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Here Comes the Judge: A Model for Judicial Oversight and Regulation of the *Brady* Disclosure Duty

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HERE COMES THE JUDGE: A MODEL FOR JUDICIAL OVERSIGHT AND REGULATION OF THE *BRADY* DISCLOSURE DUTY

*Cynthia E. Jones**

I. INTRODUCTION

There is an epidemic of Brady *violations abroad in the land. Only judges can put a stop to it.*[1]
– Judge Alex Kozinski

Under the current state of the law, there is no mechanism in place to ensure that a criminal defendant receives information in the exclusive possession of the government that negates guilt, undermines the strength of the government's case, or reduces the sentence that could be imposed. Whenever a prosecutor wants to do so, she can suppress this favorable information and prevent the court and the defense from ever learning of its existence. Without oversight and with very little accountability, prosecutors have been vested with the power to determine whether and when to disclose favorable evidence to the defense. Although many prosecutors diligently comply with the constitutional disclosure duty mandated by *Brady v. Maryland*,[2] for a wide variety of reasons, others do not, or do not do so invariably. Every year, there are numerous reported opinions where the court finds that a prosecutor has failed to disclose favorable information to the defense. As one scholar has noted, "violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations."[3]

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* Professor of Law, American University Washington College of Law. I would like to dedicate this Article to the memory of two extraordinary people, Judge Frank E. Schwelb, who was my mentor and my biggest supporter since the early days of my career when I served as his law clerk on the District of Columbia Court of Appeals; and Professor Andrew "Taz" Taslitz, whose intellectual curiosity, kindness, friendship, laughter, and generosity will always inspire me to try to be a better person. I also want to thank my research assistants, especially Bridget Lynn, who provided invaluable assistance in the final stages.

1. United States v. Olson, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting).
2. 373 U.S. 83 (1963).
3. Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE

As I have previously documented, suppression of favorable information by the prosecution causes wrongful convictions and compromises the integrity of the entire criminal adjudication process.[4] One 2014 study of over 600 cases found that *Brady* violations are more prevalent in death penalty cases.[5] Also, when the Innocence Project examined DNA exonerations, 37% of the cases "involved the suppression of exculpatory evidence."[6]

Despite the scope and magnitude of *Brady* non-compliance, in over fifty years since the Supreme Court's landmark 1963 decision, very little regulation or enforcement of the *Brady* disclosure duty has occurred. A few state and federal courts have taken steps to regulate or codify the *Brady* disclosure duty,[7] but most have not.[8] In addition, a small handful of states have passed "open file discovery" laws that require virtually all non-privileged information collected by the government during the criminal investigation be disclosed to the defense.[9] Post 2009, however, in the wake of the botched prosecution of United States Senator Ted

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W. RES. L. REV. 531, 533 (2007).

4. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 428-31 (2010) (discussing *Brady* violations in death penalty and wrongful convictions cases); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403.

5. KATHLEEN RIDOLFI ET AL., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES, at x, 43 & fig.20 (2014) (concluding that "withheld favorable information is overrepresented in death penalty decisions" based on a study finding 53% of the death penalty cases involved nondisclosure or late disclosure of favorable information to the defense attorney representing a defendant in a capital case).

6. Jones, *supra* note 4, at 429 n.60.

7. Press Release, N.Y. State Unified Ct. Sys., Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases, at 1 (2017), http://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf (last visited Nov. 15, 2017); *see also* N.Y. STATE JUSTICE TASK FORCE, REPORT ON ATTORNEY RESPONSIBILITY IN CRIMINAL CASES 7-8, app. B (2017), http://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf; LAURAL L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17-28, 18 tbl.3 (2004), http://www.uscourts.gov/sites/default/files/bradymat_1.pdf (discussing codification of *Brady* in state criminal procedure rules).

8. *See* LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES 27-28, 28 fig.4, 30 & fig.6 (2011) http://www.uscourts.gov/sites/default/files/rule16rep_2.pdf; *see also infra* Part I.B.1.

9. Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1331 (2011); *see also* RIDOLFI ET AL., *supra* note 5, at 23.

Stevens,[10] the Department of Justice opposed federal legislation that would have regulated the disclosure of favorable evidence under *Brady*,[11] and the Department of Justice thwarted an amendment to the Federal Rules of Criminal Procedure that would have clarified the scope of the *Brady* disclosure duty.[12]

Early intervention by trial courts is crucial in preventing the suppression of favorable information by the prosecution. Although trial courts are on the front lines of *Brady* enforcement during pretrial litigation and throughout the trial, trial judges traditionally rely on prosecutors to self-regulate their *Brady* disclosure duty.[13] Trial courts do not become involved in managing and regulating the *Brady* disclosure duty until the defense identifies favorable information in the government's possession that has not been disclosed and judicial intervention is needed to compel the government to produce the information.[14] This level of detachment and passivity by trial judges has proven ineffective in implementing the *Brady* mandate.[15] Trial judges have the expertise and authority to provide the critical oversight needed to ensure that the government complies with the *Brady* disclosure duty.[16]

Part II of this Article provides an overview of *Brady* and discusses three major obstacles that impede implementation of this constitutional disclosure duty. Part III proposes a comprehensive model for proactive judicial management and regulation of the *Brady* disclosure duty. Part IV discusses non-contempt sanctions that trial courts should employ to punish and deter prosecutors who fail to disclose favorable evidence in violation of the *Brady* mandate.

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10. *See* ROBERT M. CARY, NOT GUILTY: THE UNLAWFUL PROSECUTION OF U.S. SENATOR TED STEVENS 236 (2014); OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN *UNITED STATES V. THEODORE F. STEVENS*, CRIM. NO. 08-231 (D.D.C. 2009) (EGS) 188-91, 193-95 (2011); Lisa Rein, *Review Board Clears U.S. Prosecutors Accused of Botching Sen. Ted Steven's Corruption Trial*, WASH. POST (Jan. 14, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/01/14/panel-clears-u-s-prosecutors-accused-of-botching-sen-ted-stevenss-corruption-trial/?utm_term=.2c64adf1ed95.

11. The Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012).

12. Hon. Emmet G. Sullivan, *Enforcing Compliance with Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138, 142 (2016).

13. Jones, *supra* note 4, at 422-23, 431-34.

14. *Id.* at 433-34.

15. Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2031-35 (2010).

16. *See* RIDOLFI ET AL., *supra* note 5, at 47-49; Symposium, *supra* note 15, at 2029-35 (discussing various ways in which judges can provide oversight over *Brady* disclosure compliance).

II. THE *BRADY* DOCTRINE AND THE OBSTACLES TO REGULATION

Our criminal justice system is implemented by imperfect and fallible human beings, and some errors and unjust outcomes are inevitable . . . . But the most dreaded and devastating example of justice gone awry is the conviction and prolonged incarceration (and in some jurisdictions the execution) of an innocent defendant, and the rule of Brady v. Maryland *is designed to prevent such miscarriages of justice.*[17]
– Judge Frank E. Schwelb

A. The Brady *Doctrine*

In *Brady*, the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment requires the government to disclose to the defense all favorable information in the government's possession.[18] Subsequent Supreme Court cases held that "favorable" information under *Brady* includes exculpatory information, impeaching information that tends to undermine the strength of the government's case,[19] and mitigating information that could potentially reduce the sentence the defendant faces.[20] The Court has also recognized that *Brady* imposes on the prosecutor a due diligence obligation to investigate and collect all favorable information in the prosecutor's own files, as well as information held by any member of the prosecution team (i.e. law enforcement officers, forensic analysts).[21] The *Brady* disclosure obligation begins pretrial and exists as a continuing disclosure duty throughout the adjudication of the case.[22] The government is obliged to disclose *Brady* material even in the absence of a request by the defense.[23]

The *Brady* doctrine is deeply rooted in principles of fairness. The *Brady* Court stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[24] In other post-*Brady* cases, the Court recognized that the *Brady* rule aids

17. Miller v. United States, 14 A.3d 1094, 1107 (D.C. 2011).
18. Brady v. Maryland, 373 U.S. 83, 86-88 (1963).
19. *See* United States v. Bagley, 473 U.S. 667, 675-76 (1985) (plurality opinion); Giglio v. United States, 405 U.S. 150, 153-55 (1972).
20. *Brady*, 373 U.S. at 87-88.
21. Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).
22. Strickler v. Greene, 527 U.S. 263, 280-81 (1999).
23. *See* United States v. Agurs, 427 U.S. 97, 106-07 (1976); *see also Bagley*, 473 U.S. at 680-81.
24. *Brady*, 373 U.S. at 87.

in preventing "a miscarriage of justice"[25] and directs prosecutors to perform their duties mindful that their obligation "is not that it shall win a case, but that justice shall be done."[26]

The Court has stated that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense."[27] Nondisclosure of favorable information constitutes a denial of due process only when the government suppresses favorable information that is "material" or prejudicial. In determining materiality, the Court evaluates whether the "net effect of the evidence withheld by the State"[28] creates "a reasonable probability that . . . the result of the proceeding would have been different."[29] A "reasonable probability" exists when the government's suppression of favorable evidence "undermines confidence in the outcome of the trial."[30] If the favorable information suppressed is insignificant, cumulative, or when viewed in the context of the other evidence presented in the case, does not prejudice the defendant, there has been no constitutional violation.[31] Thus, a *Brady* violation requires a showing that the government negligently, recklessly, or intentionally (1) suppressed; (2) favorable information in its possession; (3) which was material in the case.[32]

When a court finds a *Brady* violation, the usual pretrial remedy is court-ordered disclosure of the information.[33] More commonly, *Brady* violations are not discovered until post-conviction, and the usual remedy is reversal of the conviction and a new trial.[34] In addition to providing a remedy for the defendant, courts also have the power to impose sanctions for *Brady* misconduct. Sanctions generally take the form of adverse action against the government's case—striking testimony, excluding evidence, and granting an adverse jury instruction.[35] Rarely do courts impose sanctions on the prosecutor responsible for the *Brady*

25. *Bagley*, 473 U.S. at 675.
26. Berger v. United States, 295 U.S. 78, 88 (1935).
27. Kyles v. Whitley, 514 U.S. 419, 436-37 (1995).
28. *Id.* at 421-22.
29. *Bagley*, 473 U.S. at 682.
30. *Id.* at 678; *see Kyles*, 514 U.S. at 434.
31. *Kyles*, 514 U.S. at 433-37.
32. Strickler v. Greene, 527 U.S. 263, 280-82 (1999).
33. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1143 (5th ed. 2009); *see also* HOOPER ET AL., *supra* note 8, at 29 & fig.4 (stating that a survey of federal judges revealed that the most common remedies for criminal discovery violations were disclosure and continuance).
34. *See* Jones, *supra* note 4, at 443; *see also* LAFAVE ET AL., *supra* note 33, at 1143.
35. Jones, *supra* note 4, at 443, 446-47, 446 n.131; *see* ROBERT M. CARY ET AL., FEDERAL CRIMINAL DISCOVERY 386, 389-92, 394-96, 398-400 (2011); HOOPER ET AL., *supra* note 8, at 29.

violation, even when there is a finding of intentional and egregious *Brady* misconduct.[36]

B. Obstacles to Implementation of Brady

There are three sets of obstacles that impede the successful implementation of the *Brady* disclosure duty. The first obstacle is the fact that the government has the power to retain exclusive possession and control over most of the evidence, and a criminal defendant has only a very limited right of access to evidence collected during the investigation.[37] Thus, if favorable evidence exists in the government's files, there is no formal mechanism for the defense or the court to learn of its existence without the prosecutor conscientiously complying with *Brady*.[38] The second obstacle stems from the ambiguity in the handful of Supreme Court cases that define the scope of the *Brady* disclosure duty. Because lower courts have largely failed to develop clear policies and procedures to "fill in the gaps" and regulate the *Brady* mandate, the government has used the ambiguity to very narrowly interpret its disclosure duty.[39] The third obstacle is the pervasive culture of resistance and noncompliance that has emerged from the lack of judicial oversight or accountability.[40] As discussed below, each of these obstacles are surmountable through proactive judicial regulation and oversight of the *Brady* disclosure duty throughout the case.

1. Access to Evidence

A good argument could be made that *Brady* was doomed to fail at the outset because the United States Supreme Court squandered a golden opportunity to establish a criminal defendant's constitutional right to discovery or right to equal access to evidence collected by the government during the course of a criminal investigation. The *Brady* Court could have recognized that while the government has traditionally maintained exclusive possession of criminal evidence, the government does not "own" the information collected in criminal cases. Although the government has a strong interest in protecting the integrity of the inculpatory information needed to secure a conviction, establishing a broader due process right to equal access to evidence would have been in

36. HOOPER ET AL., *supra* note 8, at 29 (stating that federal judges rarely hold attorneys in contempt or report *Brady* misconduct to the Department of Justice or the state bar for professional disciplinary action).

37. Jones, *supra* note 4, at 431-34.

38. *See* LAFAVE ET AL., *supra* note 33, at 959-73.

39. Jones, *supra* note 4, at 432-33.

40. *See infra* Part II.B.3.

harmony with *Brady*'s lofty aspirational goals of "fairness" and ensuring that "justice shall be done." If the Court had chosen this path many of the problems that plague the *Brady* disclosure duty could have been avoided.

The idea of a constitutional right to equal access to evidence is not completely foreign to criminal procedure jurisprudence. Long before *Brady*, it was well-established that the prosecution could not engage in conduct to impede the defense in its efforts to interview prosecution witnesses.[41] This right to equal access to witnesses remains a bedrock principle of criminal law that has long been recognized by state and federal courts and codified in many state criminal rules.[42] This rule was elevated to a due process right in *Gregory v. United States*.[43] In *Gregory*, the United States Court of Appeals for the District of Columbia Circuit ruled that the government violated the defendant's right to due process by advising witnesses not to speak to the defense unless the prosecutor was present.[44] The court reasoned that a criminal trial is a "quest for the truth" that is best when both sides have equal access to "the information from which the truth may be determined."[45] The court noted that the prosecution cannot frustrate the defense in the preparation of its case by effectively blocking their access to witnesses.[46] The rationale employed by the *Gregory* court was:

> Witnesses, particularly eyewitnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which . . . elemental fairness and due process required that he have . . . .
> . . . . [W]e know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses . . . . Presumably the

41. State v. Papa, 80 A. 12, 15 (R.I. 1911) ("Witnesses are not parties, and should not be partisans. They do not belong to either side of the controversy. They may be summoned by one or the other or both, but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous.").

42. Gregory G. Sarno, Annotation, *Interference by Prosecution with Defense Counsel's Pretrial Interrogation of Witnesses*, 90 A.L.R.3d 1231 (1979), Westlaw (database updated Oct. 2017); *see, e.g.*, COLO. R. CRIM. P. 16 ("[N]either the prosecuting attorney, the defense counsel, the defendant nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case or with showing any relevant material to any party, counsel or their agent, nor shall they otherwise impede counsel's investigation of the case.").

43. 369 F.2d 185, 188 (D.C. Cir. 1966).

