No. 07-30443

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN THOMPSON,

Plaintiff-Appellee,

v.

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; EDDIE JORDAN, in his official capacity as Assistant District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Louisiana

BRIEF FOR *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF APPELLEE

Anthony S. Barkow
CENTER ON THE
ADMINISTRATION OF
CRIMINAL LAW
New York University School of Law
110 West Third Street
New York, New York 10012
Telephone: (212) 998-6612

Martin J. Siegel
LAW OFFICES OF
MARTIN J. SIEGEL, P.C.
Bank of America Center
700 Louisiana, Suite 2300
Houston, Texas 77002
Telephone: (713) 226-8566

ATTORNEYS FOR *AMICUS CURIAE*
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in 5th Circuit Rule 28.2.1, have an interest in the outcome of this case. This representation, supplemental to those of the parties and *amici* who have already appeared, is made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Center on the Administration of Criminal Law
   Amicus Curiae

2. Anthony Barkow
   Executive Director of and attorney for Amicus Curiae *Center on the Administration of Criminal Law*

3. Martin J. Siegel, Law Offices of Martin J. Siegel, PC,
   Attorney for Amicus Curiae *Center on the Administration of Criminal Law*

Martin J. Siegel
Attorney for *Amicus Curiae* Center
on the Administration of Criminal Law

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law ("the Center"), respectfully submits this brief in support of Appellee John Thompson. The Center, based at New York University School of Law, is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy. One best practice supported by the Center is ongoing training and continuing legal education for prosecutors on the important matters that regularly arise in the performance of their duties, such as the government's disclosure obligations under the United States Constitution and applicable rules.

The Center's litigation program, which consists of filing briefs in support of both the government and defendants, seeks to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important cases in state and federal courts throughout the United States. The Executive Director of the Center, Anthony S. Barkow, is a former federal prosecutor who worked for many years in two United States Attorneys' Offices and in the United States Department of Justice in Washington, D.C.

In this brief, the Center has particularly sought to include published commentary from former prosecutors about the analytical and ethical challenges posed by compliance with *Brady* and the need for *Brady*-related training, since this appeal focuses in part on the claimed, objective obviousness of the disclosure obligation faced by Thompson's prosecutors. Specifically, the Court has directed to the parties to address "whether it would be obvious or self-evident to law-school educated, practicing criminal law attorneys that there was a *Brady* obligation to disclose the blood evidence to Thompson such that the district attorney could not be deliberately indifferent in failing to further train prosecutors on this application of *Brady*." Letter to Counsel from Charles R. Fulbruge III, dated March 18, 2009. The Center's brief focuses exclusively on this question and believes the correct answer is "no."

The Center believes that developments over the last several years confirm that prosecutors need more training about *Brady* and the government's disclosure duties, not less. *See* pp. 11-12, *infra*. Thus, the Center's appearance as *amicus curiae* in this case is prompted by its concern that an affirmative answer to the Court's question could be misconstrued as license to dispense with or deemphasize *Brady*-related training. The Center also believes that an affirmative answer may lead courts and prosecutors to

overvalue what little information students glean about *Brady* and disclosure duties in law school, or happen to absorb from colleagues while "on the job," and come to see these as adequate substitutes for sustained and effective training. Thus, the Center believes that its basic mission to improve the performance of prosecutors through the promotion of effective training is at stake in this important appeal.

INTRODUCTION

In 1941, Justice Frankfurter wrote that the prosecutor "wields the most terrible instruments of government."[1] One year earlier, then-Attorney General Robert Jackson addressed the nation's United States Attorneys and made much the same point, noting that "[t]he prosecutor has more control over life, liberty and reputation than any other person in America."[2]

In light of the considerable power bestowed on prosecutors – often young lawyers in the early stages of their careers – we should not simply assume they have picked up the necessary knowledge about and sensitivity to matters as important as the government's disclosure duties while in a law school class, or somewhere in the course of handling other cases. Rather,

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1 *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir. 1976) (Lumbard, J., concurring) (quoting Felix Frankfurter, Letter to the Editor, N.Y. TIMES, Mar. 4, 1941).

2 Robert H. Jackson, *The Federal Prosecutor*, 24 JRL OF AM. JUDICATURE SOC. 18 (June 1940).

this case illustrates the vital need to effectively and continually train prosecutors in the legal and ethical questions raised by *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent decisions.

