PLANNING *BRADY*'S COMEBACK: PUBLIC DEFENDERS ARE NEEDED AS JUDGES TO LEAD THE RESTORATION OF *BRADY*'S LOST PROMISE

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Abstract

Since 2020, nearly 60% of all people who have been exonerated have had cases infected with Brady violations, costing these people to lose more than 3,600 years combined to wrongful incarceration. Nevertheless, the United States Supreme Court has transformed from once recognizing that Brady violations undermine the "very integrity of the judicial system" to disregarding their impact as not that harmful of a constitutional violation. The promise once surrounding Brady has largely been replaced by hollow prosecutorial proclamations of a commitment to their disclosure obligations followed by courts forgiving those very same prosecutors when they suppress favorable information. Such a dynamic occurred in Turner v. United States, where Justice Breyer quoted the government's claim of a "generous" disclosure policy in the opinion. He and the majority then upheld the convictions even though the prosecution hid from the defense a substantial amount of information that could have changed the "whole tenor" of trial.

This Essay details why prosecutorial claims of having and following a generous disclosure policy were inaccurate at the time of Turner and remain inaccurate today. It explains that when courts are unwilling to uphold Brady's purpose of ensuring a fair trial they encourage prosecutors to play games with disclosures. If judges want to prioritize everyone's right to a fair trial, they must be willing to impose a series of suggested remedies and sanctions when prosecutors do fall short in their disclosure obligations. The Essay concludes by arguing that if there is any chance of systemic improvements to how

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Brady is applied, courts need judges with different experiences. They need public defenders. Replacing Justice Breyer with Justice Ketanji Brown Jackson was an important start. As Justice Jackson said during her confirmation hearings, she has "dedicated [her] career to ensuring that the words engraved on the front of the Supreme Court building, 'Equal Justice Under Law,' are a reality and not just an ideal." But to restore Brady's promise of equal justice, appointing public defenders must occur in all courts from the Supreme Court on down.

INTRODUCTION

In a trial that would later be described as a "perfect storm" of prosecutors hiding exculpatory information from the defense, Christopher Williams and Theophalis Wilson were wrongly convicted in 1993 of a triple homicide.[1] Remarkably, due to similar prosecutorial misconduct, Williams was wrongfully convicted of a separate murder the previous year.[2] They would each spend three decades in prison—including twenty-five years on death row for Mr. Williams—until being exonerated of all convictions and set free.[3]

When Williams and Wilson went to trial, the constitutional and ethical requirements placed on prosecutors to timely disclose exculpatory information to the defense had been well established. Thirty years before their convictions, the Supreme Court sought to buttress the integrity of the criminal legal system by holding in *Brady v. Maryland* that prosecutors must disclose to the defense "favorable" information that would tend to negate guilt; a failure to do so violates due process.[4] The motivating force behind the Court's *Brady* decision was the belief that "our system of the administration of justice suffers when any accused is treated unfairly."[5] The Court affirmed that a prosecutor

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1. *See* Samantha Melamed, *Accused of 6 murders, Philly man spent 25 years on death row. Now, his record is cleared.*, PHILADELPHIA INQUIRER (Feb. 9, 2021), https://www.inquirer.com/news/philadelphia-conviction-integrity-christopher-williams-exoneree-20210210.html.
2. *Id*.
3. *Id*.
4. Brady v. Maryland, 373 U.S. 83, 87–88 (1963). "Favorable" material includes anything "that the defense would want to know about," spanning both exculpatory and impeaching information. Leka v. Portuondo, 257 F.3d 89, 98–100 (2d Cir. 2001).
5. *Brady*, 373 U.S. at 87.

should not be the "architect of a proceeding that does not comport with standards of justice."[6]

Brady, and its progeny, place on the prosecution an "inescapable" responsibility to "disclose known, favorable evidence" to the defense before trial.[7] Prosecutors should resolve close questions as to whether to disclose information in favor of disclosure.[8] In reviewing a *Brady* claim following a conviction, a court should reverse the conviction if the defense can establish that favorable information was not timely disclosed and that the failure proved "material" to the outcome.[9] The Supreme Court defined "material" as whether there "is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[10]

Brady violations are no mere technicality. Courts have long agreed that a prosecutor's role is not to secure convictions but to see that "justice shall be done."[11] But as *Brady* violations continue to

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6. *Id.* at 88.

7. Kyles v. Whitley, 514 U.S. 419, 438 (1995). "Favorable" material includes anything "that the defense would want to know about," spanning both exculpatory and impeaching information. *Leka*, 257 F.3d at 98–100. A prosecutor must disclose any favorable information known or reasonably known by anyone acting on the government's behalf in the case, including the police, a group referred to as "the prosecution team." *See Kyles*, 514 U.S. at 437; Avila v. Quarterman, 560 F.3d 299, 307 (5th Cir. 2009) ("It is well settled that if a member of the prosecution team has knowledge of *Brady* material, such knowledge is imputed to the prosecutors."); *see also* Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964) ("The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's attorney,were guilty of the nondisclosure" and "[f]ailure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld.").

8. United States v. Agurs, 427 U.S. 97, 108 (1976).

9. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

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

11. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (explaining that a prosecutor's interest in "a criminal prosecution is not that it shall win a case, but that justice shall be done"). According to Westlaw Keycite's Citing References, the passage from *Berger* that a prosecutor's role is to seek justice by refraining from improper methods as much as the role is to use legitimate means to bring about a just conviction has been cited by courts in every state and in every federal appellate court. *See Berger v. U.S. Citing References*, WESTLAW, https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=%28sc.Default%29 (search for, and select, Berger v. United States, 295 U.S. 78

mount, the grand vision of the justice-seeking prosecutor proves to be more fiction than fact.[12] In spite of *Brady*'s promise, known violations remain "pervasive,"[13] with the reality being once a conviction is final, it becomes exceedingly difficult to uncover what was in the prosecutor's case file.[14]

The harm caused by *Brady* violations extends well beyond the negative impact on the public's perception of the criminal legal system. Mr. Williams' death sentence is far from unique when looking at exonerations as a result of withheld evidence. Research shows that *Brady* violations played a role in over 70% of death row exonerations since 1989.[15] As Mr. Wilson said after being set free, "[t]here's a lot of innocent people in jail."[16]

Yet *Brady* violations continue to occur because judges have grown comfortable paying lip service to *Brady*'s importance, only to then refuse to impose any type of accountability.[17] Appellate courts,

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(1935); then select "2273 Cases that cite this headnote" under headnote 8; then select "jurisdictions" on the dropdown menu).

12. *See generally* Jessica Brand, *The Epidemic of Brady Violations Explained*, THE APPEAL (April 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/ ("*Brady* violations not only send potentially innocent people to prison, but they reinforce a win-at-all costs mentality that undermines the pursuit of justice.").

13. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 (2006) ("[I]t is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations.").

14. *See* United States v. Oxman, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files.").

15. *See* THE NAT'L REGISTRY OF EXONERATIONS: DETAILED VIEW, (last visited Apr. 27, 2022) [hereinafter NAT'L REGISTRY OF EXONERATIONS] https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (showing that of the 134 people who were sentenced to death and exonerated since 1989, the prosecution withheld exculpatory information in 95 of the cases). Since just 2020, there have been 408 total exonerations. *Id.* In 233 of those cases, prosecutors withheld exculpatory information. *Id.*

16. Samantha Melamed, *A 'perfect storm' of injustice: Philly man freed after 28 years as DA condemns 'decades' of misconduct*, PHILA. INQUIRER (Jan. 21, 2020), https://www.inquirer.com/news/philadelphia-da-larry-krasner-conviction-integrity-unit-exoneration-theophalis-wilson-christopher-williams-20200121.html.

