ORAL ARGUMENT NOT YET SCHEDULED

No. 15-5051

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Association of Criminal Defense Lawyers,
Plaintiffs – Appellants

v.

Executive Office for United States Attorneys, *et al.*,
Defendants – Appellees

On Appeal from the United States District Court
for the District of Columbia (Judge Colleen Kollar-Kotelly)

BRIEF OF *AMICI CURIAE* THE CONSTITUTION PROJECT AND THE INNOCENCE PROJECT IN SUPPORT OF APPELLANT NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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July 22, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

LIST OF PARTIES AND AMICUS CURIAE

Appellant is the National Association of Criminal Defense Lawyers. Appellees are the Executive Office for United States Attorneys and the United States Department of Justice. The *Amici Curiae* in support of Appellant are The Constitution Project and the Innocence Project.

RULINGS UNDER REVIEW

The District Court ruling being appealed is United States District Judge Colleen Kollar-Kotelly's December 18, 2014 Order granting the Executive Office for United States Attorneys' motion for summary judgment (Civil Action No. 14-00269-CKK).

RELATED CASES

Amici are not aware of any currently pending related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for *amici* states that The Constitution Project and the Innocence Project are non-profit corporations, have no parent corporations, and no publicly held company has a 10 percent or greater ownership interest in either group.

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STATEMENT OF INTEREST

Amicus curiae the Innocence Project,[1] is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has a specific focus on exonerating long-incarcerated individuals through the use of DNA evidence. It also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system—including identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions not only destroy innocent lives but also allow the actual perpetrators to remain free, the Innocence Project's work both serves as an important check on the awesome power of the state over criminal defendants and helps ensure a safer and more just society. As perhaps the Nation's leading authority on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld, are regularly consulted by officials at the federal, state and local levels. In this case, the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The Innocence Project and TCP certify pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(a) that all parties have consented to the filing of this *amicus curiae* brief.

Innocence Project seeks to present its perspective on the issue presented in the hope that the risk of future wrongful convictions will be minimized and that the salutary incentives to the proper functioning of prosecutors' offices will be maintained. Because the experience of the Innocence Project has demonstrated the unfortunate but substantial role violations of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), play in wrongful convictions, the Innocence Project has a significant interest in ensuring proper training, monitoring, and supervision of prosecutors with regard to *Brady* practices.

Amicus Curiae The Constitution Project (TCP) is a bipartisan, nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. TCP creates bipartisan committees and coalitions whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations concerning pressing constitutional and legal issues. TCP devotes itself to the protection of fundamental constitutional rights including the right to due process and the right to the effective assistance of counsel, and TCP frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest state courts, in support of the protection of these rights. TCP is particularly concerned with the

right of criminal defendants to receive favorable information pursuant to the Supreme Court's 1963 decision in *Brady v. Maryland* and its progeny.

Over the past fifteen years, TCP has convened a number of committees and issued several reports that include recommendations for "open-file" discovery in criminal cases. *See, e.g.*, Mandatory Justice: The Death Penalty Revisited (2005); Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel (2009). Most recently, in 2012, TCP drafted a Call for Congress to Reform Criminal Discovery, outlining changes that Congress should make to federal criminal discovery to prevent future *Brady* violations, including creating a uniform standard across federal districts for what prosecutors must disclose; requiring prompt disclosure of favorable information to the defense counsel unless a judge rules otherwise; and establishing strong penalties and remedies for non-disclosure. The Call for Congress to Reform Criminal Discovery thus far has been endorsed by almost 150 criminal justice system experts, including former federal prosecutors, judges, law enforcement officials and others. Pursuant to the recommendations within these reports, TCP advocates for the robust protection of due process rights pursuant to *Brady v. Maryland* and its progeny.

SUMMARY OF ARGUMENT

The Freedom of Information Act (FOIA) is meant to ensure that the government is accountable to the public. The public's interest in government

accountability is at its highest when important government functions are at issue. There is arguably no more important government function than the criminal prosecution of individuals – a process whereby the government seeks to take away an individual's liberty and, in some cases, his life. Because of the importance of that government function, there is a corresponding important public interest in ensuring that such prosecutions are fair, transparent, and just. At stake in this case is the public's ability to hold the federal government accountable in its execution of this most important government function. In determining whether the Department of Justice (DOJ) can continue to shield its criminal discovery Blue Book from public disclosure, the Court will decide whether DOJ can escape the very accountability that FOIA is intended to facilitate.

