THE *MILKE* WAY: *MILKE V. RYAN* AND THE VAST GALAXY OF UNCHARTED EXCULPATORY EVIDENCE IT REVEALED

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Persons charged with crimes usually want to know about evidence that could help their cases. Since 1963, when the Supreme Court handed down its decision in Brady v. Maryland, *this desire has been recognized as something more: a due process right to all material exculpatory evidence in the prosecuting agency's hands. Like most seemingly simple rights, the right to* Brady *evidence has been examined and reexamined by the courts, resulting in the complicated behemoth known as* Brady *doctrine. This Note seeks to add to that complexity. By interpreting the Ninth Circuit's decision in* Milke v. Ryan, *this Note highlights a particular type of* Brady *evidence that prosecutors very rarely disclose: prior constitutional violations by law enforcement witnesses. In* Milke, *this type of evidence was one of three groups of undisclosed evidence that led to the reversal of a capital murder conviction. Though a close reading of the Ninth Circuit's opinion makes clear that this evidence must be disclosed in certain cases,* Milke*'s mandate is not fulfilled in every case. This Note proposes a solution: a step-by-step method for large prosecution agencies to search for past constitutional violations by repeat law enforcement witnesses. By finding and recording this information, prosecutors can then disclose the evidence in cases where it is pertinent, fulfilling the demands of due process and* Brady *in an efficient, systematic way.*

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INTRODUCTION

Debra Milke was a dead woman walking for 8,091 days of her life.[1] In 1990, a Maricopa County[2] jury convicted her of the first-degree murder of her four-year-old son, and the next January, she was sentenced to death.[3] The trial had been essentially a credibility contest between Milke and the Phoenix detective who had investigated the case.[4] The detective claimed that Milke confessed the whole crime to him in an unrecorded interview with no witnesses.[5] Milke testified that the detective had violated her *Miranda* rights, and that she had never confessed.[6] The judge and jury believed the detective, and Milke was convicted and sentenced to death.[7] After Milke's petition for post-conviction relief, direct appeal, and federal habeas petition to the District of Arizona all failed, she took the case up to the Ninth Circuit.[8] That court's decision in *Milke v. Ryan* undid all of the lower court rulings and took Milke off of death row after over 22 years.[9] The Ninth Circuit based this whirlwind reversal on an issue that had been little discussed in the lower courts: prosecutorial duties to disclose exculpatory evidence to the defense.[10]

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1. *See* Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013). Milke was sentenced to death on January 18, 1991. *Id.* at 1015. On March 14, 2013, the Ninth Circuit filed its opinion, reversing the District of Arizona's denial of habeas corpus with instructions to set aside Milke's conviction and sentence. *Id.* at 998, 1019.

2. Maricopa County is made up of Phoenix, Arizona and surrounding cities.

3. *See supra* note 1.

4. *Id.*

5. *Id.* at 1000–01, 1019. It should be noted that the State also introduced evidence of how the victim's body was found in the desert, thus satisfying the corpus delicti requirement. *See* Wong Sun v. United States, 371 U.S. 471, 488–89 (1963) ("[A] conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused."). Under Arizona law, corpus delicti requires proof that a certain result has been produced and that some person is criminally responsible for that result. State v. Gerlaugh, 654 P.2d 800, 806 (Ariz. 1982).

6. *Milke*, 711 F.3d at 1000, 1002.

7. *Id.* at 1000.

8. *Id.*

9. *Id.* at 1019.

10. In the seven opinions relating to Milke's direct appeals and federal habeas petition, neither *Brady* nor its successor, *Giglio*, is mentioned once. *See generally* State v. Milke, 865 P.2d 779 (Ariz. 1993); Milke v. Arizona, 512 U.S. 1227 (1994); Milke v. Schriro, 2006 WL 3421318 (D. Ariz. 2006); Milke v. Schriro, 2006 WL 3500869 (D. Ariz. 2006); Milke v. Schriro, 2007 WL 87091 (D. Ariz. 2007); Milke v. Schriro, 2007 WL 530197 (D. Ariz. 2007); Milke v. Ryan, 2010 WL 383412 (D. Ariz. 2010). The issue of the critical personnel files showing the detective's past misconduct had been raised, but mostly in the context of an ineffective assistance of counsel claim, alleging that Milke's trial counsel failed

This Note focuses on a particular type of exculpatory evidence highlighted by *Milke v. Ryan*: prior constitutional violations committed by the government's law-enforcement witnesses.[11] To parse out *Milke*'s historical and practical implications for the criminal justice system within the context of criminal disclosure more generally, this Note proceeds in four parts. Part I provides an overview of how *Brady* has been interpreted by courts through the years. Part II then interprets *Milke v. Ryan* within the framework of existing disclosure requirements, suggesting that the case illuminates a particular flavor of exculpatory evidence that is peculiarly difficult to discover and disclose: police officers' histories of constitutional violations. Part III explains why even ordinary *Brady* requirements are often unmet, and proposes an explanation for why past adjudications of constitutional violations are even more difficult to discover—and more rarely disclosed—on a case-by-case basis than other types of *Brady* evidence. Part IV concludes by proposing a method by which large prosecutor's offices can collect individual police officers' histories of constitutional violations and continually track new violations that occur in their jurisdictions, creating a database similar to existing "*Brady* lists," so that these histories can be disclosed to defendants.

I. OVERVIEW OF *BRADY* DOCTRINE

Since 1963, when the Supreme Court decided *Brady v. Maryland*,[12] prosecutors have been required to disclose all material exculpatory evidence under their control to defendants in criminal cases.[13] *Brady* recognizes a key due process right that safeguards defendants' presumed innocence and their interests in a fair trial: the right to know of weaknesses in the government's case against them.[14] Jurisprudence and scholarship about what evidence a prosecutor has to learn of and disclose in a criminal case—collectively referred to as *Brady* doctrine—has developed and expanded in the years since that landmark decision.[15] The careful cultivation of *Brady* doctrine has significant ramifications for a defendant's due process rights on the one hand and the logistical feasibility of prosecuting criminals on the other.[16] To fully address what *Milke v. Ryan* means for this area of law, it is first necessary to provide some background on *Brady* doctrine generally.

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to properly investigate the detective's past. *See* Milke v. Schriro, 2006 WL 3421318, at *25–27. Both the post-conviction relief court and the federal habeas court rejected this claim on the grounds that this evidence would have likely been inadmissible and would have opened the door to favorable character evidence of the detective's more recent good conduct.

