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SARE Manipulation: The Hurdles in Single-Asset Real Estate Cases

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FEDERAL CRIMINAL DEFENDANTS OUT OF THE FRYING PAN AND INTO THE FIRE? BRADY AND THE UNITED STATES ATTORNEY'S OFFICE

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In its 1963 landmark ruling, *Brady v. Maryland*, the United States Supreme Court required prosecutors to disclose to the defense information favorable to the defendant about guilt or punishment.[1] Sadly, prosecutors all over the country

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1. Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). For an analysis on how the Court's *Brady* decision has been interpreted, see Laurie L. Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. REV. DISCOURSE 74, 77 (2013) ("A *Brady* violation occurs when (1) evidence is favorable to the accused because it is exculpatory or impeaches a government witness; (2) the prosecution fails to disclose such evidence, either intentionally or inadvertently; and (3) the defendant is prejudiced because the undisclosed evidence is material.").

struggle to fulfill their *Brady* obligation to provide the defense with exculpatory and impeachment evidence before trial.[2]

Prosecutorial misconduct is an incredibly serious problem within the criminal justice system. When prosecutors fail to comply with *Brady*, the costs are enormous. Lives of the accused can be ruined by wrongful convictions.[3] Victims may suffer as past wounds are reopened and confidence in justice is lost.[4] Taxpayers bear the financial burdens of appeals, post-trial litigation, and re-trials.[5] This threatens respect for prosecutors and the criminal justice system as a whole.[6]

Brady violations have been identified as one of the main causes of wrongful convictions in the United States.[7] Since 1989, nearly 1,100 people have been exonerated after it was found that the prosecution had engaged in misconduct.[8]

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2. *See, e.g.*, United States v. Parker, 790 F.3d 550, 563 (4th Cir. 2015); United States v. Sedaghaty, 728 F.3d 885, 898–902 (9th Cir. 2013); United States v. Tavera, 719 F.3d 705, 708 (6th Cir. 2013); United States v. Mahaffy, 693 F.3d 113, 119 (2d Cir. 2012); Goudy v. Basinger, 604 F.3d 394, 401–02 (7th Cir. 2010); Wilson v. Beard, 589 F.3d 651, 660–62 (3d Cir. 2009); Mahler v. Kaylo, 537 F.3d 494, 503–04 (5th Cir. 2008); United States v. Aviles-Colon, 536 F.3d 1, 8 (1st Cir. 2008); Trammell v. McKune, 485 F.3d 546, 551–52 (10th Cir. 2007); United States v. Stevens, No. 08-CR-231 EGS, 2009 WL 6525926, at *1–2 (D.D.C. Apr. 7, 2009).

3. Since 1989, there have been 1,089 exonerations for official misconduct, 11,565 years total lost, and 10.5 average years lost per exoneration. *See Interactive Data Display*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Dec. 15, 2017) [hereinafter "*Interactive Data Display*"] (including eleven cases of posthumous exoneration). Official misconduct is defined as "[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction." *Glossary*, THE NAT'L REGISTRY OF EXONERATIONS (last visited Dec. 15, 2017), https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx; *see also* Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconductneworleans-louisiana_n_3529891.html ("Between 1973 and 2002, Orleans Parish prosecutors sent 36 people to death row. Nine of those convictions were later overturned due to *Brady* violations. Four of those later resulted in exonerations."). For information about all exonerations, see *Interactive Data Display*, *supra* note 3 (indicating that since 1989, there were 2,130 exonerations, 18,590 total years lost, and 8.7 average years lost per exoneration).

4. *See generally* Balko, *supra* note 3 (using the story of an exoneree-turned-activist to argue that *Brady* violations are the product of a broken criminal justice system unable to be self-corrected in large part because prosecutors who enjoy high level of protection from the fallout of their *Brady* violations and the attorneys who would be pursuing action against the prosecutors are naturally reluctant to hold their own colleagues to account).

5. *See* Levenson, *supra* note 1, at 74 n. 52 (noting that wrongful convictions from 1989 to 2011 in Illinois cost taxpayers approximately $214 million).

6. *See* Balko, *supra* note 3.

7. *New Report: Prosecutorial Misconduct and Wrongful Convictions*, INNOCENCE PROJECT (Aug. 25, 2010), http://www.innocenceproject.org/new-report-prosecutorial-misconduct-and-wrongful-convictions/ [hereinafter INNOCENCE PROJECT].

8. *See Interactive Data Display*, *supra* note 3; Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHICAGO TRIBUNE (Jan. 10, 1999), http://www.chicagotribune.com/news/

Brady violations are the most common form of prosecutorial misconduct cited by courts when overturning convictions.[9] According to legal scholar Cynthia E. Jones, the right to have exculpatory information turned over by the government is "one of the most unenforced constitutional mandates in the criminal justice system."[10]

The withholding of exculpatory and impeaching information is a topic national discussion. A 2015 article by Ninth Circuit Court of Appeals Judge Alex Kozinski[11] has reverberated throughout the legal community. In a dissenting opinion preceding his article, Judge Kozinski observed that there is an "epidemic of *Brady* violations abroad in the land."[12] United States Department of Justice (DOJ) attorneys responded to Judge Kozinski, denying that *Brady* violations by federal prosecutors were common and asserting that DOJ attorneys receive adequate training to not only avert *Brady* violations, but also do more than what *Brady* requires.[13] Judge Kozinski is not alone in his observations. United States District for the District of Columbia Judge Emmet Sullivan has been outspoken about *Brady* violations as well, even participating in a committee to draft a rule outlining the disclosure obligations of D.C. prosecutors.[14] Scholars recently highlighted the too frequent problem of prosecutors in this country suppressing exculpatory information.[15]

As part of the DOJ, the United States Attorney's Office (USAO) is the top prosecutors' office in the country.[16] Few prosecutors' offices are as revered as

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watchdog/chi-020103trial1-story.html (sixty-seven death row inmates have granted new trials due to *Brady* violations).

9. *See* Balko, *supra* note 3; *see also* BENNETT L. GERSHMAN, PRELIMINARY MATERIALS, IN PROSECUTORIAL MISCONDUCT, Westlaw (database updated Sept. 2017) [hereinafter PROSECUTORIAL MISCONDUCT] ("A prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies.").

10. Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 434 (2010).

11. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC iii, viii (2015).

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

13. Letter from Andrew D. Goldsmith, Assoc. Deputy Att'y Gen. & Nat'l. Crim. Discovery Coordinator, Off. of the Deputy Att'y Gen., & John F. Walsh, Chair, Att'y Gen.'s Advisory Comm., to the Geo. L.J. (Nov. 4, 2015), http://georgetownlawjournal.org/files/2015/11/DOJ-Response-to-Kozinski.pdf.

14. *See* Zoe Tillman, *D.C. Judges Weigh Rule to Curb Prosecutor Misconduct*, THE NAT. L.J. (Feb. 3, 2016), http://www.nationallawjournal.com/id=1202748711837/DC-Judges-Weigh-Rule-to-Curb-Prosecutor-Misconduct?slreturn=20160516221225.

15. *See, e.g.*, Nicholas R. Battey, Note, *A Chink in the Armor? The Prosecutorial Immunity Split in the Seventh Circuit in Light of Whitlock*, 2014 U. ILL. L. REV. 553, 562 (2014), https://illinoislawreview.org/wp-content/ilr-content/articles/2014/2/Battey.pdf ("While *Brady* creates a constitutional right to exculpatory evidence, given the development of the doctrine in the Supreme Court, it is unclear when this right vests, and to what evidence.").

16. *See generally Office of the United States Attorneys*, U.S. DEP'T OF JUST. (Apr. 6, 2017), https://www.justice.gov/usao/about-offices-united-states-attorneys ("The United States Attorney is

the USAO.[17] The prosecutors from the USAO come from top schools[18] and often forgo lucrative private sector jobs to become civil servants.[19] Despite the national prominence of the DOJ and the USAO, the USAO made headlines for a number of *Brady* violations in the last decade: the Senator Ted Stevens case,[20] the Chandra Levy case,[21] and several other cases[22] have put the USAO in the news.[23]

Responding to criticism of the USAO following the Stevens case, in 2009, then Attorney General Eric Holder said, "I am committed to ensuring that our prosecutors are provided sufficient training to understand fully their discovery obligations, and that they receive the support and resources necessary to do their jobs in a manner consistent with the proud traditions of this Department." [24] The following Attorney General, Loretta Lynch, had little opportunity for *Brady*

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the chief federal law enforcement officer in their district and is also involved in civil litigation where the United States is a party.").

17. *See, e.g.*, Brad Heath & Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA TODAY (Sept. 23, 2010, 1:31 PM), http://usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm?csp=usat.me ("USA TODAY documented 201 criminal cases in the years that followed in which judges determined that Justice Department prosecutors — the nation's most elite and powerful law enforcement officials — themselves violated laws or ethics rules."); Erin Fuchs, *America's 'Killer Elite' Lawyers Are All in One Prosecutor's Office in Manhattan*, BUSINESS INSIDER (Nov. 7, 2013), http://www.businessinsider.com/why-the-southern-district-of-new-york-is-so-prestigious-2013-11 ("The most prestigious law gig in the U.S. may be the U.S. attorney's office in Manhattan.").

18. *See, e.g.*, Elise Baranouski, Joan Ruttenberg & Carolyn Stafford Stein, *The Fast Track to a U.S. Attorney's Office*, BERNARD KOTEEN OFF. OF PUB. INT. ADVISING HARV. L. SCH. (2014), http://hls.harvard.edu/content/uploads/2008/06/fast-track-final.pdf; *Graduates Share Advice on Careers in U.S. Attorney's Office*, COLUM. L. SCH. (Nov. 21, 2014), https://www.law.columbia.edu/media_inquiries/news_events/2014/november2014/US-attorney ("Four Columbia Law School alumni currently working in the civil and criminal divisions of the U.S. Attorney's Office for the Southern District of New York.").

19. *Graduates Share Advice*, *supra* note 18 (discussing two students who left law firm jobs for the U.S. Attorney's Office).

20. United States v. Stevens, No. 08-CR-231 EGS, 2009 WL 6525926, at *2 (D.D.C. Apr. 7, 2009).

21. David Benowitz, *What The Chandra Levy Retrial Teaches Us About Defendants' Rights*, HUFFINGTON POST (May 26, 2016), https://www.huffingtonpost.com/david-benowitz/what-the-chandra-levy-ret_b_10146094.html.

22. Andrew King-Ries & Beth Brennan, *A Fall from Grace: United States v. W.R. Grace and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313, 316 (2010).

23. *See, e.g.*, Nedra Pickler, *Justice Dept. Lawyers in Contempt for Withholding Stevens Documents*, WASH. POST (Feb. 14, 2009) http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303092.html (reporting on how Judge Emmet G. Sullivan held all three DOJ lawyers in contempt for not producing the documents by the deadline when the lawyers admitted to him that they had no reason to withhold the documents).

24. *Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases*, U.S. DEP'T OF JUST. (Apr. 14, 2009), https://www.justice.gov/opa/pr/attorney-general-announces-increased-training-review-process-providing-materials-defense.

reform in her brief tenure.[25] Questions loom about Jefferson "Jeff" Sessions' ability to lead the DOJ away from more *Brady* trouble in light of the *Brady* scandals in his career as a prosecutor prior to his decades as a United States Senator.[26]

During his career as Attorney General of Alabama, courts repeatedly concluded that Sessions violated *Brady*.[27] Furthermore, in 1996, a judge called a *Brady* violation by Sessions' office the worst he had ever seen and dismissed the case.[28] Despite this extraordinary step, no appeal was taken by the office.[29]

The New York Times editorial board called on the "feds" to "stop bad prosecutors" by pointing out that the DOJ is in a unique position to monitor prosecutors.[30] With prosecutors immune from civil suits and rarely facing any ethics sanctions,[31] there is little to stop federal prosecutors from hiding *Brady*

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25. *See Loretta Lynch Fast Facts*, CNN (July 4, 2017) http://www.cnn.com/2014/11/19/us/loretta-lynch-fast-facts/index.html (stating that former Attorney General Lynch only served from April 2015 to January 2017).

26. Drew Griffin, Scott Glover & Nelli Black, *Jeff Sessions' Office Accused of Prosecutorial Misconduct in the '90s*, CNN POLITICS (Dec. 22, 2016), http://www.cnn.com/2016/12/21/politics/jeff-sessions-prosecutorial-misconduct.

27. Shields v. Alabama, 680 So. 2d 969, 975 (Ala. Crim. App. 1996) (holding the prosecution violated *Brady* when it learned about but failed to disclose to the defendant a murder victim's prior assault conviction in which the murder victim attacked someone in a drunken rage when the defendant was arguing that the victim was trying to kill him in a drunken rage); Hamilton v. Alabama, 677 So. 2d 1254, 1260–61 (Ala. Crim. App. 1995) (holding the prosecution violated *Brady* during a capital murder trial when it failed to disclose the plea agreement of a key witness who then went on to commit perjury).

28. Drew Griffin, Scott Glover & Nelli Black, *Jeff Sessions' Office Accused of Prosecutorial Misconduct in the '90s*, CNN POLITICS (Dec. 22, 2016), http://www.cnn.com/2016/12/21/politics/jeff-sessions-prosecutorial-misconduct/.

29. *Id.*

30. Editorial, *To Stop Bad Prosecutors, Call the Feds*, N.Y. TIMES (June 6, 2016), http://www.nytimes.com/2016/06/06/opinion/to-stop-bad-prosecutors-call-the-feds.html?_r=0.

31. *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (finding prosecutors immune from suits involving the violation of constitutional rights, but explaining such immunity is in the public interest); *see e.g.*, Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 535 (2011)

> The doctrine of absolute prosecutorial immunity in federal civil rights actions is unsupportable. From the point of view of public policy, absolute prosecutorial immunity leads to wrongful prosecutions and convictions, ruins the lives of the wrongly accused, subjects crime victims to the painful and protracted relitigation of their experiences, impairs public safety, wastes public resources, and undermines public respect for, and confidence in, the criminal justice system. Moreover, absolute prosecutorial immunity is historically unjustified. Section 1983 was adopted to provide a federal civil rights remedy against Southern prosecutors who were using criminal prosecutions to deny newly freed slaves their civil rights, and to punish and deter Union officers and officials from enforcing those civil rights. It was not intended to shield prosecutors from liability; on the contrary, it was intended to subject them to liability. And finally, the doctrine generates conflicts and confusion that complicate and prolong civil rights actions for prosecutorial misconduct."

and trying to win at all costs.[32] While DOJ's Civil Rights Division spent considerable efforts documenting troubling problems within local police departments[33] at the local level, efforts by DOJ to police itself are at the very least, opaque under the eras of Lynch and Holder.[34]

This Article addresses the DOJ's historic opposition to reform and the problems that stem from a lack of interest in reform. The USAO handles federal crimes and local crimes in the District of Columbia.[35] Because of the District of Columbia's uniqueness as a city without a state, the USAO prosecutes most of the crime there rather than the local District Attorney's Office. The USAO for the District of Columbia is the largest USAO, so that it can accommodate the heavy caseload of both state and federal criminal cases. This Article focuses in part specifically on the USAO for DC. It will show that the USAO record with respect to *Brady* has not been what it should be and will illustrate the many *Brady* violations revealed since 2000. This Article will be the first to show that the USAO violates *Brady* multiple times a year. In addition, this Article will show the numerous efforts at blocking *Brady* reform by the DOJ. The Article will then survey the *Brady* violations under Sessions' time as a prosecutor and evaluate the likelihood for significant reform while he is the Attorney General for the United States. Finally, this Article will suggest for *Brady* reform for courts and other institutional players.

