CERTIORARI DENIED: HOW THE SUPREME COURT REFUSES TO DEFEND *BRADY V. MARYLAND* AND *BATSON V. KENTUCKY*, DAMAGES ITS LEGITIMACY, AND ENCOURAGES PROSECUTORIAL MISCONDUCT

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I. INTRODUCTION

"There is no dispute that, during the capital trial of petitioner Davel Chinn, the State suppressed exculpatory evidence."[1] That exculpatory evidence did not alter Mr. Chinn's fate once it was discovered.[2] After exhausting his state appeals, the Supreme Court declined to hear Mr. Chinn's case.[3] Mr. Chinn is scheduled to be executed in 2027.[4] Mr. Chinn's case is but one example in a series of capital cases where the Supreme Court denied certiorari petitions or applications to stay executions despite trial phase prosecutorial misconduct implicating *Brady v. Maryland* and *Batson v. Kentucky*, as well as American Bar Association Model Rule of Professional Conduct 3.8.[5]

This paper argues that during the October 2022 Term, the Supreme Court delegitimized its own rulings in *Brady* and *Batson* by denying multiple certiorari petitions where lower courts flagrantly violated those precedents, thereby creating a permission structure for prosecutors to commit ethical violations.[6] Part Two explores *Brady*, *Batson*, and the relevant Model Rules governing prosecutorial conduct. Part Three analyzes the impact of the Supreme Court's denials

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[1] Chinn v. Shoop, 143 S. Ct. 28, 28 (2022) (Jackson, J., joined by Sotomayor & Kagan, J.J., dissenting from denial of certiorari) *denying cert. to* Chinn v. Warden (*Chinn IV*), 24 F.4th 1096 (6th Cir. 2022).

[2] *Chinn IV*, 24 F.4th at 1102 (noting that after Chinn's conviction, an investigator at the Ohio Public Defender's Office discovered records showing that the witness suffered from intellectual disabilities); *id.* at 1105-6.

[3] *Shoop*, 143 S. Ct. at 28; Petition for Writ of Certiorari at 1-2, Chinn v. Shoop, 143 S. Ct. 28 (2022) (No. 22-5058).

[4] State v. Chinn, 214 N.E.3d 572 (Ohio 2023) (setting execution date).

[5] Brady v. Maryland, 373 U.S. 83 (1963) (ruling that prosecutors violate the Due Process Clause if they withhold exculpatory evidence from the defendant); Batson v. Kentucky, 476 U.S. 79 (1986) (announcing that the Equal Protection Clause prohibits prosecutors from striking jurors based on race); MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N) [hereinafter Rule 3.8] (laying out the special responsibilities of a prosecutor).

[6] This paper focuses on the October 2022 Term because it is the most recent complete term at the Supreme Court; the October 2023 Term will not terminate until October 2024. *Opinions of the Supreme Court – 2023*, THE SUPREME COURT OF THE UNITED STATES https://www.supremecourt.gov/opinions/slipopinion/23.

of certiorari. Part Four offers policy proposals to reduce instances of prosecutorial misconduct and ethical violations.

II. BACKGROUND

A. *Brady* and *Batson*: the Supreme Court's Bulwark Against Prosecutorial Misconduct

Brady v. Maryland and *Batson v. Kentucky* imposed major limitations on prosecutorial conduct to make the criminal justice system more equitable. Both cases expanded the rights of the criminally accused by recognizing that prosecutorial misconduct can violate Fourteenth Amendment due process rights. *Brady* held that prosecutors violate the Due Process Clause when they withhold exculpatory evidence that is material to guilt or punishment, even if they acted in good faith.[7] Under *Brady*, a defendant must show that there would be a "reasonable probability" of a different outcome had the suppressed evidence been included at trial.[8] *Batson* held that prosecutors violate the Equal Protection Clause if they use preemptory strikes in *voir dire* on the basis of race.[9] To put forward a successful *Batson* claim, a defendant must first make a *prima facie* showing of discrimination. If the defendant succeeds, the burden shift to the government, which must then offer a race-neutral reason for striking a juror.[10] The trial judge then determines whether the government's reason dispels the allegation of purposeful racism and how to cure any violations.[11]

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[7] *Brady*, 373 U.S. at 87.

[8] United States v. Bagley, 473 U.S. 667, 682 (1985); Kyles v. Whitley, 514 U.S. 419, 434–38 (1995) (clarifying the four elements of the "reasonable probability" test).

[9] *Batson*, 476 U.S. at 97.

[10] *Id.* at 96; Purkett v. Elem, 514 U.S. 765, 767–68 (1995).

[11] *Purkett*, 514 U.S. at 768; *see also Batson*, 479 U.S. at 85 n.4, 89 (leaving remedies to trial judges); Theodore McMillian, Batson v. Kentucky*: A Promise Unfulfilled*, 58 U. MO. L. REV. 361 (1990) (describing the implementation of *Batson* in the years following the decision).

The Supreme Court does not hold out *Brady* or *Batson* as boundless. When the Supreme Court later refined how to apply these precedents, it imposed limitations that curtailed *Brady* and *Batson's* impact. For example, in *Van de Kamp v. Goldstein*, the Supreme Court concluded that supervisory prosecutors enjoy absolute immunity from constitutional tort liability if trial prosecutors violate a defendant's constitutional rights under *Brady* and *Giglio*[12] due to poor training or supervision.[13] Two years after *Van de Kamp*, the Supreme Court rejected a constitutional tort claim about *Brady* violations in a capital case regarding deliberate indifference, *Connick v. Thompson*.[14]

Similarly, the Supreme Court has interpreted the *Batson* test so that the government can offer almost any race-neutral reason for striking a juror.[15] Even in cases where the offered reasons "strain credulity," lower courts have found for the government.[16] Many—including Justice Marshall—believe that *Batson* does not protect defendants, but instead offers a roadmap for prosecutors to use post-hoc rationalizations to cover up racially discriminatory *voir dire*

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[12] Giglio v. United States, 405 U.S. 150 (1972) (holding that under *Brady* and other due process case law, prosecutors must disclose information about government witnesses that may impeach the witness' credibility).

[13] Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (unanimous ruling) (holding that prosecutors enjoy absolute immunity from 42 U.S.C. § 1983 claims alleging constitutional violations due to negligence in *Brady* and *Giglio* training); s*ee also id.* at 346 (acknowledging that this rule will preclude some *Brady* claims because the Supreme Court determined that training is part of a prosecutor's protected trial activities).

