Troubling the Heavens

Production of Evidence Favorable To Defendants by the United States

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.
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> — *Berger v. United States*
> 295 U.S. 78, 88 (1935)

Responding in October 2006 to proposed modifications to the Federal Rules of Criminal Procedure that would have required federal prosecutors to provide any and all exculpatory and impeaching information to defendants, the U.S. Department of Justice revised the U.S. Attorneys' Manual to ensure that prosecutors provided defendants with all such information without regard for its perceived impact at trial. Three years later, however, the Department's changes have not had their desired effect. That fact became abundantly clear during a 30-day span in the spring of 2009, in which two federal district court judges, each sitting more than 2,000 miles apart from the other, delivered stinging public rebukes of the government for withholding crucial exculpatory information from the defendants. In both cases — the prosecution of former U.S. Sen. Ted Stevens of Alaska and of chemical company W.R. Grace and its former executives — the government appeared to violate both the spirit and the letter of the October 2006 amendments to the Manual. The Justice Department appears to have recognized the gravity of the violations and already has taken some corrective action to address the problems that surfaced in *United States v. Stevens.* However, the ongoing failures of the government to comply with the requirements of the U.S. Attorneys' Manual, the scope of the violations in other recent cases, including *United States v. W.R. Grace*, and recent public statements by the Department reflecting continued opposition to modifying the Federal Rules suggest that more comprehensive and far-reaching action, both within and without the Justice Department, is necessary to ensure that the rights of criminal defendants are safeguarded. Ultimately, however, it may be that the most crucial step that the Department can take is to reinforce strongly the message found in the above-quoted passage from *Berger v. United States*, and to inculcate in federal prosecutors the goal that the rights of criminal defendants be respected, regardless of any effect on the likelihood of securing a conviction.

I. Bases for Discovery of Information Favorable to Defendants

The government's obligations to produce information favorable to defendants in federal criminal prosecutions arise from several different sources, including

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the Due Process Clause of the Fifth Amendment to the U.S. Constitution, the Federal Rules of Criminal Procedure ("FRCrP"), and the ethical and professional obligations of individual federal prosecutors. These obligations vary, however, both in their treatment of the issue of "materiality," — that is, the degree to which production of the information would need to influence the outcome of the prosecution in order to necessitate its production — as well as in the ability of defendants to enforce those obligations in court.

First and foremost among the federal government's obligations to disclose such information is the government's self-executing constitutional duty to produce certain evidence to a defendant as a matter of due process.[1] The U.S. Supreme Court has articulated the scope of that obligation in the seminal case *Brady v. Maryland*[2] and its progeny. In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[3] The Court extended that rule in its 1972 decision in *Giglio v. United States* to material evidence that tends to impeach the credibility of a government witness, holding that the due process criteria announced in *Brady* required the disclosure of an alleged promise to a government witness that he would not be prosecuted if he testified on behalf of the government.[4]

Over time, the Supreme Court has wrestled with, but consistently reiterated, *Brady's* requirement that the evidence to be produced must be "material either to guilt or to punishment."[5] Most recently, the Supreme Court has defined evidence as "material" when "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[6] "In other words," the Court stated, "favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[7] The Supreme Court has never held that the government is constitutionally required to produce evidence to a defendant that does not satisfy that standard of materiality.[8]

Second are those obligations imposed on the government by FRCrP 16, which requires that the government produce, "[u]pon a defendant's request," those documents and objects and the results of examinations and tests that are "material to preparing the defense."[9] In interpreting an earlier iteration of the "material to preparing the defense" language of Rule 16, the Supreme Court has found it to be narrower than the government's constitutional obligations as articulated in *Brady*.[10] In contrast to the government's *Brady* obligations, which extend to evidence material to both guilt and punishment, the government's FRCrP 16 obligation to produce items "material to preparing the defense" extends only to items material to "the defendant's response to the government's case in chief."[11] Accordingly, the government is not obligated under FRCrP 16 to produce those documents, objects, and test results that are material to punishment, for example, unless they are otherwise producible for reasons having nothing to do with their exculpatory character.[12] Moreover, pursuant to the plain language of the rule, unless the defendant requests such production, thereby triggering the defendant's reciprocal obligation to provide to the government those documents, objects, and test results that the defendant plans to use in his or her case-in-chief, the government has no obligation under FRCrP 16 to provide to the defendant those documents, objects, and test results that are material to preparing the defense.[13]

Third, federal prosecutors have ethical and professional obligations to turn over exculpatory information to defendants pursuant to the rules of professional conduct and the U.S. Attorneys' Manual ("the Manual"). Generally speaking, those ethical and professional obligations do not hinge on whether the information to be provided to defendants may be said to be "material" in any sense.[14] Instead, Rule 3.8(d) of the Model Rules of Professional Conduct (the "Model Rules") states that a prosecutor shall "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."[15] Although the Model Rules serve as guidance only, almost every state has adopted enforceable rules of professional conduct that are identical to or based upon the Model Rules.[16] Failure of a prosecutor to abide by applicable ethical rules can result in a range of sanctions, including, in particularly egregious circumstances, disbarment.[17] However, it seems unlikely that a federal court would permit a defendant to enforce a state ethical rule patterned after Model Rule 3.8(d) to compel access to exculpatory material.[18]

The U.S. Attorneys' Manual also recognizes that the government has what is sometimes referred to as a "Super-*Brady*" obligation to disclose information "beyond that which is 'material' to guilt as articulated in *Kyles v. Whitley* … and *Strickler v. Greene*. …"[19] More specifically, the Manual requires that the government disclose "information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime."[20] The Manual also requires disclosure of "information that either casts a substantial doubt upon the accuracy of any evidence — including but not limited to witness testimony — the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence."[21] However, a defendant may not cite to the Manual to compel the production of exculpatory material in court, for, as the Manual itself states: "This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies." Moreover, federal courts consistently have held that the Manual does not create enforceable rights.[22] The absence of any right to enforce these guidelines is significant because, as *Stevens*, *W.R. Grace*, and other recent cases show, prosecutors do not always proceed as the rules of professional responsibility and the U.S. Attorneys' Manual would seem to require.

II. Prosecution of Senator Stevens

Sen. Ted Stevens was first elected to represent Alaska in the U.S. Senate in 1968 and, by 2008 he was one of the longest-serving Republican senators in history. During that time, he served two terms as chairman of the powerful Senate Committee on Appropriations. Yet his long career in the Senate came to an ignominious close in November 2008

after a narrow election loss following his indictment and conviction on charges of public corruption. The allegations against Sen. Stevens involved his relationship with VECO Corporation, a business entity involved in Alaska's oil industry.[23] According to the government, Stevens "knowingly and willfully engaged in a scheme to conceal a material fact, that is, his continuing receipt of hundreds of thousands of dollars' worth of things of value from a private corporation and its chief executive officer" by failing to file financial disclosure forms required by the Ethics in Government Act of 1978. The gist of the government's case was that Stevens had failed to report gifts received from constituents seeking to avail themselves of his political influence.

In assembling its case against Sen. Stevens, the government relied heavily on insider Bill Allen. Allen was the former CEO, as well as a part owner, of VECO. Because Allen personally discussed with Stevens that VECO would perform renovations on the senator's house in Girdwood, Alaska, Allen was uniquely positioned to testify about the alleged falsity of the statements made by Stevens in his financial disclosure forms. With Allen's cooperation, the government likely felt that it was entering the case from a position of strength.

