

ARTICLE

A FALL FROM GRACE: *UNITED STATES V. W.R. GRACE* AND THE NEED FOR CRIMINAL DISCOVERY REFORM

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This Article examines several 2009 cases involving prosecutorial misconduct arising from the government's failure to live up to its criminal discovery obligations—e.g., United States v. Theodore Stevens, United States v. Ali Shaygan, and United States v. Jones. The Article focuses specifically on United States v. W.R. Grace, a Clean Air Act criminal case in Montana, where the court found the government had not fulfilled its discovery obligations and imposed a harsh remedy in spite of finding that the prosecutors' failures did not rise to the level of prosecutorial misconduct. While commentators have long argued that the lack of an enforceable pretrial disclosure obligation undermines fair trials from defendants' point of view, the authors' analysis of Grace, Stevens, and other cases suggests that the absence of a clear, enforceable rule also jeopardizes the government's ability to fairly prosecute its cases. Nonetheless, the Department of Justice has consistently opposed amending Federal Rule of Criminal Procedure 16 to require prosecutors to disclose evidence favorable to the defendant before trial. This resistance exacts high costs on individual prosecutors as well as the public at large. The government's narrow interpretation of its disclosure obligations will inevitably conflict with trial courts' broad interpretation of the government's duties, primarily because courts consistently interpret prosecutors' legal duties in light of their ethical duties. For these reasons, the Article supports amending Rule 16 to eliminate the gap between prosecutors' legal and ethical duties, and to require the pretrial disclo-

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The Authors co-taught a seminar in spring 2009 that covered the eleven-week Grace trial. The class created a website and trial blog that are available today as an archive of this historic trial: <http://umt.edu/gracecase>. Professors Brennan and King-Ries want to thank the Grace Class students for so enthusiastically jumping into this unprecedented project, with special thanks to their colleague from the University of Montana School of Journalism, Nadia White, who co-taught the class with them. The Authors are grateful to Prof. Carl Tobias of the University of Richmond School of Law for his thoughtful comments and constructive criticism of this Article.

sure of evidence favorable to the defendant. The Article concludes by encouraging the Advisory Committee on Criminal Rules to once again make such a recommendation to the Standing Committee on Rules of Practice and Procedure.

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“It has taken many disturbing experiences over many years to erode this court’s trust in the Department of Justice’s dedication to the principle that ‘the United States wins . . . whenever justice is done one of its citizens in the courts.’”¹

INTRODUCTION

When Judge Emmet Sullivan “exploded in anger”² over federal prosecutors’ failure to turn over documents responsive to post-trial discovery motions in *United States v. Theodore Stevens*,³ shock waves reverberated throughout the federal criminal justice system. Judge Sullivan held four Justice Department attorneys in contempt that day,

¹ *United States v. Jones*, 620 F. Supp. 2d 163, 184 (D. Mass. 2009) (referring to the inscription on the U.S. Department of Justice building in Washington, D.C. that was mentioned in *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963)).

² Nedra Pickler, *Justice Dept. Lawyers in Contempt for Withholding Stevens Documents*, WASH. POST, Feb 14, 2009, at A7.

³ Senator Ted Stevens’s federal conviction was dismissed after an investigation revealed exculpatory and impeachment evidence had been wrongfully withheld from the Senator. See, e.g., *The Ted Stevens Scandal*, WALL ST. J., Apr. 2, 2009, at A18, available at <http://online.wsj.com/article/SB123863051723580701.html>.

calling it “outrageous” that the government would ignore his explicit court order.⁴ He dismissed Senator Stevens’s conviction in response to a request by U.S. Attorney General Eric Holder, who replaced the *Stevens* prosecution team and then learned the original team had withheld even more exculpatory and impeachment evidence from the senator than originally thought.⁵ Judge Sullivan’s appointment of an independent special prosecutor to determine whether six of the *Stevens* prosecutors had engaged in criminal behavior during and after trial indicated his lack of trust in the disciplinary office of the Department of Justice.⁶ He delivered a “lacerating 14-minute speech”⁷ from the bench, in which he warned of “a ‘troubling tendency’ he had observed among prosecutors to stretch the boundaries of ethics restrictions and conceal evidence to win cases.”⁸ Judge Sullivan subsequently submitted a request to the Advisory Committee on Federal Criminal Rules asking it to amend Rule 16⁹ to require the government to disclose all information favorable to the defense regardless of materiality,¹⁰ and submitted a request to the chair of the D.C. District’s Rules Committee to consider a similar amendment to the D.C. District’s local rules.¹¹

Judge Sullivan’s anger over the government’s consistently coy responses to his orders to disclose *Brady* material¹² in *Stevens* resurrected an issue that the Standing Committee on Rules and Practice had carefully

⁴ Joe Palazzolo, *Judge Holds Prosecutors in Contempt in Stevens Case*, BLT: THE BLOG OF LEGAL TIMES (Feb. 13, 2009, 6:09 PM), <http://legaltimes.typepad.com/blt/2009/02/judge-holds-prosecutors-in-contempt-in-stevens-case.html>; Nedra Pickler, *Ted Stevens’ Prosecutor to be Held in Contempt*, HUFFINGTON POST, Feb. 13, 2009, http://www.huffingtonpost.com/2009/02/13/ted-stevens-prosecutor-to_n_166813.html.

⁵ See Carrie Johnson & Del Quentin Wilber, *Holder Asks Judge to Drop Case Against Ex-Senator*, WASH. POST, Apr. 2, 2009, at A1.

⁶ Del Quentin Wilber, *Judge Orders Probe of Attorneys in Stevens Case*, WASH. POST, Apr. 8, 2009, at A1 [hereinafter Wilber, *Attorney Probe*]. Although disciplinary complaints are usually handled by the Department of Justice’s Office of Professional Responsibility, Judge Sullivan said “he had no faith in such an internal investigation after seeing so much ‘shocking and disturbing’ behavior by the government.” *Id.*

⁷ Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1.

⁸ *Id.*

⁹ FED. R. CRIM. P. 16.

¹⁰ Letter from the Hon. Emmet G. Sullivan, U.S. Dist. Judge, Dist. of Columbia, to the Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure 1 (Apr. 28, 2009), available at Federal Rulemaking, Comments & Suggestions, U.S. COURTS, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR%20Suggestions%202009/09-CR-A-Suggestion-Sullivan.pdf> [hereinafter Sullivan Letter to Tallman].

¹¹ Letter from the Hon. Emmet G. Sullivan, U.S. Dist. Judge, Dist. of Columbia, to the Hon. Henry H. Kennedy, Chair, of Columbia Rules Committee 1 (Dec. 7, 2009) available at <http://www.mainjustice.com/files/2009/12/LettertoKennedy1.pdf>.

¹² See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[S]uppression 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.”).

tabled over two years earlier,¹³ and has sent ripples throughout the criminal justice system, which may lead, finally, to criminal discovery reform.

This would not be possible were the ground not already fertile for such change. Several federal district judges last year found that U.S. Attorneys committed prosecutorial misconduct by failing to disclose exculpatory or impeachment evidence to defendants. A federal judge in Florida publicly reprimanded the prosecuting attorneys for withholding impeachment evidence from defendant Dr. Ali Shaygan, and awarded the defendant \$600,000 in attorneys' fees after he was acquitted of 141 charges of illegally distributing drugs.¹⁴ A Massachusetts federal judge dismissed gun charges against a defendant¹⁵ upon learning that the prosecutor withheld impeachment evidence and ordered the prosecutor and the Massachusetts U.S. Attorney to show cause why they should not be sanctioned.¹⁶ In the District of Columbia, a federal judge reprimanded prosecutors for withholding impeachment evidence of a prosecution witness in a trial charging seven defendants with kidnapping a U.S. citizen in Trinidad.¹⁷

The trial court judges in each of these cases found prosecutorial misconduct based on the prosecutors' failures to disclose obviously exculpatory or impeachment evidence to the defense.¹⁸ The *Stevens* prosecutors doctored documents, shepherded a witness back to Alaska upon learning he had exculpatory information in his possession, and consist-

¹³ See Sullivan Letter to Tallman, *supra* note 10, at 1.

¹⁴ *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1322, 1324 (S.D. Fla. 2009). The attorneys' fees were awarded under the Hyde Amendment, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2440, 2159 (1964) (codified at 18 U.S.C. § 3006A (1964)) which authorizes the "award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." The district court's award of sanctions under the Hyde Amendment is on appeal to the Eleventh Circuit. Appellant Andrea Hoffman's Notice of Appeal, *United States v. Shaygan*, No. 08-20112-Cr-Gold (April 22, 2009).

¹⁵ See *United States v. Jones*, 686 F. Supp. 2d 147, 149 (D. Mass. 2010). The defendant was charged with being a felon in possession of a firearm, a conviction that would have carried a mandatory ten-year term.

¹⁶ *United States v. Jones (Jones II)*, 620 F. Supp. 2d 163, 165-66 (D. Mass. 2009); *United States v. Jones (Jones I)*, 609 F. Supp. 2d 113, 115, 131 (D. Mass. 2009).

¹⁷ See Jordan Weissmann, *Prosecutors in Kidnapping Case Rebuked over Brady*, BLT: THE BLOG OF LEGAL TIMES (June 24, 2009, 2:04 PM), <http://legaltimes.typepad.com/blt/2009/06/prosecutors-in-kidnapping-case-rebuked-over-brady.html>. The United States citizen, Balram Maharaj, eventually died while in captivity. *Id.*

¹⁸ The constitutional obligation to disclose exculpatory evidence to the defense was first articulated in *Brady v. Maryland*, 373 U.S. 83, 90-91 (1963). See *infra* Part I for a more thorough discussion of prosecutors' legal obligations to provide favorable information to criminal defendants.

ently lied to the court about what they had done.¹⁹ The *Shaygan* prosecutors directed two prosecution witnesses to secretly record conversations with defense counsel in an attempt to disqualify Shaygan's lawyers, and did not reveal to the defense that the witnesses were confidential informants for the government.²⁰ The *Jones* prosecutor did not disclose to the defendant that the key police witness had told her more than once that he did not recognize the defendant on the night of the crime.²¹ Finally, the attorneys prosecuting the hostage-taking of Balram Maharaj in Trinidad failed to disclose FBI agent notes stating one of the defendants led the agents to the wrong place when they asked to be taken to the mountain hideaway where the victim was being held captive.²²

The temptation in high-profile cases involving outrageous prosecutorial misconduct is to focus on individual prosecutors and conclude the problem lies with their knowledge, their experience, or their character.²³ While each of those flaws may exist, it is equally plausible that the prosecutors are part of a larger culture that provides them with contradictory guidance²⁴ and creates expectations that cannot consistently be met.²⁵ Trial courts and prosecutors use similar words and phrases in discussing the government's disclosure obligations, but often

¹⁹ See Senator Stevens' Motion to Dismiss the Indictment; or in the Alternative, Motion for a New Trial, Discovery and an Evidentiary Hearing at 4–8, *United States v. Stevens* (No. 08-cr-231-EGS) (Dec. 22, 2008); Wilber, *Attorney Probe*, *supra* note 6.

²⁰ *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1290–91 (S.D. Fla. 2009).

²¹ *Jones I*, 609 F. Supp. 2d at 116. Because the court noted another inconsistency in the government's evidence at the suppression hearing, it ordered the prosecutor to review her notes. *Id.* at 117. She did so, and sent a copy to the court for an *ex parte* in camera review. *Id.* That same day, she said she did not find anything that merited disclosure; the court disagreed, noting several inconsistencies. *Id.* at 117–18. At that point, the notes were turned over to the defense. *Id.* at 118.

²² Weissmann, *supra* note 17. This kind of evidence does not on its own prove or disprove anything; however, it is impeachment information that could be used by the defendant.

²³ This is reflected in judges' decisions to refer prosecutors to disciplinary offices. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 424–25 (1976) (stating that prosecutors are protected from § 1983 liability by absolute immunity); see also Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 933–34 (1997) (suggesting that prosecutors be individually liable for damages caused by their failures to disclose exculpatory information).

²⁴ Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WISC. L. REV. 399, 400 (arguing that prosecutorial misconduct results in large part from vague ethical rules, vast discretionary authority, and inadequate remedies for the misconduct).

²⁵ See, e.g., Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 488 (2009) (“*Brady*’s failure ultimately rests with the materiality requirement itself, not just the prosecutors who must apply it.”); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 651–52 (2002). Prof. Sundby contends that an ethical prosecutor with true *Brady* material should not turn the evidence over, but should dismiss the charges. *Id.*

mean entirely different things.²⁶ Courts focus on the principles animating the obligation,²⁷ while prosecutors focus on the lines over which they may not cross²⁸—lines measured only in hindsight.²⁹

Thus, while some prosecutors may flout the spirit as well as the letter of the law, even those who intend to fulfill their legal obligations may interpret those obligations more narrowly than do trial courts. When a judge orders the government to turn over evidence favorable to the defense within a certain time period, the government likely interprets the order in light of its own guidance manual³⁰ and hears, “Turn over admissible evidence that is exculpatory or impeaching if it is likely to affect guilt or punishment, in time for the defendant to make effective use of it at trial.” This interpretation of the government’s disclosure obligations is not unreasonable; it hews closely to the rules established by a line of Supreme Court cases.³¹ Nonetheless, many trial judges have higher expectations of the government than is strictly required by the Supreme Court. Those expectations are also not unreasonable, grounded as they are in principles enunciated by the Supreme Court in ethical rules governing prosecutors and in trial judges’ own charge to safeguard “the

²⁶ *United States v. Naegle*, 468 F. Supp. 2d 150, 152 (D.D.C. 2007) (“At the outset, the Court notes that too often in criminal cases the prosecution and defense are like two ships passing in the night when it comes to *Brady*; they fail to begin with a common understanding of the *Brady* decision and what is meant by the government’s so-called ‘*Brady* obligation.’”); cf. Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (noting that “as interpreted by the judiciary, *Brady* actually invites prosecutors to bend, if not break, the rules, and many prosecutors have become adept at *Brady* gamesmanship to avoid compliance”).

²⁷ See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”).

²⁸ See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; . . . ‘the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded. . . .’”); see also *Kyles v. Whitley*, 514 U.S. 419, 436–37 (1995) (“[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.”).

²⁹ *United States v. Bagley*, 473 U.S. 667, 682 (1985) (“The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”); see also Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 213 (2005–2006) [hereinafter Cerruti, *Through the Looking-Glass*] (“[T]he trial must come first, and the disclosure of exculpatory evidence must come only after a conviction, if at all.”).

³⁰ U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-5.001 (2010), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrmm.htm [hereinafter, U.S. ATTORNEYS’ MANUAL].

