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### A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence

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## A REASON TO DOUBT: THE SUPPRESSION OF EVIDENCE AND THE INFERENCE OF INNOCENCE

BY CYNTHIA E. JONES\*

*The government's duty to disclose favorable evidence to the defense under Brady v. Maryland has become one of the most unenforced constitutional mandates in criminal law. The intentional or bad faith withholding of Brady evidence is by far the most egregious type of Brady violation and has led to wrongful convictions, near executions, and other miscarriages of justice. This Article suggests that two ramifications should flow from intentional Brady violations. First, courts should have the power to inform the jury of the government's Brady misconduct by imposing a specially crafted punitive jury instruction. Unlike the ineffective sanctioning scheme currently used to redress Brady violations, the proposed "Brady Instruction" could serve as a powerful deterrent against this virulent form of prosecutorial misconduct. Second, under well-established evidentiary principles, a litigant's intentional suppression of relevant evidence gives rise to an inference that the litigant's case is weak and that the litigant knew his case would not prevail if the evidence was presented at trial. The government's intentional Brady misconduct falls within the scope of the "consciousness of a weak case" inference. Given that the government always has the burden of proof in a criminal case,*

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*evidence that the government's case is weak is relevant to whether the government can prove guilt beyond a reasonable doubt. Brady misconduct evidence also meets all other requirements for admissibility under the rules of evidence. As such, the blanket exclusion of this evidence could infringe upon the defendant's constitutional right to present a defense.*

## I. INTRODUCTION

In a nationally televised press conference, the Department of Justice announced that a federal grand jury had returned a seven-count indictment against Alaska Senator Theodore "Ted" Stevens.<sup>1</sup> The eighty-four-year-old Senator was charged with violating federal ethics laws by failing to disclose thousands of dollars in gifts and services received from constituents.<sup>2</sup> After publicly announcing the charges, the Justice Department official thanked the lawyers in the Public Integrity Section, the division of the Department of Justice charged with investigating and prosecuting corruption by public officials.<sup>3</sup> Ironically, the Public Integrity Section lawyers who investigated and prosecuted Stevens for nondisclosure of information would later face investigation and possible prosecution for obstruction of justice due to their own acts of nondisclosure of information.<sup>4</sup> In fact, following the prosecutors' repeated acts of concealing, altering, and falsifying critical evidence in the Stevens case, the trial judge rhetorically asked the prosecutors, "*How does the court have confidence that the Public Integrity Section has public integrity?*"<sup>5</sup>

Once the government initiated the criminal case against Ted Stevens, the landmark Supreme Court decision in *Brady v. Maryland*<sup>6</sup> mandated that the trial prosecutors provide the defense with favorable information collected by the government during the course of its investigation, including information that either negated guilt or undermined the government's case. The same constitutional principles of due process that compel the disclosure

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<sup>1</sup> See *DOJ Press Conference on Stevens' Indictment* (Fox News television broadcast July 29, 2008); see also U.S. Dep't of Justice, Transcript of Press Conference with Acting Assistant Attorney General Matthew Friedrich on Indictment of U.S. Senator 3 (July 29, 2008), available at <http://www.usdoj.gov/opa/pr/2008/July/pin-stevens-pressconference-transcript.pdf>.

<sup>2</sup> Indictment, *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 1), 2008 WL 284791.

<sup>3</sup> *DOJ Press Conference on Stevens' Indictment*, *supra* note 1.

<sup>4</sup> Transcript of Motion Hearing at 4-5, 45-46, *United States v. Stevens*, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 374).

<sup>5</sup> Neil A. Lewis, *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES, Apr. 2, 2009, at A1, available at <http://www.nytimes.com/2009/04/02/us/politics/02stevens.html>.

<sup>6</sup> 373 U.S. 83 (1963).

of *Brady* evidence likewise prohibit the government from securing a conviction with false testimony or concealing the fact that such tainted evidence has been introduced at trial.<sup>7</sup>

The crux of the criminal charges against Senator Stevens was that VECO, an Alaska-based company, performed extensive renovations on a home Stevens owned in Alaska.<sup>8</sup> The government maintained that the free labor, building supplies, and related gifts bestowed upon Stevens totaled more than \$100,000 over a seven-year period.<sup>9</sup> The indictment alleged that Stevens violated the criminal penalty provisions of the federal ethics law by neither paying for these services nor reporting them as gifts when he filed his annual financial disclosure statement.<sup>10</sup> Though it did not charge Stevens with accepting bribes, the indictment described Stevens' relationship with VECO as a "scheme" to accept the free services while VECO was soliciting the Senator's help with obtaining federal grants and seeking other federal government assistance with its foreign and domestic business matters.<sup>11</sup> In defense, Stevens maintained that he paid for the renovation services and was unaware that he was not billed for the full cost. Stevens argued that he never *knowingly* submitted false financial disclosure statements.<sup>12</sup>

As the Stevens litigation progressed, the government violated nearly every facet of the *Brady* doctrine. In fact, their *Brady* violations grew in number and egregiousness throughout the trial.<sup>13</sup> Specifically, the trial judge found that the government "used business records that the

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<sup>7</sup> *Napue v. Illinois*, 360 U.S. 264 (1959).

<sup>8</sup> Indictment, *supra* note 2.

<sup>9</sup> *Id.*

<sup>10</sup> Specifically, Stevens was charged with violating 18 U.S.C. § 1001(a)(2) (2006), which penalizes any person "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, [who] knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation." The statute was enacted as part of the Ethics in Government Act of 1978 and requires every elected United States Senator to file a financial disclosure form every year they are in office. The purpose of the filing requirement is to monitor and deter conflicts of interest. Senators are required to disclose their income, assets, gifts, financial interests, and liabilities from the previous year, including gifts over \$250 or \$300, and liabilities in excess of \$10,000. Indictment, *supra* note 2.

<sup>11</sup> Indictment, *supra* note 2.

<sup>12</sup> Moreover, Stevens maintained that his wife directly oversaw the renovation project and had taken out a second mortgage to pay over \$160,000 to VECO for the renovations, an amount they believed was the full cost of the services provided. See Neil A. Lewis, *Closing Arguments in Stevens Trial*, N.Y. TIMES, Oct. 21, 2008, at A19, available at <http://www.nytimes.com/2008/10/22/washington/22stevens.html>; Stevens Says, 'I am innocent' After Corruption Convictions, CNNPOLITICS.COM, Oct. 27, 2008, <http://www.cnn.com/2008/POLITICS/10/27/stevens.jurors/index.html>.

<sup>13</sup> Transcript of Motion Hearing, *supra* note 4, at 4-5.

Government undeniably knew were false,” suppressed “critical grand jury transcript[s] containing exculpatory information,” “affirmatively redacted” exculpatory content from documents, and provided the defense with a series of intentionally inaccurate document summaries.<sup>14</sup> Moreover, when a prosecution witness flown in from Alaska made unanticipated exculpatory statements during a pretrial interview, the prosecutors secretly shipped him back to Alaska before the defense could subpoena him.<sup>15</sup>

The *Brady* violations only intensified after Ted Stevens was found guilty on all counts. Post-trial, the defense learned of a whistleblower complaint filed by an FBI agent assigned to the Stevens case. When the defense petitioned the court to order the government to disclose the facts of the complaint, the prosecutors intentionally misrepresented to the court that the FBI complaint was unrelated to the Stevens verdict. When the trial judge later learned that the FBI complaint involved allegations that the prosecutors had not turned over all evidence to Stevens’s defense team, the court ordered the prosecutors to disclose all evidence related to the FBI complaint to the defense. When prosecutors repeatedly failed to comply with the court order, the trial judge held three prosecutors in contempt.<sup>16</sup>

Thereafter, a new team of prosecutors was assigned to the Stevens case. The new prosecutors quickly uncovered and disclosed what the trial judge called “the most shocking and serious *Brady* violations of all.”<sup>17</sup> Bill Allen, the Chief Executive Officer of VECO, was the star witness for the prosecution. Most of the *Brady* violations during the Stevens case involved information that either undermined Allen’s credibility or information from Allen and others that affirmatively exculpated Senator Stevens. During the trial, Bill Allen admitted that he received a letter from Stevens requesting a bill for the renovation services. Allen testified, however, that he was subsequently contacted by a Stevens emissary, Bill Persons, who indicated that the Senator was only sending the letter to create a false record to protect himself.<sup>18</sup> This explosive revelation significantly bolstered the government’s allegation that Stevens schemed to cover up his financial windfall. The government never informed the defense that, during a pretrial interview with the prosecutors, Allen stated that he did not recall having a

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<sup>14</sup> *Id.*

<sup>15</sup> Senator Stevens’s Motion to Dismiss Indictment or For a Mistrial at 1-9, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 08-231).

<sup>16</sup> See Minute Order, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (on file with author).

<sup>17</sup> Transcript of Motion Hearing, *supra* note 4, at 6.

<sup>18</sup> Actually, the testimony was that Allen should not worry about getting the letter requesting the bill because “Ted is just covering his ass.” Transcript of Motion Hearing, *supra* note 4, at 21.

conversation with Bill Persons regarding Ted Stevens's bill.<sup>19</sup> Allen's inconsistent statement was memorialized in handwritten notes prepared by the trial prosecutors.<sup>20</sup> Despite knowing that Allen's pretrial statement was either powerful impeachment evidence or that Allen's bombshell trial testimony was perjury, the prosecutors withheld their handwritten notes from the defense.

In the end, the Stevens case collapsed under the weight of the *Brady* misconduct. Newly appointed Attorney General Eric Holder took the extraordinary and virtually unprecedented step of requesting a postconviction dismissal of all charges with prejudice.<sup>21</sup> The Stevens prosecution is significant, however, for three reasons. First, unlike most criminal cases, when the *Brady* violations were discovered in *Stevens*, the prosecutor's office took affirmative steps to repair the damage to the defendant and initiated its own internal investigation of the trial prosecutors. In the overwhelming majority of cases, prosecutors face few, if any, adverse consequences for *Brady* violations either within their offices or from an outside entity with the power to address their misconduct.

The Stevens prosecution is also notable because of the actions of Judge Emmet Sullivan who presided over the trial. While applauding the Justice Department's initiative in conducting an internal investigation of the *Brady* misconduct, the judge also noted that "the events and allegations in this case are too serious and too numerous to be left to an internal investigation that has no outside accountability."<sup>22</sup> For this reason, Judge Sullivan initiated criminal contempt proceedings against six of the Stevens prosecutors "based on failures of those prosecutors to comply with the Court's numerous orders and potential obstruction of justice."<sup>23</sup>

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<sup>19</sup> *Id.* at 21-22.

<sup>20</sup> *Id.* at 24-25.

<sup>21</sup> Specifically, the Attorney General stated:

I have concluded that certain information should have been provided to the defense for use at trial. In light of this conclusion, and in consideration of the totality of the circumstances of this particular case, I have determined that it is in the interests of justice to dismiss the indictment and not proceed with a new trial.

Press Release, U.S. Dep't of Just., Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens (Apr. 1, 2009), *available at* <http://www.usdoj.gov/opa/pr/2009/April/09-ag-288.html>.

<sup>22</sup> Transcript of Motion Hearing, *supra* note 4, at 46. Judge Sullivan also remarked: "In nearly 25 years on the bench, I have never seen anything approaching the mishandling and misconduct I have seen in this case." James Oliphant, *Prosecutors Now Target of Inquiry*, L.A. TIMES, Apr. 8, 2009, at 1, *available at* <http://articles.latimes.com/2009/apr/08/nation/na-stevens8>.

<sup>23</sup> Transcript of Motion Hearing, *supra* note 4, at 46. The court acted pursuant to Federal Rule of Criminal Procedure 42, which also authorized the court to appoint an independent attorney to prosecute the case against the prosecutors. This rule of procedure states, in

Commonly, when *Brady* violations are discovered—even when the violations are intentional and blatant—trial judges focus on curing any harm suffered by the defendant but fail to take punitive measures against the offending prosecutor to deter future *Brady* violations.

Most significantly, the Stevens case is a sad testament to the relative ease with which overzealous prosecutors can manipulate evidence and finagle a guilty verdict in our American justice system. Because the Stevens case was one of the most politically explosive cases of the decade,<sup>24</sup> there was intense media coverage. Members of the press packed the courtroom, and an even larger group of photographers and camera crews were positioned outside the courthouse to provide daily reports on the trial. The intense media coverage ensured that the trial would be more public than the typical criminal case. Also, the Stevens case was prosecuted by a team of veteran prosecutors from the premiere prosecution authority in the country and defended by a top-notch team of experienced and respected private defense attorneys.<sup>25</sup> If multiple intentional *Brady* violations could occur under these conditions, it is not difficult to understand how *Brady* violations occur in run-of-the-mill criminal cases. As Judge Sullivan stated upon dismissing the charges against Stevens,

[t]he fair administration of justice . . . should not depend on who represents the [d]efendant, whether an FBI agent blows a whistle, a new administration, a new attorney general[,] or a new trial team. The fair administration of justice depends on

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relevant part: “Any person who commits criminal contempt may be punished for that contempt after prosecution on notice. . . . The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney.” FED. R. CRIM. P. 42(a)(2).

<sup>24</sup> Prior to being criminally charged, Stevens had served six terms in the U.S. Senate, winning re-election five times. Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=s000888>. When the charges were filed in July 2008, Stevens was in the middle of re-election to his seventh term in office. It was widely believed that he would almost certainly be re-elected. Lewis, *supra* note 5. Even though the guilty verdict was announced less than two weeks before the election, he was only narrowly defeated by the democratic challenger, Mark Begich. William Yardley, *Senator Stevens Hanging by a Thread in Alaska as the Ballot Counting Continues*, N.Y. TIMES, Nov. 6, 2008, at P17, available at <http://www.nytimes.com/2008/11/06/us/politics/06alaska.html>. As was widely speculated prior to the election, the loss of the “reliably Republican” Stevens seat had a far greater impact on the national political landscape because the Democratic Party was poised to (and did) win a powerful sixty-seat majority in the Senate, a feat that would not have been possible if Stevens had won re-election. *Alaska Sen. Ted Stevens Loses Re-Election Bid to Mark Begich*, ABCNEWS.COM, Nov. 18, 2008, <http://blogs.abcnews.com/politicalradar/2008/11/alaska-sen-ted.html>.

<sup>25</sup> Kim Eisler, *Sen. Ted Stevens Hires Super-Lawyer Brendan Sullivan*, WASHINGTONIAN.COM, July 1, 2007, <http://www.washingtonian.com/articles/capitalcomment/4457.html>.

the Government meeting its obligations to pursue convictions fairly and in accordance with the Constitution.<sup>26</sup>

Despite the nationwide epidemic of *Brady* violations and the magnitude of injustice that results from such misconduct, the criminal justice system has not developed effective reforms to provide a remedy for defendants or appropriately sanction prosecutors for concealing evidence favorable to the defense. Even though the disclosure duty is violated regardless of whether the nondisclosure is negligent or intentional, the most egregious *Brady* violations occur when prosecutors purposely withhold information that they know is clearly and unquestionably favorable to the defense. Shockingly, this level of willful misconduct—exemplified by the blatant arrogance of the Stevens prosecutors—is generally not met with harsh sanctions.

This Article presents two alternative proposals to remedy and deter intentional *Brady* violations. First, pursuant to the broad discretionary authority granted to courts to sanction *Brady* violations and other discovery misconduct, trial judges should redress intentional *Brady* violations with a strongly worded jury instruction. The proposed “*Brady* instruction” would inform the jury that the government intentionally withheld evidence favorable to the defense and would permit the jury to consider the impact of the *Brady* misconduct as part of its deliberations. While legal scholars have proposed the use of jury instructions to redress *Brady* violations, the instruction proposed here is designed to be a punitive sanction that would deter *Brady* violations by making the cost of *Brady* noncompliance too high for errant prosecutors.

Alternatively, even if the trial judge does not elect to impose a *Brady* instruction sanction, the defense is entitled to adduce facts at trial to show that the government intentionally suppressed vital evidence favorable to the defense. Under well-established evidentiary principles, the fact that a litigant has purposely withheld or destroyed key evidence gives rise to the inference that the litigant knows his case is weak and knows his cause will not prevail if the adverse evidence is presented at trial. This “consciousness of a weak case” inference falls under the broad umbrella of relevant circumstantial evidence. Applied in the context of intentional *Brady* violations, the defendant is entitled to show that the prosecutor—the person in the best possible position to assess the merits of the government’s case—was conscious of the weakness of the government’s case and purposely withheld evidence that bolstered the defense or undermined the

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<sup>26</sup> Transcript of Motion Hearing, *supra* note 4, at 6-7. Stevens’s lead defense lawyer, Brendan Sullivan, likewise lamented to the trial judge, “[A]s hard as you try to make it fair[,] . . . we are no match for corrupt prosecutors if they want to hide information known only to them or they want to present false testimony.” *Id.* at 30.



government's case. In a criminal case in which the government always has the burden of proof, the "consciousness of a weak case" inference signals to the jury that the government's case is compromised and can provide the jury with reasonable doubt. Just as criminal courts have traditionally allowed the government to prove the defendant's consciousness of guilt with evidence that the defendant attempted to suppress or destroy incriminating evidence, the government's intentional *Brady* misconduct is likewise admissible to prove the prosecutor's "consciousness of a weak case." Accordingly, the trial court's exclusion of *Brady* misconduct evidence against the government is both counter to long-standing evidentiary principles and constitutes an arbitrary denial of a criminal defendant's constitutional right to present all relevant evidence in defense of criminal charges.

Part II of this Article discusses the foundation and scope of the *Brady* doctrine and some of the complex litigation and reform issues that arise under the current state of the law. Part III discusses the use of a *Brady* instruction as an appropriate sanction for the government's intentional suppression of material exculpatory and impeachment evidence. Part IV discusses the application of the "consciousness of a weak case" inference created by the intentional withholding of *Brady* evidence. Part V applies both the *Brady* instruction sanction and the "consciousness of a weak case" inference to the case of *United States v. Shelton*.<sup>27</sup>

## II: THE *BRADY* DOCTRINE

More than seventy years ago, the Supreme Court stated that the role of the prosecution in the criminal justice system

is not that it shall win a case, but that justice shall be done. . . . [W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.<sup>28</sup>

To that end, in *Brady v. Maryland*,<sup>29</sup> the Court held that "suppression by the prosecution of evidence favorable to an accused violates due process when the evidence is material to either guilt or punishment, irrespective of good faith or bad faith of the prosecutor."<sup>30</sup> The purpose of the *Brady* rule is to ensure that the defendant receives a fair trial in which all relevant evidence of guilt and innocence is presented to enable the fact-finder to reach a fair

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<sup>27</sup> 983 A.2d 363 (D.C. 2009).

<sup>28</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>29</sup> 373 U.S. 83 (1963).

<sup>30</sup> *Id.* at 87-88.

and just verdict.<sup>31</sup> The *Brady* doctrine imposes an affirmative duty on the trial prosecutor to investigate, preserve, and disclose favorable information located in the prosecutor's files, as well as information in the possession of any member of the prosecution team.<sup>32</sup> Recently, in *Banks v. Dretke*,<sup>33</sup> the Court reiterated that the "essential elements" of a *Brady* claim are suppression of "favorable" and "material" evidence that results in prejudice to the defense.

#### A. "FAVORABLE" EVIDENCE

The *Brady* disclosure duty is triggered by an initial determination that the government has evidence that is "favorable" to the accused. The Court has held that "favorable" evidence includes both exculpatory evidence that negates guilt and impeaching evidence that undermines the government's case.<sup>34</sup> Both exculpatory and impeachment evidence are treated equally under the *Brady* doctrine. According to a recent national report, most state and federal statutes and court rules designed to implement the *Brady* disclosure duty fail to delineate the different types of information subject to disclosure under *Brady*.<sup>35</sup> As a result, the scope of the constitutional disclosure duty has been developed in the volume of state and federal court cases decided in the forty-five years since the Court's decision in *Brady*.

##### 1. Exculpatory Evidence

Evidence is deemed to be exculpatory if it tends to negate guilt, diminish culpability, support an affirmative defense (duress, self-defense),<sup>36</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Kyles v. Whitley*, 514 U.S. 419, 436-38 (1995).

<sup>33</sup> 540 U.S. 668, 669 (2004).

<sup>34</sup> *United States v. Bagley*, 473 U.S. 667, 675-76 (1985).