11. 711 F.3d 998, 1008–10 (9th Cir. 2013).

12. 373 U.S. 83 (1963).

13. *Id.* at 87.

14. The importance of this right is difficult to overstate. Research on convictions overturned by DNA evidence suggests that prosecutorial failure to disclose exculpatory evidence is one of the leading contributors to wrongful convictions. *See* BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56, 59–60 (1987); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278, 285 (2004).

15. For a brief history of this progression, see *infra* notes 22–23 and accompanying text.

16. *See infra* notes 27–32 and accompanying text.

The basic rule of *Brady v. Maryland* can be summed up in a single sentence from the case itself: "[T]he 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."[17] Though the fundamental rule of *Brady* remains mostly unchanged in the half-century since it was decided,[18] the case's progeny have recognized various types of evidence that must be disclosed.[19] Through several cases, *Brady* doctrine has been expanded,[20] even while its operative language has never changed.[21]

The four most noteworthy cases interpreting *Brady* are *Giglio v. United States*,[22] *United States v. Agurs*,[23] *United States v. Bagley*,[24] and *Kyles v. Whitley*.[25] Each of these cases interprets a different phrase within *Brady*'s original decree.[26] First, *Giglio* held that "evidence favorable to an accused" includes evidence that may be used to impeach the credibility of one of the government's witnesses.[27] Though *Giglio* dealt with impeachment evidence in the form of an immunity deal made with an informant,[28] the case's more important implication for purposes of this Note is that impeachment evidence against one of the police officers in the case must be disclosed.[29] Four years later, *Agurs* effectively deleted the phrase "upon request" from the *Brady* rule, holding that *Brady* evidence must be disclosed regardless of whether the defense requests it.[30] *Bagley* interpreted the "material either to guilt or to punishment" requirement to mean that convictions should be overturned when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[31] Finally, the most recent of the Supreme Court's major interpretations of *Brady*, *Kyles v. Whitley*, held that evidence is subject to "suppression by the prosecution" whenever prosecutors

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17. 373 U.S. at 87.

18. Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 LOY. L.A. L. REV. 77, 97 (2012) (referring to the original language of Brady as "the exact formulation of what [Professor Starger] call[s] the Brady Rule.").

19. *Id.* at 99.

20. Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015) ("The Supreme Court decided *Brady v. Maryland* in 1963, and it has spent the past fifty years expanding the doctrine.").

21. Starger, *supra* note 18, at 97.

22. 405 U.S. 150 (1972).

23. 427 U.S. 97 (1976).

24. 473 U.S. 667 (1985).

25. 514 U.S. 419 (1995).

26. Starger, *supra* note 18, at 99.

27. 405 U.S. at 154–55.

28. *Id.* at 150–51.

29. *See* Milke v. Ryan, 711 F.3d 998, 1006 (9th Cir. 2013) ("The court documents and the [impeachment] information in the [detective's] personnel file fit within the broad sweep of *Giglio*.").

30. United States v. Agurs, 427 U.S. 97, 107 (1976).

31. United States v. Bagley, 473 U.S. 667, 682 (1985).

fail in their affirmative duty to seek, find, and disclose exculpatory evidence "known to the others acting on the government's behalf,"[32] including police investigators.[33]

In some cases, the demands of *Brady* are fairly easy to meet, and the constitutional requirements are less strict than the related ethical requirements for prosecutors.[34] Much of the disclosure in a modern case—both exculpatory and inculpatory—comes in the form of police reports, which in Arizona must be initially disclosed to the defense at the arraignment or preliminary hearing and must be disclosed thereafter on a supplemental basis.[35] Finding all police reports in a case is, at least in theory, as simple as asking the relevant case officers for their files.

However, the discovery of some impeachment evidence under *Giglio* requires prosecutors to do more searching.[36] Professor Jonathan Abel discusses this subset of impeachment evidence, which is usually referred to as "unrelated-case evidence" because it either crops up from unrelated cases or from events outside any criminal case.[37] The standard flavors of unrelated-case evidence are criminal histories of victims and witnesses[38] and evidence of police misconduct or false statements.[39] This type of evidence is, at times, far more difficult for a prosecutor to discover.[40] The Supreme Court has never placed a limit on the lengths to which prosecutors must go to learn of unrelated-case evidence.[41] That is not to say that the nation's highest court is blind to these difficulties. The Court in *Giglio* recognized that fulfilling *Brady* requirements may impose certain ministerial burdens on prosecutor's offices.[42] The Court advised prosecutors that these burdens could be

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32. 514 U.S. 419, 437 (1995).

33. *Id.* at 438; *see also* Youngblood v. West Virginia, 547 U.S. 867 (2006).

34. ARIZ. R. OF PROF'L CONDUCT ER 3.8(d) requires that evidence be disclosed not only if it is material, but if it even "tends to negate the guilt of the accused or mitigate[] the offense." This language is drawn from Rule 3.8(d) of the American Bar Association's Model Rules of Professional Conduct. It could be argued that, in another sense, the constitutional mandate exceeds the ethical one, because ethics are generally personal and *Brady* applies to all exculpatory evidence possessed by law enforcement, regardless of whether the individual prosecutor knows about it. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 71–74 (2005) (comparing the ethical and constitutional disclosure requirements for prosecutors).

35. ARIZ. R. CRIM. P. 15.1(a), (b)(3).

36. *See* Abel, *supra* note 20, at 748–49.

37. *Id.*

38. *E.g.*, United States v. Agurs, 427 U.S. 97, 100–01 (1976) (murder victim's criminal record); Kyles v. Whitley, 514 U.S. 419, 428–29 (1995) (informant's criminal conduct).

39. Abel, *supra* note 20, at 754.

40. *Id.* at 749, 753. As addressed in Part II, the Ninth Circuit's decision in *Milke v. Ryan* highlights a particularly difficult to find type of unrelated-case material.

41. *Id.* at 749 ("[T]he Court never considered the special challenges posed to prosecutors by unrelated-case material. Specifically, the Court's *Brady* case law has provided no logical limit on how far the prosecutor must go to learn of and disclose material that is unrelated to the case at hand but is still known by some member of the prosecution team.").