The record in this case indicates that Thompson's prosecutors were confused about how to apply *Brady* to the blood evidence they ultimately suppressed prior to his trial for armed robbery. This uncertainty extended to other exculpatory information withheld by the government, revealing a global misunderstanding about *Brady*'s requirements. More generally, several facets of the decision to withhold or provide *Brady* evidence often trip up even experienced prosecutors. With effective and continuing training, however, *Brady* violations can be averted. In light of the necessity of *Brady*-related training, on the record in this case and in general, the claimed obviousness of the disclosure decision faced by Thompson's prosecutors is no reason to reverse the jury's verdict or the panel's decision.

ARGUMENT

I. The *Brady* Question at Issue Confounds Some Prosecutors

Brady and its progeny required production of the blood evidence at issue in this case. Nonetheless, this sort of *Brady* question appears to confuse some prosecutors – including, most importantly, those who prosecuted Thompson.

Initially, in rejecting the District Attorney's obviousness argument, the panel was surely correct to focus on Thompson's own prosecutors' testimony that *Brady* did not require disclosure of the blood evidence. As the panel opinion notes, the trial witness offered by the District Attorney's Office under Fed. R. Civ. P. 30(b)(6) took issue with whether the blood evidence had to be disclosed. *See* Decision at 28. That witness, Val Solino, apparently believes that, since the prosecutors did not know Thompson's blood type, the evidence need not have been provided. *See id.* Williams, one of the assistants who handled the Thompson prosecutions, also testified that the blood evidence did not have to be disclosed under *Brady* "because I didn't know what the blood type of Mr. Thompson was, and I didn't know what the blood type of Mr. LaGarde was." TT 393.[3] He also told LaGarde that the blood evidence was "inconclusive." Decision at 26. Thus, even facing civil liability and after state courts previously held suppression of the blood evidence to violate *Brady*, witnesses from the District Attorney's Office still voiced a contrary and erroneous view.

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[3] Although he testified that disclosure of the blood evidence was not required by *Brady*, Williams claimed at trial that he would have turned the lab report over anyway simply because it "was a written report that was generated in connection with this case." TT 393. Despite this testimony, however, Williams knew of the blood evidence but did nothing to ensure its production to Thompson.

It is equally telling that in 1999 – fourteen years after Thompson's prosecution and twelve years after the office codified its policy toward *Brady* – the prosecutors pondering whether to seek indictment of the assistants involved in Thompson's case still disagreed among themselves as to whether *Brady* compelled production:

> First of all... when I said that we have proof that this went, I believe we can prove this was – that Jim Williams knew about this, Mr. Connick and Mr. McElroy started to argue with us as to whether or not you have a duty to turn over that report. And Mr. Connick's point that he tried to make or persuade me about was that if you don't intend to use that piece of paper and you don't actually know what John Thompson's blood type is, then you don't have a duty to turn it over. And Mr. McElroy agreed. And I did not.

TT 986 (Glas testimony).

Similarly, Solino conceded at trial that the formal, written standard for *Brady* disclosures memorialized in the 1987 office manual would not have required production of the blood evidence. TT. 914-15. If defendants believed the blood evidence was obviously *Brady* material, surely the new office policy would have dictated its disclosure. In fact, as Thompson correctly points out, that policy was riddled with conceded legal error. *See* Appellees' Brf. at 15, 27-28.

The prosecutors' various other violations of and misunderstandings about *Brady* in this case also reinforce the overall conclusion that they found

proper construction of their constitutional disclosure obligation to be difficult. Additional evidence withheld from Thompson included eyewitness accounts not matching his appearance and information about a reward given to one government witness. *See* Appellees' Brf. at 11-12. The panel decision notes that "Defendants disputed among themselves" whether *Brady* applied to this evidence, Decision at 26 n. 15, and even now the District Attorney appears to argue that nondisclosure was appropriate. *See* Appellants' Brf. at 36-37. Actually, the evidence is classically the sort found to be covered by the *Brady* rule. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 443-44 (1995) (contrary or impeached eyewitness accounts covered by *Brady*); *U.S. v. Snell*, 899 F. Supp. 17, 22 (D. Mass. 1995) ("promises, rewards and inducements offered to government witnesses" is "classic *Brady* material"). At trial, Williams testified that information impeaching government witnesses is not covered by *Brady* and then, only moments later, changed his mind and agreed that it is. TT 381-82. Prosecutors' uncertainty could only have been magnified by the office's policy discouraging production of police reports and witness statements. TT 62-67. All this evidence of *Brady*-related confusion, internal disagreement and error supports the conclusion that the decision about whether to produce the blood evidence was not a simple one for Thompson's prosecutors.

