No. 14-1535

IN THE
Supreme Court of the United States

GEORGE GEORGIOU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae the Center on the Administration of Criminal Law ("the Center"), respectfully submits this brief in support of Petitioner George Georgiou. The Center, based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy, and particularly focuses on prosecutorial power and discretion.

One primary goal of the Center's litigation practice is to identify cases in which exercises of prosecutorial discretion raise significant substantive legal issues. A guiding principle in selecting cases to litigate is to identify cases in which prosecutors exercised discretion to engage in overaggressive or unwarranted interpretations of the Constitution, statutes, regulations, or policies in a way that diverges from standard practices, raises fundamental questions of defendants' rights, or is a misuse of government resources in light of law enforcement priorities. The Center also defends exercises of prosecutorial discretion where the discretionary decisions comport with applicable law and stand-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* provided the parties at least ten days' notice of its intention to file a brief, and the required letters of consent have been lodged with the Clerk of the Court pursuant to Rule 37.2.

ard practices and are consistent with law enforcement priorities.

Amicus agrees with Petitioner that a writ of certiorari should be granted and submits this brief to elaborate why, in its view, the creation of an exception to prosecutors' disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), when the undisclosed evidence could have been discovered by the defendant through reasonable diligence would improperly burden prosecutors and threaten to erode respect for the criminal justice system.

The split among federal and state courts on the issue presented in this case is of particular concern to the Center. The present uncertainty over the existence of a due diligence exception to the *Brady* doctrine perpetuates inconsistencies in ways that are harmful to both defendants and prosecutors, and hampers the proper functioning of the criminal justice system. The Center believes it is very important that this conflict be resolved, and the resolution take proper account of the fundamental nature of the rights at stake and the importance of proper evidentiary disclosure to the functioning of the criminal justice system.

SUMMARY OF THE ARGUMENT

Prosecutors' duty under *Brady* to disclose exculpatory evidence to defendants is a core component of prosecutors' ethical duty to seek justice rather than victory. Nonetheless, many prosecutors fail to live up to the obligations that *Brady* imposes on them. Because of the public perception that prosecutorial misconduct is widespread, public confidence in prosecutors' integrity and the overall fairness of the criminal justice system is in decline.

The Third Circuit's recognition of a "due diligence" exception to *Brady* not only undermines defendants' constitutional right to due process, but also fosters conditions likely to further erode public confidence in the system. While a legal doctrine excusing *Brady* violations might appear to be an attractive option for prosecutors, in fact it harms both prosecutors and defendants. It muddies an otherwise clear ethical obligation to disclose exculpatory information, which is central to prosecutors' duty to seek justice. It burdens prosecutors by requiring speculation about information available to their adversaries through due diligence – a determination that prosecutors are ill-equipped to make for myriad reasons. By undermining defendants' confidence in the information they receive from prosecutors, it discourages plea bargaining, which is essential to the efficient functioning of today's criminal justice system. By undercutting public confidence in prosecutors generally, it hampers their ability to obtain the cooperation of witnesses and the trust of jurors. And ultimately, it undermines the public's interest in ensuring that the guilty are convicted and the innocent exonerated, because those outcomes depend on a robust

adversarial system in which both sides have actual knowledge of the material facts.

Experience shows that meaningful judicial oversight of *Brady* disclosures can lead to significant reforms that foster better supervision and training of prosecutors, and prevent future violations. By adding an extra layer of insulation to prosecutors' already expansive discretion, the recognition of a due diligence exception would unnecessarily complicate courts' ability to exercise the effective oversight needed to promote meaningful compliance with *Brady*.

ARGUMENT

This Court's review is necessary to clarify the law, protect defendants' rights in criminal proceedings, ensure necessary judicial oversight of *Brady* disclosures, and make needed progress toward restoring public confidence in prosecutors and the criminal justice system. For the reasons explained below, leaving the Third Circuit's decision uncorrected would do substantial damage to the fair and efficient administration of justice in the United States. The Center respectfully urges the Court to grant the Petition for Certiorari.