17. *See* Cynthia Jones, *Here Comes the Judges: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 HOFSTRA L. REV. 87, 130-31 (2017) (discussing the "tide" of *Brady* violations).

filled with many former prosecutors and few public defenders, regularly confront cases where prosecutors failed to properly disclose information to the defense.[18] These courts overwhelmingly find ways to forgive the failure in order to uphold the conviction.[19] Courts reflexively accept empty assertions by prosecutors who claim they are committed to complying with *Brady* and have made all needed disclosures, regardless of how frequently these assertions prove false.[20]

No case epitomizes this dynamic more than Justice Breyer's opinion in *Turner v. United States*.[21] When writing the opinion, Justice Breyer quoted the Department of Justice's claim that it now generously discloses any "information that a defendant might wish to use."[22] Nevertheless, the Court affirmed the conviction, excusing the prosecution's failure to turn over a substantial amount of exculpatory and impeachment material.

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18. One study found that only about eight percent of all federal judges have any public defender experience, and that the number has nearly doubled in the last ten years. Allison P. Harris & Maya Sen, *Appointing public defenders as judges affects their decisions. Our study shows how*, WASH. POST. (Mar. 17, 2022), *https://www.washingtonpost.com/outlook/2022/03/17/jackson-public-defender-courts/*. In contrast, according to a study by the Cato Institute, more than one-third of federal judges were former prosecutors with another quarter who had represented the government as "noncriminal courtroom advocates." *See* Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates*, CATO INST. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates.

19. *See*, *e.g*., United States v. Straker, 800 F.3d 570, 603 (D.C. Cir. 2015) (stating that the "prosecutor's behavior" in failing to properly disclose favorable information pursuant to *Brady* "leaves much to be desired," but nevertheless holding the failure was harmless and affirming the conviction); United States v. Singhal, 876 F. Supp. 2d 82, 104 (D.D.C. 2012) (stating that "[c]ourts in this jurisdiction look with disfavor on narrow readings by prosecutors of the government's obligations under *Brady*" but then denying the defense's motion to compel disclosures of information the defense sought was favorable (quoting United States v. Edwards, 191 F. Supp. 2d 88, 89–90 (D.D.C. 2002))).

20. *See*, *e.g.*, *United States v. Gonzalez*, No. CR 20-40, 2020 WL 6158246, at *5 (D.D.C. Oct. 21, 2021) (denying a motion to compel discovery because the prosecution "indicated" it was "aware of its obligations to preserve and disclose exculpatory and impeachment evidence").

21. 137 S. Ct. 1885 (2017).

22. *Id*. at 1893 (citing Transcript of Oral Argument at 47–48, Turner v. United States, 137 S. Ct. 1885 (2017) (Nos. 15-1503, 15-1504)).

This Essay focuses on how judges can help restore *Brady*'s original intent to protect a person's right to a fair trial. Part I examines why the Justices should have recognized as inaccurate the government's claim of a generous disclosure policy asserted during *Turner*. Part II continues by showing that even after the opinion in *Turner*—and perhaps a direct result of the ruling—prosecutors still flaunt *Brady*'s mandate and courts are content to look the other way. Once the Supreme Court legitimized the prosecution's conduct in *Turner*, all potential incentives for prosecutors to be more faithful to *Brady*'s commands vanished.

Lastly, Part III delves into what courts can do to see that *Brady*'s purpose is being fulfilled. Courts must recognize that when prosecutors boast of a commitment to *Brady*, they are doing so as advocates trying to win and not as ministers of justice.[23] Instead, these courts should take steps to proactively enforce *Brady*'s requirements and then not hesitate to impose sanctions and reverse convictions when prosecutors do fall short in their obligations. Most importantly to seeing *Brady*'s purpose met, the makeup of the entire judiciary needs to be altered. More judges

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23. An example of prosecutors being more committed to obtaining convictions than to seeking justice is playing out right now in the state of New York. In New York, up until recently, lax discovery rules led to many prosecutors warning people accused of crimes to quickly accept a guilty plea without all the relevant evidence having been disclosed to the defense. The alternative people faced was to go to trial—perhaps waiting years in Rikers Island jail—with the looming threat of a far more severe penalty. *See* Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html. As a result, and after many years of debate, the state legislature in 2019 passed discovery reform that required prosecutors to actually make timely disclosures to the defense. *See* Beth Schwartzapel, *"Blindfold" Off: New York Overhauls Pretrial Evidence Rules*, THE MARSHALL PROJECT (Apr. 1, 2019), https://www.themarshallproject.org/2019/04/01/blindfold-off-new-york-overhauls-pretrial-evidence-rules. Though their job in theory is to seek justice, prosecutors throughout the state have responded to these law changes that were "intended to make the judicial process fairer" by quitting as part of an aggressive effort to have the discovery law undone. Anne Barnard, *The Prosecutors Who Are Heading for the Door*, N.Y. TIMES (Apr. 5, 2022), https://www.nytimes.com/2022/04/04/nyregion/the-prosecutors-who-are-heading-for-the-door.html; *see also* George Joseph & Josefa Velasquez, *State Budget Negotiations Stall, with Proposed Bail and Trial Changes Still Unresolved*, THE CITY (Mar. 31, 2022), https://www.thecity.nyc/2022/3/31/23004943/bail-new-york-state-budget.

in all courts at all levels need to have had meaningful public defender backgrounds. Justice Ketanji Brown Jackson's historic confirmation to the Supreme Court, with her experience as a public defender, cannot be an outlier. Public defenders have an ability to view the issues judges have to decide "with a clarity that others working within [the criminal legal system] simply do not."[24] Public defenders as judges will not solve the problem, but without them on the bench, the plague of unchecked *Brady* violations will only grow worse.

PART I. THE SUGGESTION IN *TURNER* THAT PROSECUTOR OFFICES NOW EMPLOY A GENEROUS *BRADY* POLICY DID NOT REFLECT REALITY.

Turner v. United States stemmed from a 1985 trial where the United States Attorney's Office for the District of Columbia (USAODC) charged eleven young people with murder in what the prosecution theorized was a group attack.[25] At trial, every person charged pursued a "not me, maybe them" defense.[26] The jury acquitted two of the people charged and convicted everyone else.[27]

Each person, even after being convicted, maintained his innocence.[28] In 2010, the defense attorneys began to uncover substantial information that had been in the prosecution's possession before trial but was never disclosed.[29] The undisclosed evidence cast doubt on the theory of a group attack, undermined the credibility of many of the prosecution's witnesses, and identified a different suspect who might have possibly been the one who committed the murder—a person who would later commit a "strikingly similar crime."[30]

24. Premal Dharia, Opinion, *I was a public defender for over a decade. KBJ's empathy is what our highest court needs*, CNN (Apr. 8, 2022), cnn.com/2022/04/08/opinions/ketanji-brown-jackson-confirmation-public-defender-dharia/index.html.
25. 137 S. Ct. at 1889
26. *Id*. at 1891.
27. *Id*. One of the people convicted died prior to the case reaching the Supreme Court. *Id*.
28. Brief for Petitioners at 17, Turner v. United States, 137 S. Ct. 1885 (2017) (Nos. 15-1503, 15-1505), 2017 WL 444744 at *17.
29. *Id.*
30. *Id.* at *19, *29. *See also Turner*, 137 S. Ct. at 1891–92.