George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 DRAKE L. REV. 199, 233 (2011) ("Notably, the only official receiving absolute immunity who is not neutral to the justice process–such as a witness, judge, or legislator–but acts in an argumentative and adversarial role is the prosecutor."); David G. Savage, *Supreme Court Rejects Damages for Innocent Man who Spent 14 Years on Death Row*, L.A. TIMES (Mar. 30, 2011), http://articles.latimes.com/2011/mar/30/nation/la-na-court-prosecutors-20110330 (reporting how the Supreme Court overturned a jury verdict that had awarded $14 million to an innocent man who sat on death row for fourteen years because it considered the man's case to be one incident rather than part of a pattern of conduct).

32. *See e.g.*, Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 9–18 (2009) (arguing that politics, whether it be from the election of state prosecutors or the appointment of federal prosecutors,

creates a "win-at-all-costs" mentality that perversely incentivizes prosecutors to seek as many convictions as possible rather than justice); Adam Foss, *A Prosecutor's Vision for a Better Justice System*, TED (Feb. 2016), https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system?language=en ("[Prosecutors a]re judged internally and externally by [their] convictions and [their] trial wins.").

33. Editorial, *Consent Decrees, Racial Bias, and Policing*, N.Y. TIMES (Aug. 10, 2016), http://www.nytimes.com/2016/08/11/us/heres-how-racial-bias-plays-out-in-policing.html.

34. *See* Brink, *supra* note 32, at 21–22.

35. *About Us*, U.S. ATT'Y'S OFF. DIST. OF COLUM. (Feb 11, 2016), https://www.justice.gov/usao-dc/about-us ("[The United States Attorney's Office for the District of Columbia] is responsible not only for the prosecution of all federal crimes, but also for the prosecution of all serious local crime committed by adults in the District of Columbia.").

I. BRADY AND ITS IMPLEMENTATION

Except in some circumstances, criminal defendants generally do not have a right to discovery in their federal criminal cases.[36] They do, however, have a right to be provided exculpatory material of which the government is aware.[37] In *Brady v. Maryland*, the Supreme Court held that "evidence favorable to an accused . . . where the evidence is material either to guilt or punishment" must be disclosed to the defense.[38] That disclosure is a due process right.[39] Because of the unique role of the prosecutor in the U.S. criminal justice system, the Supreme Court has said that the government must "assist the defense in making its case."[40] For the most part, criminal defendants and their attorneys have fewer resources than prosecutors and police.[41] Because of the Supreme Court's mandate and the limited resources of most indigent defendants and their public defender,[42] the defense relies on prosecutors to be the ministers of justice that the Supreme Court has said that they must be.[43]

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36. FED. R. CRIM. P. 16(a)(2).

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

38. *Id.*

39. *Id.*

40. United States v. Bagley, 473 U.S. 667, 676 n.6 (1985).

41. *See* Lawrence F. Travis III & Bradley D. Edwards, INTRODUCTION TO CRIMINAL JUSTICE 243–48 (Pamela Chester & Ellen S. Boyne eds., 2015) (stating that defense attorneys are typically less established attorneys, solo practitioners, or attorneys from small offices who have to deal with large caseloads); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 175 (2012)

> There is ample evidence that prosecutors and defense lawyers (especially court-appointed lawyers) are not equals. While defense lawyers are expected to investigate and the failure to do so constitutes ineffective assistance of counsel, this constitutional rule does not—nor could it legitimately—reflect any assumption that defense lawyers have equal capacity to conduct an investigation as compared to the average prosecutor.").

42. *See, e.g.*, Luis v. United States, 136 S. Ct. 1083, 1095 (2016) ("These defendants, rendered indigent, would fall back upon publicly paid counsel, including overworked and underpaid public defenders."); Weisburd, *supra* note 43, at 176.

> [I]ndigent criminal defendants are at a severe disadvantage. . . . [T]he provision of indigent defense in this country is in crisis. State and local public defender offices are underfunded. Individual public defenders often handle over one hundred cases at a time, often with little or no investigative support. Because of the funding crisis, court-appointed lawyers often provide representation that violates their professional duties. As a result, most court-appointed defense lawyers lack the investigative resources to discover *Brady* material after trial, much less before trial even begins. The investigative resources at the disposal of an average prosecutor always outmatch those available to an average public defender or appointed lawyer.

43. *See, e.g.*, *Luis*, 136 S. Ct. at 1095 (citing *Census of Public Defender Offices, 2007: County-based and Local Public Defender Offices*, DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 10 (Sept. 2010)) ("As the Department of Justice explains, only 27 percent of county-based public defender offices have sufficient attorneys to meet nationally recommended caseload standards."); Matt Ford, *A Near-Epiphany at the Supreme Court*, THE ATLANTIC (Mar. 30, 2016), http://www.theatlantic.com/politics/archive/2016/03/a-near-epiphany-at-the-supreme-court/476037/.

Giglio v. United States extended that obligation not just to exculpatory evidence, but also to impeachment evidence.[44] Much of the evidence that the government fails to turn over is impeachment evidence—information that undermines the credibility of the government witness.[45] Impeachment evidence is a broad category.[46] Plea agreements,[47] prior convictions,[48] inconsistent

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> Underfunding and understaffing in state public-defender systems weakens the quality of legal representation they can provide to clients. Virtually all of Kentucky's public defenders exceeded the American Bar Association's recommended caseload in 2015. Minnesota's public defenders took on almost double the ABA standard in 2010—170,000 cases for fewer than 400 lawyers—and spent only an average of 12 minutes on each case outside the courtroom. Some states face even greater crises. In cash-strapped Louisiana, where 8 out of 10 defendants cannot afford a lawyer, the system is on the verge of collapse.

44. Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.") (internal quotation marks omitted).

45. *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.").

46. *See* Jones, *supra* note 10, at 415, 425–26 (2010).

> Impeachment evidence includes any information regarding a witness's prior convictions, biases, prejudices, self-interests, or any motive to fabricate or curry favor with the government. Impeachment evidence also consists of prior inconsistent statements of the witness and any prior failure of the witness to identify the defendant. The government must also disclose information that casts doubt on the ability of the witness to accurately perceive, recall, or report the facts related to the witness's testimony, including mental instability, substance abuse, memory loss, or any other physical or mental impairment. In addition, *Brady* impeachment evidence includes any positive or negative inducements used to motivate a witness to testify on behalf of the government.

(internal citations omitted).

47. Silva v. Brown, 416 F.3d 980, 991 (9th Cir. 2005) (finding a *Brady* violation when the prosecution failed to disclose that the one witness who placed the defendant at the scene of the murder had taken a plea deal); *see, e.g.*, Silva v. Brown, 416 F.3d 980, 991 (9th Cir. 2005) ("[T]he prosecution's secret deal with [its main witness] was material to Silva's conviction for murder, and the State violated Silva's due process rights by failing to disclose the deal to the defense."); Monroe v. Angelone, 323 F.3d 286, 315–17 (4th Cir. 2003) (finding a *Brady* violation, in part, because the prosecution failed to disclose that their key witness had taken a plea deal); United States v. Sterba, 22 F. Supp. 2d 1333, 1334–40 (M.D. Fla. 1998). Following a mistrial due to prosecutorial misconduct, defendant's motion for dismissal was granted. *Id.* at 1339. Among the impeachment material that the government failed to disclose was a prior guilty plea for filing a false police report in a case that led to the arrest of an innocent man. *Id.* at 1338. This was impeachment material that should have been disclosed to the defense before trial because it signaled "severe credibility problems" of the government's main witness. *See id.*

48. *See, e.g.*, Wilson v. Beard, 589 F.3d 651, 660–62 (3d Cir. 2009) (finding a *Brady* violation in part because the prosecution failed to disclose that a key witness was a mentally ill man who was obsessed with being a law enforcement official and had been previously convicted of impersonating a police officer); Lewis v. United States 408 A.2d 303, 310–12 (D.C. Cir. 1979) (finding a *Brady* violation when federal prosecutors failed to disclose to the defense the FBI "rap sheets" of one of the prosecution's witnesses).

accounts,[49] promises of reward money,[50] and other information[51] that might diminish the weight of the witness's testimony all fall into the category of impeachment material.

The Court made clear that *Brady* extends to anyone involved in the investigation of the case.[52] Thus, *Brady*'s requirements do not simply apply to what the prosecutor chooses to learn.[53] Although sometimes the police, rather than the prosecutor, possesses the exculpatory information, the prosecutor nevertheless has a duty to learn of *Brady* information.[54] Prosecutors cannot stick their heads in the sand as they prepare their cases.[55]

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49. *See, e.g.*, Mahler v. Kaylo, 537 F.3d 494, 503–04 (5th Cir. 2008) (finding a *Brady* violation in a murder trial when the prosecution failed to disclose a witness' pre-trial statements that were inconsistent with the witness' testimony at trial even though the witness' testimony was the only tying the defendant to the murder); *see also* Monroe, 323 F.3d at 315–17 (finding a *Brady* violation in part because the prosecution failed to disclose to the defense a key witness' inconsistent statements). *But see* United States v. Jones, 609 F. Supp. 2d 113 (D. Mass. 2009)

> [The government's main witness's] important inconsistent statements were not disclosed to Jones until the court conducted an *in camera* review of [the prosecution's] notes, just before the suppression hearing was complete . . . Because [the government's main witness's] prior inconsistent statements were ultimately disclosed in time for his false testimony to be discredited, Jones has not been deprived of due process or otherwise prejudiced by the government's misconduct.

50. *See, e.g.*, Paula Reed Ward, *Court Agrees to New Trial in 1995 Fire that Killed Three Firefighters*, PITTSBURGH POST-GAZETTE (Mar. 21, 2015), http://www.post-gazette.com/local/city/2015/03/21/Court-agrees-to-new-trial-in-1995-fire-that-killed-three-firefighters/stories/201503210093.

> Gregory Brown, 37, had his original conviction overturned by Common Pleas Judge Joseph K. Williams III, who found that the prosecution withheld impeachment evidence from Brown's defense concerning two critical witnesses who were promised reward money for their testimony. The Allegheny County District Attorney's office appealed that decision on three grounds, and on Friday, the Pennsylvania Superior Court issued a 2-1 decision in Brown's favor, finding that he was "thwarted by the commonwealth's repeated denials that a reward had even been paid."

51. *See, e.g.*, Jells v. Mitchell, 538 F.3d 478, 506–07 (6th Cir. 2008) (finding a *Brady* violation in a capital murder and abduction case because the prosecution failed to disclose witness statements that cast doubt on whether an abduction occurred and evidence of the victim's intoxication that would have mitigated the aggravating factors justifying capital punishment); Benn v. Lambert, 283 F.3d 1040, 1056 (9th Cir. 2002) ("There was no evidence at trial to impeach [the government's main witness's] competence or his ability to recollect or perceive the events. Thus, evidence of his drug use would have provided the defense with a new and different ground of impeachment."); Boyette v. Lefevre, 246 F.3d 76, 92–93 (2d Cir. 2001) (finding a *Brady* violation because a fire marshal's undisclosed report cast doubt on the government's main witness's ability to correctly identify the defendant).

52. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

53. *Id.*

54. *Id.*

55. *Id.* The Court said that:

> [U]nless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

The constitutional mandates and the Supreme Court's interpretations of *Brady* are not the only rules that prosecutors must follow.[56] Ethical rules particular to prosecutors require them to "seek justice."[57] Indeed, the American Bar Association (ABA) Model Rule 3.8[58] and most state ethical rules require prosecutors to turn over exculpatory evidence.[59] The Supreme Court has said:

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> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[60]

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Unfortunately, few prosecution offices have remained immune to *Brady* errors.[61] Prosecution offices all over the country have been found to have

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Id. at 439.

56. NAT'L PROSECUTION STANDARDS § 1-1.1 (NAT'L DIST. ATTORNEYS ASS'N 2009) http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.

57. *Id.*

58. MODEL RULES OF PROF'L CONDUCT R. 3.8(d), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.html.

59. Additionally, "[n]early half of the states require disclosure of evidence that is exculpatory or tends to negate guilt or reduce punishment, without requiring that the evidence be material." Leonard Sosnov, *Brady Reconstructed: An Overdue Expansion of Rights and Remedies*, 45 N.M. L. REV. 171, 223 n. 122 (2014) (citing ALASKA R. CRIM P. 16(b)(3); 16A ARIZ. R. CRIM. P. 15.1(b)(8); ARK. R. CRIM. P. 17.1(d); CAL. PENAL CODE § 1054.1(e) (West 2013); COLO. R. CRIM. P. 16(a)(2); 4 CONN. PRAC., CRIM. P. § 40-11(a)(1); FLA. R. CRIM. P. R. 3.220(b)(4); HAW. R. PENAL. P. 16(b)(1)(vii); IDAHO CRIM. R. 16(a) (West 2013); ILL. S. CT. R. 412(c); MD. RULES 4-263(d)(5); MASS. R. CRIM. P. 14(a)(1)(A)(iii); MICH. CT. R. 6.201(B)(1); MISS. URCCC 9.04 (A)(6); MO. SUP. CT. R. 25.03(A)(9); MONT. CODE ANN. § 46-15-322 (West 2013); N.J. R. 3:13-3(b)(1); TEX. CODE CRIM. PROC. ANN. ART. 39.14(h) (West 2013); UTAH R. CRIM. P. 16(a)(4); VT. R. CRIM. P. 16(b)–(c); WASH. SUPER. CT. CR. R. 4.7 (a)(3); WIS. STAT. ANN. § 971.23(1)(h) (West 2013); State v. Castor, 599 N.W.2d 201, 211 (Neb. 1999)). North Carolina goes a step further and "mandates disclosure of the entire file of the prosecutor and all investigative agencies." *Id.* (citing N.C. GEN. STAT. ANN. § 15A-903 (West 2013)).

60. Berger v. United States, 295 U.S. 78, 88 (1935).

61. *See generally*, David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011), http://yalelawjournal.org/forum/the-

violated their Due Process obligations to provide exculpatory evidence to the defense.[62] In an egregious case, former New Orleans District Attorney Harry Connick Sr.[63] stated that he had not read a case since he was elected District Attorney and admitted that he did not train his prosecutors on their *Brady* obligations.[64] Despite the immense costs when prosecutors fail to uphold their due process obligations, consequences for prosecutors who withhold *Brady* are relatively rare.[65]

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myth-of-prosecutorial-accountability-after-connick-v-thompson-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct ("The lack of any external oversight of prosecutors' offices creates an environment in which misconduct can go undetected and undeterred.").

62. *See, e.g.*, Tony Saavedra & Kelly Puente, *In Rare Move, Judge Kicks Orange County D.A. off Case of Seal Beach Mass Shooting Killer Scott Dekraai*, ORANGE COUNTY REGISTER (Mar. 12, 2015), http://www.ocregister.com/articles/attorney-654000-county-case.html ("A Superior Court judge removed the Orange County District Attorney's Office from the case against the deadliest killer in county history, saying . . . that the defendant's right to a fair trial had been violated by false testimony and the withholding of evidence."); Denis Slattery, *Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct*, N.Y. DAILY NEWS (Apr. 6, 2014), http://www.nydailynews.com/new-york/bronx/bronx-prosecutor-barred-courtroom-article-1.1746238 (reporting on a case in which a judge banned a prosecutor barred from his courtroom because she failed to disclose *Brady* evidence that proved a defendant's innocence).