I. *Brady* Violations Have Become a Widespread and Serious Problem.

Under this Court's decision in *Brady v. Maryland*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In other words, under *Brady*, the due process clause imposes an affirmative duty on prosecutors to disclose material exculpatory evidence to criminal defendants. Arguably, "*Brady*'s announcement of a constitutional duty on prosecutors to disclose exculpatory evidence to defendants embodies, more powerfully than any other constitutional rule, the core of the prosecutor's ethical duty to seek justice rather than victory." Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007).

Ensuring that the promise of disclosure is realized in individual cases generally falls to the prosecutor.

See Brady, 373 U.S. at 87. While "prosecutors' disclosure obligations vary from jurisdiction to jurisdiction and derive from various sources," Jennifer Blasser, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1962 (2010), the *Brady* doctrine normally allows prosecutors a significant degree of discretion. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (noting that the Court's *Brady* jurisprudence "leav[es] the government with a degree of discretion"); *United States v. Brooks*, 966 F.2d 1500, 1504 (D.C. Cir. 1992) ("As has proved true of the other aspects of *Brady* jurisprudence, no formula defining the scope of the duty to search can be expected to yield easily predicted results."). Prosecutors thus exercise substantial control over the disclosures in criminal defendants' cases, and play an outsized role in fulfilling *Brady*'s constitutional guarantee.

Unfortunately, *Brady*'s promise of full disclosure often has not been realized in practice. In a recent frank opinion, Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit observed that "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend." *United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting from denial of reh'g en banc) (collecting cases). Some commentators are even more critical.[2]

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[2] *See, e.g.*, Gershman, *Litigating* Brady v. Maryland, at 531 ("Prosecutors have violated [*Brady*'s] principles so often that it stands more as a landmark to prosecutorial indifference and abuse (continued)

Empirical studies confirm that Chief Judge Kozinski's statement was no exaggeration. According to a study by the Veritas Initiative, prosecutors withheld or delayed disclosing favorable evidence in roughly one-third of the cases sampled. VERITAS INITIATIVE, MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES 38 (2014) (hereinafter "VERITAS"). Yet in 2001, "[a] nationwide study of all reported cases involving discipline for prosecutorial misconduct found only twenty-seven instances in which prosecutors were disciplined for unethical behavior that compromised the fairness of a trial." Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2095 (2010) (citing Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 751 tbl. VI, 753 tbl. VII (2001)); *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 975–77 (2009) (concluding that prosecutors rarely are disciplined for *Brady* violations). Recognizing a due diligence exception, and thereby increasing uncertainty about *Brady*'s

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than a hallmark of justice."); Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 274 (2006) (expressing similar sentiments); Joseph R. Weeks, *No Wrong Without A Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 836 (1997) (same); *see also United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[T]his court has been faced with annoying frequency with gamesmanship by some prosecutors with respect to the duty to disclose."), *cert. granted, judgment vacated sub nom. United States v. Pflaumer*, 473 U.S. 922 (1985).

scope, threatens to exacerbate these problems by suggesting judicial sanction for prosecutors' noncompliance.

II. The Third Circuit's Adoption of a Due Diligence Exception to Prosecutors' *Brady* Obligations Undermines Public Confidence in the Criminal Justice System.

Prosecutors occupy a vital and unique position within our criminal justice system. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)) ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'"). In their official capacity, prosecutors serve as "representative[s] . . . of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Notwithstanding the principled service of most prosecutors, public faith and confidence in the criminal justice system is remarkably low. A recent Harvard University poll found that roughly one-half of all young adult Americans had "little to no confidence that the justice system can operate without bias." Cara Tabachnick, *Poll: Young Americans Have "Little Confidence" in Justice System*, CBSNEWS.COM (April 30, 2015), http://www.cbsnews.com/news/poll-young-people-have-little-confidence-in-justice-system/; *see also Confidence in Institutions*, GALLUP (June 2-7, 2015), http://www.gallup.com/poll/1597/-confidence-institutions.aspx (finding that more than one-third of Americans have little or no confidence in the criminal justice sys-

tem). Minority respondents were even more skeptical. Tabachnick, *Poll: Young Americans Have "Little Confidence" in Justice System*. The level of public faith in prosecutors is also disheartening. Much of the public blames prosecutors for the failures of the criminal justice system. For example, a 2013 poll conducted by the Center for Prosecutor Integrity found that forty-three percent of Americans believed that prosecutorial misconduct is "widespread," while more than seventy percent believed it is also hidden and goes unpunished. *See* CENTER FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT (2013).