[14] Connick v. Thompson, 563 U.S. 51, 71-72, 93 (2011) (holding that when a prosecutors' office itself conceded that it violated *Brady*, the District Attorney and his deputy did not understand *Brady*, and line attorneys received no training on *Brady*, that was not enough to show deliberate indifference violating *Brady*).

[15] *Purkett*, 514 U.S. at 767–68 (1995) (*Batson* "does not demand an explanation that is persuasive, or even plausible."); Rice v. Collins, 546 U.S. 333, 338 (2006) (citing *Purkett*) (explaining that so long as the reason is not inherently racist, it is acceptable).

[16] *See, e.g.*, United States v. Clemmons, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring) ("I have recently seen other cases involving the *Batson* issue in which the prosecuting attorneys have offered nonracial justifications for peremptory challenges that strain credulity."); *see also*, Clark v. Mississippi, 143 S. Ct. 2406 (2023) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting) (decrying that the Mississippi Supreme Court accepted prosecutor reasons that showed a "double standard" for Black and white jurors) *denying cert. to* Clark v. State (*Clark I)*, 343 So. 3d 943 (Miss. May 12, 2022).

practices.[17] While critics may decry these holdings, these cases nonetheless show that at one time Supreme Court expected—and ordered—lower courts to apply these protections.

B. Rule 3.8: Special Responsibilities of a Prosecutor Is an Imperfect But Important Protection for Defendants

Prosecutors face a web of constitutional, statutory, and state law governing their conduct. Rule 3.8: Special Responsibilities of a Prosecutor ("the Rule," "Rule 3.8") is the American Bar Association's model rule for controlling conduct specific to prosecutors.[18] The Rule includes multiple parts that discuss various scenarios like seeking waivers from defendants and making extrajudicial comments.[19] Almost every state has adopted Rule 3.8(d), which requires that prosecutors "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]"[20]

Many incorrectly believe that Rule 3.8(d) and its predecessor simply codify *Brady*.[21] The Supreme Court has held that *Brady* is a floor, and that the rules of professional conduct may

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[17] Batson v. Kentucky, 476 U.S. 79 (1986) (Marshall, J., dissenting) (lamenting that prosecutors could "easily" offer race-neutral post-hoc rationalizations for their strikes); Rushton Davis Pope, Note, *How They Get Away with Murder: The Intersection of Capital Punishment, Prosecutor Misconduct, and Systemic Injustice*, 72 EMORY L. J. 1531, 1151–52 (2023) ("Commentators have argued that the Supreme Court's approach has done more harm than good because it has created a 'roadmap' for unethical prosecutors to use their peremptory strikes . . . .").

[18] MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N).

[19] *Id.*

[20] *Id.*; Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. ETHICS BLOG (June 15, 2018), https://harvardlawreview.org/blog/2018/06/disentangling-the-ethical-and-constitutional-regulation-of-criminal-discovery/.

[21] Murray & Greabe, *supra* note 20.

create more robust expectations for prosecutors.[22] Moreover, in 2009, the ABA Standing Committee on Ethics and Professional Responsibility issued a highly influential formal opinion explaining that Rule 3.8(d) does not track whatever changes the Supreme Court makes to *Brady* and its progeny.[23] The opinion also noted that the ABA has required prosecutors to disclose exculpatory material since 1908.[24] While ethics experts widely believe that Rule 3.8 establishes a higher burden on prosecutors and all states have some form of Rule 3.8 in their own ethics codes, many states do not follow the ABA's interpretation of Rule 3.8.[25] Some have criticized the ABA's 2009 opinion because it caused confusion relative to Jencks Act obligations for federal prosecutors.[26] Still fewer states have adopted other portions of Rule 3.8, which mandate that prosecutors investigate or seek to remedy situations when new exculpatory evidence is identified.[27] While not a comprehensive or uniform source of ethical authority for prosecutors,

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[22] *Id.* (noting that Rule 3.8(d) mandates disclosure of more exculpatory evidence than *Brady* as interpreted in United States v. Agurs, 427 U.S. 97 (1976) and United States v. Bagley, 473 U.S. 667 (1985) due to the Supreme Court's materiality requirement).

[23] Peter A. Joy & Kevin C. McMunigal, *ABA Explains Prosecutor's Ethical Disclosure Duty*, 24 CRIM. JUST. 41 (2010) (noting that the ABA opinion will likely be a highly persuasive form of authority throughout the country, particularly because almost all jurisdictions have adopted Rule 3.8(d)'s language); ABA Comm. on Pro. Ethics & Grievances, Formal Op. 09-454, 3 (2009) [hereinafter Formal Op. 09-454] (the framers of the Model Rules "made no attempt to codify the evolving [*Brady*] constitutional case law.").

[24] Formal Op. 09-454, *supra* note 23, at 3.

[25] NEY YORK CITY BAR, FORMAL OPINION 2016-3: PROSECUTORS' ETHICAL OBLIGATIONS TO DISCLOSE INFORMATION FAVORABLE TO THE DEFENSE (2018) (reporting that New York interprets its comparator rule (Rule 3.8(b)) in the same way at the ABA, without a materiality requirement, but that states are divided and that some apply the *Brady* materiality to their comparator rule).

[26] Kirsten Schimpff, *Rule 3.8, The Jencks Act, And How The ABA Created A Conflict Between Ethics And The Law On Prosecutorial Disclosure Between Ethics And The Law On Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729 (2012) (criticizing the ABA for adopting an interpretation of Rule 3.8 that conflicts with the Jencks Act, putting federal prosecutors in a confusing position relative to ethical disclosure obligations regarding witness statements).

[27] MARC ALLEN, NATIONAL REGISTRY OF EXONERATIONS, NON-*BRADY* LEGAL AND ETHICAL OBLIGATIONS ON PROSECUTORS TO DISCLOSE EXCULPATORY EVIDENCE 5 (2018) (noting that "19 states have adopted section (g), and only 13 of those states have also adopted section (h)."); *see also* MODEL RULES OF PRO. CONDUCT r. 3.8(g) (AM. BAR ASS'N) (holding that prosecutors must disclose new exculpatory evidence to a court, and if the conviction was in the prosecutor's jurisdiction, share with defense counsel and investigate whether the defendant was convicted for a crime they did not commit); MODEL RULES OF PRO. CONDUCT r. 3.8(h) (AM. BAR ASS'N) (holding that

Rule 3.8 offers a benchmark for guarding against prosecutorial misconduct and is particularly salient when assessing *Brady* claims.