<sup>35</sup> LAURAL L. HOOPER, JENNIFER E. MARSH & BRIAN YEH, FED. JUDICIAL CTR., TREATMENT OF *BRADY* V. *MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES 12-14, 25-38 (2007) [hereinafter *Brady* Report], available at [http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/\\$file/bradyma2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf). But see DIST. MASS. LOCAL R. 116.2(A), available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf> (providing a definition for "exculpatory evidence"); DIST. OF KAN., GENERAL ORDER OF DISCOVERY AND SCHEDULING, available at <http://www.ksd.uscourts.gov/forms/index.php> (listing specific categories of *Brady* evidence subject to disclosure); TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. STATE BAR ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 23-24 (2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> (discussing various categories of *Brady* evidence).

<sup>36</sup> *E.g.*, *Arline v. State*, 294 N.E.2d 840 (Ind. Ct. App. 1973) (ordering new trial in self-defense case where prosecution failed to disclose the weapon used by decedent during altercation); *Branch v. State*, 469 S.W.2d 533 (Tenn. Crim. App. 1969) (finding error where

or if the evidence could potentially reduce the severity of the sentence imposed. The clearest example of exculpatory evidence is information uncovered during the criminal investigation indicating that someone other than the defendant committed the crime.<sup>37</sup> Exculpatory evidence must be disclosed even if the prosecutor does not find the information credible or has other contradictory information.<sup>38</sup> Exculpatory evidence includes third-party confessions, victim or complainant recantations, eyewitness identifications of another person as the perpetrator, as well as descriptions of the perpetrator that are inconsistent with the defendant's appearance.<sup>39</sup> Also included is forensic evidence that affirmatively excludes the defendant as the culprit or fails to link the defendant to crime scene evidence (including physical evidence such as DNA, fingerprints, or bite marks).<sup>40</sup>

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defendant claimed self-defense to murder charges and gave uncorroborated testimony that the knife-wielding decedent aggressively attacked him immediately before the fatal encounter, prosecution suppressed evidence that a citizen gave police a knife purportedly belonging to the decedent that was found at or near the crime scene, and prosecutor argued in closing that there was no evidence to support the defense claim that the decedent was armed); *Ex Parte Mowbray*, 943 S.W.2d 461 (Tex. Crim. App. 1996) (mandating a new trial where prosecution intentionally withheld a blood spatter expert's report supporting the defense's theory that the victim committed suicide).

<sup>37</sup> *E.g.*, *State v. Landano*, 637 A.2d 1270 (N.J. Super. Ct. App. Div. 1994) (involving a *Brady* violation where defendant charged with killing a police officer and prosecutor concealed fingerprint and ballistics tests, which showed that the gun used to kill the police officer was used in an earlier armed robbery committed by state's chief witness).

<sup>38</sup> *See, e.g.*, *People v. Jackson*, 637 N.Y.S.2d 158, 161-62 (N.Y. Sup. Ct. 1995) ("Even if the Assistant District Attorney 'had valid reasons to consider this witness to be unreliable, [he] should nonetheless have provided the defense with this important exculpatory information which was clearly *Brady* material.'" (quoting *People v. Robinson*, 133 A.D.2d 859, 860 (N.Y. App. Div. 1987))); *People v. Springer*, 122 A.D.2d 87, 88 (N.Y. App. Div. 1986) (reversing the conviction and dismissing the indictment where prosecutor intentionally destroyed surveillance videos relevant to the sole critical issue even though the prosecutor claimed that he believed "the photographs showed nothing that would be of value in an identification procedure").

<sup>39</sup> *See, e.g.*, *People v. Thomas*, 71 A.D.2d 839 (N.Y. App. Div. 1979) (finding a *Brady* violation during prosecution of two African-American defendants where government suppressed witness statements describing perpetrators as two white males); *see also* cases cited *infra* note 44.

<sup>40</sup> *See, e.g.*, *Padgett v. State*, 668 So. 2d 78 (Ala. Crim. App. 1995) (finding a *Brady* violation where prosecutor failed to timely disclose new blood test results revealing that the blood sample used to match defendant's DNA to the crime was inconsistent with defendant's blood); *Nelson v. Zant*, 405 S.E.2d 250, 252 (Ga. 1991) (reversing capital murder conviction where government knowingly suppressed exculpatory FBI forensic report which had concluded that the hair sample used to connect the defendant to the victim was "not suitable for significant comparison purposes"); *see also* Innocence Project, Know the Cases: Roy Brown, <http://www.innocenceproject.org/Content/425.php> (last visited Feb. 2, 2010). At trial, the government introduced testimony of an expert witness that a bite mark on the victim's body was "entirely consistent" with the defendant and suppressed the fact that

The government is also required to disclose evidence regarding the existence of other suspects who either have a *modus operandi* similar to the charged offense or who had the motive, means, and opportunity to commit the charged offense.<sup>41</sup>

## 2. Impeachment Evidence

Impeachment evidence encompasses a broad range of information that would expose weaknesses in the government's case or cast doubt on the credibility of government witnesses. The Supreme Court has observed that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."<sup>42</sup> Impeachment evidence is especially valuable in a case "when it impugns the testimony of a witness who is critical to the prosecution's case."<sup>43</sup> Impeachment evidence includes any information regarding a witness's prior convictions, biases, prejudices, self-interests, or any motive to fabricate or curry favor with the government. Impeachment evidence also consists of prior inconsistent statements of the witness and any prior failure of the witness to identify the defendant.<sup>44</sup> The

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another expert had examined the bite mark before trial and excluded the defendant as the source. *Id.*

<sup>41</sup> *E.g.*, *Bloodsworth v. State*, 512 A.2d 1056 (Md. 1986) (reversing a murder conviction based on brutal rape and murder of small girl where government suppressed a police report discussing another suspect who was found in the woods near the body, had a red spot of blood on his shirt when interviewed by police, and who had the underwear of a small girl in his car); *State v. Munson*, 886 P.2d 999, 1003 (Okla. Crim. App. 1994) (reversing a conviction based in part on the failure to disclose existence of another prime suspect with a similar *modus operandi* who was seen at the scene of the crime on the night of the murder); *Cook v. State*, 940 S.W.2d 623, 625 (Tex. Crim. App. 1996) (finding that the government did not reveal the existence of a person who had a motive to kill victim and had threatened to kill victim shortly before her death).

<sup>42</sup> *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

<sup>43</sup> *Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005); *see, e.g.*, *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (granting habeas relief in murder case where state failed to disclose evidence that government's star witness was known to be a "pathological liar" and a "prolific career burglar"); *Cook*, 940 S.W.2d at 625 (finding a *Brady* violation where government failed to disclose that witness was believed to be "mentally and emotionally unstable" and "a pathological liar").

<sup>44</sup> *E.g.*, *Commonwealth v. Ellison*, 379 N.E.2d 560 (Mass. 1978) (failing to disclose initial pretrial statements of co-defendants, which did not name the defendant as one of the participants in the crime and which contradicted their subsequent statements and trial testimony); *State v. Landano*, 637 A.2d 1270 (N.J. Super. Ct. App. Div. 1994) (finding a *Brady* violation where prosecutor suppressed evidence showing that the only eyewitness to the crime specifically eliminated the defendant as the perpetrator during pretrial photo identification procedure); *Texas v. Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989)

government must also disclose information that casts doubt on the ability of the witness to accurately perceive, recall, or report the facts related to the witness's testimony, including mental instability, substance abuse, memory loss, or any other physical or mental impairment.<sup>45</sup>

In addition, *Brady* impeachment evidence includes any positive or negative inducements used to motivate a witness to testify on behalf of the government. Inducements include promises, rewards, financial payments, and benefits, as well as threats, intimidation, and other forms of coercion used to secure testimony.<sup>46</sup> Chief among government inducements are offers of favorable treatment regarding the witness's own criminal matters. Commonly, the government must enter into plea deals, cooperation agreements, or immunity agreements with witnesses in order to secure their testimony against the defendant. The government violates *Brady* if the government does not disclose the existence of these agreements. This nondisclosure is exacerbated if the government allows these cooperating witnesses to falsely testify that no agreement with the government exists.<sup>47</sup>

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(suppressing crime victim's pretrial statement that was diametrically opposed to her trial testimony as well as her failure to identify defendant at police line-up).

<sup>45</sup> *E.g.*, *Jean v. Rice*, 945 F.2d 82, 87 (4th Cir. 1991) (failing to disclose records of the victim's hypnosis, which were used to enhance the victim's testimony); *United States v. Sterba*, 22 F. Supp. 2d 1333, 1334-40 (M.D. Fla. 1998) (failing to disclose "severe credibility problems" of key government witness, including a history of mental health and substance abuse, as well the witness' prior guilty plea to lying under oath in a case that led to the arrest of an innocent man); *Munson*, 886 P.2d at 1003 (failing to reveal the fact that testimony of one witness was hypnotically induced).

<sup>46</sup> *E.g.*, *Banks v. Dretke*, 540 U.S. 668, 700 (2004) (vacating death sentence and remanding case based in part on prosecution's nondisclosure of financial payments, cooperation agreements, and other impeachment evidence involving the state's two chief witnesses); *Guerra v. Johnson*, 90 F.3d 1075, 1078-80 (5th Cir. 1996) (finding that prosecutor intimidated and threatened three juvenile witnesses to identify the defendant as the shooter); *State v. Spurlock*, 874 S.W.2d 602 (Tenn. Crim. App. 1993) (ordering a new trial where prosecution failed to disclose that a key witness implicated the defendant on recorded interview only after being promised release from jail); *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989) (finding that key government witnesses were threatened, choked, and manhandled by law enforcement officers prior to falsely implicating the defendant in the murder).

<sup>47</sup> *See, e.g.*, *Napue*, 360 U.S. 264; *Pyle v. Kansas*, 317 U.S. 213 (1942); *United States v. Kelly*, 35 F.3d 929, 932-37 (4th Cir. 1994) (finding that prosecutor allowed key government witness to give unimpeached testimony that was either patently false or seriously misleading and which severely undercut the defense); *United States v. Kojayan*, 8 F.3d 1315, 1322 (9th Cir. 1993) (failing to disclose government informant status and cooperation agreement with a key government witness); *People v. Jimerson*, 652 N.E.2d 278 (Ill. 1995) (finding error where government witness who had agreement with government for reduced charges committed perjury in denying the existence of any inducement to testify at trial and prosecutor failed to correct the false testimony); *People v. Perkins*, 686 N.E.2d 663, 669 (Ill. App. Ct. 1997) (finding prosecution's failure to correct government witness' false testimony that he received no favorable treatment in exchange for his testimony was intentional where

In some cases, prosecutors have even affirmatively used the witness's perjured testimony regarding the nonexistence of an agreement to bolster the credibility of the witness during closing arguments.<sup>48</sup> In addition to agreements, the *Brady* doctrine also mandates disclosure of both pending criminal cases and prosecutable offenses committed by any witness and known by the government.<sup>49</sup> The existence of these unresolved criminal cases could provide the witness with the expectation of favorable treatment even in the absence of a formal agreement with the government.<sup>50</sup>

#### B. "MATERIAL" EVIDENCE

Non-disclosure of favorable evidence does not result in a *Brady* violation, however, unless the defense can establish that the withheld evidence was material or prejudicial to the defendant.<sup>51</sup> In *Kyles*, the Court held that the *Brady* materiality requirement is satisfied by a showing that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."<sup>52</sup> The defense must also show that, in light of the evidence of guilt adduced by the prosecution at trial, the withheld evidence was noncumulative, highly probative evidence that could have had an impact on the determination of guilt.<sup>53</sup> The Court has stated that the defendant does not have to prove that he would have been acquitted had the *Brady* evidence been presented at trial but must show that, in the absence of the evidence, he did not receive a fair trial "resulting in a verdict worthy of confidence."<sup>54</sup>

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"[o]ne of the prosecutors who tried this case participated in the earlier negotiations" with the witness to secure testimony).

<sup>48</sup> See, e.g., *Banks*, 540 U.S. at 700-02; *Carriger*, 132 F.3d at 470.

<sup>49</sup> E.g., *Landano*, 637 A.2d at 1271 ("[The] State suppressed evidence that its principal identification witness was under investigation for having ties with organized crime, and was suspected of having engaged in loan sharking and money laundering, and further, that on the very day his earlier tentative identification of defendant became positive, he was questioned about whether he paid illegal gratuities to [murdered police officer] where defendant was convicted of killing a police officer.").

<sup>50</sup> See, e.g., *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

<sup>51</sup> The Court has made clear that the materiality determination is synonymous with the prejudice analysis. See *Kyles v. Whitley*, 514 U.S. 419, 435-40 (1995); *United States v. Bagley*, 473 U.S. 667, 674-75 (1985).

<sup>52</sup> *Kyles*, 514 U.S. at 435.

<sup>53</sup> E.g., *United States v. Jackson*, 345 F.3d 59, 73-74 (2d Cir. 2003) (finding no *Brady* violation where suppressed impeachment evidence merely furnished an additional basis on which to impeach a witness whose credibility had already been shown to be questionable); *United State v. Gil*, 297 F.3d 93, 103 (2d Cir. 2002) (holding that materiality standard is less likely met where evidence of guilt is overwhelming).

<sup>54</sup> *Kyles*, 514 U.S. at 434. If the defendant does not make this showing, reviewing courts commonly rule that, although it was error for the prosecutor to suppress favorable evidence, in light of the evidence of guilt adduced at trial, the suppressed evidence was not material.

### C. *Intentional Brady Violations*

From the inception of the *Brady* doctrine, the Court has consistently stated that the intent of the prosecutor is not determinative of whether a *Brady* violation has occurred. In *Agurs*, the Court stated:

[n]or do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence . . . of innocence is in his file, he should be presumed to recognize its significance. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.<sup>55</sup>

Though *Brady* violations can occur when a prosecutor accidentally or negligently withholds favorable information, intent is not completely irrelevant. In determining whether to impose sanctions for *Brady* violations—particularly whether dismissal of the charges is warranted—courts frequently rely on the presence or absence of evidence that the government acted with purpose or in bad faith.

Intentional violations occur when the prosecutor fully understands the *Brady* disclosure duty, is aware of the existence of favorable evidence in the government's possession, appreciates the exculpatory or impeachment value of the evidence, but intentionally withholds the evidence to gain a tactical advantage in the litigation. Too frequently, the intentional withholding of *Brady* evidence has resulted in gross miscarriages of justice in state and federal courts across the country. As in the case of Ted Stevens, courts have found intentional *Brady* violations based on the blatant and egregious conduct of prosecutors who knowingly used perjured testimony at trial,<sup>56</sup> deliberately shielded exculpatory evidence from disclosure,<sup>57</sup> purposely altered or falsified evidence,<sup>58</sup> and knowingly exploited the absence of the very evidence the state withheld.<sup>59</sup>

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<sup>55</sup> *United States v. Agurs*, 427 U.S. 97, 110 (1976).

<sup>56</sup> *E.g.*, *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (“The prosecutor’s actions in this case are intolerable. Possessed of knowledge that destroyed her theory of the case . . . she kept the facts secret . . . and then presented testimony in such a way as to suggest the opposite of what she alone knew to be true.”); *People v. Perkins*, 686 N.E.2d 663, 669 (Ill. App. Ct. 1997); *State v. Spurlock*, 874 S.W.2d 602, 620 (Tenn. Crim. App. 1993) (“[T]he prosecution made every effort to suppress the recordings. The prosecution knew if the material contained on these tapes was conveyed to defense counsel . . . the credibility of [the prosecution’s chief witness] would have been completely destroyed [and the defendant would have been acquitted].”).

<sup>57</sup> *E.g.*, *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) (stating that the prosecutor “did everything he could to keep the defense from learning” of the existence and nature of the government’s cooperation agreement with witness); *State v. Landano*, 637 A.2d 1270, 1287 (N.J. Super. Ct. App. Div. 1994) (holding that “it is apparent that the State deliberately concealed evidence” implicating the government’s two witnesses in the crime the defendant was charged with committing).

The impact of intentional *Brady* violations on the determination of guilt or innocence in criminal cases is significant. One early study found that *Brady* violations played a major role in the wrongful conviction of more than one-third of the prisoners later exonerated by DNA evidence.<sup>60</sup> Even in the absence of DNA evidence, postconviction reinvestigations of old cases have also resulted in the exoneration of many prisoners wrongly convicted in trials tainted by intentional *Brady* violations.<sup>61</sup> Most disturbing, however, is the undisputed fact that intentional *Brady* violations

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<sup>58</sup> E.g., *United States v. Sterba*, 22 F. Supp. 2d 1333, 1334-40 (M.D. Fla. 1998) (finding that where the government “knowingly disguise[d] the identity of a government witness and deceptively” allowed the witness to testify under oath and give a false name “[t]he conception and implementation of this plan was intentional and calculated to deprive the defense of its right of confrontation. It almost succeeded.”); *Price v. State Bar*, 30 Cal. 3d 537 (Cal. 1982) (convicting defendant after prosecutor altered date and time of taxi cab receipt to place defendant at the scene of the crime, destroyed original evidence supporting the defendant’s alibi, and introduced the false evidence at trial).

<sup>59</sup> E.g., *Arline v. State*, 294 N.E.2d 840, 844 (Ind. Ct. App. 1973) (finding that despite pretrial receipt of knife used by decedent to cut defendant during fatal encounter in self-defense case, prosecutor “exaggerated [the knife’s] absence in evidence,” strongly suggesting to the jury that the knife did not exist); *Ex parte Mowbray*, 943 S.W.2d 461, 465 (Tex. Crim. App. 1996) (finding that prosecutors “engaged in a deliberate course of conduct” to keep exculpatory evidence away from defense counsel).

<sup>60</sup> In a study of the first seventy-four DNA-based exonerations, the Innocence Project found that the initial wrongful conviction was caused, in part, by *Brady* violations. Specifically, the study found that 37% of the cases involved the suppression of exculpatory evidence, 25% involved the knowing use of false testimony, and 11% involved the undisclosed use of coerced witness testimony. BARRY SCHECK, JIM DWYER & PETER NEUFELD, *ACTUAL INNOCENCE* (1st ed. 2001); Innocence Project, *Understand the Causes*, <http://www.innocenceproject.org/understand/> (follow the Forensic Science Misconduct and Government Misconduct hyperlinks) (last visited Feb. 2, 2010); see also CTR. FOR PUB. INTEGRITY, *HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS* 91-100 (2003) [hereinafter *HARMFUL ERROR*] (citing twenty-eight cases where prosecutorial misconduct, most commonly *Brady* violations, significantly contributed to the wrongful conviction of people who were later exonerated).

<sup>61</sup> E.g., *Carter v. Rafferty*, 621 F. Supp. 533, 548 (D.N.J. 1985) (granting habeas relief in the case of famed boxer Rubin “Hurricane” Carter where the prosecution purposely misrepresented the results of a polygraph test given to its key witness in order to manipulate the witness into abandoning his recantation and giving the inculpatory testimony at the retrial that placed defendants at the scene of the crime); *People v. Ramos*, 614 N.Y.S.2d 977, 982-84 (N.Y. App. Div. 1994) (finding that defense was denied powerful impeachment evidence in child sexual assault trial where the government argued that the child’s extensive knowledge of sexual activity stemmed from sexual abuse by defendant but suppressed documents showing that child had an unusually advanced knowledge and sophistication regarding sexual matters well before the alleged sexual assault); *Ex parte Adams*, 768 S.W.2d 281, 293 (Tex. Crim. App. 1989) (finding in murder case that “the State was guilty of suppressing evidence favorable to the accused, deceiving the trial court during [the] trial, and knowingly using perjured testimony”).



have resulted in near executions in numerous death penalty cases.<sup>62</sup> In one case, after twelve years on death row, a man came within fifteen hours of execution before being granted habeas relief.<sup>63</sup> More recently, Delma Banks was strapped to a gurney in the Texas death chamber and was within ten minutes of execution when the Supreme Court granted a stay of execution and ruled that he was entitled to habeas relief based on *Brady* violations that infected his trial.<sup>64</sup> There have been numerous other reversals of capital convictions based on intentional *Brady* violations.<sup>65</sup> In the overwhelming majority of capital murder cases, once *Brady* violations are exposed, the government opts not to retry the case,<sup>66</sup> or the formerly

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<sup>62</sup> E.g., JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* 5 (2000), available at [http://www2.law.columbia.edu/instructionalservices/liebman/liebman\\_final.pdf](http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf) (documenting *Brady* violations in 16% to 19% of capital cases); *DEBATING THE DEATH PENALTY* (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (finding that 35 out of 350 wrongful convictions based on wrongful suppression of evidence); Ames Alexander & Liz Chandler, *Errors, Inequities Often Cloud Capital Cases in the Carolinas*, CHARLOTTE OBSERVER, Sept. 10, 2000, at 1A (stating that in "North Carolina since 1977[,] . . . [c]ourts have overturned more than 25 death sentences, many based on findings that prosecutors hid evidence, made improper arguments, or broke other rules").