The public interest in this case cannot be overstated. This FOIA case arises against the backdrop of a public debate about whether national reforms are needed to enforce a prosecutor's obligation to disclose exculpatory evidence pursuant to *Brady v. Maryland*. While this due process requirement was first articulated by the Supreme Court more than fifty years ago, *Brady* violations – both intentional and inadvertent – continue to occur with alarming frequency. In fact, as one United States Circuit Judge recently declared, "*Brady* violations have reached epidemic proportions in recent years." *Brady* violations impose a terrible cost on individual defendants and their families, and on society as a whole, leading to wrongful

convictions, permitting actual perpetrators of crime to escape prosecution, and undermining public confidence in the fairness of our criminal justice system.

Because prosecutors frequently do not meet their obligations under *Brady* – and, when these *Brady* violations come to light, prosecutors typically refuse to acknowledge wrongdoing and argue that any error was harmless – a public debate is taking place about whether the rules governing criminal discovery must be reformed. Such reforms, which could take the form of amendments to the Federal Rules of Criminal Procedure or legislation, would be designed to ensure that exculpatory evidence is disclosed and subjected to adversarial scrutiny, rather than remaining buried in the files of prosecutors and police. These changes would also provide real public accountability for prosecutors.

DOJ has, to date, vigorously – and successfully – fought such reform efforts.[2] One part of DOJ's effort to stymie these reforms – and the part most pertinent to this appeal – has been DOJ's argument that reform is unnecessary

[2] As the Honorable Jed S. Rakoff put it, DOJ's decision to prevent consideration of changes to criminal discovery rules related to forensic science "reflects a determination by the Department of Justice to place strategic advantage over a search for the truth." *See* Spencer S. Hsu, *U.S. Judge Quits Commission to Protest Justice Department Forensic Science Policy*, Washington Post (Jan. 29, 2015), available at http://www.washingtonpost.com/local/crime/us-judge-quits-commission-to-protest-justice-department-forensic-science-policy/2015/01/29/cbed0a84-a7bb-11e4-a2b2-776095f393b2_story.html; http://www.washingtonpost.com/local/full-text-judges-protest-resignation-letter/2015/01/29/41659da6-a7e1-11e4-a2b2-776095f393b2_story.html.

because its internal Blue Book has fixed the problem. But while DOJ has purposely injected the *existence* of the Blue Book into the public debate, DOJ simultaneously refuses to disclose the *contents* of its Blue Book. The context in which DOJ created the Blue Book, in reaction to the public outcry following the unlawful prosecution of Senator Ted Stevens, and the manner in which DOJ has described and used the Blue Book, as a tool to educate prosecutors on their discovery obligations, are fatal to Appellees' argument that the Blue Book is exempt from disclosure under FOIA Exemption 5 or Exemption 7(E).

Amici's focus here is to ensure that the Court resolves the FOIA issues before it with a proper regard for the backdrop in which those FOIA issues arise. Simply put, while FOIA is not a tool for criminal discovery, it is also not a means to shield DOJ's discovery policies from the public's legitimate interest in understanding and debating those policies, particularly when DOJ itself has injected these materials into the public debate of discovery reform. This Court should not allow the Freedom of Information Act – which is designed to inform public debate by providing the public access to materials created by its government on issues of public import – to be circumvented in such a fashion. Nothing in the text or the spirit of that law sanctions withholding information from the public under these circumstances.

ARGUMENT

I. THE DEPARTMENT OF JUSTICE HAS A HISTORY OF DISCOVERY VIOLATIONS BEFORE AND AFTER THE *STEVENS* CASE

A. Despite the Promise of *Brady* and Its Progeny, Discoverable Information is Frequently Withheld from the Defense

Amici have sought to appear in this case to ensure that the FOIA issues before the Court are not decided in a vacuum; resolving this FOIA case requires a thorough understanding of the *Brady* rule, the dramatic impact violations of that rule inflict on individuals, families and society, and the recent focus of public debate that has resulted from these violations. In *Brady v. Maryland*, the Supreme Court held that suppression by the prosecution of material evidence favorable to a person accused of a crime violates the due process requirement of the Constitution. 373 U.S. 83, 87 (1963). The Court went on to say:

> 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. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . . .

Id. at 87-88 (citations omitted). In a series of cases decided in the decades after *Brady*, the Supreme Court expanded and defined the scope of the *Brady* holding.

For example, in *Giglio v. United States*, the Court held that evidence that would impeach a government witness's credibility falls within the favorable evidence that must be provided to the defense. 405 U.S. 150 (1972). And in *United States v. Bagley*, 473 U.S. 667 (1985), the Court articulated the materiality requirement in the *Brady* doctrine. *See generally* Robert M. Cary, Craig D. Singer & Simon A. Latcovich, *Federal Criminal Discovery* 13-28 (2011) (summarizing *Brady* and the related cases decided thereafter).

Despite this constitutional right to favorable evidence guaranteed to criminal defendants, there is a long history of prosecutors failing to meet their constitutional obligations. *See, e.g.*, *United States v. Triumph Capital Grp., Inc.*, 544 F.3d 149 (2d Cir. 2008) (finding *Brady* violation when the government failed to disclose notes taken by an FBI Special Agent during an attorney proffer); *United States v. Aviles-Colon*, 536 F.3d 1 (1st Cir. 2008) (finding *Brady* violation and ordering convictions and sentence vacated where government failed to release two DEA reports that would have undermined its claims of a conspiracy between codefendants); *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004) (finding *Brady* violation where government failed to disclose photographs from the scene, evidence that a witness had a history of filing false reports, evidence of another witness's bias, and benefits provided to other witnesses).

Brady violations have very real consequences, including the most serious consequence of all: wrongful conviction. *See, e.g.*, *Connick v. Thompson*, 131 S. Ct. 1350, 1355 (2011) (after spending 14 years on death row, Thompson was exonerated one month before his execution based on the defense's discovery of a lab report that the prosecutors suppressed at trial); *Graves v. Dretke*, 442 F.3d 334 (5th Cir. 2006) (finding prosecutor's *Brady* violations misconduct at trial "egregious" in prosecution that resulted in death sentence); *see also* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wisc. Law Rev. 399, 400 (2006) (citing studies that revealed hundreds of homicide convictions reversed due to prosecutorial misconduct and concluding that "prosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct"). Moreover, there is no way to know how many cases with *Brady* violations occur each year that never get discovered and how many innocent people are convicted as a result. These miscarriages of justice underscore the need for transparency and comprehensive discovery rules.

B. The *Stevens* Case Revealed Widespread and Systemic Discovery Abuses at the Highest Levels of the Department of Justice

While *Brady* violations have long been discussed and many have led to calls for reform, the high-profile prosecution of the late Senator Ted Stevens in 2009 again brought this issue to the public's attention and galvanized public debate over reform efforts. On July 29, 2008, the Department of Justice indicted United States Senator Ted Stevens, alleging that Senator Stevens had failed to disclose on his Senate Financial Disclosure Forms a number of benefits and things of value he received between May 1999 and August 2007. *See* Indictment, *United States v. Stevens*, No. 08-cr-0231-EGS (D.D.C. May 29, 2008), ECF No. 1. At his arraignment two days later, Senator Stevens, who was running for re-election, invoked his right to a speedy trial, hoping to clear his name before the November election. *Id*. Order at ECF. No. 3. The government did not oppose a speedy trial date, and trial commenced on September 22, 2008. The case was tried and supervised by a number of DOJ's most experienced and senior prosecutors. The lead trial counsel, Brenda Morris, was the Principal Deputy Chief of the Public Integrity Section (PIN).[3] Throughout the trial, she reported to and worked closely

[3] *See, e.g., Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order dated April 7, 2009* ("Schuelke Report") at 3-4, *In re Special Proceedings*, No. 09-mc-00198-EGS, (D.D.C. Nov. 14, 2011) ECF No. 84.

with her supervisor, William Welch, the Chief of PIN, and the Assistant Attorney General for the Criminal Division, Matthew Friedrich, and his Principal Deputy, Rita Glavin. *Id*. Those individuals supervised not only Ms. Morris, but also the rest of the trial team, including two other experienced PIN attorneys and two seasoned Assistant U.S. Attorneys from Alaska. *Id*.