No Model Rule is closely associated with *Batson* like Rule 3.8 is with *Brady*.[28] Many do, however, read compliance with *Batson* into the conduct discussed in the Committee's notes about Rule 3.8(d).[29] Still others impute *Batson* limitations into general misconduct prohibitions, codified in Rule 8.4.[30] While not directly analogous, *Brady* and *Batson* prohibitions in conduct are widely understood to also be prohibited by the Model Rules of conduct. Indeed, modern ethical standards assume that *Brady* and *Batson* violations run counter to ABA and state ethical codes for prosecutors.

C. Examples of Prosecutorial Misconduct in *Brady* and *Batson* Cases

The *Chinn* petition for certiorari implicated *Brady* and Rule 3.8 because the government did not disclose key witness impeachment information during Mr. Chinn's trial. On the evening of January 30, 1989, in Dayton, Ohio, Brian Jones was killed in a robbery gone wrong. Witnesses and codefendants eventually identified Davel Chinn as Jones' killer.

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prosecutors must seek remedies when they become aware by clear and convincing evidence that a defendant was convicted of a crime they did not commit in the prosecutor's jurisdiction).

[28] *See, e.g.*, Jeffrey L. Kirchmeier et. al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1336-37, 1344-46 (2009) (discussing Rule 3.8 alongside *Brady* while mentioning other rules without discussing *Batson* during an analysis of prosecutorial misconduct under *Brady* and *Batson* in capital cases).

[29] *See id*. at 1329 (discussing the ABA's comment to Rule 3.8 that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate[,]" in the context of prosecutorial conduct violating *Brady* and *Batson*; *see also* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt (AM. BAR ASS'N).

[30] MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N) (prohibiting harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status); *see, e.g.*, CALIFORNIA BAR, RULE 8.4.1 PROHIBITED DISCRIMINATION, HARASSMENT AND RETALIATION 22-23 (2017) (discussing changes to the California Rules of Professional Conduct with the understand that racially-motivated conduct covered by *Batson* violates Rule 8.4(g)).

Mr. Chinn's trial was riddled with issues related to prosecutorial misconduct, though he was not able to pursue many of them on appeal because of procedural errors and the harmless error rule.[31] The appellate court was also "dismayed" that the prosecution did not disclose information it had learned of another man's presence at the scene of the crime.[32] The dismay was not persuasive, though, because the court found that there was no reasonable way that Mr. Chinn could have been acquitted if he had possessed this information at the time of trial.[33] Beyond these issues, the state did not disclose impeachment information about its key witness.[34] This witness was the only other codefendant present for the murder, and his identification of Mr. Chinn as the killer was dispositive to proving guilt.[35] The state did not disclose juvenile court records indicating that this witness had intellectual disabilities and suffered from mental illness to the degree that he might not have been able to distinguish between fact and fiction.[36] Mr. Chinn also presented evidence that during the murder, he was taking a college exam.[37] The

[31] State v. Chinn (*Chinn II*), No. 11835, 1991 Ohio App. LEXIS 6497, at *17, 22, (Ct. App. Dec. 27, 1991) (listing Chinn's twenty-six assignment of errors, finding that the prosecutor erred three times when he went beyond the bounds of closing argument limitations, made inflammatory comments to the jury about moral imperatives to find for death, and commenting about the absence of defense attorneys in violation of procedure).

[32] *Id.* at *73-74.

[33] *Id.*

[34] Chinn v. Shoop, 143 S. Ct. 28, 28 (2022) (Jackson, J., joined by Sotomayor & Kagan, J.J., dissenting from denial of certiorari) *denying cert. to Chinn IV*, 24 F.4th 1096 (6th Cir. 2022).

[35] *Id.*

[36] State v. Chinn, No. 18535, 2001 Ohio App. LEXIS 3127 * at 10–11 (Ct. App. July 13, 2001); *Shoop*, 143 S. Ct. at 28.

[37] *Chinn IV*, 24 F.4th 1096, 1100 (6th Cir. 2022) (offering testimony from Mr. Chinn's college classmate that they took an exam and rode the bus home together on the night of the murder).

appeals court, after reviewing the totality of the circumstances, identified "a substantial amount of reasonable doubt" that Mr. Chinn committed the murder.[38]

After exhausting his state court appeals, Mr. Chinn filed a habeas corpus petition with the Sixth Circuit. That court affirmed the state court's conclusion that the suppression did not meet *Brady's* reasonable probability standard because Mr. Chinn's counsel had received other records about the witness, though they did not disclose the abovementioned impeachment issues.[39] Mr. Chinn lost his following state and federal appeals; after the Supreme Court denied certiorari, the state of Ohio set his execution date for March 2027.[40]

Like Mr. Chinn's case, *Clark v. Mississippi* implicated *Batson* and other ethical issues when Mr. Clark was prosecuted for murder.[41] On October 27, 2014, thirteen-year-old Muhammed Saeed and his father, Fahd, were working at their family convenience store. In a robbery gone wrong, Muhammed was murdered and Fahd was shot but survived. Mr. Saeed identified Tony Terrell Clark, a Black man, as his son's murderer.[42] At trial, Mr. Clark raised multiple *Batson* claims at trial for conduct the Supreme Court had previously identified as evidence of *Batson* violations in *Flowers v. Mississippi*.[43] These alleged violations included

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[38] *Chinn II*, 1991 Ohio App. LEXIS 6497, at *56.

[39] *See also*, *Chinn*, 2001 Ohio App. LEXIS 3127 * at 26, 34 (reasoning in part that because counsel had access to other records about the witness, psychological records would not have changed the outcome and that despite the witness being the only other person at the scene of the murder, other witness testimony would have overwhelmed any impeachment concerns).

[40] Petition for Writ of Certiorari, *supra* note 3, at 3; State v. Chinn, 214 N.E.3d 572 (Ohio 2023).

[41] Clark v. Mississippi, 143 S. Ct. 2406 (2023) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting from denial of certiorari) *denying cert. to Clark I*, 343 So. 3d 943 (Miss., 2022).

[42] *Clark I*, 343 So. 3d 943, 952–52 (Miss. 2022).

[43] *Clark*, 143 S. Ct. at 2410 (explaining how the lower court did not apply the factors listed in Flowers v. Mississippi, 139 S. Ct. 2228 (2019)).