63. *See* Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About Brady v. Maryland*, 13 LOYOLA J. PUB. INT. L 518, 521 (2012) (describing Connick's office as having "one of the worst records in the United States for concealing exculpatory evidence from defendants, and an office culture that was deliberately indifferent to the rights of defendants, especially in training and supervising prosecutors on compliance with *Brady*"); *see also* Balko, *supra* note 3 ([Therefore between 1973 and 2002,] "[eleven] percent of the men Connick's office attempted to send to their deaths — for which prosecutors suppressed exculpatory evidence in the process — were later found to be factually innocent."); John Hollway, *Innocent on Death Row*, SLATE (Oct. 5 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/10/innocent_on_death_row.html ("According to the Innocence Project, a national organization that represents incarcerated criminals claiming innocence, 36 men convicted in Orleans Parish during Connick's 30-year tenure as DA have made allegations of prosecutorial misconduct, and 19 have had their sentences overturned or reduced as a result.").

64. *See* Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About Brady v. Maryland*, 13 LOYOLA J. PUB. INT. L 518, 521 (2012) (quoting Connick v. Thompson, 131 S. Ct. 1350, 1379 (2011)) ("Prosecutors would go to Connick with *Brady* questions, but Connick acknowledged that he 'stopped reading law books . . . and looking at opinions' when he was elected District Attorney. Further, as Thompson's expert testified, Connick's supervision regarding *Brady* was 'the blind leading the blind.'") (citing Connick v. Thompson, 131 S. Ct. 1350, 1380 (2011)); *see also* Keenan, *supra* note 63, at 208 (quoting Connick v. Thompson, 131 S. Ct. 1350, 1380 (2011) (Ginsburg, J., dissenting)) ("Shortly after Connick's retirement, 'a survey of assistant district attorneys in the Office revealed that more than half felt they had not received the training they needed to do their jobs.'").

65. *See* Angela J. Davis, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 123–77 (James Cook & Dedi Felman eds., 2007); Denis Slattery, *Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct*, N.Y. DAILY NEWS (Apr. 6, 2014), http://www.nydailynews.com/new-york/bronx/bronx-prosecutor-barred-courtroom-article-1.1746238 (containing a link to the transcript from a hearing before Judge John Wilson in which he barred the prosecutor

A. Brady in Practice

Far more exculpatory material is withheld than is documented in published appellate opinions.[66] Some *Brady* violations go undisclosed and entirely unnoticed by the defense and the court.[67] When a prosecutor suppresses exculpatory information, the violation of *Brady* is by its very nature virtually impossible for the defense to discover or prove.[68] Prosecutors may dismiss charges or make generous plea offers to avoid revealing the information prior to trial.[69] In other instances, once the prosecution discloses the information and the defense files complaints or motions for sanctions over late disclosure, prosecutors then dismiss criminal charges or make generous plea offers to escape embarrassing litigation, thus avoiding written opinions that cast them in a bad light.[70]

Some prosecutors may lack training or supervision to understand the extent of their obligations. Prosecutors who willfully withhold evidence may know that they violate the law by doing so, so they conceal their conduct.[71] Because prosecutors and police have "exclusive" access to the information and they are

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from ever appearing before him again, however it is unclear if the prosecutor was reprimanded internally); Balko, *supra* note 3

> In the end, one of the most powerful positions in public service — a position that carries with it the authority not only to ruin lives, but in many cases the power to end them — is one of the positions most shielded from liability and accountability. And the freedom to push ahead free of consequences has created a zealous conviction culture.

Nedra Pickler, *Justice Dept. Lawyers in Contempt for Withholding Stevens Documents*, WASH. POST (Feb. 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303092.html (describing the noteworthy occurrence of a judge holding three DOJ lawyers in contempt for not producing the documents by the deadline).

66. *See* Balko, *supra* note 3 ("Courts most commonly deal with misconduct by overturning convictions. To get a new trial, however, a defendant must not only show evidence of prosecutorial misconduct, but must also show that without that misconduct the jury likely would have acquitted.").

67. *See id.*

> Emily Maw, director of the New Orleans Innocence Project, a group that advocates for the wrongfully convicted, says violations in low-level cases are much less likely to come to light. 'It's expensive to discover a *Brady* violation. They're usually found after conviction, with the help of investigators and attorneys poring through police reports and prosecutors' files.

68. Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1455 n. 23 (2006) (citing Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. U.L. REV. 833).

69. Andrew P. O'Brien, *Reconcilable Differences: The Supreme Court Should Allow the Marriage of Brady and Plea Bargaining*, 78 IND. L.J. 899, 907 (2003).

70. *Id.*

71. Keenan, *supra* note 63, at 209 ("[P]rosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds.").

ones who control when, what, if, and how *Brady* material is disclosed,[72] it is difficult for defense attorneys to know whether that material exists.[73] In other words, you do not know what you do not know. This control over information by the government means that the defense does not learn of favorable material in many instances. Oftentimes the defense only learns of exculpatory evidence by accident.[74]

With over ninety-five percent of federal convictions obtained by a guilty plea,[75] it is easy for prosecutors to escape the chronicling of their *Brady* violations.[76] In *United States v. Ruiz*, the Supreme Court held that a defendant cannot withdraw a guilty plea where the government has withheld impeachment information.[77] The Court wrote, "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees" [78] and that "a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas

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72. *See* Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2175 (2010) [hereinafter "Green I"] ("Claims about the frequency of disclosure error are hard to prove or disprove, precisely because prosecutors have not systematically studied their mistakes. No one else can do so, given that prosecutors ordinarily have exclusive access to information needed to assess how and why—and often whether—disclosure errors occurred."); *see also* Weisburd, *supra* note 43, at 146 (explaining that the Supreme Court removed the requirement that the defense request exculpatory evidence from the prosecution because the prosecution would know best whether it had exculpatory evidence).

73. *See* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 306–07 (2010)

> The prosecution's *Brady* obligation is largely self-enforced: prosecutors determine what is exculpatory and what must be turned over to the defense. As a result, lack of compliance with the Brady rule will often go undetected, and it is fair to assume that most *Brady* violations go undiscovered. . . . *Brady* violations often come to light during trial or post-conviction, usually by way of re-investigation or fortuity. The type of full-scale re-investigation that is typically necessary to discover previously suppressed exculpatory evidence post-conviction is rarely conducted. . . . Unfortunately, as a consequence, the actual number of *Brady* violations remains unknown.

74. *See* Jones, *supra* note 10, at 433.

75. *See* Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, BUREAU OF JUST. ASSISTANCE U.S. DEP'T. OF JUST. (Jan. 24, 2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

76. *See* Keenan, *supra* note 63, at 210

> [T]he vast majority of known instances of prosecutorial misconduct come to light only during the course of a drawn-out trial or appellate proceeding. . . . But most criminal cases in the United States result in plea bargains, which are rarely the subject of extensive investigation or judicial review, creating a heightened risk of undetected prosecutorial misconduct in the plea bargaining context.

77. United States v. Ruiz, 536 U.S. 622, 624–25 (2002).

78. *Id.* at 628.

that are factually justified." [79] *Ruiz* does not justify withholding evidence of innocence, rather simply evidence that can be used to impeach.[80] *Ruiz*'s holding, however, means that even if a defendant discovers the suppression of favorable information that impeaches the government's version of events, after a guilty plea there is no recourse or remedy for the defendant and there will be no court opinions regarding the prosecutor's conduct.[81] But *Brady* simply does not protect defendants who plead guilty.[82]

One of the reasons that *Brady* violations persist is that prosecutors rarely suffer consequences for withholding favorable information from the defense.[83] Prosecutors have immunity for civil rights violation for withholding *Brady* information.[84] It is almost unheard of for prosecutors to go to jail[85] or lose their

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79. *Id.* at 631.

80. Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 ABA SEC. CRIM. JUS. (2008)

81. *Id.*

82. *See* Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years after Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE 407, 408 (2014).

83. *See* Gurwitch, *supra* note 75, at 309 ("The ongoing nature of this problem strongly suggests that the current system for sanctioning *Brady* violations–only granting the defendant a new trial when suppressed *Brady* evidence is discovered, and the defendant is able to meet Brady's materiality standard—is not effective."); *see* Weisburd, *supra* note 43, at 146–47 ("In practice, prosecutors often have little incentive to comply with Brady, and there are no external policing mechanisms to determine whether a prosecutor has not complied with *Brady*.").

84. *See* Gurwitch, *supra* note 75, at 314–15 ("The repeated reaffirmance of the Imbler rule of absolute prosecutorial immunity is a seemingly insurmountable obstacle to sanctioning prosecutors for *Brady* violations with financial penalties.").

85. *See*, *e.g.*, *id.* at 318–19

> While state penal laws contemplate the prosecution of prosecutors who violate *Brady*, they are so infrequently enforced that the possibility of prosecution barely warrants a mention. One anomalous case is that of the prosecutor who, in 2006, handled the prosecution of members of the Duke University lacrosse team on rape and kidnap charges. The prosecutor committed various types of misconduct, including withholding exculpatory DNA test results. Subsequent to being disbarred, the prosecutor was found guilty of criminal contempt and sentenced to a jail term of twenty-four hours. This case was highly unusual, and was surely influenced by the national publicity it attracted, as well as the resources of the defendants who were the victims of the prosecutorial misconduct at issue. In more typical cases, the prosecution of attorneys who violate *Brady* is nonexistent, thus rendering the deterrent value of the threat of prosecution to nearly nothing.

Cadene A. Russell, *When Justice Is Done: Expanding A Defendant's Right to the Disclosure of Exculpatory Evidence on the 51st Anniversary of Brady v. Maryland*, 58 HOW. L.J. 237, 256 (2014) ("In 2013, for the first time in five decades, a prosecutor would serve time in jail for wrongfully convicting an innocent man. Remarkably, fifty-one years of prosecutorial misconduct in violation of *Brady* has only seen this one instance where a prosecutor will be imprisoned for this wrongful conduct."); Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, HUFFINGTON POST (Nov. 8, 2013), http://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html; Balko, *supra* note 3:

> [S]omeone could bring criminal charges against a misbehaving prosecutor. But this is vanishingly rare. While there's no authoritative count of the number of times it's

bar license.[86] It is even rare for prosecutors to even be referred to bar counsel[87] or mentioned by name in published opinions.[88] It appears that prosecutor offices rarely fire or demote prosecutors who violated defendants' rights in this way.[89]

With more than ninety percent of cases resolved by plea[90] and no obligation to turn over impeachment information, and given that there is no appeal of guilty

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> happened, a 2011 Yale Law Journal article surveying the use of misconduct sanctions found that the first such case to reach a verdict in the U.S. was in 1999. (The jury acquitted.) More recently, the 2006 Duke lacrosse case resulted in criminal contempt charges against Durham County District Attorney Mike Nifong. He was disbarred and sentenced to a day in jail.

86. *See, e.g.*, Gurwitch, *supra* note 75, at 317 (describing a study that "[f]ound just seven cases where a prosecutor was referred to a disciplinary body due to a Brady violation" with the following results: "Four of the seven referrals resulted in discipline: a private reprimand, a public reprimand, a suspension of three months, and a suspension of six months.");

Keenan, *supra* note 63, at 220.

> Given the Supreme Court's repeated endorsement of professional discipline as the appropriate vehicle for addressing allegations of prosecutorial misconduct, one might suppose that state bar agencies frequently sanction prosecutors. In fact, prosecutors are rarely held accountable for violating ethics rules. . . . [A] study by the Center for Public Integrity found 2012 appellate cases between 1970 and 2003 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals. Yet prosecutors faced disciplinary action in only forty-four of those cases, and seven of these actions were eventually dismissed.

Russell, *supra* note 87, at 257 (stating that an investigation by the newspaper USA Today into 201 cases involving misconduct of federal prosecutors found that only one prosecutor 'was barred even temporarily from practicing law for misconduct').

87. *See, e.g.*, Jones, *supra* note 10, at 415, 436–37 ("While the use of the state bar disciplinary process is a viable option, numerous studies and reports have shown that prosecutors are generally not referred for disciplinary action for *Brady* misconduct, and it is extremely rare that such a referral results in professional discipline."); *see also* Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1096 (2009) ("[W]e cannot expect judges to begin referring more cases to bar disciplinary committees or to castigate prosecutors by name in judicial opinions simply because legal scholars suggest that they do so."); CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 73 (Gerald Uelmen ed., 2008) (discussing reluctance by judges to refer prosecutors for professional discipline for *Brady* violations), http://www.ccfaj.org/documents/CCFAJFinalReport.pdf

88. *See, e.g.*, Gershowitz, *supra* note 89, at 1062 ("[M]any judges go to great lengths to redact the names of misbehaving prosecutors from trial transcripts quoted in judicial opinions."); Balko, *supra* note 3 ("[T]hrowing out a conviction is intended to ensure due process for a given defendant — not to punish a wayward prosecutor. Appellate court decisions that overturn convictions due to prosecutorial misconduct rarely even mention the offending prosecutor by name."); *see also* Green I, *supra* note 74, at 2180 ("In most jurisdictions, disciplinary agencies keep their findings and files confidential except when they issue public sanctions.").

89. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 100 (2011) (Ginsburg, J., dissenting) (noting that the prosecutor sued in that case was "never disciplined or fired a single prosecutor for violating *Brady*").

90. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Lindsey Devers, *supra* note 77; *Sourcebook of Criminal Justice Statistics: 2003*, BUREAU OF JUSTICE

pleas, little opportunity to hear of exculpatory material post-trial, there are simply fewer opportunities for prosecutors to get caught in withholding helpful materials from the defense than in a system where more trials take place.

II. DOJ BRADY FAILURES

In their open letter, federal prosecutors Andrew Goldsmith and John F. Walsh wrote that "Judge Kozinski proffered little support for the purported epidemic of *Brady* violations." [91] The prosecutors distinguished *Brady* violations where there was a finding of deliberate misconduct and then wrote, "[t]wo cases over fifteen years . . . is still two cases too many." [92] Thus, the prosecutors are suggesting that there were only two cases of deliberate *Brady* violations in over fifteen years.

There are a variety of reasons why findings of deliberate misconduct are rarely made. First, whether the *Brady* violation is purposeful or not is part of courts' analysis in determining a *Brady* violation.[93] When making such findings, judges may want to protect young prosecutors.[94] Second, some public defenders may not want to accuse prosecutors of intentional *Brady* violation since defense attorneys are repeat players and may have to face the same prosecutor again.[95] Third, it is worth considering that in cases in which there is an acquittal, there is no reason for parties to do a post-mortem on the case. No appellate lawyer will look at the file if there is no conviction to appeal. Finally, litigation of *Brady* violations often times takes place years after trial and purposeful violations of *Brady* by prosecutors are difficult to prove without an admission on the part of a prosecutor—a rare occurrence without a smoking gun.[96]

The distinction of purposeful as opposed to reckless *Brady* violations hardly matters to the person who loses years of his life to prison. Any failure by the top prosecutor's office to disclose *Brady* material should be mourned and

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STATISTICS 439 (2003), https://www.ncjrs.gov/pdffiles1/Digitization/208756NCJRS.pdf (finding 97.1% of convictions in U.S. district courts in 2001 were due to guilty pleas).

91. Goldsmith & Walsh, *supra* note 13.

92. *Id.*

93. United States v. Dimas, 3 F.3d 1015, 1020 (7th Cir. 1993) (factoring into the *Brady* analysis whether the prosecutor had acted in bad faith); United States v. Jackson, 780 F.2d 1305, 1312 (7th Cir. 1986) (stating in dicta that, when the defendant alleges the prosecution had used false testimony, the court considers whether the prosecution knowingly used such testimony when assessing a *Brady* claim).

94. *See* Gershowitz, *supra* note 89, at 1062 ("[T]here are entrenched reasons why judges are reluctant to call prosecutors on the carpet. Many judges were former prosecutors, and there is a general instinct for people to protect their own. Indeed, even among judges who were not prosecutors, there is still a reluctance to chastise fellow lawyers.").