44. *Id.* at 187-89.

45. *Id.* at 188.

46. *Id.* at 188-89.

> prosecutor, in interviewing the witnesses, was unencumbered by the presence of defense counsel, and there seems to be no reason why defense counsel should not have equal opportunity to determine, through interviews with the witnesses, what [the witnesses] know about the case and what they will testify to.[47]

The *Gregory* court's "equal access to witnesses" analysis should apply with equal, if not greater, force to *Brady* evidence. There is no principled reason to grant the defense broad access to "live witness" evidence, while simultaneously allowing the government to restrict defense access to documents, forensic reports, and written witness statements that either exculpate the defendant or are critical to the preparation of a defense. There may be legitimate reasons for drawing a distinction between prohibiting the government from affirmatively interfering with the defense's ability to seek out or find its own evidence, versus imposing an obligation on the government to grant the defense access to evidence in the government's possession. This distinction is rendered meaningless, however, if, like the government, the criminal defendant has a right to have equal access to evidence collected during a criminal investigation.

In sharp contrast to the "access to evidence" approach, the *Brady* Court precariously placed the duty to disclose favorable information within the hostile atmosphere of criminal discovery. In 1963, when *Brady* was decided, criminal discovery was very limited and there was no right to discovery in criminal cases.[48] Thus, there was instant hostility to *Brady*, not only because it mandated disclosure of exculpatory evidence, but also, more fundamentally, because *Brady* mandated disclosure of *any* evidence to the defense.[49]

Unlike civil discovery, the evolution of criminal discovery is marred by a history of antagonism and distaste for allowing criminal defendants to receive any information related to the charges they were facing. The entrenched opposition to criminal discovery can be traced back to English common law. In *Rex v. Holland*, the government filed embezzlement charges against the defendant after conducting a lengthy investigation that culminated in a written report.[50] The defense made a

47. *Id.* at 188; *see, e.g.*, United States v. Long, 449 F.2d 288, 295 (8th Cir. 1971) (adopting the *Gregory* due process rule (citing *Gregory*, 369 F.2d at 188)); State v. Murtagh, 169 P.3d 602, 617 (Alaska 2007) (same (quoting *Gregory*, 369 F.2d at 188)); Penalver v. State, 926 So. 2d 1118, 1130 (Fla. 2006) (same).

48. Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 6 (2015).

49. *See id.* at 7-8.

50. (1972) 100 Eng. Rep.1248, 1248.

pretrial request to obtain a copy of the report and the court rejected the defense's request.[51] One jurist reasoned

> the rule for inspection is confined to civil cases . . . . In ordinary cases when an indictment is found . . . the defendant is taken into custody: but that gives him no information, nor does it entitle him to demand an inspection of the grounds upon which the prosecution is instituted . . . . The practice on common law indictments, and on informations on particular statutes, shews it to be clear that this defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial.[52]

Concurring in the holding, other jurists noted that allowing discovery in criminal cases would "lead to the most mischievous consequences"[53] and "subvert the whole system of criminal law."[54]

More than a century later, the common law rule remained deeply engrained in the American criminal justice system. In 1923, in *United States v. Garsson*,[55] Judge Learned Hand expressed his strenuous opposition to criminal discovery in the following oft-quoted passage:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.[56]

The justifications for maintaining the common law rule were articulated by the court in *State v. Tune*,[57] where, over the vigorous dissent of future United States Supreme Court Justice William Brennan, the court refused to grant a capital defendant the right to receive a copy of his written confession.[58] The court reasoned that, unlike civil proceedings, "long experience has taught" that discovery in criminal cases will lead to perjury, evidence suppression, and witness intimidation.[59] Moreover, the court noted that the defendant's Fifth

51. *Id.* at 1248-49.
52. *Id.* at 1249-50 (Buller, J., concurring)
53. *Id.* at 1248.
54. *Id.* at 1249 (Kenyon, L.C.J., concurring).
55. 291 F. 646 (S.D.N.Y. 1923).
56. *Id.* at 649.
57. 98 A.2d 881, 884-86 (N.J. 1953).
58. *Compare id.* at 893-94, *with id.* at 894-98 (Brennan, J., dissenting).
59. *Id.* at 884.

Amendment privilege against self-incrimination would preclude the State from making reciprocal discovery demands.[60] The court further reasoned that allowing the defendant to obtain discovery from the government would place the government "completely at the mercy of the defendant" and would "make the prosecutor's task almost insurmountable."[61] In his dissent in *Tune*, then-Judge William J. Brennan stated: "It shocks my sense of justice that in these circumstances counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied."[62] While acknowledging the very real dangers of obstruction of justice and witness intimidation, Judge Brennan suggested that these concerns should not be addressed through the denial of all discovery but through protective orders issued by the court.[63]

More than a decade after *Brady*, modern criminal discovery rules emerged in state courts, and later in federal courts, carving out specific exceptions to the common law.[64] Beyond the specific categories of information subject to disclosure under discovery rules, however, there is still no general "right to discovery" in criminal cases.[65] As a vestige of the common law rule, the government still retains exclusive control over all evidence collected in criminal cases. Neither the trial court nor the defense is privy to the non-privileged information contained in the government files.[66] The government is also not obligated to provide the court with an inventory of the evidence gathered during the criminal investigation, nor is the government required to disclose whether

60. *Id.* at 884-85.

61. *Id.* at 885.

62. *Id.* at 896 (Brennan, J., dissenting).

63. *Id.* at 894-96 (Brennan, J., dissenting); *see* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 12 (1990). Subsequent writings illustrate the significant impact that the *Tune* decision had on Justice Brennan. For nearly four decades following his dissent in *Tune*, he continued to attack the justifications advanced in the majority opinion for denying discovery in criminal cases. *See id.* at 5-8 (criticizing the rationale of the *Tune* court).

64. Criminal discovery rules and statutes vary greatly, but the Federal Rules of Criminal Procedure and state discovery statutes generally entitle criminal defendants to specific categories of information, including the following: (1) the defendant's statements and prior criminal record; (2) tangible evidence the government plans to introduce at trial; (3) information related to expert testimony; and (4) any reports or forensic analysis of evidence to be presented at trial. *See* FED. R. CRIM. P. 16(a)(1), 17(c)(1); *see also* LAFAVE ET AL., *supra* note 33, at 972-73 (noting that many criminal discovery rules still do not independently mandate disclosure of all police reports and officer notes, the identity of government witnesses, or witness statements collected by the government).

65. *See* LAFAVE ET AL., *supra* note 33, at 959-73; *see also* Harvey v. Horan, 285 F.3d 298, 317 n.7 (4th Cir. 2002) (citing numerous early common law cases rejecting the notion of pretrial discovery in criminal cases).

66. Jones, *supra* note 4, at 431-34.

evidence has been withheld or file a declination statement setting forth the reasons why information has not been disclosed.[67] As a result, judges do not know what information—favorable or unfavorable—is in the government's possession and cannot readily determine whether the government has violated its statutory or constitutional disclosure obligations.

Today, the *Brady* disclosure duty is tethered to the dysfunction and acrimony of criminal discovery. Moreover, the Court has made clear that *Brady* was not intended to create a broader constitutional right to discovery or usher in an overhaul of the criminal discovery process.[68] Post-*Brady*, the Court has steadfastly maintained that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[69] Moreover, the Court has held that the prosecutor alone decides whether information in the government's possession is "favorable" and subject to disclosure under *Brady*,[70] and "the prosecutor's decision on disclosure is final."[71] The Court has provided no standards beyond the general pronouncements of its *Brady* jurisprudence that the prosecutor is obliged to use in making the favorability determination, nor is the prosecutor required to disclose to the court how this determination is made.[72] While prosecutors can consult with the court ex parte, they are not constitutionally required to do so.[73]

Thus, any effective *Brady* reform by the trial court must address the obstacles caused by the government's control of evidence and the limited authority of the court to demand disclosure of information contained in the prosecutor's files. As discussed in more detail in Part II, with the use of standing court orders, *Brady* checklists, certifications, and other administrative tools, trial courts can overcome this obstacle and effectively regulate and manage the disclosure of favorable evidence in the government's possession.[74]

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67. *See* LAURAL HOOPER & SHELIA THORPE, FED. JUDICIAL CTR., *BRADY V. MARYLAND* MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES 20-21 (2007), https://www.fjc.gov/sites/default/files/2012/BradyMa2.pdf (stating that nine of thirty-seven districts refer to declination procedures with varying degrees of specificity).

68. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977); Brady v. Maryland, 373 U.S. 83, 92 (1963) (White, J., concurring).

69. *Bursey*, 429 U.S. at 559.

70. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 59-60 (1987).

71. *Id.* at 59; Brennan, Jr., *supra* note 63, at 9 (quoting *Ritchie*, 480 U.S. at 59).

72. Joy, *supra* note 4, at 421 & n.116 (stating that prosecutors make *Brady* determinations "in secret, based on personal judgment that often is not subject to any established guidelines or public oversight").

73. *See Ritchie*, 480 U.S. at 57-58.

74. *See infra* Part III.A.

2. Ambiguity of the *Brady* Doctrine

Another obstacle that impedes the disclosure of favorable information by the government is ambiguity regarding the scope of *Brady*. The lack of clarity in Supreme Court cases has led to inconsistent interpretations of the *Brady* doctrine by lower courts[75] and inconsistent disclosure practices among prosecutors.[76] When the suppression of favorable information is discovered, prosecutors frequently argue that they were unaware that the information was subject to disclosure under *Brady*.[77]

More than fifty years after the Court decided *Brady*, there is still a constant flow of litigation in state and federal courts to resolve fundamental issues regarding the scope of the *Brady* disclosure duty.[78] Although the Court has stated that the *Brady* disclosure duty begins pretrial, there remains much ambiguity regarding exactly when the prosecution is required to disclose *Brady* information to the defense.[79] This has led to last-minute, mid-trial disclosures of favorable

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75. BRUCE GREEN, CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 3 (2011), http://www2.nycbar.org/pdf/ABA105D.pdf ("The duty to disclose varies by jurisdiction—between state and federal jurisdictions, among state and federal jurisdictions, and even within state and local offices. For this reason, the scope of the federal and state prosecutors' disclosure obligations is often unclear and conflicting.").

76. *See id.* at 12-13, 20 ("[W]ildly different policies in the local United States Attorney Offices and, on occasion, amongst Assistant United States Attorneys in a particular office."); *see also* Memorandum from David W. Ogden, Deputy Att'y Gen., to All U.S. Att'ys (Jan. 4, 2010), https://www.justice.gov/archives/dag/memorandum-heads-department-litigating-components-handling-criminal-matters-all-united-states (discouraging "inconsistent discovery practices among prosecutors within the same office" and "disparate discovery disclosures to a defendant based solely on the identity of the prosecutor who happens to have been assigned a case").

77. *See, e.g.*, United States v. Jones, 686 F. Supp. 2d 147, 156-58 (D. Mass. 2010); Jones, *supra* note 4, at 428 & nn.56-57.

78. Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 & n.43, 1541 & nn.44-48 (2010) (discussing the "vagueness" of the *Brady* doctrine as an impediment to prosecutor determining whether evidence is "favorable" or "material").

79. Some state court and local federal district court discovery rules tie *Brady* disclosure to the arraignment date to ensure disclosure occurs very early in the criminal adjudication process. *See, e.g.*, W.D. WASH. R. CRIM. P. 16(a) (2017) (requiring disclosure within fourteen days of arraignment); M.D. TENN. CT. R. 16.01(a) (2016) (requiring disclosure on or before fourteen days from the date of arraignment); N.D. FLA. R. 26.2(D)(1) (2015) (requiring disclosure within seven days of arraignment "or promptly after acquiring knowledge thereof"); S.D. GA. CT. R. 16.1 (2013) (requiring disclosure within seven days of arraignment); S.D. FLA. R. 88.10(c), (q)(2) (2010) (requiring discovery not later than fourteen days after arraignment); CONN. R. CRIM. P. app. at 145 (2009, amended 2017) (requiring disclosure within fourteen days of arraignment). In jurisdictions where no time limits are specified, courts have held that *Brady* material need only be disclosed in time for effective use at trial. *See, e.g.*, Miller v. United States, 14 A.3d 1094, 1115-19 (D.C. 2011); *see also* GREEN, *supra* note 75, at 9 (stating that there is no uniform rule among state and federal courts regarding "pre-trial disclosure" of *Brady* material); Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1953 (2010).

information. Further, the Court has never addressed whether the government is required to deliver favorable information to the defense in the original format, or whether the government can meet its *Brady* obligations by simply disclosing a summary of the favorable information.[80] This ambiguity has led to the government providing unfair, inaccurate, and misleading summaries of favorable information.

Most of the ambiguity over the *Brady* disclosure duty involves the application of the "materiality" requirement. The Supreme Court has been clear that the suppression of favorable evidence by the government is not a denial of due process unless the suppressed evidence is "material" to guilt or punishment.[81] The Court has been less clear, however, regarding whether *Brady* mandates disclosure of all favorable information, regardless of whether it is material, or whether the government disclosure duty only requires disclosure of favorable information if the prosecutor determines that the information is material in the case.[82] Under this more narrow view of the *Brady* disclosure duty, the government could suppress favorable information that it subjectively believes is cumulative, not credible, only minimally negates guilt, or would be inadmissible at trial.[83]

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80. *See* Gershman, *supra* note 3, at 548 (discussing how prosecutors can strategically deliver a massive number of boxes containing information and bury the *Brady* material to frustrate the ability of the defense to identify and use favorable information).

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

82. *See Miller*, 14 A.3d at 1109 ("In a claim that is remarkable for its breadth, the government asserts in a footnote to its brief that the prosecution 'was not obligated to disclose this information at all' because *Brady* requires disclosure only of information that is both favorable to the defense and material to the outcome.").

83. *See* DiSimone v. Phillips, 461 F.3d 181, 192-95 (2d Cir. 2006) (stating that allowing the prosecutor to determine whether favorable information is reliable would be "to appoint the fox as henhouse guard"); Lindsey v. King, 769 F.2d 1034, 1040 (5th Cir. 1985) (noting that the prosecutor does not decide "whether the contents of an official police record [are] credible"); United States v. Thomas, 981 F. Supp. 2d 229, 241 (S.D.N.Y. 2013) (stating the determination of the reliability of exculpatory information is a judgment call for the defense attorney, not the prosecutor); *see also* Jones, *supra* note 4, at 439 & n.105, 440 & nn.106-09 (discussing cases where prosecutors attempted to justify nondisclosure of *Brady* material based on their subjective assessment of the quality and value of the favorable information). The trial judge in a Florida death penalty case reversed the defendant's conviction due to a *Brady* violation where the prosecutor stated that she did not disclose favorable impeachment evidence to the defense because she felt it would be inadmissible hearsay. The court stated the following:

> It is not the province of the prosecutor to either characterize or categorize evidence that, no matter how remote it might seem to her, could be exculpatory . . . . [P]rosecutors should not determine the consistency or inconsistency of statements made by material witnesses. Prosecutors do not rule on issues of admissibility of evidence and they certainly do not limit disclosure by determining that it is rumor or hearsay.