Finally, the sheer number of assistant district attorneys who were aware of the blood evidence but failed to ensure its production is further proof that they did not regard the question as clear-cut. The record confirms that at least four prosecutors – Williams, Whittaker, Dubelier and Deegan – knew of the blood evidence. *See* Decision at 25-26; Appellee's Brf. at 8, 17. Yet none took steps to make certain it was given to Thompson. To believe these prosecutors all saw the *Brady* question as obvious is to conclude that all intentionally joined in the knowing violation of Thompson's rights and the likely commission of a crime. The more probable conclusion is that some or all simply misanalyzed the *Brady* question, in which case the matter was not so clear as to obviate the need for further training. The *amicus* brief filed by Orleans Parish Assistant District Attorneys refers to "the current generation of prosecutors dedicated to securing justice – zealously, faithfully, *and ethically*." Orleans Parish ADAs Brf. at 1 (emphasis added). Because the Center believes this description fits the vast majority of prosecutors throughout the United States, including those in Orleans Parish in 1985, the fact that so many assistants knew of the blood evidence indicates that the *Brady* question at issue here was not perceived as simple or obvious.[4]

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[4] Riehlmann's testimony about Deegan's 1994 statement to him regarding

Although the notion that *Brady* did not require disclosure of the blood evidence is mistaken, Thompson's prosecutors are not the only ones to draw that conclusion when faced with evidence of this sort. In *Smith v. Sec. of N.M. Dept. of Corrections*, 50 F.3d 801 (10th Cir.), *cert. denied*, 516 U.S. 905 (1995), the state argued that it had no obligation to test blood on clothing found in the car of a suspect other than the defendant, or disclose the existence of the clothes, because "any potential exculpatory value of the clothing is speculative since no testing was ever done." *Id.* at 832. The Tenth Circuit rejected the argument because, *inter alia*, "the clothes were never made available to the defense to allow it to conduct independent tests." *Id.* at 833. Thus, far from being obviously wrong, an argument very similar to the one at issue in this case was pressed by different prosecutors in *Smith* in a federal appeals court fourteen years after Thompson's conviction.

In sum, Thompson's prosecutors' confusion about *Brady's* requirement to disclose the blood evidence and police reports, and the fact that other prosecutors have made similar arguments when faced with similar

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suppression of the blood evidence does not undermine the conclusion that the nondisclosure likely did not result from a willful project to injure Thompson, given how many assistants knew of the evidence. As the panel correctly held, Riehlmann's account did not rule out a *Brady* decision based on legal mistake. *See* Decision at 24-25. Moreover, Deegan's statement to Riehlmann that the blood evidence "*might* have been exculpatory," TT 718, supports the conclusion that Deegan was unsure about whether *Brady* required disclosure.

evidence, confirm that prosecutors do not uniformly view the disclosure question at issue here as black and white. That is not to say they are correct to suppress such evidence – only that further *Brady*-related training by the District Attorney would not have been superfluous, and deliberate indifference liability under § 1983 could reasonably attach to the failure to train.[5]

II. Several Variables Cloud *Brady* Questions for Many Prosecutors

The mishandling of the blood evidence by Thompson's prosecutors is not an isolated occurrence. Many scholars, former prosecutors, and some courts have concluded that, decades after the *Brady* decision, disclosure

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[5] In arguing the obviousness of the blood evidence, the District Attorney relies on *Burge v. Parish of St. Tamany*, 187 F.3d 452 (5th Cir. 1999) and *Pineda v. City of Houston*, 291 F.3d 325 (5th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003). *See* Appellants' Brf. at 21-22. The panel was correct in distinguishing *Burge* on its facts. *See* Decision at 27, 29. *Pineda* is similarly inapposite. In *Pineda*, this Court found that the police officers were trained in Fourth Amendment law and that there was no evidence additional training was needed. *See* 291 F.3d at 333. The Court contrasted the case with *Brown v. Bryan County*, 219 F.3d 450, 457 (5th Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001), where the deputy at issue "received *no* training in proper pursuit and arrest techniques." *Id.* Here, as Thompson and the panel discuss at length, the jury had adequate grounds for finding Thompson's prosecutors received no *Brady* training at all, as in *Brown*. *See* Decision at 30-31. Moreover, *Pineda* does not hold that officials' "basic training" is always constitutionally adequate; in fact, the decision contains no discussion of the substance of the officers' basic training. *See* 291 F.3d at 334. Nor is this a case where the prosecutors were "adequately trained" but could have had "better or more. . ."training. Appellants' Brf. at 22 (quoting *Pineda*, 291 F.3d at 334). Here, again, the record entitled the jury to find that *no Brady* training occurred.