95. Keenan, *supra* note 63, at 211.

96. *See, e.g.*, Mara Leveritt, *Prosecutors Have All the Power*, ARK. TIMES (Sept. 11, 2014), https://www.arktimes.com/arkansas/prosecutors-have-all-the-power/Content?oid=3452595 (describing a case in which, even six years after the defendant's conviction, a prosecutor refused to turn over a tape containing exculpatory evidence until ordered to by a federal judge).

studied so that it is not repeated. By focusing on purposeful *Brady* violations, prosecutors again minimize the serious problem of non-disclosure of exculpatory information by their office.

To consider whether the violations are as rare as claimed, this Article will delve deep into the U.S. documented *Brady* record. Many more *Brady* violations are likely given that only the ones brought to the attention of a court or a defendant are the *Brady* violations that surface. Contrast that with the Superior Court cases prosecuted by the United States Attorney's Office in the District of Columbia.

A. United States Attorney's Office for the District of Columbia

Overall the United States Attorney's Office prosecutes tens of thousands of cases every year.[97] But very few go to trial.[98] With dismissals, diversion programs, and guilty pleas, the numbers of cases that make it to trial are tiny.[99] Consider that in 2010 of the over 166,000 criminal cases referred by law enforcement, only 3,056 went to trial in all of the federal district courts in the entire country.[100] Meanwhile in D.C. Superior Court, a single courthouse, the United States Attorney's Office reviewed almost 27,000 cases, 1,774 went to trial.[101] There were only fifteen trials in 2010 in United States District Court for the District of Columbia.[102] In 2013 only 4.29% of the total cases referred actually went to trial in federal district court in the United States vs. 8.71% of the total cases referred in D.C. Superior Court.[103] The often-cited statistic of ninety-seven percent of federal cases resolved by guilty plea only takes into account *convictions*.[104] Many cases are never brought, dismissed, or diverted and do not result in any guilty finding, much less a conviction.[105] Though just over ninety percent of convictions in D.C. Superior Court in 2015 were via guilty plea,[106] forty-seven percent of defendants prosecuted by the United States

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97. *United States Attorneys' Annual Statistical Report: Fiscal Year 2015*, U.S. DEP'T. OF JUSTICE 2–4, https://www.justice.gov/usao/file/831856/download.

98. *Id.* at 5–7.

99. *Id.*

100. *United States Attorneys' Annual Statistical Report: Fiscal Year 2010*, U.S. DEP'T. OF JUSTICE
8–10, https://www.justice.gov/sites/default/files/usao/legacy/2011/09/01/10statrpt.pdf.

101. *Id.* at 15–16.

102. *Id.* at 49. This appears to be consistent with other years. In 2013 there were fifteen jury trials and one bench trial. *United States Attorneys' Annual Statistical Report: Fiscal Year 2013*, U.S. DEP'T. OF JUSTICE 51 (2013), https://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf. [hereinafter *U.S. Attorneys' Statistical Report FY 2013*].

103. *See U.S. Attorneys' Statistical Report FY 2013*, *supra* note 102, at 14–15, 51.

104. *Id.* at 9.

105. *Id.*

106. Office of the United States Attorneys, *United States Attorneys' Annual Statistical Report: Fiscal Year 2015*, U.S. DEP'T. OF JUSTICE 65 (2015),

Attorney's Office who went to trial in the D.C. Superior Court were found not guilty in 2013.[107] In D.C. Superior Court, defendants are 3.2 times more likely to go to trial than in federal court.[108] Given that the same U.S. Attorney's Office that prosecutes in D.C. Superior Court also prosecutes in United States District Court for District of Columbia, it is helpful to examine that office[109] since no U.S. Attorney's Office tries more cases.[110]

Senator Ted Stevens was prosecuted and convicted in United States District Court for the District of Columbia before Judge Emmett Sullivan in 2008.[111] Because he was a United States Senator, he was prosecuted by the Public Integrity Section of the DOJ as well as by Assistant United States Attorneys from the Alaska office.[112] After his conviction, it became clear that the government had withheld exculpatory material from the defense.[113] Troubled by the allegations of misconduct, Judge Sullivan ordered an independent inquiry into the conduct of the prosecutors while the DOJ launched its own investigation.[114] Judge Sullivan also vacated the convictions of the Senator.[115] Attorney General Eric Holder later declared that he would not be retried.[116]

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https://www.justice.gov/usao/resources/annual/statistical-reports [hereinafter *U.S. Attorneys' Statistical Report FY 2015*] (finding in 2015 1,920 felony convictions, 1,735 of which were from guilty pleas).

107. *See U.S. Attorneys' Statistical Report FY 2013*, *supra* note 102, at 15.

108. *Id.* at 14–15, 48 (stating that the D.C. Superior Court had disposed of 1,774 cases in that year while there were still 554 cases pending in the District Court for the District of Columbia).

109. The author notes that she was a defense attorney in the District of Columbia and can attest that there are many ethical, candid attorneys who work there.

110. *See U.S. Attorneys' Statistical Report FY 2013*, *supra* note 102, at 14–15, 48 (looking at the cases presented both in D.C. Superior Court and in the District Court for the District of Columbia). The lack of the federal sentencing guidelines and fewer mandatory minimums make Superior Court a less risk for a defendant to go to trial.

111. United States v. Stevens, No. 08-CR-231 EGS, 2009 WL 6525926, at *1 (D.D.C. Apr. 7, 2009); *see generally* Jeffrey Toobin, *Casualties of Justice: The Justice Department Clearly Wronged Senator Ted Stevens. Did It Also Wrong One of His Prosecutors?*, THE NEW YORKER (Jan. 3, 2011), http://www.newyorker.com/magazine/2011/01/03/casualties-of-justice (describing DOJ's misconduct in Senator Stevens' case and the fates of the DOJ prosecutors).

112. *See* Toobin, *supra* note 111.

113. *Stevens*, 2009 WL 6525926, at *1; *see The Ted Stevens Scandal*, WALL ST. J. (Apr. 2, 2009), http://www.wsj.com/articles/SB123863051723580701.

114. *Stevens*, 2009 WL 6525926, at *2.

115. *Id.* at *2 ("The verdict is hereby set aside and the indictment is hereby dismissed with prejudice.").

116. Neil A. Lewis, *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES (Apr. 1, 2009), http://www.nytimes.com/2009/04/02/us/politics/02stevens.html; *see The Ted Stevens Scandal*, *supra* note 113 ("Attorney General Eric Holder . . . promised a 'thorough' probe into the conduct of prosecutors, which is the least the Department owes Mr. Stevens.").

The case resulted in embarrassment for the DOJ. Newspapers all over the country reported on the story.[117] The high-profile status of the defendant, the judge's extraordinary steps in ordering an inquiry, the twin investigations into the conduct of the lawyers,[118] and later a suicide by one of the prosecutors[119] and finally the Senator's death,[120] no doubt, led to making the Senator Stevens case a significant news story that remained in the press for years. Two years after the prosecution, in a piece in the New Yorker, Jeffrey Toobin wrote that the prosecution of Senator Stevens was "profoundly unjust" and said that "what is indisputable is that the government did not play fair with Ted Stevens."[121]

There were a number of things that were done wrong in the prosecution of Senator Stevens. The government sent a witness subpoenaed by both the defense and government was back home to Alaska.[122] During trial, prosecutors claimed the witness became ill.[123] Post-trial, an F.B.I. agent alleged that the government sent home the witness because the government discovered that he was a poor witness after a mock examination of him.[124] Although prosecutors, particularly prosecutors from the Public Integrity Section, could have granted open file discovery to the Stevens defense team, the prosecutors did not.[125] They also withheld information about their main witness—a cooperator—against Senator Stevens.[126] After a decision was made by the Attorney General to dismiss the case, Judge Sullivan said in open court, "[i]n nearly twenty-five years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case." [127]

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117. *See, e.g.*, Neil A. Lewis, *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES (Apr. 1, 2009), http://www.nytimes.com/2009/04/02/us/politics/02stevens.html; Shelley Murphy, *Top Judge Wants US Prosecutor Disciplined: Says Evidence Was Withheld at Trial*, BOSTON GLOBE (July 3, 2007), http://archive.boston.com/news/local/articles/2007/07/03/top_judge_wants_us_prosecutor_disciplined/.

118. Charlie Savage, *Prosecutors Face Penalty in '08 Trial of a Senator*, N.Y. TIMES (May 24, 2012), http://www.nytimes.com/2012/05/25/us/politics/2-prosecutors-in-case-of-senator-ted-stevens-are-suspended.html.

119. Charlie Savage, *Stevens Case Prosecutor Kills Himself*, N.Y. TIMES (Sept. 27, 2010), http://www.nytimes.com/2010/09/28/us/politics/28stevens.html.

120. *See* Toobin, *supra* note 115.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Carrie Johnson & Del Quentin Wilber, *Holder Asks Judge to Drop Case Against Ex-Senator*, WASH. POST (Apr. 2, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040100763.html ("The Justice Department asked U.S. District Judge Emmet G. Sullivan to drop the case after learning that prosecutors had failed to turn over notes that contradicted testimony from their key witness.").

127. Transcript of Record at 3, United States v. Stevens, No. 08-CR-231 EGS, 2009 WL 6525926 (D.D.C. Apr. 7, 2009).

Both the Judge Kozinski article in the Georgetown Law Journal[128] and the letter from the prosecutors addressed the Senator Stevens case. In his article, Judge Kozinski applauds Judge Sullivan for holding the prosecutors to account and condemns what he sees as DOJ's self-congratulatory attempts at half-hearted reforms.[129] In contrast, the prosecutors' letter acknowledges that the Stevens prosecution "involved significant discovery failures and deserves to be held up as an object lesson to prosecutors,"[130] but fails to recognize those failures are of constitutional dimensions as *Brady* lapses. The letter continues that the "Department's efforts in the aftermath of that case also deserve discussion."[131] Those include discovery boot camp for new prosecutors and annual discovery training for the experienced and a new position of "national criminal discovery coordinator."[132]

The Senator Stevens case was followed by fallout from what appears to be another significant *Brady* problem by homicide prosecutors at the USAO—the Chandra Levy case. Chandra Levy was a Washington D.C. intern who went missing in July 2001.[133] Her disappearance made national headlines when it was revealed that she had been in a romantic relationship with a married congressman, Gary Condit.[134] About ten months later her body was discovered in Rock Creek Park in Washington, DC.[135] The case remained open for many years until a man with no relationship with Ms. Levy was arrested in 2009 and prosecuted largely on the strength of a government informant.[136] There was no DNA nor eyewitnesses to the offense, but in 2010 the man identified by the informant was convicted.[137]

In 2013, lawyers[138] for the man filed a motion for a new trial.[139] A post-trial *Brady* disclosure made to the trial judge while the appeal was pending cast

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128. *See* Kozinski, *supra* note 11, at xxiii.

129. *Id.* at xxiii–iv.

130. Goldsmith & Walsh, *supra* note 13.

131. *Id.*

132. *Id.*

133. Scott Higham & Sylvia Moreno, *Who Killed Chandra Levy?*, WASH. POST SPECIAL SERIES (July 13–27, 2008), *http://www.washingtonpost.com/wp-srv/metro/specials/chandra/*.

134. *Id.*

135. *Id.*

136. Keith L. Alexander, *Prosecutor in Retrial of Man Charged in Levy Murder Acknowledges '[M]istake'*, WASH. POST (Nov. 20, 2015), https://www.washingtonpost.com/local/public-safety/prosecutor-in-retrial-of-man-charged-in-levy-murder-acknowledges-mistake/2015/11/20/ab31854c-8fbc-11e5-ae1f-af46b7df8483_story.html.

137. *Id.*

138. Disclosure: one of those lawyers, Jonathan W. Anderson, is the husband of this Article's author.

139. Keith L. Alexander & Clarence Williams, *Defense Attorneys in Chandra Levy Murder Case Seek Retrial Based on New Information About Witness*, WASH. POST (Jan. 11, 2013), https://www.washingtonpost.com/local/crime/defense-attorneys-in-chandra-levy-murder-case-seek-retrial-based-on-new-information-about-witness/2013/01/11/3ebe1fea-5c09-11e2-88d0-c4cf65c3ad15_story.html.

significant doubt on the veracity of the government's cooperating witness's trial testimony.[140] The defense argued in their request for a new trial that the information had been in the possession of the government since the 2010 trial and that the government violated *Brady*.[141] In May of 2015 prosecutors dropped their long-standing opposition to a new trial on the eve of their attorneys having to testify at the hearing on the motion.[142] The timing of the government's non-opposition to the new trial–a year and half after the request for a new trial and the Friday before a long weekend[143] that was to be followed by Tuesday morning testimony by current and former Assistant United States Attorneys–made it seem as if prosecutors were either trying to protect those lawyers or protect the reputation of the office.[144] In 2016, the government announced that it would no longer seek to re-try the man accused and dismissed the case against him.[145]

Those two high-profile cases were not the only *Brady* scandals in the D.C. legal community that involved the USAO. In 2012, a United States Attorney admitted to withholding information from a criminal defendant back in 1985.[146] Among the information withheld from the defense was that three witnesses saw two men, who were never charged in the alley where the decedent was killed.[147] Eight men, ages sixteen to twenty-one, were convicted of first degree murder.[148] One of those men died in prison before this information was exposed.[149]

Brady violations have been a recurring problem in the District of Columbia for years. In 2004, the Washington Post reported that another former Assistant United States Attorney (AUSA) in the District of Columbia failed to disclose that he gave to government witnesses sums of money that went beyond amounts

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140. *Id.*

141. *See* Alexander, *supra* note 141.

142. Keith L. Alexander & Mary Pat Flaherty, *New Trial Likely for Man Convicted of Killing Intern Chandra Levy*, WASH. POST (May 22, 2015), https://www.washingtonpost.com/local/crime/new-trial-likely-for-man-convicted-of-killing-intern-chandra-levy/2015/05/22/d5c5ac20-00c4-11e5-833c-a2de05b6b2a4_story.html.

143. *Id.*

144. *Id.*

145. Matthew Barakat, *Reliance on Jailhouse Informant Dooms Chandra Levy Case*, WASH. POST (July 29, 2016), https://apnews.com/09d874ae2c7c47feb4060e8e02535c44/after-charges-dropped-mystery-levys-death-unresolved.

146. Keith L. Alexander, *Ex-Prosecutor Admits Withholding Evidence Before Trial in '84 Killing*, WASH. POST (May 3, 2012), https://www.washingtonpost.com/ex-prosecutor-admits-withholding-evidence-before-trial-in-84-killing/2012/05/03/gIQAXiHB0T_story.html ("[Former AUSA] Goren acknowledged that he did not disclose that one of his key witnesses had lied to authorities about a suspect's whereabouts at the time of the killing before taking the stand in the 1985 trial" and that "he kept some information from defense attorneys for the men, six of whom are still behind bars.")

147. *Id.* ("Some of those three witnesses identified the two men by name. [Former AUSA] Goren said he checked out those accounts but thought them incorrect, which is why he didn't pass that information to the defense.").

148. *Id.* ("Eight men . . . [were] sentenced to "between [thirty-five years] and life in prison.").

149. *Id.*

necessary to compensate witnesses for the time spent preparing to testify.[150] This failure to disclose deprived the defense of the ability to cross-examine on this interest-bias.[151] Although the United States Attorney's Office knew of the conduct by 1998, as a result of an investigation, the information was not made public until five years later.[152] As a result of the disclosures, three men were released early from prison.[153]

Yet another federal prosecutor was taken to task in a published opinion by the District of Columbia Court of Appeals in 2015 for failing to disclose an exculpatory statement by a witness in a case that went to trial in 2002.[154] While he was found to have violated ethical rules by intentionally withholding information, he was ultimately not sanctioned.