42. In a sense, this places *Brady* in the rare breed of rights whose exercise must be funded by the government. Generally, constitutional rights are not self-funding. *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989). However, criminal defendants and inmates have long enjoyed a number of exceptions to this general rule. *E.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (right to medical care for prison inmates);

lightened if these offices would establish efficient systems for tracking impeachment evidence for repeat witnesses—a phrase which here means "police officers and snitches"—and communicating that information to prosecutors working on individual cases.[43]

The federal circuits have been left to clarify what sorts of ministerial burdens we can expect prosecutors to bear, mostly by developing an understanding of what information a prosecutor is imputed with knowing for *Brady* purposes.[44] At least one circuit has noted the possibility that well-intentioned judges expanding *Brady*'s scope could severely cripple the efficiency of the criminal justice system: Namely, if prosecutors are imputed with unrealistically expansive *constructive* knowledge of exculpatory evidence, then the process of seeking out and obtaining *actual* knowledge of this evidence could "condemn the prosecution of criminal cases to a state of paralysis."[45]

To avoid this paralysis, some courts have placed logistical limits on the burdens that *Brady* imposes on prosecutors.[46] None of these limits are unanimously instituted, but three of the most popular ones bear mention. The first and most commonly implemented of these limits is to make prosecutors responsible only for information in the hands of police agencies that are "closely aligned" to that particular prosecutor's office.[47] Second is a logistical limit that prosecutors need not sift through mass amounts of information, especially when the likelihood of finding anything useful in a certain set of files is slim.[48] Finally, some circuits have held that prosecutors do not need to learn of or disclose information that the defendant should be able to learn through reasonable diligence, such as when the documents sought by the defendant are publicly available.[49] By adopting or rejecting these limitations and others like them, each circuit attempts to thread the needle between, on the one hand, overwhelming the prosecutor with unmanageable disclosure burdens and, on the other, allowing prosecutors to withhold vital defense evidence.[50]

II. INTERPRETATION OF *MILKE V. RYAN* AND ITS IMPLICATIONS FOR *BRADY*

In *Milke v. Ryan*, the Ninth Circuit identified three types of impeachment evidence that the prosecution failed to disclose to defense counsel: the detective's

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Douglas v. California, 372 U.S. 353 (1963) (right to state-funded counsel on non-discretionary initial appeals); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to state-funded trial counsel for indigent defendants); Griffin v. Illinois, 351 U.S. 12 (1956) (right to a trial transcript provided at state expense to indigent appellants); *see also* Kenneth Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 CONST. COMMENT. 97, 104–06 (2005).

43. Giglio v. United States, 405 U.S. 150, 154 (1972).

44. Abel, *supra* note 20, at 755–57.

45. United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (quoting United States v. Gambino, 835 F. Supp. 74, 95 (E.D.N.Y. 1993)).

46. Abel, *supra* note 20, at 755–57.

47. *See, e.g.*, United States v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir. 1992).

48. Abel, *supra* note 20, at 756.

49. United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991).

50. Abel, *supra* note 20, at 755.

police personnel file, his history of false statements to courts and grand juries, and his history of violating defendants' constitutional rights.[51] The personnel file contained an internal investigation report showing that the detective had been suspended for five days for taking what the report referred to as sexual "liberties" with a female motorist in exchange for ignoring the possible outstanding warrant for her arrest, then lying about it to superiors.[52] The history of false statements to courts consisted of four trial court orders throwing out cases or evidence because the same detective had made false statements from the witness stand.[53] Finally, the history of constitutional violations was contained in four trial court orders finding that the detective had violated a defendant's rights.[54] Though the full text of the detective's personnel file never made it to the Ninth Circuit,[55] the appendix at the end of the opinion lays out each of the detective's instances of misconduct.[56] The Ninth Circuit concluded that each of these types of evidence could have turned the tide at Milke's trial.[57] Thus, it was not just the combination that made this *Brady* evidence—the prosecution's failure to disclose *any* of these types of evidence would have been a *Brady* violation in the eyes of the court.[58]

The strangest, and perhaps the most controversial, type of *Brady* evidence in the case was the detective's history of Fourth and Fifth Amendment violations. Three of the trial court orders involved constitutional violations without any evidence of false statements.[59] In fact, the detective himself testified at the suppression hearings about the egregious misconduct he had committed that led to the suppression of evidence in these cases.[60] Though these constitutional violations were not linked to any evidence of dishonesty per se, the Ninth Circuit found that they were all *Brady* evidence, noting that disclosure of even one of these three cases could have changed the result of Milke's case.[61]

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51. Milke v. Ryan, 711 F.3d 998, 1006 (9th Cir. 2013).

52. *Id.* at 1011–12.

53. *Id.* at 1013–14.

54. *Id.* at 1014–15. Between the two sets of four court orders each, there are only seven total cases. This is because in one of the cases, *State v. King*, the detective violated the defendant's *Miranda* rights and then lied about doing so. *Id.* at 1013–14. There was also another case involving a constitutional violation, *State v. Mahler*, but the Ninth Circuit did not count this as *Brady* evidence because it was not adjudicated as a constitutional violation until after Milke's trial. *Id.* at 1017, 1021. The Appendix summarizes all eight cases. *Id.* at 1020–21. This Note will ignore *State v. Mahler*, because the focus here is determining what was and was not *Brady* evidence.

55. *Id.* at 1018.

56. *See id.* at 1020–21.

57. *Id.* at 1018–19 ("It's hard to imagine anything more relevant to the jury's—or the judge's—determination whether to believe [the case detective] than evidence that [he] lied under oath and trampled the constitutional rights of suspects in discharging his official duties.").

58. *See id.* at 1014 ("The [court orders finding false statements] make out a *Giglio* violation on their own . . . .").

59. *Id.* at 1014–15, 1020–21.

60. *See id.*

61. *Id.* at 1015 ("Had the Maricopa County Attorney's Office produced the suppression order in *Jones*, Milke could have used it in support of her motions for a new trial

In concluding that these types of evidence all constitute *Brady* evidence, the Ninth Circuit ran through the three Brady requirements: exculpatory value, willful or inadvertent suppression, and prejudice to the defendant.[62] After showing how the evidence, if disclosed, could have favored the defendant, the court turned its attention to whether the evidence was suppressed.[63] As explained above, this analysis depends largely on whether the prosecutor may fairly be expected to know that the evidence exists.[64] The court assumed that both the prosecutors and the police had actual knowledge of this particular detective's misconduct based on its egregious nature.[65] However, it noted that this assumption was not necessary to the decision, because even an "inadvertent failure to disclose is enough for a *Brady* violation."[66]

Milke is a case study in why constructive knowledge of this type of evidence—and, thus, the burden to find it and disclose it—is imputed to the prosecution and not the defense. Milke's appeals team had ten researchers sifting through court records for 7,000 hours, followed by another researcher spending a month reading through motions and transcripts of those cases to find instances of the detective's misconduct.[67] The fact that the court documents showing the detective's misconduct were matters of public record did not matter much—the court found that the defendant did not have enough information to find the *Brady* evidence with reasonable diligence.[68]

There is good reason to believe that the prosecutor in *Milke* could have found this evidence more easily than Milke's appeals team did, or that at the very least the prosecutor would have known to look for it. Prosecutor's offices routinely handle the same types of cases with the same law-enforcement officers. This creates

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and for judgment notwithstanding the verdict, and the outcome might well have been different.").

