonable doubt standard was required in criminal cases “as a matter of procedural due process” and that “[s]imilarly” the *Brady* line of cases was appropriately characterized as “dealing with the defendant’s right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution.” *Albright*, 510 U.S. at 273 n.6.

100. *Albright*, 510 U.S. at 299.

101. *Id.* at 301. Justices Stevens and Blackmun contended that the Court in *In re Winship* had “found it unnecessary to clarify whether our holding rested on substantive or procedural due process grounds.” *Id.*

102. Section 1983 does not create or define constitutional rights, but is merely a vehicle for obtaining redress for constitutional violations. The existence of a violation is established by the Constitution and the decisions of the Supreme Court interpreting it. *Baker*, 443 U.S. at 140, 144 n.3; *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

103. 510 U.S. 266.

104. This issue is discussed in detail in Section III.

105. See *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (“Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirement of due process.”). These issues are discussed *infra* in Section IV.

106. *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

did not announce a new principle of law, but rather followed from the proposition established in earlier cases that the government may not knowingly misrepresent or hide the truth in criminal cases without violating the defendant's due process rights. The *Brady* Court characterized its ruling as "an extension" of *Mooney v. Holohan*,¹⁰⁷ in which the Supreme Court had declared that "depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured" violated the Fourteenth Amendment Due Process Clause.¹⁰⁸ While the Court did not specify whether a substantive due process or a procedural due process violation had occurred, the Court's focus on the adequacy of available proceedings suggests strongly that the violation was one of procedural due process.¹⁰⁹ The *Brady* Court also explicitly grounded its ruling on *Pyle v. Kansas*,¹¹⁰ where the Supreme Court had earlier intimated that the suppression of favorable evidence violated the Constitution.¹¹¹

The Court in *Brady* declared that the principle of *Mooney v. Holohan* had not been based upon the need for sanctions against the prosecution for its misdeeds, but upon the "avoidance of an unfair trial to the accused."¹¹² *Brady*, and the cases that preceded it and followed it, did not focus on the culpability of government actors or on the egregiousness of their misconduct, with respect to failing to disclose exculpatory evidence. Rather the focus of these decisions was on the impact on an accused person when exculpatory information is not furnished, that is, on whether the government had given the defendant a fair opportunity to defend himself. *Brady*, *Mooney* and *Pyle* are based on the proposition that the "rudimentary demands of justice"¹¹³ are violated by tactics that lead to the presentation of false

107. *Mooney*, 294 U.S. at 112; *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

108. *Brady*, 373 U.S. at 86.

109. In *Mooney*, the habeas petitioner claimed that he had been convicted based on perjured testimony, known to be perjured by the prosecutor, and that the prosecutor had also suppressed evidence which would have impeached the perjured testimony. The California Attorney General argued that due process guarantees a criminal defendant only notice of the charges and a hearing at which to refute them. *Mooney*, 294 U.S. at 109-12. The Court, however, took a broader view of a defendant's rights:

[W]e are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

Id. at 112. That the argument was about what due process requires in addition to mere notice and a hearing demonstrates that it was procedural, rather than substantive, due process that was at issue.

110. 317 U.S. 213 (1942).

111. The *Pyle* Court required only one paragraph to conclude that "allegations that [habeas petitioner's] imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him . . . sufficiently charge a deprivation of rights guaranteed by the Federal Constitution . . ." *Id.* at 215-16. In *Brady* the Supreme Court explicitly adopted the Third Circuit's earlier analysis that this language from *Pyle* meant that "the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process." *Brady*, 373 U.S. at 87 (citing *United States ex rel. Almeida v. Baldi*, 195 F.2d 815, 820 (3d Cir. 1952)).

112. *Brady*, 373 U.S. at 87.

113. *Mooney*, 294 U.S. at 112.

and deceptive information to the court. Similarly, in *Napue v. Illinois*,¹¹⁴ which preceded *Brady*, the Court explicitly concluded that the proscription against the knowing use of false evidence, including false testimony, to obtain a tainted conviction was “implicit in any concept of ordered liberty.”¹¹⁵

Following *Brady*, in *Giglio v. United States*,¹¹⁶ the Court reaffirmed the principle established in *Napue* that a criminal defendant is entitled to disclosure of evidence that might be used to impeach prosecution witnesses.¹¹⁷ The Court held that the state was required to disclose evidence of consideration offered to a prosecution witness, even when the prosecutor who had made the promise to the witness was not the trial prosecutor, and where there was a dispute about whether the trial prosecutor knew of the other prosecutor’s promise.¹¹⁸ The Court recognized that this might put an additional burden on prosecutors’ offices to create information systems so that all lawyers dealing with a case would be aware of relevant information, but held that the government was obliged to shoulder this burden.¹¹⁹

In *Kyles v. Whitley*¹²⁰ the Supreme Court ruled that the government is charged with knowledge, not merely of information held by various attorneys within the prosecutor’s office, but also of exculpatory evidence known to police officers, even if it has not been disclosed to the prosecutor, and that a conviction obtained without furnishing material exculpatory evidence known only to the police must be set aside.¹²¹ The Court concluded that “the individual prosecutor has a duty to learn of

114. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In this case a defendant convicted of murder sought relief based on the fact that the prosecuting attorney had failed to correct a witness’s testimony that the prosecutor paid the witness to testify. *Id.* at 265.

115. *Id.* In *Napue* the Supreme Court held that due process is violated when the state allows false evidence to go uncorrected when it appears, even where the evidence was not solicited by the state. The Court declared that, “it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.” *Id.* In addition the *Napue* Court held that the principle that the government may not knowingly use false evidence “does not cease to apply merely because the false testimony goes only to the credibility of the witness.” *Id.* The decision established that when a government witness testifies falsely with regard to matters that could be used to impeach his testimony the government is required to disclose the true facts to the defense.

116. 405 U.S. 150 (1972).

117. *Id.* at 154.

118. *Id.*

119. *Id.*

120. 514 U.S. 419 (1995). In this case, the habeas corpus petitioner had been convicted of capital murder and sentenced to death following proceedings in which the government had suppressed, among other evidence, statements from six eyewitnesses to the murder, statements from an informant never called to testify and a computer printout of license numbers of cars parked at the murder scene, which did not list the number of petitioner’s car. *Id.* at 423-31. Some of the exculpatory evidence was not disclosed by the police to the prosecutor until after the trial. *Id.* at 438.

121. Prior to *Kyles*, lower federal courts had recognized that a reversal of criminal conviction was required even though exculpatory evidence was known only to the police and not to the prosecutor. *See Freeman v. Georgia*, 599 F.2d 65, 69 (5th Cir. 1979) (reversing the denial of petition for writ of habeas corpus because the record established that petitioner set forth a due process violation where the state knowingly suppressed exculpatory evidence); *Boone v. Paderick*, 541 F.2d 447, 448 (4th Cir. 1976) (holding that writ of habeas corpus should have been issued because police detective concealed an offer of favorable treatment he made to defendant’s principal accuser). In *Banks v. Dretke*, No. 02-8286, 2004 WL 330040 (Feb. 24, 2004), the Supreme Court made clear that where the police or prosecutors

any favorable evidence known to the others acting on the government's behalf in the case, including the police."¹²² The Court reasoned that if the government were excused from responsibility for such information, it would "substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."¹²³ This observation confirms the Court's recognition of the necessity that the police be constrained to their proper role in the criminal justice system and that they should not take upon themselves the role of final arbiters of what should be disclosed to a criminal defendant.

A prosecutor might, of course, fail to learn of exculpatory evidence in the hands of the police despite her best efforts and despite the existence of a system that required officers to share all relevant information with prosecutors. Nonetheless, if the undisclosed information is exculpatory and material, a convicted defendant is entitled to a reversal regardless of the "good faith or bad faith of the prosecution."¹²⁴ It should be clear then, that where a conviction is reversed in the absence of any wrongdoing by the prosecutor, it is the police officer who has caused the constitutional violation.¹²⁵

The foregoing cases demonstrate the apparent breadth of the doctrine that the prosecution is required to disclose material exculpatory evidence to the defense. Exculpatory evidence includes not merely information going directly to guilt or innocence, but also information that might be used to impeach prosecution witnesses. Evidence relevant only to punishment also must be furnished. The prosecution is held responsible for the failure to disclose information in the hands of prosecutors other than the one trying the case, as well as for failure to disclose information held by law enforcement officers, even though that information was not furnished to the prosecutor's office. Material exculpatory information must be disclosed whether or not it is requested by the defense.

B. The Limitation That Only "Material" Exculpatory Information Must Be Disclosed

While the factors catalogued in the preceding paragraph suggest a broad duty to disclose, the Supreme Court has also narrowed to a very significant extent the nature of the material that must be disclosed. It is important to understand the limitations of the rule that exculpatory evidence must be disclosed, because in the absence of a constitutional violation under *Brady* and its progeny, there can be no civil rights claim under § 1983. In other words, the elements of a *Brady* violation

have concealed significant exculpatory or impeaching material, the burden is on the prosecution to furnish the evidence and not on the defendant to discover it through independent investigation. *Id.* at *3. The Court held, "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id.* at *18.

122. *Kyles*, 514 U.S. at 437.

123. *Id.* at 438.

124. *Brady*, 373 U.S. at 87.

125. This point was recognized by Robert Hochman, Comment, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1693 (1996) (noting that "[t]he Due Process Clause was indeed violated in *Kyles*, but it seems more accurate to say that the police, rather than the prosecutor, violated *Brady* when they concealed evidence favorable to the accused").

are essential to any constitutional claim for damages. *Brady* held that the prosecution was required to disclose to the defense favorable evidence that is “material” either to guilt or to punishment.¹²⁶ The Court, however, initially provided no definition of materiality. It has been argued that “material” referred to “relevant” evidence.¹²⁷ As the definition of materiality developed in the Supreme Court cases, however, it eventually became clear that materiality required more than simple relevance to propositions that might help a defendant’s case.¹²⁸

Initially, the *Giglio* Court held that exculpatory evidence was not “material” unless the evidence could “in any reasonable likelihood have affected the judgment of the jury.”¹²⁹ In *United States v. Agurs*,¹³⁰ and *United States v. Bagley*,¹³¹ the Court continued to develop its definition of materiality. The *Bagley* majority concluded that a conviction must be reversed “only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.”¹³²

In 1995, in *Kyles v. Whitley*,¹³³ the Court clarified the conclusions it had

126. *Brady*, 373 U.S. at 87.

127. Justice Marshall articulated this viewpoint in his dissenting opinion in *United States v. Bagley*, 473 U.S. 667, 695-96 (1985), where he concluded that a prosecutor should be required to “turn over to the defendant, all information known to the government that might reasonably be considered favorable to the defendant’s case.” *Id.*

128. See Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 645-50 (Summer 2002) (detailing the extent to which the Supreme Court has limited the impact of *Brady* by restricting the definition of materiality).

129. *Giglio*, 405 U.S. at 154. The Court pointedly noted, “We do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict” *Id.*

130. 427 U.S. 97 (1976). The Court created different standards of review of materiality for different types of *Brady* situations. *Id.* at 103. First, where the prosecution employed perjured testimony which the prosecutor knew, or should have known, was perjury, a conviction must be set aside “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Id.* at 103. *Mooney* was identified as a typical example of this type of situation. *Id.* Second, where a defendant made a pretrial request for specific evidence, and exculpatory evidence responsive to such a request existed, the Court suggested that a conviction must also be reversed if “the suppressed evidence might have affected the outcome of the trial.” *Id.* at 104. Third, where a defendant made no request for exculpatory evidence or only a general request for “*Brady* material,” a conviction must be reversed only where “the omitted evidence created a reasonable doubt that did not otherwise exist,” taking the entire trial record into account. *Id.* at 106-12.

