

No. 11-5987

In The
Supreme Court of the United States

JOHN FLOYD,

Petitioner,

v.

BURL CAIN, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
Orleans Parish Criminal District Court of Louisiana

**AMICI CURIAE FORMER STATE AND
FEDERAL PROSECUTORS BRIEF IN
SUPPORT OF PETITIONER**

Harry Rosenberg
Counsel of Record
Bryan Edward Bowdler
PHELPS DUNBAR LLP
365 Canal Street, Suite 2000
New Orleans, Louisiana 70130
(504) 566-1311
harry.rosenberg@phelps.com

*Counsel for Amici Curiae Former
State and Federal Prosecutors*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
FACTUAL BACKGROUND	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
I. The Fingerprint Comparison Results in this Case Were Exculpatory.....	7
II. Prosecutors—Not the Police— Should Make the Decision as to Full Disclosure of Evidence in Criminal Cases.	9
A. The Prosecutor has a Unique Role in Criminal Proceedings and Specifically in Disclosure of Evidence.	9
B. The Prosecutors in this Case Would Have Discharged Their Obligation.....	13
C. Police Must Not Prevent Prosecutors from Fulfilling the State’s Constitutional Obligation to the Defendant.....	15

D. Prosecutors' Offices Should
Adopt Procedures to
Ensure Law Enforcement
Inform Prosecutors of All
Exculpatory Evidence..... 16

CONCLUSION..... 26

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Berger v. United States</i> , 295 U.S. 78 (1935).....	11, 12
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	passim
<i>Giglio v. United States</i> , 405 U.S. 150 (1972).....	18
<i>In Re Jordan</i> , 913 So. 2d 775 (2005).....	12, 16
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	passim
<i>Moore v. Illinois</i> , 408 U.S. 786 (1972).....	7
OTHER AUTHORITIES	
<i>ABA Standards for Criminal Justice:</i> <i>Prosecution Function and Defense</i> <i>Function 4</i> (3d ed. 1993)	passim
<i>Convicting the Guilty. Report of the ABA</i> <i>Criminal Justice Section's Ad Hoc</i> <i>Innocence Committee to Ensure the</i> <i>Integrity of the Criminal Process</i> (2006).....	17, 19, 20
Federal Rule of Civil Procedure 26.....	7
Federal Rule of Civil Procedure 37.....	7
Federal Rule of Criminal Procedure 16	21
Federal Rule of Criminal Procedure 26.2	37

<i>Investigation of the New Orleans Police Department</i> , available at www.justice.gov/crt/about/spl/nopd-report.pdf (last visited September 23, 2011).....	14, 18
Louisiana Code of Civil Procedure art. 1442	7
Louisiana Code of Civil Procedure art. 1471	7
National District Attorney's Association, <i>National Prosecution Standards</i> (2d ed. 1991).....	12, 13
<i>United States Attorneys' Manual</i> , Title 9, § 5.001, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm (Jan. 4, 2010).....	passim

INTEREST OF *AMICI CURIAE*¹

Glenn W. Alexander, Joseph S. Cage, Jr., Todd S. Clemons, Billy J. Guin, Jr., Julian Murray, Ross Owen, Harry Rosenberg, Richard Simmons, Jason Waltman, and Donald W. Washington (the "*Amici*") are former federal and state prosecutors in Louisiana with, collectively, more than 380 years of legal practice and over 100 years of experience prosecuting cases among them. From these decades of experience, the undersigned *Amici* are conscious of the competing pressures that line-prosecutors and their supervisors face in the discharge of their professional and legal obligations to the courts and the State, as well as their parallel obligation to protect the constitutional rights of the accused. Likewise, *Amici* know first-hand that these competing pressures often make it difficult for prosecutors to simultaneously honor all of these obligations without compromise. As such, *Amici* know the importance of cooperation and good communication between a law enforcement agency and the corresponding prosecutor's office, especially as it relates to the extent and quality of the evidence in a criminal investigation.

