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Changing the Culture of Disclosure and Forensics

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Changing the Culture of Disclosure and Forensics

Valena Beety*

Abstract

This Essay responds to Professor Brandon Garrett's Constitutional Regulation of Forensic Evidence, and, in particular, his identification of the dire need to change the culture of disclosing forensic evidence. My work on forensics is—similarly to Garrett's—rooted in both scholarship and litigation of wrongful convictions. From this perspective, I question whether prosecutors fully disclose forensics findings and whether defense attorneys understand these findings and their impact on a client's case. To clarify forensic findings for the entire courtroom, this Essay suggests increased pre-trial discovery and disclosure of forensic evidence and forensic experts. Forensic analysts largely work in police-governed labs; therefore, this Essay also posits ways to ensure complete Brady compliance as well as obtain accurate and reliable forensic findings. Correctly understanding forensic findings can remedy a lack of transparency surrounding whether results were completely disclosed and whether the results support the testimony of lab analysts. Finally, to assist the court with its gate-keeping role of admitting forensic science disciplines and findings, this Essay recommends that courts appoint independent experts under Federal Rule of Evidence 706.

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“There is simply no room in our judicial system for unethical evidentiary gamesmanship.”

- *Justice Allen Hayes Loughry, Concurring in Buffey v. Ballard*¹

I. Introduction

Joseph Buffey was 19 years old when, on the advice of his attorney, he pled guilty to a rape and robbery he did not commit.² Only afterward did he learn that the DNA evidence exonerating him of the crime, and inculcating the true perpetrator, was available to prosecutors at the time Joe pled guilty.³ Thirteen years later, Joe was finally released from prison when the West Virginia Supreme Court of Appeals ruled the prosecution should have disclosed the exculpatory DNA evidence pre-trial.⁴

1. 782 S.E.2d 204 (W. Va. 2015) (Loughry, J., concurring).

2. *See id.* at 207–09 (describing the circumstances of Buffey’s plea decision).

3. *Id.* at 209. Joseph Buffey accepted an exploding plea offer on February 6, 2002; on February 8, a lab analyst at the West Virginia State Police Crime Lab concluded that Buffey was not the assailant. *Id.* at 208. On February 9, the lab began to retest samples and came to the same conclusion. *Id.* The final concluded report was issued on April 5, 2002; Mr. Buffey was sentenced six weeks later on May 21, 2002. *Id.* at 209.

4. *See id.* at 221 (“Based upon the foregoing analysis, this Court finds that the State’s failure to disclose favorable DNA test results obtained six weeks

This small case from West Virginia is the first decision nationally to require pre-trial disclosure of *Brady* material. The criminal justice system failed Joseph Buffey. But does blame fall on the prosecutors who failed to disclose the exculpatory DNA evidence and violated their duties under *Brady*? Or does it fall on the defense attorney who pressured Joe to take a plea deal and never followed up on requesting the forensic results?

Professor Brandon Garrett's piece, *Constitutional Regulation of Forensic Evidence*,⁵ delves into a necessary cultural change: one of disclosure. Changing the culture of disclosure of forensics—by both the prosecution and the defense—can establish a more trustworthy system with fewer wrongful convictions. Garrett holds a distinguished position from which to examine wrongful convictions and their causes with his well-known work using data and case documentation to diagnose the causes of wrongful convictions.⁶ In *Constitutional Regulation of Forensic Evidence*, Garrett discusses how the Supreme Court edges toward greater disclosure of forensic evidence, while forensic disciplines are increasingly revealed as inaccurate or fallible.⁷ In his words, forensic findings are more important to court cases now while simultaneously recognized as less reliable.⁸ Garrett reasonably argues for constitutional regulation of the disclosure of forensic evidence and due process requirements for discovery.

This responsive Essay joins Garrett in calling for greater disclosure and in appealing to courts for greater recognition of faulty forensics and the barring of unreliable and inaccurate expert testimony. Driven by my own litigation of wrongful

prior to the Petitioner's plea hearing violated the Petitioner's due process rights, to his prejudice.”).