131. 473 U.S. 667 (1985). This case involved the failure of the prosecutor to disclose impeachment information, where the defendant specifically had requested evidence of inducements given to prosecution witnesses and the government had not disclosed that it had contracts with testifying witnesses. *Id.* at 669-72. The majority opinion reviewed *Brady* and *Agurs* and concluded that the due process rationale for the rule meant that a “prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.” *Id.* at 675-76.

132. *Id.* at 678. A majority of the Justices agreed that undisclosed exculpatory evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” *Id.* at 682 (opinion by Justices Blackmun and O’Connor) (concurrency by Justices White, Burger and Rehnquist). The majority also concluded that this standard should be applied whether or not there was a specific request for the evidence in question, thus consolidating two of the three categories of cases that had been identified in *Agurs*. *Id.* at 682-83.

133. 514 U.S. 419 (1995).

reached with respect to materiality over the line of cases subsequent to *Brady*. It emphasized that to obtain a reversal of a conviction, a defendant must show that if the exculpatory evidence had been furnished, there would have been a “reasonable probability” of a different result – which is shown when the government’s suppression of evidence “undermines confidence in the outcome of the trial.”¹³⁴ The Court emphasized that the materiality of undisclosed evidence is not determined item by item, but by considering all the evidence collectively.¹³⁵ *Brady* does not require an open file policy, or even that all exculpatory evidence be disclosed.¹³⁶ The prosecution’s duty is “to gauge the likely net effect of all such evidence and make disclosure when the point of ‘reasonable probability’ is reached.”¹³⁷

The Supreme Court’s most recent decision discussing materiality leaves no doubt that “material” exculpatory evidence is limited to information that would, in retrospect, undermine confidence in a conviction, and that there is no constitutional obligation on the part of the government to furnish to the defendant all exculpatory material. In *Strickler v. Greene*¹³⁸ the Court distinguished between “so-called ‘*Brady* material,’” and “real” or “true” *Brady* violations:

Thus the term “*Brady* violation” is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called “*Brady* material”—although, strictly speaking, there is never a real “*Brady* violation” unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.¹³⁹

134. *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678). The Court specifically noted that a defendant does not have to establish by a preponderance of the evidence that the suppressed evidence would have resulted in an acquittal. *Kyles*, 514 U.S. at 434. The *Kyles* Court further explained that materiality is not a sufficiency of the evidence test, that is, a defendant does not have to show that there was insufficient evidence to convict after discounting the inculpatory evidence in the light of undisclosed exculpatory evidence. *Id.* at 434-35. It is enough to show that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Id.* at 435. Once a reviewing court has found constitutional error based on the failure to disclose exculpatory evidence, there is no need for further harmless-error review. *Id.* at 435. This follows from the materiality test which itself requires that the evidence be sufficient to undermine confidence in the result of the trial.

135. *Id.* at 436.

136. *Id.* at 437. The Court specifically noted that the *Brady* obligation is less demanding of the prosecution than the ABA Standards for Criminal Justice, which require disclosure of any evidence tending to exculpate or mitigate.

137. *Id.*

138. 527 U.S. 263 (1999).

139. *Id.* at 281-82 (citation omitted). If breaching the “broad obligation to disclose exculpatory evidence” does not always result in a “true” *Brady* violation, it would appear that the broad duty is not a *Constitutional* obligation. The Court does not make it clear what the basis for this “obligation” might

In *Strickler* the Court affirmed petitioner's conviction and death sentence, even though it found that there was a "reasonable possibility" of a different result had the government disclosed impeachment material with respect to the only disinterested eyewitness to a murder.¹⁴⁰ The Court held that affirmation was required because petitioner had not shown a "reasonable probability" of a different outcome had the exculpatory material been disclosed.¹⁴¹

The materiality cases establish that there is simply no constitutional violation of the rights of a convicted defendant if the evidence in question would not have created a reasonable probability of an acquittal had it been furnished. It is clear then that there can be no § 1983 action for the failure to disclose exculpatory evidence, at least with respect to criminal cases that proceed to trial, unless the evidence was material under the *Kyles* and *Strickler* definition.

C. *The Duty to Disclose Exculpatory Evidence is Required by Procedural Due Process*

As noted above, it is critical to identify the precise constitutional right protected by the requirement that material exculpatory evidence be disclosed. Although the Supreme Court has not explicitly labeled the violation beyond a general reference to "due process," analysis of the relevant cases compels the conclusion that it is procedural due process and not substantive due process that requires the disclosure of exculpatory material information to a criminal defendant.

Substantive due process protects against deprivations of liberty where the state has no sufficient interest to justify the deprivation, regardless of the process that might be employed.¹⁴² Government interference with fundamental liberty interests violates substantive due process where the governmental interest in regulation does not justify the interference.¹⁴³ Although substantive due process is used most frequently to strike down legislative or regulatory actions by the government, substantive due process rights may be violated by the actions of a single government official. In *County of Sacramento v. Lewis*,¹⁴⁴ the Court held that the

be. Kevin C. McMunigal has persuasively argued that in its materiality decisions the Court "collapsed two different inquiries, the scope of a defendant's right to receive exculpatory information and whether a violation of that right mandates reversal and a new trial." Kevin C. McMunigal, *The Craft of Due Process*, 45 ST. LOUIS U. L.J. 477, 488 (Spring 2001). Professor McMunigal argues that this confusion of rights and remedies led to a definition of materiality which "makes no sense as a rule of disclosure," because the prosecutor must make the decision about whether to disclose evidence prior to trial at which time she "obviously cannot look back at a trial that has yet to take place." *Id.*

140. *Strickler*, 527 U.S. at 291.

141. *Id.* at 296.

142. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1, at 419-20 (Aspen L. & Bus. 1997) (discussing the differences between procedural and substantive due process).

143. For example, substantive due process has been held to protect the right to family autonomy, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); the right of an extended family to live together, *Moore v. City of East Cleveland*, 431 U.S. 494, 498-500 (1977); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942); and the right to abortion, *Roe v. Wade*, 410 U.S. 113, 164-66 (1973).

144. 523 U.S. 833 (1998). Plaintiff was injured during a high speed police chase and claimed that the conduct of the chase violated his substantive due process rights. *Id.* at 837. The Court recognized the existence of a cause of action for injuries caused during a high speed chase, but held that a plaintiff

conduct of a high-speed chase by police officers could violate substantive due process rights.¹⁴⁵ The Court recognized that the Due Process Clause protects against unjustified deprivations of liberty by government officials by covering “a substantive sphere . . . barring certain government actions regardless of the fairness of the procedures used to implement them.”¹⁴⁶ The right of a criminal defendant to receive exculpatory evidence, however, derives from concerns about the fairness of the procedures by which a defendant may be convicted, not from concerns about whether there is sufficient governmental interest in punishing convicted criminals.

Moreover, the Supreme Court has employed a particularly high standard of culpability in assessing whether the actions of individual government officials violate substantive due process. In *Lewis*, the Court reiterated that in evaluating substantive due process violations by executive officials, “the cognizable level of executive abuse of power [is] that which shocks the conscience.”¹⁴⁷ The Supreme Court has never employed the “shocks the conscience” test to determine if the failure to disclose exculpatory evidence violated a criminal defendant’s constitutional rights. This term is not employed in *Brady* or its progeny. Indeed, the Court has instead emphasized that the failure to disclose material exculpatory evidence violates constitutional rights, “irrespective of the good faith or bad faith of the prosecution.”¹⁴⁸

In the *Brady* line of cases the Supreme Court has generally referred to the right to be furnished exculpatory evidence as a “fair trial” right.¹⁴⁹ That is the language of procedural due process.¹⁵⁰ The Supreme Court’s decision in *Little v. Streater*,¹⁵¹ a civil case that raised issues similar to those raised by the suppression of exculpatory evidence in criminal cases, demonstrates that the failure to disclose exculpatory evidence is a procedural due process violation.¹⁵² The Court held that it violated procedural due process for the state to refuse to bear the cost of blood grouping tests for an indigent defendant in a paternity action brought by the state welfare department.¹⁵³ The Court applied the three-factor test of *Mathews v.*

would have to prove that the officers intended to cause him physical harm in order to meet the “shocks the conscience test” for substantive due process violations. *Id.* at 855.

145. *Id.* at 836.

146. *Id.* at 840 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

147. *Id.* at 846. The “shocks the conscience test” was first formulated and applied in *Rochin v. California*, 342 U.S. 165 (1952), where a deputy sheriff ordered the suspect’s stomach to be pumped to obtain evidence of drugs.

148. *Brady*, 373 U.S. at 87.

149. *Id.* Whether the characterization of the right to receive exculpatory evidence as a “fair trial” right implies that there is no right to receive such evidence prior to trial is discussed below in Section - IV. As discussed in greater detail below, the text of the Constitution is not limited to safeguarding a “fair trial.” The constitutional protection in both the Fifth and Fourteenth Amendments is broader, prohibiting the deprivation of liberty “without due process of law.”

150. See *Smith v. Holtz*, 879 F. Supp. 435, 443 (M.D. Pa. 1995), *aff’d*, 87 F.3d 108 (3d Cir. 1996) (describing the plaintiff’s allegations that he was denied a “fair trial” as a result of the suppression of exculpatory evidence as claims which “go to the *manner* in which . . . charges were prosecuted”) (emphasis added).

151. 452 U.S. 1 (1981).

152. *Id.* at 3.

153. In name, the suit was filed by the mother, but all expenses were paid by the state and the child support that was ordered was to be paid to the state. *Id.* The Court found state action and noted that the

Eldridge,¹⁵⁴ the leading case for determining when procedural safeguards are required by constitutional procedural due process. The court in *Mathews* described the criteria for determining the requirements of procedural due process as follows:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁵⁵

In *Little v. Streater*,¹⁵⁶ the Court found that the private interests affected by the litigation were substantial, that there was considerable risk of an erroneous decision in the absence of the blood test evidence,¹⁵⁷ and that the state's monetary interests were not significant enough to overcome the private interests of the defendant.¹⁵⁸ The Court concluded that without the aid of the state in obtaining potentially exculpatory blood test evidence, an indigent defendant lacked "a meaningful opportunity to be heard,"¹⁵⁹ and thus "the requirement of 'fundamental fairness'" of the Due Process Clause was not satisfied.¹⁶⁰ Although this decision arose from a civil case, the nature of the exculpatory evidence at issue was the same as it would be in a criminal case, and the impact of the failure to disclose the evidence upon the defendant's property interests was the same as it would be on a criminal defendant's liberty interests. In fact, the impact of a defendant's civil liberty interest is even more powerful, thus suggesting the civil decision clearly applies in a more egregious case.

That the right to be furnished exculpatory evidence is a procedural due process right was most clearly established in *United States v. Ruiz*.¹⁶¹ In *Ruiz*, the Court employed the traditional procedural due process analysis in holding that a prosecutor has no constitutional duty before entering into a plea agreement, or

case did not raise the question of whether the state would be required to pay for blood tests in a case between two private litigants. *Id.* at 9.

154. 424 U.S. 319 (1976). The case was an action by a person whose social security disability benefits had been terminated challenging the constitutional validity of the administrative procedures for assessing whether there was a continuing disability. *Id.* at 323. The factors articulated by the Court in this case for determining "what process is due" have been used in a wide variety of contexts. See generally CHEMERINSKY, *supra* note 142, at 450-70 (discussing procedural safeguards required by constitutional procedural due process).

155. *Mathews*, 424 U.S. at 334-35.

156. 452 U.S. 1.

157. Connecticut applied an unusual evidentiary rule in paternity actions. Where the mother's accusations against the defendant were consistently made, the defendant's own testimony would not be sufficient to overcome her prima facie case. *Little*, 452 U.S. at 12.

