UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
AUG - 1 2006
RECEIVED

ORAL ARGUMENT NOT YET SCHEDULED

Nos. 05-5207, 06-5048

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

HAROLD MARTIN,
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE,
Appellees.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Appellant,
v.
UNITED STATES DEPARTMENT OF JUSTICE,
Appellees.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS, SUPPORTING REVERSAL

Theodore M. Shaw
Director-Counsel
Norman J. Chachkin
Christina A. Swarns
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013-2987
Counsel for Amicus Curiae
NAACP Legal Defense Fund

Michael S. Fried
Laura Tuell Parcher
Joseph W. Clark
Juliet J. Karastelev
JONES DAY
51 Louisiana Ave N.W.
Washington D.C. 20001
Counsel for Amici Curiae
Mid-Atlantic Innocence Project, and
ACLU of the National Capital Area

Arthur B. Spitzer
American Civil Liberties Union
of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
Of counsel, ACLU of the National
Capital Area

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

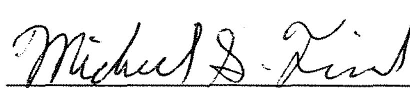
Counsel for *Amici Curiae*, Mid-Atlantic Innocence Project and the American Civil Liberties Union for the National Capital Area, hereby submits the following certificate in accordance with Circuit Rule 28(a)(1).

(A) Parties and *Amici*. Except for *amici curiae* American Civil Liberties Union for the National Capital Area and the NAACP Legal Defense and Educational Fund, all parties and *amici* appearing in this court are listed in the Brief for Appellant.

(B) Rulings Under Review. References to rulings at issue appear in the Brief for Appellant.

(C) Related Cases. These cases were previously before this Court on cross-motions for summary disposition. *See Martin v. Dep't of Justice,* No. 05-5207, Order (D.C. Cir. filed May 23, 2006). Appeal no. 05-5207 is back before this Court after an earlier remand. *See Martin v. Dep't of Justice*, No. 00-5389, 38 F. App'x 17 (D.C. Cir. Apr. 23, 2002). Counsel is not aware of any other related cases.

Respectfully submitted,



Michael S. Fried
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939 (Telephone)
(202) 626-1700 (Telecopy)

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES i

TABLE OF AUTHORITIES iii

GLOSSARY vii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE DISTRICT COURT ERRED BY CATEGORICALLY HOLDING THAT THERE IS NO PUBLIC INTEREST IN MATERIALS PERTAINING TO POSSIBLE *BRADY* VIOLATIONS 10

A. Uncovering Law Enforcement Misconduct Is A Central Purpose Of The FOIA. 10

B. Information Regarding *Brady* Violations Is Central To Current Public Debate Regarding The Proper Functioning of Our Criminal Justice System 14

C. The Public Has Other Interests in the Disclosure of Information Pertaining To Possible *Brady* Violations 22

D. The District Court Offered No Valid Ground For Its Contrary Holding That There Is No Public Interest In Exposing *Brady* Violations 25

II. THE DISTRICT COURT ERRED BY SUGGESTING THAT A FOIA REQUESTER MUST AFFIRMATIVELY PROVE GOVERNMENTAL MISCONDUCT BEFORE BEING ENTITLED TO *BRADY*-RELATED MATERIALS 27

CONCLUSION 30

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CASES

Al-Fayed v. CIA, 254 F.3d 300 (D.C. Cir. 2001) 2

Banks v. Dretke, 540 U.S. 668 (2004) 5

Bennett v. Drug Enforcement Administration, 55 F. Supp. 2d 36 (D.D.C. 1999) 13

Brady v. Maryland, 373 U.S. 83 (1963) .... *passim*

Bright v. Ashcroft, 259 F. Supp. 2d 494 (E.D. La. 2003) 18, 19, 24

Bright v. Ashcroft, 259 F. Supp. 2d 502 (E.D. La. 2003) 19

Davis v. Department of Justice, 968 F.2d 1276, 1282 (D.C. Cir. 1992) 28

Department of Air Force v. Rose, 425 U.S. 352 (1976) 9

Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989) 10, 18

Department of State v. Ray, 502 U.S. 164 (1991) 10

Ferri v. Bell, 645 F.2d 1213 (3d Cir. 1981) 17, 18

House v. Bell, 126 S. Ct. 2064 (2006) 5

Kansas v. Marsh, 125 S.Ct. 2516 (2006) 14

Landano v. Department of Justice, 873 F. Supp. 884 (D.N.J. 1994) 14

Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003) 20

NAACP v. Button, 371 U.S. 415 (1963) 3

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 10

TABLE OF AUTHORITIES
(continued)

Page

National Archives & Records Administration v. Favish, 541 U.S. 157 (2004) 9, 25, 26, 28, 29

Nation Magazine v. Customs Service, 71 F.3d 885 (D.C. Cir. 1995) 9

Oguaju v. United States, 288 F.3d 448 (D.C. Cir.), *vacated*, 541 U.S. 157 (2004) 18, 25, 26

Oguaju v. United States, 378 F.3d 1115, 1116 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 983 (2005) 26, 29, 30

People v. Wahad, 154 Misc. 2d 405 (N.Y. Sup. Ct. 1993) 21

In re Pratt, 82 Cal. Rptr. 2d 260 (Dist. Ct. App. 1999) 21

Quinon v. FBI, 86 F.3d 1222, 1231 (D.C. Cir. 1996) 28

Rosenfeld v. Department of Justice, 57 F.3d 803 (9th Cir. 1995) 13

Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991) 28

Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) 13

Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984) 13

United States v. Sampson, 275 F. Supp. 2d 49 (D. Mass. 2003) 15, 24

United States v. Stifel, 594 F. Supp. 1525, 1528 (N.D. Ohio 1984) 21, 24

United States v. Wilson, 289 F. Supp. 2d 801 (S.D. Tex. 2003) 20

STATUTES

5 U.S.C. § 552 .... 9, 10, 13

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATIVE MATERIALS

H. Comm. on Gov't Operations & S. Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act & Amendments of 1974 (P.L. 93-502) (Joint Comm. Print 1975) 11, 12, 13