Petitioner John Floyd's application for post-conviction relief and the ensuing writ of certiorari to this Court include a claim that the State of Louisiana violated *Brady v. Maryland* by choosing

¹ The parties in this case have consented to the filing of this one brief. Copies of the consent letters are being filed herewith. *Amici* certify that this brief was written by undersigned counsel, and that no counsel for a party authored any portion of this brief or made any monetary contribution to its preparation or submission.

not to disclose fingerprint comparison results from the scenes of both murders for which he was tried. Those print comparison results excluded John Floyd and the victim. *Amici* do not proffer judgment on the merits of this claim—namely, whether the evidence withheld by the State undermines confidence in the outcome of Mr. Floyd's trial as well as deprived him of fundamental constitutional and jurisprudential safeguards. *Amici* note that the record indicates that exculpatory evidence that was subject to the disclosure requirement of *Brady v. Maryland* and its progeny was withheld by the police from even the prosecutors. The secreting or non-disclosure of critical evidence denied the trial prosecutors in this case of their legal and professional obligation to fully honor Mr. Floyd's rights under the U.S. and Louisiana Constitutions. Each of the undersigned *Amici*, as former prosecutors, relied upon full disclosure by the participating law enforcement agency. Each of the *Amici* would have been troubled to learn that any law enforcement agency with which any of *Amici* worked had withheld exculpatory evidence of this nature from the prosecutor's office. Whether a police department can preempt the prosecutor's disclosure obligations is an issue ingrained in John Floyd's petition.

Because of the competing pressures they face, trial prosecutors in any office must be able to assume they have received all potential exculpatory information from the law enforcement agency with which they work to comply with their constitutional and professional responsibilities. *Amici* believe it is of the utmost important for this Court to:

- a) encourage police to err on the side of full disclosure of all of the evidence to the prosecutor in a

criminal case; and b) set guidelines for prosecutors' offices in Louisiana, and elsewhere, to ensure practices are in place that result in the efficient and complete communication of all potentially exculpatory evidence from law enforcement to prosecutors. While such practices already exist in the federal criminal system and have been urged for all prosecutors' offices by the American Bar Association, the Petitioner's case regrettably reveals that the State's criminal justice system lacks this fail-safe mechanism.

Implementing such policies and practices not only will encourage complete communication between law enforcement agencies and prosecutors' offices, but will make full disclosure a needed requirement of the judicial process. It will result in law enforcement officers being trained to disclose all information, irrespective of the individual officer's opinion of the relevance or weight. This is particularly important because that officer, even despite good intentions, is not able to assess the constitutional and legal import of his or her decision to withhold information. Such an approach also will ensure that safeguards exist so that the State of Louisiana and its District Attorneys, as well as other jurisdictions, consistently adhere to the requirements of *Kyles v. Whitley*. Prosecutors for the State will be able to try cases with the confidence that they are fully protecting each defendant's constitutional rights while preserving the integrity of the criminal judicial system.

FACTUAL BACKGROUND²

Petitioner, John Floyd, was charged with and tried for two similar murders that occurred during the week of Thanksgiving, 1980: the murder of William Hines in his French Quarter home on Gov. Nicholls St. in New Orleans and the murder of Rodney Robinson in his hotel room at the Fairmont Roosevelt Hotel in New Orleans. The similar *modus operandi* apparent in the crimes, the similar characteristics of the victims, the proximity of the crime scenes, and the timing of the crimes caused the police to believe that the same man was responsible for both crimes.

Before trial, John Floyd was excluded by serology testing and hair comparison analysis because biological material was left at both scenes by a third party. Detective John Dillmann of the New Orleans Police Department obtained confessions from John Floyd to both crimes.

Subsequent record requests by Mr. Floyd's counsel produced notations on a New Orleans Police Department log book and envelopes containing fingerprints. These notations are the results of fingerprint comparisons run against prints taken from both crime scenes. The notations in the log book reveal that all prints excluded John Floyd.