In the United States District Court for the District of Columbia, the Assistant United States Attorneys that were handling a kidnapping case were scolded for failing to turn over impeachment material.[155]

In 2011 the Washington Post reported that a Superior Court judge granted a retrial and found that the prosecutor made "repeated, blatant *Brady* violations and misrepresentations" that resulted in a young man being convicted in 2004 when he was just seventeen years old.[156] After nearly seven years behind bars the young man was acquitted in the retrial after the information was disclosed to the defense.[157] The then acting United States Attorney wrote in a statement that much of the problems in the case centered on timing rather than a failure to disclose.[158] The Washington Post article then goes on to write about four other cases between 2006-2009 of *Brady* violations where trial judges took action.[159] In another case mentioned in the article, the trial judge found that the Assistant

150. Henri E. Cauvin, *Misconduct Probe Cuts Sentences in D.C. Case*, WASH. POST (Dec. 24, 2004), http://www.washingtonpost.com/wp-dyn/articles/A23453-2004Dec23.html.

151. *See id.* ("A number of people connected to the case received vouchers. . . And many of the people who were paid were not even witnesses, the lawyers found.").

152. *Id.*

153. *Id.*

154. *In re* Kline, 113 A.3d 202, 204 (D.C. Cir. 2015). Kline was originally sanctioned with a thirty-day suspension from the practice of law, but that was appealed and Mr. Kline prevailed because there was legitimate confusion regarding his obligations under DC's Rules of Professional Conduct. *Id.* at 215.

155. Jordan Weissmann, *Prosecutors in Kidnapping Case Rebuked over* Brady, THE BLT (June 24, 2009), http://legaltimes.typepad.com/blt/2009/06/prosecutors-in-kidnapping-case-rebuked-over-brady.html ("'I have got to tell you Mr. Hegyi, I think the government is making some poor decisions when it comes to turning material over,' the judge said.").

156. Keith L. Alexander, *D.C. Judges Question Prosecutors' Roles in Criminal Cases Resulting in Mistrials, Dismissals*, WASH. POST (Oct. 16, 2011), https://www.washingtonpost.com/local/dc-judges-question-prosecutors-roles-in-criminal-cases-resulting-in-mistrials-dismissals/2011/10/07/gIQAfFuypL_story.html.

157. *Id.*

158. *Id.*

159. *Id.*

United States Attorney withheld the information "conscious, deliberately and as a tactic."[160]

Prosecutors withholding *Brady* do not always make the news, but *Brady* problems rear their heads in run of the mill cases that get little attention. Since 2000,[161] the District of Columbia Court of Appeals has found *Brady* violations in a significant number of cases.[162] In others the Court of Appeals has taken issue with timing of disclosures[163] or the materiality of the information withheld but still found (or assumed) exculpatory material was withheld.[164] All in all

160. *Id.*

161. Given that the prosecutors who penned the open letter in response to Judge Kozinski's piece only looked back fifteen years, this Article is limited to *Brady* violations discovered since 2000.

162. *See, e.g.*, Biles v. United States, 101 A.3d 1012, 1026 (D.C. Cir. 2014) (reversing a conviction because the government failed to disclose that the basis of the search of the defendant's backpack was a paid informant even though such information would have been critical to suppressing the evidence in the backpack on Fourth Amendment grounds); Vaughn v. United States, 93 A.3d 1237, 1244 (D.C. Cir. 2014) (reversing the aggravated assault convictions of two inmates after it was revealed that the government withheld a report suggesting that one of the witnesses who identified the inmates had fabricated assault charges in the past to justify using chemical agents on inmates); Miller v. United States, 14 A.3d 1094, 1097, 1123 (D.C. Cir. 2011) (holding the government failed to disclose material exculpatory evidence by not disclosing grand jury testimony that eyewitness said that the shooter used his left hand when the defendant was right-handed); Lindsey v. United States, 911 A.2d 824, 839 (D.C. Cir. 2006) (finding the government repeatedly failed to completely disclose payments it made to witnesses, but affirming the convictions because such information was not outcome-determinative);
Boyd v. United States, 908 A.2d 39, 41 (D.C. Cir. 2006) (finding that when the government failed to provide even one potentially exculpatory witness to the material evidence brought against the defendant that the governments obligations to the defendant pursuant to Brady were violated); Sykes v. United States, 897 A.2d 769, 770 (D.C. Cir. 2006) (reversing when the Court found that governments late disclosure of Brady information had a material effect on defendants ability to defend himself); Bennett v. United States, 797 A.2d 1251, 1254 (D.C. Cir. 2002) (holding that the government does have the obligation to disclose material evidence even if it adversely effects the creditability of the government's witness).

163. *See, e.g.*, Zanders v. United States, 999 A.2d 149, 161–65 (D.C. Cir. 2010) (criticizing the prosecution for the late disclosure of evidence suggesting that another individual might have had a motive to shoot and kill the victim in a homicide case, but holding the late disclosure did not warrant a new trial because the defense had but failed to take advantage of several opportunities to follow up on the report); *see also* Perez v. United States, 968 A.2d 39, 65–66 (D.C. Cir. 2009) (criticizing the prosecution for the late disclosure of grand jury testimony containing statements that casted doubt whether an eyewitness actually witnessed the crime with which the defendant was charged, but finding no Brady violation because the defense was able to elicit those statements on cross-examination).

164. *See, e.g.*, Shelton v. United States, 983 A.2d 363, 366–67 (D.C. Cir. 2009) (describing how the trial court found a *Brady* violation when the prosecutor failed to disclose that an eyewitness failed to identify the defendant as the shooter in an assault case and agreeing with the trial court's decision to continue rather than dismiss the case), *vacated by* 26 A.3d 233 (D.C. Cir. 2011) (affirming the defendant's convictions because it considered there was harmless error in the defendant's case and also questioned whether the defense actually preserved the issue for appeal); Odom v. United States, 930 A.2d 157, 159 (D.C. 2007) (affirming the trial's court denial of sanctions for the prosecution's late disclosure of an eyewitness that alleged an individual other than

there have been nine *Brady* violations found by the District of Columbia Court of Appeals in reported decisions from 2000-2015.[165] Looking at the D.C. Court of Appeals shows that there are not simply two reported cases per year as was suggested by the prosecutors over the course in the entire United States. Instead, every other year, in a single jurisdiction, a prosecutor has violated *Brady* in a way that made its way to the Court of Appeals.

Those published opinions only tell part of the story. In a letter supporting a proposed *Brady* rule in the District, the Public Defender Service for the District of Columbia cited to eight unpublished cases just in 2014–2015 where trial courts found *Brady* violations or prosecutors dismissed or offered misdemeanor pleas during the course of *Brady* litigation.[166] That is eight different *Brady* violations in a single courthouse over two years. With a Washington Post article documenting five different cases between 2009-2011 with *Brady* violations where trial judges took action, there are far more *Brady* violations than are captured by published appellate decisions. With more trials taking place in D.C. Superior Court than in federal district courts in the U.S., looking at the District is a way to focus a microscope on the *Brady* problems of the Department of Justice. Looking not just at published opinions, looking carefully at the data-rich District of Columbia Superior Court shows that *Brady* violations take place several times a year in a single office of the USAO. *Brady* violations are not rare occurrences at all, but commonplace ones. So common, those prosecutors have systems in place to hide and minimize them with dismissals and generous plea offers so that their conduct is not questioned.

B. Other United States Attorneys' Offices

It is not just that the United States Attorney's Office in the District of Columbia that has withheld *Brady* material. The United States Attorney's Office has made all manner of *Brady* violations since 2000 all over the country. The following are examples of these failures.

There are *Brady* failures that come to light in the trial stage that would not be captured by appellate reversals. In 2004 the DOJ asked a federal judge in Detroit to vacate terrorism convictions against two men because of *Brady* violations.[167] In Sacramento, California, the original conviction was vacated for a man

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the defendant was responsible for the crimes with which the defendant was charged because the defense still had three months to locate and talk with the eyewitness and three other witnesses placed the defendant at the scene of the crimes).

165. *See supra* notes 168.

166. *See generally* THE PUBLIC SERVICE DEFENDER, REGARDING RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (2010), http://www.pdsdc.org/docs/default-source/default-document-library/pds-letter-to-judge-tallman-chair-judicial-conference-advisory-committee-on-amending-rule-16d8d2f4c3c02264be8d48ff00007f1dad.pdf?sfvrsn=0.

167. Danny Hakim, *U.S. Asks for Dismissal of Terrorism Convictions*, N.Y. TIMES (Sept. 1, 2004), http://www.nytimes.com/2004/09/01/us/us-asks-for-dismissal-of-terrorism-convictions.html.

convicted of environmental terrorism where the United States Attorney's Office withheld information about the cooperator.[168] A man in Indiana won a new trial after an Assistant United States Attorney withheld information that another man had admitted owning the firearm that the defendant had been convicted of possessing.[169] This information was discovered mid-trial.. In 2009 federal prosecutors in Florida failed to turn over impeachment information from the defense and the attorneys were publicly reprimanded.[170] A federal trial judge in the Western District of Virginia found that an Assistant United States Attorney intentionally suppressed *Brady* to protect her "principal witness from damaging and embarrassing cross-examination".[171] In his opinion, the judge wrote that the failure to disclose *Brady*, "…was not an inadvertent oversight."[172] The trial judge granted a new trial and removed the AUSA from the case.[173] While the full disclosure about the officer came on one week before the appellate brief was due, the case was decided by the trial judge who gave the man a re-trial after the Fourth Circuit remanded the case.[174] Therefore, this serious finding against the office would not be an appellate reversal that the United States Attorney would count in its *Brady* statistics.

In one troubling case that made headlines, the Chief U.S. District Court Judge for the District of Massachusetts Wolf asked the Massachusetts Board of Bar overseers to look into disciplinary proceedings against a U.S. Attorney for withholding evidence from the defense that the main witness in a mafia murder case had tried to recant his story to authorities.[175] In one instance Judge Wolf wrote of federal prosecutors, "[c]ustomary means of addressing errors and intentional misconduct had proved inadequate to prevent the repetition of violations of constitutional duties. . . ." [176]

These cases are all cases were the *Brady* violation was uncovered prior to trial or in trial so there is not an appellate reversal. The violation was cured, so these are cases would not have made ripples or made it to public opinions but for the

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168. Colin Moynihan, *Man Convicted of Environmental Terrorism is Freed*, N.Y. TIMES (Jan. 8, 2015), http://www.nytimes.com/2015/01/09/us/man-convicted-of-environmental-terrorism-wins-early-release.html.

169. Jill Disis & Jon Murray, *Felon with Gun Will Get New Trial*, INDIANAPOLIS STAR (Dec. 20, 2013).

170. United States v. Shaygan, 661 F. Supp. 2d 1289, 1322, 1324 (S.D. Fla. 2009).

171. United States v. Burns, No. 613-CR-22, 2016 WL 3910273, at *4, *7 (W.D. Va. July 14, 2016).

172. *Id.* at *7

173. *Id.* at *8.

174. *Burns*, 2016 WL 3910273, at *3.

175. Shelley Murphy, *Top Judge Wants US Prosecutor Disciplined: Says Evidence Was Withheld at Trial*, BOSTON GLOBE (July 3, 2007), http://archive.boston.com/news/local/articles/2007/07/03/top_judge_wants_us_prosecutor_disciplined/.

176. *Id.*

judges' frustration with the government. But these type of failures show that some federal prosecutors are withholding information until the last moment.

And there is no shortage of appellate reversals on *Brady* grounds either. The First Circuit found a *Brady* violation in 2008 by the U.S. Attorney's Office in Puerto Rico for failing to turn over to the defense prior to trial a report that could have been used to impeach a government witness.[177]

A 2012 decision by the Second Circuit found that the United States Attorney's Office failed to turn over portions of transcripts that undermined the government's main witness.[178] That case was tried two times with lawyers from the Securities and Exchange Commission and the United States Attorney's Office—neither trial teams turned over the material. The Second Circuit called the *Brady* violation "entirely preventable" and found that prosecutors "on multiple occasions either actively decided not to disclose" the suppressed material or "consciously avoided its responsibility to comply with *Brady*."[179]

The Fourth Circuit documented "a troubling pattern by federal prosecutors of withholding evidence from defendants" in North Carolina.[180] Assistant United States Attorney's misconduct included "failing to turn over evidence that might have been beneficial to a defendant in a firearms case" and "leaving the false testimony of a witness uncorrected."[181] Prosecutors in South Carolina were found to have violated *Brady* by failing to provide impeachment material in its possession.[182] The Fourth Circuit vacated convictions of two men as a result.[183]

The Sixth Circuit reversed convictions where the government failed to disclose the exculpatory statements of the co-defendant.[184] The court wrote that, "nondisclosure of *Brady* material is still a perennial problem . . . " and that "once again . . . prosecutors substitute their own judgment of the defendants' guilt for that of the jury." [185] The court of appeals seems exasperated with the prosecutors and reflects a recognition that this is not a singular failing by one federal prosecutors but a pervasive continuing issue.

This sentiment towards prosecutors is matched in some Ninth Circuit *Brady* cases. In 2008, the Ninth Circuit affirmed a trial court's dismissal of an

177. United States v. Aviles-Colon, 536 F.3d 1, 18–22 (1st Cir. 2008).

178. Mahaffy v. United States, 693 F.3d 113, 119, 122 (2d Cir. 2012).

179. *Id.* at 122.

180. *Id.* at 133.

181. *Id.*

182. United States v. Parker, 790 F.3d 550, 558–63 (4th Cir. 2015). The Fourth Circuit documented "a troubling pattern by federal prosecutors of withholding evidence from defendants" in North Carolina. Anne Blythe, *Court Scold U.S. Prosecutors-Appeals Court cites Discovery Violation in N.C. District*, RALEIGH NEWS & OBSERVER, (Aug. 27, 2013). Such conduct included like "failing to turn over evidence that might have been beneficial to a defendant in a firearms case" and "leaving the false testimony of a witness uncorrected." *Id.*

183. *Id.*

184. United States v. Tavera 719 F.3d 705, 707, 714 (6th Cir. 2013).

185. *Id.* at 708.

indictment and found that prosecutors in Nevada violated *Brady* and *Giglio*, and made misrepresentations in court.[186] Six hundred and fifty pages of documents related to government witnesses' prior records were not disclosed. The trial judge found that the trial Assistant United States Attorney's conduct was "unconscionable" and that he "made affirmative misrepresentation[s] to the court" and "acted flagrantly willfully, and in bad faith." [187] In upholding the dismissal, the Ninth Circuit wrote, we are "troubled, both by the AUSA's actions at trial and by the government's lack of contrition on appeal." [188]

It is the ultimate sanction for a trial judge to dismiss a case on *Brady* grounds.[189] If a sanction is given for the violation it is often continuance of the trial for the defense to catch up and make use of the suppressed information, or perhaps an instruction that may make the defense whole.[190] But a dismissal reflects a fatigue with the usual excuses by the United States Attorney's Office or prejudice that cannot be cured. The fact that the Ninth Circuit affirmed the dismissal shows that the Court of Appeals has tired as well.

But the 2004 dismissal by the trial court and the Ninth Circuit affirmance was not a sufficient deterrent. In 2013, the Ninth Circuit found that U.S. Attorney's Office in Oregon "violated its obligations pursuant to *Brady v. Maryland* . . . by withholding significant impeachment evidence relevant to a central government witness." [191] Prosecutors in Oregon found that the convictions they secured were reversed when they failed to learn of exculpatory material about their main witness.[192] Judge Reinhardt wrote that "at the least the prosecutor failed in his duty to learn" of the main witness's prior convictions.[193] This type of disregard for due process by trial prosecutors is troubling.

But the most notable Ninth Circuit case is the one in which Judge Kozinski wrote in the dissent, in which three other judges on the Ninth Circuit joined, that there was an "epidemic of *Brady* violations abroad in the land." [194] Although no convictions were reversed because there was "no reasonable probability that the verdict would have been different" [195], the Ninth Circuit did find that the favorable material was not turned over to the defense.[196] In his dissent, Judge

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186. United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008).