³¹ See *Bagley*, 473 U.S. at 682; *Giglio v. United States*, 405 U.S. 150, 153–54 (1972); *Brady*, 373 U.S. at 87.

rights of the accused and the interests of the public in the administration of criminal justice.”³²

This tension between trial courts and prosecutors boiled over in *United States v. W.R. Grace*,³³ a 2009 Clean Air Act criminal trial in Missoula, Montana. There, the government’s failure to disclose certain evidence overshadowed the substantive allegations of wrongdoing against the defendant and led to an acquittal that may reflect the jury’s judgment of the government vis-à-vis its discovery obligations more than it does its judgment of the defendants’ guilt or innocence. *Grace* is emblematic of the chasm that has developed between federal district judges and prosecutors over the government’s criminal discovery obligations. Even in the absence of prosecutorial misconduct, discovery obligations based on a materiality standard that is applied only in retrospect are almost as difficult for prosecutors to comply with as they are for trial judges to enforce.³⁴

The *Grace* trial did not set out to be a cautionary tale about criminal discovery. In 2005, W.R. Grace and seven of its executives were indicted for knowingly endangering the townspeople of Libby, Montana through ongoing releases of asbestos related to Grace’s now-defunct vermiculite mine.³⁵ The scourge of Libby asbestos is well-known; the EPA sent an Emergency Response Team to Libby in 1999 to investigate the health risks posed by a unique form of asbestos that occurs naturally in the vermiculite ore and is released into the air upon the slightest disturbance.³⁶ As a result of this research, Libby was designated a Superfund site in 2002.³⁷ Nearly 2,000 current or former Libby residents have developed asbestos-related diseases; Libby residents have died from asbestosis at a rate 40–60 times higher than expected; more than 200 have died of asbestos-related diseases.³⁸

³² AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1(a) (3d ed. 2000), available at <http://www.abanet.org/crimjust/standards/specialfunctions.pdf>.

³³ 445 F. Supp. 2d 1122 (D. Mont. 2006).

³⁴ Cerruti, *Through the Looking-Glass*, *supra* note 29, at 243–46. Professor Cerruti opines that the *Brady* doctrine has been so subverted by subsequent decisions narrowing its applicability that it perversely creates the very culture of withholding that Judge Sullivan and other district court judges are railing against. *Id.* at 230–43. From Professor Cerruti’s vantage point, the gap between trial courts and prosecutors’ understanding of the government’s disclosure obligations logically follows from the Supreme Court’s *Brady* jurisprudence. *Id.* at 243.

³⁵ Superseding Indictment, paras. 39–45, *United States v. W.R. Grace*, 455 F. Supp. 2d 1122 (D. Mont. 2006) (CR-05-07-M-DWM).

³⁶ *See id.* paras. 37–38.

³⁷ Libby was placed on the National Priorities List in 2002. *See Region 8, Libby Site Background*, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/region8/superfund/libby/background.html> (last visited Nov. 6, 2010).

³⁸ *See* Superseding Indictment, *supra* note 35, paras. 47–59. Another report mentions that the rate is actually forty to sixty times higher. *See EXPOSURE INVESTIGATION & CONSULTATION BRANCH, DIVISION OF HEALTH ASSESSMENT & CONSULTATION, AGENCY FOR TOXIC*

As the *Grace* trial opened in Montana in February 2009, it promised an archetypal theme of good guys finally bringing bad guys to justice. The government alleged that the defendants knew that the asbestos from the vermiculite was deadly,³⁹ that workers were developing lung disease from exposure to tremolite, the unique Libby asbestos,⁴⁰ that Grace workers were dying from these diseases,⁴¹ and that Grace products released asbestos when used routinely and could not be made safer.⁴² The government further alleged that the defendants nonetheless allowed Libby residents to use the contaminated vermiculite as a base for school running tracks and the grade school skating rink,⁴³ that they closed the mine and sold heavily contaminated properties to people who intended to live, play, and work there without telling them of the danger,⁴⁴ and that they then left town having pocketed “at least \$140 million in after tax profits arising largely from products made with vermiculite contaminated with tremolite asbestos from the Libby Mine.”⁴⁵

Grace was an easy defendant to hate; the facts alleged by the government in the superseding indictment painted a picture of a company that had no regard for the collateral human damage that its business caused.⁴⁶ While the prosecutors’ ability to present evidence was severely limited by a few key rulings on substantive law, what finally doomed the government’s case was its admitted failure to disclose impeachment evidence⁴⁷ regarding its star witness, Robert Locke—a former W.R. Grace employee who worked in a variety of managerial roles during his twenty-four-year tenure including positions related to the Libby mine.⁴⁸

U.S. District Judge Donald W. Molloy found that the government’s discovery violations did not rise to the level of prosecutorial miscon-

SUBSTANCES & DISEASE REGISTRY, HEALTH CONSULTATION: MORTALITY FROM ASBESTOSIS IN LIBBY, MONT., 1979–1998 (2000), available at <http://www.atsdr.cdc.gov/hac/pha/pha.asp?docid=1225&pg=0>.

³⁹ See Superseding Indictment, *supra* note 35, paras. 74–76, 84–88.

⁴⁰ See *id.* paras. 76, 92, 96–102.

⁴¹ *Id.* paras. 103–04.

⁴² See *id.* paras. 115–27.

⁴³ *Id.* paras. 24–26.

⁴⁴ See *id.* paras. 28–35.

⁴⁵ Superseding Indictment, *supra* note 35, para. 46.

⁴⁶ W.R. Grace was also a defendant in other high-profile environmental contamination cases, including the contamination of public water supplies in Woburn, Mass. See JONATHAN HARR, *A CIVIL ACTION* (Vintage 1996).

⁴⁷ See generally Gov’t’s Consol. Opposition to Defendants’ Motions for Dismissal Due to Prosecutorial Misconduct, *United States v. W.R. Grace*, CR-05-07-M-DWM (April 25, 2009), available at <http://www.mtb.uscourts.gov/mtd/images/1124.pdf> (admitting that the United States was guilty of committing discovery violations).

⁴⁸ Ryan, Thompson, *Robert Locke*, UM GRACE CASE BLOG, <http://www.umt.edu/grace-case/exhibit-32/expert-witnesses/robert-locke/>. Locke sued the company for unfair treatment after his departure in 1998. *Id.*

duct⁴⁹ but held that the prosecutors had breached their constitutional and statutory duties to disclose favorable information to the defense.⁵⁰ As a remedy, the court allowed the defendants to cross-examine Locke a second time on a narrow scope of issues, prohibited the government from redirect examination, and instructed the jury that the Locke was back on the stand because the government had not lived up to its legal obligations.⁵¹

In its jury instruction, the court made some powerfully negative statements about the government.⁵² In a lengthy instruction read to the jury prior to Locke's re-cross, the court stated, *inter alia*, that "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."⁵³ The court advised the jury to "examine Locke's entire testimony with great skepticism and with greater caution than that of other witnesses."⁵⁴ Although the judge did not mention the defendants in his instruction, the implication was clear: if the prosecutors were the bad guys, the defendants must be the good guys. His unusual prohibition on redirect made it difficult for the government to recover. The verdict of acquittal two weeks later was not much of a surprise, and was not appealable.⁵⁵

In contrast to the findings of prosecutorial misconduct in other high-profile cases—*Stevens*, *Shaygan*, and *Jones*⁵⁶—the *Grace* court made an explicit finding of no prosecutorial misconduct under the current legal standards.⁵⁷ The court suggested instead that the prosecutors had not

⁴⁹ Order at 9, *United States v. W.R. Grace*, CR-05-07-M-DWM (Apr. 28, 2009) [hereinafter 2009 *Grace* Order I].

⁵⁰ *Id.* at 8.

⁵¹ *Id.* at 11–14.

⁵² Jury Instruction, *U. S. v. W.R. Grace*, No. CR-05-07-M-DWM (Apr. 28, 2009). See *infra* Appendix 1 for the complete text of this instruction.

⁵³ *Id.* at 2.

⁵⁴ *Id.* at 3.

⁵⁵ The government may have been able to file an interlocutory appeal of the judge's remedy, but it did not do so.

⁵⁶ See *infra* Part I for a more in-depth discussion of these cases.

⁵⁷ 2009 *Grace* Order I, *supra* note 49, at 9. Prosecutorial misconduct based upon a failure to disclose material evidence to the defense requires proof of three elements: that the withheld evidence was favorable to the accused or could have impeached a prosecution witness, that the government knew of the evidence but did not disclose it, and that the suppression of the evidence prejudiced the defendant. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). As discussed *infra* notes 101–104, any prejudice is cured if the defendant is able to cross-examine the witness regarding the withheld evidence. Thus, the government's failure to disclose evidence *in a timely fashion* will never amount to prosecutorial misconduct because the defendant will not be able to prove that he was prejudiced.

lived up to their ethical obligations⁵⁸ and expressed serious concern for the ability of the defendants to obtain a fair trial.⁵⁹ These concerns led it to impose severe trial sanctions that virtually assured the defendants of an acquittal.⁶⁰

This is what makes *Grace* a paradigmatic story. High-profile cases draw attention to egregious acts of particular prosecutors; *Grace* draws attention to the predictable consequences of a system that lauds high principles but enforces them only in hindsight. Prosecutors push the limits of an obligation that is not meaningful except in the breach, defendants push for more discovery by relying on lofty language touting the principles of fair trials and a just society,⁶¹ and trial courts look for law to apply so that they can ensure the fair and orderly administration of justice.

The *Grace* trial epitomizes the need for criminal discovery reform. Specifically, criminal discovery rules need to be amended to close the gap between prosecutors and courts, and between legal and ethical rules. Only in this way can the criminal justice system take an important step toward its central mission of doing “justice.” With prosecutors feeling

⁵⁸ 2009 *Grace* Order I, *supra* note 49, at 9. Prosecutors have an ethical duty to “make timely disclosure to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.” MODEL RULES OF PROF'L CONDUCT R. 3.8(d). However, ethical violations by government attorneys may not provide a basis for a private remedy:

The principles set forth herein . . . are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including criminal defendants, targets or subjects of criminal investigations, witnesses in criminal or civil cases . . . and shall not be a basis for dismissing criminal or civil charges or proceedings or for excluding relevant evidence in any judicial or administrative proceeding.

28 C.F.R. § 77.5. In addition, prosecutors are immune for their actions “associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (extending common-law immunity for prosecutors to § 1983 liability when prosecutor is acting as an advocate); *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 858–59 (2009) (holding that *Imbler* immunity extends to prosecutors’ failure to disclose *Giglio* material).

⁵⁹ See 2009 *Grace* Order I, *supra* note 51, at 10–14. While every criminal defendant has a constitutional right to a fair trial, the right is not amorphous; it is measured and enforced under interpretive rules established by the Supreme Court. In the case of a defendant’s right to a fair trial being undermined by the prosecution’s failure to disclose evidence, the right is measured by the materiality standard established in *Brady* and *Bagley*, i.e., through a finding of prosecutorial misconduct. Ethical violations are to be referred to the Office of Disciplinary Counsel for investigation and possible punishment.

⁶⁰ Given the sprawling and complex nature of the government’s case, it is unclear whether it could have obtained any convictions even in the absence of the court’s jury instruction.

⁶¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.”). Defense attorneys routinely request *Brady* material.

the brunt of the chasm between vague legal rules and lofty ethical obligations—both individually and as representatives of the people—reform may finally be possible.⁶²

Part I of this Article discusses the gap between the legal and ethical rules relating to prosecutorial misconduct. Specifically, it describes the web of overlapping duties governing prosecutors as they decide whether to provide certain information to defendants before and during trial and highlights the contradictions between prosecutors' and trial courts' interpretations of the government's discovery obligations. Part II discusses recent high-profile cases in which courts have wrestled with instances of prosecutorial misconduct involving failure to disclose exculpatory and impeachment information. Part III tells the story of *United States v. W.R. Grace*, and the evolution of the court's and parties' expectations regarding the government's discovery obligations over the four years from indictment to acquittal. Part IV analyzes the *Grace* court's resolution of the allegations of prosecutorial misconduct surrounding the government's failure to disclose impeachment evidence regarding its star witness, Robert Locke. This Part concludes that while the *Grace* court intended to correct a perceived unfairness, its interpretation of *Brady* was broad, and its jury instruction and prohibition on redirect were punitive. Part V discusses the need for reform of the criminal discovery rules. This Part analyzes current efforts underway to close the gap between prosecutors' legal and ethical obligations, and recommends amending Federal Rule of Criminal Procedure 16 as the most direct route to achieving this goal.

I. THE LEGAL & ETHICAL CONTEXT

“[I]f no one knew about *Brady* before *Stevens*, everyone does now, . . .”⁶³

A complicated web of interrelated statutes and cases governs the prosecution's duty to disclose evidence to the defense. Federal Rule of

⁶² One of the two reasons given by the Chair of the Standing Committee on Rules of Practice and Procedure to the Advisory Committee on Criminal Rules for the Standing Committee's decision not to approve the Advisory Committee's proposed amendments to Rule 16 was that there were “questions whether a need for the change had been sufficiently shown.” Advisory Comm. on Criminal Rules, *Minutes*, U.S. COURTS, 2 (Oct. 2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf>. The second stated reason was a concern that the government would be required to disclose information that is not “material,” which is the central point of conflict between trial courts and the government. *Id.* See *infra* Part I.A for an in-depth discussion of materiality in the criminal discovery context.

⁶³ Transcript of Oral Argument in Motion Hearing at 16, *United States v. Zhenli Ye Gon* (D.D.C. Jun. 2, 2009) (No. 07-181).

Criminal Procedure 16 creates a limited obligation of disclosure.⁶⁴ The Jencks Act requires the government to provide witness statements to the defense, but not until after the witness has testified on direct examination.⁶⁵ *Brady* requires the government to turn over exculpatory evidence to the defense,⁶⁶ and *Giglio* obliges the government to turn over evidence that could be used to impeach a prosecution witness.⁶⁷ Under both *Brady* and *Giglio*, the information must be disclosed only if it is “material.”⁶⁸ The U.S. Attorney’s Manual (USAM) establishes guidelines for federal prosecutors that rely on the materiality standard⁶⁹ and encourage prosecutors to err on the side of disclosure.⁷⁰ Finally, the ethical rules governing lawyers prescribe specific rules for prosecutors in regards to their disclosure obligations, as well as an overarching duty to do justice.⁷¹

A. *The Government’s Constitutional Duties to Disclose*

To those who litigate in the civil arena, criminal discovery—or the lack thereof⁷²—is surprising and confusing.⁷³ *Brady* protects a defendant’s due process rights⁷⁴ and seeks to ensure that the defendant receives a fair trial.⁷⁵ The key elements of a *Brady* claim are: (1) the

⁶⁴ See FED. R. CRIM. PROC. 16; see also *infra* notes 111 to 114 for a more detailed explanation of this rule.

⁶⁵ See 18 U.S.C. § 3500(a) (2006).

⁶⁶ See *Brady v. Maryland*, 373 U.S. 83, 90–91 (1963).

⁶⁷ *Giglio v. United States*, 405 U.S. 150, 153–55 (1972).

⁶⁸ *United States v. Bagley*, 473 U.S. 667, 682 (1985).

⁶⁹ U.S. ATTORNEYS’ MANUAL, *supra* note 30, § 9-5.001.

⁷⁰ *Id.* § 9-5.001(B)(1) (“Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence.”).