5. Brandon Garrett, *Constitutional Regulation of Forensic Evidence*, 73 WASH. & LEE L. REV. 1147 (2016).

6. See generally BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (reviewing the trial transcripts, hearing transcripts, and other records of over 200 DNA exoneration cases).

7. See generally Garrett, *supra* note 5.

8. See *id.* at 1149 (“The changing judicial understanding of the constitutional significance of forensic evidence in criminal cases may follow from a new appreciation that forensic evidence is not only increasingly important in criminal cases, but also that many traditional forensic techniques lack adequate reliability and validity.”).

convictions due to faulty forensic evidence, I ask even more of our courtroom actors: for prosecutors to adhere to their duties of disclosure both pre-trial under *Brady* and post-conviction under Professional Responsibility Rule 3.8⁹ and for judges to use the tools at their disposal to ensure their own accurate understanding of scientific evidence presented at trial. These tools include appointing independent forensic experts under Rule of Evidence 706¹⁰ and Jason Kreag's recommendation of a *Brady* colloquy,¹¹ where judges ask prosecutors about their compliance with disclosure.

II. The Supreme Court and a Necessary Cultural Change in Disclosure

Professor Garrett identifies the necessary cultural change of disclosure by referencing the Supreme Court's protection—and lack of protection—of due process rights regarding defense access to forensic evidence.¹² According to Supreme Court precedent, there is no due process protection against destroying forensic evidence, no due process right for a defendant to access an expert, and, finally, no freestanding nonprocedural due process right to DNA evidence.¹³ However, the Supreme Court has supported a defendant's right to confront lab analysts and forensic experts and has necessitated live testimony to explain forensic lab findings.¹⁴

As Garrett notes, the Supreme Court has also heightened the obligations of defense counsel to litigate forensic evidence.¹⁵ In

9. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N, Discussion Draft 1983) (setting forth eight separate special responsibilities of a prosecutor).

10. FED. R. EVID. 706 (providing for court-appointed experts on a party's motion or by the court on its own).

11. Jason Kreag, *The Brady Colloquy*, 67 STAN. L. REV. ONLINE 47, 47–58 (2014–2015).

12. Garrett, *supra* note 5, at 1156.

13. See Garrett, *supra* note 5, at 1148 nn.1–3 (describing shortcomings in the due process rights of the criminally accused).

14. See *id.* at 1148 & n.6 (citing *Williams*, *Bullcoming*, and *Melendez-Diaz*, which “tightened requirements to present live testimony in the courtroom”).

15. *Id.* at 1149 (citing *Hinton v. Alabama*, 134 S. Ct. 1081(2014)).

Hinton v. Alabama,¹⁶ the Supreme Court chastised defense counsel for failing to request a forensic expert, noting “criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.”¹⁷ And yet, is the back and forth—between the failure of defense attorneys to discover forensic evidence and the failure of prosecutors to disclose *Brady* evidence—ultimately helpful to ensure disclosure and examination of forensic findings?

Garrett answers yes: defense culture is changing, and it increasingly trains defense attorneys on forensics.¹⁸ Lower courts identify the failure to investigate forensics or obtain experts as ineffective assistance of counsel.¹⁹ With fewer and fewer cases going to trial, defense counsel has a greater responsibility to investigate forensics early in the face of a plea bargain.²⁰ The Supreme Court may ultimately determine that when counsel fails to request a *Daubert* hearing or query forensic evidence pre-trial, this dereliction is equally as damaging as failing to cross-examine experts at trial. The determination that counsel is effective, or not, is tied to “reasonableness under prevailing professional norms,”²¹ and those norms are changing.

III. Prosecutors’ Ethical Obligations to Disclose

A. Prosecutorial Disclosure Pre-Trial

Prosecutorial culture, on the other hand, appears slower to change. Professor Garrett correctly points out the failure of prosecutors to disclose forensic discovery.²² His article also notes that the ABA advises that full documentation from forensic labs should be disclosed—the underlying methods and files for the

16. 134 S. Ct. 1081 (2014).

17. *Id.* at 1088 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011)).