Public trust in the criminal justice system is necessary, lest it be viewed cynically as merely "a system for the disposition of disobedients and threats to the public welfare . . . not governed by principles of legitimacy, but . . . by constantly shifting guidelines of expedience that do little to constrain the unbridled discretion at its core." Markus D. Dubber, *Legitimating Penal Law*, 28 CARDOZO L. REV. 2597, 2604 (2007); *see also* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 486 (1988) (noting that procedural fairness in criminal cases impacts defendants' perception of fair treatment). A due diligence exception risks further undermining the legitimacy of prosecutors and the criminal justice system – at a time when such trust in both is dispiritingly low – by worsening severe systemic inefficiencies and validating the public's low regard for prosecutors.

A. Recognition of a Due Diligence Exception Undermines Public Confidence by Impeding the Ethical and Effective Prosecution of Criminal Cases.

Despite the adversarial nature of criminal proceedings, a prosecutor's paramount duty is to seek justice. "*Brady* and its progeny strike a careful balance between maintaining an adversarial system of justice and enforcing the prosecution's obligation to seek justice before victory." *Boss v. Pierce*, 263 F.3d 734, 743 (7th Cir. 2001). As this Court noted in *Brady*, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair . . . ." 373 U.S. at 87.

Disclosing exculpatory evidence helps to "justify trust in the prosecutor," and supplies legitimacy enabling the prosecutor to fulfill his or her mandate. *Kyles*, 514 U.S. at 439. By excusing failures to disclose *Brady* material that might be discovered through "reasonable diligence," *United States v. Georgiou*, 777 F.3d 125, 140 (3d Cir. 2015), the exception both weakens prosecutors' disclosure obligations and reduces transparency. In short, it undermines trust in prosecutors by minimizing their duty to disclose exculpatory evidence.

Diminished public confidence has a tangible impact on prosecutors' ability to investigate criminality, enforce the law, and protect communities. "Courts, litigants, and juries properly anticipate that 'obligations to refrain from improper methods to secure a conviction plainly resting upon the prosecuting attorney, will be faithfully observed.'" *Banks*, 540 U.S. at 696 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)) (internal alterations omitted). Defendants, witnesses,

jurors, and judges are all less likely to cooperate with prosecutors whom they feel are withholding evidence in order to succeed at trial. Indeed, every stage of a prosecution becomes more difficult when the fundamental legitimacy of the criminal justice system is called into question. "To work effectively, it is important that society's criminal process 'satisfy the appearance of justice' . . . ." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571–72 (1980) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

While a legal doctrine excusing *Brady* violations might, at first blush, appear to be an attractive option for prosecutors, further analysis reveals that a due diligence exception harms prosecutors as well as defendants. Prosecutors are disadvantaged in two distinct ways: first, the exception dilutes the absolute ethical duty imposed by *Brady*; and second, it forces prosecutors to speculate about the diligence of the defense when making disclosures.