At trial, Allen appeared to deliver. On direct examination by the government, Allen admitted that VECO performed significant renovation work at the senator's home in Girdwood and that, despite the senator's request for an invoice, VECO never sent the senator a bill for the cost of the work.[24] Asked why VECO had not billed Sen. Stevens, Allen stated that he had been told by a mutual friend, Bob Pearsons, that by requesting an invoice the senator was "just covering his ass."[25] Allen's testimony suggested to the jury that Stevens had no intention of paying VECO for its work on his house.

On the evening of Oct. 1, 2008, with Allen's direct examination set to conclude the following morning, the government provided the senator's counsel with redacted interview memoranda documenting previous conversations the government had with Allen.[26] Although the memoranda were dated March 1, 2007, and Dec. 11-12, 2006, some of the information they contained never had been produced to the senator's counsel. According to the memoranda, Allen told the government during the interviews that he believed that the senator would have paid VECO if the company had provided him with an invoice for the renovation work on the senator's home.[27] The government rationalized that the disclosures were "cumulative," thus minimizing any harm to the senator.[28] Not surprisingly, the disclosures prompted motions from the senator's defense team for dismissal and for a mistrial.[29] The trial court denied the motions, and on Oct. 27, 2008, the senator was convicted.

However, the revelations regarding Allen had not yet concluded. On April 1, 2009, the government took the dramatic step of filing a motion to set aside the verdict against Sen. Stevens and to dismiss the indictment with prejudice.[30] The government's motion reported that the government discovered during its investigation following the verdict that it had interviewed Bill Allen again on April 15, 2008, and that during that interview, Allen told the government that he had no recollection whatsoever of discussing with Pearsons the issue of billing the senator.[31] In other words, Allen did not recall the "covering his ass" comment that featured so prominently in the government's case. The government acknowledged that this information "could have been used by the defendant to cross-examine Bill Allen and in arguments to the jury," and stated that, "based on the totality of circumstances and in the interest of justice," it would not seek a new trial.[32]

On April 7, 2009, Judge Sullivan held a hearing to consider the government's post-verdict motion. The judge told those gathered in the courtroom that "this is not about prosecution by any means necessary" and that the government had "repeatedly failed" to meet its most basic discovery obligations.[33] Looking beyond the case at bar, he offered a dire warning: "We must never forget the Supreme Court's directive that a criminal trial is a search for the truth. Yet in several cases recently this court has seen troubling failures to produce exculpatory evidence in violation of the law and this court's orders."[34] To combat that perceived failing, he urged his "judicial colleagues on every trial court everywhere to be vigilant and to consider entering an exculpatory evidence order at the outset of every criminal case, whether requested to do so or not, and to require that the exculpatory material be turned over in a usable format."[35] He then granted the government's motion and delivered a final blow by appointing a special prosecutor to investigate the possibility of bringing criminal contempt charges against the prosecutors.[36]

III. Prosecution Of W.R. Grace

Just as the government's case against Sen. Stevens was collapsing in Washington, D.C., a similar drama was playing out in the small college town of Missoula, Mont. In fact, the events unfolding in the Russell Smith Courthouse arguably revealed even more significant problems with respect to exculpatory material than those that emerged in the *Stevens* case. The investigation of those issues in *W.R. Grace* included several days of hearings, including almost a full day of testimony by the lead investigative agent, at least three supplemental productions by the government, and the submission of affidavits by numerous EPA and Justice Department employees. Ultimately, those violations led the court to accuse a key government witness of lying, conclude that the government had violated its constitutional obligation under *Brady*, and give a scathing special instruction to the jury informing them of the government's misconduct.

The government's view of the *W.R. Grace* case was simple: a heartless corporation placed its lust for profits over the safety and well-being of the citizens of Libby, Mont.[37] In 1963, W.R. Grace purchased a vermiculite mine in Libby that had been operated for years by its prior owner, the Zonolite Company. Vermiculite's ability to expand when heated (a process described as "exfoliation") made it a useful fireproofing material, insulator, and soil aerator. Unfortunately, the vermiculite deposits at Libby were contaminated with tremolite asbestos as well as winchite and richterite (two asbestiform minerals not expressly included in most regulatory definitions of asbestos[38]), the vast majority of which the company removed during processing. Early on, it became clear to the company as well as to federal and state regulators that the mining, processing, and use of vermiculite and vermiculite-containing products could release asbestos fibers into the air. Yet, according to the government, W.R. Grace and the other defendants concealed that critical information from various regulatory agencies, thereby preventing them from taking necessary action to protect the citizens of Libby.

At the heart of the government's case was testimony to be provided by former W.R. Grace employee Robert

Locke, a corporate insider who had been employed by W.R. Grace for almost 25 years. Starting in 1976, Locke had primary responsibility for overseeing asbestos issues related to W.R. Grace's vermiculite products; he described himself at trial as "a dedicated advocate for tremolite matters and concerns."[39] Like Bill Allen in the *Stevens* case, Locke agreed to cooperate with the government and was willing to testify at trial against the defendants.

During two days of direct examination by the government, Locke described how W.R. Grace and the other defendants knowingly exposed the people of Libby to dangerous releases of asbestos from its vermiculite. According to Locke, the company disregarded incontrovertible evidence regarding both the toxicity of the asbestos contaminating its vermiculite ore, as well as the tendency of that asbestos to become and remain airborne and respirable. Locke also related in dramatic fashion that he confronted one of the individual defendants about the company's decision to sell contaminated property to a small, uninformed purchaser, and that the defendant simply had replied "*caveat emptor*."[40]

Fully aware of the importance of Locke's credibility, the government went out of its way to establish his *bona fides* as a witness. Through carefully crafted questioning, the government established that Locke had met only a handful of times with government attorneys and agents.[41] Locke further testified that the government had told him during one of those interviews that it considered him an unindicted co-conspirator and that he stood in jeopardy of prosecution.[42] Locke stated that the government had offered him immunity in exchange for his testimony, but that he had rejected the immunity letter negotiated by his lawyer.[43] Locke maintained that he was cooperating with the government only because it was finally time for him to do the right thing and testify against his co-conspirators:

Q: (By the prosecutor) Have you received any immunity from the government for your testimony in this trial?
A: No.
Q: Was some immunity offered?
A: Yes.
Q: And what were the circumstances of that offer?
A: I decided I didn't want it.

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A: … I — my wife and I, we talked it over and we — we stepped out of the meeting and I talked with [my lawyer]. You know, I decided I wasn't going to do it.
Q: You weren't going to do what?
A: I wasn't going to take the letter of immunity, didn't want it.
Q: So you went against your lawyer's advice?
A: Yes, I did. Paid him and ignored him.[44]

The defendants' cross-examination of Locke centered on several themes, including inconsistencies between Locke's earlier sworn statements and his current testimony and the possibility that he had altered his testimony to match what he had read in an online account of another witness's trial testimony.[45] Another significant focus of Locke's cross-examination was the unique nature of his relationship with the government. More specifically, the defendants pointed to the breezy and informal tone of a pre-indictment sworn interview of Locke by the government to suggest that Locke had been reassured early on that he was safe from prosecution.[46]

According to subsequent sworn testimony by the lead EPA agent on the case, it was only as a result of this last line of questioning that the agent realized his own prior extensive e-mail correspondence with Locke might include material that should have been produced to the defendants.[47] Without consulting the prosecutors or otherwise seeking advice, the agent immediately reviewed those e-mails, printed the ones he believed were relevant, and deleted the remainder.[48] The agent provided the printed e-mails to the prosecutors, who in turn delivered them to the defendants.[49] The government took another week to recover and produce the deleted e-mails.[50] The information contained in the belatedly produced e-mails went to the very heart of Locke's credibility, calling it into question in numerous respects.