<sup>63</sup> *Brown v. Wainwright*, 785 F.2d 1457, 1458-59 (11th Cir. 1986) (vacating 1974 capital murder convictions upon finding that the prosecutor failed to step forward when the only witness at trial to place the defendant at the scene of the crime and the only witness to testify to incriminating admissions by the defendant falsely testified that he had not received immunity from the government in exchange for his testimony).

<sup>64</sup> See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 133 (2007); see also *Banks v. Dretke*, 540 U.S. 668 (2004).

<sup>65</sup> E.g., *State v. Moore*, 969 So. 2d 169 (Ala. Crim. App. 2006) (vacating death sentence and ordering a new trial due to nondisclosure of exculpatory information in FBI reports); *Commonwealth v. Smith*, 615 A.2d 321, 322-25 (Pa. 1992) (reversing death sentence upon finding that the government's "intentional suppression" of extremely "exculpatory physical evidence" while arguing in favor of the death sentence on direct appeal "constitute[s] prosecutorial misconduct such as violat[ing] all principles of justice and fairness").

<sup>66</sup> See *Guerra v. Johnson*, 90 F.3d 1075, 1078-80 (5th Cir. 1996); *Brown v. Wainwright*, 785 F.2d 1457, 1458-59 (11th Cir. 1986); *Padgett v. State*, 668 So. 2d 78 (Ala. Crim. App. 1995); *Nelson v. Zant*, 405 S.E.2d 250, 252-53 (Ga. 1991); Taylor Bright, *Guilty Until Proven Innocent?*, BIRMINGHAM POST-HERALD, Dec. 14, 2001, available at [http://www.patrickcrusade.org/execution\\_2\\_5.htm](http://www.patrickcrusade.org/execution_2_5.htm) (reporting that after court ordered a new trial, District Attorney decided not to prosecute former condemned prisoner); Jingle Davis & Mark Curriden, *Condemned Man Is Freed After Repeal*, ATLANTA J. CONST., Nov. 7, 1991, at E2 (reporting that prosecutors decided they could not re-prosecute Gary Zant following the reversal of his capital murder conviction for the rape and murder of a six-year-old girl); Sydney P. Freedberg, *Freed from Death Row*, ST. PETERSBURG TIMES, July 4, 1999, at 8A, available at <http://www.sptimes.com/News/70499/State/yesangry.shtml> (stating that after twelve years in prison, on remand, the prosecutor's office opted not to retry the case against Joseph Greene Brown and the former death row inmate was released after over five years on death row); *Mexican Long Held in Texas Murder Wins His Freedom*, N.Y. TIMES, Apr. 17, 1997, at A16, available at <http://www.nytimes.com/1997/04/17/us/mexican-long-held-in->

condemned prisoners are acquitted at a retrial.<sup>67</sup> In other cases, death row inmates are given parole,<sup>68</sup> allowed to plead guilty to a lesser charge and released based on time served,<sup>69</sup> or sentenced to life without parole.<sup>70</sup> Rarely are formerly condemned prisoners resentenced to death after the conviction is reversed based on *Brady* misconduct.<sup>71</sup> Thus *Brady* violations, if undetected and undeterred, could result in the death of people who, under the law, deserve either life or liberty.

#### D. LITIGATING *BRADY* VIOLATIONS

Under the current state of the law, several factors make pretrial litigation and adjudication of *Brady* violations extremely difficult. First, pretrial disclosure of *Brady* evidence is governed by an unrealistic “honor

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texas-murder-wins-his-freedom.html (reporting that Ricardo Aldape Guerra had spent over fifteen years in prison and, at one point, came within three days of execution); *see also* Chevel Johnson, *No Retrial in New Orleans Killing*, ASSOCIATED PRESS ONLINE, Jan. 9, 1999 (stating that the youngest person ever sentenced to death row at age seventeen, Shareef Cousins, was given a new trial in a case involving *Brady* violations, but the sentence was ultimately reversed on other grounds because prosecutors did not have enough evidence to pursue the case a second time).

<sup>67</sup> *See, e.g., Moore*, 969 So. 2d at 185; *State v. Munson*, 886 P.2d 999, 1003 (Okla. Crim. App. 1994); Richard L. Fricker, *State Falters in Retrial of Escaped Con*, A.B.A. J., June 1995, at 38 (describing the acquittal of Adolph Munson at re-trial after ten years on death row); Death Penalty Info. Ctr., Exonerations: Jury Acquits Former Death Row Inmate of All Charges, <http://www.deathpenaltyinfo.org/exonerations-jury-acquits-former-death-row-inmate-all-charges> (last visited Jan. 19, 2010) (describing the acquittal of a man on all counts in third trial after nearly ten years on death row).

<sup>68</sup> *Ryan Issues Blanket Clemency*, CHI. TRIB., Jan. 12, 2003, at 14, available at <http://www.chicagotribune.com/media/flash/2003-01/6205191.pdf>. Madison Hobley, who spent eighteen years in prison, most of it on death row, was pardoned by Governor Ryan in Illinois during his mass purge of prisoners on death row. *Id.*

<sup>69</sup> Dave Von Drehle, *Murder Suspects Will Plead Guilty, Leave Court Free*, SAN JOSE MERCURY NEWS, Jan. 15, 1988, at 2G, available at 1988 WLNR 468637 (“U.S. District Judge George Carr found that detectives deliberately suppressed evidence that might have pointed to the innocence of Jent and Miller . . . [and that] [t]he State of Florida demonstrated ‘a callous and deliberate disregard for the fundamental principles of truth and fairness that underlie our criminal system.’”).

<sup>70</sup> *Smith*, 615 A.2d 321; Death Penalty Info. Ctr., Innocence Cases: 1984-1993, <http://www.deathpenaltyinfo.org/innocence-cases-1984-1993> (last visited Feb. 5, 2010) (describing the ultimate disposition in the *Smith* case where defendant’s original death sentence was reduced to life in prison).

<sup>71</sup> *See* Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1, available at <http://www.chicagotribune.com/news/nationworld/chi-dptrialerror-special,0,632955.special>. Of the sixty-seven death row inmates granted new trials due to *Brady* violations, twenty-four were freed because charges were dropped, they were acquitted at re-trial, or they were given full pardons. Three plead guilty in return for their immediate release from prison, twenty-five others were convicted again (but did not receive the death penalty), and only four returned to death row. *Id.*

code” system. Prosecutors are in exclusive possession of the evidence collected during the criminal investigation. They alone are entrusted to exercise their discretion and make a subjective evaluation of the case to determine whether there is favorable evidence subject to disclosure.<sup>72</sup> Even if the prosecutor determines that favorable evidence exists, it is the prosecutor who is entrusted with determining when, if at all, that evidence will be disclosed to the defense. Lower courts charged with enforcing the *Brady* mandate have repeatedly ruled that *Brady* does not require pretrial disclosure even when the government is aware of the favorable evidence prior to trial.<sup>73</sup> Prosecutors need only disclose favorable evidence to the defense “in time for its effective use at trial.”<sup>74</sup> Thus, prosecutors can (and do) purposely withhold *Brady* evidence until the last possible minute (and beyond) with full knowledge that the vital information in their exclusive possession could significantly bolster the defense case or seriously undermine the government’s case.<sup>75</sup>

Moreover, prosecutors are also empowered to make the pretrial determination of whether a particular piece of favorable evidence meets the materiality standard. Many courts have observed that the impact-based analysis used to determine materiality is unworkable as a pretrial standard for prosecutors attempting in good faith to comply with *Brady*.<sup>76</sup> The Supreme Court also acknowledged as much in *Agurs*, when it stated that the pretrial materiality determination is “inevitably imprecise” and recognized that “the significance of an item of evidence can seldom be predicted accurately until the entire record is complete.”<sup>77</sup> As Justice Marshall stated in his opinion in *Bagley*, rather than promoting full and complete

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<sup>72</sup> See, e.g., *Moore*, 969 So. 2d at 175 (noting that the prosecutor testified that “he never intended to withhold exculpatory information and that he did not consider some of the materials to be exculpatory”).

<sup>73</sup> See *United States v. Copp*, 267 F.3d 132, 135 (2d Cir. 2001); *United States v. Presser*, 844 F.2d 1275, 1283 n.9 (6th Cir. 1988) (“[D]isclosure in time for effective use at trial is all that the *Brady* doctrine requires.”); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 1143 (5th ed. 2009).

<sup>74</sup> *Copp*, 267 F.3d at 142.

<sup>75</sup> E.g., *Padgett v. State*, 668 So. 2d 78 (Ala. Crim. App. 1995) (finding that a mid-trial four-day delay prior to disclosure of exculpatory information constitutes a *Brady* violation); *People v. Jackson*, 637 N.Y.S.2d 158 (N.Y. Sup. Ct. 1995) (discussed *supra* notes 134-137 and accompanying text); *Page v. Roberts*, 611 N.Y.S.2d 214 (N.Y. App. Div. 1994) (granting new trial when district attorney kept exculpatory statement for over a year until the day prior to the start of trial when witness could no longer be found).

<sup>76</sup> See, e.g., *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (“Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment [on materiality] necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins . . .”).

<sup>77</sup> *United States v. Agurs*, 427 U.S. 97, 108 (1976).

disclosure, the materiality standard legitimizes nondisclosure by allowing prosecutors to determine which favorable evidence is material and will be disclosed and which favorable evidence is not material and can be constitutionally withheld.<sup>78</sup>

While the Court has expressed its hope that “the prudent prosecutor will resolve doubtful questions in favor of disclosure,” there is no assurance that all prosecutors will heed the Court’s caution and err on the side of disclosure.<sup>79</sup> Other than the unenforceable “honor code,” there are few incentives for prosecutors to comply with *Brady* because there is no meaningful judicial oversight of the process.<sup>80</sup> The trial judge does not know what evidence exists in the government’s files, what evidence the prosecutor has withheld, or why the prosecutor has unilaterally decided not to disclose certain evidence to the defense. Prosecutors do not have to keep a log of the evidence in the case. Nor are prosecutors required to seek an *in camera* review of potential *Brady* evidence prior to making the decision that evidence will not be disclosed. As a result, the trial court has only a limited ability to make a pretrial determinations of whether the prosecutor has fully complied with *Brady*.

The lack of judicial oversight of *Brady* disclosure decisions is compounded by the fact that, absent extraordinary circumstances, it is very likely that the defense will never learn of the existence of favorable evidence and cannot, therefore, seek leave of the court to compel disclosure. The very nature of the act of withholding evidence ensures that the defense does not know that such evidence is contained in the prosecutor’s nonpublic case file. In the overwhelming majority of cases, the defense learns of *Brady* evidence by pure accident.<sup>81</sup> Sometimes the defense stumbles upon a

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<sup>78</sup> See *United States v. Bagley*, 473 U.S. 667, 700 (1985) (Marshall & Brennan, JJ., dissenting).

<sup>79</sup> *Agurs*, 427 U.S. at 108; see also *Kyles v. Whitley*, 514 U.S. 419, 439 (1994).

<sup>80</sup> LAFAVE, *supra* note 73, § 24.3(b) at 1147-48 (noting that trial courts are reluctant to review prosecutor’s files to determine whether they have undisclosed *Brady* material); cf. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (limiting authority of the court to impose *in camera* review for disputed *Brady* material).

<sup>81</sup> *United States v. Arnold*, 117 F.3d 1308 (11th Cir. 1997) (stating that exculpatory contents of a tape recording were obtained by defense post-trial when prosecutor inadvertently sent transcripts of the tapes to the defense attorney); see *McMillian v. State*, 616 So. 2d 933, 945 (Ala. Crim. App. 1993) (involving a tape recording inadvertently given to defense counsel wherein the sheriff and other law enforcement officers were threatening the government’s star witness to force him to falsely implicate McMillan); *Armstrong & Possley*, *supra* note 71 (discussing the case of James Richardson who was wrongly convicted in Florida and served twenty-one years in prison before exculpatory evidence was “stolen from a prosecutor’s office by a man dating the prosecutor’s secretary”; also reporting on other cases wherein exculpatory evidence was discovered after “a judge directed the U.S. marshal to seize the prosecutors’ documents, or because newspapers sued under the Freedom

lay witness who possesses the information.<sup>82</sup> Alternatively, as in the Stevens case, members of the prosecution team belatedly come forward and disclose the existence of favorable evidence. The constitutional right of criminal defendants to acquire exculpatory evidence for use at trial should not depend on sheer luck or the industriousness of the defense investigative team. As the Court recognized in *Banks*: “[a] rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.”<sup>83</sup>

#### E. BRADY REFORM PROPOSALS

Numerous *Brady* reforms have been proposed by jurists and legal scholars over the past two decades to address the myriad of problems associated with the enforcement of the *Brady* mandate. Notwithstanding these reform efforts, the *Brady* disclosure duty has become one of the most unenforced constitutional mandates in the criminal justice system.<sup>84</sup> According to several major national studies, *Brady* violations in state and federal courts have been continuous and persistent over the forty-five years since the *Brady* decision.<sup>85</sup> One landmark study found that during the first

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of Information Act, or because of anonymous tips, conversations accidentally overheard or papers spied in a prosecutor’s hand”); see also Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 869 (1997) (stating that judicial opinions involving *Brady* violations “appear in the reporters only because the criminal defendant, deprived of any knowledge of exculpatory evidence by the prosecutor’s refusal to disclose it, was nevertheless able by some other means (often highly fortuitous) to discover its existence”).

<sup>82</sup> E.g., *Banks v. Dretke*, 540 U.S. 668, 675 (2004) (noting that “long suppressed evidence came to light” after attorneys for death row defendant received affidavits from government witnesses detailing that, contrary to trial testimony, and the representations of prosecutors, witnesses were coached, paid for their testimony and threatened with incarceration if they did not provide false inculpatory testimony against the defendant); *State v. Moore*, 969 So. 2d 169, 173 (Ala. Crim. App. 2006) (stating that defense was alerted to exculpatory information by witness who contacted defense counsel after trial); *State v. Cousin*, 710 So. 2d 1065, 1067 n.2 (La. 1998) (stating that the defense learned “through an anonymous communication” during the penalty phase of a capital case that eyewitness who identified defendant as murderer previously told police that she could not identify the gunman because she did not get a good look at him, was not wearing her glasses, and could only see shapes and patterns).

<sup>83</sup> *Banks*, 540 U.S. at 696.

<sup>84</sup> See BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* §§ 5:1, 5:3 (2d ed. 2002) (“Nondisclosure of exculpatory evidence by prosecutors . . . account[s] for more miscarriages of justice than any other type of prosecutorial infraction.”).

<sup>85</sup> See Armstrong & Possley, *supra* note 71; see also HARMFUL ERROR, *supra* note 60, at i (reporting that a three-year study of over eleven thousand reported opinions involving prosecutorial misconduct (including *Brady* violations) found that over two thousand cases led to reversal of conviction and twenty-eight defendants were later exonerated); see also Bill Moushey, *Win at All Costs*, PITTSBURGH POST-GAZETTE, Nov. 22, 1998, at A1, available

thirty-six years after *Brady*, 381 homicide cases across the country were reversed due to *Brady* violations.<sup>86</sup> A 2009 study further confirmed that *Brady* violations continue to be an on-going problem.<sup>87</sup>

Reform efforts to combat *Brady* violations are frequently stalled by non-reformers (usually prosecutors and former prosecutors) who persist in the assertion that *Brady* violations are an extremely rare occurrence.<sup>88</sup> Given the hundreds of thousands of cases prosecuted annually across the country, they argue that the number of reported *Brady* violations is *de minimis*.<sup>89</sup> Moreover, the small minority of prosecutors committing *Brady* violations are far outnumbered by the overwhelming number of ethical prosecutors committed to ensuring that justice is done and that all *Brady* evidence is properly disclosed to the defense.<sup>90</sup> Thus, non-reformers maintain that *Brady* violations are more “episodic” than “epidemic”<sup>91</sup> and that many of the proposed reforms unnecessarily interfere with the independence of the prosecution function. These proposed reforms, they contend, would curtail the broad discretion that prosecutors must have to perform their jobs effectively and free from undue judicial interference.<sup>92</sup>

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at <http://www.post-gazette.com/win/> (documenting, in a ten-part series, a two-year investigation into prosecutorial misconduct (including *Brady* violations) across the country).

<sup>86</sup> Armstrong & Possley, *supra* note 71.

<sup>87</sup> TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 35, at 26 (citing numerous New York cases involving *Brady* violations and stating that “despite the clarity and longevity of the *Brady* rule, a sampling of recent published or otherwise available decisions show such conduct still occurs”).

<sup>88</sup> Randall D. Eliason, *The Prosecutor’s Role: A Response to Professor Davis*, AM. U. CRIM. L. BRIEF, Fall 2006, at 15, 17-18, available at <http://www.wcl.american.edu/journal/clb/documents/CriminalLawBrief-VolIIIIssueI-Fall2006.pdf?rd=1> (commenting that given the number of prosecutors in the country (over 35,000) and the number of criminal cases prosecuted each year (twenty million in state courts and 70,000 in federal courts), the incidences of prosecutorial misconduct are extremely small).

<sup>89</sup> *Id.* at 20 (dismissing statistics from Harmful Error study which found serious prosecutorial misconduct (including *Brady* violations) in a total of two thousand cases (average of sixty-six cases per year) as statistically insignificant because “sixty-six cases per year out of several million is a vanishingly small number. Even if the true incidence of prosecutorial misconduct, reported and unreported, were 500 times greater than what was found[,] . . . it would still involve only about one percent of all serious criminal cases filed in a year.” (emphasis omitted)).

<sup>90</sup> *Id.* at 17 (“[T]he vast majority of prosecutors are dedicated public servants striving to do a difficult job in an ethical and honorable way.”).

<sup>91</sup> HARMFUL ERROR, *supra* note 60, at 110 (providing a copy of a letter from an Oregon prosecutor stating that prosecutorial misconduct is “episodic” and not “epidemic,” and stating that “prosecutors continue to be subject to the harshest sanctions on those truly rare occasions when they violate their oaths”).

<sup>92</sup> TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 35, at 36 n.11. In response to a proposal to have a mandatory *Brady* conference with the trial judge in criminal cases, dissenting Task Force members argued that “mandating a pretrial conference in every case

Non-reformers also steadfastly contend that when *Brady* violations do infrequently occur, the wrongful actions of these few errant prosecutors are adequately addressed by the current mechanisms in place within prosecution offices and the external sanctioning power of the state bar.<sup>93</sup>

The “epidemic” versus “episodic” debate, of course, misses the point. The problem with *Brady* violations is not the frequency with which they occur, it is the fact that they occur at all. By definition, *Brady* violations involve the withholding of material evidence that has a significant adverse impact on the accuracy of the guilt/innocence determination. Thus, even one *Brady* violation is too many when such misconduct can and does result in a wrongful conviction or a sentence of death. Just as it would be unacceptable to allow a preventable or curable disease to go untreated simply because it affects only a small number of people each year, we cannot allow *Brady* violations—even if infrequent and isolated—to remain “untreated.” In the fair and just criminal justice system we strive to create, we should have zero tolerance for these preventable errors.

Against the backdrop of this ongoing reform debate, legal scholars and jurists have proposed a wide array of reforms. Some of the proposed reforms would simply mandate better enforcement and utilization of existing laws and standards. For example, many have proposed more aggressive use of the state bar disciplinary process to punish prosecutors for violating the professional standards that make it unethical for them to withhold favorable evidence.<sup>94</sup> While the use of the state bar disciplinary process is a viable option, numerous studies and reports have shown that

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for judicial review of the prosecutor’s file impermissibly allows the judicial branch to intrude into the exclusive domain of a member of the executive branch, the prosecutor, in the advocacy determination of what to disclose and when; weakens the adversary system and the vigorous performance of the prosecutor’s function.” *Id.* (citations omitted).

<sup>93</sup> Eliason, *supra* note 88, at 21 (citing the state bar disciplinary process and the Department of Justice Office of Professional Responsibility as powerful sources of “professional repercussions” for errant prosecutors who engage in misconduct).

<sup>94</sup> E.g., CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 77 (Gerald Uelmen ed., 2008) (discussing judicial reluctance to refer lawyers for professional discipline for *Brady* misconduct), available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>; see also TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 35, at 28-29; Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice”*, 76 FORDHAM L. REV. 1337 (2007); Paul J. Speigelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 170 (1999) (noting that of forty-five recent federal cases where convictions were reversed due to “intentional misconduct and extensive criticism of prosecutors’ conduct, not one court ordered a prosecutor disciplined or referred a prosecutor for discipline”); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275 (2004) (advocating the creation of an independent commission to examine wrongful convictions cases and enforce disciplinary rules for prosecutors).

prosecutors are generally not referred for disciplinary action for *Brady* misconduct, and it is extremely rare that such a referral results in professional discipline.<sup>95</sup> Thus, without greater enforcement of ethical rules, reliance on the state bar disciplinary process to deter and punish *Brady* misconduct is misplaced.