1. The Purported Exception Dilutes an Absolute Ethical Duty Central to a Prosecutor's Pursuit of Justice.

Brady announced a constitutional norm designed to ensure the disclosure of exculpatory evidence and entrench an ethical duty on the part of prosecutors to seek justice, not wins. Prosecutors' legal obligations under *Brady* have also been translated into explicit ethical duties incumbent upon them as government attorneys. *See, e.g.*, Model Rules of Prof'l Conduct r. 3.8(d) (Am. Bar Ass'n 2015); *see also* Gershman, *Litigating* Brady v. Maryland, at 565 n.2. While *Brady* supplies a constitutional mandate, it is also emblem-

atic of the trust and responsibility the public places in prosecutors. Given the scope of their authority and discretion – and the importance of the duties with which they are charged – the public rightly expects prosecutors to go beyond legal technicalities and exercise sound and ethical judgment that complies not only with the letter, but also the spirit of the law. When prosecutors rise to this standard, they benefit along with the community. *See, e.g.*, Blasser, *New Perspectives on* Brady *and Other Disclosure Obligations*, at 1961 ("The most effective and ethical prosecutor's office is one where the leader sets a tone of ethical behavior, then hires and trains lawyers with good character who possess good judgment.").

The due diligence exception, however, dilutes that absolute ethical duty, which is central to the pursuit of justice and essential to ensuring fairness in criminal proceedings. The exception insulates prosecutors' decisions regarding disclosures. By weakening a prosecutor's obligation to disclose all material exculpatory evidence, it minimizes the fundamental importance of disclosure. And by imposing additional burdens on the defense, it obscures the prosecutor's higher duty to seek justice over tactical advantage. The exception thus reduces the salience of *Brady*'s ethical dimension, and makes it less likely that violations will be discovered.

When the "likelihood that a disclosure violation will be detected" decreases, "prosecutors are less likely to be deterred from engaging in intentional misconduct or from taking steps to ensure that they do not make unintentional mistakes." Barkow, *Organizational Guidelines for the Prosecutor's Office*, at 2094; *see also*

A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 4–7 (1999) (discussing the relationship between detection and deterrence). While a due diligence exception may provide an ephemeral advantage, "*Brady* reflects the Court's overriding focus on fairness in criminal trials, even where it is in tension with the traditional adversarial system." Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138, 146 (2012). Invoking the exception undermines the solemn constitutional, ethical, and moral obligations that *Brady* sought to enshrine.

2. The Purported Exception Forces Prosecutors to Speculate About the Diligence of the Defense.

The due diligence exception further undermines public confidence in prosecutors by encouraging prosecutors to engage in speculation for which they are ill-equipped. At its core, the due diligence exception assumes – mistakenly – that prosecutors "are always effective predictors of the scope of a defendant's due diligence." *Id.* at 163. In reality, prosecutors simply cannot predict with accuracy the extent or effectiveness of a defendant's investigatory efforts.[3] As such, the

[3] Indeed, the concept of "diligence" is problematic given that prosecutors possess significant informational advantages over defendants. *See United States v. Tavera*, 719 F.3d 705, 717 (6th Cir. 2013) (Clay, J., dissenting) ("A key promise of *Brady* is to remedy the persistent imbalance in resources and access that (continued)

exception rests on a flawed premise that forces prosecutors to speculate about the diligence of the defense with respect to crucial evidence. While prosecutors theoretically could disclose all *Brady* material despite the exception – and thus avoid speculation about the defendant's ability to obtain the evidence independently – the "epidemic" of *Brady* violations to date underscores the core problem with the exception itself. *See Olsen*, 737 F.3d at 631. Given the pressures on prosecutors to obtain convictions, granting them permission to withhold *Brady* material in some situations makes it more likely that they will.

One reason that prosecutors cannot adequately judge the diligence of the defense is that it is frequently unclear prior to trial what diligence is required with respect to issues that arise – even to the defense itself. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) (noting that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"). And prosecutors' perceptions of evidence inevitably are different from those of the defense. *Cf.* Barkow, *Organizational Guidelines for the Prosecutor's Office*, at 2098 (observing that because "prosecutors are ethically bound not to pursue a case if they believe a defendant is innocent . . . the prosecutor has

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favors the prosecution over the defense and for the courts to perpetuate that imbalance – whether directly caused by the government or not – seems to abdicate *Brady*'s promise."). An exception that turns on "diligence" may unfairly hold defendants accountable for their own – or worse, their lawyers' – failure to conduct an investigation beyond their means.