First, contrary to Locke's sworn testimony, the e-mails demonstrated that Locke had a long-standing and cooperative relationship with the government. Locke shared with the agent his thoughts on the defendants and possible witnesses and even went so far as to provide the agent with unsolicited comments on a pending motion and other court filings. Second, the e-mails revealed that Locke harbored a deep grudge against the defendants, including one defendant in particular. For example, in one e-mail, Locke compared the defendants to coyotes and suggested that they should be "taken out."[51] Third, the e-mails contradicted Locke's suggestion on direct examination that he met with the government agents and attorneys on only a few occasions. In fact, the e-mails documented a series of more than 20 meetings between the government and Locke.[52] When pressed on this discrepancy during a subsequent hearing, the EPA agent conceded that Locke's testimony on this point not only was factually incorrect, but also was not even close to disclosing the number of meetings that actually transpired.[53] Although the government subsequently tried to argue that Locke's original answer was not misleading because the question only applied to meetings where *both* government agents *and* government lawyers were present, the court was unconvinced by the argument, asking the government whether the question was "carefully drafted so that you would keep the information from the jury that he met with you 23 times."[54] The court met further attempts by the government to justify the apparent discrepancy in Locke's testimony with the rebuke that the government was "playing games with the jury."[55]

In response to the production of the previously withheld e-mail correspondence, the defendants filed a motion to compel additional production of specific categories of documents,[56] which the court granted on April 10, 2009.[57] On April 12, 2009, the government produced three previously undisclosed sets of rough notes by the government agents memorializing additional conversations with Locke.[58] Those notes contained yet another significant revelation that further undermined Locke's credibility and called into question the government's reliance upon him as its key witness. Omitted from Locke's direct examination, yet disclosed in the previously withheld agent notes, was the fact that the lead EPA agent had expressly advised Locke's wife that Locke should not accept the government's offer of immunity because it would make Locke a more compelling witness.[59] Contrary to the government's portrayal of Locke as a brave, independent voice willing to speak the truth at the risk of criminal sanction, it appeared Locke was cooperating closely with the government and was confident that he would never be prosecuted.

Following those additional revela-

tions, the court held a mid-trial hearing on prosecutorial misconduct, during which more disturbing facts emerged. The lead EPA agent, who had carried on the close relationship with Locke, testified at the hearing that the attorneys on the government trial team had told him that *Brady* only required production of "evidence [that] would exonerate a defendant" and did not necessarily include evidence that "would be helpful to the defense in obtaining exoneration."[60] He expressed his belief that *Giglio* material need not be produced to the defendants prior to trial.[61] Finally, he also made clear that he was wholly unfamiliar with an early discovery order entered in the case that required the government to provide both exculpatory and impeachment material to the defendants.[62] In sworn declarations, the trial attorneys contradicted the agent's account of his briefing on *Brady* and *Giglio* issues, indicating that they had discussed those topics and the court's discovery order with the agent.[63] Regardless of whether the agent was apprised of his obligations, however, it became clear that adequate procedures were not in place to ensure that the defendants received the exculpatory material to which they were entitled.

The defendants subsequently filed motions to dismiss the case for prosecutorial misconduct.[64] In a hearing held to argue the motions, counsel for the defendants described a pattern of government misconduct that had permeated the case. In response, the government refused to concede that Locke had perjured himself regarding the number of contacts he had with the government and held firm that it understood its obligations under *Brady*. At most, it conceded that inadvertent errors might have occurred: "I think that the truth of the matter is we just dropped the ball. It wasn't that we were trying to hide it."[65] Judge Molloy remained unconvinced, decrying a "failure in the process": "And that's basically the position they have taken, that we think your orders are too broad, that makes it too hard, too difficult for us, so we're going to do it our way. We'll cough it up when we feel like we should cough it up. We'll hold things until the last minute."[66]

Ultimately, Judge Molloy declined to dismiss the case on the basis of prosecutorial misconduct.[67] However, he was unstinting in his criticism of the government, observing that "the government failed in its duty to disclose witness statements and other evidence bearing on the witness's credibility in a timely manner."[68] Judge Molloy also lamented the philosophical underpinnings of the government's arguments:

> In essence, the prosecution's argument is that the virtue of its case sanctifies the means chosen to achieve conviction. This argument cannot prevail in a legal system that is designed to ensure fairness in the proceeding when each side follows the rules. Our confidence in the fairness of our system is rooted in the belief that our process is sound. Useful falsehoods are particularly dangerous in a criminal case, where the cost of wrongful conviction cannot be measured in the impact on the accused alone. Such tainted proof inevitably undermines the process, casting a dark shadow not only on the concept of fairness, but also on the purpose of the exercise of the coercive power of the state over the individual. No man should go free nor lose his liberty on the strength of false, misleading or incomplete proof.[69]

As a remedy, Judge Molloy ordered the jury to disregard Locke's testimony against one of the individual defendants, allowed the defendants limited additional cross-examination of Locke, refused to allow the government any re-direct, and specially instructed the jury on the government's discovery violations.[70] The instruction, which the judge drafted without input from the parties, excoriated the government for its "inexcusable dereliction of duty" and also offered a primer on the appropriate role of the government in a criminal case:

> The United States Attorney and the Department of Justice are representatives not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is the source of its legitimacy to govern at all and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done.
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> In this case, the Department of Justice and the United States Attorney's Office have violated their constitutional obligations to the defendants, they have violated the Federal Rules of Criminal Procedure, and they have violated orders of the Court. … Prosecutors have an affirmative duty to comply with the Constitution, the Federal Rules of Criminal Procedure and the orders of the court. That duty includes the affirmative responsibility to learn of any evidence favorable to the accused and to disclose such evidence in a timely manner so that it can be effectively used by the accused. The government has violated its solemn obligation and duty in this case by suppressing or withholding material proof pertinent to the credibility of Robert Locke.[71]

It is impossible to know the impact the instruction had on the jurors. At the time these events unfolded, the government's case already had begun to unravel, with the government already having dismissed its case with prejudice as to one defendant and dismissing it as to another a few days later. Shortly thereafter, following little more than a day of deliberations, the jury acquitted the remaining defendants of all charges brought against them.

IV. The Pervasiveness Of the Problems

As alarming as the violations of *Brady* and other government discovery obligations were in the *Stevens* and *W.R. Grace* cases, such violations, as well as efforts to address them, are not a new phenomenon. In 2003, the American College of Trial Lawyers published a "Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16," in response to the belief of its Federal Criminal Procedure Committee "that the constitutional mandate of *Brady v. Maryland* has been undermined by varying prosecutorial interpretations of 'favorable information,' delayed disclosure of this information in both guilt and punishment stages, and recent government plea policies that have the potential to deprive defendants of information essential to the sentencing process."[72]

The document proposed amendments to FRCrP 11 and 16 that defined the term "information favorable to the defendant" as "all information in any form, whether or not admissible, that tends to: (a) exculpate the defendant; (b) adversely impact the credibility of government witnesses or evidence; (c) mitigate the offense; or (d) mitigate punishment."[73] The proposed amendments required the government to disclose all such known information in writing within 14 days of a defendant's request, imposed a due diligence obligation on prosecutors to consult with government agents and locate favorable information, and required disclosure of all favorable information 14 days before a guilty plea is entered.[74]

