FROM MIRANDA TO GIDEON: A CALL FOR PRETRIAL REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

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HOUSE OF REPRESENTATIVES

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FROM MIRANDA TO GIDEON: A CALL FOR PRETRIAL REFORM

Friday, March 26, 2021

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY

Washington, DC

The Subcommittee met, pursuant to call, at 11:12 a.m., via Webex, Hon. Sheila Jackson Lee [chairwoman of the subcommittee] presiding.

Members present: Representatives Jackson Lee, Demings, Bass, McBath, Dean, Scanlon, Cicilline, Lieu, Biggs, Chabot, Tiffany, Massie, Spartz, Fitzgerald, and Owens.

Staff present: Moh Sharma, Member Services and Outreach Advisor; Jordan Dashow, Professional Staff Member; Cierra Fontenot, Staff Assistant; John Williams, Parliamentarian; Kayla Hamedi, Staff Assistant; Ben Hernandez-Stern, Counsel; Joe Graupensperger, Chief Counsel; and Veronica Eligan, Professional Staff Member.

Ms. JACKSON LEE. The hearing will come to order.

Without objection, the chair is authorized to declare recesses of the Subcommittee at any time.

We welcome everyone to this morning's hearing which is on the title "From Miranda to Gideon: A Call for Pretrial Reform." It is well-known that the Miranda Supreme Court case provided the well-known Miranda warning pretrial to give any defendant the right to counsel and to not have statements used against them, but to be able to be forewarned of their rights. And the Gideon case, of course, was to allow for an appointment of a lawyer for indigent defendants who cannot pay, and to recognize the importance of counsel, simple concept for pretrial and the issue of justice in America.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to submit materials, please send them to the email address that has been previously distributed to your offices and we will circulate the materials to Members and staff as quickly as we can.

I would also ask all Members to mute your microphone when you are not speaking. This will help prevent feedback and other technical issues. You may unmute yourself any time you seek recognition.

I will now recognize myself for an opening statement.

As I have earlier said, good morning. I believe this is an important hearing as a component of the justice system and, as well, the elements of the Constitution, particularly the Bill of Rights that govern the rights of all persons that will have to appear before a court of law, particularly, in this instance, in criminal proceedings.

As I indicated earlier, Gideon and Miranda cases were significant cases to add to and enhance the justice system that is so much admired in many instances around the world. Although our system is not perfect, it is a system that is admired for its outreach and balance to ensure justice for those who appear before the court.

That means that it is our important responsibility to ensure its near perfection and to recognize the balance between those who acted or are alleged to have acted, and those who have been impacted by those actions.

The Subcommittee convenes today to examine pretrial justice, perhaps the most crucial stage of the criminal justice process. Following arrest, interrogation, pretrial detention, and charging decision all take place in the days immediately following arrest. From the outset, the pretrial process indigent defendants are at a disadvantage, often without access to counsel. They frequently find themselves detained pending arraignment.

Law enforcement officers and prosecutors may exert disproportionate leverage during this period, since they have access to the defendant and all the evidence. Each of the major procedural steps—arrest, determining pretrial detention, and pretrial discovery—implicate the constitutional rights of the accused, who are presumed innocent.

We must recognize and address the fact that current practices disproportionately disadvantage people of color. The interrogation stage offers one of the first opportunities to solve crime. It should be used in that capacity. Also, currently includes practices that may imperil constitutional rights and undercut the fair Administration of justice.

Who are we in this Nation if we cannot provide that fair assessment and implementation of justice? In recent years, the number of documented cases of people wrongfully convicted because of confessions to crimes they did not commit has steadily increased. The Innocence Project estimates that false confessions have contributed to 28 percent of the 375 post-conviction DNA exonerations in the United States, all of which involved cases of murder and/or sexual assault.

In more than half of all cases in which the post-conviction DNA analysis cleared an innocent defendant it has also identified the actual perpetrator. Remind the Members that the DNA usage is only a recent phenomenon, and just take note of the fact of the many people that may have been falsely accused, and falsely convicted, and falsely serving time, many of those fall disproportionately in the minority communities, particularly African Americans.

Research has shown that certain conditions and police interrogation tactics are psychologically potent, especially when used in excess, and that sometimes some types of suspects are particularly vulnerable. Let me very clear, we want, too, for our law enforcement to be able to bring those to justice who have perpetrated horrific crimes and actions against society. We realize that there has to be a justice system, and a system to hold them accountable. We want to do it in a way that allows chief and guiding force just as the word justice.

One solution I propose in legislation is that all interviews and interrogations of felony suspects should be videotaped in their entirety from start to finish, without interruption, without loopholes or exception, and with a camera angle that focuses on both the suspect and the interrogator. Increasing transparency in this manner is essential for judges to determine voluntariness and coercion, and for juries to determine whether statements are reliable and the facts attributable to the suspect.

Another issue for us to consider is the conditions under which children should be interrogated. Very, very serious, and very much a concern. Children are vulnerable, which is why they are statistically over-represented in false confession cases. Additionally, we must keep in mind the array of issues related to pretrial detention, a subject we will review in more detail in the future.

We must also consider the question of which defendants are provided diversion or given a citation to appear in court. The current system produces disparately negative results for people of color, and on its face favors the wealthy.

Lastly, we also must review aspects of the current system that discourages trial and favors a plea agreement. The combination of a number of pretrial practices ends up with the poor and people of color waiving their constitutional rights to a trial and pleading guilty, sometimes to crimes they did not commit.

As you can see, we have many important issues to review today. Members, throughout our time as Members of this particular important subcommittee, because wrapped around this Committee is the question of justice that involves lives of those who may have been impacted by the criminal act, or alleged criminal act, and those who have been accused, falsely accused in terms of incarceration or loss of life through the justice system. Justice has to be real.

I look forward to the witness testimony and the robust discussion that will follow.

It is now my pleasure to recognize the Ranking Member of the subcommittee, the gentleman from Arizona, Mr. Biggs, for his opening statement.

Mr. BIGGS. Thank you, Madam Chair. I appreciate that.

I once again request that you schedule a hearing of the Subcommittee to examine how the Biden Administration's crisis along the southern border affects Homeland Security and public safety. Last week all the Republican Members of the subcommittee, including Ranking Member Jordan, sent you a letter requesting that you hold such a hearing.

We haven't heard back yet. I hope that we hear back soon because we think that this Subcommittee should hold a hearing as

soon as possible to examine how the Biden Administration's failure to secure the southern border has allowed transnational criminal organizations, smugglers, and drug traffickers to engage in criminal behavior and harm public safety.

I was just down at the border yesterday, Madam Chair. While on the Arizona border I learned of a group of 112 individuals who had surrendered to Border Patrol agents just a couple of days ago. The oldest person in that group was 94 years old, and the youngest was just 4 years old. That child was not traveling with parents, sibling, or grandparents, or in fact any other relative or legal guardian. That child had been placed in the hands of the dangerous cartels that traffic in human sex and drugs. The majority of the people in that group of 112 averred that they have come because they felt they had been invited by President Joe Biden.

So, we have to have a hearing as soon as we possibly can.

Today's hearing is very important. The Subcommittee will examine the pretrial stage of the criminal justice process. As a former trial lawyer who defended hundreds of individuals, and also engaged in prosecution activity as well, I can tell you this is an important topic. I thank you for bringing it forward.

According to the majority's memo in preparation for the hearing, it will improve, one, the role coercive interrogation practices play in eliciting false confessions; two, pretrial detention; three, pretrial evidentiary burdens federal and State practices place on defendants; and four, proposals for reform.

We have already seen how the majority has proposed to reform the pretrial stage. One member of this subcommittee, for instance, introduced the No Money Bail Act of 2019. That bill would completely eliminate bail in the federal system and make states that utilize bail for pretrial release ineligible for grants under the Byrne JAG Program. That is right, the sponsor intends to defund the police if states won't accede to his demands.

Also, last year on New Year's Eve of last year while no one was looking, and without even a press release, Chair of the Judiciary Committee introduced the Federal Bail Reform Act of 2020. His bill turns the federal pretrial release process on its head.

With some very limited exceptions, his bill even creates a presumption for post-conviction relief while the convicted criminal is appealing the conviction. Chair Nadler's bill prohibits the court from imposing any condition of release that may impose a financial on the person released.

I suppose we should just all hope defendants show up for their court appearances even after convicted, just as we are hoping tens of thousands of illegal immigrants will show up to their court hearings or report to ICE. It isn't working, which is why we have more than one million illegal border crossers with orders of removal wandering around the United States today.

The Nadler bill also states that "the judicial officer may not order the temporary detention of any person on the ground that may pose a generalized danger or a financial danger to any other individual or the community." So even if the judge or magistrate finds that the defendant poses a generalized danger to our community, the judge cannot temporarily detain the defendant who has already

been convicted. I am sure that will make everyone in the community sleep better at night.

Last year Chair Nadler also proposed bribing states to enter their jails. In that proposal, states were to be given grant dollars to release prisoners who did not "pose a risk of serious, imminent injury to a reasonably identifiable person." I guess it was okay to release that person if the injury might be hours or days away, and perhaps not so serious.

Again, there was no consideration allowed for a generalized risk to our communities in releasing these prisoners.

You don't have to take my word when it comes to these so-called bail reforms. We will have a witness today tell her very compelling, very tragic story.

Madam Chair, I also offer into the record a letter from New Jersey State Assemblyman Bob Andrzejczak to California Speaker of the House Anthony Rendon warning him about the perils of bail reform. So, Madam Chair, I offer that letter into the record.

Ms. JACKSON LEE. Without objection, so ordered.

[The information follows:]

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July 3, 2017

Dear Speaker Rendon,

I am a democratic member of the New Jersey Assembly representing Legislative District 1. Prior to joining the Assembly, I served in the Iraq War as a sergeant in the Army's 25th Infantry Division until my discharge following an injury which led to the amputation of my left leg from a grenade explosion in 2009. As a result, I was awarded the Purple Heart and Bronze Star; my recovery was featured on a 2009 episode of The Oprah Winfrey Show.

As you may know, New Jersey passed and has implemented a bail reform policy similar to California's SB10 which you are considering. I supported the legislation when presented to our Assembly and advocated for its passage. The law went into effect this past January and it has been an absolute disaster. The public safety needs of citizens in New Jersey has suffered far greater than could have been imagined. The costs to the state have increased exponentially and, even worse, the constitutional rights of many of the accused are being infringed.

We were told that there would be no danger to citizens because the dangerous criminals would not be released and on "low level" criminals would be eligible. The reality is that dangerous and career criminals are released daily within hours of arrest. We should never have considered free bail to those who commit crimes where a citizen has been victimized. We may only catch a criminal once out of a multitude of crimes in which they commit. They are simply not afraid of committing crimes against citizens and as a result our crime rate has increased at least 13% since January. This law is victimizing law abiding citizens every day.

We were also misled as to the cost of implementation and continuation of this policy. It has become apparent to us now that the cost of incarcerating those held awaiting trial were greatly exaggerated. Additionally, we have transferred the cost of "free" bail to the taxpayer rather than the offender. The bail system supported many functions of the court and the cost of re-arresting multiple offenders and bail jumpers was borne by the offenders themselves rather than the taxpayers. Now we are making taxpayers pay to release criminals back into their neighborhoods and with no accountability. The state does not have the resources to properly monitor these people out on bail so we don't. This is a powder keg and our citizens are suffering because of it.

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Not only are our citizens suffering but now even the accused are being denied their constitutional right to pre-trial release as a result of the new laws. The eighth amendment to the Constitution of the United States guarantees an accused the right to "reasonable bail". However, in New Jersey, many are being denied that right. This is not just happening to dangerous criminals it is happening to low level offenders as well. The risk assessment system is simply not working. In January, a convicted child predator was arrested for attempting to lure a 12 year old girl to his house for "sexual things". The risk assemsment determined he was not a threat and was released. The police chief of Little Egg Harbor was so distressed by this that he appealed the release all the way to our supreme court and was denied. The man was released back into the same neighborhood where the "would be" victim resides. The only recourse for law enforcement was to post on Facebook a warning to the community.

I am not "in the bag" of any industry or special interest. I fully thought this was the right thing to do because of the arguments we heard. I am writing to you because I have experienced this first hand and it has been a disaster. I am trying to rectify a problem in New Jersey that we caused and hopefully encourage you not to make the same mistake. Please listen to the experts on this issue and look at the examples before you because the safety and financial interests of your citizens are at stake. Thank you for your time.

Sincerely,

Bob Andrzejczak
Assemblyman, First Legislative District

Mr. BIGGS. Thank you.

It is notable because Assemblyman Andrzejczak was once a proponent of bail proponent. When he actually saw it in action in his home state, he called it an absolute disaster.

We will also look at pretrial discovery issues today. We need to ensure that discovery rules are equitable and that the government is held accountable. None of us want to see what happened to our late colleague Ted Stevens. We don't want to see that happen again. That being said, we should not be looking to change discovery rules that risk endangering witnesses and crime victims, which is exactly what New York State did.

Under New York's discovery rules, prosecutors will no longer be able to assure witnesses that their identity will be protected. You don't have to take my word for it. Manhattan District Attorney Democrat Cy Vance said, "I think to hand defendants a roster of who has spoken out against them just 15 days after their first appearance, absent a protective order, is a seismic change that undoubtedly will dissuade witnesses who live in all neighborhoods from reporting crime."

I hope these are not the types of reforms my colleagues on the other side are considering.

I understand that we will also be examining the practice of recording interrogations. I certainly support such practices. In fact, I think not to do that is irresponsible and reckless.

However, I point out that last Congress Democrats twice rejected Republican amendments at markup to require custodial and noncustodial interviews be recorded by Department of Justice law enforcement agencies. I hope that is an issue that all of us can get together on in the spirit of bipartisanship.

I thank the chair for holding this hearing today. I thank all the witnesses for being here. I look forward to hearing from them and their testimony.

With that, Madam Chair, thank you, and I yield back.

Ms. JACKSON LEE. The gentleman yields back. I thank the gentleman for his statement, and I thank the gentleman for his letter.

Chair Nadler speaks his regrets for not being able to participate this morning. So, it is my privilege to turn to Mr. Jordan. I now recognize the distinguished Ranking Member of the full committee, the gentleman from Ohio, Mr. Jordan, for his opening statement.

Mr. Jordan?

We will yield to Mr. Jordan as appropriate. So, we will now proceed to welcome all our distinguished witnesses and thank them for their participation. As I do that, let me also thank all our Members of Congress and this Subcommittee who are here this morning as well.

I think it is an important statement to make those Members are working, and we have worked all through the week on important meetings and hearings. I am very appreciative of the Subcommittee Members who are on this hearing this morning, this very important hearing.

So, again we welcome all our distinguished witnesses, and we thank them for their participation. Now, it is my privilege to begin by swearing in the witnesses.

If you would raise as I turn to you, to turn on your audio. All witnesses turn on their audio and make sure I can see your face. Make sure that I can see your face. We are working to see everyone's face here.

So, I am looking for every face here. Just a moment.

Witnesses, have you unmuted? Everyone should be unmuted.

Raise your right hand in a visible way so that we can see you in the screen.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information, and belief, so help you God?

[Chorus of ayes.]

Ms. JACKSON LEE. All right. Thank you so very much.

Let the record show that the witnesses answered in the affirmative. Thank you.

We will now proceed with witness introduction.

Barry Scheck is the co-founder of the Innocence Project, and a professor at Yeshiva University Benjamin N. Cardozo School of Law. There he serves as a director of clinical education for the trial advocacy program, and the Center for the Study of Law and Ethics.

Mr. Scheck also was a staff attorney at the famous Legal Aid Society of New York, well-known in its tenure and, of course, its history.

Mr. Anthony Graves is a community liaison with the Harris County Public Defender's Office. In 1992, Mr. Graves was charged with and convicted of murder, despite of a lack of a motive or any physical evidence connecting him to the crime scene. He served 12 years on death row before his conviction was overturned by a federal appeals court in 2006. He was released in 2010.

His life since then has been a tribute to the values of this nation, and it reemphasizes the cruciality of this hearing and why we must insist on the assessment of the pretrial justice that occurs to those who may be wrongly accused.

Premal Dharia is the co-director of the Institute to End Mass Incarceration at Harvard University. Prior to her current position, Ms. Dharia was Founding Director of the Defender Impact Initiative.

Following law school she worked at the public defender services in the District of Columbia, and as a federal public defender in the District of Maryland.

April Frazier Camara is the Director of Defender Legal Services Initiative at the National Legal Aid and Defender Association. She previously worked as a public defender with the Public Defender Service for Washington, DC, as a re-entry coordinator and, more recently, as a special assistant in the Juvenile Defender Unit at the law office of the Shelby County Public Defender.

Michele Hanisee is a deputy district attorney for the County of Los Angeles for 22 years. She has tried over 100 jury trials, including 43 murders and three federal murders which resulted in death sentences.

She spent five years in the hardcore Gang Division prosecuting gang murders. Has worked for the past ten years in the Major Crime Division handling high profile and complex cases. She also trained prosecutors and police officers across the State on gang

homicide and death penalty law and is author of the California Gang Crimes Manual.

June Rodgers is a resident of Millville, New Jersey. She is a mother of four and a grandmother of 14. For the past ten years she has been a direct support professional for mentally and physically disabled. She is also the New Jersey Chair of The Victims' Rights Reform Council, a non-profit organization.

She has advocated against bail reform throughout the United States in honor of her son, Christian Rodgers. We offer to her our deepest concern and also the recognition that this Congress' House passed the Victims of Crimes Act that I was a lead sponsor on just last week.

We thank her for her presence here today.

Reuben Cahn is a partner in Keller/Anderle LLP where he serves as counsel to a number of individuals and corporate clients. He has tried over 100 cases to jury verdict and has argued twice before the Supreme Court.

Previously, he served as a public defender, first in the State of Florida, and then in the federal courts. Prior to his current position he was chief assistant federal public defender of the Southern District of Florida, then the executive director of Federal Defendants of San Diego.

Please note that each of your written statements will be entered into the record in its entirety. Accordingly, I ask that you summarize your testimony in five minutes.

There is a timer in the WebEx view that should be visible on your screen.

Let me as well indicate that you are doing a public service for your nation. Congress cannot function without these hearings and witnesses which are personal, lifetime experiences that help us contribute to the justice system of this nation.

Again, we thank you for appearing before this important committee, and this important larger committee, the House Judiciary Committee.

Mr. Scheck, welcome. You may begin.

Mr. CICILLINE. Barry, you're on mute.

STATEMENT OF BARRY SCHECK

Mr. SCHECK. Can I get the time back?

Ms. JACKSON LEE. Yes. Good morning.

Mr. SCHECK. Okay, thank you.

Thank you, Chairwoman Lee and Ranking Member Biggs for the invitation to come and talk about pretrial reform to promote accurate and fair outcomes in our criminal legal system. My colleagues at the Innocence Project, as well as innocence organizations nationwide, examine cases where the innocent are convicted and the guilty escape apprehension.

Each time that happens it is a tragedy for the wrongly convicted, the persons harmed by the crime, and the families of all involved.

Since 1989, the National Registry of Exonerations reports there have been 2,755 wrongful convictions, including 375 cases where exonerations resulted from post-conviction DNA testing. A recent study by the Registry on Official Misconduct reveals extraordinary findings:

Concealing exculpatory evidence occurred in 44 percent of exonerations;

Black exonerees in general were more likely than White exonerees to have been victims of misconduct, but disparities were greater in murder cases, cases involving death sentences, and drug cases;

Police officers committed misconduct in 35 percent of cases; prosecutors in 30 percent. However, in federal exonerations, prosecutors committed misconduct more than twice as often as police;

False confessions were involved in 12 percent of exonerations; and

Twenty percent, one in five cases, involved wrongful convictions where an innocent person pled guilty.

The root cause of these wrongful convictions lies in some aspect of the pretrial process, which is why reform is so urgently needed.

Congress should implement reforms in five areas, including, one, discovery reform. You recently legislated so that federal district courts are supposed to issue Brady orders that remind prosecutors of their obligation to disclose exculpatory evidence.

A more systemic reform would be open-file discovery where data is accessible online and disputes can be resolved as to what was disclosed and when, and the defense has an opportunity to actually look at the files.

We know such an open-file system can be implemented and successful because Texas has done it. It is the Michael Morton Act. Innocence Project client Michael Morton was wrongly convicted of killing his wife. The prosecutor in that case, who became a judge, hid exculpatory evidence. This case had national publicity, and it really shook the legal community in Texas.

I must tell you that prosecutors, defense lawyers, Democrats, and Republicans came together to pass the Michael Morton Act. This is an open-file discovery system where everything is disclosed online, people can get to look at the files.

Probably the most important provision in retrospect on this is pre-pleading discovery. At the time of a guilty plea all parties say here is everything that has been disclosed, the prosecutor acknowledges his or her obligation to have disclosed all exculpatory information, and then the plea happens.

This would go a long way to eliminate that horrifying number of one in five people pleading guilty to crimes that they didn't commit.

False confessions. False confessions are counterintuitive, as most people believe no one would confess to a crime if they were in fact guilty—unless they were in fact guilty. Yet, three of ten people proven innocent by post-conviction DNA testing actually confessed to crimes they did not commit.

A false confession frequently creates tunnel vision for investigators where they will ignore reliable evidence that could have led him to actually apprehend the person who was guilty.

Three things Congress can do that would really help:

First, codify the recordation of interrogations policy to ensure all federal investigations are recorded, interrogations are recorded from Miranda forward, exactly what the

chairwoman held forth here. I was so glad to hear Ranking Member Biggs acknowledge that this is really important.

Number two, you should add reliability as a factor in terms of courts reviewing the admission of confessions.

Number three, law enforcement should not engage in explicit lies and deception during interrogations. That leads to false confessions. Legislation banning deception during interrogations has been introduced now in New York, Oregon, and Illinois. Congress should look at those bills and follow suit.

The trial penalty which leads to innocents pleading guilty, along with the problems of cash bail, I urge Congress to pursue legislation in this area having to do as well with mandatory minimums.

Improving access to forensic science by funding forensic science laboratories that are independent and allowing the defense access to real expertise. The Innocence Project client George Rodriguez was convicted based on unreliable serology from the Houston Police Department Crime Lab. Subsequent to that, the largest audit of a crime lab in the history of America was conducted.

At the end of that, what Harris County decided to do is not—they removed the forensic science laboratory from control by the Police Department, set up an independent governmental entity, the Houston Forensic Science Center. It has an independent board appointed by the mayor, and a technical advisory board of scientists.

It is the best crime lab, forensic science lab in the United States. People come from abroad to see it. It is transparent. It engages in blind proficiency testing. It is very efficient. It is the model that should be followed by Congress, who should be funding such equities. It is exactly what the National Academy of Sciences called for 12 years ago in its report on strengthening forensic science.

The last thing—I know others will talk about it—I strongly believe is focus on holistic representation.

Thank you.

[The statement of Mr. Scheck follows:]

INNOCENCE PROJECT

Testimony of Barry C. Scheck

Co-Founder of the Innocence Project

on March 26, 2021

for hearing "From *Miranda* to *Gideon*: A Call for Pretrial Reform"

before the U.S. House of Representatives

Committee on the Judiciary

Subcommittee on Crime, Terrorism, and Homeland Security

Chairman Nadler, Chairwoman Lee, Ranking Member Jordan, Ranking Member Biggs, thank you for inviting me to testify about pretrial reform measures the Congress and Executive could undertake to promote accurate and fair outcomes in our criminal legal system. My colleagues at the Innocence Project, fifty-six innocence organizations in the Innocence Network, and about seventy "Conviction Integrity Units" of District Attorney offices across the country spend most of our time examining cases where the innocent are convicted and the guilty escape apprehension. Every time that happens it's a tragedy for the wrongly convicted, the persons harmed by the crime, and the families of all involved. It's a public safety issue that in my experience is a pressing concern for Democrats and Republicans, liberals and conservatives. Since 1989 the National Registry of Exonerations (NRE) reports more than 2,700 wrongful convictions, including 375 cases where the exonerations resulted from post-conviction DNA testing. The root cause of most of these wrongful convictions lies in some aspect of the pretrial process. I will share with you today some thoughts about reforms in five areas that can make a difference: 1) Discovery Reform; 2) False Confessions; 3) The "trial penalty" and innocents who plead guilty; 4) Improving access to reliable forensic science through funding independent crime laboratories and experts for the defense; and 5) Improving indigent defense services and community safety by funding "holistic representation."

1) Discovery Reform

An exhaustive report recently issued by the NRE contains some extraordinary findings:

- Concealing exculpatory evidence – the most common type of misconduct – occurred in 44% of exonerations.
- Black exonerees were slightly more likely than whites to have been victims of misconduct (57% to 52%) but this gap is much larger for exonerations for murder (78% to 64%) – especially with death sentences (87% to 68% -- and for drug crimes (47% to 22%).

- Police officers committed misconduct in 35% of cases. They were responsible for most witness tampering, misconduct in interrogation, and fabricating evidence – and a great deal of concealing exculpatory evidence and perjury at trial.
- Prosecutors committed misconduct in 30% of the cases. Prosecutors were responsible for most of the concealing of exculpatory evidence and misconduct at trial, and a substantial amount of witness tampering.
- *In state court cases, prosecutors and police committed misconduct at about the same rates, but in federal exonerations, prosecutors committed misconduct more than twice as often as police. In federal exonerations for white-collar crimes, prosecutors committed misconduct seven times as often as police.*

Government Misconduct and Convicting the Innocent, at iii-iv (emphasis added).

The Due Process Protections Act of 2020 amended the Federal Rule 5 of the Federal Rules of Criminal Procedure to require federal district courts to enter a standing a "Brady order" reminding prosecutors in each case of their obligations to disclose exculpatory evidence and setting forth consequences for failing to do so. This was certainly a good first step but it doesn't go far enough to solve the systemic discovery problem. The difficulty is not simply that "Brady orders" can differ between Judicial Councils of the Circuits, or that orders may not be specific enough in putting prosecutors on notice of what is or is not exculpatory information – information that the ABA, state ethical rules, and case law traditionally define as "information that tends to negate guilt or mitigate the offense."[1] The problem is that it keeps the burden of finding and disclosing information on the prosecutor and does not permit the defense sufficient, automatic, and timely access to information that police and other governmental entities have in their possession. A much better system,

[1] New York State has "Brady order" that provides specific notice. *See*, Press Release, N.Y. State Unified Court System, Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017).

the Occam's razor for disclosure, is "open file" discovery where the data is accessed online and disclosure can be carefully monitored and documented.

Many states and local jurisdictions have claimed they had "open file" discovery, until a scandalous wrongful conviction case where suppressed exculpatory evidence was discovered decades after conviction proved the file was not as open as everyone believed it to be. Usually, stakeholders write it off as just negligence or the conduct of a bad actor. But Texas, where most counties said they had "open file" discovery, truly stepped up after the wrongful conviction of Innocence Project client Michael Morton.

Michael was convicted of bludgeoning his wife to death in front of his three year old son in Williamson County, Texas. He testified when he left for work his wife Christine was alive and the crime must have been committed by someone who broke into the home from a wooded area behind the house. The prosecutor, Ken Anderson, who later became a judge in Williamson County, suppressed Brady material that included a police report documenting a neighbor seeing a suspicious individual casing the Morton home from the wooded area just prior to the murder. A bandana containing blood from Morton's wife Christine and skin cells from the assailant was finally subjected to DNA testing (it was opposed for years by Williamson County prosecutors) and eventually produced a "hit" in the CODIS database that identified the real killer and led to solving another similar murder. Anderson ultimately pled guilty to misdemeanor contempt for failing to turn over exculpatory evidence, was disbarred, and did eight days in jail. The case received extensive national publicity and deeply troubled the law enforcement community in Texas. As a result, and after a powerful

lobbying effort led by Morton himself, Texas passed The Michael Morton Act (Texas Code of Criminal Procedure, Art. 39.14).

The Morton Act is the best example so far of real "open file" discovery where disclosures are ordinarily made online in most jurisdictions. Most significantly, it provides for pre-plea discovery: "Before accepting a plea of guilty or nolo contender, or before trial, each party shall acknowledge in writing or on the record in open court the disclosure, receipt, and list of all documents, items, and information provided to the defendant under this article." Art. 39.14(j). The Morton Act is a good model for the federal system and states across the nation. Congress should adopt a version of it and DOJ should incentivize states to adopt it through a grant program.

2) False Confessions

According to the NRE, at last count, false confessions were involved in 336 of 2755 exonerations since 1989 (12%). A false confession is an especially dangerous problem because it is counter-intuitive, most people (including prosecutors, police, and jurors) believe no one would confess to a crime unless they were guilty. In fact, the existence of a confession can create a cognitive bias for investigators to lower their assessment of the probative value of objectively reliable evidence simply because it is inconsistent with the confession. *See generally*, Saul M. Kassin, *Why Confessions Trump Innocence,* 67 Am. Psychologist 431 (2012). Confessions have frequently led to "tunnel vision" in pretrial investigations that result in wrongful convictions, which is "the product of a variety of cognitive distortions, such as confirmation bias, hindsight bias, which can impede accuracy in what we perceive and how we interpret what we perceive." Keith Findley, *Tunnel Vision,*

in Cutler, editor, *Conviction of the Innocent: Lessons from Psychological Research*, APA Press, 2010, at 6.

There are three steps Congress can take which would greatly reduce the incidence of false confessions.

First, Congress should codify DOJ's Recordation of Interrogations Policy to make sure all federal investigations are recorded from Miranda warnings forward.

Second, and most importantly, Congress should add "reliability" as a factor to be considered by federal courts before admitting a confession into evidence. Right now, under *Colorado v. Connelly,* 479 U.S. 157, 169-70 (1986), the Supreme Court ruled that the government need only show that a confession was voluntary and statements will only be excluded under the Due Process Clause if they were secured through unduly coercive police interrogation, even if the confession or admission is plainly unreliable. Indeed, the Connelly Court invited legislatures to be addressed by "the evidentiary laws of the forum." *Id., at* 167. This makes no sense. Reliability is a key factor to be considered in admitting eyewitness identification evidence, *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), and expert forensic science testimony under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) and FED. R. EVID. 702. Indeed, experts in interrogation, both psychologists and law enforcement officials, have long agreed that "reliability" was key factor in deciding that a confession was not false, specifically did the suspect confess to "held back" facts that only the police or perpetrator would know, or did the suspect provide information that led to other incriminating information the police didn't know about. *See,* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors*

and Recommendations, 34 LAW & HUM. BEHAV. 3, 14–22 (2010) [hereinafter *Police-Induced Confessions*].

And third, law enforcement should stop engaging in explicit lies and deception during interrogations. Falsely telling suspects that their bloody fingerprint or their DNA was found at the crime scene when it was not, or that they failed a polygraph test, when they did not, are the kind of lies that lead to false confessions. *See* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 762 (2013); Katie Wynbrant, *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*, 126 YALE L.J. 545, 546 (2016). The International Investigative Interviewing Research Group, a Europe-based network of law enforcement practitioners and academics opposes both the use of explicit deception because of the effect false evidence can have on innocent suspects and because "sanctioned deception by an investigator [also] serves to undermine the legitimacy of the court and wider principles of justice." Chicago's Wicklander-Zulawski & Associates, one of the largest police training companies in the United States, and several members of the federal government's High-Value Detainee Interrogation Group, which brings together intelligence professionals from the F.B.I., the C.I.A. and the Defense Department for national security purposes take the same position. Col. Steven M. Kleinman, a former Air Force intelligence officer who has interrogated terrorists and violent extremists, put it this way: "While this tactic might appear benign at first glance, it has proved to be insidiously problematic as a factor in generating false confessions nationwide." Legislation banning deception during interrogations has been introduced in New York, Oregon, and Illinois. Congress should do so as well.

3) The "Trial Penalty" and Innocents Who Plead Guilty

According to the NRE, 1 out of every five wrongful convictions is the result of an innocent person pleading guilty, more specifically 569 of 2755 exonerations since 1989 involved a plea (20.6%). This is, by any measure, a deeply disturbing finding. Plainly, the problem of cash bail and excessive bail factors into the false guilty plea problem. I won't address it because I know others are doing so and the Committee is working hard on this issue. Another extremely important problem that coerces the innocent to plead guilty is the "trial penalty," a subject that has been ably addressed by the NACDL and others in a double issue of the *Federal Sentencing Reporter,* in April and June of 2019, entitled "The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End," and edited by NACDL Executive Director Norman Reimer and NACDL President Elect Martin Antonio Sabelli. Again, I know the Committee will be addressing the "trial penalty" issue when holding hearings on sentencing reform and mandatory minimums. From the point of view of the Innocence Project and organizations within the Innocence Network, I would be remiss if I didn't at least underscore our concern that reform in this pretrial area is essential to redress the disgraceful phenomenon of innocent people pleading guilty.

4) Improving Access To Reliable Forensic Science Through Funding Independent Crime Laboratories And Experts For The Defense

Lack of access to reliable forensic science testing and experts is a profound problem for indigent defense, prosecutors, and police alike. The National Academy of Science addressed this issue in a landmark 2009 Report, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press 2009) (NAS Report). The NAS Report bemoaned the fact

that most crime laboratories are run by police departments. In many labs the forensic analysts themselves are sworn police officers, sheriff deputies, or state troopers. In others, the analysts are civilian employees of police agencies. The NAS Report called for the creation of independent laboratories. NAS Report at 183. The dangers of having crime labs run by police departments are self-evident: It's an obvious conflict of interest. Culture eats policy for lunch. Try as they might, analysts will be influenced to see their function as helping the police as opposed to being an independent third force in the criminal legal system that just reports objective scientific results. Indeed, when there's a budget crunch, police departments often see crime labs as playing a secondary role and will starve the laboratory for resources without decreasing demands for testing results, no matter how much the analysts complain. These pressures in the past have led to infamous crime laboratory scandals in West Virginia (Fred Zain), Oklahoma (Joyce Gilchrist), and the Houston Police Department crime laboratory. The recent dismissal of tens of thousands of cases in Massachusetts due to fraudulent results being produced by overworked inadequately supervised drug chemists show the problem has not disappeared. The monetary costs of this scandal have yet to be fully determined but will surely be astronomical. The costs in terms of loss of public confidence in the pretrial system are profound.

There is one extremely instructive story that ought to guide Congressional funding and policies – the decision not to fix the scandal plagued Houston Police Department Crime Laboratory but to re-invent it as an independent governmental entity, the Houston Forensic Science Center. The story is told brilliantly by Sandra Guerra Thompson in her book **Cops in Lab Coats:** *Curbing Wrongful Convictions through Independent Forensic Laboratories* (Carolina

Academic Press 2015). It starts with the wrongful conviction of Innocence Project client George Rodriguez, the largest independent audit of a crime laboratory in American history, a federal civil rights law suit, and finally a decision by Harris County to set up an independent, completely transparent forensic science center that does blind proficiency testing, adopts best practices recommended by the NAS Report and consults with scientists outside of the traditional crime laboratory community. You should have Sandra Thompson and laboratory Director Peter Stout come before you and explain how they have stood up a laboratory that forensic scientists across the United States and abroad come to visit when they want to see how to do the work well and independently. It turns out to be both a scientifically strong laboratory and extremely efficient. It's got a civilian oversight board and has garnered great public trust. More independent centers of excellence of this kind should be funded across the country. It certainly won't solve all the scientific problems that plague many forensic disciplines, but it will help, if only to inspire the best forensic analysts to become independent of police departments.

5) Improving Indigent Defense Services And Community Safety By Funding "Holistic Representation."

Between sixty to ninety percent of defendants charged in serious criminal cases require, because they are indigent, a state provided lawyer. Indigent defense in the states has always been comparatively underfunded by the federal government compared to funding for state prosecutors, about thirty per cent less, according to economist and law professor John Pfaff. See, John F. Pfaff, Locked In: The True Causes of Mass Incarceration – And How to Achieve Real Reform, 137-38 (2017). Pfaff points out that an annual grant of four billion dollars to state and

local governments would be three times the amount currently spent on indigent defense, especially if the grant was tied to pre-existing spending by local governments so that they couldn't reduce their own spending one-for-one with the grant. I suggest modifying Pfaff's proposal in one important way: indigent defense funding should provide incentives for defender systems to provide "holistic" defense, "an approach where public defenders work in interdisciplinary teams to address the immediate case and the underlying life circumstances – such as drug addiction, mental illness, or family or housing instability – that [complicate] client contact with the criminal justice system. See, Anderson & Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes,* 132 Harv. L. Rev. 819, 820 (2019). This recent and comprehensive study compares the effect of holistic defense on criminal justice outcomes over a ten-year period in the Bronx and produced exciting results. While holistic representation did not affect conviction rates, it decreased the likelihood of a custodial sentence by over fifteen percent and reduced the anticipated sentence length by almost twenty-five percent. During the study period, holistic defense resulted in 1.1 million fewer days of custodial punishment. *Id.,* at 822-23. Holistic defense, it turns out, is not only a good way to raise the quality of representation for the poor but also a cost-effective investment in communities that will reduce pretrial custody, minimize reliance on armed police intervention, and maximize deployment of social work and "helping" professionals who can find non-custodial resolutions of cases. In short, a rigorous ten-year study provides strong proof that "holistic defense" helps re-align the pretrial process in a way that promotes public safety and reduces custodial punishment. In this historical moment, it's a good program to pursue.

Ms. JACKSON LEE. Thank you for your testimony, Mr. Scheck. Thank you.

Thank you so very much. The gentleman's time has expired.

I will now recognize Mr. Graves for five minutes.

Mr. Graves, if you would unmute and begin your testimony.

STATEMENT OF ANTHONY GRAVES

Mr. GRAVES. Thank you, Congresswoman. Thank you, Congressman Biggs. I am excited to be here.

August of 1992, one week shy of my 27th birthday, I woke up to a knock on my mother's apartment door. It was the neighbor coming to tell me that the police were looking for me. Why?

I decided to go outside and look for the police. An officer pulled up in a patrol car. I stopped to wait on him to approach me. I didn't know that this encounter with the officer would change my life forever. I had no idea I was about to spend the next 18 years behind bars, including 12 on Texas' death row, totally innocent.

I cooperated with law enforcement 110 percent, so sure was I that the whole thing was some crazy mistake. They told me that another man had named me as his accomplice. That is it: He said my name. There was no other evidence to support his claim.

I had four alibis. I was home with my then-girlfriend that night long before the murders. There was no physical evidence to connect me to it, fingerprints, footprints, blood on my clothes, or traces of embers, no skin cells or hair follicles from the victims, no eyewitnesses, except the man who said my name. He had burns on his body when he showed up to the victim's funeral.

I witnessed the nearly unchecked power of the District Attorney's Office and how one individual can have so much impact in our lives. I witnessed how law enforcement can get tunnel vision once they have a murder suspect in custody. I witnessed the role of the media in shaping opinions around cases before trial. I also witnessed how judges give wide leeway to prosecutors instead of heeding the actual facts or some notion of justice for all.

All these things eventually led to my wrongful conviction. Our criminal justice system is deeply biased and careless.

Over the next 12 years I witnessed over 400 men being murdered at the hands of the state. I knew that I was innocent and, therefore, I remained hopeful.

I was convicted after a sham of a trial replete with mistakes, bias, and tunnel-vision. Whatever was said by law enforcement was gospel. Lack of facts to support their conclusions were tolerated. Exculpatory evidence was hidden from me and my lawyers. I was expendable.

After my trial, I was sentenced to die and sent to death row. My execution day was set twice. I remember the first time I was told the State had set an execution date. I was escorted to the major's office in handcuffs. He sat me down and told me that the State had set an execution date.

My conviction was overturned after a wonderful journalist worked hard to uncover all the errors in my case and the bias that accompanied it. I hope that this Committee will find a way to address the issues that are plaguing our criminal justice system and

fix it to make it better for us all, because every person matters. Every effort makes a difference. Believe me. I know.

Thank you.

[The statement of Mr. Graves follows:]

Anthony C. Graves Testimony
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security
Hearing on March 26, 2021
From *Miranda* to *Gideon:* A Call for Pretrial Reform

For almost two decades, I endured the grueling struggle of facing my own mortality while incarcerated on Texas Death row. I was there during hundreds of executions, multiple suicide attempts by Men using razors to cut their throats or wrists, hangings and Insane outbursts by Men going through extreme mental anguish. The good days were horrible, while the bad were unbearable and some couldn't survive it. I was in the worst place on earth.

What Happened to me? Many days I can't believe it happened at all. It was anyone's worst nightmare. It was August of 1992- and I was living my somewhat meager existence, but I was happy enough and carried a good spirit. I was a young black Man living in a small town in Texas, and that had its inherent challenges. But I also had good friends, my three sons and family who loved me. I was good in sports, and I worked at various jobs and managed to pull it all together-It was my life. I was a man with his dreams just like any other man.

Until it was all snatched away in a second. I was one week shy of my 27th birthday. I woke up to a knock on my mother's apartment front door. It was the neighbor coming to tell me that the Police were looking for me. Why? My Immediate reaction was call my Aunt to find out if the police had been to her home looking for me. After talking with her, I decided to go outside and look for the Police.

An officer pulled up in his patrol car, I stopped to wait on him to approach me. I didn't know that this encounter with the officer would change my life forever. I had no idea I was about to spend the next eighteen and a half years behind bars, including twelve and a half on Texas death row, trying to prove my innocence.

Does that sound impossible to you? It's not. Does it sound exaggerated or ripped from the headlines of the news? It happened. It's my life. Or a big part of it. You see, I didn't let it define me. It easily could have-I saw it consume Men I thought were stronger than me, and killed them one way or another. I watched men lose hope, crumble and die. In fact, it was commonplace-It even felt on some days like it was the design of death row to have that happen.

My Innocence is the very thing I relied on after my arrest. It's what initially gave me hope. I cooperated with law enforcement 110 percent, so sure was I that the whole thing was some crazy mistake. I did everything they asked of me- but quickly came to understand that what the officers wanted more was for me to confess to this horrendous crime, and then a conviction. They told me that another man who was arrested for the murder of six innocent people by burning down their house had named me as his accomplice. That's it. He said my name. There was no other evidence to support his claim. I had a full alibi- I was home with my then girlfriend that night long before the hours of the murders. There was no physical evidence to connect me to it(fingerprints, footprints, blood on my clothes or traces of embers) No skin cells or hair follicles from the victims. No eyewitnesses, except the man who said my name, and he had burns on his body when he showed up to the victims funeral.

Soon, I would be subjected to a lie- detector test that did nothing to seek the truth, or get closer to it. I was told that I had failed the test. Next, a woman would vaguely recall she saw two men putting gas into a

container at the local filing station on the night of the crimes-and she would point her finger at me in a line-up arranged by the Texas Rangers, despite the fact that I looked nothing like the description she gave to the Police .Years later this woman couldn't recognize me standing right in front of her during an oral deposition. Her choice in that line up was based on external factors, not based on memory of her seeing me at a gas station. I was of a much different age than all the other suspects in the line-up, I was in the center spot(Known as the guilty spot), and I was the one that Law enforcement wanted her to pick from the secret room behind the one way mirror.(You do the math on whether she was encouraged to pick me.)

Throughout the process since the day of my arrest, I witnessed the nearly unchecked power of the district attorney's office and how one individual can have so much impact on our lives. I witness how law enforcement can get tunnel-vision once they have a murder suspect in custody.

I witness the role of the media in shaping opinions around cases before trial. I also witnessed how judges give wide leeway to prosecutors instead of heeding the actual facts or some notion of justice for all. All of these things eventually led to my wrongful conviction over the course of years, and many appeals to follow. The day I was convicted felt like a death knell, and it was. It was just crazy.

But because I knew that I was innocent, I did not give up. I did not let my mind go to dark places I knew so many others had visited. Yes, the physical conditions in prison were harsh. But it was the mental abuse that was the hardest part. We were not allowed any human contact, and the only form of communication was between the walls and bars. It was a campaign to extinguish my light. I held on. Day after Day, I held on. For what? I was on a methodical track to be killed for a crime I didn't commit.

I was sliding down a slope that so many others have descended before me. The criminal justice system had stolen my freedom and now Texas wanted to take my life. It is not a system that holds high the values I expected it to- facts, truth, careful and thorough investigation, leave no stone unturned to find out who is really responsible for these awful acts and sweet lives extinguished too early. The courts are complicit too. The Judges didn't' care. They all Rubber-Stamped the blind march toward my conviction. The DA's office certainly didn't care-they all got their stats-another conviction of another black man for another senseless murder. That was the goal- get the indictment, get the conviction, put away a disposable young man and make the community feel safe about law enforcement doing their job. But it isn't their job- a conviction is not the goal. Seeking Justice is supposed to be the goal, right? Justice is hard. It is elusive. But isn't that the high standard we want to believe in? That we can't allow an innocent man to be executed? It was enlightening and sad, to burst the bubble of all those high concepts. They are myths in practice, despite what they tell you in law school, or on the news. "WE DO JUSTICE." No, those are words. I lived the reality, and in practice, our criminal justice system is deeply biased, careless, and more than willing to march to a goal that should be an embarrassment, an intolerable insult.

Over the next 12 ½ years, I witnessed over 400 men, young, old, mentally Ill, innocent, guilty being murdered at the hands of the state. I was locked in tiny spaces arranged like dog kennels. I was just existing behind steel doors. My world felt and smelled like death and inhumanity, with men trying to live under the worst conditions, short of slavery. I knew that I was innocent and therefore, I remained hopeful.

I was convicted after a sham of a trial replete with mistakes, bias and tunnel-vision. Whatever was said by law enforcement was gospel. Lack of facts to support their conclusion was tolerated. Exculpatory evidence

was hidden from me and my lawyers. I was expendable. After my trial I was sentenced to die and sent to death row. My Son pleaded for my life at the sentencing trial. My Mother cried day after day, thinking to herself; how are they just going to kill my son for something he didn't do?

I existed on death row, where I was held in solitary confinement since I was now deemed a danger to myself and others. My execution date was set twice. I remember the first time I was told the state had set an execution date. I was escorted to the Major's office in handcuffs. He sat me down and told me that the state had set a date for my execution.

In fact, having a date with death was a catalyst for me. I'll never forget that moment. On the outside, I merely existed. But inside, in my mind, that's where I lived. And when I was told by the Major they had set the day they planned to kill me, It had the effect of motivating me to live fully. That may sound strange to you. But it was my saving grace-It was my complete defense to this unjust and careless nightmare. I dug in. Hope grew within me, it rushed through me.

I'M GOING TO LIVE UNTIL I DIE,I TOLD MYSELF IN THAT MOMENT.

From that time forward, I was on the way up instead of sliding further down. I was buoyant at times-which seems impossible given the conditions I was in-but it's true. I was confident, with really no reason to be. Now, my task was daunting, there's no way around that. My task was to continue to believe that living until I die was enough, it was a kernel of hope upon which I could build. So I did. I immediately discovered within myself how I would live for the rest of my life. I would be hopeful no matter what because it was my choice. How would you react to such extreme injustice? This happened to me and I discovered who I am. When you suffer a severe wrong, how you respond will tell you a lot about who you are. I spent nearly two

decades in prison for something I didn't do; I didn't get angry. I not only survived, I thrived.

I ASK MYSELF-WHERE DO I GO FROM HERE? You learn about yourself in these moments. It feels like the walls are closing in on you. And you are going to be crushed. But I had my inner strength born of the resolve that I found. And I built on it. I pushed the walls out. I found space for myself- mostly inside my mind- but I found a path. Writing had a lot to do with it. I began to cultivate pen pals all around the world. I told my story to them, and they responded by returning my letters and their care. They wanted me to survive, and they helped me. I no longer felt so alone, even though I was totally isolated.

In writing to others, I realized something fundamental about myself. I loved the interaction I had with people, even though they were complete strangers to me. We were exchanging elements of our lives, and it felt good. I knew that I could be free, and I knew that when I got there, I had a purpose. I would be in service to others, and engaged in volunteer activity in my community- That's what I wanted to do. Along the way I read books. I read The Alchemist by Paulo Coelho, and the autobiographies of Martin Luther King Jr. and Malcom X.I read mis education of the Negro by Carter G Woodson. One of my all time favorite books is by a woman name Harriet Jacobs. She was a slave, and she wrote a book call escape to freedom. I gained a lot of strength from her words. I also read Sydney Poitier, The measure of a man, Soul on Ice by Eldridge Cleaver, and Native Son by James Baldwin. I lived inside my mind, and I wandered through these pages to grow instead of wilt under the weight of being on death row. I was on the rise, against all odds.

It may be hard for you to believe – a man condemned to a meager existence on death row in Texas is thinking about how he will serve others as a volunteer, and becomes an avid reader and letter writer.

When I experienced severe discrimination, I made a choice. My dreams did not die. They changed. I lost my boys in the process-they became men with children of their own while I was incarcerated. I lost baseball. I lost the ability to decide what I eat, or when I step out into the Texas sunshine. I lost everything. ALMOST everything. I did not lose my mind. I held on to my soul. I had infinite hope, born of the moment I was at the lowest point in my life.

My conviction was ultimately overturned, after a wonderful journalist worked hard to uncover all the errors in my case, and the bias that accompanied it. The Professor did her homework, and eventually helped pry my case open again, and ultimately my conviction was overturned. Finally, I got my release. I call my Mom from the parking lot of the local jail and with my first breaths of free air in nearly 20 years, I ask my Mom what was she cooking for dinner? Because I was coming home.

Today I have turned a terrible tragedy into an amazing Triumph. I am not only an accomplished public speaker, community advocate, and consultant, but also the founder of a non -profit organization call Anthony Graves.org, Board of the Houston Forensic Science Center, and I serve on the advisory board of the Texas coalition to abolish the death penalty. I presented my story at many prestigious universities including Yale , The University of Texas, Emory University, Cornell, and the University de Berne in Switzerland just to name a few.

In 2011, I was the keynote speaker at the Amnesty International European Conference in Rome. Later that same year, I was the keynote speaker at the annual conference for the Texas coalition to Abolish the Death Penalty. In 2012, I was the keynote speaker for the American Bar Association Death Penalty Representation project's 25th Anniversary along with retired Supreme Court Justice John Paul Stevens. That same

year, I testified before the U.S. Senate Hearing on Solitary Confinement, Led by Senator Dick Durbin.

In 2013, I was the keynote speaker at the 50th Anniversary of Gideon vs. Wainwright held by the American Bar Association in Marcos Island, Florida. I was honored by the Harris County Criminal Lawyers Association where I received the Torch of liberty Award. Also, in 2013 I decided to put my advocacy for criminal justice reform into action,and I established the Nicole B Casarez Endowment Scholarship Fund, created for law students at the University of Texas law school. This scholarship was named after the journalist/attorney who tirelessly committed her time, skill and resources seeking justice for me. I also launched the Anthony Graves Foundation. Our mission is to help prepare second chance citizens a success return to society. And to get the people out of prison that shouldn't be there.

In 2015, I filed a grievance with the State of Texas Bar Association against District Attorney Charles Sebesta for prosecutorial misconduct-he's the one who handled my case. I cited all of the heinous behavior including hiding exculpatory evidence from me, and he was judged by this body. They disbarred him-he would never be able to frame a innocent man again. His trespasses cost years of my life.

Two years ago I became a published Author. I wrote a book about my experiences called, Infinite Hope, I am proud to say, It was the first time I could really say it all in my own words. The process of writing it was difficult, emotional and cathartic, too.

This book was written to inspire and encourage those who have experienced true hardship in life to never give up. More importantly it is a book that has raised awareness about the urgent need for reform. It is my life's mission, and what fulfills and sustains me to this day. I could never be the man I am sitting here now if I didn't go through hell,

and come out of it ok. How I did that, how I kept hope, that is what I want to share. Reform will come when we better understand the people inside the system, and why they are worth fighting for. I am a living example-Death row did not take my life, it did not kill my soul. It gave me purpose. For that, I am grateful.

I hope that this committee will find a way to address the issues that are plaguing our criminal justice system and fix it to make it better for us all, because every person matters, every effort makes a difference. Believe me, I know.

Thank you.

Ms. JACKSON LEE. Mr. Graves, thank you so very much for that contributing testimony. Thank you is not an appropriate word for what you went through, but for you to be able to share that with us who are fact finders, thank you for being here this morning.

Ms. Dharia, you are recognized for five minutes. Please let me know if I am pronouncing your name correctly.

Ms. DHARIA. Thank you so much. It is Premal Dharia.

Ms. JACKSON LEE. Thank you so very much. You are recognized for five minutes.

STATEMENT OF PREMAL DHARIA

Ms. DHARIA. Thank you for holding this hearing and for the opportunity to testify. I have spent my entire career working within and around the criminal legal system, and I am grateful for this opportunity to discuss important measures that Congress could undertake to address our country's addiction to incarceration and punishment, and the crisis of mass incarceration that is devastating our communities.

The United States leads the world in the rate at which it incarcerates its people. We have 4 percent of the global population, but 20 percent of the global prison population. With nearly two million people in prison on any given day, the United States incarcerates approximately the same total number of people as the two largest countries on earth, India and China, combined.

In 2018, more than 10.7 million people entered U.S. jails, the equivalent of locking up every person in Portugal, Greece, or Sweden. A larger number of people in jail on any given day have not been convicted of any crime but are instead awaiting trial and presumed innocent.

We cannot lose sight of the clear historical trajectory of racism and White supremacy that plays a part. Populations of those detained pretrial have more than doubled over 15 years, and they are disproportionately Black and Hispanic.

This is not an accident, and it did not just happen on its own. We make choices every day; political choices, policy choices, and cultural choices that shape our systems. When it comes to the criminal legal system, many of those choices have been made in the context of a history of racial oppression, and also in the context of political narratives that stoke fear and ignore evidence.

Regardless of where you fall on the political spectrum, it is, hopefully, safe to assume that there is a universal desire to keep our communities healthy and safe, and that differences arise when we think about how to get there. It is important to take a step back, given those differences, to make sure we are all using the same definition of "public safety," a phrase that has in some ways taken on a life of its own. Popular conceptions of dangerousness, of violence, and of who commits crimes and why are very often not based in evidence or fact. Harm is, of course, very real, as is violence. Our communities need to find ways to both address harm and to address the people and the circumstances that cause it.

How we do that has to be grounded in what is real, in what the evidence says about what actually increases harm in our communities. We also have to recognize that our efforts to respond to harm or prevent harm can themselves cause harm, often to and

within the very communities we are trying to protect. It is past time we started considering the very real human and community costs of removing people from their families, from their jobs, and from their homes when we think and talk of public safety.

I am encouraged that the Subcommittee is holding this hearing because the way we treat individuals before trial serves in many ways as a catalyst for so many other problems in the system.

Approximately 98 percent of criminal convictions in federal courts are produced by a guilty plea, with high rates of guilty pleas in many states as well. Nearly every single person who is in a prison is there because they pled guilty. They have generally done so without adequate access to effective counsel, without adequate discovery or information about their case, without adequate investigation or expert consultation, and with the specter of increased penalties and charges hanging over their heads. Our system is not the system of adversarial trials envisioned by its creators, it is, instead, a system of pleas, one grounded in coercion, imbalance, and opacity.

Working to eliminate this coercion is essential to ending our system of mass incarceration, in which people are removed from their communities and incarcerated, subjected to onerous conditions and surveillance, and marked with punishments they will carry for the rest of their lives, in large part because we choose to allow prosecutors to possess a set of tools that they can use to extract guilty pleas.

Prosecutors can pursue pretrial detention, they can up-charge cases, they can threaten offenses that carry mandatory minimum sentences, they can withhold discovery material, they can obscure police misconduct. Because they can do all of this, not only do guilty pleas result, the transparency mechanisms built into our criminal process, but such as suppression hearings to examine police misconduct, evaporate.

Throughout the testimony today you will hear evidence that the methods and policies we use are riddled with the potential for abuse and error. They must be constantly questioned and analyzed. We cannot sit back and assume we are doing things right. Indeed, we are quite clear we are doing things wrong.

There are a variety of reforms that Congress could pursue at every stage of the pretrial process that would not on their own fix the larger crisis, but that would make inroads towards the kind of thoughtful change we need.

These include:

Moving to cite-and-release and reducing the number of custodial arrests;

Guaranteeing access to counsel by moving the attachment and availability of counsel earlier in the process to the time of arrest, and making defense attorneys available at police stations;

Limiting the length of interrogations, requiring reporting, eliminating police officers' ability to lie and coerce, and ensuring the presence of counsel;

Ensuring speedy trial rights; and

Implementing discovery reform, including the adoption of open-file discovery, earlier provisions of discovery in

Brady materials, eliminating the materiality requirement for Brady and Giglio in the context of pretrial disclosures, requiring disclosure prior to plea negotiations, and eliminating the Jencks Act, or at least requiring earlier disclosure of witness statements, including Grand Jury material.

We need jury pool and Grand Jury pool composition reform to include standards that ensure reflectiveness, and enfranchising those with felony convictions to serve on juries.

Finally, indigent defense funding standardization.

Each area is described more fully in my written testimony.

Thank you again for holding this hearing and for inviting me to present testimony.

[The statement of Ms. Dharia follows:]

Statement of Premal Dharia

Executive Director, Institute to End Mass Incarceration

Before the Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security

March 26, 2021 Hearing:

"From *Miranda* to *Gideon*: A Call for Pretrial Reform"

Statement of Premal Dharia

Executive Director, Institute to End Mass Incarceration

Before the Judiciary Committee of the House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security

March 26, 2021 Hearing:

"From *Miranda* to *Gideon*: A Call for Pretrial Reform"

Mr. Chairman and Members of the Subcommittee:

Thank you for holding this hearing and for the opportunity to testify. I have spent my entire career working within and around the criminal legal system and am grateful for this opportunity to discuss important measures Congress could undertake to address our country's addiction to incarceration and punishment and the crisis of mass incarceration that is devastating our communities.

Introductory Remarks

The United States leads the world in the rate at which it incarcerates its people. We have 4 percent of the global population, but 20 percent of the global prison population. With nearly 2 million people in prison on any given day, the United States incarcerates approximately the same total number of people as the two largest countries on earth, India and China, combined. Our per capita incarceration rate is roughly six to nine times higher than comparable countries like France, Germany, Canada, or the United Kingdom, and is two to three times higher than Russia, Saudi Arabia, and Iran.[1]

Nor is our addiction to incarceration limited to prisons. In 2018, more than 10.7 million people entered U.S. jails—the equivalent of locking up every person in Portugal, Greece, or Sweden. A large number of people in jail on any given day (490,000 in 2018) have not been convicted of any crime but are instead awaiting trial and presumed innocent.[2] As advocates have noted in the New York Times, "Current pretrial incarceration rates defy all historical norms. There are more legally

[1] Roy Walmsely, World Prison Brief, *World Prison Population List* (12th ed. 2018).

[2] Zhen Zeng, Bureau of Justice Statistics, *Jail Inmates in 2018* 2, tbls. 1 & 3 (2020); *see also Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (holding that every person charged with a crime enjoys a constitutionally guaranteed "presumption of innocence").

innocent people behind bars in America today than there were convicted people in jails and prisons in 1980."[3]

This addiction to incarceration has, of course, been documented and described in a variety of forms – books, film, scholarship, policy analysis. And there are multiple root causes that intersect with each other. But we cannot lose sight of the clear historical trajectory of racism and white supremacy that plays a part. As the Prison Policy Initiative reports, populations of those detained pretrial have more than doubled over 15 years – and they are disproportionately Black and Hispanic. Across the country, Black and brown people are at least 10-25% more likely than white people to be detained pretrial or to have to pay money bail. Young Black men are about 50% more likely to be detained pretrial than their white counterparts.[4]

This is not an accident, and it did not just happen on its own. We make choices every day – political choices, policy choices, cultural choices – that shape our systems. When it comes to the criminal legal system, many of those choices have not only been made in the context of a history of racial oppression, but also in the context of political narratives that stoke fear and ignore evidence.

Today, I would like to discuss a variety of pretrial reforms that Congress could pursue that will not, on their own, fix the larger crisis, but that will make inroads toward the kind of thoughtful change we need – and that are grounded not in unfounded emotional responses but in evidence and facts. There is a growing trend to address pretrial reform from this standpoint: encompassing evidence and seeking meaningful, sustainable solutions that will improve the lives of hundreds of thousands of people and work to end mass incarceration.

I am encouraged that the Subcommittee is holding this hearing because the pretrial component of our criminal legal system is not just in need of reform, but serves, in many ways, as the catalyst for so many other problems in the system.

Ultimately, regardless of where you fall on the political spectrum or in your views about the best way to end the unfairness and harm caused by the criminal legal system and mass incarceration, it is hopefully safe to assume that there is a universal desire to keep our communities healthy and safe, and that differences arise when we think about *how* to get there. It is also important to take a step back, given those differences, to make sure we are all using the same definition of "public safety," a phrase that has in some ways taken on a life of its own. Popular conceptions of dangerousness, of violence, and of who commits crimes and why are very often not based in evidence or fact. Harm is,

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[3] Chelsea Barabas et al., *The Problems With Risk Assessment Tools*, N.Y. Times (July 17, 2019), Opinion | The Problems With Risk Assessment Tools - The New York Times (nytimes.com).

[4] Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, Prison Pol'y Initiative (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

of course, very real, as is violence. And our communities need to find ways to both address harm and to address the people and circumstances that cause it.

But how we do that has to be grounded in what is real – in what the evidence says about what actually increases harm in our communities, and about what risk and dangerousness really mean. We also have to recognize that our efforts to respond to harm or prevent harm can themselves cause harm, often to and within the very communities we are trying to protect. For instance, a recent study conducts a "Rawlsian cost-benefit analysis" to attempt to include the harm caused by pretrial detention in our calculations.[5] Indeed, just three days of pretrial detention is enough to upend a person's housing, employment, financial stability, and family wellbeing.[6] We often consider the risk of future crime when determining what "public safety" means. But as the authors of the new study above encourage, it is past time we started considering the real human and community costs of removing people from their families, from their jobs, and from their homes when we think and talk of "public safety." Among so many other lessons, the global COVID-19 pandemic has taught us important lessons about the need to consider what public safety means when a lethal infection is ravaging our communities. Is it safer to increase transmission by keeping people locked inside a potentially infected vault? The pandemic upended entrenched notions of "safety."

All of this is important as we strive to enact policies and practices that are fair, racially equitable and that lead to increased safety and flourishing in our communities. One way to diagnose where at least some of the flaws in the system are is through an assessment of wrongful convictions. The number of documented exonerations recorded in a national registry currently stands at 2,755 and continues to grow.[7] This number, however, is surely dwarfed by the true number of innocent people who have been convicted, as formal exonerations tend to focus on people wrongly convicted of the most serious crimes, leaving aside all the many people who have been accused of lesser offenses, caved to the pressure to plead guilty, and spent years in prison as a result. Our conviction of the innocent is of course important because of the fact of their innocence. But it also tells us something essential and more fundamental about our system: that the methods and policies we use are riddled with the

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[5] Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* (Va. Pub. Law & Legal Theory Research Paper No. 2021-14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787018.

[6] Prison Policy Initiative, *Releasing People Pretrial Doesn't Harm Public Safety,* (Nov. 17, 2020), https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/ ; Pretrial Justice Institute, *3DaysCount™ for State-Level Change,* https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/ (last visited Mar. 23, 2012).

[7] The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Mar. 23, 2021).

potential for error, and thus must be constantly questioned and analyzed. We cannot sit back and assume we are doing things right. Indeed, we are quite clearly doing things wrong.

In the end, as you make policy decisions, this kind of analysis, based on evidence and facts, must prevail over uninformed decision-making and the politics or rhetoric of fear.[8]

I will now address a series of points in the pretrial system where intervention is needed and where reform would go a long way toward addressing injustice. Each of these areas, individually, create daily injustices for the people involved in the system. And together, they contribute to the mass incarceration crisis that our government must urgently address.

Plea Bargaining

Approximately 98% of criminal convictions in federal courts are produced by a guilty plea, with high rates of guilty pleas in many states as well.[9] Nearly every single person who is in a prison is there because they pled guilty. And they have generally done so without adequate access to effective counsel,[10] without adequate discovery or information about their case, without adequate investigation or expert consultation,[11] and with the specter of increased penalties and charges

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[8] Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited,* The Marshall Project (May 13, 2013) https://www.themarshallproject.org/2015/05/13/willie-horton-revisited.

[9] *See* U.S. Courts, *Federal Judicial Caseload Statistics 2020* Tables, tbl.D-4; *see also* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining,* 118 Colum. L. Rev. 1303, 1375-76, tbls. 2-3 (2018) (reporting plea rates across states).

[10] *See* Attorney General Eric Holder, Remarks to the Am. Bar Ass'n Nat'l Summit on Indigent Defense (Feb. 4, 2012) ("Across the country, public defender offices and other indigent defense providers are underfunded and understaffed. Too often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight. As a result, too many defendants are left to languish in jail for weeks, or even months, before counsel is appointed…. [T]his represents a crisis."); ABA Standing Comm. on Legal Aid & Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 686-87 (2007) (documenting the problems of high public defender caseloads).