187. *Id.* at 1084.

188. *Id.* at 1088.

189. *Cf.* United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991) ("A trial court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation" or under [the courts] 'supervisory powers.'").

190. Jones, *supra* note 10, at 441–47.

191. United States v. Sedaghaty, 728 F.3d 885, 892, 900–03 (9th Cir. 2013).

192. United States v. Price, 566 F.3d 900, 903, 914 (9th Cir. 2009).

193. *Id.* at 911.

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

195. United States v. Olsen, 704 F.3d 1172, 1185 (9th Cir. 2013).

196. *See id.* at 1181, 1187 (conceding that the contents of a report of an internal investigation file

were "clearly" favorable to the defendant, but finding that the report was not material).

Kozinski stated that this panel's ruling "effectively announces that the prosecution need not produce exculpatory or impeaching evidence" and that it is a "signal to prosecutors that, when a case is close, it's best to hide evidence helpful to the defense. . . ." [197] The dissent goes on to say that the prosecutor "stood before the district judge and uttered falsehoods" [198] and that "protecting the constitutional right of the accused was just not very high on this prosecutors' list of priorities." [199]The "prosecutor just did not take his constitutional duty to disclose exculpatory evidence very seriously."[200] The dissent then cites to twenty-nine *Brady* reversals, eight of which are federal prosecutions, as evidence that "*Brady* violations have reached epidemic proportions."[201]

The prosecutors who responded to Judge Kozinski want to focus on how few instances of willful *Brady* violations can be proven in the published opinions—just two of the eight over fifteen years. While the DOJ letter opposing the proposed rule in the District Court in the District of Columbia say that they average two *Brady* reversals a year. But by focusing only on appellate reversals, we miss many other *Brady* violations. The cases discussed above where trial judges take steps to remedy the violation—like the *Stevens* case—do not appear in those statistics. The *Brady* findings that do not meet the reversible error standard are not counted in the statistics.[202] The dismissals are not captured in those two per year statistics. The continuances that are granted for the defense to investigate the late-disclosed *Brady* are not included in this two per year statistic. The generous plea offers as a result of *Brady* violations are not counted. The still-undisclosed *Brady* is not factored into the equation. Prosecutors concentrating on willful violations also miss the mark. The inadvertent *Brady* violations are the ones that could be addressed with the clarity of a rule and other easy fixes that the DOJ opposes.

Certainly it is true that most federal prosecutors try their hardest not to violate the dictates of *Brady.* While one might argue that a single rogue prosecutor could get so convinced of a defendant's guilt that it might cause him to hide exculpatory evidence or that he may want to win at all costs to advance his career and keep evidence that weakens his case from the defense, but it is not just individual prosecutors who fail to disclose *Brady* material.[203] The failures are

197. Olsen, 737 F.3d at 630 (Kozinski, C.J., dissenting).

198. *Id.* at 631.

199. *Id.* at 631–32.

200. *Id.*

201. *Id.* at 631–32.

202. *See e.g.*, United States v. Calderon, 829 F.3d 84, 94 (1st Cir 2016) (finding that the prosecution failed to disclose the arrest of a witness, but finding the error immaterial); *see also Olsen*, 737 F.3d at 633 (arguing that the court's refusal to vacate convictions when prosecutors commit an "immaterial" *Brady* violation only encourages prosecutorial misconduct).

203. *See* Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, WASH. POST (Apr. 6, 2016) [hereinafter "Hsu I"], https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html. ("[W]hile many prosecutors

systemic. In 2012, the Washington Post reported that the Justice Department knew based on a review of its evidence that FBI hair analysis evidence was flawed since 2004, but some defendants and their lawyers were not informed until years later.[204] FBI experts testified in cases all over the country. In 250 of those cases, the DOJ determined that the flawed testimony was "critical" to the conviction.[205] While the DOJ notified prosecutors, the DOJ did not notify defendants or their lawyers themselves.[206] And while some prosecutors did make immediate disclosures, prosecutors at the United States Attorney's Office did not notify defendants for years.[207]

Three men prosecuted by the United States Attorney's Office were exonerated between 2009-2012 after the flawed forensic hair testimony was uncovered.[208] While prosecutors knew in 2004, these men spent additional *years* in prison because of the United States Attorney's inaction in this case.[209] One man, Mr. Tribble, spent twenty-eight years in prison after a forensic expert claimed that a hair recovered belonged to him, though it was a dog hair.[210] A now very seriously ill Mr. Tribble won a $13.2 million judgment.[211] This is the third multi-million dollar civil settlement as a result of the flawed testimony.[212]

The Project on Government Oversight found more than four hundred instances of misconduct by the DOJ from 2002-2013.[213] While the numbers

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made swift and full disclosures, many others did so incompletely, years late or not at all. The effort was stymied at times by lack of cooperation from some prosecutors and declining interest and resources as time went on.").

204. *Id.*

205. *Id.*

206. *Id.*

207. *See id.*; *see, e.g.*, Spencer S. Hsu, *Santae Tribble Cleared in 1978 Murder Based on DNA Hair Test*, WASH. POST (Dec. 14, 2012) [hereinafter "Hsu II"], https://www.washingtonpost.com/local/crime/dc-judge-exonerates-santae-tribble-of-1978-murder-based-on-dna-hair-test/2012/12/14/da71ce00-d02c-11e1-b630-190a983a2e0d_story.html (reporting on a case in which a man was convicted for murder on account of the faulty hair evidence).

208. *See* Hsu II, *supra* note 217.

209. *See* Hsu I, *supra* note 213.

210. *See* Hsu II, *supra* note 217.

211. Spencer S. Hsu, *Judge Orders D.C. to Pay 13.2 Million in Wrongful FBI Hair Conviction Case*, WASH. POST (Feb. 28, 2016) [hereinafter "Hsu III"], https://www.washingtonpost.com/local/public-safety/judge-orders-dc-to-pay-132-million-in-wrongful-fbi-hair-conviction-case/2016/02/28/da82e178-dcde-11e5-81ae-7491b9b9e7df_story.html?utm_term=.c279a0679a8b.

212. *Id.*

213. Nick Schwellenbach et al., *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, PROJECT ON GOV'T OVERSIGHT (Mar. 13, 2014), http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html?referrer=https://www.google.com/; *see also* Sidney Powell, *Longtime Federal Attorney: Eric Holder Protects Corrupt Prosecutors*, OBSERVER (June 19, 2014), http://observer.com/2014/06/longtime-federal-attorney-eric-holder-protects-corrupt-prosecutors/

came from the Federal Office of Professional Responsibility, names of the problem attorneys were not provided.[214] Of the misconduct, twenty-nine instances were prosecutors failing to turn over exculpatory material.[215]

The numbers of *Brady* violations that we know of by the United States Attorney's Office is substantial. As mentioned earlier, there are likely many others of which the public and defendants will never be aware. The DOJ and the United States Attorney's Office both clearly have the obligation to do better than they have done. Ethical and Constitutional mandates are clear. Their failures need to be owned by the office, studied and every effort to correct must be made. Regrettably, it seems that the United States Attorney's Office and the DOJ have been more concerned with minimizing their mistakes.

III. SESSIONS' BRADY RECORD

In 2017, a new era at the Justice Department began with Attorney General Jeff Sessions. Jeff Sessions began his work as a prosecutor in 1975 for the Southern District of Alabama and was the head of that office from 1981 to 1993.[216] He was elected as the Attorney General for the state of Alabama and served between 1994 and 1996 before he became a United States Senator the following year.[217]

Sessions has a controversial record. In his brief time, just two years, as Attorney General of Alabama there were four *Brady* findings against his office.[218] Additionally, there were other allegations of *Brady* violations that the defense was unable to prove to the Alabama Court of Appeals and the Eleventh Circuit.[219] The most noteworthy case Sessions handled is a case in which

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(mentioning then-Attorney General Eric Holder's refusal to release the names of DOJ lawyers who had committed prosecutorial misconduct).

214. Schwellenbach et al., *supra* note 223, at 7.

215. *Id.* at 3.

216. *U.S. Senate Historical Office, SESSIONS, Jefferson Beauregard, III (Jeff)*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001141 [hereinafter *SESSIONS*]; *Meet the Attorney General*, THE UNITED STATES DEPT. OF JUSTICE, https://www.justice.gov/ag/staff-profile/meet-attorney-general. As a U.S. Attorney, Sessions would have been responsible for many things, including overseeing training of the lawyers in his office, discipline of lawyers who violated office policy or act unethically in carrying out their job, and choosing which cases to bring. Adam Serwer, *Did Jeff Sessions Champion Desegregation?*, THE ATLANTIC (Dec. 7, 2016), https://www.theatlantic.com/politics/archive/2016/12/which-schools-did-jeff-sessions-desegregate/509867/. [hereinafter "Serwer I"]. His name appeared on pleadings and he was ultimately responsible for those cases even if line assistants handled them. *Id.*

217. *SESSIONS*, *supra* note 216.

218. *See e.g.*, USX Corp. v. TIECO, Inc., 189 F.R.D. 674, 675–77 (1999); *Ex parte* Willingham, 695 So. 2d 148 (Ala. 1996); Shields v. State, 680 So. 2d 969 (Ala. Crim. App. 1996); Hamilton v. State, 677 So. 2d 1254 (Ala. Crim. App. 1995).

219. *See, e.g.*, Hays v. Alabama, 85 F.3d 1492, 1498–99 (11th Cir. 1996) (finding no *Brady* violation was committed when the prosecution failed to disclose a witness' certain inconsistent statements because the witness had admitted on the stand that those statements were inconsistent); Bell v. Haley, No. CIV.A. 95-T-913-N, 2001 WL 1772140, at *33, *111–12 (M.D.

Sessions, while a U.S. Attorney, prosecuted black civil rights activists attempting to help elderly black people vote.[220] The three defendants were acquitted in just three hours after a weeks-long trial.[221] Some questioned the motives of the USAO's use of tremendous resources to prosecute black civil rights activists so aggressively.[222]

Under Session's tenure, Alabama's Office of the Attorney General was found to have committed several *Brady* violations. In 1995, the Court of Criminal Appeals of Alabama in *Hamilton v. State* ordered a new trial because prosecutors in Alabama failed to turn over proof that investigators had promised the principal witness in a murder trial help with early release.[223] In 1996, *Shields v. Alabama*, the court reversed a defendant's murder conviction because the government did

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Ala. Dec. 5, 2001) (ordering an evidentiary hearing be held regarding potentially exculpatory evidence before the court could rule on the defendant's *Brady* claim); Williams v. State, 710 So. 2d 1276, 1296–97 (Ala. Crim. App. 1996), *aff'd sub nom. Ex parte* Williams, 710 So. 2d 1350 (Ala. 1997) (finding no *Brady* violation was committed because the grand jury testimony withheld was not favorable to the defendant); Arthur v. State, 711 So. 2d 1031, 1078–80 (Ala. Crim. App. 1996), *aff'd sub nom. Ex parte* Arthur, 711 So. 2d 1097 (Ala. 1997) (finding no *Brady* violation was committed when the prosecution failed to disclose grand jury testimony and prospective jurors' arrest and voting records because the defense made no showing that would entitle the defense to grand jury testimony and because the defense could have always asked the prospective jurors about their arrest and voting records during voir dire); Carroll v. State, 701 So. 2d 47, 51 (Ala. Crim. App. 1996) (holding that the defense's *Brady* claim was precluded from review because the trial court failed to issue a ruling on whether the prosecution was required to disclose a witness' potentially inconsistent statements); Lee v. State, 683 So. 2d 33, 38 (Ala. Crim. App. 1996) (finding no *Brady* violation was committed because the defendant failed to allege that the prosecution withheld favorable evidence from the defense); Magwood v. State, 689 So. 2d 959, 970 (Ala. Crim. App. 1996) (finding no *Brady* violation was committed because the alleged non-disclosed evidence was in fact in the record); Gibson v. State, 677 So. 2d 236, 237 (Ala. Crim. App. 1995) (remanding a case in which the trial court found exculpatory evidence but failed to inquire into whether the evidence was material for *Brady* purposes); Smith v. State, 675 So. 2d 100, 102 (Ala. Crim. App. 1995) (holding the defendant failed to show a *Brady* violation because the prosecution did in fact disclose the exculpatory evidence to the defense). As an AUSA, Sessions was also accused of violating *Brady* for failing to disclose certain medical records, but the Eleventh Circuit ultimately reversed and remanded the case based on Defendant's ineffective assistance of counsel claim. Holsomback v. White, 133 F.3d 1382, 1389 (11th Cir. 1998).

220. *See, e.g.*, Emily Bazelon, *The Voter Fraud Case Jeff Sessions Lost and Can't Escape*, N.Y. TIMES MAG. (Jan. 9, 2017), https://www.nytimes.com/2017/01/09/magazine/the-voter-fraud-case-jeff-sessions-lost-and-cant-escape.html (describing the case in question and containing Sessions' claim that his decision was "necessary and just"); Mary Troyan & Brian Lyman, *Black Belt Voter Fraud Case in Alabama Shaped Sen. Jeff Sessions' Career*, USA TODAY (Nov. 18, 2016), http://www.usatoday.com/story/news/politics/2016/11/18/black-belt-voter-fraud-case-alabama-shaped-sen-jeff-sessions-career/94088186/ (including statements that insinuated or outright said that racism against blacks motivated Sessions' actions in the case).

221. Michelle Ye Hee Lee, *The Facts about the Voter Fraud Case that Sank Jeff Session's Bid for a Judgeship*, WASH. POST (Nov. 28, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/28/the-facts-about-the-voter-fraud-case-that-sunk-jeff-sessionss-bid-for-a-judgeship/?utm_term=.8bf346ebede6.

222. *See, e.g.*, Bazelon, *supra* note 233; Troyan, *supra* note 233.

223. Hamilton v. State, 677 So. 2d 1254, 1255–56, 1261 (Ala. Crim. App. 1995).

not inform the defense that the victim had a prior assault conviction even though the defendant was arguing self-defense.[224] In 1997, the court reversed a defendant's rape conviction because the prosecution intentionally failed to call as a witness a police officer on the scene who was told that that the victim denied being raped and who would have corroborated another officer's testimony that the victim did not appear scared and was fully dressed and not disheveled.[225] These reversals are all clear violations of *Brady*'s mandate to disclose exculpatory evidence.

In the most famous *Brady* violation committed by Sessions, *Alabama v. Tieco, Inc.*, an Alabama Circuit Court judge said that Sessions' actions "'far surpassed in extensiveness and measure in totality any prosecutorial misconduct ever presented to or witnessed by th[e] court.'"[226] *Tieco* arose because Sessions pursued 222 criminal charges against TIECO, Inc., a competitor of U.S. Steel, around the time U.S. Steel donated to Sessions' senatorial campaign.[227] During the case, Sessions' office repeatedly denied the existence of exculpatory evidence, repeatedly refused to provide such evidence when requested, and allowed many of the prosecution's witnesses and its own employees to deceive the court.[228] Ultimately, the judge dismissed all charges because "the prosecutorial misconduct [wa]s so pronounced and persistent that it permeate[d] the entire atmosphere of this prosecution and warrant[ed] a dismissal of these cases."[229]

Sessions' responded that "[c]harges like 'prosecutorial misconduct' offend[ed him]."[230] Although Sessions neither offered contrition nor offered a defense to the conduct of the office he said, "if prosecutors are continued to be abused by defense lawyers, it can shill their willingness to take on high-profile, complex cases." [231] Sessions left to go to the Senate shortly after that case. No appeal of the judge's ruling was taken by the office.[232]

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224. Shields v. State, 680 So. 2d 969, 970–73, 975 (Ala. Crim. App. 1996).