158. *Id.* at 16.

159. *Id.* (citing *Boddie v. Conn.*, 401 U.S. 371, 377 (1971)).

160. *Id.* (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981)).

161. 536 U.S. 622 (2002).

before the defendant enters a guilty plea, to furnish material that might be used to impeach government witnesses.¹⁶² Although the Supreme Court did not cite to *Mathews*, the opinion employed the classic criteria articulated in that case.¹⁶³ The *Ruiz* Court identified the following factors as determining the due process issue: “(1) the nature of the private interest at stake . . . , (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government’s interests.”¹⁶⁴ Balancing these factors, the Court reasoned that impeachment information does not provide great value as a safeguard against innocent people pleading guilty to crimes, but instead, requiring the government to furnish it prior to a guilty plea could seriously interfere with a number of government interests.¹⁶⁵ The decision considered only impeachment information, and did not rule with respect to exculpatory evidence which tends to establish actual innocence.¹⁶⁶

It might be argued that the conclusion that *Brady* violations are procedural due process violations requires an exception to the Supreme Court’s general rule that the *Mathews* test will seldom apply to issues of criminal procedure.¹⁶⁷ This general rule was expressed in *Medina v. California*,¹⁶⁸ where the Court rejected application of the *Mathews* test in determining whether a state statute violated procedural due process by providing that the competency of a criminal defendant to stand trial is presumed and that the burden of establishing the lack of competency rests with the

162. *Id.* at 629-30. The Court based its conclusion in part on the argument that the defendant had voluntarily and knowingly waived his rights by pleading guilty, even though he had not been advised of impeachment information. The Court relied on its prior decisions that had established that guilty pleas may be accepted even though a defendant does not have complete knowledge of a variety of relevant circumstances. *Id.* This argument would not apply to most civil actions brought by wrongfully convicted persons who were not advised of exculpatory information, where the conviction was not based on a guilty plea but resulted from a trial. By going to trial a criminal defendant is asserting, not waiving, his rights.

163. *Id.* The Court relied on the more recent case of *Ake v. Oklahoma*, 470 U.S. 68 (1985), where it had held that procedural due process requires the state to provide access to a psychiatrist to a criminal defendant who has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. *Id.* at 83. *Ake* relied on *Mathews*, 424 U.S. 319, for the analytical framework that compelled this conclusion. *Ake*, 470 U.S. at 77.

164. *Ruiz*, 536 U.S. at 631.

165. *Id.* at 631-32. The Court referred to the government’s interests in not disclosing their witnesses prematurely: protecting ongoing investigations and avoiding exposing witnesses to the risk of harm; protecting the identity of confidential sources; conserving its resources rather than devoting substantial resources to preparation for pleas; and relying heavily on plea bargaining to dispose of more than ninety percent of criminal cases. *Id.* at 632.

166. See *McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003) (concluding that *Ruiz* “strongly suggests that a *Brady*-type disclosure might be required” prior to a plea where the government has “exculpatory evidence of actual innocence”).

167. In *Dusenbery v. United States*, 534 U.S. 161 (2002), the Court declined to use the *Mathews* criteria to determine whether notice to a convicted prisoner that seized property that was subject to forfeiture met due process requirements. *Id.* at 166-69. The case has little impact on the present analysis, however, because a prior case had specifically addressed the adequacy of notice procedures under a due process analysis. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). The Court applied its focused test of whether notice was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Dusenbery*, 534 U.S. at 168 (citing *Mullane*, 339 U.S. at 314).

168. 505 U.S. 437 (1992).

defendant.¹⁶⁹ Instead the *Medina* Court applied a test derived from *Patterson v. New York*,¹⁷⁰ where the court ruled that a state's decision with respect to determining procedures in criminal cases does not violate procedural due process "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹⁷¹ The rationale provided by the Court for employing this test was that "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area."¹⁷² The failure to disclose exculpatory evidence, however, is not a policy decision made by states based upon their expertise, nor is it grounded in centuries of common-law tradition, at least not legitimately so. It is instead a rogue decision made by a state official ignoring the commands of *Brady v. Maryland*, and is therefore entitled to no deference.

As stated above, the rationale for departing from the general approach of *Mathews* relied upon by the Court in *Medina* does not apply to the failure to disclose exculpatory evidence.¹⁷³ Moreover, the failure to disclose exculpatory evidence meets the *Patterson* test that a fundamental principle of justice be violated. As noted above, even prior to *Brady*, in *Mooney* and *Napue* the Court concluded that government presentations of false and deceptive information to the court violate the "rudimentary demands of justice" and principles "implicit in any concept of ordered liberty."¹⁷⁴

The cases discussed thus far have established that the failure to furnish material exculpatory evidence to a criminal defendant is a procedural due process

169. *Id.* at 451. The *Medina* Court recognized that *Mathews* provided a general approach for determining whether state procedures violated due process that had been applied in a variety of contexts. It distinguished the only two criminal procedure cases where the *Mathews* test had been applied by the Supreme Court – *United States v. Raddatz*, 447 U.S. 667 (1980) (rejecting a challenge to a provision of the Federal Magistrates Act which authorizes magistrates to make findings and recommendations on motions to suppress evidence) and *Ake*, 470 U.S. at 83 (requiring access to psychiatrist for indigent capital defendant who has made a preliminary showing that sanity at time of offense is likely to be significant factor at trial).

170. 432 U.S. 197 (1977).

171. *Medina*, 505 U.S. at 445 (citations omitted).

172. *Id.* at 445-46.

173. Justice O'Connor, concurring in *Medina*, disagreed with the Court's rejection of the *Mathews* criteria and would have employed its "balancing of equities" to determine whether there was a due process violation. *Id.* at 453. The concurrence was joined by Justice Souter. Justice O'Connor would seemingly be even more inclined to use this approach with respect to the failure to disclose exculpatory evidence. *Id.* Indeed, Justice O'Connor explicitly cited *Brady v. Maryland* as one of "many of our criminal due process cases, in which we have required States to institute procedures that were neither required at common law nor explicitly commanded by the text of the Constitution." *Id.* at 454.

174. See Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 593-94 (2002) (suggesting that the *Mathews v. Eldridge* analysis is appropriate for determining whether "fundamental fairness" demands access to potentially exculpatory DNA evidence in post-conviction proceedings). See also *Harvey v. Horan*, 285 F.3d 298, 315 n.6 (4th Cir. 2002) (Luttig, J., concurring) (stating Judge Luttig's belief that the threshold procedural question for a cause of action under 42 U.S.C. § 1983 and the constitutional question of whether a right to post conviction evidence exists are "important questions of law").

violation that requires vacation of a conviction obtained when such evidence is not furnished. The decisions of the Supreme Court, however, have left open a number of issues. As noted above, the Supreme Court itself has never confronted a civil rights claim based on the failure to disclose exculpatory evidence. The Supreme Court has never squarely addressed the question of what constitutional obligations, if any, police officers have to disclose exculpatory information to prosecutors. It follows that the Court has never had any occasion to determine whether there is any level of culpability required to justify a damages award against officers who suppress exculpatory evidence. The Supreme Court has not ruled on whether there is ever an obligation to disclose exculpatory information in pretrial proceedings and, if so, under what circumstances. While the lower federal courts have addressed these issues, their decisions suffer from a lack of consistency and doctrinal clarity. In the next section, these decisions are examined with respect to cases where the civil rights claim was based on the failure to disclose exculpatory evidence in cases that went to trial and resulted in convictions.

III. SECTION 1983 CLAIMS FOR THE FAILURE TO DISCLOSE EXCULPATORY EVIDENCE IN CRIMINAL CASES RESULTING IN CONVICTIONS

The most straightforward claims against police officers for failure to disclose exculpatory evidence are those raised when a criminal defendant has gone to trial, been convicted and later learned of exculpatory evidence that led to the vacation of the conviction.¹⁷⁵ A number of lower federal courts have recognized such claims.¹⁷⁶ Indeed, the author is aware of no case that concludes there is no basis for a cause of action under § 1983 under these circumstances.¹⁷⁷

175. The more difficult question of whether there is a § 1983 cause of action based on the failure of a police officer to disclose exculpatory evidence at any point prior to trial is discussed in the next section.

176. See, e.g., *Manning v. Miller*, No. 03-1762, 2004 WL 94076, at *1-*2 (7th Cir. Jan. 21, 2004) (inducing witness to falsely identify plaintiff, inducing jailhouse snitch to testify to false story, and failing to disclose these actions to prosecutor would create liability on a *Brady* claim); *Newsome*, 256 F.3d at 753 (withholding from prosecutors information about officers' coaching of witnesses and fact that witnesses earlier selected pictures from a book of mug shots that did not contain plaintiff's photo violated his rights as criminal defendant); *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (holding that police who deliberately withhold exculpatory evidence and thus prevent prosecutors from complying with *Brady* violate Due Process Clause); *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir. 1999) (noting "constitutional wrong results from the officer's failure to deliver material information to competent authorities"); *McMillian v. Johnson*, 88 F.3d 1554, 1568-69 (11th Cir. 1996) (opinion amended on rehearing on other issues); *McMillian v. Johnson*, 101 F.3d 1363 (holding that intentionally withholding exculpatory and impeachment evidence from the prosecutor would violate plaintiff's rights); *Reid*, 56 F.3d at 342 (recognizing viability of § 1983 claim against officers for not disclosing exculpatory information to prosecutor; reversing district court for abuse of discretion in not permitting plaintiff discovery on officers' knowledge of exculpatory material before granting summary judgment for officers); *Jones*, 856 F.2d at 995-96 (allowing liability based on police custom of maintaining information in "street files" not furnished to prosecutors, with the result that exculpatory material is not made available to defendants); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988) (ordering reversal of judgment against Appellant prosecutors because they were entitled to absolute immunity while Appellant police officer was only entitled to qualified immunity); *Charles v. Wade*, 665 F.2d 661, 663 (5th Cir. 1982) (alleging that officer had suborned perjury and withheld exculpatory evidence).

177. Some courts have required that the failure to disclose be in "bad faith" for there to be a § 1983

Even under these straightforward circumstances, however, the decisions of the lower federal courts are frequently unclear or inconsistent with respect to basic doctrinal issues. Three significant questions must be addressed. First, what is the precise nature of the constitutional violation that is the basis of the § 1983 claim? In the preceding section, the argument was made that the *Brady* obligation is based on procedural due process principles, rather than substantive due process. There is no consensus, however, among the lower federal court cases on this issue. Second, what is the basis for imposing liability under § 1983 against a police officer? To put it another way, what is the extent and the nature of an officer's obligation with respect to disclosing exculpatory evidence? Third, are all failures to disclose actionable, or is there some level of culpability on the part of the officer that must be shown in order to establish a § 1983 cause of action?

As a preliminary matter, it must be noted that if a criminal defendant was convicted in an underlying criminal trial, the conviction must be invalidated before a cause of action accrues for the failure to disclose exculpatory evidence. In *Heck v. Humphrey*¹⁷⁸ the Supreme Court held that:

[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.¹⁷⁹

Because the constitutional requirement that exculpatory evidence be furnished to the defense only applies when the evidence is material and would, with reasonable probability alter the outcome of the case, a successful § 1983 action in

claim. *See Jean*, 221 F.3d at 656 (holding that police who deliberately withhold exculpatory evidence and thus prevent prosecutors from complying with *Brady* violate Due Process Clause). The question of whether there is a basis for imposing any culpability requirement on the § 1983 claim is discussed below.

178. 512 U.S. 477 (1994).