The four lawyers who were involved in the prosecution of this case—Jack Peebles, Nancy Sharpe, Kendall Green and David Plavnicky—have all stated that they did not know about the exclusionary print results from both crime scenes.

² The facts pertinent to the brief of undersigned *Amici* are taken from the Petitioner's brief in this case and from the exhibits and record of the case.

All four prosecutors have stated that had they known about the print exclusions they would have disclosed the results of the print comparisons to counsel for Mr. Floyd before trial in conformity with their *Brady* obligations.

SUMMARY OF ARGUMENT

This *Amicus* brief is not submitted to argue the merits of the *Brady* claim raised and denied by a 4 to 3 vote by the Louisiana Supreme Court. The materiality of the fingerprint comparison results that excluded Mr. Floyd are chronicled in detail in John Floyd's certiorari petition and pleadings in the state courts. Rather, *Amici* respectfully invite the Court's attention to two pivotal points regarding the prosecutor's constitutional duty to disclose in the context of this case.

First, in the experience of undersigned *Amici* and consistent with settled law as well as prosecutorial practices, fingerprints left at both crime scenes that exclude the defendant and exclude the victim are exculpatory evidence under *Brady v. Maryland* and its progeny. Therefore, the fingerprint exclusions in this case were subject to the State's disclosure requirement.

Second, the unique role of the prosecutor in the administration of justice includes a trusted responsibility to ensure that a defendant is afforded a fair trial. As part of this role, the prosecutor's duty to disclose exculpatory evidence is paramount. It is essential for the judiciary to ensure that the prosecutor's responsibilities, including the *Brady* disclosure obligation, are respected by every agency working with the prosecutor. A prosecutor should not be denied his or her ability to protect the

defendant's constitutional right to due process and to a fair trial by the judgment calls of police officers who often lack formal legal training. Yet, even when law enforcement officers are informed as to some of the basic legal precepts, these officers should not be usurping the duty and the ultimate responsibility of the prosecutor, because it is the prosecutor who is held accountable, both legally and professionally, for fulfilling *Brady* obligations.

For these reasons, the undersigned *Amici*—as former federal and state prosecutors throughout the State of Louisiana—urge this Court to grant Mr. Floyd's petition for certiorari review. Granting the writ application will underscore the requirement for law enforcement agencies to inform prosecutors about forensic test results that exclude a defendant from the scene of a crime. Concomitantly, accepting *certiorari* review will result in the dual benefit of fostering policies and practices, encouraged by the American Bar Association and already used by the Department of Justice, to be certain that every law enforcement agency communicates all relevant information—exculpatory and inculpatory—to trial prosecutors. Such an approach serves victims of crime by ensuring that the right person is convicted; improves the performance of law enforcement, prosecutors, and the criminal justice system as a whole; and enhances the public's confidence in the integrity of the judicial process.

ARGUMENT

I. The Fingerprint Comparison Results in this Case Were Exculpatory.

The suppression by the prosecution of evidence favorable to an accused after a request has been made by the accused violates fundamental due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). As this Court has ruled, the requirement to disclose favorable evidence to an accused extends to evidence contained in police files. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (individual prosecutor has duty to learn of any favorable evidence known to others acting on State's behalf, including members of police department).³ Not every item of information in the State's possession is subject to the disclosure requirements imposed by both the Constitution and the Rules of Professional Conduct for prosecutors. *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (prosecutor not required to make complete inventory of police work for defense). However, the hundreds of cases following from and applying *Brady v. Maryland* have provided increasing guidance as to the evidence

³ It is axiomatic that agents of a litigant must produce documents responsive to discovery requests in civil proceedings. This principle is part of Louisiana law. *See* La. C.C.P. Art. 1422, 1471; Fed. R. Civ. P. 26, 37. In the parallel situation in criminal proceedings, involving a person's liberty, it is even more important to mandate disclosure. Stated another way, the police cannot decide what a prosecutor must produce to preserve paramount constitutional rights and guarantee a fair trial.