Following the recommendations of the American College of Trial Lawyers, the Judicial Conference Advisory Committee on the Rules of Criminal Procedure ("Advisory Committee") took up the issue of possibly modifying FRCrP 16 to ensure the production of favorable information to a defendant.[75] In October 2006, the Department of Justice, having given "extensive and serious consideration" to proposed amendments to FRCrP 16 that were circulating within the Advisory Committee, modified the U.S. Attorneys' Manual to include the language set forth in Part I of this article, namely that the government is to disclose "information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime."[76]

Ultimately, in May 2007, the Advisory Committee settled on proposed language that would modify FRCrP 16 to require that "[u]pon a defendant's request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching."[77] The committee defined "exculpatory information" in an accompanying committee note as that which "tends to cast doubt upon the defendant's guilt as to any essential element in any count in the indictment or information."[78] The committee note also remarked that "[t]he rule contains no requirement that the information be 'material' to guilt in the sense that this term is used in cases such as *Kyles v. Whitley*," and further provided that "[i]t requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt."[79]

In response to the Advisory Committee's proposal, the Department of Justice wrote in June 2007 to the Chair of the Committee on Rules of Practice and Procedure to express its "deep concerns" with the proposed amendments to FRCrP 16.[80] The Department identified a number of perceived shortcomings, including the fact that the proposed amendment was inconsistent with Supreme Court precedent set forth in *Brady* and its progeny, that it was in conflict with other provisions of the criminal rules, such as the pre-existing requirement of FRCrP 16 to provide documents, objects, and test results that are "material to preparing the defense," and that it disregarded the statutory requirements of the Jencks Act,[81] which set forth the law regarding the disclosure of witness statements.[82] The Department of Justice also opined that the proposal was inconsistent with current federal court discovery procedures, that there was no demonstrated need for the change, that it would create confusion in its application, remedy, and review, and that it risked conflict with privacy interests, witness protection, and victims' rights.[83] Finally, the Department argued that its October 2006 modification to the U.S. Attorneys' Manual was "still in its infancy — having only taken effect on October 19, 2006 — and has not yet been given an opportunity to prove its effectiveness."[84]

Since that time, however, the extent, nature, and frequency of the violations documented in *Stevens*, *W.R. Grace*, and other recent cases suggest that the 2006 changes to the Manual have not had their desired effect, and that recurring problems involving the withholding of potentially exculpatory information in federal criminal prosecutions are symptomatic of a larger, more fundamental malady.[85] For example, additional internal investigation by the Department of Justice has lead to post-trial motions by the government in two additional Alaska public corruption cases based upon evidence that "appears to be information that should have been, but was not, disclosed to [the defendant] before his trial."[86] In a recent prominent terrorism prosecution, the government itself acknowledged that significant disclosure failures occurred, noting that "[i]n its best light, the record would show that the prosecution committed a pattern of mistakes and oversights that deprived the defendants of discoverable evidence (including impeachment material) and created a record filled with misleading inferences that such material did not exist."[87] And, in a long-running dispute regarding prosecutorial misconduct, Judge Mark L. Wolf, a U.S. district court judge sitting in the District of Massachusetts, has been strongly critical of the government's failure to comply with its *Brady* obligations.[88] Taken together, the scope and degree of the violations uncovered in so many recent cases strongly suggest that the Justice Department's amendments to the U.S. Attorneys' Manual have not had their desired effect and that further action is necessary both within and without the Department.

V. Potential Solutions

To its credit, the Department of Justice took swift action in response to the violations that emerged in the *Stevens* case. On April 14, 2009, fewer than two weeks after the government's motion to dismiss the *Stevens* indictment, the Department announced "comprehensive steps to enhance the Justice Department's compliance with rules that require the government to turn over certain types of evidence to the defense in criminal cases."[89] Those measures included:

- Providing supplemental training to federal prosecutors throughout the Department on their discovery obligations in criminal cases. Training will begin in the coming weeks.

- Establishing a working group of senior prosecutors and Department officials from each component to review the discovery practices in criminal cases. The working group, to be headed by the assistant attorney general of the Criminal Division and the chair of the Attorney General's Advisory Committee, will review the need for:

  - Improvements to practices and policies related to the government's obligations to provide material to the defense in criminal matters;

- Additional resources, including staffing and information technology, needed to help prosecutors fulfill their discovery obligations;

- Additional discovery-related training for other Department prosecutors.[90]

Moreover, the Department of Justice recently announced additional steps, including "mandatory annual discovery training for all prosecutors and the creation of a new position at Main Justice that will focus on discovery issues."[91]

However, while the Department has taken these important steps, it simultaneously has resisted efforts to provide defendants with mechanisms by which to enforce the government's obligation to provide defendants with any and all helpful information. Recently, the Department publicly reiterated its opposition to renewed efforts to amend FRCrP 16 to require prosecutors to provide favorable information to the defense regardless of its materiality.[92] In a recent court filing, the Department also argued that a defendant who alleged that the prosecutors in his case had violated their ethical obligations to turn over information that tends to negate guilt or mitigate an offense in violation of ABA Model Rule 3.8(d) and Alaska Rule of Professional Conduct 3.8(d) "has no standing to request relief based solely on the government's alleged ethical violations."[93] Thus, although the Department of Justice's steps represent an important initial effort, the extent of the problems revealed in *Stevens, W.R. Grace* and other recent cases, as well as the Department's recent objections both to amending FRCrP 16 and to treating prosecutors' ethical and professional obligations as enforceable by defendants, suggests that further measures are necessary.

One major remedy for these problems is an amendment to FRCrP 16, in line with that proposed by the Advisory Committee, that provides defendants an enforceable right to the government's disclosure of any and all exculpatory material, not just the information that the government deems to be "material." Such an amendment was endorsed by Judge Sullivan himself in the aftermath of the *Stevens* case,[94] and would represent an important step towards safeguarding the rights of criminal defendants. It would codify the government's obligation to provide exculpatory and impeaching information regardless of its perceived materiality and would grant defendants a right that is enforceable in court and is not currently recognized by most courts absent a showing of materiality.[95] In addition, it would help to ensure that federal prosecutors do not make decisions with respect to what information to provide to defendants based on an inherently subjective assessment of whether its use at trial would impact the outcome of the prosecution. Perhaps most importantly, amending FRCrP 16 would insulate defendants against future changes in Justice Department policy that might deemphasize as a goal the full production of all exculpatory and impeaching information to criminal defendants. For all of those reasons, amending FRCrP 16 is an important and necessary step.

However, it should be noted that simply amending FRCrP 16 as envisioned by the Advisory Committee will not completely address the problems underlying the government's recent failures. First, without further modification to the rules beyond those proposed by the Advisory Committee, the government is likely to argue that the rights of a defendant to all exculpatory information is subject to the prosecution's right to withhold internal government documents and witness statements under FRCrP 16(a)(2).[96] Second, the right to production of such material is not absolute, but rather is conditioned upon the request of the defendant, which in turn triggers the defendant's obligation to make reciprocal discovery to the government. As a result, the defendant who must rely on FRCrP 16 to ensure the production of all exculpatory or impeaching material is thereby in a weaker position than he would be if the government merely followed its own guidelines as set forth in the U.S. Attorneys' Manual and produced such information outside the reciprocal framework contemplated by FRCrP 16. Third, the proposed rule, at least as currently drafted, focuses on information that is "exculpatory or impeaching" with respect to establishing guilt, but does not include a requirement that the government produce information that would be helpful to the defendant at sentencing or would otherwise mitigate punishment. Finally, there is the risk that the rule would still allow prosecutors significant leeway to decline to provide information and for courts to decline to order its production based on differing interpretations of the terms "exculpatory" and "impeaching," similar to the way in which differing interpretations of the term "material" allow such discretion under the current regime.