Elizabeth Johnson & Lee Williams, *Second Mistrial Ordered in Lee Murder Case*, HERALD-TRIBUNE, http://www.heraldtribune.com/article/20130924/ARTICLE/130929811?p=all&tc=pgall (last updated Sept. 24, 2013) (quoting Circuit Judge Peter Dubensky).

Prosecutors find strong support for the narrow interpretation of the *Brady* disclosure duty in the language of several Supreme Court cases. In *United States v. Agurs*, the Court stated:

> First, in advance of trial, and perhaps during the course of trial as well, the prosecutor must decide what, if anything, he should voluntarily submit to the defense counsel. Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times.[84]

Later, in *Kyles v. Whitley*, the Court reiterated that the prejudice prong of a *Brady* violation is not met unless there is a reasonable probability that the suppressed evidence undermined confidence in the verdict and stated that this determination allows the government to exercise "a degree of discretion."[85] The Court further stated:

> [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.[86]

Further, in *Cone v. Bell*, the Court stated that "[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, *only mandates the disclosure of material evidence*, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."[87] In drawing a clear distinction between the more liberal ethical standard (which requires prosecutors to disclose all favorable evidence, regardless of

84. 427 U.S. 97, 107-08 (1976).

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

86. *Id.*

87. Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) (emphasis added) (first citing STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 3-3.11(a) (AM. BAR ASS'N 1993, amended 2015); then citing MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2008, amended 2016); then citing *Kyles*, 514 U.S. at 437; and then citing *Agurs*, 427 U.S. at 108).

materiality)[88] and the constitutional due process standard, the Court signaled that materiality is relevant to the pretrial disclosure duty.[89]

Notwithstanding the language used by the Court, only a small minority of courts have embraced the application of the materiality requirement to pretrial disclosure of favorable information.[90] Most courts have held that the government is required to disclose all favorable information in its possession, without regard to materiality.[91] Moreover, courts and scholars have criticized the pretrial application of materiality as both unfair and impractical. They have argued that prosecutors cannot properly assess materiality at the pretrial stage when evidence has not been presented and the defense is unknown.[92] Thus, materiality is solely

88. Rule 3.8(d) of the ABA Model Rules of Professional Conduct commands the following of the prosecutor:

> [M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . . .

MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2016). The ABA has interpreted this rule as imposing an ethical obligation of disclosure that is more extensive than the constitutional obligation of disclosure. ABA Comm'n on Prof'l Responsibility, Formal Op. 09-454, at 2 (2009). Thus, under *Kyles* and *Cone*, a prosecutor might be *constitutionally*, but not *ethically* permitted to suppress favorable evidence that is not material. The rule has been interpreted to be more demanding than the constitutional standard. *See id.* at 4 & n.18. Notably, some jurisdictions that have adopted Rule 3.8 have interpreted it to be consistent with the constitutional disclosure duty mandated by the *Brady* doctrine. The rule has been adopted under the state ethical rules for prosecutors in every state except in California. Laurie Levenson & Barry Scheck, *California Is Overdue in Adopting Rule on Exculpatory Evidence*, L.A. TIMES (Dec. 15, 2014, 5:39 PM), http://www.latimes.com/opinion/op-ed/la-oe-1216-levenson-prosecutorial-misconduct-20141216-story.html.

89. *See Agurs*, 427 U.S. at 104, 107 (discussing the *Brady* decision).

90. United States v. Coppa, 267 F.3d 132, 142-44 (2d Cir. 2001) (describing materiality as "a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made"); United States v. Jacobs, 650 F. Supp. 2d 160, 166-67 (D. Conn. 2009) (refusing to order disclosure of information "which the government may have withheld upon a determination that such information is not 'material' to the fairness of the trial").

91. *See, e.g.*, United States v. Singhal, 876 F. Supp. 2d 82, 103-04 (D.D.C. 2012); United States v. Moore, 867 F. Supp. 2d 150, 151 (D.D.C. 2012); United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005); United States v. Acosta, 357 F. Supp. 2d 1228, 1246-47 (D. Nev. 2005) ("Thus, prosecutors in this district and elsewhere are obligated to timely disclose to the defense evidence or information known to the prosecutor that tends to negate guilt of the accused or mitigate the offense, whether or not these disclosures meet *Brady*'s materiality standard."); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198-1202 (C.D. Cal. 1999); Miller v. United States, 14 A.3d 1094, 1109 (D.C. 2011) (in rejecting the government's contention that the prosecution "'was not obligated to disclose this information at all' because *Brady* requires disclosure only of information that is both favorable to the defense and material to the outcome," the court cited *Strickler* for the proposition that the duty to disclose, exists even if the evidence is not material and suppression would not warrant reversal (citing Strickler v. Greene, 527 U.S. 263, 281 (1999))).

92. *See* Zanders v. United States, 999 A.2d 149, 163-64 (D.C. 2010); Christopher Deal, Brady

a post-trial standard used by reviewing courts to determine whether the suppression of favorable evidence constitutes a *Brady* violation.[93]

As one commentator has aptly noted, if the prosecutor is allowed to suppress evidence based on a pretrial assessment that the evidence is not material, "the guiltier a defendant seems before trial, the less disclosure he is legally owed."[94] Moreover, making disclosure of favorable information subject to the prosecutor's subjective assessment of whether the favorable information is material in the litigation allows the prosecutor to prevent the defense of ever learning of favorable information in its files and provides no mechanism for the trial court to rein in rogue prosecutors who intentionally suppress evidence. As Justice Kagan recognized in her dissenting opinion in *Turner*, a case involving allegations of *Brady* misconduct by prosecutors: "The Government got the case it most wanted . . . . And the Government avoided the case it most feared . . . . The difference between the two cases lay in the Government's files—evidence of obvious relevance that prosecutors nonetheless chose to suppress."[95]

While the United States Supreme Court has not clarified the ambiguity regarding materiality, oral and written statements of individual Supreme Court justices in recent cases support the view that the government's duty to disclose favorable information to the defense is separate and distinct from the determination of whether non-disclosure of favorable information is material or sufficiently prejudicial to constitute a denial of due process. Most recently, Justice Alito, joined by Justice Thomas, dissented in *Wearry v. Cain*, where the Court held that the prosecution failed to disclose favorable information in violation of *Brady* and reversed the capital conviction.[96] Justice Alito disagreed with the Court's factual analysis of whether the government's nondisclosure was prejudicial but concluded:

> There is no question in my mind that the prosecution should have disclosed this information, but whether the information was sufficient to warrant reversing petitioner's conviction is another matter. The

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Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury, 82 N.Y.U. L. REV. 1780, 1798-1809 (2007).

93. United States v. Edwards, 887 F. Supp. 2d 63, 68 (D.D.C. 2012) ("[N]either the Government nor the Court is in a position to conclusively determine at this stage" whether the information "will not be favorable to the Defendant in preparing his defense"); *see Zanders*, 999 A.2d at 164 ("It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder.").

94. Deal, *supra* note 92, at 1784.

95. Turner v. United States, 137 S. Ct. 1885, 1899 (2017) (Kagan, J., dissenting).

96. 136 S. Ct. 1002, 1004-06, 1008 (2016) (per curiam).

> failure to turn over exculpatory information violates due process only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[97]

Further, in *Smith v. Cain*, the Court concluded that suppression of pretrial statements violated the disclosure duty imposed by *Brady*.[98] Notably, during the oral argument before the Court, the attorney for the government—the State of Louisiana—repeated the common misconception that "this Court has held that favorable evidence which is not material need not be turned over to the defense."[99] Most of the justices quickly disputed the accuracy of this statement.

> Justice Kennedy: . . . [Y]ou were asked what is—what is the test for when Brady material must be turned over. And you said whether or not there's a reasonable probability . . . that the result would have been different. That's the test for when there has been a Brady violation. You don't determine your Brady obligation by the test for the Brady violation. You're transposing two very different things . . . .[100]

> Justice Ginsburg: A prior inconsistent statement, one that is favorable to the defense, has to be turned over, period. I thought [that's] what Brady requires . . . .[101]

> Justice Scalia: . . . [S]top fighting as to whether it should be turned over[.] Of course, it should have been turned over. I think the case you're making [here] is that it wouldn't have made a difference . . . . [B]ut surely it should have been turned over.[102]

> Justice Sotomayor: I said there were two prongs to *Brady*. Do you have to turn it over, and, second, does it cause harm. And the first one you said not. That—it is somewhat disconcerting that your office is still answering equivocally on a basic obligation as one that requires you to have turned these materials over . . . whether it caused harm or not.[103]

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97. *Id.* at 1008 (quoting Kyles v. Whitley, 514 U.S. 419, 433 (1995)).

98. 565 U.S. 73, 76 (2012).

99. Transcript of Oral Argument at 29, 565 U.S. 73 (No. 10-8145); *see id.* at 37-38 (noting the argument of the government's attorney that the prosecutor's determination of materiality governs under the *Brady* doctrine).

100. *Id.* at 49.

101. *Id.* at 51.

102. *Id.* at 51-52.

103. *Id.* at 53; *see also* Janet C. Hoeffel & Stephen I. Singer, *Activating a* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467, 480-83 (2014).

Notwithstanding the very clear (but non-binding) statements by the justices, the published opinion in *Smith v. Cain* did not discuss the materiality issue,[104] allowing the ambiguity regarding materiality to linger. Because the government has exclusive control over criminal evidence, the defense and the courts will not know whether prosecutors are incorrectly applying the materiality standard to justify nondisclosure of favorable information. As discussed in Part III below, trial courts can use standing orders, *Brady* checklists, certification requirements, and other tools, to prevent ambiguity from interfering with the *Brady* disclosure duty.[105]

3. A Culture of Resistance and Noncompliance

The fairness principle at the core of the *Brady* doctrine imposes on prosecutors a duty to ensure that "justice shall be done."[106] Although prosecutors believe they have a responsibility to be "just" and "fair," they also maintain an equally strong belief that the defendant is guilty and deserves to be convicted and punished. Prosecutors and members of the prosecution team fear that compliance with *Brady* will result in unjust acquittals.[107] They worry that "dishonest" defense attorneys will use the favorable information to "create" a baseless defense, distort the "real" facts of the case, or otherwise gain an unfair advantage in the litigation.[108] In other words, they fear that the disclosure of favorable information allows the guilty to go free. Thus, directing prosecutors to adhere to ideals of justice and fairness mean little if the prosecutor does not think justice will be served by arming criminal defendants with favorable information.[109]

104. Smith v. Cain, 565 U.S. 73, 76 (2012).

105. *See infra* Part III.A. Some jurisdictions have simply adopted a rule expressly mandating disclosure "without regard to materiality." *See, e.g.*, S.D. ALA. R. 16(b)(1)(B) (2015) ("At arraignment, or on a date otherwise set by the Court for good cause shown, the government shall tender to Defendant the following: . . . All information and material known to the government which may be favorable to the Defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*." (citation omitted) (citing 373 U.S. 83 (1963))).

106. Kyles v. Whitley, 514 U.S. 419, 439 (1995) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

107. Hoeffel & Singer, *supra* note 103, at 476 & n.46.

108. *Id.*

109. United States v. Bagley, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting) ("The prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm. In perusing his files, he must make the often difficult decision as to whether evidence is favorable . . . .").

As one former prosecutor candidly states:

> [W]hen the evidence is weak, or some of the evidence might actually hurt the prosecutor's case, and prevent that defendant from getting what he deserves, the temptation is strong to simply not share it . . . . [I]t's a full-on moral judgment that sharing it before trial would categorically be the wrong thing to do.[110]

Over time, these concerns produce a culture of resistance in prosecution offices, especially where *Brady* training is either inadequate or nonexistent.

Brady noncompliance is also the product of confirmation bias, a cognitive bias that causes a person to view or interpret information in a way that is consistent with her own theories, beliefs, or expectations.[111] As one report states:

> A prosecutor reviewing a case file for the first time is testing the hypothesis that the defendant is guilty and is looking for information to confirm that expectation. Because the police or agents have "solved" the case, there will undoubtedly be information in the file to support the guilt hypothesis. Thus, as a result of confirmation bias, the prosecutor that expects to become convinced of guilt then engages in selective information processing, accepting as true information that is consistent with guilt and discounting conflicting information as unreliable or unimportant. Information discounted as unpersuasive, unreliable, or unimportant will rarely rise to the level of "material" in the mind of that prosecutor.[112]

As a former public defender, I understand very well the transformation that an advocate makes in preparing a case for trial. I can recall not only believing that I could win the case, but also believing that I would win (because victory was the only just outcome supported by my theory of the case). In some cases, this eventually morphed into me being absolutely convinced of my client's innocence. When supervisors and more senior lawyers in the office pointed out the significant weaknesses in my defense, I would passionately explain how I could attack the credibility of the government witnesses, challenge the unreliability of the forensic evidence, and successfully move to exclude my client's confession. My cognitive bias framed my exaggerated view

110. Nathaniel Burney, *Is Open File Discovery a Cure for* Brady *Violations*, BURNEY L. FIRM, http://burneylawfirm.com/blog/2012/02/28/is-open-file-discovery-a-cure-for-brady-violations (last visited Oct. 22, 2017).

111. Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, CHAMPION (May 2013), https://www.nacdl.org/Champion.aspx?id=28470; *see* RIDOLFI ET AL., *supra* note 5, at 22 & n.122.

112. RIDOLFI ET AL., *supra* note 5, at 22.

of the strength of my case and the perceived weakness or inadmissibility of the government's evidence.

Similarly, I believe that zealous prosecutors who interview crime victims, consult with police officers, and diligently prepare their cases for trial experience cognitive bias. They believe they are going to win, they believe they should win, and they believe any evidence to the contrary—evidence favorable to the defense—is insignificant, not credible, and/or inadmissible. I can understand why prosecutors convinced of the guilt of the defendant have a difficult time disclosing information in their exclusive possession that will undermine the government's case.

In addition to these internal conflicts, there are other practical barriers that impede compliance with the *Brady* disclosure duty. As discussed elsewhere,[113] some *Brady* violations are caused by "bad actors" who intentionally suppress favorable information to gain a tactical advantage in the litigation.[114] In many other cases, *Brady* noncompliance is caused by a legitimate lack of understanding by members of the prosecution team regarding what *Brady* commands.[115] Given the ambiguities in the *Brady* jurisprudence, discussed above, it is reasonable to assume that many prosecutors are unclear about what must be disclosed.[116] Despite the Supreme Court's flawed assumption that all aspiring prosecutors learn *Brady* in law school,[117] a plethora of cases in state and federal reporters attest to the fact that these law school graduates never learned or never fully understood the *Brady* doctrine.[118] Even seasoned prosecutors have difficulty engaging in the fact-specific analysis demanded to identify and disclose favorable information to the defense.[119] Consequently, when prosecutors in good faith report to the court that they have complied with *Brady*, their understanding may differ significantly from what *Brady* demands.[120]

As Professor Bennett Gershman has stated, the *Brady* doctrine has become so complex that "it is virtually impossible to identify clear and

113. Jones, *supra* note 4, at 428, 447-49 (discussing the intentional suppression of favorable evidence by the prosecution to gain a tactical advantage in the litigation and the remedial measures courts should employ during trial to thwart these efforts).