that a prosecutor must disclose. Fingerprint comparison results excluding a defendant and the victim from three separate places the perpetrator was assumed to have touched at two different crime scenes fall clearly within the category of evidence a prosecutor is obliged to produce to the defense. *Id.*

The statements given by the lawyers who prosecuted Mr. Floyd at trial support the position of *Amici*. Each of the trial prosecutors in this case has given a sworn statement that, had they been aware of the print exclusions at both scenes, they would have disclosed the results to the defense. Indeed, the record below reveals the other forensic test results that excluded John Floyd were disclosed to his counsel, but not the print exclusions. This provides further support for the inference that the prosecutors were aware of their duty to disclose forensic test results that excluded the defendant from culpability. However, the prosecutors were prevented from fulfilling their *Brady* obligation because the record indicates that the police in this case simply chose not to inform the prosecutors that the print comparisons did not match John Floyd or the victims.

Fingerprint comparison results that excluded the defendant at every place where fingerprints were lifted (and excluding the victim from some of those places) are the quintessential exculpatory information subject to disclosure. Of equal import warranting the grant of Mr. Floyd's petition is the existence of a pattern of potentially exculpatory evidence not being disclosed to prosecutors by police in Orleans Parish. The affidavits of the trial prosecutors and the testimony of the print analyst at

the evidentiary hearing reveal a systemic issue that, respectfully, should be addressed by the Court.

II. Prosecutors—Not the Police—Should Make the Decision as to Full Disclosure of Evidence in Criminal Cases.

A. The Prosecutor has a Unique Role in Criminal Proceedings and Specifically in Disclosure of Evidence.

A prosecutor's role in the adversarial system is unlike the role of any other lawyer engaged in litigation. This is because the prosecutor, as a public servant, must protect not just the State's interest in convicting the guilty. The prosecutor also must protect the interest of the criminal justice system and the community in the efficient and fair administration of justice. Uniquely for a party to the adversarial process, the prosecutor is charged with safeguarding the basic rights of an accused to a fair trial and the constitutional protections afforded to every accused. The prosecutor's legal and professional obligations cannot be satisfied when a law enforcement agent decides to short-circuit the judicial system.

The American Bar Association has adopted Model Standards for the conduct and obligations of prosecutors. These Standards provide, in pertinent part, as follows:

Standard 3-1.2 The Function of the Prosecutor

- (a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.
- (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.
- (c) The duty of the prosecutor is to seek justice, not merely to convict.

The comments to these standards explain why prosecutors are held to these standards:

The prosecutor plays a critical role in the criminal justice system. All serious criminal cases require the participation of three entities: a judge (and jury), counsel for the prosecution, and counsel for the accused. Absent any one of these entities (and barring a valid waiver of counsel), the court is incomplete. In short, a "court" must be viewed as a structure with three legs, requiring the support of all three.

Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as

well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. Thus, the prosecutor has sometimes been described as a "minister of justice" or as occupying a quasi-judicial position.

The prosecutor may also be characterized as an administrator of justice, since the prosecutor acts as a decision maker on a broad policy level and presides over a wide range of cases as director of public prosecutions.

American Bar Association, *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* 4 (3d ed. 1993) (hereinafter "ABA Standards"). The recognition of this role is not new. In 1935, the United States Supreme Court pronounced what had long been accepted as the responsibility of the prosecutor:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.

Berger v. U.S., 295 U.S. 78, 88 (1935). Similarly, the Louisiana Supreme Court has taken notice of the trusted position of the prosecutor and the ensuing obligations of that position:

A prosecutor stands as the representative of the people of the State of Louisiana. He is entrusted with upholding the integrity of the criminal justice system by ensuring that justice is served for both the victims of crimes and the accused. "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." *Brady*, 373 U.S. at 87. The actions, or inactions . . . of the prosecutor are paramount to a fair administration of justice; and the people of this state must have confidence in a prosecutor's integrity in performing his duty to disclose exculpatory evidence in order for the system to be just.

In Re Jordan, 913 So. 2d 775, 781 (2005).