[11] *See, e.g.,* Donald J. Farole, Jr. & Lynn Langton, U.S. Dep't of Justice, Bureau of Justice Statistics, *County-Based and Local Public Defender Offices,* 2007, at 1 (2010), http://www.bjs.gov/content/pub/pdf/clpdo07.pdf *("*Forty percent of all county-based offices employed no investigators. Among offices receiving less than 1,000 cases in 2007, nearly 9 in 10 (87%) had no investigators on staff.*").*

hanging over their heads.[12] Our system is not the system of adversarial trials envisioned by its creators; it is, instead, a "system of pleas," one grounded in coercion, imbalance, and opacity.[13]

In short, that system of pleas is the true dominant force in the criminal legal system and the context in which any discussions of pretrial reform must operate. Likewise, the flaws of plea bargaining manifest in a number of procedural rules and obligations that can be changed. Even discrete reforms that may not seem individually significant could make inroads at the kind of thoughtful change we need to dismantle the machinery of mass incarceration.

Working to eliminate this coercion is essential to ending our system of mass incarceration, in which people are removed from their communities and incarcerated, subjected to onerous conditions and surveillance, and marked with punishments they will carry for the rest of their lives – in large part because we choose to allow prosecutors to possess a set of tools that they can use to extract guilty pleas. Prosecutors can pursue pretrial detention, they can up-charge cases, they can threaten offenses that carry mandatory minimum sentences, they can withhold discoverable material, they can obscure police misconduct. And because they can do all of this, not only do guilty pleas result, but the transparency mechanisms built into our criminal process – such as suppression hearings to examine police misconduct – evaporate.

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[12] *See, e.g.,* Crespo, *supra* at 1310-1315.

[13] *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (noting "the reality that criminal justice today is for the most part a system of pleas, not a system of trials"). For a sampling of academic criticism of plea bargaining's systemic and individual injustices, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869, 883–84 (2009) ("The consolidation of adjudicative and enforcement power in a single prosecutor is also troubling because it creates an opportunity for that actor's prejudices and biases to dictate outcomes. . . . Indeed, researchers have found that, even after controlling for legally relevant factors, race and gender affect charging and sentencing decisions." (footnote omitted)); *Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2468 (2004) (arguing that "plea bargaining . . . bases sentences in part on wealth, sex, age, education, intelligence, and confidence"); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 878 (1995) ("[T]he prosecutor's one-sided control of plea bargaining impacts poorer defendants to a greater extent than it impacts wealthier defendants."); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 27–31 (2013) (describing racially disparate charging practices); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. Legal Stud. 75, 78 (2015) (same).

None of this is set in stone. We can make changes that move us, even if slowly, toward justice. I encourage you to consider all of these proposals against the backdrop of the systemic forces at play, and to push for change.

Arrest

Even though the word arrest signals a single moment, there are so many factors involved in who is and is not arrested, what that process is like, and what happens upon arrest. There are encounters that do not lead to arrest, there are different forms of letting people know they are to face charges or court, including not taking them into custody, and there is of course the process that follows if a person is taken into custody. All of these play important roles in the pretrial process, and are thus important points for potential intervention.

Street Encounters

A great many criminal cases start with an interaction between a civilian and a police officer.

In addition to serving as the site of much police misconduct and violence, these police "contacts" are often the front door to the pretrial phase of the criminal system's process. Indeed, it is often these encounters through which police develop the allegations and alleged evidence that is used to support requests for pretrial detention or conditions, to support decisions about what to charge, and to construct a plea offer that sets up negotiations or bargaining.

These encounters, however, can also be coercive, as scholars have noted for decades.[14] Because of this, there is a real opportunity to intervene in a way that minimizes the potential for abuse. Police should be required to verbally inform all people with whom noncustodial street encounters are initiated that they are free to leave, and to reinforce that caution by maintaining physical distance, not touching or holding weapons, making both hands visible, and by implementing safeguards, including that the exercise of the constitutional right to leave cannot be used against a person in any way, including informal retaliation.

Reducing Custodial Arrest

Custodial arrest is the direct precursor to the pretrial system. In 2014, 11.2 million people were formally arrested in the United States, with Black people once again overrepresented in the arrested population.[15] Arrests can cause harms and lead to systemic abuses in their own right, in addition to producing downstream effects on the pretrial process and ultimately on mass incarceration. There

[14] *See, e.g.*, David Cole, No Equal Justice (New Press 1st Ed. 2000).

[15] Bureau of Justice Statistics, Arrest Data Analysis Tool, https://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm#.

are important steps that can be taken within the arrest process itself to address these problems. But we can also take steps to reduce the high number of custodial arrests themselves.

Specifically, we can and should reflect on some of the hard-earned lessons of the COVID-19 pandemic. With respect to arrests and policing, one clear shift was the expanded use of cite-and-release (a process by which people are issued a summons to report to court, rather than being arrested) as an alternative to taking people into custody for every alleged violation; this approach can and should be implemented more widely.[16] Adopting such practices more broadly would have tremendous positive effects both on the resources currently used to effectuate custodial arrests and on the experiences, stability and decision-making of those facing criminal charges.

Access to Counsel, the Effective Assistance of Counsel, and the Right to Present a Defense

As our courts have recognized countless times over the past several decades, the right to counsel, to the effective assistance of counsel,[17] and to present a defense[18] are all bedrock constitutional principles of our legal system.[19] In order to ensure that those principles are more than mere words, we must guard against structural impediments – even subtle ones – to their implementation. Indeed, to overcome the possibility of constructive denial of the right to counsel, reforms of the current landscape are crucial. I will provide several examples and suggestions for steps Congress can take to ensure that these constitutional guarantees are not hollow in their implementation.

The Supreme Court has held that as a matter of constitutional law the right to counsel "attaches" only at the initiation of judicial proceedings, not arrest. The "attachment" of counsel, moreover, does not mean that counsel will actually be provided when judicial proceedings start. Rather, the right to have counsel appointed arises only at "critical stages" of the proceedings.[20] Both of these

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[16] Alexi Jones and Wendy Sawyer, *Arrest, Release, Repeat: How police and jails are misused to respond to social problems,* Prison Pol'y Initiative (August 2019), https://www.prisonpolicy.org/reports/repeatarrests.html

[17] *United States v. Cronic*, 466 U.S. 648 (1984) (defining that the right to the effective assistance of counsel as the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing); *Strickland v. Washington*, 466 U.S. 668 (1984) (laying out the standard for determining whether the assistance of counsel was effective).

[18] *Powell v. Alabama*, 287 U.S. 45 (1932).

[19] *Chambers v. Mississippi*, 410 U.S. 284 (1973).

[20] *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (holding that the right to counsel attaches when formal judicial proceedings begin).

doctrinal frameworks rely on outdated analyses, do not account for the reality of police practices in the 21st century, and importantly do not reflect at all on the context of mass incarceration, how we got here, and what lessons can be learned about what we are doing wrong. As noted in a report jointly authored by the Sixth Amendment Center and the Pretrial Justice Institute:

If it were always the case that the right to counsel attached before any critical stage occurred, then it would be a fairly simple and straight-forward matter for the magistrate before whom a defendant appears to appoint counsel for an indigent defendant and that counsel could then be prepared for and present at the first critical stage following. But things are not so clearly ordered in our criminal justice systems and there are wide variations among jurisdictions in the procedures they follow. A defendant may be arrested before or after the formal institution of prosecution. A defendant may be in custody or may be at liberty at the time of the first appearance before a magistrate. Law enforcement may arrest a defendant and wish to interrogate him, giving rise to the critical stage of custodial interrogation, before he is brought before a magistrate for the first appearance. A prosecutor may desire to offer a plea bargain to a defendant who is under investigation prior to that defendant ever being arrested or brought before a magistrate for the first appearance. The events in a criminal case proceeding can and do occur in almost any order at all.[21]

In other words, whether or not a person will actually see their right to counsel actualized depends on the happenstance of local procedures – the sequencing of different parts of the pretrial process. States, moreover, can manipulate that sequencing to avoid the constitutional requirement, with the result that people can spend tragically long periods of time incarcerated without ever meeting their attorney.

The practical reality is that, in our criminal legal system, the true process of prosecution and liberty deprivation begins at the street encounter, when the policing arm of the state restricts a person's liberty, generally by effectuating an arrest. The right to counsel should thus attach, at a minimum, upon arrest. And in order to ensure that that right is not toothless, counsel should be made affirmatively available at this stage.[22]

Under current law, people who are taken into custody and facing interrogation are entitled not to be questioned without counsel present. In practice, what this means is that those people – regardless of age, sophistication, legal experience, disability, vulnerability, or any other factor – must actively and clearly demand the presence of counsel.[23] Moreover, because current law only prohibits questioning

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[21] The Sixth Amendment Center & The Pretrial Justice Institute, *Early Appointment of Counsel* (2014) https://sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf.

[22] Fair Trials, *Station House Counsel* (Oct. 20, 2020) https://www.fairtrials.org/publication/station-house-counsel.

[23] *Miranda v. Arizona,* 384 U.S. 436 (1966) (holding that, under the Fifth Amendment, any statements that a defendant in custody makes during an interrogation are admissible as evidence at a criminal trial only if law enforcement told the defendant of the right to remain silent and the right to speak with an attorney before the interrogation started, and the rights were either exercised or waived in a

the person further once an invocation is made, people who exercises their "right to counsel" during police interrogation typically do not get an attorney at all. Instead, they wait at the police station or some other holding cell for an unknown period of time without information as to what will happen next, before simply being taken to court with no explanation as to what is happening to them. Needless to say, this process is disorienting and traumatic. In addition to being locked in crowded cells for extended periods of time, people are cut off from their families (including potentially children or loved ones in need of care) and their employment (which can threaten their job stability).

People in such a situation need more than the theoretical, largely insubstantial "right to counsel" so famously described in the *Miranda* warnings read on TV. They need the *actual* right to counsel.

Congress can and should take action to make this right more than a theory. Indeed, it's not just one discrete right at stake: as described above, there are multiple constitutional rights implicated: the right to counsel, the right to the effective assistance of counsel, and the right to present a defense. And the danger of coercion is pervasive. Indeed, by the time people facing charges see a lawyer in court, key decisions have already been made by other actors in the system with respect to charging and bail – decisions which will be determinative for many who may be coerced to plead guilty to avoid pre-trial detention, overcharging and long sentences.[24] The Registry of Exonerations has documented that 12% of exonerations arise from false confessions – including 36% of juvenile exonerations and 70% of exonerations of people with mental illness and/or developmental disabilities.[25] And as noted in a different report by the Registry: "In part, *Miranda* was a step in the Supreme Court's campaign to eliminate violence in interrogations. But *Miranda* also ratified the "modern practice of in-custody interrogation [which] is psychologically, rather than physically, oriented… Instead of regulating the process of non-violent interrogation, the court required police to give warnings before they start, and then only continue if the suspect waives his right to silence. But most do waive their rights at the outset of the ordeal; it's hard to tell an officer who has you

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knowing, voluntary, and intelligent manner.); *Davis v. United States*, 512 U.S. 452, 459 (1994) ("[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.").

[24] Fair Trials, *Station House Counsel* (Oct. 2020) https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf.

[25] The National Registry of Exonerations, *False Confessions Table* (Mar. 17, 2020) http://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf

under arrest that you won't talk to him. After that, the issue almost never comes up again. By the time they confess, *Miranda* is a distant memory, if not entirely forgotten."[26]

Just as is the case throughout Europe, counsel should be physically available at the police station to those who have been taken into custody. In many countries in Europe, people have the right of access to a lawyer, free of charge, prior to and during interrogation, 24 hours a day.[27] In 2016, legislation was passed making police station access to counsel mandatory across the European Union.

Denial of access to counsel at the police station bears a direct link to the United States' unique crisis of mass incarceration, and we need action. To complement the provision of counsel at arrest, and recognizing that no part of our criminal legal system operates in a silo, policies should be pursued and encouraged that engage other actors in the system around the same rights. For example, prosecutors could and should enact policies in which statements taken outside the presence of counsel are not used as evidence (directly or indirectly) in prosecutions and investigations. Public defender offices and appointed counsel systems should receive the necessary support to ensure provision of counsel upon arrest. And, with respect to any interrogations themselves, a number of internationally recognized and utilized procedures and protections should be implemented to ensure transparency, lack of coercion, and the meaningful existence of these rights. For example:

1) interrogations should be limited in length and suspects should be informed upfront of the cap on time,[28] as length is directly correlated to the likelihood of false confession;[29]

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[26] The National Registry of Exonerations, *For 50 Years You've had "the Right to Remain Silent"* (June 12, 2016)
http://www.law.umich.edu/special/exoneration/Pages/false-confessions-.aspx.

[27] Fair Trials, *Station House Counsel* (Oct. 2020).
https://www.fairtrials.org/sites/default/files/publication_pdf/Station%20house%20counsel_%20Shifting%20the%20balance%20of%20power%20between%20citizen%20and%20state.pdf

[28] White, Welsh S., *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 143 (1997) ("Based on the empirical evidence, an interrogation's length seems directly related to its likelihood of producing a false confession. In nearly all of the documented cases involving false confessions by suspects of normal intelligence, the interrogation proceeded for several hours, generally more than six.")

[29] Mark Costanzo & Richard A. Leo, *Research and Expert Testimony on Interrogations and Confessions* 69-98 (Expert Psychological Testimony for the Courts, 2007) (asserting that imposing a time limit of 4 hours, more than 2 times the length of a typical interrogation, will not meaningfully undermine law

2) interrogations should be recorded;[30]

3) interrogations should be free of coercion – including the ability of the police to lie in order to secure certain responses.[31]

The Criminal Court Process

Right to Counsel, to the Effective Assistance of Counsel, and to Present a Defense

As discussed previously, the rights to counsel, to the effective assistance of counsel, and to present a defense apply throughout the criminal process. There can be no meaningful debate that our system of indigent defense in the United States, despite the promises of *Gideon*, is in crisis.[32] As we work toward a future in which fewer and fewer people are brought into the carceral system, we must simultaneously ensure that those who are prosecuted are provided with the effective counsel to which they are guaranteed. In reality, this means providing resourced, quality indigent defense in an organized, responsive fashion. It also means ensuring that those defenders can provide effective assistance through investigation, expert consultation, and other defense services that must be provided by the government when it elects to pursue prosecution. This applies, of course, to Federal

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enforcement efforts to elicit true confessions, but will lead to significantly fewer false confessions elicited with the aid of exhaustion.)

[30] The Innocence Project, *False Confessions & Recording of Custodial Interrogations* https://innocenceproject.org/false-confessions-recording-interrogations/. (last visited Mar. 23, 2021).

[31] This issue was just addressed by Dr. Saul Kassin in the New York Times in January 2021, *see* Saul Kassin, *It's Time for Police to Stop Lying to Suspects*, N.Y. Times, Jan. 29, 2021 https://www.nytimes.com/2021/01/29/opinion/false-confessions-police-interrogation.html ("That's why there is a consensus on this issue within the scientific community. The American Psychology-Law Society published a white paper cautioning of the risk of presenting false evidence; the American Psychological Association passed a resolution stating the same. In a recent survey of 87 Ph.D. confession experts worldwide, 94 percent endorsed as highly reliable the proposition that "presentations of false incriminating evidence during interrogation increase the risk that an innocent suspect would confess"; 100 percent agreed "misinformation about an event can alter a person's memory for that event.")

[32] *See* note 10, *supra*.

Public Defender offices; it also applies, however, to panel and appointed attorneys who represent approximately forty percent of those who appear before the federal bench.[33]

Court Hearings

When the COVID-19 pandemic struck, our criminal legal system went into shock. It was – and is – entirely unprepared to function when faced with such a devastating public health crisis. Much harm and death has resulted from our system's unwillingness to confront, head-on, the very real dangers presented by COVID-19.[34] Over 47,000 people in the custody of the Bureau of Prisons (BOP) have tested positive, and 227 have died, in addition to 4 BOP staff member deaths.[35] Prosecutions did not stop, but court hearings did, and as a result countless people continue to wait to be heard in their cases.

We must learn from this disastrous response and adopt policies and structures to ensure our system can operate in a public health crisis. But there are also some responses to the pandemic that resulted in a positive shift. Many court systems relieved people of the burden to come physically to court or to meetings in person and allowed for hearing rescheduling and other administrative matters to be handled with ease. Moreover, in response to the pandemic, the system started to address the transportation, housing, family and employment challenges that many impacted by the system have *always* faced. It should not have taken a widespread crisis to make these hardships apparent to those in power. Allowing those whose lives are directly upended by the criminal legal system to reschedule hearings, to appear virtually, and to conduct meetings and check-ins remotely – with their voluntary, informed consent – could have tremendous impacts on the ability of people to maintain employment and to navigate the hurdles of childcare, transportation, and the costs associated with all of those things. And, because so many "returns" to incarceration are through violations – of pretrial release, of probation, and other forms of supervision – grounded in missed appointments, missed phone calls, and missed court hearings, this kind of policy shift has a direct bearing on the larger crisis of mass incarceration itself.

And one additional point here, unrelated to the pandemic's impact directly, but always relevant and supported by the discussion above, is that court hearings should never occur without counsel present. In many places around the country, first appearances and arraignments are done outside the

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[33] U.S. Courts, *Defender Services*, https://www.uscourts.gov/services-forms/defender-services (last visited Mar. 23, 2021).

[34] Madeleine Carlisle and Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population,* Time (Dec. 28, 2020); Keri Blakinger and Keegan Hamilton, *"I Begged them to Let Me Die:" How Federal Prisons Became Coronavirus Death Traps*, The Marshall Project (June 18, 2020);

[35] Federal Bureau of Prisons, COVID-19 Data Locator: https://www.bop.gov/coronavirus/ (last visited March 23, 2021).

presence of counsel. This is a true abrogation of the right to counsel, and it cements the coerciveness of the process that has led us to mass incarceration.

Speedy Trial Protections

Even prior to COVID-19, speedy trial rights were irregularly enforced. The pandemic threw an enormous wrench into the administration of courts and trials and, rather than follow existing law and release from incarceration those who could not be timely tried, prosecutors and courts around the country found paths to changing and expanding the rules to allow for exceptions and thus, in many cases, to allow for indefinite pretrial detention.[36] As a consequence, people have been languishing behind bars at a far greater rate since the pandemic started. But this structural problem is not a new one. The constitutional speedy trial right sets only a floor, and in truth leaves far too much room for extensive pretrial delays. Likewise, the federal Speedy Trial Act can be circumvented. Legislation is needed to ensure that pretrial delays are avoided – and that cases end and people who retain their presumption of innocence are released if their government cannot afford them a trial in a speedy fashion.

Discovery

Intertwined with the rights to counsel & to present a defense is the issue of discovery: specifically, what information is provided to defense counsel and the person they represent, and when.[37] In civil cases, discovery is broad and the disclosure process is structured to ensure complete disclosure to both sides, with a goal of creating a level playing field. Despite the stakes being critically higher in criminal cases, a far more secretive and imbalanced approach is taken, in which prosecutors can withhold a number of items from the defense and are only obligated to reveal certain categories of information and evidence at certain times. Indeed, it is in part because of the impossibility of creating categories that are clearly and fairly defined that discovery disputes commonly arise – and that our system of coercive plea-bargaining and uninformed convictions exists. Michael Morton's case is a clear example of this; after being wrongfully convicted and spending 25 years in prison for

[36] Betsy Woodruff Swan, *DOJ Seeks New Emergency Powers Amid Coronavirus Pandemic*, Politico (March 21, 2020), https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023.

[37] See, e.g., Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, THE CHAMPION 26 (May 2013), https://www.nacdl.org/Article/May2013-PursuingDiscoveryinCriminalCas ("[A]n effective argument can be made that the Sixth and Fourteenth Amendments to the U.S. Constitution require full disclosure to the defense of all records and materials prior to trial in a criminal case.").

the murder of his wife before being exonerated by DNA, the Texas Legislature passed the Michael Morton Act in 2013, mandating open-file discovery in criminal cases.[38]

To minimize the potential for error and confusion as to what requires disclosure, and to enhance fairness and allow for informed decision-making at all stages, all prosecutors should be required to maintain "open file" discovery, in which their files are made available to the defense for review. According to the Justice Project:

"To best protect a defendant's right to due process and improve the system's ability to efficiently resolve cases, states should enact more expansive discovery laws comparable to the laws governing discovery in civil cases. Open-file discovery grants the defense access to all unprivileged information that (with due diligence) is known or should be known to the prosecution, law enforcement agencies acting on behalf of the prosecution, or other agencies such as forensics testing laboratories working for the prosecution. An open-file policy reduces discretionary decisions in determining what evidence is "material" (meaning that it will affect the outcome of trial) and "exculpatory" (meaning that it will tend to negate guilt or mitigate a sentence) and should thus be disclosed to the defense. By allowing the defense access to the state's entire file, open-file discovery reduces the potential for error and the inefficiencies inherent in making the decisions on an item-by-item basis."[39]

Fair and Just Prosecution (FJP), an organization that works with elected prosecutors around the country on policies that promote safety and fairness, has written about the importance of expanding criminal discovery.[40] In its brief, FJP highlights the reforms implemented by a number of courts and prosecuting agencies, including legislation mandating open file discovery in North Carolina,[41] and a number of federal district courts that require early disclosure.

The question of timing is also a key one: in addition to trials, discovery plays an important role in the fairness and reasoned decision-making of bail hearings, preliminary hearings, motions hearings, investigation and plea negotiations. It also affects the ability to present mitigation and to make meaningful arguments at sentencing. Because 98% of all convictions in the federal system arise

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[38] Brian Rogers, *New Law Forces Prosecutors to Turn Over Evidence Against Suspects,* Hous. Chron. May 16, 2013, https://www.houstonchronicle.com/news/houston-texas/houston/article/New-law-forces-prosecutors-to-turn-over-evidence-4522558.php

[39] The Justice Project, *Expanded Discovery in Criminal Cases* https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf (last visited Mar. 23, 2021)

[40] Fair and Just Prosecution, *Promoting Transparency and Fairness Through Open and Early Discovery Practices* (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/01/FJP.Brief_Discovery.pdf.

[41] N.C. Gen. Stat. § 15A-903.

from guilty pleas,[42] there is an urgent need to assess the provision and scope of discovery disclosures prior to plea negotiations. Indeed, many if not most people currently facing prosecution in the United States are making life-altering decisions without the benefit of meaningful information about the allegations against them.

Within the broad category of discovery, there are also discrete categories of material that have been identified by the courts: *Brady* material, *Giglio* material and *Jencks* material. I will take them in turn.

1) *Brady* and *Giglio*. Named after the landmark case of *Brady v. Maryland*,[43] *Brady* material is that which could tend to exculpate a person or would go toward reducing the potential penalty faced. And named after the Supreme Court case *Giglio v. United States*,[44] *Giglio* material is a subset of *Brady* material that encompasses any information that impeaches the credibility of government witnesses, including law enforcement officers. Under current rules in most places, disclosure of both types of material is dependent on a prosecutor's assessment of the "materiality" of the evidence. This approach is problematic[45] for a number of reasons,[46] including that it puts the prosecutor in the difficult—if not impossible—position of serving as both a strong advocate for the government's interests and as an impartial decisionmaker as to whether evidence will be helpful to the defense: "[T]he prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case."[47] Many have called for legislation or policies that would make clear that the materiality standard (while potentially relevant when assessing *Brady* violations after the fact) has no bearing on a prosecutor's obligation to disclose

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[42] *See* U.S. Courts, *Federal Judicial Caseload Statistics 2020 Tables*, *Table D-4* (March 31, 2020), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables.

[43] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[44] *Giglio v. United States*, 405 U.S. 150 (1972).

[45] Gershman, Bennett L., *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531 (2007).

[46] *See, e.g.,* Abel, Jonathan, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743 (2015); NAT'L ASS'N OF CRIM. DEF. LAW., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES (2014), https://www.nacdl.org/getattachment/d344e8af-8528-463cbba4-02e80dfced00/material-indifference-how-courts-are-impeding-fair-disclosure-in-criminal-cases.pdf

[47] *Bagley v. United States*, 473 U.S. 667, 696 (1985) (Marshall, J., dissenting).

information in the first place.[48] Further, there is currently no established constitutional obligation that *Brady* material be disclosed prior to plea negotiations, which is, in the vast majority of cases, when it is the most relevant.[49] Here, too, legislation can substantially improve matters by raising the floor of legal protections.

2) *Jencks*. Subsection (a) of the Jencks Act, 18 U.S.C. §3500, provides that no statement of a government witness "shall be the subject of subp[o]ena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." As practicing attorneys, be they prosecutors or defenders, know well, witness testimony is often the most central evidence in a case, which means that witness statements about the events in question are essential information for the accused. The Jencks Act withholds that information from people and makes it all but impossible to fully prepare an adequate and informed defense. Many have called for the elimination – or, at a minimum, the reform – of the Act.[50] The timing of disclosure – after direct examination – is unreasonable and puts a tremendous strain and disadvantage on the defense. And of course, the presumption of a direct examination signals that a trial is underway, meaning that there is no obligation whatsoever to provide these materials pursuant to the Jencks Act during the course of plea negotiations.

Late last year, with bipartisan support, Congress passed the Due Process Protections Act (DPPA), which directly amended Federal Rule of Criminal Procedure 5.[51] The DPPA requires that courts, at the initial appearance, remind prosecutors of their *Brady* obligations and potential consequences for noncompliance. The bipartisan recognition of prosecutorial failures in passing the DPPA reflects admirable intent, but more must be done. The Act does no more than require a reminder and warning. It does not take any affirmative steps to meaningfully address the inequity in the current process, or the reality that guilty pleas are being taken on a daily basis without access to this essential material. The DPPA does not require, for example, that prosecutors provide *Brady* material in the context of plea negotiations. It does not require prosecutors to certify on the record that they satisfied their obligations. And it does not require the government to provide open-file discovery.

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[48] Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U Rev. L. & Soc. Change 407 (2014).

[49] McMunigal, Kevin C., *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651 (2007). *See also* Brandon L. Garrett, *Convicting the Innocent* 168–70 (2011); Emily M. West, *Innocence Project, Court Findings Of Prosecutorial Misconduct Claims In Post-Conviction Appeals And Civil Suits Among The First 255 DNA Exoneration Cases* (2010); *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 Cardozo L. Rev. 2037, 2071 (2010) (presentation by Terri Moore, First Assistant, Dallas County District Attorney's Office).

[50] Paul K. Rooney, and Elliot L. Evans, *Let's Rethink the Jencks Act and Federal Criminal Discovery*, 62 A.B.A. J. 10, 1313–16 (1976).

[51] Due Process Protections Act ("DPPA"), P.L. No. 116-182, 134 Stat. Ann. 894. (2020).

Given the reality that our criminal legal system is a system of guilty pleas, any meaningful reform must account for the information that is critical to making informed decisions during plea negotiations.

The recent rise in national conversations about police behavior points to one straightforward reform that can be undertaken immediately, as it is already grounded in existing constitutional law: *Giglio* obligations must be expansively interpreted, must include all police complaints (regardless of status), must seek to uncover and report expressions of white supremacy in police departments and among law enforcement officers,[52] and must earnestly seek to make transparent to the defense any issues implicating the credibility of any officers involved in a case.

Each of these areas of discoverable material are critical areas for intervention. The late and inconsistent disclosure of each precludes informed decision-making, eliminates fairness, and goes further in terms of process, as other important avenues available by law to criminal defendants are not pursued because of a lack of relevant information. For example, when guilty pleas are taken early in a case, there are generally no motions hearings to address the potential constitutional rights implicated in a street encounter or arrest. As a result, one of the system's primary methods for uncovering police misconduct or illegality – through 4th Amendment litigation – is eliminated, and police misconduct is increasingly obscured. Moreover, experts are not retained to conduct analysis, and investigation is not done that could uncover critical evidence. All of these resulting patterns further entrench the racial disparities that manifest in police behavior in terms of who is stopped, searched, and arrested. And the guilty pleas that are entered into are done without the full breadth of information that the law, on paper, suggests should be made available. And so coercion is also entrenched.

This is all fundamentally problematic in its own right. Millions of people are behind bars in our country, most of them having pled guilty. We will never know how many of those convictions were obtained fairly or are reflective of guilt or supported by the weight of our criminal laws as they may appear on the books. Indeed, 2,755 people have been exonerated in our country since 1989, based on a number of factors. And while Black people make up 13% of our country's population, they make up 47% of those exonerees.[53] Discovery reform is a racial justice issue, and a fairness issue.

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[52] Vida B. Johnson, *KKK in the PD: White Supremacist Police and What to Do About It*, 23 LEWIS & CLARK L. REV. 205, 205 (2019), https://law.lclark.edu/live/files/28080-lcb231article2johnsonpdf; see also *Confronting Violent White Supremacy (Part IV): White Supremacy in Blue—The Infiltration of Local Police Departments*: Hearing Before the Subcomm. on C.R. and C.L. of the H. Comm. on Oversight and Reform, 116th Cong. 11 (2020) (statement of Vida B. Johnson, Associate Professor of Law, Georgetown University).

[53] Sydney Stephens, *Race and Wrongful Convictions*, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Race-and-Wrongful-Convictions.aspx.

Jury Pools

Juries are, of course, selected during trial. But the pools of people from which potential jurors emerge are selected far earlier than that. And jury pool composition is ripe for reform.[54] Indeed, federal courts around the country have begun to undertake efforts to ensure that jury pools are more reflective of the communities in which they serve.[55] This is a racial justice issue, as studies consistently correlate the racial makeup of jury pools with outcomes for people facing prosecution. The current methods of enlisting potential jurors are themselves in need of change. For example, Black and Latinx residents are more likely to experience housing and employment instability, making it harder to receive juror questionnaires and to miss work in order to serve.[56] In order to ensure the constitutional right to a fair cross-section of the community, standards for reflectiveness could be imposed, requiring a certain composition that reflects a community's population. Additionally, people with felony convictions in many states and in federal courts are still precluded from juror service, despite research demonstrating that there is no reasonable basis for such an exclusion,[57] and despite the stark racial disparity in our criminal system,[58] in which one-third of Black men have felony convictions.[59] California recently passed SB310, removing the exclusion and allowing almost all people with felony convictions to serve on juries.[60] Federal reform can directly address this

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[54] Judge William Caprathe et al., *Assessing and Achieving Jury Pool Representativeness*, 55 The Judges' J. 2, 16 (Spring 2016).

[55] U.S. Courts, *Courts Seek to Increase Jury Diversity* (May 19, 2019), https://www.uscourts.gov/news/2019/05/09/courts-seek-increase-jury-diversity.

[56] Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (Sep. 1, 2015), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences/.

[57] James M. Binnall, *Twenty Million Angry Men: The Case for Including Convicted Felons in our Jury System* (2021).

[58] Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People With Criminal Records*, Prison Pol'y Initiative (Feb. 18, 2021), https://www.prisonpolicy.org/reports/juryexclusion.html.

[59] Race & Justice News, *One-Third of Black Men Have Felony Convictions*, The Sentencing Project (Oct. 10, 2017), https://www.sentencingproject.org/news/5593/.

[60] S.B. 310, 2019 Sen., Reg. Sess. (Ca. 2019).

unfounded disenfranchisement, and the resulting racial disparities, by removing the exclusion from juror eligibility requirements.[61]

Indigent Defense

Finally, I want to address an issue near and dear to my heart and career: indigent defense. When the Supreme Court handed down *Gideon v. Wainwright* in 1963,[62] it did so without a roadmap for implementation. And so we have an enormous jigsaw puzzle of indigent defense services in every state, city, county and municipality in the country, in addition to in the federal courts. It's a recipe for injustice. And indeed, that's what we have – overburdened, under-resourced public defenders, jurisdictions with no institutional defender office, a lack of pay parity with prosecutors, and so many other issues.[63] And beyond the issue of pay parity, there is also the question of infrastructure and resource parity. Hundreds of thousands of people are making uninformed, unsupported decisions that will change the course of their lives forever, all because they do not have access to the counsel the Constitution tells them they should have. The federal government needs to take responsibility for this crisis, and it should do so with the guidance and insight of defenders. Prosecutors are routinely involved in policy-making at every level; defenders should be, as well – on this issue and countless others. By implementing standards for best practices and attaching those to federal grants, the federal government can play a meaningful role not just in offering financial support but incentivizing meaningful changes. Indigent defense is at the heart of every other reform: public defenders are the only actors in the system that advocate alongside and for those impacted by it. They are the system's voice of accountability.[64] They are essential to any system that claims to involve justice.

Thank you again for holding this hearing and for inviting me to present testimony.

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[61] U.S. Courts: Juror Qualifications, https://www.uscourts.gov/services-forms/jury-service/juror-qualifications.

[62] 372 U.S. 335 (1963).

[63] Oliver Laughland, *The Human Toll of America's Public Defender Crisis*, The Guardian (Sep. 7, 2016), https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system.

[64] *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 Colum. L. Rev. 247 (1988).

Ms. JACKSON LEE. Thank you so very much. The gentlewoman's time has expired. Thank you for your testimony.

I now recognize Ms. Frazier Camara for five minutes. You are recognized, Ms. Frazier Camara.

STATEMENT OF APRIL FRAZIER CAMARA

Ms. FRAZIER CAMARA. First, I would like to say thank you to Chairwoman Jackson Lee, Ranking Member Biggs, and the Members of the Subcommittee for inviting me to testify today.

My name is April Frazier Camara, and I am Chief of Lifelong Learning at National Legal Aid and Defender Association, and also the co-founder and chair of the Black Public Defender Association. Today I am going to focus my testimony on racial inequity.

In the past year we have witnessed and awakening, a resounding call for racial justice. As some of you may know, the racial inequities in state-sanctioned violence against Black people did not begin with the killing of George Floyd and Breonna Taylor but, rather, it is a part of a long legacy of White supremacy that started with slavery, and that currently exists today with the incarceral system, including the criminal legal system.

Our country is demanding some systemic changes to the criminal legal system, and policymakers must meet the moment. Our failure to reckon with our past and specifically confront the legacy of slavery, Black codes, lynchings, Jim Crow, redlining, and the war on drugs has brought us to where we are today.

So, as Congress considers the pretrial reforms discussed today, it is crucial to call your attention to who is being policed, who is being criminalized, and who is being incarcerated.

Black communities are disproportionately surveilled, arrested, and funneled into the criminal legal system. From arrests to incarceration, Black and Latino communities are disproportionately impacted by the criminal legal system. They are more likely to be arrested and, once arrested, they are more likely to be convicted and, once convicted, more likely to receive harsher sentences than their White counterparts.

Black women alone comprise 44 percent of the people incarcerated in jails today. Black men are six times more likely to be incarcerated than White men. If we do not disrupt these systems of harm, one in every Black child born today can expect to go to prison in his lifetime.

This is a crisis and it must end. There are two systems of justice in America: One for those who are wealthy, who are disproportionately White; and one for those who are low income, who are disproportionately communities of color.

The legal theory of affording everyone equal constitutional rights under the law does not match the reality when you walk into courtrooms across America today. Eighty percent of people accused of crimes in State court are represented by public defenders. Most public defenders' offices are woefully underfunded and underresourced. There is no equal access to zealous representation in America.

So, as this Committee considers the path forward for pretrial reform, I would urge you to center your responses on the lived experiences of directly-impacted communities of color. When we discuss

the world of public safety, very rarely does it include the perspectives of the Black community. Historically, public safety is defined for impacted Black communities instead of with them, which has led to the current reality where Black communities are being targeted rather than protected.

We risk repeating the failures of the past if we do not stop and intentionally center the voice of the Black community.

I will close my comments today with a call to action from Dr. King. "History will have" us "to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but" rather "the appalling silence of the good people." As a nation, we have a choice: Will we remain silence on issues of racism and White supremacy, or face our painful history and present reality?

I look forward to speaking with the Committee today and engaging you on these important issues. Thank you.

[The statement of Ms. Frazier Camara follows:]

Written Statement of the Record

April Frazier Camara

Chief, Lifelong Learning at the National Legal Aid and Defender Association
Chair, Black Public Defender Association

Submitted to

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Crime, Terrorism, and Homeland Security

Hearing on

From Miranda to Gideon: A Call for Pretrial Reform

March 26, 2021

Chair Jackson Lee, Ranking Member Biggs, and members of the Subcommittee, thank you for the opportunity to submit this written testimony for the Subcommittee's hearing on pretrial reform.

My name is April Frazier Camara, and I am the Chief of Lifelong Learning at the National Legal Aid and Defender Association (NLADA) and Chair of the Black Public Defender Association. Currently, I also serve as the chair of the American Bar Association (ABA) Criminal Justice Section; however, I do not speak on behalf of the ABA today. For more than a century, NLADA has pioneered access to justice at the national, state, and local levels. We serve as the collective voice for our country's civil legal aid, public defense, and client community and offer high-quality advocacy, training, and technical assistance aimed at achieving America's promise of equal justice under the law.

For me, this work is both professional and personal. As a former public defender and the Co-founder and Chair of the Black Public Defender Association, I see myself in clients who are facing the threat of incarceration or those who are already incarcerated. I believe that Black public defenders, who fight for justice daily and come from the communities most harmed by the criminal legal system, must be among the leading voices in shaping solutions, and I am honored to speak before this Subcommittee about advancing pretrial reform through a racial equity lens.

Introduction

We, as a country, are in the midst of a once-in-a-generation civil rights movement. In the past year, we have witnessed an uprising across the country and a resounding call for racial justice and racial awakening. Polling shows that a majority of Americans now believe that our criminal legal system needs a "complete overhaul" or "major changes."[1]

All Americans have the obligation to understand the history of white supremacy in this country. The murders of George Floyd and countless others is the inevitable result of our failure to reckon with our past and confront the legacy of slavery, Black Codes, lynchings, Jim Crow laws, redlining, and the war on drugs. State-sanctioned violence against Black people did not begin with the killing of George Floyd, but rather it is a part of a long legacy of brutality that started with slavery and currently exists within the criminal legal system.

Our country is demanding systemic changes to the criminal legal system, and policymakers should meet the moment by advancing reforms that eliminate racial disparities within our legal system. Dr. King reminded us during the 1960s civil rights movement that:

> ***"History will have to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but the appalling silence of the good people."***

As a society, we can no longer remain silent about the unjust racial disparities that plague the criminal legal system. Proposed solutions have to address harms to Black communities, who are disproportionately surveilled, arrested, and funneled into the criminal legal system. When

[1] AP-NORC poll: Nearly all in US back criminal justice reform. (2020) Retrieved from https://apnorc.org/ap-norc-poll-nearly-all-in-us-back-criminal-justice-reform/

advancing pretrial reform, lawmakers must adequately address the disproportionate harm inflicted on Black communities and ensure that reforms are not inadvertently widening existing racial disparities or creating additional disparate harm to Black communities.

Policymakers must also take a holistic view of these issues to understand how the criminal legal system intersects with other parts of the legal system. The Black Public Defender Association is currently examining these issues through a comprehensive carceral systems approach. The definition of carceral systems includes the criminal legal system, housing courts, immigration, foster care systems, and other systems that disproportionately impact Black people in the U.S. It is important for lawmakers to keep in mind the intentional and unintentional consequences of the pretrial system on other carceral systems in order to develop effective strategies that disrupt the cycle of harm to communities of color.

Two Justice Systems in America

The failed "tough on crime" policies of the last forty years have targeted Black and Latinx communities, especially those who are experiencing poverty, and have trapped them in a cycle of incarceration that destabilizes their housing, families, and employment, among other harms.[2] From arrest to incarceration, Black and Latinx communities are disproportionately targeted: they are more likely to be arrested, and once arrested, they are more likely to be convicted, and receive harsher sentences than white people.[3] Federal prosecutors are twice as likely to charge Black people with offenses that carry a mandatory minimum as compared with similarly situated white people,[4] and state prosecutors are more likely to charge Black people under habitual offender laws as compared with similar white people.[5] Black communities in particular face stark realities. Black men are 6 times more likely to be incarcerated than white men and 2.5 times more likely than Latinx men.[6] If we do not disrupt these systems of harm, 1 in every 3 Black boys born today can expect to go prison in his lifetime, compared to 1 in every 17 white boys.[7]

This is a crisis, and it must end.

Pretrial is a crucial phase of the criminal legal system, and reform is urgently needed. Pretrial detention fuels mass incarceration and is responsible for 99% of our country's jail population growth in the past fifteen years.[8] Today, more than two-thirds of people in jail—nearly half a million people—are legally innocent and awaiting trial.[9] As with other parts of the criminal legal system, Black and poor communities have endured the brunt of this crisis disproportionately. Black people comprise nearly a third of America's jail population despite making up just 13% of

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[2] National Research Council. 2014. The Growth of Incarceration in the United States: Exploring Causes and Consequences. *The National Academies Press*. Retrieved from https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes

[3] The Sentencing Project. (2013). Shadow Report to the United Nations on Racial Disparities in the United States Criminal Justice System. Retrieved from https://www.sentencingproject.org/publications/shadow-report-to-the-united-nations-human-rights-committee-regarding-racial-disparities-in-the-united-states-criminal-justice-system/

[4] Starr, S. B. & Rehavi, M. M. (2013). Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of The Yale Law Journal, 123(2), 2-80. See also The Sentencing Project (2018). Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System. Retrieved from https://www.sentencingproject.org/publications/un-report-on-racial-disparities

[5] Crawford, C., Chiricos, T., & Kleck, G. (1998). Race, Racial Threat, and Sentencing of Habitual Offenders. Criminology, 36(3), 481–512.

[6] See note 3

[7] See note 3

[8] Wagner, P. (2015). Jails matter. But who is listening? Retrieved from https://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/

[9] Digard, L. & Swavola, E. (2019). Justice Denied: The Harmful and Lasting Effects of Pretrial Detention. Vera Institute of Justice. Retrieved from https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf

the general population.[10] Additionally, people entering jail are overwhelmingly poor, with a median annual income of approximately $15,000, which is less than half of the median for similarly-aged non-incarcerated people.[11] Being detained pretrial means that people who are already marginalized risk losing their jobs, housing, and children, all of which exacerbate economic and familial instability and worsen public safety.[12]

Black Children and Youth

Even though the number of children in confinement has dropped significantly, pretrial detention is common in the juvenile legal system. One in five children in juvenile facilities is awaiting trial. Black and Latinx children are especially vulnerable to this practice and comprise 62% of children in juvenile facilities who are detained pretrial.[13] Removing children from their homes and community, and detaining them, particularly when they are legally innocent, is detrimental and unnecessarily exposes children to trauma and maltreatment in juvenile detention facilities. Lawmakers should invest in alternatives to incarceration for children, and provide support services to families and children in their communities, outside of the criminal legal system.

Black Women

More than 60% of women in jail are awaiting trial.[14] Black women alone comprise 44% of women incarcerated in jail, and they face significant challenges in the pretrial phase.[15] Black women have the lowest incomes before incarceration compared to other demographic groups, which makes it much less likely that they will be able to purchase their freedom pretrial.[16] Research shows that even Black women who are not facing the threat of incarceration themselves are impacted disproportionately by the criminalization of poverty. Nearly half of all Black women have at least one incarcerated family member, and they are the most often burdened with securing the funds to purchase their loved one's freedom.[17]

The data points above should push us to recognize and reckon with the fact that there are two systems of justice in America: one for wealthy people (who are disproportionately white) and one for poor people (who are disproportionally people of color). Historic and structural racism drives these two systems. The legal framework of affording the accused substantial constitutional rights, in theory, promotes a concept of fairness in America. However, how courtrooms operate each day across this nation displays a different and frightening reality. Over 80% of people

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[10] Bureau of Justice Statistics. (2020). Jail Inmates in 2018. Retrieved from https://www.bjs.gov/content/pub/pdf/ji18.pdf
[11] Rabuy, B. & Kopf, D. (2016). Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. Retrieved from https://www.prisonpolicy.org/reports/incomejails.html
[12] Leslie, El. & Pope, N. (2017). The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments. Journal of Law and Economics. Retrieved from http://econweb.umd.edu/~pope/pretrial_paper.pdf
[13] Sawyer, W. (2019). Youth Confinement: The Whole Pie 2019. Retrieved from https://www.prisonpolicy.org/reports/youth2019.html
[14] Kajstura, A. (2019). Women's Mass Incarceration: The Whole Pie 2019. Retrieved from https://www.prisonpolicy.org/reports/pie2019women.html
[15] Vera Institute of Justice. (2016). Overlooked: Women and Jails in the Era of Reform. Retrieved from https://www.vera.org/downloads/publications/overlooked-women-and-jails-fact-sheet.pdf
[16] Rabuy, B. & Kopf, D. (2016). Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time. Retrieved fromhttps://www.prisonpolicy.org/reports/incomejails.html
[17] Clayton, G., Richardson, E., Mandlin, L. & Farr B. (2018). Because She's Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones. Essie Justice Group. Retrieved from https://www.becauseshespowerful.org/wp-content/uploads/2018/05/Essie-Justice-Group_Because-Shes-Powerful-Report.pdf

charged with crimes in state courts cannot afford counsel and are represented by public defenders or assigned counsel.[18]

Most states inadequately fund their public defense programs. While there are some high-quality public defender offices, in far too many cases indigent individuals with low incomes are represented by public defenders with excessively high caseloads, or by assigned counsel with limited experience in criminal defense.[19] I have the experience of working in both a high-quality public defender office and a poorly resourced office, and I have witnessed firsthand the devastating impact of inadequate representation. Funding high-quality community oriented public defense must be a key strategy to sustain any efforts toward pretrial reform.

Advancing Racial Equity through Pretrial Reform: Policy Recommendations

The scope of pretrial reform is very broad and it requires a combination of collaborative solutions. My recommendations focus on three key areas: (1) Centering the Voice of Directly Impacted Communities in Policy-Making; (2) Counsel at First Appearance, and (3) Alternatives to the Traditional Prosecution and Holistic Defense.

The Voice of Black Defenders and Directly Impacted Community

As we discuss these reforms, it is crucial to call attention to *who* is being policed, criminalized, and incarcerated. At each stage of the criminal legal system, people of color are disadvantaged and overrepresented. Black people, specifically, are surveilled, detained, charged, and punished at rates that dwarf similarly-situated white people. This is a moment to face our history and chart a path toward achieving true public safety. Historically, public safety is defined for impacted Black communities instead of with them, which has led to the current realities of many Black communities being over-policed, surveilled, and targeted by the criminal legal system.

Black communities are rarely asked, "What does safety mean to you?" Typically, questions of public safety are defined by law enforcement and addressed as normative needs, which frame issues from expert perspectives and amassed knowledge, but not lived experience. Experts are often not from the impacted Black communities they seek to study and influence. While there are many expert voices on criminal reform, the voices of defenders and directly-impacted community members are missing.

We are at a critical juncture in America in attempting to address racism and inequities in the legal system, and we must use this moment to do things radically different. We risk repeating the past failures by allowing "experts" to define what the future of public safety should look like in the Black community without the voice of the Black community. Congress must include skilled Black public defenders and directly impacted communities in the efforts to address pretrial reform and work with them to advance race equity.

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[18] Bureau of Justice Statistics. (2000). Defense Counsel in Criminal Cases. Retrieved from https://www.bjs.gov/content/pub/pdf/dccc.pdf#:~:text=publicly%20financed%20counsel%20to%20represent%20criminal%20defendants%20who,were%20the%20same%20for%20defendants%20represented%20by%20publicly

[19] E.g., Quealy, J., L.A. Times (Dec. 13, 2020). With L.A. courts paralyzed by COVID-19, public defenders say caseloads are 'unconscionable'. Retrieved from https://www.latimes.com/california/story/2020-12-13/los-angeles-courts-covid-public-defender-caseloads-doubled-tripled; Oppel, R. & Patel, J., New York Times (Jan. 31, 2019). One Lawyer, 194 Felony Cases, and No Time. Retrieved from https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html

Counsel at First Appearance

Providing access to counsel at an individual's first appearance before a judicial officer (variously termed as a bail hearing, arraignment, or magistration) can be used as an effective strategy to promote racial equity in the criminal legal system. Black people and other people of color are overrepresented in America's jail population, and representation by counsel at first appearance has been shown to reduce jail admissions, the length of jail stays, and bail amounts.[20]

Counsel at first appearance also can push back against the culture of treating people in the criminal legal system as case numbers rather than full human beings with lives that matter. Quality representation at first appearance is critical for telling the stories of people impacted by the criminal legal system and humanizing people accused of crimes. This aspect of pretrial representation by counsel is particularly notable in the context of the systematic devaluation of Black lives that has been perpetuated by the criminal legal system for centuries.

Alternatives to Traditional Prosecution and Holistic Defense

For too long in this country, we have used jails and prisons to respond to social problems, racialized neglect of Black communities, and unmet needs such as housing, and access to treatment for drug or mental diagnoses. This strategy has proven to be costly, unsustainable, and harmful to Black and low-income communities. Policymakers must seriously consider investing in deflection programs to divert people away from the criminal legal system and instead connect them to community support services to address the underlying conditions that force people to interact with the system.

Congress can look to the 29 jurisdictions across the country—as varied as Tucson, Arizona; Louisville, Kentucky; Austin, Texas; and Washington, D.C.—that diverted people away from jail as a result of COVID-19 and the public health risks of incarceration, while reducing their crime rates.[21] These cities have made the case for eliminating unnecessary prosecutions, particularly for nonviolent misdemeanors that criminalize poverty and addiction.[22] We are safer as a community and society when we use taxpayer resources to address the conditions that lead people to interact with the criminal legal system.

Another example is the groundbreaking Pre-Entry Initiative in Philadelphia, Pennsylvania. This program, launched by Chief Defender Keir Bradford Grey at the Defender Association of Philadelphia in November 2019 through funding from the John D. and Catherine T. MacArthur Foundation's Safety and Justice Challenge, to provide support services to people who have been arrested. This program saw a reduction in racial and ethnic disparities and reduced pre-trial rearrests by approximately 40%.[23] This initiative demonstrates the ways that defenders can

[20] Mrozinski, M. & Buetow, C. (2020). Access to Counsel at First Appearance: A Key Component of Pretrial Justice. Retrieved from http://www.nlada.org/sites/default/files/NLADA%20CAFA.pdf
[21] ACLU. (2020). Decarceration and Crime during COVID-19. Retrived from https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/
[22] Smith, A., Johnson, V., & Copacino, J. (2021). Opinion | Misdemeanor Court has been closed for a year. keep it that way. *The Washington Post*. Retrieved, from https://www.washingtonpost.com/opinions/2021/03/04/misdemeanor-court-has-been-closed-vear-keep-it-that-way/
[23] Defender Association of Philadelphia (2020). Pre-Entry Coalition. Retrieved from https://phillydefenders.org/pre-entry-2.

enhance community safety and avoid some of the harmful outcomes of the criminal legal system through holistic programs.

The goal of the criminal legal system should be to address the underlying conditions that brought a person into contact with the system to prevent future contact and enhance public safety. Holistic defense models provide the necessary resources needed to assist clients in achieving these goals; however, they are underfunded along with community-based alternatives to traditional prosecution. For example, limitations in publicly funded treatment options create fewer sentencing alternatives available to low-income persons charged with crimes who cannot afford to pay for treatment programs as an alternative to confinement.[24] Community-oriented holistic defenders play a key role in providing community based alternatives to low-income clients, who are disproportionately Black and Latinx.[25] Congress must adequately fund community-based alternatives to prosecution and holistic defenders to achieve better outcomes.

To this end, one proposal that NLADA strongly supports is the EQUAL Defense Act (H.R. 1408). This bill would represent a substantial step toward making the criminal legal system more fair by providing federal support to state, local, and tribal public defenders. Amid state and local budget shortfalls, supplemental federal funding would be critical to allowing defender programs to realize initiatives aimed at holistic defense and racial equity.

Thank you for the opportunity to submit this written testimony. I look forward to your questions.

[24] See note 18
[25] Ghandoosh, N. (2015). Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System. The Sentencing Project. Retrieved from https://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/

Ms. JACKSON LEE. I thank Ms. Frazier Camara. Thank you very much for your testimony and thank you for being here today and that powerful testimony.

Ms. Hanisee, you are now recognized for five minutes. Thank you.

STATEMENT OF MICHELE HANISEE

Ms. HANISEE. Thank you. Good morning, Madam Chairperson and Members of this committee. Thank you for inviting me to speak.

I have spent nearly 23 years as a prosecutor in the largest local prosecutorial agency in the nation. I am proud to say it is an extremely diverse office that has a history of hiring and promoting women and persons of color. For the majority of that time in the office my caseload has consisted of murders and sexual assault. Any improvement to the criminal justice system that decreases the possibility of wrongful conviction, while balancing the rights of victims and witnesses, is laudable.

As a prosecutor, I have seen the impact of the justice system not just on the accused but also on victims and witnesses. Intimidation of victims and witnesses is, sadly, not rare. More than one of my witnesses was murdered either before or after their testimony. I have had witnesses whose cars were firebombed, houses shot at, or were threatened in court as they testified with the classic index figure stroke across the neck gesture.

These victims and witnesses didn't volunteer to become participants in the criminal justice system, they were drafted against their will by the acts of the accused. So, we need a justice system that is fair to both the accused and to victims and witnesses.

We have learned recently in California about changes in cash bail and what they can entail. Cash bail can disproportionately impact the poor or, more to the point, advantage the wealthy. Cash bail isn't necessary so long as the accused can still be detained based on a risk assessment that accounts for flight risk, victim safety, and public safety, and which allows judges to make appropriate deviations to address the particulars of individual cases.

Detention consideration can't be based simply on algorithms but need to include the nature and particulars of the crime. Certain crimes, due to the pathology involved, are more likely to be repeated at great harm to the victims. Domestic violence, child molestation, and child abuse are some examples. The abuse can not only be repeated but can actually escalate once a perpetrator has been publicly accused, and on many unfortunate occasions a victim of domestic violence was murdered when the accused was not detained pending trial.

In California, changes to pretrial detention status are based on changes in circumstance or a triggering event like a willful violation of the terms of release. I do want to note, in California that people are provided counsel at the very first court appearance.

Being found guilty at trial is a changing circumstance that justifies a change in detention status, because prior to trial the accused is presumed innocent. That presumption disappears upon a finding of guilt. So, when a person is found guilty of a serious or violent crime that is going to result in incarceration, the presumption is

that they will be put in custody absent a significant justification for a judge to deviate from that presumption.

Videotaped interviews of arrestees and suspects are absolutely optimal. However, admissibility of a statement in court should never be conditioned on the use of audio or video recording because too many things can go wrong through no fault of the officer involved. Exclusion of evidence should only ever be based on the constitutional considerations enumerated by our courts, particularly the Supreme Court of the United States.

California's discovery laws require more and earlier disclosure than the federal system. In the absence of a significant reason to withhold pretrial discovery, it is provided to the defense promptly. However, promptness is contextual and has to take into account the volume and nature of the evidence and the necessity of processing and documenting that evidence. In the average murder case, for example, 15 days active justice by the New York proposed statute is not nearly enough time.

In California, all witness statements are provided to the defense prior to trial. As a matter of practice, many, many months, in fact years before trial.

There are, however, valid reasons at times to delay disclosure of evidence, such as risk of harm to victims and witnesses, and risk of jeopardizing an ongoing investigation. When delayed disclosure occurs, typically under the supervision of a judge who conducts ex parte review of the evidence and can issue appropriate orders.

Police reports often contain personal identifying information that can be used to target victims and witnesses. The privacy and safety concerns of victims and witnesses should be weighed against the rights of the accused.

So, in summary, I just want to say that while pondering the harm caused by incarceration, I implore you not to forget the harm caused by those who commit crimes, and the rights of the victims and witnesses to be free from threats, harassment, intimidation, and repeated interviews and hearings that take them away from their jobs and families. The safety and rights of victims and witnesses must be balanced against the rights of the accused.

Thank you so much for allowing me to testify today.

[The statement of Ms. Hanisee follows:]

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UNITED STATES HOUSE OF REPRESENTATIVES
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY
FROM *MIRANDA* TO *GIDEON:* A CALL FOR PRETRIAL REFORM
MARCH 26, 2021
STATEMENT OF
MICHELE HANISEE
PRESIDENT, ASSOCIATION OF DEPUTY DISTRICT ATTORNEYS

Good morning chairpersons and members. I have spent nearly 23 years as a prosecutor in the largest local prosecutorial agency in the country. For the majority of that time my caseload has consisted largely of murders and sexual assaults. I am proud to work in an extremely diverse office that has a history of hiring and promoting women and persons of color.

There is certainly room for reform in any system. While I believe that the United States justice system with its presumption of innocence, is one of the best, any improvement that decreases the possibility of a wrongful conviction while balancing the rights of victims and witnesses is laudable.

As a prosecutor, I have seen the impact of the justice system not just on the accused but also on victims and witnesses. Intimidation of victims and witnesses is sadly not rare. More than one of my witnesses in gang murders was murdered either before or after their testimony. I have had witnesses whose cars were firebombed, houses shot at, or who were threatened in court as they testified with the classic index finger stroke across the neck gesture.

These victims and witnesses did not volunteer to become participants in the justice system. They were drafted against their will by the acts of the accused. We need a justice system that is fair to both the accused and to the victims and witnesses.

CASH BAIL

Cash bail can disproportionally impact the poor, or more to the point, advantage the wealthy. But cash bail is not necessary so long as a pre-trial detention determination is made on a reasonable risk assessment that accounts for flight risk, victim safety, and public safety and which allows judges to make appropriate deviations to address the particulars of individual cases.

Detention considerations cannot be based simply on algorithms but need to include the nature and particulars of the crime. Certain crimes, due to the pathology involved, are more likely to be repeated at great harm to victims. Domestic violence, child molestation, and child abuse are some examples. The abuse can not only be repeated but can escalate once the perpetrator has been publicly accused. On many unfortunate occasions, a victim of domestic violence was murdered when the accused was not detained pending trial.

In California, changes to pre-trial detention status are based upon changes in circumstance or a triggering event such as willful violation of the terms of release or willful failure to appear for court. Being found guilty at trial is the type of change in circumstance that justifies a change in detention status. Prior to trial the accused is presumed innocent until proven guilty. That presumption disappears upon a finding of guilt. When a person is found guilty of a serious or violent crime that will result in incarceration, the presumption is that they be placed in custody absent a significant justification for a judge to deviate from that presumption.

INTERROGATION

Videotaped interviews of arrestees are optimal. However, admissibility of a statement in court should never be conditioned on the use of audio or video recording. Too many things could go wrong through no fault of the interviewing peace officer. Exclusion of evidence should only ever be based on the Constitutional considerations enumerated by the United States Supreme Court and lower courts of appeal.

PRETRIAL DISCOVERY

I cannot claim to be intimately familiar with the federal justice system. I do know that California's discovery laws require more and earlier disclosure than the federal system. In California, an accused is provided with counsel at their first appearance unless they decline appointed counsel. In the absence of a significant reason to withhold pre-trial discovery, it is provided to the defense promptly. Promptness, however, is contextual and has to consider the volume and nature of the evidence and the necessity of processing and documenting the evidence. In the average murder case, 15 days is not enough time. In a complex case it is not unusual for the discovery process to take months. In California, all witness statements are provided to the defense at least 30 days prior to trial, but as a matter of practice usually long before that. We have no equivalent to the Jencks Act. There are valid reasons to delay disclosure of evidence such as risk of harm to victims and witnesses; risk of jeopardizing an ongoing investigation, or risk of destruction of evidence. When delayed disclosure occurs it is typically under the supervision of a judge who conducts an ex-parte review of the evidence and who can issue appropriate protective orders to limit who has access to the evidence when it is disclosed.

While prosecutors already face penalties for non-compliance with discovery rules, such as exclusion of evidence at trial, adverse jury instructions or being reported to the state bar for discipline, a necessity for an expansive discovery policy is meaningful penalties for defense attorneys who violate discovery laws and court protective orders. It is not unprecedented for a defense attorney to turn over evidence to a defendant or defendant's family in violation of the law or in violation of court protective orders, then claim ignorance or forgetfulness when the malfeasance is discovered. Police reports containing victim and witness statements, home addresses, workplaces and other identifying information are then used to target victims and witnesses. Because of these risks, the privacy and safety concerns of victims and witnesses should be weighed against the rights of the accused. The victims and witnesses are not voluntary participants in the criminal justice system and their rights should not be trampled by having their home address and personal telephone number disclosed unnecessarily or to persons who are not part of the legal defense team.

SUMMATION

While pondering the harm caused by incarceration do not forget to consider the harm caused by those who commit crime and the rights of the victims and witnesses to be free from threats, harassment, intimidation, and repeated interviews and hearings that take them away from their jobs and families. The safety and rights of victims and witnesses must be balanced against the rights of the accused.

Ms. JACKSON LEE. Thank you so very much for your testimony and your service.

Now, I yield five minutes to Ms. Rodgers. We offer our deepest concern and sympathy for your loss.

Ms. Rodgers, you are on for five minutes to testify.

STATEMENT OF JUNE RODGERS

Ms. RODGERS. Good morning.

Ms. JACKSON LEE. Good morning.

Ms. RODGERS. I want to say good morning to everyone and all the witnesses and everyone. I want to thank you for the opportunity to address you today as a victim of bail reform.

I live in Millville, New Jersey, and bail reform was implemented in my State on January 1st of 2017. My nightmare began on April of 2017. Jules Black, a convicted felon, was taken into custody once again for gun possession. Because of bail reform, he was released back onto the street.

While in custody, he was given a risk assessment test which asked him questions such as: Can you afford bail? Will you show up for all court appearances? If you were released, do you promise not to commit another crime?

Well, as a result, the algorithm deemed him to be of low risk and safe for release. The presiding judge in the matter was compelled to release him because the laws of bail reform required him to release him by the results of the test.

Four days later, Mr. Black gunned down my son Christian Rodgers in broad daylight. Since then, Mr. Black has accumulated more charges in this case by using his girlfriend to threaten the eyewitness and the lives of her children. So, now she also lives in fear of her life.

These are the types of people who are benefitting from bail reform. Had it not been for bail reform, it is my belief that my son Christian would still be alive today. It is very disturbing that the policymakers are touting the success of cashless bail, but no one is considering the victims and their families in all of this. I cannot express enough the pain and the anguish that my entire family is suffering from losing such a kind and loving person as Christian was. He was well-loved almost by everyone who knew him.

It still pains me deeply whenever his two small sons often ask where he is and when is he coming home. I, myself, still have nightmares about seeing the picture of his lifeless body laying on the ground that someone had posted on Facebook.

I was distraught when I found out that this all happened because of bail reform. I went to my local politicians about this issue, and one of them had the nerve to refer to Christian as being collateral damage. This angered me to no end.

The very people who say they care about poor Black communities are only concerned about this paid political agenda. Politicians are telling us that cash bail is unfair to us poor Black people, but I am here to say that not being able to live in peace is more unfair. We are not safe to walk down the street in the middle of the day.

As I continue my fight for the victims of bail reform, I would like to invite the policymakers to join me in having a further commonsense dialog about bail reform in our local communities, not just

here in our nation's capital, and to please include the people who will be most affected by these laws.

I thank you for inviting me to speak on this issue that means so much to me. I look forward to answering your questions. Thank you.

[The statement of Ms. Rodgers follows:]

UNITED STATES HOUSE OF REPRESENTATIVES

HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

FROM *MIRANDA* TO *GIDEON*: A CALL FOR PRETRIAL REFORM

MARCH 26, 2021

STATEMENT OF

JUNE GROSS-RODGERS

CHAIRWOMAN, VICTIMS RIGHTS REFORM COUNCIL

Good Morning Chairman Jerrold Nadler, Ranking Member Jim Jordan, Chairwoman Sheila Jackson Lee, Ranking Member Andy Biggs, and distinguished Committee members. My name is June Rodgers. Thank you for the opportunity to address you today as a victim of bail reform.

I live in Millville, New Jersey, and bail reform was implemented in my state on January 1st of 2017. My nightmare began in April of 2017. Jules Black, a convicted felon, was taken into custody once again for gun possession, and because of bail reform, he was released back onto the street.

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These are the types of people who are benefitting from bail reform. Had it not been for bail reform, it is my belief that my son Christian would still be alive today. It is very disturbing that the policymakers are touting the success of cashless bail, but no one is considering the victims or their families in all of this. I can not express enough the pain and the anguish that my entire family is suffering from losing such a kind and loving person as Christian was. He was well-loved by almost everyone who knew him. It still pains me deeply whenever his two small sons often ask where he is and when he is coming home. I myself still have nightmares about seeing the picture of his lifeless body lying on the ground that someone had posted on Facebook. I was distraught when I found out that this all happened because of bail reform. I went to my local politicians about this issue, and one of them had the nerve to refer to Christian as being collateral damage. This angered me to no end.

The very people who say they care about poor black communities are only concerned about this paid political agenda. Politicians are telling us that cash bail is unfair to us poor black people, but I'm here to say that not being able to live in peace is more unfair. We are not safe to walk down the street in the middle of the day. As I continue my fight for the victims of bail reform, I would like to invite the policymakers to join me in having a further common sense dialog about bail reform in our local communities, not just here in our nation's capital. And to please include the people who will be most affected by these laws.

Once again, thank you for inviting me to speak on this issue that means so much to me. I look forward to answering your questions.