Based on this information, each defendant sought post-conviction relief, with the case landing before the Supreme Court.[31] The Court held oral arguments in March 2017. During arguments, Justice Kennedy asked the Deputy Solicitor General—who was arguing to protect the convictions—if he would have advised the trial prosecutors to disclose the favorable information at issue.[32] He said, "I don't know if that is the advice I would have given."[33] He then suggested disclosure "would be good practice and [it is] the practice today."[34] He contended that the current policy of the Department of Justice is, "We'll turn things over in close cases. That is the better advice. That's the Department of Justice's advice today."[35] He pointed to the United States Attorneys' Manual adopted in 2006, saying that the Department "devotes considerable resources to giving guidance, training and supervision to prosecutors to go above and beyond *Brady*[.]"[36]

No justice pushed back on the claim of a generous disclosure policy. No one asked what the policy required; no one asked whether

31. Turner v. United States, 116 A.3d 894, 900, 901 (D.C. 2015).
32. Oral Argument at 53:25, *Turner v. United States*, 137 S. Ct. 1885 (2017) (Nos. 15-1503, 15-1504), https://www.oyez.org/cases/2016/15-1503 [hereinafter *Turner* Oral Argument].
33. *Id.* The Deputy Solicitor General theorized the prosecution might not have needed to disclose information relating to a possible different person committing the murder because it was only "some statements from witnesses which were not enough to prosecute" this other person and which did not fit with the government's theory of a "group attack." *Id.* But each rationalization would not justify withholding information suggesting someone else may have committed the offense. *See Watkins v. Miller*, 92 F. Supp. 2d 824, 846 (S.D. Ind. 2000) (stating information that someone else may have committed the crime is "the type of exculpatory information that courts have long recognized as core *Brady* material"). *See also Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. 1986) (granting habeas relief because withheld evidence that a different person had a motive to commit the crime "in the hands of the defense . . . could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders").
34. *Turner* Oral Argument, *supra* note 32, at 53:56.
35. *Id*. at 54:39. Though the Deputy Solicitor General suggested the advice "today" of the Department of Justice was to disclose information in close situations, the Supreme Court forty years earlier made precisely the same suggestion for "prudent prosecutors." *See* United States v. Agurs, 427 U.S. 97, 108 (1976) (prosecutors must "resolve doubtful questions in favor of disclosure").
36. *Turner* Oral Argument, *supra* note 32, at 53:10.

the policy was followed in practice; and no one asked if there were actual internal repercussions for not following the policy.[37]

A few months later, the court affirmed the convictions.[38] Writing for the majority, Justice Breyer seized upon the government's assertion of a commitment to *Brady*. He wrote, "the Government assured the Court at oral argument that subsequent to petitioner's trial, it has adopted a 'generous policy of discovery' in criminal cases under which it discloses any 'information that a defendant might wish to use.'"[39] Despite all of the information prosecutors hid from the defense, the Supreme Court felt there was no "reasonable probability" a single juror could have reached a different conclusion as to guilt.[40]

Was it true that prosecutors at the time *Turner* was decided were following a generous policy to disclose any information the government possessed that the defense might want to use?

In a word, no. Anyone who conducted even a cursory review of published opinions deciding *Brady* issues related to the office responsible for prosecuting the *Turner* case could have quickly cast doubt on the assurance of a generous disclosure policy. The D.C.

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37. One court did push back when a prosecutor at oral argument attempted to excuse a past non-disclosure by saying if the case happened today they would disclose the information "under the modern rules of discovery." Breakiron v. Horn, 642 F.3d 126, 133 n.8 (3d Cir. 2011). In the opinion, the court wrote about the prosecutor's statement: "That response is at once true and insufficient. It was so well-established before Breakiron's trial as to have been axiomatic that prosecutors must disclose impeachment evidence like that at issue here." *Id.* (citing United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972)). *But see* In re Special Procs., 825 F. Supp. 2d 203, 205–06 (D.D.C. 2011) (involving a special prosecutor's recommendation there could not be contempt charges filed against federal prosecutors who engaged in "significant, widespread, and at times intentional misconduct" in relation to hiding information from the defense because prior to trial the court declined to issue a discovery order after accepting prosecutors' "repeated assertions" they were fully complying with their obligations).

38. *See Turner*, 137 S. Ct. at 1893 (ruling there was no "reasonable probability" of a different outcome at trial despite the failure of the prosecution to disclose favorable information).

39. *Id.* Providing the defense with any information it might want to use is not "generous" but consistent with what courts consistently have found to be required. *See* Leka v. Portuondo, 257 F.3d 89, 99 (2d Cir. 2011) (holding that favorable information requiring disclosure is any information in the prosecution team's possession that is "of a kind that would suggest to any prosecutor that the defense would want to know about it" because it might help the defense in preparing for trial).

40. *Turner*, 137 S. Ct. at 1893.

Circuit, in deciding whether the USAODC's failed to properly disclose *Brady* information relating to a cooperating witness, stated: "The prosecution's behavior leaves much to be desired, falling short of this court's expectations."[41]

The D.C. Court of Appeals—the court that hears the vast majority of appeals prosecuted by the USAODC[42]—wrote in an opinion not long before *Turner*, "[w]e are repeatedly confronted with complaints of tardy disclosure of exculpatory material" by the USAODC.[43]

The same court wrote in a different case that it was "at a loss" to comprehend the USAODC's prosecutor's reasoning for not timely disclosing a videotaped statement of an interview with a witness whose description of a suspect did not match the defendant.[44] And in an opinion issued less than a month before the oral argument in *Turner*, the same appellate court approved the trial judge having "admonished" prosecutors from that same office for "cryptic" disclosures on the eve of trial that improperly forced defense attorneys to have to "dig" to make any sense of what the disclosure meant.[45]

In the years before the argument in *Turner*, courts reversed several convictions due to the USAODC's failure to follow *Brady*.[46]

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41. *See* United States v. Straker, 800 F.3d 570, 603 (D.C. Cir. 2015).

42. The USAODC prosecutes most of its cases in D.C. Superior Court, with direct appeals to the D.C. Court of Appeals. The office also prosecutes a smaller number of its cases in federal district court in D.C. and those appeals are heard in the D.C. Circuit.

43. Perez v. United States, 968 A.2d 39, 65 (D.C. 2009). But even after recognizing "there [was] no question" the information should have been disclosed by the prosecution, the court held it was not material and thus did not result in reversal. *Id.*

44. Mackabee v. United States, 29 A.3d 952, 957 n.11 (D.C. 2011)

45. *See* Dorsey v. United States, 154 A.3d 106, 113–18 (D.C. 2017) (involving disclosure shortly before trial of only a hand-written note with a case number on it instead of the entirety of a lengthy opinion finding that the lead detective had been found to have made a false arrest and lied about it).

46. *See* Miller v. United States, 14 A.3d 1094, 1097 (D.C. 2011); Vaughn v. United States, 93 A.3d 1237, 1244 (D.C. 2014); Biles v. United States, 101 A.3d 1012 (D.C. 2014) (finding that failure to disclose information that would have led to a successful motion to suppress as it contradicted officer's arrest report warranted reversal). In addition to the reversals, there were numerous reported opinions during this same time period where the D.C. Court of Appeals agreed the USAODC possessed favorable information and failed to disclose it to the defense but nevertheless affirmed the convictions, ruling the materiality standard had not been met. *See Dorsey*, 154 A.3d at 114, 118 (agreeing that prosecutors were properly "admonished" for not properly

Each one contradicts the notion pressed at the Supreme Court of a generous disclosure policy by the U.S. Attorney's Offices. In one example, D.C. prosecutors kept from the defense until right before trial evidence the shooter in an attempted murder case was left-handed, when the defendant was right-handed.[47] On appeal, the prosecutors—the same ones who supposedly receive extensive training and guidance on the requirements of *Brady*—wrongly contended they did not have to disclose the information because they personally did not believe it would prove material to the outcome.[48] The court called such a contention "remarkable for its breadth" and reiterated "[i]t 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."[49]

In *Vaughn v. United States*, prosecutors did the opposite of going above and beyond their disclosure obligations.[50] When prosecutors learned of an internal investigation showing the lead correctional officer in its case had recently lied about a similar incident in an attempt to cover up his use of pepper spray, they actively sought to hide the information.[51] They filed a motion in limine that omitted

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disclosing favorable information to the defense but affirming the conviction); Colbert v. United States, 125 A.3d 326, 330 (D.C. 2015) (affirming conviction even though prosecutor had admitted to not disclosing information because it would "fe[e]d" the defendant information that could have helped his testimony); *Mackabee* 29 A.3d at 960–65 (affirming conviction even though prosecutors did not properly disclose to the defense that one witness failed to identify the defendant and another gave a description that could not possibly match the defendant). *See also Straker*, 800 F.3d at 603 ("The [USAODC's] behavior leaves much to be desired, falling far short of the court's expectations. Nevertheless, each of the defendant's [*Brady*] claims ultimately fails on the merits.").

47. *Miller*, 14 A.3d at 1097.

48. *Id*. at 1109.

