
LITIGATING *BRADY V. MARYLAND*: GAMES PROSECUTORS PLAY

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INTRODUCTION

By any measure, *Brady v. Maryland*¹ has not lived up to its expectations. *Brady*'s announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather than victory.² Nevertheless, prosecutors over the years have not accorded *Brady* the respect it deserves. Prosecutors have violated its principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice. Moreover, as interpreted by the judiciary, *Brady* actually invites prosecutors to bend, if not break, the rules,³ and many prosecu-

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¹ 373 U.S. 83 (1963).

² *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. The Court observed: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* *Brady*'s constitutional due process standard has been incorporated into an explicit ethical duty upon government attorneys. See MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004) [hereinafter MODEL RULES]; MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004) [hereinafter MODEL CODE]; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, Standard 3-3.11(a) (1992) [hereinafter ABA STANDARDS].

³ See 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, 836 (1997) (*Brady* "is a right that almost begs to be violated"); Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 274 (2005) ("*Brady* is now best understood as a rule of prosecutorial privilege rather than a rule of disclosure."). I am reminded of Judge Jerome Frank's famous aphorism that the rules regulating misconduct by prosecutors are seen by prosecutors as "pretend rules" when courts do not enforce them. See *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

tors have become adept at *Brady* gamesmanship to avoid compliance.⁴

To be sure, U.S. litigation tolerates a certain amount of gamesmanship—especially in civil litigation—where there exists a semblance of adversarial equality and where attorneys representing private clients are bound by rules of ethics to serve their clients’ private interests zealously within the bounds of the law.⁵ But criminal litigation is different, and one might reasonably expect there should be less tolerance for gamesmanship. In contrast to an attorney in civil litigation, a prosecutor does not represent a private client; he represents the entire community.⁶ And, as the most powerful official in the criminal justice system, the prosecutor effectively decides whether a person should live, die, be incarcerated for life, or receive special benefits and immunities.⁷ Finally, a prosecutor is constitutionally and ethically obligated to carrying out his responsibilities to promote public justice rather than private vengeance.⁸ There is no place in such a regime for prosecutorial gamesmanship.

Moreover, the criminal justice system typically features an imbalance in power and resources that increasingly favors the prosecutor and therefore makes gamesmanship even less acceptable. Most commentators would agree that the balance of advantage in the criminal justice system tilts heavily to the prosecutor.⁹ This is noticeable in every phase of the process, but most notably in the prosecutor’s control over the evidence relevant to a defendant’s guilt. The prosecutor’s acquisition of evidence from a broad variety of sources, his ability to

⁴ The term “gamesmanship” has been employed to describe a prosecutor’s treatment of *Brady*. See *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) (“this court has been faced with annoying frequency with gamesmanship by some prosecutors with respect to the duty to disclose”); *United States v. Starusko*, 729 F.2d 256, 265 (3d Cir. 1984) (“the [*Brady*] game will go on, but justice will suffer”). See also Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, CRIMINAL PROCEDURE STORIES, (Carol S. Streiker ed. 2006), at 129.

⁵ See MODEL CODE, *supra* note 2, Canon 7 (“A lawyer should represent a client zealously within the bounds of the law.”).

⁶ See ABA STANDARDS, *supra* note 2, Standard 3-3.2 cmt. (“the prosecutor’s client is not the victim but the people who live in the prosecutor’s jurisdiction”).

⁷ See *Young v. United States*, 481 U.S. 787, 813 (1987) (“Between the private life of the citizen and the public glare of accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual.”).

⁸ See MODEL RULES, *supra* note 2, R. 3.8, cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); MODEL CODE, *supra* note 2, EC 7-13 (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); ABA STANDARDS, *supra* note 2, Standard 3-1.2(c) (“The duty of the prosecutor is to seek justice, not merely to convict.”).

⁹ See YALE KAMISAR, WAYNE LA FAVE, JEROLD H. ISRAEL, & NANCY KING, MODERN CRIMINAL PROCEDURE 1221 (11th ed. 2002); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 809 (6th ed. 2000) (“[T]he prosecutor has become the most powerful office in the criminal justice system.”).

sift, evaluate, and test this information in private, coupled with a defendant's limited ability to uncover evidence advantageous to his case, recalls Justice Brennan's famous metaphor that the criminal process may be more like a "sporting event" than a quest for truth.¹⁰ And there is no better illustration of this than the prosecutor's treatment of *Brady*.

In fact, no rule in criminal procedure has been as controversial, and has generated as much gamesmanship, as the *Brady* rule. This is not surprising. *Brady* depends on the integrity, good faith, and professionalism of the prosecutor for its effectiveness. But at the same time, *Brady* presents a significant and unique departure from the traditional, adversarial mode of litigation. This schizophrenic situation means that the effective enforcement of *Brady* is an ideal of justice that may be impossible to achieve. It requires a prosecutor to balance competing and contradictory objectives, and is so malleable that it affords prosecutors an extremely broad opportunity to exercise discretion in ways that impede—rather than promote—the search for truth. Not surprisingly, violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations, with disastrous consequences: innocent people are wrongfully convicted, imprisoned, and even executed;¹¹ the reputation of U.S. prosecutors suffers;¹² and the absence of meaningful legal and ethical enforcement and accountability has a corrosive effect on the public's perception of a justice system that often appears to be arbitrary, unjust, and simply unreliable.¹³

The manner in which *Brady* is treated in federal and state courts reveals a confusing and inconsistent understanding and application of its objectives. This dysfunctional treatment is largely attributable to the Supreme Court's permissive approach to prosecutorial discretion as well as a hands-off approach by judicial, legislative, and disciplinary bodies. *Brady* is enforced by the judiciary through widely incon-

¹⁰ William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event of Quest for Truth?* 1963 WASH. U. L.Q. 279. For an update to that famous article, see William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 1990 WASH. U. L.Q. 1.

¹¹ See Bennett L. Gershman, *Reflections on "Brady v. Maryland"*, 47 S. TEX. L. REV. 685, 688 (2006).

¹² Several recent studies have documented widespread abuses by U.S. prosecutors that have seriously damaged the reputation of prosecutors as "ministers of justice." See, e.g., Frederic N. Tulsy, *Tainted Trials: Stolen Justice*, MERCURY NEWS, Jan. 22, 2006, at 1; Steve Weinberg, *Harmful Error*, THE CENTER FOR PUBLIC INTEGRITY (2003); Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE, Jan. 10, 1999, at 1.

¹³ See Ellen Yaroshesky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 299 (2004) (arguing that misconduct by prosecutors and lack of meaningful discipline and accountability has eroded public confidence in integrity of criminal justice system).

sistent approaches as to what constitutes *Brady* evidence, the specific types of information required to be disclosed, when it must be disclosed, and the sanctions for noncompliance.¹⁴ In addition, given the various enforcement protocols of different prosecutors offices, and even of individual prosecutors in the same office,¹⁵ it is virtually impossible to identify clear and consistent norms of compliance by prosecutors as to what evidence is required to be disclosed, when it must be disclosed, and permissible reasons for noncompliance. As a result, prosecutors are encouraged to play the *Brady* game without meaningful legal or ethical oversight or resistance.

OVERVIEW OF *BRADY* LITIGATION

Brady litigation spans the entire life of a criminal case, from the time a defendant is arraigned on a criminal charge, to pre-trial and trial proceedings, to the period following his conviction, to when he is incarcerated, and in some cases on Death Row awaiting execution. Typically, a defendant—at his arraignment on a federal criminal charge—makes a motion for discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure, and in all fifty states pursuant to their individual rules and statutes governing discovery. A defendant typically includes a request for *Brady* evidence in his initial discovery motion.

Prosecutorial disclosure of *Brady* evidence is not automatic. Prosecutors are typically required to provide *Brady* evidence only upon a request.¹⁶ Based on my experience, some prosecutors disclose *Brady* evidence early in the proceedings, along with their disclosure of other discovery materials. Most commonly, a prosecutor will respond to a *Brady* request by representing that he is aware of his obligation under *Brady* and will comply. Most federal and state jurisdictions do not mandate the disclosure of *Brady* evidence within a specified time period,¹⁷ nor do they specify any due diligence requirements upon prosecutors.¹⁸ No federal district imposes sanctions or

¹⁴ See *Treatment of Brady v. Maryland Material in United States District and State Courts' Rules, Orders, and Policies*, REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, (Federal Judicial Center 2004) [hereafter "*Advisory Committee Report*"].

¹⁵ See Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1521-22 (2000) (noting "significant disparity" in policies of different prosecutor offices with respect to discovery); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 684 (noting differences among offices and among prosecutors within same office).

¹⁶ See *Advisory Committee Report*, *supra* note 14, at 11, 22-3.

¹⁷ *Id.* at 12-13, 23-24.

¹⁸ *Id.* at 14, 27.

remedies for a prosecutor's nondisclosure or untimely disclosure of *Brady* evidence.¹⁹ All states, by contrast, provide remedies for prosecutorial nondisclosure that track Rule 16(d)(2) of the Federal Rules of Criminal Procedure, including granting a continuance or disallowing proof relating to the *Brady* violation.²⁰

A prosecutor may comply with his discovery and *Brady* obligations in several ways. A prosecutor may furnish the defense with all evidence specifically required by the rules of discovery, as well as all exculpatory and impeachment evidence the prosecutor believes is required to be disclosed under *Brady*. Some prosecutors may go beyond the strictures of discovery rules and furnish a defendant with the entire file of the case, including all potentially *Brady* evidence.²¹ And some prosecutors, alert to their *Brady* obligation, may seek the court's assistance in determining whether and to what extent they are required to comply with *Brady*.²² Since a prosecutor's *Brady* duty is a continuing one,²³ a prosecutor is obligated—throughout the pre-trial and trial proceedings—to disclose *Brady* evidence when he learns about it, and is required to make a diligent search for *Brady* evidence in places where *Brady* evidence is readily available.²⁴ Moreover, after initially receiving discovery materials and gaining more familiarity with the case, a defendant may make a further and more focused request for *Brady* evidence to which the prosecutor is obligated to respond. Needless to say, a belated disclosure of *Brady* evidence typically generates a claim by the defendant that the prosecutor—through his untimely disclosure—has impaired the defendant's ability to receive a fair trial.²⁵

¹⁹ *Id.* at 14-15.

²⁰ *Id.* at 27-28.

²¹ See *infra* notes 65-92, and accompanying text.

²² See, e.g., *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004) (*in camera* review to ensure safety of government witnesses); *United States v. Pena*, 227 F.3d 23 (2d Cir. 2000) (*in camera* review of confidential pretrial services and pre-sentence reports of government witnesses); *United States v. Innamorati*, 996 F.2d 456 (1st Cir. 1993) (*ex parte* proceeding to determine whether sensitive material in prosecutor's files was *Brady* material). The Supreme Court has suggested that in some circumstances such pre-trial review would be appropriate. See *United States v. Agurs*, 427 U.S. 97, 110 (1976).