already decided that the exculpatory evidence does not undermine the guilt of the defendant"). Various cognitive biases – for example, confirmation bias, selection bias, belief perseverance, and the avoidance of cognitive dissonance – also may compromise a prosecutor's ability objectively to evaluate potentially exculpatory evidence in his or her case. *See* Fred Klein, *A View from Inside the Ropes: A Prosecutor's Viewpoint on Disclosing Exculpatory Evidence*, 38 HOFSTRA L. REV. 867, 880 (2010) ("As one scholar (and former prosecutor) has thoughtfully proposed, psychological factors such as confirmatory bias, selective information processing, and resistance to cognitive dissonance inherently lead to Brady violations even by the most ethical of prosecutors."); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593-1601 (2006); *see also United States v. Bagley*, 473 U.S. 667, 702 (1985) (Marshall, J., dissenting) ("The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his judgments into question.").

Nevertheless, "the prosecutor, in deciding whether or not to disclose, will have to guess before trial whether the nondisclosure is likely to be deemed material when a reviewing court considers it after the trial." Barkow, *Organizational Guidelines for the Prosecutor's Office*, at 2098. "The prosecutor thus has to guess what the overall record in the case will be in order to estimate the significance of an individual piece of evidence." *Id.* And the prosecutor must further

speculate as to whether reasonably diligent defense counsel will uncover the evidence absent disclosure.

Anticipating the extent of the defense's diligence with any sort of accuracy is an impossible task, particularly for a defendant's adversary. As the court observed in *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005):

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).

Id. at 16. Prosecutors are not equipped to make determinations regarding the diligence of the defense with respect to any of these variables, let alone all of them at once.

Moreover, any assumptions that the prosecutor makes are likely skewed by his or her experience with "[t]he superior prosecutorial investigatory apparatus." *Tavera*, 719 F.3d at 712. Defense counsel frequently operate with far fewer resources and without inherently coercive powers that prosecutors take for granted. *See* Brian P. Fox, Note, *An Argument Against Open-File Discovery in Criminal Cases*, Note, 89 NOTRE DAME L. REV. 425, 427 (2013) (noting that in "eighty to ninety percent of criminal cases where the defendant is indigent, . . . the court-appointed defense counsel is operating under strict resource constraints"). Even if prosecutors could make accurate predictions, having spent a significant period of time building a case against the defendant, they would likely assume that the accused will easily discover the same evidence that the prosecution has obtained. But that is rarely true since "the prosecution has the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology such as wiretaps of cell phones." *Tavera*, 719 F.3d at 712. It is, therefore, both unfair and unrealistic to expect prosecutors to speculate accurately about the defense's investigation. *Cf. Amado v. Gonzalez*, 758 F.3d 1119, 1136–37 (9th Cir. 2014) ("Especially in a period of strained public budgets, a prosecutor should not be excused from producing that which the law requires him to produce, by pointing to that which conceivably could have been discovered had defense counsel expended the time and money to enlarge his investigations.").

Prosecutors cannot be expected to make conclusions about the evidence in a case from the standpoint of the defense. "[P]rosecutors receive only incomplete pic-

tures of their cases," and they "are particularly vulnerable to distortions based on the types of information to which they have access." Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 329 (2006). Indeed, several courts already recognize that prosecutors are ineffective at speculating about these issues when making materiality determinations under *Brady*. *See* Christopher Deal, Note, 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, 1800–05 (2007). A due diligence exception requires prosecutors to speculate on issues outside his or her knowledge in order to determine whether exculpatory evidence must be disclosed. The Court in *Brady* did not intend to create this constitutional guessing game, and prosecutors are disadvantaged when forced to make such a gamble.

B. Recognition of a Due Diligence Exception Undermines Public Confidence by Impeding the Efficient Resolution of Criminal Cases.

The uncertainty introduced by a putative due diligence exception also impedes the efficient and expeditious resolution of criminal cases. As this Court has recognized, disclosing more information to defense counsel "may increase the efficiency and the fairness of the criminal process." *Strickler*, 527 U.S. at 283 n.23.