179. *Id.* at 486-87 (emphasis in original, footnote omitted). Although *Heck* involved a convicted prisoner and its reasoning depended in part upon the availability of habeas corpus relief, some courts have applied its requirements to persons who have been released from prison if their convictions have not been invalidated and also to persons facing pending criminal charges where a successful § 1983 claim might imply the invalidity of a future conviction. *See, e.g., Figueroa v. Rivera*, 147 F.3d 77, 80-82 (1st Cir. 1998) (applying *Heck* requirements to deceased plaintiff); *Smith*, 87 F.3d at 111-113 (applying *Heck* requirements to pending prosecution); *see generally* AVERY ET AL., *supra* note 5, § 1:5 (discussing requirements). A majority of the Justices of the Supreme Court, however, have expressed the view that *Heck* should have no applicability where the plaintiff is not "in custody" and habeas corpus relief is unavailable. *Spencer v. Kemma*, 523 U.S. 1, 20-21 (1998) (Souter, J., joined by O'Connor, Ginsburg and Breyer, JJ., concurring) and *id.* at 25 n.8 (Stevens, J., dissenting). *See Limone v. United States*, 271 F. Supp. 2d 345, 362 (D.Mass. 2003) (noting that *Heck* should not bar suit on behalf of deceased prisoner where government agents suppressed evidence of innocence until after his death). This view, however, has not yet been embodied in any holding by the Supreme Court.

such a case would necessarily call into question the validity of the plaintiff's conviction on criminal charges. As a result, the *Heck* requirement that the underlying conviction have been invalidated must be met in such cases, at least to the extent that the *Heck* analysis applies to the case.¹⁸⁰

Having made these preliminary observations, we may turn to the cases in which the lower federal courts have held that police officers may be held liable for failing to disclose exculpatory evidence to prosecutors. It should be noted that to the extent there is an obligation, it is to furnish evidence to the prosecutor, not to the defendant or defense attorney. The lower federal courts are in agreement that there is no obligation on police officers to disclose exculpatory information directly to criminal defendants or their attorneys.¹⁸¹

A. Is the Failure to Disclose Exculpatory Evidence a Substantive or Procedural Due Process Violation?

There is no clear consensus among the lower federal courts about whether the failure to disclose exculpatory evidence is a substantive or a procedural due process violation. Some opinions have concluded that the failure to disclose exculpatory evidence is a constitutional violation without specifying the constitutional right that is violated.¹⁸² Other courts have simply denominated the failure to disclose

180. See *Amaker v. Weiner*, 179 F.3d 48, 52 (2d Cir. 1999) (noting that statute of limitations on plaintiff's claim begins to run once conviction is invalidated); *Perez v. Sifel*, 57 F.3d 503, 605 (7th Cir. 1995) (noting that since the inmate plaintiff had not yet successfully challenged his conviction, his claims were time barred); *Snyder v. City of Alexandria*, 870 F. Supp. 672, 688 (E.D. Va. 1994) (holding that claims implicating validity of conviction do not arise until favorable termination); *Hudson v. Chicago Police Department*, 860 F. Supp. 521, 523 (N.D. Ill. 1994) (stating that the claim was dismissed because the judgment was still pending in state court). Because *Heck* established that no cause of action accrues until the underlying conviction is invalidated, it also follows that the statute of limitations does not begin to run on such claims until after the conviction has been invalidated; *Snyder*, 870 F. Supp. at 687-88 (E.D. Va. 1994) (holding claims accrued on date of battery, and were consequently time barred); *Girdler v. Dale*, 859 F. Supp. 1279, 1282 (D. Ariz. 1994) (noting claims accrued when state issued order dismissing all charges).

181. See, e.g., *Mowbray v. Cameron County, Texas*, 274 F.3d 269, 278 (5th Cir. 2001) (holding that plaintiff was unable to overcome official immunity because she could not meet the applicable burden of proof); *Kelly*, 21 F.3d at 1552-1553 (holding that there is no constitutional duty to seek out the exculpatory evidence in the report and provide it to the court); *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992) (affirming the dismissal of a claim on the ground that the police had a duty to provide the exculpatory evidence).

182. See *Carter*, 34 F.3d at 263-64 (involving a plaintiff who had been convicted of the attempted murder of his ex-wife, over his alibi defense and argument that she was an emotionally unstable person who might have shot herself either to commit suicide or to frame him; after plaintiff spent four years in prison, a deputy sheriff disclosed that the alleged victim had told him prior to the shooting that she hated plaintiff so much that she would shoot herself if she could make it look like he did it so that he would spend the rest of his life in jail; plaintiff alleged that the deputy had not furnished this information to the prosecutor prior to trial); *Charles*, 665 F.2d at 662, 660 (concerning the plaintiff, who was convicted of murder, but secured a new trial after new evidence convinced the district attorney of the legitimacy of his alibi; plaintiff alleged that the defendant police officer had testified falsely at the criminal trial, that he had falsified two eyewitness identifications of plaintiff, that he had persuaded a jailhouse snitch to testify falsely, and that he had withheld exculpatory evidence; after defense verdict in the civil case, the Fifth Circuit reversed due to error on the part of the trial judge who had not permitted plaintiff to take the deposition of the jailhouse snitch, who had given a statement that the officer had supplied him with

exculpatory evidence as a “due process” violation, without analysis that is helpful in distinguishing substantive from procedural due process.¹⁸³

There is little explicit support in the opinions of the lower federal courts for the argument that the failure to disclose exculpatory evidence constitutes a substantive due process violation.¹⁸⁴ It might be argued, however, that the opinion of the “concurring” judges in the *en banc* decision by the Fourth Circuit in *Jean v. Collins*¹⁸⁵ provides support for a substantive due process characterization of the right.

The rationale of the concurring opinion favoring dismissal is that the existence of a “*Brady* violation” by the government is not a sufficient basis for a § 1983 claim, where the constitutional violation was committed by the prosecutor, not the police. To establish a claim against the police, the concurrence required evidence of “an additional constitutional violation” by the officers who allegedly failed to

the details of the murders and the plaintiff had not confessed to him, contrary to his testimony at the criminal trial). In *Burge v. Parish of St. Tammany*, 187 F.3d 452 (5th Cir. 1999), plaintiff was convicted of murder, and served five years before previously suppressed exculpatory evidence was furnished and plaintiff was acquitted at a new trial. *Id.* at 457. The court summarily rejected the defendant deputy sheriff’s qualified immunity argument that the law was not “clearly established,” relying on its decision in an earlier habeas corpus case “that suborning perjury and concealing exculpatory evidence by police officers were constitutional violations.” *Id.* at 480 (citing *Luna v. Beto*, 391 F.2d 329, 332 (5th Cir. 1967)). The *Burge* opinion does not identify the right at issue, although *Luna* is based on “due process,” without specification of whether substantive or procedural due process was at issue. In *Luna*, however, one element of the claim was that because impeachment material had not been furnished, the defendant had not been afforded his right of cross-examination of the state’s witness. *Luna*, 391 F.2d at 332. This would be a specifically enumerated right under the Sixth Amendment, incorporated within the due process afforded by the Fourteenth Amendment. See also *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 358-59 (6th Cir. 1997) (finding error to exclude tape of interview in which interrogator fed details of crime to murder suspect in § 1983 action; court recognized obligation of officer to furnish exculpatory evidence to prosecutor); *McDonald v. State of Illinois*, 557 F.2d 596, 603 (7th Cir. 1977) (involving a prison official who refused to allow defense counsel to take pictures of defendant depicting exculpatory evidence of beating which denied defendant his right to preserve potentially exculpatory evidence).

183. See *Henderson*, 631 F.2d at 1119 (concerning officers who removed exculpatory clothing from evidence locker on the day of trial, without bringing them to court or returning them – court held that “[t]o deny a defendant an opportunity to present competent proof in his defense constitutes a violation of a fair trial and of due process.”); *Wardell*, 75 F. Supp. 2d at 855 (holding that the motion to dismiss was denied because the facts alleged a cause of action for due process violation); *Taylor v. Hansen*, 731 F. Supp. 72, 79 (N.D.N.Y. 1990) (allowing a cause of action to be maintained where there was a reasonable probability that the officer’s conduct affected the trial). In *Taylor v. Waters*, 81 F.3d 429 (4th Cir. 1996), the Fourth Circuit discussed the failure to disclose exculpatory evidence as a potentially substantive or procedural due process violation, without deciding which characterization was more appropriate. *Id.* at 436. *Taylor* is discussed in greater detail below.

184. In *Ahlers v. Schebil*, 966 F. Supp 518, 532 (E.D. Mich. 1997), the court concluded that the right to exculpatory evidence under *Brady* was “firmly grounded in substantive due process,” but conducted no analysis of the distinction between procedural and substantive due process.

185. 221 F.3d 656 (4th Cir. 2000) (*en banc*). Plaintiff, who had earlier been freed from prison by a habeas decision that his *Brady* rights had been violated, *Jean v. Rice*, 945 F.2d 82 (4th Cir. 1991), filed a § 1983 claim, alleging that officers had failed to turn over exculpatory evidence to prosecutors, namely, evidence that eyewitnesses against him had their memories enhanced and influenced by hypnosis. *Jean*, 221 F.3d at 658 (Wilkinson, J., concurring). The *en banc* court of appeals split evenly, resulting in a *per curiam* opinion affirming the district court decision dismissing the case. *Id.* at 650.

transmit exculpatory information to prosecutors.¹⁸⁶ It characterized this violation as a due process violation, without specifically identifying whether it is procedural or substantive due process that is violated. The dissenting judges concluded that the concurrence had mistakenly treated the officers' failure to disclose evidence to prosecutors as a substantive due process violation separate from the government's procedural due process violation of *Brady*.¹⁸⁷

In fact, however, the *Jean* concurrence committed itself to neither a procedural nor a substantive theory of due process. It required that the officers engage in "the kind of affirmative misuse of power that the Supreme Court has indicated would implicate due process protections,"¹⁸⁸ but it did not cite to substantive due process cases such as *County of Sacramento v. Lewis*, nor did the concurrence require that an officer's conduct be "shocking to the conscience." At the same time, the opinion did not engage in an analysis of "what process was due" the criminal defendant under *Mathews* or other procedural due process cases.¹⁸⁹

There is much stronger support in the lower federal court opinions for concluding that the failure to disclose exculpatory evidence should be seen as a procedural due process violation. For example, in 1989 a panel of the Fourth Circuit suggested in *Goodwin v. Metts*¹⁹⁰ that allowing a prosecution to go forward without furnishing exculpatory evidence would violate procedural due process.¹⁹¹ The dissenters in *Jean v. Collins* reasoned that if police officers are implicated in a *Brady* violation during the prosecution of a criminal defendant, no separate constitutional violation by the officers is necessary as a basis for a § 1983 action.¹⁹² They concluded that the § 1983 remedy "would seem to follow inexorably from the very fact of the underlying *Brady* violation."¹⁹³ They viewed the failure by police officers to provide exculpatory evidence as part of an underlying *procedural* due process violation:

186. *Id.* at 659 (Wilkinson, J., concurring).

187. *Id.* at 674-75 (Murnaghan, J., dissenting). The dissenters concluded that in order to get money damages, rather than simply having his conviction reversed, "the concurrence thinks that [plaintiff] needs a different legal theory, which treats the right to exculpatory evidence as a 'fundamental' liberty interest rather than a 'fair trial' guarantee." *Id.* at 675.

188. *Jean*, 221 F.3d at 662 (Wilkinson, J., concurring).

189. The concurrence required that an officer have acted in "bad faith," defined as requiring "that the officer have intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial." *Id.* at 663. The concurrence is clear that a *Brady* violation is a "necessary, but not a sufficient, condition for § 1983 liability on the part of the police." *Id.* Because the concurrence finds that the officers' actions in the case were merely negligent and not in "bad faith," it concluded that it need not explore in detail the precise contours of what might be required by its "*Brady* plus" standard. *Id.*

190. 885 F.2d 157 (4th Cir. 1989).