²³ The Supreme Court's treatment of *Brady* has routinely viewed the prosecutor's duty as a continuing one. See, e.g., *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (due process violated where prosecutor learned during trial that committed perjury but failed to inform defendant). See also *Advisory Committee Report*, *supra* note 14, at 13, 26 (noting federal and state courts that explicitly make the prosecutor's disclosure obligation "a continuing one."). Moreover, the prosecutor's duty under *Brady* does not end with the verdict but continues. See *Canion v. Cole*, P.3d (Ariz. App. 2004) ("The defendant's right to due process with regard to the disclosure of exculpatory evidence does not cease to exist after the verdict is rendered; the prosecution has a continuing duty to provide such evidence as was unlawfully withheld").

²⁴ See *infra* notes 102-137, and accompanying text.

²⁵ See *infra* notes 153-164, and accompanying text.

When a defendant pleads guilty or the case goes to trial, there is a presumption that a prosecutor has complied with his disclosure obligations.²⁶ However, it is commonly believed that most *Brady* evidence never gets disclosed; rather, it remains buried in drawers, boxes, and file cabinets in the offices of the prosecutor, the police, and other law enforcement and government agencies connected to the case.²⁷ The *Brady* decisions we read only present a very small and select sampling of exculpatory and impeachment evidence that has been discovered after the trial. When *Brady* evidence is discovered after the trial but before an appeal, a defendant may make a motion for a new trial based on newly discovered evidence, or raise the *Brady* issue on his appeal.²⁸ Post-conviction, *Brady* litigation most often occurs when a defendant who is incarcerated for a long prison term, or who awaits execution, has discovered that *Brady* evidence that was concealed from him during his trial seeks to vacate his conviction and sentence because of the prosecutor's unconstitutional nondisclosure. Defendants who have been convicted by a guilty plea,²⁹ or have completed their prison sentence, usually do not search for undisclosed *Brady* evidence or raise and litigate a *Brady* claim. Moreover, because a prosecutor ordinarily enjoys absolute immunity from civil

²⁶ See *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)) ("Ordinarily, we presume that public officials have properly discharged their official duties.").

²⁷ See *United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996) ("the government's failure to turn over exculpatory information in its possession is unlikely to be discovered and thus largely unreviewable"); *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) ("material favorable to the defense may never emerge from secret government files"). See also Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450, 1455 (2006) ("Defendants only rarely unearth suppressions."); Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1579 (2000) (arguing that in most cases, "withheld evidence will never see the light of day"); Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 909 (1995) ("it is probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported").

²⁸ See *infra*, notes 165-174, and accompanying text.

²⁹ The extent to which *Brady* applies in the context of plea bargaining and guilty pleas is unclear. See Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 958 (1989) (noting that although *Brady* issues are raised in the plea bargaining process, the extent of a prosecutor's duty to disclose exculpatory evidence during plea negotiations is unclear). The Supreme Court has held that a prosecutor does not suppress evidence under *Brady* when he fails to disclose, during plea negotiations, evidence that a defendant could use at trial to impeach a government witness. See *United States v. Ruiz*, 536 U.S. 622, 623 (2002). However, *Brady* may apply in the plea bargaining process when the prosecutor's failure to disclose evidence was sufficiently outrageous as to constitute a material misrepresentation rendering the plea involuntary. See *Ferrara v. United States*, 456 F.3d 278, 293 (1st Cir. 2006) ("government's nondisclosure was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary."); *Matthew v. Johnson*, 201 F.3d 353, 364 n. 15 (5th Cir. 2000) (even if nondisclosure is not a *Brady* violation, there may be situations in which the prosecutor's nondisclosure makes it "impossible [for defendant] to enter a knowing and intelligent plea.").

liability for *Brady* violations,³⁰ and it is unlikely that a defendant whose case has been completed and who is no longer incarcerated will seek to litigate a civil rights action against the prosecutor.

How does undisclosed *Brady* evidence get discovered after the trial? *Brady* evidence may be discovered after conviction in different ways. Sometimes a defendant is able to locate such evidence pursuant to a request under the Freedom of Information Act.³¹ A defendant may initiate his own investigation, usually through relatives and friends, to attempt to locate witnesses to prove that the prosecutor suppressed *Brady* evidence.³² Additional *Brady* evidence may be discovered after a court grants an evidentiary hearing, orders discovery, and takes testimony on a defendant's motion to vacate the conviction.³³ And there have been instances when *Brady* evidence is discovered serendipitously.³⁴

Assuming that previously undisclosed *Brady* evidence has been discovered after conviction, and assuming further that there are no procedural obstacles that would bar review, a court addressing the merits of a *Brady* claim must answer three questions: (1) Did the prosecutor suppress evidence? (2) Was the evidence favorable to the accused? (3) Was the suppression prejudicial to the accused? These three questions comprise what are commonly referred to as the "three components of a true *Brady* violation."³⁵ They are the basis not only for examining the judiciary's interpretation and application of the *Brady* rule, but also for examining the tactics that prosecutors employ, and the games that prosecutors play, to avoid complying with *Brady*.

³⁰ See, e.g., *Spurlock v. Thompson*, 330 F.3d 791 (6th Cir. 2003); *Lyles v. Sparks*, 79 F.3d 372 (4th Cir. 1996).

³¹ See, e.g., *United States v. Bagley*, 473 U.S. 667, 671 (1985).

³² See, e.g., *State v. Larkins*, 2003 WL 22510579 (Ohio App. 8 Dist.). (Bishop Alfred Nickles filed a public records request with the Cleveland Police Department, seeking the same police reports previously denied to Larkins, and after receiving the documents, forwarded them to Larkins).

³³ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 278 (1999).

³⁴ See, e.g., *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994) (*Brady* evidence discovered by U.S. probation officer during routine pre-sentence investigation which revealed documents casting doubt on the credibility of key government witness); Sean Gardner, *\$5 Million Cannot Undo 7 Years; City Settles Over Wrong Conviction*, NEWSDAY, Dec. 17, 2003 (*Brady* evidence inadvertently discovered by an investigator for an insurance company representing New York City and a day care center in a civil lawsuit brought by parents of the victim of a sexual abuse crime).

³⁵ See *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

THE METAPHOR OF GAMES

Discussion of U.S. litigation frequently employs the metaphors of sports and games. We refer to contests, fights, winning, losing, fair play, foul play, harmful errors, harmless errors, plain errors, points, and penalties. Discovery doctrine also makes reference to games, especially when the issue involves the difficulty for one party to acquire relevant information, and the duty of the other party to disclose relevant information to the adversary. The Supreme Court long ago recognized that one of the overriding objectives of the rules of discovery was to make a trial “less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”³⁶ More recently, the Court has invoked the games of “gambling,”³⁷ “hide and seek,”³⁸ and “scavenger hunts”³⁹ to characterize the perverse conduct of prosecutors in seeking to avoid their responsibilities under *Brady*. Indeed, there is probably no better context in which to examine prosecutorial gamesmanship than in connection with the *Brady* rule. What follows are the games that prosecutors most commonly play to avoid compliance with *Brady*. These games include charades, scavenger hunts, gambling, blind man’s bluff, hide and seek, delay and conquer, obstacle courses, mazes, and Simon Sez. And, needless to say, prosecutors win almost all the time.

CHARADES: DISGUISE AND DECEIVE

One of the most insidious prosecutorial schemes to subvert *Brady* is the orchestration of a plan whereby a key prosecution witness, who ordinarily would have a motive to lie by virtue of having made a deal with the government, testifies that no deal was made. In fact, the witness’s testimony that he has made no deal with the prosecutor may be accurate because the witness himself may not know about it. Unbeknownst to the judge, the jury, and the witness himself, a prosecutor may make a deal with a witness’s attorney in which the prosecutor agrees to reward the witness for his testimony as long as the attorney’s promises not to tell his client about the agreement. Employing this charade, the prosecutor can later claim that the witness’s testi-

³⁶ *United States v. Procter & Gamble Company*, 356 U.S. 677, 682 (1958).

³⁷ *United States v. Bagley*, 473 U.S. 677, 701 (1985) (Marshall, J., dissenting) (*Brady* “invites a prosecutor, whose interests are conflicting, to gamble, to play the odds”).

³⁸ *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (“A rule thus declaring ‘prosecution may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.”).

³⁹ *Id.* at 695 (“Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.”).

mony about the absence of a deal is not perjury and there was no deal with the witness motivating him to provide impeachable testimony. How often prosecutors engage in this game is difficult to say. Several cases have been reported that describe such conduct. In *Hayes v. Brown*,⁴⁰ for example, the prosecutor made an agreement with the attorney for a key witness in a murder case to give the witness transactional immunity and dismiss other pending charges in exchange for his client's testimony. However, seeking to keep the arrangement from the judge and jury, the prosecutor extracted a promise from the witness's attorney that he would not tell his client about the deal; in that way, the witness could honestly testify without perjuring himself because he would not be personally informed of the deal.⁴¹ At the trial, when the defendant's attorney asked the prosecutor whether there had been any negotiated settlement in exchange for the witness's testimony, the prosecutor responded in open court that "[t]here has been absolutely no negotiations whatsoever in regard to his testimony,"⁴² and that there were "absolutely no promises and no discussions in regard to any pending charges."⁴³

On appeal following the conviction, after this charade was divulged, the government argued that the witness did not give false testimony, and therefore the prosecutor did not violate the *Brady* rule by allowing false testimony to be given without correction. Rejecting this argument in scathing language, the Ninth Circuit observed: "It is reprehensible for the State to seek refuge in the claim that a witness did not commit perjury, when the witness unknowingly presents false testimony at the behest of the State."⁴⁴ Citing a series of Supreme Court decisions involving a prosecutor's presentation of false testimony,⁴⁵ the appellate court vacated the conviction and harshly condemned the prosecutor's scheme as a "covert subornation of perjury."⁴⁶

⁴⁰ 399 F.3d 972, 977 (9th Cir. 2005) (en banc).

⁴¹ Although the court assumed that the witness was unaware of the deal, the court noted the "distinct risk that, in preparing [the witness] for his testimony, [the witness's] counsel – who did know about the deal – might have influenced the content of that testimony, deliberately or not." *Id.* at 981 n. 1.

⁴² *Id.* at 979.

⁴³ *Id.* at 980.

⁴⁴ *Id.* at 981. See also *Wilhoite v. Vasquez*, 921 F.2d 247, 251 (9th Cir. 1990) (Trott, J., concurring) ("This saves [the witness] from perjury, but it does not make his testimony truthful.")

⁴⁵ *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942).

⁴⁶ 399 F.3d at 981. See also *People v. Steadman*, 623 N.E.2d 509, 511 (N.Y. 1993) ("scheme employed by the District Attorney's office undermines [*Brady*]" and "cannot be condoned.").