114. Medwed, *supra* note 78, at 1551.

115. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 56-58 (2011).

116. *See supra* Part II.B.2.

117. *Compare Thompson*, 563 U.S. at 64, *with* Susan A. Bandes, *The Lone Miscreant, The Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715, 727-28 (2011).

118. Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About* Brady v. Maryland, 13 LOY. J. PUB. INT. L. 517, 529-30 (2012).

119. Medwed, *supra* note 78, at 1551-52.

120. *See* Gershman, *supra* note 3, at 548-50, 550 n.100.

consistent norms of compliance by prosecutors as to what evidence is required to be disclosed, when it must be disclosed, and permissible reasons for noncompliance."[121] Thus, shortly after the collapse of the prosecution of Senator Ted Stevens, Judge Sullivan stated, "I encourage the Attorney General, for whom I have the highest regard, to require *Brady* training for new and veteran, experienced prosecutors throughout the country."[122] Not long thereafter, then-Attorney General Eric Holder made criminal discovery training a central component of his effort to reform criminal discovery practices in the Department of Justice.[123] *Brady* training is also a central feature of state *Brady* reform initiatives.[124]

The misunderstanding of the *Brady* doctrine extends beyond prosecutors to other members of the prosecution team. *Kyles* imposed on prosecutors a duty to investigate and uncover favorable information in the possession of the entire prosecution team.[125] The "prosecution team" broadly consists of other lawyers, paralegals, and investigators in the prosecutor's office; all law enforcement officers working on the case; and other government agencies or entities likely to be in possession of information related to the case (e.g. independent forensic science units, hospitals). Thus, *Brady* requires prosecutors to inquire of the other members of the prosecution team and ascertain whether they are in possession of any records or files containing favorable information.[126]

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121. *Id.* at 534.

122. Transcript of Record at 8-9, United States v. Stevens, No. 08-231 (D.D.C. 2009).

123. *See Deputy Attorney General James M. Cole Testifies Before the Senate Judiciary Committee*, U.S. DEP'T JUST., http://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-testifies-senate-judiciary-committee (last updated Sept. 17, 2014); *Attorney General: Eric H. Holder, Jr.*, U.S. DEP'T JUST., https://www.justice.gov/ag/bio/attorney-general-eric-h-holder-jr (last updated Aug. 24, 2017).

124. *See, e.g.*, *In re* Amendments to Fla. Rules of Criminal Procedure—Rule 3.113, 139 So. 3d 292, 293 (Fla. 2014) (per curiam) (instituting mandatory *Brady* training); TEX. DIST. & CTY. ATT'YS ASS'N, SETTING THE RECORD STRAIGHT ON PROSECUTORIAL MISCONDUCT 23-27 (2012) (describing Texas's statewide effort to provide training to state prosecutors on *Brady* and other discovery obligations).

125. Kyles v. Whitley, 514 U.S. 419, 437-38 (1995); Gershman, *supra* note 3, at 552.

126. *See, e.g.*, ALASKA R. CRIM. P. 16(b)(4) ("The prosecuting attorney's obligations extend to material and information in the possession or control of (A) members of the prosecuting attorney's staff, and (B) any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office."); ARIZ. R. CRIM. P. 15.1(f) ("The prosecutor's obligation under this rule extends to material and information in the possession or control of any of the following: (1) The prosecutor, or members of the prosecutor's staff, or (2) Any law enforcement agency which has participated in the investigation of the case and that is under the prosecutor's direction or control, or (3) Any other person who has participated in the investigation or evaluation of the case and who is under the prosecutor's direction or control."); OKLA. STAT. tit. 22, § 22-2002(A)(3) (2002) ("[M]aterial and information in the possession or control of members of the prosecutor's staff . . . any information in

This "due diligence" requirement also mandates that prosecutors preserve favorable information in possession of any member of the prosecution team.[127] *Brady* is still violated, therefore, even if the prosecutor is not aware of the existence of exculpatory information.[128]

In some cases, the prosecutor cannot disclose favorable information because law enforcement officers and other members of the prosecution team do not know what information must be retained and what information must be disclosed to the prosecutor.[129] A prosecutor simply asking a law enforcement officer, "Do you have any *Brady* material in this case," would be ineffective if the officer is unaware of the scope of the *Brady* disclosure duty. Moreover, even when law enforcement officers have been trained on *Brady*, many law enforcement agencies do not have formal policies and procedures in place to ensure compliance with the *Brady* disclosure duty.[130] One state study found that more than one-quarter of the *Brady* violations were the result of nondisclosures and

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the possession of law enforcement agencies that regularly report to the prosecutor of which the prosecutor should reasonably know, and . . . any information in the possession of law enforcement agencies who have reported to the prosecutor with reference to the particular case of which the prosecutor should reasonably know.").

127. *See* McMillian v. Johnson, 88 F.3d 1554, 1567-69 (11th Cir. 1996) (noting that police officer concealed evidence favorable to the defendant from the prosecutor), *amended by* 101 F.3d 1363 (11th Cir.) (per curiam); *see also In re* Sealed Case No. 99-3096, 185 F.3d 887, 896 (D.C. Cir. 1999) (stating that the U.S. Attorney's Office violated *Brady* where prosecutors failed to conduct a complete search of all law enforcement agencies' files for favorable material).

128. *See* United States v. Thomas, No. 06-553, 2006 WL 3095956, at *1 (D.N.J. Oct. 30, 2006) (ordering the government to disclose "[a]ny material evidence favorable to the defense related to issues of guilt, lack of guilt or punishment which is known *or that by the exercise of due diligence may become known* to the attorney for the United States, within the purview of *Brady v. Maryland* and its progeny" (emphasis added)).

129. Richard Lisko, *Agency Policies Imperative to Disclose* Brady v. Maryland *Material to Prosecutors*, POLICE CHIEF, Mar. 2011, at 12, 12; *see* TEX. DIST. & CTY. ATT'YS ASS'N, *supra* note 124, at 15.

130. *Disclosing Exculpatory Evidence*, LAW OFFICER (Feb. 18, 2012), http://www.lawofficer.com/article/investigation/disclosing-exculpatory-evidenc ("Although several big city and county agencies have established protocols regarding the disclosure of Brady materials, many agencies haven't. More importantly, agencies often don't provide any meaningful training to officers on this important issue. Anecdotally, many officers haven't even heard of the Brady v. Maryland decision and its progeny . . . ."); *see* Lisko, *supra* note 129, at 12-13 (stating that many police departments do not adequately train police officers on *Brady* and do not have policies in place to ensure that *Brady* material will be turned over to the prosecution). *But see* R.C. Phillips, *Training Bulletin*, SAN DIEGO SHERIFF'S DEP'T, http://www.sdsheriff.net/legalupdates/docs/bradytrainingbulletin.pdf (last visited Oct. 26, 2017) (providing a very detailed explanation of the *Brady* doctrine, including what types of information must be disclosed to the defense, and what police personnel information is potentially subject to disclosure under *Brady*).

other errors by law enforcement.[131] The American Bar Association ("ABA") places the burden of educating the prosecution team squarely on the shoulders of the prosecutor's office.[132] According to the ABA's Standards for Criminal Justice: "The prosecutor should take steps to promote compliance . . . with . . . [all] legal rules" and "assist in providing training to police and other law enforcement agents concerning potential legal issues and best practices in criminal investigations."[133] More specifically, the ABA encourages prosecutors to work with law enforcement agencies to ensure that there are adequate policies and procedures in place regarding the *Brady* disclosure duty.[134]

Proper training of prosecutors and law enforcement officers is a surmountable obstacle to judicial regulation and enforcement of the *Brady* disclosure duty. Courts can play a leadership role in ensuring that the prosecutors who litigate in their courtrooms have been properly trained on what *Brady* commands. Courts can also play a leadership role in ensuring that prosecutors work collaboratively with law enforcement to provide training and institute policies and procedures to identify and preserve *Brady* material. While there are many examples of willful, intentional *Brady* misconduct by prosecutors, in far more cases courts have found that nondisclosure of favorable information by the prosecutor was the product of the prosecutor's misunderstanding of the *Brady* disclosure duty.[135] As discussed in more detail below, through the use of standing orders and "*Brady* checklists," courts can eliminate the common "*I didn't know this information was* Brady" excuse for nondisclosure of favorable evidence.[136]

131. TEX. DIST. & CTY. ATT'YS ASS'N, *supra* note 124, at 15 (finding that twenty-six percent of *Brady* errors were caused by law enforcement nondisclosures to prosecutors and noting that *Brady* is not currently part of law enforcement training program and few law enforcement agencies have adopted written policies and procedures on *Brady* compliance).

132. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS Standard 26-1.3 (AM. BAR ASS'N 2014).

133. *Id.* Standard 26-1.3(b), (d).

134. *See id.* Standard 26-1.3(b) cmt. at 65 ("The prosecutor should seek access to all police notes and reports that may contain exculpatory evidence, and police departments should be encouraged to promulgate administrative processes that require police officers to be trained to preserve potentially exculpatory evidence and to turn such evidence over to prosecutors.").

135. United States v. Jones, 620 F. Supp. 2d 163, 183 (D. Mass. 2009).

136. *See infra* Part III.A.1–2.

III. JUDICIAL MANAGEMENT AND REGULATION

Some prosecutors don't care about Brady *because the courts don't* make *them care*.[137]
– Judge Alex Kozinski

The United States Supreme Court either assumed prosecutors would routinely comply with *Brady* without oversight or assumed judges would provide the oversight needed to enforce the *Brady* mandate.[138] Perhaps, for that reason, the Court did not carve out a specific role for trial judges to play in regulating the *Brady* disclosure duty. Individual judges can, however, institute rules and practice standards for the cases in their courtroom. More significantly, trial courts can promulgate uniform court rules to govern all criminal proceedings.[139] As discussed below, these management and regulatory measures will allow trial judges to move past the obstacles that impede the successful implementation of the *Brady* disclosure duty.

A. Criminal Discovery Regulation and Management Practices for Trial Judges

Trial judges are ideally positioned to oversee compliance with *Brady*. Trial judges have access to all pleadings filed in the case and can easily gain the level of familiarity with the facts of each case needed to determine whether specific information is favorable to the defense. Also, trial courts routinely engage in extensive pretrial litigation on a range of constitutional and procedural issues in criminal cases, including discovery disputes. Therefore, it would not be a broad extension of authority for trial judges to institute specific measures to manage and regulate the *Brady* disclosure duty during the pretrial stage of the case.

The essential components of judicial management and regulation of *Brady* are: (1) comprehensive standing orders; (2) *Brady* checklists; (3) pretrial "*Brady* compliance" hearings; and (4) mandatory certification of *Brady* compliance.[140] This package of tools must be coupled with a range of appropriate sanctions, discussed in Part IV.

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137. United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting).

138. *See* Yaroshefsky, *supra* note 111.

139. Press Release, N.Y. State Unified Ct. Sys., *supra* note 7; *see also* N.Y. STATE JUSTICE TASK FORCE, *supra* note 7, at 8, App. B.

140. *See* United States v. Hykes, No. CR 15-4299 JB, 2016 WL 1730125, at *16 (D.N.M. Apr. 11, 2016); Yaroshefsky, *supra*, note 9, at 1345-46; *infra* Part II.A.

1. Standing Orders

I . . . urge my judicial colleagues on every trial court to be vigilant and consider entering an exculpatory evidence order at the outset of every criminal case, whether requested to do so or not.[141]
– Judge Emmet Sullivan

In every criminal case, trial courts should issue an administrative or "standing" court order governing the *Brady* disclosure duty.[142] Standing orders are commonly used by trial courts to detail the specific procedures employed by the judge to implement governing laws. These orders "fill in the gaps" and ensure that litigants are aware of the specific practices that will be followed in all litigation before the judge.[143] While standing orders cannot conflict with, or exceed the scope of, existing court rules, the authority to create binding standing orders is a valid exercise of the court's inherent supervisory powers.[144] In addition, Federal Rule of Criminal Procedure 57(b) gives federal judges wide latitude to craft standing orders.[145] As such, standing orders have the force of law and can subject a litigant to contempt of court for violating a provision of a standing order.[146]

Given the court's lack of access to criminal evidence in the government's possession, standing orders allow judges to order the government to disclose favorable evidence, specify when disclosure must be made, and hold the government accountable for any favorable

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141. Transcript of Record at 8-9, United States v. Stevens, 715 F. Supp. 2d 1 (No. 08-231) (D.D.C. 2009).

142. *See Hykes*, 2016 WL 1730125, at *15 (discussing the use value of pretrial orders to disclose *Brady* material).

143. *See* COMM'N ON THE RULES OF PRACTICE & PROCEDURE OF THE U.S. JUDICIAL CONFERENCE, REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN THE DISTRICT AND BANKRUPTCY COURTS 8-9 (2009).

144. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 COLUM. L. REV. 1433, 1457-58, 1477-79 (1984); Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41, 57-62 (1994).

145. The rule provides:

> A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.

FED. R. CRIM. P. 57(b).

146. *See, e.g.*, Seymour v. United States, 373 F.2d 629, 631-32, 631 n.4 (5th Cir. 1967) (citing 18 U.S.C. § 401 (1984, amended 2015)); Fludd v. Gibbs, 817 So. 2d 711, 714 (Ala. Civ. App. 2001).

information that is suppressed.[147] *Brady* standing orders should, at a minimum, contain a comprehensive discussion of the basic tenets of the *Brady* doctrine, pursuant to both local law and Supreme Court precedent. In this way, the standing order will provide clarity regarding ambiguous aspects of the *Brady* doctrine and ensure that that all litigants are operating under a common understanding of the full scope of the disclosure duty. Specifically, the standing order should define what constitutes "favorable" evidence,[148] explain the court's interpretation of the materiality standard, and describe the full scope of the prosecutor's duty to investigate and learn of favorable information among members of the prosecution team.

Second, to the extent local rules do not so do, the standing *Brady* order should set strict timelines for disclosure and clarify that the duty to provide supplemental favorable information extends throughout the case. In addition, the standing order should inform the prosecution that favorable information should be disclosed in its original format, whenever possible, and not in summary form.

Finally, the standing order should state that violation of the provisions of the order could subject the litigant to sanctions, including contempt. As discussed in Part IV, the use of sanctions to enforce the *Brady* disclosure duty is critical. Including a reference to sanctions puts litigants on notice and encourages them to be diligent and thorough in executing their responsibilities.[149] A few courts and individual judges have adopted standing orders that provide a comprehensive explanation of *Brady* with the level of clarity and specificity needed to fully inform litigants of the full scope of the disclosure duty.[150] Included in the detailed "Standing *Brady* Order" issued by Judge Emmet Sullivan of the United States District Court for the District of Columbia is the following: "[I]f the government has identified any information which is favorable to the defendant but which the government believes not to be material, the government shall submit such information to the Court for

147. Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 908 (2015).