Despite the seniority and experience of the prosecutors and their supervisors, the pretrial and trial proceedings in the *Stevens* case were plagued by repeated instances of prosecutorial misconduct that at the time the prosecutors claimed were innocent mistakes. As the trial judge, the Honorable Emmet G. Sullivan, later wrote:

> Frequently during the trial, the Court was presented with persuasive arguments by the defense that the case should be dismissed or a mistrial declared because of prosecutorial misconduct.
>
> ***
>
> In response to those arguments, the [prosecutors] repeatedly responded that the mistakes were 'unintentional,' 'inadvertent,' and/or 'immaterial.' For example, when the government failed to produce the exculpatory grand jury testimony of prospective government witness Rocky Williams, the prosecutors claimed that the testimony was immaterial. When the government sent Mr. Williams back to Alaska without first advising the defense or the Court, the prosecutors asserted that they were acting in 'good faith.' When government counsel told the Court that the government's key witness, Bill Allen, had not been re-interviewed the day before the hearing on its *Brady* disclosures, this was a 'mistaken understanding.' When the government failed

> to turn over exculpatory statements from Dave Anderson, another government witness, the prosecutors claimed that the statements were immaterial. When the government failed to turn over a grand jury transcript containing exculpatory information, the prosecutors claimed that it was 'inadvertent.' When the government used 'business records' that the government knew to be false, the prosecutors said that it was unintentional. When the government failed to produce the bank records of Bill Allen and then surprised the defense at trial with Bill Allen's check, it claimed that this, too, was immaterial to the defense.

In re Special Proceedings, 842 F. Supp. 2d 232, 242-43 (D.D.C. 2012) (internal citations omitted).

Based on the prosecutors' representations, Judge Sullivan did not dismiss the case or declare a mistrial. *Id*. at 243. Following a five-week trial, the jury found Senator Stevens guilty. However, within weeks, one of the FBI agents who had worked on the *Stevens* case filed a whistleblower-styled complaint alleging misconduct on behalf of the prosecutors and the lead FBI agent on the case. *See, e.g.*, *United States v. Stevens*, 715 F. Supp. 2d 1, 2 (D.D.C. 2009). This led to a series of post-trial hearings; at one such hearing, Judge Sullivan held three of the prosecutors in civil contempt for failure to disclose documents to the defense despite a court order to do so. *See, e.g.*, *In re Contempt Findings in U.S. v. Stevens*, 663 F.3d 1270, 1273 (D.C. Cir. 2011). At that point, Attorney General Eric Holder, who had recently assumed office, appointed a new team of prosecutors. *See, e.g.*, Schuelke Report at 1.

Almost immediately, the new team of prosecutors discovered that the previous prosecutors had committed *Brady* violations and within weeks the Attorney General took the extraordinary step of moving to set aside the verdict and dismiss the indictment. *Id*. Judge Sullivan granted the government's motion, but also appointed Henry F. Schuelke III "to investigate and prosecute such criminal contempt proceedings as may be appropriate" against the six prosecutors who conducted the investigation and trial of Senator Stevens. *Id*.

Mr. Schuelke's investigation lasted two years, required that he and his colleague, William Shields, review and analyze over 128,000 pages of documents and conduct depositions of prosecutors, agents and other individuals involved in the investigation and trial of Senator Stevens. *Id*. At the conclusion of their investigation, Messrs. Schuelke and Shields reported to Judge Sullivan that the "investigation and prosecution of U.S. Senator Ted Stevens were permeated by the systemic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." *Id*. Their investigation "found evidence which compels the conclusion, and would prove beyond a reasonable doubt, that other *Brady* information was intentionally withheld from the attorneys for Senator Stevens[.]" *Id*. at 28.