Comm. on the Judiciary, Freedom of Information Act Sourcebook: Legislative Materials, Cases, Articles, S. DOC. No. 93-82, at 79 (2d Sess. 1974) 10

MISCELLANEOUS

A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia, available at http://www.icva.us 15, 22, 23, 24

Ken Armstrong & Maurice Possley, *Trial & Error. How Prosecutors Sacrifice Justice to Win.*, CHI. TRIB., Jan. 10, 1999, at C1 17

Robert Becker, *Ford Heights 4 To Get Their Settlement From County*, CHI. TRIB., Mar. 16, 1999 at B3 23

Edward J. Boyer, *Pratt Reportedly Settles Case for $4.5 Million*, L.A. TIMES, Apr. 26, 2000, at A1 21

Patrice Brymner, *Where Massachusetts Fits among States in Compensation for the Wrongfully Convicted*, Apr. 2004, *available at* http://www.cjpc.org/rest_other_states.htm 23

Patrice Gaines, *A Case of Conviction*, WASH. POST, May 6, 2001, at F1 20

James Gill, *High Court Steps Closer To Righting A Wrong*, Times-Picayune (New Orleans, LA), April 16, 2004, Metro, at 7 19

Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1 14

TABLE OF AUTHORITIES
(continued)

Page

Jeffrey A. Kaufman & Alysa N. Zeltzer, Investigation Report For Beverly Ann Monroe (January 22, 2004), *available at* http://www.wcl.american.edu innocenceproject/ICVA/supp_case.html 20

Ronald Sullivan, *Court Erupts as Judge Frees an Ex-Panther*, N.Y. TIMES, Mar. 23, 1990, at B1 21

Adam Zagorin, *A Rogue's Revenge*, TIME, Dec. 19, 2005, at 63 21

GLOSSARY

ACLU-NCA	American Civil Liberties Union of the National Capital Area
FOIA	The Freedom of Information Act
ICVA	Innocence Commission of Virginia
LDF	NAACP Legal Defense and Educational Fund, Inc.
MAIP	The Mid-Atlantic Innocence Project

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

Identity of Amici Curiae

The Mid-Atlantic Innocence Project ("MAIP") was established in the face of mounting evidence that innocent people are incarcerated for criminal offenses — and sometimes even placed on death row — while the real perpetrators remain free to carry out additional criminal acts. MAIP is dedicated to help remedy such travesties, and, in doing so, to help improve the proper functioning of the criminal justice system. At the level of individual cases, MAIP focuses on the exoneration of persons who have been wrongly convicted of serious crimes in Maryland, Virginia, and the District of Columbia. At a societal level, MAIP represents the interests of law enforcement and the public in advocating reforms to increase the reliability of the criminal justice system, thus better protecting the community from dangerous criminals and reducing the costs of wrongful convictions to society (and, of course, to the innocent convicts).

MAIP is based at American University's Washington College of Law, and is advised by an Honorary Board that represents a broad range of views on justice and policy matters, including former federal judges and former senior federal prosecutors. MAIP works with student groups at five area law schools, as well as a network of pro bono attorneys, to investigate and litigate prisoners' claims of

actual innocence. MAIP currently investigates approximately forty to sixty prisoner applications for assistance each month. Lessons learned from these investigations help MAIP to develop its legislative and policy agenda for preventing and remedying failures in the criminal justice system.

The American Civil Liberties Union of the National Capital Area (the "ACLU-NCA") is the local affiliate of the American Civil Liberties Union (the "ACLU"), a nationwide, nonprofit organization with more than 500,000 members that is dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. With a local membership of more than 10,000 persons, the ACLU-NCA defends and seeks to expand civil liberties in the Nation's Capital and Prince George's and Montgomery Counties in Maryland. The ACLU-NCA has often been an *amicus* in this Court, including in FOIA cases. *See, e.g., Al-Fayed v. CIA*, 254 F.3d 300 (D.C. Cir. 2001).

The NAACP Legal Defense and Educational Fund (the "LDF") is a non-profit corporation formed to assist African-Americans in securing their legal rights. It is the nation's oldest civil rights law firm, having been founded as an arm of the NAACP in 1939 by Charles Hamilton Houston and Thurgood Marshall. The LDF was chartered by the Appellate Division of the Supreme Court of New York in 1940 as a non-profit legal aid society "to render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by

reason of race or color and unable to employ and engage legal aid and assistance on account of poverty." Since 1957, LDF has operated independently of the NAACP. The United States Supreme Court has recognized that the LDF "has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). Throughout its history, LDF has been involved in such litigation throughout the country, both as counsel for parties and as *amicus curiae* in cases before the United States Supreme Court, this Court, and numerous other State and federal courts.

Interest of *Amici Curiae* in the Case

MAIP is regularly involved in using information obtained by requests under the Freedom of Information Act (the "FOIA") to further its mission of improving the accuracy of the criminal justice system in prosecuting, convicting, and incarcerating only those who are actually guilty of having committed the charged crimes. MAIP uses the FOIA as an important tool to investigate potential government misconduct in improperly withholding exculpatory materials — so-called "*Brady* materials" — from criminal defendants. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process"). And it uses this information obtained through the FOIA to exonerate individuals who have been

wrongfully convicted, often resulting in the identification and prosecution of the actual perpetrators of those crimes. MAIP also uses this information to document the scope of *Brady* violations in the aggregate to assist the public in evaluating the propriety and effectiveness of its government in the criminal justice arena.