A similar—but less overt—form of prosecutorial gamesmanship that achieves the same objective is the prosecutor’s ploy of making a tacit deal with a witness without actually verbalizing the agreement. For example, a witness may approach a prosecutor and seek to make a deal for his testimony. A prosecutor may reward the witness without verbalizing or memorializing his intention. A prosecutor could thereby claim that he did not violate *Brady* by soliciting the testimony of a cooperating witness who could credibly say he made no deal and received no benefits for his testimony. Some courts actually allow the prosecutor to engage in this type of charade, as long as the prosecutor does not make an overt promise of assistance before the witness testifies, even if the prosecutor in fact intends to reward the witness with favorable treatment after the testimony and does so.⁴⁷ It is not difficult to imagine, as one court observed, that “such a formalistic and technical evasion would eviscerate the *Brady* rule.”⁴⁸ Given the potential for gamesmanship and abuse, many courts agree that allowing a prosecutor to make such a secret agreement would be a means for a prosecutor to circumvent his *Brady* obligation.⁴⁹ Thus, as reported in *Bell v. Bell*,⁵⁰ where a witness approached the prosecutor and sought benefits from the prosecutor (and, the court noted, most cooperating witnesses do not testify from altruistic motives⁵¹) and the prosecutor understood this expectation and fulfilled the witness’s expectation by actually bestowing benefits, the court found an implied agreement that reasonably impacted on the witness’s credibility.⁵² To allow this type charade not to be disclosed, the court observed, merely encourages further gamesmanship.⁵³

Prosecutors have concocted similarly deceptive schemes to subvert the *Brady* rule and thereby insulate their witnesses from attacks on their credibility. For example, in *Silva v. Brown*, the prosecutor made a secret deal with the attorney for a key witness to forestall a psychi-

⁴⁷ *Shabazz v. Artuz*, 336 F.3d 154 (2d Cir. 2003) (favorable treatment for witness insufficient to show agreement between prosecution and witness).

⁴⁸ *Bell v. Bell*, 460 F.3d 739, 753 (6th Cir. 2006), *reh’g granted en banc*, 2006 U.S. App. LEXIS 32575.

⁴⁹ *Id.* at 754-55 (6th Cir. 2006); *Wisehart v. Davis*, 408 F.3d 321, 323-24 (7th Cir. 2005) (tacit understanding between prosecution and witness must be disclosed); *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989); *United States v. Shaffer*, 789 F.2d 682, 685 (9th Cir. 1986).

⁵⁰ 460 F.3d 739 (6th Cir. 2006).

⁵¹ *Bell v. Bell*, 460 F.3d at 753 (“a jailhouse informant is one of the least likely candidates for altruistic behavior; his offer to testify is almost always coupled with an expectation of some benefit in return.”).

⁵² *Id.* at 755 (“A tacit agreement must be disclosed regardless of when the prosecution acts upon that agreement.”).

⁵³ *Id.* (court’s rule “is necessary to prevent the prosecution from shirking its *Brady* responsibilities by simply waiting until after the petitioner’s trial to act upon the tacit agreement.”).

atric examination of the witness prior to his testimony.⁵⁴ The witness was the accomplice in a murder who had sustained severe brain damage years earlier. The witness's attorney planned to have his client psychiatrically evaluated after his arraignment because he was either unable to cooperate in his defense or was insane. However, because a psychiatric evaluation would have to be disclosed and under *Brady* would "supply ammunition to the defense," the prosecutor struck a bargain with the witness's lawyer under which he would delay the examination until after the witness's testimony in exchange for dismissing the murder charges against his client.⁵⁵

According to the appellate court, which reversed the defendant's conviction, the "prosecutor's unscrupulous decision to keep secret the deal he made to prevent an evaluation of the competence of the State's star witness" was crucial impeaching evidence under *Brady* because, as the prosecutor well knew, the examination results would have had a powerful impact on the jury's assessment of the witness's testimony.⁵⁶ Moreover, "the very fact that the [prosecutor] had sought to keep evidence of [the witness's] mental capacity away from the jury might have diminished the State's own credibility as a presenter of evidence."⁵⁷

Finally, the connection between a prosecutor's nondisclosure of *Brady* evidence and his coaching of a witness should be noted. Improper coaching is itself a form of lawyer gamesmanship. It has been called one of the "dark secrets" of the U.S. adversary system in the way it undermines the search for truth,⁵⁸ and is very difficult to detect because neither the lawyer nor the witness would reveal the secret. Sometimes the coaching is obvious. In a recent egregious case, undisclosed *Brady* evidence depicted a federal prosecutor ordering a police investigator to take a recanting witness out of the room and "straighten him out."⁵⁹ Indeed, one of the prominent features in several of the Supreme Court's *Brady* decisions has been an effort by the prosecutor to coach witnesses in order to avoid revealing the existence of *Brady* evidence. In *Banks v. Dretke*,⁶⁰ a key piece of sup-

⁵⁴ 416 F.3d 980, 984 (9th Cir. 2005).

⁵⁵ *Id.*

⁵⁶ *Id.* at 991.

⁵⁷ *Id.* at 988.

⁵⁸ John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989) ("Witness preparation is treated as one of the dark secrets of the legal profession.").

⁵⁹ *Ferrara v. United States*, 456 F.3d 278, 282 (1st Cir. 2006). The court found that the prosecutor "manipulated the witness and deliberately tried to cover up the evidence," and that this "blatant misconduct...was so outrageous that it constituted impermissible prosecutorial misconduct sufficient to ground the petitioner's claim that his guilty plea was involuntary." *Id.* at 293.

⁶⁰ 540 U.S. 668, 677, 685, 705 (2004).

pressed evidence was a transcript of a practice session showing how the prosecutor “intensively coached” and “closely rehearsed” the testimony of witnesses. In *Kyles v. Whitley*,⁶¹ there was a clear implication of coaching from the suppressed evidence that would have shown how the witness’s testimony became much more precise at a re-trial.⁶²

A good example of a prosecutor’s manipulating a witness to evade *Brady* is *Walker v. City of New York*, in which a prosecutor almost certainly coached a cooperating witness to give false testimony to conceal information that would have destroyed the witness’s credibility.⁶³ In *Walker*, the cooperating witness in a murder prosecution initially identified two individuals as the perpetrators. However, when the prosecutor learned that one of these alleged perpetrators could not have committed the crime because he was in prison at the time, he elicited testimony from the cooperator, before the grand jury and at trial, that he did not mention a second accomplice. The appellate court, in reversing the conviction, condemned the prosecutor’s failure to disclose the stark inconsistency in the witness’s story, but the implication of witness manipulation is obvious.

THE SCAVENGER HUNT: OPEN FILE DISCOVERY

Some prosecutors represent that their office maintains a so-called “open file” discovery policy, whereby the entire file of a case is routinely made available to the defense, in all cases, well in advance of the trial. To be sure, an open file policy may be a responsible means of insuring a fair and orderly prosecution. According to one prosecutor, “We’re taking the approach now that every document that we gather in the course of an investigation will be made available to the defense. And it should be made available at the time of arraignment.”⁶⁴ Under such an open-file approach, materials that are often viewed as critical to defense discovery, including a list of the government’s witnesses, statements of those witnesses, summaries of statements made by witnesses, and relevant police reports, are turned over to the defense early in the case.⁶⁵ An open file policy that dis-

⁶¹ 514 U.S. 419, 443, 443 n.14, 454 (1995).

⁶² For other *Brady* decisions by the Supreme Court that appear to have involved a prosecutor’s coaching of witnesses, see *Strickler v. Greene*, 527 U.S. 263 (1999); *Alcorta v. Texas*, 355 U.S. 28 (1957).

⁶³ 974 F.2d 293, 295, 301 (2d Cir. 1992).

⁶⁴ Panel Discussion, *Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781, 786 (1999) (comments of G. Douglas Jones, United States Attorney for the Northern District of Alabama) [hereinafter *Panel Discussion*].

⁶⁵ Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1522 (2000) (“Some defense attorneys are fortunate to practice in jurisdictions that have “open-file” discovery practices and thus receive the material early

closes every relevant item in the government's case to the defense may, theoretically, offer a better chance of a prosecutor complying with *Brady* than a more restrictive discovery approach.⁶⁶ However, even under the most expansive open file policy, prosecutors typically make a distinction between what is required under discovery rules, and what is required under *Brady*, disclosing the former but not the latter.⁶⁷

Prosecutors ostensibly maintain an open file policy for several reasons. Such a policy may enhance a prosecutor's reputation for transparency and fairness. It may also foster in judges and defense lawyers a sense of trust of the prosecutor that reduces the occasions for contentious discovery litigation. And an open file arrangement may encourage defendants to plead guilty in the belief that having been fully informed about the prosecution's case, they may assume that they will receive a favorable bargain from a prosecutor who acts with integrity. To be sure, this informal arrangement defies generalization, because as many commentators have observed, it is implemented in vastly different ways, by different offices, and indeed, by different prosecutors in the same office.⁶⁸

Given the superficial attractiveness of an open file policy, and the institutional benefits allegedly accruing from such a policy, one might assume that such a policy enhances a defendant's ability to obtain more complete discovery, including the disclosure of *Brady* evidence, well in advance of trial, enabling a defendant to make an informed decision whether to go to trial or plead guilty. However, this assumption may be flawed. To the extent that an open file policy represents to a defendant that a prosecutor has disclosed everything in her file relevant to the case, it may lull a defendant into believing that he need take no further action to enforce discovery requirements. In such a case, an open file policy may become a trap for the unwary. Through the pretense of transparency, prosecutors have the ability to not only

in the case.”).

⁶⁶ This assumes, of course, that the prosecutor has carefully reviewed the file, is aware of the details in the file, including potential *Brady* material, and has made the decision to disclose all of this information to the defense. However, this assumption is not necessarily justified. See *Panel Discussion*, *supra* note 65, at 805 (comments of Art Leach, Assistant United States Attorney and chief of Organized Crime Strike Force) (“open file discovery is the lazy approach to handling discovery” because prosecutors are “unaware of many details that appear in what you are presenting for discovery”).

⁶⁷ See *Panel Discussion*, *supra* note 65, at 786 (comments of U.S. Attorney Jones) (open file discovery “doesn’t necessarily include the ‘Brady’ material”).