"jarring" statistics about the high rates of striking Black jurors, uneven investigations into Black jurors compared to white jurors, and prosecutorial misrepresentations about the nature of the strikes made to evade *Batson*.[44] Even though the record showed that Mississippi did not apply appropriate *Batson* precedent, the Supreme Court denied certiorari.[45] As of this writing, Mr. Clark is litigating his post-conviction appeal for relief at the Mississippi Supreme Court.[46]

D. Current Context: Historically Anti-Defendant Supreme Court Majority Ignores *Brady* and *Batson*

Chinn and *Clark* are not outliers. In the October 2022 term, Justices Sotomayor, Kagan, and Jackson joined each other in eight dissents from denials of certiorari regarding violations of settled criminal due process law.[47] Six of these denials were capital cases. Five dissents were about prosecutorial misconduct, including *Brady* and *Baston* issues.[48] The Justices also dissented

[44] *Id*. at 2408-10.

[45] *Id*. at 2406.

[46] Motion for Post-Conviction Relief, Motion for Post-Conviction Relief at 1, Clark v. Mississippi, 2022-DR-00829-SCT (Miss. filed Aug. 18, 2022) (filing for relief pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code § 99-39-9).

[47] *See, e.g.*, Brown v. Louisiana, 143 S. Ct. 886 (2022) (Jackson, J., joined by Sotomayor & Kagan, J.J., dissenting from denial of certiorari) (reprimanding the Louisiana Supreme Court for ruling against established principles of *Brady* and its progeny and noting that the Supreme Court had previously reversed the Louisiana Supreme Court for similar rulings) *denying cert. to* State v. Brown, 347 So. 3d 745 (La., Jan. 28, 2022). Justice Kagan did not join in two dissents.

[48] *See, e.g.*, Anthony v. Louisiana, 143 S. Ct. 29 (2022) (Sotomayor, J., joined by Jackson, J., dissenting from denial of certiorari) (decrying the Supreme Court's refusal to correct the lower court's error of allowing a prosecutor to testify against a witness and use the prestige of his office to urge the jury to find guilt) *denying cert. to* State v. Anthony, 309 So. 3d 912 (La. App. 5th Cir. 2020).

from Sixth[49] and Eighth Amendment[50] denials. In contrast, Justice Thomas, joined by Justice Alito, dissented from a denial of certiorari arguing that the Supreme Court should have reversed a lower court's stay of execution under the Eight Amendment prohibition of cruel and unusual punishment.[51] Justice Thomas held that the defendant's claim about the painfulness of the lethal injection should have been overturned because of pleading errors.[52] The Court's current membership includes justices who are historically unfriendly to criminal defendants and as such, these denials may be seen as part of a general anti-criminal defendant stance by the Supreme Court's conservative majority.[53]

Race also casts a shadow over this trend. While dissenting from denial of Mr. Clark's petition, Justice Sotomayor reminded her colleagues that his was "yet another death pen[]alty

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[49] Burns v. Mays, 143 S. Ct. 1077 (2023) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting from denial of certiorari) *denying cert. to* Burns v. Mays, 31 F.4th 497 (6th Cir. 2022); Thomas v. Lumpkin, 143 S. Ct. 4 (2022) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting from denial of certiorari) *denying cert. to* Thomas v. Lumpkin, 995 F.3d 432 (5th Cir. 2021); Davis v. United States, 143 S. Ct. 647 (2023) (Jackson, J., joined by Sotomayor, J., dissenting from denial of certiorari) *denying cert. to* Davis v. United States, No. 20-11149, 2022 U.S. App. LEXIS 3753 (11th Cir. Feb. 10, 2022).

[50] Johnson v. Vandergriff, 143 S. Ct. 2551 (2023) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting from denial of certiorari) *denying cert. to* Johnson v. Vandergriff, No. 4:23-cv-00845-MTS, 2023 U.S. Dist. LEXIS 122368, (E.D. Mo., July 17, 2023).

[51] Hamm v. Smith, 143 S. Ct. 1188 (2023) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari) *denying cert. to* Smith v. Comm'r Ala. Dep't of Corr., No. 22-13781, 2022 U.S. App. LEXIS 31789 (11th Cir. Nov. 17, 2022).

[52] *Id.* at 1189–90 (noting that the defendant did not properly plead an Eight Amendment cruel and unusual punishment claim because he did not include an alternative form of lethal injection).

[53] *See* Statistica, *Ideological Scores of Supreme Court justices in the United States in 2022* (Nov. 24, 2023) https://www.statista.com/statistics/1322613/ideological-scores-supreme-court-justices-us/ (displaying that six of the current Justices have conservative voting records that lean "tough on crime"); Brent Newton, *Fourth Amendment Scorecard*, 3 Stan. J.C. R. C. L. 1, 15 (2017) (showing that from 1985 through 2015, Justices Roberts, Thomas, and Alito are three of the five Justices who are least likely to find for Fourth Amendment defendants). Justice Alito is particularly unfriendly to criminal defendants. *See* Emily Bazelon, *Mysterious Justice*, N.Y. TIMES MAGAZINE (Mar. 18, 2011) https://www.nytimes.com/2011/03/20/magazine/mag-20Lede-t.html?login=email&auth=login-email ("Alito is the least likely justice to show a glimmer of concern for the rights of criminal defendants. He has ruled for the defense in only 17 percent of the criminal cases he has heard since he joined the court, putting him to the right of Roberts, Scalia, Thomas — and every other justice of the past 65 years other than William Rehnquist . . . .").

case involving a Black defendant," where the Supreme Court refused to intervene.[54] Indeed, when the Supreme Court narrows the sweep of *Brady* and *Batson*, these legal standards become roadblocks for defendants who are disproportionally Black and male. Moreover, prosecutors are also disproportionally white and male, which heightens ethical concerns about the integrity of the convictions the Supreme Court refuses to examine.[55] Given that the Supreme Court has led the way in making it "difficult to litigate issues of race, especially real-world forms of discrimination experienced by [B]lack individuals" in other areas of the law, these denials of certiorari cannot be examined in a vacuum.[56]

III. ANALYSIS

A. The Supreme Court Has Enforced *Brady* in the Past and Its Reticence to Enforce It Now Signals That the Court Does Not Prioritize the Ethos of Rule 3.8

The Supreme Court has previously granted certiorari petitions to enforce compliance with *Brady* and *Batson*. In 2016, the Supreme Court intervened when the Louisiana Supreme Court raised the materiality bar too high for *Brady* defendants in *Wearry v. Cain*.[57] The *Wearry* court that found Louisiana had "egregiously misapplied settled law" when it affirmed Michael Wearry's capital murder conviction.[58] The events in *Wearry* and *Chinn* are similar. In both cases, there was a post-conviction discovery that the state suppressed impeachment evidence about the

[54] Clark v. Mississippi, 143 S. Ct. 2406, 2407 (2023) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting from denial of certiorari) *denying cert. to Clark I*, 343 So. 3d 943 (Miss., 2022).