225. *In re* Willingham, 695 So. 2d 148, 149, 152 (Ala. 1997).

226. USX Corp. v. TIECO, Inc., 189 F.R.D. 674, 680 (1999). The court referred to Sessions' office because there were allegations that, during the criminal case, Sessions' office was sharing the evidence discovered with TIECO's competitor U.S. Steel while U.S. Steel was suing TIECO. Mark Oppenheimer, *Jeff Sessions: An Attorney General Who Is All in for Prosecutors*, L.A. TIMES (Jan. 5, 2017), http://www.latimes.com/opinion/op-ed/la-oe-oppenheimer-sessions-prosecutor-20170105-story.html.

227. *See Testimony of ACLU National Legal Director David Cole on the Nomination of Sen. Sessions for Attorney General*, ACLU (Jan. 11, 2017), https://www.aclu.org/other/testimony-aclu-national-legal-director-david-cole-nomination-sen-sessions-attorney-general [hereainafter *Cole Testimony*] (transcript of hearing before the Senate Judiciary Committee).

228. *USX Corp.*, 189 F.R.D. at 674.

229. *See Cole Testimony*, *supra* note 227, at 7.

230. *See* Oppenheimer, *supra* note 248.

231. *Id.*

232. *See Cole Testimony*, *supra* note 227, at 8.

While most prosecutors would be chastened by this type of dressing down by a judge, Sessions did not offer contrition or even a defense or explanation. Rather, he blamed defense counsel for exposing his office's constitutional violation. The lack of an appeal after such a public lashing suggests that other lawyers in the office thought that they would have little chance on appeal of justifying what took place.

While he was the head of the USAO, Jeff Sessions was nominated in 1986 by then-President Ronald Reagan to become a federal district court judge.[233] During his confirmation hearing, it came to light that Sessions used the word "nigger."[234] He also made jokes about the Ku Klux Klan to a black lawyer in his office.[235] Sessions, then thirty-nine at the time of the hearing, conceded to make those statements, but insisted he made them in jest.[236] As a white man who grew up in the segregated deep south in the 1950s and 60s,[237] it is not hard to believe that he may have harbored negative feelings towards African Americans even as a prosecutor. As a result of these allegations of racism, Sessions was not confirmed.[238]

Given those racially insensitive comments were made decades ago, they may give only limited insight into Sessions' current views on black people. On the other hand, his being the head of the federal criminal justice system, which has been criticized for its racism towards African Americans, is troubling.[239] Someone who does not view black people as equal to whites may not be inclined to treat them fairly in the adversarial criminal justice system.

While on the campaign trail for Trump in 2016, Sessions applauded Trump's 1989 full page advertisement in the New York Times calling for the death penalty for five African American teenagers accused of raping a jogger in

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233. Ryan J. Reilly, *Jeff Sessions Was Deemed Too Racist to Be A Federal Judge. He'll Now Be Trump's Attorney General.*, HUFFINGTON POST (Nov. 20, 2016), http://www.huffingtonpost.com/entry/trump-attorney-general-jeff-sessions-racist-remarks_us_582cd73ae4b099512f80c0c2.

234. Kyle Scott Clauss, Deval Patrick Urges Senate Committee to Reject Jeff Sessions, BOSTON MAGAZINE (Jan. 4, 2017), http://www.bostonmagazine.com/news/2017/01/04/deval-patrick-jeff-sessions-letter/.

235. *See, e.g.*, Adam Serwer, *What Jeff Sessions's Role in Prosecuting the Klan Reveals About His Civil-Rights Record*, THE ATLANTIC (Jan. 9, 2017), https://www.theatlantic.com/politics/archive/2017/01/sessions-kkk-case/512600/; Phillips, *supra* note 252.

236. Reilly, *supra* note 255.

237. *See* Alisa Chang, *Sen. Jeff Sessions: Loyal To Trump, Defined By Race And Immigration*, NPR (July 14, 2016), https://www.npr.org/2016/07/14/486011917/sen-jeff-sessions-loyal-to-trump-defined-by-race-and-immigration.

238. *See* Phillips, *supra* note 252.

239. *Inmate Race*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp. (indicating that while only twelve percent of the U.S. population, African Americans make up thirty-seven percent of the inmates under the supervision of the Federal Bureau of Prisons).

Central Park.[240] At the time that Sessions made those comments the five had long been exonerated.[241] Rape is not a capital offense.[242] Nevertheless Sessions celebrated Trump for the gesture of the ad and the tough stance against the innocent young men.[243] This position seems at odds with someone seeking criminal justice reform.

In addition to examining *Brady* record and statements on race, looking into his views on other criminal justice issues may offer some insight into what kind of AG Sessions will be. Within days of assuming office, Sessions saw to it that the DOJ's policy towards a move away from private prisons was reversed.[244] Housing federal criminal prisoners in private contract facilities as come under fire over the years because of safety concerns and poor health outcomes for people in those facilities.[245] Some may see Sessions change back to private prisons as a cost-savings measure, but his predecessor at that DOJ, Sally Yates, found that private prisons do not save tax payers money.[246] This move is one that has been seen as illustrating a disregard for criminal defendants.[247]

The Sessions DOJ has indicated it would not pursue civil rights actions against police departments.[248] At a meeting of states attorneys, Sessions indicated that the Civil Rights division of DOJ would "pull back" [249] on those remedies that

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240. Gregory Krieg, *Sessions: Case of Central Park 5, Later Exonerated, Shows Trump's Dedication to "Law and Order*," CNN (Nov. 18, 2016, 8:38 PM), http://www.cnn.com/2016/08/18/politics/jeff-sessions-donald-trump-central-park-five-death-penalty/index.html.

241. Kennedy v. Louisiana, 554 U.S. 407, 413, *opinion modified on denial of reh'g*, 554 U.S. 945 (2008) ("We hold the Eighth Amendment prohibits the death penalty for [child rape not resulting in death]."); Coker v. Georgia, 433 U.S. 584, 592 (1977) ("We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.").

242. *See* Krieg, *supra* note 262.

243. *Id.*

244. Eric Lichtblau, *Justice Department Keeps for Profit Prisons, Scrapping an Obama Plan*, N.Y. TIMES (Feb. 23, 2017), https://www.nytimes.com/2017/02/23/us/politics/justice-department-private-prisons.html .

245. *See id.* ("[The] order had followed a report from the Justice Department inspector general about safety and security concerns with the operations at private prisons, along with other issues.").

246. *Id.*; *see also* Richard Oppel, *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES (May 18, 2011), http://www.nytimes.com/2011/05/19/us/19prisons.html (reporting on a study that found in some cases that it would cost $1,600 per year more to house an inmate in a private prison than in a state prison).

247. *See* Marc Mauer, *The Price of Private Prisons*, USN (Feb. 24, 2017), https://www.usnews.com/opinion/op-ed/articles/2017-02-24/jeff-sessions-is-unwise-to-expand-private-prison-use. ("If the DOJ intends to continue, much less expand, the use of private prisons, the Eighth Amendment's prohibition of cruel punishments requires the attorney general to address these safety issues.").

248. Pete Williams, *AG Sessions Says DOJ to 'Pull Back' on Police Department Civil Rights Suits*, NBC NEWS (Feb. 28, 2016), https://www.nbcnews.com/news/us-news/ag-sessions-says-trump-administration-pull-back-police-department-civil-n726826.

249. *Id.*

address police violence against American citizens following the deaths of unarmed young men in Ferguson, Mo and Baltimore, Md at the hands of police.[250] This move is seen by many as a policy change favoring police over civilians, particularly ones entangled in the criminal justice system.[251] While the relationship between private prisons and civil rights policy and *Brady* policy remains to be seen, these position changes certainly suggest that *Brady* reform will not be at the top of the Attorney General's to-do list.

Even despite the other items on his agenda given his history as someone who has violated *Brady* without apology, *Brady* reform is not something Sessions will concern himself.. Holder at least talked about training and educating young prosecutors, it does not appear that the same will hold true for Sessions. If we are to see *Brady* reform within the United States Attorney's Office, it will have to come from the bench, Congress, or litigation by defense attorney while Sessions is the Attorney General. It does not appear we will see progress from inside the DOJ.

IV. DOJ'S FIGHT AGAINST CHANGE

Even prior to the appointment of Jeff Sessions as Attorney General, the DOJ has consistently resisted meaningful *Brady reform*. In the 2015 letter responding to Judge Kozinski, the prosecutors called themselves "stewards of the public's trust" and "committed to fair play and honest dealings in every matter [they] handle."[252] Nonetheless, the following year, the Lynch DOJ sent a letter opposing a proposed rule that would regulate the dissemination of *Brady* material by prosecutors, arguing the rule would "significantly expand the scope of the government's disclosure obligation and accelerate the timing of such disclosures" at the cost of negatively impacting DOJ's ability to protect witnesses and increasing the costs of litigation, ultimately to address a rare occurrence.[253] Again citing the statistic stating that *Brady* violations are found

250. *Id.* ("Under the Obama Administration, the Justice Department opened 25 investigations into police departments and sheriff's offices and was enforcing 19 agreements at the end of 2016, resolving civil rights lawsuits filed against police departments in Ferguson, Missouri; Baltimore, New Orleans, Cleveland and 15 other cities."); *see, e.g.*, Ian Simpson, *Justice for Freddie: Hundreds Protest Death of Man After Arrest by Baltimore Police*, HUFFINGTON POST (updated Apr. 23, 2015), https://www.huffingtonpost.com/2015/04/22/protests-freddie-gray-dea_n_7119938.html; *Ferguson Unrest: From Shooting to Nationwide Protest*, BBC (Aug. 10, 2015), http://www.bbc.com/news/world-us-canada-30193354.

251. *See, e.g.*, Quentin Wilber & Kevin Rector, *Civil Rights Groups Alarmed at Justice Department's Review of Local Police Settlements*, L.A. TIMES (Apr. 4, 2017), http://www.latimes.com/politics/la-na-justice-department-sessions-police-20170404-story.html.

252. Goldsmith & Walsh, *supra* note 13.

253. Letter from Andrew D. Goldsmith et al., Assoc. Deputy Att'y Gen. & Nat'l. Crim. Discovery Coordinator, Off. of the Deputy Att'y Gen., to John Aldock, Chairman, Advisory Comm. on Loc. Rules for the U.S. District Court for the District of Columbia (Mar. 30, 2016) [hereinafter Goldsmith] (on file with author).

"on average fewer than two reported federal cases each year . . . ," [254] the letter states that the "Department of Justice strongly urges the Court to reject the proposal in its entirety."[255] There appears to be no recognition that two a year is a significant number or that there are more than two *Brady* violations a year. The violations missing from the figure just have not made it into a published opinion.

The rule proposed in the District of Columbia would simply require prosecutors to follow their ethical obligations, stating that the *Brady* obligation begins at the "defendant's initial appearance before the court." [256] Noticeably, the rule does not have a materiality standard.[257] In many ways that is simpler– prosecutors need not wrestle with whether information is material or not. The proposed rule is straightforward.

In anticipation of the concerns that DOJ expressed in its letter, the proposed rule contains a provision for witnesses' safety or national security, or time-sensitive law enforcement techniques.[258] In those instances where there is a law enforcement concern or a witness security issue, prosecutors "may apply to the court for a modification" of the rule.[259] There is nothing extreme or out of the ordinary about the new rule that has been proposed. It is not as broad as the *Brady* rule in federal court in Massachusetts.[260] The District Court in the District of Columbia would not be alone—over twenty-five District Courts have rules regulating what prosecutors must disclose and more than a dozen have standing orders.[261] The ABA supports the proposed *Brady* rule.[262]

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254. *Id.* at 2.

255. *Id.* at 3.

256. *See* United States District Court for the District of Columbia, Comment Letter on Proposed Disclosure Rule (Feb. 3, 2016), http://pdfserver.amlaw.com/nlj/DWLR%20version%20Actual%20Notice%20and%20Comment%20for%20Brady%20Rule.pdf.

257. *Id.*

258. *Id.*

259. *Id.*

260. MASS. R. CRIM. P. 14; *see* Zoe Tillman, *D.C. Judges Weigh Rule to Curb Prosecutor Misconduct*, THE NATIONAL LAW JOURNAL (Feb. 3, 2016), http://www.nationallawjournal.com/id=1202748711837/DC-Judges-Weigh-Rule-to-Curb-Prosecutor-Misconduct?slreturn=20160516221225 ("Cynthia Jones, a professor at American University Washington College of Law and a member of the committee, said the proposed rule was not as broad as the *Brady* rule in the U.S. District Court for Massachusetts, which has some of the most expansive language in the country.");

261. Tillman, *supra* note 281.

262. Letter from Thomas M. Susman, Dir., Gov't Aff. Off., to John Aldock, Chairman, Advisory Comm. on Loc. Rules for the U.S. District Court for the District of Columbia (Mar. 15, 2016), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2016_dcproposeddisclosurerule_l.authcheckdam.pdf.

The DOJ response to this suggested rule was severe. In a seventeen-page single-spaced letter the DOJ laid out its opposition.[263]. They called the rule – proposed by two federal judges (among others) – "unwarranted and unwise."[264] They claimed that the rule will "upend decades of settled practice."[265] They say "the proposed rule eliminates *Brady*'s 'materiality' requirement and seeks to provide the defense with what might amount to open file discovery."[266] Though later in the letter they state that their own internal regulations requires "disclosure by prosecutors of information beyond which is 'material' to guilt. . . ." [267] Nevertheless, the letter stated that the rule is "unnecessary to ensure a constitutionally fair trial."[268] This is an extreme reaction to a rule particularly from an agency that is supposed to ensure fair trials. The fact that the office opposes this rule in the wake of the high-profile scandals and in a time when much of the criminal justice system is being questioned is also evidence of the extent to which the office seeks to avoid change. With Sessions at the helm, it is unlikely that DOJ will reverse course in this regard.

This is not the first time the United States has opposed a rule regulating *Brady*. The DOJ successfully fought a proposed federal rule several times. In 2004, DOJ opposed an amendment to Federal Rule of Criminal Procedure 16 ("Rule 16")—the federal discovery rule—that would include a provision on exculpatory material.[269] Once again, in 2009, following the fallout from the Steven case, prosecutors again opposed the expansion of Rule 16 to include Brady material.[270] While the DOJ has consistently maintained that a modification of Rule 16 is unwarranted, this view is not shared with all the players in the criminal justice system, as evidenced by a survey conducted in 2010 that found that ninety percent of defense attorneys and fifty percent of federal judges supported a change to the rule.[271]

The government has even fought access to information about how their office decides when to disclose *Brady* material. The DOJ fought efforts to obtain copies of their discovery practices, memorialized in the "blue book." [272] One of

263. Goldsmith, *supra* note 253.

264. *Id.* at 17.

265. *Id.*

266. *Id.* at 4.

267. *Id.* at 6.

268. Memorandum from U.S. Department of Justice (Criminal Division) to Hon. Susan C. Bucklew, Chair, Judicial Conference Subcommittee on Rules 11 and 16 (April 26, 2004).

269. A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES, www.uscourts.gov/file/17996/download (last visited Dec. 27, 2017).

270. Joe Palazzolo, *Justice Department Opposes Expanded Brady Rule*, MAIN JUST. (Oct. 15, 2009), http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-brady-rule/.

271. *See* Hooper et al., *supra* note 291, at 21.