In view of all of the above, while amending FRCrP 16 as envisioned by the Advisory Committee likely will provide considerable benefit to criminal defendants, the Department of Justice should do more on its own initiative to ensure the production of favorable information to defendants prior to trial. While the Department recently has indicated that it is considering adopting new internal procedures, the violations seen in the *W.R. Grace* case highlight particular steps that should be taken as part of any package of revised internal procedures. One such area where specific internal procedures are necessary is the interaction between investigative agents and prosecutors. As *W.R. Grace* demonstrated, inadequate or misinterpreted communications between government agents and attorneys can have disastrous results. As soon as a criminal investigation commences, the investigative agents and their supervisors should meet to discuss procedures for preserving their work product in a single location for attorney review in the event charges are filed. Procedures also should be in place to ensure that there is a thorough post-indictment review of the government's files for any material favorable to the defendants. Additional procedures should ensure that agents are provided and briefed on any operative court orders relative to required disclosures and that they comply with their directives.

The Justice Department also should develop standard procedures that govern when an agent must prepare a report of a witness interview, the length of time it should take for an agent to prepare such a report, the fact that agents must make a record of information favorable to defendants,[97] and the kinds of information that may be redacted from agent notes and reports prior to production.

Agent notes and reports were a particular problem in the *W.R. Grace* case. As discussed earlier, exculpatory information contained in agent notes from interviews of Robert Locke was not provided to the defendants prior to his testimony. Moreover, in several instances, agents interviewed other witnesses, including former company

employees, and did not produce typed reports or rough notes of those interviews to the defendants.[98] Establishing standard procedures for the recording and handling of information from witness interviews should help to ameliorate similar problems in future cases.

Another proposed step for the Department to undertake does not represent a new procedure, but rather is a matter of emphasizing existing obligations. As previously noted, the U.S. Attorneys' Manual requires prosecutors to disclose all exculpatory material without making distinctions based on its materiality. However, in the *W.R. Grace* case, the government attempted to draw fine distinctions between information that might prove useful to the defense during the cross-examination of Locke and information producible under *Brady* and *Giglio*.[99] It is precisely to avoid such hair-splitting that the Manual appropriately instructs prosecutors to disclose any and all exculpatory information regardless of its materiality. The Justice Department should make this obligation a point of particular emphasis during its training and retraining of prosecutors.

Along with the adoption of specific new procedures and the retraining of prosecutors relative to existing requirements, the Department of Justice also should make clear that the failure of prosecutors to comply with the Department's internal guidelines will result in real and significant consequences. Currently, there appear to be few meaningful consequences for *Brady* violations. As one commentator reported, "[t]he Center for Public Integrity examined the frequency of bar referral for prosecutors and found only 44 cases since 1970 in which prosecutors faced disciplinary proceedings for misconduct that adversely affected criminal defendants."[100] Accordingly, the Department's Office of Professional Responsibility should subject prosecutors who flagrantly violate their *Brady* obligations to aggressive internal investigation and, when appropriate, to sanction. Additionally, when merited, the Justice Department should refer offending prosecutors to the appropriate state bar association for professional administrative sanctions.

If such internal enforcement measures are not implemented and, more importantly, pursued, trial judges likely will continue to step into the breach and take the measures they feel are necessary, such as appointing independent prosecutors to investigate potential misconduct or holding prosecutors in contempt.[101] A wronged defendant also may seek redress through a civil suit, though prosecutorial immunity will limit the effectiveness of such remedies. However, the problems with those external mechanisms are twofold. First, they are inherently *ad hoc* and will lead to inconsistent enforcement. Second, they are *ex post* remedies that come only after public confidence in our system of criminal justice has been further eroded by the violation at issue. Only by developing a comprehensive internal system for the handling of exculpatory information can the Department of Justice avoid those problems and restore confidence that the government will prosecute cases in accordance with the Constitution and basic notions of fairness and justice.

VI. Concluding Observations

When the Justice Department amended the U.S. Attorneys' Manual in October 2006 to require the production by the government of all exculpatory and impeaching material without regard to materiality, it might reasonably have expected the changes to have resolved any ongoing issues with respect to *Brady* compliance. However, the events of the past three years have shown that it was not enough simply to modify the Manual. Additional changes are necessary, both outside the Department, by modifying FRCrP 16, and inside the Department, by promulgating internal procedures similar to those discussed above.

In the final analysis, however, new court rules and departmental policies will only be effective if line prosecutors follow them. Ethical rules and the Manual already contain broadly worded mandates that require prosecutors to turn over any exculpatory information, regardless of its materiality. Accordingly, the primary problem may not lie solely in the articulation of the government's obligations, but rather in the approach of individual prosecutors to compliance with them.

As long as the adversarial process exists, some prosecutors will be tempted to take a tactical approach to compliance with their *Brady* obligations, with the intent of limiting production to their opponents as much as possible, just as if they represented a party in a civil case. However, civil cases, in which a litigant may obtain admissions, documents, and witness testimony[102] to test the adequacy of an opponent's production, differ greatly from criminal cases, in which defense counsel cannot depose witnesses or easily obtain specific categories of documents relevant to the defense. Rather, in criminal cases, the government unilaterally decides what should be produced. As a consequence, the adequacy of criminal discovery, at least in the first instance, depends almost entirely upon an individual prosecutor's ability and willingness to comply with his or her disclosure obligations.

The solution to this asymmetry ultimately may be either to take *Brady* disclosure decisions away from the prosecutors trying the case, or to ensure that those prosecutors view securing the rights of a defendant as an objective that is paramount to winning a conviction. We do not believe that another layer of decision-making relative to *Brady* disclosures is a practical solution. However, the Justice Department should take every opportunity to reinforce the teachings of cases like *Berger v. United States*,[103] which discusses at length the unique obligations and duties of prosecutors. As one commentator has stated: "Telling a prosecutor to behave ethically and consistently is far less fruitful than creating an environment that expects, monitors, and rewards ethical, consistent behavior."[104] Discouraging prosecutors from adopting an overly adversarial approach to *Brady* compliance, where the goal is to improve the chances of victory by limiting disclosure that may hurt the government's case, is an integral final step to reigning in potential prosecutorial misconduct.

For more than a hundred years, courts have said that a prosecutor's goal is justice, not victory. As the Latin maxim states, *fiat justitia ruat caelum* — let justice be done though the heavens fall. Indeed, justice must prevail even if that means the government loses its case. Although the rules of criminal procedure and those setting policy within the Justice Department clearly can do more to safeguard the rights of defendants, in the end, they only can do so much. It is the hope of defense attorneys that individual federal prosecutors take heed of the lessons of *Stevens*, *W.R. Grace*, and the numerous other cases in which the rights of defendants were compromised, and ensure that justice remains the North Star that guides the discharge of their obligations — even if the outcome may trouble the heavens.

The authors successfully represented Robert C. Walsh, the former president of the W.R. Grace Construction Products Division and a named defendant in the W.R. Grace case discussed in this article. After 10 weeks of trial and in response to the filing of a Motion for Judgment of Acquittal, the government agreed to dismiss all charges against Robert Walsh with prejudice. The views expressed here are the views of the authors. They do not necessarily reflect the views of Bradley Arant Boult Cummings LLP or of its clients.