⁶⁸ See John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 461 (2001) (“Different prosecutors may offer ‘open file discovery’ and have vastly different ideas of what that means.”).

withhold *Brady* evidence—as they may do in any case—but also by suggesting that full disclosure has been made, forestall any further inquiry and, in fact, change the nature of the defense. Indeed, several of the most egregious *Brady* violations have been reported in cases where prosecutors represented that they allegedly maintained an open file policy and had claimed to disclose everything in the file relating to the case, including *Brady* evidence.⁶⁹

The opportunities for gamesmanship under an open file policy are considerable. First, so-called open file discovery is really a misnomer. Even those prosecutors who boast that, upon arraignment, they disclose to defendants every document that has been gathered in the course of an investigation, from every agency involved in the investigation—including the statements of witnesses and other evidence material to the defense—candidly acknowledge that much evidence is *not* disclosed under this policy and that defendants must scavenge for additional evidence.⁷⁰ Among the evidence that is not ordinarily disclosed are a prosecutor's work product, summaries of interviews with witnesses, notes and communications with other law enforcement officials, information that is privileged or confidential, and information whose disclosure might threaten the safety of witnesses.⁷¹

Second, prosecutors acknowledge that even under the most liberal open file policy, open file disclosure does not necessarily include all relevant documents, including *Brady* evidence.⁷² Prosecutors know that *Brady* evidence may be in the files of other government agencies,

⁶⁹ See e.g., *Banks v. Dretke*, 540 U.S. 668, 693 (2004) (prosecution represented that it had fully disclosed all relevant information its file contained; file did not include critical exculpatory information relating to one of state's key witness); *Strickler v. Greene*, 527 U.S. 263, 276 n. 14 (1999) (prosecutor told petitioner that the prosecutor's files were open and thus there was no need for a formal *Brady* motion; prosecution file given to the petitioner did not include several important documents prepared by one of the prosecutor's key witnesses).

⁷⁰ *Panel Discussion*, *supra* note 65, at 786-87 (comments of U.S. Attorney Jones) (noting that open file discovery may not include summaries of witness interviews or statements of witnesses whose safety needs to be protected).

⁷¹ *Id.* at 787-88 (evidence withheld to protect safety of witnesses); *Id.* at 805 (agent's notes of interviews with witnesses not required to be disclosed); *Id.* at 805 ("work product" evidence reflecting prosecutor's impressions, strategies, and legal theories not required to be disclosed). See Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33, 55-858 (2004) (discussing extent to which privileged communications are able to be disclosed under *Brady*). The Supreme Court has not decided whether a prosecutor's "work product" must be disclosed under *Brady*. However, lower courts have discussed the question of whether a prosecutor's "work product" that includes *Brady* evidence must be disclosed. Compare *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006) (*Brady* rule does not extend to prosecutor's work product because it "would greatly impair the government's ability to prepare for trials") and *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000) (reaching the same conclusion as *Morris* regarding prosecutor's work) with *Mincey v. Head*, 206 F.3d 1106, 1133 n. 63 (11th Cir. 2000) (citing lower federal and state court cases and noting "that most have concluded that there is no automatic exemption from disclosure of work product under *Brady*").

⁷² *Id.* at 786 (open file "doesn't necessarily include the *Brady* material).

i.e., the police and other law enforcement agencies involved in the investigation.⁷³ To the extent that a prosecutor represents that he maintains an open file policy, he knows that he may be misleading the defense into believing they are getting a complete file. A good example is *Strickler v. Greene*,⁷⁴ where the prosecutor allegedly maintained an open file policy that allowed the defense to inspect the entire case file, including police reports and witness statements. However, several items of evidence that would have seriously discredited a key prosecution witness were not included in the file; they were located in the files of the police and the prosecutor's office in a different county. Relying on the prosecutor's open file representation, defense counsel did not file a pre-trial motion for *Brady* evidence.⁷⁵ Thus, whether from negligence or deceit, the prosecutor's assurance caused the defense not to hunt for additional evidence.

That an open file policy may result in *Brady* evidence being withheld by other government officials, including other prosecutors, and not disclosed to the prosecutor who is preparing the case for trial, should not be a surprise. Governmental agencies involved in an investigation may decide not to disclose *Brady* evidence to the prosecutor for various reasons, including a fear that disclosure may undermine the safety of witnesses, compromise the integrity of the case, or damage other ongoing investigations. The relationship between prosecutors and the police has not been sufficiently examined with respect to the formulation and dissemination of rules and policies for the creation, retention, and disclosure of *Brady* evidence. But it is reasonable to expect that some prosecutors, particularly those who are young and inexperienced, may not press the more experienced police agents too hard.⁷⁶ Moreover, there are occasions when the competitive relationship between federal and state law enforcement agencies may result in important evidence in the possession of federal officials being withheld from their state counterparts.⁷⁷

⁷³ See *infra* notes 109-111, and accompanying text.

⁷⁴ 527 U.S. 263, 276 (1999).

⁷⁵ *Id.* The Court noted that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*." *Id.* at 283 n. 23.

⁷⁶ See *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993) (commenting on "disastrous consequences" from young, untrained, and ambitious prosecutors). See also DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 295 (3d ed. 2001) ("Many prosecutors are relatively young, inexperienced, and ambitious, which makes them particularly vulnerable to adversarial pressures."); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 945 (1999). ("The relationship between the prosecutor and the agent who investigated the case has also resulted in assistants acting in a less than diligent fashion").

⁷⁷ See *People v. Santorelli*, 741 N.E.2d 493 (N.Y. 2000) (no *Brady* violation where FBI refused to turn over to state prosecutor interview reports with key witness obtained during

Third, an open file policy may provide a prosecutor with an opportunity to conceal *Brady* evidence with the excuse that he inadvertently slipped up.⁷⁸ For example, the prosecutor in the Duke lacrosse rape case, Michael B. Nifong, the former District Attorney of Durham, North Carolina, who apparently had a reputation for giving defense lawyers open access to his evidence,⁷⁹ was recently disbarred for suppressing critical exculpatory evidence—a finding by a laboratory that showed DNA evidence from four unidentified men on the clothes of the alleged victim, but no DNA evidence from any lacrosse player.⁸⁰ Indeed, the director of the laboratory testified that this information was excluded from his report at the prosecutor’s direction, notwithstanding the prosecutor’s representation to the court that the report was a complete description of the laboratory’s findings.⁸¹ The prosecutor’s excuse for his failure to disclose the information was that it got lost in the massive amount of evidence in the case, and that he was distracted by other pressing matters in his office. “You know,” he stated, “it’s not the only case I have right now.”⁸²

independent and preexisting federal investigation).

⁷⁸ See Douglass, *supra* note 69, at 461 (“The *Brady* case law is filled with examples of defendants who received “open file” discovery from well-meaning, but negligent prosecutors.”).

⁷⁹ See David Barstow and Duff Wilson, *DNA Witness Jolted Dynamic of Duke Case*, N.Y. TIMES, Dec. 24, 2006 (“[Nifong] has long been known locally for giving defense lawyers open access to his evidence, even before a state law required that.”).

⁸⁰ See Duff Wilson, *Hearing Ends in Disbarment For Prosecutor in Duke Case*, N.Y. TIMES, June 17, 2007, at 21.

⁸¹ *Id.* After the court asked Nifong: “So you represent that there are no other statements from Dr. Meehan?” Nifong replied: “No other statements... No other statements made to me.” Nifong has been charged in an ethics complaint by the North Carolina State Bar with making inflammatory statements to the media and misleading the public about evidence in the case. See David Barstow and Duff Wilson, *Prosecutor in Duke Case Faces Ethics Complaint*, N.Y. TIMES, Dec. 29, 2006. Following the ethics complaint, the State Attorney General, at Nifong’s request, took over the prosecution and after conducting his own investigation, dismissed the charges against the three former Duke lacrosse players, declaring them to be innocent and wrongly accused by an “unckecked” and “overreaching” district attorney. See David Barstow and Duff Wilson, *Duke Prosecutor Throws Out Case Against Players*, N.Y. TIMES, April 12, 2007, at A1.

⁸² See Barstow and Duff, *supra* note 80. Nifong’s justification for failing to disclose the DNA evidence is not unusual. Prosecutors frequently argue that excessive workloads, inadequate funding, and the involvement of many government agencies in an investigation places an unfair burden on prosecutors to comply with *Brady*. See, e.g., ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (2006) at xxvii (prosecutors’ “daily struggle to handle each day’s crises,” together with “enormous workloads” and “without adequate funding... makes it hard for prosecutors to ensure [compliance with *Brady*]”); Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions*, 15 GA. ST. U.L. REV. 601, 604, 617 (1999) (“proliferating proceedings,” “avalanche of documents” and involvement in investigation of many other government agencies would be “disruptive” and “impose an unfair burden on the Government.”). *But see* Giglio v. United States, 405 U.S. 150, 154 (1972) (“To the extent [*Brady*’s disclosure duty] places a

Even assuming that prosecutors who administer a well-intentioned open file policy may inadvertently omit some crucial *Brady* evidence, there is no doubt that some unscrupulous prosecutors intentionally administer an open file arrangement to trap an unwary defense counsel into believing that he has received full disclosure and that he need not engage in further and unnecessary discovery litigation. One of the most notorious perpetrators of this type of misconduct is the former chief prosecutor in Cuyahoga County, Ohio, Carmen Marino. As anybody who has followed Marino's prosecutorial career is aware, he has been the subject of widespread criticism by courts and commentators for his overzealous and unethical conduct.⁸³ In several cases, particularly capital prosecutions, Marino's practice was to "open" his files to the inspection and discovery by the defense.⁸⁴ According to testimony by defense lawyers, Marino's custom was to have his colleagues lead members of the defense team into the prosecutor's office "to allow defense counsel to look at the file."⁸⁵ Under this arrangement, "the defense was not permitted to physically view the police reports and a prosecutor read them to defense counsel."⁸⁶ Nevertheless, this practice was a ploy by Marino to lull the defense into believing it had received a complete accounting of the prosecutor's file. As disclosed in legal proceedings many years later, critical *Brady* evidence was hidden from the defense, including evidence that strongly suggested that innocent persons had been wrongfully prosecuted and convicted of capital murder and sentenced to death without access to evidence that would have exonerated them.⁸⁷

burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.").

⁸³ See *In re Lott*, 366 F.3d 431, 433 n.1 (6th Cir. 2004) (citing ten cases in which Ohio state courts found that Marino engaged in prosecutorial misconduct); Steven Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, THE CENTER FOR PUBLIC INTEGRITY (2003) (identifying Carmen Marino as a "recidivist prosecutor" who has frequently been cited for misconduct); Regina Brett, *A prosecutor's Win Not Always Justice*, THE PLAIN DEALER, July 12, 2006 (according to Cuyahoga County Common Pleas Judge Daniel Gaul: "Marino should be criminally prosecuted for the abuses. It's nothing but one deceitful act after another. To permit anyone to be put to death after being prosecuted by Carmen Marino would be so ethically inappropriate you'd almost be culpable yourself.").

⁸⁴ See *D'Ambrosio v. Bagley*, 2006 WL 1169926, at *17-18 (N.D. Ohio) (describing the open file policy in Cuyahoga County Prosecutor's Office); *State v. Larkins*, 2003 WL 22510579, *3 (Ohio App. 8 Dist.) (witnesses at hearing "all attested to the 'open' discovery policy of Marino").