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

63. *Milke*, 711 F.3d at 1016–18.

64. *See supra* notes 44–45 and accompanying text.

65. *Milke*, 711 F.3d at 1016.

66. *Id.* at 1017.

67. *Id.* at 1018. Judge Kozinski, who wrote both the majority opinion and the concurring opinion in *Milke*, later called this a "gargantuan effort" undertaken by Milke's attorney, an investigator, and a dozen law students at Arizona State University. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. xxiv–xxv, nn.124–25 (2015).

68. *Milke*, 711 F.3d at 1017–18. The court suggests that Milke could have more easily discovered the court documents if she had access to the personnel file, claiming that the personnel file would have included information about cases that the detective had worked on, possibly leading to court orders referencing his misconduct. *Id.* at 1018. This claim finds little support beyond the fact that one of the detective's yearly evaluations mentions six of his more high-profile cases that year. However, one of the cases of the detective's unconstitutional interrogations cited by the Ninth Circuit, *State v. Conde*, came to trial the very same year as that yearly evaluation. *Id.* at 1014. Also, one of the cases involving the detective's false statements, *State v. Rangel*, was remanded to the grand jury that same year. *Id.* Yet, if either *Conde* or *Rangel* was one of those six high-profile cases mentioned in the personnel file, the Ninth Circuit makes no mention of that fact. *See generally id.* This hints that, despite Judge Kozinsky's claim, some or most of the detective's constitutional violations would have to be discovered independent of his personnel file.

a sort of institutional knowledge of the reputations of various individual officers. The court in *Milke* points to this exact type of repeat-player benefit as the reason it claims "[t]he prosecutor's office no doubt knew of [the detective's] misconduct."[69] Prosecutors also work more closely with law-enforcement officers than defense attorneys do, further bolstering this institutional knowledge advantage.

However, even with these advantages, there is no reason to believe that every individual prosecutor is personally aware of every single constitutional violation by every single police officer in that prosecutor's jurisdiction. Because *Brady* treats prosecutor's offices as monoliths, individual prosecutors are treated as if they know everything the office knows. Especially in large prosecution offices, this poses a problem for prosecutors who seek to comply with *Brady*'s and *Giglio*'s mandates as they relate to evidence of a police officer's past constitutional violations. Often, there will be a large divide between what an individual prosecutor is expected to know and what that prosecutor actually knows. Suppose, for example, that the prosecutor in *Milke* had heard from colleagues about three of the four cases of the detective's constitutional violations, but had never heard of the fourth. It seems unlikely that the court would have excused the prosecutor for failure to discover this additional piece of evidence, especially if it happened to be the most probative of the four. While there is nothing to suggest that this was the situation in *Milke* itself, it is easy to imagine how even a court-ordered suppression could escape the institutional knowledge of a prosecutor's office. The people involved in the case where evidence was suppressed could simply forget about the case after several years had passed, or the prosecutor involved could leave the office.[70] If this occurs, and the prosecutor in the case at hand does not manage to discover the fourth violation by some other means, then *Milke* makes clear that the prosecutor runs the twin risks of leaving the case prone to appellate reversal and of failing to fulfill a prosecutor's ethical role as a "minister of justice."[71]

If prosecutors in Arizona were worried about issues like this when the Ninth Circuit decision came down, their fears were only exacerbated by what followed. When the Maricopa County Attorney's Office re-filed its charges against Milke, the Arizona Court of Appeals struck down the re-filing as barred by double jeopardy, based on the same prosecutorial misconduct the Ninth Circuit had found.[72] Maricopa County Attorney Bill Montgomery filed a motion to de-publish the new

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69. *Id.* at 1016.

70. Prosecutor's offices often see notoriously high turnover rates. *See, e.g.*, Kim Smith, *Turnover Cuts Experience Among County Prosecutors*, ARIZ. DAILY STAR (May 23, 2011), http://tucson.com/news/local/crime/turnover-cuts-experience-among-county-prosecutors/article_5769d2f8-4683-56e3-bdd9-62504beca621.html (Pima County Attorney's Office); Bruce Vielmetti, *Study Finds Prosecutor Turnover "Alarming," Suggests Pay Changes*, MILWAUKEE J. SENTINEL (Oct. 26, 2011), http://archive.jsonline.com/newswatch/132619883.html (various Wisconsin offices).

71. *See* ARIZ. R. OF PROF'L CONDUCT ER 3.8 cmt. 1 (2013) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *see also* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1539 (2010) (noting that prosecutors try to comply with *Brady* requirements for both ethical and practical reasons).

72. Milke v. Mroz, 339 P.3d 659, 659 (Ariz. Ct. App. 2014).

opinion,[73] and the Arizona Prosecuting Attorneys' Advisory Council filed an amicus brief, arguing that the holding of the case could "be interpreted as extending Brady to require the State to report every case in which statements made to, or evidence collected by, an officer were suppressed," and that this "sets an unrealistic and impractical disclosure standard for the real world."[74] This motion to de-publish the opinion was dismissed without explicit explanation, possibly because the motion was filed a week too late.[75] Thus, the still-published opinion in *Milke v. Mroz* makes plainly—and in some prosecutors' minds, painfully—clear that prior constitutional violations like those committed by the detective in *Milke v. Ryan* must be disclosed in all state trial courts in Arizona.