⁷¹ MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983); MONT. RULES OF PROF’L CONDUCT R. 3.8(d) (2005).

⁷² “There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; . . . ‘the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded.’” *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)).

⁷³ In the words of former National Association of Criminal Defense Lawyers President Larry Pozner: “If you are fighting about money in America, you can have full discovery of everything your opponent intends to do to you years in advance of trial. But if you’re fighting for your life, for your liberty, in America, you can get sandbagged every day.” Symposium, *Panel Discussion: Criminal Discovery in Practice*, 15 GA. ST. L. REV. 781, 783 (1999).

⁷⁴ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“[T]he 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.”).

⁷⁵ *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial”); *Brady*, 373 U.S. at 87 (“Society wins not only when the guilty are convicted but when criminal trials are fair”).

evidence was favorable to the defendant, (2) the government withheld the evidence willfully or inadvertently, and (3) the evidence was material to either guilt or punishment.⁷⁶ The last prong is often referred to in shorthand as “prejudice” to the defendant.⁷⁷ *Brady* applies whether or not the defendant makes a specific request for the information.⁷⁸

Although *Brady* involved evidence withheld by the prosecutor, its conceptual roots are found in an earlier rule holding that a prosecutor deprives a defendant of his right to a fair trial when she knowingly uses perjured testimony.⁷⁹ This rule in turn was extended to cases in which the prosecutor does not suborn perjury, but allows false testimony to stand uncorrected—even when the testimony goes merely to the credibility of the testifying witness.⁸⁰ *Brady* has been interpreted as applying to evidence that would only have been used to impeach a prosecution witness.⁸¹

Importantly, the government may—and often does—withhold favorable evidence without committing a “real” violation of *Brady*.⁸² The government’s failure to disclose evidence rises to a constitutional violation only if the withheld evidence was material, which is defined as “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”⁸³ As explained by the Court, “The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense.”⁸⁴ At the same time, “a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.”⁸⁵

⁷⁶ *Brady*, 373 U.S. at 87.

⁷⁷ See *Strickler v. Greene*, 527 U.S. 263, 282 (1999).

⁷⁸ *United States v. Agurs*, 427 U.S. 97, 107 (1976).

⁷⁹ See *Brady*, 373 U.S. at 86 (citing *Mooney v. Holohan*, 294 U.S. 103, 111–12 (1935) (holding that a prosecutor can deprive a defendant of due process by knowingly using perjured testimony and withholding favorable evidence)).

⁸⁰ See *Brady*, 373 U.S. at 87 (quoting *Napue v. Illinois*, 360 U.S. 264, 268–70 & n.3 (1959) (reversing conviction where witness falsely testified he was not receiving any benefit from prosecutor for his testimony, and prosecutor did not correct him)); see also *Alcorta v. Texas*, 355 U.S. 28, 31–32 (1957) (per curiam) (testimony “taken as a whole” was seriously prejudicial to a capital murder defendant, and withheld testimony might have resulted in a finding of a lesser offense).

⁸¹ *Giglio v. United States*, 405 U.S. 150, 154 (1972).

⁸² *Kyles v. Whitley*, 514 U.S. 419, 436–437 (1995) (“[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.” (citing *United States v. Bagley*, 473 U.S. 667, 675 & n.7 (1985))).

⁸³ *Bagley*, 473 U.S. at 682 (adopting the standard for materiality from *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

⁸⁴ *United States v. Agurs*, 427 U.S. 97, 109–10 (1976).

⁸⁵ *Kyles*, 514 U.S. at 434; *Bagley*, 473 U.S. at 682 (“A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”).

Similarly, allowing false testimony to stand uncorrected—sometimes known as a *Napue* violation⁸⁶—does not constitute a “real” due process violation unless the evidence was material.⁸⁷ The Ninth Circuit standard is “whether there is ‘any reasonable likelihood that the false testimony could have affected the judgment of the jury.’”⁸⁸ As the Supreme Court has explained, “The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”⁸⁹ Thus, although the materiality rule is worded slightly differently, the ultimate inquiry for both *Brady* and *Napue* violations is whether the verdict is “worthy of confidence.”⁹⁰

Because materiality is measured by confidence in the verdict, it is difficult to define the scope of the government’s disclosure obligation before or during trial.⁹¹ The prosecution must “make disclosure when the point of ‘reasonable probability’ is reached.”⁹² As Justice Thurgood Marshall observed in his dissent to *Bagley*, the Court “defines the right not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial.”⁹³ One

⁸⁶ *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959) (holding that the state may not allow false testimony to stand uncorrected, even if the falsity was relevant only to the witness’s credibility).

⁸⁷ See *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Jackson v. Brown*, 513 F.3d 1057, 1075–76 (9th Cir. 2008); *Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005) (en banc).

⁸⁸ *Hayes*, 399 F.3d at 984 (quoting *Belmontes v. Woodford*, 350 F.3d 861, 881–82 (9th Cir. 2003)).

⁸⁹ *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *Hayes*, 399 F.3d at 984).

⁹⁰ *Id.*

⁹¹ The Court has acknowledged this difficulty:

[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.

United States v. Agurs, 427 U.S. 97, 108 (1976). At least one commentator disagrees with this portrayal of the “prudent prosecutor”: “The prudent prosecutor will do no such thing. The Court’s use of the word “prudent” here connotes the prosecutor who wants to seal a conviction and would not engage in behavior that risks the security of that conviction. However, the Court’s holdings have set up exactly the opposite incentive.” Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1144 (2005).

⁹² *Kyles*, 514 U.S. at 437.

⁹³ *Bagley*, 473 U.S. at 699 (Marshall, J., dissenting). Professor Hoeffel contends that this outcome-oriented materiality standard creates inherent incentives for prosecutors to withhold evidence: “The *Brady* standard at trial means that the prosecutor can withhold favorable evidence on the theory it would not have affected the outcome of the trial, knowing this is in fact what appellate courts usually find in similar circumstances. The ethical rules are not enforced.” Hoeffel, *supra* note 91, at 1151.

scholar has explained why “a literal application of *Brady* requires little disclosure from prosecutors”:

If a conscientious prosecutor faces exculpatory evidence that would shake her faith in any conviction she might obtain without the evidence, then she will presumably dismiss charges against the defendant. . . . On the other hand, if the exculpatory evidence does not undermine her belief in the defendant’s guilt, she is likely to conclude that the evidence will not affect the jury’s determination either. Accordingly, she would treat the evidence as immaterial and therefore not within her *Brady* obligation.⁹⁴

In other words, it is not only possible but predictable that prosecutors will withhold evidence from defendants under the Court’s materiality standard. As the D.C. District Court has stated, articulating the scope of the government’s pretrial disclosure obligation through a materiality lens “permits prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the trial.”⁹⁵ One commentator describes the materiality standard as a prosecutorial privilege “to withhold exculpatory information until the defendant manage[s] to both discover and prove, post trial, that the prosecutor’s conduct, standing alone, had probably cost him an acquittal.”⁹⁶

Brady is premised on a core principle underlying our system of government: “[O]ur system of the administration of justice suffers when any accused is treated unfairly.”⁹⁷ But the *Bagley* materiality standard chafes against this lofty principle with its focus on the defendant’s guilt or innocence rather than on his ability to prepare for trial.⁹⁸ Not surprisingly, the juxtaposition of *Brady* and *Bagley* leads not only to conflicting interpretations by district courts, but to a constant tension among prosecutors, defense lawyers, and judges over the actual scope of the government’s disclosure obligations.⁹⁹

⁹⁴ Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 488 (2009) (citations omitted).

⁹⁵ *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005).

⁹⁶ Cerruti, *Through the Looking-Glass*, *supra* note 29, at 235–36.

⁹⁷ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

⁹⁸ *United States v. Agurs*, 427 U.S. 97, 112 n.20 (1976) (“It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant’s ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. Such a standard would be unacceptable for determining the materiality of what has been generally recognized as ‘*Brady* material.’” (citation omitted)). Information that is not disclosable under *Brady* may still be discoverable, however. FED. R. CRIM. P. 16(a)(1)(E)(i) provides that the defendant be permitted access to items within the government’s “possession, custody, or control” that are “material to preparing the defense,” as long as the defendant requests such items. *See United States v. W.R. Grace*, 401 F. Supp. 2d 1069, 1074 (D. Mont. 2005).

⁹⁹ *See, e.g., United States v. Acosta*, 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005) (“*Brady*’s concern whether a constitutional violation occurred after trial is a different question

Trial courts consistently order the government to disclose all exculpatory and impeachment evidence, but prosecutors routinely withhold such information, either intentionally or inadvertently. If the failure to disclose is not discovered prior to the verdict, and the defendant is convicted, the appellate court will look at all of the evidence introduced at trial to determine whether the withheld evidence would have tipped the scale in the defendant's favor. However, the mere fact that such information existed and was not disclosed is insufficient to establish a *Brady* violation. A failure to disclose is deemed material only if the exculpatory information might have created reasonable doubt, or if impeaching information was about a sole or key witness—in other words, cases where the reviewing court believes that the jury would have reached a different conclusion had the prosecution presented the evidence it withheld.¹⁰⁰

In cases of delayed disclosure, where the government should have disclosed the information earlier but did eventually disclose it, the delay is not material in the *Bagley* sense, i.e., the defendant is not prejudiced, if he can use the information at trial. The ability to use the information means the ability to conduct cross-examination of the relevant witnesses and not the ability to defend the case differently.¹⁰¹ Thus, if the defendant has the opportunity to cross-examine the witness after the untimely disclosure is made, any prejudice is cured.¹⁰² Dismissal of the indictment is a proper remedy for delayed disclosures only if “less drastic alternatives are not available.”¹⁰³ Even if the defendant is convicted, a post-conviction finding that exculpatory or impeachment evidence was improperly withheld does not automatically require reversal.¹⁰⁴

A few district courts have held that the proper standard for discoverability before and during trial is whether the evidence is favorable to the

than whether *Brady* is the full extent of the prosecutor's duty to disclose pretrial.”); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) (“[S]uppression of exculpatory evidence is improper even if it does not satisfy the materiality standard of *Brady* and result in a due process violation. Though an error may be harmless, it is still error.”); *Panel Discussion: Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781 (1999).

¹⁰⁰ See, e.g., *Agurs*, 427 U.S. at 97; *Brady*, 373 U.S. at 88–89.

¹⁰¹ See, e.g., *United States v. Fallon*, 348 F.3d 248, 252 (7th Cir. 2003); *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000); *United States v. Bencs*, 28 F.3d 555, 560–61 (6th Cir. 1994); *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988); *United States v. Browne*, 829 F.2d 760, 765 (9th Cir. 1987); *United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986), cert. denied, 480 U.S. 922 (1987); *United States v. Davenport*, 753 F.2d 1460, 1462 (9th Cir. 1985) (no due process violation where defendant had information at beginning of trial and made use of it in cross-examination).

¹⁰² See *Bagley*, 473 U.S. at 682; *United States v. Jacobs*, 855 F.2d 652, 655–56 (9th Cir. 1988).

¹⁰³ *United States v. Kearns*, 5 F.3d 1251, 1254 (9th Cir. 1993).

¹⁰⁴ *Bagley*, 473 U.S. at 678 (“[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.”); *Kearns*, 5 F.3d at 1254.

accused, not whether it is favorable *and* material.¹⁰⁵ They have done so by distinguishing a post-conviction standard that determines whether a defendant should receive a new trial from a pretrial and trial standard that seeks to ensure the fairness of the process as it is occurring.¹⁰⁶ If all courts agreed that this interpretation of the *Brady* obligation were correct, there would be no need for criminal discovery reform; however, several courts and the Department of Justice disagree.¹⁰⁷

Thus, the constitutional duty imposed upon the government by *Brady*, *Giglio*, and *Bagley* is borne of a commitment to the defendant's right to a fair trial but is circumscribed by a standard that measures violations of that duty post-verdict, and provides no consistently enforceable rules to apply before and during trial.

B. *Statutory Duties: Jencks Act & Federal Rule 16*

In addition to its constitutional obligations, the government has disclosure obligations under two federal statutes. The Jencks Act, enacted in 1957, requires the prosecution to provide statements of its witnesses to the defense.¹⁰⁸ Under the Act, the government must give the defense copies of a government witness's prior recorded statements that "relate to the subject matter as to which the witness testified" *after* the witness testifies on direct examination and "on motion of the defendant."¹⁰⁹

Federal Rule of Criminal Procedure 16 (Rule 16) has the potential to be more useful than Jencks to criminal defendants because it requires the prosecution to disclose, among other things, any written or oral statements of the defendant including statements of an organizational defendant's agents.¹¹⁰ Rule 16 does not impose a blanket rule on the prosecution to disclose exculpatory or impeaching evidence, although it does require the disclosure of documents or tangible items "material to preparing the defense" if the defendant asks for them.¹¹¹ If a party vio-

¹⁰⁵ *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial."); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("[T]he definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context . . .").

¹⁰⁶ *Safavian*, 233 F.R.D. at 16; *Sudikoff*, 36 F. Supp. 2d 1196, 1199 ("[S]uppression of exculpatory evidence is improper even if it does not satisfy the materiality standard of *Brady* and result in a due process violation.").

¹⁰⁷ *See, e.g.*, *United States v. Boyd*, 908 A.2d 39, 60 n. 32 (D.C. App. 2006) (disagreeing with *Safavian*, 233 F.R.D. at 16); U.S. ATTORNEYS' MANUAL, *supra* note 30, § 9-5.001(B) (The Department of Justice includes materiality as an element of exculpatory or impeachment information that is subject to disclosure).

¹⁰⁸ 18 U.S.C. § 3500 (2010).

¹⁰⁹ 18 U.S.C. § 3500 (a)–(b) (2010).

¹¹⁰ FED. R. CRIM. P. 16(a)(1).

¹¹¹ FED. R. CRIM. P. 16(a)(1)(E)(i). This requires a threshold showing by the defense that the prosecution is in possession of specific information helpful to the defense; conclusory

lates Rule 16, the court may order disclosure, grant a continuance, prohibit the introduction of the undisclosed evidence, or “enter any order that is just under the circumstances.”¹¹² Rule 16 empowers the court to control discovery and to sanction any failures of compliance.¹¹³

Efforts to codify *Brady* have focused on amending Rule 16.¹¹⁴ U.S. District Judge Emmet Sullivan, who presided over the *Stevens* trial, wrote to the Advisory Committee on Criminal Rules in April 2009 urging it to propose once again an amendment to Rule 16 requiring the disclosure of all exculpatory information to the defense.¹¹⁵ The Advisory Committee made such a recommendation to the Standing Committee on Rules and Procedure in April 2007;¹¹⁶ the Standing Committee deferred consideration of the proposal indefinitely in June 2007.¹¹⁷ In response to

allegations are not sufficient. *United States v. W.R. Grace*, 401 F. Supp. 2d 1069, 1074 (D. Mont. 2005) (citing *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1995)); *United States v. McVeigh*, 954 F. Supp. 1441, 1450 (D. Colo. 1997)). Judge Molloy suggested in one of his early discovery orders that the materiality requirement of Rule 16(a)(1)(E)(i) necessarily includes *Brady* material. *Grace*, 401 F. Supp. 2d 1069, 1076 n.5 (citing the Advisory Committee’s Note to 1974 Amendments, Rule 16, Federal Rules of Criminal Procedure). While documents and tangible objects that are “material to preparing the defense” are probably also “favorable to the accused,” this interpretation again overlooks the *Bagley* materiality standard. *United States v. Bagley*, 473 U.S. 667, 674 (1985).