191. The court simply concluded that "[b]eing subjected to a prosecution because an officer withheld exculpatory evidence from the prosecutor while urging that the prosecution should go forward can work a constitutional deprivation." *Id.* at 163. While the court did not explicitly characterize the nature of the constitutional violation, it did note that the Third Circuit, in what the *Goodwin* opinion declared was an analogous situation, declared that an abuse of process "is by definition a denial of procedural due process." *Id.*

192. *Jean*, 221 F.3d at 665 (Murnaghan, J., dissenting).

193. *Id.* at 665 (Wilkinson, J., concurring).

In the instant case, the right to exculpatory evidence is already protected under the *procedural* component of the Due Process Clause. Under this constitutional doctrine, States may not ‘deprive’ citizens of their liberty interest in avoiding incarceration unless they first provide ‘due process of law’—a term that encompasses the panoply of procedural safeguards we associate with the concept of a ‘fair trial.’ *Brady* is a case in this long doctrinal development elaborating the elements of a ‘fair trial.’ It held that part of the ‘process’ the State must provide, prior to effecting the deprivation of a criminal defendant’s liberty, is an *unconditional* right of access to exculpatory evidence.¹⁹⁴

The dissent made clear that it is the deprivation of an accused’s liberty which constitutes the constitutional injury:

The Due Process Clause’s ‘fair trial’ guarantee, usually discussed under the heading of *procedural* due process, prohibits the State from depriving its citizens of liberty in a criminal trial unless it first observes certain procedural safeguards. While the focus in procedural due process cases is on the State’s non-compliance with certain delineated ‘procedures,’ the constitutional injury in such cases goes beyond the denial of the ‘process’ that is due. A better description of the constitutional injury would be ‘the deprivation of *liberty* without due process of law.’¹⁹⁵

In *McCann v. Mangialardi*,¹⁹⁶ the Seventh Circuit explicitly identified the failure to disclose exculpatory evidence as a procedural due process violation.¹⁹⁷ Earlier in *Newsome v. McCabe*¹⁹⁸ the Seventh Circuit had held that the failure of police officers to furnish exculpatory evidence to prosecutors constituted a constitutional violation.¹⁹⁹ The court characterized the violation as “a due process claim in the original sense of that phrase – he did not receive a fair trial if the prosecutors withheld material exculpatory details.”²⁰⁰

The *Newsome* court engaged in no extensive analysis of this claim, premising

194. *Id.* at 674 (Murnaghan, J., dissenting) (emphasis in original, citation omitted).

195. *Id.* at 677 (Murnaghan, J., dissenting) (emphasis in original).

196. 337 F.3d 782, 787 (7th Cir. 2003). *See also* Carroccia v. Anderson, 249 F. Supp. 2d 1016 (N.D. Ill. 2003) (recognizing procedural due process violation for failure to disclose exculpatory evidence, even though defendant was acquitted at trial).

197. *McCann*, 337 F.3d at 787.

198. *Newsome*, 256 F.3d at 748.

199. The plaintiff’s allegations were that he was wrongfully convicted of murder and spent fifteen years in prison because the officers failed to alert the prosecutors that his fingerprints did not match those they had obtained at the scene of the crime and that the officers wrongfully encouraged two witnesses to select him from a line-up, yet withheld from prosecutors information about their coaching of the witnesses. *Id.* at 748-49. At the trial the jury evidently credited these claims; it awarded plaintiff \$15 million in damages. *Newsome v. McCabe*, 319 F.3d 301, 303 (7th Cir. 2003).

200. *Newsome*, 256 F.3d at 752. *See also* *Ineco*, 286 F.3d at 989-99 (reaffirming and following *Newsome*); *Manning*, 2004 WL 94076, at *5 (reaffirming and following *Newsome*). The *Newsome* court rejected the plaintiff’s assertion of a constitutional claim based on malicious prosecution, concluding that a substantive due process claim was not appropriate. *Newsome*, 256 F.3d at 751.

its conclusion on *Brady*, its earlier decision in *Jones v. Chicago*²⁰¹ and the Fourth Circuit's *en banc* opinion in *Jean v. Collins*. The court rejected the argument that the officers were not liable because the prosecutor was the agent who failed to furnish the exculpatory evidence to the defense.²⁰² Instead, the court relied on the policy argument that both deterrence of future violations and providing a remedy for constitutional wrongs required a finding against liability of the officers themselves.²⁰³

The First Circuit identified a procedural due process constitutional violation under § 1983 for the failure to disclose exculpatory evidence to prosecutors and courts in *Reid v. State of New Hampshire*.²⁰⁴

As these decisions disclose, there is more support in the lower federal court opinions for a procedural, rather than a substantive, due process characterization of the right violated by the failure to disclose exculpatory evidence. This confirms the argument of Section II of this Article that analysis of the Supreme Court cases on exculpatory evidence compels the conclusion that the right involved is a procedural due process right. Nonetheless, the failure of the Supreme Court and most of the lower federal courts to explicitly employ a procedural due process analysis causes confusion, particularly with respect to claims based on criminal cases that do not proceed to trial. Before leaving a discussion of cases that do go to trial and turning to those issues, however, it is necessary to discuss why there should be an obligation on police officers to disclose exculpatory evidence to prosecutors, and under what circumstances their failure to do so should result in § 1983 liability.

B. What is the Basis for Imposing Liability on Police Officers Who Fail to Furnish Exculpatory Evidence to Prosecutors?

Separate from the question of whether the government's failure to furnish exculpatory information should be characterized as required by substantive or procedural due process, is the issue of whether individual police officers should be held liable for failing to furnish exculpatory evidence. The obligations of prosecutors with respect to furnishing exculpatory evidence in their possession are clearly established by *Brady* and its progeny. These cases make it clear that the

201. 856 F.2d 985 (7th Cir. 1988) (discussed in detail below).

202. *Id.* at 994.

203. Judge Easterbrook concluded:

If officers are not candid with prosecutors, then the prosecutors' decisions – although vital to the causal chain in a but-for sense – are not the important locus of action. Pressure must be brought to bear elsewhere. Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their performance with or without legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution.

Newsome, 256 F.3d at 752.

204. 56 F.3d 332, 342 (1st Cir. 1995). *See also Brady*, 187 F.3d at 114 (holding that it was proper to grant summary judgment under qualified immunity because minor discrepancies did not render the arrest unreasonable). Although the *Reid* court explicitly distinguished this claim from causes of action based on false arrest or malicious prosecution, *Reid*, 56 F.3d at 336, 341, it did not provide an analysis of why the claim should be understood as a procedural due process violation.

government bears the responsibility of furnishing information unknown to prosecutors, if it is in the hands of law enforcement officers connected to the case, with the consequence that a conviction may be overturned if exculpatory information is not furnished. Under what circumstances does § 1983 impose an additional consequence, civil liability and damages, on police officers who do not furnish exculpatory evidence to prosecutors?

It is important to note that the language of § 1983 itself requires liability in damages for police officers whose failure to furnish evidence to prosecutors causes a *Brady* violation. The statute by its terms imposes liability on “every person” who, under color of law, “subjects, or causes to be subjected” a person to a violation of constitutional rights.²⁰⁵ The statute imposes liability against those whose actions do not themselves violate a constitutional duty, if the conduct causes a constitutional violation.²⁰⁶

In spite of this clear statutory provision, some courts have questioned on policy grounds whether an obligation to determine whether evidence is exculpatory and/or material should be placed on police officers. One might argue that issues of materiality may raise questions too difficult to be answered by police officers. In many cases officers may not have the information necessary to assess materiality. Further it may be difficult for officers to assess the potential weight of a particular piece of evidence, given that they may not be aware of what other evidence the prosecution has collected, much less what evidence the defense is planning to offer.²⁰⁷

On the basis of these concerns, the concurring judges in *Jean v. Collins* questioned whether police officers should be charged with determining whether an item of evidence is exculpatory and material and concluded that they should not be:

The prosecutor must ask such lawyer’s questions as whether an item of evidence has ‘exculpatory’ or ‘impeachment’ value and whether such evidence is ‘material.’ It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution’s task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context. To hold that the contours of the due process duty applicable to the police must be identical to those of the prosecutor’s *Brady* duty would thus improperly mandate a one-size-fits-all regime.²⁰⁸

Whatever theoretical appeal these arguments may have, however, they ignore

205. 42 U.S.C. § 1983 (emphasis added).

206. Liability may be imposed against municipalities, for example, even if the policies or customs of the municipality are not themselves unconstitutional, as long as there is an “affirmative link” between the municipality’s policies or customs and the constitutional violation complained of. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387 (1989); *Tuttle*, 471 U.S. at 823.

207. As *Kyles* and *Strickler* make clear, whether a given piece of exculpatory evidence is material will depend upon its weight in light of all the evidence offered at trial.

208. *Jean*, 221 F.3d at 660 (Wilkinson, J., concurring).

the reality of the facts of most of the cases discussed in this Article. Any discussion on policy grounds of whether police officers should be civilly liable for not disclosing exculpatory evidence must begin with the recognition that in many cases officers who suppress evidence are clearly aware of its exculpatory nature and its significance. Consider, for example, the alleged conduct of Deputy Sheriff Gary Hale in *Burge v. Parish of St. Tammany*.²⁰⁹ In a murder prosecution, Hale took a statement from the victim's mother that her son was picked up by someone in a car on the night of his death, but that she did not see the vehicle or the person in it.²¹⁰ However, at the trial, the mother testified that she saw her son leave her house with the defendant and another man the night of the murder.²¹¹ Neither her original statement, nor another significant exculpatory statement was disclosed to the defense.²¹² When the statements were finally disclosed and a new trial held, the victim's mother was impeached with her original story.²¹³ At that time she admitted that she had lied in the first trial when she testified that she saw her son leave the house with the defendant.²¹⁴

The court of appeals opinion leaves no doubt that Hale was aware of the consequences of not furnishing the witness's original statement prior to the first trial. Immediately after the conviction in the first trial, Hale had left the courthouse with his lieutenant.²¹⁵ Hale opened the trunk of his car and showed the lieutenant several reports and statements concerning the prosecution.²¹⁶ He explained their presence in his trunk by saying that "[s]ome of this stuff could probably make us lose the case."²¹⁷ When the lieutenant asked Hale how he had gotten the witnesses to lie on the witness stand, Hale told him, "Over a period of time there is a little brainwashing, you tell them the story of what happened, and what you need to win a case in court and they begin to believe it."²¹⁸

There is obviously nothing unfair or surprising about imposing civil liability on an officer, like Deputy Hale, who knows full well the consequences of his suppression of exculpatory evidence. While Hale was unusually candid with his superior officer, his underlying conduct was similar to police misconduct identified in many of the § 1983 claims for failure to disclose exculpatory evidence described in this Article.

From a policy point of view, it would seem to be far worse to allow officers to hide behind prosecutors they have rendered helpless by failing to furnish to them

209. 187 F.3d 452 (5th Cir. 1999). The district court had denied Deputy Sheriff Hale's motion for summary judgment on qualified immunity grounds and the Fifth Circuit held that because of factual disputes there was no jurisdiction for an interlocutory appeal. Burge later obtained a jury verdict for \$4,075,000 in damages against Hale at trial and Hale did not appeal. *Burge v. St. Tammany Parish Sheriff's Office*, 2001 WL 845463, at *1 (E.D. La. 2001). See also *Burge v. St. Tammany Parish*, 336 F.3d 363, 366 (5th Cir. 2003) (appeal of the head Sheriff on government agency liability issues).

210. *Burge*, 187 F.3d at 459.

211. *Id.* at 461.

212. *Id.* at 462.

213. *Id.*

214. *Id.*

215. *Id.* at 461.

216. *Burge*, 187 F.3d at 461.