Ms. JACKSON LEE. Ms. Rodgers, let me personally thank you for being willing to appear before a Committee of the United States Congress in your pain. I want you to know that your testimony has been received. We thank you so very much for committing yourself to be here to provide the information that you have given us.

Thank you again.

Ms. RODGERS. Thank you so much.

Ms. JACKSON LEE. It is now my pleasure to recognize Mr. Cahn for five minutes of his testimony. Mr. Cahn, you are recognized.

STATEMENT OF REUBEN CAMPER CAHN

Mr. CAHN. Thank you, Chair Lee, Chair Jackson Lee, Ranking Member Biggs, and the other Members of the subcommittee. Thank you for the opportunity to speak about these important issues today.

Ms. Rodgers, I want to say my heart goes out to you. I cannot even imagine the pain of losing a child in those circumstances.

I recently returned to private practice after 30 years as a public defender. Now, I represent not only individuals but also corporations, wealthy corporations. I was immediately struck by the truism that a corporation fighting for its money has far more rights to information about the case against it than an accused citizen fighting for his freedom or his life. I want to try and put this in practical terms and consider what it means.

Imagine to start, Chair Lee, Members of Congress, that a campaign manager who has violated finance laws. The prosecutors suspect that you are involved. A Grand Jury subpoenas documents and witnesses, your campaign manager is threatened with charges, but offered a sweetheart deal if he testifies again you.

The Government indicts you, offers probation if you plead guilty, but threatens five years in prison then if you go to trial. In your innocence, what can you do to take apart the case against you and prove your innocence?

Well, you can't depose your accuser, or anyone else for that matter. You can't subpoena third parties for emails or documents that might lead to evidence that proves your innocence. You cannot demand the prosecutors turn over all the evidence they have against you. In many courts, even when prosecutors possess evidence of your actual innocence, they can withhold it unless and until you are actually in trial.

From law school on you are told that a trial is a search for truth. If that is really to be the case, we have to fix the system. There are a few simple fixes.

First, we need to recognize that Brady has failed. In Brady the Supreme Court recognized that no criminal trial or sentencing can be fair if a defendant doesn't get information that could help the defense at trial or sentencing. The court left it to prosecutors to turn over this evidence, and the results are predictable.

Recent examples in New York, Judge Alison Nathan was forced to sanction prosecutors for burying exculpatory evidence. Those were her words.

The Ninth Circuit upheld dismissal of the Cliven Bundy case, calling the prosecutor's repeated failures to disclose exculpatory evidence egregious.

These are two examples. There are others.

Last fall, prompted by the disastrous Ted Stevens prosecution, Congress passed the bipartisan Due Process Protection Act to promote prosecutorial accountability. The Department of Justice has resisted Congress's clear intent, and continues to insist that a prosecutor alone should be able to decide what information gets turned over, arguing that its prosecutors are trained on what to disclose, to err on the side of disclosure, and to pursue justice, not conviction.

Well, I believe that all of this is true, but I know that it doesn't matter in the real world. That is why we still see cases like Ted Stevens and Cliven Bundy. Prosecutors are simply not the right people to decide what evidence the defense sees. If the trial is really going to be a search for the truth and not a sporting contest, both sides must have equal access to evidence.

This means that Criminal Rule 16, the primary procedural device for discovery, should allow discovery of any information likely to lead to admissible evidence. Criminal defendants should be given the same rights as civil defendants.

Second, defendants need to be able to investigate their cases. When Congress passed the subpoena rule, Rule 17, it said the Rule is substantially the same as its civil counterpart which allows parties to seek documents leading to admissible evidence. The judge made limitations to render the Rule almost meaningless.

Again, the revision needed is simple: Criminal Rule 17 should be amended so it mirrors Civil Rule 45, as Congress intended it to do.

Third, trial by surprise has to end. The Jencks Act allows prosecutors to withhold witness statements until after a witness testifies at trial. Statements need to be provided well before trial.

Fourth, allow defendants to depose witnesses. This isn't a radical proposal. The State where I began my practice, Florida, allowed witness depositions, and this was way back in the 1980s. Compelling pretrial testimony is a basic power enjoyed by every civil litigant and by prosecutors. It is absolutely wrong that accused citizens cannot do this.

Making these simple changes will ensure that equal justice under law becomes a reality in this country.

Thank you for the opportunity to address these issues. I look forward to answering your questions.

[The statement of Mr. Cahn follows:]

KA
Keller/Anderle LLP
BUSINESS TRIAL LAWYERS

March 23, 2021

Statement of Reuben Camper Cahn

A corporation fighting for money has far more rights to information than an accused citizen fighting for his life.

Consider this thought experiment. Your campaign manager has violated campaign-finance laws, but prosecutors suspect you're involved. A grand jury subpoenas documents and witnesses. Your campaign manager is threatened with charges but offered a sweetheart deal if she testifies against you. The government indicts you and offers probation if you plead guilty but threatens 5 years imprisonment if you go to trial.

You're innocent. What can you do to take apart the case against you. You cannot depose your accuser, or anyone else for that matter. You cannot subpoena third-parties for emails or documents that might lead to evidence that proves you innocent. You cannot demand that prosecutors turn over all evidence they have. And in many courts, even when prosecutors possess evidence of your actual innocence, they can withhold it—unless and until you go to trial.

We're told that a trial is a search for truth. If we want that to be true, we have to fix this.

First, we must recognize that Brady has failed. In Brady, the Supreme Court recognized that no criminal trial or sentencing can be fair if a defendant doesn't get information that could help the defense at trial or sentencing. But the Court left it to prosecutors to turn over this evidence. The results are predictable. Recent examples: In New York, Judge Alison Nathan was forced to sanction prosecutors for "burying" exculpatory evidence.[1] The Ninth Circuit upheld dismissal of the Cliven-Bundy case, calling the prosecutors' repeated failures to disclose exculpatory evidence "egregious."[2] These are two examples; there are others.[3]

Last fall, prompted by the disastrous Ted-Stevens prosecution, Congress passed the bipartisan Due Process Protection Act to promote prosecutorial accountability.[4] But the Department of Justice has resisted Congress' clear intent. It insists that a prosecutor, alone, should be able to decide what information gets turned over because its prosecutors are trained on what to disclose, to err on the side of disclosure, and to pursue justice, not conviction.

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[1] *U.S. v. Nejad*, __F. Supp.3d__, 2020 WL 5549931 (S.D.N.Y. Sep. 16, 2020).

[2] *U.S. v. Bundy*, 968 F.3d 1019 (9th Cir. 2020).

[3] *See, e.g., U.S. v. Obagi*, 965 F.3d 993 (9th Cir. 2020) (finding a *Brady* violation where prosecutors in the Central District of California failed to disclose an immunity agreement with a witness while telling the jury in closing the witness "had no agreement" and should therefore be believed).

[4] *See* Pub. Law 116-182 (October 21, 2020).

This is true, and it doesn't matter. That's why we still see cases like Ted Stevens and Cliven Bundy. Prosecutors are not the right people to decide what evidence the defense sees. If the trial is really going to be a search for the truth and not a sporting contest, both sides must have equal access to evidence. That means Criminal Rule 16 should allow discovery of any information likely to lead to admissible evidence. Criminal defendants must have the same rights as civil defendants.

Second, let defendants investigate their cases. When Congress passed the subpoena rule, Rule 17, it said the rule is "substantially the same" as its civil counterpart, which allows parties to seek documents leading to admissible evidence.[5] But judge-made limitations have rendered the rule almost meaningless. Again, the revision needed is simple: criminal Rule 17 should be amended so it mirrors civil Rule 45[6]—as Congress intended.

Third, stop trial by surprise. The Jencks Act allows prosecutors to withhold witness statements until after the witness testifies at trial.[7] Statements should be provided well before trial.

Fourth, allow defendants to depose witnesses. Multiple states have done it for decades without problem.[8] Compelling pretrial testimony is a basic power enjoyed by every civil litigant and by prosecutors. It is wrong that accused citizens cannot.

These changes will help ensure equal justice under law.

Reuben Camper Cahn
Partner

[5] *See* Fed. R. Crim. P. 17, 1944 Adv. Comm. Notes ("This rule is substantially the same as rule 45(a) of the Federal Rules of Civil Procedure.").

[6] Fed. R. Civ. P. 45 is generally considered a pretrial discovery tool for use with non-parties. *Roberts v. Cty. of Riverside*, 2020 WL 5913852, at *2 (C.D. Cal. July 14, 2020) ("[Rule 45] provides the exclusive method of discovery on non-parties" and noting that the "general scope of discovery for parties and non-parties is the same"). Civil Rule 45 is widely understood to allow broader discovery than Criminal Rule 17, which is strictly limited.

[7] *See* 18 U.S.C. §3500(a) (2021).

[8] *See, e.g.*, Iowa R. Crim. P. 2.13 (allowing a defendant in a criminal case to depose all witnesses listed by the state); Florida R. Crim. P. 3.220 (same).

Ms. JACKSON LEE. Thank you so very much for your testimony as well, Mr. Cahn.

Let me, as I begin, indicate again how crucial the role of each of you witnesses are in the order of justice, to provide us with the information that we are, in fact, needing to be able to address a myriad of issues, and particularly dealing with the question of justice, but also the question of freedom and the question of response to those victims, or families of victims as well, in this criminal justice system.

Let me pause for a moment and determine whether Mr. Jordan has joined the hearing.

Has Mr. Jordan joined? Mr. Biggs, has Mr. Jordan joined?

Mr. BIGGS. Madam Chair, I have reached out to him. He was on and I think he had to leave. So, I don't think he has come back on. I am sorry. I am sorry about that. Thank you.

Ms. JACKSON LEE. Not at all. We wanted to extend him a courtesy. Thank you, sir.

Please, let him know that we wanted to make sure we extended to him a courtesy of his statement.

Mr. BIGGS. Madam Chair, I will.

Ms. JACKSON LEE. Thank you so very much.

We will now proceed under the five-minute Rule with questions. I will begin by recognizing myself for five minutes. We will then work accordingly with our Members for this important hearing. Thank you so very much.

Mr. Scheck, according to the September 2020 report from the National Registry of Exonerations, of the nearly 3,000 documented cases since 1989 of people exonerated of crimes they did not commit, 44 percent involved government concealing of exculpatory evidence. What reforms would you propose to reduce the risk of wrongful convictions and ensure due process of people accused of federal crimes?

Can you unmute?

Mr. SCHECK. Very simple. Open file discovery on the model of the Michael Morton Act in Texas. That is a really good statute. It also relies on pre-plea discovery. Everybody knows exactly what has not been disclosed, and the prosecutor's obligation should be carefully defined, is to turn over all information that tends to negate guilt or mitigate the offense.

Let me say I subscribe to every one of the recommendations that Mr. Cahn put forward. They are critical if we can get them done. Depositions, like in Florida and lots of other states, that is crucial.

The ability to issue subpoenas. No more trial by surprise. Everything that he put forward I subscribe to and adopt.

Ms. JACKSON LEE. Thank you very much.

You also mentioned the whole idea of one in five pleading their case, and pleading a false confession. Do you have a solution to that?

Mr. SCHECK. Well, the things that lead to it I think, number one, of course, if you don't have discovery you wind up pleading. The cash bail situation there is no question puts pressure on people when they see there is no way for them to go, particularly, in misdemeanor cases.

The trial penalty is crucial. We have to look at those mandatory minimums.

I know that lots of our friends in the Cato Foundation, lots of different people recognize this problem. It is logical for so many people when charged with these mandatory minimums to plead guilty to crimes they didn't commit. So, I think that the bail situation, the mandatory minimums, trial penalty, those are all crucial reforms.

Ms. JACKSON LEE. Thank you very much.

Mr. Graves, your legal case was full of injustices up to the very end. Step after step the prosecutor and investigators used unreliable information to put you on trial. The prosecutor in your case withheld exculpatory evidence from your counsel. The injustices started at the pretrial stage of the process.

Immediately following your arrest, what were the first unjust acts of justices that led to your imprisonment? How should we prevent such injustices from happening to others in the future, Mr. Graves?

Mr. GRAVES. Yes, ma'am.

Ms. JACKSON LEE. Yes. Thank you.

Mr. GRAVES. Thank you for that question.

Transparency, there was a lack of transparency at the initial stage. When I was arrested, and didn't know why I was being arrested, I asked the question. They wouldn't tell me. They took me to the police station. I am cooperating 110 percent.

I am asking officers because I am sitting there, could somebody tell me why I am here? Nobody would talk to me.

Then, finally, they came in, read me my rights. If we would have had access to the intake video everyone would have seen Anthony Graves knew absolutely nothing about this case. That video never showed up until I was released.

Also, they interrogated me for over 12 hours. At one point the White officers asked if they would just walk out of the room and leave me with the Black officers. Right? I am, like, I don't care. You don't have to leave because I don't have nothing to hide.

Well, the Black officer asked me if he could record the conversation. I told him, sure, yeah. I don't care.

We never heard that tape that we recorded. Why? Because I was telling him that I was innocent. That never came about.

Lack of transparency is leading to wrongful convictions at the stage, at the pretrial stage.

One thing I will say, is that when someone is in the custody of law enforcement, I don't think law enforcement should be able to talk to him without his attorney. Because that guy who is innocent, all he wants to do is tell the truth. He doesn't care about you telling him what you would be able to use against him, because he is telling the truth, not understanding that they are going to pick apart everything he said and try to use it against him. Because he is bungling at that stage.

That was me. I just wanted to tell the truth. They picked apart what I was telling them and tried to make it seem that I was lying.

Lack of transparency is leading to wrongful convictions. That is what I would say.

Ms. JACKSON LEE. Thank you so very much for that powerful testimony.

My time has expired. I will seek another time to continue my questioning. At this time, I want to be able to yield to Ms. Bass. Is Ms. Bass?

Ms. Bass?

Ms. BASS. Ms. Bass is here.

Ms. JACKSON LEE. Wonderful.

Ms. BASS. I would yield to you. You can take my time, and if I need some I will come back.

Ms. JACKSON LEE. Well, thank you. Are you sure, Ms. Bass, in relation to the five minutes? I will take a portion of it up. Do you want to go ahead at this time?

Ms. BASS. No. You continue and I will take your last two minutes.

Ms. JACKSON LEE. You are very kind.

Let me just continue with Ms. Camara. Ms. Bass has yielded to me, Members, so I am not on extended time. I thank her for her courtesy.

Prosecutorial discretion over what charges are filed and what charges are brought in the pre-negotiation for each case means that prosecutors hold an immense power, amount of power in determining whose lives are defined by involvement in the criminal legal system and who can return to normal life.

Can you just explain how an accused person's race affects charging decisions? Ms. Frazier Camara.

Ms. FRAZIER CAMARA. Yes, Chairwoman Jackson Lee.

In the federal system, African Americans are two times more likely to be charged with mandatory minimums compared to Whites. In the State system we see the use of habitual offender laws to result in a lot of racial disparity.

As a former public defender, the reality is that we see every day in the courtroom that the charging decisions are influenced by implicit and explicit bias.

Ms. JACKSON LEE. Thank you.

I am going to pause with a little bit of technical mishap here, and ask Ms. Bass to pause on the time, and ask staff to take note of the time remaining so that the clock can be cleared. We have three minutes remaining.

We are going to turn to Mr. Biggs at this time.

Mr. Biggs?

Mr. BIGGS. Yes, Madam Chair.

Ms. JACKSON LEE. You are not forgotten. You are recognized for five minutes. We are paused. Thank you.

Mr. BIGGS. Thank you. I appreciate that, Madam Chair.

Ms. JACKSON LEE. Recognized for five minutes.

Mr. BIGGS. Thank you. I appreciate the testimony of Mr. Graves was very powerful, as well as Ms. Rodgers.

Several states, including California, Maryland, New Jersey, and New York have modified their—

Ms. JACKSON LEE. Mr. Biggs, if you suspend. The clock needs to be on five minutes for Mr. Biggs, please, back to five minutes.

All right, Mr. Biggs, continue. Your clock should start at five minutes.

Mr. BIGGS. Great. Thank you.

Several states, including California, Maryland, New Jersey, and New York have modified their bail practices to eliminate or de-emphasize the use of monetary bail systems. Many of these reforms have resulted in increases in property and violent crime.

As I mentioned in my opening statement, one New Jersey assemblyman referred to it as an "absolute disaster," and further stated that "the public safety needs of citizens in New Jersey have suffered far greater than could have been imagined."

Ms. Rodgers, your testimony was compelling. Your story was truly moving. I am very, very sorry to hear about the loss of your son Christian to a convicted felon who was released on bail. I can't imagine your pain and I appreciate you being willing to share your story today and your efforts in your community to make policy changes.

I understand you are the New Jersey Chair for the Victims Rights Reform Council, which is a non-profit organization. In that role, you are a voice for crime victims, and you wish to raise awareness. Could you please elaborate why you oppose bail reform as implemented in the State of New Jersey and elsewhere?

Ms. RODGERS. Okay. It is because I think that when releasing these people back onto the streets with no bail, no supervision whatsoever, they are not considering the victims.

We have here in New Jersey about 500 Members in our organization. A lot of their stories are pretty much the same. The guy or the perpetrator is released with no supervision just because the computer system says that they are not a threat. Then they will come right back out and commit more offenses, and a lot of them are deadly.

So, now we have people not wanting to speak up or even report the crime because as soon as the person gets arrested they are right back out. We have to look at these people because they are coming right back into the same neighborhood. We are absolutely terrified. It is not right.

Something should really be done about this. When we had the old cash system at least we could call whoever is holding their bond and say, hey, this guy is riding around with firearms and shooting up our convenience stores, or whatever. Someone would go and pick them up. It would not cost us anything.

I work very, very hard. I know that my taxes are going to fund this cashless system with the ankle monitors and what have you. It is a mess. You will have to excuse me because, I get a little emotional every time I start talking about this. It is a shame.

Then, it is like no one is listening to the victims. No one is taking this into consideration that we are the ones that are living this nightmare. It is just unbearable.

Mr. BIGGS. Thank you, Ms. Rodgers, for sharing that and explaining the situation regarding the release of the person who murdered your son. I appreciate you, again, being here.

Ms. Hanisee, some witnesses have offered suggestions for reforms. Of those reforms, are there some that you would support and then are there some that would have negative ramifications in investigation or prosecuting of defendants?

I am thinking of the open discovery that Mr. Scheck mentioned, as well as Mr. Cahn's pretrial witness deposition mandate. So, what do you think there, Ms. Hanisee?

Ms. HANISEE. Yeah, there are some that I agree with and some that I don't. I want to say up front, I don't believe that Brady has failed. Citing a handful of cases where it didn't work is like saying seatbelts don't work because some people wearing them died in car crashes anyway.

That said, the federal rules of discovery require far less disclosure than California rules. We do not have a Jencks Act. There is no specific Rule in California, and I wouldn't condone implementing such a Rule in California. All discovery is provided prior to trial. We don't withhold discovery pending plea.

However, I don't think that open discovery is workable. There is too much information that really involves a lot of personal information about victims and witnesses that has to be closely guarded, and internal systems like rap sheets that has basically everything an individual would need to commit widespread identity theft, or use the information to identify, threaten, harass, and injure victims and witnesses.

I also really do not believe at all that victims should be compelled to submit to depositions as in civil cases depositions are used to harass and intimidate witnesses. Compelling them to submit to repeated interviews against their will is a violation of their rights and disturbs their peace of mind, especially for child witnesses and witnesses of crimes like sexual assault and abuse. Repeated interviews for these victims just increase the psychological damage that they are subject to.

This is where the rights and the needs of the victims and witnesses really need to be balanced against misuse.

Mr. BIGGS. Thank you. I yield back, Madam Chair.

Ms. JACKSON LEE. Thank you so very much, Mr. Biggs.

Now, I am going to yield to Ms. Bass. Are you ready, Ms. Bass? You have three minutes remaining on the clock.

Ms. BASS. Yes, thank you. I will just ask one quick question.

I wanted to understand the impact of this system on juveniles, the young people that are involved in the juvenile justice system. Any of the witnesses, please.

Ms. FRAZIER CAMARA. Representative Bass, I am happy to answer. When we look at the juvenile justice system, we see disproportionate minority representation in pretrial phases. Specifically, you see 62 percent of children who are held pretrial in juvenile adjudications are children of color.

So, similar to the adult system, despite a lot of reforms that have taken place within the juvenile system, we still see glaring disparities around what children are held in detention facilities.

Ms. BASS. Yes. Given the disparities, I would certainly like to know what kind of reform some of the other witnesses feel should take place.

I know California is quoted a lot. Of course, I would disagree that everything is in disarray in California or the reforms are not working. Even before the reforms passed there was moves to repeal them. So, and some reforms weren't even given an opportunity to be implemented.

I do think in California what we should have done is we could have built out the prevention side before we actually did some of the reforms.

Anyway, maybe one of the other witnesses could explain, especially the woman representing the D.A.s could explain what type of reforms are needed, given the extreme disparity.

Ms. HANISEE. Well, one type of reform I would like to see specifically to the juvenile system is just more funding, more funding for the juvenile justice system, and more funding for those facilities where juveniles are, unfortunately, incarcerated. When we are talking about juveniles, sometimes we are talking about people who are 17 years old and 6′1″.

We had an unfortunate incident recently where a, I believe it was a social worker in one of our juvenile facilities was beaten to death by a number of the individuals being held there. Some of them were juveniles and they have now killed this man who was a social worker.

Ms. BASS. Excuse me. Let me reclaim my time. Yes, I am actually aware of the case that happened in Los Angeles. The vast many juveniles that are in the system, you can quote an extreme case.

In California we have moved to shut down juvenile prisons, period, and to transfer it over to Health and Human Services. Given the science that we know now about brain development and the responsibility of juveniles, clearly different things need to be done instead of what is the current system.

Ms. HANISEE. Well, as I say, encourage further and more extensive funding of the juvenile system. If you have ever been to the Eastlake Juvenile Facility, it is terrible. It is terrible. So, put more money into research and preventing these individuals from entering the system, and more resources in rehabilitating them once they are in.

Ms. BASS. I will yield back my time in a minute.

That doesn't speak to the type of reforms that need to be done. I agree there needs to be more funding.

I yield back to you, Madam Chair. Madam Chair?

Ms. JACKSON LEE. Yes. Thank you so very much for yielding back, very much. You have asked a very important question.

I don't know if I can get one in in the next one minute, but I will quickly try to do so with Mr. Camper Cahn before I yield over.

Mr. Camper Cahn, what are the most pressing problems involving law enforcement's use of informants in federal cases? How can we best address them?

I basically have 53 seconds. We will come back to you, but are you able to respond, Mr. Cahn?

Mr. CAHN. Yes. I am sorry. I need to remember to unmute.

Thank you for your question. So, I think that I should begin by noting that no one should be particularly surprised that informant testimony is at the heart of some of the most egregious failures in our system. If I responded to your question by proposing that the way to address the problem is really to level the playing field and allow defendants to pay for testimony and for the results of testimony we would all think it absurd because we would all under-

stand that it is not the way to produce a reliable system that we can trust.

If we are going to use informants in the system, if they are going to continue to be a part of the system, we are going to pay people for their testimony through freedom or in other goods, then there are two practical solutions that I could suggest to reduce the risk of wrongful conviction and to increase fairness.

The first of these is to mandate recording of all interaction between informants and law enforcement from minute one, and to turn that over to the defense. The reason is this way juries can understand exactly what implicit promises and assurances are given to informants, not merely the explicit promises.

The other thing is that juries can see the small and subtle way that informants shape their testimony to fit prosecutors' narratives. In the cases in which—

Ms. JACKSON LEE. Mr. Cahn, my time has expired.

Mr. CAHN. Sorry to go over.

Ms. JACKSON LEE. We will let you finish that at another opportunity if we are able to take a second round. Thank you so very much.

Let me yield now to Ms. Spartz for five minutes.

Ms. SPARTZ. Thank you, Madam Chair. I appreciate this informing conversation. I have to tell you, I agree that alternatives as the ineffective pretrial services could be beneficial to both the problems that are mentioned.

Ms. JACKSON LEE. Are we able to hear Ms. Spartz? Ms. Spartz?

Mr. CICILLINE. I think she is frozen, Madam Chair, and nobody can hear her.

Ms. JACKSON LEE. Then, do you know, Mr. Biggs.

Mr. BIGGS. Madam Chair, I am trying to reach out to her, but she looks to be frozen. So, if you could go to our next, next questioner on our side, that would be great. Thank you.

Ms. JACKSON LEE. All right, I will do so. Do you have the list of the next individual, Mr. Biggs? Is she back?

Mr. BIGGS. I have the list. The next one would be Representative Chabot from Ohio.

Ms. JACKSON LEE. The clock will go back to five.

Mr. Chabot, you are recognized for five minutes.

Mr. Biggs, you work with Ms. Spartz.

Mr. BIGGS. I will, Madam Chair.

Ms. JACKSON LEE. Mr. Chabot, you are recognized for five minutes. Thank you, Members, for bearing with us.

Mr. Chabot? Can you unmute, Mr. Chabot? Is he present?

Mr. CICILLINE. I am not sure he is still with us, Madam Chair.

Ms. JACKSON LEE. All right. Mr. Biggs, do you have another person?

Mr. BIGGS. Yes, Madam Chair. I have next Mr. Tiffany.

Ms. JACKSON LEE. Mr. Tiffany. Mr. Tiffany, you are recognized for five minutes. Unmute.

Mr. BIGGS. Is he still there?

Ms. JACKSON LEE. It is on you, Mr. Biggs.

Mr. BIGGS. Madam Chair, it looks like Mr. Massie. I am pretty certain he was, he was there just a second ago, so let's try that.

Ms. JACKSON LEE. Mr. Massie, I am prepared to recognize you for five minutes.

I don't see Ms. Spartz back.

Mr. Biggs, you are on again.

Mr. BIGGS. Then, I will go to Mr. Owens, Madam Chair, Mr. Owens whom I see.

Ms. JACKSON LEE. Mr. Owens, can you unmute?

Mr. OWENS. Yes, thank you so much. I just want to take a couple minutes.

Ms. JACKSON LEE. You are recognized for five minutes.

Mr. OWENS. Can you hear me okay? Am I coming through? Am I coming through, okay?

Ms. JACKSON LEE. Yes. You are recognized for five minutes.

Mr. OWENS. Okay. Mr. Biggs, if there is anybody who wants to take over my last, I just want to have a couple comments I just wanted to say here.

Earlier we were talking about the juvenile system. I think it is very important that we recognize that this has nothing to do with the color of a person's skin. It is policies, it is around these young people that have put them in a position where they have really no hope.

I am speaking from an environment which I grew up in at a time we had 70 percent of Black men committed to their marriage and children. We now have flipped that over upside-down based on policies. We now have in the State of California, 2017, a DOJ, a DOE study, 35 percent of Black boys in the State of California in 2017 cannot pass standard reading and writing tests.

So, what we have, you wonder why there is such a disproportionate number of Black men, boys and men, is because we are not giving them opportunity to work, to get instructed, to be educated. To tie this into just the color of their skin is not correct. We need to make sure we are tying it to the policies that has put these Black families in the place that they are in right now.

Also, making sure that those families are still trying to find safety and their communities are safe. In the beginning of the day we have bad people being released into a community of good people, bad people will end up causing havoc and terrorists and fear. We just cannot allow that to happen.

So, let's make sure as we go through this process of reform that we look at the beginning, the genesis of this. It goes back to the family unit has been turned upside-down over the last 50 or 60 years by policies purposely put in place to make sure that our young people do not have hope in our country, do not believe in themselves. They are angry and they will go out, therefore, and do things that is not going to give them the opportunity to have the American experience, the American dream.

Just wanted to make that real quick point because of my experience, again, of starting a program here in Utah, Second Chance for Youth. I am the founder. So, I have been working with the juvenile system for the last three or four years. It has been a dream of mine for decades. My dad and I talked about how we can get our young people believing in our country again. It comes down to policies, my friends. So, let's make sure we change those policies to give our kids hope that they can succeed and move forward.

I yield back.

Ms. JACKSON LEE. The gentleman has yielded back.

I now recognize Ms. Demings for five minutes.

Ms. DEMINGS. Good afternoon, everybody. I want to thank the chair and the Ranking Member for this hearing, "From Miranda to Gideon." I am quite familiar with both.

I truly believe that the level of representation a person is able to receive, or how long a person sits in jail waiting to go before a judge, should not be determined by a person's ability to pay. Everyone knows I spent 27 years in law enforcement. During that time, I served in every rank, including the rank of chief of police.

I served as a detective and as a detective sergeant. I took my oath to the Constitution. I say that with perfect peace. I took my oath to the Constitution very seriously. I do believe that in any state, anyone who was treated unfairly, inhumanely, or trapped into making a false statement deserves justice.

I am glad we are advocating on their behalf. Mr. Graves, I cannot imagine serving 18 years on death row as an innocent person. Hear me clearly: That is shameful.

Ms. Rodgers, my heart goes out to you and your family for your loss.

Today, Madam Chair, I chose to advocate on behalf of victims of crime. As we well know, victims come in all ages, genders, cultures, and races. Too many of the victims during my experience as law enforcement, let me make this clear, look just like me.

It appears we seldom remember the victims, their faces, their stories, their voices, and their rights these days. The victims in Georgia and Colorado have a right to live, and so many other sons and daughters who have been gunned down in a country that we say is the greatest country in the world.

Let's remember the victims who have been raped, robbed, and assaulted, victims of economic crimes and had their life savings stolen from them. People who have been victims of hate crimes—that is a familiar one these days—because of who they are or who they love.

Today, Madam Chair, I choose to use my very limited time advocating for the victims of crime. I will continue to use my time, my talent, and my energy to advocate for justice, which does include justice for the victims.

With that, Madam Chair, I yield back.

Ms. JACKSON LEE. I thank the gentlelady for her eloquence, and she is well positioned on this Committee to find the kind of balance and respect for those unjustly accused and convicted, and as well as she so eloquently said, those who are victims. Because isn't it interesting, those individuals seem to fall heavily in communities of color, and particularly, African-Americans? So, thank you for your testimony/statement today, as a member. Thank you so very much. I appreciate it.

It is now my desire, Mr. Biggs, to call upon a member. Is Ms. Spartz ready?

Ms. SPARTZ. Thank you, Madam Chair.

Mr. BIGGS. Here she is. Thanks.

Ms. JACKSON LEE. Yes, Ms. Spartz, you are recognized for 5 minutes. Thank you.

Ms. SPARTZ. Okay. Thank you very much.

I appreciate this hearing today. In fact, for trial services for lower-risk crimes, low-risk offenders, it could be very beneficial. Actually, I talked to Stephanie Ruggles. She is Director of Pretrial Services in Hamilton County, Indiana, in my district. They really have a gold-standard system with involvement of stakeholders, and then, other wraparound services, job placement, housing placement, and with safety rates—87 percent of the people don't come back into the criminal justice system.

It is important to have an effective mechanism. When I discussed with her what are really some of the things that made the system successful additional to all of the involvement of a variety of stakeholders, she mentioned, also, very effective a pretrial risk assessment tool which was validated with researchers.

So, my question is for Ms. Hanisee. What other things have you seen in the system that have been working effectively to make sure that we have the right mechanisms/tools to rehabilitate people that have a right framework and things that may be a factor; make sure that we give people second chances, but also have a proper system that addresses really harsh crimes? So, what things could you suggest?

Ms. HANISEE. Well, I would suggest putting far more resources and far more study into rehabilitation before releasing individuals early, particularly violent, and serious offenders, to make sure they are rehabilitated before you start releasing them early. Unfortunately, the California Department of Corrections and Rehabilitation and the Los Angeles County Probation Department have a woefully poor rate of rehabilitating individuals. I just don't think they put the same resources into that. It is a government agency; they have limited resources, as do all government agencies, including my office.

There are groups in Los Angeles who have been successful at very rehabilitation, including rehabilitation of violent offenders. One, in particular, is the Anti-Recidivism Coalition in Los Angeles, but it is a resource-intensive program. That said, they have very low recidivism rates for their offenders. They have what they all credible messengers who enter the prisons and start working with individuals in prison while they are still incarcerated. They have had very successful rates. As I said, it is a labor- and resource-intensive process, and they are also really strict with their people they are supervising. They will violent someone or refer them to the court for violation for really very minor infractions, and they are strict. I think that the level of accountability, combined with the credible messenger aspect, is what has made them really successful.

Ms. SPARTZ. Okay. Thank you. I yield back, Madam Chair.

Ms. JACKSON LEE. Thank you so very much, Ms. Spartz, for your participation.

I am now delighted to yield 5 minutes to the gentlelady from Georgia, Ms. McBath.

Ms. MCBATH. Thank you so much, Madam Chair.

First and foremost, I just want to say thank you. For everyone that is here today, thank you for expertise and thank you for sharing your stories with us as to how we are going to be able to really

promote public safety while also making sure that our courts are seeking true justice.

I especially want to thank those of you that are here today to share your personal stories. Mr. Graves, I am so sorry for your incarceration, your unjust incarceration, and I am so happy that you are free here today to be able to testify before us.

Of course, Ms. Rodgers, I am so, so sorry for your loss, and I can honestly say that with full empathy to my core because I know the pain of losing a son to senseless gun violence, and there are just absolutely no words that can bring back your son, Christian, just as there are none that can bring back my son, Jordan. I know that, as mothers, all we can do is just completely speak our truth and share our stories. So, I thank you for being here today to tell us about your son.

I think it is critical that we always continue to hear from victims and survivors of gun violence and listen to their needs.

Last week, we were able to pass a bipartisan bill to support services for victims of crimes and their families. I know how important that funding is, so that so many of our communities and families can try to heal again. We can never bring back a loved one, but I hope that our bipartisan bill to fix the Victims of Crime Act funding will give meaningful support to those who really, really need it.

Mr. Graves, I will start with you. Your testimony speaks to the potentially enormous human toll that can come from wrongful detentions. We know that pretrial detention can absolutely be deadly, and unfortunately, according to the Bureau of Justice Statistics, suicide continues to be the leading cause of death in jails, where many people are held for pretrial detention.

Mr. Graves, during your pretrial detention, do you ever recall if you had any access to mental health services?

Mr. GRAVES. Thank you so much for asking me that question. No, I don't recall. I never had access to any mental health treatment.

Ms. MCBATH. I am sorry to hear that. Yes, I am sorry.

Mr. GRAVES. Yes, I was in jail for two and a half years before trial.

I just want to—bail reform is hard—I just want to address something I heard earlier. Bail reform is hard, and my heart goes out to Ms. Rodgers and you for losing your child. I sat in jail for two and a half years with no bond, and I was absolutely innocent; wasn't even in the same town that the crime happened in; had an alibi, witnesses who knew I was home. I was with my family. I sat in jail two and half years with no bond. So, I understand that. Are we going to be a Nation of laws or what? Because we are supposed to be presumed innocent until guilty.

So, are we going to be a Nation of laws? If we are, then we have to actually let people out that hasn't been convicted. Are we going to massage that law, and we are going to decide based on our emotions whether this person should stay in jail or not because he done something to me? Our system cannot be based around someone's personal experience, but it has to be what is best for us and the society. I am saying, if I am innocent until proven guilty, why am I still in jail for two and a half years for something I didn't do?

Ms. MCBATH. Thank you.

Mr. GRAVES. So, it is very hard.

Ms. MCBATH. Well, thank you so much for that, Mr. Graves. Once again, we are so, so sorry for the injustices that you have suffered.

I like to move on. Ms. Dharia, your testimony noted that, among those listed in the National Registry of Exonerations, 70 percent of those with a mental illness or intellectual disability made a false confession. What can we do to enable public defenders and mental health professionals to identify those with mental illness and prevent false confessions?

Ms. DHARIA. Thank you and thank you for the question.

I want to sort of echo condolences to those who have shared their personal experiences as well and offer some thoughts about how we can identify precisely the kinds of things that you have mentioned. The vulnerabilities of people that are impacted by the system, right, are broad. They span youth in terms of age of people who are impacted, mental health issues, intellectual disability, sophistication in terms of understanding the legal system and how it works. There are a number of pieces there in which people can be further victimized and harmed by the process, in which we need to take safeguards to ensure they are not.

With respect to false confessions, in particular, there are scores of reports and studies and pieces of evidence that support a number of reforms that can minimize the number of false confessions. I have named some of them earlier, as have Mr. Scheck and others. First and foremost, access to counsel, and meaningful access to counsel. Counsel should be made available at the time of arrest and made available at police stations. Currently, our system allows for the invocation of the right to counsel, but that doesn't actually mean that counsel should—

Ms. JACKSON LEE. Ms. Dharia, wrap up your answer.

Ms. DHARIA. Okay.

Ms. JACKSON LEE. If you could summarize your answer, please?

Ms. DHARIA. Sure. So, access to counsel, eliminating the ability of police and law enforcement to lie, which is currently fairly unfettered, and ensuring that there are time limits on detentions as well. So, those are all measures that could be taken immediately to address the likelihood and prevalence of false confessions.

Ms. JACKSON LEE. Thank you.

Ms. MCBATH. Thank you so much for your answers.

I yield back.

Ms. JACKSON LEE. I thank the gentlewoman for her important questions as well. Thank you.

Let me now yield 5 minutes to Mr. Fitzgerald. Mr. Fitzgerald, you are recognized for 5 minutes. Can you unmute, please?

Mr. FITZGERALD. There we go, sorry about that, Madam Chair.

Ms. JACKSON LEE. That is okay.

Mr. FITZGERALD. We don't have private bail bonds in Wisconsin. We don't have it. We haven't had it since 1979, and I think there are three other states. If I am correct, I think Oregon is one of them. I think Kentucky. Mr. Massie might want to talk about how they do it in Kentucky. I don't think they are all the same. I know this is a very broad hearing we are looking at, but there are very

specific things I think that the states are doing that could be applied. It is worth examining.

The one thing I just wanted to go back to—I think that Ms. Hanisee had touched on this, but it might be lost, and that is that, under federal rules on criminal procedure, the Supreme Court precedent ensured that defendants, obviously, get a fair trial under due process with the Fifth and Fourteenth Amendments. I think what is lost sometimes is, can you walk us through kind of why pretrial detention is really more based on the risk of harm to the public and to the victim, and then, flight risk as well? I mean, this isn't about the individual's prior record or convictions. It is about a snapshot right there in front of the bench on whether the person is a flight risk. I am wondering if you could just address that.

Ms. HANISEE. Yes. Prior to some recent changes, bail was based upon the crime charge, and it was presumed to be an accurate charge. It is, in a sense, based on the person's history, not so much criminal history, but if they have had prior failures to appear, which are recorded on rap sheets. If they have had a failure to appear in court, or willful failure, that information will be in their probation reports or with their rap sheets. That is a legitimate consideration for the court. If they have previously been ordered to appear by a court and willfully failed to do so, that is a significant consideration, but, also, the crime charged, and the nature of the crime charged. Clearly, it is a risk to the public and a risk to the victims to allow individuals who have committed violent offenses to be released into the public, particularly in those crimes that target known individuals. I am talking about domestic violence, child abuse, child molestation, rapes, and those types of offenses where the perpetrator is fixated on an individual.

I will also mention stalking. We have a lot of celebrities here in California and we have some people who, unfortunately—and probably due to some mental health issues—do stalk celebrities here, and it can be quite frightening and dangerous. The fact that someone suffers from mental health issue doesn't mean that they cannot also perpetrate a violent crime.

So, those are the kinds of offenses and the types of circumstances that the judges should be able to evaluate and look at in determining whether a person is appropriate for pretrial release.

In comparison, for misdemeanor offenses and nonviolent offenses, the detention levels are very low and minimal because they are not an immediate risk to the public and to public safety.

Mr. FITZGERALD. Very good. Thank you, Madam Chair. I just wanted to touch on that point and appreciate the time and the hearing this morning. I yield back.

Ms. JACKSON LEE. We thank the gentleman for his time, and we thank the gentleman for yielding back.

It is my pleasure now to yield 5 minutes to the gentlewoman from Pennsylvania, Ms. Scanlon. Ms. Scanlon, you are recognized for 5 minutes.

Ms. SCANLON. Thank you. Thank you very much, Madam Chair.

Thank you all for being here.

As we are talking about these important issues, of course, we each bring our individual experiences to the conversation. I am particularly concerned about how pretrial practices impact juve-

niles in our criminal justice system, and particularly, how insufficient access to counsel and manipulative investigatory techniques can lead juvenile defendants to confess to and accept plea bargains for crimes they didn't commit.

Before I came to Congress, I often worked at the intersection of child advocacy and the school-to-prison pipeline, including participating in the defense of some children who were caught up in what became known as the "kids-for-cash" scandal in Pennsylvania. For those who don't know about it, between 2003 and 2008, hundreds of Pennsylvania teens were sentenced to for-profit detention centers in which the sentencing judges had a financial interest, often after they had been pressured to waive their right to counsel or confess to crimes that they didn't commit.

Since coming to Congress, just in the last two years, I have seen two juvenile detention centers in my district close after widespread abuse of the children who had been housed there. In some of the most heartbreaking cases, it appears that juveniles who were sent to the detention centers for allegedly having committed misdemeanors were, then, beaten by guards, and when they tried to fight back, they ended up charged with aggravated assault felonies and sent to adult prison.

So, the Supreme Court has long held that juveniles lack the maturity and mental acuity to be treated as adults in our justice system—underdeveloped sense of responsibility; they can be impetuous. Basically, their prefrontal cortex has not completely developed. So, that is the angle that I am interested in with your testimony.

Ms. Dharia, you testified about the human cost of removing people from their homes and families. Can you speak to the impact of the human cost on juveniles of removing them with pretrial detention?

Ms. DHARIA. Absolutely. Thank you for the question. The human cost of removing anyone from their communities is tremendous, and we shouldn't underestimate it in any of these conversations. Juveniles, of course, have their lives ahead of them. The earlier that we start exposing them to the trauma and harm of the pretrial detention system or the carceral system at all, the more we are setting people up to continue the cycle of harm. It is a cycle, right? We respond to harm and trauma with additional harm and trauma, and none of it adds up to healing or to safety or to health.

So, acknowledging that early, when children should be in school, when children should be supported by their communities, and at home with their families, and learning to socially develop—and rather than providing all of those things and investing in that, we are exposing them to violence, to harm, to coercion, and to trauma.

I think an important piece of this as it relates to, as you mentioned, in particular, confessions and coercion by law enforcement, and this is true for adults as well—that the people at this stage of proceedings are presumed innocent, and that the law enforcement approach currently presumes guilt, right? A lot of these coercive tactics, a lot of these attempts to extract confessions and to lie to get certain responses, presume guilt, and that is not what our law demands and it is not what law enforcement should be engaging in. So, that is an important precursor to addressing the further harm of pretrial detention.

Ms. SCANLON. Thank you.

I would love to speak to all of you all day.

Mr. Scheck, your testimony touches on several issues that have impacted the juvenile defendants whom I am thinking about in these questions. Could you address how juvenile defendants may be impacted by—we have talked a little bit about dissent, interrogation, pressure to avoid the trial penalty, and how holistic defense mechanisms might help them, such as through special education, mental health supports, *et cetera*.

Mr. SCHECK. Yes, I would be glad to. One need not say anything more than the exonerated five in New York or Kalief Browder, somebody that was held in on cash bail and suffered terribly, and was there forever in terms of solitary confinement.

The American Psychological Association has issued clear papers about the increased risk of false confessions among juveniles. That is why eliminating deception, in particular, by law enforcement in terms of interrogations is extremely important, certainly when juveniles are concerned. Of course, the recordation, and most importantly—in some ways, people overlook this—that there should be a requirement, a factor for courts to consider, that the confession received, particularly from a juvenile, is reliable. In other words, there is corroborating evidence that shows that a juvenile's confessions, or anyone who is confessing to a crime, with information that only the real perpetrator and the police would know, where they said something that led to other incriminating information. Without that reliability requirement, which, unfortunately, in *Colorado* v. *Connelly*, the Supreme Court has not given us, courts cannot intelligently assess confessions to see whether they are reliable and not false.

Ms. SCANLON. Thank you, and I yield back.

Ms. JACKSON LEE. Thank you very much for your testimony. The gentlelady yields back.

Now, I would like to recognize Mr. Massie for 5 minutes.

Mr. MASSIE. Thank you, Madam Chairwoman, for having this important bipartisan Committee hearing.

Ms. Dharia, you touched on speedy trials, and I would like to relate a story for when I was county executive. Our biggest line item in the budget next to the roads was the jails. I noticed a pattern over there. We had overcrowding and they were always trying to get us to build more jails. That wasn't the problem. The problem is we had too many people awaiting trial.

There was this perverse incentive for the judges at the State level to keep inmates in there because they would pull them out after 16 months, and then, encourage them to plead guilty for time served. Now, the interesting thing is the counties paid for the time served. It went to the county budget, and the State didn't have to pay for the incarceration. So, in Kentucky, at least, we have got the State pushing the burden of incarceration, the fiscal burden, onto the counties. So, they have this incentive to get the inmates to serve time in county jails before they come up.

This wouldn't be a problem, and unreasonable bail wouldn't be a problem, if we actually just followed the Sixth Amendment, I feel like. What is right now the accepted threshold for a speedy trial in the Supreme Court or elsewhere?

Ms. DHARIA. Well, as you have described, even just describing the county and the State differential there, rules differ by state. Our criminal justice system is a completely piecemeal jigsaw puzzle of rules and statutes, and the approaches to them have been different everywhere, particularly in the pandemic when a lot of jurisdictions attempted to address their speedy trial statutes and to expand the time that people could be held to try to manage the pandemic. DOJ did that for the Federal Government as well, where U.S. Attorneys were seeking to enlarge the time that people could be held. So, there is not clean answer to the question of how long people are traditionally held or generally held in different places.

I do think that your question, though, touches on a bunch of these different issues that people have been discussing today because they all relate to each other, right? The question of pretrial detention being part of how pleas are coerced, and the question of whether discoveries provided earlier in the process, so that people can make decisions and move on—these are all interconnected and they relate to the amount of time that people spend pretrial and to when and how they can make informed and voluntary decisions. So, I think they are all interrelated.

Mr. MASSIE. Since you mentioned discovery, that is a good transition into my next question, which deals with facial recognition. You sort of have this same problem when you use canines to establish probable cause. How do you cross examine a canine? I think you shouldn't be able to use a dog to establish probable cause because, really, it is up to the handler to say that the dog saw something or smelled crack instead of a cheeseburger.

Now, I am worried that we are going to have this same problem with facial recognition. How do you cross examine an algorithm, and will the Brady material be available? The algorithm identified 10 other suspects that aren't being prosecuted. Is that made available?

So, if any of the witnesses would like to speak to that, I would like to open that up for a brief comment.

Mr. SCHECK. Yes, I can address that. You are absolutely right in terms of facial recognitions because there is no clear discovery of close matches. The way it comes into courts right now is that it is viewed as a, quote, "investigative lead," unquote, right? So, we don't even have to disclose it to you—it is an investigative method.

If I could go back just one minute, because, Mr. Massie—

Mr. MASSIE. I will give you 30 seconds.

Mr. SCHECK. You made a great point about pretrial detention and exactly the situation you described. I don't want to leave without calling attention to holistic representation. There is this amazing study out of the Bronx where they compare holistic representation to traditional defense. It found that, over a 10-year study, in terms of pretrial custodial sentences, and custodial sentences overall, a 15 percent decrease, 1.1 million fewer days of custodial punishment. It was a huge savings. It is a much better way to do defense, and it really will promote safe communities.

Mr. MASSIE. Thank you.

In my remaining 30 seconds, I want to point out that the racial and economic injustice extends beyond those who are incarcerated. Ms. Camara mentioned that African-American males are six times

more likely to be incarcerated than Caucasian males. Well, when you go do an instant background check to purchase a firearm, it turns out that, within races and ethnicities, a lot of people share the similar surnames. I have been trying to get from the DOJ and the ATF, because they collect this data, the false-positives that occur at a higher rate among minorities when they go to try and purchase a firearm. There were 112,000 denials in the last year we have data and only 12 prosecutions. Most of the denials are false, and I am very concerned that a lot of those denials are racially biased because of the mass incarceration of African-American males and the fact that a lot of Latinos share surnames among them. So, just maybe we could get that data from the DOJ at some point.

Thank you.

Ms. JACKSON LEE. Mr. Massie, your time has expired. Even though your particular example will be challenging to some of us who certainly want the legal purchase of a gun, but we certainly don't want the illegal purchase—

Mr. MASSIE. Correct.

Ms. JACKSON LEE. You are making a very good and I hope that we will have a bipartisan opportunity to work on some of the issues that you raise as it relates to pretrial detention and pretrial procedures.

Mr. MASSIE. Thank you.

Ms. JACKSON LEE. Thank you so very much for your questioning.

It is my pleasure now to recognize Ms. Cicilline for 5 minutes. Thank you for your presence.

Let me also acknowledge Ms. Dean as well being present at the hearing today.

Mr. Cicilline, 5 minutes, and you are recognized. Thank you.

Mr. CICILLINE. Thank you, Madam Chair.

Thank you to our witnesses. It is great to see all of you, and thanks for your testimony.

Of course, I, too, want to extend my condolences to Ms. Rodgers for her terrible, terrible loss and to Mr. Graves for what you experienced. Thank you both for your willingness to share your stories.

Mr. Scheck, thank you for the great work that you do. It is good to see you again.

It seems like the reliance on these false confessions that are produced as a result of deception by law enforcement is a pretty easy thing to fix by simply prohibiting that practice. Do you agree, Mr. Scheck? I think you are on mute. I think you are muted.

Mr. SCHECK. Sorry.

I absolutely agree. I think what is fascinating now is, if you look at experts in interrogations who deal with high-valued detainees, one of the major companies is Wicklander-Zulawski—I can't pronounced their name—the professional interrogators, they don't believe in deception. They know this can produce false confessions. It is a simple thing. The legislation is good. They don't do it in Europe.

Mr. CICILLINE. Right. I don't think it is done in any other Western countries.

Mr. SCHECK. Right.

Mr. CICILLINE. I think you are right, that is an easy thing for us fix, and I hope we will do that. I also think the recommendations that Mr. Cahn made that you also supported are very sensible.

It reminds me I was a public defender, and then, a criminal defense lawyer for most of my career. I remember a colleague telling me he was working on a case, and he has papers on the floor, *United States* v. *John Smith*. His son said, "What is this?" He said, "That's the case." He said, "The whole country is against you?" His dad said, "Sort of." It is really about leveling the playing field.

One of the things I am really interested in is open file discovery that you referenced that the State of Texas does. I think Ms. Hanisee has said, "Oh, that is not workable." Would you just speak a little bit about how well that has worked in Texas and what it actually entails?

Mr. SCHECK. I really welcome somebody to come there. It has been unbelievable. All the prosecutors, they are my witnesses, and Republicans, who say this has really worked. They have put it online.

So, the case comes in and there are provisions made to make sure that information that everybody agrees should be redacted—because it would endanger lives or invade people's privacy—is redacted. Then, it goes online and everybody gets to look at it.

Because, as Mr. Cahn said, we just can't depend on prosecutors themselves, particularly in federal cases with all this information—no one prosecutor, or even group of them, is going to be able to go through all that data the way that a defense lawyer would to find out what is really relevant and really is information that tends, many feel, to mitigate the offense.

When you have this open file system where you can actually see what was disclosed, when it was disclosed, no disputes, and most importantly, you really have to look at the Texas statute—I cited it specifically in my testimony—that at the time of the plea, everybody is sitting there. You know exactly what has been disclosed, the prosecutor is asserting, all exculpatory information has been provided, and then, the plea goes down.

Because, I must tell you, with all the innocence work we have been doing across the country, when the Registry put out that 20 percent of people are pleading guilty to crimes they didn't commit—that is what the exoneration data shows and that means something. That is why we have to have pre-pleaded disclosure.

Mr. CICILLINE. One of the other things that I know from my own practice is, when you sit through an arraignment, you see lots of people of color; White folks, when you go to the prison and do your prison visit, it feels like the White folks have all been weeded out. So, this disparity in who gets held, both pretrial and post-conviction, is an issue, a very serious one.

I am just wondering, when you think about pretrial detention and the impact it has on the ability of that defendant to prepare for trial, to help locate witnesses, all the difficulties, what kinds of reforms should we be thinking about to ensure that people are not disadvantaged from their ability to actually help prepare their defense because of their economic status, their inability to post bail?

Secondly, this other question about the charging decisions by prosecutors who can by themselves decide whether or not someone

will face the mandatory minimum or not, and then, you run into these impossible situations in which innocent people say, "I want to plead guilty because I can get out to a lesser charge, even though I didn't do it. Otherwise, I have to sit in trial as an innocent person awaiting my trial."

So, just in those areas, what kinds of recommendations would you make to the committee?

Mr. SCHECK. Well, personally, that the Federal Government has to step up. We need a Marshall Plan for indigent defense. Because it has been demonstrated—John Pfaff's book "Locked In"—we can show that so much more money has gone to assist prosecutors who are benefitted in the State system because they do have police departments to work for them, right? Nothing can get somebody out of jail who should be out jail pretrial. Because they can raise money for bail, if it still a cash bail system, or they can put move forward, or they can meet conditions for release.

A good lawyer, and a lawyer from a holistic defense system that is rooted in the community, that is the best thing. This study—I can't say it enough times—in the Harvard Law Review from the Qualtrone Center, a 10-year study where they show that holistic representation compared to traditional representation dramatically reduced custody, particularly in the area of pretrial release. It is far better representation. It is good for the community. It increases community safety. It is where you ought to put your money.

Mr. CICILLINE. Thank you.

With that, Madam Chair, I yield back.

Ms. JACKSON LEE. I thank the gentleman for his questions, and I thank you for raising the issue of the law enforcement and the misrepresentation in some forms of pretrial work. I want to make sure that everyone knows that not one single member on this Committee ignores the impact on victims and community/families that are impacted, but I think we can work on those issues. Mr. Cicilline, I understand we are moving on that legislation. As we are looking to protect our victims, we want to make sure, as I said, that we emphasize justice. So, thank you so very much for your questioning.

I want to check with Mr. Biggs. Mr. Biggs, do you have a member at this time?

Mr. BIGGS. It is my understanding that you have gone through all the Republican witnesses, Madam Chair.

Ms. JACKSON LEE. All right. Thank you so very much.

Mr. Lieu, you are recognized for 5 minutes.

Mr. LIEU. Thank you, Chairwoman Jackson Lee, for holding this important hearing.

Before I ask my questions, I want to make a statement about the radical voter suppression law that Republicans in Georgia enacted yesterday. Voting is one of the strongest expressions of our voice, of our opinions, of our beliefs. When Republicans enact voter suppression laws, they are canceling the voices of many voters. So, if you are a Republican who supports a radical Georgia voter suppression law, don't ever lecture anyone on cancel culture ever again. In fact, that law is so extreme, it criminalizes giving water to voters in line. If freedom means anything, it means we should be able to give water to another human being. If you are a Repub-

lican who supports the radical Georgia voter suppression law, don't ever lecture anyone on freedom ever again.

Now, I would like to talk about bail reform. On any given day, hundreds of thousands of Americans are sitting in jails not because they have been convicted of anything, but because they can't pay the fee to leave jail. It is un-American. It has a disproportionate effect on the poor and people of color, and it is perverse because it ends up causing people to plead guilty at much higher rates.

My first question goes to Mr. Scheck. Thank you, first, for your work on Innocence Project. The people who can't pay this fee to leave jail, it would seem like they are the same kinds of folks that would lose their job, can't handle healthcare expenses, have a whole cascade of rippling effects.

You had a pretty stunning statistic that showed about 20 percent of people plead guilty to crimes they did not commit. Do you believe the cash money bail system contributes to that?

Mr. SCHECK. There is no question about it, which is not to say that there aren't things that can be done to improve the release system to prevent some of the terrible things that we have heard about today. The bottom line is, the cash bail system has penalized poverty. If you are a poor person who can't make cash bail, or you have to get out to keep your job, it is logical that you will plead guilty. It is logical to plead guilty to get out. It goes way, way back. "The Process Is the Punishment," Malcolm Feeley's great book about this. We have known about this for decades. We are now becoming, thankfully, in this era far more cognizant of the fact that race and class has everything to do with this, and we can stop it.

What Mr. Massie was talking about in his particular system just illustrates it. We can't run a system where we are inducing guilty pleas all the time to make the system work, and the way we induce it is we keep people in jail who just can't afford to pay bail.

There are so many good ways to change that. As I pointed out, the holistic representation and just changing the way we look at public safety can do so much for that.

Mr. LIEU. Thank you, Mr. Scheck.

I have introduced the Pretrial Integrity and Safety Act, along with Chair Nadler. It provides grants to assist local jurisdictions to move away from the money bail system into a better system, such as, for example, the system that Kentucky has or Washington, DC, and so on.

So, I have a question for Mr. Cahn. First, thank you for your service as public defender. Do you believe that freedom and liberty should ever be linked to how much money you have in a bank account, so that you can pay a fee to leave jail?

Mr. CAHN. Well, thank you for that question. I think the answer is certainly not. I think that it is important to understand that not only is this devastating to the people who are kept in jail and have no opportunity to return to their lives, and how destructive that is, how they lose their jobs, they lose their apartments, they lose their cars, and can never reclaim their lives, even if they are innocent. It is also devastating to the communities in which they live, and it can be devastating in other ways.

When a cash system is in place, it is not only that the innocent get out; it is that, oftentimes, people who are truly dangerous, sim-

ply because they have the money, sometimes from criminal enterprises, to pay a bail bond with a corporate bail bondsman can be free, can be out on the street, rather than having some real look at whether or not people need to be detained.

I would like to point to one other aspect of the way in which money affects people. It affects their inability to contest their cases. We talk about innocent people pleading guilty. I think one of the reasons that we haven't touched upon is the sense of hopelessness that a defendant in prison, pretrial detention, feels when they realize that their lawyer is so overworked and underfunded that there is no possibility of that lawyer investigating and contesting their case.

That is why Congress should act, not only to encourage adequate funding for State defendant systems, but also should look at an independent and adequately funded federal defender system. The Cardone Committee of the Judicial Conference issued a report calling for such a system in the federal system, and Congress needs to look at that and address that and move forward with it. That is another way to prevent innocent people from pleading guilty in this system.

Mr. LIEU. Thank you. I yield back.

Ms. JACKSON LEE. Thank you. The gentleman yields back. The gentleman's time has expired.

Let me now yield to Mr. Biggs?

Mr. BIGGS. Yes, Madam Chair?

Ms. JACKSON LEE. I have a member who is requesting 2 minutes, not myself. The two of us will conclude. I don't know if you have another member here. Without objection, I am prepared to yield to her, but I want to be fair and don't know if you have another individual that, likewise, would use 2 minutes.

Mr. BIGGS. Madam Chair, I still have a couple of Members on. I will check with them. Feel free to go ahead and give those two additional minutes, and I will ask my Members.

Ms. JACKSON LEE. Thank you so very much. That excludes you. I understand you have some information you want to share.

Mr. BIGGS. Yes, thank you.

Ms. JACKSON LEE. Thank you.

Now, I am happy to yield to Ms. Scanlon for 2 minutes.

As I do that, I thank Mr. Lieu for his testimony. I just want to make sure—Mr. Correa?

Ms. Scanlon, you are recognized for 2 minutes.

Ms. SCANLON. Thank you. There was just one more issue I wanted to speak to.

We talked a little bit about the fact that juveniles are at this disadvantage, given their development, *et cetera*, during pretrial. So, they are more likely to plead guilty. They are more likely to make a false confession in many circumstances. Then, when they are incarcerated, they are more likely to be abused, statistically, than adults, and less likely to be able to navigate the jurisdictional hurdles to being able to get relief.

So, one of the things that I have been working on is a bill called the Justice for Juveniles Act, for which we had bipartisan sponsorship, that would exempt juveniles from the administrative revenues portion of the Prison Reform Litigation Act.

So, Ms. Camara, could you speak to how that might benefit juveniles going forward?

Ms. CAMARA. Absolutely. I think you raise a very important question about the susceptibility of children, because that is who they are—they are children—to abuse when they are in juvenile detention facilities. I would point to D.C. Public Defender Service as a national model where you actually have public defenders embedded within juvenile detention facilities. PDS has an office where children can reach out confidentially to raise issues concerning confinement, but also advocate for the issues that arise concerning their release, whether or not they are properly programming and receiving credit for rehabilitation, which ultimately impacts when they are able to return home to the community. So, I would definitely point to the D.C. Public Defender Service Juvenile Reentry Program as a national model that should exist in every state.

Children's rights must be protected, and we have to invest in making sure that they are not abused when they are in those detention facilities.

Ms. SCANLON. Thank you for that, and I appreciate that, as we move forward and try to find better models.

Thank you, and I yield back. Thank you for everyone's courtesies.

Ms. JACKSON LEE. Well, thank you, Congressman Scanlon, and I want you to know this Committee is particularly interested in juvenile justice. We thank you for that initiative, and we will be turning our attention to juveniles in the justice system. I think all of this will be more than appropriate. So, we thank you for your line of questioning and for your leadership.

Your time is expired.

Let me now yield to Mr. Biggs. Mr. Biggs, is there anyone that is requesting a moment? Mr. Biggs?

Mr. BIGGS. Madam Chair, thank you. Of our Members who are still on, so far as I can see, no one has requested additional time.

Ms. JACKSON LEE. All right. Mr. Biggs, I am going to yield to you for 5 minutes. I need to take a clarifying 5 minutes, not to be considered a second round. I want to be able to thank our Members and the witnesses. I am going to yield to you, for the record, we want to clarify that Ms. Bass was kind enough to yield to me for a moment, but we left, when we finally concluded, 3 minutes on the clock. So, I wanted to make sure you had the time, as we conclude this hearing. I want to be able to make time to thank all the witnesses, but I do have two questions that I have.

So, I am going to put 5 minutes on the clock for you, Mr. Biggs. If you have submissions to the record, or any other matters, please, you are yielded to at this time. Thank you very much for your participation in the hearing. Thank you.

Mr. BIGGS. Thank you, Madam Chair. I appreciate that.

I do want to thank all of our witnesses. It has been very informative. This has been a very important hearing, I think. I thank all the Members who have also participated.

So, I want to go to Ms. Rodgers, if I can, just because I had some questions for you that I had not been able to ask because I ran out of time, because that happens the way that goes. I know that, Mr. Graves, I particularly thank you for your testimony as well. Both

of you, very difficult circumstances in coming forward and testifying today. I am very, very appreciative.

Ms. Rodgers, I wanted to know if anyone in New Jersey had been held accountable for the clearly faulty risk assessment that led to your son Christian's murder.

Ms. RODGERS. Not at all. As I stated before, there was a person, a politician, that referred to my son as being collateral damage and it is the same all over the State with all the victims of this bail reform. All we hear is how successful it is, but no one is considering us and the things that we have to go through.

Then, they are talking about, oh, bail reform is a good thing and people are getting speedy trials and less detainment, and everything, but it has been four years since this happened to my son and we are still waiting on a trial. So, to me, it is a total nightmare.

The only thing that I am asking is that they go back to the drawing board on some of these things because it really wasn't fair the way they implemented it, anyway, because they never informed us of the ins and outs of this thing. They just said, "Here, we're enacting this new law, and you all are just going to have to swallow it." They did not consider us in these neighborhoods.

There are a lot of people just saying, "Oh, well, it's not fair to the people that are accused of these crimes." I am not saying everyone with misdemeanors and first-time offenders, or whatever, should be held without bond and go through all of this. I am talking about the people with the bad history, the terrible offenders, and things of that nature.

My main objective is to have our neighborhoods be safe. I have grandchildren that can't go to our city park because of this mess. I am sick of going to funerals of people that I know who have lost people because of this very thing.

This is my thing: Everybody is talking about cost and money, and this and that. How much is too much when you are losing lives? I don't know. My thing is, we should come together as a people to figure out this thing, because it was done recklessly. It is not fair to us.

Mr. BIGGS. Well, Ms. Rodgers, I really appreciate your coming in and giving testimony today. I am very appreciative. I know it has got to be difficult, but I am grateful. I am grateful to all the witnesses, again, for being here today.

With that, Madam Chair, thank you for the additional time, and I will yield back to you.

Ms. JACKSON LEE. Thank you very much, Mr. Biggs. I just want to make sure; did you have documents you wanted to submit into the record?

Mr. BIGGS. Madam Chair, I submitted the one in my opening statement, and hopefully, we will get that to you digitally.

Ms. JACKSON LEE. Thank you so very much.

Mr. BIGGS. Thank you.

Ms. JACKSON LEE. I, too, wanted to utilize a brief time to ask two more quick questions, but also to incorporate my thanks to all the Members. I will do so by acknowledging all of them and to give some data that is extremely important.

So, let me quickly go to Mr. Scheck and build on Congresswoman Scanlon's line of questioning. Juvenile suspects as well as adults

with mental health problems or intellectual disabilities and how they invoke false confessions. It is an empirical fact, too, that they often fail to comprehend and routinely waive their Miranda rights. What measures do federal law enforcement agents take to protect these highly vulnerable individuals during an interrogation and ensure that they are not coerced, tricked, or otherwise induced into a giving a false confession? That is for you, Mr. Scheck.