C. In the Wake of the *Stevens* Case and Despite the Department of Justice's Internal Initiatives, Discovery Violations Continue to Occur

Not surprisingly, the dramatic events that led DOJ to move to set aside the verdict and dismiss the indictment of Senator Stevens and DOJ's own unqualified admissions that the trial team had committed *Brady* violations, *see* Transcript Hrg at 13, *United States v. Stevens*, No. 08-cr-231-EGS, (D.D.C. Apr. 7, 2009), ECF No. 374, received significant publicity. In response, DOJ promised reforms and initiatives that it claimed would prevent another *Stevens* debacle.[4]

Unfortunately, however, in the six years since the *Stevens* case, discovery violations in federal prosecutions have continued. In fact, as one United States Circuit Judge recently wrote (joined by four others): "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend." *See United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kosinski, C.J., dissenting from the order denying petition for rehearing en banc) (citing cases). *See also United States v. Morales*, 746 F.3d 310,

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[4] *See, e.g.*, Jesse Greenspan, *New DOJ Position to Oversee Discovery Initiatives* LAW360, (Jan. 19, 2010), available at http://www.law360.com/articles/144191/new-doj-position-to-oversee-discovery-initiatives. *See also Ensuring That Federal Prosecutors Meet Discovery Obligations: Hearing Before the S. Comm. On the Judiciary*, 112th Cong. 9-11 (2012) (statement of James M. Cole, Deputy Attorney General) available at http://www.judiciary.senate.gov/download/testimony-of-cole-pdf .

311 (7th Cir. 2014) ("One would think that by now failures to comply with [the rule that prosecutors have a duty to turn over upon request any material evidence that is favorable to the defense] would be rare. But *Brady* issues continue to arise. Often, non-disclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a 'reasonable probability of a different result.'") (internal citations omitted).

A non-exhaustive review confirms that indeed "*Brady* issues continue to arise." *See, e.g.*, *United States v. Parker*, 2015 U.S. App. LEXIS 10760 (4th Cir. June 25, 2015) (vacating the defendant's conviction because federal prosecutors failed to disclose that key witness was under investigation by the SEC for fraud); *United States v. Mazzarella*, 784 F.3d 532, 538-40 (9th Cir. 2015) (finding *Brady* violations (but no prejudice) where federal prosecutors failed to disclose bias information for several government witnesses, including an informal promise of immunity and communications about potential employment with the FBI); *United States v. Tavera*, 719 F.3d 705, 714 (6th Cir. 2013) (vacating conviction based on *Brady* violations where federal prosecutors failed to disclose plainly exculpatory and material statements by government witness); *United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013) (finding *Brady* violation (but no prejudice) where federal prosecutors did not disclose proffer agreements with two government witnesses); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (concluding "that

the government violated its obligations pursuant to *Brady v. Maryland* . . . by withholding significant impeachment evidence relevant to a central government witness" and remanding for a new trial); *United States v. Mahaffy*, 693 F.3d 113, 133 (2d Cir. 2012) ("The government's failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with *Brady*."). *See also, e.g.*, Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, Washington Post (Apr. 16, 2012);[5] Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. Crim. Law & Criminology 415 (2010).[6]

Given these continued violations, it is not surprising that public debate over *Brady* reform is vigorous and on-going. DOJ has injected itself into that debate, and has done so by unilaterally and aggressively opposing reform, often pointing to its own purported "reforms," like the Blue Book, as the very reason why no

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[5] Available at http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html.

[6] Available at http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7353&context=jclc.

additional steps are necessary. Under these circumstances, the Blue Book is not exempt from FOIA under Exemption 5. The Blue Book, a manual designed to inform prosecutors of their discovery obligations and how to meet those obligations, was not created "in anticipation of litigation" for purposes of the work product doctrine. To the contrary, the Blue Book was created to reassure the public that prosecutors would meet their discovery obligations in all cases.

Similarly, the Blue Book cannot be kept from the public under Exemption 7(E) – in fact, such a conclusion would flip the exemption on its head. Exemption 7(E) permits an agency to withhold information where disclosure would risk circumvention of the law. Here, Appellant seeks access to the Blue Book as part of its efforts to hold DOJ accountable and ensure that DOJ itself is not circumventing the law (*Brady*) by hiding behind its own manual.