217. *Id.*

218. *Id.*

exculpatory evidence, than to require officers to make a determination that an item of evidence is exculpatory and must be furnished to prosecutors. Recognizing this, the Seventh Circuit Court of Appeals concluded in *Jones v. City of Chicago*:

If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded.²¹⁹

In *Kyles*, the Supreme Court noted that holding the government responsible for exculpatory evidence even when prosecutors have not received the evidence from the police will encourage prosecutors to develop systems to collect all necessary information.²²⁰ But *Kyles* did not imply and it does not follow from its holding that police officers themselves should not be held liable for suppressing such information. As the dissent in *Jean v. Collins* reasoned, "the fact that *Kyles* made the prosecutor vicariously responsible when police officers fail to disclose exculpatory evidence does *not* mean that *Kyles* also placed police officers beyond constitutional reproach for their personal role in subverting the State's *Brady* duty."²²¹ In *Manning*, the Seventh Circuit specifically found that officers have a duty to disclose exculpatory evidence based on *Kyles*.²²²

The dissenters in *Jean v. Collins* would simply require police officers to engage in the "ministerial" duty of furnishing all available evidence to prosecutors, so that the prosecutors can make decisions about the exculpatory and material nature of the evidence.²²³ This argument has considerable merit. First, the rule is easy to follow and disposes of the objection that requiring officers to determine whether evidence is exculpatory and material requires them to make legal judgments for which they are not trained. More significantly, the rule is defensible under a *Mathews* procedural due process analysis. The second *Mathews* factor assesses the extent of a "risk of an erroneous deprivation" of liberty in the absence of a proposed procedural safeguard.²²⁴ *Mathews* does not require a certainty that there will be an erroneous deprivation of liberty to establish a procedural due process violation, just a meaningful risk.²²⁵ The argument that police officers are not trained and may lack the necessary information to assess the exculpatory and material nature of evidence demonstrates that there is a risk of a *Brady* violation whenever an officer fails to furnish any relevant evidence to the prosecutor.

It may be argued, however, that there are reasons why a police officer should not be required to turn all available evidence of a criminal case over to the

219. *Id.* (emphasis in original). The Seventh Circuit later affirmed in *Newsome v. McCabe* that deterrence of constitutional violations caused by the suppression of exculpatory evidence by police officers requires recognizing a cause of action against the officers. *See supra* notes 198-200.

220. *Kyles*, 514 U.S. at 439-40.

221. *Jean*, 221 F.3d at 668 (Murnaghan, J., dissenting) (emphasis in original).

222. *Manning*, 2004 WL 94076, at *5.

223. *Id.* at 669.

224. *Mathews*, 424 U.S. at 334-35.

225. *Id.* at 321.

prosecutor. For example, officers might desire to protect the identity of confidential informants or the integrity of ongoing investigations to which the prosecutor is not privy. Such purposes, however, would be accommodated by the third *Mathews* factor, which takes into account that even when there is a risk of an erroneous deprivation of liberty there may be governmental interests that would justify foregoing a procedural safeguard.²²⁶ If officers are able to articulate a sufficiently persuasive reason for not furnishing evidence to prosecutors there may be no procedural due process violation. It would be a rare case, however, where failing to disclose evidence to the prosecutor would be justified. Police disclosure of information to the prosecutor does not necessarily mean that the information will be furnished to the defense. Information furnished to the prosecutor remains within the government team unless the prosecutor determines that it is exculpatory and material.

If courts are unwilling to require police officers to furnish all relevant evidence to prosecutors, they should at a minimum require officers to furnish all exculpatory evidence. Although the argument that it may be difficult for officers to appreciate the materiality of evidence has some force, it is hard to argue that officers cannot be expected to determine whether evidence is exculpatory. The police are, after all, in the business of gathering facts to make cases. Decisions about whether evidence tends to establish or undermine guilt or innocence should be routine.

C. What is the Level of Culpability Required to Impose Liability on Police Officers for Failing to Furnish Exculpatory Evidence to Prosecutors?

Assuming police officers are obligated to furnish prosecutors with all exculpatory evidence, the question remains as to whether some standard of culpability with respect to the failure to furnish such evidence must be met in order to justify imposing civil liability on police officers. Section 1983 generally does not require proof of a specific intent to violate a constitutional right,²²⁷ nor does it impose any state of mind requirement to establish liability.²²⁸ Where proof of a particular intent is required to establish a specific constitutional violation, however, a plaintiff does have to prove that such intent existed in order to establish liability under § 1983.²²⁹

The dispute over whether a particular level of culpability is required to warrant liability under § 1983 in this area is illustrated by the opinion in *Jean v. Collins*. The concurring judges in *Jean* concluded that “bad faith” is required to establish liability for the failure to disclose exculpatory evidence.²³⁰ The court, first,

226. *Id.*

227. *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

228. *Parratt*, 451 U.S. at 534-35; *Daniels*, 474 U.S. at 330.

229. *Parratt*, 451 U.S. at 534-35; *Daniels*, 474 U.S. at 330.

230. *Jean*, 221 F.3d at 663 (Wilkinson, J., concurring). In an unpublished decision, *Reid v. Simmons*, 163 F. Supp. 2d 81, 91 (D.N.H. 2001), the court adopted much of the concurring judges’ analysis in *Jean* and concluded that to impose liability for the failure of an officer to disclose exculpatory evidence, a plaintiff must prove that the officer acted with “bad faith, or with the intent to violate the plaintiff’s constitutional rights, or with deliberate indifference to those rights.” *Id.* The Court of Appeals affirmed,

properly held that a merely negligent failure to furnish exculpatory evidence could not be actionable under § 1983,²³¹ relying upon the Supreme Court's decision in *Daniels v. Williams*.²³² The *Jean* concurrence, however, then went on to require that an officer have acted in "bad faith," which it defined as intentionally withholding exculpatory evidence for the purpose of depriving the plaintiff of the use of that evidence during his criminal trial, in order to be liable under § 1983.²³³ In articulating this requirement and definition, the concurrence in *Jean v. Collins* relied heavily on the argument that the failure to disclose exculpatory evidence is equivalent to the failure to preserve potentially exculpatory evidence,²³⁴ and on the precedent established by the Supreme Court in *Arizona v. Youngblood*²³⁵ that there was no constitutional violation caused by the failure to preserve potentially exculpatory evidence in the absence of bad faith.²³⁶

The dissenters in *Jean* rejected the concurrence's requirement that a failure to disclose exculpatory evidence must be in bad faith to be actionable.²³⁷ The dissent noted that in criminal cases the failure to make disclosures is a due process violation "irrespective of the good faith or bad faith" of the prosecution,²³⁸ citing *Brady*.²³⁹ The dissent noted that "bad faith" as required in *Daniels* "simply means a state action that is more than merely negligent – an act that involves the willful, intentional use of government power to invade some protected life, liberty, or property interest possessed by its citizens."²⁴⁰

The argument by the *Jean* concurrence that "bad faith" is required is not convincing. *Arizona v. Youngblood* involved the failure of the police to promptly

also in an unpublished decision, *Reid v. Simmons*, 47 Fed. Appx. 5, 5 (1st Cir. 2002), indicating that while it was not in complete agreement with the district court's opinion, it found that plaintiff had failed to prove that the defendant officer had "failed to disclose the evidence in issue either deliberately or with reckless indifference to Reid's constitutional rights." *Id.* Given that the court of appeals engaged in no further discussion of the issue, it is difficult to ascertain precisely what level of culpability the First Circuit believes is required in these cases.

231. *Jean*, 221 F.3d at 663 (Wilkinson, J., concurring).

232. *Daniels*, 474 U.S. at 330. A prisoner filed a claim under § 1983 for injuries suffered when he slipped and fell on a pillow allegedly left on a staircase by a deputy sheriff. *Id.* at 323. Because plaintiff believed that he would have no cause of action in state court because of sovereign immunity, and thus no post-deprivation remedy for his loss, he claimed that he was denied liberty without due process of law. *Id.* The *Daniels* Court reiterated its earlier decision in *Parratt* that § 1983 imposes no state of mind requirement and thus there is no generally applicable answer to the question of whether negligent acts can be the basis for liability under the statute. *Daniels*, 474 U.S. at 330. *Daniels*, however, made clear that a particular constitutional violation may require a state of mind other than negligence. It held that the Due Process Clause is not implicated by negligent actions. *Id.* at 330-31. See also *Davidson v. Cannon*, 474 U.S. 344, 347 (1986) (holding that a prison official's lack of due care did not rise to the level of abusive conduct that the Due Process Clause was created to prevent); *Simmons v. McElveen*, 846 F.2d 337, 339 (5th Cir. 1988) (declining to impose liability on officers whose handling of exculpatory evidence was merely negligent).

233. *Jean*, 221 F.3d at 663 (Wilkinson, J., concurring).

234. *Id.*

235. 488 U.S. 51 (1988).

236. *Jean*, 221 F.3d at 661.

237. *Id.* at 669 (Murnaghan, J., dissenting).

238. *Id.* (quoting *Brady*, 373 U.S. at 87).

239. *Brady*, 373 U.S. at 87.

240. *Jean*, 221 F.3d at 673 (Murnaghan, J., dissenting).

perform tests for semen after gathering physical evidence, and their failure to properly preserve clothing so it could be tested for semen at a later date.²⁴¹ Because the tests could not be performed at the time the issue was raised, there was no evidence that the results of the tests would have been exculpatory.²⁴² The Supreme Court noted that good or bad faith is irrelevant to a *Brady* violation, but imposed the bad faith requirement for the failure “to preserve evidentiary material of which no more can be said than that it could have been subject to tests, the results of which might have exonerated the defendant.”²⁴³ The Court noted that the state had complied with *Brady* and *Agurs* in the case, and that if relief were to be granted to the defendant, “it must be because of some constitutional duty over and above that imposed by cases such as *Brady* and *Agurs*.”²⁴⁴ The Supreme Court itself thus rejected the parallel relied upon by the *Jean* concurrence between the failure to disclose evidence the exculpatory nature of which was already apparent and the failure to preserve evidence which is only potentially exculpatory.²⁴⁵

The issue of culpability must be resolved as suggested by the dissenting judges in *Jean*. As long as a police officer’s failure to disclose exculpatory evidence is not merely negligent, neither general principles of liability under § 1983 nor the content of a *Brady* procedural due process violation require specific intent or a particular state of mind for there to be a constitutional violation.

IV. SECTION 1983 CLAIMS AGAINST POLICE OFFICERS FOR WITHHOLDING EXCULPATORY EVIDENCE IN CASES RESOLVED PRIOR TO TRIAL AND CONVICTION

The previous sections developed the argument that the government’s failure to disclose material exculpatory evidence to a criminal defendant constitutes a procedural due process violation. The preceding section advanced the argument that although the ultimate responsibility for furnishing material exculpatory evidence to the defense is on the prosecutor, officers should be held liable for failing to furnish exculpatory evidence to prosecutors when their failure to do so causes a constitutional violation. When the failure to furnish material exculpatory evidence results in a criminal conviction, the lower federal courts are in agreement that there is a cause of action under § 1983 against police officers who withhold the evidence from prosecutors. Some courts have held, however, that where a criminal defendant is acquitted, or where a case is resolved prior to trial, the failure to disclose exculpatory evidence does not violate his constitutional rights because he has not been deprived of a “fair trial” and that the *Brady* rule only provides protection for a “fair trial.”²⁴⁶

When a criminal proceeding terminates prior to conviction, whether police

241. *Youngblood*, 488 U.S. at 51.

242. *Id.* at 53.

243. *Id.* at 57.

244. *Id.* at 56.