[55] POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 196-202 (Angela Davis ed., 2017).

[56] *Id.* at 280 (discussing how courts and the Supreme Court in particular create difficulties in litigating discrimination by law enforcement).

[57] Wearry v. Cain, 577 U.S. 385 (2016) (per curiam).

[58] *Id.* at 392, 394–96.

government's key witness.[59] In *Wearry*, the Supreme Court ruled that the impeachment evidence *did* meet the reasonable probability threshold for materiality under *Brady*, stressing that Wearry only needed to show "that the new evidence [was] sufficient to 'undermine confidence' in the verdict."[60] Under *Wearry*, a court would likely find that the suppressed evidence in *Chinn* was material because defense counsel was not able to impeach the witness's ability to correctly identify Mr. Chinn.[61]

Chinn relied on *Wearry* for support in the Sixth Circuit. That court distinguished between the two cases, holding that *Wearry* did not offer a rule with enough "granularity" to apply to *Chinn*, despite the similarities between the cases.[62] Instead of applying *Wearry's* materiality standard, that court relied on an older Supreme Court case, *Harrington v. Richter*, which stated that reasonable probability was only slightly different from a more-likely-than-not standard.[63]

The Sixth Circuit erred when it rejected *Wearry*. The *Wearry* court rejected a state's attempt to harden the *Brady* materiality test, but the Sixth Circuit's ruling that did just that. Moreover, the Sixth Circuit concluded that "the central evidence against" against Mr. Chinn was

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[59] *Compare id.* at 386–91 (noting that evidence was discovered that the state's key witness had lied about the events of the murder and was not at the scene of the crime, but was instead at a strawberry festival at the time of the murder), *with Chinn IV*, 24 F.4th 1096, 1104 (6th Cir. 2022) (explaining that psychological records reported the state's key witness had "neuropsychological impairments" that could cause him difficulty remembering events and differentiating between reality and fiction).

[60] *Wearry*, 577 U.S. at 392 (quoting Smith v. Cain, 565 U.S. 73, 75 (2012)).

[61] *See* Chinn v. Shoop, 143 S. Ct. 28, 28 (2022) (Jackson, J., joined by Sotomayor & Kagan, J.J., dissenting from denial of certiorari) (noting that the state's witness had mental disabilities that might have impacted his "ability to remember, perceive fact from fiction, and testify accurately.") *denying cert. to Chinn IV*, 24 F.4th 1096 (6th Cir. 2022).

[62] *Chinn IV*, 24 F.4th at 1106.

[63] *Id.* at 1103 (6th Cir. 2022) (citing Harrington v. Richter, 562 U.S. 86 (2011)) (explaining that the Sixth Circuit has held that the *Brady* standard is the same as *Strickland's* reasonably likely standard). *Contra Wearry*, 577 U.S. at 392 (citing Smith v. Cain, 565 U.S. 73, 75 (2012)) ("To prevail on his *Brady* claim, Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted.").

the state's key witness' testimony and that "once the jury believed [the witness], a guilty verdict was 'inevitable.'"[64] Even if the Sixth Circuit was correct in applying the more-likely-than-not standard, its own finding that the witness' testimony was dispositive in the jury's decision-making would counsel for a new trial with the impeachment evidence.

In her dissent, Justice Jackson wrote that she would have summarily reversed the Sixth Circuit for issuing a ruling contrary to the Supreme Court's precedent because it substituted the reasonable probability standard for the more-likely-than-not standard.[65] While Justice Jackson assessed that the Sixth Circuit's error was plainly contrary to the Supreme Court's holdings, there may have been a genuine dispute about how the Supreme Court conceives of the reasonable probability standard, given the contradictory statements in *Harrington* and *Wearry*. Whether the Supreme Court's opinion in *Chinn* would have corrected a clear misapplication of *Brady* or instead clarified a rule's ambiguity, intervention would have provided guidance to lower courts. Regardless of the legal issues at play, Rule 3.8 does is not limited by *Brady's* materiality standard, and the prosecutorial misconduct present in both these cases raises serious concerns about the conduct the Supreme Court is not correcting by refusing to grant certiorari for Mr. Chinn's case.

[64] *Chinn IV*, 24 F.4th at 1107 (citing State v. Chinn, 709 N.E.2d 1166, 1178 (1999)).

[65] *Shoop*, 143 S. Ct. at 28–29 ("That reasoning violated the spirit, if not the letter, of our many cases . . . .").

B. The Supreme Court Vigorously Defended *Batson* in the Past and Its Refusal to Enforce It Again Creates a Permission Structure for Prosecutors to Ignore Ethical Obligations

In 2019, the Supreme Court defended *Batson* in *Flowers v. Mississippi*.[66] There, one state prosecutor tried Curtis Flowers in six separate jury trials for the murder of four people.[67] Mr. Flowers is Black and the prosecutor, District Attorney Doug Evans, is white. The Mississippi Supreme Court reversed the first three trials (the first and third for *Batson* violations and the second for other forms of prosecutorial misconduct), and the fourth and fifth trials resulted in a hung jury.[68] Despite evidence that Mr. Evans had again engaged in racial discrimination during jury selection at the sixth trial, the Mississippi Supreme Court affirmed Mr. Flower's conviction.[69] While reviewing Mr. Flowers' sixth trial, the Supreme Court held that Mr. Evans violated *Batson* during the jury selection process, and reversed Mr. Flowers' conviction.[70] The Court stressed that it broke "no new legal ground," and "simply enforce[d] and reinforce[d] *Batson* by applying it to the extraordinary facts of this case."[71] *Flowers* made clear to lower courts that *Batson* violations could not stand because the Supreme Court explicitly stated it did not to make new law in *Flowers*.

In contrast, the Supreme Court declined to enforce *Batson* when it denied Mr. Clark's petition for certiorari.[72] In *Flowers*, the Supreme Court proclaimed it was "vigorously

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[66] Flowers v. Mississippi, 139 S. Ct. 2228 (2019).