Efficiency is an important and legitimate goal in the administration of criminal justice. *See generally* Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. & CRIMINOLOGY 238, 239 (1966) (identifying one model of the criminal justice system as

being focused on efficiency). The need to handle criminal cases promptly has only grown as prison populations increase, case backlogs reach crisis levels, and the public increasingly takes note of the tragic inefficiency of the nation's criminal courts. *See, e.g.*, Michael Schwirtz & Michael Winerip, *New Plan to Shrink Rikers Island Population: Tackle Court Delays*, N.Y. TIMES (April 13, 2015) (noting that "[a]s of late March [2015], over 400 people had been locked up [in New York City] for more than two years without being convicted of a crime"). A due diligence exception to *Brady* disclosure compounds this public crisis.

Because of the heavy caseloads found in most criminal courts across the country, plea bargains have become the primary method of disposing of most cases. In 2013, for example, ninety-seven percent of all non-dismissed cases were resolved through plea bargaining. *See* Hon. Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE N.Y. REV. BOOKS (Nov. 20, 2014). Some commentators suggest that a widespread reduction guilty pleas would "crash" the criminal justice system. Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012). "To note the prevalence of plea bargaining is not to criticize it," however, as its "potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

The proper functioning of the plea bargaining system depends on both parties having enough information about the evidence to make informed decisions about the costs and benefits of a given disposition. *See,*

e.g., Fox, *An Argument Against Open-File Discovery in Criminal Cases*, at 430 ("Defendants can make informed decisions about whether to proceed to trial or plead guilty when they know the full weight of the evidence against them.") (internal citation omitted). Introducing additional obstacles to information-sharing between the prosecution and the defense is likely to impede this process and prolong the time required to resolve cases. As discussed above, the due diligence exception encourages prosecutors to withhold information from defendants – even if material and exculpatory – if the prosecutor feels that the defendant eventually can discover it with reasonable diligence. As a result, the exception reduces incentives among the prosecution and defense to collaborate.

Reducing the informational exchange among the parties prior to trial adversely affects the pre-trial resolution of cases through plea bargains. Indeed, numerous studies have demonstrated that plea bargaining is heavily influenced by the weight of the prosecutors' evidence against the defendant. *See* Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in Balance*, 28 GEO. J. LEGAL ETHICS 1, 33 (citing Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the "Shadow of the Trial" a Mirage?*, 28 J. QUANTITATIVE CRIMINOLOGY 437, 442 (2012)). A due diligence exception hampers the process of discovery for defendants and thus slows the pace at which cases can proceed. The recognition of a due diligence exception would also force defendants and their counsel to speculate about whether the government has in fact disclosed all favorable evidence. Since "counsel has a duty to make reasonable investi-

gations or to make a reasonable decision that makes particular investigations unnecessary," *Strickland v. Washington*, 466 U.S. 668, 691 (1984), such uncertainty hinders or discourages plea bargaining even in cases where a prompt resolution would be appropriate and in the best interest of both the defendant and the community.

Conversely, disclosure rules that increase defendants' confidence in the comprehensiveness of the prosecutor's disclosure and the evidence in the defendant's possession can be expected to encourage more expeditious resolutions. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 516 (2009) ("Defendants confronted with the evidence against them may be quicker to plead guilty if the evidence is strong, or to argue persuasively for dismissal if the evidence is weak, leading to the earlier resolution of cases and the elimination of unnecessary trials."). Moreover, "[w]ith greater faith in the goodwill of their adversaries, defendants might embrace the notion of fair play and be reluctant to instigate protracted discovery litigation for the sake of fishing for some unknown delicacy in the deep blue sea of the prosecution's files." Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1560 (2010). For similar reasons, the participants at a 2009 symposium, which "includ[ed] representatives from state and federal prosecutors' offices, defense lawyers, judges, legal academics, cognitive scientists, social psychologists, doctors, as well as members of the medical and corporate risk management fields," Blasser, *New Perspectives on* Brady *and Other Disclosure Obligations*, at 1961, all agreed "that prosecutors, other than in ex-

ceptional cases, should disclose relevant information, rather than making individual judgments about what particular information in their file is or is not useful to the defense." *Id.* at 1968; *see also* Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1371 n.309 (2012) (noting "general agreement among symposium attendees that justice is best served when defense counsel has information useful for case assessment, investigation, and trial as well as for client communication") (internal quotation marks omitted).