18. Garrett, *supra* note 5, at 1176.

19. *See id.* at 1167–70 (outlining determinations of ineffective assistance of counsel in lower courts due to attorney errors regarding forensic evidence).

20. *Id.* at 1171.

21. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

22. Garrett, *supra* note 5, at 1180–82.

analysis, not simply the results.²³ As Garrett notes, this parallels the Supreme Court's Confrontation Clause rulings, requiring the presence of an analyst to testify rather than the bare results of the analysis.²⁴ When prosecutors are the only individuals with full access to the forensic findings and the underlying methods and files, the same bias and tunnel vision that plagues prosecutors in their refusal to re-examine cases post-conviction can likewise play a detrimental role in the initial prosecution.

Our court system is now dependent on plea bargains to function.²⁵ As Judge Rakoff of the Southern District of New York remarked, the plea bargaining system is unjust, excessive, and "so totally untransparent it is going to lead to some serious mistakes."²⁶ These mistakes have already been made: the National Registry of Exonerations has found that 40% of people exonerated in 2015 were convicted based on taking a guilty plea; these cases range from drug crimes to homicides.²⁷ One easy and effective solution to more informed plea agreements is open case-file discovery.²⁸ A closed-file system exacerbates timing concerns

23. *Id.* at 1180 n.142.

24. *See generally* Williams v. Illinois, 132 S. Ct. 2221 (2012); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

25. *See generally* Bennett Capers, *The Prosecutor's Turn*, 57 WM. & MARY L. REV. 1277 (2016) (discussing the increasingly prominent role plea bargaining has in our criminal justice system). A substantial majority of criminal cases are resolved by guilty pleas; thus, plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system." Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (emphasis added).

26. Judge Jed Rakoff, S.D.N.Y., Keynote Address at the Eleventh Annual H.F. Guggenheim Symposium at the John Jay College of Criminal Justice: Making Room for Justice: Crime, Public Safety & the Choices Ahead for Americans (Feb. 26, 2016); *see also* Adam Wisnieski, *A 'Draconian' System Where the Innocent Plead Guilty*, JOHN JAY COLLEGE, <http://thecrimereport.org/2016/02/29/2016-guggenheim-3/> (last visited Feb. 4, 2016) (reporting on Judge Rakoff's keynote address) (on file with Washington & Lee Law Review).

27. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, at 1 (2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf.

28. This was noted recently in an empirical study comparing the open-file system of North Carolina with the closed-file system of Virginia. *See* Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016).

and disclosure issues by allowing prosecutors to only produce critical evidence on the eve of, or at, trial.²⁹

In response to wrongful convictions caused by prosecutorial misconduct, the Texas legislature passed the Michael Morton Act in 2013 requiring open file discovery.³⁰ The Act requires prosecutors to disclose any information favorable to the defense, including exculpatory, impeaching, and mitigating evidence. This disclosure is required “as soon as practicable” after the prosecution receives a request, and extends even after conviction. This Act serves as an example of open-file discovery, and its implementation has highlighted resistance by some prosecutors to comply. Indeed, the State Bar of Texas recently issued an ethics opinion chastising prosecutors who attempt to circumvent the Act by requiring defendants give up discovery rights in exchange for a plea offer.³¹

Perhaps these prosecutors are concerned because in cases of a plea agreement, the prosecutor may not have yet examined the case as fully as she would in preparation for trial, and may not have even discovered *Brady* evidence, particularly forensic evidence.³² Federal Rule of Criminal Procedure Rule 16 provides prosecutors with some discovery leeway for forensics. Rule 16 only requires discovery of scientific reports and examinations if

29. See *id.* at 303 (describing closed-file jurisdictions). It should be noted that in their research, even with the open-file discovery system, relevant information is frequently missing from the file; see also Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 45 (2015) (“A number of state jurisdictions . . . make the trial the ‘focal point’ of their discovery and disclosure rules.”).