violations continue to occur. Recent studies of reversals and exonerations in thousands of capital and homicide cases found that unconstitutional suppression of evidence accounted for a significant percentage of the reversals.[6] One study of all 5,760 capital convictions in the United States from 1973-1995 found that illegal suppression of evidence accounted for 16% of reversals.[7] Another cited 381 homicide convictions reversed because of wrongfully suppressed evidence and/or untruthful witness testimony.[8] Hence one former prosecutor writes, "[t]housands of decisions by federal and state courts have reviewed instances of serious *Brady* violations, and hundreds of convictions have been reversed because of the prosecutor's suppression of exculpatory evidence."[9] In the last few months alone, two high-profile federal trials – the Ted Stevens prosecution and the

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6 *See* Elizabeth Napier Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L. J. 1450, 1454 (2006).

7 *See* Dewar, *supra* note 6 at 1454 (citing James S. Liebman, *et al.*, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000)).

8 *See* Dewar, *supra* note 6 at 1454 (citing Ken Armstrong and Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1)).

9 Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (Summer 2006); *accord* Andrew Smith, Brady *Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935, 1938 (November 2008) ("disclosure violations continue to occur at high rates at both the federal and state levels").

prosecution of W.R. Grace executives for asbestos poisoning in Libby, Montana – have been derailed by prosecutors' struggles with *Brady* evidence and resulting judicial sanctions.[10] Of course, because *Brady* violations involve non-production of evidence, it seems reasonable to assume that many erroneous disclosure decisions never come to light at all.[11]

The frequency of *Brady*-related error raises the question of why it occurs so often. As noted above, the Center believes most prosecutors are ethical public servants committed to ensuring a fair trial. In the Center's view, then, the overwhelming majority of *Brady* errors must be ascribed to something other than intentional misconduct, namely, the analytical and institutional challenges many prosecutors face in correctly applying *Brady*. Only with proper training can such formidable obstacles be overcome.

A. The Complexity of *Brady's* Materiality Standard

The legal analysis called for by a *Brady* decision is not often "obvious or self-evident." Fulbruge Ltr. In *U.S. v. Agurs*, 427 U.S. 97 (1976), the leading *Brady* decision at the time of Thompson's trial, the Court acknowledged that prosecutors have to "deal[] with an inevitably imprecise

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[10] *See* Mike Scarcella, *Sen. Stevens Trial Suspended Over Possible* Brady *Violation*, LEGAL TIMES, Oct. 2, 2008 at 1; Kirk Johnson, *Asbestos Prosecution Results in Acquittals*, N.Y. TIMES, May 9, 2009 at A10.

[11] *See, e.g.*, Dewar, *supra* n. 6, at 1452 ("most *Brady* violations pass undiscovered or without remedy").

standard." *Id.* at 108; *accord Kyles*, 514 U.S. at 439 ("judgment calls" inherent in *Brady* decisions); *U.S. v. Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999) (*Brady* standard "has not been clearly stated"). As one commentator writes:

> What exculpatory evidence consists of; what "material" means; under what circumstances exculpatory evidence must be disclosed – by whom – and when it must be disclosed; have been the subject of much confusion, revision, and debate among courts, lawyers, and academics.[12]

Even the District Attorney acknowledges that *Brady* often presented "gray areas" that left assistants in need of "more than a little help" making "subjective, sometimes difficult, decisions" about disclosure – though he then inexplicably argues that, despite this complexity, it is "improper" for Thompson to urge that additional training was needed. Appellants' Brf. at 30-31; *see also* Decision at 20-22 (quoting Connick calling *Brady* "an elastic thing" and other testimony regarding doctrine's "gray areas").

Perhaps the most vexing aspect of the *Brady* analysis is its materiality component. If the evidence in question is not material, disclosure is not required, even though it might be useful to the defense. *See, e.g., Agurs*, 427 U.S. at 108-13. Materiality, in turn, hinges on whether nondisclosure will result in deprivation of a fair trial considering all the proof adduced at trial.

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[12] Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 564 (2006).

See id. at 112-13. This standard requires the government to determine *before trial* whether the trial would be deemed fair *afterward*, when the record is complete and the verdict rendered, if the evidence is not disclosed. *See id.; accord, U.S. v. Bagley*, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

Requiring prosecutors to estimate the fairness and outcome of the trial before it actually occurs poses particular quandaries, starting with the prosecutor's lack of information about how the trial will develop at the time materiality must be considered. One court summarized the difficulty:

> Most prosecutors are neither neutral (nor should they be) nor prescient, and any such [materiality] 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).

U.S. v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005).