Mr. SCHECK. Yes, again, special care must be taken and training when you are dealing with an intellectually disabled person. I mean, we at the Innocence Project, they are still dealing with the case of Pervis Payne, who is on death row in Tennessee, which is really one of the great travesties in terms of an intellectually disabled person who is in exactly the position you just discussed.

Again, the best thing is recording the interrogations. It is very important that you put into the Federal Rules of Evidence the idea that a confession should—the issue of reliability should be considered when you are looking at a confession because so many intellectually disabled people, or anybody that is in a position where they are being coerced and they give a confession, the only thing the Supreme Court looks at in *Colorado* v. *Connelly* is voluntariness. It only makes sense that you should also consider the issue of reliability. All the experts in interrogations always agree; they look to see, is this information that only the real perpetrator or the police would know? Did this lead us to other incriminating evidence?

Ms. JACKSON LEE. Thank you.

Mr. SCHECK. That is the reliability test, and that should be put into the law.

Ms. JACKSON LEE. Thank you so very much.

Mr. Cahn, I could not finish with you. Quickly, would you respond to this question? Evidence shows that lying informants and cooperators are responsible for a sizable percentage of the wrongful convictions in this country. The reliability of informants poses serious systemic concerns. You started to answer, but what are the most pressing problems involving law enforcement's use of informants in federal cases, and how can we best address them? I am saddened that your time is short because I have to conclude with some other comments. Mr. Cahn, would you please try to give me a response to that, please?

Mr. CAHN. Let me try and be very brief. First, I think that Congress needs to look seriously at the rewards that can be offered informants and prosecutors' unilateral power to offer those rewards.

The other suggestion I would make, practical suggestion, is that evidence about informers needs to be turned over early, so that the defense can investigate. It is only when there is adequate time to investigate these informants that there is an opportunity to learn what their true motives are, what their true role in the crimes are, and to expose that, when necessary, to a jury. So, I think that is an essential element of ensuring fairness in our system.

Thank you.

Ms. JACKSON LEE. Thank you very much for providing that insight. I think that is an area that needs to be assessed. Of course, we need to make sure that we are fair to all.

Let me start out, first, with my appreciation to all of the witnesses.

As all the witnesses have done, I want to acknowledge Ms. Rodgers and her pain. It has not gone ignored, and this Committee believes in justice and we are as much concerned about those who are victims as we are concerned about those who are victims in the justice system.

So, again, we want to express our appreciation to the witnesses that include, of course, Mr. Scheck, Ms. Dharia, Ms. April Frazier Camara, and Mr. Reuben Cahn. I believe that we have called off all our witnesses. We want to make sure that we express our appreciation for all of you for your presence here today.

It is also important, Ms. Hanisee, of course, and Ms. Rodgers, it is also important to make sure that the record is clear. There was testimony or a statement that I believe should be adjusted, or at least there should be something in the record. Allow me to indicate the following information very quickly that needs to be included.

This data is somewhat listed as the most recent data, but it is 2013. Black juveniles were more than four times as likely to be committed as White juveniles. American Indian juveniles were more than three times as likely, and Hispanic juveniles were 61 percent more likely. We do know that this issue of committing juveniles, and as well not having access in the pretrial or the preliminary stages, can be very devastating to young people, and it falls heavily on minority youth.

Let me say to Mr. Graves, who I have had the privilege of knowing, as I conclude, what happened to you has happened, tragically, to many in an unfair justice system. I think what is most explicit in your testimony is that you are open in your responses to all those who question you, and all you wanted to do is press your innocence. Of course, the tape that was utilized, in your knowledge and your understanding, was never provided to show your innocence. Your guilt seemed to rely on someone who called your name, whether as an informant or an alleged co-defendant. You were unjustly prosecuted. I think that is an important point that we need to make.

So, let me, as I conclude this hearing, again, acknowledge all the Members that participated.

I think it is appropriate to indicate that justice requires a response to those who are victims. In most instances, that involves those who are falsely accused and that involves those, Ms. Rodgers, who have suffered. Our greatest sympathy to you.

I conclude in this hearing to acknowledge the killings in Atlanta, where eight victims' lives were taken. Six of those were Asian-Americans. It requires this Nation to bring the perpetrator to justice; that justice be rendered to them.

As well, to acknowledge those victims in Colorado, which included a law enforcement officer. We mourn with their families, and, of course, justice must be brought to them. This Committee is a Committee that believes that justice is one that we must fight for and we must render.

So, this concludes today's hearing. We thank all of you for your participation, Members and witnesses alike. I thank you for the commitment that you have made to present your facts and your

testimony to the United States Congress. You are truly distinguished, and we thank you for your attendance and participation.

Without objection, all Members will have five legislative days to submit additional written questions for the witnesses or additional materials for the record.

Ms. JACKSON LEE. With that, I would call this hearing is now adjourned. Thank you all so very, very much.

[Whereupon, at 1:42 p.m., the Subcommittee was adjourned.]

APPENDIX

The Leadership Conference
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STATEMENT OF SAKIRA COOK, SENIOR DIRECTOR, JUSTICE REFORM PROGRAM

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

HEARING ON "FROM MIRANDA TO GIDEON: A CALL FOR PRETRIAL REFORM"

MARCH 26, 2021

Chairwoman Bass, Vice-Chairwoman Demings, and members of the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security: My name is Sakira Cook and I am the senior director of the Justice Reform Program at The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 220 national organizations to promote and protect the civil and human rights of all persons in the United States. Thank you for the opportunity to submit written testimony regarding the need for transformative pretrial reform.

While we were founded as the legislative arm of the civil rights movement, The Leadership Conference's mission has since expanded so that, today, we are meeting the new challenges of the 21st century. These challenges include guaranteeing quality education for children, ensuring economic opportunity and justice for all workers, preserving the right to vote and other democratic institutions for marginalized communities, and transforming the criminal-legal system in America.

The American criminal-legal system is a stain on our democracy. This system replicates and reinforces patterns of racial and economic oppression that can be traced from slavery — and the result is a criminal-legal bureaucracy that denies millions of people the opportunities, legal equality, and human rights they deserve, while at the same time fueling the world's highest incarceration rate. Our overreliance on incarceration and criminalization as the primary mechanism to advance public safety has had a devasting impact on the communities we represent.

Today, the United States leads the world in imprisoning or supervising more than 6.6 million people while ripping parents and loved ones from their families every day. Research shows that nearly one in two adults in America — approximately 113 million people — has an immediate family member who is currently or formerly incarcerated.[i] This crisis of over-criminalization and incarceration is fueled by the policy choices the nation has made since the start of the War on Drugs more than 40 years ago.

Since then, there has been a growing movement to reverse course. But, while there has been some progress at the state and federal levels to address drivers of mass incarceration and criminalization, and to decrease prison populations and address racial inequity, these reforms have largely overlooked the crisis we face within our jail systems —- a crisis that is largely fueled by our massive over-use of pretrial detention. Ultimately, we cannot end mass incarceration and criminalization without significant changes to our pretrial systems.

Moreover, the challenges we see today, including the challenges discussed here with the pretrial system and money bail, must be considered in light of the COVID-19 pandemic. Our country's overreliance on jails and wealth-based bail not only has civil rights implications, but also may have deadly consequences for those who are unable to afford the cost of being released from pretrial detention. For many being held in crowded jails across the country, the risk of exposure to COVID-19 is exceedingly high, resulting in potentially higher costs than the enormous burdens that the system placed on individuals prior to the pandemic. There are currently no comprehensive statistics about the number of COVID-19 cases or deaths in local jails. The devastating number of deaths in prisons and nursing homes across the country is a cautionary tale for keeping individuals in close confinement. While it is past time to reimagine what a fair and just pretrial system could look like in the United States, the implications of the coronavirus necessitate swift action and immediate reforms.

According to the Vera Institute of Justice, between 1970 and 2015, "the number of people being detained before trial increased by a whopping 433 percent."[ii] One of the primary drivers of rising jail populations and overcrowding has been an increase in pretrial detention, despite a decrease in crime rates.[iii] This significant increase in pretrial detention can be tied directly to the fact that many jurisdictions require people arrested and accused of crimes to pay upfront money bail in order to be released until their trial, regardless of their offense. This phenomenon flies in the face of one of the bedrock principles of the American criminal-legal system and the fundamental purpose of bail: that individuals are presumed innocent until proven guilty in a court of law.

Fundamentally, bail is the mechanism through which pretrial release is secured. Many people today mistake this point, thinking of bail as a monetary sum. This misconception is tied to the evolution of the bail system and not the essential nature of pretrial release. As originally defined, bail meant release from custody, a concept that undergirds the legal principle of innocence until proven guilty. This presumption of innocence ensures that individuals who are faced with criminal charges will be treated fairly by the court and places the burden of proof on the government to prove one's guilt beyond a reasonable doubt. Yet, the current structure of the bail system belies these core tenets of our judicial system.

That is why in recent years advocates and activists throughout this country have issued a clarion call to end wealth-based detention and transform our state and federal bail systems. We can no longer afford to use the criminal-legal system as the sole mechanism for advancing public safety. Instead, we must take bold action to end the structural inequalities and racism that plague the system, especially at the earliest stages, namely, arrest and pretrial. Our nation must be willing to imagine a new paradigm for public safety, one that does not rely exclusively on criminalization and incarceration. The time has come to overhaul the bail system. We need a new pretrial framework that dramatically reduces pretrial detention, ends racial and other inequities prevalent in the current system, and abolishes wealth-based discrimination throughout the pretrial process. Congress must pass legislation that incentivizes states to end wealth-based detention (i.e. money bail), use alternatives to arrest and prosecution for minor offenses, and preserve the presumption of innocence by establishing robust due process protections.

Overview of Bail in the Criminal-Legal System

The modern concept of bail originated in England, where a person accused of a crime was required to find an individual to serve as their "surety" who would agree to pay the settled amount to the victim if the defendant fled. The English framework was brought over to the colonies, and when the framers drafted the first 10 amendments to the U.S. Constitution, they enshrined a protection against the use of "excessive bail."[iv] The understanding of whether bail was excessive was originally tied to the purpose of bail, which was interpreted to assure the presence of the accused person at subsequent hearings.[v] Therefore, bail deemed "excessive" was an amount "set at a figure higher than an amount reasonably calculated [to] assure the presence of the accused."[vi] The Judiciary Act of 1789 required that in the federal system, bail must be set for all crimes not punishable by death.

This system established at the founding was revolutionary, since it created an almost universal presumption of release; pretrial detention was only considered permissible for a small, confined subset of the most serious capital crimes.[vii] Over time, though, the United States turned this system on its head. While England went in a different direction, allowing judges to release people even without a surety, the United States entrenched a commercial system of cash bail. In this system, judges would release people if someone — usually a bail bonds agent who was making a profit off the transaction (and charging individuals a 10 percent premium that they would never get back) — promised to pay a large sum if the person did not appear in court. In setting money bail amounts, judges seldom ask what the accused individual can actually pay. The result was that our jails became filled with people who could have been free if they had enough money in the bank but were left behind bars simply because they were poor. As courts used money bail more frequently, and set money bail at higher amounts, this country saw an explosion in the private bail industry — as well as in the rate of pretrial detention — much of it simply because people were too poor to pay a sum of money.

In 1964, Congress set out to reform the federal bail system, introducing a suite of bills and holding hearings. The testimony of then-Attorney General Robert F. Kennedy is instructive on

the problems with bail our society faced at that time and are still very present today. He said in part:

> "That problem, simply stated is: The rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail. Bail has only one purpose — to insure that a person who is accused of a crime will appear in court for his trial. We presume a person to be innocent until he is proven guilty, and thus the purpose of bail is not punishment. It is not harassment. It is not to keep people in jail. It is simply to guarantee appearance in court. This is a legitimate purpose for a system of justice. In practice, however, bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom. I am talking about a very large number of Americans. In fiscal 1963, the number of federal prisoners alone held in jail pending trial exceeded 22,000. The average length of their detention was nearly 29 days. Like figures can be compiled from state and local jurisdictions. On a single day last year, for example, there were 1,300 persons being held prior to trial in the Los Angeles County jail. In St. Louis, 79 percent of all defendants are detained because they cannot raise bail. In Baltimore the figure is 75 percent. A 1962 American Bar Association survey of felony cases showed high percentages of pretrial detention in New Orleans, Detroit, Boston, San Francisco, and Miami. And similar conditions exist in smaller communities. In Montgomery County, Maryland, nearly 30 percent of jail inmates are persons awaiting grand jury action or trial. The heart of the problem is that their guilt has not been established. Yet they must wait in jail for three to six months. The main reason for these statistics is that our bail setting process is unrealistic and often arbitrary. Various studies demonstrate that bail is set without regard to defendants' character, family ties, community roots, or financial condition. Rather, what is often the sole consideration in fixing bail is the nature of the crime."[viii]

As a result of this outcry for reform, the first significant effort to change the federal bail system was the Bail Reform Act of 1966 (BRA). The BRA sought to ensure that "all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges."[ix] The BRA established a presumption in favor of releasing non-capital defendants pending trial, and required that the lowest possible burden be placed as a condition of release that would ensure a charged individual's appearance. This included restrictions on money bail, which could only be imposed if a non-financial condition was not enough to ensure appearance.[x] While the BRA went far in accomplishing its main goal to reduce the needless detention of bailable defendants, it failed to provide a solution to a growing concern surrounding pretrial release: assessing an individual's threat to public safety while on release.[xi] The BRA generally forbade judges from treating a defendant's dangerousness or risk to public safety as a reason for detention, except in capital cases, cases where those convicted were awaiting sentencing, and cases where those convicted filed an appeal. Put together, these exceptions represented the first time in American history that a law authorized a judge to consider dangerousness as a legitimate

reason to deny bail.[xii] This narrow class of exceptions was considered by some to be too restrictive, however, and a movement to consider an individual's risk to public safety while on pretrial release began to gain traction.[xiii]

During the height of the War on Drugs and the crack cocaine epidemic in the 1970s and 1980s, the appearance of rising crime rates drew public concern.[xiv] Much of this concern was directed to crimes attributed to individuals on pretrial release, despite significant evidence to the contrary.[xv] Congress passed the Bail Reform Act of 1984 to address these concerns, removing many of the protections against detention established by the 1966 Act, and establishing the modern federal bail framework.[xvi] The 1984 Act created presumptions of pretrial detention for "previous violators" and "drug and firearm offenders."[xvii] Under the "previous-violator presumption," no condition of release is presumed to be able to ensure the safety of the community where the defendant has been convicted of committing one of a series of specified crimes while out on bail, and is now accused of committing another of the specified crimes.[xviii] The "drug-and-firearm-offender presumption" assumes that no condition of release will reasonably be able to ensure the individual's appearance and the safety of the community where there is probable cause to believe the defendant has committed the same enumerated offenses considered for the "previous violator presumption."[xix]

The act also expanded the allowable scope of the bail inquiry from a question of ensuring re-appearance, to include a consideration of the defendant's "dangerousness" to the community if released prior to trial.[xx] A 'danger to the community' included not only a physical danger of violence, but the broader, more subjective question of whether a person is in danger of recidivating while on pretrial release. This is the first time that the question of the potential dangerousness of an individual was explicitly allowed to inform the bail inquiry, and these changes led to a significant increase in pretrial detention: between 1982 and 2004, federal pretrial detention rates rose from 38 percent to 60 percent.[xxi] More than three decades after the Bail Reform Act of 1984 became law, "federal and state statutes were rewritten . . . [to] permi[t] judges to order dangerous defendants to be detained, money bail is still used as a back-door means to manage dangerousness."[xxii]

The Supreme Court asserted the constitutionality of the Bail Reform Act of 1984 in its decision in *United States v. Salerno* in 1987.[xxiii] The Court stated that an arrestee may additionally be detained prior to trial if the government can provide "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community."[xxiv] The Court went further, explaining that under this new standard, "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designated to ensure that goal, and no more… [however] when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here [with dangerousness], the eighth amendment does not require release on bail."[xxv] In its determination, the Court noted that the Bail Reform Act served a regulatory purpose, not a penal one, because it requires a 'prompt' detention hearing, the maximum length of pretrial detention is limited by the requirements of the Speedy Trial Act,[xxvi] and pretrial detainees must be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending

appeal."[xxvii] Perhaps most importantly, *Salerno* created a clear mandate for how our bail system should operate: "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Today, we have turned *Salerno* on its head. With more than 60 percent of our jail population legally innocent and awaiting trial,[xxviii] we have made pretrial detention our norm in all too many places and for all too many communities. It is time to address this crisis and restore the promises of our constitutional framework.

Pretrial Detention Significantly Impacts Individuals and Communities

Each year, there are 12 million admissions to jails[xxix] and each night, nearly half a million people sit in jail not because they have been convicted of a crime, but because they are detained prior to trial,[xxx] often because they cannot afford money bail. Nationally, 62 percent of people in jail are there because they are awaiting trial, usually for misdemeanors or lesser offenses.[xxxi] These are mostly cash-poor people arrested for very minor offenses who cannot afford to post bail and are often dealing with mental health or substance use problems.[xxxii]

Research shows that this pervasive system of pretrial detention has devastating effects on individuals, their families, and the community. Stories like those of Sandra Bland[xxxiii] and Kalief Browder[xxxiv] show the shocking effects of detention, whether for a couple of days or three years, on an individual not convicted of a crime, who is detained for very minor offenses.

The impact of prolonged pretrial detention, however, reaches further than the detention itself. While in jail, people are at risk of losing employment, falling behind in school, not getting needed medication, losing their housing, and losing custody of their children.[xxxv] Not only does pretrial detention significantly impact access to counsel and opportunities for dismissal, diversion, and plea bargaining,[xxxvi] detention has a coercive effect that has been shown to induce individuals to plead guilty out of a desire to go home.[xxxvii] People detained prior to trial are three to four times more likely to receive a sentence to jail or prison, and their sentences are two to three times longer.[xxxviii] Just three days in jail increases the risk that some people will be arrested on new charges. Pretrial detention further bleeds resources from communities that can least afford it, sucking away billions of dollars[xxxix] from families and communities that will never get it back. All of these harsh realities are even more acute as we continue to grapple with impact of COVID-19 in jails across the country, which has the additional risk of loss of life as a result of unjust pretrial incarceration.

The Problems with Money Bail and the Need for Reform

Between 1992 and 2006, the average bail amount increased by 118 percent, and eight in 10 people would have to pay more than a full year's wages to meet the average bail amount.[xl] According to a report by the Federal Reserve Board, 43 percent of individuals stated that they would be unable to pay for an emergency expense of $400 out of pocket,[xli] while 12 percent of Americans have no means at all to pay for such an expense.[xlii] In the federal system in 2018, 51,000 people were detained prior to trial, representing 75 percent of those charged with

crimes.[xliii] The median bail nationwide for felonies is currently $10,000, roughly eight months of income for a typical individual facing pretrial detention.

Despite constitutional requirements that bail may not be set higher than necessary to assure that the defendant will appear to stand trial,[xliv] many states determine bail costs through bail schedules, which tie the cost of release to the seriousness of criminal charges and sometimes additional factors such as criminal history or age.[xlv] Absent from those additionally considered factors are the individual's ability to pay and an individualized assessment of the person's risk of flight or danger to the community.[xlvi] This often results in higher rates of pretrial detention, because the amount required to post bail is vastly greater than an average defendant's financial capacity. Local communities often bear the burden of these higher rates of detention, as jails have become increasingly more overcrowded, and as a result, more expensive. The population in local and regional jails has tripled over the last 40 years, and a significant reason for that increase is rooted in the high rates of pretrial detention.[xlvii]

This money-based system is shown to be counterproductive to policy goals and ineffective at performing the very functions that bail is meant to perform. The primary concern driving the imposition of bail is that defendants will not appear for their court appearances, but the statistics show that failure to appear is incredibly rare: In a study done by the Bureau of Justice Statistics between 1990 and 2004 in 40 of the 75 largest U.S. counties, more than 75 percent of those accused of a crime showed up for their court dates within a one-year timespan.[xlviii] Many of the people who miss court appearances do so not out of a desire or attempt to flee, but because of structural barriers to appearance.[xlix] The inability to miss work, find child care, or find adequate transportation often contribute significantly to individuals failing to appear in court, as do simple mistakes like forgetting or getting the date wrong. Statutes criminalizing failure to appear fail to take these structural barriers into account, criminalizing missed court dates as if they were equivalent to willful fleeing of the jurisdiction.[l]

There are several methods that have been found to be more effective at ensuring court appearances, including a robust system of pretrial support and the imposition of non-financial conditions of release. Pretrial support systems seek to target many of the structural barriers to appearance through the provision of childcare and transportation services. Additionally, studies have shown that pretrial support systems that provide reminder calls or text messages dramatically reduce rates of failed appearances, sometimes reducing failure to appear rates by as much as 75 percent.[li] Courts can also choose to impose non-financial conditions for pretrial release, including periodic reporting to a pretrial services office, maintaining current routines related to employment, training or education, and release to the custody of a designated person who can ensure the individual's appearance.[lii]

Risk Assessment Tools Are Not the Answer

As calls for reform of money bail systems have grown and in recognition of the major emotional and financial costs of pretrial detention on individuals, families, and communities, many jurisdictions in recent years have switched to using pretrial risk assessment tools as an alternative

to cash bail. Pretrial risk assessment tools are often promoted as an essential part of bail reform, one that can help judges make more informed, objective pretrial decisions. The Leadership Conference, however, believes that risk assessments should never be used to replace the judgement of a court of law, as they threaten to further intensify unwarranted discrepancies in the justice system, and to provide a misleading and undeserved imprimatur of impartiality for an institution that desperately needs fundamental change.

Risk assessments are actuarial tools that use historical data, both from criminal-legal databases and demographic factors, to attempt to "forecast" which people can be safely[liii] released from custody without failing to appear at court and without getting arrested again on a new charge. Designers of these tools purport that they are evidence based and can provide magistrates and judges high-quality, "objective" data. In turn, these data supposedly help make jail populations smaller without putting public safety at risk by providing insights about who can be safely released following an arrest. But independent studies of whether or not risk assessment tools actually cause decarceration of our jails, and reduce racial disparities,[liv] have shown that many jurisdictions have not made their jails smaller. In fact, some have increased pretrial incarceration while none have reduced racial disparities in pretrial decision-making when using these tools.[lv] Prominent independent research has shown that these algorithms, trained on a practice of criminal justice that is racist at its root, have a punitive, disparate impact on Black and Brown people, even when well calibrated for "accuracy."[lvi]

After these tools are deployed, they are often tied to a "decision-making framework"[lvii] that interprets the scores these risk assessments produce and ties those scores to pretrial outcomes based on the level of risk of flight or rearrests that an individual poses — often termed low, moderate, or high.[lviii] Recommendations of release, pretrial supervision, or pretrial detention follow those risk levels. Because the tracking of a numerical score of "low," "moderate," and "high" risk is a policy decision, the ultimate determination of whether a defendant poses a risk is one of policy, not science, and is the result of "risk factors" that are highly malleable, subjective, and informed by the local tolerance for "risk" in the legal system.[lix]As a policy choice, actuarial risk assessments have not proven effective in reducing the number of people detained pretrial or the racial disparities attendant to pretrial justice. That is not the fault of the tools, but a function of the deep and pervasive structural inequities that define America's criminal-legal system. Thus, it follows, that the forecasts that come from technological tools reflect those inequities, rendering them an inadequate solution to meet the challenge of infusing fairness and racial equity into the criminal-legal system in general, and the pretrial justice system in particular.[lx]

Because of these concerns, The Leadership Conference released "The Use of Pretrial Risk Assessment Instruments: A Shared Statement of Civil Rights Concerns," signed by more than 100 civil rights, data science, and community-based organizations. The statement argued that risk assessment tools were deeply flawed, skewed based on race and socioeconomic status, and therefore should not be used to replace the constitutional judgement of courts of law when making detention decisions.[lxi] If at all utilized, the only meaningful purpose they can serve is to identify which people can be released immediately and which people are in need of non-punitive or restrictive services. We acknowledged, however, the increasing adoption of risk assessment

tools by many jurisdictions as alternatives to cash bail and, therefore, developed six principles guiding their use in order to reduce the harm that these assessments can impose.[lxii]

1. If in use, a pretrial risk assessment instrument must be designed and implemented in ways that reduce and ultimately eliminate unwarranted racial disparities across the criminal-legal system.
2. Pretrial risk assessment instruments must be developed with community input, validated regularly by independent data scientists with that input in mind, and subjected to regular, meaningful oversight by the community.
3. Risk assessment instruments must never recommend detention. Instead, if they do not recommend immediate release, they should recommend a hearing where a person is protected by rigorous procedural safeguards.
4. Neither pretrial detention nor conditions of supervision should ever be imposed, except through an individualized, adversarial hearing.
5. In accordance with the presumption of innocence, pretrial risk assessment instruments must communicate the individual's likelihood of success upon release, not failure, in clear and concrete terms.
6. These instruments must be transparent, independently validated, and open to challenge by an accused person's counsel.

Recommendations

A new framework for pretrial justice must maximize pretrial liberty while ending racial and wealth-based discrimination. To realize this vision, changes must be made to the release processes and presumptions of the pretrial process itself, the mechanisms of release, and the frameworks into which individuals are released prior to trial at both the federal and state levels.

Federal Reform Recommendations

Since the Bail Reform Act of 1984, the federal pretrial detention rate has risen from 24 percent to 75 percent of individuals facing trial.[lxiii] Policymakers should set clear metrics for reversing this increase, in order to return at least to a rate consistent with the levels prior to 1984. An essential first step in reducing this rate is to eliminate existing "presumptions" of pretrial detention. The statutory language of the 1984 Act has resulted in an overarching practice of detaining defendants in presumption cases. These presumptions of detention should be eliminated or significantly limited so as to not run counter to the statutory presumption of release and the Constitution's presumption of innocence. Eliminating or limiting the presumption of detention is possible without compromising judicial discretion, as the BRA requires judges to consider "the nature and circumstances of the offense charged" and "the weight of the evidence" at a detention hearing.[lxiv] One study shows that pretrial services officers less frequently recommend release in presumption cases and that release rates are higher for low-risk non-presumption cases.[lxv] Moreover, presumption "failed to correctly identify those who are most likely to recidivate, fail to appear, or be revoked for technical violations."[lxvi] In addition, even if presumptions in the

BRA are not eliminated, the statutory language should be clarified to confirm that the courts have the authority to make "individualized, discretionary decisions" in presumption cases.[lxvii]

Beyond the general elimination and clarification of the statutory presumptions, special consideration should be given to eliminating the "previous violator presumption" and the "drug and firearm offender presumption."[lxviii] Courts should work to further protect the presumption of innocence by presuming pretrial release in all but the most extreme cases, where absolutely no combination of conditions will ensure the person's appearance at court or the safety of identified members of a community.[lxix] Where the court feels that release is not appropriate, a decision to detain must be made only after a robust, adversarial hearing in front of a judge, where the charged person is represented by an attorney.[lxx] The government should invest the savings from bail reform in community-based and community-led services, including pretrial support services, drug and alcohol treatment centers, job training, youth programs, financial literacy, and childcare for communities adversely impacted by discriminatory bail practices. Further, Congress should examine the extent to which the Federal Pretrial Risk Assessment (PTRA) has failed to influence pretrial release in the federal system. Developed in 2009, policymakers hoped the instrument "might lead to an increase in release rates." However, "the PTRA's implementation has not been associated with rising pretrial release rates; rather, release rates have declined during the period coinciding with PTRA implementation."[lxxi]

State Reform Recommendations

Many states have already undertaken significant efforts at bail reform, and others should be incentivized by the federal government to go further. Washington, D.C. moved away from its use of cash bail in 1992, and currently releases 94 percent of those arrested.[lxxii] Between 2011 and 2016, roughly 90 percent of individuals on pretrial release were not re-arrested prior to the resolution of their case, and between 98 and 99 percent of released defendants were not arrested for violent crimes.[lxxiii] During that same time frame, between 88 and 90 percent of released defendants made their scheduled court dates.[lxxiv] Of those who were re-arrested, the vast majority were not for violent crimes.[lxxv]

Likewise, New Jersey deprioritized the use of money bail in 2014; since then, it has seen time spent behind bars while awaiting trial reduced by 40 percent,[lxxvi] and the state's overall population detained prior to trial has decreased by 44 percent.[lxxvii] A comparison of the old money bail system used until 2014 and the new system implemented in 2017 shows that both recidivism and court appearance rates have largely remained consistent.[lxxviii] New York's bail reform law, passed last year, deprioritized money bail, mandated release for 90 percent of all arrests statewide, and prohibited significant electronic monitoring in the vast majority of cases.[lxxix] The law is expected to reduce the state's pretrial jail population by 40 percent if implemented effectively. While these jurisdictions use risk assessment tools, their successes in decreasing pretrial detention cannot be wholly attributed to their adoption. In fact, these successes are the result of a combination of changes that completely overhauled the pretrial systems in these jurisdictions and increased due process protections for accused persons.

Declines in pretrial detention rates and the jail population in Philadelphia are additionally instructive on this point. Philadelphia has been successful in reducing its jail population by 40 percent by moving away from cash bail and driving other reforms by implementing systemic changes to its pretrial system, including diversion programs and recommending release automatically for minor offenses. Partially due to advocacy from local and national communities, Philadelphia has accomplished all of this without implementing a new risk assessment for pretrial decision-making. When Philadelphia's new system is compared with the old money bail approach, there has been no change in failure-to-appear or recidivism rates. In fact, the court-appearance rate for individuals charged with a crime in Philadelphia was the highest it had been in a decade.[lxxx]

Meaningful efforts to reform state pretrial detention policies should begin by reducing jail populations. Unless prohibited by a local statute, courts should assume release for the vast majority of accused persons — 95 percent — before trial. In order to achieve this target, The Leadership Conference recommends supporting states engaging in bail reform measures, including:

- Eliminating the use of money bail, pretrial fees, and any other "secured" financial conditions that require upfront payments and/or proof of collateral.
- Automatically releasing on recognizance everyone charged with a misdemeanor and/or certain felonies using a "cite and release" program that avoids the need for police processing or jail booking. The only condition should be that the person returns to court.
- Before imposing conditions or detention, requiring robust hearings that start by presuming innocence and, accordingly, release. Such a process must require, at a minimum:
    - The right to appointed counsel immediately following arrest;
    - A written record justifying detention or any release conditions imposed;
    - The right to discovery;
    - The right to testify, present witnesses, cross-examine witnesses, and present evidence;
    - The right to a good cause continuance;
    - The right to a speedy trial; and
    - The right to appeal and to have decisions speedily reviewed.
- Ensuring that eligibility for pretrial detention (the "detention eligibility net") is extremely limited. In addition to the "net" requirement, ensuring that, before imposing onerous conditions or detention, there is a robust adversarial hearing, where judges must find by clear and convincing evidence that individuals pose a high risk of intentional flight or of seriously physically harming another reasonably identifiable person during the adjudication period. Judges must also find that there are no combinations of conditions that will ensure the accused person will return to court and not pose a risk of specific and

identifiable harm to known persons in the future. Evidence supporting these findings must be specific to individuals and not based on generalized characteristics, such as the neighborhood in which they reside.

- Requiring release conditions to be no more restrictive than necessary to mitigate — and be directly tied to mitigating — the specific risk or risks identified. Ensuring that neither probation offices nor other enforcement agencies bear responsibility for providing pretrial services, including, but not limited to, engaging in monitoring, surveillance, and searches.

- Requiring robust, timely collection and reporting of pretrial detention and release data so communities can monitor whether racial and/or other disparities persist. Specifically, data must be automatically collected before trial for each individual detained and must include information about race, ethnicity, age, and gender.

- Requiring reporting of all prosecutorial decision-making (i.e., charging decisions and other discretionary decisions).

- Resisting the use of algorithm-based "risk assessment" tools, which exacerbate racial biases, in determinations of the conditions of release and detention.

Conclusion

Bringing fairness, equity, and dignity to our legal system is one of the most profound civil and human rights issues of our time. The unequal treatment of people of color and people who are low-income undermines the progress the nation has made over the past five decades toward equality under the law.

The Leadership Conference appreciates the recognition by many in Congress that this country has a broken bail system; and we have been pleased to support some of the federal reform efforts on this front. The Leadership Conference endorses the previously introduced legislation that utilizes federal resources to assist states in reforming the injustices of money bail systems that incarcerate people who have not been convicted of a crime simply because of their inability to pay. Legislative reforms such as these are significant steps forward as we work to eliminate all forms of preventative detention and unnecessary bail conditions.

In addition to federal legislation that encourages meaningful state level reforms, The Leadership Conference urges Congress to address the inadequacies of the federal bail system. The Bail Reform Act of 1984 presumes pretrial detention for certain offenders, including drug offenders, which has led to a federal pretrial detention rate of approximately 75 percent. Congress should eliminate existing presumptions of pretrial detention, reserving pretrial incarceration for rare, serious charges. With that change, we expect that, at both the state and federal levels, at least 95 percent of people in the criminal-legal system will be released no later than 48 hours after arrest.

The Leadership Conference

We urge this Subcommittee to pursue the measures outlined above to reform the federal pretrial release system, and to assist and incentivize states to engage in their own reform initiatives.

Thank you for your leadership on this critical issue.

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[xvii] 18 U.S.C.A. § 3142(e) (2008).
[xviii] Adair Jr., David N. "The Bail Reform Act of 1984." *Federal Judicial Center.* 2006https://www.fjc.gov/sites/default/files/2012/BailAct3.pdf. This presumption applies to crimes including: crimes of violence, federal drug offenses that carry a maximum prison term of ten years or more, certain offenses related to children, and certain terrorism-related charges.18 U.S.C. § 3142(f)(1).
[xix] *See* 18 U.S.C.§ 3142(e)(2),
[xx] Ibid. § 3142(e)(1) ("If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required *and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").*

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Congress of the United States
Washington, DC 20515

February 26, 2020

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable Karen Bass
Chairwomen
Subcommittee on Crime
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler and Subcommittee Chairwoman Bass,

In 1963, the U.S. Supreme Court announced its seminal decision in *Gideon v. Wainwright* that every individual charged with a crime who is unable to afford a lawyer has a right under the Sixth Amendment to the U.S. Constitution to be provided a lawyer. We urge the House Judiciary Committee and the Subcommittee on Crime to schedule a hearing on the status of public defender systems around the country.

For more than 50 years, states and localities have struggled to uphold the Sixth Amendment right to counsel. In many areas of the country, people accused of a misdemeanor with the possibility of serving time in jail are not even represented by counsel as they navigate the complexities of the criminal justice system.

- In Louisiana, it has recently been reported that inadequate funding in Caddo Parish forced the public defender to eliminate twelve attorney positions. This left twenty-two lawyers to work on more than 15,000 cases.

- In Florida, a single public defender can have a caseload of 500 felony cases per year. This is well over the national standards on caseloads, which suggests that a single lawyer handle no more than 150 felony cases per year.

- In Missouri, the public defender system is so overwhelmed and underfunded that 5,000 people were put on "wait lists." These "wait lists" have delayed the processing of cases until a public defender is available. In addition, seven public defenders in St. Joseph, Missouri have been so overwhelmed by their caseloads that they have requested relief from the court. Each lawyer had been working on more than 200 cases last year and the office worked on more than 1,700 total cases last year.

- In Alabama, there is no statewide public defender system. For capital cases, lawyers at the trial level are paid $70 per hour. This is far below the market rate. For capital cases on direct appeal, lawyers are paid $70 per hour with a $2,500 cap to represent an indigent person. On direct appeal, lawyers must raise all of the errors that occurred at the trial level.

The widespread crisis in our nation's public defender system is creating an alarming situation of people being processed into the criminal justice system. Local jails are being overwhelmed with a

The widespread crisis in our nation's public defender system is creating an alarming situation of people being processed into the criminal justice system. Local jails are being overwhelmed with a massive number of people moving through their facilities on a daily basis. Each year, people enter local jails an astonishing 10.6 million times. For comparison, 600,000 people enter our nation's prisons each year. Many people entering local jails have not yet been convicted of a crime. In fact, fewer than 150,000 people in local jails have actually been convicted of a crime and are serving time in the jail.

The *First Step Act* focused much of its reforms of the criminal justice system on changes to sentencing and prison conditions. It is however critical for the next steps of criminal justice reform to address the entry of people into the system in the first place. This includes the many people accused of a crime who sit in jail to wait for an attorney. We have introduced legislation – H.R. 2868/S. 1377, the *Ensuring Quality Access to Legal (EQUAL) Defense Act* – that would provide much needed systemic, financial, and training support for public defender offices.

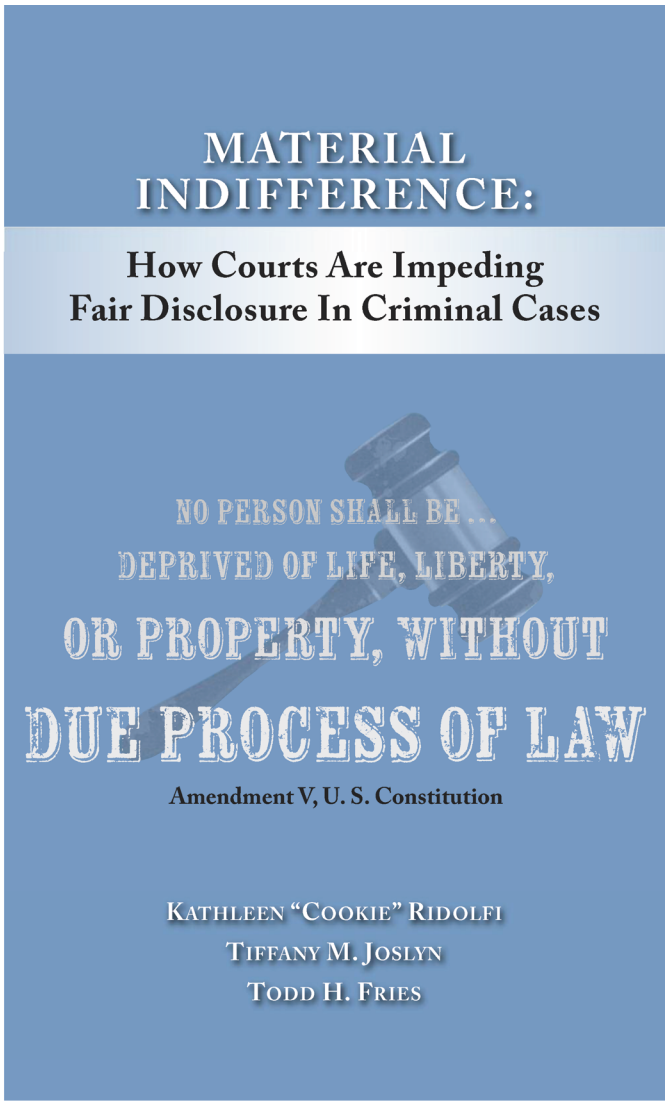
The ongoing crisis in our nation's public defender systems is violating constitutional rights, harming people and communities, and creating enormous hardship for local and state governments. A hearing on this crisis and on our legislation would be a valuable first step in ensuring that we uphold the constitutional right to counsel for every American.

We appreciate your prompt attention to this matter and look forward to working with you on this issue.

Sincerely,

Theodore E. Deutch
Member of Congress

Kamala D. Harris
U.S. Senator



FOUNDATION FOR CRIMINAL JUSTICE

National Association of Criminal Defense Lawyers NACDL 1958

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The VERITAS Initiative

MATERIAL INDIFFERENCE:
How Courts Are Impeding Fair Disclosure In Criminal Cases

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ABOUT THE VERITAS INITIATIVE OF SANTA CLARA UNIVERSITY SCHOOL OF LAW

The Veritas Initiative (VERITAS Initiative) is a program of Santa Clara University School of Law. The mission of the VERITAS Initiative is to advance the integrity of the justice system through research and data-driven reform. The VERITAS Initiative was founded in the fall of 2010 with the release of the most comprehensive statewide study ever undertaken on prosecutorial misconduct in state and federal courts. The work of the VERITAS Initiative has prompted national dialogue on the fair administration of justice and the critical importance of accountability in the justice system.

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The VERITAS Initiative

ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime … Foster the integrity, independence and expertise of the criminal defense profession … Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 10,000 direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The research and publication of this report was made possible through the support of individual donors and foundations to the Foundation for Criminal Justice, NACDL's supporting organization.

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ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

The Foundation for Criminal Justice (FCJ) preserves and promotes the core values of the American criminal justice system — among them due process, freedom from unreasonable search and seizure, fair sentencing, and access to effective counsel. The FCJ pursues this goal by supporting programs to educate the public on the role of these rights and values in a free society; and by preserving these rights through resources, education, training, and advocacy tools for the nation's criminal defense bar.

The FCJ believes that when someone is accused of misconduct, justice is only possible when the accused can effectively test the propriety and legality of the government's invocation of its power to prosecute. Justice is denied when someone accused of misconduct lacks universal and timely access to information that could expose a wrongful prosecution. Due process and respect for fundamental constitutional principles must be safeguarded in all criminal prosecutions.

The FCJ is incorporated in the District of Columbia as a 501(c)(3) non-profit corporation. All contributions to the FCJ are tax-deductible. The affairs of the FCJ are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the FCJ's own Articles of Incorporation, and its Bylaws.

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This study and report are the product of a collaborative project between the National Association of Criminal Defense Lawyers (NACDL) and the VERITAS Initiative of Santa Clara University School of Law (VERITAS Initiative). The authors would like to thank Dean Lisa A. Kloppenberg, Santa Clara University School of Law, as well as NACDL President Theodore Simon, the officers and directors of NACDL, the Foundation for Criminal Justice (FCJ), and FCJ President Gerald Lefcourt and, the FCJ Board of Trustees for their support.

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Despite these acknowledgments, any errors or omissions in the study or report are solely the responsibility of the authors.

FOREWORD

The criminal justice system is always a work in progress, and its architects need to stay tirelessly at the project of finding and implementing the right incentives and safeguards. In 2009, the new leadership of the Department of Justice — of which I was a part — confronted a critical aspect of that project, fundamental issues relating to *Brady v. Maryland* and the issue of prosecutorial disclosure in criminal cases. Responding to the very painful experience of the failed Senator Ted Stevens prosecution, early in 2010 we implemented changes in Department policy meant to provide direction and resources to prosecutors in fulfilling their obligations to disclose favorable information. In announcing those changes, we observed that federal prosecutors' duty is to "seek justice," and spoke about the "truth-seeking role of the prosecutor." I believe today as I did then that the Department's lawyers are dedicated to these principles, and in the overwhelming majority of cases succeed admirably in serving them in letter and spirit. But of course prosecutors have a dual role; though they are ultimately seekers of justice and the truth, they are of course tasked as a primary matter with seeking convictions of those they believe are guilty of crimes. That is obviously an enormously important function. And advocates pursuing a valid and important goal may tend to view things through a particular lens, no matter how hard they try to get their calls right. So certainly, judges have an indispensable role and obligation to oversee the system's guarantees of fairness and to make sure that its truth- and justice-seeking mission is fulfilled in each case.

There is no more important judicial role. The issue of fair disclosure relates to the most fundamental criminal justice issue of all — the guilt or innocence of the accused. Whether, when, and how the prosecution shares information with the defense also goes directly to the integrity of our legal system, the participants in it, and our institutions of justice. Defense counsel have limited discovery tools at their disposal — and lamentably, in the typical criminal case, often have very limited resources to conduct their own investigations. If the prosecution for whatever reason fails to disclose information favorable to the defense, this may well mean that it never comes to light. No greater harm can be done by our criminal justice system than conviction of innocent people. And we know from tragic experience that our system — despite its many virtues — is capable of reaching wrong results. Progress here as in any proper policy exercise depends on continued respect for all of the legitimate values at stake, including here, centrally, the rights of accused persons to have access to favorable information; but also important or compelling equities of the government, including (in some cases) concerns about the safety of witnesses or even national security concerns. Considering the rules and approaches by which judges accommodate those critical interests is obviously of central importance to the project.

Material Indifference:

I do not hold myself out as sufficiently expert in the case law or the methodology to have an informed opinion about all of this study's findings and conclusions. In an official role, I may have disagreed with some of them in the past. But by focusing on the shape of legal rules, and by connecting its prescriptions to data, I do believe that this paper contributes to our urgent and permanent collective project of seeking a criminal justice system with incentives and safeguards that best allow the government to obtain convictions of the perpetrators of crimes while protecting innocent people from wrongful conviction.

David W. Ogden
Chair, Government and Regulatory Litigation Group,
Wilmer Cutler Pickering Hale and Dorr LLP;
Deputy Attorney General of the United States, 2009–2010

EXECUTIVE SUMMARY

The integrity of the criminal justice system relies on the guarantees made to the actors operating within it. Critical to the accused is the guarantee of fair process. For the accused, fair process includes not only the right to put on a defense, but to put on a complete defense. The U.S. Supreme Court recognized the importance of this guarantee over 50 years ago, in *Brady v. Maryland*, when it declared that failure to disclose favorable information violates the constitution when that information is material. This guarantee, however, is frequently unmet. In courtrooms across the nation, accused persons are convicted without ever having access to, let alone an opportunity to present, information that is favorable to their defense.

The high-profile cases of Senator Theodore "Ted" Stevens and Michael Morton put a spotlight on this unfulfilled promise. The prosecutors in these cases possessed information favorable to the defense but failed to disclose it. Convinced of the defendants' guilt, they worked to build cases against them while ignoring information which tended to undercut their own view of the defendants' guilt. Both Senator Stevens and Michael Morton prevailed in clearing their own names, but countless others deprived of favorable information remain incarcerated or stained with a criminal record. Despite the reform that Morton's ordeal spawned in Texas, the federal system in which Senator Stevens was prosecuted remains the same and disclosure violations continue in state and federal cases nationwide.

In courtrooms across the nation, accused persons are convicted without ever having access to, let alone an opportunity to present, information that is favorable to their defense.

The frequency with which these violations occur and the role they play in wrongful convictions prompted the National Association of Criminal Defense Lawyers (NACDL) and the VERITAS Initiative of Santa Clara University School of Law (VERITAS Initiative) to come together to look at the problem from a different perspective. Many have heard about the problem of prosecutors engaging in misconduct by failing to disclose favorable information. The focus of such scholarship is typically on the individual prosecutor's behavior or the culture and policies of a particular prosecution office. Rather than look at the prosecution, with this study, NACDL and the VERITAS Initiative ask: What role does judicial review play in the disclosure of favorable information to the accused?

To answer that question, the authors took a random sample of *Brady* claims litigated in federal courts over a five-year period and assessed the quality and consistency of judicial review of the claims. The sample included 620 decisions in which a court ruled on the merits of a *Brady* claim. Guided by an extensive methodology, the review of these decisions included evaluating the materiality analysis employed by the courts and a variety of other factors and characteristics. The firsthand review of each decision in the sample and statistical analysis of the data as a whole reveals a variety of problems and answers the question motivating the study — through judicial review, the judiciary plays a significant role in impeding fair disclosure of favorable information.

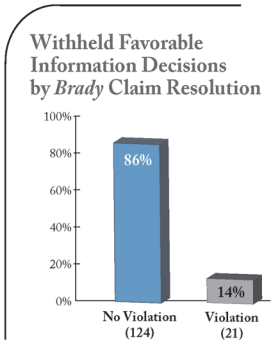
Material Indifference:

KEY FINDINGS

◆ The Materiality Standard Produces Arbitrary Results and Overwhelmingly Favors the Prosecution

The authors reviewed, analyzed, and coded each of the 620 decisions that decided a *Brady* claim on the merits. This process revealed that courts apply the materiality standard in an arbitrary manner. Two courts could have the same favorable information before them in remarkably similar factual contexts and come out differently on the question of materiality.

Despite the arbitrary application of the materiality standard, the data shows that it overwhelmingly favors the prosecution. Of the 620 decisions in the Study, prosecutors failed to disclose favorable information in 145. The defense prevailed in just 21 of these 145 decisions — that is, in only 14 percent of these decisions did the court deem the undisclosed favorable information material and find that a *Brady* violation had occurred. The courts ruled in favor of the prosecution in the remaining 86 percent of these decisions.



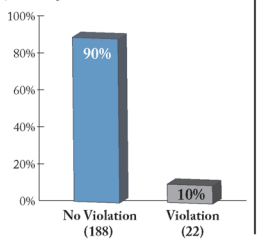
◆ Late Disclosure of Favorable Information Is Almost Never a *Brady* Violation

When the prosecution discloses favorable information late, the prejudice to the defense can be the same as if the prosecution did not disclose the information at all. The study included 65 decisions in which the prosecution disclosed favorable information late. The majority of these late disclosures occurred during trial, and statistical analysis reveals that statements, rather than other types of information, are more likely to be disclosed late. Only one court, out of these 65 decisions, held that the prosecution's late disclosure violated *Brady*. In the other 64 decisions, the court rejected the notion that the prejudice to the defense was sufficient to constitute a *Brady* violation.

The defense lost in 90 percent of the decisions in which the prosecution withheld favorable information.

EXECUTIVE SUMMARY

Withheld Favorable Information Decisions by *Brady* Claim Resolution



◆ The Prosecution Almost Always Wins When It Withholds Favorable Information

The prosecution prevailed on the question of materiality in 86 percent of the decisions in which it failed to disclose favorable information, and its odds improved when late disclosure decisions are included. In 90 percent of the decisions in which the prosecution withheld favorable information — disclosed it late or never at all — the defense lost. The courts held that the prosecution's withholding of favorable information violated *Brady* in just 10 percent of these decisions.

◆ Withholding Incentive or Deal Information Is More Likely to Result in a *Brady* Violation Finding

The defense was more likely to prevail on its *Brady* claim when the information at issue was an incentive or deal for a witness to testify. Despite being just 16 percent of the Study Sample, decisions involving incentive or deal information make up over one-third of the decisions resolved by a finding that *Brady* was violated. Further, the statistical analysis revealed a strong correlation between this type of impeachment information and findings that the prosecution violated *Brady*.

◆ Courts 'Burden Shift' When They Employ the Due Diligence 'Rule' Against the Defendant

When the prosecution fails to disclose favorable information, courts sometimes use the due diligence rule to excuse this failure and deny a defendant's *Brady* claim. This occurred in just over three percent of the decisions. Employing the due diligence rule shifts the court's inquiry away from the prosecution's failure to satisfy its disclosure obligation, and to the defense's failure to discover the favorable information on its own. By treating the discovery process like a game of hide-and-seek, the due diligence rule runs counter to the guarantee of fair process.

This study provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging disclosure of favorable information.

Death Penalty Decisions Are More Likely to Involve Withheld Favorable Information and to Be Resolved With a 'Not Material' Finding

Favorable information was withheld or disclosed late by the prosecution in 53 percent of the decisions involving the death penalty, but only 34 percent of all the decisions studied. And, in death penalty decisions, withheld favorable information was more likely to be found not material. Nearly two-thirds of the death penalty decisions resulted in a finding that the withheld information was not material. By comparison, only one-third of all the decisions studied were resolved with a not material finding.

Mechanisms for Increasing Disclosure of Favorable Information

The judiciary plays a significant role in the fair disclosure of, and defense access to, favorable information. More specifically, this study provides empirical support for the conclusion that the manner in which courts review *Brady* claims has the result, intentional or not, of discouraging prosecutors from disclosing information that does not meet the high bar of materiality. Thus, any attempt to address the problems identified in this study must come from the judiciary or, should it fail to act, the legislature.

The weight of legislative action is greater than any other mechanism — it is an enforceable message that fair disclosure is a requisite to fair process.

This report offers three reform mechanisms that can be applied by the judicial and legislative branches at both the state and federal levels.

Ethical Rule Order — A Court Order for Disclosure of Favorable Information in Criminal Proceedings

In each case, defense attorneys should request, and judges should grant, orders for the prosecution to disclose all favorable information in accord with ABA Model Rule 3.8(d). This order, known as an Ethical Rule Order, would bind prosecutors and make it possible for judges to sanction those prosecutors who fail to comply. If defense attorneys and judges make this order the norm for a particular court, jurisdiction, or even the entire judicial system, it will serve to deter willful non-disclosure. This is even more effective when judges or courts issue a standing order for all their cases. The Ethical Rule Order is one way that individual defense attorneys and judges can obtain immediate results in a particular criminal proceeding, while simultaneously encouraging broader change in disclosure practices and helping to prevent the problematic practices identified by this study.

◆ Amendment of Judicial Rules and Policies Governing Disclosure

Another mechanism for increasing fair disclosure and preventing the type of arbitrary practices evidenced by this study is amendment of judicial rules. In many jurisdictions, the judicial branch sets forth the rules that regulate the prosecution's disclosure obligations, which are then enforced by every court within that jurisdiction. These rules are often set by the highest court in a jurisdiction or, as in the federal system, a group of judges that are representative of the various courts within the system. As a result, judicial branches nationwide are well-positioned to respond to the failure of the prosecution to disclose favorable information in a timely fashion. Amendment of court rules and policies to require fair disclosure of information could decrease the sort of prosecutorial gamesmanship that has become commonplace and help restore balance to the justice system.

◆ Legislation Codifying Fair Disclosure

The most effective mechanism for reform of prosecutorial disclosure practices could come through the legislative branch. Legislation that sets forth a clear mandate for disclosure of favorable information, as well as comprehensive rules for the disclosure process, would have a significant system-wide impact. The weight of legislative action is greater than any other mechanism — it is an enforceable message that fair disclosure is a requisite to fair process. Codifying a fair disclosure process could increase defense access to favorable information and help prevent the problems identified in this study. Further, enactment of this reform may deter prosecutorial gamesmanship in the discovery context and decrease *Brady* claims system-wide.

Conclusion

Courts are impeding fair disclosure in criminal cases, and in so doing, encouraging prosecutors to disclose as little favorable information as possible. With *Brady*, the Supreme Court held that non-disclosure only violates the Constitution when the information is material. This holding established a post-trial standard of review that many prosecutors have adopted as the pre-trial standard governing their disclosure obligations. Despite ethical rules that set forth a disclosure obligation far broader than *Brady*, many prosecutor offices, and even some courts, have taken the same incorrect position — prosecutors need only disclose as much as necessary to ensure the conviction survives appeal.

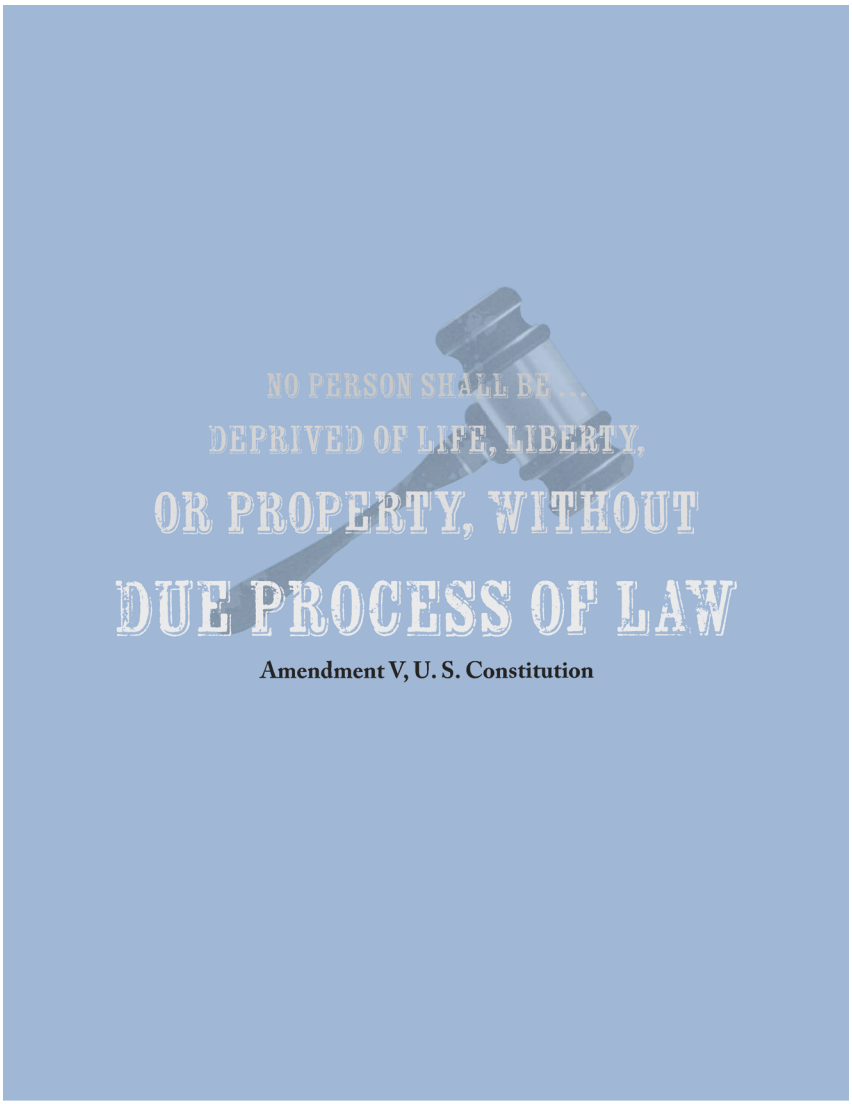
EXECUTIVE SUMMARY

Across the nation prosecutors are guiding their disclosure obligations by a post-trial standard that some courts have decried as unworkable in the pre-trial context. Prosecutors are ill-equipped to apply a post-trial standard to a pre-trial obligation without the benefit of the defense perspective and with their natural biases as zealous advocates. Taking their cues from the courts, prosecutors are acting to the detriment of the defense and fair process.

This study demonstrates that the odds are in favor of prosecutors who withhold favorable information. Courts are rarely finding that the withholding of favorable information is prejudicial enough to constitute a *Brady* violation. Strict judicial adherence to the materiality standard without regard to the integrity of the process is a direct endorsement of non-disclosure of favorable information.

Until courts embrace a broader disclosure obligation, such as that embodied in the ABA Model Rules, and reject the premise that a prosecution's obligation is measured solely by *Brady*, they will continue impeding disclosure of favorable information. The status quo of material indifference must yield to the guarantee of fair process. Whether it comes through individual courts, the judiciary, or legislative action, reform is necessary.

The status quo of material indifference must yield to the guarantee of fair process.



Amendment V, U. S. Constitution

I. INTRODUCTION*

Fifty years ago in ***Brady v. Maryland***, the U.S. Supreme Court recognized the constitutional importance of providing a person accused of a crime with **favorable information** and declared that failure to do so violates due process when that information is "material" either to guilt or punishment.[1] Yet, studies over the last 10 years have conclusively demonstrated that this duty is often left unfulfilled.[2] Recent high profile wrongful convictions such as those of the late U.S. Senator Ted Stevens, Michael Morton, and John Thompson have shaken public confidence in the justice system and elevated the issue of ***Brady* violations** in the public arena. These cases and others like them show how devastating the consequences can be when favorable information is not disclosed to those facing criminal charges.[3]

After over 50 years of discussion, debate, scholarly articles, and conferences, "state and federal criminal justice systems appear less than adequate in assuring the prosecutorial disclosure obligations are met."[4] The growing visibility of wrongful convictions and the countless anecdotes of prosecutors withholding favorable information prompted the National Association of Criminal Defense Lawyers (NACDL) and the VERITAS Initiative of Santa Clara University School of Law (VERITAS Initiative) to undertake the study that is the subject of this report. The authors took a random sample of *Brady* claims litigated in federal courts over a five-year period and assessed the quality and consistency of judicial review of such claims. Focusing on the courts, this study seeks to understand the particular impact of judicial review on defendants' access to favorable information in criminal cases.

The impact of withholding favorable information extends beyond the question of guilt or innocence. When this occurs, the integrity of the entire system is at stake.

At the outset, NACDL and the VERITAS Initiative acknowledge that this study only scratches the surface of this problem. The question of how often prosecutors violate *Brady v. Maryland* is impossible to answer because, by its very nature, the withholding of *Brady* material is hidden, and withheld information may never surface. The number of cases in which a judge or jury may have convicted an innocent person, without becoming aware of all the favorable information actually in existence, remains unknown. One can fairly assume that for every wrongfully convicted individual who has been vindicated, there are countless others whose innocence remains invisible to the system.

The impact of withholding favorable information extends beyond the question of guilt or innocence. And, ramifications extend beyond the right of the accused to present a defense. When deprived of favorable information, the right of an accused to due process is violated and the role of the judge and jury as fact-finder is compromised. When this occurs, the integrity of the entire system is at stake.

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*The Report Glossary is located at Appendix B. Any word or phrase contained in the Report Glossary will appear in **bold** the first time it appears in the report text.

The failure to timely produce favorable information to the defense is also a significant factor in the conviction of innocent people. When researchers for the Innocence Project looked at DNA exoneration cases[5] involving documented appeals and/or civil suits alleging prosecutorial misconduct, 42 percent alleged *Brady* violations — non-disclosure of favorable information that would have made a difference in the outcome of the case.[6] Unfortunately, when DNA is unavailable, or it is not relevant to a case, many individuals wrongly convicted because of the failure to disclose favorable information may never get justice.

The case of John Thompson illustrates what can happen when favorable information is not disclosed. On Dec. 6, 1984, Ray Liuzza, an executive from a prominent New Orleans family, was robbed and murdered near his home.[7] The murder received widespread public attention, leading to an intensive police investigation and the Liuzza family offering a $15,000 reward for information leading to a conviction.[8] Soon thereafter, acting on a tip, the police arrested John Thompson and prosecutors charged him with the murder.[9]

For 18 years, the New Orleans District Attorney had withheld from the defense test results that conclusively established someone other than Thompson committed the carjacking.

On Dec. 28, 1984, not far from the Liuzza murder scene, three teenagers were carjacked at gunpoint and assaulted.[10] Based on a news photo connected to the Liuzza murder, the teens identified their carjacker as John Thompson.[11] For strategic reasons, prosecutors obtained a conviction against Thompson in the felony carjacking case before trying him for the murder.[12] Prosecutors brought the carjacking charge to trial first because the felony conviction could serve as the basis for elevating the homicide to a capital case and deter Thompson from testifying at the murder trial in his defense.[13] Thompson was ultimately convicted of the Liuzza murder and sentenced to death.[14]

After 18 years in prison, 14 of which he spent on death row, Thompson was facing his seventh execution date when a defense investigator made a critical discovery. She learned that the carjacking perpetrator's blood was found on one of the victims' pants leg.[15] Although the authorities had tested the blood as part of their investigation, the results were not disclosed to the defense. The test results conclusively established that someone other than Thompson committed the carjacking.[16] For 18 years, the New Orleans District Attorney had withheld these test results from the defense.[17] When the blood test results became known, Thompson was exonerated in the carjacking case and the trial court immediately stayed his execution.[18]

For the next three years, John Thompson fought for and gained a reversal in the murder case on the ground that the carjacking conviction had "unconstitutionally deprived [him] of his right to testify … at the murder trial."[19] Undeterred, the prosecutors retried Thompson for the Liuzza murder.[20] In preparation for this second murder trial, the defense uncovered even more information that the government had withheld, information that bolstered Thompson's defense.[21] The jury took only 35 minutes to return a verdict of not guilty.[22] After nearly two decades, John Thompson was vindicated and released.[23]

John Thompson was 22 years old and living in a public housing project in New Orleans at the time of his arrest. Two years later, in another part of the country, 32-year-old Michael Morton was living in a middle-class Texas suburb when his life took a

similarly tragic turn.[24] On Aug. 13, 1986, Morton's wife was brutally murdered in their home. In a deeply disturbing chain of events, Morton was arrested, charged, and ultimately convicted of her murder. Michael Morton spent 25 years behind bars before DNA evidence established his innocence[25] and he was exonerated.[26]

The post-conviction DNA litigation unveiled information even more disturbing than the conviction of an innocent man; it revealed that the government had obtained that conviction by failing to disclose favorable information to the defense in violation of *Brady v. Maryland*.[27] Eleven days after witnessing his mother's murder, Eric Morton, the three-year-old son of Michael and Christine Morton, told his grandmother Rita Kirkpatrick what he saw.[28] Despite the trauma of the event, Eric was able to describe the crime scene and murder in great detail. He stated that a "monster," not his father, had attacked his mother and that his "Daddy" was "not home" when it happened.[29] Eric's grandmother brought this information to the police and, although it was recorded in the notes of the lead investigator, the information never reached the defense.[30]

When the defense team raised the possibility that something was amiss, prosecutors provided the trial judge with a sealed file of that investigator's notes and reports. The sealed file did not include two critical pieces of information — young Eric's eyewitness account and the statements of the Mortons' neighbors who told the police that a man in a green van had repeatedly parked on the street behind the Mortons' home and walked off into the nearby wooded area.[31] This information would have provided material support to Michael Morton's defense that an intruder came into his home and brutally victimized his wife. This information was withheld from the defense and intentionally suppressed during the trial court's pre-trial discovery inquiry. Absent the presence of DNA evidence in Morton's case, this other undisclosed information would have remained hidden forever.