MAIP's experience in this area has helped to establish that negligent or deliberate noncompliance with *Brady* obligations within some law enforcement agencies is a significant issue of public importance in the criminal justice arena. The FOIA has been an invaluable tool in the increasingly prominent public discussion over the scope and impact of *Brady* violations. That statute has also helped to hold government agencies accountable for meeting their constitutional obligations to disclose exculpatory material to the defense and to ensure that they identify, prosecute and imprison the actual perpetrators of crimes in order to protect the public.

The ACLU-NCA has a significant interest in the enforcement of the FOIA. Both the ACLU and the ACLU-NCA make regular use of the FOIA in the service of their institutional goals, and as a means of assisting clients or potential clients in obtaining information useful to their own causes. The two purposes are not truly separate, and indeed often overlap. The ACLU has often represented clients pursuing FOIA requests, and most ACLU cases — FOIA and otherwise — involve some potential personal benefit to the plaintiff, as well as a benefit to the public

interest. A doctrine holding that personal benefit and the public interest are mutually exclusive domains would be empirically incorrect, and would significantly weaken the FOIA.

The LDF has a long-standing concern with criminal justice issues affecting the fairness of trial proceedings, including disclosure of exculpatory evidence by prosecutorial authorities. For example, LDF has recently litigated two Supreme Court matters on behalf of death-sentence prisoners whose cases turned on evidence that was unlawfully suppressed at trial and discovered years later during federal habeas corpus proceedings. *See House v. Bell*, 126 S. Ct. 2064 (2006); *Banks v. Dretke*, 540 U.S. 668 (2004). In *House*, the Supreme Court allowed the petitioner to proceed on a claim of actual innocence based on a showing that included both new exculpatory DNA test results as well as other critical forensic evidence that came to light during habeas proceedings. In *Banks*, the Court's ruling critically depended on open access to law enforcement records that led to the discovery of material, exculpatory facts the prosecution had withheld at trial. *Id.* at 703-05.

The LDF has also investigated and publicly reported the cases of Ruben Cantu, Larry Griffin, and Carlos DeLuna, three men who were executed although there is reason to believe that they were innocent of the capital crimes for which they were sentenced. LDF's investigation of these and other similar cases, long

closed by police departments and courts, required FOIA access to public records and painstaking review of disclosed materials. In these and similar cases, FOIA requests were not always honored; when they were not, investigations were hamstrung and the public, including the families of both crime victims and the executed men, were deprived of a complete accounting of the events that might have led to the gravest miscarriages of justice. Based upon these experiences, LDF is vitally concerned with the preservation of the broadest possible availability of disclosure of exculpatory materials under the FOIA.

Source of Authority to File *Amicus* Brief

MAIP filed a *Motion for Leave to Participate as Amicus Curiae* on February 28, 2006. This Court granted that motion on March 3, 2006. *See Martin v. Dep't of Justice*, No. 05-5207 (D.C. Cir. Mar. 3, 2006) (order granting motion of *Amicus Curiae*). The Court also granted the ACLU-NCA and the LDF's motion for leave to participate as *amici curiae*, and to join in the MAIP *amicus* brief. *See Martin v. Dep't of Justice*, No. 05-5207 (D.C. Cir. July 31, 2006) (order granting motion of *Amici Curiae*).

SUMMARY OF ARGUMENT

The purpose of the FOIA is to provide the public with access to information about the workings of their government, including the operation of its criminal justice system. The district court erred by manufacturing a blanket exemption

from FOIA disclosure requirements for materials pertaining to potential *Brady* violations. If allowed to stand, this error would subvert a central purpose of the statute and harm the public's ability to obtain information from its government in an area of significant public discussion and controversy.

Brady violations are precisely the sort of governmental misconduct the FOIA was designed to help uncover. Even apart from the general societal interest in policing the conduct of its government, the public has a particularly strong interest in obtaining information regarding *Brady* violations, because such information is at the heart of a vigorous and ongoing public debate over the scope and causes of wrongful convictions. The district court failed to consider this important public interest in reaching its holding that the public has no interest in information regarding *Brady* violations.

Moreover, the district court neglected several other strong public interests in discovering the scope and frequency of *Brady* violations. The public has an obvious interest in avoiding the costs of wrongful convictions and incarcerations that *Brady* violations can produce. The public also has an interest in facilitating public safety by ensuring that real criminals do not remain free to commit additional crimes when innocent people are wrongly convicted. For these reasons, too, the district court erred in concluding that such information is of no public interest at all.

Finally, the district court erroneously suggested a heightened burden of proof for a FOIA requester to obtain materials relating to potential *Brady* violations. The district court indicated that it might require advance proof of government misconduct in order to receive materials relating to such misconduct in a FOIA request. Such a requirement would put the cart before the horse; the proper standard merely requires a reasonable suspicion that such wrongdoing might have occurred — proof is precisely what the FOIA disclosures may provide.

ARGUMENT

This case presents the issue of whether the FOIA can ever be used to obtain materials necessary to demonstrate *Brady* violations by prosecutors. The district court announced a *per se* rule that records relating to possible *Brady* violations can never be subject to FOIA disclosure requirements — indeed, that they are "outside the proper role of FOIA" altogether — because "an individual's interest in *Brady* material is private in nature." Op. 12 (internal quotation marks omitted). This categorical holding would preclude the public from using the FOIA to uncover *Brady* misconduct, to collect evidence relating to the ongoing controversy over the extent to which *Brady* misconduct systemically hinders the proper functioning of our criminal justice system, and to develop policy solutions to address such governmental misconduct. All of these uses fall squarely within the central purpose of the FOIA, which is "to open agency action to the light of public

scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (internal quotation marks omitted).