A second category of proposed *Brady* reforms would require major changes in existing law to implement. Legal scholars have proposed subjecting prosecutors to civil liability for their actions by eliminating or reducing the broad immunity prosecutors currently enjoy.<sup>96</sup> In light of recent Supreme Court precedent upholding prosecutorial immunity, this proposal is not likely to succeed.<sup>97</sup> Other reform proposals, including the use of criminal sanctions and contempt citations against prosecutors, are also very rarely used.<sup>98</sup> Moreover, the effectiveness of these measures

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<sup>95</sup> Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987) (discussing the results of a nation-wide empirical study of state bar disciplinary actions for *Brady* violations and finding few prosecutors are referred and even fewer are actually disciplined); see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009) (discussing Rule 3.8(d) of the Model Rules of Professional Conduct, which defines the scope of the prosecutor's duty to make timely disclosure of exculpatory evidence under ethics rules independent of the constitutional disclosure duty); see also HARMFUL ERROR, *supra* note 60, at 81-90. But see Amended Findings of Fact, Conclusions of Law and Order of Discipline, N.C. State Bar v. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n July 24, 2007), available at <http://www.ncbar.gov/Nifong%20Final%20Order.pdf>. In the high profile investigation of allegations that an African-American woman was gang-raped at an off-campus party hosted by college students who were members of the Duke University lacrosse team, the prosecutor violated *Brady* by suppressing exculpatory DNA results that excluded the defendants and by instructing a doctor to withhold such evidence from his medical report. The prosecutor was held in contempt following an independent investigation. *Id.* See generally Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007).

<sup>96</sup> Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (finding that the district attorney's failure to train employees on their *Brady* obligations and "the duty not to lie or persecute the innocent" subjected her to liability under 28 U.S.C. § 1983); see also Yarris v. County of Delaware, 465 F.3d 129, 132, 137 (3d Cir. 2006) (following re-prosecution of defendant by the same prosecutor who "allegedly slammed his case file against the courtroom wall, screamed at [the defendant Yarris], 'Motherfucker, you'll never leave the county alive!' and spat in Yarris's face," and finding that prosecutor's conduct in destroying exculpatory evidence was not covered by absolute immunity).

<sup>97</sup> Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009) (holding that the chief deputy district attorney and district attorney were entitled to absolute prosecutorial immunity).

<sup>98</sup> Weeks, *supra* note 81, at 879 (dismissing as improbable "the alternative of criminal sanctions for civil rights violations" due to *Brady* violations). But see United States v. Jones, 609 F. Supp. 2d 113 (D. Mass. 2009) (requiring the government to show cause why the court should not impose sanctions for *Brady* violation after the prosecutor failed to turn over the inconsistent statements of a police officer). Also, some state court rules and statutes expressly recognize contempt as a discovery sanction. *E.g.*, LA. CODE CRIM. PROC. ANN.



depends on the willingness of individual judges and prosecution offices to take punitive measures against errant prosecutors. Judges have been reluctant to take action, and as one scholar noted, “[p]rosecutors simply will not prosecute other prosecutors.”<sup>99</sup>

Similarly, some scholars and jurists have proposed amending Rule 16, the criminal discovery provision of the Federal Rules of Criminal Procedure, to include mandatory disclosure of *Brady* evidence.<sup>100</sup> Included among the provisions of the potential Rule 16 amendment is a requirement that prosecutors make timely disclosure of all favorable evidence, irrespective of any pretrial materiality determination they have made.<sup>101</sup> This *Brady* amendment to Rule 16 was vigorously opposed by the Department of Justice and ultimately defeated.<sup>102</sup>

The final category of *Brady* reforms involves administrative changes within prosecution offices to enhance compliance with the *Brady* disclosure

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Art. 729.5(B) (2003) (stating that willful violation of discovery rule “shall be deemed to be a constructive contempt of court”); see also ARK. R. CRIM. P. 19.7(b); FLA. R. CRIM. P. 3.220(n)(2); HAW. R. PENAL P. 16(9)(ii); ILL. SUP. CT. R. 415(g)(ii); MINN. R. CRIM. P. 9.03(8); VT. R. CRIM. P. 16.2(g)(2); WASH. SUP. CT. CRIM. R. 4.7(h)(7)(ii).

<sup>99</sup> Weeks, *supra* note 81, at 879.

<sup>100</sup> *Brady* Report, *supra* note 35, at 6. The proposed “*Brady* Amendment” to Rule 16 provided:

Exculpatory or Impeaching Information. Upon a defendant’s request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

*Id.* at 23 app. A (emphasis omitted) (providing the text of the *Brady* Amendment); see also Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93 (2004).

<sup>101</sup> Am. Coll. of Trial Lawyers, *supra* note 100, at 113.

<sup>102</sup> See *Brady* Report, *supra* note 35, at 4. In opposition to the Rule 16 amendment, the Department of Justice (DOJ) argued before the Judicial Conference Advisory Committee on the Rules of Criminal Procedure (“Advisory Committee”) that no codification of the *Brady* rule was warranted because the *Brady* disclosure obligation was already “clearly defined” under existing law. *Id.* at 6-7. Although DOJ opposed the amendment, DOJ representatives revised the Department of Justice Manual for United States Attorneys in an effort to more clearly define the scope of the *Brady* disclosure duty under existing law. See also *id.* at 6-7, 43 app. D (providing the text of United States Attorney’s Policy Regarding Disclosure of Exculpatory and Impeachment Information, § 9-5.001). Following the Ted Stevens litigation, the federal judge who presided over the case, Judge Emmet Sullivan, wrote a letter to the Judicial Conference Advisory Committee urging reconsideration of the *Brady* Amendment to Rule 16. Letter from Judge Emmett G. Sullivan to Judge Richard C. Tallman, Chair, Judicial Conference Advisory Committee on the Rules of Criminal Procedure (Apr. 28, 2009) (on file with author). Judge Sullivan wrote: “An amendment to Rule 16 that requires the government to produce all exculpatory information to the defense serves the best interests of the court, the prosecution, the defense, and ultimately the public.” *Id.*

duty. These reforms include improved training, the creation of detailed guidelines on *Brady* disclosure,<sup>103</sup> and administrative procedures to track and catalog *Brady* evidence to make disclosure more efficient.<sup>104</sup> Advocates of these internal reforms suggest that such measures would combat confusion over the scope of the disclosure duty and avoid carelessness or negligent nondisclosures.

While some of these proposals could potentially curb *Brady* violations when nondisclosure is the result of carelessness or negligence, it is unlikely that many of these measures would be sufficient to curb the more egregious, intentional *Brady* violations committed by prosecutors determined to “win at all costs.” In numerous cases, nondisclosure is the result of a deliberate choice to withhold evidence that the prosecutor knows is subject to disclosure under *Brady*. The intentional, purposeful nature of the *Brady* violation in those cases is illustrated by the varied excuses articulated by prosecutors in defense of their decisions to conceal *Brady* evidence. For example, prosecutors have defended their intentional suppression of *Brady* evidence on the grounds that (1) the witness that provided an exculpatory pretrial statement was not, in the prosecutor’s mind, a credible witness;<sup>105</sup>

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<sup>103</sup> CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 94, at 87-91 (recommending that State Attorney General formulate and disseminate a written office policy to govern *Brady* compliance, create a “*Brady* list” of impeachment evidence against law enforcement officers/witnesses, and hold training programs on *Brady* disclosure compliance); *see also* JOHN F. TERZANO ET AL., IMPROVING PROSECUTORIAL ACCOUNTABILITY: A POLICY REVIEW 3-6 (2009), *available at* <http://www.thejusticeproject.org/wp-content/uploads/pr-improving-prosecutorial-accountability1.pdf> (recommending increased training for line prosecutors on *Brady* disclosure duties); TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 35, at 37-38 (recommending same).

<sup>104</sup> ABA CRIM. JUSTICE SECTION’S AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIM. PROCESS, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 1, 103 (2006) (“In light of the prosecutor’s on-going obligation to disclose *Brady* material and the desire to provide all defendants with fair trial, prosecutors should establish guidelines and procedures for turning *Brady* evidence over to the defense and for receiving that information from its partners and agents, including police departments and laboratories.”); CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 94, at 12-16; TERZANO ET AL., *supra* note 103, at 7-8; Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 641 (2007) (advocating for the head prosecutor to provide “clearer guidance that ensures complete compliance with *Brady*,” and proposing “open file” discovery to give defense attorneys greater access to discoverable materials); *see also* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

<sup>105</sup> In *United States v. Harrington*, the government failed to disclose the existence of a witness who contradicted the trial testimony of the government’s star witness and implicated that witness as the true perpetrator of the crime. The government claimed that it did not

(2) the exculpatory evidence was not subject to disclosure because it would have been inadmissible at trial;<sup>106</sup> (3) the exculpatory statement was not *Brady* evidence because the same statement also contained other inculpatory information;<sup>107</sup> or (4) the prosecutor did not personally believe the witness's pretrial inconsistent statement was credible.<sup>108</sup> It is difficult to accept that prosecutors in possession of evidence that falls squarely within the scope of the *Brady* doctrine could honestly form the professional opinion that disclosure was not mandated for any of these reasons. As one court stated in rejecting a prosecutor's incredulous excuse for suppressing blatantly exculpatory evidence, "Such an explanation is laughable, offering it an effrontery. It does not wash, nor do we believe for a moment that the prosecutor could have been so simple-minded as to have believed it would."<sup>109</sup>

Thus, although the wide array of reform proposals that have been advanced by jurists and legal scholars have the potential to greatly improve

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disclose the witness's pretrial statements to the defense because the government did not find the witness to be credible. In reversing the murder conviction, the trial judge stated:

[B]oth the identity and the testimony of Ms. Gibson, unquestionably, without any doubt, should have been turned over to the defense well in advance of trial. . . . [T]he information about Ms. Gibson's identity and her information and her grand jury testimony and her police statement was withheld from the defense consciously, deliberately, and as a tactic, because I think the Government probably recognized it as not particularly favorable to their case, at a minimum, and may have recognized it as something that could be mischievous in the hands of a good defense lawyer. . . . In my opinion, it was patently disclosable, not a debatable point. . . . [T]he government's attempt to explain away the evidence that is, in my view obviously favorable to the accused, is unavailing largely for the reason pointed out by [defense counsel]: It's not for [the prosecutor] to decide whether Ms. Gibson would be believable . . . it's for the jury to decide . . . .

Transcript of Hearing on Post-Trial Motion to Dismiss at 9-10, 13, *United States v. Harrington*, No. 2007-CF1-22855 (D.C. Sup. Ct. Apr. 17, 2009) (on file with author) (emphasis added).

<sup>106</sup> *Branch v. State*, 469 S.W.2d 533 (Tenn. Crim. App. 1969) (arguing that a lack of proper chain-of-custody excused the prosecutor's failure to disclose the knife purportedly belonging to decedent that was given to the police shortly after a fatal brawl).

<sup>107</sup> Gwen Filosa, *Review Board Clears Prosecutor*, TIMES-PICAYUNE, Sept. 25, 2004, at B1 (discussing statements made by Roger Jordan, a seasoned prosecutor in New Orleans, during a state bar disciplinary proceeding related to his prosecution of Shareef Cousins for capital murder); *see also* *State v. Cousins*, 710 So. 2d 1065, 1066-67 (La. 1998) (discussed *supra* note 66).

<sup>108</sup> *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985) ("As for the prosecutor's attempted explanation of his refusal to produce the police report[,] . . . [i]t was for the jury, not the prosecutor, to decide whether the contents of an official police record were credible, especially where—as here—they were in the nature of an admission against the state's interest in prosecuting Lindsey. On such grounds as these, prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense."); *see, e.g., Shelton v. United States*, 983 A.2d 363 (D.C. 2009) (discussed *infra* Part IV).

<sup>109</sup> *King*, 769 F.2d at 1040.

the disclosure of *Brady* evidence, comprehensive *Brady* reform must also include measures specifically designed to address intentional, purposeful violations. The two proposals discussed in Parts III and IV below recommend the presentation of evidence of the *Brady* misconduct at trial either as a punitive sanction or as relevant circumstantial evidence of the government's consciousness of a weak case.

### III: THE “BRADY INSTRUCTION” SANCTION

If a young boy takes his sister's rag doll and purposely hides it from her to prevent his little sister from playing with the doll, upon learning of her son's behavior, the mother will likely order her son to return the doll and instruct the little boy not to take his sister's toy again. Is more punishment of the little boy mandated? Probably not. While the mother clearly has the authority and the discretion to impose more severe sanctions, like ordering the little boy to forego playing with his own toys for a while, the little boy's transgression probably is not serious enough to warrant more than a mild rebuke from his mother. If instead of a rag doll, the little boy intentionally withheld his sister's asthma inhaler while she was gasping for air during an asthma attack, the mother would undoubtedly view her son's conduct with greater disdain and feel it necessary and appropriate to impose a sanction beyond simply ordering him to give his sister the medication. In the criminal justice system, the suppression of *Brady* evidence is treated with the triviality of a lost rag doll, when it should be treated with the exigency of an asthma attack. Instead of exercising its broad authority to impose appropriate, meaningful sanctions, courts simply order the government to disclose the *Brady* evidence and offer the defense a continuance to “catch its breath” before the next trial date. As discussed more fully below, compelled disclosure, without more, is an inadequate sanction for the intentional destruction or withholding of *Brady* material, because it does little to enforce the constitutionally mandated disclosure duty and does even less to deter future violations.

Given the fact that the existing extrajudicial entities with the power to regulate prosecutors and punish *Brady* misconduct have been ineffective or underutilized, the burden falls on judges to redress *Brady* misconduct.<sup>110</sup> In addition to the direct assault on the defendant's right to a fair trial, *Brady* violations corrupt the fact-finding process of the trial.<sup>111</sup> As Justice

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<sup>110</sup> Joy, *supra* note 104, at 631 (stating that until systemic reforms are implemented judges have the responsibility to take measures to curtail *Brady* violations).

<sup>111</sup> Taylor v. Illinois, 484 U.S. 400, 409 (1988) (“The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.”); *see also* Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37

Brennan stated, “Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence. Violations of discovery rules thus cannot go uncorrected or undeterred without undermining the truthseeking process.”<sup>112</sup> Moreover, nondisclosure of *Brady* evidence gives prosecutors the authority to usurp the power of the trial judge and unilaterally decide what evidence will be presented at trial and what evidence will be excluded.<sup>113</sup> In so doing, the jury is forced to reach a verdict based on a distorted, “prosecution-friendly” version of the facts. Predictably, this leads to unreliable verdicts, wrongful convictions, and the erosion of public confidence in the ability of the judicial system to convict only the guilty and free the innocent. Courts, therefore, have a vested interest in imposing meaningful sanctions to thwart this invidious form of prosecutorial misconduct to vindicate the affront to judicial integrity. The goal advanced by imposing meaningful sanctions for *Brady* violations is not merely to punish the individual prosecutor but to ensure that the government does not feel empowered to violate constitutional mandates with impunity.<sup>114</sup> Jurists and legal scholars are in accord that sanctions should be imposed not only to protect the defendant’s right to a fair trial but also to deter future *Brady* violations.<sup>115</sup>

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SETON HALL L. REV. 335, 344 (2007) (“[W]hen left unchecked [prosecutorial] misconduct undermines the integrity of the system itself, thereby threatening the equally important appearance of a fair trial. . . . [T]here is an incalculable cost in damaged integrity [to the judicial system itself] that may be difficult to repair[.]”) (alteration in original) (emphasis omitted); Joy, *supra* note 104, at 628 (“When false testimony is introduced into evidence, or exculpatory evidence is withheld from the defendant for possible use at trial, the justice system is derailed.”); Paul J. Speigelman, *supra* note 94, at 131 (“Intentional wrongdoing in court by perhaps the most critical member of the government law enforcement team calls into question the fairness and integrity of the trial.”).

<sup>112</sup> *Taylor*, 484 U.S. at 419 (Brennan, J., dissenting); *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005) (“When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire justice system is called into doubt and public confidence in it is undermined.”).

<sup>113</sup> *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (stating that the disclosure duties imposed by the *Brady* doctrine “preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations”).

<sup>114</sup> Dale A. Nance, *Evidentiary Foul Play: The Roles of Judge and Jury in Responding to Evidence Tampering*, 7 INT’L COMMENT. ON EVIDENCE 3 (2009) (stating that deterrence of discovery misconduct is a goal of imposing discovery sanctions, but noting that sanctions are not designed to punish the litigant but constitute an “effort to protect the integrity of the system of adjudication by refusing to submit cases to the jury when they have been inappropriately prepared”).

<sup>115</sup> *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993) (“Quite as important as assuring a fair trial to the defendants now before us is assuring that the circumstances that gave rise to the misconduct won’t be repeated in other cases.”); *State v. Kaiser*, 486 N.W.2d 384 (Minn. 1982) (stating that reversal of conviction is sometimes warranted not simply to

A. THE CURRENT SANCTIONS SCHEME FOR *BRADY* VIOLATIONS

The Supreme Court has never articulated the range of sanctions that should be imposed when the government fails to comply with the *Brady* disclosure duty.<sup>116</sup> In practice, when *Brady* violations are discovered after trial, the usual remedy is a new trial in which the previously withheld evidence can be introduced by the defense.<sup>117</sup> When *Brady* violations are discovered pretrial, the court usually orders the government to disclose the suppressed evidence and, if necessary, grants a continuance in order to give the defense the opportunity to make effective use of the exculpatory information.<sup>118</sup> Simply ordering the prosecutor to disclose the *Brady* evidence is, of course, more of a directive than a sanction, because the prosecutor is not required to do anything above and beyond that which was already constitutionally mandated.<sup>119</sup> Under this scheme, the consequences of noncompliance with *Brady* are identical to the consequences of compliance—disclosure of favorable evidence to the defense. Therefore, simply mandating compelled disclosure as a *Brady* sanction is not a potent deterrent to prosecutors who would purposely withhold favorable evidence.

Likewise, granting a continuance of the trial date in response to a *Brady* violation is not an effective sanction alternative because of the wide range of collateral consequences. First, defendants that have been detained pretrial are forced to endure a more prolonged loss of liberty if a continuance of the trial date is necessitated by the government's failure to comply with its *Brady* disclosure duty. In jurisdictions with crowded court dockets, the length of the delay could extend for several months. Moreover, following the disclosure of the previously suppressed *Brady* evidence, the

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remedy a potentially unjust trial result, but as a means to provide the incentive to prosecutors to obey disclosure obligations); see also Weeks, *supra* note 81, at 913 ("By increasing substantially the risk of reversal as a sanction for suppression of exculpatory evidence, the . . . standards might reasonably be expected to increase the degree of disclosure by prosecutors anxious to avoid this result."). See generally Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for the Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2945 nn.288-89 (discussing the goals advanced by discovery sanctions).

<sup>116</sup> See Thomas F. Liotti, *The Uneven Playing Field, Part III or What's on the Discovery Channel*, 77 ST. JOHN'S L. REV. 67, 74 (2003) (concluding that *Brady* violations must be met with "real remedies with serious consequences for prosecutors who fail to comply").

<sup>117</sup> See LAFAVE, *supra* note 73, at 1143.

<sup>118</sup> *Id.*

<sup>119</sup> See Edward J. Imwinkelried, *A New Antidote for an Opponent's Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent's Case*, 1993 BYU L. REV. 793, 794 (discussing Judge Myron Bright's observation that merely ordering disclosure as a sanction for discovery misconduct is ineffective because "it does little good to merely order a litigant to do what he should have done four months before").

defense will be required to spend additional time, money, and effort to make effective use of the new information (locating witnesses, hiring experts, seeking forensic testing, pursuing investigative leads).<sup>120</sup> This, in turn, leads to the needless waste of judicial resources when courts must respond to additional motions and conduct evidentiary hearings stemming from the belated disclosure of exculpatory evidence. Consequently, to create a strong disincentive for prosecutors to suppress *Brady* evidence, and to prevent this needless waste of time and resources in the criminal justice system, courts must do more than grant a continuance of the trial date to redress *Brady* misconduct.