¹¹² FED. R. CRIM. P. 16 (d)(2).

¹¹³ “At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief.” FED. R. CRIM. P. 16(d)(1). The court is empowered to sanction a party’s failure to comply with its discovery orders by ordering discovery, granting a continuance, refusing to admit certain evidence, or “enter any other order that is just under the circumstances.” FED. R. CRIM. P. 16(d)(2).

¹¹⁴ Such an amendment has been discussed by the Advisory Committee on Criminal Rules for several years. Advisory Comm. On Criminal Rules, *Docket of Suggested Changes to the Federal Rules of Criminal Procedure Considered by the Advisory Committee Since 1991*, U.S. COURTS, 10 (2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010-CRDocket.pdf>. Judge Molloy became a member of the Advisory Committee on Criminal Rules in 2007; his term will expire in 2010. Advisory Committee on Criminal Rules Members, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Committee_Membership_Lists/ST_Roster_2009.pdf (last visited Sept. 5, 2010).

¹¹⁵ Sullivan Letter to Tallman, *supra* note 10, at 1.

¹¹⁶ Advisory Comm. On Criminal Rules, *Minutes*, U.S. COURTS, 5 (Oct. 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR10-2009-min.pdf> [hereinafter *Minutes*]; *History of Committees’ Consideration of Amendments to Rule 16, Table of Contents with Summary of Action*, [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule 16 Table of Contents.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Table%20of%20Contents.pdf) (last visited Sept. 5, 2010) [hereinafter *Committee’s Consideration*]. The 2007 proposal arose out of a report issued by the American College of Trial Lawyers. Amer. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 111 (Winter 2004) (proposing a new section to Rule 16 requiring disclosure within fourteen days of a request of “all information favorable to the defendant” that is known to the prosecutor or any investigating agency, and defining favorability).

¹¹⁷ *Committee’s Consideration*, *supra* note 116, at 1.

Judge Sullivan's request, however, the Advisory Committee reconstituted its Subcommittee on Rule 16.¹¹⁸

The Department of Justice has opposed the proposed amendment from its inception.¹¹⁹ It advocated in 2006 for the addition of Section 9-5.001 to the U.S. Attorneys' Manual.¹²⁰ It contends that a rule amendment would "unnecessarily upset the careful balance of interests in the criminal justice process."¹²¹ Specifically, the Department of Justice opposes any amendment that "expand[s] disclosure requirements beyond the dictates of *Brady*," but it "would not object to amending Rule 16 simply to codify the disclosure requirements of *Brady*."¹²² At the October 2009 Advisory Committee meeting, Assistant Attorney General Lanny Breuer suggested that if the committee wants to amend Rule 16 "beyond the dictates of *Brady*," congressional action is necessary.¹²³

Judge Tallman, chair of the Advisory Committee, noted at the October 2009 meeting the potential conflict between the Jencks Act and a rule requiring disclosures before trial, as well as the unresolved legal issue of whether the "supersession clause" would give precedence to the Rules

¹¹⁸ *Minutes, supra* note 116, at 5. Judge Tallman appointed himself, Judge Morris C. England, Jr., Prof. Andrew D. Leipold, attorney Rachel Brill, and Assistant Attorney General Lanny Breuer to the subcommittee. *Id.*

¹¹⁹ Memorandum from U.S. Dept. of Justice (Criminal Division) to Hon. Susan C. Buckley, Chair, Judicial Conference Subcomm. on Rules 11 and 16 (Apr. 26, 2004); FED. JUDICIAL CTR., TREATMENT OF *Brady v. Maryland* Material in the U.S. District Courts' Rules, Orders & Policies: Report to the Advisory Comm. on Crim. Rules to the Judicial Conference of the United States (Oct. 2004), available at <http://ftp.resource.org/courts.gov/fjc/bradymat.pdf>; FED. JUDICIAL CTR., BRADY V. MARYLAND Material in the U.S. District Courts' Rules, Orders & Policies: Report to the Advisory Comm. on Crim. Rules to the Judicial Conference of the United States 6-7 (May 2007) [hereinafter FED. JUDICIAL CTR., *Brady Material*], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR05-2007.pdf>.

¹²⁰ *Minutes, supra* note 116, at 5 ("[I]n 2007, the Committee had approved an amendment to Rule 16, over the objection of the Department of Justice."); Sullivan Letter to Tallman, *supra* note 10, at 1.

¹²¹ *Minutes, supra* note 116, at 5.

¹²² *Minutes, supra* note 116, at 6. It is not clear what the Department of Justice means by this. The black-letter rule from *Brady* is 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." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Although the term "material" was not fully interpreted until *Bagley*, the Department likely means that it supports codification of this requirement but opposes an amendment that requires disclosure of all information favorable to the defense. *See, e.g., United States v. Acosta*, 357 F. Supp. 2d 1258, 1232 (D. Nev. 2005) ("[T]he government urges *Brady's* materiality standard is the limit of the duty to disclose.").

¹²³ *Minutes, supra* note 116, at 6 (Oct. 2009). This reflects the Department's contention that any interpretation of *Brady* that imposes a *pretrial* disclosure obligation on the government impermissibly conflicts with the Jencks Act. *Id.*; *see Acosta*, 357 F. Supp. 2d at 1234-36 (recognizing that in Ninth Circuit, the Jencks Act trumps *Brady*, citing *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979), explaining why those conflicts are rare, and proposing a process to deal with conflicts when they occur).

Enabling Act¹²⁴ over the statute.¹²⁵ He and Judge Lee Rosenthal, chair of the Standing Committee on Practice and Procedure, “cautioned that as a general matter, the rules committees prefer not to rely on the supersession clause, and that committees should strive to avoid conflicts with statutes wherever possible.”¹²⁶

C. *The U.S. Attorneys’ Manual*

The U.S. Attorneys’ Manual is an internal guidance manual containing “general policies and some procedures.”¹²⁷ It does not create enforceable rights and “does not create a general right of discovery in criminal cases.”¹²⁸ In response to the Advisory Committee’s decision in 2006 to recommend amending Rule 16 to codify *Brady*, the Department of Justice amended the U.S. Attorneys’ Manual to include a section providing direction to prosecutors regarding their disclosure obligations.¹²⁹ In January 2010, outgoing Deputy Attorney General David Ogden issued a memo providing additional guidance to Department of Justice prosecutors regarding their discovery obligations.¹³⁰ Thus, the department policies regarding the disclosure of exculpatory and impeachment information are found in Section 9-5.001 and CRM 165, “subject to legal precedent, court orders, and local rules.”¹³¹

In a separate memo announcing the issuance of the January 2010 guidance memo, Mr. Ogden quoted language from *Berger v. United*

¹²⁴ 28 U.S.C. § 2072(b) (2010).

¹²⁵ *Minutes*, *supra* note 116, at 7.

¹²⁶ *Id.*

¹²⁷ U.S. ATTORNEYS’ MANUAL, *supra* note 30, § 1-1.100.

¹²⁸ U.S. ATTORNEYS’ MANUAL, *supra* note 30, § 9-5.001(E); DEPT. OF JUSTICE, CRIM. RESOURCE MANUAL § 165 (Jan. 4, 2010) available at http://www.justice.gov/usao/eousa/foai_reading_room/usam/title9/crm00165.htm (stating the guidance “is not intended to have the force of law or to create or confer any rights, privileges, or benefits”); accord *United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000). Section 9-5.001, “Policy Regarding Disclosure of Exculpatory and Impeachment Information,” was added in October 2006. See U.S. ATTORNEYS’ MANUAL, *supra* note 30, § 9-5.100 (“On October 19, 2006, the Attorney General amended this policy to conform to the Department’s new policy regarding disclosure of exculpatory and impeachment information”); Memorandum from David W. Ogden, Deputy Atty. Gen. to Department Prosecutors, (Jan. 4, 2010), available at <http://www.justice.gov/dag/dag-memo.html> [hereinafter Ogden Memo].

¹²⁹ U.S. ATTORNEYS’ MANUAL, *supra* note 30, § 9-5.001(E).

¹³⁰ Ogden, *Guidance for Prosecutors Regarding Criminal Discovery*, *supra* note 128; Ogden Memo, *supra* note 128, at 1. The Department of Justice convened a working group in response to the extensive discovery misconduct that occurred in *Stevens*. Joe Palazzolo, *Attorney General Promises Judges a New Day at DOJ*, NAT’L L.J. (May 5, 2009), available at <http://www.law.com/jsp/article.jsp?id=1202430445215>.

¹³¹ Ogden Memo, *supra* note 128, at 2–3 (“With the advice of the Working Group, I have approached any further revisions to Department policy with the understanding that local practices and judicial expectations vary among districts, and that a one-size-fits-all approach might result in significant changes in some districts and no changes in others.”).

States,¹³² which forms the basis for prosecutors' ethical responsibilities.¹³³ Emphasizing that prosecutors have an obligation to "seek justice," Mr. Ogden explained all U.S. Attorney's offices have been directed to develop discovery policies that consider "controlling precedent, existing local practices, and judicial expectations."¹³⁴ Mr. Ogden named a national coordinator for criminal discovery programs,¹³⁵ and noted that each United States Attorneys' Office (USAO) has also named a "discovery coordinator," who will conduct trainings and act as "on-location advisors with respect to discovery obligations."¹³⁶ Mr. Ogden promised continuing action with respect to creating structural support for prosecutors to more easily meet their discovery obligations.¹³⁷ Specifically, he stated that the department will create an "online directory of resources pertaining to discovery issues," a "Handbook on Discovery and Case Management," and "a pilot case management project to fully explore the available case management software" to ensure that information from law enforcement files is more readily available to prosecutors.¹³⁸ He also stated that the Department will implement discovery training programs for paralegals and law enforcement agents and "[r]evitalize the Computer Forensics Working Group" to better determine how to store and catalogue information.¹³⁹

The Department is relying on these actions to convince the Advisory Committee that Rule 16 does not have to be amended.¹⁴⁰ In his October 2009 presentation to the Advisory Committee on Criminal Rules, Assistant Attorney General Lanny Breuer differentiated prosecutorial misconduct from prosecutorial error by stating that the former, resulting from knowing and intentional conduct, "can only be rectified by robust enforcement and sanctions" and will not be cured by a broader duty to disclose.¹⁴¹ He contrasted that with prosecutorial error, which he contended is susceptible to improvement through "training, guidance, strong leadership, and more uniformity."¹⁴²

¹³² 295 U.S. 78, 88 (1935).

¹³³ See Ogden Memo, *supra* note 128, at 2.

¹³⁴ *Id.* at 2–3.

¹³⁵ Andrew Ramonas, *DOJ Names New Criminal Discovery Coordinator*, MAINJUSTICE (Jan. 15, 2010, 3:23 PM), <http://www.mainjustice.com/2010/01/15/doj-names-new-criminal-discovery-coordinator/>.

¹³⁶ Ogden Memo, *supra* note 128, at 3.

¹³⁷ See *id.* at 3–4.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See *Minutes*, *supra* note 114, at 6 ("[T]he Department remained opposed to amending Rule 16 to expand disclosure requirements beyond the dictates of *Brady*.").

¹⁴¹ *Id.* at 5.

¹⁴² *Id.* at 6.

One member of the Advisory Committee stated at the October 2009 meeting that it was important that the Department be held “accountable for assessing and reporting the effects of the 2007 changes to the Manual, since the changes had essentially functioned as an alternative to amending the rule.”¹⁴³ Although no formal assessment has been done, the Department has made noteworthy contentions to at least one court.¹⁴⁴ In July 2009, the government submitted a brief to Judge Emmet Sullivan in response to his request for briefing on whether the government’s delay in disclosing to defendant Zhenli Ye Gon that a key witness against him had recanted was a *Brady* violation.¹⁴⁵ Paul O’Brien, the chief of the Narcotic and Dangerous Drug Section,¹⁴⁶ stated in his brief that *Brady* violations cannot occur if the government disclosed the exculpatory information in enough time for the defendant to make effective use of it at trial.¹⁴⁷ More importantly, Judge Sullivan had inquired of the government how its actions comported with the USAM, which creates a disclosure obligation “broader than the Constitution itself requires.”¹⁴⁸ In his brief, Mr. O’Brien responded by quoting Section 9-5.001(E), which states that the manual “does not create a general right of discovery in criminal cases” nor “provide defendant with any additional rights or remedies.”¹⁴⁹ Mr. O’Brien stated: “Instead, the manual is strictly a matter of Department of Justice policy, and any possible failure to comply with it is therefore a matter of internal concern.”¹⁵⁰ In other words, for those who believe that current problems with criminal discovery may be traceable to the unenforceability of a pretrial disclosure obligation and the substantial discretion given prosecutors to determine materiality,¹⁵¹ the

¹⁴³ *Id.* at 8.

¹⁴⁴ Second Supplement to the Gov’t’s Motion to Dismiss, at 12–13, *United States v. Zhenli Ye Gon*, (D.D.C. 2009) (No. 07-181).

¹⁴⁵ *Id.* at 1–3.

¹⁴⁶ Paul O’Brien led the department’s investigation into the withholding of evidence in *Stevens*. Joe Palazzolo, *Is Emmet Sullivan Brady-Crazy?*, MAINJUSTICE (June 25, 2009, 6:16 PM), <http://www.mainjustice.com/2009/06/25/is-judge-sullivan-brady-crazy/>. Mr. O’Brien appeared on behalf of the Department of Justice before Judge Sullivan in April 2009 when the *Stevens* indictment was dismissed upon the government’s motion. Mary Jacoby, *O’Brien: We at DOJ “Deeply Regret” Mistakes in Ted Stevens Case*, MAINJUSTICE (Apr. 7, 2009), <http://www.mainjustice.com/2009/04/07/obrien-we-at-doj-deeply-regret-mistakes-in-ted-stevens-case/>.

¹⁴⁷ Second Supplement to the Gov’t’s Motion to Dismiss, *supra* note 144, at 3.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; Joe Palazzolo, *Hypothetical Brady Ain’t Real Brady, DOJ Says*, MAINJUSTICE (July 14, 2009), <http://www.mainjustice.com/2009/07/14/hypothetical-brady-aint-real-brady-justice-department-says/>.

¹⁵¹ At least two members of the Advisory Committee expressed concern about relying on prosecutors rather than judges to determine materiality of exculpatory or impeachment information. *Minutes, supra* note 116, at 7.

U.S. Attorneys' Manual is unlikely to provide an effective alternative to the status quo.