The standards for prosecutors adopted by the National District Attorneys Association reflect the same legal, constitutional, and professional priority for prosecutors that has been juridically recognized by this Court. Standard 1.1 states: "The primary responsibility of the prosecution is to see that justice is accomplished." National District Attorney's

Association, *National Prosecution Standards* 9 (2d ed. 1991) (hereinafter "NDAA Standards").

Both the NDAA Standards and the ABA Standards provide guidance with respect to the discovery responsibility of prosecutors, reiterating that the prosecutor has a responsibility to provide exculpatory evidence to the defense. *ABA Standards, supra* at 18 (Standard 3-3.11); *NDAA Standards, supra* at 90, 163-65 (Standards 25.4, 52, 53). The commentary to ABA Standard 3-3.11 explains that the prosecutor's duty to disclose exculpatory evidence is directly related to his or her function as a minister of justice:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the accused is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, including consideration of exculpatory evidence known to the prosecution.

ABA Standards, supra at 82. The NDAA Standards discuss the same basis for the disclosure obligation: the achievement of a just result and not merely a conviction in each criminal case. *NDAA Standards, supra* at 91, 165.

B. The Prosecutors in this Case Would Have Discharged Their Obligation.

The record establishes that each of the prosecutors involved in this case was cognizant of his or her responsibility to provide exculpatory evidence

to defense counsel for Mr. Floyd. Each prosecutor has said under oath that he or she would have turned over the fingerprint evidence had it been made known to them by the New Orleans Police Department. There is no suggestion in any of the four affidavits by the seasoned prosecutors who tried this case (Mr. Peebles, Mr. Green, Ms. Sharpe, and Mr. Playnicky) that they were unaware of their constitutional obligations to Mr. Floyd. There is no suggestion that they were trying to avoid the State's disclosure obligations to Mr. Floyd. There is no indication that they deliberately or negligently suppressed the exculpatory information. Tellingly, the non-disclosure of exculpatory evidence here stemmed singularly from the acts and omissions of the New Orleans Police Department.⁴ However, the police are not bound by the same professional and constitutional obligations as a prosecutor. There lies the hiatus in this case. It is respectfully submitted that this Court should address this constitutional gap in the system by clarifying that police must disclose all evidence to trial prosecutors. A defendant is denied a fair trial when a police officer usurps the responsibilities of a prosecutor and that misconduct by the police officer is exacerbated when the police officer withholds evidence that the

⁴ As detailed by the United States Department of Justice, Civil Rights Division's, Report entitled *Investigation of the New Orleans Police Department*, dated March 16, 2011, the New Orleans Police Department, at least with respect to interrogations, "employs practices that could facilitate and hide constitutional violations of criminal suspect's rights." *Investigation of the New Orleans Police Department*, p. 112, available at www.justice.gov/crt/about/spl/nopd-report.pdf (last visited September 23, 2011) (hereinafter "DOJ Report").

prosecutors have deemed to be both exculpatory and subject to *Brady* disclosure.

C. Police Must Not Prevent Prosecutors from Fulfilling the State's Constitutional Obligation to the Defendant.

In this case, the print comparison results were located in the police files and not in the District Attorney's files. Stated simply, the record suggests that the police chose not to inform prosecutors of the existence of fingerprint comparison results that excluded John Floyd. The print comparison results were obtained by the NOPD Crime Lab. These facts highlight that an employee of the New Orleans Police Department determined not to inform the prosecutors on the case that the print comparisons did not match John Floyd. Yet the police should not be empowered to decide whether to disclose such determinative evidence to defense counsel. Law enforcement officers, despite their good intentions, are not qualified to make the call as to whether the District Attorney should be furnished with exculpatory information. This Court's decision in *Kyles v. Whitley* places the responsibility on the prosecutor to seek out exculpatory information in the files of a law enforcement agency. The prosecutor, bound by the ethical obligations of his profession and by his constitutional obligations to the defendant, is the actor trusted to make the decision regarding the requirement of disclosing evidence to the accused. *Kyles* makes clear that the police are not qualified, nor should they be permitted, to make this judgment call: "[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about

boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Kyles*, 514 U.S. at 438.