However, *Milke* was not "extending *Brady*," as the amicus brief suggested. It did not, and could not, extend anything. Because the case came up on federal habeas petition, the Ninth Circuit had to reach its conclusion in light of the Antiterrorism and Effective Death Penalty Act of 1996,[76] which limits habeas relief to situations where the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or based on an unreasonable determination of the facts.[77] Thus, *Milke*'s finding that *Brady* was violated rests on old cases fundamental to *Brady* doctrine.[78]

In effect, this means that the amicus brief was wrong in saying that *Milke* stretched *Brady* "to require the State to report every case in which statements made to, or evidence collected by, an officer were suppressed."[79] There was no stretching to be done; this was already a requirement. What the history of *Milke* suggests is that there was, and likely still is, a severe interpretive divide in *Brady* doctrine. Some—mainly prosecutors—believed that *Brady* did not mandate disclosure of unrelated constitutional violations by case officers.[80] Others, including the Ninth Circuit, believed that it always had.

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73. Michael Kiefer, *AZ Supreme Court Lets* Milke *Ruling Stand as Precedent*, THE ARIZ. REPUBLIC (Apr. 21, 2015, 3:23 PM), http://www.azcentral.com/story/news/local/phoenix/2015/04/21/bill-montgomery-debra-milke-appeals/26142983/.

74. Amicus Curiae Brief of the Arizona Prosecuting Attorneys' Advisory Council in Support of Real Party in Interest, State of Arizona at 4, Milke v. Mroz, 339 P.3d 659 (Ariz. Ct. App. 2014) (No. CV 15-0016-PR), 2015 WL 6082988.

75. Kiefer, *supra* note 73.

76. Milke v. Ryan, 711 F.3d 998, 1003 (9th Cir. 2013).

77. 28 U.S.C. § 2254(d)(1)–(2) (2012).

78. *Milke*, 711 F.3d at 1005–06 (citing to *Brady*, *Bagley*, *Giglio*, *Kyles*, and *Strickler* to determine that the state court's decision was contrary to clearly established Federal law).

79. *See supra* note 74.

80. This issue is not the only example, and certainly not the most egregious one, of prosecutors and law enforcement officers believing that *Brady*'s requirements are much less stringent than they are. *See* Abel, *supra* note 20, at 775–76.

III. EXISTING PROSECUTION EFFORTS TO TRACK AND DISCLOSE *BRADY* EVIDENCE

Perhaps contributing to this divide in interpretation is the divide in perspective: Prosecutors see *Brady* from an a priori viewpoint, attempting to determine what is and is not *Brady* evidence, while appellate judges always have the benefit of hindsight.[81] Though this divide is nothing unusual, it is unusually wide and problematic in applying *Brady* where the defense theory, the defendant's testimony or lack thereof, and the admissibility and sometimes even the nature of the State's evidence all factor into whether a particular piece of evidence is exculpatory and material.[82] None of these variables are fully known to the prosecutor before trial, but all of them will be clear from the record seen by the appellate court after trial.[83]

In attempts to give clarity to individual prosecutors in the midst of all this uncertainty, prosecutors' offices have developed a wide variety of policies on how to efficiently uncover and disclose *Brady* evidence. At the federal level, the Department of Justice attempted to adhere to the search requirements imposed by the Ninth Circuit in *United States v. Henthorn*[84] by adopting a nationwide policy that whenever a defendant requests a personnel file on a federal agent, the prosecutor assigned to the case will search the agent's file and disclose any *Brady* evidence discovered.[85] Several local prosecutors' offices, including the Maricopa County Attorney's Office,[86] the Pinal County Attorney's Office,[87] and the Pima County Attorney's Office,[88] have established what are referred to—depending on who you ask—as *Brady* lists, *Giglio* lists, liars lists, potential impeachment disclosure databases, or law-enforcement integrity databases.[89] Though the criteria for making it onto one of these lists vary from place to place, *Brady* lists generally keep track of all current police officers with any recorded past instances of misconduct indicating dishonesty or bias.[90]

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81. *See* Medwed, *supra* note 71, at 1540–42 ("How does a prosecutor figure out prior to trial whether evidence is *favorable* to the accused and *material* to guilt or punishment?").

82. *See id.*

83. *See* Alafair Burke, Commentary, Brady*'s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 578–80 (2007) (noting how the prosecutor's cognitive biases work against her in determining what evidence is and is not exculpatory).

84. 931 F.2d 29 (9th Cir. 1991) (holding that impeachment materials contained in testifying officers' personnel files must be disclosed under *Giglio*).

85. Abel, *supra* note 20, at 759.

86. *Id.* at 772.

87. *Id.* at 773 n.157.

88. Matthew Schwartz, *N4T Investigators: The List*, KVOA (Apr. 23, 2015, 2:38 PM), http://www.kvoa.com/story/28884814/n4t-investigators-the-list.

89. Abel, *supra* note 20, at 780.

90. *See id.* at 772; *see also* Schwartz, *supra* note 88.

However, not all prosecutor's offices have *Brady* lists.[91] And even among those that track false statements by law-enforcement officers, few if any appear to keep records of constitutional violations where the violations do not correlate to a recorded false statement made by a law-enforcement officer.[92] These "records of constitutional violations" that, according to *Milke*, must be disclosed include at least unlawful searches and seizures under the Fourth Amendment and un-*Mirandized* or involuntary statements taken in violation of the Fifth Amendment.[93] Though *Milke* only illuminates—rather than decides—that this evidence must be disclosed, for the sake of clarity and convenience the rest of this Note will refer to past recorded incidents of constitutional violations by police witnesses simply as "*Milke* evidence."[94]

There are several possible reasons *Milke* evidence is not tracked like other *Brady* evidence. As addressed above, some prosecutors still do not see disclosure of this evidence as a requirement under *Brady*.[95] It could also be that, even if prosecutors wanted to disclose *Milke* evidence, they would be subject to severe pushback from law-enforcement agencies, making it difficult or even impossible to do so.[96]

Likely contributing to the problem is the well-established fact that *Brady* doctrine in its current state fails to deter all disclosure violations.[97] Prosecutor's offices rarely see convictions overturned on *Brady* grounds.[98] Many scholars believe that this is because the materiality requirement places such a steep hurdle in the way of appellate relief.[99] If other exculpatory evidence is rarely deemed material, it is possible that *Milke* evidence will even more rarely be material. The admissibility of

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91. *See generally* Abel, *supra* note 20, at 762–79 (noting the various policies different agencies and states have taken in response to *Brady*, ranging from making police personnel files open records and tracking false statements through *Brady* lists, to making the files confidential so that not even prosecutors can see records of false statements by individual officers).

92. *See id.*

93. *See* Milke v. Ryan, 711 F.3d 998, 1014–15 (9th Cir. 2013) (outlining the four prior cases where the detective there had "violated the Fifth Amendment or the Fourth Amendment" in circumstances similar to Milke's interrogation).