D. Local Rules

The District of Massachusetts pioneered the use of local rules to create an enforceable disclosure obligation on the government.¹⁵² The rule defines exculpatory information¹⁵³ and imposes deadlines by which such information must be produced.¹⁵⁴ According to the Federal Judicial Center (FJC), in 2007, thirty-seven of the ninety-four federal judicial districts reported having a local rule, standing order, or procedure governing the disclosure of *Brady* material.¹⁵⁵ Whether those districts experience fewer problems with criminal discovery is an open question; the Committee has asked the Federal Judicial Center informally study this and report its findings to the Committee.¹⁵⁶

The 2007 FJC report describes the variation among districts in their local rules, standing orders, and procedures.¹⁵⁷ The districts vary in their description of the information that must be disclosed, whether disclosure is automatic, the timeframe within which information must be disclosed, and whether the disclosure obligation is continuing.¹⁵⁸ No district specifies sanctions for prosecutors' violations of the rules, leaving it instead to the discretion of the court.¹⁵⁹

¹⁵² LR, D. Mass. 116.2, available at <http://www.mad.uscourts.gov/general/pdf/combined01.pdf>; *United States v. Jones*, 620 F. Supp. 2d 163, 169–70 (D. Mass. 2009) (including Chief Judge Mark Wolf's explanation of the development of the local rules regarding criminal discovery).

¹⁵³ LR, D. Mass. 116.2(A):

Exculpatory information includes, but may not be limited to all information that is material and favorable to the accused because it tends to: (1) Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information; (2) Cast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731; (3) Cast doubt on the credibility or accuracy of any evidence that the government anticipates offering in its case-in-chief; (4) Diminish the degree of the defendant's culpability or the defendant's Offense Level under the United States Sentencing Guidelines.

¹⁵⁴ See *id.* R. 116.2(B).

¹⁵⁵ FED. JUDICIAL CTR., *Brady Material*, *supra* note 119, at 7.

¹⁵⁶ *Minutes*, *supra* note 114, at 7–8. The Federal Judicial Center reported to the Advisory Committee in April 2010 that it was preparing a survey of federal judicial districts to assess the need for an amendment to Rule 16. Advisory Comm. On Criminal Rules, *Minutes*, U.S. COURTS, 7 (Apr. 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR2010-04-min.pdf>.

¹⁵⁷ See FED. JUDICIAL CTR., *Brady Material*, *supra* note 119.

¹⁵⁸ *Id.* at 8. For example, some districts require disclosure of "favorable information," others refer to "*Brady* information," and others use the term "exculpatory information." *Id.*

¹⁵⁹ *Id.*

E. *The Ethical Context*

The Model Rules of Professional Conduct specify the “special responsibilities” of a prosecutor,¹⁶⁰ which were gleaned from the oft-cited 1935 Supreme Court decision in *Berger v. United States*.¹⁶¹ One of those special responsibilities is “to seek justice, not merely to convict.”¹⁶² As one scholar has observed, “If the adversarial trial remains a boxing match, at least the prosecutor must fight by the Marquis of Queensbury rules and avoid striking below the belt.”¹⁶³ As the representative of the people armed with the power of the sovereign, the prosecutor is held to a higher standard than other lawyers:

The United States Attorney . . . may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁶⁴

Specifically, the Model Rules of Professional Conduct require prosecutors 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.”¹⁶⁵ In other words, the ethical rules not only exhort prosecutors to observe their higher calling, they mandate disclosures that are favorable even if they are not material.

The trial court is also governed by ethical obligations. The ABA Standards for Criminal Justice state:

¹⁶⁰ MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983). U.S. Attorneys practicing in federal court are governed by the district's local rules as well as the state's ethical rules for attorneys. 28 U.S.C. § 530B(a) (2006); 28 C.F.R. § 77.3 (2009). Attorneys practicing in the Montana federal courts are governed by the American Bar Association's Model Rules of Professional Conduct as well as the Montana Rules of Professional Conduct. D. Mont. L.R. 83.13.

¹⁶¹ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“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.”).

¹⁶² CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2(c), at 4 (3d ed. 1993), available at <http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf>.

¹⁶³ Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 131 (Carol Steiker ed., 2006), available at <http://www.thejusticeproject.org/wp-content/uploads/bibas-brady.pdf>.

¹⁶⁴ *Berger*, 295 U.S. at 88 (1935).

¹⁶⁵ MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1983); MONT. R. PROF'L CONDUCT 3.8(d) (2004).

The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.¹⁶⁶

One of the important roles that trial judges play in the criminal justice system is protector of the process and, consequently, protector of defendants. This is illustrated by the ABA Standards for trial judges which state that “[t]he trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice.”¹⁶⁷ As noted by Judge Learned Hand:

A judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial, and he must intervene *sua sponte* to that end, when necessary. It is not always enough that the other side does not protest; often the protest will only serve to emphasize the evil. Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge.¹⁶⁸

This principle is captured in comments made in late 2009 by white-collar criminal defense attorney Brendan Sullivan¹⁶⁹ after U.S. District Judge Cormac Carney dismissed with prejudice an indictment against William Ruehle, the former CFO of Broadcom because of government misconduct:

[W]hen I was a young lawyer, I was naive and I thought that fairness was assured in our courtrooms because our founding fathers had devised this magical constitution and this magical bill of rights, and somehow if the government lived by that, that we would always be just fine.

¹⁶⁶ CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.1(a), at 13 (3d ed. 2000).

¹⁶⁷ *Id.*

¹⁶⁸ *Brown v. Walter*, 62 F.2d 798, 799–800 (2d Cir. 1933). It was also Learned Hand who said that criminal defendants do not deserve all of the government’s evidence. See *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950).

¹⁶⁹ Mr. Sullivan has represented many high-profile defendants over the forty-plus years of his practice, including Lt. Col. Oliver North, Henry Cisneros, and most recently, Senator Ted Stevens. *Brendan V. Sullivan, Jr. Biography*, WILLIAMS & CONNOLLY, <http://www.wc.com/attorney-BrendanSullivan.html> (last visited Feb. 21, 2010).

But I was naive. I learned in short order that the only thing that assures fairness in the courtroom are judges with courage to keep their eyes open, watch what is happening, keep an open mind and make fair decisions, fair to both sides.¹⁷⁰

II. *STEVENS, SHAYGAN, AND JONES: HIGH PROFILE FINDINGS OF PROSECUTORIAL MISCONDUCT*

Our system of government embodies the belief that a structured set of rules, applied equally to everyone, is not just the *best* way to create a free society but the *only* way.¹⁷¹ When rules are clear, every party to a proceeding can make informed decisions. However, when rules sound like they are clear but the law supporting those rules is enforceable only in the breach, prosecutorial decision-making becomes a guessing game involving predictions of how the trial will unfold and what information will be revealed.¹⁷² Moreover, the trial court's discovery orders are interpreted in the context of this larger guessing game, as that determines the materiality of exculpatory or impeaching evidence. Thus, a trial court's orders to disclose "favorable information" may be interpreted as "material information," sometimes subverting the trial court's explicit intentions.

District court judges work daily within the constraints of the law; they apply law that has been created by appellate courts, legislatures, and executive agencies. They know their decisions are subject to review by other judges who will be coolly detached from the courtroom, the parties, the lawyers, and the jury. District court judges know that many of their decisions will be determined to be in error by judges who have more time than they do to make a decision. That is the nature of the trial court's world—a world about which few trial judges complain.

Judges who have taken the unusual step of publicly advocating for criminal discovery reform have done so because they are angry and frustrated.¹⁷³ In *Stevens*, for example, Judge Sullivan appointed a special

¹⁷⁰ Transcript of Proceedings at 5203, *United States v. Ruehle*, (C.D. Cal. Dec. 15, 2009) (No. SACR 08-00139-CJC).

¹⁷¹ See generally *Brady v. Maryland*, 373 U.S. 83 (1963) (discussing rules of disclosure, liberty, and the demands of justice).

¹⁷² This is how the gamesmanship of *Brady* disclosures develops. See Gershman, *supra* note 26, at 533, 548–50.

¹⁷³ Judge Emmet Sullivan is the most recent judge to publicly call for an amendment to Rule 16. See *supra* text accompanying notes 2–11. However, Chief Judge Mark Wolf, of the District of Massachusetts, was one of the earliest crusaders for criminal discovery reform. The story of Chief Judge Wolf's experience can be found in several of his opinions. See *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009); *Barone v. United States*, 610 F. Supp. 2d 150 (D. Mass. 2009) (open letter to newly appointed U.S. Attorney General, Eric Holder, explaining Chief Judge Wolf's history and frustration with criminal discovery); *Ferrara v.*

prosecutor to investigate the prosecutors who withheld impeachment information from Senator Stevens.¹⁷⁴ More recently, in *United States v. Gon*,¹⁷⁵ Judge Sullivan dismissed an indictment with prejudice because of the length of time that had passed between the key government witness's recantation and the disclosure of that recantation to the defense.¹⁷⁶ In *Shaygan*, Judge Gold awarded the defendant \$600,000 in attorneys' fees under the Hyde Amendment,¹⁷⁷ referred the prosecutors to the Office of Professional Responsibility, and publicly reprimanded the U.S. Attorney and his senior staff, the assistant U.S. attorney in charge of the narcotics division and her deputies, and the two lead prosecutors.¹⁷⁸

Similarly, the *Grace* court was not angry merely because the government had not disclosed information it should have; it was angry because it perceived an unfairness in the process that it felt obliged to correct.¹⁷⁹ Its remedy was unusual both in terms of the extensive comments made in the jury instruction and in the prohibition on redirect,¹⁸⁰ but unusual remedies are becoming more commonplace as judges grow increasingly frustrated by prosecutors who fail to disclose exculpatory or impeachment information in spite of clear orders to the contrary.

Judge Wolf of Massachusetts has also struggled with an appropriate remedy for a prosecutor's failure to disclose exculpatory information that was discovered in time to prevent prejudice to the defendant.¹⁸¹ Under

United States, 384 F. Supp. 2d 384 (D. Mass. 2005). Chief Judge Wolf was a member of the Advisory Committee on Criminal Rules from 2005 to 2008. *Jones*, 620 F. Supp. 2d at 171 n.6. Chief Judge Wolf was also involved in establishing the Office of Professional Responsibility, the disciplinary arm of the Department of Justice. Palazzolo, *supra* note 130.

¹⁷⁴ See, e.g., *The Ted Stevens Scandal*, WALL ST. J., Apr. 2, 2009, at A18.

¹⁷⁵ No. 07-181 (D.D.C., filed July 7, 2007).

¹⁷⁶ *United States v. Gon*, No. 07-181 (D.D.C. Aug. 28, 2009) (order dismissing indictment).

¹⁷⁷ *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1320–23 (S.D. Fla. 2009). The attorneys' fees were awarded under the Hyde Amendment, which authorizes an "award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." 18 U.S.C.A. § 3006A (West 2010), Historical and Statutory Notes.

¹⁷⁸ See *Shaygan*, 661 F. Supp. 2d at 1324–25.

¹⁷⁹ See *United States v. W.R. Grace*, 455 F. Supp. 2d 1122, 1132 (D. Mont. 2006).

¹⁸⁰ It is not unusual for a court to prohibit recross because recross requires a finding that the redirecting party introduced evidence outside the scope of direct and cross, but redirect is a standard part of the examination process. See generally *United States v. Stoehr*, 196 F.2d 276, 280 (3d Cir. 1952) ("Where new evidence is opened up on redirect examination, the opposing party must be given the right of cross-examination on the new matter, but the privilege of recross-examination lies within the trial court's discretion."); accord *United States v. Perez-Ruiz*, 353 F.3d 1, 11 (1st Cir. 2003); *Hale v. United States*, 435 F.2d 737, 749–50 (5th Cir. 1970). A Westlaw search of ALLFEDS on December 9, 2010 using the search terms (sanction & (prohibit! /s redirect)) failed to turn up any instances where a court had sanctioned a party by prohibiting it from redirect.

¹⁸¹ See *United States v. Jones*, 609 F. Supp. 2d, 113, 115 (D. Mass. 2009) ("Because Cooley's prior inconsistent statements were ultimately disclosed in time for his false testimony

the traditional view of *Brady*, the government has not committed any wrong if the defendant has not been prejudiced.¹⁸² Thus, Judge Wolf's serendipitous discovery of inconsistent witness statements would usually mean that the prosecution might be scolded or reprimanded but no worse—i.e., no harm, no foul. Judge Wolf was not happy with that outcome, however, and took the unusual step of ordering a prosecutor in his district as well as the U.S. Attorney for the Massachusetts district to show cause why they should not be held in contempt for the prosecutor's failure to disclose the information.¹⁸³ In the judge's words: "Customary means of addressing errors and intentional misconduct had proved inadequate to prevent the repetition of violations of constitutional duties, the requirements of the Federal Rules, Local Rules, and court orders concerning discovery."¹⁸⁴

In one of the more creative attempts to stanch what he perceived as continuing misconduct, and in lieu of immediate sanctions, Judge Wolf organized an educational workshop on criminal discovery led by a federal judge and a federal magistrate.¹⁸⁵ He invited the federal public defender and chair of the Criminal Justice Act Board to participate in planning the program, ordered the acting U.S. Attorney in Massachusetts to either participate in planning or name someone in his stead, and ordered the acting U.S. Attorney to inform the court as to whether he would require all criminal prosecutors to attend.¹⁸⁶ He also ordered the offending prosecutor as well as the U.S. Attorney to file briefs after the workshop explaining why they should not be sanctioned.¹⁸⁷

Judge Wolf ultimately decided not to sanction either the individual prosecutor or the U.S. Attorney for the failure to disclose exculpatory information.¹⁸⁸ In his opinion, the judge indicated he was pleased with the individual prosecutor's efforts not to repeat her previous mistakes, and with the U.S. Attorney's office generally for its post-*Stevens* emphasis on training prosecutors.¹⁸⁹ He also made the following observation: "Prosecutors, like judges and all other human beings, are imperfect.

to be discredited, Jones has not been deprived of due process or otherwise prejudiced by the government's misconduct.").

¹⁸² See Janet Hoefel, *Prosecutorial Discretion*, 109 PENN ST. L. REV. 1133, 1151 (2005) ("The Brady standard at trial means that the prosecutor can withhold favorable evidence on the theory it would not have affected the outcome of the trial . . .").

¹⁸³ *Jones*, 609 F. Supp. 2d at 120.

¹⁸⁴ *United States v. Jones*, 686 F. Supp. 2d 147, 148 (D. Mass. 2010) (order supplementing decision).

¹⁸⁵ See *United States v. Jones*, 620 F. Supp. 2d 163, 185 (D. Mass. 2009) (order deferring decision).

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *Jones*, 686 F. Supp. 2d at 148.

¹⁸⁹ See *id.* ("The United States Attorney's Office has made intensive efforts to better prepare its prosecutors to perform their duties to provide discovery.").