49. *Id*. at 1109–10. *See also* Zanders v. United States, 999 A.2d 149, 164 (D.C. 2010) ("Any doubts [regarding *Brady* disclosures] should be resolved in favor of full disclosure."); Nuckols v. Gibson, 233 F.3d 1261, 1267 (10th Cir. 2000) (opining that questions as to the impact of undisclosed evidence "should have been resolved by a jury"); Lindsey v. King, 769 F.2d 1034, 1040 (5th Cir. 1985) ("It was for the jury, not the prosecutor to decide whether the contents of an official police record were credible.").

50. 93 A.3d 1237, 1243 (D.C. 2014).

51. *Id*. at 1243–44.

critical information and portrayed the investigation as having "little to do" with the officer's credibility.[52] As the D.C. Court of Appeals recognized, had the prosecutors provided accurate information, the trial court would have been required to order it disclosed.[53] The Court of Appeals not only reversed the conviction but remanded the case with guidance that if the trial court determined the suppression of the key information was a "deliberate" ploy to avoid *Brady*, then the case could be dismissed with prejudice.[54]

Besides reversals, the D.C. Court of Appeals upheld sanctions for two different Assistant U.S. Attorneys from the USAODC for unrelated unethical conduct due to their *Brady* violations.[55] In one such case, a prosecutor was disbarred when it was uncovered he had improperly paid witnesses thousands of dollars over several cases and never disclosed any of those payments to defense counsel.[56]

D.C. trial courts also routinely grappled with local prosecutors' inability to follow *Brady.* In D.C. Superior Court, where the USAODC prosecutes most of its criminal cases, one judge expressed a frustration at the excuses offered by the USAODC for not complying with *Brady*.[57] When ruling on a motion to dismiss due to *Brady* violations, the judge noted: "I … continue to have concerns about the level of understanding in the U.S. Attorney's Office of some of the issues we've discussed over the last two days, and have been pretty disappointed in some of the positions taken by Government counsel, including those taken by [] the head of the felony section over in the U.S. Attorney's Office."[58]

After having obtained a much publicized conviction in the murder of Chandra Levy, a Capitol Hill intern, the USAODC saw their

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52. *Id*.
53. *Id*.
54. *Id*. at 1267 n.35.
55. *See* In re Howes, 52 A.3d 1, 4–5 (D.C. 2012); In re Kline, 113 A.3d 202, 205 (D.C. 2015) (affirming 30-day suspension for prosecutor who assured the defense and court that all exculpatory information had been disclosed when he had hidden a note documenting that a police officer had reported that the victim had failed initially to make an identification; the information was never disclosed until a different prosecutor did so the night before a second trial, following an initial hung jury).
56. *Howes*, 52 A.3d at 5.
57. Transcript of Record at 4–5, United States v. A.R., 2013 CF3 18775 (D.C. Sup. Ct. July 10, 2015).
58. *Id*.

case "crumble."[59] Following the conviction, the defense uncovered a mountain of evidence that prosecutors kept information from the defense relating to their key witness, a jailhouse informant, and had even "lied and allowed perjured testimony" to be presented to the jury.[60] Though the USAODC initially denied any error had occurred, they eventually agreed to a new trial and then dismissed the case entirely.[61] Recently, six years after all charges were dismissed, the D.C. attorney disciplinary committee recommended that the lead federal prosecutor in the case be suspended from practicing law for 90 days due to having withheld evidence from the defense.[62]

Although this Section focused on one particular U.S. Attorney's Office, the same one that prosecuted the *Turner* case, that office is far from alone in its failure to employ a generous disclosure policy. At the time of *Turner*, *Brady* violations were a nationwide problem. In one case, the Third Circuit had said, "[w]e are at a loss to understand why prosecutors, so long after *Brady* became law, still play games with justice and commit violations by secreting and/or withholding exculpatory evidence from the defense."[63] In a different case, the Fourth Circuit wrote that, "we are repeatedly confronted with charges of discovery abuse by this office" that "raise[] questions regarding whether the errors are fairly characterized as unintentional."[64]

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59. *See* Jessica Brand & Ethan Brown, *U.S. Attorney's Office That Prosecuted Inauguration Day Protesters Has History of Misconduct Findings*, THE APPEAL (July 30, 20180), https://theappeal.org/us-attorneys-office-that-prosecuted-inauguration-day-protesters-has-long-history-of-misconduct/.

60. *See id*.

61. *See* David Benowitz, *What the Chandra Levy Retrial Teaches Us About Defendant's Rights*, HUFFINGTON POST (May 27, 2017), https://www.huffpost.com/entry/what-the-chandra-levy-ret_b_10146094; Richard Pérez-Peña, *Charges Dropped Against Man Accused of Killing Chandra Levy*, N.Y. TIMES (July 28, 2016), https://www.nytimes.com/2016/07/29/us/charges-dropped-against-man-accused-of-killing-chandra-levy.html.

62. *See* Keith Alexander, *Panel finds ex-federal prosecutor withheld evidence in Chandra Levy murder case, recommends 90-day suspension of license*, WASH. POST (Feb. 26, 2022), https://www.washingtonpost.com/politics/2022/02/26/chandra-levy-trial-prosecutor-misconduct/.

63. Breakiron v. Horn, 642 F.3d 126, 133 n.8 (3d Cir. 2011).

64. *See* United States v. Bartko, 728 F.3d 327, 343 (4th Cir. 2013). *See also* United States v. Dvorin, 817 F.3d 438, 451 (5th Cir. 2016) (prosecutor violated both *Brady* and *Napue* by first not disclosing to the defense a plea agreement it had reached with a cooperating witness and then not correcting the witness when he testified he had not

PART II. NOTHING HAS CHANGED SINCE *TURNER*

Unfortunately for people accused of crimes and for the integrity of the criminal legal system, the *Turner* decision did not spur a commitment toward *Brady* by prosecutors. One month after the *Turner* decision, USAODC prosecutors again were caught trying to skirt *Brady*'s obligations and then offering weak excuses for their failings in a case where three young men faced murder charges.[65] In that case, during a hearing on a defense motion to dismiss due to *Brady* violations, a supervisor in the office's homicide division suggested that if the defense did not want thousands of pages and hours of video dumped on its lap at the last minute—all of which had been in the prosecution's possession for months if not years—the "only option" was for the prosecutor to withhold it altogether.[66] The Superior Court judge interrupted, "[n]o, it's not the only option and I know that."[67] The next day, the prosecution, while still admitting no wrong, dismissed the case, which led the judge to admonish, "[i]f the case is re-brought … [m]y only hope is that these three young men do get a fair trial, and they deserve a fair trial, and that your office will think carefully about the many resources that you have so that this doesn't have to repeat itself."[68]

Few cases typify the failure of the USAODC to follow a generous disclosure policy more than the prosecution of the "J20"

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received any promises in exchange for testifying); *United States v. Flores-Rivera*, 787 F.3d 1, 18–19 (1st Cir 2015) (failure to disclose lead cooperating witness's letters to law enforcement and FBI notes of interviews with a co-conspirator violated *Brady* as they could have impacted the witnesses' credibility in a case that pivoted on their credibility); *United States v. Sedaghaty*, 728 F.3d 885, 901–02 (9th Cir. 2013) (failure to disclose interview notes and government payments to cooperating witness were material as the defense was "severely limited" in its ability to cross-examine a critical prosecution witness without the undisclosed impeachment); *United States v. Torres*, 569 F.3d 1277, 1283–84 (10th Cir. 2009) (where the government's case "hinge[d]" on the credibility of an informant, its failure to disclose the full extent of the informant's criminal record, that he had breached a prior plea agreement, and that he had failed to identify the defendant at a debriefing violated *Brady*).

65. *See* Transcript of Record at 14–28, United States v. D.C., 2015 CF1 11309 (D.C. Sup. Ct June 12, 2017).

66. *Id*. at 41.

67. *Id*.