30. See Brandi Grissom, Perry Signs Michael Morton Act, *Tex. Tribune* (May 16, 2013), <https://www.texastribune.org/2013/05/16/gov-rick-perry-signs-michael-morton-act/> (last visited Feb. 4, 2017) (discussing the “measure that aims to avoid wrongful convictions by preventing prosecutors from suppressing evidence”) (on file with the Washington and Lee Law Review).

31. See TEXAS APPLESEED, TOWARDS MORE TRANSPARENT JUSTICE v (2015), http://texasdefender.org/wp-content/uploads/Towards_More_Transparent_Justice.pdf (reporting that some prosecutors require “that defendants waive the right to discovery in exchange for a favorable plea, or that defendants forfeit other rights in exchange for accessing discovery”). The State Bar found that these “waivers” violate the Texas Rules of Professional Conduct. *Id.*

32. See Baer, *supra* note 29, at 44 (“If ninety-five percent of the defendant pool pleads guilty, then resource-deprived prosecutors should rationally delay some of their preparation for trial until they know for sure whether a given defendant plans to plead not guilty.”).

such evidence “is material to preparing the defense” or “the government intends to use the item in its case-in-chief at trial.”³³ At the time of a plea, a prosecutor may only have given a cursory glance at crime lab results.

The expectation of prosecutors is changing. Joseph Buffey’s case is particularly instructive as the first coherent opinion requiring *Brady* disclosure of exculpatory—not impeachment—evidence during plea negotiations before trial.³⁴ While the U.S. Supreme Court has ruled impeachment evidence does not need to be disclosed in plea negotiations,³⁵ the Court has not ruled on exculpatory evidence. The West Virginia Supreme Court of Appeals ruled that the constitutional due process rights in *Brady* extend to the plea negotiation stage of criminal proceedings.³⁶ The Court found “that the DNA results were favorable, suppressed, and material”; thus nondisclosure violated Buffey’s due process rights and was prejudicial.³⁷ In Justice Loughry’s concurrence, he stated that *Brady* disclosure requirements “extend to evidence in the State’s control that is favorable to the defendant regardless of whether a plea agreement or trial ensues.”³⁸ Furthermore, the Court found that the evidence does not need to be exonerative, and the standard for materiality “does not require a demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.”³⁹

33. FED. R. CRIM. P. 16(a)(1)(F)(iii).

34. *Buffey v. Ballard*, 782 S.E.2d 204, 212–18 (2015) (examining the applicability of *Brady* to the plea negotiation stage).

35. *See United States v. Ruiz*, 536 U.S. 622, 623 (2002) (“Although the Fifth and Sixth Amendments provide, as part of the Constitution’s ‘fair trial’ guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, . . . a defendant who pleads guilty foregoes a fair trial as well as various other accompanying constitutional guarantees.” (internal citation omitted)).

36. *Buffey*, 782 S.E.2d at 218.

37. *See id.* (“We find that the DNA results were favorable, suppressed, and material to the defense. Thus, the Petitioner’s due process rights, as enunciated in *Brady*, were violated by the State’s suppression of that exculpatory evidence.”).

38. *Id.* at 221 (Loughry, J., concurring).

39. *Id.* at 212 (majority opinion).

B. Prosecutorial Ethical Obligations Post-Conviction

When discussing prosecutorial disclosure, prosecutors face a different ethical standard than defense attorneys. Prosecutors do not represent an individual client; rather, they represent the state and the government. The duty of a prosecutor is to ensure justice, even if that means “losing” an individual case. Under the ABA Rules of Professional Conduct 3.8:

[A] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and rectify the conviction of innocent persons.⁴⁰

This responsibility requires disclosure of evidence that helps a defendant and undermines the state’s case.

In 2008, the ABA amended Rule 3.8 to affirmatively require a prosecutor to disclose evidence of a defendant’s innocence found *after* the conviction.⁴¹ A minister of justice seeks the truth whether before or after a conviction. And yet while the fear of wrongful convictions has galvanized defense attorneys to advocate more robustly for clients and has led courts to chastise a lack of defense, prosecutors often remain planted all the more firmly in their original positions. Instead of “seek[ing] to remedy

40. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 1983).