245. *Id.*

246. *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *McKune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); *Nygren v. Predovich*, 637 F. Supp. 1083, 1087 (D.Colo. 1986); and the cases discussed in Section I of this Article.

officers are liable for deprivations of liberty other than conviction should depend upon whether procedural due process requires that exculpatory evidence be furnished in advance of trial. This question should be answered by employing the criteria of *Mathews* to determine “what process is due” at a given stage of criminal proceedings.

The lower federal courts, however, have not explicitly employed a *Mathews* analysis to determine when exculpatory evidence must be furnished prior to trial. This is largely a consequence of the fact that, for the most part, the courts have not clearly identified the right to exculpatory evidence as a procedural due process right, as described above. This section of the Article will demonstrate that a *Mathews* analysis could have been employed in several cases selected for discussion, and that such an analysis would produce doctrinally correct results in exculpatory evidence cases generally.

When the question of whether there is an obligation to furnish *Brady* material prior to trial arises in criminal proceedings, it is in post-conviction and habeas cases that address whether a conviction should be reversed or vacated for a late disclosure of exculpatory evidence. The question in these cases is whether a criminal defendant was given an opportunity to use the exculpatory information at trial. In these cases it is clear that the prosecution must disclose such evidence at a time when there is a reasonable opportunity to make use of the information.²⁴⁷ In some cases this might be as late as during the trial itself, in others, even disclosure shortly before trial may be too late.²⁴⁸ These criminal proceedings, however, should not be controlling with respect to a claim that exculpatory information is required prior to trial for a purpose other than preparing for trial. They should not be read to define or restrict the responsibility of police with regard to exculpatory evidence prior to an arrest or between the time of arrest and the time of trial.²⁴⁹

Unless the only justification for the obligation to disclose exculpatory evidence is to assist the defense in preparing for a criminal trial, the time at which

247. *United States v. Coppa*, 267 F.3d 132, 146 (2d Cir. 2001) (rejecting district court’s order that *Brady* material be furnished immediately upon request by defense).

248. In *Leka v. Portuondo*, 257 F.3d 89 (2d Cir. 2001), the court held that petitioner was entitled to a writ of habeas corpus, even though disclosure of the existence of an eyewitness who was a former police officer was made some days before trial. *Id.* at 96-97. The court discussed the reasons why it is difficult on the eve of trial to make full use of exculpatory information and held that under the circumstances of the case, the prosecution had disclosed “too little, too late.” *Id.* at 100-104.

249. The law in the Second Circuit prior to *Ruiz*, 536 U.S. 622, had been that *Brady* material had to be furnished in time for its effective use at trial, or at a plea proceeding in the event the defendant pleaded guilty. *Coppa*, 267 F.3d at 142. In *Ruiz* the Supreme Court held that it is not necessary to furnish impeachment material prior to a guilty plea in order to satisfy constitutional requirements for the plea. *Ruiz*, 536 U.S. at 622. Where other pretrial decisions are at issue, however, the logic of the Second Circuit’s prior requirement that exculpatory information be furnished for pleas would suggest that exculpatory information be furnished, at least by the police to the prosecutor, in time for it to be taken into account in connection with a particular decision, for example, a bail recommendation by the prosecutor. The *Coppa* court reasoned that exculpatory information should be furnished “no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made.” *Coppa*, 267 F.3d at 142. This language closely parallels the second *Mathews v. Eldridge* factor, that where there is a risk of an erroneous deprivation and a procedural safeguard is of probable value in avoiding it, the safeguard should be furnished.

disclosure must be made must relate to the purpose for which the evidence is material. The Fifth and Fourteenth Amendments protect against any deprivation of liberty without due process of law, not merely against an “unfair trial.” The Constitution does not mention a “fair trial,” and a “fair trial” is but one example of a procedural safeguard designed to avoid a wrongful deprivation of liberty. Liberty deprivations also occur in advance of trial.²⁵⁰ Whether the Constitution requires disclosure of exculpatory information prior to trial depends upon an analysis of the Fourth Amendment and procedural due process constitutional guarantees that are implicated at different stages of a criminal proceeding.²⁵¹

As was discussed in Section I, it is the Fourth Amendment that determines what weight must be given to and what disclosure must be made of exculpatory evidence in connection with an arrest. Section I also noted that there is disagreement among the cases about whether it is the Fourth Amendment or procedural due process that should govern the disclosure of exculpatory evidence between arrest and trial. The argument was made that the decisions of the Supreme Court in *Gerstein v. Pugh*²⁵² and *Baker v. McCollan*²⁵³ do not require that the period between arrest and trial be regulated by the Fourth Amendment. In fact these opinions suggest that only the threshold decision to commence criminal proceedings with an arrest is governed by the Fourth Amendment and that later proceedings must satisfy the requirements of procedural due process.²⁵⁴

There is an important distinction between employing the Fourth Amendment analysis and a procedural due process analysis for the period between arrest and trial. Under the Fourth Amendment analysis, one might argue that the only constitutional requirement is probable cause and if the exculpatory information does not destroy probable cause there is no violation. On the other hand, one might suffer a violation of procedural due process rights even if there is probable cause to support the prosecution. Prior to trial there are decisions that must be made that lie somewhere in between probable cause and guilt or innocence. A prosecutor, for example, might decide to move to dismiss a prosecution even though there is enough evidence to establish probable cause, because she does not believe the defendant to be guilty or does not believe that trial will result in a conviction. A prosecutor ordinarily makes a recommendation to the court with respect to the amount of bail that should be required, or whether to require bail at all. If an officer suppresses exculpatory information there is a risk that the prosecution will make erroneous decisions regarding these matters, with a consequent deprivation of

250. *Gerstein*, 420 U.S. at 114; *United States v. Marion*, 404 U.S. 307, 320 (1971).

251. The cost of failing to conduct this sort of analysis was demonstrated in *Hahn v. Sargent*, 523 F.2d 461 (1st Cir. 1975), where plaintiff alleged that the defendants had not furnished him with exculpatory evidence prior to trial, although the evidence was furnished during trial and the plaintiff was acquitted of the criminal charges against him. *Id.* at 467. The court analyzed the claim based on late disclosure only with respect to the disclosure’s impact on the result of the trial, and did not discuss whether an earlier disclosure might have resulted in an earlier termination of the criminal prosecution. *Id.* Plaintiff was thus denied an opportunity for redress of any deprivations of liberty he suffered prior to trial and in connection with the burden of standing trial itself. *Id.*

252. 420 U.S. 103.

253. 443 U.S. 137.

254. *Gerstein*, 420 U.S. at 103.

the defendant's liberty.

A proper analysis of the period between arrest and trial would employ a procedural due process analysis under *Mathews*. For example, under a *Mathews* procedural due process analysis, it would appear that the Fourth Circuit reached the correct result in *Goodwin v. Metts*,²⁵⁵ although the holding of that case that due process requires the police to furnish exculpatory information to prosecutors in the period between arrest and trial was later repudiated in *Taylor v. Waters* and the concurring opinion in *Jean*.²⁵⁶ Although the *Goodwin* court did not reference *Mathews*, its discussion of the issues in the case would have been appropriate under that framework. The *Goodwin* court assessed the private interest at stake as significant, which is the first *Mathews* factor.²⁵⁷ The court cited the Supreme Court's characterization in *United States v. Marion*²⁵⁸ that a prosecution is:

[A] public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.²⁵⁹

The *Goodwin* court's analysis also would have provided an assessment of the second *Mathews* factor, the risk of an erroneous deprivation of the private interest, and the probable value, if any, of the proposed additional safeguard. The court found that a jury might have reasonably found that the exculpatory evidence destroyed probable cause.²⁶⁰ The court also held that the jury could reasonably have concluded that if the prosecutor had been told of the exculpatory information, he would have not proessed the case.²⁶¹

Nothing in the *Goodwin* opinion addressed the third *Mathews* factor, the government's interest in avoiding the fiscal and administrative burdens that the additional procedural requirement would entail. It is hard to argue, however, that requiring police officers to promptly advise prosecutors of exculpatory evidence in their possession entails significant administrative burdens. It is common for officers to file supplementary reports on criminal matters as new evidence comes into their possession and certainly filing reports of exculpatory evidence poses no greater burden than filing reports of incriminating evidence.

255. 885 F.2d 157 (4th Cir. 1989). Between arraignment and trial in this case the officers discovered impeaching evidence with respect to a principal witness and also learned that another person had confessed to the burglary the plaintiffs were charged with. *Id.* at 159. They did not inform prosecutors of these facts. *Id.* Plaintiffs were acquitted at trial. *Id.* at 160.

256. *Id.* at 163.

257. *Id.*

258. *Marion*, 404 U.S. at 320.

259. The *Goodwin* court also cited the Third Circuit's conclusion that the injuries flowing from a prosecution are constitutionally cognizable: "The injuries allegedly caused by defendants' actions include the deprivation of liberty concomitant to arrest and to the pendency of a criminal process, whether the plaintiff was in jail, released on bail, or released on his own recognizance." *Goodwin*, 885 F.2d at 163 (citing *Jennings v. Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977)).

260. *Goodwin*, 885 F.2d at 161.

261. *Id.* at 161, 164.

The analysis of the facts in *Sanders v. English*²⁶² also fits comfortably within a *Mathews* procedural due process framework. The court emphasized that a jury could find that if the exculpatory evidence had been disclosed to the prosecutor, the plaintiff would have been released from custody and the charges dropped earlier.²⁶³ This conclusion establishes that there was a risk of erroneous deprivation of liberty in the absence of the procedural protection of furnishing exculpatory evidence, and that providing the protection would have had value as a safeguard.

Similarly the analysis of the Seventh Circuit in *Jones v. City of Chicago*²⁶⁴ clearly would justify a constitutional claim on a procedural due process theory. In discussing causation, the court rejected the defense argument that the decision by the state's attorney to prosecute was the sole legal cause of plaintiff's injuries.²⁶⁵ It concluded that the jury could well have found that the defendants "systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision whether to prosecute Jones and whether (that decision having been made) to continue prosecuting him right up to and into the trial."²⁶⁶ The court concluded that had the prosecutors known of the exculpatory evidence "they would almost certainly have dropped the charges against [plaintiff] before trial," and "he might never have been charged in the first place if the prosecutors had known the facts militating against [plaintiff's] guilt. . . ."²⁶⁷ In procedural due process terms, this is equivalent to a conclusion that there was a significant "risk of an erroneous deprivation" through the procedures that were used, and that there would be significant "probable value . . . of additional or substitute procedural safeguards."²⁶⁸

These cases demonstrate that some courts are effectively employing the factors required by the *Mathews* framework, even though their opinions may not make clear that they are conducting a procedural due process analysis. If the *Mathews* analysis were explicitly employed by the courts in determining whether the failure to disclose exculpatory evidence caused a procedural due process violation, it would bring both greater clarity and consistency to this body of law.

A. What are the Implications of Parratt v. Taylor for Procedural Due Process Claims for the Failure to Disclose Exculpatory Evidence?

The availability of a cause of action under § 1983 for a procedural due process violation based on a failure of the police to furnish exculpatory evidence to the prosecutor is subject to one potential qualification. In *Parratt v. Taylor*²⁶⁹ and *Hudson v. Palmer*,²⁷⁰ the Supreme Court determined that where a claim is based on

262. 950 F.2d 1152 (5th Cir. 1992).

263. *Id.* at 1162.

264. 856 F.2d 985 (7th Cir. 1988).

265. *Id.* at 994.

266. *Id.* at 993.

267. *Id.*

268. *Mathews*, 424 U.S. at 334-35.

269. 451 U.S. at 527 (plaintiff was a state prisoner who complained that his due process rights were violated by the negligent loss of a hobby kit by prison officials).