At the other end of the sanctions spectrum is the remedy of dismissal. Though dismissal of the indictment would be an effective sanction to deter prosecutors from suppressing *Brady* evidence and would adequately address the harm to defendants and the courts, dismissal is a “disfavored” or “drastic”<sup>121</sup> sanction that is rarely imposed.<sup>122</sup> Generally, courts will only dismiss criminal charges as a sanction for *Brady* violations when there is a pattern of egregious *Brady* violations or when *Brady* evidence has been permanently lost or destroyed by the government.<sup>123</sup> While some state court rules expressly allow for dismissal as a sanction for “particularly

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<sup>120</sup> Transcript of Motion Hearing, *supra* note 4, at 26. Defense counsel stated:

The efforts that were made by . . . the Defense in this case to obtain discovery and *Brady* material are unprecedented . . . [O]f the thousands of hours we spent defending Ted Stevens, I would estimate that 25 percent to a third of the time was focused on things we shouldn't have had to ask for, discovery and *Brady* material time and time again.

<sup>121</sup> *Id.*; *People v. Kelly*, 467 N.E.2d 498, 501 (N.Y. 1984) (finding a discovery violation and stating “as a general matter the drastic remedy of dismissal should not be invoked where less severe measures can rectify the harm done by the loss of evidence”); *see e.g.*, *People v. Jackson*, 637 N.Y.S.2d 158 (N.Y. Sup. Ct. 1995), *aff'd*, 695 N.Y.S.2d 357 (N.Y. App. Div. 1999) (holding that dismissal was not an appropriate sanction where witness suffered memory loss but court permitted the introduction of prior statements at trial).

<sup>122</sup> JOSEPH F. LAWLESS, *PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS* 5-109 (4th ed. 2008) (stating that counsel may expect dismissal of charges to be rare and that the more expected procedure will be the exclusion of certain evidence or the granting of a continuance). *See generally* BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* § 5.22, at 5-43 to -45 (2d ed. 2008) (supplemented annually) (stating that the court exceeds its authority in granting dismissal as a sanction for *Brady* violation where a less severe sanction could have cured the violation).

<sup>123</sup> *United States v. Pollock*, 417 F. Supp. 1332, 1349 (D. Mass. 1976) (emphasizing that dismissal was the only adequate sanction when notes that may have corroborated the defense theory that the defendant was working undercover as an agent for a government agency were intentionally destroyed in bad faith); Jones, *supra* note 115, at 2916 n.146 (citing numerous cases where courts found dismissal warranted due to destruction of *Brady* evidence or “flagrant” *Brady* violations); *see also* Ferrera v. *United States*, 456 F.3d 278 (1st Cir. 2006) (affirming district court’s motion to vacate defendant’s conviction under the federal RICO statute based on prosecutor’s failure to disclose a key witness’s recantation).

egregious” *Brady* violations,<sup>124</sup> other jurisdictions prohibit dismissal as “too severe” of a sanction for *Brady* misconduct.<sup>125</sup> Thus, absent extreme facts,<sup>126</sup> courts very rarely dismiss a criminal case due to *Brady*

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<sup>124</sup> See DIST. MASS. LOCAL R. 1.3 (“Failure to comply with any of the directions or obligations set forth in, or authorized by, these Local Rules may result in dismissal, default, or the imposition of other sanctions as deemed appropriate by the judicial officer.”); ME. R. CRIM. P. 16(d); N.C. GEN. STAT. ANN. § 15A-910(a)(3b) (2009); see also *Brady* Report, *supra* note 35, at 60.

<sup>125</sup> *Brady* Report, *supra* note 35, at 60; e.g., LA. CODE CRIM. PROC. ANN. art. 729.5(A) (2009) (“If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may . . . enter such other order, *other than dismissal*, as may be appropriate.” (emphasis added)); *United States v. Davis*, 578 F.2d 277, 279-80 (10th Cir. 1978) (holding that new trial, not dismissal, is remedy for suppression of *Brady* evidence); *People v. Wimberly*, 7 Cal. Rptr. 2d 152, 163 (Cal. Ct. App. 1992) (“Even where the prosecution acts willfully and in bad faith . . . ‘the extreme sanction of dismissal is rarely appropriate unless a defendant has established prejudice . . . and the prejudice cannot be otherwise cured . . .’”); *Commonwealth v. Burke*, 781 A.2d 1136 (Pa. 2001) (holding that dismissal of charges was extreme and inappropriate sanction for *Brady* violation).

<sup>126</sup> The 2007 campus shooting at Delaware State University (DSU) is one recent example of a dismissal based on *Brady* violations. Order upon Defendant’s Motion to Dismiss, *Delaware v. Braden*, No. 0709030642 (Del. Super. Ct. May 19, 2009) [hereinafter *Braden* Order] (on file with author). On September 21, 2007, shots were fired at a group of students leaving a DSU campus eatery, leaving one student dead and another student injured. The investigation eventually led to the arrest of a DSU student, Loyer Braden, who was charged with second-degree murder and a series of assault and gun charges. The government alleged that Braden fired the shots to retaliate against a DSU student in the crowd with whom he had a dispute. Malcolm McQuiston, another DSU student present in the crowd when the shots were fired, was interviewed by police and later gave a statement exonerating Braden and identifying two other people as the shooters. *Id.* According to the government, although the police turned McQuiston’s statement over to the prosecutors one month after the shooting, prosecutors never listened to or viewed the tape and were unaware of its content until they began preparing for trial. State’s Answer to the Defendant’s Motion to Dismiss, *Delaware v. Braden*, No. 0709030642 (Del. Super. Ct. April 14, 2009). Thus, despite written defense requests for disclosure of *Brady* evidence in December 2007 and June 2008, the McQuiston statement was not disclosed to the defense until April 2009, the eve of trial when jury selection was about to begin, and only after disclosure was ordered by the court. *Braden* Order, *supra*, at 2-3. By the time of the belated disclosure, McQuiston could not be located, despite a month-long search by both the defense and the prosecution. The trial judge granted the defense motion to dismiss based on the government’s loss of *Brady* evidence. *Braden* Order, *supra*, at 8. Although McQuiston was subsequently located, the government opted not to appeal the trial judge’s ruling. The government stated that its decision not to appeal was based, in part, on the fact that a “key” prosecution witness had recanted his original statement implicating Braden in the shooting. Inexplicably, the government also failed to inform the defense about this second piece of exculpatory information. See Media Release, Del. Dep’t of Justice, Delaware Department of Justice Announces Appellate Decision in Criminal Case Against Defendant Loyer Braden (May 28, 2009), available at <http://attorneygeneral.delaware.gov/media/releases/2009/appelatedecisioncriminalcase.pdf>; *Dismissed Charges Against N.J. Man Accused in Delaware State Shooting Will Not Be Appealed*, ASSOCIATED PRESS, May 28, 2009, <http://www.nj.com/news/index.ssf/>



misconduct.<sup>127</sup> Although legal scholars and jurists have proposed *Brady* reforms that strongly encourage the expanded use of dismissal as a sanction for intentional violations, those reforms have not been adopted by state and federal courts.<sup>128</sup>

While it is well settled that state and federal courts have the power to impose a wide range of sanctions for *Brady* violations, courts have not developed effective sanctions that fall between the minimal sanction of compelled disclosure and the maximum sanction of dismissal. Even though all state courts have specific court rules and statutes that govern and regulate the disclosure of *Brady* evidence,<sup>129</sup> state laws are silent on the specific sanctions to be imposed for noncompliance with the *Brady* disclosure duty.<sup>130</sup> Instead, both state and federal courts have relied upon the discovery sanctions in Rule 16(d) of the Federal Rules of Criminal Procedure or its state law equivalent. Rule 16 authorizes a court to sanction discovery violations by ordering disclosure, precluding evidence, granting a continuance, or entering “any other order that is just under the circumstances.”<sup>131</sup> As discussed below, a strongly worded instruction that

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2009/05/del\_attorney\_general\_will\_not.html; *Murder Case Against Suspected Delaware University Shooter Dismissed*, FOXNEWS.COM, May 19, 2009, <http://www.foxnews.com/story/0,2933,520723,00.html>.

<sup>127</sup> See, e.g., *People v. Roberts*, 611 N.Y.S.2d 214 (N.Y. App. Div. 1994) (granting new trial when district attorney kept exculpatory statement for over a year until the day before trial when witness could no longer be found).

<sup>128</sup> E.g., Am. Coll. of Trial Lawyers, *supra* note 100, at 120 (proposing the codification of the *Brady* disclosure duty in Federal Rule of Criminal Procedure 16 and advocating “dismissal of an indictment for failure to comply with Rule 16 upon a showing of substantial prejudice to the defendant or intentional misconduct by the government”); see also Cicchini, *supra* note 111, at 336 (proposing rule requiring automatic mistrial for prosecutorial misconduct at trial and proposing dismissal with prejudice for intentional prosecutorial misconduct). But see Peter Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 827 (1999) (arguing that dismissal of charges should not be available simply to deter prosecutorial misconduct and stating that courts “should not rely on granting a particular defendant relief to serve as a check on future prosecutorial actions in other cases except to the extent necessary to vindicate a specific constitutional protection breached by the prosecutorial misconduct. . . . [C]onstitutional protections belong to individuals, not to courts for use as a means to police the conduct of prosecutors.”).

<sup>129</sup> See *Brady* Report, *supra* note 35, at 49-59.

<sup>130</sup> *Id.* at 59-60.

<sup>131</sup> FED. R. CRIM. P. 16(d)(2) states:

If a party fails to comply with this rule, the court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.

Many state rules parallel the federal rule. See, e.g., ALA. R. CRIM. P. 16.5; ARK. R. CRIM. P. 19.7(a); FLA. R. CRIM. P. 3.220(n)(1); HAW. R. PENAL P. 16(9)(i); ILL. SUP. CT. R. 415(g)(i); LA. CODE CRIM. PROC. ART. 729.5(A); MINN. R. CRIM. P. 9.03(8); VT. R. CRIM. P. 16.2(g)(1);

informs the jury that the government intentionally suppressed favorable evidence should be included among the sanctions that is “just under the circumstances” to redress intentional *Brady* violations.

#### B. AN ALTERNATIVE SANCTION: THE “BRADY INSTRUCTION”

Informing the jury of the government’s intentional suppression of *Brady* evidence is an appropriate “middle ground” sanction between simple disclosure and complete dismissal. The proposed “*Brady* instruction” is closely akin to adverse inference instructions, also known as “missing evidence” or “spoliation” instructions. Those specially crafted instructions are traditionally used by courts to address evidentiary imbalances created when discoverable or admissible evidence is suspiciously lost or inexplicably destroyed while in the exclusive possession of an adverse party.<sup>132</sup> Commonly, adverse inference instructions inform jurors that they are permitted to infer that if the absent evidence had been produced at trial, it would have been damaging to the party responsible for its loss.<sup>133</sup>

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WASH. SUP. CT. CRIM. R. 4.7(h)(7)(i). Beyond the Rule 16(d) enumerated sanctions, a handful of states expressly permit courts to impose additional sanctions, including contempt or an assessment of costs incurred by opposing party for willful violations. *See, e.g.*, ARK. R. CRIM. P. 19.7(b); FLA. R. CRIM. P. 3.220(n)(2); HAW. R. PENAL P. 16(9)(ii); ILL. SUP. CT. R. 415(G)(II); LA. CODE CRIM. PROC. ART. 729.5(B) (providing that willful violation of discovery rule “shall be deemed constructive contempt of court”); MINN. R. CRIM. P. 9.03(8); VT. R. CRIM. P. 16.2(g)(2); WASH. SUP. CT. CRIM. R. 4.7(h)(7)(ii); *see also Brady Report, supra* note 35, at 60 n.136.

<sup>132</sup> *See State v. Fulminante*, 975 P.2d 75, 93 (Ariz. 1999) (“When police negligently fail to preserve potentially exculpatory evidence, an instruction . . . permits the jury to infer that the evidence would have been exculpatory.”); *State v. Willits*, 393 P.2d 274, 276, 279 (Ariz. 1964) (ordering the trial court on remand to give an adverse inference instruction as a sanction for the government’s *Brady* misconduct and stating that the unfavorable inference may be sufficient to “create a reasonable doubt as to the defendant’s guilt”); *People v. Wimberly*, 7 Cal. Rptr. 2d 152, 162-64 (Cal. Ct. App. 1992) (holding that trial court properly gave jury remedial instruction that improper destruction of evidence by prosecution could support inference adverse to prosecution which might be sufficient to raise reasonable doubt); *State v. Maniccia*, 355 N.W.2d 256, 259 (Iowa 1984) (holding that the defendant’s right to due process was violated due to the state’s destruction of evidence and imposing an adverse inference instruction); *Tinsley v. Jackson*, 771 S.W.2d 331, 332 (Ky. 1989) (citing *Sanborn v. Commonwealth*, 754 S.W.2d 534, 539 (Ky. 1988), *rev’d on other grounds*, 892 S.W.2d 542 (Ky. 1994)) (declaring that a “missing evidence instruction” likely would be sufficient to “offset the prosecutor’s misconduct”).

<sup>133</sup> *See generally* David J. Kessler, *Spoliation in Capital Post-Conviction Proceedings: Theory of Spoliation In Habeas Corpus—Part I*, CHAMPION, Nov. 2005, at 14, 16. *See also* Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 293-94 nn.396-97 (2008) (collecting cases both demanding and relaxing the requirement of proof of bad faith or intentional destruction of evidence as a prerequisite for an adverse inference instruction).

While adverse inference instructions are most commonly given when evidence has been permanently lost, trial judges have infrequently employed the instructions to redress *Brady* misconduct. In *People v. Jackson*,<sup>134</sup> the court imposed an adverse inference instruction following the government's intentional withholding of exculpatory evidence. The three defendants were on trial for a triple homicide that occurred inside an apartment. Shortly after the crime, the police interviewed a witness, Nicholas Taylor, and memorialized his oral statement. Thereafter, Taylor gave a sworn statement to the prosecutor. In both statements, Taylor stated that he was in the hallway outside of the apartment when the victims were shot and he saw one of the victims open the apartment door after the defendant departed the premises. Taylor stated that he saw the defendant standing outside of the apartment building at the time the victims were killed in the apartment. For three years, the government did not disclose Taylor's exculpatory statements to the defense. Due to his severe learning disabilities, Taylor was unable to recall any of the critical details of his earlier statements by the time of trial. The court found that the government's failure to make timely disclosure of Taylor's "extremely exculpatory" statement was intentional and prejudicial to the defense.<sup>135</sup> The court also found that sanctions were warranted because the government was well aware of the fact that Taylor's disability created "a high probability of failing memory."<sup>136</sup> The court denied a defense request for dismissal but permitted the defense to introduce Taylor's two pretrial statements, and it ruled that "the jury will be provided with an adverse inference charge regarding the *Brady* violation by the People."<sup>137</sup>

The Federal Rules of Civil Procedure provide additional support for the use of a *Brady* instruction to redress the intentional suppression of *Brady* evidence. Rule 37 empowers the court to impose sanctions on civil litigants and specifically authorizes the court to "inform the jury of the party's failure" to disclose discoverable material.<sup>138</sup> Rule 37 was amended

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<sup>134</sup> *People v. Jackson*, 637 N.Y.S.2d 158 (N.Y. Sup. Ct. 1995).

<sup>135</sup> *Id.* at 189-91. The government admitted that it was aware of the statement but argued that Taylor's statement did not fall within *Brady* because there were several inconsistencies in Taylor's statements, and the government did not consider them credible. *Id.* at 186-87. The court summarily rejected this contention as "disingenuous" and found that the exculpatory value of Taylor's statements "is evident on its face" without regard to the prosecutor's unilateral assessment of the credibility of the witness's account.

<sup>136</sup> *Id.* at 190.

<sup>137</sup> *Id.* at 191.

<sup>138</sup> Rule 37(c)(1)(B) provides that where a party "fails to provide information or identify a witness," the court can employ a wide range of sanctions, including "inform[ing] the jury of the party's failure." FED. R. CIV. P. 37(c)(1)(B); see *Tarlton v. Cumberland County Corr. Facility*, 192 F.R.D. 165 (D.N.J. 2000) (discussing discovery obligations in civil cases and

to include the jury instruction sanction in order to enhance the court's power to enforce the disclosure duties imposed on civil litigants.<sup>139</sup> Specifically, the Advisory Committee noted:

Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides for a wide range of other sanctions—such as . . . allowing the jury to be informed of the fact of nondisclosure—that . . . can be imposed when found to be warranted after a hearing.<sup>140</sup>

Rule 37 should be instructive to trial judges in criminal cases seeking to impose meaningful sanctions for noncompliance with *Brady* disclosure duties. The practical recognition in the civil rules that strong sanctions are necessary to ensure the disclosure of unfavorable information that might “advantageously be concealed” by a litigant mirrors the concerns over nondisclosure of *Brady* evidence. As a matter of policy, if adverse inference instructions have been expressly adopted as a sanction in civil cases in which the verdict will, at most, cause a litigant to suffer pecuniary losses, there is no principled justification for not imposing the sanction in criminal cases in which the verdict could result in a loss of liberty or life. Recognizing the disparity between the higher standards imposed upon civil litigants than imposed upon the government in criminal cases, one judge remarked, “Surely if that rule is to be invoked to protect the pocketbook of an insurance company it should be invoked in the instant case to protect natural persons from being sent to jail unjustly.”<sup>141</sup>

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the mandatory nature of Rule 37 sanctions). The jury instruction sanction was imposed by the court in *McCloud v. Goodyear Dunlop Tires North America, Ltd.*, No. 04-1118, 2007 WL 2584289, at \*5 (D. Ill. Aug. 23, 2007), where the court found that the defendant's response to discovery was “at best deliberately misleading and at worst a deliberate attempt to hide the identity of a damning witness.” See also *Howell v. Maytag*, 168 F.R.D. 502, 508 (M.D. Pa. 1996) (concluding that destruction of the evidence “requires a jury instruction on the spoliation inference”); EDWARD J. IMWINKELRIED, 2 UNCHARGED MISCONDUCT EVIDENCE § 7:2 (stating that in *Slessinger v. Walt Disney Corp.*, Case No. BC 022365 (Cal. Super. Ct. June 16, 2000), the trial judge instructed the jury that it “may infer that Disney willfully suppressed evidence in order to prevent such evidence from being presented in this trial and the jury may consider that fact in determining what inferences to draw from the evidence”).

<sup>139</sup> FED. R. CIV. P. 37 advisory committee's note to 1987 amendment.

<sup>140</sup> *Id.*

<sup>141</sup> See *United States v. Antonelli Fireworks*, 155 F.2d 631, 658 (2d Cir. 1946) (Frank, J., dissenting) (criticizing the court for finding harmless improper statements made by the prosecutor at trial and noting that similar conduct would have been reversible error in a civil case).

### 1. *The Formulation of the Brady Instruction*

In recent years, a few legal scholars and jurists have proposed greater use of adverse inference instructions to sanction discovery misconduct in both civil and criminal cases.<sup>142</sup>

One instruction specifically designed to address *Brady* violations would inform the jury as follows:

[i]n this case, the government failed to turn over promptly, as required by law, a piece of evidence favorable to the defense, namely [evidence], of which the defense learned only on [date], when [means of disclosure]. Although this delay does not necessarily bear on the guilt or innocence of the defendant, you may, if you think it appropriate in light of all the evidence, take into account the possible harm to the defense caused by this delay when evaluating whether the government has proven the defendant's guilt beyond a reasonable doubt.<sup>143</sup>

The strength of this instruction is in the clarity with which it conveys the government's disclosure duty and its breach of that duty. Both of those components are essential for a jury to appreciate fully the significance of the government's *Brady* violation. The weakness of this instruction, however, is that it does not go far enough. The instruction fails to inform the jury that the government's misconduct was intentional and not the result of an innocent or careless oversight. This fact underscores the significance of the government's misconduct. Also, the instruction directs the jury to gauge the possible harm or prejudice to the defense caused by the withholding of the evidence. However, in finding that the government violated *Brady*, the trial judge necessarily would have made that determination in finding that the withheld evidence met the *Brady* materiality requirement. Thus, allowing the jury to assess whether the defense was prejudiced by the *Brady* violation is misdirected. The

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<sup>142</sup> Elizabeth N. Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1459 (2006); see also TASK FORCE ON WRONGFUL CONVICTIONS, *supra* note 35, at 26-27 (recommending the use of a jury instruction sanction for Brady violations); Imwinkleried, *supra* note 119, at 793-96 (advocating for broader use of litigating discovery violations at trial as a sanction for discovery misconduct by litigants).