Nonetheless, the district court created a blanket exemption for *Brady*-related materials, relying upon FOIA exemption 7(C). That exemption excludes from mandatory disclosure law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); Op. 8-13. The Supreme Court has held that application of Exemption 7(C) requires a "balanc[ing of] the competing interests in privacy and disclosure" in order to justify non-disclosure. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); *accord, e.g.*, *Nation Magazine v. Customs Serv.*, 71 F.3d 885, 894-95 (D.C. Cir. 1995) (noting that "the mere fact that records pertain to an individual's activities does not necessarily qualify them for exemption" from disclosure). The district court, however, did not conduct any genuine balancing of the privacy and disclosure interests. Instead, it merely held that there was no public interest at all in materials documenting *Brady* violations, and, therefore, that *any* privacy interest would necessarily outweigh it. If allowed to stand, the district court's decision would seriously impair the public's ability to obtain information about important issues of ongoing concern and debate.

I. THE DISTRICT COURT ERRED BY CATEGORICALLY HOLDING THAT THERE IS NO PUBLIC INTEREST IN MATERIALS PERTAINING TO POSSIBLE *BRADY* VIOLATIONS.

A. Uncovering Law Enforcement Misconduct Is A Central Purpose Of The FOIA.

By "facilitat[ing] public access to Government documents," *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), the FOIA helps to "ensure an informed citizenry," which is "vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see* Comm. on the Judiciary, Freedom of Information Act Sourcebook: Legislative Materials, Cases, Articles, S. DOC. No. 93-82, at 79 (2d Sess. 1974) (the "FOIA Sourcebook") (noting that "depriv[ing] the people of knowledge of what their government is doing" has the effect of "depriving them of the opportunity to examine critically the efforts [of] those who are chosen to labor on their behalf"). To achieve this goal, the statute requires that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person," subject to specifically enumerated exceptions. 5 U.S.C. § 552(a)(3)(A).

In short, the FOIA disclosure obligations were designed to allow the public to discover "what their government is up to." *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989) (internal quotation marks omitted).

Information concerning possible law enforcement misconduct or abuses is precisely this sort of information. Indeed, allowing the public to uncover government misconduct is so central to the statutory purpose that Congress added a provision, the current Exemption 7(C), to the statute directly addressing this issue.

Prior to enactment of that provision, courts had allowed agencies to refuse to provide information that was part of investigatory files compiled for law enforcement purposes. Agencies had been permitted to do so without proof that disclosure would interfere with a specific, cognizable interest, such as the right to a fair trial, protection of the identity of informants, or preventing an unwarranted invasion of personal privacy. *See* H. Comm. on Gov't Operations & S. Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act & Amendments of 1974 (P.L. 93-502), at 332-33 (Joint Comm. Print 1975) (hereinafter "Amendments of 1974"). The legislative materials leading to the amendments criticized those decisions as "wooden[] and mechanical[]," and "in direct contravention of congressional intent," which was "to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests." *Id.* at 335.[1]

[1] The earlier provision had exempted from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." *See* Amendments of 1974 at 332. In amending this provision with the current Exemption 7(C), the Congress expressed the view that the courts had failed adequately to honor the congressional intent and "spirit" of

Congress determined that precluding such categorical FOIA denials in the law enforcement context was particularly necessary in light of the "fantastic scope and quality of abuses committed by the Federal law enforcement and intelligence community . . . [that] had escaped accountability for such a long period of time." Amendments of 1974 at 344. As a result of "lawless elements within" federal law enforcement agencies, *id.* at 347, Congress noted that "case after case after case ha[d] been thrown out [of court] because the law enforcement and intelligence communities acted illegally." *Id.* at 348.

While acknowledging that greater disclosure could "make the job of the law enforcement agencies more difficult," Congress determined that this was a price worth paying, because a "far greater danger lies behind closed doors and in locked files." *Id.* at 346. Indeed, Congress recognized that had the government been more open and accessible in the first instance, "[n]one of the abuses that we have seen come out of this system would have happened." *Id.*; *see also id.* at 285 (discussing abuses such as the "[s]ecret bombing of Cambodia, secret wheat deals, secret campaign contributions, secret domestic intelligence operations, secret cost

---

(continued...)

the FOIA by refusing to "look behind classification markings" of files as "investigatory" to determine whether the disclosure would significantly harm governmental interests. *Id.* at 335-36.

overruns, secret antitrust settlement negotiations, [and] secret White House spying operations").

Congress thus legislated that "records or information compiled for law enforcement purposes" are proper subjects of enforceable FOIA requests, so long as they are not otherwise exempted by statute, 5 U.S.C. § 552(b)(7). Exemption of law enforcement materials was thereby limited "to the extent that the production of such records would" (and, after a further 1986 amendment, "could") result in specific delineated harms. Amendments of 1974, at 332. *See generally Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971) ("The policy of the act requires that the disclosure requirements be construed broadly, the exemptions narrowly."), *cited with approval in* Amendments of 1974 at 265.

Consistent with this history, this Court has long recognized that "the public has a strong interest in the airing of [law enforcement agencies'] unlawful and improper activities" that may be served by the FOIA. *Stern v. FBI*, 737 F.2d 84, 93 (D.C. Cir. 1984); *see also Rosenfeld v. Dep't of Justice*, 57 F.3d 803, 811 (9th Cir. 1995) ("It certainly serves FOIA's purpose to disclose publicly [sic] records that document whether the FBI abused its law enforcement mandate."); *Bennett v. Drug Enforcement Admin.*, 55 F. Supp. 2d 36, 42-43 (D.D.C. 1999) (finding that the DEA's withholding of information regarding an informant under Exemption 7(C) was improper, given the substantial public interest in exposing what appeared

to be "massive government misconduct" resulting from the agency's relationship with the informant); *Landano v. Dep't of Justice*, 873 F. Supp. 884, 892 (D.N.J. 1994) ("[T]he public clearly benefits from . . . disclosure since it has an interest in the fair and just administration of the criminal justice system."). Revealing law enforcement misconduct is thus at the heart of the FOIA.