[67] *Id.* at 2234–37

[68] *Id.* at 2235.

[69] *Id.*

[70] *Id*. at 2251.

[71] *Id.*

[72] Clark v. Mississippi, 143 S. Ct. 2406 (2023) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting from denial of certiorari) ("In yet another death penalty case involving a Black defendant, that court failed to address not

enforc[ing] and reinforc[ing]" *Batson* to "guar[d] against any backsliding."[73] But a few years later in *Clark*, the *same* conduct occurred in the *same* jurisdiction as in *Flowers* and the Supreme Court was silent. What's more, the Mississippi Supreme Court was aware that affirming Mr. Clark's conviction was bucking *Batson's* edict.[74] The Court's refusal to address a "direct repudiation" of its own precedent is tantamount to tacitly allowing the Mississippi Supreme Court to ignore *Batson* and *Flowers* and condoning prosecutorial misconduct.[75]

The Justices themselves understand the risk of the Supreme Court's denials. While dissenting from the denial of certiorari in *Clark*, Justice Sotomayor wrote that denying certiorari created a permission structure for the Mississippi Supreme Court to continue it's "noncompliance" with *Batson*.[76] Justice Sotomayor criticized her peers for being "unwilling to take even that modest step to preserve the force of [the Supreme Court's] own recent precedent."[77] The dissent emphasized the stakes: not only did this denial deny a defendant's constitutional rights, but it also made Mississippi a constitutional island where *Batson* and *Flowers* do not seemingly apply.[78]

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just one but three of the factors *Flowers* expressly identified.") *denying cert. to Clark I*, 343 So. 3d 943 (Miss., 2022).

[73] *Id.* at 2407 (citing *Flowers v. Mississippi*).

[74] *Clark I*, 343 So. at 1014–24 (King, P.J., dissenting) (analyzing how the majority ignored the Supreme Court's rules announced in *Batson* and clarified in *Flowers*).

[75] *Clark*, 143 S. Ct. at 2407.

[76] *Clark*, 143 S. Ct. at 2407; *see id.* at 2411 ("[C]ourts throughout the State will take note and know that this Court does not always mean what it says.").

[77] *Id*. at 2411.

[78] *Id.* ("The failure of the court below to engage with several factors expressly identified in *Flowers* cannot stand if *Batson* is to retain its force in the State of Mississippi.").

C. Comparing *Chinn* and *Clark* with *Wearry* and *Flowers* Reveals Concerning Implications About the Rule of Law and Prosecutorial Misconduct

In contrast to *Wearry* and *Flowers*, these denials offer—at best—mixed messages about how the Supreme Court values its precedent. The Court increasingly expects lower courts to follow the unexplained or very brief orders it issues on its emergency docket.[79] In such an environment, lower court judges and practitioners could reasonably wonder if the Supreme Court considers these merits docket denials to also have precedential value; in fact, Justice Jackson has pointed out in her dissents that the Supreme Court's denials should "no way be construed as an endorsement of the lower court's legal reasoning."[80]

These denials also show lower court judges that the Supreme Court will not always correct misapplication or non-application of its law. The Court cannot take up all petitions it receives, but the Supreme Court is hearing historically low numbers of cases.[81] Even if the Supreme Court granted certiorari in all the criminal due processes cases with a dissent from denial, it would still hear far fewer cases than its historically has.[82] The Court is not denying

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[79] STEVE VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC xii (2023).

[80] *See, e.g.*, Brown v. Louisiana, 143 S. Ct. 886 (2023) (Jackson, J., joined by Sotomayor & Kagan, J.J., dissenting from denial of certiorari) ("This Court has decided not to grant Brown's petition for certiorari, but that determination should in no way be construed as an endorsement of the lower court's legal reasoning. In my view, the Louisiana Supreme Court misinterpreted and misapplied our *Brady* jurisprudence in a manner that contravenes settled law.") *denying cert. to* State v. Brown, 347 So. 3d 745 (La., Jan. 28, 2022) .

[81] Adam Feldman, *Is the Roberts Court the Least Productive Court of All Time?*, EMPIRICAL SCOTUS (June 7, 2022), https://empiricalscotus.com/2022/06/07/least-productive-court/ (nothing that the Roberts Court heard the fewest number of cases on oral argument since the Civil War).

[82] *See id.* (noting that the Roberts court, as of June 2022, heard 0.94-percent of cases filed, the lowest amount since 1880. The Burger court is the next–lowest amount, through that is double the rate of the Roberts court); Adam Feldman, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2022), https://empiricalscotus.com/2023/06/30/another-one-bites-2022/ (showing that in the October 2022 Term, there were about 4,000 certiorari petitions filed, compared to over 7,000 petitions filed from 2003 through 2014).

these cases because it does not have the bandwidth. If not a practicability issue, lower courts are left to wonder why the Supreme Court lets is precedents go undefended.

Aside from the rule of law concerns these denials implicate, Mr. Chinn and Mr. Clark's cases represent profound ethical failings. Mr. Chinn is locked into a death sentence despite substantive reasonable doubt about his guilt, and Mr. Clark continues to fight his conviction despite textbook prosecutorial violations of his constitutional rights. These situations are morally untenable; *Brady*, *Batson*, and Rule 3.8 are all intended to prevent scenarios like these. The judiciary, from state trial courts through the Supreme Court, has failed to protect core ethical principles about fairness and justice. The state courts failed to ensure that Mr. Chinn and Mr. Clark received fair trials free from prosecutorial misconduct and supported by convictions beyond a reasonable doubt. State and federal appellate courts failed to correct those lower court errors and misapplied clear constitutional precedent that protects defendants. And finally, the Supreme Court, sitting atop the judiciary, failed to not only defend its legal authority, but also to serve as a final check on injustice in the lower courts.

The Court's refusal to disturb the extraordinary circumstances at issue in *Chinn* and *Clark* set a dangerous tone of impunity for prosecutors. Multiple factors demonstrate that denying these petitions for certiorari creates a permission structure for prosecutors to violate ethical and legal rules. *Brady* and *Batson* are the floor, while ethical obligations imposed by the Model Rules and many state Rules impose a higher duty on prosecutors.[83] In Mr. Chinn and Mr. Clark's cases, the prosecutorial errors at issue are undisputed.[84] By dissenting from the denial of certiorari, these

[83] *See, e.g.*, NEY YORK CITY BAR, *supra* note 25 (showing that the New York Bar interprets its version of Rule 3.8 to carry a higher burden for prosecutors that *Brady*).