II. EVEN IN THE WAKE OF THE *STEVENS* CASE THE DEPARTMENT OF JUSTICE HAS REPEATEDLY AND VIGOROUSLY RESISTED ALL CRIMINAL DISCOVERY REFORM EFFORTS BY POINTING TO THE SECRET BLUE BOOK

A. The Department of Justice Has Opposed Efforts to Revise Federal Rule of Criminal Procedure 16

On April 28, 2009, three weeks after granting the government's motion to set aside the verdict and dismiss the indictment in the *Stevens* case, Judge Sullivan wrote to the Advisory Committee on Criminal Rules ("Committee") to urge the Committee to "once again propose an amendment to Federal Rule of Criminal

Procedure 16 requiring the disclosure of all exculpatory information to the defense."[7] In response to Judge Sullivan's letter, Judge Tallman, the Chair of the Committee, appointed a Rule 16 subcommittee and put the matter on the agenda for the Committee's October 2009 meeting.[8]

This was not the first time that the Committee had considered such an amendment. In fact, it began studying the advisability of such an amendment in 2003, long before the *Stevens* case. In 2007, after four years of discussion and consideration by the full Advisory Committee and two subcommittees, the Standing Committee considered, but voted not to publish for notice and comment, an amendment endorsed by the Rules Committee that would have mandated "open file" discovery of all exculpatory and impeaching information in the federal prosecutors' and investigative agencies' custody or control. *See* 2009 Advisory Committee Report at 2. The Standing Committee did not take action on the amendment due to DOJ's opposition. *See* October 2009 Agenda Book at 270.

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[7] *Advisory Committee on Criminal Rules Agenda Book* ("October 2009 Agenda Book"), United States Courts Rules & Policies 201-04 (October 13-14, 2009) at 201, available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-criminal-procedure-october-2009.

[8] *Memorandum Report of the Advisory Committee on Criminal Rules* ("2009 Advisory Committee Report"), United States Courts Rules & Polices (Dec. 11, 2009) at 2, available at http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-december-2009.

DOJ took the position that the proposed amendment would "upset the balance of interests in the criminal justice process." *See* 2009 Advisory Committee Report at 2. DOJ also argued that it was "important to allow time for the recent amendments to the United States Attorneys' Manual to have a demonstrable effect on the practice of federal prosecutors." *Id*. Therefore, the Standing Committee remanded the issue to the Advisory Committee for further consideration "at some future date after sufficient time had passed to assess the impact of those changes." *Id*.

Unfortunately, even in the wake of the *Stevens* case, DOJ once again vigorously opposed amending Rule 16.[9] During the Committee's consideration of the amendment, DOJ argued, in part, that, since the *Stevens* case, the Department had taken a litany of steps to "improve disclosure practice within the Department of Justice." April 2011 Agenda Book at 139. According to DOJ, these steps obviated the need for the proposed amendment. *Id.* at 140. The Blue Book was among the "steps" that DOJ cited in opposition to an amendment to Rule 16. *Id*. at 142. Ultimately, DOJ successfully defeated an amendment to Rule 16 and the

[9] *Advisory Committee on Criminal Rules* ("April 2011 Agenda Book"), United States Courts Rules & Policies at 129 (2011), available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-criminal-procedure-april-2011.

Advisory Committee declined to propose such an amendment for the Standing Committee's consideration.[10]

B. The Department of Justice Has Also Opposed Important Legislation that Would Help Ensure Access to Information Guaranteed to the Defense by the Constitution

DOJ has also injected the Blue Book into the Congressional debate over discovery reform. On March 15, 2012, in direct response to the events in the *Stevens* case and after DOJ defeated efforts to amend Rule 16, Senator Lisa Murkowski (R-AK), introduced the Fairness in Disclosure of Evidence Act of 2012. The bill, S.2197, would require prosecutors to turn over information favorable to the defense and provide penalties when prosecutors fail to do so. Senators from both parties co-sponsored the legislation.

On June 6, 2012, the Senate Judiciary Committee held a hearing – "Ensuring that Federal Prosecutors Meet Discovery Obligations" – and considered Senator Murkowski's legislation. Notably, Senator Murkowski recognized that an amendment to Rule 16 may have been preferable to legislation enacted by Congress, but that DOJ had successfully foreclosed that possibility.

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[10] *Memorandum: Report of the Advisory Committee*, United States Courts Rules & Policies, (2011), available at http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-criminal-procedure-may-2011.