41. *Id.* at r. 3.8:

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor’s jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

the conviction,”⁴² prosecutors challenge the testing of DNA evidence, argue against its relevancy, and often re-bring charges if a conviction is reversed in court. Indeed, less than half the states have adopted—or even considered—Rule 3.8 (g) and (h) for state law.⁴³ Prosecutors proclaim the amendments are insulting and resent the insinuation of poor behavior.

Insinuations? In Joseph Buffey’s case, prosecutors re-filed the exact same charges as soon as the West Virginia Supreme Court of Appeals vacated them—even after they had prosecuted and convicted the true perpetrator, identified by DNA, of the same single-assailant crime.⁴⁴ Instead of following Rule 3.8’s admonition that “guilt is decided upon the basis of sufficient evidence” and that prosecutors are obliged to “rectify the conviction of innocent persons,” prosecutors in Clarksburg, West Virginia,⁴⁵ convicted the true perpetrator, Adam Bowers, of this single-assailant crime⁴⁶ and then re-charged Buffey with the same assault. Additionally, prosecutors charged Joe with statutory rape from 2002 because as a 19-year-old he fathered a child with his then 14-year-old girlfriend.⁴⁷ To avoid being registered as a sex offender for life, Joe took an *Alford* plea⁴⁸ to

42. *Id.* at r. 3.8(h).

43. See *CPR Policy Implementation Committee Report: Rule 3.8(g) and (h)*, AM BAR ASS’N (Sept. 1, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf.

44. See *Joseph Buffey Agrees to Plea Deal, Freed After 15 Years in Prison*, CHARLESTON GAZETTE-MAIL (Oct. 11, 2016), <http://www.wvgazette.com/news-cops-and-courts/20161011/joseph-buffey-agrees-to-plea-deal-freed-after-15-years-in-prison> [hereinafter GAZETTE-MAIL] (last visited Feb. 4, 2017) (reporting on Buffey’s *Kennedy* plea in response to the renewed charges) (on file with the Washington and Lee Law Review).

45. Specifically, these prosecutors were David Romano and Cindy Romano, Harrison County Office of the Prosecuting Attorney.

46. *Clarksburg Man Sentenced After Raping and Robbing 83-Year-Old Woman*, 12 NEWS-WBOY (Sept. 2, 2015), <http://www.wvalways.com/story/29946684/clarksburg-man-sentenced-after-raping-and-robbing-83-year-old-woman> (last updated Sept. 14, 2015) (last visited Feb. 4, 2017) (on file with Washington and Lee Law Review).

47. GAZETTE-MAIL, *supra* note 44.

48. An *Alford* plea, known in West Virginia as a *Kennedy* plea, is where the defendant does not concede guilt but instead concedes the state would have enough evidence to find him guilty. For the genesis of this sort of plea agreement, see generally *North Carolina v. Alford*, 400 U.S. 25 (1970).

the original crime he did not commit, and the state dropped the statutory rape charge. Thirteen years after his original conviction, Joseph Buffey pled guilty⁴⁹—again—to a crime he did not commit on October 11, 2016. In his own words, he told the court he did not commit the crime, but thought it was in his best interest to plead guilty.⁵⁰ As is often the case in these re-prosecutions, the prosecutors asked only for a sentence of time served.

Professor Keith Findley has documented the accompanying “time served” plea offer to re-brought charges, usually for particularly heinous and memorable crimes.⁵¹ Do even the prosecutors believe the person they re-charged committed the crime if they are allowing a perpetrator to be free on the streets? Yet prosecutors can be reluctant to consent even to DNA testing to determine if the convicted person is truly guilty. Although courts are increasingly receptive to allowing DNA testing to determine the true perpetrator, prosecutors continue to oppose it.

In Charles “Manny” Kilmer’s case,⁵² although the FBI admitted to its analyst falsely testifying and offered free DNA testing to rectify this false testimony, the local state prosecutor objected to the testing. Are the people of West Virginia and the citizens of that county well represented when their ministers of justice insist on expending significant state resources to seek an

49. Mike Valentine, *Joseph Buffey Enters Alford Plea, Walks Free*, 5 NEWS WDTV.COM (Oct. 11, 2016, 11:43 AM), <http://www.wdtv.com/content/news/Charges-dismissed-against-Joseph-Buffey--396651991.html> (last visited Jan. 12, 2017) (on file with the Washington and Lee Law Review).