<sup>143</sup> Dewar, *supra* note 142, at 1457. *Brady* instructions have also been proposed by other legal scholars. See, e.g., 3 KEVIN F. O'MALLEY, JAY E. GRENIG, & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104.27 (5th ed. 2000) ("If you should find that a party willfully [suppressed] [hid] [destroyed] evidence in order to prevent its being presented in this trial, you may consider such [suppression] [hiding] [destruction] in determining what inferences to draw from the evidence or facts in the case."); 4 THOM LUNDY, THE NATIONAL CRIMINAL JURY INSTRUCTIONS COMPENDIUM § 36.1.2 (2008), available at <http://www.juryinstruction.com/toc.shtml> (password and paid registration required) ("If you find that the [government] attempted to suppress evidence in any manner, you may draw an adverse inference to the prosecution. Such an adverse inference may be sufficient, alone or in combination with other matters, for you to have a reasonable doubt as to defendant's guilt.").

language of this instruction simply lacks the power to serve as an effective sanction that will deter *Brady* misconduct.

A more appropriate *Brady* instruction would focus the jury's attention on what weight, if any, it might choose to give the government's conduct in its determination of whether the government has proven guilt beyond a reasonable doubt. A jury should be told, plainly and clearly, that the government's intentional nondisclosure of favorable evidence was wrong. A jury should also be told that it may draw a permissive inference regarding the connection between the government's misconduct and whether the government has proven guilt beyond a reasonable doubt. The language of the *Brady* instruction should deter prosecutors from withholding *Brady* evidence in order to gain a tactical advantage in the litigation. Under the current state of the law, prosecutors can perform their own private cost-benefit analysis to determine whether suppression of *Brady* evidence is "worth the risk" of any sanctions. This cost-benefit calculation is greatly informed by the improbability that the suppressed evidence will ever be discovered, the remote possibility that there will be any adverse consequences to the government's case, and the unlikely prospect that the individual prosecutor will be held accountable. The prosecutor is forced to make a very different calculation, however, if a presumptive consequence of intentional *Brady* misconduct is an instruction to the jury that places the government in a disadvantageous position, shifting the tactical advantage of nondisclosure to the defense. The threat of such a sanction would make the suppression of evidence a far riskier proposition and would cause prosecutors to correctly err on the side of disclosure.<sup>144</sup> A punitive *Brady* instruction that comprehensively addresses all of these concerns would be the following:

Ladies and Gentlemen,

Under the United States Constitution, in order for the defendant to receive a fair trial, the government is required to inform the defense of any information known to the government that tends to suggest the defendant might not have committed the crime(s) charged as well as information that casts doubt on the credibility of the government's own evidence. In this case, the government intentionally withheld such evidence from the defense. Specifically, the government failed to inform the defense that [ ]. In evaluating the merits of this case, you can decide what weight, if any, to give to the government's misconduct. The government's actions, standing alone, or in combination with other facts presented in this case, may create a reasonable doubt in your mind about the defendant's guilt.

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<sup>144</sup> Dewar, *supra* note 142, at 1462-65 (stating that "the very existence of the [jury instruction] remedy would cause prosecutors to take more care in carrying out their *Brady* duties out of heightened fear of imperiling their convictions" and that "if prosecutors do suffer lost convictions, jury nullification, or public outcry, [they may be provoked to improve the delivery of *Brady* information]").

This proposed instruction explains what is required under *Brady* and why disclosure is important (and not a mere “technicality”). This instruction also explains exactly what the government did wrong and appropriately allows the jury to decide the significance of the misconduct. While this instruction will not be outcome determinative in every case (nor should it be), the instruction will likely have a greater impact if the jury finds that the *Brady* evidence is central to the guilt/innocence determination. Conversely, the *Brady* instruction will have less impact if the jury believes the government, notwithstanding the *Brady* violation, has presented compelling evidence of guilt.

## 2. *The Limitations of the “Brady Instruction” Sanction*

The *Brady* instruction sanction is not a panacea for all *Brady* violations. Even if the court finds that the prosecutor intentionally suppressed material exculpatory or impeachment evidence, the trial court’s decision to impose this particular sanction is completely discretionary.<sup>145</sup> Without a statute or court rule, the defense would not have a right to a *Brady* instruction as a remedy. Moreover, the *Brady* instruction would only be as effective as the language used by the court to convey the severity of the violation and explain the nexus between the government’s misconduct and the burden of proof. The exact language of jury instructions is generally left to the sound discretion of the trial judge.<sup>146</sup> The court could, therefore, adopt a very weak instruction that would have little impact on the jury and no deterrent effect upon prosecutors.<sup>147</sup>

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<sup>145</sup> 33 FEDERAL PROCEDURE § 77:272 (West 2009) (stating that the trial judge has discretion as to the style, form, and language of jury instructions, and the judge’s formulation of the instructions will be reversed only upon a showing of prejudice); AM. JUR. TRIAL § 921 (West 2007) (noting that trial judges make the decision whether to give a jury instruction and which instruction to give, and such decisions may not be overturned absent an abuse of discretion); *see, e.g.*, *State Farm Fire & Gas. Co. v. Short*, 459 N.W.2d 111 (Minn. 1990) (noting that trial courts enjoy broad discretion in determining jury instructions).

<sup>146</sup> *See* 33 FEDERAL PROCEDURE, *supra* note 145, § 77:272 (noting that while the parties are entitled to jury instructions which reflect correct legal standards, they are not entitled to instructions phrased exactly as they desire); *see also* *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26 (1st Cir. 2003) (stating that jury instruction could be overturned only if a party’s substantial rights are prejudiced, and the instruction misleads the jury or misstates the correct legal standard).

<sup>147</sup> The efficacy of using adverse inference instructions to punish and deter discovery misconduct has drawn criticism from some legal scholars. Nance, *supra* note 114, at 1. Recently, Professor Nance has urged the complete elimination of adverse inference instructions in most cases. Professor Nance contends that reliance on adverse inference instructions is misplaced, because it is the role of the court—not the jury—to manage evidence, set discovery standards for litigants, and apply discipline when there are discovery abuses by litigants. Nance argues that what jurors actually do when given an adverse

On balance, the use of a stern, carefully crafted *Brady* instruction could simultaneously address the harms occasioned by intentional *Brady* misconduct and provide the desired benefits of a *Brady* sanction, including the amelioration of the harm suffered by the defendant, vindication of the integrity of the court, and deterrence of prosecutorial misconduct.

#### IV. INTENTIONAL *BRADY* MISCONDUCT AND THE “CONSCIOUSNESS OF A WEAK CASE” INFERENCE

Independent of the trial judge’s decision to impose a strongly worded *Brady* instruction as a sanction for *Brady* misconduct, evidence of intentional *Brady* misconduct is admissible at trial to show that the government’s case is weak.<sup>148</sup> Under well-established principles of evidence, the government’s intentional suppression of evidence gives rise to an inference that the prosecutor engaged in obstructionist misconduct, because she knew that the government’s case was weak and would be further weakened by the presentation of the *Brady* evidence at trial. That subjective assessment by the trial prosecutor—the person in the best possible position to know the merits of the government’s evidence—permits the inference that the government’s case is, in fact, weak.<sup>149</sup> Given that the government has the burden of proof in a criminal case and must prove guilt beyond a reasonable doubt, evidence that the government’s case is weak is relevant to whether the government can meet its burden. Moreover, the fact that the *Brady* evidence was eventually disclosed to the defense and made available for use at trial does not diminish the evidentiary value of the government’s conduct in withholding critical evidence.

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inference instruction is decide whether the litigant’s discovery misconduct warrants “increasing the burden of persuasion” to the point where the litigant loses. While Professor Nance correctly identifies some of the weaknesses of adverse inference instructions, these concerns must yield in the face of intentional *Brady* misconduct that poses a far greater threat to the integrity of the adjudication process and results in the wrongful conviction of innocent people.

<sup>148</sup> In *Shelton v. United States*, 983 A.2d 363 (D.C. 2009), discussed in greater detail in Part IV, *infra*, the court noted the distinction between the admission of *Brady* misconduct as a sanction for a *Brady* violation and the presentation of *Brady* misconduct as “substantive evidence” that the government’s case is weak. *Id.* at 11 n.15.

<sup>149</sup> *Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998) (“The prosecutor, more than neutral jurists, can better perceive the weakness of the state’s case.”); *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995) (“If the prosecutors did not think their case air tight (and so they tried to improperly bolster it), this is some indication that it was indeed not airtight.”); *see also United States v. Dimas*, 3 F.3d 1015, 1020 (7th Cir. 1993) (finding that the prosecutor’s bad faith in suppressing *Brady* evidence “could shed some light on whether the prosecution thought the evidence was valuable to the defendants”); *United States v. Jackson*, 780 F.2d 1305, 1311 (7th Cir. 1986) (“We are doubtful that any prosecutor would in bad faith act to suppress evidence unless he or she believed it could affect the outcome of the trial.”).



To fully appreciate the evidentiary significance of *Brady* misconduct evidence, one need only look at a criminal case from the perspective of the prosecutor who believes the government has strong evidence of guilt and can prove the defendant's guilt beyond a reasonable doubt. The prosecutor who is confident that the government will prevail at trial has no incentive to withhold *Brady* evidence in violation of the constitutionally mandated disclosure duty. Instead, upon learning of the *Brady* evidence, the prosecutor would disclose the evidence to the defense and use the considerable investigative resources of the police department, the forensic skill and technology of the crime lab, and the subpoena power of the grand jury to refute the *Brady* evidence at trial.<sup>150</sup> The prosecutor who knows the government's case is strong and strives to "do justice" and not merely "seek convictions" is well-positioned to thoroughly investigate the *Brady* evidence and eliminate any lingering doubts about the defendant's innocence.

By contrast, the prosecutor who believes that the government's case is weak has a powerful incentive to withhold *Brady* evidence to ensure victory at trial. If the prosecutor has accurately evaluated the merits of the government's case and determined that the government does not have compelling evidence of guilt, the *Brady* evidence presents a serious impediment to securing a conviction. The intentional nondisclosure of *Brady* evidence, therefore, is an attempt to engineer a guilty verdict in a weak case by concealing evidence that would, by definition, significantly bolster the defense case or seriously undermine the government's case.<sup>151</sup> While there may be other reasons for the nondisclosure of *Brady* evidence, the defense has a right to present the evidence of *Brady* misconduct at trial in support of the "consciousness of a weak case" inference. In rebuttal, the government can present evidence to support an alternative explanation for its conduct.<sup>152</sup>

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<sup>150</sup> See *Wardius v. Oregon*, 412 U.S. 470, 476 n.9, 480 (1973) (noting that the "virtually limitless resources of government investigators" give the government "inherent information gathering advantages," including the power to interrogate, obtain search warrants, and issue subpoenas to the grand jury); see also Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Cases*, 69 YALE L.J. 1149, 1182-83 (1960) (stating that the state has far superior resources, whereas the defendant has "neither a crime laboratory nor vast identification and fingerprint files available to him").

<sup>151</sup> *Boyd*, 55 F.3d at 241 (stating that a *Brady* violation may support an inference that "the prosecutors resorted to improper tactics because they were justifiably fearful that without such tactics the defendants might be acquitted"); see also *Conley v. United States*, 415 F.3d 183, 190 (1st Cir. 2005).

<sup>152</sup> See *infra* note 193 (discussing cases regarding a party's right to present evidence to rebut the "consciousness of a weak case" inference).

Accordingly, when the government intentionally withholds *Brady* evidence, the defense is entitled to present the facts surrounding the government's *Brady* misconduct at trial and receive the full evidentiary benefit of the "consciousness of a weak case" inference, including presentation of facts related to the government's awareness of the *Brady* evidence and the measures taken by the government to prevent its disclosure to the defense.

In the few cases that have addressed the admissibility of *Brady* misconduct evidence at trial in support of the "consciousness of a weak case" inference, trial judges have used the rules of evidence to exclude *Brady* misconduct evidence on the grounds that the evidence was not relevant<sup>153</sup> or was unfairly prejudicial.<sup>154</sup> As discussed below, such rulings are incorrect. Evidence of intentional *Brady* misconduct meets the evidentiary standards of admissibility, and the blanket exclusion of such evidence violates the defendant's constitutional right to present a defense.

#### A. THE RELEVANCE OF *BRADY* MISCONDUCT EVIDENCE

Relevance is the starting point for determining the admissibility of a proffered piece of evidence. Under the Federal Rules of Evidence, relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>155</sup> Evidence of *Brady* misconduct meets the standard of relevance. As John Henry Wigmore stated:

[i]t has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, *his fabrication or suppression of evidence* by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference

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<sup>153</sup> See, e.g., *United States v. Shelton*, 983 A.2d 363, 368 (D.C. 2009) (sustaining prosecutor's relevance objection to the admissibility of evidence that *Brady* material was intentionally suppressed by the government prior to trial) (discussed *infra* at notes 211-225 and accompanying text); *Barnes v. State*, 462 So. 2d 550, 551 (Fla. App. 1985) (upholding trial court's ruling that defense evidence of the prosecutor's attempts to intimidate defense witnesses was not admissible to show "the state's lack of confidence in the strength of its case" because such evidence was not relevant to the defendant's guilt and the witness was not actually intimidated into recanting his testimony).

<sup>154</sup> See, e.g., *United States v. Cole*, 670 F.2d 35, 37 (5th Cir. 1982) (rejecting defense contention that law enforcement officers' conduct in trying to intimidate defense witnesses was admissible to show the weakness of the government's case, and finding that evidence was properly excluded as unfairly prejudicial because, *inter alia*, the evidence would divert the jury's attention to a collateral issue).

<sup>155</sup> FED. R. EVID. 401.

thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.<sup>156</sup>

Other scholars characterize the “consciousness of a weak case” inference as a party’s “admission by conduct.” According to McCormick:

[a]s might be expected, wrongdoing by the party in connection with its case amounting to an obstruction of justice is also commonly regarded as an admission by conduct. By resorting to wrongful devices, the party is said to provide a basis for believing that he or she thinks the case is weak and not to be won by fair means, or in criminal cases that the accused is conscious of guilt.<sup>157</sup>

The “consciousness of a weak case” inference recognizes that certain behavior by a litigant bespeaks a subjective awareness of legal liability. If a litigant is aware that his case has no merit and is not likely to succeed at trial, the self-preservation instinct will cause him to take actions that one would expect of a person seeking to avoid the adverse consequences of litigation. In civil cases, the “consciousness of a weak case” inference has been applied to a wide array of misconduct, including the destruction and suppression of evidence.<sup>158</sup> The inference has also been applied against governmental entities in civil litigation.<sup>159</sup>

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<sup>156</sup> JOHN HENRY WIGMORE, 2 EVIDENCE § 278, at 133 (James Harmon Chadborn ed., Little, Brown 1979) (1940) (emphasis added); see also 32 C.J.S. *Evidence* § 535 (2008) (collecting cases on the consciousness of a weak case inference that flows from suppression, alteration, or fabrication of evidence); *Evidence—Admissibility of Attempts by a Party to Suppress Evidence*, 9 TEX. L. REV. 79, 100 (1930) (stating that it has “long been recognized” that a party’s misconduct in manipulating evidence is admissible as indicating a “consciousness of the weakness of his case,” and citing cases from the 1800s that applied the inference to the fabrication, suppression, or destruction of evidence).

<sup>157</sup> 2 MCCORMICK ON EVIDENCE § 265, at 203 (John William Strong, ed., 1999). See generally Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?*, 87 MINN. L. REV. 401, 402 (2002) (discussing the admissibility of pretrial statements made by the prosecutor or members of the prosecution team that are inconsistent with the government evidence at trial as admissions by party opponent).

<sup>158</sup> *E.g.*, *Great Am. Ins. Co. v. Horab*, 309 F.2d 262, 264 (8th Cir. 1962) (recognizing that a litigant’s attempt to prevent service of subpoena on a witness could support the consciousness of a weak case inference); *Scrivner v. Am. Car & Foundry*, 50 S.W.2d 1001, 1016 (Mo. 1932) (considering an attempt to bribe a witness to be “an admission, circumstantial in its nature, that the plaintiff at the time of this offer was conscious of the weakness of his cause.”); see also *Nowack v. Metro. St. Ry. Co.*, 60 N.E. 32 (N.Y. 1901). See generally Michael J. Hunter, *2004-2005 Evidence*, 54 SYRACUSE L. REV. 1075, 1095-96 (2004) (discussing the use of the consciousness of a weak case inference in New York civil cases).

<sup>159</sup> *E.g.*, *District of Columbia v. Perez*, 694 A.2d 882 (D.C. 1997) (noting that the alteration of medical records following patient’s death gave rise to the consciousness of a weak case inference and permitted the jury to resolve factual issues against the government); *Miller v. Montgomery County*, 494 A.2d 761, 768 (Md. App. 1985) (stating that the county government’s action in altering evidence to conceal a defect “may be taken as an indication

In criminal cases, the “consciousness of a weak case” inference is almost exclusively used by the government to show that the defendant has a “guilty mind” or as circumstantial evidence of consciousness of guilt. Evidence of a criminal defendant’s consciousness of guilt has been so widely accepted that admissibility is regarded as “universally conceded.”<sup>160</sup> Such evidence generally falls into two categories. The first category includes actions taken by the defendant after the crime to elude capture, such as flight from the scene of the crime, escape from custody, alteration of physical appearance, use of an alias, and false exculpatory statements to the police.<sup>161</sup> The second category of consciousness of guilt evidence involves various acts of evidence manipulation by the defendant that are closely analogous to actions that would constitute *Brady* misconduct, including the subornation of perjury, bribery or attempted bribery of witnesses,<sup>162</sup> or the destruction or concealment of incriminating evidence.<sup>163</sup>

While it is “universally conceded” that the defendant’s conduct in manipulating and suppressing evidence is admissible to establish the defendant’s consciousness of guilt, there are a very few criminal cases applying the “consciousness of a weak case” inference to similar acts of

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of consciousness of the weakness of the county’s case and a belief that its defense would not prevail without the aid of such improper tactics”).

<sup>160</sup> WIGMORE, *supra* note 156, § 276 at 122 (“It is universally conceded today that the fact of an accused flight, escape from custody, resistance to arrest, concealment, assumption of a false name and related conduct, are admissible as evidence of consciousness of guilt, and thus guilt itself.”).

<sup>161</sup> *Id.*

<sup>162</sup> See, e.g., *State v. Coltherst*, 820 A.2d 1024, 1041-44 (Conn. 2003) (writing a letter offering money in exchange for an alibi); *People v. Leyra*, 134 N.E.2d 475, 480 (N.Y. 1956) (offering a false alibi); *State v. Melson*, 56 P.2d 710, 711 (Wash. 1936) (attempting to pay witness \$500 to withdraw allegation).

<sup>163</sup> See, e.g., *United States v. Briscoe*, 896 F.2d 1476, 1497-98 (7th Cir. 1990) (allowing government to introduce the fact that defendant attempted to conceal evidence by shoving it into his sock as consciousness of guilt); *United States ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1014 (7th Cir. 1984) (finding that defendant’s concealment of the body in a murder case supports a consciousness of guilt inference that defendant was responsible for death of the deceased); *State v. Denis*, 622 S.W.2d 404, 406 (Mo. Ct. App. 1981) (affirming the trial court’s decision to admit a torn check, even though it served as evidence of another crime, because it showed that defendant had attempted to destroy evidence, demonstrating consciousness of guilt); *State v. Broadhurst*, 196 P.2d 407, 430 (Or. 1948) (finding that repeated incidents of defendant’s fabrication, suppression, and destruction of evidence in a murder case were admissible as circumstantial evidence of defendant’s guilt). See generally 22A C.J.S. *Criminal Law* § 1017 (2008) (collecting cases on circumstantial evidence of consciousness of guilt based on the suppression, destruction, or fabrication of evidence); Dan Stigall, *Prosecuting Raskolnikov: A Literary and Legal Look at “Consciousness of Guilt” Evidence*, 2005 ARMY LAW. 54 (stating that the admissibility of evidence of the destruction and concealment of incriminating evidence by the defense has long been and continues to be competent evidence in both federal and military courts).

evidence suppression by the government in violation of *Brady*. In pre-*Brady* cases, courts acknowledged that government actions amounting to evidence obstruction are admissible to support the “consciousness of a weak case” inference. In *United States v. Remington*,<sup>164</sup> the Second Circuit Court of Appeals ruled that the defense was entitled to adduce evidence at trial that the prosecutor called witnesses before the grand jury in an effort to intimidate them. While the court rejected the defense contention that the witnesses’ testimony should be stricken, the court stated that the evidence of witness intimidation by the government could properly be explored by the defense on cross-examination and “brought out as part of the defense evidence which goes to the jury.”<sup>165</sup> The court reasoned that such evidence, if proven, would constitute “affirmative evidence of the weakness of the prosecution’s case.”<sup>166</sup>

Similarly, in *United States v. Graham*,<sup>167</sup> a government witness testified that his testimony at prior trials was false and induced by promises of executive clemency by government agents. The court acknowledged that if such evidence of government misconduct was believed, “the jury would have had reason enough for concluding that the prosecutor was conscious that his case against appellants was lacking in merit and that they were innocent men unjustly accused.”<sup>168</sup> The court further stated that the same presumption that arises against a party who withholds or destroys evidence “is equally applicable to the prosecution of a criminal charge.”<sup>169</sup>

Although both *Remington* and *Graham* were decided well before the Court’s decision in *Brady*, the prosecutor’s misconduct in both cases fall squarely within the scope of the *Brady* disclosure duty.<sup>170</sup> Post-*Brady*, however, there are few cases regarding the use of *Brady* misconduct evidence at trial to support the “consciousness of a weak case” inference.<sup>171</sup>

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<sup>164</sup> 191 F.2d 246 (2d Cir. 1951).