148. If the court adopts a *Brady* checklist, the list will include a fuller explanation of each category of favorable information. The court may, therefore, wish to have the checklist incorporated into the standing order.

149. *See* Press Release, N.Y. State Unified Ct. Sys., *supra* note 7 (providing the report of the N.Y. State Justice Task Force, which includes a model order directed to the prosecutors); *see also* N.Y. STATE JUSTICE TASK FORCE, *supra* note 7, at app. B, at 15-16 (providing a model order directed to the prosecutors); *see also* United States v. Perez, 222 F. Supp. 2d 164, 171 (D. Conn. 2002) (stating that the district court standing order mandated *Brady* disclosure within ten days of arraignment); United States v. Feliciano, 998 F. Supp. 166, 169-70 (D. Conn. 1998) (same).

150. *See, e.g.*, Standing *Brady* Order, No. XX-XX (EGS), http://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder_0.pdf.

in camera review."[151] When coupled with the additional administrative tools discussed below, standing orders can serve as an effective tool in management of the *Brady* disclosure duty.[152]

2. *Brady* Checklists

The issuance of standing court orders should be coupled with the use of *Brady* checklists, an itemized list of the different types of exculpatory, impeachment, and mitigating information subject to disclosure under *Brady*. These detailed worksheets provide a useful guide for courts and litigants in determining whether a particular piece of information is subject to disclosure.[153] Trial judges can use the checklist to query the government on whether specific forms of favorable information have been disclosed. As well, the ABA has endorsed the use of *Brady* checklists as an effective tool for the defense in making more specific *Brady* requests and as a guide for the prosecution in performing its search for *Brady* material that might exist in the prosecution team's files.[154] Because the determination of whether a particular piece of information is "favorable" requires a very case-specific factual analysis, *Brady* checklists are non-exhaustive guides designed to assist litigants in identifying common categories of favorable evidence.

A *Brady* checklist should, at a minimum, include the following categories of information:

1. Information that would tend to negate or reduce the defendant's guilt of any count of the accusatory instrument or reduce punishment.
2. Information about any promise, reward, or inducement regarding a prospective witness.

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151. *Id.* at 3.

152. *See supra* Part III.A.1, *infra* Part III.A.2-4.

153. Symposium, *supra* note 15, at 2019-20 ("The checklist should enumerate either specific documents and items of evidence (e.g., forms by name or number, officer memo books), categories of documents and evidence (e.g., police reports, recorded witness statements, lineup forms), or a combination thereof . . . ."); Yaroshefsky, *supra* note 9, at 1345-46.

154. ABA resolution 104A states, in part:

> the American Bar Association urges . . . courts to adopt a procedure whereby a criminal trial court shall, at a reasonable time prior to a criminal trial, disseminate to the prosecution and defense a written checklist delineating in detail the general disclosure obligations of the prosecution under *Brady v. Maryland* and its progeny and applicable ethical standards.

ABA, Adopted Resolution 104A to the House of Delegates (Feb. 4, 2011) (citation omitted) (citing 373 U.S. 83 (1963)).

> 3. Information regarding criminal convictions or pending cases of a prospective witness and, where available and in circumstances that would not compromise ongoing investigations, information regarding criminal conduct of a prospective witness.
> 4. Information regarding the failure of a prospective witness to make a positive identification at an identification procedure involving the defendant or a co-defendant.
> 5. Any prior inconsistent oral or written statement by a prospective witness regarding the alleged criminal conduct of the defendant.
> 6. Whether a prosecution witness has recanted any testimony or statement and, if so, the substance of that recantation.
> 7. Information that would impeach a prospective witness by showing the witness's bias or prejudice against the defendant, character for lack of truthfulness, or mental or physical impairment that may affect that witness's ability to testify accurately or truthfully.[155]

Also, if local law enforcement agencies seek to adopt standard operating procedures on *Brady*, the checklist would be a useful starting point.[156] While there is some concern that the use of a *Brady* checklist oversimplifies the prosecutor's disclosure duties and could cause over-reliance on the checklist by prosecutors, the ABA has cautioned that "the written checklist does not relieve the prosecutor or defense counsel of their legal and ethical responsibilities regarding disclosure."[157] The ABA also recommends that if courts adopt a *Brady* checklist, courts also form a committee comprised of local prosecutors and criminal defense attorneys to aid the court in "formulating and updating the written checklist delineating in detail the prosecution's general disclosure obligations."[158] Decades of reported opinions on *Brady* and the experiences of trial judges also provide ample guidance on specific categories of information that are commonly suppressed in violation of *Brady*.

In addition to the general categories of exculpatory and impeachment information on many *Brady* checklists, courts should supplement the checklist to inquire about specific categories of

155. CRIMINAL COURTS COMM. & CRIMINAL JUSTICE OPERATIONS COMM., ADOPTION OF A *BRADY* CHECKLIST app. A at 4 (2011).

156. Symposium, *supra* note 15, at 1974-75 ("[A]s soon as the prosecutor becomes involved in a case, that prosecutor should provide the checklist to each police agency involved in an investigation related to that case.").

157. GREEN, *supra* note 75, app. at 17.

158. *Id.*

information that commonly lead to wrongful convictions. Over the last twenty-five years, there have been over 300 exonerations of people who were wrongly convicted. One study found that nearly forty percent of exonerations involved *Brady* misconduct.[159] Four categories of evidence have emerged as the principle causes of wrongful convictions: eyewitness misidentification, jailhouse informant testimony, false confessions, and the use of faulty forensic science.[160] Thus, in developing *Brady* checklists, trial courts should query the government on the specific categories of evidence that have commonly led to wrongful convictions with a special emphasis on the reforms that have been implemented in the jurisdiction, if any, to reduce the risk of wrongful convictions.

a. Eyewitness Identification

Wrongful convictions studies and case profiles are replete with cases showing that eyewitness identifications can be unreliable and lead to wrongful convictions.[161] According to a recent study, eyewitness misidentifications were involved in seventy-two percent of all DNA exonerations.[162] "High risk" eyewitness identifications—those that present the greatest chance for error—include stranger identifications, single eyewitness identifications, or cross-racial identifications.[163] In addition, there is now a wide body of literature confirming that pretrial identification procedures can contribute to misidentifications.[164] As a

159. EMILY M. WEST, DIR. OF RESEARCH, INNOCENCE PROJECT, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 4 (2010).

160. *See infra* Part II.A.2.a–d.

161. The case of Earl Charles provides an apt example. Despite a solid alibi placing him in another jurisdiction, the defendant was wrongly convicted of a double murder and sentenced to death. *See* JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 10 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf (discussing *Charles v. Wade*, 665 F.2d 661 (5th Cir. 1982)). At trial, the government presented the testimony of two surviving witnesses to the furniture store murder, neither of whom could identify the defendant in photographs from mug books in repeated pretrial identification procedures. *Id.* Due in part to the suggestive nature of pretrial identification procedures, these witnesses testified at trial and, with confidence, identified the defendant as the assailant. *Id.* The government did not disclose to the defense that the eyewitnesses failed to identify the defendant prior to trial and did not disclose that, following her identification, one of the witnesses stated: "I could have made a mistake." *Id*. As a result, the defense was unable to challenge the credibility of the eyewitness testimony at trial. *Id.* at 11.

162. Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989–2014: Review of Data and Findings from the First 25 Years*, 79 ALB. L. REV. 717, 732 (2016).

163. *Id.* at 745; *see also* Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2929-30 (2009).

164. *See id.* at 2929-32; *see also* Gershman, *supra* note 3, at 555-56.

result, many jurisdictions have reformed pretrial eyewitness identification procedures to reduce the risk of false identifications.[165] In cases involving eyewitness identifications, the *Brady* checklist should include the following:

> 1. Any information that any witness failed to identify the defendant in any pretrial proceeding.
> 2. Any information that any witness identified someone other than the defendant.
> 3. Any information that any witness expressed reluctance or doubt about an identification of the defendant (i.e., "*I'm not sure, but I think that's him"* or *"I believe that's him, I can't be 100% sure"*).
> 4. Any information that any witness has recanted or repudiated any identification of the defendant.
> 5. Any information that any pretrial identification of the defendant was not conducted pursuant to established pretrial identification procedures.
> 6. Any information that any person, whether or not a witness in this case, failed to identify the defendant as the perpetrator or has identified another person as the perpetrator.

b. Jailhouse Informant Testimony

The use of incentivized "snitch" testimony has led to numerous wrongful convictions.[166] Unlike accomplices, jailhouse informants have no first-hand knowledge of the crime and claim only that the defendant confessed to the crime. False information provided by these witnesses has led to fifteen percent of the DNA exonerations.[167] The informal and formal agreements reached with these witnesses fall squarely within the impeachment category of information subject to disclosure under the Court's holding in *Giglio v. United States*.[168] Thus, in cases where the

165. Jones, *supra* note 163, at 2930, 2931 & n.214.

166. *Id.* at 2936-37; *see* Gershman, *supra* note 3, at 540-41, 554 (discussing cases where witnesses approach prosecutors seeking some benefit in exchange for their testimony). Again, the case of Earl Charles is instructive. In addition to the faulty eyewitness identification, the government relied on the testimony of a jailhouse informant who testified that while he and the defendant were in pretrial detention, the defendant bragged to him about the murders. JUSTICE PROJECT, *supra* note 161, at 10. The informant also testified that no promises were made or expected as a result of his testimony. *Id.* at 10-11. Post-conviction, it was learned that the detective assigned to the case not only supplied the informant with the details needed to falsely implicate Charles in the murders, but also wrote a letter on behalf of the informant recommending his release from prison based on the informant's assistance in the Charles case. *Id.* at 11.

167. West & Meterko, *supra* note 162, at 732.

168. 405 U.S. 150, 153-55 (1972).

government plans to present testimony of a jailhouse informant a *Brady* checklist should be used to request the following:

> 1. Any promise, reward, or inducement that has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.[169]
> 2. Any description of any cases pending against any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness.[170]
> 3. Any prior case(s) where the witness was offered an inducement to testify in a criminal case or provide information in connection with a criminal investigation.[171]
> 4. Any information that the witness has previously given unreliable or inaccurate information, or testified falsely against another in any case.[172]
> 5. Any information that casts doubt on the accuracy or reliability of the information provided by the informant (i.e. information that the informant and the defendant were never housed in close proximity to each other and were not in a position to communicate with each other while in detention).

c. Custodial Confessions

Statements made by the defendant during custodial confessions are discoverable under Federal Rule of Criminal Procedure 16 and under most state discovery statutes.[173] Over a decade of research on false confessions shows that interrogators—wittingly or unwittingly—provide incriminating details about the crime to defendants.[174] Also, it is not uncommon to find that the defendant's confession does not match the known facts at the crime scene or the factual information supplied by other witnesses.[175] Though, standing alone, these facts are not a constitutional grounds for exclusion, the defense will be able to make effective use of this information to challenge credibility of the

169. HOOPER ET AL., *supra* note 7, at 10.
170. *Id.*
171. *Id.*
172. *Id.*
173. *See* FED. R. CRIM. P. 16(a)(1)(A)–(B)(ii); Caroll J. Miller, Annotation, *What Is the Accused's "Statement" Subject to State Court Criminal Discovery*, 57 A.L.R.4th 827 (1987), Westlaw (database updated Oct. 2017).
174. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 16-17 (2010).
175. *Id.* at 170.

confession at trial. One study found that 27% of DNA exonerations involved false confessions.[176] Therefore, in cases involving the use of a custodial confession, the *Brady* checklist should include the following categories of information:

> 1. Any information that any inculpatory statement of the defendant is inconsistent with the physical evidence recovered from the crime scene.
> 2. Any information that there were initial denials of involvement by the defendant in any or all of the criminal activity alleged
> 3. Exculpatory statements by the defendant, whether oral, written, or recorded.
> 4. Any information that the defendant was suffering from physical pain, injury, mental, or emotional impairment at the time the statement was made, whether or not such condition was caused by the police.
> 5. Any information that any confession or inculpatory statement was preceded by prolonged interrogation in violation of proscribed guidelines.
> 6. Any information that any statement allegedly made by the defendant during pretrial interrogation by the government was not memorialized in an electronic recording.
> 7. Any information that any police officer involved in the interrogation has previously been accused of, charged with, or disciplined for using improper interrogation tactics, including excessive force, during an interrogation in any case.
> 8. Any information that any police officer involved in the interrogation has previously elicited a false confession or falsely claimed that a defendant made incriminating statements.
> 9. Any information that the interrogation was not conducted in accordance with any police department or other guideline, procedure or standard in the jurisdiction, including mandatory recording requirements.

d. Forensic Science Errors

Nearly 50% of the first 300 DNA-based exonerations of the Innocence Project involved inaccurate forensic science testimony.[177] Forensic experts have testified in hundreds of cases declaring a "match"

176. West & Meterko, *supra* note 162, at 732.

177. *Id.*; *see* Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 172-96 (2007) (discussing the nationwide pervasiveness of forensic science errors is overwhelming and citing investigative reports on the fraud and misconduct by individual lab technicians and entire forensic labs); *see* Brief for Olsen as Amici Curiae Supporting Petitioner at 12-13.

between some evidence found at the crime scene and the defendant.[178] These "matches" were later refuted by DNA evidence or other information. Commonly, these errors involved serology and hair analysis.[179] The 2009 report from the National Academy of Sciences raised serious concerns about courts allowing expert forensic testimony when no standards or protocols exist to support the scientific validity of the analysis.[180] More recently, concerns over the accuracy of forensic evidence were raised in a 2016 report published by the President's Council of Advisors on Science and Technology.[181] These and other problems have raised serious concerns about the integrity of non-DNA forensic evidence.[182] Although discovery rules in nearly every jurisdiction require the prosecution to disclose some combination of the name, credentials, and summary of the expert opinion to be offered by any expert witness, in many wrongful conviction cases, prosecutors have ignored or dismissed evidence that the expert's testimony was inaccurate, misleading, or unsupported by the expert's own scientific reports.[183] In other cases, prosecutors have ignored, and failed to disclose, systemic fraud, incompetence, and dysfunction in the forensics lab.[184] In addition, prosecutors have concealed complaints and allegations of incompetence of forensics experts that would have undermined the credibility of their testimony. Therefore, if the government intends to rely on non-DNA forensic evidence to prove guilt, a *Brady* checklist should query the prosecutor to identify and disclose:

> 1. Any results, reports, and opinions obtained from examinations, tests, and experiments on physical items collected during the investigation of this case that indicate a lack of criminal involvement or are otherwise favorable to the

178. *See* PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 29-31 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

179. West & Meterko, *supra* note 162, at 746 fig.16, 747-49.

180. *See* Harry T. Edwards & Constantine Gatsonis, *Preface* to COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, at xix-x (2009); COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., *supra*, at 85-109.

181. PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., *supra* note 175, at 25-38.

182. Gershman, *supra* note 3, at 553 ("A prosecutor's failure to carefully scrutinize the accuracy and credibility of scientific experts, and to search for evidence that would demonstrate the expert is fabricating or mistaken has been one of the recognized causes of wrongful convictions." (footnote omitted)).