"This court cannot think of a more intentionally harmful act than a prosecutor's conscious choice to hide mitigating evidence so as to create an uneven playing field for a defendant facing a murder charge and life sentence."

— In re Honorable Ken Anderson (A Court of Inquiry)

As Morton sat in prison for a crime he did not commit, the man who was ultimately convicted of killing Christine Morton is suspected of taking another life — Debra Master Baker in Travis County, Texas — in the same brutal manner.[32] Meanwhile, Morton watched his relationship with his son Eric grow distant and eventually fall into disarray, while the prosecutor who withheld this information went on to win election to become a Williamson County District Judge.[33]

In February 2011, during a formal "Court of Inquiry," a rare legal proceeding for the purpose of reviewing a prosecutor's conduct, Morton explained to the court that although he does not seek "revenge" or "anything ill" for the prosecutor, he realizes "that there needs to be accountability" because, "[w]ithout that, every single thing falls apart."[34] In the court order following the proceeding, the presiding judge wrote: "This court cannot think of a more intentionally harmful act than a prosecutor's conscious choice to hide mitigating evidence so as to create an uneven playing field for a defendant facing a murder charge and life sentence."[35]

Despite their different backgrounds — Thompson, an African-American man living in public housing, and Morton, a white man living in middle-class suburbs — their stories are eerily similar. They demonstrate the significant human wreckage that can result from a system that fails to ensure defendants access to information favorable to their case. The problem is not limited by race or class and transcends types of crime and the boundaries of state and federal jurisdiction. In fact, one of the most notable and recent examples of the damage caused by the withholding of *Brady* material involves a longtime U.S. senator and allegations of corruption.

Theodore Fulton "Ted" Stevens served in the U.S. Senate for over 40 years, from December 1968 to January 2009. He was the longest-serving Republican senator, holding the position of majority whip of the Senate twice, serving as president pro tempore of the Senate once, and being only the third senator to hold the title of president pro tempore emeritus. Despite this lifelong commitment to public service, Senator Stevens' career did not end with the dignity traditionally afforded a dedicated public servant. Rather, his service was taken from him, along with his reputation, through a miscarriage of justice.

From the start, the prosecution of Senator Stevens was permeated with *Brady* violations, making it impossible for the senator to receive a fair trial.

On July 29, 2008, during his re-election campaign, a federal grand jury indicted Senator Stevens on seven counts of criminal ethics violations for failing to report gifts related to renovations of his home.[36] Maintaining his innocence and attempting to clear his name prior to Election Day, the senator invoked his right to a speedy trial by jury. On Oct. 27, 2008, the jury returned a verdict of guilty on all counts and, approximately one week later, the Alaska electorate replaced their senior senator with his challenger.[37] It was only after this electoral defeat, and shortly before his tragic passing, that Senator Stevens was finally exonerated.[38]

From the start, the prosecution of Senator Stevens was permeated with *Brady* violations, making it impossible for the senator to receive a fair trial.[39] During a pre-trial interview, for example, the government's star witness, Bill Allen, stated that he believed Senator Stevens would have paid construction bills if they were sent to him.[40] This statement was crucial information for the defense, as the senator's knowledge of and intent to pay constructions bills was the main issue in the case.[41] The government did not give this statement to the defense. In addition, during the trial the government also withheld exculpatory statements made by renovation foreman Rocky Williams during pre-trial interviews. They also refused to provide the defense with grand jury testimony of Williams in which he reiterated the exculpatory statements. Prosecutors argued that the testimony was not "*Brady* material."[42]

These are just a few examples of the *Brady* violations exacted upon Senator Stevens. It was only after a whistleblower pulled back the curtain on this unjust prosecution that the senator's indictment was eventually dismissed.[43] The decision to move for dismissal ultimately came from Attorney General Eric Holder himself, following a review of the case by a new team of Department of Justice lawyers.[44] Granting the government's motion for dismissal, U.S. District Court Judge Emmet G. Sullivan stated, "'There was never a judgment of conviction in this case. The jury's verdict is being set aside and has no legal effect.'"[45] He then ordered an investigation into the government's conduct, noting that "[t]he

government's ill-gotten verdict in the case not only cost that public official his bid for re-election, the results of that election tipped the balance of power in the United States Senate."[46] The investigation could not, however, undo the damage to the senator's reputation and legacy, all the more irreparable due to his tragic passing.

Thompson, Morton, and Stevens were all ultimately vindicated because they were able to discover undisclosed information that proved their claims. Although this study has the benefit of their stories, it is constrained by the undeniable fact that an unknowable number of *Brady* violations are hidden and no methodology, no matter how elaborate, can account for such cases. Any study of *Brady* violations will be incomplete — the full scope of the problem is simply unascertainable. For those cases that are visible, however, there is much to be learned.

The Thompson, Morton, and Stevens cases are exceptional not only because the undisclosed information surfaced, but because courts concluded that the non-disclosures amounted to constitutional violations. Even when undisclosed information surfaces, it is rare for the justice system to afford the defendant a remedy. This unfortunate reality is in part what motivates this study. Any attempt to alter the status quo requires an understanding of the role judicial review plays in shaping the dynamic between what *Brady v. Maryland* requires and what actually happens in practice. As such, the primary objective of this study was to review a sufficient number of court decisions in order to provide a fair assessment of the quality and consistency of judicial review by courts deciding claims under *Brady v. Maryland.*

In support of that objective, the study applies a detailed analytic methodology to a random sample of *Brady* claims litigated in federal courts over a five year-period[47] in order to answer the following questions: (1) To what extent are courts consistent in the use and application of the materiality standard when deciding *Brady* claims? (2) What other issues or factors are there underlying courts' resolutions of *Brady* claims? (3) To what extent is favorable information being withheld from the defense? These questions focus on the courts and judicial review of claims brought under *Brady v. Maryland*, as opposed to the prosecutors and the line distinguishing ethical behavior from prosecutorial misconduct. Rather than critique individual actors within the system, the study seeks to assess the system as a whole. This is consistent with the objective of the study: to understand the role judicial review plays in shaping disclosure of favorable information in criminal cases.

Even when undisclosed information surfaces, it is rare for the justice system to afford the defendant a remedy.

The report that follows attempts to set forth the answers to these questions and to document central themes that emerged from review of the **Study Sample**. As a prelude to the study's findings, the report also provides a brief history of the development of *Brady* claims and the gradual erosion of due process rights under *Brady v. Maryland*, as well as the methodology employed in the study. The findings demonstrate that the deep concerns motivating the study are, in fact, well-founded. Specifically, the data reveals several troubling, recurring issues regarding how courts analyze *Brady* claims and that application of the materiality standard overwhelmingly favors the government and produces arbitrary results. In light of these findings, the report concludes with a discussion of various reform proposals and how, if implemented, such proposals would help prevent these problems and increase fair disclosure in the future.

II. HISTORY AND DEVELOPMENT OF THE *BRADY* DOCTRINE

In *Brady v. Maryland*, the U.S. Supreme Court held that the prosecution has the duty to furnish favorable information to the accused and that failure to do so "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[48] John L. Brady was convicted of capital murder and sentenced to death. Only after an unsuccessful appeal did he learn the prosecution had withheld a statement that could have mitigated his death sentence. Upon seeking post-conviction relief, the state appeals court held that "suppression of the evidence by the prosecution denied [Brady] due process of law," and remanded the case for retrial of the question of punishment, not the question of guilt.[49] Affirming this decision, the U.S. Supreme Court concluded that "the withholding of this particular confession [] was prejudicial to the defendant Brady" and he was entitled to relief.[50]

No matter how favorable to the defense, if the undisclosed information is not deemed material, then there is insufficient prejudice to constitute a *Brady* violation.

With this decision, "the Supreme Court established an approach to analyze a case retrospectively to determine whether a defendant received a fair enough trial under general due process standards."[51] To obtain relief under the *Brady* rule, the accused must show that the information (1) was not disclosed by the prosecution; (2) is favorable to the accused;[52] and (3) is material either to guilt or punishment. If all three requirements are met, then a *Brady* violation has occurred and the constitutional due process right of the accused has been violated.

No matter how favorable to the defense, if the undisclosed information is not deemed material, then there is insufficient prejudice to constitute a *Brady* violation. Although the Court established this materiality requirement in the *Brady* decision, its contours were not defined until later in subsequent decisions. The two most common articulations of the materiality standard come from two Supreme Court decisions referenced in *Strickler v. Greene*.[53] In *Strickler*, relying on its decision in *Bagley,* the Court held that information is material only if "there is a reasonable probability that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense."[54] Quoting from its decision in *Kyles*, the Court further explained that "'[t]he 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.'"[55] Despite the prominence of the ***Bagley*** and ***Kyles*** **standards**, lower courts sometimes articulate the materiality requirement in different ways that increase or decrease the burden on the accused.[56]

Material Indifference:

The *Brady* decision was part of a judicial movement led by Justice Oliver Wendell Holmes that expanded criminal due process from the basic procedural requirement of "notice and opportunity to be heard," to the more meaningful concepts of "substantive justice" and "fair trial."[57] The *Brady* decision was one in a series of decisions by the Supreme Court that incorporated important procedural rights for defendants and did so in ringing moral tones. "These opinions possess special rhetorical power because they were expressly based on fundamental values like equality, human dignity, morality of government, protection of the oppressed, and privacy."[58]

The *Brady* decision was no exception. Concluding the government's conduct violated Brady's 14th Amendment right to due process, Justice William O. Douglas wrote,

> A prosecution that withholds evidence … which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant [and] casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice [.][59]

Further, Justice Douglas explained, "Society wins not only when the guilty are convicted but when criminal trials are fair," and underscored his message by quoting the grand language inscribed on the walls of the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts."[60]

At its inception, the *Brady* rule, through its disclosure mandate,[61] offered new hope for the strengthening of fair trial rights. In the ensuing decades, however, the Court took *Brady* in two somewhat opposing directions. It expanded the reach of the *Brady* rule in several specific instances while at the same time it limited its application by narrowing the definition of materiality. The Court expanded the reach of *Brady* to include information not specifically requested by the defendant,[62] information that may be used to impeach government witnesses,[63] and information in the control of government agents regardless of whether the prosecutor was aware of the information.[64] In light of these decisions, "*Brady* appear[ed] to be an expanding doctrine into which the Court ... injected flexibility to reflect the realities of criminal prosecutions."[65]

The current permutation of *Brady* is a hindrance to a "defendant's access to the kind of exculpatory evidence whose disclosure *Brady* held to be fundamental to due process."

— Professor Alafair Burke

But at the same time, and in subsequent decisions, the Court was in other ways moving away from a broad interpretation of the doctrine to a narrower definition of materiality and stricter application of the rule.[66] The Court did this by driving home that *Brady* did not create a right to discovery *per se*, but rather acknowledged a Constitutional Due Process[67] right to a fair trial that includes a right to discovery of favorable information — that is exculpatory or impeaching information of such importance that if omitted would create "a reasonable doubt of guilt that did not otherwise exist."[68] This narrowing has led at least one scholar, Professor Alafair Burke, to describe the current permutation of *Brady* as a hindrance to a "defendant's access to the kind of exculpatory evidence whose disclosure *Brady* held to be fundamental to due process."[69]

But the analysis does not end there. The parameters of a prosecutor's obligation to disclose favorable information, and a defendant's corresponding right to access that information, are not defined entirely by *Brady*, and the Court has repeatedly said so. Despite the Court's unwillingness to expand a defendant's due process right to information not constrained by the "materiality" test, it has been reminding prosecutors all along that they are ethically bound under professional rules to a broader disclosure obligation beyond what the Constitution provides a defendant.[70] The Court has long encouraged the "prudent prosecutor to resolve doubtful questions in favor of disclosure."[71]

As the Court has emphasized, a prudent and ethical prosecutor discloses more than what is constitutionally required.

The Court has, on multiple occasions, underscored the difference between what is required under *Brady* to sustain a conviction and the course an ethical prosecutor must take. The *Brady* standard used by courts following a conviction is not the rule by which prosecutors should abide when making disclosure determinations prior to conviction. In 1999, in *Strickler v. Greene*, the Court referred to this broad disclosure obligation when it distinguished between "material" favorable information that must be disclosed under the Due Process Clause and non-material favorable information that a prosecutor has a "duty to disclose."[72]

> [T]he term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence — that is, to any suppression of so-called '*Brady* material' — although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.[73]

Through this discussion of "so-called '*Brady* material,'" the Court was actively encouraging prosecutors to turn over non-material favorable information.[74]

A decade later in *Cone v. Bell*, the Court provided additional support for this point:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.[75]

The prosecutor's affirmative duty to disclose is separate and apart from the post-trial standard of review embodied in the *Brady* rule. And, as the Court has emphasized, a prudent and ethical prosecutor discloses more than what is constitutionally required.

These somewhat disparate views on prosecutorial disclosure obligations are not confined to the Court's dicta. For example, the American Bar Association (ABA) has established a disclosure obligation far broader than that recognized by the Department of Justice (DOJ) in its own guidance to prosecutors. In Formal Opinion 09-454, the ABA Standing Committee on Ethics and Professional Responsibility acknowledged the variety of sources governing disclosure

obligations, but held that prosecutors "have a separate disclosure obligation under Rule 3.8(d) of the Model Rules of Professional Conduct."[76]

The ABA Model Rules establish an "independent" duty, "more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome."[77] This duty "requires prosecutors to disclose favorable evidence so that the *defense* can decide on its utility."[78] And, unlike the constitutional decisions, the ethics rule does not "establish an after-the-fact, outcome-determinative 'materiality' test."[79]

In contrast, in a Jan. 4, 2010, memo to all DOJ prosecutors, Deputy Attorney General David W. Ogden stated that "prosecutors should be aware that [U.S. Attorney's Manual] Section 9-5.001 details the Department's policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*."[80] Neither the Ogden Memo nor the U.S. Attorney's Manual (USAM), however, currently includes any citation to ABA Formal Opinion 09-454 or any ABA rules or standards.[81] Despite the broad disclosure obligation referenced in the Ogden Memo, disclosure of all favorable information, regardless of materiality, is not the policy of the Department.[82]

Rather, USAM § 9-5.001(A) states that the "policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair."[83] Then, citing Supreme Court case law, USAM 9-5.001(B) sets forth a prosecutorial disclosure obligation that focuses primarily on the concept of "materiality[,]"[84] adding that "ordinarily[] evidence that would not be admissible at trial need not be disclosed."[85]

What is clear is that the *Brady* doctrine alone, as it has been circumscribed by the courts, cannot be relied upon to ensure a defendant's access to favorable information.

Because the Supreme Court takes somewhat contrary views regarding a prosecutor's disclosure obligations, the message to prosecutors and to courts has been confused. Prosecutors have been told they are constitutionally bound to disclose only material favorable information yet ethically bound to do more. Under a strict reading of *Brady* and its progeny, however, prosecutors can disclose very little without risk of upsetting the conviction. The lack of clarity from the Court is evident in the lack of consistency in the practices of prosecutors and in the different ways in which lower courts resolve questions of disclosure.

In addition, the difficulties inherent in the application of *Brady*'s materiality standard have caused some courts to conclude that the standard is simply unworkable in the trial context. For example, Federal District Court Judge Paul L. Friedman noted that the pre-trial judgment of materiality is "speculative" and dependent on questions that are "unknown or unknowable."[86] What is clear is that the *Brady* doctrine alone, as it has been circumscribed by the courts, cannot be relied upon to ensure a defendant's access to favorable information.

III. STUDY PURPOSE AND METHODOLOGY SUMMARY[87]

The primary objective of this study was to review a sufficient number of judicial decisions in order to provide a fair assessment of the quality and consistency of judicial review by courts deciding claims under *Brady v. Maryland*. As an initial matter, the **Research Team**[88] limited the universe of decisions to those made in federal courts over a defined five-year time period from August 2007 to August 2012.[89] From that group, the Research Team identified over 5,000 decisions in which *"Brady v. Maryland"* appeared in the decision text and pulled a random selection of those decisions to arrive at the Study Sample of 1,497 decisions for closer reading, analysis, and coding.[90]

The Research Team then developed a detailed analytical methodology to provide quantitative answers to the following three questions:

1. Are courts consistent in the use and application of the materiality standard when deciding *Brady* claims?

2. What other issues or factors, if any, influence or underlie courts' resolutions of *Brady* claims?

3. To what extent is favorable information being withheld from the defense?

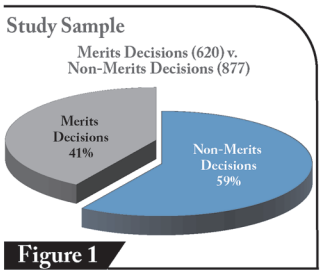
To ensure consistency, the Research Team created an extensive **Guidance Document**[91] with step-by-step instructions on how to analyze and code each decision within the Study Sample. Only the decisions contained within the Study Sample received analysis and coding, *i.e.,* the Study did not analyze any subsequent treatment of the decisions by any reviewing courts.

Before discussing the study's findings, it is important to acknowledge the limitations of the study's methodology. First, this research barely scratches the surface of *Brady* practice and jurisprudence. *Brady* violations are by definition hidden and this study examines only those decisions in which a petitioner/appellant raised a violation claim. Second, this study is based on information gathered from post-conviction opinions available on Westlaw and, as such, the Study Sample almost exclusively reflects cases in which the defendant exercised his right to a trial. The study therefore does not touch on the majority of criminal prosecutions resolved without trial, which make up more than 90 percent of all criminal cases,[92] or those cases in which the undisclosed information is yet to be discovered. Further, the troubling findings discussed in this report are all the more serious when considered in the context of this study's limitations — the Study Sample includes less than one-third of the federal court decisions citing *Brady* during the selected five-year time period that are available on Westlaw, and it does not include *Brady* claims that were abandoned before reaching federal court.

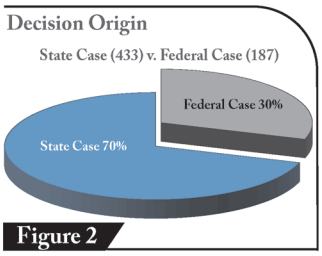
IV. PROFILE OF THE STUDY SAMPLE

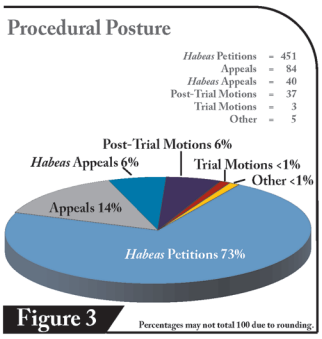
The Study Sample included 1,497 decisions issued by federal courts over a five-year time period, from Aug. 1, 2007 to July 31, 2012.

As illustrated in Figure One, 620 decisions or 41 percent of the Study Sample resolve a *Brady* claim on the **merits***, and the remaining 877 decisions or 59 percent of the Study Sample do not resolve a *Brady* claim on the merits, *i.e.*, a **non-merits decision**.[93] ***See* Figure 1**.



Of the 620 decisions, 433 are in cases that originated in a state court and the remaining 187 are in cases that arose from a federal court prosecution. As Figure Two reflects, this is a two-to-one ratio of state to federal prosecutions. ***See* Figure 2**.





Although these decisions present a variety of procedural postures, nearly three-fourths are petitions for a writ of ***habeas corpus***.[94] Figure Three illustrates the decisions broken down by procedural posture.[95] ***See* Figure 3**.

*As used in this report, the term "decisions" refers only to the 620 Study Sample decisions that resolve a *Brady* claim on the merits.

Figure Four demonstrates that more of the decisions involve a petitioner appearing *pro se* than those acting with legal representation. Specifically, 285 decisions involve a petitioner represented by counsel and 335 decisions involve a petitioner appearing *pro se*.[96] ***See*** **Figure 4**.

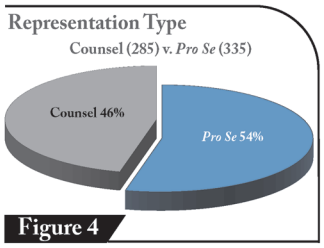
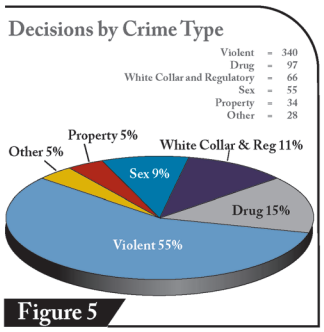
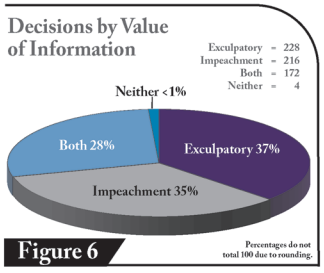


Figure Five shows the breakdown of decisions by crime type, with violent crimes constituting over 50 percent of the 620 decisions. ***See*** **Figure 5**.



The Research Team also identified 59 decisions in which the petitioner raising the *Brady* claim was facing the death penalty. Thus, in nearly 10 percent of the decisions, the court assessing the *Brady* claim did so with knowledge that denying the claim and upholding the conviction could result in the petitioner's execution.

As Figure Six demonstrates, the number of decisions involving impeachment information is nearly equal to the number involving exculpatory information. Approximately 28 percent of the decisions involve both impeachment and exculpatory information. ***See*** **Figure 6**.



The information at issue in the decisions came in a variety of forms, most frequently as documentary information or **statements**. Figure Seven illustrates all 620 decisions broken down by information type.[97] In order to account for the many decisions that involve multiple types of information, Figure Seven lumps all such decisions into one category labeled "multiple." ***See*** **Figure 7**.

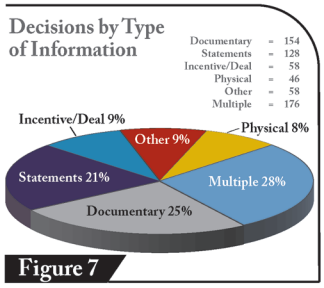


Figure 7

To gain a different perspective on the prevalence of each information type in the Study Sample, the Research Team distributed each instance of a particular type of information in the "multiple" category to the total count for that type of information without regard to decision double counting. By counting the total instances of a particular type of information, the prevalence of that one type, within all the decisions, can be compared to the prevalence of every other type of information within all the decisions. Figure Eight sets forth this comparison and reveals that nearly half the decisions contain documentary information and approximately two-fifths contain statements.[98] ***See* Figure 8**.

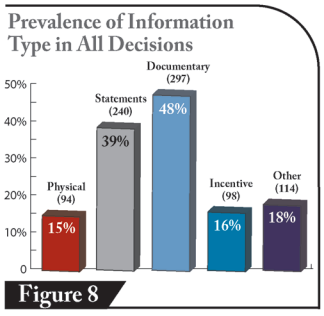


Figure 8

Each of the 620 decisions resolves one or more *Brady* claims in one of four possible ways. In resolving the claim, the court may have found (1) the government did **not withhold** the information at issue, (2) the information at issue was **not favorable**, (3) the information at issue was **not material**, or (4) the government violated *Brady* by withholding favorable, material information. Figure Nine shows the breakdown of the 620 decisions by *Brady* claim resolution. ***See* Figure 9**.

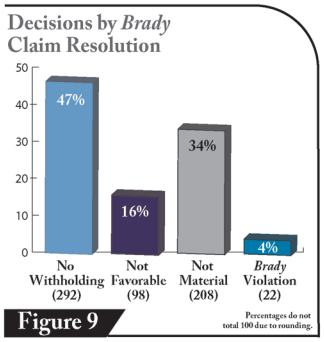


Figure 9

In 292 decisions, the court rejected post-conviction relief on the grounds that the government had not withheld the information at issue. Another 98 decisions rejected the *Brady* claim when the court concluded the information at issue was not favorable to the defendant. In 208 decisions, more than one-third of all the decisions, the petitioner failed to obtain relief because the court deemed the information at issue not material. And, in the 22 remaining decisions, the court found that the government violated *Brady* by withholding favorable, material information.[100] Thus, as illustrated above, the court ruled in favor of the defense in less than four percent of the decisions and sided

with the government over 96 percent of the time, with approximately one-third of those decisions turning on the question of materiality.

The Research Team also identified 145 decisions in which the government failed to disclose favorable information.[101] Notably, in 86 percent of these decisions, the court concluded that the **undisclosed favorable information**[102] was not material and rejected the *Brady* claim; only 14 percent of these decisions resulted in a finding that the undisclosed favorable information was material and, therefore, a violation of *Brady*. Figure 10 illustrates this significant imbalance — nearly nine out of 10 decisions involving undisclosed favorable information rejected the *Brady* claim and ruled in favor of the government. ***See*** **Figure 10**.

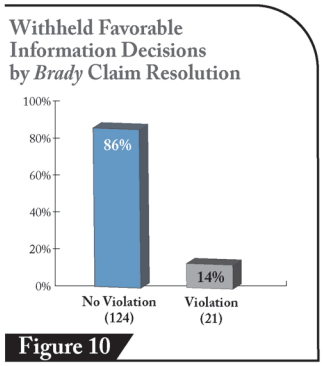


Figure 10

The Research Team also identified 65 decisions in which the government did disclose the favorable information but did so in an untimely manner. Of these 65 **late disclosure decisions**, the court determined that the favorable information was not material, or that the late disclosure was not materially prejudicial, in all but one. Adding late disclosure decisions to those decisions involving undisclosed favorable information reveals an even greater imbalance. As Figure 11 demonstrates, the courts ruled in favor of the government in 90 percent of decisions involving **withheld favorable information** — *i.e.*, when the government disclosed favorable information late or never disclosed it at all, it prevailed in nine out of 10 decisions. ***See*** **Figure 11**.

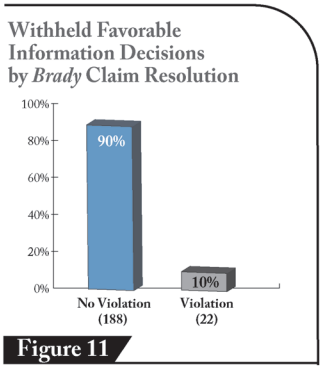


Figure 11

V. THE MATERIALITY STANDARD AS DEFINED AND APPLIED BY THE BENCH

A primary objective of this study was to analyze the articulation and application of the materiality standard by courts resolving *Brady* claims. In support of this objective, the Research Team sought to ascertain all articulations of the materiality standard set forth by courts subsequent to the *Brady* decision. Then, for each decision in the Study Sample, the researchers identified which of those articulations, if any, that particular court used when making its materiality determination. Of the decisions in the Study Sample that included a materiality determination, researchers found that nearly 87 percent articulated and applied either the *Bagley* standard, the *Kyles* standard, or both.[103] About five percent of the study's decisions that included a materiality determination applied an alternative articulation and the remaining eight percent did not include any materiality standard articulation.

Regardless of how the materiality standard is articulated, courts apply the standard in an arbitrary and unpredictable manner.

The Research Team found that, regardless of how the materiality standard is articulated, courts apply the standard in an arbitrary and unpredictable manner. In other words, the researchers found no relationship between the particular articulation of the standard and the decision outcome. Even when evaluating the same information, in similar factual contexts, and applying the same articulated standard, different courts may ultimately resolve the *Brady* claim differently. In addition, the data demonstrates that materiality determinations significantly favor the government and suggests that courts may take a results-oriented approach to the application of the materiality standard.

A. Decision Comparisons — Arbitrary Application of the Materiality Standard

The decision comparisons that follow demonstrate the flawed nature of the materiality standard. Even when courts articulate it consistently, the standard may be applied in an arbitrary and subjective manner. As shown below, the results of that application can be inconsistent.

MATERIAL OR NOT MATERIAL?

16 Key Government Witness Investigated for Sexual Misconduct with Minors and Attempt to Suborn Perjury

Factual Similarities: Peter Kott and Victor Kohring were both former members of the Alaska State House of Representatives when they were convicted of three federal public corruption offenses — conspiracy, extortion, and bribery.[104] The convictions stemmed from a larger public corruption conspiracy orchestrated by Bill Allen, the chairman of a large oil industry company. Kott and Kohring were alleged to have taken bribes from Allen in exchange for legislative action. Allen struck a deal with the government in exchange for his testimony against Kott, Kohring, and others implicated in the conspiracy, as well as former U.S. Senator Ted Stevens.[105]

Undisclosed Information: The prosecutors failed to disclose several thousand pages of documents, including information that Allen had been, or was still being, investigated for sexual misconduct with minors and had attempted to conceal that behavior by soliciting perjury from the minors and making them unavailable for trial.

United States v. Peter Kott

U.S. District Court for the District of Alaska

Peter Kott — Information Is Not Material

"Kott had ample opportunity to show, and at trial did show, Allen's bias based on the substantial value of Allen's cooperation, … a consideration which made the jury well aware of the powerful incentive Allen had to shade his testimony in favor of the government." This evidence "may be described as needlessly cumulative on the question of Allen's incentive to help the prosecution."

United States v. Victor Kohring

U.S. Court of Appeals for the Ninth Circuit

Victor Kohring — Information Is Material

"The fact that Allen might have had a motive to testify [] in order to gain leniency as to his corruption charges does not mean that evidence of a different bias of motive would be cumulative." This evidence "would have shed light on the magnitude of Allen's incentive to cooperate" and "would have revealed that he had much more at stake than was already known to the jury."

Therefore, "[t]his evidence would have been excluded under Rule 403."	Therefore, this evidence "does not run afoul of Rule 403[.]"
Regarding cross-examination on the topic, "[i]t is known that Allen had previously denied the conduct, so he surely would have repeated the denial. The result is that this line of inquiry would not be of significant assistance[.]"	Regarding cross-examination on the topic, "even if Allen would have denied the allegations, the jury would have been able to observe his demeanor when he answered the questions, which might have been telling."
"[A]dmission of the evidence creates a serious danger of confusing the issues which the jury actually needs to decide — whether Kott is guilty of the crimes charged, not whether Allen is guilty of sex crimes."	"The alleged misconduct would have added an entirely new dimension to the jury's assessment of Allen. Allen was the prosecution's star witness."
"In view of this court, the evidence regarding the alleged subornation of perjury is not material in the context of all the evidence, and the failure to disclose it did not prejudice Kott."	"[H]ad the evidence of Allen's past been disclosed, there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment regarding Allen's testimony against Kohring."
U.S. District Court for District of Alaska: **No *Brady* violation. Conviction upheld.**	*Court of Appeals for the Ninth Circuit:* ***Brady* violation. Conviction reversed.**

17

MATERIAL OR NOT MATERIAL?

18 Late Disclosure of Potentially Exculpatory Physical Evidence

Factual Similarities: During their respective jury trials, Michael A. Willis and Wayne D. McDuffie each pursued the same defense theory — that he had been framed.[106] Specifically, each argued that he was the victim of a police conspiracy because he refused to cooperate with other ongoing murder investigations. The prosecution in both cases possessed, but failed to disclose until after the trial was well underway, physical evidence that could have supported the defense theory and may have proven exculpatory upon further investigation. The untimely disclosure of this evidence not only foreclosed such investigation, but prevented Willis and McDuffie from presenting their defense theory in a coherent manner.

Different Crimes: The charges against Michael Alan Willis were violent in nature, first degree felony murder being the most serious count of which he was convicted, whereas Wayne D. McDuffie was convicted of two drug charges (manufacture and possession with intent to distribute cocaine base).

Undisclosed Evidence: For Willis, the government withheld a Michigan State Police laboratory report stating that the palm print recovered from the crime scene was suitable for comparison but that no match had been identified and that the lab requested, but did not receive, a palm print of Willis for comparison. Following the trial, Willis learned that the Michigan State Police records contained a copy of his palm print that could have been compared to the palm print recovered from the crime scene. In the case of McDuffie, the government withheld the presence of a fingerprint belonging to Detective Barrington, a key witness for the government, on a drug scale recovered from McDuffie's apartment during a planned search pursuant to a warrant.

Michael A. Willis v. Warden Carol Howes

U.S. District Court for the Eastern District of Michigan

Michael Alan Willis — Late Disclosure Of Evidence Is Not Material

"[The] report was not 'suppressed' within the meaning of *Brady* … [because it] was disclosed during Officer Calabrese's testimony and counsel was able to cross-examine Calabrese regarding his earlier incorrect testimony about the contents of the report."

"[I]nformation that the state police in fact had petitioner's palm print on file would not have impeached Calabrese or damaged any of his other testimony, but merely would have impeached the laboratory report."

United States v. Wayne D. McDuffie

U.S. Court of Appeals for the Ninth Circuit

Wayne D. McDuffie — Late Disclosure Of Evidence Is Material

"Because the disclosure of this evidence near the end of its own case in chief prevented McDuffie from presenting his theory of the case in a coherent manner, the government effectively suppressed it."

"This evidence is favorable to McDuffie and potentially impeaching of Barrington."

"[T]here is not a reasonable probability that the result of the proceeding would have been different had the existence of petitioner's palm print file been disclosed at trial. The existence of the palm print file had no substantive exculpatory value, and its only value would have been in impeaching Officer Calabrese's testimony regarding the reason why the recovered palm print was not compared with petitioner's palm print."

"[The] view that '[t]he palmprint record was *Brady* evidence because at a minimum Willis could have used it to impeach the credibility of the investigating officer who subsequently denied that the record existed' … is simply incorrect."

Court discredits defense theory of the case, relies on government's case …

"There was extensive eyewitness testimony[] and defense counsel strove mightily to impeach or otherwise call into question that testimony, and at times succeeded in doing so. Counsel focused extensively, particularly in his cross-examination of Officer Calabrese, on the utter lack of physical evidence tying [Willis] to the crime. [Willis] presented a vigorous alibi and misidentification defense, calling witnesses who testified both as to his whereabouts on the day and time of the crime and his appearance at that time, which did not match the descriptions given by the witnesses. … Despite this evidence, and despite [Willis'] own alibi evidence, the jury nonetheless credited the prosecution witnesses' in-court identifications[.]"

"Given the extensive impeachment of the prosecution case already before the jury, it is highly doubtful that one additional point of impeachment, on a collateral matter which was not actually within the testifying witness's personal knowledge, would have affected the jury's verdict. Much less is there a "reasonable probability" that the result of petitioner's trial would have been different had it been disclosed that the State Police in fact had a copy of petitioner's palm print on file."

U.S. District Court for the Eastern District of Michigan:
No *Brady* violation. Conviction upheld.

"[H]ad McDuffie been able to present a coherent theory of evidence tampering, there is a reasonable probability that the jury would have discredited Barrington and reached a different conclusion in the case."

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"McDuffie was unable to retain his own experts in forensics or police procedure, or to do any pretrial discovery into the [] chain of custody."

"This evidence supported McDuffie's theory that Barrington sought to frame him in order to pressure him to cooperate."

Court relies on defense theory of the case, does not consider government's case…

"[H]ad McDuffie been able to present a coherent theory of evidence tampering, there is a reasonable probability that the jury would have discredited Barrington and reached a different conclusion in the case."

"The government's failure to disclose this evidence was [] prejudicial, again because it prevented McDuffie from presenting a coherent version of his theory of the case."

"The prejudicial effect of the government's late disclosure is therefore 'sufficient to undermine confidence in the outcome of the trial.'"

U.S. Court of Appeals for the Ninth Circuit:
***Brady* violation. Conviction reversed.**

B. Materiality Analysis — An Arbitrary and Unpredictable Approach

The disparity in the way courts resolve similar *Brady* claims, as demonstrated in the preceding decision examples, is a consequence of the highly subjective nature of assessing the relevance and impact of information and the inherent vagaries in the nature of the *Brady* doctrine itself. In that regard, the case of Senator Ted Stevens discussed in the introduction is particularly illustrative when considered alongside the two related court decisions, *United States v. Kohring*[107] and *United States v. Kott*,[108] that are compared above. Stevens, Kohring, and Kott were all Alaska elected officials facing charges of political corruption, and in all three cases the government withheld substantial information pertaining to its star witness Bill Allen. As between Kohring and Kott, despite reviewing nearly identical *Brady* claims, the U.S. District Court for Alaska and the Ninth Circuit Court of Appeals reached different results.[109]

In *Kohring* and *Kott*, different courts dealing with identical charges, an identical witness, and identical information in the same context, reached different conclusions.

In *Stevens*, the U.S. District Court for the District of Columbia vacated the conviction upon the request of the government when the *Brady* violations came to light.[110] At the same time, Kohring and Kott were pursuing appellate challenges to their respective convictions and moved to order the government to disclose all information "favorable to the accused."[111] In response, the government moved to remand both cases to the Alaska District Court and then, for the first time, disclosed literally thousands of pages of documents, including multiple pieces of information that directly impeached star witness Bill Allen and information that had not been revealed in the Stevens proceedings.[112] Arguing that the government's conduct violated *Brady*, Kohring and Kott moved for a dismissal of their convictions or a new trial. The district court rejected their claims, declaring that the withheld information was not material, forcing both defendants to pursue another appeal. In both cases, however, the Ninth Circuit disagreed — it ultimately held the undisclosed information was in fact material and therefore a violation of *Brady*. It was not until the Ninth Circuit vacated their convictions that Kohring and Kott were finally afforded a remedy.[113] For Kott, it took nearly a year from the *Stevens* dismissal to secure this relief and, for Kohring, the wait was over two years.[114]

The inclusion of the Alaska District Court's *Kott* decision and the Ninth Circuit Court's *Kohring* decision in the Study Sample is particularly illustrative of the arbitrary manner in which the materiality standard can be applied.[115] In *Kohring* and *Kott*, different courts dealing with identical charges, an identical witness, and identical information in the same context, reached different conclusions when applying the same legal standard. Further, the interplay between the government's decision to dismiss the conviction in the *Stevens* case and its decision to defend the convictions of Kott and Kohring, even after more withheld information came to light, illustrates the truly disparate treatment defendants can receive when the government withholds information from the defense.

Material Indifference:

These decision comparisons put a human face on the flawed nature of the materiality standard. The data, however, illustrates another problem — when a *Brady* claim is resolved on the question of materiality, courts overwhelmingly favor the government. Of the 620 decisions, courts found the withheld information to be material in only 22 — *i.e.*, less than four percent of the decisions were resolved with a court finding that *Brady* was violated.

Acknowledging that not all the Study Sample decisions involved the withholding of favorable information, the Research Team individually evaluated each of the 620 decisions to identify only those involving favorable information that was not disclosed.[116] The Research Team found that 145 decisions involved undisclosed favorable information and, notably, only 21 of those decisions (14 percent) resulted in a court finding the government violated *Brady*. Conversely, of the 145 undisclosed **favorable information decisions**, the court found that the information was not material in 124 decisions — *i.e.*, when the *Brady* claim was resolved by application of the materiality standard, the government won 86 percent of the time (***see* Figure 10**). When those decisions involving the late disclosure of favorable information are included, this number jumps to 210 decisions and, of those 210 decisions, the court found the information not material in 188, which is 90 percent of the time (***see* Figure 11**).[117]

While the arbitrary application of the materiality standard is problematic in itself, the frequency with which courts conclude information is not material overwhelmingly favors the government and creates an impression of bias.

C. Conclusions on the Materiality Standard

Although *Brady* violations are often couched in terms that place criticism on the shoulders of the prosecutors, this is not a complete picture of the problem. When materiality is the norm for disclosure, earnest and ethical prosecutors are asked to struggle with a doctrine that in many ways is unworkable. Justice Thurgood Marshall characterized the materiality requirement as "a pretrial standard that virtually defies definition."[118] For these reasons, while recognizing the importance of strengthening and enforcing ethical rules, experts are now turning their attention to the *Brady* doctrine itself, specifically reforms that prohibit the use of the materiality requirement to limit disclosure, rather than reinforcing ethical rules or disciplining prosecutors for mistakes or failures.[119]

The prosecutor was so convinced of the defendant's guilt that DNA tests to the contrary were, in his eyes, not material. The *Brady* rule is no match for this sort of blinding conviction.

Brady articulates a post-trial standard used by reviewing courts when assessing the prejudice of non-disclosure in the context of due process demands. This may make sense in the post-trial context, but use of *Brady* as the pre-trial standard for determining disclosure obligations is fundamentally flawed. It is flawed because it asks a prosecutor to assess the materiality of information in relation to the "whole case" before there is a "whole case" to measure the information against.[120] It is impossible to weigh the material value of information in a case before it is tried, before the issues are known, and without the

benefit of the defense theory. The job of correctly assessing materiality prospectively, when materiality can only accurately be measured retrospectively, is guesswork under the best of circumstances. According to the *Agurs* Court, "[t]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete."[121]

Further, the problem is compounded by the cognitive biases inherent in human nature. In the prosecutor's dual roles of advocate and minister of justice, with the difficult job of deciding what information to disclose to her opponent, cognitive bias takes on exceptional importance. Confirmation bias is a type of cognitive bias that signifies the tendency to seek or interpret information in ways that support existing beliefs, expectations, or hypotheses.[122]

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Judges are under considerable pressure from the system to uphold convictions and are limited in many of the same ways as prosecutors when attempting to measure materiality.

A prosecutor reviewing a case file for the first time is testing the hypothesis that the defendant is guilty and is looking for information to confirm that expectation.[123] Because the police or agents have "solved" the case, there will undoubtedly be information in the file to support the guilt hypothesis. Thus, as a result of confirmation bias, the prosecutor that expects to become convinced of guilt then engages in selective information processing, accepting as true information that is consistent with guilt and discounting conflicting information as unreliable or unimportant. Information discounted as unpersuasive, unreliable, or unimportant will rarely rise to the level of "material" in the mind of that prosecutor.

Common examples of this phenomenon can also be seen when requests are made for post-trial DNA testing in cases in which prosecutors start out convinced of the defendant's guilt. This is illustrated in the case of Ronald Williamson, the subject of John Grisham's first book of non-fiction. Grisham writes: "Bill Peterson [the prosecutor] liked the idea of DNA testing. He had never wavered in his belief that Williamson was the killer, and now it could be proved with real science."[124] But after the DNA tests exonerated Williamson, the prosecutor's opinion was not affected. Grisham wrote: "Peterson was still convinced Ron Williamson had raped and murdered Debbie Carter, and his evidence had not changed. Forget the DNA."[125] The prosecutor was so convinced of the defendant's guilt that DNA tests to the contrary were, in his eyes, not material. The *Brady* rule is no match for this sort of blinding conviction.

Even for the most ethical prosecutor, application of the materiality standard is not done in a vacuum and rarely considers the defense perspective — the application is unfairly influenced by the prosecutor's **theory of the case**, even if inadvertent. In light of what is a pliable materiality standard, a prosecutor, with a singular drive to win his case, might be inclined to conclude that information is not material.

Prosecutors are not only zealous advocates but also ministers of justice responsible for ensuring the fairness of a judicial process.

> [T]he dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate.

> He is a trained attorney who must aggressively seek convictions ... at the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence.[126]

And for those prosecutors practicing close to the ethical line, the nature of the materiality standard provides an opportunity for engaging in a kind of gamesmanship that is wholly inconsistent with the spirit of *Brady* and, quite possibly, in violation of *Brady*'s mandate.[127]

Unless the jurisdiction has adopted open file discovery, the prosecution's file is not available to the defendant or to the court absent the prosecutor's permission.[128] The justice system therefore depends on the prosecutor to recognize the significance of the information and to willingly disclose it. This makes little sense in cases in which the decision to disclose jeopardizes the prosecution's case.[129] The problem is exacerbated since such decisions are almost never subject to review.

Judges face similar challenges and are just as susceptible to confirmation bias as anyone else. They are under considerable pressure from the system to uphold convictions and are limited in many of the same ways as prosecutors when attempting to measure materiality. As the Supreme Court acknowledged, "The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures ... to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor."[130] The reviewing court has a record of what was presented at trial, but rarely has insight into that which is not in the record — defense theories and strategic decisions based on what was disclosed, additional information that could have been discovered, what influenced the jury's decision, and how the disclosure might have tipped the scales.

This Study not only provides quantitative evidence that the materiality standard favors the government, but it demonstrates how such an approach is arbitrary, and, therefore, unjust.

Despite these uncertainties, judges are left to make these decisions in a vacuum and, when the decision turns on the question of materiality, as this Study demonstrates, the defense rarely wins. This Study not only provides quantitative evidence that the materiality standard favors the government, but it demonstrates how such an approach is arbitrary, and, therefore, unjust.

VI. RECURRING ISSUES AND FACTORS AFFECTING *BRADY* CLAIM RESOLUTION

Analysis of the Study Sample reveals some recurring issues in the decisions and certain factors that tend to influence courts' resolution of *Brady* claims. First, a significant number of the decisions involved the late disclosure of favorable information.[131] Second, the Research Team identified a group of decisions in which the court denied the *Brady* claim because "the defense could have obtained the evidence on its own with reasonable diligence,"[132] sometimes in instances in which defendants had little ability to access the information. Third, in a large portion of the decisions — nearly one of every six — the *Brady* claim involved information of an incentive or deal for a witness to testify or alleged facts suggesting the existence of a deal for a witness to testify.

Of the 65 late disclosure decisions, nearly all involved a disclosure taking place after the start of trial and, in all but one, the courts concluded the timing was not materially prejudicial.

A. Late Disclosure of Favorable Information

The Study Sample includes 65 late disclosure decisions.[133] A late disclosure decision is a decision in which the accused asserts a *Brady* claim based on the untimely disclosure of favorable information by the prosecutor. The timing of disclosure in these decisions ranges from shortly before trial to long after conviction, with the large majority taking place during trial. Specifically, the Research Team identified 12 decisions involving late disclosure pre-trial, 53 decisions where the favorable information was disclosed during trial, and three decisions where the favorable information was disclosed after trial.[134] Figure 12 shows the timing of the disclosure — pre-trial, during trial, and after trial — for decisions involving late disclosure of favorable information. ***See* Figure 12**.

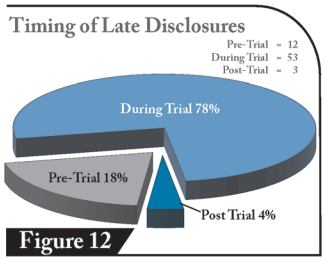

Figure 12

Material Indifference:

The rules that govern the timing of favorable information disclosures vary, but any such disclosure that takes place after the start of trial is untimely under most rules. Federal districts differ widely, but all require disclosure of favorable information before trial.[135] There is also disparity among state disclosure requirements, ranging from 10 days after arraignment to not later than seven days before trial.[136] In addition, as the Supreme Court recognized in *Cone v. Bell*,[137] a prosecutor's disclosure obligation "may arise more broadly under a prosecutor's ethical or statutory obligations" than under *Brady*. The Court cited the ABA Criminal Justice Standards, which encourage prosecutors to disclose favorable information at the "earliest feasible opportunity,"[138] as well as ABA Model Rule of Professional Conduct 3.8(d).[139] The Model Rule encourages "timely disclosure," clarified in ABA Formal Opinion 09-454 to mean "as soon as reasonably practical" after the prosecutor becomes aware of the information.[140]

Of the 65 late disclosure decisions, nearly all involved a disclosure taking place after the start of trial. In all but one of these 65 decisions, the courts concluded that the defendant was not materially prejudiced by the timing of the disclosure. By excusing this behavior, the judiciary undermines the clear rules intended to protect a defendant's access to timely disclosure of favorable information.[141]

1. Late Disclosure Sample Decisions

Disclosing favorable information late can render that information useless, either by preventing the defense from following up on potential leads or by interfering with the ability to develop a cogent defense theory or an alternate theory of a case. The *Jackson v. Senkowski* decision illustrates these precise issues.[142]

In *Jackson*, the favorable information was disclosed three and a half years after it was in the prosecutor's control — too late to be of any value to the defense and having the same effect had it never been disclosed. Just a couple days after a multiple homicide, an eyewitness made two separate statements to the police and prosecutor, respectively, supporting Jackson's defense theory.[143] Specifically, the eyewitness stated unequivocally that Jackson was in the stairwell, not inside the apartment with the victims, when the fatal shots were fired. The statements also included leads to other possible perpetrators of the crimes. The prosecution withheld these two favorable statements for three and a half years, disclosing them just six months before trial. By then, the witness's "memory of the incident had diminished to the point that he could no longer recollect any of the events at issue."[144]

There is no *Brady* violation as long as *Brady* material is disclosed in time for "its effective use at trial," a phrase that is interpreted in such a way as to give considerable deference to the prosecution.

As a result of the prosecution's late disclosure, Jackson lost the ability to present eyewitness testimony that supported his version of the facts and to pursue other leads. When affirming Jackson's conviction, the court acknowledged the favorable nature of these two statements, but held that "the trial judge effectively remedied any prejudice stemming from the prosecution's *Brady* violation" when it severed Jackson's trial from his co-defendants, allowed the admission of the two favorable statements into evidence, and instructed the jury that they could draw an adverse inference from the prosecution's failure to disclose.[145] Jackson was convicted of multiple counts and sentenced to 25 years to life in prison.[146]

In another decision, *Chinn v. Warden of Mansfield Correctional Institution*, the disclosure of favorable information during the trial prevented the defense from following up on potential leads.[147] At trial, during the cross-examination of a key government witness, the defense learned for the first time that the witness had seen a third person at the crime scene just before the crime occurred. It was also revealed that the witness made a statement to this effect to both the police and the prosecutor directly, but it was never disclosed to the defense. Although defense counsel "was afforded the opportunity to fully cross-examine" the witness on this information, the timing of this disclosure precluded any additional investigation.[148]

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Late disclosure handicaps pre-trial preparation by a defendant's legal team and can have the same profoundly unfair consequences as never disclosing the information at all.

Chinn argued that the delayed disclosure of this favorable information "effectively deprived him and his counsel of the opportunity to pursue an investigation[,] … to explore alternative [defense theories], to fully present inconsistencies in the testimony of the State's witnesses, and to show weaknesses in the State's evidence."[149] If the defense had these opportunities, Chinn asserted, then "there was a reasonable probability that the result of the proceeding would have been different."[150] Rejecting the notion that the late disclosure caused any prejudice, the court stated: "It is purely speculative that defense counsel would have been able to track down this unidentified third person and what he would have said."[151] The court concluded the prosecution did not violate *Brady* and upheld Chinn's conviction and death sentence.

These decisions demonstrate that the late disclosure of favorable information — in some cases years after the prosecutor had control of the information — has the same profoundly unfair consequences as never disclosing the information at all.

2. Problems Created by Late Disclosure

Courts generally take the position that there is no *Brady* violation as long as *Brady* material is disclosed in time for "its effective use at trial,"[152] a phrase that is interpreted in such a way as to give considerable deference to the prosecution.[153] Despite the judicial standard for what constitutes an excusable late disclosure,[154] the reality is that late disclosure of favorable information poses serious challenges for the defense.

Late disclosure handicaps pre-trial preparation by a defendant's legal team. Yet prosecutors withheld favorable information until after opening statements in nearly all the late disclosure decisions in this Study Sample. By the time the opening statement is given, the defense in most cases is already committed to its theory of the case. It can be devastating when the prosecution discloses information for the first time after the defense has delivered its opening statement, particularly when the information contradicts an assertion made in the opening or when it is critical information that should have been addressed in the opening. After the defense has delivered the opening statement, it is often too late to take meaningful advantage of new information or follow up on leads that require further investigation.

Importantly, late disclosure also increases the likelihood that an innocent defendant, unaware that favorable information exists, will plead guilty[155] rather than risk conviction of a more serious crime and higher sentence after trial.[156] According to retired U.S. District Court Judge Lee Sarokin,

> Roughly 20 percent of those that have been exonerated confessed to the crimes with which they were charged and convicted. Most of those involved persons who had actually gone to trial, but we have no way of knowing how many there are who merely entered guilty pleas through bargains and never appealed as a result. … [O]nly about 5 percent [of criminal cases] actually go to trial and the balance are resolved by plea agreements.[157]

Judicial tolerance of late disclosure enables prosecutors to pressure a defendant, who would otherwise exercise his right to a trial, to accept a plea agreement.

Sometimes the late disclosure contains information probative of an issue that concerns a witness who has already taken the stand and been excused. Making use of that kind of information requires recalling the witness and interrupting the flow of the trial. Courts sometimes suggest a continuance to give the defense time to pursue the witness for recall or to make use of other newly produced information as a proper remedy for late disclosure,[158] but that too risks disrupting the flow of the case and jurors blaming the defense for prolonging the trial. This can undercut the value of the information and force the defense, after weighing the options, to conclude that recalling the witness is not worth the risk. When defense counsel fails to ask for a continuance, however, some appellate courts interpret this to mean timely disclosure would not have made a difference to the defendant.[159]

3. Late Disclosure Conclusion

Nearly half of the late disclosure decisions in the Study Sample involved statements, suggesting that witness statements are disclosed late more often than other kinds of information.[160] This makes

There is very little excuse for a prosecutor to disclose witness statements late.

sense in the context of federal cases because the **Jencks Act** does not require disclosure of government witness statements until after the witness has testified on direct examination.[161] However, of the late disclosure decisions involving statements, only nine are decisions that originated in federal court where the Jencks Act applies. As illustrated in Figure 13, the majority of the late disclosure decisions involving statements are in decisions that originated in state court where the Jencks Act does not apply and where witness statements are not exempt from rules of discovery that require information be turned over before trial.[162] ***See*** **Figure 13**.

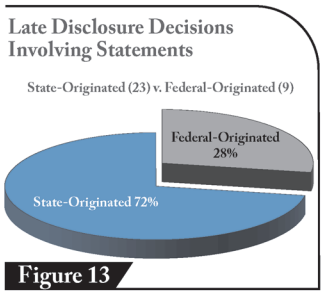

Figure 13

The side-by-side pie charts in Figure 14 illustrate the overrepresentation of statements in late disclosure decisions as compared to statements in all decisions. Of the 620 decisions, approximately 39 percent involved statements. However, of the late disclosure decisions, 49 percent involved statements. ***See*** **Figure 14**.

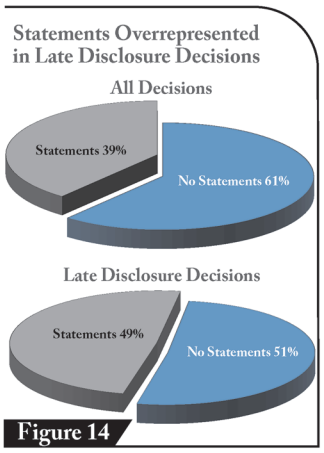

Figure 14

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There is very little excuse for a prosecutor to disclose witness statements late. Witness statements are, with rare exception, recorded in the earlier phases of criminal investigations. Prosecutors not only have access to witness statements early in the process, but could not develop their case-in-chief without them. When prosecutors exercise their discretion to delay disclosure of favorable material without justification, they are taking advantage of judicial tolerance of late disclosure and unfairly disadvantaging the defense. Except in unusual circumstances in which disclosure of a witness statement would put the witness in jeopardy, there is no justifiable basis for prosecutors to disclose witness statements late.[163]

Even when the government failed to disclose favorable information in a timely fashion, it still prevailed on the *Brady* claim in over 98 percent of the decisions — an almost perfect record.

The findings of this report demonstrate that, with 65 late disclosure decisions, the practice is common.[164] Over 10 percent of the Study's decisions involved the late disclosure of information. Due to the generally accepted notion that there is no *Brady* violation if the information is disclosed in time for "its effective use at trial,"[165] courts almost never find the late disclosure of information a violation of *Brady*. In fact, of the 65 late disclosure decisions in the Study Sample, only one resulted in a *Brady* violation. Thus, even when the government failed to disclose favorable information in a timely fashion, it still prevailed on the *Brady* claim in over 98 percent of the decisions — an almost perfect record. Judicial indifference encourages the continued practice of late disclosure, which the data strongly suggests has evolved into a trial tactic rather than an allowance for exceptional and necessary circumstances.[166]

B. The Due Diligence 'Rule'

The Study Sample includes 19 decisions in which the court denied the *Brady* claim based, at least in part, on an assertion that the defense knew or should have known about the relevant information or could have obtained the information through the exercise of its own due diligence.[167] In binding the defendant to this **due diligence 'rule**,' courts reason that the prosecutor's failure to disclose the relevant or favorable information is not a breach of duty if the defendant with any reasonable diligence could have obtained the information on his own.[168] These courts conclude that *Brady* simply is not implicated if "a defendant knew or should have known the essential facts permitting him to take

advantage of any exculpatory information[.]"[169] When a court invokes the due diligence rule, however, it is engaging in burden shifting — alleviating the prosecution from its obligation to disclose the relevant or favorable information by imposing an obligation on the defense to seek out the information.

Under the due diligence 'rule', a prosecutor is encouraged to hide, and a defendant is unfairly burdened to seek, information that a prosecutor should disclose.

1. Due Diligence 'Rule' Sample Decisions

The majority of **due diligence decisions** in the Study Sample involved information contained within police reports and government documents. For example, in *Abdur'Rahman v. Colson*, portions of a police report documenting the erratic behavior of Abdur'Rahman were withheld from the defense.[170] The information in these redactions supported the central theme of Abdur'Rahman's defense — that he was a man who suffered emotional problems, was particularly susceptible to manipulation, and was not the calculated depraved killer the prosecutor depicted at trial.[171] Specifically, the redacted portions memorialized observations that, upon arrest at the police station, Abdur'Rahman cried and banged his head against the table and the wall, and that after the detectives got him under control and relocated him to the booking room, he again began banging his head against the wall.[172] The government offered no explanation for the redactions and failure to provide a complete report to Abdur'Rahman.

The defense argued that the report could have caused one or more jurors to vote in favor of a life sentence over death.[173] The court, in its majority opinion, rejected the defense argument: "[W]e are not convinced that, at the time of the sentencing phase, petitioner did not know the essential facts of the behavior described in [the Detective's] report. … The prosecution's suppression of this part of [the Detective's] report does not undermine our confidence in petitioner's sentence."[174] The court reasoned further: "If [defense] counsel did not know the essential facts of Abdur'Rahman's head-banging[,]" then "he likely should have discovered them through further investigation."[175] The court's reasoning assumes, incorrectly, that a defendant is capable of telling his lawyer the statements he made and the behavior he engaged in during an extreme emotional disturbance. Further, it minimizes the weight that a jury might give to the recorded observations of the defendant by a police officer.

As acknowledged by Judge Cole in his dissent, "[T]he fiction that the defense had the time and aptitude to discover what the prosecution had a constitutional obligation to provide underpins the [court's] dismissal of the exculpatory evidence at issue[.]"[176] Further, "[w]ith respect to the [] report, the majority washes its hands of the prosecution's deliberate withholding of this evidence by insisting that [defense] counsel knew the fuzzy contours of the report and that through investigation he 'should have discovered' the essential facts that it contained."[177] In that regard, the court minimized the weight of a detective's written statement contained within a police report by equating it with an oral statement made by a defendant that, on its face, appears self-serving.

2. Problems Created by the Due Diligence 'Rule'

The due diligence rule puts unreasonable expectations on defendants to obtain information that is not readily accessible to the defense, but which is almost always within easy reach of

prosecutors.[178] Under the due diligence rule, a prosecutor is encouraged to hide, and a defendant is unfairly burdened to seek,[179] information that a prosecutor should disclose. The rule is rationalized on two grounds. "First, prosecutors should not be punished for failing to provide the defense with facts or [information] that defendants or defense counsel could have obtained themselves."[180] Second, if a defense attorney is not diligent, the defendant can subsequently raise a claim of ineffective assistance of counsel.[181]

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These rationalizations "are contrary to the Due Process Clause, as interpreted in *Brady* and its progeny."[182] The first rationale runs contrary to the truth-seeking process. The inspiration behind *Brady* is the concept that justice prevails when *all* the evidence is before the jury. The second rationale, instituting an ineffective assistance of counsel claim as a fail-safe, is troubling for several reasons. It is a waste of government resources to require the defendant to unnecessarily pursue an ineffective assistance of counsel claim. This is especially so when the situation could easily have been avoided had the prosecutor shared the information in the first place. Further, an ineffective assistance of counsel claim, considered years after the information is withheld and years after conviction, almost never leads to relief for the defendant and "is no substitute for having the benefit of the evidence at trial when the defendant might avoid the conviction altogether."[183] Even where counsel is found to be ineffective, it is extremely difficult for a defendant claim to obtain relief under harmless error analysis.[184]

For some prosecutors, the due diligence rule facilitates the sort of gamesmanship that undermines the intent of *Brady*.

The due diligence rule is contrary to due process and inconsistent with *Brady* jurisprudence, which requires that "evidence tending to show innocence, as well as guilt, be fully aired before the jury."[185] The due diligence rule relieves the prosecutor of his obligation to "assist the defense in making its case"[186] and imposes an expectation on a defendant to access information that is often not realistically within reach. A defendant's ability to actually obtain the information is often limited by a lack of resources — resources that prosecutors readily have at their disposal.

3. Due Diligence 'Rule' Conclusion

This study illustrates the ramifications of courts invoking the due diligence rule — prosecutors are incentivized to withhold relevant or favorable information, rather than encouraged to abide by their duty to err on the side of disclosure.[187] In 19 decisions, or just over three percent of the Study Sample, courts imposed the due diligence rule upon the defendant and excused the prosecution's non-disclosure. The undisclosed information in most of these due diligence decisions fits into four major categories: (1) witness statements,[188] (2) defendant's own statements or conduct,[189] (3) witness criminal records,[190] and (4) police reports.[191] Witness statements and police reports are typically in the sole possession of the prosecution team, making the prosecution, not the defense, best positioned to know of the information's existence. And when in possession of criminal records, the prosecution's decision to disclose that record to the defense should not turn on whether the record is publicly available — it should simply be disclosed.

For some prosecutors, the due diligence rule facilitates the sort of gamesmanship that undermines the intent of *Brady*. Judicial reliance on the due diligence rule turns the *Brady* inquiry away from the prosecutor's obligation to disclose favorable information and, ultimately, decreases defense access to favorable information.[192] Despite the prevalence of courts imposing the due diligence rule on the defense, it is worth noting that a recent Michigan Supreme Court opinion held "that a diligence requirement is not supported by *Brady* or its progeny."[193]

C. Incentive/Deal Information

According to Northwestern University Law School's Center on Wrongful Convictions, 45.9 percent of documented wrongful capital convictions have been traced to false informant testimony, making "snitches the leading cause of wrongful convictions in U.S. capital cases."[194] In spite of demonstrated proof that informant testimony is a leading cause of wrongful conviction, prosecutors continue to rely on it heavily.[195] As reflected in Figure 15 on page 36, within the 620 Study Sample decisions, a total of 101 involved **incentive/deal information**. These are decisions in which prosecutors made deals with witnesses, witnesses had an admitted self-interest to testify, witnesses received unexplained benefits, or there was a suggestion that a witness had a self-interested motive to testify.

1. Incentive/Deal Information Sample Decisions

Notwithstanding the clear impeachment value of information that a witness is testifying in exchange for government favors or has another incentive to testify against the accused, courts routinely hold that such information is not material and that its non-disclosure does not amount to a *Brady* violation.

◆ Deal with Witness to Testify

In *Hunt v. Galaza*, evidence of a deal with a witness was disclosed only after Victor Hunt's trial and conviction for second-degree murder.[196] The prosecutor informed Hunt's defense counsel that a discovery violation had occurred — that the government had failed to disclose that a witness had been offered a deal in exchange for testifying. In response to Hunt's request for post-conviction relief, the court said, "There is no dispute regarding whether the evidence of [the witness's] proposed plea deal was favorable to petitioner or was suppressed by the government."[197] Nonetheless, the court held that because the witness had been impeached at trial with information of prior convictions, pending criminal charges, and a mental health problem, the deal information was cumulative and therefore not material.[198]

Despite what the court said was the "undeniably damaging" effect of the witness testimony, it rejected the notion that this additional impeachment evidence could have made a difference.

— Payton v. Cullen

◆ Admitted Self-Interested Motive to Testify

In *Payton v. Cullen*, a key prosecution witness testified that he was not working for a law enforcement agency "in any capacity."[199] The witness's true role only came to light more than two decades after William Payton was convicted

of rape and murder.[200] The witness then admitted that, at the time of his testimony, he "was and had been for some time working for various police agencies"[201] and considered himself to be working as a government agent during that time. Seeking relief for the prosecution's failure to disclose this information, Payton argued that impeachment of the witness with these facts would have "changed the calculus on the believability of his testimony"[202] and affected the jury decision.

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The court, however, found that "[w]hile it would no doubt have been helpful to [Payton] because of its impeachment value ... [t]he jury knew that [the witness] had prior convictions, and that he had recently pled to a felony robbery charge ... [and] hoped for leniency for testifying against Payton."[203] The court reasoned that the jury was well aware that the witness "had a motive for testifying, and for testifying in such a way as to maximize benefit to himself."[204] Despite what the court said was the "undeniably damaging" effect of the witness testimony, it rejected the notion that this additional impeachment evidence could have made a difference.[205] The court found the information not material and *Brady* not violated.

"[P]rosecutors are adept at holding out hopes for leniency to a cooperating witness without creating any legally cognizable 'promise' subject to disclosure."