A second challenge is that, because the materiality standard requires weighing a single piece of potentially exculpatory evidence against all

inculpating evidence, the totality of which may seem especially powerful in the investigative stage, "the guiltier a defendant seems before trial, the less disclosure he is legally owed."[13] Because prosecutors typically believe in the guilt of those they charge and labor to convict – indeed, under ethics rules, they cannot proceed with the case otherwise – the materiality analysis can encourage under-disclosure. The prosecutor must "achieve a state of cognitive separation where she can simultaneously recognize that a piece (or pieces) of evidence objectively can create a reasonable doubt for the jury while still believing the case warrants prosecution."[14] This demands what one writer has called a "Zen-like state of... harmonizing," or, as another commentator put it, the objectivity of "saints."[15] "More mortal advocates will understandably view such evidence as a 'problem' that threatens to undermine the case."[16]

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13 Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1784 (December 2007).

14 Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 662 (Summer 2002).

15 Sundby, *supra* n. 14, at 662; 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, 843-44 (Fall 1997).

16 Weeks, *supra* n. 15, at 844.

It is quite possible that nondisclosure of the blood evidence in this case can be traced to the complexity of applying *Brady*'s materiality standard. Thompson's prosecutors appeared to believe that the evidence's materiality would have been clear had they known Thompson's blood type at the time they made the disclosure decision. *See* p. 5 *supra*. Lacking such information, however, they seemed to struggle to assign value to the evidence – without which it could hardly be weighed against the other evidence they possessed inculpating Thompson. The most Williams would say of the blood evidence is that "it *might have*" established Thompson's innocence, TT 84 (emphasis added) – a level of probability apparently insufficient to exceed the threshold of *Brady* materiality in the minds of Thompson's prosecutors. Hence, Williams testified that he simply steered clear of any mention of blood at trial and thereby avoided the problem altogether. *See* Decision at 5, 26; *see also, e.g., Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992) (plaintiff stated § 1983 claim because some withheld evidence "not directly establishing the innocence of the accused" was "not of the sort that one would obviously turn over" without "training in the intricacies of *Brady*"), *cert. denied*, 532 U.S. 1007 (2001).

B. Institutional Pressures Faced By Prosecutors

The burden prosecutors face when forced to decide what evidence to produce to the defendant is compounded by a host of institutional pressures that are worth the Court's consideration before deciding on the obviousness of the blood evidence in this case. One of these is simply the nature of the adversary system, which places paramount emphasis on winning. Writing in 1957, Second Circuit Judge Jerome Frank noted the "peculiar dilemma" of the "reflective, conscientious prosecutor" assigned the task of safeguarding the defendant's rights while simultaneously fulfilling "another duty, that of convicting a criminal."[17] Given this unique duality not faced by defense lawyers freed, indeed enjoined, to focus exclusively on zealously representing their accused clients, prosecutors could "scarcely [be] blame[d]" for falling back on standard adversarial "wiles and stratagems."[18] *See, e.g., Schmitt v. True*, 387 F. Supp. 2d 622, 656 (E.D. Va. 2005) (chastising prosecutor who "seemed to regard the whole concept of *Brady* as a game"); *aff'd*, 189 Fed. Appx. 257 (4th Cir.); *cert. denied* 549 U.S. 1028 (2006). Similarly, Columbia Law School Professor Richard Uviller, a

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17 Jerome Frank and Barbara Frank, NOT GUILTY, 233 (1957).

18 Frank, *supra* note 17, at 233.

former assistant district attorney who admits regarding prosecutors as "the flower of the bar," cautioned:

> Young assistants think of themselves primarily as advocates. The case they make, or (more likely) inherit from a law enforcement unit, is cast immediately as a trial scenario. It is refined and amplified – as it usually requires – in preparation for exposure to a jury. In this posture, of course the Assistant cares a good deal more for supplementary information that fortifies the case against the defendant than new data that calls his thesis into question...
>
> [E]ven the best of prosecutors – young, idealistic, energetic, dedicated to the interests of justice – are easily caught up in the hunt mentality of an aggressive office.[19]

Winning defuses internal office pressures as well as external public and political ones. "Prosecutors do not gain renown or reelection for losing cases."[20] A survey of 103 state and local prosecutors revealed that "a number of prosecutors view their primary function in terms of conviction and punishment," and that the "conviction rates of prosecutors are used as a measurement of success at prosecutorial work."[21] Highly publicized cases like the murder for which Thompson was prosecuted, which appeared on the

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[19] H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1700, 1702 (2000).

[20] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 732 (April 1987).

[21] George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 99, 121-22 (1975).