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ The opinions in *D'Ambrosio v. Bagley* and *State v. Larkins* – capital murder convictions prosecuted by Marino—detail the numerous *Brady* violations committed by Marino. Given these serious violations, and the many other citations to Marino's misconduct, one can only

Finally, a variation of the open file gambit that has attracted only modest attention is the practice by some prosecutors, particularly in corporate fraud, tax, and other white-collar crime cases, to overwhelm the defense with massive amounts of documents, including items that may be potential *Brady* evidence, and that are virtually impossible to read and digest in the limited time available for pretrial preparation.⁸⁸ For example, in one of the “Enron” cases,⁸⁹ the prosecution’s open file policy required the defense to review over 80 million pages of documents, without identifying potential *Brady* evidence. In another financial fraud case,⁹⁰ the prosecution made roughly 160 boxes and 36 file cabinets of warehouse records available to the defense, without segregating the files or identifying potential *Brady* evidence. To be sure, some prosecutors provide indexes and other identifying data to aid the defense in inspecting the material. But so long as the prosecution has made the files available for defense inspection, the courts do not require the prosecution to “point the defense to specific documents within a larger mass of material that it has already turned over.”⁹¹

GAMBLING: PLAYING THE ODDS ON MATERIALITY

As already noted, most *Brady* evidence that has been suppressed by prosecutors is never uncovered.⁹² The evidence remains buried somewhere, and as one court noted, “may never emerge from secret government files.”⁹³ Although there are many reasons why prosecutors suppress *Brady* evidence, probably the most powerful justification most often relied on is the prosecutor’s unilateral conclusion that the evidence is not material.⁹⁴ This prosecutor’s calculation is not based on an estimate of whether the evidence will be favorable, helpful, or advantageous to the defense; rather, the only question is

wonder how many other “Marino prosecutions” included exculpatory evidence that Marino concealed from the defense.

⁸⁸ See *Panel Discussion*, *supra* note 65, at 800-01 (comments of Nina A. Ginsberg) (describing problems of open file discovery in “big document cases” as “overwhelming task,” since it is “impossible to go through file cabinets full of documents, make any sense out of them, figure out what might be helpful to you”).

⁸⁹ *United States v. Causey*, 356 F.3d 681 (S.D. Tex. 2005).

⁹⁰ *United States v. Pelullo*, 399 F.3d 197 (3d Cir. 2005).

⁹¹ *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997).

⁹² See *supra* note 28.

⁹³ *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984).

⁹⁴ Most of the criticism of the judiciary’s application of the *Brady* rule centers on the issue of materiality, and the conclusion most often reached by the courts that notwithstanding the prosecutor’s suppression of evidence favorable to the accused, the evidence was not material and therefore no constitutional violation was committed.

whether the evidence will be viewed by a court after the trial has been completed as being sufficiently important that it is “reasonably probable” that with the evidence the defendant would not have been found guilty,⁹⁵ and that without the evidence, the guilty verdict is not “worthy of confidence.”⁹⁶ Thus, the central issue in most of the cases in which suppressed *Brady* evidence is discovered and litigated, often many years after a defendant’s conviction—and there are thousands of such cases—concerns the materiality of the suppressed evidence. And as with other issues in *Brady* litigation, the lenient standard of materiality encourages prosecutorial gamesmanship by allowing prosecutors to play and frequently beat the odds that their suppression of evidence, even if discovered, will be found immaterial by a court..

Indeed, under the standard of materiality applied by the courts, gamesmanship by the unethical prosecutor is to be expected. The rogue prosecutor who wants to “outwit and entrap [his] quarry”⁹⁷ will almost always deliberately suppress *Brady* evidence, believing that it will probably never be discovered, but even if it is discovered, perhaps long after the conviction, it is unlikely to be found material. Even the ethical prosecutor knows he cannot lose this game, and following her adversarial instincts, might reasonably determine not to disclose evidence that is obviously favorable to the defense. Consider Professor Sundby’s description, most likely imagined with tongue lodged firmly in cheek, of the “ethical” prosecutor thinking about a particular piece of favorable evidence under *Brady*’s materiality standard:

This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence. Under *Brady*, therefore, I need to turn this evidence over to the defense. Then, once I turn the evidence over and satisfy my constitutional obligation, I can resume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.⁹⁸

Prosecutors are, in case after case, increasingly “play the odds” that their suppression of important items of evidence will be viewed

⁹⁵ United States v. Bagley, 473 U.S. 667, 682 (1985) (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”).

⁹⁶ Kyles v. Whitley, 514 U.S. 419, 434 (1995) (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”).

⁹⁷ Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring).

⁹⁸ Scott E. Sunby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 653 (2002).

retrospectively by a reviewing court as not material and therefore not a violation of *Brady*. When this type of prosecutorial gamesmanship is exposed, courts occasionally check-mate the prosecutor, as a federal court recently did in vacating a murder conviction arising from a fight outside of a bar in New Rochelle, New York.⁹⁹ There, the prosecutor withheld from the defense, until the trial was almost over, another individual's confession that he stabbed the victim twice. The prosecutor argued at a hearing that this confession was not material, first, because it was more inculcating than exculpating, and second, because it was patently unreliable and therefore did not need to be disclosed. The confession was obviously material, as the federal court concluded several years after the conviction. The court also pointed out that it was not a prosecutor's prerogative in making a materiality determination to evaluate the credibility of a piece of evidence, as "[t]o allow otherwise would be to appoint the fox as henhouse guard."¹⁰⁰

BLIND MAN'S BLUFF: THE PROSECUTOR AS OSTRICH

As discussed below, a defendant's knowledge of *Brady* evidence ordinarily relieves a prosecutor of her disclosure obligation. By the same token, a prosecutor's lack of knowledge of *Brady* evidence also may relieve a prosecutor of her *Brady* duty. The parties' knowledge of the evidence is the touchstone of *Brady*. Justice White made this point in *Giles v. Maryland*: "[A]ny allegation of suppression boils down to an assessment of what the State knows at trial in comparison to the knowledge held by the defense."¹⁰¹ Courts continue to recite the litany that prosecutors who may lack knowledge of the existence of *Brady* evidence have a constitutional and ethical duty to learn about its existence, but prosecutors continue to invoke their own familiar litany when a defendant requests *Brady* evidence: "We are aware of our *Brady* obligation and will comply." However, prosecutors are aware that if they lack knowledge of the existence of *Brady*

⁹⁹ *DiSimone v. Phillips*, 461 F.3d 181 (2d Cir. 2006). Following remand, a federal district court vacated the conviction and dismissed the indictment. *See DiSimone v. Phillips*, # 04 Civ. 3128 (CLB)(S.D.N.Y. Feb. 5, 2007). *See also* Shawn Cohen and Bruce Golding, *Conviction in Balancio Slaying Overturned*, THE JOURNAL NEWS, Feb. 8, 2007, at 1A.

¹⁰⁰ *Id.* at 195. *See also* *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (it is "the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"); *United States v. Alvarez*, 86 F.3d 901, 905 (9th Cir. 1996) ("It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false."). Nor may a prosecutor unilaterally conclude that evidence is cumulative or redundant. *See Monroe v. Angelone*, 323 F.3d 286, 301 (4th Cir. 2003) ("[T]he prosecution has a duty to disclose material even if it may seem redundant.")

¹⁰¹ 386 U.S. 66, 96 (1967) (White, J., concurring).

evidence, there is nothing for them to suppress—or disclose. Thus, prosecutors can avoid complying with *Brady* by asserting either that they are unaware of the existence of *Brady* evidence, or that any *Brady* evidence, even if it exists, is not in their possession or control. Clearly, a claim of ignorance offers a prosecutor a convenient opportunity to engage in gamesmanship to avoid compliance with *Brady*.

The prosecutor's claim of ignorance as an excuse for compliance with *Brady* resembles a defendant's claim of ignorance as an excuse to avoid criminal liability. With respect to criminal defendants, ignorance or mistake may excuse criminal liability if it eliminates the mental state necessary for the crime.¹⁰² However, a defendant's claim of ignorance is rejected when the defendant deliberately avoids knowledge.¹⁰³ Or, using the so-called "Ostrich instruction,"¹⁰⁴ a judge typically advises a jury that a defendant may not avoid guilty knowledge by "shut[ting] his eyes for fear that he would learn,"¹⁰⁵ or "bury[ing] his head in the sand so that [he] will not see or hear bad things."¹⁰⁶ Should a prosecutor who claims ignorance of *Brady* evidence as an excuse for non-compliance be held to a less demanding standard?¹⁰⁷ Indeed, if a prosecutor believes that there is a high probability *Brady* evidence exists and deliberately chooses to be indifferent to finding it, it would not seem unreasonable to charge a prosecutor with constructive knowledge of its existence. This conclusion would, in turn, render the prosecutor's nondisclosure a suppression of *Brady* evidence.

A prosecutor's ability to claim ignorance of *Brady* evidence as a basis for non-disclosure affords a prosecutor a considerable opportunity for gamesmanship. To be sure, under the Supreme Court's evolving standards governing a prosecutor's *Brady* duty, a prosecutor may not successfully claim ignorance if the evidence actually contained in the prosecutor's own files, the files of police agencies involved in the investigation, and the files of other investigative agen-

¹⁰² See WAYNE R. LAFAYE, CRIMINAL LAW § 5.1, at 432 (3d ed. 2000).

¹⁰³ See, e.g., MODEL PENAL CODE (Proposed Official Draft 1962) ("When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.").

¹⁰⁴ See Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 223-27 (1990).

¹⁰⁵ United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc).

¹⁰⁶ United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990).

¹⁰⁷ But see David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 976 (1999) ("in legal ethics, unlike criminal law, there is no willful blindness doctrine."). However, there is a huge distinction between a private lawyer failing "to press her client for knowledge or to corroborate what her client tells her," *Id.*, and a public prosecutor failing to press the police for knowledge or to corroborate what the defense counsel tells her. See *supra* notes 5-8, and accompanying text.

cies that are part of the “prosecution team.”¹⁰⁸ As the Court has noted, these are contexts in which a prosecutor, even if he lacks actual knowledge of the evidence, “should have known” of the evidence,¹⁰⁹ or, as elaborated in *Kyles v. Whitley*, “has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.”¹¹⁰

But the extent of a prosecutor’s duty to search for *Brady* evidence in places where a prosecutor is charged with constructive knowledge has not been carefully analyzed or explained. The reasoning tends to be ad hoc, and often concludes with a finding that the evidence is not material in any event and therefore the prosecutor’s non-compliance does not violate *Brady*.¹¹¹ But, again, a prosecutor is well aware that if he chooses to remain ignorant of evidence located in the files of another agency, or fails to aggressively look for it, he will only be held accountable for non-compliance with *Brady* if the evidence is eventually is discovered, is deemed to have been in the prosecutor’s possession or control, and is found to be material. Accordingly, a prosecutor who seeks to game the system in this way will almost always choose to avoid knowledge and assume the risk—an extremely safe risk—that he will never be held accountable.¹¹²

¹⁰⁸ See *United States v. Risha*, 445 F.3d 298, 302 (3d Cir. 2006) (“if a team or joint investigation did exist here, or if any state agent was acting on behalf of the federal government, the federal prosecution may be charged with the knowledge of the state Attorney General’s Office”).