In this case, the prosecutors were prevented by the police from making an informed decision as to whether they were obligated to disclose exculpatory evidence to Mr. Floyd's defense counsel. They were. They knew it. But the police inexplicably short-stopped the information. Nonetheless, the misconduct by the police is tantamount to critical *Brady* violations. The capricious action by the police in keeping secret exculpatory information, coupled with the prosecutors' resulting inability to fulfill their *Brady* obligations, are precisely why this Court should grant Mr. Floyd's petition.

D. Prosecutors' Offices Should Adopt Procedures to Ensure Law Enforcement Inform Prosecutors of All Exculpatory Evidence.

Under *Kyles v. Whitley*, the responsibility for learning from law enforcement about exculpatory evidence in a criminal case falls on the individual prosecutor. *Kyles*, 514 U.S. at 437. *See also In Re Jordan*, 913 So. 2d at 781-82. Unquestionably, state prosecutors have high case loads and limited resources. They must serve the interests of the criminal justice system, the larger community, and the victims in each case, while simultaneously protecting the basic constitutional protections afforded to each criminal defendant. A 2006 report by the American Bar Association discusses this tension:

Prosecutors, however, cannot do more to convict the guilty or free the innocent without adequate funding. Many prosecutors' offices require their attorneys to handle enormous workloads that make it a daily struggle for them to provide competent representation of the People. This daily struggle to handle each day's crises makes it hard for prosecutors to ensure that law enforcement agencies, laboratories, and other experts understand their obligation to inform prosecutors about exculpatory or mitigating evidence.

American Bar Association, *Achieving Justice: Freeing the Innocent, Convicting the Guilty. Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process* xxvii (2006) (hereinafter "ABA Report").

Therefore, while *Kyles* places the legal responsibility on the prosecutor to ferret out exculpatory information from the police files, for practical reasons, it is essential for the judiciary to encourage law enforcement to recognize this burden by ensuring that a prosecutor does not have to chase down material as plainly exculpatory as exclusionary fingerprint results. This Court in *Kyles* partially addressed this very issue:

[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But

neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Kyles, 514 U.S. at 438. Yet these facts go far beyond the police officers' mere failure to inform prosecutors of exculpatory evidence; rather, the police chose not to provide exculpatory evidence to the prosecutors and, indeed, the record shows that the decision not to provide exclusionary fingerprint results was not isolated to this case. Such an approach, if not judicially rectified, effectively destroys the *Brady* framework.

In the interest of public safety and the efficient administration of justice, undersigned *Amici* respectfully urge this Court to provide an incentive and directive for law enforcement to assist prosecutors in discharging the State's obligation under *Kyles* by promptly and completely informing trial prosecutors of exculpatory forensic test results. Indeed, the need for such an incentive and directive is particularly acute in New Orleans.⁵ *Amici* urge this Court to discourage police from hindering prosecutors in their important roles as ministers of justice by choosing not to inform prosecutors of material information and documents that they, the prosecutors, have an affirmative obligation to disclose to the defense. Such an approach by the Court will telegraph to District Attorneys

⁵ See generally DOJ Report.

throughout the State of Louisiana and in every other state to demand procedures and training in their offices that will direct law enforcement agents to assist prosecutors in discharging their constitutional obligations. It will signal to law enforcement agents that they do not have unfettered discretion in resolving *Brady* issues – without the attendant consequences. This will result in fair and legal judicial proceedings. The 2006 ABA Report makes this recommendation:

In light of the prosecutor's ongoing obligation to provide all defendants with fair trials, prosecutors should establish guidelines and procedures for turning *Brady* evidence over to the defense and for receiving that information from its partners and agents, including police departments and laboratories. This Resolution is consistent with (1) ABA Prosecution Function Standard 3-2.7, which calls on the prosecutor to provide legal advice and training to the police concerning police duties and functions, (2) Prosecution Function Standard 3-4, which calls on the prosecutor to take reasonable care to ensure that investigators working at their discretion or under their authority are adequately trained on the issuance of arrest and search warrants, and (3) Discovery Standard 11-4.3(b), which calls on the prosecutor to make reasonable efforts to ensure that

material and information relevant to the defendant are provided by investigative personnel to the prosecutor's office.