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Notes

1. U.S. Const. amend. V. *See Marshall v. Hendricks*, 307 F.3d 36, 52 (3d Cir. 2002) ("The principles enunciated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), protect a defendant's right to due process of law under the Fifth Amendment by requiring that a prosecutor disclose material exculpatory evidence to the defense.").

2. 373 U.S. 83 (1963).

3. *Id.* at 87.

4. 405 U.S. 150, 153-55 (1972).

5. *See United States v. Agurs*, 427 U.S. 97, 112-13 (1976); *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). In the years since *Brady*, the Court has held consistently that "when the state suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." *Illinois v. Fisher*, 540 U.S. 544, 547 (2004) (citations omitted); *see also Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) ("A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused.").

6. *Cone v. United States*, 129 S. Ct. 1769, 1783 (2009) (citing *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.)).

7. *Id.* (quoting *Kyles*, 514 U.S. at 435).

8. However, some federal courts have held that the materiality requirement articulated by the U.S. Supreme Court in *Brady* applies only on appeal, in the context of determining post-trial whether a *Brady* violation took place, and not to pretrial motions by defendants to compel the production of potentially helpful material. *See United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("[T]he government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed — with the benefit of hindsight — as affecting the outcome of the trial."); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005) ("Simply because 'material' failures to disclose exculpatory evidence violate due process does not mean only 'material' disclosures are required."); *United States v. Carter*, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) ("[I]n the pretrial context, the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial."); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the court relies on the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*."); *see also United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009) (noting "favorably" the "thoughtful analysis" by the courts in *Acosta* and *Sudikoff* "[f]or the benefit of trial prosecutors who must regularly decide what material to turn over"). Other courts, however, have declined to dispense with the materiality analysis during pretrial review of a defendant's motion to compel the production of *Brady* material. *See United States v. Coppa* , 267 F.3d 132, 140 (2d Cir. 2001) ("Although the government's obligations under *Brady* may be thought of as a constitutional duty arising before or during the trial of a defendant, the scope of the government's constitutional duty — and, concomitantly, the scope of a defendant's constitutional right — is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial."); *United States v. Causey*, 356 F. Supp. 2d 681, 696 (S.D. Tex. 2005) ("Because the *Brady* standard applied in *Sudikoff* conflicts with the *Brady* standard applied in this circuit, and because defendants fail to cite — and the court has not found — any case in which the Fifth Circuit has adopted or applied the *Sudikoff* standard, the court is not persuaded to apply that standard in this case.").

9. Fed. R. Crim. P. 16(a)(1)(E)(i); Fed. R. Crim. P. 16(a)(1)(F)(iii).

10. *See United States v. Armstrong*, 517 U.S. 456, 461-64 (1996) (interpreting prior version of FRCrP 16 that required production of documents and objects "which are material to the preparation of the defendant's defense").

11. *Id.* at 462. In *Armstrong*, the Court addressed whether FRCrP 16's requirement that the government produce documents and objects "material to the preparation of the defendant's defense" required the government to produce documents that discuss the government's prosecution strategy for cocaine cases, which would aid the defendant in establishing a selective prosecution claim. The Court found that it did not. *Id.* The Court noted that "[w]hile it might be argued that as a general matter, the concept of a 'defense' includes any claim that is a 'sword,' challenging the prosecution's conduct of the case, the term may encompass only the narrower class of 'shield' claims, which refute the government's arguments that the defendant committed the crime charged." *Id.*

12. *See, e.g.,* 18 U.S.C. § 3500 (2009) (the "Jencks Act") (requiring that "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified"); Fed. R. Crim. P. 16(a)(1)(A)-(B) (requiring that the government, upon a defendant's request, disclose to the defendant certain oral, written, or recorded statements of the defendant); Fed. R. Crim. P. 16(a)(1)(D) (requiring that the government, upon a defendant's request, disclose to the defendant a copy of the defendant's prior criminal record); Fed. R. Crim. P. 16(a)(1)(G) (requiring that the government, upon a defendant's request, give the defendant a written summary of any expert testimony that the government intends to use during its case-in-chief).

13. *See* Fed. R. Crim. P. 16(b)(1)(A) (requiring production by the defendant of certain documents and objects "[i]f a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies"); Fed. R. Crim. P. 16(b)(1)(B) (requiring production by the defendant of certain examination and test results "[i]f a defendant requests disclosure under Rule 16(a)(1)(F) and the government complies").

14. *See Cone*, 129 S. Ct. at 1783 n.15 ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.").

15. In a recent formal opinion, the American Bar Association's Standing Committee on Ethics and Professional Responsibility stated that Rule 3.8(d) "does not implicitly include the materiality limitation recognized in the constitutional case law," and indicated that the rule "requires

prosecutors to disclose favorable evidence so that the defense case can decide on its utility." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 454 at 2 (2009), *available at* http://www.abanet.org/cpr/09-454.pdf. Notably, the opinion also stated that "supervisors who directly oversee trial prosecutors must make reasonable efforts to ensure that those under their direct supervision meet their ethical obligations of disclosure, and are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations," that supervisory lawyers "must ensure that subordinate prosecutors are adequately trained regarding this obligation," and that "[i]nternal office procedures must facilitate such compliance." *Id.* at 8.

16. For examples of state rules identical or virtually identical to Model Rule 3.8(d), see ALASKA RULES OF PROF'L CONDUCT R. 3.8(d); ARIZ. ETHICS R. 3.8(d); ARK. RULES OF PROF'L CONDUCT R. 3.8(d); COLO. RULES OF PROF'L CONDUCT R. 3.8(d); DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 3.8(d); FLA. RULES OF PROF'L CONDUCT R. 4-3.8(c); HAW. RULES OF PROF'L CONDUCT R. 3.8(b); IDAHO RULES OF PROF'L CONDUCT R. 3.8(d); ILL. RULES OF PROF'L CONDUCT R. 3.8(d); IND. RULES OF PROF'L CONDUCT R. 3.8(d); KAN. RULES OF PROF'L CONDUCT R. 3.8(d); KY. RULES OF PROF'L CONDUCT SCR 3.130(3.8)(c); LA. RULES OF PROF'L CONDUCT R. 3.8(d); ME. RULES OF PROF'L CONDUCT R. 3.8(b); MD. LAWYERS' RULES OF PROF'L CONDUCT R. 3.8(d); MASS. RULES OF PROF'L CONDUCT R. 3.8(d); MICH. RULES OF PROF'L CONDUCT R. 3.8(d); MINN. RULES OF PROF'L CONDUCT 3.8(d); MISS. RULES OF PROF'L CONDUCT RULE 3.8(d); MO. RULES OF PROF'L CONDUCT R. 4-3.8(d); MONT. RULES OF PROF'L CONDUCT R. 3.8(d); NEB. RULES OF PROF'L CONDUCT R. 3-503.8(d); NEV. RULES OF PROF'L CONDUCT R. 3.8(d); N.H. RULES OF PROF'L CONDUCT R. 3.8(d); N.J. RULES OF PROF'L CONDUCT RPC 3.8(d); N.M. RULES OF PROF'L CONDUCT RULE 16-308(D); N.Y. RULES OF PROF'L CONDUCT R. 3.8(b); N.C. RULES OF PROF'L CONDUCT R. 3.8(d); N.D. RULES OF PROF'L CONDUCT R. 3.8(d); OHIO RULES OF PROF'L CONDUCT R. 3.8(d); OKLA. RULES OF PROF'L CONDUCT R. 3.8(d); OR. RULES OF PROF'L CONDUCT R. 3.8(b); PA. RULES OF PROF'L CONDUCT R. 3.8(d); R.I. RULES OF PROF'L CONDUCT R. 3.8(d); S.C. RULES OF PROF'L CONDUCT R. 3.8(d); S.D. RULES OF PROF'L CONDUCT R. 3.8(d); TENN. RULES OF PROF'L CONDUCT R. 3.8(d); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.09(d); UTAH RULES OF PROF'L CONDUCT R. 3.8(d); VT. RULES OF PROF'L CONDUCT R. 3.8(d); VA. RULES OF PROF'L CONDUCT R. 3.8(d); WASH. RULES OF PROF'L CONDUCT R. 3.8(d); WIS. RULES OF PROF'L CONDUCT FOR ATTORNEYS SCR 20:3.8(f)(1); WYO. RULES OF PROF'L CONDUCT R. 3.8(d). For modified versions of Model Rule 3.8(d) see ALA. RULES OF PROF'L CONDUCT 3.8(d) (adding willful component to Model Rule); D.C. RULES OF PROF'L CONDUCT RULE 3.8(e); GA. RULES OF PROF'L CONDUCT R. 3.8(d) (providing that prosecutor shall "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 that mitigates the offense.").