94. To clarify, so-called *Milke* evidence is a species of *Brady* evidence. Like squares and rectangles, all *Milke* evidence will be *Brady* evidence, but not all *Brady* evidence is *Milke* evidence.

95. *See supra* notes 72–80 and accompanying text.

96. Abel, *supra* note 20, at 779 ("Even when prosecutors learn of police misconduct, police officers spend much energy pressuring them not to disclose it."). This resistance, though constitutionally unsupportable, is not born of pure malignance—officers in jurisdictions with strong *Brady* list policies understandably fear for their jobs if they are placed on a list that effectively prevents them from testifying, and further fear that the lists are easily abused by prosecutors and police chiefs who want a way to blacklist a certain officer outside of the procedural safeguards surrounding most adverse employment actions. *Id.* at 779–80; *see also* Jim Parks, Brady *("Liar's") List a Most Important Issue, in* AZCOPS SPEAKS, Spring 2004, at 2, http://azcops.org/wp-content/uploads/newsletter_050704.pdf.

97. *See* Medwed, *supra* note 71, at 1543–44.

98. *Id.*

99. *Id.*

this evidence is often questionable.[100] Though inadmissibility is not a complete bar to materiality,[101] it does force defendants who are appealing their convictions on *Brady* grounds to exercise more creativity to explain how the inadmissible information could have led to a reasonable probability of altering the verdict. Even if a certain piece of *Milke* evidence is admissible or otherwise usable—for example, by cross-examining the witness on collateral, extrinsic instances of untruthfulness[102]—the evidence will only tend to be material in "he said, she said" cases like *Milke* where at least one element of the charge hinges on whether the fact-finder believes the police officer violated the Constitution.[103] With the use of recorded police interviews and body cameras growing, these cases may become even less common as technology supplants the importance of the credibility of a police narrative of events.[104]

Further weakening *Brady*'s deterrent effect on prosecutors is the simple fact that, for a *Brady* appeal to succeed, evidence that was once hidden must be found by someone on the appeals team.[105] *Milke* is the extreme example—it took thousands of work hours for law students to sift through all of the records relevant to the detective's misconduct.[106] The work there was done using microfiche

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100. This was true even in *Milke*. As the Ninth Circuit mentions, the post-conviction court had found this type of evidence of the detective's past misconduct inadmissible under ARIZ. R. EVID. 404(b). Milke v. Ryan, 711 F.3d 998, 1009 (9th Cir. 2013). The Ninth Circuit's explanation of the importance of this evidence of past misconduct mirrors almost exactly the Rule 404(b) definition of inadmissible propensity evidence: "[S]uch violations could have shown the jury that [the detective] habitually circumvented *Miranda*, as Milke argued in state and federal court." *Id.* at 1010.

101. This fact looks odd at first glance. The counterargument is as follows: How can something change the result of trial if it never comes out at trial? But some cases have held that even inadmissible evidence is important for its ability to open up avenues of investigation that can lead to powerful and admissible exculpatory evidence. *E.g.*, Commonwealth v. Willis, 46 A.3d 648, 670 (Pa. 2012) ("[A]dmissibility at trial is not a prerequisite to a determination of materiality under *Brady*.").

102. Under ARIZ. R. EVID. 608(b), evidence of a witness' prior false statements can be used to establish a good-faith basis for cross-examining the witness about specific instances of conduct probative of untruthfulness. However, cross-examiners using this method are stuck with the witness' answer, even if there is extrinsic evidence that could show that the witness is lying on the stand. 1 SHIRLEY J. MCAULIFFE, ARIZ. PRAC., LAW OF EVIDENCE § 608:3(F) (4th ed. 2017). This is especially dangerous when one considers that the cross-examiner is effectively counting on a witness that the cross-examiner alleges is lying on the stand to not lie on the stand about lying in the past.

103. This is not to say that *Milke* evidence will never be material. The importance of even a single piece of impeachment evidence in the hands of a defense attorney was recognized even before *Brady*. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

104. *See Should Every Police Officer be Outfitted with a Body Camera?*, NBC NEWS (Nov. 26, 2014, 4:05 PM), https://www.nbcnews.com/storyline/michael-brown-shooting/should-every-police-officer-be-outfitted-body-camera-n256881 (noting several police departments that have begun using body cameras).

105. Medwed, *supra* note 71, at 1541–42.

106. *See supra* note 67 and accompanying text.

records[107] rather than digital versions of documents, so there is some hope that computerized "Find" commands[108] could substantially cut down the time it would take to discover all of this information in jurisdictions with digital copies of court documents. Either way, only the most serious of charges or the most egregious of misconduct could justify this level of effort in searching through trial court documents that are unlikely to be admissible, from a defense attorney's point of view.[109] This practicality issue adds an artificial barrier on top of the materiality barrier to defense attorneys asserting *Brady* violations based on undisclosed *Milke* evidence.

A failure to disclose *Milke* evidence is, thus, unlikely to result in appellate reversal. This fact may help to explain why no known prosecutor's office has developed a means of recording and disclosing this type of evidence. With the bar for materiality set as high as it currently is, it is probably possible for whole categories of exculpatory evidence to go undisclosed for years without appellate reversal ever bringing light to their importance.[110]

Of course, the fact that evidence *can* go undisclosed without reversal does not mean that it *should*. Prosecutorial ethics, simple morality, and the Constitution all demand more of prosecutors than that. Prosecutors aware of the disclosure requirements illuminated by *Milke* should seek a way to fulfill those requirements. Indeed, because cases in which this type of evidence *is* material will inevitably arise, prosecutors should be prepared to disclose *Milke* evidence in every case.

IV. DON'T CRY OVER SPILLED *MILKE*: HOW TO IMPLEMENT THE OPINION

To disclose *Milke* evidence, prosecutors first need a way to track it. The first issue with tracking *Milke* evidence is that, regrettably, constitutional violations by police officers are not uncommon.[111] Most criminal cases where police have conducted some search or seizure will involve at least one defense motion to suppress evidence on constitutional grounds, and some bigger or more complicated cases may involve several.[112] These motions are denied more often than not, but

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107. Catherine Hancock, *Reflections on the* Brady *Violations in* Milke v. Ryan*: Taking Account of Risk Factors for Wrongful Conviction*, 38 N.Y.U. REV. L. & SOC. CHANGE 437, 450 n.101 (2014). A microfiche is a flat piece of film containing microphotographs of a document, which can be viewed full-scale by inserting the sheet into what is essentially a magnifying glass attached to a screen.