> I have consistently said that Congress is perhaps not the most desirable of places to deliberate on *Brady* reform. Ideally, these issues would be sorted out by the Advisory Council on the Federal Rules of Evidence. The Justice Department would have us believe that the Advisory Council has considered *Brady* reform on its merits and then rejected it. But the legal press indicates that the Advisory Council's reform efforts have been abandoned as a direct result of the Justice Department opposition.

Remarks by Senator Lisa Murkowski before the United States Senate Committee on the Judiciary on June 6, 2012, S.Hrg. 112-933, Before the S. Comm. on the Judiciary, 112th Cong. 6 (2012) (statement of the Honorable Lisa Murkowski, U.S. Senator).[11]

Deputy Attorney General James M. Cole testified at the hearing,[12] insisting that "new rules are not necessary. What is necessary, and what the Department has been vigorously engaged in providing, since the *Stevens* dismissal, is enhanced guidance, training, and supervision to ensure that the existing rules and policies are followed." Mr. Cole then recited a number of DOJ "reform" efforts in the wake of the *Stevens* case, including the creation of the Blue Book in 2011, which,

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[11] Available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg93800/pdf/CHRG-112shrg93800.pdf.

[12] *Ensuring That Federal Prosecutors Meet Discovery Obligations: Hearing Before the S. Comm. On the Judiciary*, 112th Cong. 9-11 (2012) (statement of James M. Cole, Deputy Attorney General) available at http://www.judiciary.senate.gov/download/testimony-of-cole-pdf .

according to Mr. Cole, is available electronically on the desktop of every prosecutor and paralegal nationwide. *Id*. at 3.

C. The Department of Justice's Refusal to Share the Blue Book on the Basis of Attorney Work Product is Inconsistent With Its Public Position that the Blue Book Ensures Uniform Understanding Within the Department of Its Longstanding Discovery Policies and Procedures

In short, when publicly debating the merits of a rule amendment or legislation that would set out prosecutors' *Brady* obligations and provide accountability when prosecutors fail to meet those obligations, DOJ argued that reforms were unnecessary because DOJ already had policies and procedures like the Blue Book that accomplished those goals. Having injected the Blue Book into the public debate in this fashion, DOJ placed that governmental material directly into the heartland of information that FOIA was designed to make public. *See, e.g., U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) ("This basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' . . . indeed focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose.") (internal citations and quotations omitted).

Instead, DOJ is apparently attempting to use FOIA to distort the public debate by (1) making representations about the Blue Book that the public cannot

verify and (2) making representations to the District Court about the Blue Book that flatly contradict its public statements. In this litigation, DOJ told the District Court that the Blue Book:

> Encourages certain practices and discourages others; identifies factors prosecutors should consider in making particular decisions; describes the types of claims/tactics defense counsel raise/employ and provides advice and authority to counter those claims/tactics; evaluates the merits of arguments prosecutors can make; and illustrates with cases pitfalls for prosecutors to avoid, including arguments available in case prosecutors fall into those pitfalls.

Memorandum & Opinion at 8, *Nat'l Ass'n of Criminal Defense Lawyers v. Ex. Office for the U.S. Attorneys*, No. 14-cv-0269 (D.D.C. Dec. 18, 2014) ECF No. 28. The District Court agreed, finding that "the Blue Book is a ''how to' manual for building defenses and litigating cases under the [relevant discovery statutes] and discloses explicit agency strategy.'" *Id*. at 8 (quoting *Shapiro v. Dep't of Justice*, 969 F. Supp. 2d 18, 37 (D.D.C. 2013)). If this is an accurate description of the Blue Book, it is hard to imagine how it could be argued that the Blue Book accomplished what the proposed amendment to Rule 16 or the draft legislation set out to do – namely, enact uniform requirements for the production of *Brady* material.