Conversely, if more comprehensive *Brady* disclosure instead leads defense counsel to believe that the defendant will prevail at trial, it may still facilitate a resolution by encouraging the prosecution to reconsider its demands. Prosecutors are not charged simply with securing convictions; they are expected to pursue justice in every case. *Brady*, 373 U.S. at 87 (noting that "[t]he United States wins its point whenever justice is done its citizens in the courts"); *Boss*, 263 F.3d at 743. Cases in which defense counsel is convinced, after a thorough review of the evidence, that the prosecutor cannot prove the defendant's guilt beyond a reasonable doubt are precisely the cases that *should* proceed to trial.[4] And in such instances, the quality of the proceedings will benefit substantially from the examination of all of the issues by counsel who are

[4] Few civil litigators would accept the loss of this competitive edge. "But criminal litigation is different, and one might reasonably expect [that] there should be less tolerance for gamesmanship." Gershman, *Litigating* Brady v. Maryland, at 532.

well-acquainted with all of the relevant evidence. *Cf.* Burke, *Revisiting Prosecutorial Disclosure*, at 516 ("Those cases that do proceed to trial may be litigated more efficiently because the defense attorney will have had an opportunity to identify the central issues in the case prior to trial.").

In short, the exception forces defense counsel to speculate about what the prosecutor has not disclosed and impedes the processes of discovery, information-sharing, and plea bargaining. These consequences are antithetical both to obtaining just outcomes in criminal cases and to the efficient functioning of the system as a whole. While it may afford some temporary tactical advantages to prosecutors, the due diligence exception ultimately hinders rather than helps prosecutors in their pursuit of justice. "When prosecutors betray their solemn obligations and abuse the immense power they hold, the fairness of our entire system of justice is called into doubt and public confidence in it is undermined." *Silva v. Brown*, 416 F.3d 980, 991 (9th Cir. 2005). The Court should not sanction an exception to *Brady* that encourages such an outcome.

III. Judicial Oversight of *Brady* Disclosures is Necessary to Promote Efficient and Ethical Prosecutions in Criminal Cases.

As demonstrated by the nationwide epidemic of *Brady* violations, *see supra* Part I, prosecutorial disregard of *Brady* obligations is all too prevalent. In *Kyles v. Whitley*, this Court suggested that, "anxious about tacking too close to the wind," unsure prosecutors will tend to "disclose a favorable piece of evidence."

514 U.S. at 439. If in fact "the prudent prosecutor will resolve doubtful questions in favor of disclosure," *Agurs*, 427 U.S. at 108, then prudence in criminal cases has waned. Many prosecutors are not, in fact, so concerned about approaching the *Brady* line that they err on the side of disclosure. And when courts excuse those violations on the basis of a due diligence exception, the public may be led to conclude that, in the words of Chief Judge Kozinski, "prosecutors don't care about *Brady* because courts don't *make* them care." *Olsen*, 737 F.3d at 631. Judicial oversight is necessary both to remedy *Brady* violations and to deter prosecutors from committing such abuses in the future.

Recognizing a due diligence exception reduces the likelihood that errant prosecutors will be held accountable for disregarding their *Brady* obligations. Indeed, the Veritas study cited previously found that courts invoking the due diligence exception to excuse *Brady* violations did so with roughly the same frequency that they acknowledged the abuses themselves. *See* VERITAS at 28. As a result, courts granted a *Brady* objection made by defense counsel in only ten percent of the cases sampled. *Id.* at 38. That striking finding means that *Brady* violations went unaddressed and unremedied in two-thirds of the cases in which they were found.