108. Microsoft Word and the Adobe suite, among other programs, will allow a user to search a document for a particular word or phrase by pressing "Ctrl + F."

109. For the sake of comparison, one study found that a lead counsel in a capital murder case spends, on average, 1,347 hours of work from the indictment until the end of post-conviction proceedings, and that number was only 601 for a non-capital murder case. TERANCE D. MIETHE, ESTIMATES OF TIME SPENT IN CAPITAL AND NON-CAPITAL MURDER CASES: A STATISTICAL ANALYSIS OF SURVEY DATA FROM CLARK COUNTY DEFENSE ATTORNEYS 4 (2012), https://deathpenaltyinfo.org/documents/ClarkNVCostReport.pdf.

110. Medwed, *supra* note 71, at 1543–44.

111. Telephone Interview with Joel Feinman, Pima County Public Defender (Oct. 18, 2017).

112. *Id.*

sometimes evidence is suppressed.[113] As a result, it is very possible that many police officers have seen evidence suppressed based on a constitutional violation that was in some way or another their fault.[114] Finding every one of these violations thus constitutes a full search of all local court cases that are recent enough to have involved any of the officers currently active in—or even recently retired from—that jurisdiction. In many cases, this will be as many as 30 to 40 years.

Assuming that the local court system keeps digital, searchable[115] copies of all of its filings, finding all constitutional violations that have led to suppression orders would be arduous and complicated, but not impossible. In proposing a method for finding and tracking this evidence, this Note assumes that these copies of court filings are contained in an online database that allows attorneys to look up case documents, including all orders entered in a case, simply by searching the defendant's name or the case number.[116] Ideally, this court database would also contain all motions filed, but this should not be strictly necessary. Through the following ten steps, a prosecutor's office could use the court's database to develop a database of *Milke* evidence to be disclosed to defense counsel for each officer involved in a particular case:

> 1. The office should appoint a veteran attorney to supervise the project and gather a sufficiently large group of volunteers or employees with at least some degree of legal training. Frankly, law students would be ideal for this task, because they are generally both familiar with the legal jargon of Fourth and Fifth Amendment law and willing to work for little or no pay.
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> 2. The supervisor should train the workers on how to most efficiently carry out steps 4–8, outlined below, to find *Milke* evidence.
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> 3. The supervisor should compile a list of all officers who are either currently working in the jurisdiction or still testifying in cases from when they were working. This list should be handed out to each of the workers.
>
> 4. The workers should search case by case through the court records, starting with the first case worked by the most veteran law-enforcement officer in the jurisdiction, looking for documents with titles such as "Order Granting Defendant's Motion to Suppress" or even "Order Denying Defendant's Motion to Suppress"[117] and then

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113. *Id.*

114. *Id.*

115. That is, the files are kept in some form that allows a user to run a "Find" command for specific text.

116. In Pima County, a website called Agave stores records from both the Superior Court and the Justice Court.

117. This may seem odd, but orders *granting suppression* may be under-inclusive when looking for all orders *finding constitutional violations*. The independent-source doctrine, the inevitable-discovery doctrine, the good-faith exception, standing doctrine, and the knock-and-announce rule are all circumstances in which a court can find that the constitution was violated by a police officer, but that evidence should not therefore be suppressed. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("Suppression of

reading those documents when they indicate that the court may have found a constitutional violation committed by one or more of the officers involved.

5. When a worker comes across a court order finding a constitutional violation, that worker should then identify which officer or officers the court found to be at fault,[118] which constitutional right was violated, and how the officer violated the right.[119] This information should all be entered, along with the case number and perhaps a link to the order, in a database that lists all such constitutional violations, sorted by officer.[120]

6. This process should be repeated for all courts, including appellate courts, in the jurisdiction where this particular prosecutor's office resides.

7. The supervisor should conduct regular quality-control checks to ensure that each worker is finding and properly recording each constitutional violation in every case assigned to that worker.

8. The workers should also check through the office's own intake records for any cases that were never charged because the intake attorney believed there to be a constitutional violation that fatally impaired the case.[121]

9. Once all of the documents have been entered in the database, trial prosecutors in individual cases can search the document or database for all constitutional violations committed by a particular officer, and disclose that information to defense counsel when it constitutes *Brady* evidence.

10. On an ongoing basis after the initial creation of this database, prosecutors working in the intake unit, the trial unit, and the appeals unit should be required to insert a new entry in the database whenever a constitutional violation is found in one of their cases.

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evidence . . . has always been our last resort, not our first impulse."). But for *Brady* purposes, all violations should be tracked.

118. At times, even determining the names of the officers involved may be difficult. Not every local court record is thorough, and some appellate courts consciously exclude the officer's name to avoid publicly humiliating the officer. In these circumstances, it may be necessary to look to other files related to the case, including the prosecutor's file or the police department's file if they still exist.

119. In effect, this is the same information contained in the appendix in *Milke*. *See* Milke v. Ryan, 711 F.3d 998, 1020–21 (9th Cir. 2013).

120. A simple Microsoft Excel document would be sufficient, though Google Forms and Google Sheets could be more convenient in some cases, as these programs allow information to be entered into a single spreadsheet from multiple computers at once. Even more sophisticated programs could be used if additional security or functionality is needed.

121. This is, admittedly, a bit outside of *Milke*'s mandate. However, cases where the prosecutor's office was not even willing to argue the constitutionality of a certain police action would presumably be even more egregious than those in which the case was charged and evidence was later suppressed.

Admittedly, this method does not solve every problem that may arise in tracking and disclosing evidence of prior constitutional violations. Sometimes multiple officers will be jointly responsible for a single constitutional violation in a case.[122] Other times, a constitutional violation will never be adjudicated because the case pleads out before the defense ever moves to suppress.[123] Officers will move from one department to another, or go off-duty for a time and then come back.[124] Some violations will inevitably be missed as the workers fail to perceive a particular violation in the mass of court documents for a given jurisdiction.[125] Other violations will be misattributed or misinterpreted.[126] Some police officers will get caught in the middle of unanticipated shifts in Fourth or Fifth Amendment case law and be held responsible for actions that were considered perfectly constitutional at the time they were taken.[127] Additional procedures will have to be put in place for each of these issues to be resolved, so that a complete and accurate database can be maintained.