¹⁰⁹ *United States v. Agurs*, 427 U.S. 97, 103 (1976). See also *Giglio v. United States*, 405 U.S. 150, 154 (1972) (“The prosecutor’s office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed for these purposes, to the Government.”).

¹¹⁰ *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). However, there is no correlative duty on the part of the police to impart such information to the prosecutor. See Stanley Z. Fisher, “Just the Facts, Ma’am:” *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. ENG. L. REV. 1, 53 (1993) (claiming that police operate independently of prosecutors, answer to different constituencies, and may not reveal to prosecutors exculpatory evidence). See also Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 FORDHAM L. REV. 1379 (2000) (proposing amendments to ethics codes to require prosecutors to learn of exculpatory evidence known to police and to provide guidance on implementing responsibility).

¹¹¹ But see *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. App. 1992) (“the courts’ willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government non-disclosure”); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (“if disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the government.”); *In re Brown*, 952 P.2d 715, 721 (Cal. 1998) (“Here, as in most circumstances, *Brady* compliance demanded no more than simple advertence. The evidence was readily accessible to the prosecution.”).

¹¹² See Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 568 (“Some prosecutors remain willing to take their chances that the evidence will never come to light or, if unearthed, will result in no significant penalty to the prosecution.”).

A prosecutor's deliberate blindness is most commonly encountered with respect to specific types of witnesses—scientific experts, cooperating witnesses, and eyewitnesses. A prosecutor's failure to carefully scrutinize the accuracy and credibility of scientific experts, and to search for evidence that would demonstrate the expert is fabricating or mistaken has been one of the recognized causes of wrongful convictions.¹¹³ Indeed, scientific evidence, because it is so technical and complex, and has a unique capacity to persuade juries, requires close scrutiny by a responsible prosecutor.¹¹⁴ Discovery rules require prosecutors to disclose results, reports, and statements by scientific experts the prosecutor intends to use at trial, in order to allow the defense sufficient time to analyze the scientific information, to conduct independent tests of their own, and to prepare their own experts.¹¹⁵

There are many instances, however, of a prosecutor's failure to disclose evidence showing that the testimony of the prosecutor's scientific expert was either false or misleading.¹¹⁶ There are many instances involving a prosecutor's incomplete, untimely or total failure to comply with discovery obligations.¹¹⁷ Moreover, there are other disturbing examples of prosecutors who appear to be ignorant of their expert's dishonest and incompetent analysis, as well as the expert's use of so-called "junk testimony," notwithstanding obvious signs of pervasive and systematic fraud, incompetence, and misconduct by the expert.¹¹⁸ Indeed, in order to obtain the benefits of their expert's testimony, prosecutors have deliberately ignored and concealed complaints of misconduct, and have publicly praised and rewarded the work of some of the most notorious of these so-called "experts."¹¹⁹

Prosecutors also avoid knowledge about weaknesses in the testimony of cooperating witnesses deliberately, as well as the existence

¹¹³ See JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE* (2000), at 158-171.

¹¹⁴ See *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) (expert usually viewed by jury with an "aura of special reliability and trustworthiness").

¹¹⁵ See FED. R. CRIM. P. 16(a)(1)(C) and (D); ABA STANDARDS FOR JUSTICE: DISCOVERY AND TRIAL BY JURY § 11-2.1(iv) and (v) (3d ed. 1996).

¹¹⁶ See Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 21-8 (2003). In a recent murder case exoneration from upstate New York, the prosecutor suppressed a report from the nation's leading odontologist that "excluded" the defendant for causing a bite mark on the victim's arm, and used the testimony of a local dentist to convict the defendant, who spent 15 years in prison until freed by DNA evidence. See Fernanda Santos, *With DNA From Exhumed Body, Man Finally Wins Freedom*, N.Y. TIMES, Jan. 24, 2007, at B5.

¹¹⁷ *Id.*

¹¹⁸ See Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997) (documenting accounts of widespread abuses by forensic scientific experts).

¹¹⁹ See Gershman, *supra* note 117, at 27, 31.

of *Brady* evidence that might discredit the testimony of cooperators. Professor Yaroshefsky's important study of cooperating witnesses,¹²⁰ based on extensive interviews with former federal prosecutors, describes the extent to which prosecutors succumb to the allure and manipulation of the cooperator. One former prosecutor described the relationship as "falling in love with your rat,"¹²¹ which not only skews the prosecutor's ability to evaluate the cooperator's credibility objectively, but inhibits the prosecutor from searching for evidence that might discredit the witness. Such a mindset intentionally avoids probing into obvious fabrications and embellishments by the cooperating witnesses,¹²² of searching for corroboration that would reasonably support the witness's story,¹²³ not inquiring about prior statements cooperators may have made to police investigators,¹²⁴ and accepting unhesitatingly the case agent's opinions and recommendations about the credibility and accuracy of the witness.¹²⁵

Thus, the ostrich-prosecutor, as Professor Yaroshefsky's study reveals, has an unduly simplistic attitude about the truth, an "obsession with exact facts," and is a poor intuitive judge of truth and deception.¹²⁶ By the same token, several commentators have described a prosecutorial mindset that embodies a kind of "macho-ostrich," characterized by a hardened view of justice,¹²⁷ an emphasis on putting bad

¹²⁰ See Yaroshefsky, *supra* note 77.

¹²¹ *Id.* at 944.

¹²² *Id.* at 946-47 ("additional probing makes the case more complicated and sometimes more difficult to prevail so people ignore such facts"; "cooperator's testimony was so important to a case that the evaluation of his veracity was skewed through the lens of his utility to the government"; "the pressures and mindset of some prosecutors make it less likely that the government will carefully examine lies by its cooperators").

¹²³ *Id.* at 936, 938, 940 ("the black hole of corroboration is the time that cooperators and agents spend alone"; "some prosecutors become 'lazy and sloppy' in obtaining and evaluating corroboration"; "there were numerous instances where facts were not uncovered due to lack of investigation").

¹²⁴ *Id.* at 945-6, 958, 961 ("many people do not want to uncover facts that are inconsistent with their theory of the case"; "embellished testimony is the 'dirty little secret' of our system"; "the office lore is don't take too many notes or figure out how to take notes so that they are meaningful to you and no one else").

¹²⁵ *Id.* at 945 ("The relationship between the prosecutor and the agent who investigated the case has also resulted in assistants acting in a less than diligent fashion"; "if you are committed to getting the absolute truth, you often have tension with various agencies").

¹²⁶ *Id.* at 953-6 ("there is a perception that many assistants do not share the complex view of the nature of truth"; "there's often a linear attitude about the truth"; "prosecutors simply do not understand how memory works and the reality of truth"; "danger of imposing a lawyer's view of fact development upon a cooperator who does not share a lawyer's 'obsession with exact facts'").

¹²⁷ See George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 109 (1975) (prosecutor's "working environment caus[es] him to view his job in terms of convictions rather than the broader achievement of justice"); Yaroshefsky, *supra* note 77, at 949 (describing prosecutors as having "law enforcement," "gung ho," and "true believer" mentality).

people in jail,¹²⁸ and a “tunnel vision” approach to ascertaining the truth and the credibility of their witnesses.¹²⁹ This mindset, needless to say, makes it much less likely that a prosecutor will search for *Brady* evidence, and appreciate its value even if he finds it.

Prosecutors also are willfully blind to the unreliability of eyewitnesses. Given the many DNA exonerations, mostly attributable to erroneous eyewitness testimony, it is reasonable to expect that a prosecutor seeking to promote justice would carefully probe the accuracy of the eyewitness and search for any discrediting evidence. In fact, prosecutors are probably more adept than juries in evaluating the reliability of their eyewitnesses.¹³⁰ Prosecutors know more about the case, about the techniques of interviewing witnesses, and presumably are aware of the inherent dangers of eyewitness testimony. Nevertheless, cases are replete with examples of eyewitness testimony whose reliability defies logic, and whose testimony would seem unbelievable even to the most naive and inexperienced prosecutor.¹³¹ For prosecutors to blindly accept the testimony of these witnesses because they appear to be confident, and refuse to engage in even the most superficial investigation of their background and reliability, makes it much more likely that innocent persons will be convicted.¹³²

A prosecutor is also willfully blind to the existence of *Brady* evidence in places where a prosecutor is not deemed to have constructive knowledge, but where a search might reasonably yield exculpatory evidence. If *Brady* evidence is in the possession of a government agency that is not a part of the investigation or the “prosecution team,” a prosecutor’s *Brady* duty generally is limited to instances in which a prosecutor actually knows about the evidence.¹³³ Thus, even

¹²⁸ See Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 552 (1987) (“the prosecutor will almost always believe the defendant to be guilty”).

¹²⁹ See Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291; Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006).

¹³⁰ See, e.g., Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 446 (1987) (“There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases.”).

¹³¹ See Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 343 n. 191 (2001) (studies documenting unreliability of eyewitness identifications).

¹³² The growing number of DNA exonerations is probably the most powerful indicator of the questionable reliability of eyewitness identifications.

¹³³ *But see* Pennsylvania v. Ritchie, 480 U.S. 39, 57-60 (1987) (suggesting that *Brady* may impose a duty on prosecutors to examine files of other government agencies to determine if they contain exculpatory evidence); Lavalley v. Coplan, 374 F.3d 41, 45 (1st Cir. 2004) (noting “ambiguity about the relationship between *Ritchie* and *Brady*”); Crivens v. Roth, 172 F.3d 991, 997 (7th Cir. 1997) (prosecutor required to conduct “diligent search” for evidence in possession of “some arm of the state”).

though it might be reasonable for a prosecutor to believe that *Brady* evidence exists, and even though the failure to search for it might encourage the perception that prosecutors willfully overlook or avoid their *Brady* obligations, prosecutors ordinarily do not search for such evidence.¹³⁴ Prosecutors claim that it would be an onerous burden to engage in an open-ended “fishing expedition,” particularly given a prosecutor’s heavy workload, daily crises, and trial preparation.¹³⁵ Prosecutors also claim that such evidence is available to the defense through a discovery request or a subpoena. Finally, prosecutors are aware that even if the evidence ultimately is discovered, the prosecutor will not be found to have suppressed the evidence because the evidence was not in the prosecutor’s possession or control but, rather, was in the possession and control of an independent agency.¹³⁶ However, if a prosecutor is faced with a specific request for *Brady* evidence and knows or should know that the evidence exists, he cannot bury his head in the sand.

HIDE AND SEEK

A prosecutor also may avoid *Brady* disclosure by claiming that the defense knew of the existence of the evidence, or with reasonable diligence could have obtained the evidence. The *Brady* rule, as described in *United States v. Agurs*, applies to situations “[involving] the discovery, after trial, of evidence which had been known to the prosecution but unknown to the defense.”¹³⁷ This description appears to focus on a defendant’s actual knowledge of the evidence in determining whether evidence is available to a defendant for *Brady* purposes.¹³⁸ To permit a defendant who has actual knowledge of the existence of suppressed evidence later to claim a *Brady* violation based on the prosecutor’s nondisclosure would enable a defendant to sandbag the prosecutor. Such a tactic, one court observed, “would allow [a defendant] to take a free ride during the trial and if he is not satisfied

¹³⁴ See Robert Hochman, *Brady v. Maryland and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1687 (1996) (“*Brady* does not impose a general duty on the government to investigate.”).

¹³⁵ See *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006) (“prosecutors are not required to undertake a ‘fishing expedition’ in other jurisdictions to discover impeachment evidence.”). See also ACHIEVING JUSTICE, *supra* note 83.

¹³⁶ See *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) (prosecutor not charged with knowledge of relevant document in possession of federal welfare benefits agency that was not part of “prosecution team”).

¹³⁷ 427 U.S. 97, 103 (1976).

¹³⁸ See *Boss v. Pierce*, 263 F.3d 734, 743 (7th Cir. 2001) (the description in *Agurs* “suggests a focus of actual knowledge as the key consideration in determining whether evidence is available to the defense for *Brady* purposes.”).

with the result he can always get a new trial.”¹³⁹ In addition, a rule of disclosure that focuses on a defendant’s actual knowledge strikes an appropriate adversarial balance that places reasonable obligations on a defendant and enforces a prosecutor’s duty to seek justice.

However, courts have amplified this “exception” to a prosecutor’s suppression of *Brady* evidence not just in situations where the defendant has actual knowledge of the *Brady* evidence, but also in situations where the defense could have been expected to discover the evidence through the exercise of reasonable diligence.¹⁴⁰ And the extension of the principle of defense knowledge has offered prosecutors another opportunity to engage in gamesmanship— i.e., to conceal important evidence that theoretically may be available to a defendant—and argue later, if the evidence ever comes to light, that the defendant, despite having no actual knowledge of the evidence, could easily have discovered the evidence with the exercise of reasonable diligence. The consequences of this gamesmanship are several. First, by shifting the focus away from his own duty to disclose hidden evidence to the defendant’s duty to find it, prosecutors bring disrepute to themselves and disrespect for the system of justice.¹⁴¹ Moreover, resolving questions of whether a defendant could have learned about the evidence with reasonable diligence requires courts to engage in difficult post hoc factual determinations of the extent to which evidence was available to a defendant, and whether the defendant reasonably should have known about it.

To be sure, where *Brady* evidence is readily accessible to a defendant by exercising reasonable diligence, it makes sense not to impose a search and disclose obligation on the prosecutor. Examples might include evidence contained in an open file that has been furnished to the defense; items that a defendant reasonably should know are contained in a public record and may be obtained through routine discovery or service of a subpoena;¹⁴² or conversations between a defendant and other persons which the defendant reasonably should recall. However, although a prosecutor might be able to avoid disclosure by claiming that a defendant should have been aware of pertinent state-

¹³⁹ *Smith v. State*, 541 S.W.2d 831, 838 (Tex. Crim. App. 1976).

¹⁴⁰ *See United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (“Evidence is not suppressed if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.”).

¹⁴¹ *See Boss v. Pierce*, 263 F.3d 734, 740, 743 (7th Cir. 2001) (prosecutor’s “untenable” and “expansive” view of what evidence is available to the defense skews the “careful balance between maintaining an adversarial system of justice and enforcing the prosecution’s obligation to seek justice before victory” and “would punish the defense for not obtaining evidence it had no reason to believe existed.”).

¹⁴² *United States v. Barham*, 595 F.2d 231 (5th Cir. 1979).

ments that he made to other persons, it is not reasonable for a prosecutor, as one court observed, “to hold a defendant accountable for every conversation he has ever had in his lifetime regardless of the surrounding or intervening circumstances.”¹⁴³ Or, as another court put it, “it is untenable to suggest that, in order to obtain impeachment evidence on behalf of a client, a public defender is, in any way, obligated to check the total list of persons who have been served by the agency to ascertain whether a prospective witness was a former client.”¹⁴⁴

Moreover, since a defense attorney has the power to subpoena public records, a court may find that the attorney’s failure to attempt to obtain a public document that is available and accessible exempts the prosecutor from non-compliance with *Brady*. However, merely because evidence theoretically may be available to a defendant does not necessarily mean that it is available for purposes of determining whether *Brady* applies. For example, a prosecutor’s nondisclosure of an affidavit of a key government witness filed in court prior to her guilty plea is theoretically available to the defense by the simple expedient of requesting the information or serving a subpoena for the record. However, the failure of the prosecutor to disclose the affidavit would constitute prosecutorial suppression of evidence if the defense had no reason to know of the existence of the public record.¹⁴⁵ Moreover, a defendant may have even less reason to know of the existence of the record if the prosecutor has already produced a large volume of other materials concerning the witness, including numerous publicly-available court documents and thereby may have lulled the defense into believing that they had received every pertinent item.¹⁴⁶

Finally, the willingness of courts to accept a prosecutor’s claim of defense knowledge as a way of excusing a *Brady* nondisclosure encourages further gamesmanship. For example, in *DiSimone v. Phillips*,¹⁴⁷ a murder case, the prosecutor concealed a statement from a third person admitting to having stabbed the deceased. The defense made three separate requests for *Brady* evidence, including a specific

¹⁴³ *Schledwitz v. United States*, 169 F.3d 1003, 1013 (6th Cir. 1999).

¹⁴⁴ *United States v. Perdomo*, 929 F.2d 967, 973 (3d Cir. 1991).

¹⁴⁵ *United States v. Payne*, 63 F.3d 1200 (2d Cir. 1995) (defense had no reason to know that government witness’s affidavit had been filed in court prior to her guilty plea); *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994) (public record not reasonably available to defense when document not filed until day on which defense rested its case).

¹⁴⁶ *United States v. Payne*, 63 F.3d at 1209) (“A defendant receiving such documents from the government could reasonably assume that the court files did not include other undisclosed exculpatory and impeachment documents”).

¹⁴⁷ 461 F.3d 181 (2d Cir. 2006).

request for evidence that someone other than the defendant stabbed the victim. The prosecutor responded that no such evidence existed, and that the defense was engaging in a “fishing expedition.”¹⁴⁸ When it was discovered that such a statement existed, and that the prosecutor had not disclosed it, the prosecutor argued that the defense knew about the statement by virtue of the specificity of its request.¹⁴⁹ Given that the defendant was on trial for a murder, had specifically asked for any statement of third-party culpability, and was deceived by the prosecutor into believe that no statement existed, it would not have been unreasonable for the prosecutor to represent to the trial court that such a statement existed but that it had no duty of disclosure in view of the fact that the defense probably knew about the statement. Moreover, it is patently unreasonable to suggest, as the prosecutor argued post-trial, that the defense was being disingenuous and was trying to sandbag the prosecutor. The prosecutor’s conduct in *DiSimone* aptly illustrates one court’s observation of *Brady* litigation: “[T]he game will go on, but justice will suffer.”¹⁵⁰

DELAY AND CONQUER

Prosecutors in possession of *Brady* evidence who are inclined to disclose the evidence have a powerful incentive to delay the disclosure as long as possible. Prosecutors know that the judiciary’s treatment of “suppression” does not require a prosecutor to make pre-trial disclosure, and thus allows a prosecutor considerable latitude to withhold the evidence prior to trial.¹⁵¹ Indeed, courts generally review delayed disclosure to determine whether the defendant had a meaningful opportunity to make effective use of the evidence at trial in order to cross-examination prosecution witnesses and present the defense case.¹⁵² Ethics codes require “timely disclosure,” but do not explicitly require pre-trial disclosure.¹⁵³ Moreover, prosecutors are

¹⁴⁸ *Id.* at 193.

¹⁴⁹ *Id.* at 197. The Second Circuit remanded the case to the district court to determine whether the defendant or his attorney knew of the undisclosed *Brady* evidence. On remand, the district court rejected the contention and based on the *Brady* violation vacated the conviction and dismissed the indictment.

¹⁵⁰ *United States v. Starusko*, 729 F.2d 256, 265 (3d Cir. 1984).

¹⁵¹ *See Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001) (“Disclosure prior to trial is not mandated.”).

¹⁵² *Blake v. Kemp*, 758 F.2d 523, 532 n 10 (11th Cir. 1985) (“In some instances [disclosure of *Brady* material during trial] may be sufficient. However...some [*Brady*] material must be disclosed earlier. This is because of the importance of some information to adequate trial preparation.”).

¹⁵³ *See* MODEL RULES, *supra* note 2, R. 3.8(d) (requiring prosecutor to make “timely disclosure”); MODEL CODE, *supra* note 2, DR 7-103 (B) (requiring timely disclosure); ABA STANDARDS, *supra* note 2, Standard 3-3.11(a) (requiring disclosure “at the earliest feasible

well aware that continuing to withhold favorable evidence may enhance the opportunity for a guilty plea and may also impair a defendant's pre-trial preparation. Thus, the timing of *Brady* disclosure provides a prosecutor with another opportunity to engage in litigation gamesmanship.

Prosecutors usually are aware of the existence of *Brady* evidence well before the date of trial. Moreover, an experienced prosecutor reasonably should know that some evidence is inherently *Brady* evidence (i.e., promises to witnesses, eyewitnesses who have identified a different person, a confession by a person other than the defendant, and scientific evidence that casts doubt on the prosecution's theory of the case). Moreover, even if a prosecutor does not appreciate the significance to the accused of the evidence, a prosecutor who receives a specific defense request for *Brady* evidence in advance of trial that identifies the nature of the evidence sought is obviously alerted to the evidence and can make an informed decision on whether to disclose the it. Assuming that a prosecutor is aware of the significance of the evidence to the defense, and that for different reasons it must be disclosed, a prosecutor strategically may wait as long as she can until the trial actually commences before making the disclosure.

Most often a prosecutor's gamesmanship in delaying the disclosure will be successful because of the wide latitude afforded by the courts, particularly where the defense does not seek a continuance after receiving the evidence. There are risks, however, in this type of gamesmanship. Depending on the circumstances, belated disclosures may be found by a reviewing court to be the equivalent of suppression, especially if the court appreciates the harm that belated disclosures may inflict not only on the ability of a defendant to receive a fair trial but also on the defendant's ability to effectively prepare for trial. An example of prosecutorial gamesmanship in delaying disclosure of critical exculpatory evidence is *Leka v. Portuondo*,¹⁵⁴ in which the Second Circuit Court of Appeals found that the state prosecutor violated *Brady*, notwithstanding that the evidence was disclosed 3 days before the trial. In *Leka*, a murder case, two prosecution eyewitnesses identified the defendant as the shooter. Three other eyewitnesses, however, gave statements to the police that undermined the prosecution's theory, and one of these witnesses, an off-duty police officer, gave an account that essentially destroyed the prosecution's

opportunity").

¹⁵⁴ 257 F.3d 89 (2d Cir. 2001).

case.¹⁵⁵ The defense made a request for *Brady* evidence twenty-two months before trial.¹⁵⁶ During plea negotiations, the prosecutor told the defendant, falsely, that an off-duty police officer was a key witness who observed the shooting and could identify the defendant.¹⁵⁷ And when the defense first learned of the officer's identity at a hearing 3 days before trial, "the prosecution pressed its advantages to extend the delay" by taking successful steps to prevent the defense from interviewing this witness.¹⁵⁸

The court found that the prosecutor's belated disclosure was "too little, too late."¹⁵⁹ While recognizing that pre-trial disclosure is not mandated, the court observed that the longer a prosecutor withholds evidence, and the closer to trial the disclosure is made, the less opportunity there is for effective use.¹⁶⁰ The court was sensitive to the harm to a defendant from delayed disclosure – i.e., the need to divert scarce resources from more pressing initiatives and the inability to assimilate the new information into its case and throw exiting strategies into disarray.¹⁶¹ "The opportunity for use under *Brady*," the court concluded, "is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought."¹⁶² *Leka* is one of a handful of cases in which the prosecutor's gamesmanship backfired.

OBSTACLE COURSES, MAZES, AND SIMON SEZ

Prosecutorial resistance to post-conviction claims of innocence has been amply documented by courts and commentators.¹⁶³ The reasons for such resistance are not always clear or consistent, but in a test of a prosecutor's commitment to serving justice instead of victory, many prosecutors will fail. Prosecutorial resistance to persuasive claims of innocence finds an interesting parallel in prosecutorial resistance to post-conviction claims that *Brady* evidence has been wrongfully suppressed. Even in the most egregious instances of a prosecutor's unconstitutional and unethical suppression of *Brady* evidence, prosecu-

¹⁵⁵ *Id.* at 92-93, 98.

¹⁵⁶ *Id.* at 93.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 102.

¹⁵⁹ *Id.* at 100.

¹⁶⁰ *Id.* at 101.

¹⁶¹ *Id.*

¹⁶² *Id.* at 103.

¹⁶³ See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399.

tors, rather than acknowledging the misconduct and the resulting failure to accord the defendant a fair trial, often raise an obstacle course of hoops that a defendant must overcome before successfully litigating his meritorious *Brady* claim. This prosecutorial conduct is even more brazen in the way it reinforces the prosecutor's earlier misconduct in falsely and misleadingly representing to the court and defendant that no *Brady* evidence exists.

Thus, prosecutors have argued that notwithstanding the nondisclosure of *Brady* evidence, the defendant should be procedurally barred from litigating the *Brady* claim in a post-conviction proceeding in federal court because he did not exhaust his *Brady* claim by failing to submit the claim initially to a state court.¹⁶⁴ This argument assumes, of course, that the defendant was aware of the pertinent facts when he litigated his claim in the state court, and deliberately chose not to raise the *Brady* issue. However, if a prosecutor's concealment of *Brady* evidence was not known by the defendant during the state court proceedings, it would be disingenuous for a prosecutor to make such an argument. Indeed, as federal courts have consistently noted in rejecting such a prosecutorial gambit, "[w]e will not penalize [a defendant] for presenting an issue to us that he was unable to present to the state courts because of the state's misconduct."¹⁶⁵

Prosecutors similarly resist a defendant's post-conviction *Brady* claim by arguing that the defendant has not shown sufficient cause why he did not develop the claim in state court proceedings.¹⁶⁶ Once again, a defendant shows cause for his failure to develop the facts in a state court proceeding where the prosecutor's suppression of *Brady* evidence was the reason for the defendant's failure to raise the claim.¹⁶⁷ Thus, where the prosecution concealed *Brady* evidence from the defendant at his trial, and misleadingly represented that it had complied with *Brady* disclosure obligations, a defendant may demonstrate cause for failing to investigate the prosecutor's nondisclosure in state post-conviction proceedings. As the Supreme Court observed in *Banks v. Dretke*: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material

¹⁶⁴ *Banks v. Dretke*, 540 U.S. at 690. See *Crivens v. Roth*, 172 F.3d 991, 995 (7th Cir. 1999) (Crivens failure to raise claim in state courts "resulted not from his own lack of attention or other fault, but rather because the state did not provide the [previously suppressed *Brady* evidence] until after the habeas petition was filed.").

¹⁶⁵ *Crivens v. Roth*, 172 F.3d at 995.

¹⁶⁶ *Banks v. Dretke*, 540 U.S. at 691-96.

¹⁶⁷ See, e.g., *Banks v. Dretke*, 540 U.S. at 692; *Strickler v. Greene*, 527 U.S. at 289; *Crivens v. Roth*, 172 F.3d at 995-96.

when the prosecution represents that all such material has been disclosed.”¹⁶⁸

Moreover, prosecutors typically respond to a post-conviction *Brady* claim by arguing that even if a defendant has exhausted his claim in the state court, or notwithstanding sufficient cause for his failure to develop the facts in the state court, the defendant was not prejudiced by the prosecutor’s nondisclosure. This claim dovetails with the requirement that in order to establish a *Brady* violation, a defendant must demonstrate that the evidence was material to guilt or punishment. A prosecutor’s attempt to defeat a post-conviction *Brady* claim by arguing lack of prejudice simply duplicates the prosecutor’s gamesmanship in concealing the evidence from the defendant in the first place. Interestingly, when *Brady* evidence is discovered post-trial and is the subject of the litigation, we often are able to discern from the prosecutor’s argument that the evidence is not material to how the prosecutor gambled and “play[ed] the odds” originally in denying the defendant a fair trial.¹⁶⁹

Finally, some prosecutors inject other procedural obstacles to a defendant’s presumably meritorious post-conviction *Brady* claim, i.e., “You didn’t say Simon Sez.” Thus, prosecutors argue that the defendant did not use the correct nomenclature to describe the nondisclosure violation, i.e., that a *Brady* claim must be pleaded separately from a *Giglio* claim,¹⁷⁰ or that a defendant did not move to amend his petition after he learned during the post-conviction hearing the nature and extent of the prosecutor’s violation.¹⁷¹ And, to compound this gamesmanship to protect an unconstitutional conviction, some prosecutors in their arguments to an appellate court, even to the Supreme Court, continue to play word games by claiming, falsely, that they said things in the lower court that they did not say, and did not say certain things that they did say.¹⁷²

¹⁶⁸ 540 U.S. at 695.

¹⁶⁹ See *United States v. Bagley*, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) (*Brady* materiality standard “invites a prosecutor to gamble, to play the odds, and to take a chance that the evidence will later turn out not to have been potentially dispositive.”). For an interesting example of this type of gamesmanship, see *DiSimone v. Phillips*,

¹⁷⁰ See *Banks v. Dretke*, 540 U.S. at 690, n. 11 (Court does not reach prosecutor’s argument that *Brady* claim is distinct from a *Giglio* claim and must be pleaded separately because *Banks* qualifies for relief under *Brady*).

¹⁷¹ *Id.* at 687 (prosecutor argued that when new and previously unknown *Brady* evidence came to light, *Banks* should have moved to amend or supplement his earlier petition that raised a different *Brady* claim, notwithstanding the prosecutor’s failure to object to the new argument when it was made originally and by failing to object, impliedly consented pursuant to Federal Rule of Civil Procedure 15[b] to *Banks*’ new claim).

¹⁷² See oral argument before Supreme Court in *Banks v. Dretke*, 540 U.S.668 (2004) (lawyer for state, Gena Bunn, falsely denies that a key government witness was an informant and in response to a question from the Court: “So the prosecution can lie and conceal and the prisoner

AFTERTHOUGHTS

Prosecutorial gamesmanship in litigating *Brady v. Maryland* should come as no surprise. To a prosecutor, having to disclose exculpatory evidence to a defendant whom the prosecutor believes is guilty and which may enable that defendant to defeat the ends of justice is intolerable. Moreover, given a prosecutor's enormous discretion over *Brady* disclosure, the broad and malleable rules within which to exercise that discretion, and the likelihood that suppressed evidence will never be found, it is almost certain that prosecutors will routinely avoid compliance with *Brady*. To the extent that the literature finds pithy ways to catalogue prosecutors: "virtuous,"¹⁷³ "prudent,"¹⁷⁴ "good,"¹⁷⁵ "neutral,"¹⁷⁶ "ethical,"¹⁷⁷ "unique,"¹⁷⁸ "minister of justice"¹⁷⁹—I would add "gamesman" to the list to denote an official who revels in the combat of the courtroom—the "wide world of litigation"—and the sheer thrill of playing games with the evidence. And there is probably no greater thrill than to play games with the rules of discovery generally, and especially the disclosure rule of *Brady v. Maryland*, in order to thwart a defendant's ability to win, because the odds of not getting caught are stacked so heavily in the prosecutor's favor.

I have attempted to use the metaphor of games to describe the prosecutor's litigation tactics with respect to *Brady* disclosures. The schemes, tactics, and outright games are sometimes extreme in their brazenness. Occasionally, even a ghoulish quality emerges, particularly in those cases in which a prosecutor's nondisclosure has sent an innocent man to the death chamber. Moreover, since there is virtually no accountability, liability, or punishment for *Brady* violations, prosecutors are encouraged to play the game with impunity. We are

still has the burden to —to discover the evidence? That's your position?" Ms. Bunn responded, "Yes, Your Honor."). See Transcript of Oral Argument, 2003 WL 22992276, at 15, 16.

¹⁷³ See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988).

¹⁷⁴ See Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001).

¹⁷⁵ See Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133 (2005); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

¹⁷⁶ See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000).

¹⁷⁷ See Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987).

¹⁷⁸ See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

¹⁷⁹ See MODEL RULES, *supra* note 2, R. 3.8, comment a (prosecutor has responsibility of "a minister of justice").

told by commentators that education,¹⁸⁰ self-awareness,¹⁸¹ financial incentives,¹⁸² increased “transparency,”¹⁸³ and an appreciation of their own “moral superiority,”¹⁸⁴ may make prosecutors more inclined to behave ethically. However, given the stark reality that emerges from studying the *Brady* cases, it is much more rational to conclude that prosecutors most often think about games to avoid compliance with *Brady*, because there is nothing tangible to stop them.

¹⁸⁰ See Kenneth Bresler, “*I Never Lost a Trial*”: *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 546 (1996).

¹⁸¹ See Bruce A. Green, *Why Should Prosecutors “Seek Justice?”*, 26 FORDHAM URB. L.J. 607, 642 (1999) (“it may take a certain amount of inner strength (or strength of character) for an individual prosecutor...to comply with procedural norms”).

¹⁸² See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

¹⁸³ See Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237.

¹⁸⁴ See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 450 (2002) (arguing that federal prosecutors have a “sense of moral superiority” and resist efforts to regulate their behavior because they “care about ethics issues and do not misbehave”).