A due diligence exception would add an extra and unnecessary layer of insulation to prosecutorial discretion. In jurisdictions that recognize the exception, courts will find a *Brady* violation only if they find that prosecutors withheld exculpatory evidence and the evidence itself was not reasonably available to the defense. Providing such insurance to prosecutors hardly

engenders effective deterrence or encourages responsible disclosure. And the additional degree of protection for prosecutors comes at the expense of defendants who are forced to assume the burden of proving both that they were not aware of the evidence withheld by the prosecutor and could not have discovered the evidence through "reasonable diligence." *Georgiou*, 777 F.3d at 140; *compare People v. Chenault*, 845 N.W.2d 731, 738, *reh'g denied*, 845 N.W.2d 518 (Mich. 2014) ("The *Brady* rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel.").

It need not be so. Meaningful judicial oversight of *Brady* disclosures can prevent future violations and promote systemic change within prosecutors' offices. As Professor Rachel Barkow notes, strong judicial responses to *Brady* violations can lead to significant reforms that foster better supervision and training. *See* Barkow, *Organizational Guidelines for the Prosecutor's Office*, at 2112–14 (describing the Department of Justice's response to unfavorable rulings in the prosecutions of former Alaska Senator Ted Stevens and Dr. Ali Shaygan). In particular, courts can apply "judicial pressure" that stimulates organizational reforms including new training programs, revised policies, more oversight by senior lawyers, better internal auditing procedures, and improved lines of communication. *Id.* at 2113. Without judicial involvement, however, there is little to encourage a prosecutor's office to "take a closer look at its policies to deflect criticism and to ensure that it [i]s meeting its constitutional obligations." *Id.* at 2114. Rigorous review by courts is necessary to ensure that *Brady*'s disclosure requirements

are scrupulously observed and the public's confidence in the administration of justice restored.

CONCLUSION

For the reasons stated above, the Center as *amicus curiae* respectfully urges the Court to grant Mr. Georgiou's petition for a writ of certiorari.

Respectfully submitted,

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Office of the Solicitor General

The Solicitor General

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July 22, 2015

Helen V. Cantwell
Debevoise & Plimpton, LLP
919 Third Avenue
New York, NY 10022

Re: Georgion v. United States, Sup. Ct. No. 14-1535

Dear Ms. Cantwell:

As requested in your letter of July 13, 2015, I hereby consent to the filing of an amicus curiae brief in the above-captioned case on behalf of the Center on the Administration of Criminal Law.

Very truly yours,

DONALD B. VERRILLI, JR.
Solicitor General

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE UNITED STATES

No. 14-1535

----------X

GEORGE GEORGIOU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

----------X

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Mariana Braylovskiy, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Amicus Curiae.*

That on the 27th day of July, 2015, I served the within *Brief of the Center on the Administration of Criminal Law as Amicus Curiae in Support of Petition for a Writ of Certiorari* in the above-captioned matter upon:

Neal Kumar Katyal
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by depositing three copies of same, addressed to each individual respectively, and enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by the United States Postal Service, via Regular Mail.

That on the same date as above, I sent to this Court forty copies of the within *Brief of the Center on the Administration of Criminal Law as Amicus Curiae in Support of Petition for a Writ of Certiorari,* with Consent Letter, through the United States Postal Service by Express Mail, postage prepaid.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of July, 2015.

Mariana Braylovskiy

Sworn to and subscribed before me this 27th day of July, 2015.

Elias Melendez

Elias Melendez
Notary Public, State of New York
No. 24-4799601
Qualified in Kings County
Commission Expires Aug. 31, 20

260648

SUPREME COURT OF THE UNITED STATES

No. 14-1535

----------X

GEORGE GEORGIOU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

----------X

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 5,994 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 27, 2015.

Mariana Braylovskiy

Sworn to and subscribed before me
this 27th day of July, 2015.

Eli Melendez

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