50. GAZETTE-MAIL, *supra* note 44.

51. Keith Findley, Associate Professor of Law, University of Wisconsin School of Law, *Reconvicting the Innocent? Plea Bargaining in the Shadow of a New Trial* (Nov. 21, 2015).

52. As we said in our brief in support of Manny Kilmer:

There is no possible downside to allowing the FBI to perform DNA testing at zero cost to the State of West Virginia. There is certainly a downside to continuing to try to prevent a seventy-one-year-old man who has asserted his innocence for the past two-and-a-half decades from obtaining DNA testing, especially in light of the Circuit Court of Berkeley County’s order granting testing and the FBI’s offer to provide testing.

Response in Opposition to Petition for Writ of Prohibition, *Kilmer v. Ballard*, No. 15-C-351 (W. Va. 2016).

extraordinary remedy to fight against DNA testing that the FBI has offered to perform at absolutely no cost to the state?

Manny Kilmer was convicted in 1991 of murdering Sharon Lewis in Martinsburg, West Virginia. His case involves a coerced confession, a snitch, poor lawyering, and improper forensic science exacerbated by false scientific testimony.⁵³ If the prosecuting attorneys are as confident as they profess that Manny perpetrated the murder of Sharon Lewis, then the FBI has offered them a way to confirm, once and for all, the integrity of the conviction. On the other hand, if there is any doubt whether the right person was convicted, a prosecutor would presumably be eager to allow the FBI to perform DNA testing to correct a manifest injustice. The prosecutors are unable to explain how allowing DNA testing could cause harm to the state. Opposing testing not only disregards the prosecutor's duty as a minister of justice, it also wastes valuable state resources.

In summary, prosecutors hold a duty to disclose evidence of innocence under Rule 3.8 and also to serve as ministers of justice rather than simply as advocates. Their duty to uphold justice extends after a conviction, particularly when evidence exposes a wrongful conviction. The disclosure of forensic evidence is key to an accurate conviction and to upholding the requirements of the position as prosecuting attorney.

IV. Solutions for Judges

Professor Garrett's timely piece discussing the culture of disclosure coincides with a recent report by the President's Council of Advisors on Science and Technology (PCAST) questioning the reliability of certain forensic disciplines.⁵⁴ The report, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, made eight recommendations for the FBI, the Attorney General, the

53. See generally *id.* (describing what had happened to Kilmer).

54. PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFFICE OF THE PRESIDENT, *FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* (2016) [hereinafter *STRENGTHENING*], https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

judiciary, and science-based agencies. These recommendations emphasized the need for objective analysis and empirical research on the accuracy and consistency of forensic results, the challenging duty of the court to evaluate expert testimony, and the need for established standards for validity and reliability in forensic science disciplines.⁵⁵ The forensic disciplines receiving the most focus in the Report are bite marks, fingerprints, firearms, mixture samples of DNA, and footwear. PCAST was particularly concerned—as was the National Academy of Sciences in their 2009 report on forensics⁵⁶—with independent scientists providing analyses rather than police labs and the gate-keeping role of judges in admitting reliable evidence. To assist judges in this role, PCAST recommended “best practices” and training materials for judges on understanding scientific standards for validity. The Attorney General and the FBI—the prosecutors and the police—rejected PCAST’s recommendations.⁵⁷

I suggest that courts appoint independent experts to evaluate forensic evidence under Federal Rule of Evidence 706. While this has been rarely done, an independent expert can assist judges in their gate-keeping role, particularly with ongoing changes in science. In *Jackson v. Pollion*,⁵⁸ a the Seventh Circuit prisoner health case, Judge Richard Posner suggests the same and lambasts the legal profession to “get over its fear and loathing of science.”⁵⁹ Under Rule 706, parties may submit nominations and the court may on its own motion appoint an expert.⁶⁰