— R. Michael Cassidy

◆ Unexplained Benefits Given to Prosecution Witness

In *Cooper v. McNeil*, Richard Cooper, a Florida inmate, was convicted of three counts of first-degree murder.[206] During the penalty phase, the prosecution called an incarcerated former police officer who had previously served as a jailhouse informant. By recounting a confession that Cooper allegedly made to him, the witness provided the prosecution with damning testimony in support of the death penalty. The defense knew of the witness's past work as an informant, and that information was shared with the jury, but the prosecution did not disclose any information on the benefits or incentives the witness had for testifying.[207]

Seeking post-conviction relief, Cooper argued that the witness received a variety of benefits — a trip outside the prison to eat dinner with his family, conjugal visits, and a reduction of sentence in three grand theft cases — that were in exchange for his testimony.[208] Lacking evidence that tied these benefits directly to the witness's testimony, the court dismissed Cooper's claim as mere speculation. The court found "a dearth of evidence in the record" to support the defense claim. The one exception was the opportunity the witness had to leave the prison to have dinner with his family.[209] In that instance, the court accepted the witness's representation that his extraordinary opportunity to take a trip outside the prison to have dinner with his family was not a favor in exchange for his cooperation but rather "was granted because he was not allowed the same contact visits as other inmates due to his solitary confinement, which was because of security reasons[.]"[210]

◆ Other Information Suggesting Incentive

In *United States ex rel. Young v. McCann*,[211] James Young was prosecuted and convicted of murder in the gang-related shooting of two men near a Chicago housing project. According to the prosecution, the shooting was to avenge a sexual assault of A.W., Young's girlfriend, committed by

rival gang members. Immediately after the killings, police interviewed A.W., who denied any connection to Young and the events surrounding the shooting. She was later called as a witness before the grand jury where she again denied involvement. At trial, however, A.W.'s testimony contradicted her earlier version of events — she implicated Young and four other gang members in the murders.[212]

Specifically, A.W. testified that she reported the assault to Young and walked him and members of his gang around the neighborhood to identify her attackers. Another prosecution witness testified that a few hours later Young and his fellow gang members committed the murders. During her testimony, A.W. explained that her prior account had been untruthful and motivated by her fear at that time of Young and other gang members.[213] She said that she did not provide the "true account" to the officer and assistant State's attorney until after she was relocated out of the housing project.[214]

Young argued that A.W.'s trial account was motivated by favors she received from the State. First, Young pointed out that A.W's testimony changed only after the State relocated her out of the housing project. Young also argued that prosecutors failed to provide him with her new, different version of the events. Second, "the State failed to disclose that police had promised A.W. that she would not be prosecuted for perjury if she gave a different version of events at trial."[215] The court rejected both defense claims and affirmed Young's conviction. It found no information to support the immunity claim, noting that "[O]fficer Winstead testified that he informed A.W. that he could make no guarantee of immunity."[216] The court reasoned further that Young "had sufficient opportunity to explore any suspected bias on cross-examination."[217]

2. Problems Created by Withholding Incentive/Deal Information

Former prosecutor and Senior Circuit Judge for the Ninth Circuit Stephen S. Trott said,

> Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.[218]

According to Professor Cassidy, "The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government."

The Supreme Court has also raised concerns about the use of informant testimony:

> [T]he evidence of such a witness ought to be received with suspicion, and with the very greatest of care and caution, and ought not be passed upon by the jury under the same rules governing other and apparently credible witnesses.[219]

Although there are inherent risks, prosecutors rely heavily on the testimony of informants and sometimes fail to disclose the fact that the witness is receiving benefits in exchange for testimony.[220] Moreover, "prosecutors are adept at holding out hopes for leniency to a cooperating witness without

creating any legally cognizable 'promise' subject to disclosure."[221]

According to Michael Hersek, California State Public Defender, prosecutors in death penalty cases in particular rely on informant testimony when they have little independent evidence against the defendant:

> I've noticed that in death penalty cases snitch testimony is used to (1) bolster shaky identity testimony (where the informant claims that the defendant admitted the crime); (2) show premeditation; and/or (3) establish at the *guilt* phase the special circumstance allegation, which if found true by the jury, makes a first degree murder eligible for the death penalty. (Pen. Code § 190.2 lists all the special circumstances.) As to the special circumstances, I've seen the snitch used to supply the motive and intentionality requirements not necessarily present simply from the raw facts of the crime.[222]

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Without discovery of the oral assurances made to the witness "the defense is handicapped in cross-examining the witness for bias."

— R. Michael Cassidy

Informants typically cooperate and provide information in exchange for some sort of benefit, and the prosecution is required to disclose that benefit to the defense.[223]

In *Giglio v. United States*, the U.S. Supreme Court held that a prosecutor must inform the jury when a government witness has been offered an incentive in exchange for his testimony.[224] "[A] promise, reward or inducement to a government witness in a criminal case is considered exculpatory evidence subject to mandatory disclosure to the defense under the Due Process Clause of the Fifth Amendment."[225] Despite the concerns and the attention that the use of informants has received from courts and legal experts, the "impact of *Giglio* in terms of guaranteeing meaningful disclosure to defense counsel has turned out to be largely illusory."[226] This is best understood by considering the ways in which cooperation agreements between the prosecution and informant witnesses are made.

According to Professor R. Michael Cassidy, former Chief of the Criminal Bureau in the Massachusetts Attorney General's office, there are three models of cooperation.[227] In Model One, the prosecutor makes no initial promises to the witness. At the conclusion of the witness's testimony, however, the prosecutor and the defense attorney bargain for the appropriate charge and sentence based upon what the prosecutor assesses to be the value of the witness's testimony to the prosecution's case. In this scenario, the risk is that the witness, knowing that his fate depends upon the prosecutor's satisfaction with his testimony, will conform his testimony to best support the prosecution's case even if that means not being completely truthful. According to Professor Cassidy, "The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best."[228]

Material Indifference:

In Model Two, the witness is allowed to plead guilty to a lesser offense and is sentenced before providing testimony.[229] Of the three models, this provides the greatest disadvantage to the prosecutor. Not only must the prosecutor trust that the witness will live up to his side of the bargain, but because a deal has been made, under *Giglio* the prosecutor is required to disclose to the jury that the witness is receiving a benefit for his testimony.

Under Model Three, the witness pleads guilty before testifying but sentencing is delayed until after the defendant's trial.[230] According to Professor Cassidy, these agreements are written in such a way that the witness's "obligation is very clear (*i.e.*, to tell the truth), but the prosecutor's obligation is open-ended (*e.g.*, the prosecutor will consider whether to file a substantial assistance motion and/or will make the witness's level of cooperation known to the sentencing judge)."[231] A critical fact to be underscored in this scenario is that the prosecution, and the prosecution alone, decides what is "truthful" testimony. Thus, the obligation in the agreement to "tell the truth" is really an obligation to testify to what the prosecution wants, hopes, or expects the "truth" to be.

Having the witness enter a guilty plea prior to testifying, but delaying the sentencing of that witness until after the trial concludes, accomplishes two things. As in the first model, the witness knows his fate depends upon the prosecutor's satisfaction with his testimony and, therefore, has incentive to conform his testimony to best support the prosecution's case. At the same time, because the prosecution's side of the bargain is open, the witness can honestly testify that no promises have been made in exchange for his testimony, even though there is clear incentive for the witness to conform his testimony to align with the prosecution's theory of the case. This raises serious concerns since these decisions are in cases in which there is incentive to testify untruthfully, but the disclosure obligations triggered by *Giglio* do not apply.[232]

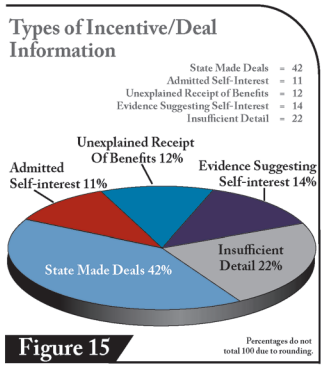
Without discovery of the oral assurances made to the witness by the prosecution in Models One and Three, "the defense is handicapped in cross-examining the witness for bias. The witness can testify that he is cooperating 'because it is the right thing to do' (Model One) or can testify that 'what happens to me is up to the judge' (Model Three) and the partial falsity of these statements cannot be exposed successfully on cross-examination."[233] A mere hope or expectation of leniency by a cooperating witness or his counsel does not trigger *Giglio* disclosure, absent an affirmative representation by the prosecution. Thus, in Models One and Three, the prosecution is able to circumvent the risk of a *Brady* violation by deliberately diluting the favorable aspect of the benefit conferred while still ensuring the cooperation of the witness. In this way, the prosecution is violating the spirit of *Brady v. Maryland* without technically committing a *Brady* violation.

The prosecution, and the prosecution alone, decides what is "truthful" testimony. Thus, the obligation in the agreement to "tell the truth" is really an obligation to testify to what the prosecution wants, hopes, or expects the "truth" to be.

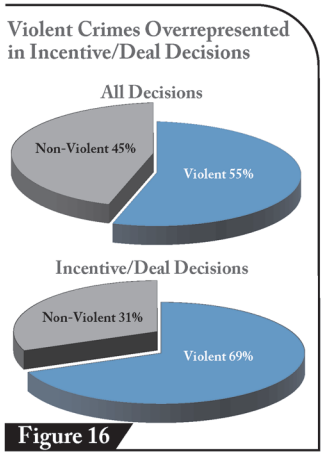
3. Incentive/Deal Information Conclusion

While it cannot be determined from the record how many of the decisions in the Study Sample are Model One or Model Three decisions, there is ample evidence to suggest that there are a significant number.[234] Out of the 101 incentive/deal decisions identified, 42 involved prosecution-made deals with witnesses, 11 contained witnesses admitting a self-interested reason to testify, 12 involved prosecution witnesses receiving unexplained benefits, and 14 included information suggesting the witness had a self-interested motive to testify. The existence of incentive/deal information could not be substantiated in 22 decisions.

Figure 15 shows the percentage of each type of incentive/deal information in relation to all 101 incentive/deal information decisions. ***See*** **Figure 15**.



The incentive/deal category of decisions reveals certain interesting connections. Nearly 70 percent of the incentive/deal decisions involve violent crimes, which is noticeably higher than the percent of violent crimes — 55 percent — in all the decisions in the Study Sample. The side-by-side pie charts in Figure 16 illustrate the overrepresentation of violent crimes in incentive/deal decisions. ***See*** **Figure 16**.



As illustrated in the side-by-side charts in Figure 17, incentive/deal information is overrepresented in *Brady* violation decisions.[235] Whereas only 16 percent of all decisions involve information of incentives or deals, 36 percent of the *Brady* violation decisions involve incentive/deal information. ***See* Figure 17**.

The 20 percentage point difference shown in Figure 17 suggests that courts may have an easier time appreciating the value of impeachment information than they do exculpatory information. These findings also reinforce the notion that judges may find it more challenging to view non-impeachment exculpatory information from the defense perspective than they do impeaching information.

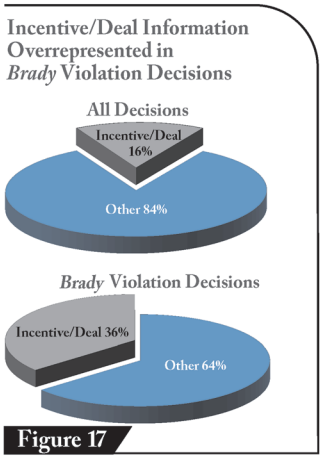


Figure 17

Because of the inherent unreliability of informant testimony, rules requiring disclosure and other trial safeguards are necessary to assist juries in evaluating witness credibility.[236] When prosecutors fail to disclose the fact that they are presenting a cooperating witness or a witness who expects to receive a favor, defendants are denied access to these safeguards. Juries are left to weigh the credibility of the informant testimony without knowing the testimony should be viewed with suspicion. The defendants are denied the opportunity to cross-examine these informants about the self-serving nature of their testimony. And the defendants do not have the benefit of the cautionary jury instruction to which they are entitled. Thus, despite disclosure rules and trial safeguards, there remains a high risk that cooperating witnesses will testify falsely, juries will believe that testimony, and wrongful convictions will result.[237]

Courts have acknowledged "the reality that the Government has ways of indicating to witness's counsel the likely benefits from cooperation without making bald promises." [238] To address the inherent problems in dealing with informant witnesses, there needs to be a broader construction of *Giglio* by the courts. As Professor Cassidy recommends, courts should broaden their definition of "promises, rewards, and inducements" under *Giglio* to capture any statement by a government agent to a witness that the agent knows or reasonably should know may be construed by the witness to suggest favorable consideration on a pending or anticipated criminal charge.[239]

VII. WITHHOLDING OF FAVORABLE INFORMATION

In *Strickler v. Greene*, the Supreme Court distinguished "real" *Brady* information from "so-called" *Brady* information.[240] "Real" *Brady* information is favorable information that would be deemed "material," *i.e.*, would change the outcome of a case. "So-called" *Brady* information is all other favorable information.[241] One purpose of this study was to assess the extent to which *Brady* violation claims involve the withholding of favorable information.

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The 210 favorable information decisions represent a small fraction of all cases in which prosecutors withheld information from the defense. The true number is unknowable.

Favorable information includes both exculpatory and impeachment information. Exculpatory information tends to negate the guilt of the accused or mitigate the defendant's sentence.[242] Impeachment information tends to have a negative impact on the credibility or reliability of a government witness.[243] The duty to disclose impeaching information is the same as the duty to disclose exculpatory information[244] and applies without regard to whether the information would be admissible at trial.[245] The study identified 210 decisions in which favorable information was withheld or disclosed late. These decisions turned on the question of materiality. In 188 decisions, the court deemed the information not material or concluded the late disclosure did not materially prejudice the defendant.

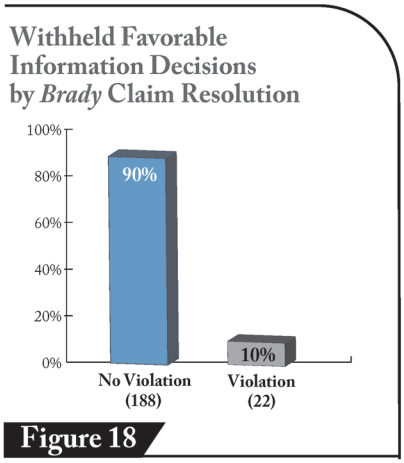

Figure 18

Figure 18 is a graph showing how courts resolved the 210 decisions in which favorable information was withheld or disclosed late. The defendant prevailed in only 10 percent of these decisions. ***See* Figure 18**.

Material Indifference:

In assessing the frequency with which favorable information was being withheld, the Research Team found that looking to the courts for guidance was of limited use. Decisions in the Study Sample rarely articulated whether a particular piece of information was favorable or not. In the Study Sample, many courts issuing decisions skipped the discussion of information favorability altogether and moved directly to the question of materiality.[246] Though many courts did not explicitly refer to information as "favorable," they often used language that acknowledged the exculpatory or impeachment character of the information.[247] Thus, in order to tabulate the total number of decisions within the Study Sample in which favorable information was withheld, the Research Team looked to the court's express articulation of favorability, its acknowledgment of the exculpatory or impeachment value of the information, or, where the court was silent, researchers implemented an independent analysis of favorability based on the facts.

A. Courts Expressly State the Information Is Favorable

Of the 210 favorable information decisions, in only 45 did the court explicitly use the word "favorable" in characterizing the withheld information, 22 of which were *Brady* violations. One example, not a *Brady* violation decision, is *Moya v. Sullivan*, in which the pre-trial prosecutor failed to disclose to the trial prosecutor critical information she learned at the time of the preliminary hearing regarding the eyewitness's failure to identify the defendants at the post-arrest show up.[248] When this fact was uncovered at trial, the trial court found the non-disclosure of this information constituted a *Brady* violation, but concluded it could be cured through the testimony of a detective and an instruction addressing the failure to disclose. In characterizing the information, the district court said that the failure to make an identification "constituted evidence that was *favorable* to the defense."[249] Despite finding the information favorable, the court concluded that the failure to disclose it was not materially prejudicial.[250]

B. Courts Acknowledge Exculpatory or Impeachment Value of the Information

Rather than expressly characterizing withheld information as "favorable," courts were more likely to acknowledge the exculpatory or impeachment value of the information. For example, in *Salgado v. Allison*, Salgado was charged with attempted murder and assault with a deadly weapon.[251] The central issue at trial was the identity of the perpetrator. The *Brady* claim was based on the prosecution's failure to disclose a composite drawing and its accompanying description of the suspect based on information furnished by the victim immediately after the attack. What was remarkable about the composite drawing was that it portrayed a person very different in appearance from Salgado. Nonetheless, despite the differences between the victim's description to the police and Salgado's appearance, the victim positively identified Salgado at trial as his attacker.

Courts often skipped over the favorability prong of the *Brady* analysis altogether and moved straight to the question of materiality.

Although the reviewing court failed to use the word "favorable" in reference to the withheld information, it acknowledged the information's exculpatory and impeachment value by reference to the state court of appeals opinion:

> Despite the People's arguments to the contrary, we agree with [petitioner] that the composite drawing and its accompanying description of the suspect were clearly exculpatory evidence that should have been disclosed to the defense. The composite drawing, based on information furnished by [victim] immediately after the attack, shows a suspect whose appearance is very different from [petitioner's] appearance. More importantly the composite drawing is accompanied by a description of a suspect that differs greatly from the description of [petitioner].[252]

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Relying on the cumulative nature of the information to deny a *Brady* claim is logically flawed and is another illustration of the manner in which judicial reliance on the *Brady* rule encourages non-disclosure.

Despite agreeing with Salgado on the salient facts and finding the information exculpatory, the court cited the strength of the prosecution's evidence to reject Salgado's *Brady* claim.

Another example of a court acknowledging the exculpatory or impeachment value of information involves the non-disclosure of information that calls into question prosecution efforts to present a witness as neutral and disinterested. In *Gentry v. Morgan*, Gentry was convicted of aggravated first-degree murder and sentenced to death based on evidence that included the testimony of two government informants, Brian Dyste and Timothy Hicks.[253]

Regarding Brian Dyste, the government stipulated that the "State had no relationship with any of its witnesses" and Dyste "testified at trial that he was not given anything in exchange for his testimony[.]"[254] Rejecting these claims, the court found that Dyste had in fact acted as a paid informant for Detective Pfitzer during the relevant time period.[255] Without expressly characterizing the undisclosed information as favorable, the court held that it "plainly has impeachment value" and Gentry could have used it to "impeach Dyste's credibility."[256]

Likewise, concerning Timothy Hicks, the court said, "[r]espondent's insistence that Hicks received no 'deal' in exchange for his testimony is a carefully worded argument intended to suggest that Hicks received nothing in exchange for his testimony, a notion that is clearly belied"[257] by the evidence. Further, the court said that "the prosecution could dispute the materiality or impeachment value of this information, but its responsibility to disclose the information is indisputable."[258] Without specifically describing the withheld information as "favorable," the court clearly acknowledged the impeachment value of the information to the defense.[259]

Despite the court's acknowledgement that the undisclosed information had impeachment value, it ultimately rejected Gentry's *Brady* claims. The court concluded that the non-disclosure of this information was "not prejudicial to Gentry when considered collectively in the context of the evidence presented at the guilt phase of the trial."[260] The court affirmed Gentry's conviction and death sentence.

Material Indifference:

C. Favorability of the Information Implicit in the Facts

In some decisions in the Study Sample, courts skipped over the favorability prong of the *Brady* analysis altogether and moved straight to the question of materiality. In many of these decisions, however, the favorability of the information at issue was implicit in the facts. In one such example, *Trevino v. Thaler*, a prosecutor failed to disclose a co-defendant's written statement linking someone other than Trevino to the crime.[261] The court deemed the information immaterial because the co-defendant made a subsequent inconsistent statement. The dissent disagreed, asserting that the statement could have been effectively used "to exculpate [petitioner] and challenge the credibility of the state's witnesses against him in the guilt and penalty phases of his capital murder trial."[262]

Stevenson v. Yates is another decision in which the favorability of the information was implicit in the facts.[263] In that case, Stevenson was the driver of a truck from which a passenger shot and killed a man. He was subsequently convicted of aiding and abetting a murder. Central to the prosecution's case was witness Kelly Reaves, who testified that Stevenson drove his truck directly at the victim. So crucial was this evidence that the prosecutor in closing argument told the jury, "Mr. Stevenson drove the car at them. The testimony was it was driven directly at them. … He punched it and went directly at the victims in this case."[264]

In contrast, after the trial, the prosecutor produced an audiotape recording of a police interview with Reaves in which the witness told police, "It looked like [Stevenson] just wanted to turn off, you know. Turn into the lane and just take off."[265] This crucial evidence corroborated Stevenson's testimony that he was trying to drive away and not aiming the truck at the victim. The trial court denied Stevenson's motion for a new trial, finding there was nothing material in the tape recording, and the reviewing court rejected his *Brady* claim on the same basis.

The dissent disagreed, concluding this non-disclosure was a *Brady* violation. The dissent said, "[O]ne might consider the language of the audiotape to be ambiguous. … Such matters are in the province of the jury. In either case, it seems clear from the audiotape transcript that Stevenson turned the truck, a fact which undermines the prosecution's theory at trial. … Stevenson's lawyer, if he had received the audiotape, was entitled to present his most vigorous defense with that audiotape supporting his client's views."[266]

Over 34 percent of the Study Sample decisions involved the withholding or late disclosure of favorable information.

And in *Brooks v. Tennessee*, a third decision with strong facts implying the favorability of the information, Brooks had been convicted of first-degree felony murder and sentenced to life in prison based in part on the testimony of Michael Nelson.[267] During the post-conviction proceedings well after the trial, Brooks learned that Nelson had a prior conviction for forged instruments and perjury. The perjury charge was based on Nelson's false testimony against another person years earlier, which led to the man being arrested and charged with attempted murder. Brooks argued that the prosecution violated his due process rights by failing to disclose this important impeachment information about its key witness Michael Nelson.

Without explicitly finding this information favorable, the court went directly to the question of materiality, which it characterized as "a close one."[268] The court reasoned that "[a]s a professional and ethical matter, the prosecution should have discovered this important background information about Nelson before calling him as a witness."[269] "This is particularly true," the court stated, when the prior convictions "were obtained by *the very same prosecutor's office* as was trying Brook's case."[270] Finally, the court admonished the prosecution for "failing to correct" Nelson's "inaccurate testimony at trial concerning the extent of his prior criminal history[.]"[271]

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The judiciary's almost unilateral focus on materiality conveys a message that non-material favorable information is unimportant and need not be disclosed.

Ultimately, the court declared the prosecution's conduct "a serious professional failing[,]" but conceded that "the *Brady* standard for materiality is less demanding than the ethical obligations imposed on a prosecutor."[272] The court found that because Brooks impeached Nelson on other grounds, Nelson's conviction for providing false testimony in the past would only have been cumulative in this case. Affirming Brooks' conviction, the court concluded that "although this issue is uncomfortably close to the constitutional line, the undisclosed evidence was not material under *Brady*."[273]

D. Withholding of Favorable Information Conclusion

The 210 favorable information decisions in the Study Sample represent a small fraction of all cases in which prosecutors withheld information from the defense. The true number is unknowable. The 210 decisions include a wide range of withholding, from late disclosure to complete non-disclosure. While the courts in nearly all these decisions ultimately decided the withholding of favorable information did not materially prejudice the defendant, the most important point is that valuable information that could have helped bolster the defense theory, led to a more effective trial strategy, or led to other material information was not turned over to the defense.

When the withheld information is favorable, courts sometimes deny *Brady* claims based on the assertion that the information is cumulative and, as such, it would not have made a difference in the outcome of the case. This reasoning ignores the fact that cumulative information may still be critical information in the eyes of the jury; it is not readily apparent what or how much information a jury will find persuasive. One additional instance of impeachment can make the difference in a juror's assessment of a witness's credibility. Relying on the cumulative nature of the information to deny a *Brady* claim is logically flawed and is another illustration of the problematic nature of the materiality standard and the manner in which judicial reliance on the *Brady* rule encourages non-disclosure.

The number of *Brady* violations uncovered through this study cannot convey the full extent to which favorable information is being withheld. The 210 favorable information decisions identified include 22 *Brady* violation determinations; 23 decisions in which courts expressly articulated that the withheld information, though not deemed material, was favorable; 80 decisions in which the court acknowledged the exculpatory or impeachment value of the information without expressly calling it favorable; and 85 decisions in which, through independent analysis, favorability was found to be implicit in the facts. Of the 620 decisions in the Study Sample, over 34 percent involve the non-disclosure or late disclosure of favorable information.

Figure 19 breaks down the 210 withheld favorable information decisions into one of the three categories discussed above. Specifically, in 22 percent of withheld favorable decisions the court expressly articulated favorability, in 38 percent of these decisions the court acknowledged the exculpatory or impeachment value of the information, and in 40 percent of these decisions the Research Team discerned favorability based on the facts. ***See* Figure 19**.

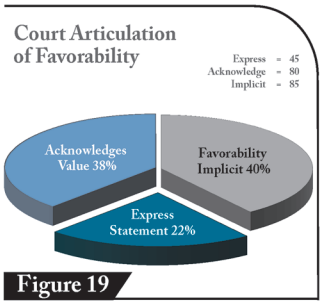

Figure 19

In addition, the Research Team found a correlation between **death penalty decisions** and favorable information decisions.[274] Within the Study Sample, researchers identified a total of 59 death penalty decisions, and in 31 (53 percent) prosecutors disclosed favorable information late or never at all. The side-by-side charts in Figure 20 demonstrate that withheld favorable information is overrepresented in death penalty decisions as compared to all Study Sample decisions. ***See* Figure 20**.

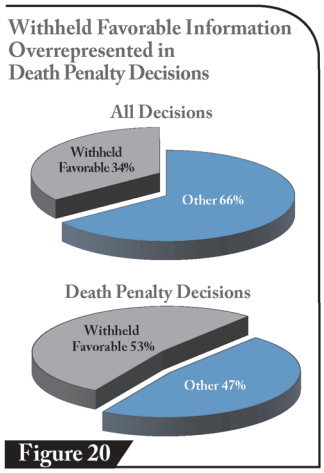

Figure 20

Despite the high stakes involved, the data also shows that courts in death penalty decisions overwhelmingly find withheld information not material. As illustrated in Figure 21, of the 59 death penalty decisions, courts found the information not material in 38 or nearly two-thirds.[275] By comparison, only one-third of all decisions were resolved with a finding that the information was not material. ***See*** **Figure 21**.

Not Material Resolutions Overrepresented in Death Penalty Decisions

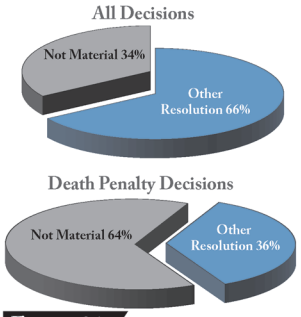

Figure 21

That death penalty decisions are more likely to result in a finding that the undisclosed information is not material could be related to the greater volume of evidence typically introduced in capital cases. Where there is a greater volume of evidence, judges are more likely to view the undisclosed information as cumulative in nature and, therefore, not material to the outcome.

The court's reliance on materiality as the central inquiry in a *Brady* violation claim has evolved into a standard by which prosecutors measure their disclosure obligations. In doing so, prosecutors conflate two distinct issues: (1) the obligation to disclose favorable information pre-trial, and (2) the court's application of the materiality standard post-trial. Taking cues from the way in which courts analyze *Brady* claims in the post-trial context, the prosecutor's inquiry becomes not whether a piece of information is favorable, but instead whether the information would have made a difference in the outcome of the case. The judiciary's almost unilateral focus on materiality conveys a message that non-material favorable information is unimportant and need not be disclosed. As a result, the current system of judicial review fails to promote a culture of compliance, instead fostering *Brady*, or "so-called *Brady*," violations.[276]

VIII. SUMMARY OF STUDY FINDINGS AND CONCLUSIONS

- **Application of the materiality standard produces arbitrary results.** The study demonstrates the arbitrary nature of the materiality standard. Even when evaluating the same information, in similar factual contexts, and applying the same articulation of the materiality standard, different courts may ultimately resolve a *Brady* claim differently.

- **Materiality determinations overwhelmingly favor the prosecution.** Of all the decisions, only four percent result in a court finding that the prosecution violated *Brady*. In those decisions where the prosecution failed to disclose favorable information, it still won 86 percent of the time, with the court concluding the information was not material. On the issue of materiality, this data demonstrates that the odds are almost always in the government's favor.

- **Courts almost never find *Brady* was violated by the late disclosure of favorable information.** Of the 65 decisions that involve late disclosure of favorable information, only one resulted in a *Brady* violation finding. This means that, for the decisions in this Study Sample, the government has a nearly perfect record when defending late disclosure of favorable information.

- **Disclosed late or never disclosed at all, the withholding of favorable information is rarely found to violate *Brady*.** The study identifies hundreds of decisions in which favorable information was disclosed late or never disclosed at all. And, within this group, the defendant prevails on the question of materiality in only one of every 10 decisions — *i.e.*, the prosecution wins 90 percent of the time.

- **Statements are more likely to be disclosed late.** Of the decisions involving the late disclosure of favorable information, nearly half involved statements.

- **Some courts engage in burden shifting by denying *Brady* claims upon a finding that the defense could have obtained the information on its own with due diligence.** In just over three percent of the decisions, courts excused the prosecutor's failure to disclose favorable information by imposing a due diligence obligation on the defendant. By employing this due diligence rule, courts shift the inquiry away from the prosecutor's obligation to disclose favorable information, and instead focus on the defendant's efforts to find information.

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- ***Brady* claims involving information on incentives or deals are more likely to result in a *Brady* violation finding.** The statistical analysis reveals a strong correlation between *Brady* violation decisions and incentive/deal information. Whereas 16 percent of all the decisions involve incentive/deal information, 36 percent of the *Brady* violation decisions involve incentive/deal information.

- **Favorable information is more likely to be disclosed late or withheld entirely in death penalty decisions.** Favorable information was never disclosed or disclosed late by the prosecution in 53 percent of decisions involving the death penalty, but only 34 percent of all the decisions studied.

- **Death penalty decisions are more likely to be resolved with a finding that the information is not material and almost always upon a finding that the information is cumulative.** Nearly two-thirds of the death penalty decisions resulted in a finding that the withheld information was not material. By comparison, only one-third of all the decisions studied were resolved with a not material finding.

IX. MECHANISMS FOR INCREASING FAIR DISCLOSURE

While acknowledging the role that prosecutors play in establishing policies and cultures affecting disclosure,[277] this report focuses on the role of courts in fostering a culture of non-disclosure. This section offers three different proposals for addressing the problems identified in this report. The first reform mechanism can be initiated by criminal defense lawyers in their current practice and by individual judges. The other two mechanisms require action by the judiciary or the legislature through their respective rule and lawmaking functions. Federal and state courts could amend court rules and policies to mandate disclosure of favorable information. State and federal lawmakers could also enact legislation requiring prosecutors to disclose favorable information. Whether through the judicial or legislative process, such reforms would prohibit prosecutors from using the materiality standard to limit the extent of pre-trial disclosure obligations.

A. Court Order for Disclosure of Favorable Information in Criminal Proceedings

On Jan. 1, 2010, the American Bar Association (ABA) officially clarified that Rule 3.8(d) of the ABA Model Rules of Professional Conduct, Special Rules of a Prosecutor, is broader than the constitutional obligation established by *Brady v. Maryland* and its progeny.[278] The ABA explained that although the disclosure obligation under Rule 3.8(d) may overlap with prosecutors' other disclosure obligations, it is "separate from" any imposed under the "Constitution, statutes, procedural rules, court rules, or court orders."[279] "It relies on state law, but it would bind every state *and* federal prosecutor"[280] and has been adopted in every state but California.[281]

Model Rule 3.8(d) states that "the prosecutor in a criminal case shall ... 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."[282] Materiality, under the rule, is not a factor for prosecutors to consider when making the decision of whether or not to disclose favorable information. The rule is also forward-looking, not retrospective, and prosecutors need not assess whether the information would be admissible at trial.[283]

Whether through the judicial or legislative process, these reforms would prohibit prosecutors from using the materiality standard to limit pre-trial disclosure obligations.

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As a recently enacted statute adopted in every state with the exception of California, Model Rule 3.8(d) supersedes the Jencks Act, which allows witness statements to be withheld until after the witness testifies for the prosecution.[284] Thus, if a federal prosecutor withholds a favorable statement under the Jencks Act and fails to turn over the statement "as soon as reasonably practicable" as required by Model Rule 3.8(d), then the federal prosecutor would be in violation of federal code provision 28 U.S.C. § 530B(a), which requires federal prosecutors to abide by the state laws and rules, and local federal court rules, governing that particular jurisdiction.[285]

The court should issue an order in each case plainly stating that "willful and deliberate failure to comply" with Rule 3.8(d) will be viewed as contempt of court.

To most effectively enforce Model Rule 3.8(d), defense attorneys should file a pre-trial motion asking the court to issue an **Ethical Rule Order** requiring the prosecutor to search his file and disclose all information that "tends to negate the guilt of the accused or mitigates the offense."[286] The motion should cite the relevant rule in the local jurisdiction. To the extent it makes strategic sense, the attorney could also lay out the defense theory of the case and describe the kind of information that would be favorable and tend to negate guilt. Defense attorneys should be specific in requesting the court to order prosecutors to search the files of law enforcement or other agencies where favorable information is likely to be found and to put on the record or reduce to writing all favorable oral witness statements.[287]

To ensure enforcement, the court should prepare and sign an order in each case plainly stating that "willful and deliberate failure to comply" with Rule 3.8(d) will be viewed as contempt of court. Such an order would avoid the problem that faced the court in the case of the late Senator Ted Stevens. In that case, after granting the Department of Justice's motion to set aside the verdict and dismiss the indictment, District Judge Emmett G. Sullivan was unable to hold the assistant U.S. attorneys accountable for their deliberate failure to disclose information. Judge Sullivan did not have the legal authority to hold the prosecutors in contempt because their actions did not constitute a specific violation of the contempt statute 18 U.S.C. § 401, which requires the intentional violation of a clear and unambiguous court order.

A carefully worded order requiring a prosecutor to comply with Rule 3.8(d) — made at the outset of the case — would bind prosecutors and make it possible for judges to hold in contempt prosecutors who willfully fail to comply with the order of the court to disclose favorable information. The presumption that most lawyers will comply with ethical rule orders creates a reasonable probability that widespread use could have a deterrent effect on willful non-disclosure. This should "generally and specifically deter 'bad apple' prosecutors because it is not subject to many of the practical and procedural hurdles that have obstructed punishment even for deliberate, intentional, and malicious *Brady* violations."[288]

Based on recent discussions with leaders in the prosecutorial community and the judiciary, there is a growing consensus that the prosecutors who deliberately and willfully

withhold favorable information should be sanctioned for the deterrent value alone, even if the withholding is deemed harmless.[289] In a recent *amicus* brief filed by the National Association of Assistant U.S. Attorneys and the National District Attorneys Association in the case of *Pottawattamie County v. McGhee*, prosecutors underscored the effectiveness of consequences and the deterrent value of the threat of bar discipline, criminal prosecution, and political embarrassment.[290] Increased requests for and imposition of an ethical rule order is a direct mechanism for both the defense bar and individual judges to recognize and counter the problems identified by this study.

B. Amendment of Judicial Rules and Policies Governing Disclosure

While the American Bar Association requires that all prosecutors disclose information "that tends to negate the guilt of the accused or mitigates the offense," state and federal rules governing disclosure obligations vary significantly. In the federal system, **Federal Criminal Procedure Rule 16** obligates prosecutors to disclose only "favorable information material to guilt or sentencing,"[291] allowing federal prosecutors to withhold other favorable information without breaking the rule.[292] Under state systems, disclosure obligations range "from bare compliance with constitutional minimums to more expansive disclosure requirements."[293] Clear and consistent guidelines to improve defendants' access to favorable information are needed and can be achieved through judicial rule and policy reform.

Judicial rule changes, at the state and federal levels, would do a great deal to prevent reoccurrence of the kind of problems discussed in this report.

In 2004, seeking to address problems within the federal system, the American College of Trial Lawyers (ACTL) proposed amending the Federal Rules of Criminal Procedure to "codify the rule of law first propounded in *Brady*," in particular requiring disclosure of all favorable information without requiring a finding of "materiality."[294] In support of its proposal, the ACTL explained that "[b]ecause the prosecutor alone can know and weigh what is undisclosed, he is faced with serious and potentially conflicting responsibilities: to decide whether information is exculpatory, and, if so, whether and when it should be disclosed to the accused."[295]

Faced with fierce opposition from the Justice Department, the ACTL proposal died before reaching the Judicial Conference's full Advisory Committee on Criminal Rules.[296] While NACDL has long championed discovery reform, in recent years federal judges have also begun calling for Rule 16 reform, including Ninth Circuit Judge Alex Kozinski and Judges Paul Friedman and Emmet Sullivan of the U.S. District Court for the District of Columbia.[297] The findings of this Study lend hard evidence to what supporters for reform have been saying — by focusing solely on the question of materiality, courts are encouraging prosecutors to withhold favorable information. Rule changes, at the state and federal levels, would do a great deal to prevent reoccurrence of the kind of problems discussed in this report.

C. Legislation Codifying Fair Disclosure

On March 15, 2012, in direct response to the flawed prosecution of the late Senator Ted Stevens,[298] Senators Lisa Murkowski (R-AK) and Daniel Inouye (D-HI), along with a bipartisan group of co-sponsors, introduced S. 2197, the **Fairness in Disclosure of Evidence Act of 2012**, to provide a clear and meaningful standard governing the prosecution's disclosure obligation.[299] The Act would require prosecutors to disclose all information "that may reasonably appear favorable to the defendant,"[300] effectively prohibiting the government from using the *Brady* materiality requirement to narrow its disclosure obligation. Although the bill has not yet been enacted,[301] it would address the major problems identified and detailed in this report and it serves as a model for bringing about sensible discovery reform through legislation.[302]

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The Fairness in Disclosure of Evidence Act is a model for sensible and comprehensive discovery reform that this study demonstrates is critically needed.

The Act would require prosecutors to disclose all "information, data, documents, evidence, or objects that may reasonably appear to be favorable to the defendant in a criminal prosecution" with respect to the determination of guilt, any preliminary matter, or the sentence to be imposed.[303] The disclosure obligation would apply to that which is "within the possession, custody, or control of the prosecution team," known to the prosecution team, or "by the exercise of due diligence would become known" to the prosecution team.[304] The Act defines the term "prosecution team" broadly to include all individuals and agencies, including law enforcement, that act on behalf or under the control of the government or that jointly investigate with the prosecuting agency.[305] In those instances where disclosure could be detrimental to witness safety, the Act includes a fair mechanism for seeking a protective order,[306] and exempts all classified information from the disclosure obligation.[307]

If legislation such as this were enacted, defendants would have increased access to favorable information, thereby reducing *Brady* litigation system-wide. When prosecutors use the *Brady* rule to determine pre-trial disclosure obligations, they engage in a subjective assessment of whether the information would make a difference in the case without the benefit of hindsight. Under this Act, that assessment is removed from the prosecution's decision-making — the favorability of the information alone would trigger the duty to disclose.

The enactment of this legislation would also address the major problems discussed in this report, including the common practice of late disclosure, the imposition of the due diligence rule, and the frequency with which incentive/deal information is not disclosed. Sixty-five decisions, over 10 percent of all the Study Sample decisions, involved late disclosure. Compliance with the language of this Act would require that information be disclosed "without delay after arraignment" or, if its existence is not known, "as soon as is reasonably practicable upon the existence of [it] becoming known."[308] Moreover, because this timing requirement applies "before the entry of any guilty plea[,]"[309] it would better inform the

defense on the strength of the government's case, thereby reducing the pressure on innocent defendants to plead guilty.[310]

This legislation would also significantly reduce, and possibly eliminate, the imposition of a due diligence requirement on the defense. On its face, the Act does not base the prosecutor's disclosure obligation on the defendant's knowledge or access to the information. Prosecutors would be required to disclose favorable information that previously would have been subject to the due diligence rule, such as witness statements, statements by the defendant, police reports, criminal records, and incentive/deal information. The Act would also set forth broad definitions of the covered information and the prosecution team, and place a due diligence requirement on the prosecutor to seek out the information. This legislation would mandate a comprehensive disclosure obligation that should foreclose attempts to impose the due diligence rule on the defense.

The Fairness in Disclosure of Evidence Act is a model for sensible and comprehensive discovery reform that this study demonstrates is critically needed. Providing clear standards aimed at ensuring compliance would remove much of the gamesmanship that is commonplace in the discovery process and result in less litigation and a fairer process.

Under the Act, the favorability of the information alone would trigger the duty to disclose.

X. FINAL THOUGHTS

In *Brady v. Maryland*, the Supreme Court recognized that criminal defendants have a due process right to favorable, material information and that the prosecutor has an obligation to make that information available to the defense. The purpose of the *Brady* decision was not to limit a prosecutor's disclosure obligations by the constitutional parameters articulated in the decision. Courts, when properly analyzing *Brady* claims, are not asking whether the prosecution has fully met its disclosure obligation, since the obligation extends beyond *Brady*, but whether the prosecution withheld favorable, material information, thereby violating a defendant's constitutional right to due process. These two separate questions are often conflated, misleading courts and prosecutors to conclude that prosecutors are not obligated to turn over favorable information unless it is deemed material.

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Whereas the courts are charged with applying the *Brady* analysis to protect defendants' due process rights, the disclosure decisions made by prosecutors are not so constrained — the prosecution's disclosure obligation extends far beyond *Brady* and, as such, *Brady* has no role in determining that obligation. The Supreme Court, as well as other courts, has repeatedly stated that prosecutors should err on the side of disclosing more than the constitutional minimum. Courts have made clear that prosecutors are bound by ethical rules beyond *Brady* that require the disclosure of favorable information without regard to materiality. The American Bar Association has expressly articulated that prosecutors have an obligation embodied in ABA Model Rule 3.8(d)[311] to disclose favorable information "as soon as reasonably practical" or, according to the ABA Criminal Justice Standards, at the "earliest feasible opportunity."

Yet, even as some courts encourage disclosure of more than what is constitutionally required and what ethical rules dictate, many other courts disregard these directives and continue to analyze and resolve *Brady* claims in a way that reinforces the incorrect assumption that the prosecutor's obligation is measured solely by the defendant's due process rights. The courts' reliance on materiality to assess disclosure obligations, and its parsimonious application of that standard, have resulted in a rigid materiality rule with a bar set dangerously high. As explained by Ninth Circuit Judge Alex Kozinski,

Courts, when properly analyzing *Brady* claims, are not asking whether the prosecution has fully met its disclosure obligation, but whether the prosecution withheld favorable, material information, thereby violating a defendant's constitutional right to due process.

> By raising the materiality bar impossibly high, [courts invite] prosecutors to avert their gaze from exculpatory evidence, secure in the belief that, if it turns up after the defendant has been convicted, judges will dismiss the *Brady* violation as immaterial.[312]

The findings in this study support Judge Kozinski's conclusion that the materiality bar is set unreasonably high. Out of 210 decisions where favorable information was withheld, the court, in 188, or 90 percent of the decisions, held that the information or timing of the disclosure was not material to the outcome of the case.[313]

Compounding the unduly narrow construction of "materiality" is the unworkable nature of the materiality standard itself, described by Justice Thurgood Marshall as "a pretrial standard that virtually defies definition." The materiality standard requires prosecutors to predict what information will be relevant to the defense's case before the defense's case is known or developed. As Justice John Paul Stevens pointed out in *United States v. Agurs*, "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete."[314] For a prosecutor poised to try to win a case while meeting his responsibility to an opponent in an adversarial system, accurately assessing what information is material poses a significant challenge.

Moreover, as this study demonstrates, several disturbing issues arise within *Brady* jurisprudence that can effectively relieve prosecutors of their disclosure obligations and deprive defendants' access to favorable information. Late disclosure of favorable information is a common problem. More than 10 percent of the Study Sample decisions involved late disclosure of favorable information. Despite the large number of late disclosure decisions identified in the Study Sample, only one resulted in a *Brady* violation finding.

A second troubling issue is the court's imposition of a due diligence requirement on the defense. Researchers identified 19 decisions, or three percent of all the decisions, in which courts imposed a due diligence requirement. When a court refuses to hold the prosecution to its disclosure obligation because the defense could have obtained the information, it sends a message that fulfillment of that obligation is not important, interferes with the truth-seeking process, and unfairly burdens the defense.

The current system's reliance on prosecutors to make these decisions does not facilitate fair disclosure.

Perhaps most troubling of the issues identified by this study is the prevalence of government incentives offered in exchange for informant testimony — despite the strong link between use of informant testimony and wrongful convictions. In this study, researchers identified 101 decisions that involved the promise or insinuation of favor in exchange for testimony. Of the 22 *Brady* violation decisions in the Study Sample, 36 percent involved incentive/deal information, suggesting that courts may have an easier time appreciating the value of impeachment information than of exculpatory information.

The 22 *Brady* violation decisions identified in the study represent just a small fraction of all decisions where favorable information was withheld. In addition to these 22 decisions, researchers uncovered another 188 decisions in which a *Brady* violation was not found, but favorable information was withheld or disclosed late. This study shows

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that the manner in which courts review *Brady* claims fosters a culture of non-disclosure by: (1) applying an overly stringent definition of materiality; (2) minimizing the importance of favorable information by failing to make specific reference to its favorability; (3) failing to remind prosecutors of their ethical obligation to disclose non-material favorable information; and (4) regularly excusing the prosecution's late disclosure or non-disclosure of favorable information.

In light of the adversarial nature of the justice system, it is unreasonable to rely on prosecutors alone to fix the problem. As Ninth Circuit Chief Judge Kozinski acknowledged, "[t]here is an epidemic of *Brady* violations abroad in the land" which, in his view, "[o]nly judges can put a stop to."[315] While prosecutors bear some responsibility, it is also true that they are in a conflicted position. The prosecutor is a minister of justice but also an advocate with the pressure to prosecute and win cases. He is tasked with controlling information and playing gatekeeper to what information is disclosed. He decides whether a single piece of information, if withheld, would make a difference in the outcome of a case and on that basis decides whether or not to disclose it. The prosecutor's unilateral, non-transparent application of an unworkable materiality standard may explain why otherwise ethical prosecutors fail to turn over favorable information.

Until the materiality standard is removed as a barrier to fair disclosure, and there are real consequences for withholding favorable information, the system will remain unaccountable to defendants.

In deciding whether favorable information is material to the defense, the prosecutor has to be completely neutral, which as an advocate he cannot be. He must be in a position to understand the defense perspective — what the defense knows and appreciates about the case. "What may appear exculpatory to a defense attorney — or lead to the discovery of exculpatory evidence through additional investigation — may appear only tangentially relevant to a prosecutor."[316] The current system's reliance on prosecutors to make these decisions does not facilitate fair disclosure.

To bring clarity to this issue, provide prosecutors and courts with clear guidance, and ensure that those facing criminal charges are accorded the rights they deserve, there needs to be reform. That reform should come through passage, at the state and federal levels, of a statute consistent with Model Rule 3.8(d) of the ABA ethical rules governing disclosure. Reform also could be attained through amendment of state and federal judicial rules in the same manner. In the meantime, individual judges can order prosecutors to abide by ABA Model Rule 3.8(d) to disclose favorable information that "tends to negate the guilt of the accused or mitigates the offense."

"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."[317] Until the materiality standard is removed as a barrier to fair disclosure, and there are real consequences for withholding favorable information, the system will remain unaccountable to defendants.

ENDNOTES

1. *Brady v. Maryland*, 373 U.S. 83 (1963).

2. *See* American Civil Liberties Union of New Jersey, *Trial and Error: A Comprehensive Study of Prosecutorial Conduct in New Jersey* (September 2012), *available at* http://pdfserver.amlaw.com/nj/aclu_report09-12.pdf; Kathleen M. Ridolfi & Maurice Possley, Northern California Innocence Project, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* (2010), *available at* http://digitalcommons.law.scu.edu/ncippubs/2/; Emily M. West, Innocence Project, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* (2010), *available at* http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf; *see generally* The Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors*, http://www.publicintegrity.org/accountability/harmful-error; Investigative Series, *Misconduct at the Justice Department*, USA TODAY, http://usatoday30.usatoday.com/news/washington/judicial/2010-12-08-prosecutor_N.htm#; Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win (Parts 1-5)*, CHI. TRI., Jan. 11-14, 1999, at A1.

3. Since its decision in *Brady*, the Supreme Court has further clarified that the prosecutor's duty extends to not just exculpatory information but to all favorable information. Specifically, "the duty encompasses impeachment evidence as well as exculpatory evidence" and thus, "[i]n order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf[], including the police.'" *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This duty is not limited to that which goes to guilt, rather it extends to mitigating information, including that which would reduce the penalty. *See* Peter Goldberger, *Codifying the* Brady *Rule*, THE CHAMPION, May 2013, at 9 (noting that the *Brady* decision dealt with sentencing mitigation and that the majority never actually used the word "exculpatory").

As such, when discussing the type of information that prosecutors must disclose under *Brady*, this report generally uses the term "favorable." However, when exploring individual decisions or data sets, this report may specifically refer to the information at issue as "exculpatory," "impeachment," or "mitigating" information, depending on its precise nature. In all such instances, this report defines "exculpatory," "impeachment," and "mitigating" information as types of "favorable" information and, inversely, defines "favorable" to include information that is "exculpatory," "impeaching," and/or "mitigating" in nature.

4. Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010) (summarizing the purpose and work of the two-day symposium).

5. The Innocence Project standard for exoneration is rigorously confined to cases where there is conclusive evidence of innocence established as a result of DNA testing. Email from Dr. Emily West, Research Director, Innocence Project, to Kathleen "Cookie" Ridolfi, Professor of Law, Santa Clara University School of Law (Jan. 27, 2014) (on file with recipient).

6. West, *supra* note 2, at 4-5.

7. *Connick v. Thompson*, 563 U.S. ___, 131 S. Ct. 1350, 1371 (Ginsburg, J., dissenting) (2011).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 1372.

12. *Id.*

13. *Id.* at 1372-74.

14. *Id.*

15. *Id.* at 1356, 1375; The Innocence Project, *Holding Prosecutors Accountable*, http://www.innocenceproject.org/Content/Holding_Prosecutors_Accountable.php.

16. *Connick* at 1375.

17. *Id.* After the trial court vacated the carjacking conviction, the District Attorney's Office initiated grand jury proceedings to investigate the non-disclosure of the lab report on the blood. *Id.* However, the District Attorney terminated these proceedings after just one day, based upon the spurious reasoning that "the lab report would not be *Brady* material if the prosecutors did not know Thompson's blood type." *Id.*

18. *Id.*

19. *Id.* at 1357 (citing *State v. Thompson*, 825 So.2d 552 (La. App. 4 Cir. 2002)).

20. *Id.* at 1376.

21. *Id.*

22. *Id.*

23. *Id.*

24. *See generally In re Honorable Ken Anderson (A Court of Inquiry)*, Probable Cause Order, Cause No. 12-0420-K26 (26th Jud. Dist. Ct. Williamson Cty., TX, April 19. 2013) [hereinafter Probable Cause Order].

25. *Id. See* Chuck Lindell, *Lawyers Spar Over Documents in Anderson Inquiry*, AM. STATESMAN, Feb. 4, 2013, *available at* http://www.statesman.com/news/news/anderson-court-of-inquiry-set-to-begin/nWFRp/.

26. *Ex Parte Morton*, No. AP-76663 (Tex. Crim. App., Oct. 12, 2011).

27. *See generally* Probable Cause Order.

28. *Id.* at 3.

29. *Id.* at 3.

30. *Id.* at 5.

31. *Id.* at 6.

32. Brandi Grisson, *Mark Norwood Indicted in Second Austin Murder*, The Texas Tribune, Nov. 9, 2012, *available at* http://www.texastribune.org/2012/11/09/mark-norwood-faces-grand-jury-second-austin-murder/; *see also* Pamela Colloff, *Mark Alan Norwood Found Guilty of Christine Morton's Murder*, Texas Monthly, March 27, 2013, *available at* http://www.texasmonthly.com/story/mark-alan-norwood-found-guilty-christine-mortons-murder.

33. Brandi Grisson, *Exonerated in Killing of Wife, a Father Renews Ties With Son*, The Texas Tribune, July 7, 2012, *available at* http://www.nytimes.com/2012/07/08/us/exonerated-in-wifes-killing-father-renews-bonds-with-son.html.

34. Chuck Lindell, *Lawyers Spar Over Documents in Anderson Inquiry*, AM. STATESMAN, Feb. 4, 2013, *available at* http://www.statesman.com/news/news/anderson-court-of-inquiry-set-to-begin/nWFRp/.

35. Probable Cause Order at 13.

36. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009, *In re Special Proceedings*, Case No. 09-0198 at 2 (D.D.C. March 15, 2012) [hereinafter Schuelke Report].

37. Memorandum Opinion, *In re Special Proceedings*, Case No. 09-0198 at 2-3 (D.D.C. Feb. 8, 2012) [hereinafter Sullivan Order].

38. It is noteworthy that the prosecution, which was eventually determined to be flawed and rife with misconduct, was conducted by the Justice Department at a time when the same political party as Sen. Stevens led the Executive Branch, underscoring that the problem of withholding favorable information is institutional in nature.

39. *See generally* Schuelke Report; *see also* Sullivan Order at 54.

40. Schuelke Report at 4, 390-91, 393, 395-96.

41. *Id.* at 5, 497.

42. *Id.* at 6-9, 28, 38, 107-08, 122-25, 500.

43. *Id.* at 1, 32.

44. *See* Statement of Attorney General Eric Holder Regarding *United States v. Theodore F. Stevens*, Department of Justice (April 1, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-ag-288.html. *See also* Carrie Johnson & Del Quentin Wilber, *Holder Asks Judge to Drop Case Against Ex-Senator Stevens*, WASH. POST, April 2, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040100763.html ("Holder assigned a team of top department lawyers to review the case" and "he made the decision [to dismiss the indictment] after a thorough review of the evidence." In particular, the "discovery [of notes contradicting testimony of a key witness] by a fresh team of lawyers and their acknowledgment that the material should have been shared with Stevens' defense team led Holder to conclude [the case] could not be salvaged."); Nina Totenberg, *Justice Dept. Seeks to Void Stevens' Conviction*, NPR, April 1, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=102589818 (Holder decided to drop the case "rather than continue to defend the conviction in the face of persistent problems stemming from the actions of prosecutors" and the "straw that apparently broke Holder's back" was the discovery of more undisclosed prosecutorial notes "by the new prosecution team, which was appointed in February.").

45. Schuelke Report at 12.

46. Sullivan Order at 54.

47. As used in this report, the phrase "Study Sample" refers to the complete set of 1,497 federal court decisions analyzed by NACDL and the VERITAS Initiative researchers for this study. Appendix A, containing the Methodology and Guidance Document, provides a detailed explanation of the criteria and methodology used to identify this set of decisions.

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

49. *Id.* at 85.

50. *Id.* at 88.

51. Laurie L. Levenson, *Discovery from the Trenches: The Future of Brady*, 60 UCLA L. REV. 74, 77 (2013); *See also* Irwin H. Schwartz, *Beyond* Brady*: Using Model 3.8(d) in Federal Court for Discovery of Exculpatory Information*, THE CHAMPION, March 2010, at 34 ("*Brady* is applied retrospectively. '[T]here is never a real "*Brady* violation" unless nondisclosure was so serious' that a post-trial review leads judges to conclude that it undermined their confidence in the verdict.") (alteration in the original) (quoting *Strickler v. Green*, 527 U.S. 263, 281-82 (1999)).

52. Favorable information includes exculpatory as well as impeachment information. *See supra* note 3; *see also* Peter Goldberger, *Codifying the* Brady *Rule*, THE CHAMPION, May 2013, at 9 ("The *Brady* majority itself never used the term 'exculpatory' to describe the limits of its concern. Instead, it referred to material which 'would *tend to* exculpate [the accused] or *reduce the penalty*,' using the term 'favorable' three times to capture the essential characteristic of the covered material.") (italics and alteration in the original).

53. *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999).

54. *Strickler*, 527 U.S. at 289 (internal quotation marks omitted); *see also United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining a "reasonable probability" to be "a probability sufficient to undermine confidence in the outcome"). For the purposes of discussion, this report refers to this articulation as the *Bagley* standard.

55. *Strickler*, 527 U.S. at 289-90; *see also Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). For the purposes of discussion, this report refers to this articulation as the *Kyles* standard.

56. These alternative articulations used such phrases as "reasonable doubt," "significant chance of reasonable doubt," "reasonable likelihood," "reasonable possibility," and a "different view of the testimony." *See Banks v. Thaler*, 583 F.3d 295, 311 (5th Cir. 2009) ("[A] materiality showing does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in acquittal[.]") (citing *Kyles*, 514 U.S. at 434-46); *Ortega v. Duncan*, 333 F.3d 102, 109 (2d Cir. 2003) ("We also consider 'whether there was a significant chance that this added item, developed by skilled counsel … could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.'") (quoting *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975)); *accord. Ogden v. Wolff*, 522 F.2d 816, 822 (8th Cir. 1975) (citing *Shulder v. Wainwright*, 491 F.2d 1213, 1223 (5th Cir. 1974) (quoting *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969))); *United States v. Coppa*, 267 F.3d 132, 141 (2d Cir. 2001) ("In this sentence, the Court appears to be using the word 'material' in its evidentiary sense, *i.e.*, evidence that has some probative tendency to preclude a finding of guilt of lessen punishment, *cf.* FED. R. EVID. 401. Thirteen years later, however, in *United States v. Agurs*, 427 U.S. 97, [] (1976), the Court began a process that would result in the word 'material' in the *Brady* context having an entirely different meaning.") (footnote omitted); *Singh v. Prunty*, 142 F.3d 1157, 1163 (9th Cir. 1998) ("[T]here is a reasonable probability that had the evidence been disclosed to the defense, one or more members of the jury could have viewed [the witness's] testimony differently."); *United States v. Gardner*, 611 F.2d 770, 774 (9th Cir. 1980) ("In a case in which a general request for exculpatory evidence is made, the test for materiality is whether the suppressed evidence 'creates a reasonable doubt that did not otherwise exist.'") (quoting *Agurs*, 427 U.S. at 112); *United States v. Aguiar*, 610 F.2d 1296, 1305 (5th Cir. 1980) ("Assuming that appellants have established [a suppression by the prosecution after a request by the defense], they have not shown [the evidence's favorable character for the defense] and [the materiality of the evidence] because there is no reasonable likelihood that 'the suppressed evidence might have affected the outcome of the trial.'") (quoting *Agurs*, 427 U.S. at 104); *Lutes v. Ricks*, 2005 WL 2180467 at *16 (N.D.N.Y. 2005) ("[T]here is no reasonable possibility that had the evidence been disclosed, the result would have been different.") (internal quotation marks and citations omitted). In addition, when articulating the materiality standard, some courts specifically stated what the standard is not; it is not a "preponderance of the evidence" standard and the term "material" is not synonymous with the Federal Rules of Evidence definition.

57. Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 113-14 (2012) (discussing the creation and evolution of the *Brady* doctrine) (internal quotation marks and citations omitted).

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

59. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963). "Justice Douglas's constitutional analysis relied on a line of due process cases involving prosecutors soliciting or willfully failing to correct false evidence and a quote inscribed on a wall in the Department of Justice. The cases, *Mooney v. Holohan*, *Pyle v. Kansas*, and *Napue v. Illinois*, had set a low floor for fairness at trial, finding a due process violation only when the state 'knowingly use[d] false evidence . . . to obtain a conviction.' The inscribed quote taught that '[t]he United States wins its point whenever justice is done its citizens in the courts.'" Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury,* 82 N.Y.U. L. REV. 1780, 1788-89 (2007).

60. *Brady*, 373 U.S. at 87.

61. In 1977, in *Weatherford v. Bursey*, the Supreme Court clarified that, while *Brady* provides an avenue for discovery, there is no constitutional right to discovery in a criminal case. 429 U.S. 545, 559 ("It does not follow from the prohibition against concealing evidence

favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote, 'the Due Process Clause has little say regarding the amount of discovery which the parties must be afforded.'" (quoting *Wardium v. Oregon*, 412 U.S. 470, 474 (1963)).

62. *See United States v. Agurs*, 427 U.S. 97, 111 (1976) (reasoning that "there are situations in which evidence is obviously of such substantial value to the defense that elemental fairness requires it to be disclosed even without a specific request[]" because the prosecutor "is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, Vol. 2: Adjudication 145 (4th ed. 2006).

63. *See United States v. Bagley*, 473 U.S. 667 (1985) (holding "[i]mpeachment evidence, [] as well as exculpatory evidence, falls within the *Brady* rule") (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972) (reversing conviction where government failed to disclose information relevant to the credibility of one of its witnesses)); *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

64. *Kyles*, 514 U.S. at 438-39 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

65. Sundby, *see supra* note 58, at 647.

66. In addition to narrowing the definition of materiality, in the decisions following *Brady v. Maryland*, courts have created a variety of arbitrary barriers to limit the application of the *Brady* rule. For example, *Brady* does not discuss the undisclosed information in terms of admissibility nor does it declare admissibility a precondition for a due process violation. Yet, "[s]everal courts have construed the *Brady* rule to require that, unless the evidence would be admissible, it need not be disclosed." Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 701 (2006) (citing *Madsen v. Dormire*, 137 F.3d 602, 604 (8th Cir. 1998); *United States v. Derr*, 990 F.2d 1330, 1335-36 (D.C. Cir. 1993); *Zeigler v. Callahan*, 659 F.2d 254, 269 (1st Cir. 1981)). *See also Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996) (holding inadmissible information is "as a matter of law, 'immaterial' for *Brady* purposes."); *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989) ("To be material under *Brady*, undisclosed information or evidence acquired through that information must be admissible."); *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983) ("Inadmissible evidence is by definition not material, because it never would have reached the jury and therefore could not have affected the trial outcome."). This admissibility rule not only ignores the role that inadmissible information can play in leading to admissible evidence, but it fails to acknowledge the fact that evidence may be inadmissible for some purposes but admissible for others or under certain exceptions.

In addition to this admissibility rule, courts frequently refuse to apply *Brady* to situations in which the defense could have obtained the undisclosed (or late disclosed) information through reasonable due diligence. Generally there are three variations of the so-called due diligence 'rule.' Specifically, courts may excuse non-disclosure when (1) the information at issue is "equally available to a diligent defendant[,]" (2) the information at issue is "known by the defendant himself and he could have or should have told his lawyers about it[,]" or (3) even if the information at issue "is in the exclusive control of the government, so long as the relevant facts are accessible to a diligent defendant." Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 154-56 (2012). Thus, even when the government knows that its key witness has a criminal record and fails to disclose this fact to the defense, if the defense could have discovered the criminal record through a search of public records, the trend now is for the court to rely on the due diligence rule to avoid finding *Brady* violated. In sum, courts apply the due diligence rule "not just to situations where the defendant had actual knowledge, but also to situations where the defendant could have obtained the knowledge through due diligence" and impute the knowledge of the defendant to defense counsel. *Id.* at 154; *see, e.g.*, *Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009) ("there is no suppression if the defendant knew of the information or had equal access to obtaining it"); *United States v. Zichittello*, 208 F.3d 72, 102 (2d Cir. 2000) ("Even if evidence is material and exculpatory, it is not suppressed by the government within the meaning of *Brady* if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.") (internal quotation marks and citations omitted); *United States v. Rodriguez*, 162 F.3d 135, 147 (1st Cir. 1998) ("government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender"); *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997) (to state a *Brady* claim a defendant must demonstrate that "discovery of the allegedly favorable evidence was not the result of a lack of due diligence") (citations omitted); *Hoke*, 92 F.3d at 1355 ("The strictures of *Brady* are not violated, however, if the information allegedly withheld by the prosecution was reasonably available to the defendant."); *United States v. Dimas*, 3 F.3d 1015, 1019 (7th Cir. 1993) (when "the defendants might have obtained the evidence themselves with reasonable diligence . . ., then the evidence was not 'suppressed' under *Brady* and they would have no claim"); *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) ("No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' . . . or where the evidence is available to defendant from another source.") (citations omitted).

67. *Agurs*, 427 U.S. at 107 ("We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights. We are dealing with the defendant's right to a fair trial

mandated by the Due Process Clause of the Fifth Amendment to the Constitution.").

68. *Id.*

69. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483 (2009). In her article advocating for a prophylactic rule to effectuate *Brady*, Professor Burke explains: "*Brady*'s progeny have made clear that prosecutors are not constitutionally obligated to disclose all exculpatory evidence, or even all relevant exculpatory evidence. In fact, the definition of 'material' exculpatory evidence is so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's general right to withhold evidence from the defense. Under *Brady*'s progeny, a prosecutor can constitutionally withhold all evidence, except for exculpatory evidence that 'creates a reasonable doubt that did not otherwise exist.'" *Id.*

70. The Court discussed this juxtaposition of duties in *Kyles v. Whitley*, stating: "We have never held that the Constitution demands an open file policy [], and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any information tending to exculpate or mitigate. *See* ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1984) ('A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused'); ABA Model Rule of Professional Conduct 3.8(d) (1984) ('The prosecutor in a criminal case shall … 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')." 514 U.S. 419, 437 (1995).