272. DOJ PERSUADES PANEL AT U.S. COURT OF APPEALS FOR THE DC CIRCUIT TO KEEP ITS FEDERAL CRIMINAL DISCOVERY BLUE BOOK FROM BEING DISCLOSED TO THE AMERICAN

the reasons not to make the handbook public that the DOJ cited was that sharing the information would divulge DOJ's litigation strategies to the defense and thereby "hamper the adversarial process."[273] When the National Association of Defense and Legal Aid Lawyers attempted to get access to it, the DOJ successfully kept the NACDL from getting access to the handbook.[274] Eventually the newspaper *USA Today* was able to get copies through a lawsuit.[275]

V. SUGGESTIONS FOR REFORM

Although no doubt there are prosecutors who purposefully hide material from the defense to make their cases stronger to win convictions, there are also prosecutors who simply find themselves in a culture that does not provide them with appropriate guidance and support to do their job correctly.[276] In addition, prosecutors get entrenched in groupthink, tunnel vision, and other unconscious biases that encourage prosecutors to try to win at all costs.[277] Prosecutors asked to imagine themselves as the defense and to determine how information might be of use to a defendant will likely fail. Prosecutors can easily explain away or erroneously minimize relevant evidence. Because of the lack of support for *Brady* reform by the DOJ, real reform will have to come from the bench and legislature and/or through litigation and pressure from criminal defense attorneys.

A. Open File Discovery

The single easiest fix to the *Brady* problem would be for actual open file discovery. Legal scholars have called for open file discovery over the years.[278]

PUBLIC; NACDL TO SEEK REHEARING EN BANC, https://www.nacdl.org/bluebook_july2016/ (last visited Dec. 31, 2017).

273. Declaration of Andrew D. Goldsmith at 7, *Nat. Assoc. of Crim. Def. Lawyers v. Exec. Off. for U.S. Att'ys and U.S. Dep't of Just.*, 75 F. Supp. 3d 552 (D.D.C. 2014) (on file with author).

274. Brad Heath, *Rules to Keep Federal Prosecutors in Line Revealed*, USA TODAY (Mar. 30, 2015), http://www.usatoday.com/story/news/2015/03/03/justice-department-discovery-policies-released/24239225/.

275. *Id.*

276. Andrew King-Ries & Beth Brennan, *A Fall from Grace: United States v. W.R. Grace and the Need for Criminal Discovery Reform*, 20 CORNELL J.L. & PUB. POL'Y 313, 317–18 (2010), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1328&context=cjlpp (positing that *Brady* violations arise in part because prosecutors, following their offices' guidance, narrowly interpret their *Brady* obligations while courts demand that prosecutors follow the spirit of *Brady*); *see also* Ken White, *Confessions of an Ex-Prosecutor*, REASON (June 23, 2016), http://reason.com/archives/2016/06/23/confessions-of-an-ex-prosecutor (describing the numerous factors, e.g. the fear of failing to convict a potential repeat offender, colleagues' shameless use of bad-faith arguments, etc. that contribute to the occurrence of *Brady* violations).

277. Alafair Burke, *Improving Prosecutorial Decision-making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609–12 (2006).

278. *See, e.g.*, Alkon, *supra* note 84, at 418; Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 654 (2013) [hereinafter "Green II"];

Open file discovery by its very nature means that generally prosecutors will not withhold anything.[279] Open files mean also that prosecutors do not have to make the call about what is helpful to the defense. Rather, the defense can decide on its own because the defense has access to all the information that the government does about the alleged offense.

Open file discovery is not burdensome given that most evidence exists in an electronic format.[280] The state of Texas has implemented open file discovery, albeit a somewhat limited form.[281] Their open file law was put in place in response after it was revealed that prosecutors withheld exculpatory information that caused an innocent man to serve twenty-five years for a murder he did not commit after DNA exonerated him.[282] Open file discovery law was created to take the decision to turn over exculpatory evidence out of the hands of prosecutors and thereby reduce wrongful convictions.[283]

To the extent that open file raises concerns about witness security, appropriate redactions or protective orders that limit with whom the information can be shared can address those concerns. In certain instances when the protection of a witness is an issue, the defense attorneys may not be given the witness's name or information may not be shared outside of the defense team. This exception would alleviate any concerns about witness security.

The opposition to open file discovery seems to be largely to gain a tactical advantage over the defense. With protective orders and redactions, there is no other disadvantage to the government. An office that claims to "seek justice"[284] should crave an even playing field between the prosecutor and defense particularly after the high-profile lapses. However, the USAO and DOJ have opposed open file rules for decades in many jurisdictions.[285] With little chance

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Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 272 (2008).

279. Mosteller, *supra* note 298, at 275. *But see* Alkon, *supra* note 84, at 418–20 (describing an amendment to Texas discovery rules that eliminates prosecutorial discretion over the disclosure of exculpatory evidence, but requires the defense to file a motion for such evidence and does not obligate the prosecution to inform the defense of information the prosecution learns about after the defendant enters a guilty plea).

280. Alkon, *supra* note 84, at 418.

281. *Id.* at 419*; see also supra* note 302.

282. *Id.*; *see* Brandi Grisson, *Inmates release Brings Call for New Evidence Law*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/us/inmates-release-brings-call-for-new-evidence-law.html; *see generally* TEX. CRIM. PRO. CODE ANN. art. 39.14 (West 2017) (introduced as the Michael Morton Act).

283. Alkon, *supra* note 84, at 419–20.

284. NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS § 1-1.1 (3d ed. 2009), http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.

285. *See, e.g.*, Memorandum from David W. Ogden, Deputy Att'y Gen., for U.S. Dep't. of Just. Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), https://www.justice.gov/archives/dag/memorandum-department-prosecutors

for support for open file by the government, open file may be an untenable goal without support from Congress.

B. Rules

While prosecutors continue to limit the defense access to information, court rules that guides their conduct is the next best thing. Although a national federal rule has been suggested in the past,[286] it is certainly time for one now. With stark evidence that withheld *Brady* material is a major cause of reversals in criminal cases,[287] as well as a leading cause of wrongful convictions,[288] it is hard to justify not implementing a rule. Such rule would help trial courts ensure the fairness of their proceedings and court rules help achieve that goal and trial court simply should not allow the government to burden our appellate courts. Fewer innocent people in jail and fewer reversals in criminal convictions cannot be something that prosecutors can legitimately oppose. Rules that regulate timing and dispense with decisions about materiality by prosecutors should make obligations much clearer to prosecutors. Rules that guide young and inexperienced prosecutor should be welcomed by all. Defense attorneys can also more adequately advise clients if they know when to expect disclosure of *Brady* information.

But given that a national rule has been suggested and failed, local federal rules are the next best thing in the interim. The United States Courts for the District of Massachusetts has a rule[289] that was also opposed by the DOJ.[290] It followed the 2009 mid-trial disclosure of *Brady* in federal court. Yet despite the opposition by the USAO and the DOJ, the rule still was passed.[291]

> Prosecutors should never describe the discovery being provided as 'open file.' Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided. Furthermore, because the concept of the 'file' is imprecise, such a representation exposes the prosecutor to broader disclosure requirements than intended or to sanction for failure to disclose documents, e.g. agent notes or internal memos, that
> the court may deem to have been part of the 'file.'

Green II, *supra* note 301, at 640–41 (citations omitted).

286. Green II, *supra* note 301, at 667.

287. *Id.*

288. *See* INNOCENCE PROJECT, *supra* note 7.

289. MASS. R. CRIM. P. 14.

290. *See* Hooper et al., *supra* note 291, at 23 ("Although individual U.S. Attorney Offices provided responses to other sections of the FJC survey, the DOJ provided one response for the entire agency regarding potential amendments to Rule 16. DOJ reported that it opposes any type of amendment to Rule 16.").

291. *See* MASS. R. CRIM. P. 14.

C. Orders

Judges who find themselves in jurisdictions without rules that regulate *Brady* material should order prosecutors to turn over exculpatory material before trial. After the Senator Stevens debacle, Judge Sullivan called on his "judicial colleagues on every trial court everywhere . . . to consider entering an exculpatory evidence order at the outset of every criminal case." [292] Like a rule, orders given in all criminal cases would set up expectations for the defense and guides the conduct of the prosecutor.[293] In addition, the judge could decide what stage at which he enters the order, at the beginning of the case or at indictment in order to balance the interests of both sides.

Such order is likely to yield different results than a young prosecutor simply having a general notion from criminal procedure class that information that is material to innocence should be turned over. The natural extension of orders in specific cases is that when prosecutors willfully violate order, that they be held in contempt. This penalty provides an additional deterrent for prosecutors to commit *Brady* violations.

D. Punitive Jury Instructions

Judges should also consider punitive jury instructions in cases in which prosecutors withhold *Brady* material.[294] This type of instruction would inform jurors of 1) the government's *Brady* obligation, 2) the plain facts of the non-compliances, and 3) allow jurors to infer that the government's withholding of information means that the government believes that its case is weak.

The federal judge in *United States v. W.R. Grace* gave an instruction with the first two components.[295] The District of Columbia Court of Appeals sanctioned such a practice and then after a petition for rehearing *en banc*, withdrew its opinion.[296] Additionally, legal scholars have called for such a remedy as a sanction for intentional *Brady* violations.[297] Punitive jury instructions are a significant sanction but it is a less severe one than dismissal, which a number of

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292. Transcript of Record at 8, United States v. Stevens, No. 08-cr-231, 2009 WL 6525926 (D.D.C. Apr. 7, 2009).

293. *Id.*

294. *See* Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1456 (2006) (proposing "that when suppressed favorable evidence comes to light during or shortly before a trial, the trial court should consider instructing the jury on *Brady* law" and allow "the defendant to argue that the government's failure to disclose the evidence raises a reasonable doubt about the defendant's guilt."); *see also* Armstrong, *supra* note 8 (describing a 1999 study showing that of the 381 homicide reversals nationally, not a single prosecutors faced convictions or disbarment).

295. United States v. W.R. Grace, 455 F. Supp. 2d 1196, 1197–98 (D. Mont. Apr. 9, 2009).

296. Shelton v. United States, 983 A.2d 363 (2009), *rhr'g granted and opinion vacated*, 26 A.3d 216 (2011).

297. *See* Jones, *supra* note 10, at 447–48.

jurisdictions have come to allow.[298] Either sanction is likely to make prosecutors think twice about failing to turn over evidence.

E. Referrals to Bar Counsel

Prosecutors suffer little to no consequences for their actions when they withhold *Brady*. Few are prosecuted criminally despite violating laws.[299] Prosecutors do not seem to lose their jobs when they withhold *Brady*.[300] They rarely seem to suffer any sanction, even professionally.[301] Even the prosecutors in the Senator Stevens case—one of the most reported *Brady* violations in recent years—were shuffled around to different parts of the DOJ rather than dismissed.[302] Because prosecutors do not suffer professional consequences in their own office when they violate the constitution, judges should make sure that they do.

Prosecutors risk little personally when they withhold information and yet stand to benefit professionally if they win a case, so a powerful incentive is at play when they have information that is favorable to the defense, but about which that the defense does not know. Legal commentators have observed that if prosecutors were sanctioned more frequently, the instances of *Brady* violations would decrease.[303] More frequent sanctions would keep bad

298. *Id.* at 445–46.

299. *But see* Jordan Smith, *Former DA Anderson Pleads Guilty to Withholding Evidence in Morton Case*, AUSTIN CHRON. (Nov. 8, 2013), https://www.austinchronicle.com/daily/news/2013-11-08/former-da-anderson-pleads-guilty-to-withholding-evidence-in-morton-case/ (reporting on the guilty plea to criminal contempt of a Texas prosecutor who had withheld exculpatory evidence for almost twenty-five years from a defendant in a murder case); Shaila Dewan, *Duke Prosecutor Jailed, Students Seek Settlement*, N.Y. TIMES (Sept. 8, 2007), http://www.nytimes.com/2007/09/08/us/08duke.html (reporting on the sentence of a North Carolina prosecutor who had lied about withholding DNA evidence from the defense in the Duke Lacrosse rape case).

300. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 100 (2011) (Ginsburg, J., dissenting) ("[Harry Connick Sr., former District Attorney of the Parish of Orleans from 1973 to 2003,] never disciplined or fired a single prosecutor for violating *Brady*.").

301. *See, e.g.*, Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 885–87 (2015) (describing the case of a celebrated Ohio prosecutor who was able to retire without consequence despite withholding evidence in a capital murder case that strongly suggested that another person with a motive to kill the victim was actually responsible for the murder);

Jeffrey L. Kirchmeier et. al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1338 (2009) (describing the case of a New Mexico prosecutor who, despite failing to disclose exculpatory evidence, ironically became the "chief counsel of the state's lawyer disciplinary board").

302. Toobin, *supra* note 115.

303. *See* Keenan, *supra* note 63, at 245 ("Irrespective of the wisdom of the Court's reasoning, the ethics rules governing prosecutorial behavior need to be expanded and strengthened, and the disciplinary procedures tasked with enforcing them reformed, if our legal system is to justifiably rely on professional sanctions to deter prosecutorial misconduct.").

prosecutors from reoffending. Professional sanctions are a warning to other prosecutors not emulate this practice.

However, judges rarely refer prosecutors to bar counsel for professional ethics sanctions.[304] They should. It is a clear violation of a prosecutor's ethical obligation to withhold favorable information from the defense. However, referrals of federal prosecutors to bar counsel are rare and even more rare than state prosecutors.[305] If they risked the prospect of losing their bar license and livelihood for withholding *Brady* material, it stands to reason that prosecutors would be less likely to commit *Brady* violations.

VI. CONCLUSION

The DOJ has consistently rejected *Brady* reform for decades. It is unlikely that the prospects will be any better with Jeff Sessions as Attorney General. Sessions' own record of unapologetic *Brady* violations and his stance on other criminal justice issues make it clear that improvements that benefit criminal defendants are not priorities for him.

The ideas for reform proposed above should be considered by legislators and judges. Open file discovery would be the best way to curtail *Brady* violations. All but the most conscious, intentional, egregious violations would be avoided by allowing the defense access to the government's files.

In the absence of open file discovery, the suggested rules and orders should give guidance to young prosecutors who are not clear on their obligations. A change in personnel, at least among the discovery coordinators within the DOJ, would help prosecutors with the close calls on materiality.

In addition to guidance, deterrence is needed. Punitive jury instructions would serve as a deterrent to the withholding of information. Knowing that one might get a sanction mid-trial in the form of an instruction telling jurors that you have 1) violated the constitution and 2) you did it because your case was weak might cause a prosecutor to turn over material long before the trial starts. Referrals to bar counsel by judges when they find *Brady* violations would also be a powerful deterrent. Prosecutors would likely not risk losing their livelihoods by violating *Brady*.

The DOJ cannot continue to fight reform and yet maintain its prestige. The reputation of the USAO suffered mightily because of the number of recent

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304. *Id.* at 220 (describing a California study that found 707 instances of prosecutorial misconduct between 1997 and 2009 and comparing it with a review of California disciplinary actions that found that out of the 4741 cases warranting disciplinary action, only six involved prosecutorial misconduct).; *see also* Balko, *supra* note 3 ("The Louisiana Supreme Court, which must give final approval to any disciplinary action taken against a prosecutor in the state, didn't impose its first professional sanction on any prosecutor until 2005.").

305. *Compare* Heath & McCoy, *supra* note 17 ("USA TODAY, drawing on state bar records, identified only one federal prosecutor who was barred even temporarily from practicing law for misconduct during the past 12 years.") *with* Keenan, *supra* note 63, at 220.

scandals–in The District of Columbia, Massachusetts, Montana, Nevada, California, Oregon. The failures of the DOJ have taken their toll on the reputation of the Department in the legal community and in the public in general. Federal trial judges and appellate judges have taken the office to task in very public ways. Judges Kozinski, Sullivan, and Wolf have all publicly called for the offices to institute reform. Continuing to fight progress cannot be said to be in pursuit of fairness or justice. It is time for the DOJ to implement real change and stop fighting efforts at reform. Ethics, justice, and fair play demand that the USAO and the DOJ do better.