68. Transcript of Record at 4, United States v. D.C., 2015 CF1 11309 (D.C. Sup. Ct June 13, 2017).

protesters.[69] In February 2017, D.C. prosecutors charged a group of more than 200 people with various felonies, including felony rioting, for actions during the previous month's presidential inauguration.[70] The lead prosecutor assured the court that the video evidence that formed the backbone of the government's case was "complete" and "unredacted."[71]

That assurance turned out to be misleading at best.[72] A year later, defense attorneys discovered that the video had been edited.[73] Either law enforcement officers or the prosecution had most likely "removed a section of the video" that would have "blown[n] apart the government's theory that the protesters engaged in a highly organized plan to commit violence."[74] The trial court was deciding on possible remedies or sanctions[75] when the defense learned of nearly seventy additional undisclosed, relevant videos.[76] The court agreed to dismiss some of the charges, and soon after, the prosecution dismissed all remaining charges.[77]

Just as it had before *Turner*, the USAODC after *Turner* continued to have plenty of company in its apathetic approach to

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69. *See* Brand and Brown, *supra* note 59.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id. See also* Defense Motion for Sanctions and Dismissal at 1, *United States v. H. et. al*, No. 2017 CF2 7212 (D.C. Sup. Ct. May 22, 2018) ("The government has abused its power by hiding discovery from all defendants, purposefully choosing not to disclose *Brady* information, and calling into question the integrity of all of its . . . proffers in open court.").
75. Alan Pyke, *Prosecutor lied about key evidence in Trump inauguration protest trial, judge rules*, THINK PROGRESS (May 24, 2018), https://thinkprogress.org/prosecutors-hid-evidence-that-favors-anti-trump-protesters-judge-rules-5eec98867027/.
76. *See* Brand and Brown, *supra* note 59.
77. *See* Adler Bell, *With Last Charges Against J20 Protesters Dropped, Defendants Seek Accountability for Prosecutors*, THE INTERCEPT (July 13, 2018), https://theintercept.com/2018/07/13/j20-charges-dropped-prosecutorial-misconduct/; Keith Alexander, *Federal prosecutors abruptly dismiss all 39 remaining Inauguration Day rioting cases*, WASH. POST (July 7, 2018), https://www.washingtonpost.com/local/public-safety/federal-prosecutors-abruptly-dismiss-all-remaining-inauguration-day-rioting-cases/2018/07/06/d7055ffe-7ee8-11e8-bb6b-c1cb691f1402_story.html

Brady.[78] For example, the conduct of federal prosecutors in *United v. Nejad* stood in stark contrast to the contention asserted in *Turner* that the DOJ devotes "considerable resources" to training and supervising prosecutors to go "above and beyond *Brady*."[79] In *Nejad*, during trial, when prosecutors came across previously undisclosed information they had possessed for years, their response was not to immediately inform the defense. Instead, they debated how "best to turn [it] over to the defense without drawing attention to its late disclosure."[80] One federal prosecutor wrote in an email that she wondered if they should "wait until tomorrow and bury it in some other documents."[81] Another agreed.[82] And "after looping in more prosecutors," they deliberately obfuscated the documents disclosure.[83] They were not concerned with "justice," but rather with protecting their chance at a conviction.

When all of the conduct came to light, the court asked the prosecutors to explain in writing how it all transpired. But even then, they submitted a letter that "misrepresented the circumstances of the" disclosure.[84] The court determined that the prosecutors' "failures and misrepresentations in this case represent grave derelictions of prosecutorial responsibility" and "reflects a systematic disregard of their disclosure obligations. Prosecutors then compounded these missteps through a sustained pattern of refusing to fess up."[85]

Despite examples such as *Nejad*, most courts since *Turner* look the other way at *Brady* violations, even when the prosecution concedes it suppressed favorable information from the defense.[86] The *Turner*

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78. *See*, *e.g*., United States v. Bundy, 968 F.3d 1019, 1023 (9th Cir. 2019) (affirming dismissal with prejudice due to prosecution's repeat failures to properly disclose information in case where at oral argument prosecutor conceded "we fell short"); United States v. Walter, 870 F.3d 622, 630–31 (7th Cir. 2017) (reversing conviction where prosecution never disclosed impeachment evidence relating to its cooperating witness).
79. *See Turner* Oral Argument, *supra* note 32, at 0:53:40.
80. United States v. Nejad, 521 F. Supp. 3d 438, 442 (S.D.N.Y. 2021) (*Nejad II)*.
81. *Id*. at 447.
82. *Id*.
83. United States v. Nejad, 487 F. Supp. 3d 206, 208 (S.D.N.Y. 2020) (*Nejad I)*.
84. *Nejad II*, 521 F. Supp. 3d at 442.
85. *Id*. at 443.
86. *See, e.g.*, United States v. Cantoni, No. 19-4358-CR, 2022 WL 211211, at *2 (2d Cir. Jan. 25, 2022) (noting that "[a]s the government conceded at oral argument, it did not promptly comply with its discovery obligations," but holding that the defense

decision itself provides insight into both why prosecutors continue to fail to properly disclose information to the defense and why courts routinely are all too willing to forgive the errors.

The *Turner* Court did reiterate that a generous disclosure policy is "as it should be."[87] However, that statement has had less of an impact going forward than the Court's conclusion that no reversible error had occurred in the face of extensive undisclosed information.[88] Though the Court in *Brady* declared that "society wins . . . when criminal trials are fair,"[89] *Turner*'s holding signaled that society's victory matters less than securing and affirming convictions.

Prior to trial, *Brad*y requires prosecutors to disclose information that may be favorable to the defense.[90] But following a conviction, *Brady* restricts reversals to situations where the defense can show materiality, i.e., that there is a reasonable probability that the outcome of trial would have been different had the prosecution properly

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failed to show it was prejudiced from the late disclosures of cell site and fingerprint evidence); Baskerville v. United States, No. 19-3583, 2021 WL 3578940, at *3 (3d Cir. Aug. 13, 2021) (holding that although the prosecution "concedes" that the undisclosed information was "exculpatory and suppressed," the failure was harmless); United States v. Driscoll, 984 F.3d 103, 106–07 (D.C. Cir. 2021) (holding that exculpatory evidence that only came to light due to defense cross examination at trial did not meet the materiality standard because the defense still managed to make some use of it during trial); United States v. Henry, 842 F. App'x. 809, 813 (3d Cir. 2021) ("The government concedes that the supplemental plea agreement and the oral cooperation agreement [should have been disclosed]. But [the defendant] cannot show that he suffered prejudice from the government's suppression of the evidence."); United States v. Siri-Reynoso, 807 F. App'x. 103, 107 (2d Cir. 2020) (characterizing prosecutor's failure to learn of information possessed by a different attorney in the office as "inadvertent," despite it being a longstanding requirement, and holding that failure to disclose information was harmless); United States v. Wright, 866 F.3d 899, 908 (8th Cir. 2017) (holding that while prosecution admits that information about three of its witnesses being confidential informants was both suppressed and favorable, the information would not have altered the verdict); United States v. Smith, 706 F. App'x. 241, 244–45 (6th Cir. 2017) (agreeing with defense that evidence not disclosed until after the verdict would have been "helpful" to the defense and that the prosecution "should" have disclosed it but upholding the conviction).

87. Turner v. United States, 137 S. Ct. 1885, 1893 (2017).

88. *See id.*

89. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

90. *See id.*

disclosed information.[91] The effect of *Turner* was to minimize the prosecution's obligation to timely disclose favorable information. It then placed all the emphasis on whether a court after the fact can envision trial occurring in a manner different than the one the prosecution actually presented. Just like the Supreme Court did in *Turner*, most other courts are content to seek cover under the materiality standard in order to uphold a conviction.

Prosecutors seizing upon this have realized it is better for them to seek forgiveness for a delayed or non-disclosure than it is to risk losing a case by fully complying in a timely manner prior to trial.[92] Even prosecutors with the best of intentions can get *Brady* disclosures wrong. They are focused on obtaining a conviction but at the same time must review information through a defense perspective to understand if it should be promptly disclosed.[93] Prosecutors operating in good faith often will overestimate the strength of the government's case while minimizing that of the defense, causing them to fail to recognize information that should be disclosed.[94]

Professor Ellen Yaroshefsky explained the role of "cognitive bias" in *Brady* violations: "Some prosecutors, convinced of their theory of guilt, cannot perceive an alternative theory of how information could

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91. *See*, *e.g.*, Strickler v. Greene, 527 U.S. 263, 281–82 (1999) ("[T]here is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.") .