Therefore, it is only a true rededication to the ideal described by the Supreme Court, and etched into the entryway to the Attorney General's office, that will protect the rights promised to all people by our constitution."¹⁹⁰

This, then, is the connection between the ethical ideals of *Brady* and *Berger* and the need for a rule governing pretrial disclosures: In the absence of rules that reflect our collective commitment to the ideals of justice, a criminal trial is more likely to resemble a blood sport than a quest for justice.¹⁹¹ This is not the result of any personal failings on the part of prosecutors,¹⁹² but rather the result of the dichotomous duties that federal prosecutors are asked to fulfill.¹⁹³

III. *UNITED STATES V. W.R. GRACE*: FROM INDICTMENT TO ACQUITTAL

In February 2005, W.R. Grace and seven of its executives were indicted for criminally violating the Clean Air Act,¹⁹⁴ conspiring to violate the Clean Air Act, obstructing justice, and conspiring to obstruct justice.¹⁹⁵ The case was massive by several standards: the Missoula federal courtroom added an entire bank of tables for the numerous lawyers representing various defendants, hundreds of pretrial motions were briefed, argued, and decided, the trial spread over eleven weeks, and the number of documents turned over by the government numbered several million¹⁹⁶—even though the government's failure to disclose sufficient documents ultimately contributed to the demise of its case.

¹⁹⁰ See *id.* at 158 (referring to the inscription on the Department of Justice building, "The United States wins its point whenever justice is done in its courts").

¹⁹¹ See William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? a Progress Report*, 68 WASH. U. L.Q. 1, 16 (1990).

¹⁹² See Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 485 (2006) ("For the conscientious prosecutor, as with any conscientious actor, there will be conflicting loyalties."); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 488 (2009) ("[E]ven virtuous prosecutors trying to do justice can err in their good-faith attempts to apply the doctrine on its own terms[.]").

¹⁹³ See *Bagley v. United States*, 473 U.S. 677, 696 (1984) (Marshall, J. dissenting) ("The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a representative of the state, he must place foremost in his hierarchy of interests the determination of truth. . . . Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence.").

¹⁹⁴ 42 U.S.C. § 7413(c)(5)(A) (2000) ("Any person who knowingly releases into the ambient air any hazardous air pollutant listed . . . and who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment of not more than 15 years, or both.").

¹⁹⁵ See *Superseding Indictment*, *supra* note 35.

¹⁹⁶ The government initially produced about three million pages of discovery. Gov't's Consol. Opposition to Defendants' Motions to Dismiss for Prosecutorial Misconduct at 10,

The asbestos in Libby occurs naturally in the vermiculite ore that W.R. Grace and its predecessors mined from the surrounding mountains.¹⁹⁷ The vermiculite was used all over Libby—under roads, under playgrounds and running tracks, and inside attics.¹⁹⁸ It was the pervasive, ongoing presence in Libby of the asbestos-releasing vermiculite that led to serious health and environmental problems there.¹⁹⁹

In an early and significant victory for the defendants, the court ruled that Congress did not intend for “knowing endangerment” under the Clean Air Act to be a continuing offense.²⁰⁰ This meant that the government could rely only on acts taken by the defendants since November 3, 1999²⁰¹ to prove that Grace knowingly endangered others by releasing asbestos. Judge Molloy also ruled before trial that “ambient air” means “outside air,” which meant that the government could not rely on releases into houses or other buildings to prove its case.²⁰²

Thus, as trial began, the government’s Clean Air Act case²⁰³ was limited to acts that occurred after November 1999 and involved outdoor releases. These rulings made it crucial that the government succeed in proving conspiracy to violate the Clean Air Act. Conspiracy is one of the few crimes that is inherently a continuing offense, which was the portal the government needed in order to put into evidence actions Grace took three or four decades ago.²⁰⁴

The government’s case was largely built on internal corporate documents. It was therefore important for the government to make its case and tell a compelling story to the jury through its witnesses. Robert Locke was one of those critical witnesses for the prosecution. The government billed him as the key corporate insider who would explain the

United States v. W.R. Grace, CR-05-07-M-DWM (D. Mont. filed Apr. 25, 2009) available at <http://www.mtb.uscourts.gov/mtd/images/1124.pdf> [hereinafter Gov’t’s Consol. Opposition to Defendants’ Motions].

¹⁹⁷ Superseding Indictment, *supra* note 35, at paras. 1–6.

¹⁹⁸ *Id.* paras. 25–26, 119–120, 175.

¹⁹⁹ *See id.* (describing asbestos-contaminated vermiculite in Libby, and observing rates of asbestosis 40–80 times higher than expected in Libby residents).

²⁰⁰ United States v. W.R. Grace, 429 F. Supp. 2d 1207, 1245 (D. Mont. 2006).

²⁰¹ *Id.* at 1239 n.31 (“Because the Clean Air Act’s knowing endangerment provision does not contain its own statute of limitations, the offense carries the five-year statute of limitations generally applicable to non-capital federal criminal offenses.” (citing 18 U.S.C. § 3282(a))).

²⁰² United States v. W.R. Grace, 455 F. Supp. 2d 1172, 1175 (D. Mont. 2006) (interpreting 42 U.S.C. § 7413’s criminalization of releases “into the ambient air”).

²⁰³ Counts II, III, & IV charged violations of the Clean Air Act; Count I charged conspiracy; Counts V, VI, VII, and VIII charged obstruction of justice. *See* Superseding Indictment, *supra* note 355, at paras. 185–202.

²⁰⁴ Toussie v. United States, 397 U.S. 112, 122 (1970). Even though conspiracy is a continuing offense, the government must prove an overt act taken in furtherance of the conspiracy within the statutory period. *Id.*

inner workings of the W.R. Grace Corporation.²⁰⁵ His job was to not only make the memos come alive but also to testify about the early years of the alleged conspiracy in the 1970s. In the words of principal W.R. Grace attorney David Bernick, Locke was “the voice of the documents.”²⁰⁶

A. Pretrial Wrangling

The court’s ultimate resolution of the government’s failure to disclose information regarding Robert Locke had its roots in the many discovery motions filed during the four years before trial.²⁰⁷ The court wryly observed at one point, “Defendants have established a pattern of repeatedly ‘racing to the court’ whether the government has committed a discovery violation or not.”²⁰⁸ The defense strategy worked, though; by the time the trial began, the court had made a series of rulings that placed substantial pressure on the prosecution to disclose a wide range of information to the defense.²⁰⁹ For example, the court ruled that Rule 16(a)(1)(E)’s requirement that the government disclose items in its “possession, custody, or control” was to be measured by the “knowledge and access test,”²¹⁰ and the court rejected the “prosecution team” approach advocated by the government.²¹¹ This affected the government’s disclosure obligations under both Rule 16(a)(1)(E)²¹² and *Brady*.²¹³ The court

²⁰⁵ As described by one *Grace* case blogger, “Imagine a tripod. Without one leg, the entire structure cannot stand. Locke’s testimony is one of those legs; without that leg, the prosecution’s case on all of the counts against WR Grace falls.” Christopher Orman, *The Questioning of the Adversarial Process*, UM GRACE Case Blog (Apr. 27, 2009, 3:27 PM), <http://www.umt.edu/gracecase/day-by-day-april/april-27-2009/index.html>. However, Assistant U.S. Attorney Kevin Cassidy represented to the court at the evidentiary hearing on the motions to strike Locke’s testimony or dismiss the indictment that the government’s case did not rely solely on Locke’s testimony. Shannon Foley, *Prosecution Defends Itself Against Flurry of Accusations, Interruptions*, UM GRACE Case Blog (Apr. 27, 2009), <http://www.umt.edu/gracecase/day-by-day-april/april-27-2009/index.html> [hereinafter Foley, *Prosecution Defends Itself*].

²⁰⁶ Defendants’ Joint Motion to Dismiss the Indictment Due to the Gov’t’s Repeated and Intentional Misconduct at 34, *United States v. W.R. Grace*, CR-05-07-M-DWM (D. Mont. Apr. 23, 2009) (quoting Transcript of Record at 24–25, *United States v. W.R. Grace*, CR-05-07-M-DWM (D. Mont. Apr. 17, 2009)), available at <http://www.mtb.uscourts.gov/mtd/images/1113.pdf> [hereinafter Defendants’ Motion to Dismiss Due to Gov’t Misconduct].

²⁰⁷ See, e.g., *id.* at 2 (describing one such motion to compel the production of materials).

²⁰⁸ *United States v. W.R. Grace*, 235 F.R.D. 692, 696 n. 5 (D. Mont. 2006).

²⁰⁹ See, e.g., *id.* at 696.

²¹⁰ *U.S. v. W.R. Grace*, 401 F. Supp. 2d 1069, 1074–75 (D. Mont. 2005) (“Information held by federal agencies not directly involved with the investigation is nonetheless discoverable under Rule 16(a)(1)(E) if the prosecutor has knowledge of and access to the information.”).

²¹¹ *Id.* at 1078 (“In my view, the law of the Ninth Circuit prohibits adoption of the flawed ‘prosecution team’ idea.”).

²¹² *Id.* at 1075.

²¹³ *Id.* at 1079 (“Appreciation of the knowledge and access test in this case shows that the United States takes an impermissibly narrow view of its obligations under *Brady*. It is insufficient for *Brady* purposes for the prosecution to produce only that information from other agen-

acknowledged that, under its interpretation, the “constitutional obligations may prove burdensome to the prosecution.”²¹⁴ However, it evinced no sympathy: “[T]he government has levied a broad and complex Indictment. . . . The Constitution does not go too far in defense of due process when it requires that the prosecution’s search for evidence favorable to the accused be as far-reaching as the search for evidence against him.”²¹⁵

As part of this same series of discovery orders, the court held that Rule 16(a)(1)(E) required the government to disclose information underlying its asbestos sampling results.²¹⁶ The court also decided that Rule 16(a)(1)(B)(ii) required the disclosure of an agent’s “rough notes” taken during interviews of any past or present employees of Grace if the government intended to use an employee’s statement or conduct at trial to bind Grace.²¹⁷ Finally, the court ruled that documents related to EPA’s investigation of air quality after the collapse of the World Trade Center towers were discoverable under Rule 16(a)(1)(E) because they might reveal inconsistent statements made by EPA about the dangers of airborne asbestos.²¹⁸

Regarding the prosecution’s *Brady* obligations, the court stated, “*Brady* places an affirmative duty on the prosecutor to seek out information in the government’s possession that is favorable to the defendant.”²¹⁹ Although it stated that information must be material before its suppression violates *Brady*,²²⁰ it did not incorporate that significant limitation into its ultimate pronouncement of the government’s duty: “The prosecution must inform itself as to all information in the government’s possession, and disclose that which is favorable to the accused.”²²¹

Having established the scope of discovery, the court moved on to more substantive motions. In mid-2006, the court dismissed Count I of the original indictment, which alleged conspiracy to violate the Clean Air

cies that has found its way into the physical possession of the prosecutor.”) The court mentioned several federal agencies whose documents would be deemed within the prosecution’s possession, custody or control. *Id.* at 1077 (listing the EPA, NIOSH, MSHA, CPSC, BLM, USGS, and ATSDR).

²¹⁴ *Id.* at 1080.

²¹⁵ *Id.*

²¹⁶ *United States v. W.R. Grace*, 233 F.R.D. 586, 590 (D. Mont. 2005).

²¹⁷ *United States v. W.R. Grace*, 401 F. Supp. 2d 1087, 1092 (D. Mont. 2005).

²¹⁸ *United States v. W.R. Grace*, 401 F. Supp. 2d 1069, 1086 (D. Mont. 2006) (holding that the documents were “within the prosecution’s possession, custody and control for purposes of Rule 16” and that they were material under Rule 16 because “the defense may be aided by documents tending to show that the agency . . . made determinations elsewhere that conflict with critical allegations here”).

²¹⁹ *Id.* at 1075.

²²⁰ *Id.*

²²¹ *Id.* at 1076 (emphasis added). The requirement to disclose all information favorable to the defense is broader than a requirement to disclose all material exculpatory and impeaching information. See *infra* Part I.

Act's "knowing endangerment" provision, on statute-of-limitations grounds.²²² The dismissal was grounded in the indictment's failure to allege any overt acts taken in furtherance of the knowing endangerment object within the limitations period.²²³

Two weeks after Count I was dismissed, the government filed a superseding indictment with minor changes to properly plead the Count I conspiracy.²²⁴ The defendants again moved to dismiss, arguing that the defect had not been cured by the new indictment, and that even if it had been, the previous indictment was dismissed with prejudice.²²⁵ Although the court denied that the superseding indictment was prohibited by the dismissal of the original indictment with prejudice,²²⁶ it held that the substantive defects in the original indictment had not been cured and could not be saved by a six-month statutory grace period, and again dismissed the conspiracy charge on statute of limitations grounds.²²⁷

Toward the end of this opinion, the court's tone toward the government notably changed: "Government counsel characterized the prosecution's case as a quest for justice. Justice is the primary concern of this Court as well."²²⁸ Reflecting the court's emerging view that the government was overreaching and that the court—not the government—was the primary protector of justice, the court said:

While the prosecution views its quest for justice as the pursuit of a particular outcome, this Court is bound to uphold that conception of justice, rooted in our Constitution and laws, that lies in the process. The knowing endangerment object of the Count I conspiracy is time-barred. Section 3288 cannot save it. Some may say this determination is based on a mere technicality but that would miss the point. "In a society devoted to the rule of law, the difference between violating or not violating

²²² *United States v. W.R. Grace*, 434 F. Supp. 2d 879, 888 (D. Mont. 2006). This ruling reflects the ruling discussed earlier, in which the court held that knowing endangerment is not a continuing offense. See *supra* note 183 and accompanying text. Grace closed the Libby mine in 1990, Superseding Indictment, *supra* note 35, at para. 27, which meant the statute of limitations presented obvious problems.

²²³ *Id.*

²²⁴ Superseding Indictment, *supra* note 35.

²²⁵ Defendants' Joint Motion to Dismiss the Clean Air Act Object of Count I of the Superseding Indictment, to Suspend the Arraignment Pending Decision on the Motion, and to Expedite Briefing at 2–4, *United States v. W.R. Grace*, 455 F. Supp. 2d, 1113 (D. Mont. 2006) (CR-05-07-M-DWM), available at <http://www.mtb.uscourts.gov/mtd/images/596.pdf>.

²²⁶ *United States v. W.R. Grace*, 455 F. Supp. 2d 1113, 1119 (D. Mont. 2006).

²²⁷ *Id.* at 1121–22.

²²⁸ *Id.*

a criminal statute cannot be shrugged aside as a minor detail.”²²⁹

The course of the litigation changed significantly after this order was entered. The government filed an interlocutory appeal to the Ninth Circuit,²³⁰ which reversed the dismissal of Count I on statute of limitations grounds.²³¹ In addition, the government’s earlier appeal of an order requiring it to produce a final witness list one year before trial, as well as some key evidentiary rulings, was initially reversed by a three-judge panel²³² but eventually affirmed by an en banc panel.²³³ After the defendants unsuccessfully petitioned for certiorari,²³⁴ the case returned to district court after a two-year hiatus with the district court’s power to manage the trial affirmed, but its interpretation of the governing law reversed.²³⁵

At a status conference shortly after the case returned to district court, the court asked the government whether it had continued to produce documents to the defendants during the pendency of the appeal.²³⁶ The government replied it had not and tried to explain how difficult its duty was:

[T]hese efforts that we take to comply with Rule 16 and the Court’s discovery orders are monstrous. And we can’t do them on a monthly basis. It’s just—it is not possible. So what we tried to do was wait until we had certainty from the Supreme Court and then we sent out

²²⁹ *Id.* at 1121–22 (quoting *Goldyn v. Hayes*, 444 F.3d 1062, 1070 (9th Cir. 2006)).

²³⁰ Opening Brief of the United States and Petition for Writ of Mandamus, *United States v. W.R. Grace*, 504 F.3d 745 (9th Cir. 2007) (06-30472, 06-30524).

²³¹ *United States v. W.R. Grace*, 504 F.3d 745, 751–54 (9th Cir. 2007).

²³² *United States v. W.R. Grace*, 493 F.3d 1119, 1123; 1127–32 (9th Cir. 2007).

²³³ *United States v. W.R. Grace*, 526 F.3d 499, 503, 508–16 (9th Cir. 2008).

²³⁴ *W.R. Grace v. United States*, 128 S. Ct. 2964 (2008) (mem.) (denying certiorari); *Eschenbach v. United States*, 128 S. Ct. 2964 (2008) (mem.) (denying certiorari).

²³⁵ *See* *W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (en banc).

²³⁶ Defendants’ Motion to Dismiss Due to Gov’t Misconduct, *supra* note 206, at 20–21 (quoting Status Conference Transcript for Oct. 24, 2008 at 23–24). In its brief opposing a motion to compel, the government described the process of fulfilling its discovery obligations as follows:

It requires hundreds of federal employees in nine federal agencies to review files for relevant documents. These materials must then be reviewed by agency attorneys for privileged materials. The privileged materials must be set aside and privilege logs created. All materials must be scanned, bates stamped, and placed into a searchable database for the defendants. The Department of Justice must then perform quality control review of each agency’s privilege logs. This massive undertaking simply cannot physically or logistically be performed on an intermittent or rolling basis as suggested by the defendants.

United States’ Response to the Defendants’ Joint Motion to Compel Production of Discovery and Joint Motion for Sanctions at para. 3, *United States v. W.R. Grace*, CR-05-07-M-DWM (D. Mont. filed Dec. 19, 2008) available at <http://www.mtb.uscourts.gov/mtd/images/868.pdf>.

this monstrous request to all the federal agencies that we surveyed for our first disclosure back in January '06.²³⁷

If the government thought this description of an overwhelming workload would elicit a sympathetic response from the court, it was mistaken. In a scheduling order issued immediately after the status conference, the court set the eventual trial date of February 19, 2009²³⁸ and ordered the government to produce all remaining documents subject to discovery under *Brady* and Rule 16 of the Federal Rules of Criminal Procedure on October 27, 2008—a mere three days after the order was entered.²³⁹

Amazingly, the government complied and produced 1.7 million pages of documents within three days and several hundred thousand more pages over the next month.²⁴⁰ Nonetheless, the defendants found multiple problems with the production including several failures to produce exculpatory material and one instance in which the government had deleted relevant emails.²⁴¹ The defendants filed several motions to compel that led the court to issue an order warning the government that it should be prepared to “immediately supply any material to which the Court find the Defendants are entitled”²⁴² and stating that failure to comply would result in sanctions.²⁴³ Although the government appealed the court’s order that the government produce its witness list a year before trial,²⁴⁴ it did not appeal the court’s arguably broad interpretation of the government’s *Brady* obligation.

In January of 2009, a month before trial started, the court issued an order addressing several pending motions to compel discovery.²⁴⁵ After ordering and denying some discovery, the court addressed the defendants’ request for sanctions on the grounds that they had been prejudiced by the government’s failure to produce any discovery during the two-year appeal process. The court was derisive of the government’s failure,

²³⁷ Defendants’ Motion to Dismiss Due to Gov’t Misconduct, *supra* note 206, at 21 (quoting Status Conference Transcript for Oct. 24, 2008, at 23–24).

²³⁸ Order at 1, *United States v. W.R. Grace*, CR-05-07-M-DWM (D. Mont. Oct. 24, 2008), available at <http://www.mtb.uscourts.gov/mtd/images/818.pdf> [hereinafter 2008 *Grace* Order I].

²³⁹ *Id.* at 3.

²⁴⁰ Defendants’ Motion to Dismiss Due to Gov’t Misconduct, *supra* note 206, at 20–21.

²⁴¹ *Id.* at 22.

²⁴² Order at 1, *United States v. W.R. Grace*, CR-05-07-M-DWM (D. Mont. Dec. 12, 2008), available at <http://www.mtb.uscourts.gov/mtd/images/863.pdf> [hereinafter 2008 *Grace* Order II].

²⁴³ *Id.* at 2.

²⁴⁴ *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (upholding the court’s authority to enter such an order).

²⁴⁵ Order, *United States v. W.R. Grace*, CR-05-07-M-DWM (D. Mont. Jan. 14, 2009), available at <http://www.mtb.uscourts.gov/mtd/images/881.pdf> [hereinafter 2009 *Grace* Order II].

saying that the government simply had not found disclosure “convenient.”²⁴⁶ Nonetheless, the court noted that the touchstone of a sanctions inquiry is whether the party has suffered prejudice, and it observed that the defendants had offered “little evidence of prejudice resulting from the delay.”²⁴⁷ The court also noted that the defendants did not ask for any documents during that time by referring to the defendant’s “lack of curiosity regarding any evidentiary development.”²⁴⁸ Because the defendants still had a month to prepare for trial, the court found no prejudice and denied the motion.²⁴⁹

Thus, as trial began in February 2009, the parties had been fighting for years over the government’s discovery obligations. The court had interpreted the government’s discovery obligations broadly, and the government was struggling to keep up.

B. *The Government’s Acts & Omissions*

The damaging testimony of Robert Locke took place on direct examination, during the fourth week of trial.²⁵⁰ When asked for the dates of any meetings he had with prosecutors or investigating agents, Locke said he had met six times with the government.²⁵¹ In response to a question about his relationship with the government, Locke testified that he had learned in 2005 that he was “on a list of criminal conspirators” and was concerned he might be indicted.²⁵² After meeting with the government, Locke was offered a letter of immunity, which he declined to take.²⁵³ The prosecution had not turned the immunity letter over to the defendants.²⁵⁴ The defendants immediately moved for an order compelling the government to turn over the letter, which was granted.²⁵⁵ Two days later—less than an hour before Locke’s cross-examination was to begin—the prosecution turned over the letter.²⁵⁶

Locke also testified on direct that defendant Robert Bettachi had callously said “caveat emptor” in response to Locke’s expression of con-

²⁴⁶ *Id.* at 4–5.

²⁴⁷ *Id.* at 17.

²⁴⁸ *Id.* at 17.

²⁴⁹ *Id.* at 19.

²⁵⁰ See Carly Flandro, *Former Grace Employee Takes the Stand*, UM Grace Case Blog (Mar. 23, 2009, 10:25 AM), <http://www.umt.edu/gracecase/day-by-day-march-2/march-23-2009/index.html>; Kathryn Mazurek, *Locke Called as a Witness*, UM Grace Case Blog (Mar. 23, 2009, 10:55 AM), <http://www.umt.edu/gracecase/day-by-day-march-2/march-23-2009/index.html>.

²⁵¹ Defendants’ Motion to Dismiss Due to Gov’t Misconduct, *supra* note 206, at 35 (quoting Trial Transcript for Mar. 23, 2009 at 3596).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 37 (quoting Trial Transcript for Mar. 23, 2009, at 3695).

²⁵⁵ *Id.* at 37 (quoting Trial Transcript for March 23, 2009, at 3695).

²⁵⁶ *Id.* at 37 n.1 (quoting Trial Transcript for March 23, 2009, at 4032).

cern over Grace's sale of contaminated property to Libby residents Mel and Lerah Parker.²⁵⁷ The defendants moved to strike this testimony,²⁵⁸ which was eventually determined by the judge to be false²⁵⁹ but not perjurious.²⁶⁰ During Locke's cross-examination, the defense brought out Locke's bitter history with Grace, including his disappointment when defendant Robert Bettachi was promoted over him in the 1970s and 1980s, and his pending civil lawsuit against Grace for employment discrimination.²⁶¹ Arguably, the defendants did an excellent job of impeaching his credibility.

Then the government's problems took a turn for the worse. During Locke's cross-examination, Bert Marsden, the primary EPA case agent working with Locke, realized he had "a couple hundred" emails from Locke that had not been disclosed to the defense.²⁶² Agent Marsden went home, printed many of the emails, deleted several, gave the ones he had printed to the prosecution, and waited.²⁶³ On April 7, almost two weeks after Locke's cross-examination, the government began producing the Locke-Marsden emails to the defendants.²⁶⁴ The government admitted that the emails were impeachment material subject to disclosure under *Giglio v. United States*²⁶⁵ and the Jencks Act.²⁶⁶

The defendants then moved to compel a range of documents related to Locke and complained that the emails "demonstrate[d] more clearly than ever Mr. Locke's intense prosecutorial partnership with the Government and his obsession with seeking revenge against Defendant Grace,

²⁵⁷ *Id.* at 37–38 (quoting Trial Transcript for March 23, 2009, at 4046–47).

²⁵⁸ See Defendants' Joint Motion to Strike the Testimony of Robert Locke, United States v. W.R. Grace, CR-05-07-M-DWM (D. Mont. filed Apr. 5, 2009), available at <http://www.mtb.uscourts.gov/mtd/images/1021.pdf>.

²⁵⁹ 2009 *Grace* Order I, *supra* note 49 at 5 ("[T]he record does not permit us to know for certain whether Locke presented a convenient remembrance, a crafty embellishment, or an outright lie.").

²⁶⁰ *Id.* at 11 ("[W]hile there is ample evidence of his untrustworthiness, and a strong circumstantial case for perjury, there is no irrefutable objective proof that he perjured himself.").

²⁶¹ Defendants' Motion to Dismiss Due to Gov't Misconduct, *supra* note 206, at 38.

²⁶² See Gov't's Consol. Opposition to Defendants' Motions, *supra* note 196, at 13; Defendants' Motion to Dismiss Due to Gov't Misconduct, *supra* note 206, at 41 (quoting Trial Transcript for Apr. 15, 2009, at 150).

²⁶³ Defendants' Motion to Dismiss Due to Gov't Misconduct, *supra* note 206, at 41 (quoting Trial Transcript for Apr. 15, 2009, at 150). The deleted emails were eventually recovered from an EPA server and turned over to the defense. Daniel Doherty, *Marsden Testifies on Locke Bias, Immunity*, UM *Grace* Case Blog (April 17, 2009 5:02 p.m.), <http://www.umt.edu/gracecase/2009/04/17/marsden-testifies-on-locke-bias-immunity/index.html>.

²⁶⁴ Defendants' Motion to Dismiss Due to Gov't Misconduct, *supra* note 206, at 42.

²⁶⁵ See 405 U.S. 150 (1972).

²⁶⁶ See Gov't's Consol. Opposition to Defendants' Motions, *supra* note 196, at 15 ("[C]ertain of the Locke to Marsden e-mails should have been disclosed previously as impeachment materials under *Giglio*, as Rule 16 statements that could be used to bind the Defendant corporation, or as Jencks material.").

Defendant Bettacchi, and the other Defendants.”²⁶⁷ On April 10, 2009, the court ordered the government to turn over all correspondence between Locke and any government agent or government witness, the hard drive to his personal computer, any evidence of remuneration or compensation that the government may have paid to Locke, Locke’s calendars, and all notes or videos of meetings Locke had with the government.²⁶⁸ The court also ordered a deposition of Locke in front of U.S. Magistrate Jeremiah Lynch and set a hearing on the defendants’ motion to strike Locke’s testimony for April 17, 2009.²⁶⁹

At the end of that hearing, the defendants argued that the only remedy for the range of problems with the government’s case was to dismiss the indictment.²⁷⁰ The government acknowledged its errors but argued that additional cross-examination of Locke would cure any problems.²⁷¹ Those observing the hearing thought that the judge was angry enough with the government and that the government’s case was sufficiently incoherent to make the odds of dismissal better than even:²⁷²

The day ended with [Judge] Molloy stating he was concerned with what he deemed was the “underlying problem here, which is about the process being tainted.” He then proceeded to call Robert Locke a “liar.”²⁷³

[Judge] Molloy concluded his comments by stating the following, “The way of business here appears problematic to me. . . . I am reminded of an instance where as a young attorney I saw federal agents absolutely destroy a home during a search. It was not right. Somebody in the Department of Justice needs to have the courage to do what is right.”²⁷⁴

²⁶⁷ Defendants’ Joint Motion to Compel Discovery Regarding Robert Locke at 1, *United States v. W.R. Grace*, No. CR-05-07-M-DWM (D. Mont. Apr. 9, 2009), available at <http://www.mtb.uscourts.gov/mtd/images/1030.pdf>.

²⁶⁸ See Order at 3–5, *United States v. W.R. Grace*, CR-05-07-M-DWM (D. Mont. Apr. 10, 2009), available at <http://www.mtb.uscourts.gov/mtd/images/1049.pdf> [hereinafter 2009 *Grace* Order III].

²⁶⁹ See *id.* at 6.

²⁷⁰ See Will Grant, *Defense Argues for Dismissal of Case*, *UM Grace Case Blog* (Apr. 17, 2009, 5:15 PM), <http://umt.edu/gracecase/2009/04/17/defense-argues-for-dismissal-of-case/>.

²⁷¹ See *id.*

²⁷² Christopher Orman, *Defense Makes Its Case on Prosecutorial Misconduct*—“This Case Should Be Dismissed,” *UM Grace Case Blog* (April 17, 2009, 6:38 PM), <http://www.umt.edu/gracecase/day-by-day-april/april-17-2009/index.html> (“Arguably, the defense did not meet the necessary burden of proof. However, by all appearances, Judge Molloy believed they did.”).

²⁷³ See generally Kirk Johnson, *Prosecution in Asbestos Poisoning of Montana Town Is Forced to Go on Defense*, *N.Y. TIMES*, April 25, 2009, at A9 (Judge Molloy making statement outside of the presence of the jury).

²⁷⁴ Orman, *supra* note 272.