17. For a general discussion of sanctions against prosecutors for ethical violations, see Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

18. In a recent case, *United States v. Kott*, the defendant has moved to dismiss the indictment or, in the alternative, for discovery in response to alleged *Brady* violations by the government, basing his argument in part on Alaska Rule of Professional Conduct 3.8(d), which requires a prosecutor to "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," and the McDade Act, 28 U.S.C. § 530B (2009), which states that "[a]n attorney for the government shall be subject to state laws and rules, and local federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that state." *See* Motion to Dismiss or, in the Alternative, for Discovery at 53-55, *United States v. Kott*, No. 07-00056 (D. Alaska Sept. 24, 2009). Federal courts, however, typically have rejected the use of the McDade Act to create enforceable rights for defendants when a prosecutor violates his or her ethical duties. *See United States v. Lowery*, 166 F.3d 1119, 1124-25 (11th Cir. 1999) (rejecting defendant's argument that testimony should be suppressed because it was obtained in violation of the Florida Bar's ethics rule); *United States v. Syling*, 553 F. Supp. 2d 1187, 1192-93 (D. Haw. 2008) (rejecting defendant's argument that indictment should be dismissed because government did not present exculpatory evidence at grand jury proceeding and stating that 28 U.S.C. § 530B "does not override the law governing presentation of evidence in federal grand jury proceedings"); *see also Stern v. United States District Court*, 214 F.3d 4, 19 (1st Cir. 2000) ("[I]t simply cannot be said that Congress, by enacting Section 530B, meant to empower states (or federal district courts, for that matter) to regulate government attorneys in a manner inconsistent with federal law."). *But see United States v. Colo. Supreme Court*, 189 F.3d 1281, 1284, 1288-89 (10th Cir. 1999) (finding that Colorado Rule of Professional Conduct 3.8(f), which required prosecutor to obtain prior judicial approval of subpoena directed to lawyer after opportunity for adversarial hearing, was enforceable as a "rule of professional ethics clearly covered by the McDade Act" and not "a substantive or procedural rule that is inconsistent with federal law").

19. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL at § 9-5.001(C) (2009). *See also Kyles v. Whitley*, 514 U.S. 419 (1995) and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999).

20. *Id.* at § 9-5.001(C)(1).

21. *Id.* at § 9-5.001(C)(2).

22. *See generally United States v. Montoya*, 45 F.3d 1286, 1295 (9th Cir. 1995) ("[F]ailure to strictly comply with the United States Attorneys' Manual creates no enforceable rights.") (citations omitted); *United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir. 1993); ("[T]he U.S. Attorneys' Manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.") (citation and internal quotation marks omitted); *United States v. Le*, 306 F. Supp. 2d 589, 592 (E.D. Va. 2004) ("[I]nternal DOJ guidelines do not create any substantive or procedural rights for a defendant.") (citations omitted).

23. *See* Indictment, *United States v. Stevens*, No. 08-00231 (D.D.C. July 29, 2008). The recitation of the government's allegations in this paragraph and the immediately following paragraph is derived from the Indictment.

24. *See* Memorandum in Support of Senator Stevens's Motion for a New Trial at 36-37, *United States v. Stevens*, No. 08-00231 (D.D.C. Dec. 5, 2008), 2008 WL 5240647.

25. *Id*.

26. *See* Senator Stevens's Motion to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct at 5, *United States v. Stevens*, No. 08-00231 (D.D.C. Oct. 5, 2008), 2008 WL 4498628.

27. *Id*. at 5-6.

28. *Id*. at 6.

29. *Id.*; *see also* Senator Stevens's Emergency Motion to Dismiss the Indictment or for a Mistrial Due to Government's Continuing *Brady* Violations, *United States v. Stevens*, No. 08-00231 (D.D.C. Oct. 2, 2008), 2008 WL 4498626.

30. Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice, *United States v. Stevens*, No. 08-00231 (D.D.C. Apr. 1, 2009).

31. *Id.* at 1.

32. *Id.* at 2.

33. Transcript of Motion Hearing of April 7, 2009 at 6-7, *United States v. Stevens*, No. 08-00231 (D.D.C. Apr. 7, 2009).

34. *Id.* at 8.

35. *Id.*

36. *Id.* at 46-48.

37. *See* Indictment, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Feb. 7, 2005). The recitation of the government's allegations in this paragraph is derived from the Indictment.

38. *See* Defendants' Joint Motion in Limine to Exclude Evidence Based on Sample Results Indicating the Presence of Fibers from Minerals That Do Not Constitute "Asbestos" Under the Clean Air Act, *United States v. W.R. Grace*, No. 05-07 (D. Mont. May 31, 2006).

39. Trial Transcript at 3571, *United States v. W.R. Grace*, No. 05-07 (D. Mont. 2009).

40. *Id.* at 4047.

41. *Id.* at 3596.

42. *Id.* at 3597.

43. *Id.* at 3598-99.

44. *Id*.

45. *Id.* at 4491.

46. *Id.* at 4303.

47. Transcript of Hearing on Defendants' Joint Motion to Strike the Testimony of Robert Locke at 150, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 17, 2009).

48. *Id.* at 150; 196.

49. *Id.* at 151.

50. *Id.* at 151-52.

51. Transcript of Hearing on Defendants' Joint Motion to Dismiss at 23, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 27, 2009).

52. *See* Defendants' Joint Motion to Dismiss the Indictment Due to the Government's Repeated and Intentional Misconduct at 45, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 23, 2009).

53. Transcript of Hearing on Defendants' Joint Motion to Strike the Testimony of Robert Locke at 101, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 17, 2009).

54. Transcript of Hearing on Defendants' Joint Motion to Dismiss at 146, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 27, 2009).

55. *Id.*

56. Defendants' Joint Motion to Compel Discovery Regarding Robert Locke, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 8, 2009).

57. Order, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 10, 2009).

58. *See* Defendants' Joint Motion to Dismiss the Indictment Due to the Government's Repeated and Intentional Misconduct at 48, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 23, 2009).

59. *Id.* at 49.

60. Transcript of Hearing on Defendants' Joint Motion to Strike the Testimony of Robert Locke at 132, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 17, 2009).

61. *Id.* at 147.

62. *Id.* at 192.