B. Information Regarding *Brady* Violations Is Central To Current Public Debate Regarding The Proper Functioning of Our Criminal Justice System.

The frequency and causes of wrongful criminal convictions has been an increasingly prominent issue in the contemporary debate over the criminal justice system, both among the public and within the judiciary. *Compare, e.g.*, *Kansas v. Marsh*, 125 S.Ct. 2516, 2544-46 (2006) (Souter, J., dissenting) (discussing evidence of wrongful criminal convictions), *with id.* at 2531-39 (Scalia, J., concurring) (disputing Justice Souter's conclusions regarding wrongful convictions); *see also, e.g.*, Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1 (reporting Governor George Ryan's moratorium on executions in light of evidence of wrongful convictions). This is precisely the sort of vigorous public discussion regarding the extent to which the government is acting properly that the FOIA was designed to facilitate.

Brady violations are an important component of the ongoing public discussion regarding wrongful convictions. What is at stake here is therefore not

simply Harold Martin's personal interest in a "garden-variety act of misconduct," (Op. 12 n. 8), but rather whether the public may use the FOIA to investigate and redress an area of significant public concern in our criminal justice system.

For example, MAIP has participated in the production of a report, issued by the Innocence Commission for Virginia (the "ICVA"), entitled *A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia* (the "Report"), which demonstrates the broad public interest in increasing the reliability of the state's criminal justice system. *See* ICVA Report, *available at* http://www.icva.us (follow "The ICVA Report" hyperlink) (last visited July 28, 2006). The Report closely analyzes eleven documented wrongful convictions of rape or murder in Virginia between 1982 and 1990 and identifies several factors that significantly contribute to the risk of wrongful convictions. One of these factors is the failure of police and prosecutors to disclose to the defense exculpatory *Brady* materials.

Over a quarter of the official exoneration cases evaluated in the Report (three out of eleven) were found to have involved the failure of police and prosecutors to disclose significant exculpatory evidence. Whether this failure arises through negligence or intentional misconduct by governmental officers, there are serious ramifications not only for the accused, who may be wrongfully convicted as a result of the non-disclosure, but also for society, which has a strong

interest in ensuring and policing the integrity of its government's operations, including the criminal justice system.

Similarly, the Center on Wrongful Convictions at Northwestern University School of Law analyzed the cases of eighty-six defendants who had been sentenced to death but subsequently legally exonerated; it found that almost twenty percent of those cases involved police or prosecutorial misconduct. *See* http://www.law.northwestern.edu/depts./clinic/wrongful/Causes/eyewitnessstudy01.htm (last visited July 28, 2006). The Innocence Project at the Cardozo School of Law has found that the most prevalent form of police and prosecutorial misconduct is the suppression of exculpatory evidence. Thirty-four percent of instances of police misconduct, and thirty-seven percent of instances of prosecutorial misconduct, involves the suppression of exculpatory material. *See* http://www.innocenceproject.org/causes/policemisconduct.php.

Brady violations and their impact upon the criminal justice system have also been analyzed in the particular context of capital cases: "A recent study of capital cases from 1973 to 1995 reported that one of the two most common errors prompting the reversal of state convictions in which the defendant was sentenced to death was the improper failure of police or prosecutors to disclose 'important evidence that the defendant was innocent or did not deserve to die.'" *United States v. Sampson*, 275 F. Supp. 2d 49, 57 (D. Mass. 2003) (quoting James S. Liebman, *et*

al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii (2000)); *see also* Ken Armstrong & Maurice Possley, *Trial & Error. How Prosecutors Sacrifice Justice to Win.*, CHI. TRIB., Jan. 10, 1999, at C1 (finding that since *Brady*, at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false).

Courts have recognized the strong public interest in uncovering *Brady* violations, and therefore have upheld the use of the FOIA to procure such information. For example, in *Ferri v. Bell*, 645 F.2d 1213 (3d Cir. 1981), a federal prisoner sought access to the arrest record of an individual who testified against him at trial. The prisoner sought to show that the government had agreed to drop criminal charges against the individual in exchange for this testimony. The Third Circuit acknowledged that the prisoner's own personal interests may have been the subjective reason he had filed the petition, because if "he could establish that such a deal was made, without his knowledge, Ferri might be entitled to a new trial." *Id.* at 1218. Nonetheless, the panel observed that "[t]he public at large has an important stake in ensuring that criminal justice is fairly administered; to the extent disclosure may remedy and deter *Brady* violations, society stands to gain." *Id.*

The Third Circuit thus reversed the district court's application of Exemption 7(C) and required that the materials be provided. *See id.*[2]

Similarly, following his murder conviction, Dan Bright learned through a response to his FOIA request that the FBI had been advised by a source that a different person (whose name had been redacted) was the actual killer, and that the government had failed to disclose this potentially exculpatory information before or during his trial. *See Bright v. Ashcroft*, 259 F. Supp. 2d 494, 497 (E.D. La. 2003). When Bright requested an unredacted copy of the document in order to obtain the identity of the person who had been identified as the murderer, the government denied the request under Exemption 7(C). The district court rejected the government's position, recognizing that, although Bright's request would benefit him personally, production also would serve vital public interests. Specifically, the court stated that production of the unredacted copy would "confirm or refute whether the FBI is meeting its constitutional obligations as set forth in *Brady v. Maryland*," *id.* at 500 n.17, and that where "a question of