55. Indeed, the Report closely tracks Federal Rule of Evidence 702 requirements on admitting experts.

56. NAT’L ACADEMY OF SCIENCES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter *Strengthening*].

57. *White House Advisory Council Report is Critical of Forensics Used in Criminal Trials: U.S. Attorney General says Justice Department won’t Adopt Recommendations*, WALL ST. J. (last updated Sept. 20, 2016, 4:25 PM), <http://www.wsj.com/articles/white-house-advisory-council-releases-report-critical-of-forensics-used-in-criminal-trials-1474394743> (last visited Feb. 4, 2017) (on file with Washington and Lee Law Review).

58. 733 F.3d 786 (7th Cir. 2013).

59. *Id.* at 790; *see also id.* at 788 (noting that “[t]he discomfort of the legal profession, including the judiciary, with science and technology is not a new phenomenon”).

60. FED. R. EVID. 706(A).

Furthermore, this court appointment of an expert does not prevent the parties from calling their own experts, should they choose to do so.⁶¹ Because judges have an obligation under *Daubert* to act as gatekeepers to exclude invalid science, a Rule 706 impartial court-appointed expert would assist in judges fulfilling that duty. Indeed, in a concurrence to *General Electric Co. v. Joiner*, Justice Breyer recommended that “[j]udges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.”⁶² But, twenty years later, district courts remain largely reluctant to use these tools.

An independent expert appointed by a judge, with equal access to the expert for all courtroom actors, may ensure more accurate results and more complete documentation, particularly if labs remain entrenched in police departments. The lack of independent crime labs is an ongoing issue, seven years after the National Academy of Sciences recommended crime labs be removed from police control.⁶³

A final suggestion particular to disclosure, put forward by Professor Jason Kreag, is for courts to routinely ask prosecutors if they have disclosed *Brady* evidence pre-trial.⁶⁴ In this “*Brady* colloquy,” the judge questions the prosecutor about her compliance with disclosure on the record. Some prosecutors refute the idea of a *Brady* colloquy, insisting that this questioning is demeaning, and they are insulted by the inference of not complying with their duties.⁶⁵ The reality of opposition to DNA

61. FED. R. EVID. 706(E).

62. *General Electric Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (quoting Brief for New England Journal of Medicine, 18–19). Breyer also recommended judges use a range of tools to make determinations about scientific evidence, and “[a]mong these techniques are an increased use of Rule 16’s pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.” *Id.* at 146.

63. See STRENGTHENING, *supra* note 56.

64. See generally Kreag, *supra* note 11.

65. See Radley Balko, *Judge Says Prosecutors Should Follow Law. Prosecutors Revolt.*, WASH. POST. (March 7, 2014),

testing, re-filing debunked charges, and retributive actions against defendants who have been proven innocent lessen the alleged insult of these questions, in my opinion. Even Judge Kozinski of the Ninth Circuit has opined, “There is an epidemic of Brady violations abroad in the land . . . only judges can put a stop to it.”⁶⁶ A *Brady* colloquy is yet another tool for judges to ensure accurate disclosure, the first step to admitting accurate forensics in the courtroom.

V. Conclusion

Professor Garrett is correct in recognizing the need for a cultural change in disclosure of forensic evidence and greater responsibility placed on not simply the defense but also on the prosecution to present accurate evidence.

Ultimately, all courtroom players need to own a sense of responsibility to act and to ensure valid and reliable forensic evidence is presented in the courtroom and that these forensic findings are disclosed to defendants. All courtroom players can and need to work to exonerate the innocent and prevent their wrongful convictions in the first place.

<http://www.washingtonpost.com/news/the-watch/wp/2014/03/07/judge-says-prosecutors-should-follow-the-law-prosecutors-revolt> (last visited Feb. 4, 2017) (“In a debate a couple of weeks ago, [Maricopa County Attorney William] Montgomery reiterated his opposition. He said he already follows the rule, and so he was insulted that anyone would suggest an ethical guideline would be necessary to hold him to it.”) (on file with Washington & Lee Law Review).

66. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting).