The Rising Tide in Wrongful Convictions: The Shortcomings of *Brady* and the Need for Additional Safeguards

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INTRODUCTION

Picture this—it is 1978, you have been arrested, convicted of first-degree murder, and sentenced to life in prison without parole.[1] You maintain your innocence over the next twenty years.[2] You ask the Innocence Project to review your file, and it uncovers sealed police reports that reveal other individuals admitted to committing the very crime for which you are in prison and these statements were made during the initial stages of police investigation.[3] You and your attorney were never made aware of these reports.[4] It turns out that before trial, the prosecutor asked the court for a secret hearing without your or your attorney's presence and convinced the court to seal these police reports under the pretense of protecting an anonymous informant.[5] It is blatantly apparent that the prosecution and investigators colluded to violate your constitutional right to exculpatory information.[6] When this came to light, the judge who issued a report in your case recommending that your conviction be overturned stated that, "[t]he prosecution was so successful in violating the trial court's orders and its constitutional obligation that by the time the exculpatory evidence came to light—nearly three decades later—many of the important

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1 *See Michael Hanline*, CAL. INNOCENCE PROJECT, https://perma.cc/G9E8-2WU4 (last visited Feb. 23, 2022) (demonstrating that these hypothetical facts replicate the facts in Michael Hanline's case).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

witnesses had died or disappeared."[7] After serving thirty-six years in prison for a crime you never committed, you are finally set free.[8]

The prosecutorial misconduct described in the hypothetical above should require little imagination because it happened to Michael Hanline.[9] Michael Hanline's story is not an anomaly—there are numerous cases in which intentional and unintentional prosecutorial acts resulted in a wrongful conviction.[10] Prosecutors are the most powerful officials in the criminal justice system.[11] Although police officers have the power to bring individuals into the system, it is ultimately the prosecutor who holds the power to keep individuals firmly ingrained in it.[12] To level the playing field in criminal trials, the U.S. Supreme Court ("Supreme Court") held in *Brady v. Maryland* that prosecutors are required to disclose materially exculpatory evidence in the government's possession to the defense.[13] Despite *Brady's* fifty-year history, its promise of fairness in criminal discovery has yet to materialize.[14]

This Note will argue that the conflicting standards that prosecutors

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[7] *Michael Hanline*, *supra* note 1.

[8] *Michael Hanline*, *supra* note 1.

[9] *Michael Hanline*, *supra* note 1.

[10] *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 (2006) ("[I]t is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations. Indeed, *Brady* may be the paradigmatic example of prosecutorial misconduct. Numerous studies have documented widespread and egregious *Brady* violations."); *Historic* Brady *Rule Doesn't Always Hold Up*, INNOCENCE PROJECT (May 14, 2013), https://perma.cc/9RE4-3QN7; *see also* Tiffany M. Joslyn & Shana-Tara Regan, *Faces of* Brady*: The Human Cost of* Brady *Violations*, THE CHAMPION, May 2013, at 46, https://perma.cc/DLC8-FW28 (describing various cases where the government's failure to comply with *Brady* resulted in wrongful convictions); Innocence Staff, *2018: A Record Year in Exonerations*, INNOCENCE PROJECT (Nov. 19, 2018), https://perma.cc/45L3-3MJB (describing various clients of the Innocence Project and their exonerations).

[11] Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 823 (2013).

[12] *Id.* at 832.

[13] 373 U.S. 83, 86–88 (1963).

[14] *See* Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 654–55 (2007) ("Cases in which DNA evidence demonstrated wrongful convictions revealed a host of sources of inaccuracy in criminal trials. Among these have been failures by police and prosecutors to disclose exculpatory information . . . ."); Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1321 (2011); Tom Jackman, *More than Half of All Wrongful Convictions are Caused by Government Misconduct, Study Finds*, WASH. POST, (Sept. 16, 2020), https://perma.cc/G9BE-YJCA (citing to the concealment of exculpatory evidence as a cause of wrongful convictions).

follow for guidance on when and whether to disclose, coupled with the lack of discipline imposed on prosecutors and unchecked mental processes, has largely left prosecutors to self-regulate in fulfilling their *Brady* obligation. But self-regulation has not been a viable solution to the problems *Brady* sought to solve. This Note will analyze possible solutions to the inadequacies of *Brady*, specifically through judicial involvement by the creation of an Ethical Rule Order motion and additional rules of criminal procedure. Part I of this Note will discuss the *Brady* obligation, the role of prosecutors in the criminal justice system, and the mechanisms meant to hold them accountable for prosecutorial misconduct. It will also discuss examples of conflicting standards that prosecutors are subject to. Part II of this Note will discuss the importance of this issue. Part III will discuss the use of an Ethical Rule Order in criminal cases to prevent *Brady* violations. Part IV will discuss the use of an adverse inference jury instruction, inspired by the Federal Rules of Civil Procedure Rule 37(e)(2), as a means to prevent intentional *Brady* violations. Finally, Part V will discuss the use of special masters, which are predominantly utilized in civil adjudication, as a way to combat both intentional and unintentional *Brady* violations. The ultimate objective of this Note is to explore possible solutions to the shortcomings of *Brady* in order to prevent or mitigate the risk of wrongful convictions.

I. Background

A. Brady *and Its Current State*

In 1963, the Supreme Court held in *Brady v. Maryland* that suppression of favorable evidence by the prosecution that is material to either guilt or punishment violates a defendant's Fifth and Fourteenth Amendment rights.[15] In delivering the majority opinion, Justice William O. Douglas stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."[16] With a goal of making criminal trials fairer, the Court created an obligation that prosecutors disclose evidence to the defense that is material to guilt or punishment.[17] Disclosing such evidence is a duty that belongs to prosecutors because they are ultimately responsible for the evidence known to agents acting on behalf of the government.[18] Qualifying evidence is often called "*Brady* material," and the failure to disclose such

[15] 373 U.S. at 86–88.

[16] *Id.* at 87.

[17] *Id.*

[18] *Id.* at 87–88.

material is a "*Brady* violation."[19] Evidence is deemed material if there is a reasonable probability that a conviction or sentence would have been different had the evidence been disclosed.[20] *Brady* was extended in *Giglio v. United States* to require prosecutors to disclose to the defense any information relevant to the credibility of a prosecutor's witness.[21]

While the Supreme Court's acknowledgment of the policies underlying *Brady* and the duty subsequently imposed on prosecutors sounded and appeared promising, several obstacles have prevented *Brady* from fulfilling its promises in application.[22] First, prosecutors are subject to *Brady* disclosure obligations under state and federal constitutional provisions, statutory laws, court rules, and state ethics rules.[23] At times, however, these standards conflict with one another, resulting in unclear obligations for prosecutors.[24] Additionally, prosecutors enjoy absolute and qualified immunity and thus are rarely punished for misconduct under 42 U.S.C. § 1983, the federal statute that provides individuals the right to sue government employees acting under the color of state law for civil rights violations.[25] Prosecutors can also suffer from confirmation bias, resulting in an inadvertent failure to disclose qualifying information.[26] Exacerbating the issue is the lack of

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[19] *See, e.g.*, Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006); Tiffany R. Murphy, *Futility of Exhaustion: Why* Brady *Claims Should Trump Federal Exhaustion Requirements*, 47 U. MICH. J.L. REFORM 697, 701 (2014) ("Qualifying evidence comes in many forms, including a confidential informant's prior criminal history, an eyewitness's identification of another person, or a plea deal with a key state witness that was never disclosed."); *Misconduct: Failure to Disclose*, PROSECUTORIAL ACCOUNTABILITY, https://perma.cc/A5E7-VU38 (last visited Feb. 23, 2022).

[20] Strickler v. Greene, 527 U.S. 263, 296 (1999).

[21] 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.").

[22] *See Brady*, 373 U.S. at 87–88 ("'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused . . . does not comport with standards of justice . . . ."); Yaroshefsky, *supra* note 14, at 1321.

[23] Yaroshefsky, *supra* note 14, at 1321.

[24] *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 533 (2007) ("The manner in which *Brady* is treated in federal and state courts reveals a confusing and inconsistent understanding and application of its objectives."); Blaise Niosi, Note, *Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence Is Material Under the* Brady *Rule*, 83 FORDHAM L. REV. 1499, 1513–17 (2014).

[25] 42 U.S.C. § 1983 (1996); Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976).

[26] Peter A. Joy & Kevin C. McMunigal, *The Ethics of Prosecutorial Disclosure*, 30 CRIM. JUST., Fall 2015, at 41, 41 ("Confirmation bias predicts that prosecutors will tend to seek information that confirms a preexisting position, such as a belief that a defendant is guilty, and ignore information, such as exculpatory evidence, that contradicts the preexisting position.").

punishment and accountability imposed on prosecutors from their respective state bar associations in response to misconduct.[27]

B. Brady *and the Federal Rules of Criminal Procedure*

Rule 16 of the Federal Rules of Criminal Procedure contains extensive coverage of the disclosure requirements applicable to prosecutors in federal court.[28] While state courts are not subject to the federal rules, it is helpful to note the federal requirements since they can indicate what state courts may require for disclosure.[29] Rule 16 requires the government to disclose the defendant's oral statements, the defendant's written or recorded statements, the defendant's prior criminal record, certain documents and objects, certain examination and test reports, and the content and basis of any expert testimony the government intends to offer during its case-in-chief.[30]

On October 21, 2020, President Donald Trump signed into law the "Due Process Protections Act," which sought to "balance . . . the power dynamic between the prosecution and the defense by requiring federal courts at the outset of a case to place the government on notice of its constitutional discovery obligations and the potential consequences for flouting those obligations."[31] By directly amending the Federal Rules of Criminal Procedure instead of waiting for the Judicial Conference of the United States to recommend an amendment, the enactment of "this new law suggests a sense of urgency" among lawmakers to reduce prosecutorial misconduct.[32]

C. *Prosecutors and the Mechanisms That Hold Them Unaccountable for Their* Brady *Obligation*

A prosecutor is the primary "representative of the state in all matters related to [criminal adjudications]."[33] The prosecutor controls "virtually every decision made in the course of every case that comes before criminal courts."[34] This includes deciding whether to charge an individual and what

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27 Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 314 (2019).

28 *See* FED. R. CRIM. P. 16.

29 Brady *Disclosure Requirements*, IACP NAT'L LAW ENFORCEMENT POLICY CTR. 2 (Aug. 2008), https://perma.cc/CA36-ELWQ.

30 FED. R. CRIM. P. 16.

31 Edward J. Loya Jr., *What Good Will the "Due Process Protections Act" Do?*, 11 NAT'L L. REV., Dec. 2020, https://perma.cc/U9GY-2MDP.

32 *Id.*

33 NAT'L RESEARCH COUNCIL ET AL., WHAT'S CHANGING IN PROSECUTION?: REPORT OF A WORKSHOP 7 (Carol Petrie & Philip Heymann eds., 2001).

34 *Id.*

those charges will be, deciding to offer plea bargains, deciding how the trial for the state will be conducted, and providing sentencing recommendations.[35] The prosecutor also has an investigative function when they provide advisory assistance to the police in an investigation.[36] This breadth of discretion as to how cases move forward means that prosecutors have a uniquely powerful role in criminal cases and highlights the importance of effective oversight.[37]

1. Prosecutorial Immunity

Under the federal civil rights statute, 42 U.S.C. § 1983, two types of immunity apply to prosecutors: absolute immunity and qualified immunity.[38] In *Imbler v. Pachtman*, the Supreme Court held that prosecutors who acted within the scope of their duties in initiating and pursuing a criminal prosecution have absolute immunity.[39] Absolute immunity is applicable even where a prosecutor knowingly uses perjured testimony at trial, fails to make a full disclosure of all facts that cast doubt on the state's case, or deliberately withholds exculpatory information.[40] Prosecutors have qualified immunity when acting in an administrative or investigative capacity and are immunized unless the misconduct clearly violated an established rule of law of which a reasonable prosecutor would have known.[41] These immunities leave those who have been wrongly convicted due to prosecutorial misconduct with no civil remedies.[42]

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[35] *Id.* at 8; Davis, *supra* note 11, at 832.

[36] NAT'L RESEARCH COUNCIL ET AL., *supra* note 33, at 8.

[37] Angela J. Davis, *Meet the Criminal Justice System's Most Powerful Actors*, THE APPEAL (May 29, 2018), https://perma.cc/E9EN-C9RE ("The power and discretion of prosecutors cannot be overstated.").

[38] Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 53 (2015).

[39] 424 U.S. 409, 431 (1976).

[40] *See* Kalina v. Fletcher, 522 U.S. 118, 124 (1997); *Imbler*, 424 U.S. at 425 ("The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and ultimately in every case the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury.").

[41] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993).

[42] *See* Johns, *supra* note 38, at 54.

2. The Subtle and Pervasive Effect of Confirmation Bias on Prosecutors

Brady violations are also attributable to cognitive processes that can impede a prosecutor's awareness of the exculpatory nature of evidence and the importance of disclosing such evidence to the defense.[43] Researchers have identified these processes as cognitive biases, which encompass both explicit and implicit biases.[44] Explicit bias refers to a category of attitudes of which an individual has self-awareness, while implicit bias involves "evaluations that are automatically activated by the mere presence (actual or symbolic) of the attitude object and commonly function without a person's full awareness or control."[45] Implicit biases are likely to differ from one's open and conscious beliefs.[46] Confirmation bias, an example of an implicit bias, is believed to cause prosecutors to dismiss the exculpatory quality of evidence or discount its value, leading to the failure to disclose.[47] Prosecutors under the influence of unconscious confirmation bias may identify and interpret evidence in a manner that only supports their beliefs and may undervalue or disregard evidence that contradicts those beliefs.[48] In other words, once a prosecutor is convinced that a defendant is guilty, it is difficult for the prosecutor to perceive an alternate theory of how the defense might use information differently.[49] Confirmation bias is dangerous

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[43] Kate Bloch, *Harnessing Virtual Reality to Prevent Prosecutorial Misconduct*, 32 GEO. J. LEGAL ETHICS 1, 4 (2020).

[44] *Id.* at 4–5.

[45] John F. Dovidio, Kerry Kawakami & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 62 (2002), https://perma.cc/C5F9-NA62.

[46] *See* BERNICE B. DONALD & SARAH E. REDFIELD, FRAMING THE DISCUSSION: ENHANCING JUSTICE: REDUCING BIAS 14 (Sarah E. Redfield ed., 2017).

[47] Bloch, *supra* note 43, at 5; *see* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006) ("When testing a hypothesis's validity, people tend to favor information that confirms their theory over disconfirming information. Good evidence suggests that this information-seeking bias results because people tend to recognize the relevance of confirming evidence more than disconfirming evidence."); Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 179 (2016) (stating that prosecutors approach the *Brady* obligation "through a lens clouded by cognitive bias" and therefore, exculpatory evidence appears "meaningless or unconvincing, and the materiality element [of *Brady*] makes it easy to suppress").

[48] Bloch, *supra* note 43, at 5.

[49] Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, THE CHAMPION, May 2013, at 12, https://perma.cc/9F9Y-2KJY.

because it is largely an unconscious process that is subtle, pervasive, and difficult to overcome through the "force of will, good intentions, or even training."[50]

3. The Lack of Disciplinary Action and the State Bars' Propensity to Impose the Proverbial Slap on the Wrist

Like other attorneys, prosecutors must adhere to the standards of professional conduct required of them within the state where they practice.[51] However, it is evident that courts and the American Bar Association ("ABA") view prosecutors as "ministers of justice" with a responsibility to uphold higher professional standards than other attorneys.[52] Rule 3.8 of the Model Rules of Professional Conduct imposes special obligations on prosecutors.[53] Rule 3.8(d) specifically states that prosecutors must

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[54]

As of January 2, 2020, all fifty states and the District of Columbia have

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[50] *Id.*; *see The Confirmation Bias: Why People See What They Want to See*, EFFECTIVIOLOGY, https://perma.cc/VT9C-VXHA (last visited Feb. 23, 2022) (stating that confirmation bias promotes various problematic patterns of thinking and does so through the biased search for information, biased favoring of information, biased interpretation of information, and biased recall of information).

[51] Neil Gordon, *Misconduct and Punishment*, CENTER FOR PUB. INTEGRITY (June 26, 2003), https://perma.cc/2VSY-M22F.

[52] *See* MODEL R. PROF'L CONDUCT 3.8 cmt. 1 (AM. BAR ASS'N 2010) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."); *see, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) (stating that prosecutors have special obligations as representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"); People v. Jones, 375 N.E.2d 41, 44 (N.Y. 1978) ("[T]he responsibilities of a prosecutor for fairness and open-dealing are of a higher magnitude than those of a private litigant . . . .").

[53] MODEL R. PROF'L CONDUCT 3.8.

[54] *Id.*

adopted some version of subsection (d) of Rule 3.8.[55] An attorney's failure to abide by the state's standards of professional conduct can result in disbarment, suspension, probation, public or private censure, an order to pay restitution, or other sanctions.[56]

Despite the adoption of some form of Rule 3.8(d) in all fifty states and the District of Columbia, prosecutorial misconduct commonly goes unpunished by state Bar Associations.[57]For example, in 2015, appellate courts in New Orleans overturned at least thirty-six convictions caused by prosecutorial misconduct—nine of which involved defendants on death row.[58] This prompted defense attorneys to file a series of complaints with Louisiana's Office of Disciplinary Counsel.[59] It took more than two years for these defense attorneys to even be given notice that the Office received their complaints.[60] Another survey conducted by the Innocence Project, Resurrection After Exoneration, and the Veritas Initiative analyzed five states over the 2004–2008 period and found that, in 660 cases of prosecutorial misconduct, only one prosecutor was disciplined.[61] Another 2003 report by the Center for Public Integrity examined 11,400 allegations of prosecutorial misconduct between 1970 and 2003.[62] Prosecutorial misconduct in 2,012 of those cases resulted in dismissals, sentence reversals, or sentence reductions.[63] However, only forty-four prosecutors were sanctioned for the violations, and even then, seven of those violations were dismissed.[64] Overall, the consensus from various studies shows very few instances where

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[55] *See Variations of the ABA Model Rules of Professional Conduct: Rule 3.8: Special Responsibilities of a Prosecutor*, ABA: AM. BAR ASS'N, https://perma.cc/FJ6R-3572 (last updated Nov. 2021) [hereinafter *Variations of Rule 3.8*].

[56] *See* MODEL R. PROF'L CONDUCT 10; *see also Discipline, Sanction, Disqualification*, LAW SHELF, https://perma.cc/ZV9C-8F6G (last visited Mar. 1, 2022).

[57] David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. Online 203, 205 (2011) ("In reality, prosecutors have rarely been subjected to disciplinary action by state bar authorities.").

[58] Radley Balko, *New Orleans's Persistent Prosecutor Problem*, WASH. POST (Oct. 27, 2015), https://perma.cc/YTC3-E32Y.

[59] *Id.*

[60] *Id.*

[61] Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), https://perma.cc/64BQ-9GGY.

[62] Christopher Zoukis, *Prosecutorial Misconduct: Taking the Justice out of Criminal Justice*, PRISON LEGAL NEWS (Nov. 8, 2014), https://perma.cc/6S3J-6HL8.

[63] *Id.*

[64] *Id.*

prosecutorial misconduct resulted in disciplinary action, with the majority of sanctions being a proverbial slap on the wrist.[65] Moreover, as a result of "infrequent [reports of misconduct] due to arcane complaint procedures, lax enforcement, and a culture of secrecy and indifference by regulatory agencies, one must conclude that the problem of prosecutorial misconduct in our nation's criminal justice system is much greater than the official numbers reflect."[66]

D. *The Lack of Uniformity Surrounding the* Brady *Obligation*

1. The Conflict Between State Standards and Federal Standards

As noted, prosecutors are subject to *Brady* obligations imposed under state and federal constitutional provisions, statutory laws, court rules, and state ethics rules.[67] When these standards conflict with one another, the *Brady* obligations for prosecutors become unclear.[68] One example of this is the conflict around standards of ethics and professional responsibility.[69] Rule 3.8(d) of the Model Rules of Professional Conduct states that prosecutors must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[70] There is ongoing debate as to whether this rule requires prosecutors "to disclose 'more' than is required by *Brady v. Maryland*."[71] In 2009, the ABA proclaimed that the disclosure obligation

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[65] Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 HOFSTRA L. REV. 121, 122 (2001) ("Numerous authorities on prosecutorial ethics and discipline have maintained for many years that prosecutors are far too infrequently subjected to professional discipline and that courts cannot responsibly defer to disciplinary authorities to oversee prosecutorial misconduct that deprives individuals of fundamental rights."); Zoukis, *supra* note 62.

[66] Zoukis, *supra* note 62.

[67] *See* Yaroshefsky, *supra* note 14, at 1321.

[68] Niosi, *supra* note 24, at 1513–17.

[69] Zachary H. Greene & Jenna W. Fullerton, *Separation of Powers in the Trenches: Using Ethical Rules to Expand Criminal Discovery*, ABA: AM. BAR ASS'N. (Oct. 16, 2019), https://perma.cc/MV9H-CQXN.

[70] MODEL R. PROF'L CONDUCT 3.8 (AM. BAR ASS'N 2010).

[71] Dennis A. Rendleman, *Perhaps the Toughest Job with the Toughest Questions: Professional Responsibility and Criminal Prosecutors*, ABA: AM. BAR ASS'N (Jan. 2020), https://perma.cc/9DRW-YW7G; Joy & McMunigal, *supra* note 26, at 41 ("A key issue that has emerged in applying Model Rule 3.8(d) and its state counterparts is whether the materiality limitation found in *Brady* doctrine should be read into state versions of Model Rule 3.8(d) despite the fact that the text of these rules routinely sets forth no such materiality limitation.").

under Rule 3.8(d) is a separate obligation that is broader than *Brady*.[72] Although the majority of states also view the ethical duty as a separate obligation from the one imposed by *Brady*, there are a substantial number of states that conclude that Rule 3.8(d) does not impose more than what is required by *Brady*.[73]

The tension surrounding Rule 3.8(d) can be seen in Tennessee.[74] In 2018, "the Tennessee Board of Professional Responsibility issued Formal Ethics Opinion 2017-F-163 [in an effort] to clarify a prosecutor's duty of disclosure . . . ."[75] The Opinion stated that Rule 3.8(d) extended far beyond the constitutional requirements to disclose only material exculpatory information as promulgated by *Brady*.[76] Because the U.S. District Court for the Eastern District of Tennessee ("Eastern District") followed the Tennessee Rules of Professional Conduct, the Opinion had the ability to affect federal courts.[77] When the Opinion was published, the U.S. Attorney's Office asked the Board to withdraw its Opinion.[78] Ultimately, the Tennessee Supreme Court vacated the Opinion because having two standards—the *Brady* standard and Rule 3.8(d)—would bring a myriad of conflicts.[79] However, despite the Tennessee Supreme Court's decision, Chief Judge Pamela Reeves of the Eastern District sent a letter to U.S. Attorney Doug Overby stating that the Tennessee Supreme Court is free to insist on higher standards than state standards and thus, would expect the U.S. Attorney's office to abide by the

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[72] Peter A. Joy & Kevin C. McMunigal, *ABA Explains Prosecutor's Ethical Disclosure Duty*, 24 CRIM. JUST., no. 4, Winter 2010, at 1, 1 (stating that the ABA found that constitutional law cases "establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct").

[73] Rendleman, *supra* note 71; *see* Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. BLOG (June 15, 2018), https://perma.cc/TB4Q-HV3K (noting jurisdictions that conclude that Rule 3.8(d) does not impose more than what is required of *Brady* include "Ohio (2010), Wisconsin (2013), Oklahoma (2015), and Louisiana (2017)").

[74] Greene & Fullerton, *supra* note 69.

[75] Greene & Fullerton, *supra* note 69.

[76] Greene & Fullerton, *supra* note 69 (expressing that disclosure is to be made as reasonably practicable and must be made before guilty plea proceedings).

[77] Greene & Fullerton, *supra* note 69.

[78] Bert, *TN: Prosecutors Resist State Bar's Ethical Ruling*, PROSECUTORIAL ACCOUNTABILITY (Aug. 2, 2018), https://perma.cc/J26H-NKRR. S*ee generally* Greene & Fullerton, *supra* note 69.

[79] *Tennessee Supreme Court Vacates Board of Professional Responsibility Formal Ethics Opinion 2017-F-163*, TN COURTS.GOV (Aug. 23, 2019), https://perma.cc/U7CH-BM5F. *See generally* Greene & Fullerton, *supra* note 69.

rule that was vacated.[80] Attorney Overby countered that he would only follow the discovery policy promulgated by the Department of Justice.[81] As a result, the consequences of Opinion 2017-F-163 in the Eastern District are unclear.[82] This tension regarding the inconsistent *Brady* standard in the Eastern District could represent a national trend.[83]

2. The Circuit Split on the *Brady* Obligation During Plea-Bargaining

In 2002, the Supreme Court held in *United States v. Ruiz* that prosecutors do not need to disclose impeachment evidence during the pre-trial plea-bargaining process.[84] The decision left lower courts with the question of whether *Brady* required pre-trial disclosure of exculpatory evidence during the plea-bargaining stage.[85] While some circuit courts hold that impeachment evidence constitutes exculpatory evidence, others do not.[86] In 2018, the U.S. Court of Appeals for the Fifth Circuit held in *Alvarez v. City of Brownsville* that prosecutors are not constitutionally obligated to disclose exculpatory evidence to defendants during the plea-bargaining process.[87] This decision places the Fifth Circuit in the company of the First, Second, and Fourth Circuits and distinguishes it from the holdings of the Seventh, Ninth, and Tenth Circuits.[88] After the Fifth Circuit rendered its decision, Alvarez filed a petition for a writ of certiorari to the Supreme Court.[89] The Supreme Court denied the writ despite the circuit split and the implication it could have on the fairness of plea-bargaining.[90]

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[80] Greene & Fullerton, *supra* note 69; *see Update on Tennessee Ethics Battle*, NAFUSA: NAT'L ASS'N OF FORMER U.S. ATTORNEYS (Aug. 30, 2019), https://perma.cc/UEE9-2KU6.

[81] Greene & Fullerton, *supra* note 69.

[82] Greene & Fullerton, *supra* note 69.

[83] Greene & Fullerton, *supra* note 69 ("Opinion 2017-F-163 and the tension in the Eastern District of Tennessee could represent a national trend. Ethics panels and courts in a significant number of jurisdictions—including Michigan, Texas, Virginia, and Utah, among others—have interpreted similar rules of professional conduct to extend prosecutor's duty of disclosure beyond constitutional standards.").

[84] 536 U.S. 622, 633 (2002).

[85] *See, e.g.*, United States v. Ohiri, 133 F. App'x 555, 561–62 (10th Cir. 2005); McCann v. Mangialardi, 337 F.3d 782, 787 (7th Cir. 2003).

[86] *See* Cameron Casey, Comment, *Lost Opportunity: Supreme Court Declines to Resolve Circuit Split on* Brady *Obligations During Plea-Bargaining*, 61 B.C. L. REV. E-SUPPLEMENT II. 73, 74 (2020).

[87] 904 F.3d 382, 394 (5th Cir. 2018).

[88] Casey, *supra* note 86, at 74.

[89] Alvarez v. City of Brownsville, 139 S.Ct. 2690, 2690 (2019).

[90] *Id. See generally* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J.

The Seventh, Ninth, and Tenth Circuit courts hold that *Brady* requires prosecutors to disclose exculpatory information during the plea-bargaining process.[91] The reasoning of these courts lies in the distinction between impeachment and exculpatory evidence.[92] In *McCann v. Mangialardi*, the Seventh Circuit found that the *Ruiz* decision implied that there is a difference in treatment between exculpatory evidence and impeachment evidence.[93] The Court found that under *Ruiz*, impeachment evidence is not essential for a defendant to voluntarily and knowingly enter a plea bargain.[94] However, the Seventh Circuit believed that the Supreme Court intended for *Ruiz* to only apply to impeachment evidence because a defendant cannot knowingly and voluntarily enter a plea bargain without crucial information such as exculpatory evidence.[95]

On the other hand, as mentioned, the First, Second, Fourth, and Fifth Circuit courts hold that criminal defendants are not entitled to exculpatory information prior to entering guilty pleas.[96] In *United States v. Mathur*, the

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Empirical Legal Stud. 448, 448 (2019), ("Intercircuit splits occur when two or more circuits on the U.S. Court of Appeals issue different legal rules about the same legal questions. When this happens, federal law is applied differently in different parts of the country. Intercircuit splits cause legal nonuniformity, are an impediment to lawyering and judging, and have practical consequences for American law.").

[91] *See, e.g.*, Smith v. Baldwin, 510 F.3d 1127, 1148 (9th Cir. 2007); United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005); McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003); *see also* Casey, *supra* note 86, at 83–86.

[92] Casey, *supra* note 86, at 84–85 (noting that the Ninth Circuit in *Smith v. Baldwin* did not mention *Ruiz* in its decision and instead applied *Brady* in the context of plea bargains, suggesting that *Ruiz* is not controlling in situations involving exculpatory evidence); *see, e.g.*, *McCann*, 337 F.3d at 787–88 (suggesting that if exculpatory and impeachment evidence are distinct concepts, the Court's ruling in *Ruiz* would mean that defendants are constitutionally entitled to exculpatory evidence before entering a guilty plea).

[93] Casey, *supra* note 86, at 84 ("In *Ruiz*, the Court . . . conclude[d] that disclosure of impeachment evidence is not necessary to eliminate the risk that an innocent person might plead guilty. The Seventh Circuit reasoned that, when the Supreme Court acknowledged the value that required disclosure of exculpatory evidence has in protecting against wrongful convictions, it confirmed that such a disclosure is constitutionally required under *Ruiz*.").

[94] *McCann*, 337 F.3d at 787; *see* United States v. Ruiz, 536 U.S. 622, 633 (2002).

[95] *McCann*, 337 F.3d at 788 ("[I]t is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.").

[96] *See, e.g.*, United States v. Mathur, 624 F.3d 498, 507 (1st Cir. 2010); Friedman v. Rehal 618 F.3d 142, 154 (2d Cir. 2010) (noting that the Supreme Court treats exculpatory and impeachment evidence in the same way for defining the obligation of a prosecutor to provide *Brady* material and therefore the ruling of *Ruiz* supports denying the defendant's argument); United States v.

First Circuit Court of Appeals interpreted *Ruiz* to affirm that *Brady* did not protect criminal defendants from entering a guilty plea without knowledge of all relevant facts.[97] Consequently, the policies of fairness in criminal trials underlying *Brady* disappear when criminal defendants decide to enter a guilty plea.[98] In *Alvarez v. City of Brownsville*, the Fifth Circuit ruled that the Constitution did not require disclosure of exculpatory evidence because no Supreme Court case firmly established that a failure to disclose evidence during the plea-bargaining process constituted a *Brady* violation.[99] Until the Supreme Court takes a stance on the matter, the circuit split will continue to produce uncertain and unequal application of the *Brady* obligation in the plea-bargaining process.[100]

II. The Importance of the Issue

The record of wrongful convictions in the United States has repeatedly shown that prosecutors can withhold exculpatory evidence for long periods of time while an innocent person spends years or decades in prison.[101] *Brady* disclosures are necessary to an impartial criminal justice system because they contribute to an accurate determination of guilt or innocence.[102] Unfortunately, the National Registry of Exonerations found that official misconduct contributed to a wrongful conviction in 56% of 2,991 cases since

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Moussaoui, 591 F.3d 263, 285 (4th Cir. 2010) (stating that the *Brady* protections are only a trial right and exist to preserve the fairness of a trial verdict and prevent innocent persons from being found guilty; therefore, when a defendant pleads guilty, those concerns are almost completely eliminated because their guilt is admitted).

97 624 F.3d at 507.

98 *See id.* (noting that when a *Brady* claim is raised, the relevant concern is whether the defendant received a fair trial, which is not explicitly defined by the court, despite not having access to the suppressed evidence).

99 904 F.3d 382, 392–94 (5th Cir. 2018).

100 *Cf.* Johnathan M. Cohen & Daniel S. Cohen, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 996 (2020), https://perma.cc/3Q8P-SHSC ("[C]ircuit splits create uncertain and disparate applications of federal legal rights."); Kelly Rader, *Circuit Splits Project*, YALE UNIV., https://perma.cc/KP5U-NWZD (last visited Mar. 1, 2022) (stating that "many active and important [circuit] splits persist indefinitely and continue to generate significant litigation").

101 *See* THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 10–16 (2007), https://perma.cc/RHA5-SYZ2; *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 96 (2008) (examining claims brought by exonerated individuals, including claims of *Brady* violations).

102 FED. R. CRIM. P. 16 Advisory Comm. Notes on 1974 Amendment.

1989.[103] In 2018, a study found that a record number of exonerations in that year involved misconduct by government officials and that the average time an exonerated person spends in prison is more than eight years and ten months.[104] Alarmingly, the rising tide of wrongful convictions has reached a peak within the past seven years.[105] Exacerbating this issue is the difficulty in gauging the full extent of *Brady* violations given that prosecutors control access to evidence.[106] Therefore, official findings on prosecutorial misconduct represent merely a fraction of misconduct that has been uncovered and do not paint a full picture of the misconduct that actually occurs.[107]

In *Berger v. United States*, Justice Sutherland described prosecutorial misconduct as "overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[108] Due to the increasingly high record of wrongful convictions, it is no surprise that advocates for those wrongly convicted are increasingly focused on *Brady* violations, which they view as "one of the most harmful and pervasive forms of prosecutorial misconduct."[109]

ANALYSIS

III. The Use of an "Ethical Rule" Order in Criminal Cases to Combat Intentional *Brady* Violations

A. *The Mechanics of an Ethical Rule Order Motion*

All fifty states have adopted some form of the ABA's Model Rules of

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[103] *% Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, https://perma.cc/7P9U-K9UW (last visited Mar. 1, 2022).

[104] *Wrongful Convictions*, EQUAL JUST. INITIATIVE, https://perma.cc/2SXQ-TSJ8 (last visited Mar. 1, 2022).

[105] *See* Lara Bazelon, *The Rising Tide of Wrongful Convictions*, https://perma.cc/6HGS-QXJ5 (last visited Mar. 1, 2022) ("In 2014, a record-setting 147 people were exonerated. That record was broken in 2015, when 160 people were freed. It was broken again in 2016, when the number rose to 168, an average of more than three people per week. In a 2017 report, the National Registry of Exonerations came to this sobering conclusion: 'Exonerations used to be unusual; now they are commonplace.'"); *Exonerations by State*, NAT'L REGISTRY OF EXONERATIONS, https://perma.cc/E9G8-W284 (last visited Mar. 1, 2022).

[106] Zack, *supra* note 61.

[107] Zack, *supra* note 61.

[108] 295 U.S. 78, 84 (1935).

[109] Zack, *supra* note 61.

Professional Conduct Rule 3.8(d).[110] Rule 3.8(d) states that prosecutors must disclose all evidence or information tending to negate the guilt of the accused or mitigate the offense.[111] The ABA has made it clear that the disclosure obligation under this rule is broader than the *Brady* obligation.[112] Therefore, one solution to prevent intentional *Brady* violations is to create a Rule 3.8(d) Ethical Rule Order, which was first articulated by former president of the National Association of Criminal Defense Lawyers, Barry Scheck, and former U.S. District Judge, Nancy Gertner.[113]

In an Ethical Rule Order motion, the defense attorney files a pre-trial order requesting that the prosecutor disclose all information related to the defense's theory of the case tending to negate guilt.[114] This motion should cite to Rule 3.8(d)'s relevant jurisdictional counterpart.[115] The defense should strategically and specifically state its theory of the case to place the prosecution on notice of what it seeks.[116] The defense can address timeliness and request that the prosecutor disclose certain information sooner because it is reasonable or appropriate.[117] Rule 3.8(d) recognizes that a prosecutor can seek an appropriate protective order from the court if disclosing information to the defense would result in substantial harm to the public interest or an individual; a Model Rule Ethical Order motion would thereby "allow[] the prosecutor to delay disclosure by making an *in camera ex parte* production and a showing of 'good cause'" with a judge who will not preside at the trial.[118] Lastly, the motion should request that the prosecutor's "willful and

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[110] *See Variations of Rule 3.8*, *supra* note 55.

[111] MODEL R. PROF'L CONDUCT 3.8 (AM. BAR ASS'N 2010).

[112] Joy & McMunigal, *supra* note 72, at 1 (stating that the ABA found that constitutional law cases "establish a constitutional minimum but do not purport to preclude jurisdictions from adopting more demanding disclosure obligations by statute, rule of procedure, or rule of professional conduct").

[113] Barry Scheck & Nancy Gertner, *Combatting* Brady *Violations With an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, at 40, https://perma.cc/35HP-EBG2.

[114] *Id.*

[115] *Id.*

[116] *Id.* (stating that within the bounds of what makes sense strategically, the defense should be specific about its theory of the case and the information that would tend to negate the guilt of the accused or mitigates the offense).

[117] *Id.*

[118] *Id.*; *see* MODEL R. PROF'L CONDUCT 3.8 cmt. 3 (Am. Bar Ass'n 2010); *Ex Parte In Camera Hearing Definition*, QUIMBEE, https://perma.cc/XA8A-XMTG (last visited Mar. 1, 2022) ("Also known as an in camera *ex parte* hearing, a private court proceeding involving only one of the parties to a case, conducted by the judge to review one aspect of the case. The fact the hearing was held, but not the contents of the hearing, becomes a matter of public record."); *see, e.g.*,

deliberate failure to comply" be punishable by contempt.[119]

B. *How an Ethical Rule Order Can Mitigate the Shortcomings of* Brady

While defendants may request evidence during discovery and ask that the prosecution turn over material exculpatory evidence in what is typically known as a *Brady* motion, the creation of an Ethical Rule Order provides other advantages.[120] The motion is based on each pertinent jurisdiction's ethical rules and, therefore, has authority to direct a prosecutor's actions even if the motion's disclosure requirement is broader than the constitutional requirement under *Brady*.[121] Additionally, because *Brady* violations have resulted in the conviction of innocent persons, the creation of such an order may bolster public confidence in the integrity of the criminal justice system.[122]

The Ethical Rule Order motion can deter prosecutors from withholding material exculpatory evidence because it is not subject to many of the procedural hurdles that have hindered punishment for deliberate *Brady* violations.[123] The typical remedy for a *Brady* violation is the reversal of a conviction when material exculpatory evidence that was withheld would have led to a different outcome such that the integrity of the verdict is undermined.[124] The general belief is that once a *Brady* violation is discovered,

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MASS. R. PROF'L CONDUCT 3.3 (2013) (providing that "[i]f disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera").

[119] Scheck & Gertner, *supra* note 113.

[120] *See* Scheck & Gertner, *supra* note 113; *see, e.g.*, People v. Lewis, 240 Cal. App. 4th 257, 261 (2015) (stating that the defense filed a *Brady* motion seeking from the prosecution "[a]ny evidence that would tend to exonerate . . . [the defendant], minimize his probable sentence, or that constitutes information that the defense might use to impeach or contradict prosecution witnesses").

[121] Scheck & Gertner, *supra* note 113 ("Judges and prosecutors may be startled initially when they see the 'ethical rule' motion as opposed to the usual request to turn over all *Brady*/*Kyles* material. But upon reflection, what can a prosecutor credibly say in opposition? That the state does not recognize the ethical rule, invariably a state statutory obligation, as binding?").

[122] *See* Scheck & Gertner, *supra* note 113. *See generally* Candice Crutchfield, *Week 11: Wrongful Convictions*, MEDIUM (Sept. 9, 2019), https://perma.cc/SEL9-CFLN ("Criminal justice issues impact entire communities and public confidence in the system is (rightfully) diminished when innocent people are convicted."); *% Exonerations by Contributing Factor*, *supra* note 103 (showing that 1,684 of 2,991 wrongful convictions were caused by prosecutorial misconduct).

[123] Scheck & Gertner, *supra* note 113.

[124] *See, e.g.*, United States v. Pasha, 797 F.3d 1122, 1139 (D.C. Cir. 2015) (stating that "a *Brady* violation requires a remedy of a new trial [and] such new trial may require striking evidence, a special jury instruction, or other additional curative measures tailored to address persistent

the district attorney will punish the prosecutor or "fix the systemic breakdown that caused the failure to disclose in the first place."[125] However, it is not very likely that a district attorney will punish a prosecutor or fix the systemic breakdown in cases where the intentional withholding of evidence was deemed a harmless error, since public outrage for action is not likely to arise.[126] Therefore, prosecutors in those cases are likely to escape public scrutiny and public punishment.[127] Accordingly, the benefit of an Ethical Rule Order is that it would allow defense attorneys to "take direct action against individual prosecutors who deserve to be sanctioned . . . [by] the judge whose order was violated."[128] The use of an Ethical Rule Order creates another avenue in which prosecutors are disciplined for *Brady* violations and would serve as additional deterrence against them, regardless of whether those violations are harmless errors.[129] Consequently, a prosecutor would not only worry about withholding evidence that prejudices the defendant and warrants a reversal of conviction, but also contemplate the repercussions of intentionally withholding exculpatory evidence under the Ethical Rule Order even if withholding that evidence is ultimately deemed

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prejudice"); People v. Springer, 122 A.D.2d 87, 90 (N.Y. App. Div. 1986) (reversing the conviction where prosecutor intentionally destroyed surveillance videos relevant to the critical issue at trial).

[125] Scheck & Gertner, *supra* note 113. *But see* Joaquin Sapien et al., *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013, 5:30 AM EDT), https://perma.cc/97SB-MC8Q (discussing how prosecutors who were cited for prosecutorial abuse by courts were not punished by their superiors in the cities' district attorney offices and records showed that several received promotions and raises soon afterwards).

[126] Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1462 (2006) (expressing that when prosecutors "suffer lost convictions, jury nullification, or public outcry, their offices might be provoked into developing better bureaucratic infrastructures for gathering and disclosing *Brady* evidence, both within their offices and their relationships with police departments"); Scheck & Gertner, *supra* note 113 (stating that "[c]ases involving obviously guilty defendants are not likely to engender much public outrage or impetus for action"); *see also* United States v. Agurs, 427 U.S. 97, 111–12 (1976) ("[T]he judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury' . . . .").

[127] Scheck & Gertner, *supra* note 113.

[128] Scheck & Gertner, *supra* note 113.

[129] *See* Mike Fawer, *Misconduct by Prosecutors Is Rampant—How Do We Deter It?*, THE LENS (Apr. 11, 2019), https://perma.cc/RP5S-J3TJ ("[T]he court's suggestion that the use of disciplinary sanctions by bar associations would suffice to deter the errant prosecutor is nonsensical.").

a harmless error.[130]

Barry Scheck and Nancy Gertner posit that a violation of an Ethical Rule Order motion is more likely to result in contempt citations, bar discipline, and even criminal prosecution because it would allow judges to issue a contempt citation without having to wait on the district attorney to do so.[131] Another benefit to the Ethical Rule Order is that contempt citations for violations can be immediately appealed and would generate precedent quickly, which could then be used to direct prosecutors on how they should conduct themselves regarding Ethical Rule Orders.[132] Furthermore, because "contempt is a continuing offense, the statute of limitations in most states would not bar prosecution" of a prosecutor.[133] Finally, because such a motion would be premised on a jurisdiction's ethical rule, the motion would serve as concrete evidence of willfully disregarding the state's rules of ethics.[134] Accordingly, such a motion would provide deterrence twofold—through the consequences both for potential violations of court orders and for the willful aberration of the prosecutor's professional and ethical responsibility as promulgated by the prosecutor's respective state bar.[135]

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[130] *See generally* David E. Singleton, Brady *Violations: An In-Depth Look at "Higher Standard" Sanctions for a High-Standard Profession*, 15 WYO. L. REV. 139, 158–59 ("Indeed, the prosecutor rarely suffers a serious penalty for his or her misconduct. Often, however, when courts take remedial measures, the government easily overcomes such measures by showing that the prosecutor's conduct was harmless error.").

[131] Scheck & Gertner, *supra* note 113; *see* Rosalind D. Anderson, *Comments: A Pragmatic Look at Criminal Contempt and the Trial Attorney*, 12 U. BALT. L. REV. 100, 100–01 (1982) (stating that "[c]ontempt of court is any act calculated to embarrass, hinder, or obstruct a court in its administration of justice" and is a sanction falling primarily within the trial judge's discretion).

[132] Scheck & Gertner, *supra* note 113.

[133] Scheck & Gertner, *supra* note 113.

[134] *See Model Ethical Rule Order*, NACDL: NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, https://perma.cc/ZC4H-JZAZ (last visited Mar. 1, 2022) (demonstrating that a Model Ethical Rule Order should cite the local ethics rules that require the prosecutor to disclose the evidence the defense seeks).

[135] *See* MODEL R. OF PROF. CONDUCT 8.4 cmt. 1 (AM. BAR ASS'N 2016) ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . . ."); Anderson, *supra* note 131, at 100 (describing the power to punish contempt as "an inherent right necessary to preserve the dignity and authority of the courts, and ultimately the integrity of the judicial system").

IV. The Creation of an Adverse Inference Jury Instruction to Combat *Brady* Violations

A. *The Relationship Between the Prosecutor's Duties to Preserve and Disclose*

The prosecutor has a duty under the Sixth and Fourteenth Amendments to preserve certain types of evidence during the investigation and prosecution of a defendant.[136] The responsibility to preserve evidence is imputed to those formally working for or with a law enforcement agency.[137] This can include prosecutors, police officers, detectives, investigators, and scientific labs.[138] "The duty to preserve evidence starts as soon as the evidence is obtained and continues after a conviction."[139] The evidence that must be preserved is limited to evidence "that might be expected to play a significant role in the suspect's defense."[140] To meet the constitutional standard of materiality, such evidence must possess an exculpatory value[141] and "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[142] In *Arizona v. Youngblood*, the Supreme Court held that in cases involving only potentially

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[136] *Preserving Evidence in Criminal Cases*, JUSTIA, https://perma.cc/2FUZ-WM9J (last updated Oct. 2021).

[137] *Id.* (identifying a scientific lab that is regularly retained by the prosecutor's office to examine evidence as an example of an agency that could be charged with preserving evidence).

[138] *Id.*

[139] *Id.*

[140] California v. Trombetta, 467 U.S. 479, 488 (1984); *see Preserving Evidence in Criminal Cases*, *supra* note 136 (stating that examples of evidence that must be preserved can include an alibi, recorded statements of the defendant or witnesses, photographs, blood samples, and tangible evidence from the scene of the crime).

[141] *Trombetta*, 467 U.S. at 489; *see, e.g.*, United States. v. Rastelli, 870 F.2d 822, 833 (2d Cir. 1989) (holding there was no due process violation where government lost audio tapes because testimony did not establish tapes had apparent exculpatory value before they were lost, and FBI summaries of tapes did not have exculpatory value); United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (finding no due process violation where government destroyed agent's witness interview notes because government included all information in reports, examination of other interview notes revealed no *Brady* material, and defendants offered only speculation as to notes' exculpatory value).

[142] *Trombetta*, 467 U.S. at 489; *see, e.g.*, Olszewski v. Spencer, 466 F.3d 47, 58–59 (1st Cir. 2006) (finding no error where police did not recover written statement corroborating defendant's alibi from trash after witness discarded it and made new statement because defense could recreate substance of original statement through testimony); *Rastelli*, 870 F.2d at 833 (ruling there was no error where audio tapes destroyed because defendant could have used contemporaneously prepared FBI notes of same meetings).

exculpatory evidence, a defendant must show bad faith in order to establish a denial of due process.[143] To prove bad faith, a defendant must prove the government's intent to destroy evidence and its specific intent to spoil possibly exculpatory evidence.[144] If a defendant is successful in showing such bad faith prior to trial, the court may suppress the government's use of the related evidence or limit testimony about it.[145] Accordingly, the duty to preserve relates to the requirement that prosecutors disclose material exculpatory evidence to the defense under their *Brady* obligation.[146] After all, such evidence cannot be disclosed if it is not properly preserved.[147]

Although the duty to preserve is related to the prosecutor's *Brady* obligation, the government's intentions are irrelevant in determining whether the government violated its *Brady* obligation.[148] The Supreme Court justified its requirement that defendants show bad faith for a denial of due process on the grounds that "whenever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often disputed."[149] The Court also noted that the fundamental fairness requirement of the Due Process Clause should not be read to impose an absolute duty to retain and preserve all materials that might be of conceivable evidentiary significance in a prosecution.[150] However, by emphasizing an instrumental approach to government misconduct in this respect, the Supreme Court adopted an unjustifiably narrow view of due process.[151] Such an instrumental approach leads to the conviction of the innocent.[152] Requiring a bad faith showing for

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[143] 488 U.S. 51, 58 (1988).

[144] Joseph Hays, Comment, *The Rejection of "Good Faith" Rights Violations: The Case for a Negligent Standard in Death Penalty Spoliation Issues*, 56 HOUS. L. REV. 1151, 1157 (2019) ("In other words, the destroyed evidence must shout 'Save me!' to prove its exculpatory nature before its destruction becomes a due process violation under *Youngblood*.").

[145] *See Trombetta*, 467 U.S. at 486; *Preserving Evidence in Criminal Cases*, *supra* note 136 ("Proving bad faith requires showing intentional misconduct by the government, rather than mere carelessness.").

[146] *Preserving Evidence in Criminal Cases*, *supra* note 136.

[147] *See Litigation Hold Triggers and the Duty to Preserve Evidence (2020 Edition)*, PERCIPIENT (Oct. 7, 2020), https://perma.cc/3ENS-CLH2 ("For a party to meet its obligation to produce relevant evidence in litigation . . . they must first meet their duty to preserve evidence.").

[148] Brady v. Maryland, 373 U.S. 83, 87 (1963); *Youngblood*, 488 U.S. at 58.

[149] *Trombetta*, 467 U.S. at 486.

[150] *Id.* at 488–89.

[151] Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 245 (2008).

[152] *Id.* at 243 ("The loss of such evidence, even though it may preclude a claim of actual

a Due Process Clause claim, for what can be viewed as a procedural requisite to fulfill one's *Brady* obligation, erodes the right *Brady* was meant to give to the defense.[153] Part of the issue is that the rule under *Youngblood* provides too little deterrence.[154] Therefore, if there is a good faith basis to believe that before or during trial the prosecution or its agents lost or destroyed potentially exculpatory evidence in bad faith, the defense should be able to request an adverse inference jury instruction.[155]

B. *How Rule 37(e) of the Federal Rule of Civil Procedure Is Instructive on Combatting Intentional* Brady *Violations*

This proposal draws inspiration from Rule 37(e)(2) of the Federal Rules of Civil Procedure.[156] An adverse inference instruction outlines permissible inferences a jury may make against a party that has lost, altered, or destroyed evidence.[157] This instruction generally provides that the jury may draw an inference that a specific piece of evidence, which no longer exists, was harmful to the spoliator's case and or helpful to the opposing party.[158] Rule 37(e)(2) states that

> [i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: . . . (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the

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innocence, cannot result in a due process violation unless the accused shows that the police acted in bad faith. This is so despite the fact that forensic DNA typing has exonerated more than 200 individuals . . . .").

[153] *See* Hays, *supra* note 144, at 1156–57 ("'It's frightening how easy it is to convict an innocent person in this country . . . . And it's overwhelmingly difficult to release an innocent person.' The *Youngblood* doctrine is a large reason for that overwhelming difficulty. Proving bad faith has created an almost functionally impossible burden except in the most egregious examples of police and government misdeeds.").

[154] *See* Hays, *supra* note 144, at 1157 ("As of August 2006, courts found that defendants met the bad faith standard in only 7 of 1,675 published cases citing *Youngblood*.").

[155] *See* FED. R. CIV. P. 37(e)(2).

[156] *See id.*

[157] *See, e.g.*, Meredith v. Paccar, Inc., No. 4:03-CV-959 CAS, 2005 U.S. Dist. LEXIS 45728 (E.D. Mo. Aug. 18, 2005).

[158] *See* FED. R. CIV. P. 37 Advisory Comm. Notes on 2015 Amendment; Bruce V. Miller, *What Is the Difference Between an Adverse Sanction and an Adverse Instruction?*, CASETEXT (July 31, 2013), https://perma.cc/UG5Z-3NA8.

> information was unfavorable to the party . . . .[159]

As indicated by Rule 37(e)(2), the use of adverse inference instructions applies to electronic discovery in civil litigation.[160] The Committee Note on Rule 37(e) states that "[a]dverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence" and that the opposing party was prejudiced from loss of information that would have favored its position.[161] It was meant to address and deter failures to preserve electronically stored information on a finding that a party lost the information "with the intent to deprive another party of the information's use in the litigation," and "to provide a uniform standard in federal court for use of these serious measures when addressing the failure to preserve electronically stored information."[162] Under Rule 37(e)(2), a finding on whether a party acted with the intent to deprive another party of evidence at trial could be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial.[163]

1. The Mechanics of a Rule 37(e)(2) Counterpart in the Federal Rules of Criminal Procedure

If there is a good cause basis to believe that before or during trial the prosecution or its agents lost or destroyed potentially exculpatory evidence in bad faith, the defense should be able to request an adverse inference jury instruction.[164] The government has acted in bad faith when it knows or has reason to know that the evidence is potentially exculpatory and purposefully, knowingly, or recklessly loses or destroys it.[165] In bringing such a request, the defense should articulate the reasons for why there is good cause to believe potentially exculpatory evidence was lost or destroyed in bad faith, and if applicable, present evidence that supports that belief.[166]

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159 FED. R. CIV. P. 37(e)(2).

160 *See id.*

161 FED. R. CIV. P. 37(e)(2) Advisory Comm. Notes on 2015 amendment.

162 *Id.*

163 *Id.*

164 *See* FED. R. CIV. P. 37(e)(2)(B).

165 *See generally Mens Rea*, LEGAL INFO. INST., https://perma.cc/K3Q9-JD6M (last visited Mar. 3, 2022) (defining the Model Penal Code's culpable states of mind into four hierarchical categories).

166 *See generally Good Cause*, LEGAL INFO. INST., https://perma.cc/MJY4-NQEX (last visited

The defense should additionally state why the evidence was potentially exculpatory to its case.[167] If both these requirements are established by clear and convincing evidence, a rebuttable presumption should arise that the government has lost or destroyed potentially exculpatory evidence in bad faith.[168] The prosecution would then be afforded the opportunity to rebut this presumption by clear and convincing evidence.[169]

The model adverse inference jury instruction should state: "In determining the verdict, you should consider that the government acted in bad faith by losing or destroying potentially exculpatory evidence. In doing so, you should deem that the lost or destroyed evidence was unfavorable to the government's case."[170] Although adverse inference instructions generally instruct jurors that they *may* consider the missing evidence to mean that it was unfavorable to the party who lost or destroyed the evidence, the model adverse inference instruction here states that jurors *should* consider the missing evidence and deem the evidence unfavorable to the government.[171] Such a strong proposition comes from the fact that criminal trials generally involve higher stakes than civil trials, and the model adverse inference instruction requires the defense to demonstrate both that the evidence was potentially exculpatory and that the government purposefully, knowingly, or recklessly lost or destroyed it.[172] Similarly to the

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Mar. 3, 2022) (defining good cause as a legally sufficient reason for a ruling by a judge).

[167] *See* California v. Trombetta, 467 U.S. 479, 488–89 (1984) (stating that evidence that must be preserved includes that which might be expected to play a significant role in the suspect's defense).

[168] *See generally Rebuttable Presumption*, LEGAL INFO. INST., https://perma.cc/BKU5-L4YQ (last visited Mar. 3, 2022).

[169] *See generally* Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. & AM. L. REG. 307, 307 (1920) (stating that the rebuttable presumption of law is an evidentiary rule, and its only effect is to shift the burden of producing evidence).

[170] *Cf.* JUDICIAL COUNCIL OF CAL. CIV. JURY INSTR. 204 (2020) (stating the willful suppression of evidence instruction for civil cases in California).

[171] *See, e.g.*, 1 FLA. FORMS OF JURY INSTR. § 2.07 (2021) ("If you find that: (Name of party) [lost] [destroyed] [mutilated] [altered] [concealed] or otherwise caused the (describe evidence) to be unavailable, while it was in [his] [her] [its] possession, custody, or control; and the (describe evidence) would have been material in deciding the disputed issues in this case; then you may, but are not required to, infer that this evidence would have been unfavorable to (name of party).").

[172] *See* Brian P. Fox, Note, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 429 (2013) ("Unlike modern discovery in civil trials, criminal discovery is very restricted. There are many reasons to be critical of this dichotomy, the most prevalent of which is the injustice of placing a greater importance on cases involving money than on cases 'where the freedom and, sometimes, the life of the defendant are at stake.'").

Federal Rules of Civil Procedure Rule 37(e)(2), the determination on whether to use an adverse inference instruction can be made pretrial, during a bench trial, or at trial.[173]

In deciding whether to grant the defense's request for such an adverse inference jury instruction, the judge should consider the applicability of the following factors: whether the missing evidence was materially exculpatory; whether an effort was made to preserve such evidence and how reasonable those efforts were; whether the failure to preserve was the result of bad faith; whether the request to preserve and disclose that information was received by the prosecution; and whether the prosecution was on notice that the information was discoverable by the defense.[174]

2. How Use of an Adverse Inference Jury Instruction is Beneficial to Preventing *Brady* Violations

Codifying this remedy in the Federal Rules of Criminal Procedure would discourage prosecutors from the willful alteration, destruction, and loss of exculpatory evidence, making it more difficult to avoid their *Brady* obligations.[175] Such an instruction strongly incentivizes strict compliance with the prosecution's preservation duties because detecting a willful and reckless failure to preserve evidence sways the jury in the defense's favor.[176] Along the same vein, an adverse inference jury instruction strongly deters the prosecution from the willful or reckless destruction or the loss of potentially exculpatory evidence because the use of such a jury instruction acts as punishment for that misconduct.[177] Most importantly, this remedy decreases the risk of willful or reckless destruction of potentially exculpatory evidence during the pretrial and trial phase, which prevents wrongful convictions from happening in the first place.[178] There is likely nothing more

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[173] *Cf.* FED. R. CIV. P. 37(e)(2) Advisory Comm. Notes on 2015 amendment.

[174] *Cf.* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF ADVISORY COMMITTEE ON CIVIL RULES (2014), https://perma.cc/7CBP-WPMM.

[175] *See Why Codify?*, AM. LEGAL PUBL. CORP., https://perma.cc/KB7C-JZ3F (last visited Mar. 3, 2022) (stating that codifying rules and laws allows for the public to determine the standards of law and allows for ease of enforcement).

[176] *Cf.* Morris v. Union Pacific R.R., 373 F.3d 896, 900 (8th Cir. 2004) (demonstrating that the giving of an adverse inference instruction brands one party as a bad actor, creating a difficult hurdle for the spoliating party to overcome).

[177] *Cf. id.*

[178] *See, e.g.*, *Former Prosecutor, Now on Arkansas Supreme Court, Cited for 'Bad Faith' Destruction of Exculpatory Evidence in Death Penalty Case*, DEATH PENALTY INFO. CENTER (May 14, 2020), https://perma.cc/X3H5-QFG4 (stating that "[t]he United States Court of Appeals for the Eighth

persuasive to a juror than hearing a judge tell the juror to look at the facts or evidence a certain way.[179]

V. Using Special Masters in Criminal Cases to Prevent *Brady* Violations

Special masters are professionals predominantly hired or appointed by the court to assist in resolving disputes in civil adjudication.[180] Courts can utilize special masters in the pretrial phase, during trial, or in the post-trial phase.[181] They are known to perform various functions including: managing discovery, adjudicating particular issues, facilitating discussion between parties or settlement, providing expertise, evaluating specialized issues, determining damages, dealing with complaints of ethical violations, and almost anything else that requires professional assistance to aid resolution.[182] Special masters have also been called to handle unique tasks such as monitoring corporate governance issues; supervising prison reforms ordered by the court; and developing best practices for resolving disputes within educational institutions, transportation systems, and disability rights.[183] When appointed by the court, "special masters [virtually] become temporary or quasi-judges."[184] However, because they are not a judicial officer with a formal court docket, a special master can have one-sided conversations with an attorney outside the presence of the other party.[185] The advantages of special masters in civil litigation include that their

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Circuit . . . found that a former prosecutor now serving as a justice on the Arkansas Supreme Court deliberately destroyed exculpatory evidence in a case in which he had sought the death penalty against the defendant"). *See generally* EMILY M. WEST, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 4 (2010), https://perma.cc/6EC3-TZCV (noting that prosecutorial misconduct included the destruction of evidence).

[179] *Cf.* Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 160 (2010) (noting that, in one judge's experience, jurors almost always say what they think the judge wants to hear).

[180] Shira Scheindlin, *How Courts and Litigants Can Benefit from Special Masters*, LAW360 (Jan. 8, 2020, 3:09 PM EST), https://perma.cc/RQ32-KR7M.

[181] David B. Keller, *Court-Appointed Special Masters: Dispute-Resolvers?*, MEDIATE.COM (Jan. 1998), https://perma.cc/A6WX-SBYL; Peter F. Vaira, *Increased Use of Special Masters and How They Can Help*, WGP LLP (Nov. 21, 2018), https://perma.cc/E9W8-46YJ.

[182] Vaira, *supra* note 181; *see* Shira Scheindlin, *The Use of Special Masters in Complex Cases*, LAW360 (Aug. 15, 2017, 11:36 AM EDT), https://perma.cc/CEU9-XRC5 [hereinafter *Special Masters in Complex Cases*].

[183] Scheindlin, *supra* note 180.

[184] Keller, *supra* note 181.

[185] Vaira, *supra* note 181.

appointments are beneficial in resolving disputes quickly, streamlining discovery, relieving courts of the burden of managing pretrial process, providing expertise in cases that involve specialized issues, handling delicate settlement negotiations, and, in certain instances, reducing cost and delay.[186]

The appointment of special masters in civil cases is permitted under Rule 53 of the Federal Rules of Civil Procedure.[187] Under Rule 53(a), a court may appoint a special master to perform a duty that is consented to by the parties; to "hold trial proceedings and make or recommend findings of fact on issues to be decided without a jury if appointment is warranted by [either] some exceptional condition[] or [] the need to perform an accounting or resolve a difficult computation of damages"; or "to address pretrial and posttrial matters that cannot be effectively and timely addressed" by a judge of the court.[188]

A. *The Potential Benefits of Using Special Masters in Criminal Cases*

Although primarily used in civil cases, special masters can provide invaluable service in criminal cases.[189] In 2018, a federal district court judge appointed a special master to look for attorney-client communications in documents seized by the FBI in a search warrant for the law offices of David Cohen, long-time attorney of President Donald Trump.[190] In *State ex rel. Woodworth v. Denney*, the Supreme Court of Missouri hired a special master to determine whether the state had violated its *Brady* obligation to the defendant.[191]

The use of special masters in criminal cases can be a viable solution to the many problems left unresolved by *Brady*.[192] One of the benefits of the appointment of a special master in civil cases is the assurance of procedural compliance by the parties through the strict monitoring of their adherence to the governing rules.[193] Therefore, if consented to by the prosecution and defense, the parties should have the option to appoint a special master to

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[186] Scheindlin, *supra* note 180; *Special Masters in Complex Cases*, *supra* note 182.

[187] FED. R. CIV. P. 53.

[188] *Id.*

[189] Vaira, *supra* note 181.

[190] Allan Smith & Sonam Sheth, *A Federal Judge Just Sided with Michael Cohen on the Biggest Issue in His Case—And Added Another Wildcard*, BUS. INSIDER (Apr. 26, 2018, 12:55 PM), https://perma.cc/WU9L-NB9A.

[191] 396 S.W.3d 330, 333 (Mo. 2013).

[192] *See, e.g.*, *id.*

[193] Scheindlin, *supra* note 180.

look through the prosecutor's evidence during pretrial to determine whether any information falls under the *Brady* obligation.[194] Alternatively, if the prosecutor declines the use of a special master, the defense should have the option to request the appointment of a special master to investigate the prosecutor's evidence.[195] The defense must have made a good cause showing for making the request.[196]

"Special masters are also valuable in solving conflict of interest issues among defense attorneys in criminal cases since special masters can interview attorneys and clients confidentially about issues and facts that could constitute a conflict and that a judge may not learn about in a normal conflict hearing."[197] Additionally, special masters are unbiased to the litigation, and their use would take away the prosecutor's discretion to disclose.[198] Prosecutors may not recognize that the evidence or information they possess tends to negate guilt or mitigate the offense due to their confirmation bias.[199] Therefore, appointing special masters to review the prosecution's evidence before trial could prevent both intentional and unintentional *Brady* violations, and could prevent a wrongful conviction from happening in the first place.[200]

B. *Addressing the Costs of Using Special Masters in Criminal Cases*

The main drawback to the appointment of special masters in civil litigation, which is likely to carry over to criminal cases, is the cost of

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[194] *Cf. Denney*, 396 S.W.3d at 333.

[195] *See* Vaira, *supra* note 181("Even if only one party requested such an appointment, and made a good case for making the request, the judge would likely be amenable to such an appointment.").

[196] Vaira, *supra* note 181; *see infra* Part V(B) (discussing when there might be good cause).

[197] Vaira, *supra* note 181.

[198] Cobell v. Norton, 334 F.3d 1138, 1142 (D.C. Cir. 2003). *See generally* AM. BAR ASS'N, ABA-JUDICIAL SPECIAL MASTERS COMMITTEE CHECKLIST FOR MAKING USE OF SPECIAL MASTERS TO HELP DEAL WITH THE NEW NORMAL (2020), https://perma.cc/952B-CZ6L [hereinafter ABA SPECIAL MASTERS CHECKLIST] ("Those who serve as Special Masters must do conflict checks with their law practice and disclose any potential conflicts to the court and the parties consistent with the rules applicable to Special Masters.").

[199] *Id*.

[200] *Cf.* Zachary Parkins, *Electronic Discovery: Why The Appointment of Special Masters in All Large Electronic Discovery Disputes Is Vital to the Progress of American Civil Justice*, 2011 AM. J. MEDIATION, no. 5, at 1, 4, https://perma.cc/Z8K9-T88H ("The problem inherent in this system, and exasperated by electronic discovery, is that a special master appointed under FED. R. CIV. P. 53 is ordinarily appointed after problems have already arisen. Often, millions [have] been spent throughout a litigation only to find that evidence has been hidden, or worse, destroyed.").

appointment.[201] The constraints of judicial resources are why this Note suggests making the appointment of special masters optional, either through consent of both parties or by the defense's request upon a good cause showing, such as when the case involves a capital or serious offense or there is reason to believe the prosecutor is in possession of materially exculpatory evidence and has failed to disclose it.[202] Capital crimes are punishable by the death penalty, and the severity of this punishment justifies a prophylactic remedy for a *Brady* violation through the appointment of a special master to investigate the prosecutor's evidence.[203] Although there will be a cost for the appointment of special masters in criminal cases, those costs will not substantially overburden the system given that their use is optional and warranted through the consent of both parties or by the defense when there is a showing of good cause.[204] Thus, it is very likely that the use of special masters will be utilized only in a selective number of cases such as those involving complex issues of fact or law, serious charges, or where there is good cause to believe the prosecution is committing a *Brady* violation.[205] Such an expense is worthwhile given that it could prevent wrongful convictions.[206] Additionally, one way to minimize the costs of implementing the use of special masters is to create a pro bono registry and appoint pro

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201 *See* Scheindlin, *supra* note 180.

202 *See* Michael W. Drumke, *TIPS Toolkit for Fair Court Funding*, ABA: AM. BAR ASS'N (June 1, 2016), https://perma.cc/6WGV-X2SJ (discussing how federal and state courts are under attack from ever-increasing budget cuts resulting in underfunding).

203 *See Capital Offense*, LEGAL INFO. INST., https://perma.cc/E3MQ-Y9J9 (last updated June 2020).

204 *See* David R. Cohen, *The Judge, the Special Master, and You*, 40 LITIG., no. 4, Summer 2014, at 1, 2, https://perma.cc/5WHR-AN7W ("Put simply, both judges and litigants almost never regret the appointment of a special master. Litigants sometimes start out fearing the unknown additional cost, and judges sometimes initially are apprehensive about what they assume is a ceding of their authority. But neither of those concerns proves valid.").

205 *See, e.g.*, *id.* at 3 (stating that there are three types of cases where the benefits of appointing a special master exceeds costs such as cases requiring the review of thousands of documents because it requires time the court lacks).

206 *See generally* Marvin Zalman et al., *Citizens' Attitudes Toward Wrongful Convictions*, 37(1) CRIM. JUST. REV. 51 (2012), https://perma.cc/26DH-ZF5L ("Overall, the results of this exploratory study suggest that respondents not only recognize the incidence of wrongful conviction but also believe that such errors occur with some regularity. Further results show that respondents believe wrongful convictions occur frequently enough to justify major criminal justice system reform."); *How Much Does it Cost to Incarcerate an Inmate?*, LAO: LEGIS. ANALYST'S OFF., https://perma.cc/L4VV-QQBB (last updated Jan. 2022) (stating that it costs an average of $106,000 to incarcerate an inmate in prison in California); *Michael Hanline*, *supra* note 1 (stating that the cost of the wrongful conviction of Michael Hanline totaled $2,923,308).

bono special masters who are versed in the *Brady* obligation.[207]

CONCLUSION

When it comes to wrongful convictions, even one is one too many. We cannot rely on *Brady* to prevent all wrongful convictions because through the conflicting standards prosecutors are subject to—coupled with the lack of discipline imposed upon them and unchecked mental processes such as confirmation bias—prosecutors are largely left to regulate themselves. Self-regulation has proven inadequate. If we are to affirm one of the most sacred principles in the American criminal justice system—that a defendant is innocent until proven guilty—we cannot sit idly by while innocent persons have guilt imposed upon them. We must implement the necessary safeguards to our system to ensure that wrongful convictions never happen again. These safeguards can come in the form of the Ethical Rule Order motion, the use of an adverse inference instruction when exculpatory evidence is destroyed, or through the use of special masters to inspect the prosecution's evidence.

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[207] *See* ABA SPECIAL MASTERS CHECKLIST, *supra* note 198, at 4; *see also, e.g.*, Vince Pisegna & Tony Cichello, *The Holy Grail for Litigation—Appointment of a Special Master*, THE LITIGATORS' BLOG (Feb. 22, 2013), https://perma.cc/H3VT-UWCN ("In this instance, the parties were quite fortunate that a retired superior court judge had volunteered to take matters like this on a pro bono basis so the cost to the parties for the special master was zero.").