92. *See* Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 549 (2007); *see also United States v. Bartko*, 728 F.3d 327, 342 (4th Cir. 2013) ("The problem is that the government appears to be betting on the probability that reams of condemning evidence will shield defendants' convictions on appeal such that at the trial stage, it can permissibly withhold discoverable materials[.]").

93. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1611 (2006) ("[T]he prosecutor's application of *Brady* is biased not merely because she is a zealous advocate engaged in a 'competitive enterprise,' but because the theory she has developed from that enterprise might trigger cognitive biases, such as confirmation bias and selective information processing.").

94. *See id*. at 1590–91 ("Perhaps prosecutors sometimes fail to make decisions that rationally further justice, not because they fail to value justice, but because they are, in fact, irrational. They are irrational because they are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality.").

be used by the defense."[95] Such cognitive bias leads to unintentionally withholding of evidence due to a "largely unconscious process" where prosecutors review reports and evidence with only their theory of the case in mind.[96] A different outcome in *Turner* may have forced prosecutor offices to proactively try to combat cognitive bias; the affirmance removed any incentive to change.

Besides reasonable mistakes, which are no less harmful to the person facing conviction, there also remain many instances where prosecutors are reckless, if not deliberate, in their conduct as it relates to disclosure requirements.[97] But these too are frequently forgiven.[98]

There is an unfortunate takeaway from the continued parade of cases where judges realize prosecutors possessed and suppressed favorable information but refuse to find prejudice: prosecutors can decide whether to disclose information based not on if it would help the defense but on whether it would result in a reversal if later discovered.

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95. Ellen Yaroshefsky, *Why do Brady Violations Happen?: Cognitive Bias and Beyond*, THE CHAMPION, May 2013, at 12, 13.

96. *See id.*

97. *See, e.g.*, United States v. Nunez, 791 F. App'x. 347, 351 (3d Cir. 2019) (agreeing with a district court's decision that the prosecution's *Brady* violation had been "willful"). *See also, e.g.*, Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NPR (March 25, 2012), https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case; Alan Pyke, *Prosecutors Hid Mountains of Evidence in Trial of Trump Inauguration Protesters*, THINK PROGRESS (May 31, 2018), https://archive.thinkprogress.org/j20-evidence-hidden-from-protesters-cfcc9fbc5c95/; Tom Church, *SDNY Judge Refers Prosecutors of Internal Investigation for Brady Violations*, THE FEDERAL DOCKET (March 4, 2021), https://thefederaldocket.com/sdny-judge-refers-prosecutors-for-internal-investigation-for-brady-violations/; Brooke Williams & Sam Musgrave, *The Botched Cliven Bundy Case was Just the Latest Example of Prosecutorial Misconduct in Las Vegas*, THE INTERCEPT (April 26, 2018) (judge dismissed indictment over "outrageous" misconduct by prosecutors), https://theintercept.com/2018/04/26/cliven-bundy-case-nevada-prosecutorial-misconduct/.

98. *See e.g.*, United States v. Swenson, 894 F.3d 677, 685 (5th Cir. 2018) (despite agreeing that it was "beyond dispute that the government made some missteps" in disclosing information to the defense, reversing decision of the district court to dismiss the case and "direct[ing]" the Chief Judge of the district court to assign the case upon remand to a new judge); United States v. Mason, 951 F.3d 567, 571–72 (D.C. Cir. 2020) (holding that "even a grossly belated disclosure does not violate *Brady*" if the defense does not suffer prejudice from the delay).

Until trial and appellate judges change their perspective on a prosecutor's constitutional and ethical obligations to comply with *Brady*, it is unlikely that any internal prosecutor policy—whether generous or not—will make a difference.

PART III. HOW COURTS CAN RESTORE THE ORIGINAL MEANING OF *BRADY*

"While the *Brady* case itself held promise for the promotion of justice and fairness in criminal trials, its progeny and the mistaken interpretations of that case law, decimated any such hope."[99] At one point, the Supreme Court had said that the failure to disclose all facts undermines the "very integrity of the judicial system."[100] But protecting integrity has fallen by the wayside. In 2020, the Court decided the prosecution's uncontested deliberate withholding of favorable information was no reason to even press pause before the federal government executed Brandon Bernard.[101] A few years before that, the Court reversed an award of damages to a man who was wrongfully convicted and sentenced to death due to a *Brady* violation, which was just the latest under the leadership of the same district attorney.[102] In

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99. *See* 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, 467 (2014); *see* Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 213-14 ("[The *Brady* doctrine] might better be described as a novel doctrine of harmless conviction, for the Supreme Court has now made it perfectly clear that when a prosecutor operating within our competitive adversarial system fails both deliberately and unethically to disclose exculpatory material to the criminal defendant at the trial court level, it is not in itself even deemed to be error. It becomes error only when a reviewing court concludes that the nondisclosure of *its own accord* has produced a wrongful conviction *at trial*.") (emphasis in original).

100. United States v. Nixon, 418 U.S. 683, 709 (1974).

101. *See* Bernard v. United States, 141 S. Ct. 504, 504 (2020) (refusing to grant a stay of execution to permit Bernard to have a hearing on his claim that the prosecutor's withholding of information that contradicted their theory for sentencing him to death would have resulted in a different sentence)*; see also* Jess Bravin, *Brandon Bernard Executed Despite Protests*, WALL ST. J. (Dec. 11, 2020), https://www.wsj.com/articles/u-s-carries-out-second-of-six-executions-set-during-biden-transition-11607663425.

102. Connick v. Thompson, 563 U.S. 51, 71–72 (2011).

that case, the Supreme Court rested its conclusion, in part, on a rationalization that constitutional violations committed by prosecutors do not pose the same "danger" as those committed by police.[103]

Such reasoning reduces *Brady* violations to mere technicalities and ignores that prosecutors frequently fail to properly follow *Brady*'s requirements, that the vast majority of violations are likely never uncovered,[104] and that every time favorable information is kept from the defense it prevents reasons to doubt that the prosecution has proved their case from reaching the jury. According to the National Registry of Exonerations, over forty-six percent of all wrongful convictions since 1989 have involved prosecutors failing to disclose exculpatory information.[105]

These wrongful convictions have cost people a combined nearly 20,000 years in prison.[106] Of those exonerations, ninety-four people had been sentenced to death and another 153 sentenced to life without parole.[107] Just as with every other aspect of the criminal legal system, stark racial disparities exist with who is wrongfully convicted when the prosecution withholds *Brady*: since 1989, Black people account for

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103. *Id*. at 67.

104. *See generally* Brief of *Amicus Curiae* the National Association of Criminal Defense Lawyers in Support of Respondent at 26, *Connick v. Thompson*, 563 U.S. 51 (2011) (No. 09-571), 2010 WL 3198842, at *26 ("The rare uncovering of a prosecutor's withholding of Brady material almost always is a result of [a person's] extraordinary perseverance or pure luck."); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, N. Cal. Innocence Project 36 (2010) ("*Brady* violations are, by their nature, difficult to uncover; they become apparent only when the withheld material becomes known in other ways."), http://digitalcommons.law.scu.edu/ncippubs/2; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny,* 86 IOWA L. REV. 393, 432 (2001) ("*Brady* violations, like most other forms of illegal prosecution behavior, are difficult to discover and remedy."); *Connick*, 563 U.S. at 81 (Ginsburg, J. dissenting) ("*Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps.").

105. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 15.

106. *Id*. The nearly 1400 people who have been wrongfully convicted in cases infected with a *Brady* violation since 1989 spent an average of 14 years in prison before being exonerated. *Id*.