[84] Chinn v. Shoop, 143 S. Ct. 28, 28 (2022) (Jackson, J., joined by Sotomayor & Kagan, J.J., dissenting from denial of certiorari) *denying cert. to* Chinn v. Warden (*Chinn IV*), 24 F.4th 1096 (6th Cir. 2022); *see* Clark v. Mississippi, 143 S. Ct. 2406, 2407-10 (2023) (Sotomayor, J., joined by Kagan & Jackson, J.J., dissenting from denial of

cases also drew national attention.[85] These denials show prosecutors that when their conduct not only dips below Rule 3.8's standards, but also the lower standards of *Brady* and *Batson*, their convictions will not be overruled. What force will chasten these prosecutors if the court of last resort refuses to correct these ethical wrongdoings?

IV. POLICY PROPOSAL

In light of the Court's reluctance to enforce *Brady, Batson*, and ethics codes, policy reforms could offer relief.[86] While post-conviction statutes allowing *Brady* and *Batson* appeals seem promising, they did not help Kevin Johnson. In 2021, Missouri created a statutory remedy for defendants to pursue post-conviction appeals.[87] The law allows defendants to enlist prosecutors to investigate their cases, who in turn may seek to vacate unconstitutional criminal judgments if they uncover constitutional defects. Mr. Johnson filed an application under this statute regarding his conviction for murdering a police officer.[88] After an investigation, the special prosecutor appointed to review Mr. Johnson's case petitioned the Supreme Court and the

certiorari) *denying cert. to Clark I*, 343 So. 3d 943 (Miss., 2022) (discussing prosecutorial errors under *Batson* that are in the lower court record).

[85] *See, e.g.*, Amy Howe, *Denials of Review in Five Cases Draw Dissents from Various Justices*, SCOTUSBLOG (Nov. 7, 2022, 3:47PM), https://www.scotusblog.com/2022/11/denials-of-review-in-five-cases-draw-dissents-from-various-justices/ (remarking on the denials discussed in this paper).

[86] The Supreme Court is not an outlier: trial courts are also reluctant to impose sanctions on prosecutors who engage in misconduct. Pope, *supra* note 17 at 1548 ("[T]rial judges only sporadically impose the sanctions available to the court, preferring to encourage professional ethics entities to take disciplinary measures instead.")

[87] Mo. Rev. Stat. § 547.031. Almost every state has a postconviction relief statute. THE SUPREME COURT OF OHIO TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW, POSTCONVICTION RELIEF PETITIONS AND CONVICTION INTEGRITY: 50 STATE SURVEY 2.

[88] Application for Stay of Execution Pending Appeal at 7-8, Johnson v. Missouri, 143 S. Ct. 417 (2022), No. 22-A463.

Missouri Supreme Court to stay Mr. Johnson's execution.[89] The special prosecutor found evidence that at Mr. Johnson's trial, the prosecutor pursued the death penalty because Mr. Johnson was Black and struck Black jurors because of their race.[90] Furthermore, the special prosecutor identified evidence that the prosecutor who litigated Johnson's trial chronically committed *Batson* violations and even found a memo strategizing how to strike Black jurors and evade *Brady* during Mr. Johnson's trial.[91] Despite clear evidence, the Missouri courts found against Mr. Johnson, and the Missouri Supreme Court misapplied the post-conviction relief statute.[92] The Supreme Court declined to hear Mr. Johnson's case or issue a stay, and he was executed by the state of Missouri later that day.[93] As such, statutory proposals may fall short because the Supreme Court does not seem likely to force compliance with these regimes.

Without reliable judicial or statutory remedies available, one naturally wonders what can be done *inside* the offices that employ the people engaging in misconduct. Cases like *Van de Kamp v. Goldstein* and *Connick v. Thompson* validate the allegation that some large prosecutors' offices do not respect *Brady*, *Batson*, or Rule 3.8, and show that the Court is not willing to create legal schemes that would encourage compliance or culture change through prosecutor liability.[94]

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[89] *Id.*

[90] State v. Johnson, 654 S.W.3d 883, 897 (Mo. 2022) (Breckenridge, J., dissenting).

[91] Application for Stay of Execution Pending Appeal, *supra*, note 73 at 13, 16-17.

[92] Johnson v. Missouri, 143 S. Ct. 417 (2022) (Jackson, J., dissenting from denial of certiorari) ("The Missouri Supreme Court turned this straightforward procedural statute on its head.") *denying cert. to* State v. Johnson, 654 S.W.3d 883 (Mo. 2022).

[93] *Id.* at 417; *Missouri Executes Kevin Johnson Despite Special Prosecutor's Call to Vacate Death Sentence*, Death Penalty Information Center (Nov. 28, 2022), https://deathpenaltyinfo.or g/news/missouri-court-greenlights-execution-of-kevin-Johnson-despite-special-prosecutors-call-to-vacate-death-sentence.

[94] *See* Van de Kamp v. Goldstein, 555 U.S. 335 (2009) (unanimous) (offering an example of systemic failure to train prosecutors and create information-sharing systems); Connick v. Thompson, 563 U.S. 51, 71-72, 93 (2011) (showing that not training prosecutors on *Brady* has a negative impact on protecting defendants form *Brady* violations).

Experts also note that prosecutors are not representative of their communities, with over-representation of white men and under-representation of Black people in prosecutor roles; perhaps increased connection between prosecutors and the communities they serve would reduce misconduct.[95] Ultimately, this information shows that it is a tall order to seek improvement from the source of the problem: prosecutors and their offices.[96]

A source of change may be found in bar licensure entities; however, even though prosecutors are subject to sanctions for *Brady*, *Batson*, and Rule 3.8 violations, they are rarely imposed.[97] For example, Doug Evans, the District Attorney in *Flowers*, was able to serve until his retirement.[98] Likewise, in a study of 11,000 criminal cases where prosecutor misconduct was alleged, only 0.004% of those instances resulted in prosecutor discipline.[99] As such, one is forced to acknowledge a status quo where "[a]bsolute prosecutorial immunity and the reluctance of bar associations, judges, and legislators to do anything simply encourage more malfeasance."[100]

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[95] POLICING, *supra* note 55, at 245-49.