[2] Despite dictum in a vacated opinion of this Court questioning the continuing validity of *Ferri*, *see Oguaju v. United States*, 288 F.3d 448, 451 (D.C. Cir.), *vacated*, 541 U.S. 157 (2004), the Supreme Court did not hold in *Reporters Committee* that there could be no public interest in the government's responsiveness to *Brady* requests. To the contrary, *Reporters Committee* held that a request for an individual's criminal record could be authorized under the FOIA when it reveals something about an agency's own (mis)conduct, thereby serving the overall purpose of the FOIA "to ensure that the Government's activities be opened to the sharp eye of public scrutiny." 489 U.S. 749, 773-74 (1989) (emphasis omitted) ["Government's" emphasized in original].

innocence and law enforcement misconduct [was] at stake, the public interest is profoundly strong." *Id.* at 500. After reviewing the unredacted document *in camera*, the district court granted Bright's FOIA request, because "[t]he failure by law enforcement agencies to disclose the statement before his murder trial raises the stakes of the public interest and pays little currency to any claim of private interest." *Bright v. Ashcroft*, 259 F. Supp. 2d 502, 502-03 (E.D. La. 2003). After Bright had served eight years in prison, his conviction was ultimately overturned in 2004. *See* James Gill, *High Court Steps Closer To Righting A Wrong*, Times-Picayune (New Orleans, LA), April 16, 2004, Metro, at 7.

The FOIA has been used in a variety of other cases both to expose wrongful government withholding of exculpatory material and to overturn wrongful convictions obtained through such misconduct. Through MAIP's collaboration with the ICVA and its own investigations, MAIP has first-hand experience regarding the importance of FOIA statutes in uncovering exculpatory evidence wrongfully withheld by law enforcement from the defense. For example, a woman named Beverly Monroe was convicted of first-degree murder and sentenced to twenty years in prison for the death of her boyfriend. After her conviction, Ms. Monroe discovered, through a FOIA request, significant exculpatory evidence that had been withheld by the prosecution during the trial. Such evidence, including a medical examiner's report and a physician's report, suggested that her boyfriend

had been depressed and taking anti-depressant medication at the time of his death, and that his death might have been a suicide. *See Monroe v. Angelone*, 323 F.3d 286, 294 (4th Cir. 2003). The district court consequently allowed Monroe to seek additional post-trial evidence of her innocence and ultimately granted her petition for habeas corpus in an order affirmed by the Fourth Circuit. *Id.* at 291; *see also* Jeffrey A. Kaufman & Alysa N. Zeltzer, Investigation Report For Beverly Ann Monroe (January 22, 2004), *available at* http://www.wcl.american.edu innocenceproject/ICVA/supp_case.html (follow "Beverly Monroe" hyperlink).

MAIP also is currently investigating the murder of Catherine Fuller in Washington D.C. in 1984, for which thirteen members of a group calling themselves the "Eighth and H crew" were convicted, with many sentenced to life in prison. Through the FOIA, a Washington Post reporter uncovered a statement, never disclosed at trial, of a witness named Ammie Davis, who claimed that she had seen a man named James Blue, rather than the Eighth and H crew, commit the murder of Ms. Fuller. Other undisclosed statements in the file corroborated Ms. Davis's story. Ms. Davis was killed by James Blue one week before the Fuller trial. *See* Patrice Gaines, *A Case of Conviction*, WASH. POST, May 6, 2001, at F1.

There are many other examples. *See, e.g., United States v. Wilson*, 289 F. Supp. 2d 801, 802 (S.D. Tex. 2003) (vacating conviction of former CIA officer for exporting explosives to Libya because the government knowingly used false

evidence against him and suppressed exculpatory evidence); Adam Zagorin, *A Rogue's Revenge*, TIME, Dec. 19, 2005, at 63 (explaining that judge threw out Wilson's conviction largely on the basis of newfound evidence Wilson unearthed through FOIA requests); *United States v. Stifel*, 594 F. Supp. 1525, 1528, 1542-43 (N.D. Ohio 1984) (vacating sentence, after defendant had served eleven years in prison, because "the prosecution possess[ed] a mass of evidence tending to show that [he] was not the perpetrator of the crime" that it did not divulge to the defendant, who learned about it through FOIA requests); *In re Pratt*, 82 Cal. Rptr. 2d 260, 271 (Dist. Ct. App. 1999) (affirming grant of habeas petition to incarcerated prisoner after serving twenty-seven years in prison due to denial of critical *Brady* material), Edward J. Boyer, *Pratt Reportedly Settles Case for $4.5 Million*, L.A. TIMES, Apr. 26, 2000, at A1 (referencing FBI documents released under the FOIA that were instrumental in release of defendant Pratt); *People v. Wahad*, 154 Misc. 2d 405, 422 (N.Y. Sup. Ct. 1993) (vacating conviction of defendant who served 19 years in prison because FBI wrongfully withheld exculpatory materials at trial, materials that were later obtained by defendant through the FOIA), Ronald Sullivan, *Court Erupts as Judge Frees an Ex-Panther*, N.Y. TIMES, Mar. 23, 1990, at B1 (discussing prosecution's failure to overturn critical FBI tapes to defendant Wahad at time of trial, tapes which were later obtained through the FOIA).

As the foregoing examples show, analyzing *Brady* violations can, and often does, reveal frequent or systemic problems in the conduct of criminal prosecutions. This information is therefore the furthest thing from facts "relevant only as to the unique facts and circumstances surrounding plaintiff's criminal proceeding," or "akin to exposing a single, garden-variety act of misconduct," as the district court characterized it. Op. 12 n.8 (internal quotation marks omitted). Rather, it is at the center of a vital and ongoing public discussion about the proper functioning of our criminal justice system.

C. The Public Has Other Interests in the Disclosure of Information Pertaining To Possible *Brady* Violations.

Not only did the district court err in dismissing the public's strong interest in documenting governmental *Brady* violations in order to evaluate and improve the proper functioning of the criminal justice system, but it failed to appreciate two other important public interests that are implicated by the disclosure of *Brady* violations.