ABA Report at 103.

A recent memorandum issued by the Department of Justice to all United States Attorneys' Offices provides comprehensive guidance in the federal system to ensure that the government's *Brady* and *Giglio* obligations are met in every case. The memorandum, titled "Guidance for Prosecutors Regarding Discovery," was the result of a 2009 working group convened by the Assistant Attorney General of the Criminal Division and the Chair of the Attorney General's Advisory Committee at the request of the Deputy Attorney General. The working group included, among others, senior-level prosecutors from United States Attorneys' Offices and Main Justice, as well as law enforcement representatives. The memorandum has now been incorporated into the Criminal Resource Manual of the United States Attorneys' Manual. See "Guidance for Prosecutors Regarding Discovery," *United States Attorneys' Manual*, Title 9, § 5.001, at 165 (Jan. 4, 2010) (*available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm).

The memorandum is a detailed guide for United States Attorneys' Offices to be certain that all members of the prosecution team are in compliance with the discovery obligations that fall to the individual prosecutors in the U.S. Attorneys' Offices. The memorandum is a step-by-step guide

for prosecutors. First, it covers where to look for discoverable information, explaining in detail the extent of those who are considered a part of the prosecution team for purposes of the prosecutor's constitutional obligation.⁶ Second, it explains very

⁶ The manual now states, in pertinent part, as follows:

Step 1: Gathering and Reviewing Discoverable Information

A. Where to look—The Prosecution Team

Department policy states:

It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.

USAM 9-5.001. This search duty also extends to information prosecutors are required to disclose under Federal Rules of Criminal Procedure 16 and 26.2 and the Jencks Act.

In most cases, "the prosecution team" will include the agents and law enforcement officers within the relevant district working on the case.

"Guidance for Prosecutors Regarding Discovery," supra at 165.

clearly what to look for, emphasizing the importance for prosecutors to discuss with law enforcement whether additional information may exist that is not in the agency's case file.⁷ Next, it lays out who should review the information and how such a review should be conducted. Of particular importance for this case, the memorandum

⁷ The manual now states, in pertinent part:

B. What to Review

To ensure that all discovery is disclosed on a timely basis, generally all potentially discoverable material within the custody or control of the prosecution team should be reviewed. The review process should cover the following areas:

1. *The Investigative Agency's Files:* With respect to Department of Justice law enforcement agencies, with limited exceptions, the prosecutor should be granted access to the substantive case file and any other file or document the prosecutor has reason to believe may contain discoverable information related to the matter being prosecuted. Therefore, the prosecutor can personally review the file or documents or may choose to request production of potentially discoverable materials from the case agents. . . . Prosecutors should also discuss with the investigative agency whether files from other investigations or non-investigative files such as confidential source files might contain discoverable information. Those additional files or relevant portions thereof should also be reviewed as necessary.

Id.

emphasizes that the prosecutor must not delegate the decision as to whether information must be disclosed. The manual now provides, in pertinent part, as follows:

Step 2: Conducting the Review

Having gathered the information described above, prosecutors must ensure that the material is reviewed to identify discoverable information. It would be preferable if prosecutors could review the information themselves in every case, but such review is not always feasible or necessary. The prosecutor is ultimately responsible for compliance with discovery obligations. Accordingly, the prosecutor should develop a process for review of pertinent information to ensure that discoverable information is identified. Because the responsibility for compliance with discovery obligations rests with the prosecutor, the prosecutor's decision about how to conduct this review is controlling. This process may involve agents, paralegals, agency counsel, and computerized searches. Although prosecutors may delegate the process and set forth criteria for identifying potentially discoverable information, *prosecutors should not delegate the disclosure determination itself.*