107. *Id*.

fifty-five percent of the exonerations where prosecutors withheld exculpatory information.[108]

Suffice to say, *Brady* violations cause real harm. And the role courts play in encouraging violations cannot be overlooked. Every time courts refuse to impose meaningful remedies or sanctions for late disclosures or acknowledge that information was both suppressed and favorable but still decide to uphold a conviction, they contribute to the continued undermining of *Brady*. In her dissent in *Bernard*, Justice Sotomayor wrote that the Court's decision "rewards" prosecutors who successfully conceal their *Brady* violations until after conviction.[109]

To reverse this trend, judges must use their authority to put teeth back into the *Brady* disclosure requirement. Because prosecutors wield "enormous . . . power," as Judge Nathan wrote in *Nejad*, they "must exercise it in a way that is fully consistent with their constitutional and ethical obligations. And it is the obligation of the courts to ensure that they do and hold them accountable if they do not."[110]

There are several changes that can occur to help make this happen.

First, all judges must be skeptical of prosecutorial claims of a commitment to *Brady*. The decision in *Brady* held that the suppression by the prosecution of evidence favorable to an accused that "would tend" to impact either guilt or punishment "does not comport with standards of justice."[111] An application of *Brady* principles should have made a decision to reverse in *Turner* an easy one for the Supreme Court—the suppression of a significant amount of information that if disclosed would have changed the "whole tenor" of the trial.[112] But a majority of the Court could not see past the prosecution's theory of its case and the conviction.

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108. *Id*.
109. *Bernard*, 141 S. Ct. at 506–07 (Sotomayor, J., dissenting).
110. *Nejad I*, 487 F. Supp. 3d at 208.
111. *Brady*, 373 U.S. at 88.
112. *See Turner*, 137 S. Ct. at 1897 (Kagan, J. dissenting) (With the undisclosed evidence, the whole tenor of the trial would have changed. Rather than relying on a 'not me, maybe them' defense, all the defendants would have relentlessly impeached the Government's (thoroughly impeachable) witnesses and offered the jurors a way to view the crime in a different light. In my view, that could well have flipped one or more jurors—which is all *Brady* requires.").

It is unknowable to what extent the Deputy Solicitor General's insistence that the Department of Justice employs a generous discovery policy had on the outcome. But the message's implication was clear: do not worry about this type of thing happening again because we have fixed the problem. Courts going forward must recognize such claims are arguments by an advocate trying to win and not statements of fact.[113]

Part of that skepticism means when deciding *Brady* issues, judges and justices should stop writing that the court "acknowledge[s] the serious nature of the state's failure to disclose" only to impose no sanctions or remedy.[114] Stern warnings to prosecutors absent follow through have done little to encourage better prosecutorial compliance. Absent sanctions and remedies from appellate and trial courts, prosecutors—explicitly and implicitly—will continue to disclose information guided not by ensuring a fair trial but by what will protect their convictions.

Other than reversal or dismissal, possible sanctions courts should be ready to impose for the prosecution's failure to timely disclose favorable information should include, but are in no way limited to:

- striking the government's related evidence or precluding a witness from testifying relevant to the delayed disclosure;
- permitting the defense to admit otherwise inadmissible evidence, such as hearsay, to combat the harm from the late disclosure;

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113. Another critical need is the creation of the Office of Defender General tasked with the responsibility to advocate before the Supreme Court on behalf of those charged and convicted of criminal offenses as a class. *See* Daniel Epps & William Ortman, *The Defender General*, 168 U. PA. L. REV. 1469, 1472 (2020) ("Creating a Defender General would be a relatively straightforward and low cost reform that would generate significant benefits for the entire criminal justice system."); Adam Liptak, *A Proposal to Offset Prosecutors' Power: The 'Defender General'*," N.Y. TIMES (Jan. 27, 2020) (quoting Justice Kagan admitting that "[c]ase in and case out, the category of litigant who is not getting great representation at the Supreme Court are criminal defendants"), https://www.nytimes.com/2020/01/27/us/a-proposal-to-offset-prosecutors-power-the-defender-general.html.

114. *See Chinn v. Warden, Chllicothe Corr. Inst.*, No. 20-3982, 24 F.4th 1096, 1105 (6th Cir. 2022) (recognizing "the serious nature of the state's failure to disclose Washington's juvenile record" but declining to reverse).

- allowing the defense a chance to present a second opening statement to address the newly disclosed information's impact or re-open its case if necessary;
- allowing the defense to re-cross a witness;
- allowing the defense to present evidence to the jury that informs them of the prosecution's untimely disclosure despite its constitutional obligation otherwise;[115]
- allowing the defense to argue in closing that the jury can interpret the prosecution's discovery failure as consciousness of the weakness of their case;[116]
- instructing the jury about the prosecution's constitutional obligation to properly disclose information to the defense and that the jury may consider a failure to properly disclose information in deciding if the prosecution met its burden in the case.[117]

Moreover, trial judges must take a proactive approach in enforcing *Brady*. They can no longer be satisfied to wait for a defense motion to compel or an argument over a late disclosure. Given the challenges with proving materiality after a conviction and the difficulty uncovering undisclosed evidence, it is incumbent on trial judges to become the gatekeepers of enforcing the meaning of *Brady*.

Federal district court judge Emmet Sullivan, who presided over the federal government's prosecution of then Senator Ted Stevens that

115. *See* Shelton v. United States, 983 A.2d 363, 371–72 (D.C. 2009) (reversing conviction where defense was precluded from asking questions to a witness about a delayed disclosure to then be able to argue to the jury that the delay could be used against the prosecution).
116. See United States v. Boyd, 55 F.3d 239, 241–42 (7th Cir. 1995) (agreeing that a prosecution's failure to meet its constitutional obligations may support "an inference that the prosecutors resorted to improper tactics because they were justifiably fearful that without such tactics the defendant might be acquitted" and this failure is "some indication that [the prosecution case] was indeed not airtight").
117. *See generally* Criminal Jury Instructions for the District of Columbia, No. 2.322 Late Disclosure or Non-Disclosure of Evidence (Barbara Bergman ed., 5th ed. 2020) (instructing the jury it may use the prosecution's failure to timely disclose information to the defense in deciding if the prosecution met its burden of proof).

was marred by *Brady* violations,[118] has since taken such a step.[119] He established a standing *Brady* order in each case that reminds prosecutors of their obligations. He has explained the importance of trial judges issuing these orders in every case: "[i]t's one thing for prosecutors to know they are supposed to follow the law. But it's far more likely actually to happen when a judge's order tells them exactly what is expected, and what the consequences are for noncompliance."[120]

Second, judges must stop treating repeat *Brady* offenses as having no connection to one another. Instead, courts should view such circumstances as evidence of a pattern that the office has failed in ensuring line prosecutors can reasonably comply with *Brady*. When prosecutors from the same office keep trying to excuse their failure to timely disclose favorable information by rationalizing that it was inadvertent, a mistake, a misstep, courts should be concerned with how, all these years after *Brady*, prosecutors can continue to be so wrong on the issue in court. Repeat *Brady* violations from the same office are "anything but harmless" to "our justice system at large."[121] They are not harmless to the people charged either.

Courts in such situations should question the prosecutor on the office's *Brady* policies, how they are implemented, and how they are

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118. *See* In re Special Proc., 825 F. Supp. 2d 203, 204–05 (D.D.C. 2011) (the prosecution was "permeated by the systemic concealment of significant exculpatory evidence which would have independently corroborated [Senator Steven's] defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness") (*quoting* REPORT TO THE HONORABLE EMMET G. SULLIVAN OF INVESTIGATION CONDUCTED PURSUANT TO THE COURT'S APRIL 7, 2009 ORDER, at 1).

119. *See* Standing Brady Order (D.D.C. J. Sullivan Nov. 2017), available at https://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder_November2017.pdf. The requirements Judge Sullivan places in the order should not present a challenge for prosecutors to grasp if they are truly trained in their disclosure obligations: prosecutors have a continuing obligation to timely disclose favorable information to the defense; the obligation supersedes any other disclosure requirement in terms of scope and timing; any doubt must be resolved in favor of full disclosure; if there is information the government is not sure can be or should be disclosed, it should submit it for an in camera review; and the format of disclosures must be sufficiently complete to enable the defense to understand its potential usefulness. *Id*.