63. Declaration of Kevin M. Cassidy at 2-3, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 26, 2009); Declaration of Kris A. McLean at 2, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 26, 2009).

64. *See* Defendants' Joint Motion to Dismiss the Indictment Due to the Government's Repeated and Intentional Misconduct, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 23, 2009); Defendant Robert J. Bettacchi's Motion for Dismissal with Prejudice on the Ground of Prosecutorial Misconduct, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 24, 2009).

65. Transcript of Hearing on Defendants' Joint Motion to Dismiss at 125, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 27, 2009).

66. *Id.* at 131, 133.

67. Order, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 28, 2009).

68. *Id.* at 2.

69. *Id.* at 3-4.

70. *Id.* at 11-13.

71. Jury Instruction at 1-3, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 28, 2009).

72. Am. Coll. of Trial Lawyers, Proposed Codification of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16 at 2 (2003) [hereinafter ACTL Proposal], *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62.

73. *Id.* at 17. FRCrP 11 governs the making of guilty and nolo contendere pleas. The proposed amendments to FRCrP 11 would have required the disclosure to the defendant of all exculpatory and mitigating information 14 days prior to the defendant's plea of guilty or nolo contendere. *See* ACTL Proposal, *supra* note 72, at 26.

74. *Id.* at 2.

75. Judicial Conference Advisory Comm. on the Rules of Criminal Procedure, Report to Standing Committee at 18 (May 2007), *available at* http://www.uscourts.gov/rules/Agenda%20Books/Criminal/CR2009-10.pdf.

76. Letter from Paul J. McNulty, Deputy Attorney General, U.S. Dep't of Justice, to Hon. David F. Levi, Chair, Committee on Rules of Practice and Procedure at 2 (June 5, 2007) [hereinafter *McNulty Letter to Judge Levi*], *available at* http://www.uscourts.gov/rules/Agenda%20Books/Criminal/CR2009-10.pdf; U.S. Dep't of Justice, United States Attorneys' Manual § 9-5.001 (2009).

77. *Id*.

78. Text of Rule 16 Proposal as submitted to Standing Committee (May 2007), *available at* http://www.uscourts.gov/rules/Agenda%20Books/Criminal/CR2009-10.pdf.

79. *Id*.

80. *McNulty Letter to Judge Levi*, *supra* note 76, at 1.

81. 18 U.S.C. § 3500 (2009).

82. *McNulty Letter to Judge Levi*, *supra* note 76, at 4.

83. *Id.* at 4-5.

84. *Id.* at 2-3.

85. *See, e.g., United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) (affirming dismissal of indictment with prejudice where the trial judge found that the government attorney acted "flagrantly, willfully, and in bad faith," in connection with *Brady* and *Giglio* violations); *United States v. Shaygan*, No. 08-20112-CR, 2009 WL 980289, at *2 (S.D. Fla. Apr. 14, 2009) ("I write in detail to make clear what happened here because it is necessary to get to the bottom of what went wrong. I do so in hope that it will not happen again. Our system of criminal justice cannot long survive unless prosecutors strictly adhere to their ethical obligations, avoid even the appearance of partiality, and directly obey discovery obligations and court orders."); *United States v. Quinn*, 537 F. Supp. 2d 99, 121-22 (D.D.C. 2008) ("This case was unfortunately plagued by a serious misstep by the government. The government was presented with several opportunities to disclose information favorable to the defense, but it instead chose to withhold that valuable information, thereby unfairly prejudicing [defendant] in the presentation of his defense. In the end, the court is unable to conclude that [defendant] received a fair trial and a verdict worthy of confidence.").

86. *See* Government's Consented Motion for Remand to the District Court for Further Proceedings and for Appellant's Release Pending Resolution of the Case, *United States v. Kott*, No. 07-30496 (9th Cir. June 4, 2009); Government's Consented Motion for Remand to the District Court for Further Proceedings and for Appellant's Release Pending

Resolution of the Case, *United States v. Kohring*, No. 07-30170 (9th Cir. June 4, 2009).

87. Government's Consolidated Response Concurring in the Defendants' Motions for a New Trial, and Government's Motion to Dismiss Count One Without Prejudice and Memorandum of Law in Support Thereof at 5, *United States v. Koubriti*, No. 01-80778 (S.D. Mich. Aug. 31, 2004).

88. *See United States v. Jones*, 609 F. Supp. 2d 113, 119 (D. Mass. 2009) ("The egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court.") (footnote omitted); *United States v. Jones*, 620 F. Supp. 2d 163, 167 (D. Mass. 2009) ("The persistent recurrence of inadvertent violations of defendants' constitutional right to discovery in the District of Massachusetts persuades this court that it is insufficient to rely on Department of Justice training programs for prosecutors alone to assure that the government's obligation to produce certain information to defendants is understood and properly discharged."). In fact, Judge Wolf has written successive letters to U.S. Attorneys General Gonzales, Mukasey, and Holder regarding his concerns. *See, e.g.,* Letter from Hon. Mark L. Wolf, Chief Judge, United States District Court, District of Massachusetts, to Hon. Eric H. Holder, U.S. Attorney General (Apr. 23, 2009) (attaching letters previously sent to U.S. Attorneys General Mukasey and Gonzales).

89. Press Release, U.S. Dep't of Justice, Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases (Apr. 14, 2009).

90. *Id.*

91. Mike Scarcella, *DOJ Outlines Changes After Stevens Case*, NAT'L L. J., October 19, 2009.

92. *Id.*

93. United States' Response Opposing Defendant Kott's Motion to Dismiss at 42, *United States v. Kott*, No. 07-00056 (D. Alaska Oct. 23, 2009); *see also supra* note18 (discussing defendant's motion that prompted government's response brief).

94. Letter from Hon. Emmet G. Sullivan, Judge, United States District Court for the District of Columbia, to Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009), *available at* http://www.uscourts.gov/rules/Agenda%20Books/Criminal/CR2009-10.pdf.

95. However, to the extent federal district courts employ a pretrial standard for the production of helpful information by the government that does not incorporate a materiality analysis, *see supra*, note 8, the proposed amendment to FRCrP 16 will not appreciably enlarge a defendant's rights, except in the post-trial context.

96. FED. R. CRIM. P. 16(a)(2) states: "Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500."

97. The U.S. Court of Appeals for the Second Circuit recently held that "[t]he obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form." *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (footnote omitted).

98. *See* Defendant W.R. Grace's Motion to Compel Production of Government Attorney Notes at 4 n.3, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 5, 2009).

99. *See* Government's Partial Opposition to Defendants' Joint Motion to Compel Discovery Regarding Robert Locke at 3, *United States v. W.R. Grace*, No. 05-07 (D. Mont. Apr. 10, 2009).

100. *See* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 291 (2007) (footnote omitted).

101. For example, Assistant U.S. Attorney Richard Convertino, lead prosecutor in *United States v. Koubriti*, was charged with conspiracy, obstruction of justice, and making false declarations in connection with concealment of information and presentation of false testimony in connection with that prosecution. *See* Press Release, U.S. Dep't of Justice, Former Federal Prosecutor, State Department Agent Indicted for Obstruction of Justice and Presenting False Evidence in Terrorism Trial (Mar. 29, 2006). A jury ultimately acquitted Convertino of all charges brought against him.

102. *See, e.g.,* Federal Rules of Civil Procedure 30 (depositions by oral examination), 31 (depositions by written questions), 33 (interrogatories to parties), and 36 (requests for admission).

103. 295 U.S. 78 (1935).

104. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1016 (2009). ■

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