<sup>165</sup> *Id.* at 251 (citing WIGMORE, *supra* note 156, § 278).

<sup>166</sup> *Id.*

<sup>167</sup> 102 F.2d 436 (2d Cir. 1939).

<sup>168</sup> *Id.* at 442.

<sup>169</sup> *Id.* at 442-43; *see also* Commonwealth v. Enwright, 156 N.E. 65, 67 (Mass. 1927) (“[I]f the district attorney should unfairly suppress evidence he would thereby subject the case of the commonwealth to the same adverse inferences as would result from similar conduct by another party to the same cause.”).

<sup>170</sup> *See supra* notes 46 and 48 (citing cases finding *Brady* violations based on witness coercion and the presentation of false testimony).

<sup>171</sup> *E.g.*, Shelton v. United States, 983 A.2d 363 (D.C. 2009) (discussed *infra* Part V); United States v. Boyd, 55 F.3d 239, 241-42 (7th Cir. 1985); United States v. Cole, 670 F.2d 35, 36-37 (5th Cir. 1982); *cf.* Bruce v. United States, 617 A.2d 986, 996-97 (D.C. 1992) (citing WIGMORE, *supra* note 156, § 278, and stating that “the persuasive force of the entire prosecution case might have been impaired or undermined if exculpatory evidence had been presented at trial.”).

In a handful of cases, courts have found that the prosecutor's intentional or bad faith suppression of *Brady* evidence gave rise to an inference that the suppressed evidence was material. In *Silva v. Brown*,<sup>172</sup> the government made a plea deal with its star witness in exchange for testimony against the defendant. As part of the plea, the witness was required to refrain from undergoing psychiatric treatment for his mental condition prior to testifying in the case. The court found that this deal evinced the prosecution's concerns regarding the mental state of the witness and should have been disclosed to the defense as impeachment under *Brady*. The court found that the fact that the government went to such extremes showed that even the prosecution viewed the witness' testimony "with some doubt."<sup>173</sup> Significantly, the court noted that "the prosecutor's own conduct in keeping the deal secret underscores the deal's importance."<sup>174</sup> In rejecting the government's contention that its nondisclosure of the secret deal did not meet the *Brady* materiality standard, the court stated that "[t]he Prosecutor's actions can speak as loud as his words."<sup>175</sup> The court reasoned that "the State's deliberate and strategic decision to make the deal and not to disclose it suggests the weakness of its post hoc claims that the evidence was irrelevant."<sup>176</sup>

Like the court in *Silva*, other courts have found that the intentional nature of the prosecutor's actions in suppressing *Brady* evidence gives rise to an inference that the prosecutor believed the suppressed evidence was critically important in the case and met the *Brady* materiality standard.<sup>177</sup> Thus, despite the limited precedent and the scarcity of scholarly debate,<sup>178</sup> the "consciousness of a weak case" and the "materiality" inferences that courts have found to flow from the intentional nondisclosure of evidence by the government provide a solid foundation for finding that *Brady* misconduct evidence is relevant to support the "consciousness of a weak case" inference. This inference is operable against plaintiffs and defendants in civil cases, against defendants in criminal cases, and against the government in civil cases. To find that evidence of *Brady* misconduct is

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<sup>172</sup> 416 F.3d 980 (9th Cir. 2005).

<sup>173</sup> *Id.* at 986.

<sup>174</sup> *Id.* at 990.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *E.g.*, *United States v. Dimas*, 3 F.3d 1015, 1020 (7th Cir. 1993); *United States v. Jackson*, 780 F.2d 1305, 1311 (7th Cir. 1986).

<sup>178</sup> Several legal scholars have written extensively on the scope and limitations of discovery misconduct evidence. *See* Nance, *supra* note 114; Imwinkelreid, *supra* note 119; John H. Mansfield, *Evidential Use of Litigation Activity of the Parties*, 43 SYRACUSE L. REV. 695 (1992). However, their work has focused exclusively on civil cases and has not addressed the unique issues that arise in the context of *Brady* violations in criminal litigation.

not relevant when offered against the government in a criminal case would create a solitary exception to the general admissibility of a litigant's intentional destruction of evidence in support of the "consciousness of a weak case" inference.

In addition to the relevance of *Brady* misconduct evidence in support of a "consciousness of a weak case" inference, *Brady* misconduct evidence has particular relevance in cases in which the defense either mounts a challenge to the government's criminal investigation or claims the prosecution is tainted by government misconduct or bias. It is not uncommon in criminal litigation for the defense to elicit facts to illustrate that the government did not perform a thorough investigation of the crime. In *Kyles*, the Supreme Court noted that an attack by the defense on the thoroughness of the government's investigation is a proper subject of inquiry at trial.<sup>179</sup> In furtherance of this defense theory, defense attorneys commonly seek to show that the police officers handling the investigation failed to perform critical investigative tasks that could have yielded exculpatory physical evidence or that might have affirmatively identified another person as the perpetrator of the crime.<sup>180</sup> As the Court noted in *Kyles*, "indications of conscientious police work will enhance probative force [of evidence] and slovenly work will diminish it."<sup>181</sup> Evidence that the government intentionally withheld *Brady* material can significantly bolster the defense theory that the government's case is not built on the solid foundation of a conscientious investigation. This defense strategy is often viewed as the desperate act of a guilty person attempting to escape responsibility by "putting the government on trial." But evidence of

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<sup>179</sup> *Kyles v. Whitley*, 514 U.S. 419, 445 (1995); see also *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986); *Commonwealth v. Bowden*, 399 N.E.2d 482, 486 (Mass. 1980) ("The fact that certain tests were not conducted or certain police procedures not followed could raise a reasonable doubt as to the defendant's guilt in the minds of the jurors."); *Commonwealth v. Rodriguez*, 391 N.E.2d 889, 896 (Mass. 1979) (failure of government experts to perform state-of-the-art forensic tests admissible); *Evans v. State*, 922 A.2d 620, 628-29 (Md. Ct. Spec. App. 2007) (failure to use audio and video equipment to document key information); *People v. Marchese*, 638 N.Y.S.2d 71 (N.Y. App. Div. 1996) (discussing cross examination of police officers concerning their failure to use available investigative techniques); *Workman v. Commonwealth*, 636 S.E.2d 368, 378 (Va. 2006) (finding nondisclosure of favorable evidence violated *Brady* where evidence could have been used to "attack the reliability of the police investigation").

<sup>180</sup> *Holmes v. South Carolina*, 547 U.S. 319, 322-23 (2006) (noting that the defense criticized the procedures used in the collection and handling of fingerprint, fiber, and DNA evidence in support of the claim that law enforcement mishandled the investigation). See generally, 1 DAVID E. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY 2-196-200 (3d ed. 2009) (citing Maryland law for the proposition that the defense is entitled to comment on the absence of well-known and commonly available evidence like fingerprints).

<sup>181</sup> *Kyles*, 514 U.S. at 446 n.15.

intentional *Brady* misconduct significantly bolsters the credibility of this defense theory because the jury learns that the government intentionally concealed exculpatory evidence and went to great lengths to keep the evidence hidden in violation of its disclosure duty. This kind of purposeful misconduct lends credence to defense claims that the government might have “cut corners” or engaged in other acts of misconduct in the investigation and preparation of the case.

Likewise, *Brady* misconduct evidence is particularly relevant in cases in which the defense contends that the government’s case is based, in whole or in part, on bias or other improper misconduct by members of the prosecution team. Defenses grounded in wrongful government conduct include claims that the police fabricated or planted evidence or that law enforcement officers plotted to “frame” or falsely implicate the defendant.<sup>182</sup> Also included in this category is the defense of entrapment,<sup>183</sup> claims of selective or discriminatory prosecution,<sup>184</sup> and retaliatory or vindictive prosecution claims.<sup>185</sup> Evidence of *Brady* misconduct makes it more probable that these other forms of misconduct occurred in the case. Frequently, when the defendant or a witness alleges coercion or intimidation by police, there are no other witnesses to the event and the jury is presented with a credibility contest between the defendant and the police

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<sup>182</sup> See *Holmes*, 547 U.S. at 322-23 (noting that a major part of the defendant’s defense was that contaminated and planted evidence was used by law enforcement officers to purposely frame him for a crime that was actually committed by a third party).

<sup>183</sup> *Sherman v. United States*, 356 U.S. 369, 376 (1957) (concluding that the defense of entrapment is viable when “the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which it otherwise would not have attempted”); *United States v. Garza-Juarez*, 992 F.2d 896, 908 (9th Cir. 1993) (stating that entrapment is a defense designed to prevent the conviction of the unwary innocent induced by government action to commit a crime and consists primarily of two elements: actions constituting inducement by the government and the absence of facts showing criminal predisposition of the defendant) (citing *United States v. Skarie*, 971 F.2d 317, 320 (9th Cir.1992)). See generally LAFAYE, CRIMINAL LAW § 9.8, at 501-21 (4th ed. 2003).

<sup>184</sup> *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (finding that claims of selective prosecution are grounded in the Equal Protection Clause and require the claimant to show: (1) that he was singled-out for prosecution while others similarly-situated were not prosecuted; and (2) the defendant was targeted for prosecution based on race, religion or some other impermissible basis); see also Angela J. Davis, *Prosecution and Race*, 67 FORDHAM L. REV. 13 (1998) (critiquing *Armstrong*, 517 U.S. 456).

<sup>185</sup> Vindictive prosecution claims are rooted in the Due Process Clause and prohibit a prosecution initiated in retaliation for the defendant exercising a protected constitutional or statutory right. See *United States v. Paramo*, 998 F.2d 1212, 1219 (3d Cir. 1993) (“[I]t is an elementary violation of due process for a prosecutor to engage in conduct detrimental to a criminal defendant for the vindictive purpose of penalizing the defendant for exercising his constitutional right at trial.”). Proof of vindictiveness requires some showing that the prosecutor harbored genuine animus towards the defendant. *United States v. Cyprian*, 23 F.3d 1189, 1196 (7th Cir. 1994).



officer. Informing the jury of the government's *Brady* misconduct makes the defendant's other allegations of improper conduct more credible.

B. POTENTIAL EXCLUSION OF *BRADY* MISCONDUCT EVIDENCE AS  
"UNFAIRLY PREJUDICIAL"

Even if a trial judge finds that *Brady* misconduct evidence is relevant under the evidentiary rules, the court can still exclude the evidence upon finding that it is unfairly prejudicial or would cause an unreasonable disruption in the trial. Specifically, Rule 403 of the Federal Rules of Evidence states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>186</sup>

In applying the probative/prejudicial analysis, trial courts are cautioned to "distinguish between prejudice resulting from the reasonable persuasive force of evidence and prejudice resulting from excessive emotional or irrational effects that could distort the accuracy and integrity of the factfinding process."<sup>187</sup> In *Old Chief v. United States*, the Court stated that *unfair* prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>188</sup> Accordingly, state and federal courts commonly exercise their discretionary authority to exclude evidence that "evokes the anger or punitive impulses of the jury, unfairly puts a party or witness in a negative light, appeals to the jury's prejudices, or gives rise to overly strong sympathetic reactions."<sup>189</sup>

Applying the unfair prejudice standard to *Brady* misconduct evidence, a trial judge could exclude facts related to the government's intentional *Brady* misconduct upon finding that the evidence will distract the jury from its main focus of determining whether the defendant committed the crime.<sup>190</sup> A trial court could find that any probative value of evidence that the government intentionally concealed favorable information from the

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<sup>186</sup> FED. R. EVID. 403.

<sup>187</sup> CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 175 (3d ed. 2003).

<sup>188</sup> 519 U.S. 172, 180 (1997).

<sup>189</sup> MUELLER & KIRKPATRICK, *supra* note 187, at 175-80.

<sup>190</sup> *United States v. Cole*, 670 F.2d 35, 36-37 (5th Cir. 1982). The defense argued that an effort by the government to influence testimony should be considered by the jury in evaluating the merits of the government's case, and "an inference may be drawn as to the weakness of the Government's case from that conduct." *Id.* at 36. The court excluded the evidence under Federal Rule of Evidence 403 finding the evidence was both collateral and cumulative. *Id.* at 37; *see also* *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 136 (S.D. Fla. 1987) (reasoning that informing jury of discovery misconduct may consume jury's attention and divert them away from substantive issues in the case).

defense is far outweighed by the risk that jurors might seek to “punish” the government and express its moral outrage over the government’s misconduct by rendering a verdict favorable to the defense and against the weight of the evidence. The potential for this kind of emotionally charged jury nullification is the kind of unfair prejudice that Rule 403 is designed to prevent.

In addition to the impact on the prosecution’s case, *Brady* misconduct evidence could be excluded by the trial judge on the grounds that such evidence will unduly extend and complicate the trial, counter to the interests in judicial economy and efficiency embodied in Rule 403. Litigating the *Brady* misconduct issue would involve the presentation of evidence regarding when the prosecutor learned of the misconduct, who was involved in the “cover-up,” and the steps the prosecutors took to conceal the information. In rebuttal, the prosecution would be entitled to present evidence to show that the nondisclosure of *Brady* evidence was not in bad faith, but was the result of carelessness or simple negligence during the pretrial case preparation, or the innocent failure of the prosecution team to appreciate the exculpatory nature of the evidence. Presentation of all of these facts could create a collateral “mini-trial” involving the direct and cross-examination of numerous additional witnesses and hours of additional court time. Accordingly, a trial judge could use Rule 403 to exclude the *Brady* misconduct evidence based on “considerations of undue delay.”

Despite these concerns and the broad discretionary authority of the trial court, evidence of intentional *Brady* misconduct should not be excluded under Rule 403. As one court has noted, “[t]he fact that materially exculpatory evidence may complicate a trial is no grounds to exclude the evidence; some trials are meant to be complicated and juries are capable of dealing with factual complexity.”<sup>191</sup>

Moreover, despite the prejudice to the defense, courts routinely allow evidence of consciousness of guilt. Over a century ago, the Supreme Court observed that

there are so many reasons for [consciousness of guilt] conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt; but this evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances.<sup>192</sup>

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<sup>191</sup> Harris v. United States, 834 A.2d 106, 122 (D.C. 1996).

<sup>192</sup> Hickory v. United States, 160 U.S. 408, 417 (1896) (internal quotation marks omitted).

Accordingly, consciousness of guilt evidence is freely admitted regardless of whether the defendant has an innocent explanation for the conduct.<sup>193</sup> The defense is simply allowed, in rebuttal, to offer evidence in support of an innocent explanation of the defendant's conduct.<sup>194</sup> Any prejudice to the defense is deemed sufficiently mitigated by the court giving the jury a balanced instruction on the limited value of the evidence in proving guilt and telling the jury that there may be innocent explanations for the defendant's conduct. One standard instruction informs the jury as follows:

[y]ou have heard evidence suggesting that the defendant may have intentionally tried to conceal evidence in this case. If the Commonwealth has proved that the defendant did conceal evidence, you may consider whether such actions indicate feelings of guilt by the defendant and whether, in turn, such feelings of guilt might tend to show actual guilt . . . . You are not required to draw such inferences, and you should not do so unless they appear to be reasonable in light of all the circumstances of this case. If you decide that such inferences are reasonable, it will be up to you to decide how much importance to give them. But you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people. Finally, remember that, standing alone, such evidence is never enough by itself to convict a person of a crime. You may not find the defendant guilty on such evidence alone, but you may consider it in your deliberations, along with all the other evidence.<sup>195</sup>

Likewise, to ameliorate any possible unfair prejudice to the government when *Brady* misconduct evidence is presented, the court should take similar precautionary measures. Specifically, the government should be permitted to explain why its conduct, though intentional, does not evince consciousness of a weak case. The jury can then decide what significance, if any, the government's *Brady* misconduct will have in the case. The trial court can then modify the court's standard consciousness of guilt

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<sup>193</sup> See, e.g., *Commonwealth v. Rivera*, 490 N.E.2d 1160, 1163-64 (Mass. 1986); *Commonwealth v. Sawyer*, 452 N.E.2d 1094, 1102-03 (Mass. 1983).

<sup>194</sup> WIGMORE, *supra* note 156, § 276, at 130 (“[T]he accused may always endeavor to destroy the adverse significance of his conduct by facts which indicate it to be equally or more consistent with such other hypothesis than that of consciousness of guilt.”); e.g., *Commonwealth v. Chase*, 530 N.E.2d 185, 187 (Mass. 1988) (“The defendant had an unqualified right to negate the inference of consciousness of guilt by explaining [the facts] to the jury . . . .”); Massachusetts Criminal Model Jury Instructions, Instruction 3.580 n.6 (2009), available at <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/jury-instructions/criminal/>.

<sup>195</sup> Massachusetts Criminal Model Jury Instructions, *supra* note 194; see also AARONSON, *supra* note 180, § 2.55(B) (quoting a standard jury instruction as stating, in part: “You are free to ignore any evidence that the defendant [concealed] evidence if you decide that the conduct was innocent in nature or was not reflective of a consciousness of guilt of the crime charged”).

instruction to inform the jury of the proper use of the *Brady* misconduct evidence presented by the defense. In advancing the court's legitimate concerns over judicial economy and "considerations of undue delay," the same skills in courtroom management and discretion used to regulate and control the orderly and efficient presentation of consciousness of guilt evidence should inform the court's handling of *Brady* misconduct evidence.

Finally, there is no principled reason to shield the government's intentional misconduct from the jury. The rules of evidence currently provide blanket exclusions for certain categories of evidence—settlement negotiations, plea discussions, subsequent remedial measures—that advance important social policies.<sup>196</sup> There are no similar policy considerations to justify shielding intentional misconduct by litigants from disclosure at trial. In fact, existing evidence exclusionary rules do not exclude evidence of misconduct by a litigant.<sup>197</sup> Just as the evidentiary rules do not provide a shield for either the defendant who seeks to hide incriminating evidence or other civil and criminal litigants who engage in obstructionist behavior, the rules should not shield the government's intentional *Brady* misconduct when legitimately offered by the defense to prove the government's case is too weak to establish guilt beyond a reasonable doubt.

### C. THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

In addition to meeting evidentiary admissibility standards, the right of a criminal defendant to present evidence of intentional *Brady* misconduct in support of the "consciousness of a weak case" inference is firmly grounded in the constitutional right to present a defense. Although the Constitution does not expressly state that criminal defendants have a right to present a

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<sup>196</sup> See, e.g., FED. R. EVID. 407 (providing that evidence that a party took remedial steps or "subsequent remedial measures" after an accident to ameliorate the cause of the accident and prevent further injuries is not admissible to prove liability); FED. R. EVID. 408 (providing that statements made by parties during the course of settlement negotiations are generally not admissible at trial to prove liability); FED. R. EVID. 409 (providing that "good Samaritan" offers to pay medical expenses out of compassion are not admissible to prove liability); FED. R. EVID. 410 (providing that statements made during plea negotiations are generally excluded during trial to prove guilt). See generally MUELLER & KIRKPATRICK, *supra* note 187, at 231-63.

<sup>197</sup> While Federal Rule of Evidence 408 generally excludes offers to compromise and statements made during settlement negotiations, the rule expressly allows evidence offered to prove "an effort to obstruct a criminal investigation or prosecution." FED. R. EVID. 408(b); see also MUELLER & KIRKPATRICK, *supra* note 187, at 246. Likewise, Federal Rule of Evidence 410 generally excludes statements made by the defendant during plea negotiations but does not prohibit the admissibility of certain sworn statements of the defendant when offered against the defendant "in a criminal proceeding for perjury or false statement." FED. R. EVID. 410.

defense, the Supreme Court has long recognized that criminal courts cannot deny defendants the opportunity to adduce relevant evidence to either establish their innocence or challenge the government's case. The Court has stated that the constitutional right to present a defense is grounded in the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment.<sup>198</sup> The right has been described as "the right to present the defendant's version of the facts"<sup>199</sup> and the defendant's basic right to "have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'"<sup>200</sup> While state and federal rule makers can adopt rules that restrict or exclude evidence from criminal trials,<sup>201</sup> the Court has stated that the defendant's right to present a defense is violated when the rigid application of such evidentiary rules precludes the defense from presenting probative exculpatory evidence.