120. Emmet G. Sullivan, *How New York Courts Are Keeping Prosecutors in Line*, WALL ST. J. (Nov. 17, 2017), https://www.wsj.com/articles/how-new-york-courts-are-keeping-prosecutors-in-line-1510953911.

121. United States v. Bartko,728 F.3d 327, 342 (4th Cir. 2013).

enforced. Too often, courts focus only on whether the defense can recover from the late disclosure. That question of course matters. But judges, particularly when facing a late disclosure from a prosecutor who is a repeat *Brady* offender, should also be concerned with why the information was not timely disclosed. If the answers reveal a prosecutorial indifference to *Brady*, courts should be prepared to rule against the government not only for the specific issue involved but also because of the failure to have "systems in place" for prosecutors to understand and comply with their responsibilities.[122] A lack of proper systems is evidence of the government's reckless disregard for its "constitutional obligations."[123]

And third, for a realistic chance of anything changing with how *Brady* is applied and enforced, we need judges with more diverse experiences and backgrounds. In particular, courts everywhere need more judges who were public defenders. With so few former public defenders sitting as judges and justices, many courts struggle to see any case through the defense perspective. One study found that for every federal judge with any public defender experience, over four had prosecution experience.[124] And a different study determined that less than one percent of federal appellate judges had spent "the majority of their careers" as public defenders.[125] Of the five justices in the majority

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122. *See* Vaughn v. United States, 93 A.3d 1237, 1258 (D.C. 2014) (requiring the government to have "systems in place to *ensure* that it was alerted to [exculpatory] information.").

123. *See, e.g.*, United States v. Chapman, 524 F.3d 1073, 1085 (9th Cir. 2008) (affirming dismissal of indictment with prejudice and holding that willful misconduct includes "reckless disregard for the prosecution's constitutional obligations"); Virgin Islands v. Fahie, 419 F.3d 249, 245–55 (3d Cir. 2005) (concluding that in certain situations of government misconduct, dismissal may be appropriate "because those cases call for penalties which are not only corrective but are also highly deterrent"); United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993) ("Quite aside from the major and minor trespasses and evasions catalogued above, we must ask the broader question: How did all this come about?").

124. *See* Sarah Fair George, *There are Too Many Prosecutors on the Bench. Take it From Me, a Prosecutor*, THE APPEAL (Jan. 8, 2021), https://theappeal.org/there-are-too-many-prosecutors-on-the-bench-take-it-from-me-a-prosecutor/.

125. *See* Fabiola Cineas, *Why Ketanji Brown Jackson's Time as a Public Defender Matters*, VOX (Mar. 21, 2022), https://vox.com/22979925/ketanji-brown-jackson-public-defender.

in *Turner*, three were former prosecutors.[126] None of the justices involved had any public defender experience. Courts that are stuffed with former prosecutors and government attorneys as judges repeatedly prove incapable of theorizing how effective defense counsel could have made use of information if the prosecution had properly provided it.

In contrast, the lawyers who best understand the importance" of a person's rights pursuant to *Brady* and other "basic protections, of course, are public defenders."[127] Premal Dharia, executive director of Harvard Law School's Institute to End Mass Incarceration and a former public defender, wrote that "[p]ublic defenders are the only actors in the criminal legal system who stand next to, and work on behalf of, those targeted by it; they see that system with a clarity that others working within it simply do not."[128]

The confirmation of Judge Ketanji Brown Jackson, who was an assistant federal public defender in Washington, D.C., to replace Justice Breyer will provide the Supreme Court with a Justice who can envision from the standpoint of the defense the impact of a delayed or non-disclosure. When Justice Jackson takes the bench later this year she will be the first justice with significant experience representing indigent people charged and convicted of crimes since Thurgood Marshall retired in 1991.[129] Professor Alexis Hoag, herself a former public defender, highlighted that Justice Jackson will bring to the Court a justice with the "ability to hold space for people accused of [criminal] conduct, to recognize their humanity, and to defend their [constitutional] rights."[130]

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126. Justices Alito, Sotomayor, and Thomas all have prosecutor experience. Chief Justice Roberts and Justice Breyer had experience representing the government. Justice Gorsuch, who did not participate in the case, also is a former prosecutor. *See* SUPREME COURT OF THE UNITED STATES: ABOUT THE COURT https://www.supremecourt.gov/about/biographies.aspx (last visited April 11, 2022).

127. Kyle Barry, *Democratic Presidential Candidates Should Promise to Appoint This Kind of Judge to the Federal Courts*, SLATE (Mar. 20, 2019), https://slate.com/news-and-politics/2019/03/democratic-presidential-candidates-judges-supreme-court.html.

128. Premal Dharia, *I was a Public Defender for Over a Decade. KBJ's Empathy is What Our Highest Court Needs*, CNN (Apr. 8, 2022), cnn.com/2022/04/08/opinions/ketanji-brown-jackson-confirmation-public-defender-dharia/index.html.

129. *See* Barry, *supra* note at 127.

130. Alexis Hoag (@alexis_hoag), Twitter (Feb. 25, 2022, 3:26 PM), https://twitter.com/alexis_hoag/status/1497307124455649290.

As Justice Jackson said at her earlier confirmation hearing for the D.C. Circuit: "I think actually having defender experience can help, not only the judge . . . in considering the facts and circumstances in the case, but also help the system overall, in terms of their interactions with defendants and the way in which they proceed in the courtroom."[131] And during her Supreme Court hearings, she said that she had "dedicated [her] career to ensuring that the words engraved on the front of the Supreme Court building, 'Equal Justice Under Law,' are a reality and not just an ideal."[132]

But as important and historic as it is that Judge Jackson became Justice Jackson for so many reasons,[133] we need better judges in every courtroom, trial and appellate, state and federal. The overwhelming majority of *Brady* issues are raised and decided in courts far removed from the Supreme Court. The same way prosecutors view information in a case differently than how a defense attorney would, judges who were former prosecutors or never practiced criminal law view cases differently than someone who was a public defender. A person with meaningful experience as a public defender will grasp the importance of a piece of information and the materiality of it differently than a judge who does not.[134]

It should be no surprise that an opinion such as *Vaughn v. United States*—that reversed for a *Brady* violation by the USAODC, suggested dismissal with prejudice may be appropriate, and warned prosecutors,

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131. C-Span, *Confirmation Hearing for Judicial Nominees* at 1:02:11, C-Span Video Library (April 28, 2021), https://www.c-span.org/video/?511313-1/confirmation-hearing-judicial-nominees.

132. *See* C-Span, *Jackson Confirmation Hearings, Day 1* at 4:02:54, C-Span Video Library (March 21, 2022), https://www.c-span.org/video/?518341-1/jackson-confirmation-hearing-day-1

133. *See*, *e.g.*, Peniel E. Joseph, *KBJ's Confirmation is One of the Beautiful Moments MLK Described*, CNN (April 7, 2022), https://edition.cnn.com/2022/04/07/opinions/ketanji-brown-jackson-confirmation-mlk-vietnam-riverside-speech-joseph/index.html.

134. *See* Clark Nelly & Devi Rao, *We Need More Public Defenders and Civil Rights Attorneys as Judges*, HOUSTON CHRONICLE (July 22, 2021) ("[T]o ensure better reasoning, more thoughtful deliberations, and better outcomes, the federal judiciary should mirror the professional diversity of the bar itself. It should have judges who have formerly practiced criminal law as public defenders, not just prosecutors, and those with experience as civil rights attorneys, not just former courtroom advocates for government."), https://www.cato.org/commentary/we-need-more-public-defenders-civil-rights-attorneys-judges.

"betray *Brady* … and you will lose your ill-gotten conviction"[135]—was authored by a former public defender. To restore *Brady* to its original purpose, there needs to be more public defenders presiding in courts across the United States.

135. Vaughn v. United States, 93 A.3d 1237, 1266 (D.C. 2014) (internal citation and quotation omitted).