First, wrongful incarceration, appeals, and retrials impose substantial costs upon the taxpayers, and the public has an obvious interest in avoiding these wasteful expenditures. The ICVA Report determined that the average time from conviction to exoneration in the eleven study cases was close to eleven years, during which time Virginia taxpayers spent over $2 million on imprisoning these innocent convicts. (ICVA Report, p. 1) Moreover, even after an innocent person

is freed, the financial cost to the public does not end. The government will often then need to spend hundreds of thousands of additional dollars to identify, prosecute, and incarcerate or execute the actual perpetrator of the crime, as well as to compensate the innocent defendant for his erroneous term of imprisonment.

At least eighteen states and the District of Columbia have laws providing for compensation for wrongful convictions. *See* Patrice Brymner, *Where Massachusetts Fits among States in Compensation for the Wrongfully Convicted*, Apr. 2004, *available at* http://www.cjpc.org/rest_other_states.htm (including table on state legislation for compensation for erroneous convictions as of March 2005) (last visited July 28, 2006). Jeffrey Cox, who was one of the subjects of the Report, was awarded $750,000 by the Virginia General Assembly after his habeas petition was granted on the basis of undisclosed exculpatory evidence. (ICVA Report, p. 15). This sum was low compared to the $37.7 million judgment paid by Cook County to four men who were wrongly imprisoned for murder. *See* Robert Becker, *Ford Heights 4 To Get Their Settlement From County*, CHI. TRIB., Mar. 16, 1999 at B3. In the District of Columbia there is no cap on the potential compensation that a wrongfully convicted person could receive. Thus, the timely use of FOIA requests can, if they result in exculpatory information, reduce the taxpayers' bill for imprisoning innocent individuals and providing them with the compensation that they are due. The FOIA thereby acts as a check against the government

wasting taxpayer money on defense of post-conviction appeals or incarceration when the defendant is actually innocent.

Second, the public has a safety and security interest in discovering *Brady* violations, because as long as the wrong person is imprisoned for a crime, the actual perpetrator will often remain at large, and might commit further crimes. For example, in the case of David Vasquez, four brutal assaults might have been prevented if the true perpetrator had been identified and prosecuted in the first instance. (ICVA Report, p.1).

Indeed, exculpatory evidence that tends to exonerate a defendant by its nature frequently tends to inculpate someone else. *See, e.g.*, *Bright*, 259 F. Supp. 2d at 502 (another person had bragged about committing a murder for which Bright had been convicted); *Sampson*, 275 F. Supp. 2d at 57 (FBI informants, rather than defendants, were true murderers of Edward Deegan); *Stifel*, 594 F. Supp. at 1532-34 (exculpatory evidence strongly suggested that father (not defendant) had sent bomb to estranged wife's home, killing son). Thus, the disclosure of *Brady* violations serves as an important safeguard for the public to ensure that its government officials are directing their resources to protecting them from actual criminals, as opposed to from the innocent.

In short, the district court neglected several additional significant public interests beyond the overriding interest in policing the criminal justice system. By

themselves, these additional interests show that the district court erred in finding no public interest in the disclosure of information pertaining to possible *Brady* violations.

D. The District Court Offered No Valid Ground For Its Contrary Holding That There Is No Public Interest In Exposing *Brady* Violations.

The district court did not discuss or dispute any of the foregoing considerations in reaching its categorical ruling that no public interest was at stake in obtaining documentation of *Brady* violations. The district court failed to consider any of the substantial public interests in *Brady*-related FOIA requests and failed to conduct the balancing required by the Supreme Court in *Favish.*

Nor did the district court base its determination that there was no public interest in the requested materials on the facts of this particular case. To the contrary, it assumed that, as a matter of law, there is never any public interest in materials relating to potential *Brady* violations. Op. 12 ("It is settled that an individual's interest in *Brady* material is private in nature.") In support of this proposition, the district court relied primarily on language in *Oguaju v. United States*, 288 F.3d 448 (D.C. Cir. 2002), a decision that the Supreme Court subsequently vacated and remanded for reconsideration in light of its intervening decision in *Favish, see* 541 U.S. 157 (2004). In the vacated *Oguaju* opinion, the

panel had indicated that "exposing a single garden variety act of misconduct would not serve the FOIA's purpose." 288 F.3d at 451.

On remand from the Supreme Court after consideration of *Favish*, however, this ground was conspicuously *absent* from the opinion of this Court reinstating its previous judgment of affirmance. In the second, and controlling, *Oguaju* decision, the sole ground for affirming the use of Exemption 7(C) to the request for *Brady*-related materials at issue in that case was the fact-specific, evidentiary ground that the requester had "produced no evidence that 'would warrant a belief by a reasonable person' that the Department of Justice mishandled his *Brady* request." *Oguaju v. United States*, 378 F.3d 1115, 1116 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 983 (2005). Not only does *Oguaju* fail to support the district court's categorical legal holding, but a more natural reading suggests that the Court implicitly rejected that interpretation by failing to include it as a basis on remand after having done so before vacatur. This latter reading makes sense, because the intervening *Favish* decision made clear that a FOIA request can be justified in an Exemption 7(C) analysis if the requester can show that an "investigative agency or other responsible officials acted negligently or otherwise improperly in the performance of their duties." *Favish*, 541 U.S. at 173.

In his January 1, 2004 FOIA request, Mr. Martin explains that his FOIA request supports "the public interests in safeguarding the fairness of the criminal

justice system . . . showing the need for government reform (including reform of the government's FOIA policies), exposing government wrongdoing, doing justice in particular criminal cases, and recognizing the public interest in inquiring into wrongful withholdings of *Brady* material, its causes and cures." Pl.'s Appx. to Cross-Motions for Summ. J. at 83 (Findings, Conclusions and Recommendation of the United States Magistrate Judge, Case Nos. 3:93-CR-316-G; 3-97-CV-963-G) ("Pl.'s Appx.").

Even apart from the adequacy of Mr. Martin's FOIA request in particular, MAIP's overriding concern is against letting stand the district court's *per se* ruling that there is no public interest in learning of potential *Brady* violations. Because the FOIA was intended to give the public the opportunity to monitor government wrongdoing, including misconduct by law enforcement agencies, this Court should hold that requests related to withheld *Brady* materials are well within the scope of FOIA and supported by strong public interests.

II. THE DISTRICT COURT ERRED BY SUGGESTING THAT A FOIA REQUESTER MUST AFFIRMATIVELY PROVE GOVERNMENTAL MISCONDUCT BEFORE BEING ENTITLED TO *BRADY*-RELATED MATERIALS.

The district court stated that it was "assuming, without deciding," Op. 12, that Mr. Martin had produced "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 10-11 (quoting *Favish*, 541 U.S. at 174). In dictum, however, the district

court suggested that Mr. Martin might not meet this burden of proof because in a section 2255 hearing in the Northern District of Texas, "the magistrate judge *never specifically found* that the government withheld exculpatory information." Op. 11 (emphasis added). The district court thus suggested that in order for an individual to obtain *Brady*-related materials through the FOIA based on allegations of government impropriety, the requester must actually *prove* that government impropriety *did* occur. This is in direct conflict with *Favish,* which requires only a reasonable belief (not a judicial finding or dispositive proof) that government impropriety *might have* occurred.

The district court relied upon several pre-*Favish* decisions that had required FOIA requesters to come forward with "compelling evidence" of government impropriety in order to obtain disclosure. Op. 11. *See Quinon v. FBI*, 86 F.3d 1222, 1231 (D.C. Cir. 1996); *see also Davis v. Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (same); *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (same). The district court's requirement of a "specific[] finding" by a court that government wrongdoing occurred is even more stringent than the "compelling evidence" standard adopted by those cases. Op. 11. But in any event, that standard has now been abrogated by *Favish.* In that case, the Supreme Court squarely held that in the Exemption 7(C) context, a requester must merely

"produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." 541 U.S. at 174.

Mr. Martin more than satisfied the *Favish* standard. The magistrate judge for the district court of the Northern District of Texas specifically found that the "exclusion of th[e] evidence" requested by Mr. Martin was "significant," and accordingly required an evidentiary hearing on the "information and its importance in the underlying trial of" Mr. Martin. Pl.'s Appx. at 91. While that court ultimately found that the stringent standard for a section 2255 petition had not been met, that ruling in no way conflicts with the conclusion that the much lower "might have occurred" standard applicable in the FOIA context is satisfied. *See also* Pl.'s Appx. at 96 ("[T]he Court agrees that this [undisclosed] information could have altered the defense strategy."). The magistrate judge's support of Mr. Martin's request for the information – even if the magistrate judge was not ultimately convinced that this clearly affected his conviction – is far more weighty evidence of a belief in possible government wrongdoing than Oguaju's proffer of his own testimony as a basis for alleged government impropriety. *Oguaju*, 378 F.3d at 1117 ("An assertion of that sort . . . is too insubstantial to warrant reopening the record in this case."). The fact that the magistrate judge ordered a full *Brady* hearing is an ample evidentiary ground to support at least a reasonable suspicion

that *Brady*-related impropriety might have occurred in Mr. Martin's criminal prosecution. *Id.*

CONCLUSION

For the foregoing reasons, amici request that this Court reverse the district court's determination that there is no public interest in *Brady* material, and that requests for such material is beyond the scope of the FOIA.

Respectfully submitted,

Theodore M. Shaw
Director-Counsel

Norman J. Chachkin/MSF

Norman J. Chachkin
Christina A. Swarns
NAACP Legal Defense &
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013-2987
(212) 965-2200

Counsel for Amicus Curiae
NAACP Legal Defense Fund

Michael S. Fried
Laura Tuell Parcher
Joseph W. Clark
Juliet J. Karastelev
Jones Day
51 Louisiana Ave N.W.
Washington D.C. 20001
(202) 879-3939

Counsel for Amici Curiae
Mid-Atlantic Innocence Project
ACLU of the National Capital Area

Of counsel:
Arthur B. Spitzer
American Civil Liberties Union
of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

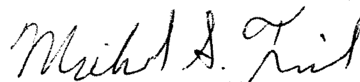
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and Fed. R. App. P. 32(a)(7)(B) because:

   _X_ this brief contains 6,790 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because:

   _X_ this brief has been prepared in a proportionally spaced typeface using Microsoft XP in 14 pt. Times New Roman.



Michael S. Fried
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939 (Telephone)
(202) 626-1700 (Telecopy)

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2006, the foregoing BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS, was served by causing two copies to be delivered by U.S. MAIL to each of the following attorneys:

Edwin E. Huddleson, III
Counsel for Appellant, Harold Martin
Bank of America Building
1090 Vermont Ave, N.W., Suite 814
Washington, D.C. 20005
(202) 543-2233

R. Craig Lawrence, Assistant U.S. Attorney
Michael Joseph Ryan, Assistant U.S. Attorney
Claire M. Whitaker, Assistant U.S. Attorney
Kenneth L. Wainstein, U.S. Attorney
Counsel for Appellee, U.S. Department of Justice
U.S. Attorney's Office, Civil Appellate
555 4th Street, N.W., 10th Floor
Washington, D.C. 20530
(202) 514-7159

Jaclyn C. Taner, Counsel
Counsel for Appellee, FDIC
Legal Division, Appellate Unit
Federal Deposit Insurance Corporation
3501 North Fairfax Drive
VS-D-7006
Arlington, VA 22226-3500

Michael S. Fried
Jones Day
51 Louisiana Ave, N.W.
Washington, D.C. 20001
(202) 879-3939
(202) 626-1700