71. *Agurs*, 427 U.S. at 108 ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.").

72. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

73. *Id.*

74. *Id.*

75. *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009); *see also Agurs,* 427 U.S. at 108.

76. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 1 (2009). The ABA opinion explains that although the "obligation may overlap with a prosecutor's other legal obligations[,]" it would be "inaccurate" to describe this rule as merely "codifying" *Brady* and "incorrect" to assume it requires "no more from a prosecutor than compliance" with *Brady* and its progeny. *Id.* The text of Rule 3.8(d) does not contain a materiality requirement and a "review of the rule's background and history indicates that Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law." *Id.* at 2. Notably, every state but California has adopted ABA Model Rule 3.8(d). *See* ABA, State Adoption of the ABA Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.htm.

77. ABA Formal Opinion 09-454 at 4.

78. *Id.* at 2 (emphasis added).

79. *Id.* at 4 n.16 (citing *Cone*, 556 U.S. at 470 n.15; *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); Annotated Model Rules of Professional Conduct 375 (ABA 2007); 2 Geoffrey C. Hazard, Jr., & W. William Hodes, *The Law of Lawyering* § 34-6 (3d 2001 & Supp. 2009); Peter A. Joy & Kevin C. McMunigal, *Do No Wrong: Ethics for Prosecutors and Defenders* 145 (ABA 2009).

80. Memorandum from David W. Ogden, Deputy U.S. Att'y Gen, U.S. Dept. of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html [hereinafter Ogden Memo].

81. The Department of Justice Office of Legal Education has also published a "Federal Criminal Discovery Blue Book" for use by federal prosecutors. DOJ has declined, however, to make this guidance available to the public. In December 2012, NACDL filed a Freedom of Information Act (FOIA) lawsuit to obtain the guidance and is currently engaged in litigation over the matter. DOJ has asserted that its policies regarding disclosure of favorable information are protected from public disclosure by attorney-client and work-product privileges. *See* Press Release, National Association of Criminal Defense Lawyers, DOJ Opposes Legislating Discovery Reform, but Declines to Disclose Its Own Federal Criminal Discovery Blue Book; Nation's Criminal Defense Bar Filed Federal Suit Today (Feb. 21, 2014) (http://www.nacdl.org/NewsReleases.aspx?id=31999).

82. Following the release of the Ogden Memo, one commentator wrote: "Consistent with *Bagley*, [DOJ's] guidance has required, and continues to require, some degree of materiality." Gil Soffer, *Recent Changes in DOJ Discovery Policies: The Ogden Memo*, 2011 WL 190331 *5 (2011). Further, Soffer explains that "[t]he department's newest guidance does not address materiality head-on, but in prescribing more rigorous methods for the collection, review, and production of exculpatory and impeaching information, the department doubtless hopes to forestall demands for changes to Rule 16 [of the Federal Rules of Criminal Procedure to expand the government's disclosure obligations.]" *Id.* at *4-5; *see* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1336-37 (2011) (Under the U.S. Attorney's

Manual, "the DOJ adheres to the materiality standard[]" and "federal prosecutors are likely to continue to adhere to the [manual] when in conflict with the ABA Criminal Justice Standards until courts decide otherwise.").

83. U.S. Dep't of Justice, United States Attorneys' Manual 9-5.001 (updated June 2010), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm [hereinafter USAM 9-5.001].

84. *Id.* In addition, the Ogden Memo sets forth the following considerations regarding the scope and timing of disclosures:

> Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases. It also provides a margin of error in case the prosecutor's good faith determination of the scope of appropriate discovery is in error. Prosecutors are encouraged to provide broad and early discovery *consistent with any countervailing considerations*. But when considering providing discovery beyond that required by the discovery obligations or providing discovery sooner than required, *prosecutors should always consider any appropriate countervailing concerns in the particular case*, including, but not limited to: protecting victims and witnesses from harassment or intimidation; protecting the privacy interests of witnesses; protecting privileged information; protecting the integrity of ongoing investigations; protecting the trial from efforts at obstruction; protecting national security interests; investigative agency concerns; enhancing the likelihood of receiving reciprocal discovery by defendants; any applicable legal or evidentiary privileges; and *other strategic considerations that enhance the likelihood of achieving a just result in a particular case*.

Ogden Memo at Step 3, Part A (emphasis added).

85. USAM 9-5.001, *supra* note 83.

86. The ambiguity raised by this judicial double-speak and the difficulty applying the materiality standard pre-trial inspired a number of federal courts to conclude that the *Brady* materiality standard is unworkable in the trial context. For example, in *United States v. Safavian*, a case that arose out of the Jack Abramoff scandal, Federal District Court Judge Paul L. Friedman characterized the materiality standard as requiring the trial court to "look at the case through the end of a telescope an appellate court would use post-trial," and concluded that the materiality standard is unworkable in the trial context. *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). Further, Judge Friedman stated that the "only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial." *Id.* (citing *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999); also citing *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D.Nev. 2005), and appended magistrate judge's decision, 357 F. Supp. 2d at 1237; *United States v. Carter*, 313 F. Supp. 2d 921, 924-25 (E.D. Wis. 2004)). In the end, the court ordered the government to disclose all favorable information before trial. *Id.* 20-21.

Similarly, in *United States v. Sudikoff*, the court concluded that, because it was unable to determine whether the information the government was trying to withhold would create a reasonable probability of a different outcome at trial, "[the materiality] standard is only appropriate, and thus applicable, in the context of appellate review." *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999). Rather than wrestle further with the materiality standard, the *Sudikoff* court ordered the government to disclose all favorable information before trial. *Id.* at 1206.

Finally, the idea that pre-trial discovery requires broad disclosure of favorable information is a position taken by many, but not all, courts. *See, e.g., United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001); *United States v. Osorio*, 929 F.2d 753 (1st Cir. 1991); *United States v. Mannarino*, 850 F. Supp. 57 (D. Mass 1994).

87. A detailed description of the methodology is available at Appendix A — Methodology [hereinafter Methodology Appendix].

88. As used in this report, the phrase "Research Team" refers to the group of individuals who developed and executed the study discussed in this report. This group includes VERITAS Initiative Director Kathleen "Cookie" Ridolfi, NACDL Counsel for White Collar Crime Policy Tiffany M. Joslyn, VERITAS Initiative Pro Bono Research Attorneys Todd Fries and Jessica Seargeant, and six law student volunteers from the Santa Clara University School of Law. The phrase "Project Supervisors" refers to Ridolfi, Joslyn, and Fries.

89. The Study Sample included only decisions made by federal courts. However, these decisions resolved *Brady* claims from cases that originated in both federal and state courts. Those decisions originating in state courts generally reached the federal courts through a petition for a writ of *habeas corpus*. *See* 28 U.S.C. § 2254.

90. As discussed in the Methodology Appendix, only those decisions that resolve a *Brady* claim on its merits were subjected to extensive analysis. If a court discards the *Brady* claim on procedural grounds, then the decision was coded as "non-merits" and no further analysis or coding was conducted for it.

91. The Guidance Document is part of the Methodology Appendix.

92. As the Supreme Court has explained, with "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions [] the result of guilty pleas," the criminal system "'is for the most part a system of pleas, not a system of trials.'" *Missouri v. Frye*, 566 U.S. ___,

132 S. Ct. 1399, 1407 (2012) (quoting *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376, 1378 (2012)). As a result, the Court recognized that "[i]n today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id. See also* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 CRIM. L. & CRIMINOLOGY 1, 13 (2013) ("[Today] over 96% of convictions in the federal system result from pleas of guilt rather than decisions by juries.").

93. For additional explanation of the difference between a decision that resolves a *Brady* claim on the merits and a decision that does not, see the Methodology Appendix.

94. In 1996, AEDPA altered 28 U.S.C. § 2254 and set a new "standard of review" for habeas relief in prosecutions originating in state courts. Under AEDPA, the federal habeas court determines whether the state court's finding was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or that it was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." De novo is the standard of review for *habeas* claims that originate in federal court. *See United States v. Espaillet,* 380 F.3d 713, 718 (2d Cir. 2004); *Owens v. United States,* 483 F.3d 48, 57 (1st Cir. 2007); *Parsley v. United States,* 604 F.3d 667, 671 (1st Cir. 2010); *United States v. Infante,* 404 F.3d 376, 386 (5th Cir. 2005); *United States v. Blanco,* 392 F.3d 382, 387 (9th Cir. 2004).

95. Procedural postures in the "other" category include: an application for a stay and abeyance of *habeas* proceedings; a petition for a writ of *coram nobis*; and an application for a certificate of appealability.

96. The Research Team only looked at the representation type for the specific proceeding resolved by the decision included in the Study Sample — *i.e.*, these numbers do not speak to the type of representation at the time of plea or conviction.

97. Information in the "other" category includes, for example, the identity of a particular person, information concerning the government's trial strategy and intended witnesses, and unspecified assertions such as "everything the prosecutor knows."

98. As discussed above, the totals for the information form exceed 620 because 176 decisions involve multiple forms of information. Of the 176 decisions involving multiple forms of information, 48 involve physical information, 112 involve statement or testimony information, 143 involve documentary information, 40 involve incentive or deal information, and 50 involve information categorized as "other."

99. Although a number of decisions involved multiple *Brady* claims, researchers coded and analyzed only one *Brady* claim per decision—the claim that was the central focus of the court's decision.

100. Of the 22 *Brady* violation decisions identified in the Study, only one was a *pro se* decision, despite the fact that *pro se* decisions represented 54 percent of the Study sample.

101. As detailed in the Methodology Appendix, the Research Team coded a decision as one involving favorable information only when the court explicitly states that the information is "favorable," the court implies the information is favorable by acknowledging its exculpatory or impeaching value, or when the Research Team could make such a determination based on a reasonable reading of the facts. Decisions are not coded as favorable if the information does not exist, if there is insufficient detail about the information to make such a determination, or if the claim is not relevant or is frivolous. As a result, the quantity of decisions coded as favorable is conservative and may be understated.

102. For the purposes of this report, the phrase "undisclosed favorable information" refers to information that the Research Team determined to be favorable, in accord with the Guidance Document contained in the Methodology Appendix, and not disclosed to the defense. *See id.* (discussing the method for determining the number of decisions involving favorable information). Undisclosed favorable information is not information that the government actually disclosed or disclosed in an untimely fashion.

103. *See supra* notes 54 and 55 (providing *Bagley* and *Kyles* standards).

104. The facts, quotations, and any other information used in this decision comparison come from *United States v. Kohring,* 637 F.3d 895 (9th Cir. 2011), and *United States v. Kott*, No. 3:07-CR-056, 2010 WL 148447 (D.C. Alaska 2010), *vacated*, *United States v. Kott*, 423 F. App'x 736 (9th Cir. 2011).

105. Bill Allen, the government's key witness in both the Kott and Kohring prosecutions, was also the government's key witness in the prosecution of Senator Stevens discussed in the introduction of this report. *See supra* Section I.

106. The facts, quotations, and any other information used in this decision comparison come from *Willis v. Howes*, No. 2:02-CV-72436, 2010 WL 7645642 (E.D. Mich. 2010), *adopted by*, No. 02-CV-72436, 2011 WL 4504739 (E.D. Mich. 2011), and *United States v. McDuffie*, 454 F. App'x 624 (9th Cir. 2011).

107. *Kohring*, 637 F.3d 895.

108. *Kott*, 2010 WL 148447.

109. In Stevens, the U.S. District Court for the District of Columbia vacated the conviction upon the request of the government after the *Brady* violations came to light. Whereas in both Kott and Kohring, following the revelations in the Stevens case, the government opposed dismissal and the U.S. District Court for the District of Alaska rejected the defendants' *Brady* claims. As a result, Kott and Kohring appealed

the district court's decisions to the U.S. Court of Appeals for the Ninth Circuit, which reversed the district court, vacated their convictions, and remanded both cases for new trials.

110. Ultimately the decision to dismiss the indictment against Sen. Stevens came from U.S. Attorney General Eric Holder following a review of the case by a new team of Department of Justice lawyers. *See supra* note 44.

111. *Kohring*, 637 F.3d at 900; *Kott*, 2010 WL 148447, at *2.

112. *Kohring*, 637 F.3d at 900.

113. This study identified all federal court decisions citing *Brady v. Maryland* during a set five-year time period, but only included a portion of those decisions, selected at random, in the Study Sample. As a result, the Study Sample included only the decision of the Ninth Circuit in *Kohring* and the decision of the U.S. District Court for the District of Alaska in *Kott*. Ultimately, Kott appealed the Alaska District Court's decision to the Ninth Circuit and, citing *Kohring*, it reversed the district court. *See United States v. Kott*, 423 F. App'x 736, 737 (9th Cir. 2011). The Ninth Circuit decision in *Kott*, however, was not included in the study's random sample. Despite the identical procedural history of these two cases — a ruling for the government at the district court level and a reversal in favor of the defendant at the circuit court level — the inclusion in the Study Sample of the conflicting circuit and district court decisions, based on nearly identical facts, serves to demonstrate the unpredictability of the materiality standard.

114. The *Stevens* indictment was dismissed in April 2009 and the Ninth Circuit vacated Kott's conviction in January 2010 and Kohring's conviction in March 2011. *See supra* notes 44, 104, 113.

115. *See supra note* 113 (explaining how the decisions from these two different courts, in cases that followed identical procedural paths, were included in the Study Sample).

116. As detailed in the Guidance Document contained in the Methodology Appendix, the Research Team coded a decision as involving favorable information only when the court expressly found the information to be favorable or implied the information to be favorable by acknowledging its exculpatory or impeaching value or when the Research Team could make such a determination based on a reasonable reading of the facts. Decisions were not coded as favorable if the information did not exist, if there was insufficient detail about the information to make such a determination, or if the claim was not relevant or was frivolous. As a result, the quantity of decisions coded as favorable is conservative and may be understated.

117. As discussed in Section VI, when the Research Team includes decisions involving the late disclosure of favorable information, this number jumps to 210 decisions and, of those 210 decisions, the court found the information not material in 188 — *i.e.*, 90 percent of these decisions.

118. Dissenting in *United States v. Bagley*, Justices Marshall and Brennan explained, "the Court permits prosecutors to withhold with impunity large amounts of undeniably favorable evidence, and it imposes on prosecutors the burden to identify and disclose evidence pursuant to a pre-trial standard that virtually defies definition." 473 U.S. 667, 700 (1985) (Marshall, J., dissenting).

119. *See* The Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012) (proposed legislation effectively prohibiting the government from using the *Brady* materiality requirement to narrow its disclosure obligation by requiring prosecutors to disclose all information "that may reasonably appear favorable to the defendant" and appellate courts to employ a "harmless [] beyond a reasonable doubt" standard of review for disclosure violation claims). For additional discussion of S. 2197 and other reforms, see *infra* Section IX.

120. Rejecting the use of *Brady*'s materiality standard for determining the government's pre-trial disclosure obligations, U.S. District Court Judge Harry Pregerson explained, "[the materiality] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighed against the presumed effect of the undisclosed *Brady* material. This analysis obviously cannot be applied by a trial court facing a pretrial discovery request." *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999). *See also* discussion *supra* note 86.

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

122. Keith A. Findley, *Tunnel Vision* 6, Univ. of Wisconsin Legal Studies Research Paper No. 1116, *in Conviction of the Innocent: Lessons From Psychological Research* (B. Cutler, ed., 2010), *available at* http://ssrn.com/abstract=1604658. *See generally* Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, THE CHAMPION, May 2013 at 12; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCHOL. 175 (1998); Yaacov Trope & Nira Liberman, SOCIAL HYPOTHESIS-TESTING: COGNITIVE AND MOTIVATIONAL MECHANISMS, IN SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES (E.T. Higgins & A.W. Kruglanski, eds.) (1996); Richard Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (1980).

123. Burke, *supra* note 69, at 495.

124. JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN 288 (2006).

125. *Id.* at 302.

126. Sundby, *supra* note 58, at 656.

127. *See* Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131 (1986).

128. The phrase "open file discovery" refers to a system in which the prosecution gathers all the information in the case, places it in a file, and then makes the file available to the defense prior to trial. The system may be a statutory mandate or merely an office policy, and thus the precise contours of case file content and defense access can differ substantially. Implicit in any open file system, however, is an obligation to ensure that the file is complete — *i.e.*, the prosecutor has an affirmative duty to seek out all relevant information from all those involved in the investigation and prosecution *and* place it in the file.

For offices with an open file policy, "the definitions vary considerably." Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 939 n.167 (2012). One office "might invite defense counsel to view all information gathered in a case, while another office may simply give the defense substantial, but not total, access to its files. Some may have little in the file thus the term 'open file' does not provide meaningful access to information." *Id.* (internal citation omitted). Open file discovery should eliminate or at least minimize gamesmanship, but "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." Bennett L. Gershman, *Prosecutorial Ethics and the Right to a Fair Trial: The Role of the* Brady *Rule in the Modern Criminal Justice System*, 57 CASE W. RES. L. REV. 531, 543 n.67-70 (2007). *See also* Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1561-63 (discussing various ways prosecutors and law enforcement can evade fair disclosure in an open file system).

On the other hand, statutory mandates provide clear guidance and are "short and simple." Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1372. For example, in a "full open file discovery" system, like that adopted by North Carolina, the prosecutor must obtain "all information about the case from police and all agencies involved" and disclose "all case-related information to the defense [with narrow exceptions]." Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS at 939. In addition, the statute specifically requires disclosure of "the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation [or prosecution,]" provides an extensive definition of the term "file," and, with some exceptions, requires all oral statements to be in "written or recorded form." N.C. GEN. STAT. § 15A-903(a)(1); *see* Yaroshefsky at n.169 ("The combination of provisions in the North Carolina statutes qualify North Carolina's reform as 'full' open file discovery.").

129. Fred Klein, *A View From Inside the Ropes: A Prosecutor's Viewpoint on Disclosing Exculpatory Evidence*, 38 HOFSTRA L. REV. 867, 869 (2010).

130. *United States v. Bagley*, 473 U.S. 667, 702 (1985).

131. The phrase "late disclosure" covers a wide range of time, from shortly before trial and during trial, to long after conviction.

132. This group does not include any decision involving information that is not favorable. *See id.*

133. Late disclosure decisions are only those decisions involving the late disclosure of *favorable* information — *i.e.*, favorable information decisions involving a late disclosure. If the decision involves the late disclosure of information that is not favorable, then the decision is not included in the late disclosure decision total. *See supra* note 116 (defining "favorable information decision" and explaining the methodology used to evaluate favorability).

134. The breakdown of the time of late disclosure adds up to more than 65 because a number of these decisions included late disclosure of multiple pieces of information at different times during the proceeding.

135. In 2004, the Judicial Conference Advisory Committee on Rules of Criminal Procedure (JCAC) published a comprehensive study of federal and state court rules that addressed the disclosure obligations set out in *Brady v. Maryland*. The JCAC was able to obtain rules and procedures for 30 of the 94 United States federal districts and quantified what it found. Regarding timetables for disclosure of *Brady* material, JCAC found that the federal districts varied significantly but all required disclosure before trial. The most common time frame permitted disclosure "within 14 days of arraignment" followed by "within five days of arraignment." For districts without specified time requirements, timing was characterized as "as soon as reasonably possible," "before the trial," or "after defense counsel has entered an appearance." These rules apply to all information favorable to the defendant with the exception of witness statements governed by the Jencks Act. *See* Laurel L. Hooper, Jennifer E. Marsh & Brian Yeh, Fed. Judicial Ctr., Treatment of *Brady v. Maryland* Material in United States District and State Courts' Rules, Orders, and Policies: Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (2004).

136. According to the JCAC study, when assessing the timing of *Brady* material disclosures, there is a wider disparity among states than there is among federal districts. *See id.* at 23-26. Times range from "[w]ithin 10 calendar days after arraignment" to "[n]ot later than 7 days prior to trial." *Id.* Some states rely on undefined terms such as "timely disclosure" or "as soon as practicable," which have been interpreted to mean "within a sufficient time for its effective use" by the defendant. *Id.* (internal quotation marks omitted). State courts have emphasized that disclosure must not constitute "unfair surprise." *Id.*

137. *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009).

138. ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1984).

139. *See* Schwartz, *supra* note 51, at 34 (discussion of using Model Rule 3.8(d) as a tool for expanding discovery rights).

140. *See supra* Section II, at 8-9.

141. Despite the harm late disclosure causes for the defense, judicial tolerance is justified in some limited circumstances. For example, late disclosure may be justified when a prosecutor does not gain possession of information until late into the investigatory process or during the trial itself. Absent intentional avoidance of knowledge or possession of the information, when a prosecutor without fault is unable to provide more timely disclosure, tolerance is understandable. In addition, judicial tolerance is mandated when the delay is based on the Jencks Act, a federal rule allowing federal prosecutors to disclose witness statements *after* they testify. 18 U.S.C. § 3500 (1994) (prohibiting federal courts from ordering disclosure of witness statements until after the witness has testified).

Congress enacted the Jencks Act in response to a 1957 Supreme Court decision holding that the defendant is entitled to production of "relevant statements or reports ... of government witnesses touching the subject matter of their testimony at trial." *Jencks v. United States*, 353 U.S. 657, 672 (1957); *see* Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 653 (1999) (citing S. Rep. No. 85-981 (1957)). Although the Court did not state when the prosecution must disclose the statements, the decision was met with significant criticism, much of which resulting "from court decisions that read Jencks liberally." *Id.* Taking the position "that misapplication of the *Jencks* doctrine can mean an irretrievable loss to the government's case[,]" Congress drafted the Jencks Act with the intent to "protect[] the files of the FBI and of the government from danger of the disclosure of irrelevant and incompetent matter, as well as any matters which are within a valid exclusionary rule." S. Rep. 85-981 at 1862 (1957). The result is a statement, in no uncertain terms, that courts cannot afford the defense access to, or even inspection of, a statement made by a witness "until said witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(a).

When statements contain favorable information, the rigid dictate of the Jencks Act can conflict with *Brady*'s requirement that information be disclosed in time for the defense to use it effectively. *See infra* note 154 (discussing the judicial standard for excusable late disclosure). All courts agree that *Brady* material contained within Jencks material must be disclosed, but there is no consensus on whether *Brady* supersedes Jencks' timing provisions. *See* Federal Judicial Center, Benchbook for U.S. District Court Judges at 174-75 (6th ed. March 2013), *available at* http://news.uscourts.gov/updated-edition-benchbook-now-available. "[C]ircuits are split about which law trumps when they conflict" and the "split comes down to a disagreement about how much time the defense needs to use exculpatory evidence effectively." Cara Spencer, *Prosecutorial Disclosure Timing: Does* Brady *Trump the Jencks Act?*, 26 GEO. J. LEGAL ETHICS 997, 998, 1004 (2013) ("some courts find[] that the later disclosure on the Jencks Act's terms always conforms to *Brady*, and others finding that *Brady* sometimes or even generally requires earlier disclosure than the Jencks Act permits."). Whereas prosecutors already exercise broad discretion over what to disclose, the Jencks Act further insulates the exercise of that discretion "because it explicitly forbids courts from ordering disclosure of witness statements until relatively late in the trial." *Id.* at 1000. For the defendant, this further diminishes access and impairs the ability to prepare an effective defense strategy.

142. *Jackson v. Senkowski*, No. 03 Civ. 2737, 2012 WL 3079192 (S.D.N.Y. July 30, 2012).

143. *Id.* at *6-7 (citing *People v. Jackson*, 264 A.D.2d 683, 683-84 (N.Y. App. Div. 1999) (citing *People v. Jackson*, 637 N.Y.S.2d 158 (N.Y.A.D.2d 1995) (setting forth the facts underlying Jackson's *Brady* claim in detail))).

144. *Id.* at *6.

145. *Id.* at *7.

146. *See also United States v. Qunhar,* No. 07-3515-cr, 2009 WL 1874339 (2d Cir. 2009) (late disclosure of electronic database diminishes the value of the information to the detriment of the defense).

147. *Chinn v. Warden of Mansfield Corr. Inst.*, No. 3:02-cv-512, 2011 WL 5338973 (S.D. Ohio Oct. 14, 2011).

148. *Id.* at *71.

149. *Id.* at *70.

150. *Id.*

151. *Id.* at *71.

152. *See United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir. 1997); *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir. 1985); *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984).

153. For example, of the 65 late disclosure decisions identified within the Study Sample, only one resulted in a *Brady* violation finding.

154. "The Supreme Court has never expressly held that evidence that is turned over to the defense during trial has been 'suppressed' within the meaning of *Brady*." *Powell v. Quarterman*, 536 F.3d 325, 335 (5th Cir. 2008). As a result, circuit courts tend to excuse late disclosure so long as the defendant was able to use the evidence or information effectively at trial. *See id.* at 336 ("We have held that a defendant is not prejudiced if the evidence is received in time for its effective use at trial.") (citations omitted). *See also United States v. Ross*, 703 F.3d 856, 881 (6th Cir. 2012) ("*Brady* generally does not apply to delayed disclosure of exculpatory information, but only to complete failure to disclose.

... [E]ven tardy disclosures of *Brady* material do not violate the defendant's constitutional rights unless he can demonstrate the delay denied him a constitutionally fair trial.") (internal quotation marks and citations omitted); *United States v. Houston*, 648 F.3d 806, 813 (9th Cir. 2011) ("there is no *Brady* violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value) (citations omitted); *United States v. Celis*, 608 F.3d 818, 836 (D.C. Cir. 2010) ("the critical point is that disclosure must occur in sufficient time for defense counsel to be able to make effective use of the disclosed evidence") (citations omitted); *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) ("the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously," that is, "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial"); *United States v. Almendares*, 397 F.3d 653, 664 (8th Cir. 2005) ("Under the rule in our circuit *Brady* does not require pretrial disclosure, and due process is satisfied if the information is furnished before it is too late for the defendant to use it at trial.") (citations omitted); *United States v. Perez-Ruiz*, 353 F.3d 1, 8 (1st Cir. 2003) ("When *Brady* or *Giglio* material surfaces belatedly, 'the critical inquiry is not why disclosure was delayed but whether the tardiness prevented defense counsel from employing the material to good effect.") (citations omitted).

155. While a prosecutor must disclose information that would establish that a defendant was innocent prior to acceptance of a guilty plea, in order to ensure that those factually innocent of crimes do not nonetheless plead guilty, the "Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 631, 633 (2002).

156. In a study of the first 200 DNA exoneration cases, Prof. Brandon Garrett identified nine cases in which the defendant pled guilty and was later exonerated. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008). *See also* Brandon L. Garrett, *Convicting the Innocence: Where Criminal Prosecutions Go Wrong* 169, 200-03 (2011) (defendants in 29 of the first 250 DNA exoneration cases raised *Brady* claims).

157. Judge Lee Sarokin, *Why Do Innocent People Plead Guilty?*, HUFFINGTON POST (May 29, 2012), http://www.huffingtonpost.com/judge-h-lee-sarokin/innocent-people-guilty-pleas_b_1553239.html.

158. *See United States v. Mordi*, 277 F. App'x 613, 617 (7th Cir. 2008) ("Although Mordi complains mightily about material disclosed shortly before the original trial date, he cannot plausibly argue that those disclosures hindered his trial preparation because the district court gave him a one-month continuance."); *United States v. Navarro*, 263 F. App'x 428, 429 (5th Cir. 2008) ("Cuevas was granted a continuance during trial to determine whether [the witness] had been convicted of murder in Mexico. … Because Cuevas had time to investigate and put the information to effective use at trial, he was not prejudiced by the late disclosure of [the witness's] criminal history, and there is no *Brady* violation.") (internal citations omitted).

159. *United States v. Rittweger*, 309 F. App'x 504, 506 (2d Cir. 2009) ("We have previously stated that the failure to ask for a continuance when allegedly new evidence is introduced at trial is, if not a waiver of any later unfair surprise claim, at least strong proof that the party was not in fact surprised by the 'new' evidence.") (citing *United States v. Cephas*, 937 F.2d 816, 823 (2d Cir. 1991) ("If [the defendant was] truly surprised by the testimony, he could have sought time to prepare his cross-examination and/or answering case."); *United States v. Caine*, 441 F.2d 454, 456 (2d Cir. 1971) ("[T]he absence of surprise is highlighted by appellants' failure to request a continuance when the court ruled the evidence admissible.")).

160. Within the Study Sample, there is a correlation between late disclosure decisions and statements. Statements are overrepresented in late disclosure decisions. (*Chi Square* statistic .070).

161. The Jencks Act is a federal statute that allows disclosure of witness statements only *after* the witness testifies. *See supra* note 141.

162. A total of 32 late disclosure decisions involved statements. Of those decisions, nine originated in federal court and 23 originated in state court. The discovery rules in the majority of these 23 state-originated decisions do not follow the Jencks Act and require disclosure of witness statements pre-trial.

163. Late disclosure may be justified when providing the witness statement could put the witness in danger. Any risk of danger can be averted, however, on a case-by-case basis through judicial *in camera* review of the statement and a remedy tailored to the particular facts, such as "attorney's eyes only" disclosure, a redacted disclosure, or some other limiting order from the judge.

164. *See, e.g. United States ex rel. Young v. McCann*, No. 07 C 1100, 2007 WL 2915634 (N.D. Ill. Oct. 5, 2007) (witness recantation disclosed during trial); *Gardner v. Fisher*, 556 F. Supp. 2d 183, 188 (E.D.N.Y. 2008) (police report of interview with witness disclosed during trial); *Quinones v. Rubenstein*, Civ. No. 5:06-cv-00072, 2009 WL 899428, at *30 (S.D. W.Va. March 26, 2009) (57-page witness statement turned over on first day of trial); *Ennis v. Kirkpatrick*, No. 10 Civ. 4023(PKC), 2011 WL 2555994, at *1 (S.D.N.Y. June 27, 2011) (witness statement exculpating defendant turned over during trial); *Colbert v. Minnesota*, No. 06-4407, 2007 WL 4224214 at *3 (D. Minn. Nov. 28, 2007) (expert witness statement that coat on videotape did not match defendant's coat turned over after expert testified); *Parson v. Keith*, No. CIV-07-994-M, 2008 WL 2568385 (W.D. Okla. June 24, 2008) (exculpatory statements by victim and witness disclosed during trial), *cert. denied*, 310 F. App'x 271 (10th Cir. 2009); *Collins v. Shewalter*, No. 1:09CV2427, 2010 WL 3603147, at *6-*7 (N.D. Ohio July 7, 2010)

(police report containing witness statement provided after she testified); *Stitt v. Yates*, No. 1:10-CV-01270, 2011 WL 533584, at *6 (E.D. Cal. Feb. 11, 2011) (photographic lineup disclosed during trial); *United States v. Barraza*, 655 F.3d 375, 380-1 (5th Cir. 2011) (witness inconsistent statement disclosed during trial); *Black v. Warden*, No. 05-cv-2187, 2009 WL 1220493, at *11-*12 (W.D. La. March 12, 2009) (police officer's prior false arrest affidavit disclosed after officer testified); *United States v. Qunbar*, 335 F. App'x 133, 135-36 (2d Cir. 2009) (income and expense database in tax fraud case disclosed four days into trial).

165. *See United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir.1997); *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 532 (4th Cir.1985); *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984). *See also supra* note 154 (discussing the judicial standard for what constitutes an excusable late disclosure).

166. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531 (2007); *see also* Gershman, *supra* note 127.

167. There are two generally accepted case precedents for the *Brady* defendant due diligence rule. In *Kyles v. Whitley*, 514 U.S. 419 (1995), and *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court articulated a variation of the *Brady* test that described information that was withheld as "unknown to the defense." This simple phrase has since been interpreted so as to impose a burden that if the defendant could have, should have, or actually did know about the undisclosed information, then the information could not have been "unknown to the defense." The prosecution therefore cannot be held accountable for not disclosing the information.

In *Kyles*, despite a specific discovery request by the defense, the prosecutor denied having information that was in her possession. In concluding that the prosecutor did not withhold the information, the Supreme Court said,

> showing that the prosecution knew of an item of favorable evidence *unknown to the defense* does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.

514 U.S. at 437. This reference in *Kyles* is the only time the Supreme Court mentions that the information must be unknown to the defense. There is no mention of imposing a burden on the defendant to prove there was no other way he could have obtained the information.

Although the phrase "unknown to the defense" is not part of the *Brady* definition, this phrase has evolved into a rule being followed in every federal court of appeal with the exception of the Tenth and D.C. Circuits. Weisburg, *supra* note 66, at 143. Courts have taken this phrase to mean that "there is no *Brady* violation if the defendant knew or should have known about the evidence at the time of trial." *Id.* In addition, lower courts sometimes cite other criminal procedural due diligence requirements to justify a defendant due diligence requirement for an alleged *Brady* violation.

168. *Bell v. Bell*, 52 F.3d 223, 235 (6th Cir. 2008) (holding no violation of *Brady* where the sentencing records of a prosecution witness were publicly available and the witness "mentioned a pending charge as a reason for his incarceration" to the defendant while in jail together) (citing *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007) ("Where, like here, 'the factual basis' for a claim is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense.") (internal citation omitted)); *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (There is no *Brady* violation where information is available to the defense "because in such cases there is really nothing for the government to disclose.").

169. *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991) (per curiam) (internal citations and quotation marks omitted).

170. *Abdur'Rahman v. Colson*, 649 F.3d 468 (6th Cir. 2011).

171. *Id.* at 476.

172. *Id.* at 475-76.

173. *Id.* at 476.

174. *Id.*

175. *Id.*

176. *Id.* at 479 (Cole, J., dissenting).

177. *Id.*

178. The due diligence rule emerged from an out-of-context phrase taken from *Kyles v. Whitley* and *United States v. Agurs*, two Supreme Court decisions. *See supra* note 167 (discussing the origin of the due diligence rule). *See also* Weisburd, *supra* note 66, at 142-143.

179. *Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("A rule [] declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendant due process.").

180. Weisburd, *supra* note 66, at 141.

181. *Id. See Tice v. Wilson*, 425 F. Supp. 2d 676, 696 (W.D. Pa. 2006).

182. Weisburd, *supra* note 66, at 142.

183. Weisburd, *supra* note 66, at 178.

184. Harmless error analysis refers to a doctrine of appellate review that analyzes whether evidence of guilt is so strong that error would not have made a difference in the outcome of the case. If the answer is yes, the conviction is allowed to stand, despite the error, which is deemed harmless.

185. *United States v. Agurs,* 427 U.S. 97, 116 (1976) (Marshall, J., dissenting).

186. *United States v. Bagley*, 473 U.S. 1, 18 (1999).

187. "[S]uch disclosure will serve to justify trust in the prosecutor as the representative ... of the sovereignty ... whose interest ... in a criminal prosecution is that it shall win a case, but that justice shall be done." *Kyles v. Whitley,* 514 U.S. 419, 439 (1995) (ellipses in original) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935).

188. *See, e.g.*, *Rhoades v. Henry*, 638 F.3d 1027, 1037 (9th Cir. 2011) (police reports documenting that a witness confessed to the crime multiple times); *Blalock v. Smith,* No. 08 Civ. 7528, 2012 WL 3283439 at *9 (S.D.N.Y. Aug. 13, 2012) (statements from a witness interview concerning the events involving the decedent prior to her death); *Simpson v. Warren,* 662 F. Supp. 2d 835 (E.D. Mich. 2009) (information that the police coerced two witnesses into making police statements about the events leading up to the assault); *United States v. Elso,* 364 Fed. App'x 595 (11th Cir. 2010) (government omitted from debriefing reports exculpatory statements of two witness, both of whom refused the defendant's pre-trial requests for interviews and invoked their Fifth Amendment privilege against self-incrimination at trial); *Vasquez v. Thaler,* Civ. No. SA-09-CA-930-XR, 2012 WL 2979035 (W.D. Tex. 2012) (statements by multiples witnesses that the defendant was not present at the motel the evening of the crime and a statement by one of the victims that he may have broken one of the assailant's fingers); *Roberson v. Quarterman,* No. 3-07-CV-0339-B, 2007 WL 4373267 (N.D. Tex. 2007) (statements by multiple witnesses that the defendant did not assault his daughter); *Jeffries v. Morgan,* Civ. No. 05-CV-66, 2009 WL 4891836 (E.D. Ky. 2009) (existence and contents of interview with another individual observed in the vicinity around the time of the crime); *Trevino v. Thaler,* No. 10-70004, 2011 WL 5554816 (5th Cir. 2011) (statements made by co-defendant who ultimately testified for the government).

189. *See, e.g.*, *Abdur'Rahman v. Colson*, 649 F.3d 468 (6th Cir. 2011) (information on defendant's self-destructive behavior while in police custody); *Franklin v. Bradshaw,* No. 3:04-cv-187, 2009 WL 649581 (S.D. Ohio March 9, 2009) (contents of notes produced by the defendant and the defendant's family history); *Rhoades v. Henry,* 638 F.3d 1027, 1040 (9th Cir. 2011) (fact that defendant invoked his right to silence en route to the police station).

190. *See, e.g.*, *Bethany v. Thaler,* No. 3:09-CV-288-N, 2011 WL 4544021 (N.D.Tex. Aug. 31, 2011); *Washington v. Brown,* No. 09-CV-544, 2009 WL 1605553 (E.D.N.Y. June 8, 2009); *Ford v. Carey,* No. CIV S-05-0944, 2009 WL 3806224 (E.D. Cal. Nov. 12, 2009).

191. *See, e.g.*, *United States v. Are,* 590 F.3d 499 (7th Cir. 2009); *Bozsik v. Bradshaw,* No. 1:03CV1625, 2010 WL 770223 (N.D. Ohio June 4, 2010); *Bell v. United States,* No. 11-1086, 2012 WL 2126551 (D. Md. June 11, 2012); *Cal v. Warren,* No. 07-11389, 2009 WL 388284 (E.D. Mich. Feb. 13, 2009); *Abdur'Rahman v. Colson,* 649 F.3d 468 (6th Cir. 2011).

192. Gershman, *supra* note 166.

193. *People v. Chenault*, 845 N.W.2d 731 (Mich. 2014).

194. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006); Rob Warden, Center on Wrongful Convictions, Northwestern University School of Law, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (2004), *available at* http://www.law.northwestern.edu/wrongfulconvictions. *See also* Vesna Jaksic, *California May Crack Down on the Use of Jailhouse Informants: Commission Advises Law Requiring Corroboration*, 29 NAT'L L.J. 6 (Jan. 1, 2007) (Of the 117 death penalty appeals pending in the California State Public Defender's Office,17 involved testimony by in-custody informants and six by informants in constructive custody.).

195. Post-conviction analysis of DNA exoneration cases reveals that "[i]n more than 15 percent of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial." The Innocence Project, *Understand the Causes: Informants*, http://www.innocenceproject.org/understand/Snitches-Informants.php.

196. *Hunt v. Galaza*, No. CIV S-03-1723, 2009 WL 5183835 (E.D. Cal. Dec. 21, 2009).

197. *Id.* at *17.

198. *Id.*

199. *Payton v. Cullen*, 658 F.3d 890, 895 (9th Cir. 2011) (internal quotation marks omitted).

200. In a new statement dated July 13, 2006, the witness described the full extent of his relationship with and work for law enforcement when he testified at Payton's trial in 1981. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 895-96.

204. *Id.*

205. *Id.* at 896. For more examples of decisions in which witnesses admitted self-interested motives to testify, see *Green v. Harrison*, No. 05CV1485, 2009 WL 1953133 (S.D. Cal. July 6, 2009) (witness testified that no promises had been made but that she hoped for leniency in her upcoming sentencing); *United States v. Harris*, No. 07-10143, 2009 WL 4059388 (D. Kan. Nov. 20, 2009) (witness testified that he hoped for, and ultimately received, leniency in exchange for his testimony); *Armendariz v. Knowles*, No. C 07-00264, 2011 WL 3862082 (N.D. Cal. Aug. 31, 2011) (witness admitted he was motivated to cooperate by fear of returning to prison); *Smith v. Secretary Dept. of Corrs.*, No. 8:06-cv-1330-T-17MAP, 2009 WL 3416775 (M.D. Fla. Oct. 19, 2009), vacated and remanded by *Smith v. Secretary Dept. of Corrs.*, No. 10-11562, 2011 WL 4810173 (11th Cir. Oct. 12, 2011) (witness admitted he hoped for state favor in exchange for cooperation and that the state had helped in the past).

206. *Cooper v. McNeil*, No. 8:04-CV-1447-T-27MSS, 2008 WL 5252267 (M.D. Fla. Dec. 17, 2008).

207. *Id.* at *58.

208. *Id.*

209. *Id.*

210. For other decision examples of unexplained benefits given to government witnesses, see *Morgan v. Hardy*, 662 F.3d 790, 800-01 (7th Cir. 2011) (witness had two drug cases *nol prossed* before testifying); *Higgins v. Galaza*, No. CV 05-7599, 2011 WL 3420610 at *19 (C.D. Cal. Aug. 4, 2011) (prosecutor argued in closing that "his office turned down a plea deal with" the witness, and court found no information that a deal had been made, but following his testimony against petitioner the court sentencing the witness struck one charge and reduced the sentence for another); *Breedlove v. Berbary*, No. 09-CV-6297, 2011 WL 3439261 at *3-*4 (W.D.N.Y. Aug. 5, 2011) (affirming the state court's conclusion that the petitioner's unsupported allegations of favor are "'based upon nothing more than the release of the prosecution's witnesses from jail following [petitioner's] trial.'"); *Light-Roth v. Sinclair*, No. C11-0313-JCC, 2011 WL 7020919 (W.D. Wash. Nov. 2, 2011) (witnesses were given consideration at sentencing on open cases based on their cooperation as government witnesses); *Higgins v. Cain*, Civ. No. 09-2632, 2010 WL 890998 at *4 (E.D. La. March 8, 2010) (eyewitness Brown was arrested for battery on a police officer but never charged); *Ford v. Carey*, No. CIV S-05-0944, 2009 WL 3806224 (E.D. Cal. Nov. 12, 2009) (witness had felony charges dropped while awaiting defendant's trial). For other examples of unexplained benefits given to government witnesses, see *Mannino v. Graham*, No. 06 CV 6371, 2009 WL 2058791 (E.D.N.Y. July 15, 2009) (at sentencing on an open case, witness first asserted he was offered a promise for leniency in exchange for his testimony then recanted that statement).

211. *U.S. ex rel. Young v. McCann*, No. 07 C 1100, 2007 WL 2915634 (N.D. Ill. Oct. 5, 2007).

212. *Id.* at *2.

213. *Id.* at *7.

214. *Id.*

215. *Id.* at *8.

216. *Id.* For additional examples of decisions in which there is other information suggesting a motive to testify, see *Gentry v. Morgan*, No. C99-0289L, 2008 WL 4162998 (W.D. Wash. Sept. 4, 2008) (status of witness as a paid informant who had an ongoing relationship with the detectives and prosecutors involved in the case); *United States v. Faulkenberry*, 614 F.3d 573 (6th Cir. 2010) (defense witness had previously been an FBI informant); *Brooks v. Tennessee*, 626 F.3d 878 (6th Cir. 2010) (status of witness as a recurrent snitch and the perks of snitching); *Williams v. Nish*, Civ. No. 07-1302, 2007 WL 2852443 (E.D. Pa. Sept. 26, 2007) (witness testified that he had no special relationship as an informant, but just before sentencing the prosecutor disclosed fact that witness did act as a police informant).

217. *Id.* at *8.

218. *Commw. of N. Mariana Islands v. Bowie*, 236 F.3d 1083, 1095-96 (9th Cir. 2001).

219. *Crawford v. United States*, 212 U.S. 183, 204 (1909); *see also On Lee v. United States*, 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility.").

220. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 53-55 (2000).

221. R. Michael Cassidy, *'Soft Words of Hope:' Giglio, Accomplice Witnesses and the Problem of Implied Inducements*, 98 NWULR 1129, 1166 (2004).

222. Email from Michael Hersek, California State Public Defender, to Kathleen "Cookie" Ridolfi, Professor of Law, Santa Clara University School of Law (Oct. 22, 2013) (on file with recipient).

223. *Giglio v. United States*, 405 U.S. 150 (1972).

224. Cassidy, *supra* note 221 at 1131.

225. *Id.* (internal quotation marks omitted).

226. *Id.* at 1132.

227. *Id.* at 1144-47.

228. *Id.* at 1154.

229. *Id.* at 1145.

230. *Id.* at 1146.

231. *Id.* (citing Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 17-19 (2003); *United States v. Alegria*, 192 F.3d 179, 184-85 (1st Cir. 1999)).

232. "Even when an agreement under Model Three is formalized in writing, such as in most federal cooperation agreements, the government may make oral statements to the accomplice witness that augment, define, or give context to the open-ended terms used in the written instrument (*e.g.*, 'We'll just have to see how it goes, but if you really come through at trial I will recommend in my substantial assistance motion that the judge give you the street.'"). Cassidy, *supra* note 221, at 1148.

233. Cassidy, *supra* note 221, at 1148-49.

234. It is impossible to say with certainty which decisions fall under Model One and Model Three because the appellate record does not reflect negotiations between the government and the government's witnesses. However, there are a substantial number of decisions in the sample in which government witnesses received benefits after testifying for the prosecution. *See, e.g.*, *Light-Roth v. Sinclair*, No. C11-0313-JCC, 2011 WL 7020919 (W.D. Wash. Nov. 2, 2011) (government witness's cooperation in petitioner's case was presented to judge at witness's sentencing hearing); *Breedlove v. Berbary*, No. 09-CV-6297, 2011 WL 3439261 (W.D.N.Y. Aug. 5, 2011) (prosecution witness released from jail following petitioner's trial); *Higgins v. Galaza*, No. CV 05-7599, 2011 WL 3420610 (C.D. Cal. April 27, 2011) (government witness's sentence reduced based on cooperation in petitioner's case); *Jones v. Cain*, No. 10-213, 2010 WL 5375951 (E.D. La. Dec. 17, 2010) (government witness offered favorable treatment for his testimony); *Morgano v. Ricci*, No. 08-1524, 2010 WL 606503 (D.N.J. Feb. 18, 2010) (plea agreement with government witness made after petitioner's trial was complete); *Williams-El v. Bouchard*, No. 05-CV-70616-DT, 2009 WL 3004008 (E.D. Mich. Sept. 15, 2009) (government witness given subsequent lenient treatment following testimony in petitioner's case); *United States v. Harris*, No. 07-10143-JTM, 2009 WL 4059388 (D. Kan. Nov. 20, 2009) ("'The mere fact that this witness's hopes later came true does not establish, in the absence of any further evidence ... that any deal actually existed at the time of the witnesses testimony."); *James v. United States*, 603 F. Supp. 2d 472 (E.D.N.Y. 2009) ("the government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony."); *Cooper v. McNeil*, No. 8:04-CV-1447-T-27MSS, 2008 WL 5252267 (M.D. Fla. Dec. 17, 2008) (witness was allowed conjugal visits, given reduced sentence for three grand theft charges and allowed to leave the prison to go out to dinner with family); *Flores v. Secretary Dept. of Corrections*, No. 8:06-CV-1756-T-30-TGW, 2008 WL 2977350 (M.D. Fla. Oct. 10, 2008) (government witness promised the possibility of a transfer to a prison facility closer to his family); *Bell v. Bell*, 512 F.3d 223 (6th Cir. 2008) (government witness expected some benefit in return for his testimony).

235. There was a strong statistical correlation between *Brady* violations and incentive/deal information. Eight percent of all incentive/deal decisions were *Brady* violations.

236. Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?* 74 FORDHAM L. REV. 257, 260 (2005).

237. *Id.* (citing The Innocence Project at Cardozo Sch. of Law, *Causes and Remedies of Wrongful Convictions*, http://www.innocenceproject.org/understand/factors_74_chart.php (listing the testimony of informants and snitches as a major factor in 14 of the first 74 wrongful convictions to be overturned by the results of post-conviction DNA testing)).

238. *United States v. Ramirez*, 608 F.2d 1261, 1266 n.9 (9th Cir. 1979).

239. Cassidy, *supra* note 221, at 1166.

240. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

241. *Id.*

242. ABA Model Rule of Professional Conduct 3.8(d) (1984).

243. Black's Law Dictionary defined "impeachment evidence" as "[e]vidence to undermine a witness's credibility." (9th ed. 2009). *See also United States v. Bagley*, 473 U.S. 667, 676 (1985) (explaining that impeachment evidence is evidence "the defense might have used to impeach the Government's witnesses by showing bias or interest.").

244. *See supra* note 3 (*Brady* requires disclosure of impeachment information as well as exculpatory information).

245. Some courts hold, and the Department of Justice maintains, that admissibility of information is a precondition of a prosecutor's disclosure obligations. *See supra* note 66 (discussing the consideration of admissibility by courts resolving *Brady* claims and DOJ policy). Such reasoning fails to appreciate the critical role inadmissible information can often play in leading to admissible information. Failure to disclose this information may foreclose access to the admissible information necessary to proving that an accused is innocent. Separately, there are instances in which inadmissible information is nevertheless required to be admitted under the compulsory process clause of the Sixth Amendment, for example. *See* Peter Westen, *Compulsory Process*, 73 MICH. L. REV. 71, 120-21 (1974); *see also Holmes v. South Carolina*, 547

U.S. 319 (2006); *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Even if admissibility were a legitimate precondition to disclosure, allowing prosecutors to make a unilateral determination on the admissibility of a particular piece of information is incongruous with the adversarial process. Admissibility is typically a question for the courts, decided only after each side is given an opportunity to make an argument.

246. *Hamilton v. Ayers*, 583 F.3d 1100 (9th Cir. 2009); *United States v. Hernandez*, 312 F. App'x 937 (9th Cir. 2009); *Moseley v. Branker*, 545 F.3d 265 (4th Cir. 2008); *United States v. Butler*, 275 F. App'x 816 (11th Cir. 2008); *Shell v. Lewis*, No. C 11-2515 JSW, 2012 WL 3235798 (N.D. Cal. Aug. 6, 2012); *McClure v. United States*, Civ No. DKC 08-1830, 2011 WL 3511816 (D. Md. Aug. 10, 2011); *Fisher v. De Rosa*, No. ED CV 08-01470-RSWL, 2010 WL 6334518 (C.D. Cal. Nov. 23, 2010); *Ly v. Kansas*, No. 07-3259-CM, 2009 WL 4508165 (D. Kan. Dec. 2, 2009); *DeGonia v. Bowersox*, No. 4:06CV1601 CDP, 2009 WL 3068092 (E.D. Mo. Sept. 23, 2009); *United States v. Mungro*, No. 5:04CR18-1-V, 2008 WL 2048388 (W.D.N.C. May 13, 2008); *Morgan v. Calderone*, No. 1:07-cv-763-DFH-JMS, 2008 WL 2095526 (S.D. Ind. May 16, 2008).

247. *See infra* Section VII.A.

248. *Moya v. Sullivan*, No. CV 07-01598, 2010 WL 1023940 (C.D. Cal. Jan. 22, 2010).

249. *Id.* at *18.

250. *Id.* at *19. *See also Hunt v. Galaza*, No. CIV S-03-1723, 2009 WL 5183835 at *17 (E.D. Cal. Dec. 21, 2009) ("[t]here is no dispute regarding whether the evidence of [the witness's] proposed plea deal was favorable to petitioner or was suppressed by the government.").

251. *Salgado v. Allison*, No. EDCV 10-1822-MMM, 2011 WL 4529606 (C.D. Cal. Aug. 25, 2011).

252. *Id.* at *6.

253. *Gentry v. Morgan*, No. C99-0289L, 2008 WL 4162998 (W.D. Wash. Sept. 4, 2008).

254. *Id.* at *2.

255. *Id.* at *7.

256. *Id.*

257. *Id.* at *8.

258. *Id.*

259. *Id.* For more examples in which courts acknowledge the exculpatory or impeachment value of information without expressly calling it favorable, *see Quintana v. Armstrong*, 337 F. App'x 23 (2d Cir. 2009) ("undisclosed impeachment evidence"); *Shue v. Sisto*, 444 F. App'x 172 (9th Cir. 2011) (witness's prior conviction for welfare fraud was impeachment information); *United States v. Butler*, 275 F. App'x 816 (11th Cir. 2008) (impeachment information not material); *Bell v. Bell*, No. 04-5523, 2008 WL 50315 (6th Cir. Jan. 4, 2008) (non-disclosure of deal information that tended to reinforce the defense's theory of the case); *Flores v. Woodford*, No. CV 08-2729-DOC, 2011 WL 3564426 (C.D. Cal. Jan. 14, 2011) ("impeachment information relevant to an investigating officer"); *Menei v. Ballard*, No. 2:09-cv-01516, 2011 WL 612808 (S.D. W.Va. Jan. 11, 2011) ("statements constitute impeachment evidence"); *United States v. Ramos-Gonzalez*, 747 F. Supp. 2d 280 (D. P.R. 2010) (key government witness's letter was "collateral impeachment evidence"); *United States v. Jones*, 609 F. Supp. 2d 113 (D. Mass. 2009) (witness statement was "plainly material exculpatory evidence"); *United States v. Ledingham*, No. 6:07-CR-00007, 2008 WL 4621838 (W.D. Va. Oct. 17, 2008) (The ATF claim form is exculpatory material).

260. *Id.* at *12.

261. *Trevino v. Thaler*, 449 F. App'x 415 (5th Cir. 2011), vacated and remanded by *Trevino v. Thaler*, 133 S. Ct. 1911 (May 28, 2013).

262. *Id.* at 435.

263. *Stevenson v. Yates*, 407 F. App'x 178 (9th Cir. 2010).

264. *Id.* at 181.

265. *Id.* at 180.

266. *Id.* at 180-81.

267. *Brooks v. Tennessee*, 626 F.3d 878 (6th Cir. 2010).

268. *Id.* at 892.

269. *Id.*

270. *Id.* (emphasis in original).

271. *Id.*

272. *Id.*

273. *Id.* at 894.

274. Here, correlation exists between death penalty decisions and favorable information. Favorable information is overrepresented in death penalty decisions. (Chi Square statistic .002).

275. For example, in *Wessinger v. Cain*, an investigative report showing petitioner's fingerprints were not on the gun or at the scene of

the crime was just one of 13 separate pieces of information withheld from the defense. *Wessinger v. Cain*, Civ. No. 04-637, 2012 WL 602160 (M.D. La. Feb. 23, 2012). In that decision, the court expressed clear "concern that so much evidence apparently did not make it to the hands of the defense team for trial." *Id.* at *15. The court said, "[i]t should have." *Id.* The court also clearly explained that disclosure of the report "would no doubt have helped the defense's case." *Id.* Despite the court's criticism of the prosecution, the court did not find any single piece of withheld information, or the cumulative effect of 13 pieces of withheld information, to be material.

276. A prosecutor could conceivably parse through the discovery in a case and disclose only the information that in his judgment is material exculpatory information, withholding all other favorable information to the detriment of the defendant's case. The problem is exacerbated by contextual bias and the limitations of judging what is material in a case before the case unfolds.

277. *See supra* note 4 at 1959 (the two-day symposium examined "best practices to optimize effective training, supervision, and control mechanisms for managing information within prosecutors' offices"). *See also* Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosures*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN PRACTICE 269 (Leslie C. Levin & Lynn Mather eds., 2012).

278. Brief of the American Bar Association as *Amicus Curiae* Supporting Petitioner at 1, *Smith v. Cain*, 565 U.S. ___, 132 S. Ct. 627 (2012) (No. 10-8145); *See also Cone v. Bell*, 556 U.S. 449, 477 n.15 (2009).

279. *See* ABA Formal Opinion 09-454 at 1.

280. Nancy Gertner & Barry Scheck, *Combatting* Brady *Violations With an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION, May 2013, at 40 (outlining the elements of an effective ethical rule order and the best practices for obtaining judicial action and compliance).

281. *Supra* note 76.

282. ABA MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009). *See supra* note 76.

283. Had the defense in *Brooks v. Tennessee* requested an order to comply with Rule 3.8(d), the prosecutor in the case would have been accountable for the professional failing noted by the court. *See supra* note 267 and p.41-42.

284. ABA Formal Opinion 09-454 at 1 (2009). A state's adoption of ABA Model Rule 3.8(d) does not mean that the state has also adopted ABA Formal Opinion 09-454. For example, the Ohio Supreme Court expressly rejected the ABA's position in *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125 (Ohio 2010). The ABA Opinion has also received pointed criticism. *See, e.g.*, Kirsten M. Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1767 (August 2012) (citing Margaret Colgate Love, The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000, 15 GEO. J. LEGAL ETHICS 441, 469 (2002)).

285. 28 U.S.C. § 530B(a) states that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." *See* Schwartz, *supra* note 51, at 34.

286. *See* Schwartz, *supra* note 51, at 34.

287. *Id.*

288. Gertner & Scheck, *supra* note 280, at 44.

289. *Id.*

290. Brief of the National Association of Assistant United States Attorneys and National District Attorneys Association as *Amici Curiae* Supporting Petitioners at 13-15, *Pottawattamie County v. McGhee,* 547 F.3d. 922, 925 (8th Cir. 2008), *cert. granted*, 556 U.S. 1181 (2009) (mem.), *cert. dismissed*, 558 U.S. 1103 (2010) (mem.).

291. *Id.*

292. *See supra* notes 80 and 82 (as set forth in the Ogden Memo and the U.S. Attorney's Manual, it is not the policy of the U.S. Department of Justice to disclose all favorable information).

293. *Id.*

294. American College of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 95 (2004).

295. *Id.* at 101.

296. Yaroshefsky, *supra* note 277.

297. *See* The BLT: The Blog of LegalTimes, *DOJ Pushes 'Comprehensive Approach' to Discovery Reform*, Nov. 6, 2009 ("Judge Paul Friedman of the U.S. District Court for the District of Columbia says he's 'radicalized' when it comes to prosecution disclosure obligations. He is a proponent of a federal rule that clearly spells out the government's obligation to turn over favorable evidence to defense lawyers."); The BLT: The Blog of LegalTimes, *Judicial Conference to Review Prosecution Disclosure Obligations*, July 8, 2009 ("Judge Emmet Sullivan of the U.S. District Court for the District of Columbia wrote the committee in April urging it to re-examine amending Rule 16 to require

disclosure of any exculpatory information."); *but see* The Third Branch News, *Judiciary Split on Need for Rule 16 Changes*, May 2011, *available at*: http://www.uscourts.gov/news/TheThirdBranch/11-05-01/Judiciary_Split_on_Need_for_Rule_16_Changes.aspx.

298. *See supra* Section I (discussing the prosecution of Senator Ted Stevens).

299. The Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012) (adding a new section, "3014. Duty to disclose favorable information." to Title 18 of the United States Code). The Fairness in Disclosure of Evidence Act of 2012 is bipartisan in nature with former Sen. Daniel Inouye (D-HI) joining Sen. Lisa Murkowski as a lead sponsor and Sen. Mark Begich (D-AK) and former Sens. Kay Bailey Hutchinson (R-TX) and Daniel Akaka (D-HI) as original co-sponsors. *Id.*

300. *Id.* at proposed § 3014(a)(1). *See* Peter Goldberger, *Codifying the* Brady *Rule*, THE CHAMPION, May 2013, at 8-11 (providing a detailed section-by-section examination of the Act).

301. Congress failed to enact S. 2197 prior to the close of the 112th legislative session.

302. The legislation is supported by NACDL, the ABA, the American Civil Liberties Union, the Constitution Project and the Institute for Legal Reform at the U.S. Chamber of Commerce. *See* News Release, NACDL, NACDL Applauds Sensible, Bipartisan Discovery Reform Legislation Introduced Today in the United States Senate (March 15, 2012), *available at* http://www.nacdl.org/NewsReleases.aspx?id=23792&libID=23761 ("passage would represent a giant step forward in improving the fairness and accuracy of our criminal justice system").

303. S. 2197 at proposed § 3014(a).

304. *Id.* at proposed § 3014(b).

305. *Id.* at proposed § 3014(a)(2) (the prosecution team includes the "(A) the Executive agency ... that brings the criminal prosecution on behalf of the United States" and "(B) any entity or individual, including a law enforcement agency or official, that—(i) acts on behalf of the United States with respect to the criminal prosecution; (ii) acts under the control of the United States with respect to the criminal prosecution; or (iii) participates, jointly with the Executive agency ... in any investigation with respect to the criminal prosecution.").

306. *See id.* at proposed § 3014(e) (the court may issue a protective order when the information is favorable solely because it provides a basis for impeaching the testimony of a potential witness and only if the government "establishes a reasonable basis to believe" the identity of the potential witness is not known to the defendant and disclosure "would present a threat to the safety of the potential witness or of any other person.").

307. *See id.* at proposed § 3014(d)(2) (classified information remains under the purview of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16).

308. *Id.* at proposed § 3014(c).

309. The continuing duty to disclose also applies "without regard to whether the defendant has entered or agreed to enter a guilty plea." *Id.*

310. *See* Dervan & Edkins, *supra* note 92 (empirical study examining the use of plea bargaining and its innocence problem).

311. ABA Model Rule 3.8(d) has been adopted by all states except California, where the California State Bar has prepared a proposal for adoption that will be submitted to the California Supreme Court for consideration. *See supra* note 76; State Bar of California, Proposed Rules of Professional Conduct, Rule 3.8(d), *available at* http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx; *see also* Petition to Approve New California Rules of Professional Conduct and Repeal Existing Rules of Professional Conduct, State Bar of California (Cal. July 20, 2011), *available at* http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=sOY6VmyQx7s%3d&tabid=2669; *Ethics Rules Get a Rewrite*, CAL. B.J., April 2010, *available at* http://www.calbarjournal.com/April2010/TopHeadlines/TH3.aspx.

312. As Judge Alex Kozinski points out in his recent dissent in *United States v. Olsen*, a restrictive materiality standard poses serious risks that prosecutors inclined to practice close to the ethical line will cross it. *United States v. Olsen*, 737 F.3d 625, 633 (9th Cir. 2013).

313. The ultimate ruling in these 210 decisions was based on the materiality of the most significant piece of allegedly withheld information, even though many of these decisions involve multiple pieces of information.

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

315. *Olsen*, 737 F.3d at 626.

316. Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecutor's Files*, THE CHAMPION, May 2013, at 26, 28.

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

APPENDIX A — METHODOLOGY

In developing this study, NACDL and VERITAS Initiative researchers sought to obtain quantitative answers to three questions:

1. Are courts consistent in the use and application of the materiality standard when deciding *Brady* claims?
2. What other issues or factors, if any, influence or underlie courts' resolutions of *Brady* claims?
3. To what extent is favorable information being withheld from the defense?

The researchers established a variety of parameters to narrow the research into a manageable data set without compromising the possibility of statistically meaningful relationships.

Specifically, in order to ensure the study included a sufficient number of judicial decisions and that the decisions were randomly selected, the researchers limited the universe of decisions to those made in federal courts over a defined five-year time period from August 2007 to August 2012.[318] From that group, using Westlaw, the Research Team identified over 5,000 decisions in which *"Brady v. Maryland"* appeared in the text of the decision, and pulled a stratified random sample[319] of those decisions to arrive at the Study Sample of 1,497 decisions for a closer reading, analysis, and coding.

In order to ensure ultimate consistency, the Research Team developed an extensive Guidance Document providing step-by-step instructions for the analysis and coding of each of the 1,497 decisions in the Study Sample. The Guidance Document aligns with a coding spreadsheet used by the Research Team to code every entry in the Study Sample and describes each piece of information to be coded in the spreadsheet. It includes detailed instructions for determining the proper code for each piece of information in each decision. The Guidance Document begins on page four.

As an initial matter, for each decision, researchers determined whether the court addressed a *Brady* claim on its merits. Specifically, if a court identified and/or acknowledged a *Brady* claim, applied any portion of the *Brady* analysis to the claim, and reached a conclusion as to the merit of the claim, then the decision was coded as "merits" and it was subjected to extensive analysis. If a court discarded the *Brady* claim on procedural grounds, then the decision was coded as a "non-merits" decision and no further analysis or coding was conducted for it.[320] In addition, researchers coded each "merits" decision in a vacuum, without regard to any later treatment of the decision by a reviewing court.

As outlined in the Guidance Document, the researchers coded every "merits" decision by using the following objective characteristics: decision year; trial year; procedural posture; origin jurisdiction; current jurisdiction; type of representation; type of crime; imposition of death sentence; and decision result.

With regard to "type of representation," researchers made best efforts to distinguish between public defenders, court-appointed counsel, and private counsel. Regardless, in every decision the researchers determined whether the petitioner/appellant appeared *pro se* or had some form of representation.

For "crime type," the Research Team selected from the following options: violent (non-sex); sex (violent and non-violent); property; weapon; drug; immigration; white collar and regulatory; and other. The Guidance Document established definitions for each crime type.[321] In addition, researchers labeled decisions as "death sentence" if the petitioner/appellant was in fact facing the death penalty at the stage of proceedings under analysis — *i.e.*, that the court assessing the *Brady* claim was doing so under the actual risk of sending the petitioner/appellant to be executed. Decisions in which a petitioner/appellant had been facing the death penalty at one point, but the possibility of receiving the death penalty was removed, were not coded as "death sentence" decisions.