183. *Id.* at 553 & n.116, 554.

184. *Id.* at 554 & n.118.

> defendant, including any materials that are inconclusive or identify another person.
> 2. Any information that tests were not performed in accordance with lab protocol.
> 3. Any professional complaints filed against the forensic analyst.
> 4. Any information that the laboratories where tests were performed are or were uncertified, below industry standards, or otherwise not in compliance with state or local laws.
> 5. Any information that the forensic analyst has given false testimony, misrepresented findings, or reported findings that were later refuted by DNA or other evidence.

3. Pretrial *Brady* Compliance Hearings

In most jurisdictions, pretrial hearings are either authorized or mandated in criminal cases under local court rules. These hearings facilitate the resolution of a wide range of discovery and evidentiary issues. Although in some jurisdictions the court is specifically mandated to address the *Brady* disclosure duty during the pretrial hearing,[185] in many other jurisdictions *Brady* concerns are only addressed when specifically raised by the defense.[186] Trial courts should use the pretrial hearing to proactively manage the *Brady* disclosure duty.[187] Specifically, courts should either set a special hearing or designate time during the regularly scheduled pretrial hearing to engage in a *Brady* "compliance inquiry." During this inquiry, the court should determine whether the prosecutor has (1) identified all members of the prosecution team; (2) conducted a thorough inquiry to ascertain whether any member of the team has favorable information; (3) reviewed all the government's files to identify favorable information; and (4) disclosed favorable information to the defense in a manner that allows the defense to make effective use of the material. If the court has a detailed standing order on *Brady* and/or a *Brady* checklist, the pretrial hearing should provide the court with an opportunity to query the prosecutor about specific categories of favorable information that might exists in the case. This

185. *See, e.g.*, D. MASS. R. 117.1(a)(4)(A) ("[T]he district judge to whom the case is assigned must . . . convene an initial pretrial conference, which counsel who will conduct the trial must attend. At the initial pretrial conference the district judge must . . . order the government to disclose . . . the exculpatory information [under *Brady*]."); HAW. CRIM. R. 17.1.1(c) ("A magistrate judge shall conduct at least one pretrial conference . . . . The agenda for the pretrial conference shall consist of . . . [the] [d]ate of production of evidence favorable to the defendant on the issue of guilt or punishment, as required by *Brady v. Maryland* . . . ." (citation omitted) (citing 373 U.S. 83 (1963))).

186. *See, e.g.*, OKLA. STAT. tit. 22, § 22-2002(A) (2002).

187. United States v. Hykes, No. CR 15-4299 JB, 2016 WL 1730125, at *17-18 (D. N.M. Apr. 11, 2016) (discussing the merits of a pretrial hearing to discuss *Brady* compliance).

hearing also provides a forum for the prosecutor to request an *in camera* review of "questionable" information in their files that could be subject to disclosure.

The ABA has endorsed the use of pretrial hearings to assist the court in ensuring compliance with the *Brady* disclosure duty.[188] The ABA has stated:

> Not only will the conference encourage candor . . . [but] if the defense makes specific requests for material that the prosecution did not think to seek from law enforcement—not knowing its existence or recognizing its relevance—such requests may lead to the discovery of evidence that might otherwise have been inadvertently non-disclosed.[189]

Moreover, because criminal discovery is "self-policed" and much of discovery is conducted off-the-record, pretrial hearings allow courts to intervene and assist parties in meeting their disclosure obligations.[190] The formality of on-the-record pretrial hearings will "add an additional safeguard against nondisclosure" because parties will "think twice" and "make doubly sure" they have complied with all disclosure obligations before making representations to the court.[191]

In addition, one scholar has proposed that courts engage in the following "*Brady* colloquy" during pretrial discovery hearings[192]:

> 1. Have you reviewed your file, and the notes and file of any prosecutors who handled this case before you, to determine if these materials include information that is favorable to the defense?
> 2. Have you requested and reviewed the information law enforcement possesses, including information that may not have been reduced to a formal written report, to determine if it contains information that is favorable to the defense?

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188. ABA recommendation 102D states the following:

> [T]he American Bar Association urges . . . courts to adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a criminal trial involving felony or serious misdemeanor charges, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations . . . and to offer the court's assistance in resolving disputes over disclosure obligations.

ABA Recommendation 104A Adopted by the House of Delegates (Feb. 8-9, 2010).

189. *Id.* at 3.

190. *Id.* at 1-2.

191. *Id.* at 3.

192. Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 50-51 (2014); *see* Sullivan & Possley, *supra* note 162, at 929-30 (noting the *Brady* colloquy). *But see Hykes*, 2016 WL 1730125, at *16-18 (questioning the effectiveness of the colloquy in every case).

> 3. Have you identified information that is favorable to the defense, but nonetheless elected not to disclose this information because you believe that the defense is already aware of the information or the information is not material?
> 4. Are you aware that this state's rules of professional conduct require you to disclose all information known to the prosecutor that tends to be favorable to the defense regardless of whether the material meets the *Brady* materiality standard?[193]

Brady compliance hearings allow the court to regulate and manage the *Brady* disclosure duty while the prosecution remains in control of the criminal evidence. Because the court has a right to rely on representations made by litigants during court proceedings,[194] prosecutors can be held accountable for making misrepresentations to the court about the nonexistence of *Brady* information within their possession, as well as their failure to investigate and identify favorable information in the possession of members of the prosecution team.[195] In addition, active engagement by the trial judge can begin changing the culture of resistance to the *Brady* disclosure duty by making the process more formal and transparent.[196]

4. *Brady* Certification Requirement

Another administrative tool that trial judges could utilize is court-ordered certification of compliance with *Brady*. In some jurisdictions, certification is mandated by local discovery rules.[197] In other instances, local and federal courts have mandated certification in response to *Brady* violations.[198] If courts adopt a certification requirement, courts should

193. Kreag, *supra* note 192.

194. *See* United States v. Fallen, 498 F.2d 172, 174 (8th Cir. 1974) (noting that the government's misrepresentation allows the government to foreclose the court's discretionary authority because "the government attempted to become prosecutor and judge"); Rosser v. United States, 381 A.2d 598, 605 (D.C. 1977) ("'In open court, the court has the right to rely on the truthfulness of the government's statements.' So does defense counsel." (citation omitted) (quoting *Fallen*, 498 F.2d at 174)); *see also* United States v. Lewis, 511 F.2d 798, 800-01 n.3 (D.C. Cir. 1975); United States v. Wilkerson, 456 F.2d 57, 61 (6th Cir. 1972).

195. *In re* Stuart, 803 N.Y.S.2d 577, 578 (App. Div. 2005) (ordering a three-year suspension of the prosecutor from practice of law for making misrepresentations to the judge regarding his knowledge of the whereabouts of a *Brady* witness).

196. *See* Symposium, *supra* note 15, at 2031-34.

197. *See, e.g.*, MASS. R. CRIM. P. 14(a)(E)(3) ("Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided.").

198. Milke v. Ryan, 711 F.3d 998, 1019 (9th Cir. 2013) (reversing the conviction based on *Brady* misconduct and directing the government to "provide a statement under oath from a relevant

use a detailed *Brady* checklist and require members of the prosecution team to certify that they have checked their files for each and every category of favorable information listed and certify that responsive information has been disclosed or does not exist. A general, blanket certification—such as, "I hereby certify that I have disclosed all information required by *Brady*"—does little to ensure that the prosecution team has fully complied with all that *Brady* demands.

There are several benefits to requiring a standard written certification in all cases. First, the court can use written certifications to ensure the government has complied with its obligation to learn of any favorable information in the possession of any member of the prosecution team. This requirement will reduce *Brady* violations that result from prosecutors either not performing a due diligence inquiry or not including all members of the prosecution team in its constitutionally mandated search for favorable information.

Second, if trial courts require police officers and other members of the prosecution team to file a written certification of compliance with *Brady*, the trial judge could reduce the number of *Brady* violations that stem from the intentional or negligent suppression of favorable information by police officers. Police certification requirements would also allow the court to educate police officers on *Brady* or reinforce the policies or general orders on *Brady* that may exist within their police department. Moreover, false certification could subject police officers to judicial sanctions. While some prosecutors and police officers might be willing to risk *Brady* misconduct if there is a good chance that their misdeeds will not be discovered, far fewer would be willing to file false statements with the court that could subject them to sanctions.

The administrative tools discussed above provide trial judges with the resources needed to manage and regulate the *Brady* disclosure duty and disrupt the current culture of non-compliance. When coupled with the use of the sanctions, discussed below, trial courts can create strong incentives for the government to disclose favorable information in their possession.

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police official certifying that all of the records have been disclosed"); United States v. Naegele, 468 F. Supp. 2d 150, 155 (D.D.C. 2007) (compelling the disclosure of *Brady* material from the government and ordering the government to conduct a thorough and diligent search for the *Brady* material requested by the defense and "certify to the Court in writing" that it has complied); *see* Vaughn v. United States, 93 A.3d 1237, 1266-67 (D.C. 2014) (reversing the conviction due to *Brady* violation and stating that the government had never represented that it had fulfilled its disclosure duties and "the government should be directed to make such a representation, in writing, filed with the trial court").

B. Systemic Judicial Reform of the Brady *Disclosure Duty*

There are systemic *Brady* reforms that trial and appellate courts can institute to reform the *Brady* disclosure duty. By amending the court rules to specifically address the *Brady* disclosure duty, instituting mandatory *Brady* training for litigants in criminal cases, and establishing "best practices" for litigants, the judiciary can effectively remove the barriers that impede the *Brady* disclosure duty.

1. Codifying the *Brady* Disclosure Duty in a Court Rule

For the past three years, I have worked with a team of experienced litigators and judges to create a court rule to codify the *Brady* disclosure duty.[199] We have met regularly, utilized research on *Brady* criminal discovery rules adopted by other federal and state courts across the country, sought input from the local bar,[200] and faced staunch resistance from the Department of Justice. The committee has compromised and altered the proposed rule to address concerns raised by a wide range of stakeholders.[201] We have learned that creating a *Brady* rule that all criminal justice stakeholders can embrace is virtually impossible. Although prior attempts to amend the Federal Rules of Criminal Procedure to codify the *Brady* disclosure duty have failed, state and federal courts should still seek to craft a rule to clarify the ambiguity in the *Brady* doctrine. Unlike the set of criminal discovery management tools set forth for individual judges, a court rule will apply to all criminal cases in the jurisdiction and hold all prosecutors to a uniform standard of practice in every case.

A *Brady* rule should, at a minimum, clarify the scope of the duty to disclose favorable information and the categories of favorable information—exculpatory, impeaching, and mitigating. The rule should also provide clear timelines on when the government must disclose *Brady* material to the defense and specify the format for disclosure—summaries or original source documents. The court rule should also have sanctions that the trial judge can impose if the disclosure obligations are not met. The most comprehensive *Brady* rule is one adopted by the United States District Court of Massachusetts.[202] This rule should be the starting point for any court seeking to use a rule-making process to regulate and manage the *Brady* disclosure duty.

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199. The author is a member of the Special Ad Hoc Committee on Criminal Disclosure Obligations for the United States District Court for the District of Columbia.

200. D.D.C. Proposed Disclosure R., 144 Daily Wash. L. Rep. 197 (Jan. 29, 2016).

201. D.D.C. Proposed Disclosure R. (Nov. 2017 Notice), http://www.dcd.uscourts.gov/sites/dcd/files/Nov2017NoticeProposedBradyRule.pdf.

202. D. MASS. R. 116 (2008); *see also* HOOPER ET AL., *supra* note 7, at 9-10.

2. Changing the Culture of Prosecutorial Resistance and Noncompliance with *Brady*

While most of the responsibility for implementing *Brady* reform will be shouldered by trial court judges, appellate courts can also play a vital role in the management and regulation of the *Brady* disclosure duty. Two opinions by the local and federal appellate courts in the District of Columbia illustrate the impact that appellate courts can have on systemic reform of criminal discovery practices.

In 1971, in *Rosser v. United States*, the District of Columbia Court of Appeals suggested a practice that fundamentally changed criminal discovery practices in the District.[203] The defendant allegedly admitted to the police after his arrest that he was a "con man."[204] Although the prosecution never disclosed the "con man" statement during discovery, the government was allowed, over the defense's objection, to use the statement to impeach the defendant's trial testimony.[205] The government argued, among other things, that the defense never requested the statement, as then required under the local discovery rule.[206] The defense attorney countered that he had made a general oral request for discovery "sufficient to cover any statement by his client."[207] The defense's discovery request was never memorialized and the original prosecutor assigned to the case was no longer with the prosecutor's office by the time the case went to trial.[208] Although the court found that there was insufficient evidence that the defense ever requested discovery, the court also noted that several representations made by the prosecutor in court misled the court and the defense into believing that the government had no statements of the defendant.[209] The court ultimately reversed, but also took notice of a pattern of prior cases in which the government used previously undisclosed statements of defendants to impeach the defendants' testimony.[210] In so doing, the court stated:

> We suggest that the most effective way of making and responding to a Rule 16 request in the context of the required informal discovery is for defense counsel to deliver a letter or "request" document to the prosecutor specifying the types of material desired, and for the prosecutor to confirm in writing either that all such material has been produced or that certain material is being withheld pending a court

203. 381 A.2d 598, 605-09 (D.C. 1977).
204. *Id.* at 600.
205. *Id.* at 601.
206. *Id.* at 604.
207. *Id.*
208. *Id.* at 604-05.
209. *Id.* at 605.
210. *Id.* at 608-09.

> determination at defendant's instance. While such a written exchange is not required by the rule, this case should make clear why that approach is highly desirable. A similar procedure is advisable for informal handling of Jencks Act requests.[211]

Although this "suggestion" by the court was mere dicta in the court's opinion, the defense bar adopted the court's suggestion. Following *Rosser*, it has now become standard practice in the District of Columbia for the defense to file what is locally referred to as a "*Rosser* letter" in every case to memorialize pretrial discovery requests made to the prosecution.[212] This practice has brokered a resolution of many routine criminal discovery disputes and halted a strategic trial tactic by the prosecution that the court deemed to be unfair to the defense.

Similarly, appellate courts could "suggest" practice standards to reform the *Brady* disclosure duty. For example, while *Agurs* makes clear that the government must disclose favorable information even in the absence of a demand by the defense, many have suggested that a specific *Brady* demand by the defense, similar to the *Rosser* letter, might significantly improve the delivery of *Brady* material.[213] Likewise, appellate courts might suggest that prosecutors make all *Brady* disclosures in writing, and file a copy with the court. While it is not the role of appellate courts to manage trial discovery or reform discovery practices, appellate courts have a stake in ensuring that constitutional rights are not routinely violated because of ambiguities in what *Brady* demands.