In *Chambers v. Mississippi*,<sup>202</sup> hearsay rules and the common law "voucher rule," which barred a litigant from impeaching his own witness, were used to prevent the defense from presenting testimony that a hostile witness had previously confessed to the very crime the defendant was charged with committing. The Court found that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanically to defeat the ends of justice."<sup>203</sup> Similarly, in *Crane v. Kentucky*,<sup>204</sup> the Court found that the right to present a defense was violated by a state court evidence rule that prevented the defendant from presenting evidence to show that the police coerced his confession. In the Court's most recent pronouncement on the right to present a defense, *Holmes v. South Carolina*,<sup>205</sup> the Court found unconstitutional a state court rule that allowed a trial court to bar the defense from presenting evidence that a third party actually committed the

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<sup>198</sup> *Id.* at 690. ("Whether rooted in, Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment the Constitution guarantees defendants a meaningful opportunity to present a complete defense.") (citations omitted); see also EDWARD J. IMWINKELRIED, EXCULPATORY EVIDENCE §§ 2.1-2.6 (2d ed. 1996 & Supp. 1998); Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711 (1976).

<sup>199</sup> *Taylor v. Illinois*, 484 U.S. 400, 423 (1988) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

<sup>200</sup> *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986).

<sup>201</sup> *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citing *United States v. Scheffer*, 523 U.S. 303, 308 (1998)).

<sup>202</sup> 410 U.S. 284, 295 (1973).

<sup>203</sup> *Id.* at 302.

<sup>204</sup> *Crane*, 476 U.S. at 687.

<sup>205</sup> *Holmes*, 547 U.S. 319.

crime if the trial judge determined that the government had already adduced strong evidence of guilt.

The Supreme Court has also found that the right to present a defense is violated by the arbitrary application of state court rules that prevent the presentation of certain evidence by the defense but impose no corresponding restriction on the government's ability to present the same type of evidence. In *Washington v. Texas*,<sup>206</sup> the Court found unconstitutional a Texas statute that barred the defense from presenting the exculpatory testimony of an accomplice but did not prohibit the accomplice from giving inculpatory testimony for the prosecution. In finding that this uneven and arbitrary evidentiary rule violated due process, the Court noted that the state had no legitimate reason for the double standard. In his concurrence, Justice Harlan also condemned the Texas evidence rule for its "discrimination between the prosecution and the defense."<sup>207</sup>

The right to present a defense does not, however, give the accused an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Court, in *Illinois v. Taylor*, stated that "[t]he adversary process could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case."<sup>208</sup> When the defendant's right to present exculpatory evidence conflicts with evidence rules, the court must balance these competing interests to determine whether those advanced by exclusion of the evidence must yield to the defendant's rights. Several provisions of the Federal Rules of Evidence recognize this delicate balance and expressly make exclusionary rules subject to the defendant's constitutional right to present a defense.<sup>209</sup>

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<sup>206</sup> *Washington v. Texas*, 388 U.S. 14 (1967).

<sup>207</sup> *Id.* at 17 (Harlan, J., concurring).

<sup>208</sup> *Taylor v. Illinois*, 484 U.S. 400, 411 (1988).

<sup>209</sup> For example, the Federal Rules of Evidence generally exclude impeachment with juvenile adjudications but permit its use if required for "a fair determination of the issue of guilt or innocence." FED. R. EVID. 609(d). In *Davis v. Alaska*, 415 U.S. 308, 320 (1974), the Court held that the state's interest in protecting juvenile records could not be used to prevent the defendant from impeaching a key government witness based on bias. The Court recognized that the state's interest "must fall before the right of petitioner to seek out the truth in the process of defending himself." *Id.* Likewise, the "rape shield" provision of the Federal Rules of Evidence generally precludes criminal defendants from introducing evidence concerning a rape complainant's sexual history or predisposition but allows such evidence if "exclusion . . . would violate the constitutional rights of the defendant." FED. R. EVID. 412(b)(1)(C); *see also* *United States v. Stamper*, 766 F. Supp. 1396 (W.D.N.C. 1991) (finding that the defendant's Sixth Amendment right to present a defense necessitated the

Against this backdrop, blanket exclusion of *Brady* misconduct evidence when offered by the defense to support the “consciousness of a weak case” inference would violate the defendant’s right to present a defense. Any rule that would preclude the defendant from offering evidence of the government’s intentional suppression of evidence while freely allowing the government to introduce evidence of the defendant’s acts of evidence suppression to show consciousness of guilt would constitute the very kind of arbitrary and uneven application of the rules of evidence struck down by the court in *Washington v. Texas* over forty years ago, especially when there are no compelling policy reasons to justify exclusion of this evidence.<sup>210</sup>

In sum, *Brady* misconduct evidence is admissible under the rules of evidence because intentional *Brady* violations give rise to the well-established “consciousness of a weak case” inference. Not only is *Brady* misconduct evidence relevant to whether the government’s case is strong enough to prove guilt beyond a reasonable doubt, such evidence is particularly probative when the defense challenges the integrity of the government’s investigation and when the defense claims that the prosecution is tainted by government bias or ill will toward the defendant. *Brady* misconduct evidence is also admissible over an “unfair prejudice” objection. Just as courts have developed safeguards to prevent any unfair prejudice to the defendant from the admission of consciousness of guilt evidence, trial judges can use similar measures to prevent *Brady* misconduct evidence from causing unfair prejudice to the government’s case. Finally, prohibiting the defense from presenting evidence of the government’s intentional acts of evidence suppression would run afoul of the defendant’s constitutional right to present a defense, especially when evidence rules liberally allow the prosecution to present such evidence against the defense.

#### V. THE CASE OF ARNELL SHELTON

The District of Columbia Court of Appeals opinion in *United States v. Shelton*<sup>211</sup> is perhaps the first (and only) post-*Brady* case to apply the

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presentation of evidence of complainant’s previous allegations of sexual misconduct against three other men).

<sup>210</sup> *E.g.*, *Harris v. United States*, 834 A.2d 106, 120 (D.C. 2003) (“The language of the party admissions rule provides no basis for creating a prosecutorial exception or an exception where the government is the party opponent. Such an exception . . . is unfair in light of the applicability of the party admissions rule to criminal defendants.”); *People v. Hall*, 12 N.W. 665, 668 (Mich. 1882) (stating that “[t]here is no more reason for exempting the prosecution than the defence [sic] from scrutiny concerning tampering with witnesses” where government tried to induce witnesses to suppress testimony).

<sup>211</sup> 983 A.2d 363 (D.C. 2009).

“consciousness of a weak case” inference to intentional *Brady* misconduct. As discussed in more detail below, *Shelton* serves as a good vehicle to illustrate the application of the *Brady* instruction and the “consciousness of a weak case” inference.

#### A. THE FACTS

Arnell Shelton was tried in the Superior Court of the District of Columbia for assault with intent to kill and other charges related to the shooting of Christopher Boyd.<sup>212</sup> According to the government, while Boyd was double parked in his car, Shelton arrived on the scene in another vehicle and fired several shots at Boyd, hitting Boyd in his back. Remarkably, Boyd sped away and drove himself to a nearby hospital. The identity of the shooter was the central disputed issue at trial. To prove that Shelton was the shooter, the government relied primarily on Boyd’s testimony that he knew Shelton before the shooting and recognized Shelton as the person who shot him. Boyd also testified that Shelton’s possible motive to shoot him was a prior “beef” between them.<sup>213</sup> For the defense, Shelton’s wife testified that Shelton was at home on the night of the shooting. The jury was unable to reach a unanimous verdict at the conclusion of the first trial, and the judge declared a mistrial.<sup>214</sup>

On the eve of the retrial, Shelton’s defense attorney was contacted by the new prosecutor assigned to the case who reported that there was “potential *Brady*” information that had not been disclosed to the defense.<sup>215</sup> Specifically, the new prosecutor disclosed that Officer Woodward, the first police officer assigned to investigate the shooting, spoke briefly to Boyd at the hospital before he went in for surgery. Officer Woodward asked Boyd if he knew the identity of the person who shot him, and Boyd responded in the negative, stating either that he did not know or did not see who shot him. Boyd’s hospital statement was memorialized in Officer Woodward’s notes and in Woodward’s grand jury testimony.<sup>216</sup> Despite defense counsel’s *Brady* request prior to the first trial, the original trial prosecutor never informed the defense of Boyd’s hospital statement.

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<sup>212</sup> *Id.* at 364.

<sup>213</sup> Prior to the shooting, Boyd testified that he informed his cousin that Shelton had made unwanted sexual advances towards his cousin’s sister. Boyd testified that he was present when his cousin confronted Shelton on the street and the retaliatory confrontation led to his cousin assaulting Shelton and causing major damage to Shelton’s car. *Id.* at 365-66.

<sup>214</sup> *Id.* at 364 n.6.

<sup>215</sup> Transcript of Pretrial Hearing re *Brady* Disclosure at 13, *United States v. Shelton*, No. F-847-01 (D.C. Super. Ct. July 18, 2002) (on file with author).

<sup>216</sup> *Id.* at 15; Brief for Appellee at 11, *Shelton v. United States*, No. F-847-01 (D.C. Super. Ct. Jan. 11, 2007) (on file with author).



Defense counsel informed the trial judge of the new prosecutor's last-minute disclosure of *Brady* information and moved to dismiss all charges with prejudice. The trial judge delayed the start of the trial until the next day to give the defense an opportunity to investigate the *Brady* information and the circumstances surrounding its nondisclosure. The following day, the prosecutor candidly admitted in court that the original prosecutor (Mr. Kline) was aware of Boyd's hospital statement prior to the first trial. When asked by the trial judge why Mr. Kline failed to disclose the statement to the defense, the prosecutor stated:

[i]t was Mr. Kline's position that the information was not exculpatory. . . . My understanding is that Mr. Kline's position was based on the thought that there was a reason for the witness to respond in that way. The reason being that the witness was in pain. He had just been taken to the hospital. He was on a gurney, staff attending to him, etc.<sup>217</sup>

In response, the trial judge stated:

given the prosecutor's obligations under *Brady v. Maryland*, I don't see how the prosecutor who states that if a witness says I don't know who shot me or I did not see who shot me or all I saw was a dark car, who's later going to come into court and say Arnell Shelton shot me, I saw it, saw him, and should not turn that over because the prosecutor doesn't think it true. . . . I don't see how any prosecutor anywhere in any state in the country could say I don't have to turn that over because I think I know why he said that.<sup>218</sup>

Thereafter, the trial judge offered (and the defense declined) a continuance of the trial date and denied the defense motion to dismiss.

During the second trial, Boyd identified Shelton as the shooter, and the defense then called Officer Woodward to testify to Boyd's hospital statement. The defense then attempted to elicit from Officer Woodward the fact that Boyd's hospital statement was withheld by the government prior to the first trial. The government objected on relevance grounds. The court sustained the objection and stated to defense counsel: "I don't want you [going] into what he told Mr. Kline, why Mr. Kline didn't tell you, the jury's not going to hear that."<sup>219</sup> The defense attorney explained that her purpose in eliciting testimony regarding the *Brady* violation was to show that the government was "playing dirty." The trial judge stated that the sole remedy for the *Brady* violation was the offer of a continuance. The judge informed defense counsel that "there's no other sanction you're going to get."<sup>220</sup>

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<sup>217</sup> *Shelton*, 983 A.2d at 367.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 368.

<sup>220</sup> *Id.*

At the close of the evidence, Arnell Shelton was convicted on all counts. Shelton argued on appeal that the trial court erred in precluding the defense from introducing the facts surrounding the *Brady* violation to support a “consciousness of a weak case” inference.<sup>221</sup> The appellate court agreed, holding that “defense counsel had a basis in law to argue that the government’s nondisclosure of exculpatory information was akin to an admission by conduct that the government was conscious that its case was weak (and that it was in fact weak) and that appellant should have been allowed to present that evidence.”<sup>222</sup>

#### B. ANALYSIS

Although the opinion in *Shelton* should be lauded for its clarity in articulating the clear nexus between intentional *Brady* violations and the “consciousness of a weak case” inference,<sup>223</sup> the opinion does not provide any guidance to trial courts on sanctions to be imposed when confronted with these kinds of intentional *Brady* violations. The *Brady* violation in *Shelton* was intentional. The facts clearly indicate that the prosecutor was well aware of the statement prior to the first trial, and the prosecutor’s stated belief that disclosure was not required demonstrates that the withholding of the statement was a deliberate decision.<sup>224</sup> Notwithstanding, no sanction was imposed by the trial court. The only “sanction” the trial court purported to impose was a continuance of the trial date. This, of course, was not actually a sanction *against* the government. Given the government’s blatant *Brady* violation, a *Brady* instruction would have been an effective and appropriate sanction. Consistent with the instruction proposed above in Part III, the trial judge could have instructed the jury as follows:

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<sup>221</sup> *Id.* at 369.

<sup>222</sup> *Id.* at 371.

<sup>223</sup> The court in *Shelton* recognized that the *Brady* disclosure duty is breached whether nondisclosure is negligent or intentional but correctly noted that only an intentional suppression of *Brady* information will give rise to the inference that the government considered that disclosure of the evidence would weaken its case. *Id.* at 372 n.19.

<sup>224</sup> Also, contrary to the prosecutor’s dubious contention that he believed Boyd’s statement was not credible because Boyd was injured and in pain when the statement was made, these extreme circumstances surrounding the making of the statement would make the statement more—not less—credible under traditional rules of evidence. As the statement was made shortly after Boyd was shot and related to the circumstances surrounding the shooting (the identity of the shooter), the statement would likely be deemed sufficiently reliable to be admissible as an “excited utterance” under either the federal or the District of Columbia rules of evidence. *See* FED. R. EVID. 803(2) (defining an excited utterance as “[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition”); *Price v. United States*, 545 A.2d 1219 (D.C. 1988) (noting the same).

[u]nder the United States Constitution, in order for the defendant to receive a fair trial, the government is required to inform the defense of any information known to the government that tends to suggest that the defendant might not have committed the crime(s) charged, as well as information which casts doubt on the credibility of the government's own evidence. In this case, the government intentionally withheld such evidence from the defense. Specifically, the government failed to inform the defense that shortly after he was shot, Mr. Boyd informed the police that he could not identify the person who shot him. In evaluating the merits of this case, you can decide what weight, if any, to give to the government's misconduct. The government's actions, standing alone, or in combination with other facts presented in this case, may create a reasonable doubt in your mind about the defendant's guilt.

In addition, the decision in *Shelton* fell short in finding that the trial court's error in precluding the defense from presenting *Brady* misconduct evidence was harmless. The *Shelton* court failed to fully appreciate the rich evidentiary value of *Brady* misconduct evidence and the persuasive force of the "consciousness of a weak case" inference.<sup>225</sup> In the hands of a skilled

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<sup>225</sup> The government's evidence of guilt was not overwhelming. There was no gun or other physical evidence to link Shelton to the crime scene. The entire case rested largely on the strength of Boyd's identification of Shelton as the shooter. In support of its conclusion that Shelton was not prejudiced by the trial court's error, the *Shelton* court stated that Officer Woodward's testimony regarding the hospital statement was "ambiguous" and "did not have much force." *Shelton*, 983 A.2d at 372. In fact, the only ambiguity was whether Boyd told Woodward: "I did not see who shot me," or whether Boyd said: "I don't know who shot me." Under either version, Boyd told Officer Woodward that he could not identify the shooter. In addition, Officer Woodward—not Boyd—first mentioned Shelton's name as the possible shooter when he interviewed Boyd. *Id.* at 366. Before traveling to the hospital to interview Boyd, Boyd's mother told Woodward about the prior beef between Boyd and Shelton. Brief for Appellee, *supra* note 216, at 16; Brief of Appellant at 12-13, *Shelton v. United States*, No. F-847-01 (D.C. Super. Ct. July 3, 2006); see also Transcript of Jury Trial at 225-30, *Shelton v. United States*, No. F-847-01 (D.C. Super. Ct. July 23, 2002). Even then Boyd did not name Shelton as the shooter. *Id.* In addition, Boyd testified that when he spoke to Woodward he was "in and out of consciousness" and "didn't really know what was going on at the time." *Shelton*, 983 A.2d at 365. However, Officer Woodward testified that when he arrived at the hospital to speak to Boyd, though Boyd appeared to be in obvious pain from his gunshot wound, Boyd was very much conscious, awake, and alert. Transcript of Jury Trial, *supra*, at 229. Woodward's testimony on this point was bolstered by Boyd's hospital records (introduced by the defense), which reported that Boyd was alert although "anxious" and in "moderate pain." Brief of Appellant *supra*, at 12; see also Transcript of Jury Trial at 351, 362, *Shelton v. United States*, No. F-847-01 (D.C. Super. Ct. July 24, 2002). The *Shelton* court also stated that Boyd's eyewitness identification was corroborated by another witness, Andrew Durham, who was "not significantly impeached." *Id.* at 373. However, Durham was impeached with two different pretrial statements wherein he stated that he did not know the shooter. Durham was also impeached with the fact that during a pretrial meeting with detectives when he was shown a photograph of Shelton, Durham stated that the photograph did not look anything like the shooter. Transcript of Jury Trial (July 23, 2002), *supra*, at 208, 168, 196, 205; Brief of Appellant, *supra*, at 10-12. The defense also impeached Durham with the fact that he only stated that he could identify Shelton as the shooter after Durham was incarcerated and facing his own criminal charges. Thus, Boyd's

criminal defense attorney, the government's *Brady* misconduct could illuminate the overall weaknesses in the government's case and explain the strong connection between the government's misconduct and the government's burden of proving guilt beyond a reasonable doubt. For example, the defense could have argued the following:

Ladies and Gentlemen of the jury:

Actions speak louder than words. By their actions—hiding and concealing key evidence—the government is sending you a message: they cannot prove that Mr. Shelton committed this crime. Mr. Boyd, the government's key witness, told the police that he did not know who shot him and he could not identify the shooter. Plain and simple: the government's case is weak. They know it, and now you know it, too.

This case is not about the evidence the government showed you, it's about the evidence they tried to hide from you. The evidence they never wanted you to hear. The prosecution knew you would never believe Mr. Boyd if you knew the that the story Mr. Boyd is saying now is completely different from what he reported to the police at the hospital right after he was shot. This is the truth the government tried to hide. These are the facts they did not want you to know.

Ask yourself: if the government had a solid case against Mr. Shelton, why would they stoop so low as to violate the law by purposely hiding this critical piece of evidence? They wouldn't. They would have no reason to. Hiding evidence is an act of desperation. The government wants to win at all costs—even if they have to cheat to do it. By their underhanded actions, the government is telling you that their case is weak. And we hear them loud and clear.

Ladies and Gentlemen, after all they did and all they hid, how could you not have a reasonable doubt in this case?

Having admitted on the record that nondisclosure of the hospital statement was not accidental, the government would have been hard-pressed to proffer a credible explanation to rebut the “consciousness of a weak case” inference argued by the defense. Because the trial court precluded the *Brady* misconduct evidence needed to support the “consciousness of a weak case” inference, the defense in *Shelton* was unable to attack the heart of the government's case and reap the full benefit of this valuable argument on reasonable doubt.

## VI: CONCLUSION

The magnitude of *Brady* misconduct in the American criminal justice system is reflected in the number of wrongful convictions, near executions, and other miscarriages of justice in state and federal courtrooms across the country. These violations infect the accuracy of the fact-finding process and undermine the overall integrity of the judicial system. Prosecutors have

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identification was not bolstered by other compelling evidence presented by the government at trial.

not performed well as the stewards of exculpatory evidence but have remained steadfast in their resistance to any external restrictions on their ability to control whether and when *Brady* evidence is disclosed to the defense. As both *Stevens* and *Shelton* make plain, the status quo is dysfunctional. In seeking to improve the management and delivery of *Brady* evidence, criminal courts should take a serious look at two well-worn civil practices that allow litigants to introduce discovery misconduct evidence at trial, either as a court-imposed sanction or as relevant evidence of the weakness of a litigant's case. Unlike other *Brady* reform proposals, both these measures can be fully implemented by trial courts within the framework of existing law and could prompt prosecutors to begin systematically disclosing all material exculpatory evidence to the defense as envisioned by the Supreme Court over forty-five years ago in *Brady v. Maryland*.