In addition to these objective categories, researchers coded every decision for a variety of more subjective categories that required the researcher to apply certain principles to the court's opinion and ultimately make a determination as articulated in the Guidance Document. Every "merits" decision received only one code in the following categories:

- Value of Information: exculpatory; impeachment; both.
- *Brady* Claim Result: (1) disclosure/no withholding; (2) not favorable; (3) not material; (4) *Brady* violation.

Every "merits" decision received one or more codes in the following categories:

- Type of Information: physical; statements/testimony; documentary; incentive/deal; other.
- Favorability: favorable; not favorable; late disclosure; insufficient detail; does not exist; not relevant or frivolous.
- Disclosure/No Withholding: multiple codes available to describe court's rationale for concluding the allegedly withheld information was not withheld or was disclosed.
- Materiality Test: multiple codes available to describe the materiality test articulated by the court when assessing materiality of allegedly withheld information.
- Materiality Factors: various factors the court may have considered when assessing materiality of allegedly withheld information.

As described in the Guidance Document, every decision received additional coding in the favorability category to reflect the manner in which favorability was determined.

A variety of quality assurance measures were put in place to optimize coding consistency. The measures included, but were not limited to:

Material Indifference:

- Coding of the first 150 decisions in the Study Sample by two separate researchers and conducting a comparison of the coding results.
- Coding of the first 10 decisions of each researcher by a **project supervisor** and conducting a comparison of the coding results.
- Adjustments and calibrations to the Guidance Document based on the coding comparisons.
- Weekly questions and answers among all researchers and project supervisors.
- The ability of researchers to flag decisions for supervisory review.
- Supervisory review of over 65 percent of the decisions.
- External review of 250 decisions by criminal defense practitioners.

In addition to the above quality assurance measures, Project Supervisors conducted a significant review of the decisions and the coding for a variety of purposes, including code correction, trend analysis, supplemental coding, code correction, and other edits.

Researchers analyzed the data for statistical significance to find issues that were not likely to occur randomly, but rather were attributable to a specific cause. Statistical significance was determined by conducting a **chi-square calculation**, used to evaluate the level of statistical significance attained in a cross-tabulation. The chi-square calculation shows how likely it is that an observed distribution is due to chance. For a relationship to be considered statistically significant, it must meet a minimum level of significance, which was set at .05 in this study. In other words, if a chi-square calculation is less than the .05 level, there would be less than a five percent probability that the correlation occurred by chance.

It is important to acknowledge the limitations of the study's methodology. As discussed earlier, this study only looks at decisions that stem from a challenge to a criminal conviction, which are almost exclusively the result of a trial, raised through a writ of *habeas corpus*, an appeal, and in limited instances a post-trial motion. The study therefore does not touch on the majority of criminal prosecutions resolved without trial, which make up more than 90 percent of all criminal cases,[322] or those cases in which the information is yet to be discovered. In addition, the Study Sample includes less than one-third of the federal court decisions citing *Brady* during the selected five-year time period, and it does include *Brady* claims that were abandoned before reaching federal court.

BRADY MATERIALITY STUDY GUIDANCE DOCUMENT

This document seeks to provide step-by-step guidance for the analysis and coding of every decision reviewed as part of the *Brady* Materiality Study being conducted by VERITAS and NACDL. The goal of this document is to create and maintain maximum consistency throughout the entire coding process. This document aligns with the coding spreadsheet and describes each piece of information that must be listed on the coding spreadsheet. Please review this document in its entirety prior to coding. Note: The phrase "the opinion" is used throughout this document to refer to the written opinion that you are reading, analyzing and coding.

Decision Name — List the decision name provided by Westlaw. Only include the last name(s) of the party. Abbreviate "versus" as "v." and "United States" as "U.S."

Citation — List the Westlaw citation only. If there is no Westlaw citation, then list the federal reporter citation.

Higher Court Review of the Opinion (A/R/F) — This category looks at whether the opinion was reviewed by a higher court and, if so, *whether the opinion was affirmed or reversed.* Use Westlaw's "Full History" and "Direct History" functions to determine the correct entry for this column. If the opinion was reviewed by more than one higher court, such as a Circuit Court and the U.S. Supreme Court, then enter the ruling on the opinion of the highest court only. Mark "A" for an affirmed ruling, "R" for a reversed ruling, and "F" if there was no higher court review of the case.

Brady* Merits Claim (Y/N) —** This category asks, as an initial matter, whether this opinion addresses a *Brady* claim on its merits. If, for example, there is no *Brady* claim at all or the opinion states that the defendant "has not exhausted state remedies" and thus the *Brady* claim is not ripe for consideration, then the opinion ***does not address a *Brady* claim on its merits.

If, for example, the opinion decides the case on another issue and does not reach the *Brady* claim, then the opinion ***does not*** address a *Brady* claim on its merits. If there is absolutely no discussion of the *Brady* claim other than a flat denial, then the opinion does not address a *Brady* claim on its merits. However, if, for example, the opinion dismisses the defendant's *Brady* claim on the grounds that there was no suppression, then the opinion ***does*** address a *Brady* claim on its merits.

If the court ***does not*** address a *Brady* claim on its merits, then type "N" and move on to the next case. If the court ***does*** address a *Brady* claim on its merits, then type "Y" and continue the analysis and coding.

Material Indifference:

Year of Decision — List the year the opinion was decided by the court.

Trial Year — If available, list the year that the trial, or proceeding out of which the *Brady* claim arose, concluded. To the extent there were multiple trials or proceedings, use the trial or proceeding referenced in the opinion. If the opinion is based on a motion, and not a trial, then list the same year as the opinion.

Procedural Posture — List the method in which the underlying case or decision reached the court writing the opinion. Use the following phrases:

- A = Appeal
- HP = *Habeas* petition to be reviewed on the merits, including opinions adopting all or part of a Magistrate Judge's Report and Recommendation
- HRR = *Habeas* petition report and recommendation, i.e., opinions of Magistrate Judges

[*Note: This classification will require additional follow-up to determine whether the recommendation was adopted. Please look at the history to find whether the recommendation was adopted and include in the Notes section. See Notes for further instructions.*]

- HD = Appeal of *Habeas* petition denial
- HG = Appeal of *Habeas* petition grant
- MPJ = Motions post-judgment (to vacate, for new trial, for judgment of acquittal)
- MTN = Motions during trial (for mistrial, to dismiss, to suppress evidence)
  - MD = Motion to Dismiss
  - MM = Motion for Mistrial
  - MS = Motion to Suppress Evidence
- OTHER = Procedural postures listed below:
  - CN = Petition for Writ of *Coram Nobis*
  - COA = Request for Certificate of Appealability
  - ASHP = Application for Stay of HP

Origin 1 — This category looks at the very first point of entry, into the criminal justice system, of the case upon which the opinion is based. List "State" for decisions originating in state court or "Fed" for decisions originating in federal court.

Origin 2 — This category looks at the very first point of entry, into the criminal justice system, of the case upon which the opinion is based. For decisions originating in state court, list the two-letter abbreviation of that state. For decisions originating in federal district court, list the commonly accepted abbreviation for that court, such as "E.D.N.Y.," "D.D.C.," "S.D. Cal.," etc.

Current Juris 1 — This category looks at the court that issued the opinion. List "District" for federal district courts, "Circuit" for federal circuit courts, and "SCOTUS" for the U.S. Supreme Court.

Current Juris 2 — This category looks at the court that issued the opinion. For federal district courts, list the commonly accepted abbreviation for that court, such as "E.D.N.Y." "D.D.C." "S.D. Cal." etc. For federal circuit courts, simply list the circuit court's number only (*i.e.*, "2" not "2nd"). For the U.S. Supreme Court, simply list "U.S."

Defense Attorney Name — If available, list the complete name of the defense attorney(s) as it appears in the opinion. If there is no name, leave this entry blank. If the defendant is *pro se*, then type the defendant's full name. This category looks at the proceedings related to the opinion, not the lower court proceedings.

Type of Representation — Mark the appropriate number in the box according to the type of defense representation as it appears in the opinion. This category looks at the proceedings related to the opinion, not the lower court proceedings. Select from:

- Select (1) if Represented by Counsel.
- Select (2) if *Pro Se*.
- Select (3) if Unknown.

Crime — Most serious charge — List the most serious or leading criminal charge against the defendant. Use your best judgment on which crime is the most serious. If you have a question, please consult a supervisor.

Type of Crime(s) — Mark the appropriate number in the box according to the most serious type of crime charged against the defendant. Select from the following:

- Select (1) if Violent (non-sex) = Violent crimes, not sexual in nature, such as murder or assault.
- Select (2) if Sex (violent or not) = Sex crimes, violent or non-violent, such as rape or child porn possession.
- Select (3) if Property = Crimes against property, such as arson or burglary.
- Select (4) if Drug = Crimes involving controlled substances.
- Select (5) if White Collar and Reg = Financial crimes, corruption, paperwork or regulatory violations, etc.
- Select (6) if Other = Anything that does not easily fit into the above categories.

Death Sentence Imposed — This category asks whether a death sentence was imposed in the underlying case. Mark "Y" or "N."[323]

Nature of the Information — Describe with specificity the information the defendant asserts the government withheld in violation of *Brady*. If there is more than one piece of information, label each with a), b), c) ... etc.

Type of Information — Mark the appropriate number in the box(s) according to the type(s) of information the defendant asserts the government withheld in violation of *Brady*. **Mark as many types that apply to the information**. Select from the following:

- Select (1) if Physical — This category includes physical items (any material object such as a murder weapon), trace material (such as fingerprints or firearm residue), and biological material (such as DNA).
- Select (2) if Statements/Testimony — This category includes statements or declarations of fact, either oral or written, by any person. This includes transcripts, statements to or by police, misidentifications or failures to identify the accused, etc.
- Select (3) if Documentary — Documentary information includes any media by which

information can be preserved, such as police reports, medical records, photographs, tape recordings, films, printed emails, and writings on paper. This includes information on criminal history, prior bad acts and known but uncharged conduct or bad acts, as well as information on mental or physical impairments of the accused. This does not include statements covered by the "statements/testimony" category.

- Select (4) if Incentive/Deal — Information on an agreement between the government and a witness, in which the witness is promised, given or may be given, some incentive, benefit, leniency, etc., in exchange for his or her testimony, statement or assistance.

- Select (5) if Other — Information that is not physical, testimony, or documentary in nature.

Incentive Deal Code — This category seeks to code the different types of incentive/deal information. Please code this section **only if this is an incentive/deal decision** designated by a (4) in the Nature of Information code. Select from:

- Select (1) if the incentive/deal information involves a government deal with a witness.

- Select (2) if the incentive/deal information involves a witness with an admitted self-interested reason to testify.

- Select (3) if the incentive/deal information involves a government witness receiving unexplained benefits.

- Select (4) if the incentive/deal information involves information suggesting the witness had a self-interested motive to testify.

- Select (5) if the incentive/deal information cannot be substantiated according to the facts and/or evidence.

Information Code — This category asks whether the information the defendant asserts the government withheld in violation of *Brady* is exculpatory information, impeachment information, or both. This category looks at the information from the **perspective of the defendant** and his or her asserted characterization of the information as exculpatory, impeachment of both. Select (1) for exculpatory, (2) for impeachment, and (3) for both. Consider these definitions as guidance:

- Exculpatory: Information that is favorable to the defendant, points to the defendant's innocence or mitigating defendant's guilt.

- Impeachment: Information that calls into question the credibility of a witness against the defendant, including a police officer or other agent of the government.

Result of *Brady* Claim — Provide a short description of the court's conclusions on the *Brady* claim, as articulated in the opinion. If there is no explanation of the court's ruling, then note that here. If there are different results for different pieces of information, please denote that with the corresponding a), b), c) from above.

***Brady* Result Code —** This category asks for the court's ruling on the defendant's asserted *Brady* violation as articulated in the opinion. The court may rule based on prong (1) or (2) but then engage in a discussion of materiality. If that happens, then code based on the actual ruling and not any additional discussion. Select **only one** from the following:

- Select (1) if the opinion concludes there was no withholding.
- Select (2) if the opinion concludes information was withheld, but it was not favorable.
- Select (3) if the opinion concludes favorable information was withheld, but it was not material.
- Select (4) if the opinion concludes there was a *Brady* violation.

Favorable Withheld Code — This category asks whether the information the defendant asserts the government withheld **was actually** withheld and favorable. "Withholding" in this category includes decisions in which favorable information was disclosed late. Only those decisions with ***Brady* Result Code** (1), (3), or (4) should be coded in this section. Please select one of the following:

- FW = Favorable information withheld, favorable information disclosed late
- O = Other, information not favorable, information not relevant, information not withheld

Favorability Code — This category asks whether the favorability of the withheld information is expressly stated by the court, acknowledged by the court or implicit in the facts of the case. The decisions in this category are assessed from the **perspective of the court as well as considering the stated facts of the case.** Please select one of the following:

- FE = Favorable Express (The court expressly calls the information "favorable")
- FA = Favorable Acknowledged (The court does not expressly call the information "favorable," but does state that the information has either "exculpatory" or "impeachment" value to the defense)
- FI = Favorable Implicit (The court is silent on the favorability of the information, but favorability is implied upon a reading of the facts of the decision by the Research Team)

Favorable Late Disclosure Code — This category seeks to code decisions in which favorable information was disclosed late. Please code this section **only if this is a favorable withheld decision** designated by a FW in the Favorable Withheld Code. Select from the following:

- FL = Favorable Late (Favorable information was disclosed late)
- O = Other (Information was not favorable, information was timely disclosed, favorable information was withheld)

Favorable Late Disclosure Timing — This category seeks to code the timing of the late disclosure of favorable information. Please code this section **only if this is a favorable late disclosure decision** designated by a FL in the Favorable Late Disclosure Code. Select from the following:

- P = Pre-trial
- D = During trial
- A = After government received
- E = End of trial

Due Diligence Code — This category seeks to code those decisions in which the court finds

information is not withheld because the defendant knew about the information or could have obtained the information through exercise of due diligence. Please code this section **only if this is a no withholding decision** designated by a (1) in the *Brady* Result Code. Select from the following:

- DD = The court finds **relevant** or **favorable** information not to be withheld because the defendant knew about the information or could have obtained the information through exercise of reasonable diligence
- O = Other, the information was disclosed to the defendant or the information is not relevant or favorable to defendant's claim

Due Diligence Basis — This category seeks to code the basis for the court's imposition of the due diligence rule upon the defendant. Please code this section **only if this is a due diligence decision** designated by a DD in the Due Diligence Code. Select from the following:

- C = Defendant created the information
- DD = Defendant could have obtained the information through due diligence
- K = Defendant knew about the information

No Withholding Details — Provide a description of the court's reasoning behind its finding of no withholding. Please code this section **only if this is a no withholding decision** designated by a (1) in the *Brady* Result Code.

***Brady* Materiality Analysis Details —** Provide a description of the court's *Brady* materiality analysis as articulated in the opinion. Include any factors the court disregarded, considered but dismissed, and/or found persuasive. If the court rules that there was no withholding or the information was not favorable, but continues to do a materiality analysis, fill out the materiality analysis columns.

Materiality Tests — This category seeks the court's ultimate reasoning and conclusion on the materiality of the withheld information. This selection should not be based on the court's general recitation of case law, precedent and standards of review. Rather, the reviewer should select which of the following tests most closely parallels or accurately reflects the test/reason articulated by the court when declaring that the information at issue is or is not material. Possible variations on each test have been provided below. **Please select more than one code if necessary**:

- **RD = Reasonable Doubt:** Whether the withheld information creates a reasonable doubt that did not otherwise exist. Whether, in light of the whole record, the withheld information creates a reasonable doubt that did not otherwise exist.
- **SCRD = Significant Chance of Reasonable Doubt:** Whether there is a significant chance that the withheld information would have induced a reasonable doubt in the minds of enough jurors to avoid conviction.
- **RL = Reasonable Likelihood:** Whether there is a reasonable likelihood that the withheld information could have affected the judgment of the trier of fact. Whether there is any reasonable likelihood that the withheld information might have affected the jury's ultimate judgment.
- **RProb = Reasonable Probability:** Whether there is a reasonable probability that, had the information been disclosed, the result would have been different. Whether the withheld

information would have made a difference great enough to show a reasonable probability that the result would have been different. Whether there is reasonable probability that disclosure would have made any difference at the guilt or penalty stage of the trial

- **FT = Verdict Confidence/Fair Trial:** Whether the withheld information could reasonably put the whole case in such a different light as to undermine confidence in the verdict. Whether, in the absence of the withheld information, the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Whether we can be confident that the jury would have returned the same verdict had the information been disclosed.

- **RPoss = Reasonable Possibility:** Whether there is a reasonable possibility that, had the information been disclosed, the result would have been different.

- **PE = Preponderance of Information:** Whether the defendant has shown, by a preponderance of the evidence, that disclosure of the withheld information would have resulted in acquittal.

- **CC = Clear and Convincing:** Whether the defendant has shown, by clear and convincing evidence, that disclosure of the withheld information would have resulted in acquittal.

- **DV = Different View of Testimony:** Whether there is a reasonable probability that, had the information been disclosed, one or more members of the jury could have viewed the witness's testimony differently.

- **PT = Probative Tendency:** Whether the withheld information has some probative tendency to preclude a finding of guilt or lessen punishment.

- **OT = Other:** Any test that does not fit into one of the above categories. Provide the test language in "*Brady* Materiality Analysis Details" category.

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1. The Study Sample included only decisions made by federal courts. However, these decisions resolved *Brady* claims from both federal and state prosecutions. Decisions originating in state courts generally reached the federal courts through a petition for a writ of *habeas corpus*. *See* 28 U.S.C. § 2254.

2. Stratified sampling is generally used when a population is heterogeneous, where sub-populations, commonly called strata, can be isolated. A stratified sample is obtained by taking samples from each stratum or sub-group of a population. To get a stratified random sample of approximately 1,500 decisions, researchers first found the percentage of the total: 1,500 targeted decisions / 5,587 total decisions between August 2007 to August 2012 = 26.8 percent. To get a random sampling of these targeted 1,500 decisions, the 5,587 decisions were first grouped by year. Using Microsoft Excel's =Rand() formula, each decision in each year was assigned a random decimal between 0 and 1. Researchers then arranged the decisions in each respective year from smallest random decimal to largest random decimal and starting from the smallest decimal, selected the corresponding number of decisions from the stratified sample calculation, 26.8 percent of the decisions from each year.

3. There were some decisions in which the court resolved the *Brady* claim on the merits, but did so with either a flat denial or a discussion so limited that the researchers were unable to discern any meaningful information about the claim. Because these decisions did not include a merits discussion, and therefore could not be analyzed in the same manner as the "merits" decisions, they were not included in the "merits" group of decisions. Rather, these decisions were included in the "non-merits" group of decisions and did not receive any additional coding.

4. Ultimately, the decisions coded as "weapon" and "immigration" crimes were consolidated together and added to the decisions coded as "other" crimes for the purposes of data presentation and statistical analysis.

5. *See supra* note 92 (noting that 97 percent of federal convictions and 94 percent of state convictions are the result of a plea agreement).

6. After the initial coding, Project Supervisors reviewed all the decisions coded as "death sentence imposed" in order to exclude those decisions in which a petitioner had been facing the death penalty at one point, but the possibility of receiving the death penalty was later removed. Thus, the group of death penalty decisions discussed in this report only includes those in which the petitioner was in fact facing the death penalty at the stage of proceedings under analysis — *i.e.*, that the court assessing the *Brady* claim was doing so under the actual risk of sending the petitioner to execution.

APPENDIX B — REPORT GLOSSARY

***Brady* Violation:** A court resolves a *Brady* claim by finding that the prosecution withheld or failed to disclose favorable, material information in violation of *Brady v. Maryland.*

***Bagley* Standard:** The standard for assessing materiality articulated in the U.S. Supreme Court decision of *U.S. v Bagley*, 473 U.S. 667, 702 (1985) (Specifically, information is only material if there is a "reasonable probability" that the result would have been different had the information been disclosed to the defense).

***Brady v. Maryland*:** U.S. Supreme Court decision holding that the non-disclosure of favorable information to the accused violates due process when the information is material either to guilt or punishment. 373 U.S. 83 (1963). This holding is sometimes referred to as the *Brady* rule.

Chi-Square Calculation: The chi-square calculation shows how likely it is that an observed distribution is due to chance.

Death Penalty Decision: Decision in which the petitioner/appellant was in fact facing the death penalty at the stage of proceedings under analysis — *i.e.*, the court assessing the *Brady* claim was doing so under the actual risk of sending the petitioner/appellant to execution.

Due Diligence Decision: Decision in which the court excuses the prosecution's non-disclosure or late disclosure of relevant or favorable information by imposing the due diligence 'rule' on the defense.

Due Diligence 'Rule': Rule that excuses the prosecution's failure to disclose information if the defendant could have, should have, or actually did know about the undisclosed information, or the essential facts permitting the defendant to take advantage of the information.

Ethical Rule Order: Court order that requires prosecutors to comply with ABA Rule 3.8(d) or state law adopting the rule, which requires disclosure of information that "tends to negate the guilt of the accused or mitigates the offense," and states that "willful and deliberate failure to comply" with the mandate of Rule 3.8(d) will be viewed as contempt of court.

Fairness in Disclosure of Evidence Act of 2012: U.S. Senate bill 2197, introduced by Senator Lisa Murkowski and others during the 112th Congress, requiring prosecutors to disclose all information that may reasonably appear favorable to the defendant and appellate courts to employ a harmless beyond a reasonable doubt standard of review for disclosure violation claims.

Favorable Information: Information that tends to negate the guilt of the defendant, to mitigate the defendant's sentence, or to have a negative impact on the credibility or reliability of a government witness. This information includes both admissible and inadmissible evidence.

Favorable Information Decision: Decision in which the court explicitly states the information is "favorable," the court implies the information is favorable by acknowledging the exculpatory or impeaching value of the information, or the favorable nature of the information could be discerned from a reasonable reading of the facts.

Federal Criminal Procedure Rule 16: Rule for U.S. District Courts that establishes disclosure rules, procedures, and obligations for both the prosecution and the defense in relation to a federal criminal prosecution.

Federal-Originated Decision/Case: Decision in which the underlying case originated in federal court.

Guidance Document: Document implementing the study methodology by providing step-by-step guidance for the analysis and coding of every decision reviewed as part of the study. The Guidance Document is part of the Methodology Appendix and aligns with a coding spreadsheet used by the Research Team to collect data on every entry in the Study Sample.

***Habeas Corpus*:** A *habeas corpus* petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment. The petition must show that the court ordering the detention or imprisonment made a legal or factual error.

Incentive/Deal Information: Information of an agreement between the government and a witness, in which the witness is promised, given, or may be given, some incentive, benefit, leniency, etc., in exchange for his or her testimony, statement or assistance. This also includes information that a witness had an admitted self-interest to testify, information of a government witness receiving unexplained benefits, and information suggesting a witness had a self-interested motive to testify.

Jencks Act: A federal statute codified at 18 U.S.C. § 3500 that, among other things, permits prosecutors to withhold witness statements until after the witness has testified on direct examination.

***Kyles* Standard:** The standard for materiality articulated in the U.S. Supreme Court decision *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (Specifically, when deciding materiality, "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.").

Late Disclosure Decision: Favorable information decision in which the disclosure of the favorable information was untimely.

Methodology Appendix: A detailed description of the methodology implemented by the Research Team in analyzing the Study Sample.

Merits Decision: Decision within the Study Sample that addresses and analyzes a *Brady* claim on the merits.

Material Indifference:

Non-Merits Decision: Decision within the Study Sample that does not address the defendant's *Brady* claim on the merits because the claim is not ripe for consideration, the opinion decides the case on another issue and does not reach the *Brady* claim, or the opinion contains no discussion of a *Brady* claim.

Not Favorable: The decision resolves the *Brady* claim by holding that the information at issue is not favorable because it lacks exculpatory, impeachment, or mitigating value.

Not Material: The decision resolves the *Brady* claim by holding that the information at issue is not material because there is no reasonable probability that the result would have been different had the information been disclosed and/or the withheld information cannot reasonably be viewed to put the whole case in such a different light as to undermine confidence in the verdict.

No Withholding/Not Withheld: The decision resolves the *Brady* claim by finding the information at issue was not withheld, that it was disclosed, or that the prosecution had no duty to disclose it.

Project Supervisors: VERITAS Initiative Director Kathleen "Cookie" Ridolfi, NACDL Counsel for White Collar Crime Policy Tiffany M. Joslyn, and VERITAS Initiative Pro Bono Research Attorney Todd Fries.

Research Team: The group of individuals who developed and executed the study, including VERITAS Initiative Director Kathleen "Cookie" Ridolfi, NACDL Counsel for White Collar Crime Policy Tiffany M. Joslyn, VERITAS Initiative Pro Bono Research Attorneys Todd Fries and Jessica Seargeant, and six law student volunteers from the Santa Clara University School of Law.

Statements: Information consisting of statements or declarations of fact, either oral or written, by any person. This includes transcripts, statements to or by police, misidentifications, or failures to identify the accused, and includes statements made by the victim, witnesses, co-defendants, and defendants.

State-Originated Decision/Case: Decision in which the underlying case originated in state court.

Study Sample: The complete set of 1,497 federal court decisions analyzed by the Research Team.

Theory of the Case: A theory of the case is an advocate's position and approach to the undisputed and disputed evidence that will be presented at trial. The theory of the case is usually developed before a trial begins and sets out the factual support for the verdict an advocate is seeking.

Undisclosed Favorable Information: Information that the Research Team determined to be favorable that was never disclosed to the defense.

Withheld Favorable Information: Information that the Research Team determined to be favorable that was never disclosed to the defense or was withheld by the government and then disclosed in an untimely manner.

AUTHOR BIOGRAPHIES

KATHLEEN "COOKIE" RIDOLFI is a Professor of Law at Santa Clara University School of Law and the cofounder and former Director of the Northern California Innocence Project. In 2004, she co-founded the Innocence Network, an affiliation of organizations dedicated to pursuing exonerations on behalf of wrongfully convicted prisoners and working to redress the causes of wrongful conviction. She was lead researcher and co-author of *Preventable Error, A Report on Prosecutorial Misconduct in California* 1997-2009. From 2004-2008, she served on the California Commission on the Fair Administration of Justice tasked with the study and review of the administration of criminal justice in California.

In 2010, Professor Ridolfi launched the VERITAS Initiative, a research and policy program at Santa Clara University School of Law committed to pursuing data-driven justice reform. She remains committed to educating law students by teaching in the areas of criminal law, wrongful conviction, and legal ethics. Professor Ridolfi has been the recipient of numerous awards, including California Lawyer Magazine Attorney of the Year, Women Defenders Annual Award, and the ACLU's Don Edwards Civil Liberties Award. She has also been recognized by the Daily Journal as one of the top 75 women litigators in California.

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Prior to joining NACDL, Ms. Joslyn clerked for the Honorable John R. Fisher of the District of Columbia Court of Appeals. She graduated with honors from George Washington University Law School, where she co-authored the 2006-07 Van Vleck Constitutional Law Moot Court Competition Problem and served as Co-President of Street Law. Ms. Joslyn graduated *summa cum laude* from Clark University, where she majored in American Government with concentrations in Law, Ethics, and Public Policy.

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Prior to working at the VERITAS Initiative and NCIP, Mr. Fries worked as an Employment Litigation Associate at Paul Hastings LLP in Palo Alto and as an attorney at the Santa Clara County Superior Court Family Law Self-Help Office. He graduated cum laude from Santa Clara University School of Law in 2009 with a certificate in Public Interest and Social Justice after receiving a Bachelor of Arts from the University of California, Los Angeles.

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THE USE OF PRETRIAL "RISK ASSESSMENT" INSTRUMENTS:

A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS

We believe that jurisdictions should not use risk assessment instruments in pretrial decisionmaking, and instead move to end secured money bail and decarcerate most accused people pretrial. Thus, the principles that follow should not be construed as an endorsement of risk assessment instruments in pretrial decisionmaking, but rather tools to mitigate harm in places where they are already in use.

A growing number of jurisdictions across the United States are implementing pretrial risk assessment instruments that use data in an attempt to forecast an individual's likelihood of appearance at trial and/or risk to public safety. These tools are often presented as a transparent and equitable alternative to current systems of secured money bail in pretrial detention decisionmaking.

In reality, however, these tools can defer the responsibility of determining who to detain pretrial and who to release. Furthermore, implementation of these tools has not curtailed the continued over-incarceration of people of color pretrial – people who should otherwise be legally entitled to due process of law before being torn away from their families, homes, and careers.

Our system of justice is profoundly flawed: it is systematically biased against and disproportionately impacts communities of color and allows for frequent violations of the right to due process. As such, the data driving many predictive algorithms – such as prior failures to appear and arrest-rates – reflects those flaws and biases and, as a result, are profoundly limited. Decades of research have shown that such data primarily document the behavior and decisions of *police officers and prosecutors*, rather than the individuals or groups that the data are claiming to describe.

Algorithmic decisionmaking tools are only as smart as the inputs to the system. Many algorithms effectively only report out correlations found in the data that was used to train the algorithm. Algorithms being applied nationwide are widely varied in design, complexity, and inputs, including cutting-edge techniques like machine learning. Machine learning is the process by which rules are developed from observations of patterns in the training data. As a result, biases in data sets will not only be replicated in the results, they may actually be exacerbated. For example, since police officers disproportionately arrest people of color, criminal justice data used for training the tools will perpetuate this correlation.

Thus, automated predictions based on such data – although they may seem objective or neutral – threaten to further intensify unwarranted discrepancies in the justice system and to provide a misleading and undeserved imprimatur of impartiality for an institution that desperately needs fundamental change.

The main problem that has caused the mass incarceration of innocent people pretrial is the detention of individuals perceived as dangerous ("preventive detention"). Though the Constitution requires that this practice be the rare and "carefully limited exception," it has instead become the norm. Risk assessment tools exacerbate this issue by relying upon a prediction of future arrest as a proxy for so-called "danger."

If pretrial risk assessment instruments are utilized at all, the only purpose they can meaningfully serve is to identify which people can be released immediately and which people are in need of non-punitive or restrictive services. They should not be used as part of the determination as to whether a person should be detained pretrial. Pretrial risk assessment instruments are insufficient to addressing the breadth of problems regarding current bail practices.. Real reform addresses underlying structural inequalities, rather than attempting to triage a structurally flawed system. Jurisdictions can – *and should* – abolish systems of monetary bail, combat mass incarceration, make meaningful investments in communities, and pursue pretrial fairness and justice *without* adopting such tools.

However, understanding that these tools are already used in communities across the country, as civil and human rights, community, and data justice leaders from across the United States, we have developed the following principles that, in total, provide tools and guidance for reducing the harm that these assessments can impose. In order to ameliorate the strong dangers and risks we see in the implementation of risk assessment instruments in pretrial decisionmaking, all of the standards described in our principles below should and must be met by a jurisdiction.

PRINCIPLE 1

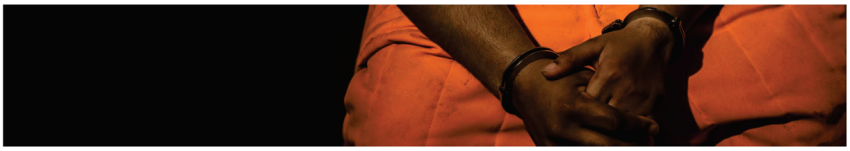
If in use, a pretrial risk assessment instrument must be designed and implemented in ways that reduce and ultimately eliminate unwarranted racial disparities across the criminal justice system.

When considering whether and how to adopt pretrial risk assessment instruments, jurisdictions and stakeholders must acknowledge that the criminal justice system in the United States, since its inception, has allocated benefits and burdens on the basis of race. History confirms the point, as do decades of research and data.

While the methods of arrest, prosecution, and punishment have evolved over time, the imbalance in the allocation of burdens has not. Persistent racial disparities plague the system today. Armed with that knowledge, jurisdictions must work to remedy known, unwarranted racial disparities in the administration of criminal law. In this context, the term "racial disparity" refers to unjustifiable differences in the rates of contact by a racial group with any stage of the criminal justice system that are attributable to explicit bias, implicit bias, socioeconomic inequality, or facially race-neutral policies that produce a disparate racial impact. The national movement to reduce race and wealth-based inequities in pretrial detention will be of limited utility if the types of disparities that jurisdictions seek to remedy simply re-emerge at another point in the system.

Against that historical backdrop, it is imperative that pretrial risk assessment instruments, if used at all, be designed to help meet the goal of reducing racial disparities in the criminal justice system. If a tool cannot help achieve that goal, then it is not a tool that the justice system needs. All pretrial risk assessment instruments must be designed, tested, calibrated, and implemented with the goals of exposing, documenting, reducing, and ultimately eliminating unwarranted racial disparities across the criminal justice system.

Pretrial risk assessment instruments must be designed so that no racial group bears the undue burden of errors made by the instrument. Several measures of fairness – such as error rate balance and predictive parity – currently exist. As innovation progresses, other measures will be developed. Jurisdictions should choose the measure, or combination of measures, that will allow them to best avoid burdening one racial group with erroneous predictions or sanctions. Community input and independent data scientist support in a jurisdiction's choice of a fairness measure is essential.



Those engaged in the design, implementation, or use of risk assessment instruments should also test ways to reduce the racial disparities that result from using historical criminal justice data, which may reflect a pattern of bias or unfairness. One approach is exploring a corrective weights design, which counteracts biased outcomes by accounting for the effects of systemic racism characterized by patterns of over-policing and other racially disparate criminal justice practices that drive systemic inequities.

The methods chosen to address racial disparities should be jurisdiction-specific, as the causes of disparity may vary over time and by location. Ideally, jurisdictions would use the risk assessment process to engage in research and analysis of the root causes of racial disparities in their criminal justice apparatuses. Critically, the means to address those disparities may fall outside the scope of the criminal justice system, and require an investment in education, public health, economic opportunities, or various other social services.

Jurisdictions should collect and maintain quantitative data on race across all stages of the criminal justice system in order to implement this principle. When possible, that quantitative data should be audited by an agency or institution independent from actors within the system to avoid biased statistical reporting. Quantitative data should also be supplemented by qualitative accounts from individuals who have come into contact with the criminal justice system by virtue of an arrest. These data sets should inform the design, implementation, and use of pretrial risk assessment instruments.

Pretrial risk assessment instruments are not a panacea for racial bias or inequality. Nor are they race-neutral, because all predictive tools and algorithms operate within the framework of institutions, structures, and a society infected by bias. Those facts weigh heavily against their use. However, in those instances when jurisdictions commit to employing a risk assessment instrument as part of the pretrial ecosystem, doing so with an eye toward eliminating unwarranted racial disparities advances the cause of justice for all.

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PRINCIPLE 2

If in use, a pretrial risk assessment instrument must never recommend detention; instead, when a tool does not recommend immediate release, it must recommend a pretrial release hearing that observes rigorous procedural safeguards. Such tools must only be used to significantly increase rates of pretrial release and, where possible, to ascertain and meet the needs of accused persons before trial, in combination with individualized assessments of those persons. Pretrial risk assessment instruments, when used to assign community supervision, should only be used to assign the least restrictive and onerous forms of pretrial supervision. Risk assessment instruments must automatically cause or affirmatively recommend release on recognizance in most cases, because the U.S. Constitution guarantees a presumption of innocence for persons accused of crimes and a strong presumption of release pretrial.

Pretrial risk assessment instruments, if used at all, should only identify groups of people to be released immediately. Additionally, such tools may be used in combination with an individualized assessment to determine the specific needs of an accused person pretrial, with the goal of finding non-punitive, non-onerous direct supports and alternatives to detention that would encourage the accused person's appearance at trial, and would reduce their risk of being arrested again during the length of the trial.

Pretrial risk assessment instruments must be carefully crafted to avoid encroaching upon the limited scope, or prohibition, of preventative detention and over-conditioning of release in each jurisdiction. **Given these limits, pretrial risk assessment instruments need not forecast future arrests at all.** Such an approach would alleviate the most egregious forms of bias, and acknowledge the fact that bail has historically existed only for the purpose of ensuring appearance at court. Additionally, the design of any tool should always give far greater weight to the avoidance of false positives than to the avoidance of false negatives, as the harms of detaining the wrong person pretrial are far greater than erring on the side of release.

If jurisdictions seek to use such tools, any scores that do not support or recommend release needn't be shown to individual judges. Rather, as discussed in the preamble, they need only trigger individual hearings. To the extent that tools involve risk scores being given to individual judges for decisionmaking and value-balancing, the results of pretrial risk assessment instruments should never be framed in a way that recommends detention or that labels an individual as "high risk," as this masks an inherent value-balancing in the guise of purportedly neutral data. An algorithm cannot determine what level of risk warrants detention or release. Such determinations are fundamentally political and not empirically derived, and they must be explicitly identified as such. Moreover, unquestioning reliance on risk assessment instruments – when determining a defendant's pretrial liberty – directly violates the constitutional requirement of individualized determinations.

Data used in the development of risk assessment instruments must be reviewed for accuracy and reliability. Data collection must include a transparent and periodic examination of release rates, release conditions, technical violations or revocations, and performance outcomes by race to monitor for disparate impact within the system.

Defense counsel must be included in the process of selecting, calibrating, designing, shaping, and testing a pretrial risk assessment instrument and included in the ongoing evaluation of the tool. Tools of this nature should be overseen and used only toward reducing or ending monetary bail without triggering more expansive forms of supervision and surveillance, such as the use of electronic monitoring. Instead, such controls should only be imposed as an actual alternative to incarceration for someone who has otherwise been lawfully determined eligible for possible detention. Groups with a stake in increasing detention, or in causing high money bail amounts to be set, should not be involved in tool selection.

If the use of a particular pretrial risk assessment instrument by itself does not result in an independently audited, measurable decrease in the number of people detained pretrial, the tool should be pulled from use until it is recalibrated to cause demonstrably decarceral results.

PRINCIPLE 3

Neither pretrial detention nor conditions of supervision should ever be imposed, except through an individualized, adversarial hearing. The hearing must be held promptly to determine whether the accused person presents a substantial and identifiable risk of flight or (in places where such an inquiry is required by law) specific, credible danger to specifically identified individuals in the community.

The prosecution must be required to demonstrate these specific circumstances, and the court must find sufficient facts to establish at least clear and convincing evidence of a substantial and identifiable risk of flight or significant danger to the alleged victim (or to others where required by law) before the exceptional step of detention of a presumptively innocent person, or other supervisory conditions can be imposed.

All conditions short of detention must be the least restrictive necessary to reasonably achieve the government's interests of mitigating risks of intentional flight or of a specifically identified, credible danger to others.

Any person detained pretrial must have a right to expedited appellate review of the detention decision.

Extensive evidence demonstrates that pretrial detention and intensive supervision can and do derail the lives of accused people, imposing enormous costs on them, their loved ones, and society at large. Detention and intensive supervision are extraordinary and toxic sanctions to impose on any person based on an unproven allegation of criminal conduct. These deprivations cannot be justified by merely resorting to generalities or statistical estimates. Only an individual, adversarial hearing should ever be considered a constitutionally sound basis for detention pretrial.

At timely, individualized hearings, counsel must be provided to represent accused persons. Public defenders or court-appointed counsel shall be present to represent those who cannot afford their own attorney. **The court must ensure that defense counsel has the time, training, and resources to learn important information about the client's circumstances that may not be captured in a pretrial risk assessment instrument and adequate opportunity to present that information to the court.** The court shall administer an "ability to pay" inquiry prior to setting any financial conditions of release, and only after concluding financial conditions are least restrictive. When an accused person establishes that they receive means-tested public benefits, currently held or recently held in correctional facilities or residential facilities that serve mental or physical illness, or have an income below 250 percent of the federal poverty guidelines, when adjusting for household size, said individuals shall be determined ineligible to pay. When an accused person suggests that they do not meet the above-mentioned criteria, but otherwise believe they are unable to pay the amount established by the court, said individuals shall receive a substantive ability-to-pay hearing, including inquiry into income, debt, and public benefits, as well as an affirmative opportunity for accused individuals to provide evidence of indigence. Prospective future employment, access to illiquid assets, the ability to borrow money from family members, or the ability to loan money from a for-profit surety company shall not be considered as contributing to an accused individual's present ability to pay.

In all cases, the hearing shall commence with a presumption of release on recognizance. If the prosecution seeks an order of pretrial detention – which must be done transparently, and not through the imposition of unaffordable money bail – the burden of proof shall be on the prosecution to establish fact-specific clear and convincing evidence of "relevant risks," defined as a substantial and identifiable risk of intentional flight or, when explicitly permitted by law, a specifically identified, credible danger to a specific person (rather than the amorphous notion of "community safety").

Detention should only be an option in specific and narrow circumstances; in all other cases, only release on recognizance and, where necessary, non-monetary, non-onerous conditions of release, should be available. In the specific and narrow circumstances where pretrial detention is a possibility, this determination may only be made at the conclusion of an individualized, adversarial hearing following the appropriate procedures, and if the court finds at least clear and convincing evidence of a relevant risk that no condition or combination of conditions of release or support services could mitigate.

Prior to setting any nonfinancial conditions on an arrestee's pretrial release, the court must determine that those conditions are the least restrictive necessary to reasonably assure that any relevant needs are served or risks present are mitigated. In all cases, the presumption will be of release on no conditions. Any conditions set must be tailored to the individual arrestee: uniform or blanket conditions of release shall not be permitted.

PRINCIPLE 4

If in use, a pretrial risk assessment instrument must be transparent, independently validated, and open to challenge by an accused person's counsel. The design and structure of such tools must be transparent and accessible to the public.

The design of pretrial risk assessment instruments must be public, not secret or proprietary. This means adopting local legislation or enforceable regulations that enforce transparency by sharing the data and design with that specific jurisdiction, in addition to reporting requirements throughout the implementation process. The source code and training data (appropriately anonymized) should be made public. And all tools and their documentation must be clear about the source data and code underlying each conclusion in any report; in other words, whether any given conclusion is empirically derived or based on a political, moral or personal choice or assumption set by criminal justice decisionmakers or other government officers.

At minimum, the public, the accused person, and the accused person's counsel must all be given a meaningful opportunity to inspect how a pretrial risk assessment instrument works, including access to:

- A complete description of the design and testing process used to create a tool;
- All input factors a pretrial risk assessment instrument uses;
- The weights assigned to those factors;
- The thresholds and specific data used to determine "low," "medium," or "high" risk calculations or risk scores; and
- The outcome data used to develop and validate the tool.

The accused person's counsel must also be given an opportunity to inspect the specific inputs that were used to calculate their client's particular categorization or risk score, along with an opportunity to challenge any part – including non-neutral value judgments and data that reflects institutional racism and classism – of that calculation.

In addition, the factors considered by a pretrial risk assessment instrument must comport with local and state law regarding the presumption of release.

PRINCIPLE 5

If in use, a pretrial risk assessment instrument must communicate the likelihood of *success* upon release in clear, concrete terms.

In accordance with basic concepts of fairness, the presumption of innocence, and due process, pretrial risk assessment instruments must frame their predictions in terms of success upon release, not failure. For example, a tool could say that, in the past, people similar to the accused person have had an 80 percent likelihood of appearing for all of their court dates over 18 months of hearings. Communicating and framing a pretrial risk assessment instrument's prediction in negative terms (that is, the likelihood the accused would fail to appear upon release) may unnecessarily lead decisionmakers to perceive and treat the accused more harshly. To the extent possible, the tools should also provide the likelihood of success when certain supports or services are provided, consistent with identifying and addressing genuine needs rather than purported risks.

Further, such tools should only predict events during the length of the trial or case – not after the resolution of the open case. Every tool should thus have a temporal cutoff for its prediction period – for example, six months – which local stakeholders may wish to track speedy trial laws.

PRINCIPLE 6

If in use, a pretrial risk assessment instrument must be developed with community input, revalidated regularly by independent data scientists with that input in mind, and subjected to regular, meaningful oversight by the community.

A pretrial risk assessment instrument must be designed with input from members of the local community, including, but not limited to:

- Independent data scientists not paid for by the designer of the implemented tool;
- Survivors of harm and violence and people impacted by mass incarceration;
- Decisionmakers and actors throughout the criminal justice system, including public defenders, judges, and district attorneys; and
- Community groups focused on racial justice.

Revalidation of the tool should include a check for predictive validity – including understanding mean score differences across race/gender/protected characteristics that could result in disparate impact on those communities. Revalidation should include independent auditing for the decarceral and racially equitable results our communities want and need. Validation and revalidation should take place annually at the least, with the ideal being quarterly.

The people described above should be convened into a funded and staffed community advisory board, supported by data scientists to understand how algorithms work, how they are trained, how they weight their factors, and how pretrial decisionmakers use the algorithms in real decisions. This board should be able to host regular hearings educating it and the public on how algorithms are used in pretrial decisionmaking, and potentially in other criminal justice, community well-being, or public sector decisionmaking contexts. This funded board could be convened through acts of city councils, mayors, or state bodies, depending on local laws and jurisdictional practices. This funded board should have the ability, in concert with elected officials, to pause or roll back the use of a pretrial risk assessment instrument if that tool is not meeting, in practice, the decarceral or racially equitable goals set out by the funded board and other stakeholders.

Judges and their officers – including bail administrators and magistrates, pretrial services staff, and anyone who touches the pretrial risk assessment instrument – should receive regular training and retraining on the use of the tool, and should be overseen in their use of the tool for decarceral and racially equitable results.

The particular pretrial risk assessment instrument designed or chosen should be trained by, or at least cross-checked with, local data and should be evaluated for decarceral and racially equitable results on a regular basis by the local community, including the funded board consisting of key groups mentioned above.

47. Impact Fund
48. Impact Justice
49. Jewish Council for Public Affairs

SIGNED BY:

1. African American Ministers In Action
2. Alternate ROOTS
3. American Civil Liberties Union
4. American-Arab Anti-Discrimination Committee
5. Amistad Law Project
6. Arab American Institute
7. Asian Pacific American Labor Alliance
8. Bend the Arc Jewish Action
9. Black Alliance for Just Immigration (BAJI)
10. Black Lives Matter Philadelphia
11. Brooklyn Community Bail Fund
12. Brooklyn Defender Services
13. Center for Democracy & Technology
14. Center for Justice Research - Texas Southern University
15. Center for Popular Democracy
16. Center on Race, Inequality, and the Law at NYU Law
17. Chicago Community Bond Fund
18. Civil Rights Corps
19. College and Community Fellowship
20. Color Of Change
21. Colorado Freedom Fund
22. Connecticut Bail Fund
23. Cville Immigrant Bond Fund
24. Data & Society
25. Dauphin County Bail Fund
26. Decarcerate Tompkins County
27. Defender Association of Philadelphia
28. Defending Rights & Dissent
29. Denver Justice Project
30. Eastern Iowa Community Bond Project
31. Electronic Frontier Foundation
32. Ella Baker Center for Human Rights
33. Entre Hermanos
34. Essie Justice Group
35. Families for Justice as Healing
36. Fight for the Future
37. Free Press
38. FreeThe350BailFund
39. Global Justice Institute
40. Government Information Watch
41. Helping Educate to Advance the Rights of Deaf Communities (HEARD)
42. Humanizing AI in Law Research Group, MIT
43. Immigrant Family Defense Fund
44. Impact Fund
45. Impact Justice
46. Insight Center for Community Economic Development
47. Jewish Council for Public Affairs
48. Juntos
49. Justice Strategies
50. Kent County (Michigan) Immigrant Bond Relief Fund
51. LatinoJustice PRLDEF
52. The Leadership Conference Education Fund
53. The Leadership Conference on Civil and Human Rights
54. Local Progress
55. Madison County Bail Fund Inc.
56. Massachusetts Bail Fund
57. Media Alliance
58. Media Mobilizing Project
59. Mijente
60. Minnesota Freedom Fund
61. Movement Voter Project
62. MoveOn
63. NAACP
64. NAACP Legal Defense and Educational Fund, Inc.
65. National Action Network
66. National Association of Social Workers
67. National Bail Out
68. National Center for Lesbian Rights
69. National Council of Churches
70. National Employment Law Project
71. National Hispanic Media Coalition
72. National Law Center on Homelessness & Poverty
73. NETWORK Lobby for Catholic Social Justice
74. New America - Public Interest Technology
75. New America's Open Technology Institute
76. Northwest Community Bail Fund
77. Oakland Privacy
78. One Pennsylvania
79. Open MIC (Open Media and Information Companies Initiative)
80. OVEC-Ohio Valley Environmental Coalition
81. People's Paper Co-op
82. People's Action | Mass Liberation Project
83. Philadelphia Bail Fund
84. Philadelphia Community Bail Fund
85. Philadelphia Red Umbrella Alliance
86. PolicyLink
87. Portland Freedom Fund
88. POWER Interfaith
89. Prison Policy Initiative
90. Progressive Leadership Alliance of Nevada
91. Project SAFE
92. Public Defender Association
93. Public Knowledge
94. Reclaim Philadelphia
95. Reentry Think Tank
96. Richmond Community Bail Fund
97. Robert F. Kennedy Human Rights
98. Silicon Valley De-Bug
99. Southern Center for Human Rights
100. Southerners On New Ground
101. Southwest Workers Union
102. Texas Organizing Project
103. The Bronx Freedom Fund
104. The Center for Carceral Communities
105. The Center for Media Justice
106. The Greenlining Institute
107. The Institute of the Black World 21st Century
108. The Mass Liberation Campaign
109. The National Council for Incarcerated and Formerly Incarcerated Women and Girls
110. The People's Press Project
111. Tucson Second Chance Community Bail Fund
112. United Church of Christ, OC Inc.
113. Urbana-Champaign Independent Media Center
114. VietLead
115. Voice of the Experienced
116. Washington Lawyers' Committee for Civil Rights and Urban Affairs
117. Washington Square Legal Services Bail Fund
118. Young Women's Freedom Center
119. 215 People's Alliance

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FOR QUESTIONS OR COMMENTS, CONTACT pretrialjustice@civilrights.org

What causes people to give false confessions?

Lisa Black and Steve Mills, Tribune reporters

After 14 hours of interrogation in a small, windowless room, Kevin Fox simply gave up. He knew he hadn't sexually assaulted or murdered his 3-year-old daughter, but police had rejected his requests for a lawyer and told him they would arrange for inmates to rape him in jail, according to court records.

The distraught father later testified that detectives also screamed at him, showed him a picture of his daughter, bound and gagged with duct tape, and told him that his wife was planning to divorce him, the records show.

Fox finally agreed to a detective's hypothetical account of how his daughter, Riley, died in an accident, thinking investigators would realize that the phony details didn't match up with the evidence, his lawyer said. Instead, he remained in Will County jail for 8 months, released only after DNA evidence excluded him as a suspect. In May, another man was charged with the crime.

What could be a similar story is now unfolding in Lake County, where Jerry Hobbs III, 39, is accused of murdering his 8-year-old daughter and her 9-year-old friend. Hobbs, who had a criminal record, has been in jail five years, in large part because of a confession that emerged after hours of high-pressure interrogation. Prosecutors planned to seek the death penalty in his October trial, even though his DNA did not match semen found on his daughter's body.

Authorities recently matched the DNA with another man accused of rape and robbery in Arlington, Va., offering Hobbs a chance at exoneration and once again raising the possibility that police coerced a suspect to falsely confess.

Both cases raise a question: Why would anyone confess to such horrific crimes — especially involving their own child or loved one — if they didn't commit them? Seemingly unfathomable, it happens far more often than most people believe, experts say.

"The interrogation itself is stressful enough to get innocent people to confess," said Saul Kassin, a psychology professor at John Jay College of Criminal Justice in New York. "But add to that a layer of grief and shock and perhaps even some guilt — 'I should have been there' — and then that the parent is trying like hell to be cooperative because they want the murder of their child solved."

Trauma, lack of sleep and highly manipulative interrogation techniques are a few factors that can cause the most level-headed people to falsely confess to a crime — even one as heinous as a child's murder, according to experts. Researchers believe that false confessions lead to about 25 percent of wrongful convictions, a statistic underscored by the increasingly sophisticated use of DNA evidence.

Over the past two decades, 254 people have been exonerated by DNA evidence, including 17 who were on death row, according to the Innocence Project, a nonprofit legal clinic based at Yeshiva University in New York.

"We know that for certain kinds of people, particularly those with mental illness and mental deficiencies, but other people as well, the psychological intensity of an interrogation can prove absolutely as torturous as physical pain," said Lawrence Marshall, a Stanford University law professor who co-founded Northwestern University's Center on Wrongful Convictions.

Confessions carry powerful weight with juries, and, as shown in the Hobbs case, they also strongly influence authorities. In 2008, Lake County Judge Fred Foreman agreed with prosecutors that Hobbs should remain imprisoned

without bail, despite the revelation that his DNA did not match the semen found on his daughter's body.

Prosecutors suggested that Hobbs' daughter Laura had gotten the DNA in her body because she was found in a wooded area where people apparently go to have sex — in spite of the fact she was fully clothed.

Lake County prosecutors have not said if they have ruled out Hobbs as a participant in the crime, but they announced they're renewing their investigation in light of the DNA evidence.

In the Fox case, the Will County Sheriff's Department plans to hire an outside firm to evaluate its procedures and determine if they need to be changed.

"Obviously, there were some things that went wrong in this investigation," the sheriff's spokesman, Pat Barry, said. "We are in the process now of vetting a couple of firms ... that will come in and review the Fox case for us."

Confessions that are not backed up with corroborating evidence should be viewed as suspect, Marshall said.

"I think what we are seeing right now is there has become an overdependence on confessions," said Marshall, who is appealing the case of Juan Rivera of Waukegan, who in May 2009 was convicted for the third time of the rape and murder of an 11-year-old girl despite DNA evidence that excluded him. Lake County prosecutors suggested the girl was sexually active to undercut the DNA.

While law enforcement agencies have long relied on the "Reid Technique" method of interrogation to elicit confessions, some critics argue it's based on faulty assumptions of deceptive behavior. Investigators are taught how to base their questions and method of interrogation on a suspect's verbal and non-verbal cues and mood, sometimes using a "baiting" approach to elicit confessions.

Even those who believe such techniques are effective in obtaining true confessions say they can be misused by authorities.

"There is a lot of coercion that can happen, short of the (former Chicago police Cmdr. Jon) Burge case where they are torturing someone to get confessions," said Fred Hunter of Hinsdale, a licensed polygraph administrator. Burge, 62, was convicted last month of obstruction of justice and perjury for lying about torturing suspects in a civil case.

Those most vulnerable to overzealous police work often are "throwaway people," said Hunter, referring to suspects who lack education, advocates or resources to represent themselves.

Dr. Robert Galatzer-Levy, a psychiatrist on the faculty of the University of Chicago and the Chicago Institute for Psychoanalysis, said interrogations are designed "not simply to get information," as the police often portray them. Instead, he said, interrogations are "well-thought-through psychological manipulations to get a confession."

Police do that by first developing a rapport with suspects. They then give them their Miranda rights, though in such a way that suspects feel they are being uncooperative if they invoke them. Finally, he said, police confront a suspect, saying they know he committed the crime but offering a way out that acknowledges guilt but to something less heinous.

The stress that comes with the death of a child, as in the cases of Hobbs and Fox, makes it all the worse. In such cases, experts say, it is natural for the police to focus their attention first on the child's parents or siblings. Many murders of children, it turns out, are committed by family members.

"People all say, 'I'd never confess. Not in a million years,'" said Galatzer-Levy. "But it turns out that people who are vigorously interrogated will confess — even if they're innocent. The terrified but rational person might give police a

story just to end the interrogation, or because they think it might improve their situation."

Richard Leo of the University of San Francisco law school said no research has been done on whether the death of a family member makes a suspect more susceptible to interrogation. But, he said, "it kind of stands to reason. They're grief-stricken. They're distressed. They've often not gotten a lot of sleep. Those are all conditions that contribute to false confessions."

In the book "True Stories of False Confessions," Rob Warden and Steven A. Drizin of the Center on Wrongful Convictions write that reasons for false confessions range from desperation suspects feel as they endure lengthy interrogations to police exploiting suspects' mental handicaps.

Warden draws parallels between the case of Fox and Hobbs. In May, officials announced DNA matched a sex offender, Scott Eby, who has been charged in Riley Fox's murder.

Fox and Hobbs were accused of killing their children, leaving the two fathers especially distraught and more vulnerable to what Warden called "the emotional and intellectual manipulation that interrogators are taught to use."

Hobbs' interrogation ran for close to 20 hours. Although both confessions were videotaped, the interrogations were not — even though a new law had been signed that required the videotaping of interrogations in murder cases. The law at that point had not gone into effect.

"You can't imagine you'd ever confess to something you didn't do," said Warden. "But at some point people simply lose their will to resist. That's the danger of prolonged interrogation."

What's more, police often have preconceived notions of how a father, say, should react to the death of a child. When a suspect's behavior strays from those notions, police may ratchet up pressure.

"Either you're crying too much or you're not crying enough," said Warden. "Both touch off suspicion. You can't win either way."

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Editorials

Editorial: Bad-cop database really a ‘remarkable’ step to accountability

By Albuquerque Journal Editorial Board

Tuesday, November 17th, 2020 at 12:02am

Credit is due to 2nd Judicial District Attorney Raúl Torrez for launching a new database that will allow the public to see if police officers in the Albuquerque metro area have a history of use of force, dishonesty or bias.

Torrez says the list of so-called Giglio officers should be published on the DA’s website early next year, likely becoming the first public database of its kind in the United States.

That’s a major step in the correct direction of transparency, with a real potential of rebuilding trust in our local police agencies while protecting the reputations of the many honest men and women in uniform.

As Jennifer Burrill, the vice president of the New Mexico Criminal Defense Lawyers Association, notes, officers who get into trouble are often allowed to resign and then move on to a different agency. As we play pass-the-bad-cop, the public, and new police agency, are often unaware an officer was ever involved in misconduct.

“So with a transparent database other departments can look and find out whether that person has issues that are not welcomed at their department and end the practice of officers with misconduct issues being passed around from department to department,” Burrill told the Journal.

The database will apply only to police officers in the Albuquerque metro area, which include the Albuquerque Police Department, the Bernalillo County Sheriff’s Office, New Mexico State Police, the Pueblos of Sandia, Laguna, Isleta and the UNM police departments.

We certainly hope the state’s dozen other DAs follow Torrez’s example.

And while the list will say if an officer had a disclosure of misconduct, it won’t say what the misconduct was. So there’s room for improvement there, too.

Torrez stresses the practice of making Giglio disclosures is not new. It’s based on a 1972 Supreme Court case, Giglio v. United States, that requires prosecutors to provide defense attorneys Giglio disclosures showing if their law enforcement witnesses are unreliable or biased.

The next step, making that information available to the public, is new, and it is groundbreaking.

In addition to informing the public, Torrez echoes Burrill in saying another big reason he’s implementing the database is to let police chiefs know if applicants have credibility issues. “Frankly if they do have that information, it might impact the willingness of those leaders to hire the officer, and if they do hire the officer what type of responsibilities they would give them,” Torrez says.

Representatives of the Law Offices of the Public Defender and the New Mexico Criminal Defense Lawyers Association, which routinely ask for Giglio disclosures at the beginning of every case, applauded Torrez’s initiative. Burrill even calls it “remarkable,” adding it will help restore trust with police officers and “hold everyone accountable.”

Shaun Willoughby, president of the Albuquerque Police Officers’ Association, has voiced concerns about a lack of confidentiality with the database, but especially given the city’s Department of Justice settlement agreement on constitutional policing, the risk at bad cops. Plus, Torrez predicts

the overwhelming majority of officers "are not going to have cause for concern and are not going to have anything that would result in a Giglio notice from our office."

We have to believe that's correct for the vast majority of our local law enforcement officers. Most officers not only have nothing to hide, they don't deserve to be tarred with the broad brush of police misconduct. And officers with a history of abuse of force, dishonesty or other misconduct shouldn't expect to serve with anonymity and not prove they have changed. The new database promises to give the public a much-enhanced ability to see who deserves to wear the uniform. And who does not.

This editorial first appeared in the Albuquerque Journal. It was written by members of the editorial board and is unsigned as it represents the opinion of the newspaper rather than the writers.

QUESTIONS AND ANSWERS FOR THE RECORD

Remarks: Representative Cori Bush
House Judiciary Committee
From Miranda to Gideon: A Call for Pretrial Reform

St. Louis and I thank you, Chairwoman, for convening this hearing.

St. Louis, like many other cities, condemns hundreds of people to suffer under inhumane conditions simply because they do not have the access and resources, they need to obtain their freedom.

Last month, 117 people at the St. Louis City Justice Center staged an uprising. In the days and weeks since I've heard from my constituents, many of them incarcerated within the facility, who have shared stories of water deprivation, inadequate food, harsh winter temperatures, and a concern for their health and safety during this pandemic. The average wait time for a preliminary hearing is 146 days.

St. Louis is also home to the "Workhouse," a $16 million dollar facility housing 210 people, 90% of whom Black and over 95% of them are awaiting trial. The truth is we have a pretrial crisis that preys on people with limited means. I want to deepen our understanding of the trauma, pain and violence of this system.

- **Mr. Graves, thank you for being here with us today. It is a privilege to be in this fight with you, and to be learning from you. Can you share with us the lasting impacts of your detention?**

Thank you, Mr. Graves. Your experience makes clear that we need to stop pretending that pretrial detention is about public safety.

A few days in jail can cost a person their life as they know it: lost jobs, fractured families, disrupted education or mental health treatment, and an increased risk of being unhoused. *During* the pandemic, a few days, even a few hours in jail, can cost many people their lives.

Professor Dharia, data supports the claim that those in pretrial detention return to court when they are provided with the community support to help them appear in court. Rather than subject people to cash bail and detention when cash bail is unaffordable, people should be provided with text reminders, transportation, housing, childcare, employment, substance use treatment and other community support they may need.

- **How can the federal government incentivize states and localities to eliminate their cash bail systems and instead support services that ensure people return to court?**
- **During the pandemic, some state and local governments - like in California - have reduced their jail and pretrial populations to prevent the spread of infection by reducing and in some instances eliminating cash bail. How can the federal government encourage large-scale bail reform to continue reducing jail populations during and post-pandemic?**

This is the moment. This is our work to complete, our assignment unto liberation. This fight is in our hands.

Thank you and I yield back.

Dear Representative Bush,

Thank you for your questions and for the opportunity to provide some reflections and information in response. I agree that the issue of pretrial liberty is a critical one, and that the pandemic shined a bright light on the reality that jails do not improve public safety and, in fact, undermine it.

With respect to all reform in this area, and particularly important as the federal government considers the role it can play in encouraging local change, it is imperative that, as we seek to dismantle the system of mass incarceration that we have built, we are careful not to create new, carceral structures in its place and are truly looking to address the root issues. The federal government's own experience with pretrial detention offers a cautionary lesson in this regard. As you know, cash bail was essentially eliminated in federal court years ago. And yet, "the federal pretrial detention rate has skyrocketed since the Bail Reform Act (BRA) was enacted in 1984, rising from 19% in 1985 to 75% in 2019."[1] The rate of pretrial detention in federal court far outpaces that of the states.

The federal pretrial detention crisis illustrates that the elimination of cash bail is no panacea. Congress should not overlook the crisis of pretrial detention in federal cases, which this Subcommittee examined in November 2019.[2] In its oversight role, the Committee can also consider the role the Attorney General might play in addressing changes to current federal pretrial detention practices.[3]

With respect to state and local reform, by implementing standards for best practices and attaching those to federal grants with clear requirements for sustained rates of decarceration, the federal government can play a meaningful role not just in offering financial support but incentivizing meaningful changes. Congress may also have authority to require changes to state and local practices under the Constitution's Commerce Clause and under sections two and five of the Thirteenth and Fourteenth Amendments.

Most fundamentally, it is important to look to and to support expanded decriminalization, including for failures to appear; legislative efforts that narrow the net of detention-eligible offenses; reforms that do not allow for expanded use of electronic monitoring or other forms of surveillance; and reforms that do not rely on risk assessment tools that further entrench racial injustice. It is also important to take care not to use pretrial release to tether social services and supports to the criminal legal system. There is no doubt that communities across our country are

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[1] Alison Siegler and Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, The Champion (Journal of the National Association of Criminal Defense Lawyers), May 2020, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601230.

[2] *The Administration of Bail by State and Federal Courts: A Call for Reform*: Judiciary Committee of the House of Representatives, Subcommittee on Crime, Terrorism, and Homeland Security, November 14, 2019 (Testimony of Alison Siegler) (https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf).

[3] Alison Siegler and Kate M. Harris, *How Did the 'Worst of the Worst' Become 3 out of 4?*, N. Y. TIMES, February 24, 2021, available at: https://www.nytimes.com/2021/02/24/opinion/merrick-garland-bail-reform.html.

in critical need of such support. But we should provide it because we care about the health and well-being of our communities, not to facilitate criminal prosecution and proceedings, and not in a way that could result in carceral consequences.

Premal Dharia

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