The manner in which DOJ has been able to manipulate public debate by making representations about the contents of government materials, while making

different representations to shield those same materials from scrutiny, cannot be squared with the public policy interests that led to the passage of FOIA itself. *See, e.g.*, *The Washington Post Co. v. U. S. Dep't of Health & Human Servs., et al.*, 690 F.2d 252, 264 (D.C. Cir. 1981) (noting that the purpose of FOIA "is to permit the public to decide *for itself* whether government action is proper[,]" and establishes "'the right of the individual to be able to find out how his government is operating.'") (emphasis in original).[13]

The presence or absence of effective *Brady* training is something that the public has a right to examine and consider, and the public is entitled to do so itself, not by relying on DOJ representations. *See, e.g.*, *Connick v. Thompson*, 131 S. Ct. 1350, 1378-82 (Ginsburg, J. dissenting) (discussing inadequate training in which the senior prosecutors with responsibility to train junior prosecutors misunderstood *Brady*, there was no formal training, and the training manual contained a mere four sentences on *Brady* that were "notably inaccurate, incomplete, and dated.").[14]

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[13] Recognizing the importance of FOIA to our democracy, on his first full day in office President Obama instructed the heads of all executive departments and agencies that the "Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." *See Memorandum for the Heads of Executive Departments and Agencies*: *Freedom of Information Act*, WHITEHOUSE.GOV, https://www.whitehouse.gov/the_press_office/FreedomofInformationAct.

[14] In New Orleans, the effect of decades of inadequate *Brady* training is both indisputable and shocking. In nineteen cases challenging the criminal conviction,

(footnote continued on next page)

Nor should the District Court have resolved this issue without taking those important policy considerations into account. By injecting the Blue Book into the important public debate about *Brady* issues, at the highest levels of government, DOJ made clear that the Blue Book is exactly the sort of information that *must* be disclosed. If FOIA means anything, it must mean that government agencies cannot cite to secret governmental materials as part of the public debate on an issue, and then withhold those materials when the public asks to see them.

CONCLUSION

For decades, citizens have been wrongfully convicted based on intentional and unintentional *Brady* violations by federal prosecutors. These wrongful convictions take a tragic toll on the convicted individuals and their families,

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(footnote continued from previous page)
nine were found to have *Brady* violations and five of the thirty-six people put on death row during Henry Connick's tenure as District Attorney have been exonerated or pardoned. *State v. Anthony*, 776 So. 2d 376 (La. 2000); *State v. Bright*, 875 So. 2d 37 (La. 2004); *Brown v. Cain* 104 F.3d 744 (5th Cir. 1997); *State v. Cousin*, 710 So. 2d 1065 (La. 1998); *Deboue v. Cain*, No. 01-464 (E.D. La. Apr. 21, 2005); *see also State v. Deboue*, 552 So. 2d 355 (La. 1989); *State v. Deruise*, 802 So. 2d 1224 (La. 2001); *State v. Frank*, 803 So. 2d 1 (La. 2001); *State v. Harris*, 892 So. 2d 1238 (La. 2005); *James v. Whitley*, 926 F.2d 1433 (5th Cir. 1991); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *State v. Lacaze*, 824 So. 2d 1063 (La. 2002); *State v. Mattheson*, 407 So. 2d 1150 (La. 1981); *Monroe v. Butler*, 883 F.2d 331 (5th Cir. 1988); *State v. Smith*, 600 So. 2d 1319 (La. 1992); *Smith v. City of New Orleans*, 1996 WL 34136 (E.D. La. Jan. 29, 1996); *Louisiana v. Scire*, 1993 WL 192206 (E.D. La. May 28, 1993); *State v. Sullivan*, 596 So. 2d 177 (La. 1992); *State v. Thompson*, 825 So. 2d 552 (La. App. 4th Cir. 2002); *Ward v. Whitley*, 21 F.3d 1355 (5th Cir. 1994).

compromise the integrity of our criminal justice system, and severely undermine society's confidence in the fairness and efficacy of that system. The public is entitled to hold DOJ accountable in carrying out DOJ's constitutional obligation to prosecute criminal cases in a just and fair manner. The public is denied this ability to hold DOJ accountable when DOJ refuses to make transparent its training materials, policies, and procedures related to how its prosecutors meet or avoid their discovery obligations while simultaneously injecting those materials into the public debate on criminal discovery reform. *Amici* respectfully submit that the District Court's decision should be reversed.

July 22, 2015

Respectfully submitted,

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I hereby certify that on July 22, 2015, I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* THE CONSTITUTION PROJECT AND THE INNOCENCE PROJECT IN SUPPORT OF APPELLANT NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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