The same year that *Rosser* was decided, the United States Court of Appeals for the District of Columbia Circuit "nudged" the government to significantly overhaul its discovery practices to comply with the Jencks Act.[214] In *United States v. Bryant*,[215] law enforcement officials made an audio recording of the defendant engaging in a drug transaction with an undercover officer.[216] The defense made a pretrial request for the audio recording which captured both the words of the defendant and the officer and was, therefore, discoverable under both the Jencks Act and

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211. *Id.* at 610.

212. *See, e.g.*, Zanders v. United States, 999 A.2d 149, 161 n.17 (D.C. 2010).

213. JaneAnne Murray, *The* Brady *Battle*, 37 CHAMPION, May 2013, at 72, 73; *see* Symposium, *supra* note 15, at 2021-22 (proposing *Brady* "checklists" for defense lawyers).

214. The Jencks Act mandates government disclosure of all "substantially verbatim" recorded pretrial statements of witnesses after the witness has testified at trial. Pub. L. No. 85-296, 71 Stat. 595, 595-96 (1974) (codified as amended at 18 U.S.C. § 3500(b), (e)(2) (2012)).

215. 439 F.2d 642 (D.C. Cir.), *on remand*, 331 F. Supp. 927 (D.D.C), *and aff'd*, 448 F.2d 1182 (D.C. Cir. 1971) (per curiam).

216. *Id.* at 645-46.

Federal Rule of Criminal Procedure 16.[217] When the government reported that the tape was intentionally not preserved by the law enforcement officers who were unaware of the Jencks disclosure obligations, the court sharply criticized the government's "thoroughly unstructured" approach to preserving criminal discovery, calling it "a dark no-man's-land of unreviewed bureaucratic and discretionary decision-making."[218] As in *Rosser*, the court noted the number of cases involving lost or intentionally unpreserved materials.[219] The court proposed a prophylactic discovery reform and required the government to demonstrate in future cases that the government has

> promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation . . . .
> . . . . By requiring that the discretionary authority of investigative agents be controlled by regular procedures . . . we intend to ensure that rights recognized at one stage of the criminal process will not be undercut at other, less visible, stages.[220]

The admonition by the *Bryant* court led to systemic reform in the preservation and disclosure of witness statements in the District of Columbia. Following *Bryant*, the local police department developed and instituted standard operating procedures for police officers to preserve pretrial statements subject to disclosure under the Jencks Act.[221]

Much like the "dark no-man's-land of unreviewed bureaucratic and discretionary decision-making"[222] that impeded the implementation of the Jencks Act, the government has not taken steps to ensure that police officers preserve, maintain, and disclose favorable information collected during the course of their investigation as mandated by *Brady*.[223] Also, as discussed below, many police departments do not have training on *Brady*, nor do they have specific policies and procedures in place to ensure that *Brady* material is properly identified and preserved. Thus, the due diligence requirements imposed by *Kyles* are easily thwarted by the untrained police officers.

With each successive case involving government suppression of favorable information, reviewing courts either reverse the conviction or find error and sustain the conviction without taking affirmative steps to

217. *Id.* at 646-47.
218. *Id.* at 644, 646-47.
219. *Id.* at 650-53.
220. *Id.* at 652.
221. *See* Jones, *supra* note 163, at 2909-10, 2924 nn.184, 185.
222. *Bryant*, 439 F.2d at 644.
223. Jones, *supra* note 163, at 2900 n.31, 2914-15.

reform *Brady* disclosure practices. The type of "suggestions," "directives," and "practice pointers" made by the appellate courts in *Rosser* and *Bryant* that reformed criminal discovery practices in the District of Columbia could also prove effective in reforming the *Brady* disclosure duty.

3. Training

Another critical measure that courts can take to change the culture of resistance and noncompliance is comprehensive training on *Brady*. Trial and appellate court judges could work with law schools and local bar associations to develop a rigorous *Brady* training course to ensure that all litigants in criminal cases—especially all members of the prosecution team—are fully informed of the basic tenets of the *Brady* doctrine. While prosecutors offer a number of different excuses for nondisclosure of favorable evidence, a common excuse is, *"Your Honor, I did not know this was* Brady *material."* In instances where the prosecutor is new and/or there has been no comprehensive training on *Brady* provided by the prosecuting authority, ignorance of the *Brady* disclosure duty might explain the first nondisclosure. Likewise, given the ambiguities in the *Brady* doctrine, confusion over the scope of disclosure mandated by *Brady* might also explain nondisclosure by more seasoned prosecutors. For this reason, courts have a vested interest in ensuring that prosecutors know what the Constitution requires and how to meet these requirements. The stakes of nondisclosure are too high for courts to continue to allow ignorance of what *Brady* commands to be an acceptable "defense" to the nondisclosure of favorable information.

Ideally, *Brady* training should be comprehensive and mandatory. Professor Gershman has created a "*Brady* Training Program Course Syllabus" which should prove helpful to the court in implementing a *Brady* training sanction.[224] Professor Gershman's materials include a list of the Supreme Court's *Brady* cases, a synopsis of the *Brady* jurisprudence, and a detailed discussion of each category of "favorable" evidence.[225] Professor Gershman also includes a series of hypothetical fact patterns that could be used to teach the proper application of the *Brady* doctrine.[226] These materials could easily form the foundation for a *Brady* training course, supplemented with the *Brady* precedent and rules of the local courts.

224. *See* Gershman, *supra* note 118, at 533-44.
225. *Id.*
226. *Id.* at 544-49.

With a mandatory *Brady* training program, it will be difficult for members of the prosecution team to claim ignorance of what *Brady* demands. Completion of the training course erodes both the reasonableness and the plausibility of nondisclosure of *Brady* material based on the prosecutor's failure to appreciate that the information was subject to disclosure, especially if the trial court employs the range of administrative tools discussed in Part III to regulate the disclosure of favorable information.

IV. JUDICIAL SANCTIONS FOR *BRADY* MISCONDUCT

> *When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law. When such transgressions are acknowledged yet forgiven by the courts, we endorse and invite their repetition.*[227]
>
> – Judge Alex Kozinski

The judicial regulations and management initiatives discussed above will be ineffective—and largely ignored—unless the court also utilizes sanctions to redress the suppression of favorable information by the prosecution. Courts must not make it so easy for prosecutors to succumb to the temptation to suppress *Brady* information. Courts must take steps to force prosecutors to reach the conclusion that it is far easier to comply with the *Brady* disclosure duty than risk the sanctions that the court will impose. This assessment will only be reached by prosecutors if courts institute a range of sanctions designed to hold prosecutors accountable and deter would-be violators of the *Brady* disclosure duty.[228]

The past four decades of *Brady* litigation have not resulted in the consistent imposition of sanctions on prosecutors for *Brady* misconduct. Even when trial judges believe the prosecutor's *Brady* misconduct warrants the imposition of sanctions, judges often refer the matter to an extrajudicial entity—either the prosecuting authority or the state bar—for disciplinary action.[229] While these third-party referrals for

227. United States v. Olsen, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, J., dissenting).

228. *See* United States v. Tavera, 719 F.3d 705, 714 (6th Cir. 2013) (vacating the district court judgment based on *Brady* misconduct and stating that "[w]e do not want other prosecutors to imitate the prosecutor's conduct in this case. *Brady* . . . d[oes] not require the defendant to discover such undisclosed statements laying in the prosecutor's file").

229. *See, e.g.*, *id.* at 707-08 ("[W]e recommend that the U.S. Attorney's Office for the Eastern District of Tennessee conduct an investigation of why this prosecutorial error occurred and make sure that such *Brady* violations do not continue."); *see also* United States v. Bartko, 728 F.3d 327,

disciplinary action can sometimes be effective in redressing *Brady* misconduct,[230] exclusive reliance on outside entities results in the court's inability to control the unconstitutional behavior of prosecutors that occurs during the litigation before the court. Moreover, reliance on extrajudicial sanctions has not proved effective in deterring *Brady* misconduct. Even in cases of egregious *Brady* violations or persistent patterns of *Brady* violations by individual prosecutors, deferral of sanctions to third-party disciplinary authorities has not resulted in consistent sanctions nor have such referrals stemmed the tide of *Brady* violations.[231]

In *United States v. Jones*, the trial judge expressed palpable frustration when the prosecutor failed to review her own notes and disclose the fact that a government witness, on several occasions, made statements to the prosecutor that directly contradicted the witness's trial testimony.[232] The court characterized the prosecutor's *Brady* violation as "serious and repeated"[233] and part of "a dismal history of intentional and inadvertent violations of the government's duties to disclose."[234] After noting the ineffectiveness of the Department of Justice's procedures for policing *Brady* misconduct,[235] the court stated: "[I]t is now particularly important that judges find effective means to themselves hold prosecutors and other government officials accountable."[236]

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342 (4th Cir. 2013) ("To underscore our seriousness about this matter, and to ensure that the [*Brady*] problems are addressed, we direct the Clerk of Court to serve a copy of this opinion upon the Attorney General of the United States and the Office of Professional Responsibility for the Department of Justice.").

230. *See, e.g.*, *In re* Howes, 52 A.3d 1, 25 (D.C. 2012) (ordering that federal prosecutor be disbarred for *Brady* and related misconduct); Press Release, David W. Prater, Dist. Att'y, Okla. Cty. (undated) (on file with author) (stating that district attorney terminated two prosecutors for withholding *Brady* evidence and referred them to the state bar association for disciplinary action, and to the Oklahoma Attorney General's Office for investigation of possible criminal violations); Alexa Ura, *Anderson to Serve 9 Days in Jail, Give Up Law License as Part of Deal*, TEX. TRIB. (Nov. 8, 2013, 3:00 PM), http://www.texastribune.org/2013/11/08/ken-anderson-serve-jail-time-give-law-license (former Texas prosecutor convicted and sentenced to ten days in jail for intentionally withholding *Brady* evidence that resulted in the wrongful conviction of Michael Morton).

231. *See* United States v. Jones, 620 F. Supp. 2d 163, 176-78 (D. Mass. 2009).

232. *Id.* at 178-79.

233. *Id.* at 180.

234. *Id.* at 165 (quoting United States v. Jones, 609 F. Supp. 2d 113, 119 (D. Mass), *modified*, 620 F. Supp. 2d 163 (D. Mass. 2009)).

235. *Id.* at 166-67 ("The persistent recurrence of inadvertent violations of defendants' constitutional right to discovery in the District of Massachusetts persuades this court that it is insufficient to rely on Department of Justice training programs for prosecutors alone to assure that the government's obligation to produce certain information to defendants is understood and properly discharged.").

236. *Id.* at 176-77.

As expressed by Judge Wolf, there are compelling reasons for trial courts to take on the primary role of imposing sanctions for *Brady* misconduct. First, trial courts are ideally suited to impose sanctions for *Brady* misconduct.[237] In the course of determining whether the prosecutor suppressed favorable evidence that "undermined confidence in the verdict," the trial court must necessarily make the factual findings relevant to the imposition of sanctions. Moreover, the prosecutor's act of depriving the fact finder of critical evidence simultaneously deprives the court of the opportunity to prevent a miscarriage of justice. Beyond the adverse impact on the defendant's constitutional right to a fair trial, *Brady* misconduct corrupts the truth-seeking function of the trial and has an overall corrosive impact on the efficacy and integrity of the criminal adjudication process. Judges lose the ability to control the admissibility of evidence, and juries are forced to make guilt/innocence determinations without the benefit of critical facts. *Brady* violations are also antithetical to the court's strong interest in judicial efficiency. Whether *Brady* misconduct surfaces pretrial, during trial, or post-trial, courts will be required to expend judicial resources to adjudicate the *Brady* violations and assess the net impact of the offending conduct on the defendant's right to a fair trial. Courts must, therefore, hold prosecutors accountable when the actions of the prosecutor result in the denial of constitutional rights and undermine the effectiveness of the judicial process.

A. Judicial Authority to Sanction Brady *Misconduct*

Unlike the Jencks Act and other criminal discovery rules,[238] the *Brady* disclosure duty does not have prescribed sanctions for noncompliance. The power to impose sanctions for *Brady* misconduct stems from the court's broad inherent supervisory power to implement a remedy for violation of a recognized constitutional right and/or deter future illegal conduct.[239] The Supreme Court has recognized that the

237. *See* United States v. Kouri-Perez, 187 F.3d 1, 12 (1st Cir. 1999) ("Although it may be difficult . . . to draw the line between zealous advocacy and unacceptable courtroom tactics, the line must be drawn, and the district courts are better able to draw it in the first instance." (citation omitted) (citing United States v. Int'l Bhd. of Teamsters, 948 F.2d 1338, 1343 (2d Cir. 1991))).

238. *Compare* FED. R. CRIM. P. 16(d)(2) (stating that a court may compel discovery, grant continuance, exclude evidence or "enter any other order that is just under the circumstances"), *with* 18 U.S.C. § 3500(d) (2012) (noting that a court can strike testimony as a sanction of nondisclosure of a witness statement).

239. *See* United States v. Fitzgerald, 615 F. Supp. 2d 1156, 1159-62 (S.D. Cal. 2009) (exercising inherent supervisory power to redress *Brady* violation); *see also* Chambers v. Nasco, Inc., 501 U.S. 32, 44, 46 (1991).

inherent supervisory powers encompass the authority to impose disciplinary sanctions on attorneys who appear before the court.[240]

There are very few published opinions involving judicially-imposed sanctions to punish and deter *Brady* violations by prosecutors. Unlike other discovery misconduct regulated by statute, a court can impose sanctions pursuant to its inherent supervisory powers even in the absence of a finding that the prosecutor's actions were undertaken in bad faith.[241] Moreover, because *Brady* is violated regardless of whether the prosecutor intentionally, recklessly, or negligently withheld favorable evidence, a bad faith restriction on the court's authority to sanction *Brady* misconduct would insulate many violations of the *Brady* disclosure duty. Also, if trial judges adopt some or all of the regulatory tools discussed in Part III, there should be fewer and fewer good faith *Brady* violations because prosecutors will be on notice of the full scope of their *Brady* disclosure duty at the outset of the litigation.

The primary vehicle that courts have to redress *Brady* violations and other forms of attorney misconduct during litigation is the contempt power. The Supreme Court has held that courts have the inherent authority to invoke the contempt power as a punitive sanction to "vindicate the authority of the court."[242] Federal judges also have statutory authority to hold lawyers in criminal contempt pursuant to federal statutes and Rule 42 of the Federal Rules of Criminal Procedure.[243] State judges also enjoy the broad authority to impose contempt sanctions on errant lawyers.[244] The contempt power of the courts, however, is generally reserved for intentional misconduct and courts are cautioned to exercise this authority "with restraint and

240. *Chambers*, 501 U.S. at 45-51.