[96] Gilbert Stroud Merritt, Jr, *Symposium: Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 677 (2009) ("[T]he greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance—an old, widespread, and persistent habit.")

[97] Pope, *supra* note 17 at 1543-44 ("[V]iolating prosecutors rarely receive sanctions harsher than a metaphorical slap on the wrist.").

[98] Death Penalty Information Center, *Doug Evans, the District Attorney Who Prosecuted Curtis Flowers Six Times, Retires* (July 12, 2023) https://deathpenaltyinfo.org/news/doug-evans-the-district-attorney-who-prosecuted-curtis-flowers-six-times-retires (noting that before retiring, Mr. Evans ran unopposed for reelection as the District Attorney, has not received any public discipline from the bar, and a lawsuit stemming from his conduct in *Flowers* was quashed for procedural reasons).

[99] Pope, *supra* note 17 at 1548.

[100] Merritt, *supra* note 80, at 682.

Despite this dismal state of affairs, Maryland offers an instructive example of ways to improve culture within a bar. In a case of first impression, the state's highest court was the first in the country to hold that *Brady* obligations extend to the post-conviction phase when prosecutors learn of exculpatory evidence after the defendant has exhausted their appeals.[101] The court also made the rare choice to disbar an attorney for *Brady* violations.[102] The Maryland Office of Bar Counsel litigated that case and advocated for the disbarment of a prominent former State's Attorney.[103] The Office also advocated to discipline another high-profile prosecutor, former Baltimore State's Attorney Marilyn Mosby; there the Office sought suspension of Mosby's license.[104] This ruling and the Maryland Bar Counsel's advocacy hopefully signals increasing attention paid to ethical issues and may serve as an example to attorneys.

Although Maryland's Office of Bar Counsel sets an improved tone of accountability, room for improvement remains. Augmenting Model Rule 8.3: Reporting Professional Misconduct ("Rule 8.3") could address the apathy present in the judiciary, prosecutors' offices, and lack of enforcement at bar licensure organizations. Rule 8.3 holds that when an attorney "knows" that an attorney or judge has violated the Rules or acted in a way that raises "substantial" questions of the attorney or judge's condor or fitness, the witness-attorney must

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[101] Andrew V. Jezic and Erin A. Risch, *Administering Justice: Maryland Interprets Rule 3.8(d)*, ABA (Jan. 20, 2023), https://www.americanbar.org/groups/government_public/publications/public-lawyer/2023-winter/administering-justice-maryland-interprets-rule-3-8-d/?login; *see generally* Atty. Griev. Comm'n of Md. v. Cassilly, 476 Md. 309 (2021) (holding that, *inter alia*, the former State's Attorney for Harford County violated Rule 3.8 and that Maryland criminal disclosure obligations extend to the post-conviction phase).

[102] *Cassilly*, 476 Md. at 331.

[103] *Id.* at 327.

[104] Adam Thompson & Kelsey Kushner, *Maryland Bar Counsel Pushes to Suspend Marilyn Mosby's License to Practice Law*, CBS NEWS (Dec. 27, 2023, 11:09 pm) https://www.cbsnews.com/baltimore/news/maryland-bar-counsel-files-petition-to-suspend-former-states-attorney-marilyn-mosbys-law-license/.

report that information to a licensure authority or some other "appropriate" body.[105] The ABA holds that Rule 8.3 does not create an obligation to report every violation of the Rules; in fact, a failure to report was previously a violation itself, but the ABA claimed that was unenforceable.[106]

There are several issues with the current iteration of Rule 8.3. First, the standard of knowledge to initiate a report is far too robust. As law students learn in their first year, "knowing" is a high bar. Given the secret nature of much legal work, peer attorneys may not have enough evidence to "know" that an attorney or judge violated a rule, but could suspect, worry, or believe in good faith that a violation of 3.8 occurred. The current formulation artificially removes many potential complaints and discourages attorneys from filing complaints. Replacing the current standard with "knows or believes based on reliable evidence" would discourage filing frivolous claims but also allow for increased reporting.

Second, the ABA's claim that non-reporting violations were unenforceable does not make sense. Bar organizations conduct investigations into attorneys alleged of misconduct; it would be unreasonable to assume that those investigations would not be able to identify attorneys who knew or should have known about the initial misconduct. This type of investigation and information discovery is basic practice in administrative, civil, and criminal practice. Surely bar counsel would be equipped to discover and prosecute attorneys who know of, but do not report, misconduct. Moreover, *Brady* itself creates a strict-liability scheme where lead trial prosecutors are responsible for exculpatory material evidence known to the entire team, including non-

[105] MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N).

[106] MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. (AM. BAR ASS'N).

attorneys and attorneys who left the trial team.[107] As such, there are already structures in place that force attorneys to be aware of prosecutorial misconduct and correct for those issues. While these changes would not capture every instance of misconduct, identifying and disciplining some is better than none. Reimposing the non-reporting violation would not pose existential enforcement problems and would reap positive changes.

Third, the Model Rules should impose licensure sanctions as a punishment for non-reporting. This change would encourage increased reporting because attorneys would want to keep their licenses, of course, but would also offer another benefit: culture change. If the industry standard changed so that reporting was required and that non-reporters faced severe consequences, attorneys and judges would be able to use 'protecting my license' as an excuse to report. In offices like the one at issue in *Connick*, it would not be a popular choice of an attorney to report a supervisee, peer, or managing attorney to bar counsel. But if the industry is aware that the reporting attorney had no choice but to report to protect their licenses, the social costs of reporting within prosecutors' offices would likely decrease. Such a sea-change would likely reduce pressure on attorneys to stay silent. Without judicial oversight, reforming cultural norms may offer the best solution to *Brady*, *Batson*, and other ethical violations.

[107] *See* Giglio v. United States, 405 U.S. 150, 154 (1972) ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.)"

V. CONCLUSION

Beyond delegitimizing the rule of law, when the Supreme Court does not strike down clear examples of prosecutorial misconduct that violate *Brady*, *Batson*, and Rule 3.8, it also creates a permission structure for prosecutors to commit ethical violations. Denials like *Chinn*, *Clark*, and *Johnson* compound existing ethical failures as courts throughout the judicial hierarchy fail to correct for prosecutorial misconduct. Without clear consequences, prosecutors prone to violating *Brady*, *Batson*, and Rule 3.8 will continue to do so. The Supreme Court's refusal to take up these petitions indicate that it is unwilling to intervene even when state courts allow prosecutors to violate ethical rules.