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122. Fourth Amendment case law is rife with examples of this, probably because so much of police work is a group—or at least partner—effort. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 473–74, 479–83 (1963) (six or seven federal narcotics agents violated the Fourth Amendment by arresting James Wah Toy without probable cause); Kyllo v. United States, 533 U.S. 27, 29–30, 34–35 (2001) (two agents illegally searched Danny Kyllo's apartment using a thermal imager). Fifth Amendment violations may be even more commonly based on the conduct of multiple officers, because so many interrogations involve multiple officers. In fact, one of the core concerns in *Miranda* was with a particular type of two-officer interrogation called the "Mutt and Jeff" act, more commonly known today as the "good cop, bad cop routine." Miranda v. Arizona, 384 U.S. 436, 452–54 (1966).

123. Pleading guilty, often as part of a plea bargain, is by far the most common way for a defendant to be convicted in either the state or federal system. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Though some states allow defendants to enter a conditional plea and preserve their right to appeal an issue like Fourth Amendment suppression, several others—including Arizona—do not allow this practice. *E.g.*, State v. Arnsberg, 553 P.2d 238, 239 (Ariz. Ct. App. 1976). Even in states where the legislature and courts allow such a plea, the prosecution is under no obligation to offer it. Thus, some defendants forgo even strong claims for suppression in favor of the lesser sentence offered by the plea bargaining process. Note, *Conditional Guilty Pleas*, 93 HARV. L. REV. 564, 577–80 (1980).

124. As with other types of specialized workers, experienced police officers from one state can usually qualify, get a job, and start working in another state or another jurisdiction within the same state without going through all the same training and testing a new officer might have to complete. This process is referred to as a "lateral transfer." *See Police Officer Lateral Transfers*, CITY OF PHOENIX, https://www.phoenix.gov/police/joinphxpd/police-officer-lateral-transfers (last visited Oct. 18, 2017).

125. This is more a fundamental fact of human imperfection than anything else. Diligent double-checking and careful supervision can reduce the total number of mistakes, but if the total number of constitutional violations is large, the odds of at least one case slipping through the cracks will be high.

126. *See supra* note 125.

127. One example pertinent to Arizona would be the issue presented in *State v. Valenzuela*, where the Arizona Supreme Court held that telling drivers that ARIZ. REV. STAT. ANN. § 28-1321(A), (B) (2013) "required" them to submit to a blood draw after a DUI arrest rendered those drivers' consent involuntary, thus making a long-standing practice

Even if the list were perfectly complete, however, that would be no guarantee of "smooth sailing." Police unions already oppose *Brady* lists,[128] even though most *Brady* lists have only a small number of officers on them at a time.[129] The proposed "*Milke* list" would likely include more officers. Because *Milke* evidence is so much less likely to be material or admissible than the type of credibility evidence contained in a *Brady* list, there is good reason to believe that officers could keep their jobs even if they find themselves with several entries on the *Milke* list. But that is unlikely to stop individual officers from worrying about subtler adverse employment actions being taken against them if they start to accumulate a few too many violations. Also, in Arizona and other states, *Brady* lists are a part of the public record,[130] and presumably a *Milke* list would be too. Public disclosure of such information could be very embarrassing for an officer. Ultimately, this all produces a chilling effect that, at first blush, seems to do exactly what one would hope: curbing police officers from violating the Constitution. But the further a police officer shies away from the constitutional line, the slower the investigation goes, and the fewer crimes can be investigated. Too much chilling and the entire law-enforcement machine could be frozen in place.

Another, even more obvious, issue with this method is that it will take time. For large offices, implementing this system could take months. For smaller offices, it may be difficult or impossible to institute scaled-down versions of this system. In the interim for large offices, and possibly on a permanent basis for smaller offices, some other method will have to be used to discover and disclose constitutional violations. The simplest solution would be to ask each officer, preferably in a recorded interview, whether a court has ever found that the officer committed a constitutional violation. This is far from perfect,[131] but it is better than nothing. Supplementing this bare-bones approach by asking senior prosecutors in the same office if they have heard of *Milke* evidence against the officer produces a passable temporary solution that should catch most constitutional violations. Still, this interim solution is not sufficient long-term in a large-scale office. The more systematic approach described above is necessary in such situations.

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unconstitutional. State v. Valenzuela, 371 P.3d 627, 634 (Ariz. 2016). The Court in *Valenzuela* noted that this was a shift in the law in this area, and thus found that officers who had told DUI arrestees that their consent was "required" were therefore shielded by the good-faith exception to the Fourth Amendment. *Id.* at 309. *Milke* is not clear as to whether good-faith constitutional violations like this would have to be disclosed under *Brady*. If so, many police officers, especially those specializing in DUI investigations, would have to explain to juries why they drew blood from DUI arrestees without valid consent. A discussion of whether this would be a positive result would go beyond the scope of this Note.

128. *See generally* Abel, *supra* note 20.

129. *See, e.g.*, Schwartz, *supra* note 88 (listing only 16 out of 1,497 total employees of the Pima County Sheriff's Department as being on the *Brady* list, with only one of those being a Deputy Sheriff, as of 2015).

130. *Id.*

131. A veteran officer could forget such a finding, or an officer could fail to understand a complicated legal matter within the court's suppression order, or the officer could have to leave the suppression hearing before the court rules on whether a violation occurred. Particularly unscrupulous officers might even lie and claim that they have never been found responsible for a constitutional violation when they actually have.

Finally, it must be noted that this database does not, on its own, discharge an individual prosecutor's obligations under *Brady* and *Milke*. Prosecutors will need to individually analyze the evidence found in the database to determine what is and is not *Brady* evidence in a particular case. *Milke* evidence of a Fifth Amendment violation, for example, may be wholly irrelevant in a case where the defendant provided no statements to police. Also, *Milke* evidence relating to officers with minimal involvement in the investigation may not need to be disclosed. These and other similar considerations will have to be handled on a case-by-case basis. The *Milke* list produced by the system promulgated above is just a tool for prosecutors to fulfill their *Brady* obligations. The list does not do their jobs for them.

CONCLUSION

Though the *Milke* list proposed in this Note could be difficult to produce, the mandates of due process must be upheld. *Milke* makes clear that the disclosure of this type of evidence is a due process requirement. By following the method laid out in this Note, this requirement can be met with minimal cost. Like it or not, defendants in criminal cases have a due process right to *Milke* evidence. Prosecutors who seek to do justice must find a way to provide it.