241. *See, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 635-36 (1962) (suggesting no finding of bad faith is required before courts impose sanctions for attorney misconduct, as neglect justified the sanctions imposed by the lower court); Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 n.11 (3d Cir. 1994) (stating that bad faith is not required before a court imposes a sanction on an attorney under its inherent supervisory powers); Harlan v. Lewis, 982 F.2d 1255, 1259-60 (8th Cir. 1993) (rejecting the argument that bad faith is required to impose sanctions under a court's inherent supervisory powers); *see* Redfield v. Ystalyfera Iron Co., 110 U.S. 174, 176-77 (1884) (imposing a sanction on an attorney for misconduct absent bad faith finding); *see also Chambers*, 501 U.S. at 58-59 (Scalia, J., dissenting) ("Since necessity does not depend upon a litigant's state of mind, the inherent sanctioning power must extend to situations involving less than bad faith. For example, a court has the power to dismiss when counsel fails to appear for trial, even if this is a consequence of negligence rather than bad faith.").

242. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828-29 (1994) (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911)).

243. 18 U.S.C. § 401 (2012); FED. R. CRIM. P. 42.

244. *See, e.g.*, State v. Schiewe, 673 N.E.2d 941, 943 (Ohio Ct. App. 1996) (recognizing that the state court has the inherent power to hold a prosecutor in contempt but finding insufficient evidence to support the sanction).

discretion."[245] Instead, judges are advised to "deploy[] the least extreme sanction reasonably calculated to achieve the appropriate punitive and deterrent purposes."[246] Although criminal contempt is not an appropriate or viable alternative for every—or even most—*Brady* misconduct, there are reported state court opinions holding prosecutors in contempt to sanction *Brady* violations.[247] Notably, Judge Emmet G. Sullivan initiated contempt proceedings against the prosecutors in *United States v. Stevens* for the wide range of egregious *Brady* misconduct committed throughout the trial.[248]

B. Non-Contempt Brady *Sanctions*

Given the traditional reluctance of courts to impose sanctions for *Brady* violations and the importance of having sanctions to punish and deter *Brady* misconduct, it is critical for courts to have "an array of options, ranging from criminal contempt to non-contempt measures."[249] Proposed below are three non-contempt alternative sanctions that trial courts can impose to punish and deter *Brady* misconduct.[250] These sanctions serve to enforce the regulatory tools proposed above and provide the court with a measured and effective means of holding prosecutors accountable for *Brady* violations.

1. *Brady* Violation Database

Trial courts should establish an internal database for all judges on the court to log and track *Brady* violations committed by each prosecutor before any judge on the court. At a minimum, the database should include the name of the prosecutor, the case name, the specific category of favorable evidence withheld, the prosecutor's proffered justification for nondisclosure, and the sanction imposed. If no sanction was imposed, the database should state the reason the trial judge did not

245. *Chambers*, 501 U.S. at 44-45.

246. United States v. Kouri-Perez, 187 F.3d 1, 8 (1st Cir. 1999).

247. *See, e.g.*, State v. Khong, 502 N.E.2d 682, 687-88, 693 (Ohio Ct. App. 1985) (noting that the prosecutor failed to provide defendant with exculpatory reports and holding the prosecutor in contempt because the prosecutor failed to comply with a court order to produce the requested documents in discovery). *But see* Brophy v. Comm. on Prof'l Standards, 442 N.Y.S.2d 818, 819 (App. Div. 1981) (censuring the prosecutor after a *Brady* violation).

248. *See* Neil A. Lewis, *Prosecutors in* Stevens *Case Are Ruled in Contempt*, N.Y. TIMES (Feb. 13, 2009), http://www.nytimes.com/2009/02/14/us/politics/14stevens.html; *see also* Notice of Filing of Report to Hon. Emmet G. Sullivan, *supra* note 12, at 17-19. The special prosecutor appointed by the court to investigate the conduct of the lawyers ultimately found that, although their conduct was egregious, the court could not hold them in contempt because they did not violate a clear order of the court. *Id.* at 513-14.

249. *Kouri-Perez*, 187 F.3d at 8; *see* Sullivan & Possley, *supra* note 162, at 907-08.

250. *See infra* Part IV.B.

impose a sanction. Armed with this information, courts can monitor compliance with *Brady* and establish norms for the imposition of sanctions.

The database would also be a valuable administrative and management tool for the trial court. When a prosecutor suppresses favorable evidence before or during trial, the trial judge orders disclosure and there may be no published opinion or written record of the violation. Further, when a defendant is acquitted and there is no appeal, *Brady* misconduct discovered during the trial may not be memorialized. As a result, the *Brady* violation is "invisible" to other judges on the court. The database will ensure that all of the trial judges know whether a prosecutor or other member of the prosecution team has previously engaged in *Brady* misconduct. This will prevent the same prosecutor from appearing before different judges, engaging in the same *Brady* misconduct, and either offering the same excuses for nondisclosure or repeatedly professing ignorance of the scope of disclosure required under *Brady*. Moreover, each trial judge will be able to refer to the database at the outset of the litigation and determine pretrial whether, based on the prosecutor's past discovery practices, the court should provide greater oversight and scrutiny of her actions.

Beyond use of the database in specific cases, this tool also allows the court to determine whether the court rules, standing orders, and other *Brady* management tools are effective in curbing *Brady* violations. The database might show a pattern of the same type of *Brady* misconduct which could prompt the court to amend its standing orders or conduct training to clarify a common misunderstanding among practitioners.

The database would also be a valuable sanctioning tool. The database gives trial judges the critical information needed to determine whether to impose a sanction on a particular prosecutor for a *Brady* violation. The judge will be able to see whether the actions of the prosecutor reflect a singular, isolated lapse in judgment or a persistent pattern of *Brady* misconduct. The database will likewise inform the court's discretionary determination of the severity of sanctions to be imposed for the *Brady* violation. Serial *Brady* violators should, of course, face stiffer sanctions, especially if the prosecutor has engaged in the same or similar *Brady* misconduct and has previously been sanctioned. Prosecutors should be made aware of the existence of the *Brady* violation database and told when their conduct is memorialized in the database. Knowledge of this information could serve as a deterrent for *Brady* misconduct.

2. Public Reprimand

When prosecutors are reckless, intentionally suppress favorable information to gain a tactical advantage in the litigation, or engage in a pattern of negligent *Brady* violations, courts should impose sanctions on the prosecutor. A public reprimand by the trial court is a low-level sanction available to the court.

Traditionally, published trial and appellate opinions on *Brady* violations or other forms of prosecutorial misconduct omit the name of the prosecutor who committed the misdeed.[251] This grant of anonymity is perhaps a professional courtesy appropriate for members of the bar who, despite their best efforts have made an error.[252] This privilege should not be accorded routinely. As one court noted, "A risk of professional stigma surely attends most sanction orders, since sanction either explicitly or implicitly impugns counsel's professional ethics or competence."[253] The public reprimand is specifically designed to achieve this purpose.[254] When courts identify the offending prosecutor by name in a published opinion, it subjects the prosecutor to public embarrassment and diminishes her standing within the legal community.[255] The impact of a public reprimand is far greater, however, in the digital age. It is highly likely that the prosecutor's misdeeds will be known nationally due to the expansive scope of online search engines and websites devoted exclusively to documenting prosecutorial misconduct.[256] Also, the public reprimand sanction will undoubtedly have an adverse impact on the prosecutor's future employment opportunities and foreclose some opportunities for public office. Though the public reprimand is a much less severe sanction than criminal contempt, the scope and magnitude of these adverse consequences should make it a very effective sanction for punishing *Brady* misconduct and deterring other prosecutors. Several courts have used public

251. *See* United States v. Jones, 620 F. Supp. 2d 163, 175 (D. Mass. 2009).

252. *Id.* ("[r]ecognizing that published criticism of a named prosecutor may haunt the attorney, this court has refrained from memorializing in writing" the attorney's name in a published opinion).

253. *Kouri-Perez*, 187 F.3d at 12.

254. *See* Jerry P. Coleman & Jordan Lockey, Brady *"Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U. S.F. L. REV. 199, 243 (2016).

255. Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 404 (2002) ("Most obviously, judges on rare occasion criticize a prosecutor's behavior in a written opinion . . . . While these methods do not actually set any standards or exact any economic toll, they serve to embarrass the prosecutor and encourage him and others to refrain from similar conduct in the future." (footnote omitted)).

256. *See, e.g.*, *Open File*, PROSECUTORIAL MISCONDUCT & ACCOUNTABILITY, http://www.prosecutorialaccountability.com (last visited Oct. 21, 2017); *Registry Database*, CTR. FOR PROSECUTOR INTEGRITY, http://www.prosecutorintegrity.org/registry/database (last visited Oct. 21, 2017).

reprimands to redress *Brady* misconduct.[257] Other courts have stated their intention to use public reprimand sanctions in future cases to redress *Brady* violations.[258]

3. Banishment or Suspension

A New York trial judge barred an assistant district attorney from appearing before him upon learning that she failed to disclose *Brady* material in a rape case.[259] The prosecutor in a sexual assault case before Judge John Wilson failed to disclose the fact that the accuser initially reported to the police that sex with the defendant was consensual.[260] By the time this *Brady* misconduct was discovered, the defendant had been held in pretrial detention for more than eight months and closing arguments had concluded in the two-week trial.[261] In dismissing the charges, the trial judge characterized the prosecutor's *Brady* misconduct as "an utter and complete disgrace—not just for you, but for your office in general."[262] The judge then told the prosecutor to remain standing and stated:

> Here are your sanctions: You're going to leave this room, and you're never going to come back. You can't appear before me anymore. I'll tell you why, because I can't trust anything you say or do. I can't believe you. I can't believe your credibility anymore. The only thing a lawyer ever has to offer is their integrity and their credibility, and

257. United States v. Shaygan, 661 F. Supp. 2d 1289, 1323-25 (S.D. Fla. 2009) (using its inherent supervisory power to issue a public reprimand against United States Attorney's Office and three Assistant United States Attorneys for *Brady* misconduct), *vacated*, 652 F.3d 1297, 1317-18 (11th Cir. 2011) (finding the trial court violated the civil rights of prosecutors by imposing public reprimands as a sanction without giving them notice and an opportunity to respond to misconduct allegations), *rh'g denied*, 676 F.3d 1237 (11th Cir. 2012); *see, e.g.*, People v. Hill, 952 P.2d 673, 684-94, 697-700 (Cal. 1998) (naming the offending prosecutor and discussing previous instances wherein the same prosecutor was criticized for misconduct); McGuire v. State, 677 P.2d 1060, 1062-64 (Nev. 1984) (per curiam) (identifying the prosecutor and citing two other instances of similar misconduct by the prosecutor).

258. *See, e.g.*, United States v. Horn, 29 F.3d 754, 766-67 (1st Cir. 1994); United States v. Helmandollar, 852 F.2d 498, 502 n.3 (9th Cir. 1988) (noting public reprimand as an option available to the court); United States v. Jones, 620 F. Supp. 2d 163, 175 (D. Mass. 2009) ("[P]rosecutors should now foresee that they will likely be named in published decisions if this court is convinced that they have engaged in misconduct."); Ferrara v. United States, 384 F. Supp. 2d 384, 429 (D. Mass. 2005).

259. Denis Slattery, *Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct*, N.Y. DAILY NEWS (Apr. 6, 2014, 2:01 AM), http://www.nydailynews.com/new-york/bronx/bronx-prosecutor-barred-courtroom-article-1.1746238 (including link to the transcript of the court proceeding).

260. *Id.* (Tr. at 20-21).

261. *Id.*

262. *Id.*

> when you have lost that, there is no purpose in your appearing before this Court.[263]

It is well-established that judges have the inherent supervisory authority to punish *Brady* misconduct by barring lawyers from appearing before the judge in any future cases.[264] This "banishment" or suspension sanction has been imposed in a number of criminal cases against defense attorneys and prosecutors for *Brady* and other forms of misconduct.[265]

In most jurisdictions, prosecutors practice in a specific courthouse and appear before the same set of criminal court judges on a regular basis. In some jurisdictions, prosecutors are assigned to a specific courtroom or a specific judge's calendar and will appear before the same judge for months at a time. Regardless of the staffing practices, prosecutors will inevitably be required to make court appearances before the same set of judges many times during their career. When a trial judge finds that a prosecutor has engaged in *Brady* misconduct, the judge has the power to refuse to allow the prosecutor to handle matters before the judge in any future litigation. The impact of this sanction on the prosecutor is profound. This sanction could force the prosecuting authority to reassign or terminate the prosecutor's employment. The sanction may also have collateral consequences if local court rules permit the judge to initiate proceedings to completely suspend the prosecutor from practicing law in the court.[266]

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263. *Bronx ADA Megan Teesdale: Integrity Lost*, SIMPLE JUSTICE: A CRIMINAL DEFENSE BLOG (Apr. 8, 2014), https://blog.simplejustice.us/2014/04/08/bronx-ada-megan-teesdale-integrity-lost.

264. *See id.* at *1-2, *5-6 (affirming the decision of several judges on the bankruptcy court to suspend an attorney from practicing in the bankruptcy court in the Eastern District of Virginia for a wide range of conduct, including the failure to timely file motions, properly advise clients, and filing documents with false statements). In upholding the suspension, the Eastern District Court of Virginia recognized the inherent power of the court to discipline lawyers who appear before the court, including the ability to suspend lawyers when warranted. *Id.* at *5-6.

265. *See, e.g.*, United States v. Wittig, No. 03-40142, 2005 WL 758606, at *8, *22 (D. Kan. Apr. 4, 2005) (noting that one of the attorneys on the defense team in a criminal case was barred during the trial and barred from appearing before the court on re-trial based on the lawyer's "blatantly hostile behavior directed at the Court"); *cf.* Petition for Writs of Prohibition, Certiorari and (If Necessary) Mandamus and Motion for Emergency and Accelerated Consideration at 1-2, Tolleson v. Circuit Court, No. 2011-1 (Ark. June 30, 2011), https://www.arktimes.com/images/blogimages/2011/07/05/1309885067-tollesonpetition.pdf (filing for writ of prohibition against judge who entered an order removing and disqualifying himself from any proceeding in which Deputy Public Defender Julie C. Tolleson was representing a party in any case pending or filed in the future). *But see In re* Jefferson, 753 So. 2d 181, 191 (La. 2000) (stating that the judge abused his discretion in banishing the prosecutor until he apologized and that this "constituted an extreme and unwarranted abuse of judicial authority" and "[his] actions went beyond the bounds of acceptable judicial behavior").

266. *See, e.g.*, *In re* Parker, No. 3:14cv241, 2014 WL 4809844, at *1-2 (E.D. Va. Sept. 26, 2014).

In sum, the sanctions proposed here provide the court with effective options to redress *Brady* misconduct without relying on extra-judicial entities to enforce the *Brady* disclosure duty and without resorting to the drastic sanction of contempt. These sanctions are easy to administer and are properly calibrated to punish the offending prosecutor and deter other prosecutors from *Brady* misconduct.

V. CONCLUSION

Brady is broken and the only entity in the criminal justice system that has not supported major reform is the prosecution. Open file discovery and other reforms provide viable options for ensuring that favorable information is disclosed to the defense as mandated by *Brady*. Trial judges do not need to wait for these external reform measures. Trial judges currently have the power and resources to regulate and reform the *Brady* disclosure duty. The duel approach of strict pretrial regulation and the use of appropriate sanctions for *Brady* misconduct is an effective formula for preventing *Brady* violations.