"*Guidance for Prosecutors Regarding Discovery*," at 165 (emphasis added). After also discussing the scope and timing of disclosure (advising early and ongoing discovery to be provided to counsel for the accused), the Justice Department's memorandum's concluding paragraph summarizes the rationale for the method advised:

Compliance with discovery obligations is important for a number of reasons. First and foremost, however, such compliance will facilitate a fair and just result in every case, which is the Department's singular goal in pursuing a criminal prosecution. . . . By evaluating discovery obligations pursuant to the methodical and thoughtful approach set forth in this guidance and taking advantage of available resources, prosecutors are more likely to meet their discovery obligations in every case and in so doing achieve a *just and final result in every criminal prosecution*.

Id. (emphasis added).

Fair and just results in criminal cases serve the interests of public safety, victims of crime, and the judiciary. Full and mandatory disclosure of exculpatory evidence by police to prosecutors will result in trials that are conducted with both sides having confidence that all of the evidence—exculpatory and inculpatory—is out in the open and considered by an impartial jury. Such trials will result in more accurate verdicts. This means guilty

perpetrators will not escape punishment while innocent defendants will not be convicted by juries not privy to all of the relevant evidence.

Likewise, these precautions at the pre-trial stage will reduce the need for post-conviction litigation years after the trial when the exculpatory evidence, which should have been disclosed before the trial, is finally discovered. The Department of Justice Memorandum concludes by reminding U.S. Attorneys that full disclosure achieves "a just *and final result* in every criminal prosecution." *Id.* (emphasis added). Such finality serves the interests of all victims, especially the victims of violent crimes and their families, who will not have to endure post-conviction proceedings that necessarily force them to re-live the terrible experience of suffering violence or losing a loved one to violence. Even if guided by good intentions, the police do not serve the interests of the victims of crime in choosing not to disclose exculpatory information to the prosecutors. Post-conviction litigation decades after a criminal trial burdens the criminal justice system; it requires prosecutors, defense counsel, and the courts to spend time and resources re-examining old cases. Policies and training in prosecutors' offices that improve the communication between law enforcement agencies and those offices will increase the guarantee of a fair and legal result in the original trial and will significantly reduce the post-conviction litigation which drains limited resources of prosecutors and defense counsel alike.

When so much is at stake, there is no reason that our state prosecutors' offices cannot implement the same discovery safeguards with their local law enforcement agencies as their federal colleagues.

CONCLUSION

The fingerprint comparison results obtained by the New Orleans Police Department through the investigations of the murders of William Hines and Rodney Robinson were, without doubt, exculpatory material that should have been furnished to the accused before trial. All of the undersigned *Amici*, in addition to the prosecutors on the case, agree these results should have been furnished to Mr. Floyd's defense counsel.

The record indicates that the police department did not disclose the exculpatory fingerprint comparison results to the prosecutors before or during the trial of Mr. Floyd. The record also reveals that this case, by far, is not the only instance when the New Orleans Police Department apparently failed to disclose print results to the prosecutors. Undersigned *Amici* believe it is inappropriate for the prosecutor's role to essentially be commandeered by the police department. Such usurpation took place in this case and, potentially, in many more.

Undersigned *Amici* respectfully urge this Court to grant John Floyd's petition and address the constitutional violations that arise when the police are allowed to decide pre-trial discovery issues and secrete exculpatory evidence from prosecutors. Guidance from this Court would serve as a strong incentive for prosecutors' offices as well as law enforcement agencies to establish procedures to prevent such breakdowns of communication, whether deliberate or unintentional, as occurred in this case. The facts of this case alone demonstrate

that such guidance is sorely needed and that this Court's voice should be heard.

Respectfully submitted,

HARRY ROSENBERG

Counsel of Record

BRYAN EDWARD BOWDLER

PHELPS DUNBAR LLP

365 Canal Street, Suite 2000

New Orleans, Louisiana 70130

(504) 566-1311

Counsel for *Amici Curiae* Former
State and Federal Prosecutors