270. 468 U.S. 517 (1984) (plaintiff alleged that prison guards entered his cell and intentionally

a violation of procedural due process rights and the conduct of the state actors is random and unauthorized (rather than pursuant to official policy), and the state is unable to predict or prevent the deprivation, a postdeprivation remedy is all that must be provided.²⁷¹ In other words, there is no cause of action under § 1983 for procedural due process violations where state law provides a remedy in tort or otherwise. The doctrine applies to deprivations of liberty, as well as property.²⁷² A full explication of the extent to which *Parratt* might bar § 1983 claims for the failure to disclose exculpatory evidence is beyond the scope of this Article. There are several reasons, however, why most such claims should not be barred.

First, the Supreme Court's decisions applying *Parratt* are not entirely consistent. In *Zinermon v. Burch*,²⁷³ the Court held that a former mental patient had a cause of action where he claimed that state hospital officials should have afforded him a hearing under involuntary commitment procedures prior to his admission, rather than accepting his voluntary admission.²⁷⁴ The Court held that the failure to hold a hearing was not random and unauthorized because the officials with the authority to order the hearing failed to do so even though they should have foreseen the need for this procedural protection.²⁷⁵ It is at least arguable that a similar result should be obtained with respect to the failure of the police to disclose exculpatory evidence. The *Zinermon* Court distinguished *Parratt* and *Hudson* as cases where the very nature of the deprivation made predeprivation process impossible.²⁷⁶ In *Zinermon* a predeprivation hearing would have substantially reduced the risk of an erroneous deprivation of the plaintiff's liberty. Similarly, because the disclosure of exculpatory information by police officers is a procedural safeguard that can be afforded prior to a deprivation of liberty occasioned by criminal proceedings, predeprivation process is not impossible in such cases.²⁷⁷

Second, the limitations of *Parratt* do not apply where a plaintiff complains of a violation of a substantive constitutional right.²⁷⁸ Thus to the extent a person deprived of liberty by the failure to disclose exculpatory evidence can argue that a substantive constitutional right was violated, the action should not be barred by

destroyed some of his personal property).

271. See generally AVERY ET AL., *supra* note 5, § 2:46 (discussing due process violations and state remedies); CHEMERINSKY, *supra* note 142, § 7.2, at 426-29 (discussing whether the availability of state remedies prevents a finding that the state has deprived due process).

272. *Zinermon v. Burch*, 494 U.S. 113, 131-32 (1990).

273. *Id.*

274. The plaintiff argued that the hospital officials should have known that he was incapable of giving informed consent for his admission. *Id.* at 123-24.

275. *Id.* at 138-39.

276. *Id.* at 137.

277. The four dissenting Justices in *Zinermon* rejected the majority's reasoning completely and concluded that the Court's opinion "transforms well-established procedural due process doctrine and departs from controlling precedent." *Id.* at 139. In addition to the dramatic split among the Justices in *Zinermon*, Justices Kennedy and Thomas, in their concurrence in *Albright v. Oliver*, concluded that courts, including the Supreme Court, "have been cautious in invoking the rule of *Parratt*," that the Court had demonstrated "ambivalence over the outer limits of *Parratt*" and that the *Parratt* rule had been subject to "evasions." *Albright*, 510 U.S. at 284-85. An attempt to resolve this level of controversy on this point is beyond the scope of this Article.

278. *Zinermon*, 494 U.S. at 125.

Parratt. For example, a defendant subject to pretrial detention might complain that the failure of the police to disclose exculpatory evidence resulted in a violation of his Eighth Amendment right not to have excessive bail imposed – a substantive constitutional right.

Third, *Parratt* bars a § 1983 action based on procedural due process only where there is an adequate postdeprivation state remedy. Few, if any, state jurisdictions provide a tort claim based on the failure of a police officer to disclose exculpatory information to a prosecutor. Section 1983 claims for this violation of procedural due process should thus be viable. In *Reid v. State of New Hampshire*²⁷⁹ the First Circuit treated the § 1983 claim for the failure to disclose exculpatory evidence as based on a procedural due process violation.²⁸⁰ New Hampshire, where this claim arose, did not recognize a claim for the failure to disclose exculpatory evidence and the court thus concluded that plaintiff had presented a viable § 1983 claim on that basis.²⁸¹ Similarly, the Seventh Circuit in *Newsome v. McCabe* held that a § 1983 claim for the failure to disclose exculpatory evidence was actionable, although a malicious prosecution claim would be barred as a procedural due process claim if the state provided an adequate postdeprivation remedy.²⁸² This argument involves distinguishing between a malicious prosecution claim for which there is likely to be a remedy under state law and a claim for the failure to disclose exculpatory evidence. This distinction is appropriate because a malicious prosecution claim generally requires the initiation of proceedings without probable cause and proof of malice or a primary purpose other than that of bringing an offender to justice,²⁸³ whereas a claim for the failure to disclose exculpatory evidence is premised on the nondisclosure of exculpatory evidence and does not depend upon the absence of probable cause or upon proof of malice.²⁸⁴

B. *Qualified Immunity*

A police officer is entitled to qualified immunity in a § 1983 claim unless a reasonable officer in his position would have known that his actions would violate clearly established constitutional rights of the plaintiff.²⁸⁵ In order to overcome

279. 56 F.3d 332 (1st Cir. 1995).

280. *Id.* at 336 n.8.

281. *Id.* at 341. The First Circuit noted that under its precedents, it would not recognize § 1983 claims based on the torts of false arrest and malicious prosecution if there was a remedy under state law, because it characterized them as procedural due process claims. *Id.*

282. *Newsome*, 256 F.2d at 751-52.

283. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 871 (5th ed. 1984).

284. The failure to disclose exculpatory evidence might constitute some of the conduct of police officers engaged in a malicious prosecution. In some cases, proof of the intentional failure to disclose exculpatory evidence might establish the malice required by a malicious prosecution action. This is not inconsistent, however, with the fact that the failure to disclose exculpatory evidence provides a basis for a separate and independent cause of action for a procedural due process violation, and that to prove such a violation it is not necessary to establish the same elements as required by malicious prosecution.

285. *Hope v. Pelzer*, 536 U.S. 730 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001), *Anderson v. Creighton*, 483 U.S. 635 (1987). See generally AVERY ET AL., *supra* note 5, at Ch. 3 (discussing qualified immunity).

qualified immunity, a plaintiff must show both that the constitutional right at issue was clearly established at the time of the event in question, and that the defendant should have known that his specific actions in the case in question would violate that right. As this Article has demonstrated, the case law concerning the liability of police officers for failing to furnish exculpatory evidence to prosecutors in the period between arrest and trial is inconsistent. As a result, in those circuits where the courts have failed to establish a clear rule, an officer may argue that he is protected from liability by current qualified immunity doctrine.²⁸⁶

Few of the reported decisions have discussed qualified immunity in detail with respect to claims for failure to disclose exculpatory evidence. Some courts have simply held that if an officer suppresses exculpatory evidence he violates clearly established law.²⁸⁷ As a result, it is not clear in the case law precisely what an officer must appreciate with respect to his suppression of evidence in order for him to lose qualified immunity for his actions. Because the qualified immunity doctrine itself is complicated and frequently applied inconsistently by the courts, a full discussion of the qualified immunity defense to suppression of exculpatory evidence claims is beyond the scope of this Article.²⁸⁸ Consistent with the discussion above which focuses on the procedural due process analysis required by these cases, however, there is one issue that merits brief mention here.

Where a case has gone to trial and the defendant has been convicted, if the defendant later claims damages as a result of the conviction, he must show that the exculpatory evidence that was suppressed was material in order to show that his constitutional rights were violated. That is, materiality is an element of the constitutional claim the aggrieved person is making, and there is no doubt that the plaintiff must show that the suppressed evidence was material in order to establish a claim. The question remains, however, what is necessary to defeat qualified immunity. Certainly the plaintiff must show that a reasonable officer would have appreciated that the evidence was exculpatory. Must the plaintiff also show not only that the evidence was material, but that a reasonable officer would have appreciated the materiality of the evidence? The Eleventh Circuit answered this question in the affirmative in *McMillian v. Johnson*,²⁸⁹ where it remanded the defendant officers' appeal of the district court's denial of their motions for summary judgment on qualified immunity grounds to determine whether the officers should have known that the evidence was material at the time it was suppressed.²⁹⁰

Requiring that the officers appreciate the materiality of exculpatory evidence is problematic, because when a court reviewing a criminal conviction rules on whether there was a *Brady* violation it has before it a completely developed record

286. See, e.g., *Glidewell v. Gantt*, 176 F. Supp. 2d 1263, 1269-70 (M.D. Ala. 2001) (describing an officer afforded qualified immunity in suit based on the claim that he learned of exculpatory information after he testified before magistrate in support of an arrest warrant, but failed to disclose it).

287. *Ineco v. City of Chicago*, 286 F.3d 994, 1000-01 (7th Cir. 2002); *Geter*, 849 F.2d at 1559.

288. Decisions regarding qualified immunity in both the Supreme Court and the lower federal courts in police misconduct cases are "marked by ad hoc decision making, conflicting rationales, and a high degree of doctrinal manipulation." AVERY ET AL., *supra* note 5, § 3:4.

289. *McMillian*, 88 F.3d at 1569-70.

290. *Id.* at 1572.

from the trial. When officers fail to furnish exculpatory evidence to a prosecutor prior to trial, however, they have no such record and may well not be aware of what other evidence is in the case, either in the hands of the prosecution or the defense. If a plaintiff were required to show that the officers appreciated the materiality of the suppressed evidence at that time, it would be difficult for plaintiffs to defeat qualified immunity unless the significance of the evidence suggested that it would be material without regard to what other evidence might exist in the case.

Where officers are aware, however, that the information they are suppressing is exculpatory, they certainly are aware that they might be suppressing material evidence, that is, they are aware that they are creating a risk of an erroneous deprivation of liberty. Under a procedural due process analysis, knowledge that the suppressed evidence is exculpatory is all that should be required to defeat qualified immunity. The second *Mathews* factor assesses “the risk of an erroneous deprivation of [liberty] through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”²⁹¹ The officer should be charged with the knowledge that by failing to furnish evidence to a prosecutor he is creating a risk of a wrongful deprivation of liberty and at the same time arrogating to himself the decision about the value of the procedural safeguard – a decision which should be made by the prosecutor, and not the police, as the Supreme Court declared in *Kyles v. Whitley*.²⁹² Under these circumstances to afford qualified immunity to the officer would run counter to the whole force of the *Brady* rule.

CONCLUSION

The argument developed in this Article begins with the recognition that the suppression of exculpatory evidence in criminal cases violates the *procedural* due process rights of criminal defendants. To determine if there is a procedural due process violation by the failure to disclose exculpatory evidence in a given case at a particular stage of criminal proceedings requires application of the balancing test of *Mathews*. Where there is an erroneous risk of a deprivation of liberty by failing to provide exculpatory evidence, and providing the evidence would substantially reduce that risk without imposing undue burdens on the government, procedural due process requires that the evidence be furnished. Prosecutors are ultimately responsible for furnishing exculpatory evidence to the defense, but fundamental principles of § 1983 liability establish that police officers should be held liable for failing to furnish exculpatory evidence to prosecutors, where that failure causes a violation of a criminal defendant’s constitutional rights. Although Fourth Amendment principles determine the extent to which police officers must take into account and/or disclose exculpatory evidence prior to arrest, in the period between arrest and trial it is procedural due process principles that govern this issue. A proper analysis of the police failure to disclose exculpatory evidence to prosecutors as a denial of procedural due process rights will justify a § 1983 remedy not only for the suppression of exculpatory evidence that leads to wrongful convictions, but

291. *Mathews*, 424 U.S. at 334-35.

292. 514 U.S. at 423-31, 38; *see supra* text at notes 120-22 (discussing *Kyles*).

also for pretrial deprivations of liberty.