The judge ended the hearing by saying, “I think we have a very, very serious problem.”²⁷⁵

A few days later, even more undisclosed agent notes between the government and Locke were produced.²⁷⁶ The government’s credibility was unraveling quickly, the defendants were preparing to pounce, and the court’s irritation was focused squarely on the government. Ten days later, at a hearing on the defendants’ motion to dismiss the indictment for prosecutorial misconduct, Judge Molloy was “clearly angry.”²⁷⁷ The prosecutors apologized for their errors and omissions²⁷⁸ but insisted they did not believe Locke had lied.²⁷⁹

C. *The Court’s Resolution*

Although those in attendance at the hearing predicted the court would impose the drastic remedy of dismissal,²⁸⁰ the court did not. The court addressed two factors that must be established to dismiss for prosecutorial misconduct—first, that the witness could not be recalled, and second, that the government had acted flagrantly, willfully, and in bad faith.²⁸¹ The court found neither prong satisfied.²⁸² The court began by noting, “The government has committed clear and admitted violations of [Federal Rule of Criminal Procedure] 16, [the Jencks Act], *Brady*[,] and *Giglio*.”²⁸³

²⁷⁵ Grant, *supra* note 270.

²⁷⁶ See Defendants’ Motion to Dismiss Due to Gov’t Misconduct, *supra* note 206, at 57.

²⁷⁷ Kirk Johnson, *Judge in Asbestos Case Angrily Lectures Prosecutors*, N.Y. TIMES, Apr. 28, 2009, at A17; see Josh Benham, *Molloy: Trust in Prosecution Almost Gone*, UM GRACE CASE BLOG (Apr. 27, 2009, 4:50 PM), <http://umt.edu/gracecase/day-by-day-april/april-27-2009> (stating that Judge no longer trusts the government’s lawyers prosecuting the case); see also Foley, *Prosecution Defends Itself*, *supra* note 205 (“The response from the bench was that hell will probably freeze over before he and the prosecution can agree on that fact.”).

²⁷⁸ See 2009 *Grace* Order I, *supra* note 49, at 2 (“The government suggested at oral argument that it referred to its ‘mistake, violation, error, misstep or regret’ . . . in its brief in response to the motions to dismiss.”).

²⁷⁹ See Foley, *Prosecution Defends Itself*, *supra* note 205 (Prosecutor responding that he does not believe that Locke perjured his testimony).

²⁸⁰ See generally Orman, *supra* note 272 (Judge Molloy appearing to agree with the defense on showings of prosecutorial misconduct).

²⁸¹ See 2009 *Grace* Order I, *supra* note 49, at 9 n.1.

²⁸² See *id.*; cf. Pub. L. No. 105-119, tit. VI, § 617, 111 Stat. 2519 (1997) (codified as amended at 18 U.S.C. § 3006A (2006)) (automatically precluding an award of attorneys’ fees under the Hyde Amendment, which requires a finding that the government’s actions were “vexatious, frivolous, or in bad faith”).

²⁸³ 2009 *Grace* Order I, *supra* note 49, at 6 (“While the prosecution initially resisted any such characterization of its non-disclosure as a violation of any obligation, counsel for the government now concede their error and profess to take full responsibility for it.”). *But see* FED. R. CRIM. P. 16 (requiring disclosure of Locke’s statements that the government intended to rely on to bind Grace); cf. 18 U.S.C. § 3500 (2010) (not requiring disclosure until after the witness testifies).

The court seemed especially perturbed by the government's contention that the job of disclosing so much information to the defendants was more than it could reasonably bear: "The government's own attorneys argue that the demands of this sprawling case are so daunting that the Court must permit the occasional nonmalicious violation of the Defendants' constitutional rights."²⁸⁴ The court refused to view the government's discovery obligations separately from its charging decisions, however, and insisted that any burden of the former flowed directly from the breadth of the latter:

The size of the case, and the resulting disclosure obligation, is a condition of the government's choosing. The constitution and the law do not yield when the government casts a wide net in the charging decision. . . . The history of this case suggests that the failure to disclose documents related to Locke is merely *the latest manifestation of a systemic problem*, i.e., that the Department of Justice charged a case larger than the one it prepared to prosecute.²⁸⁵

Ultimately, the court found that although the government had acted terribly and the prosecutors must shoulder the blame, the mistakes did not add up to prosecutorial misconduct.²⁸⁶ Nonetheless, the court said, "What is clear from the record is that the government's conduct creates a climate in which the Defendants' constitutional rights are at risk, and the court's role of ensuring the fair administration of justice is complicated."²⁸⁷

The court then searched for a remedy for the two distinct wrongs it found: first, Locke's "incredible" testimony,²⁸⁸ and second, the government's failure to fulfill its *Brady/Giglio* obligations.²⁸⁹ While acknowledging that the issues were distinct in terms of the underlying wrongs, the court noted that the issues were otherwise so "intertwined" that they would be "addressed collectively in the implementation of the remedy."²⁹⁰ The court considered a range of possible remedies from dis-

²⁸⁴ 2009 *Grace* Order I, *supra* note 49, at 8.

²⁸⁵ *Id.* at 7 (emphasis added).

²⁸⁶ *See id.* at 9.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 4.

²⁸⁹ *See id.* at 6; *see also* Gov't's Consol. Opposition to Defendants' Motions, *supra* note 196, at 15 ("Certain of the Locke to Marsden e-mails should have been disclosed previously as impeachment material under *Giglio*, as Rule 16 statements that could be used to bind the Defendant corporation, or as Jencks material. Those e-mails, along with the agent notes that should have been disclosed pursuant to this Court's Rule 16 discovery orders, should be the focus of this Court's inquiry into discovery violations.").

²⁹⁰ 2009 *Grace* Order I, *supra* note 49, at 4.

missing the indictment to declaring a mistrial to striking Locke's testimony in its entirety.²⁹¹ Dismissal was not warranted because the prosecutors' disclosure violations did not rise to the level of prosecutorial misconduct, and a mistrial was not favored by either party.²⁹² Striking Locke's testimony in its entirety had "some appeal in light of the prejudice occasioned by the government's non-disclosure and the unreliable nature of Locke's testimony," but it was deemed to be going "too far."²⁹³

The court concluded that the "minimally intrusive solution . . . [was] to allow Locke's testimony to stand, subject to the following conditions intended to cure the prejudice to the Defendants resulting from the government's failure to disclose."²⁹⁴ First, the court would allow additional cross-examination of Locke regarding "his relationship and meetings with the government, his animus toward the Defendants, and his status in relation to immunity."²⁹⁵ Because Locke's testimony was deemed "especially prejudicial" to defendant Robert Bettachi,²⁹⁶ the court stated that "the continued cross-examination of Locke [would] be accompanied by an instruction to the jury that it [could] not rely upon the testimony of Robert Locke in deciding Defendant Bettachi's guilt or innocence on any charge."²⁹⁷ The court also announced that it would instruct the jury that Locke was back on the stand because the government had "failed to fully disclose information to the defense as required by the rules and the Constitution" and that "the jury should view Locke's entire testimony with skepticism."²⁹⁸ Finally, the court prohibited the government from conducting redirect examination of Locke.²⁹⁹

The instruction turned out to be a lengthy soliloquy that essentially told the jury that the government had cheated and its star witness was a liar.³⁰⁰ For example, the court told the jury: "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

²⁹¹ *Id.* at 10.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 11. The court did not specify the prejudice that had occurred, other than Robert Bettachi, who was "uniquely prejudiced" due to Locke's "caveat emptor" testimony regarding Bettachi. *Id.* at 11–12. See generally Defendants' Motion to Dismiss Due to Gov't Misconduct, *supra* note 206, at 38–39.

²⁹⁵ 2009 *Grace* Order I, *supra* note 49, at 11.

²⁹⁶ *Id.* at 12.

²⁹⁷ *Id.* at 13.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ See *infra* Appendix: Locke Jury Instruction.

the Court.”³⁰¹ After explaining that the government has an “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 court said, “As a sanction for this inexcusable dereliction of duty the Court has entered an order that prohibits consideration of any proof offered by Robert Locke in the case brought against Robert Bettacchi.”³⁰² The court went on to say:

Having made this ruling the court does not mean to suggest that you should give any more credence to Robert Locke’s testimony as to any of the other defendants. Indeed, you should examine Locke’s entire testimony with great skepticism and with greater caution than that of other witnesses. . . .

You will have to decide what weight to give to Locke’s testimony if any but you should be very cautious about making a determination of criminal liability for any defendant based upon his proof.³⁰³

With this, the government was left with no appealable rulings, no witness to make the documents come alive, and no credibility with the jurors. Ten days later, the jury acquitted all remaining defendants of all charges.³⁰⁴

IV. THE *GRACE* COURT ATTEMPTS TO DO JUSTICE: ANALYZING THE REMEDY

“It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial.”³⁰⁵

The Supreme Court offers little guidance for lower courts as they attempt to enforce the lofty principles articulated in *Brady*, which has led many trial courts—including the *Grace* court—to cobble together a mix of remedies and sanctions. The size and complexity of the *Grace* trial made it a challenge for the government to adhere to prescribed procedures—a challenge, the *Grace* court noted more than once, that was brought on by the government’s own charging decisions.³⁰⁶ But the absence of bright-line rules regarding the government’s pretrial and trial disclosure obligations arguably affects charging decisions as much as remedies.

³⁰¹ *Id.* para. 3.

³⁰² *Id.*

³⁰³ *Id.* paras. 5–6.

³⁰⁴ See Proposed Order, *United States v. Theodore Stevens*, No. 08-231 (EGS) (D.D.C. Apr. 1, 2009); Press Release, Statement of Williams & Connolly LLP, Brendan V. Sullivan, Jr., and Robert M. Cary, Counsel to Senator Ted Stevens (Apr. 1, 2009) (on file with author).

³⁰⁵ *Lakeside v. Oregon*, 435 U.S. 333, 341–42 (1978).

³⁰⁶ See 2009 *Grace* Order I, *supra* note 49, at 6–8.

The *Grace* court's remedy was designed to rectify two errors made by the prosecution: first, Robert Locke's testimony, which the court concluded was "incredible" and bordered on perjury, and second, the government's failure to disclose impeachment information to the defense in time for the defense to use it on Locke's initial cross-examination.³⁰⁷ The government's failure to disclose impeaching evidence about Locke was a "real" *Brady* violation only if the evidence was not cumulative of other evidence, was favorable to the defendant, and would likely have affected the verdict, i.e., material.³⁰⁸ In other words, even if the government wrongly withheld impeachment information about Locke, the defendants did not necessarily suffer a "real" *Brady* violation. Most importantly, because the evidence was disclosed to the defendants in time for them to use it in cross-examination, an appellate court would almost certainly have concluded that the defendants were not prejudiced. Even the government's apparent concession on materiality³⁰⁹ should not have foreclosed an independent inquiry into materiality. In the absence of prejudice, the government did not commit a "real" *Brady* violation; it made mistakes that the trial court was able to and did correct.

The court's harsh description of the wrongs committed by the government may therefore have overstated the prosecution's errors. The court's description did more than that, however; it came close to crossing the boundary between the provinces of the judge and the trier of fact. It is considered highly persuasive to the jury when a prosecutor vouches for a witness's credibility.³¹⁰ It must surely be even more persuasive when a judge tells the jury to "examine [a witness's] entire testimony with great skepticism and with greater caution than that of other witnesses" and to

³⁰⁷ *Id.* at 4.

³⁰⁸ *United States v. Bagley*, 473 U.S. 667, 669 (1985) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

³⁰⁹ See Gov't's Consol. Opposition to Defendants' Motions, *supra* note 196, at 36 ("[T]he Government understands that the Court must deal with the untimely disclosures in an effort to ensure that the Defendants receive a fair trial and that the verdict is not unworthy of confidence.").

³¹⁰ Prosecutors are prohibited from vouching for a witness's credibility for this reason. See CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-5.8(b) (1993) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant."). Prosecutors are prohibited from vouching for a witness's credibility for this reason. "The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-5.8(b) (3d ed., 1993), available at http://www.abanet.org/crimjust/standards/pfunc_blk.html#5.8.

“be very cautious about making a determination of criminal liability for any defendant based upon his proof.”³¹¹

The instruction given by the federal judge in *Shaygan*, another federal case involving delayed disclosure of impeaching information during trial, provides a useful contrast.³¹² Like the *Grace* instruction, it was designed to explain to the jury that a witness was returning to the stand for additional cross-examination as a result of untimely disclosures by the government:

THE COURT: Okay. So, members of the jury, I have an instruction for you. I am now going to reopen the defense cross-examination of two prior witnesses. These are witnesses you have heard from, Carlos Vento and Trinity Clendening. And the reason is that the United States has failed to provide timely to the defense certain information and discovery materials which could have been used by the defense during its cross-examination of each of these witnesses.

This occurred through no fault of the defense. Now during the cross-examination that you are going to hear, I expect that you will hear reference to the substance of recorded conversations of defense counsel or members of the defense team by these two witnesses. I have personally reviewed the substance of the recorded conversations, and I can assure you that the defense did nothing wrong. Because I concluded that the United States has acted improperly in not turning over the necessary discovery materials and also by allowing recordings to occur in the first place, I am reopening the witnesses' examination so you can hear everything that occurred. Other than that, I [have] no further comment on the evidence. Go ahead and recall the witness, please.³¹³

Thus, the judge in *Shaygan* explained what was going to happen and why, and then proceeded to assure the jurors that they should not ascribe any of this to the defense. He did not criticize the government for its failures other than to say that the government “has failed to timely provide to the defense certain information and discovery materials,” and that

³¹¹ Locke Instruction *infra* note 330, at 3, paras. 5–6; see *Bollenbach v. United States*, 326 U.S. 607, 612 (1946) (“Particularly in a criminal trial, the judge’s last word is apt to be the decisive word.”).

³¹² See *United States v. Shaygan*, No. 08-20112-CR, 2009 WL 980289 (S.D. Fla. April 14, 2009).

³¹³ Transcript of Record at 67–68, *United States v. Shaygan*, 2009 WL 980289 (S.D. Fla. March 10, 2009) (No. 08-20112-CR).

“the United States has acted improperly in not turning over the necessary discovery materials.”³¹⁴ Dr. Shaygan’s acquittal of 141 charges after only three hours of deliberation³¹⁵ supports the proposition that even a restrained statement by the trial judge can have a profound effect on the jury.³¹⁶ To the extent the effect of the *Grace* court’s comments could have been alleviated through redirect of Locke, the prohibition on redirect added to the weight of the remedy and made it that much more difficult for the prosecution to recover.

“While the practice is not without some danger,”³¹⁷ it has long been recognized that a trial judge “may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.”³¹⁸ The exceptions are when the trial judge comments on a criminal defendant’s testimony³¹⁹ or when the effect of his instruction is to direct a particular verdict.³²⁰ The court must make clear to the jury that the essential fact questions—such as Locke’s credibility—are for the jury’s determination.³²¹ Importantly, the *Grace* court told the jurors that Locke’s credibility was ultimately up to them.³²²

Nonetheless, the court overstated the government’s errors and overcorrected the harm. It began with an overly broad statement of the government’s *Brady* obligations that the government never objected to, and then relied on prosecutors’ ethical obligations to conclude that a serious wrong had been committed. It crafted a remedy that overstepped the boundary between its province and that of the jury’s, and added a punitive prohibition on redirect. Its remedy is in many ways unprecedented; because the government failed to file an interlocutory appeal, it is also unreviewable.

The *Grace* court’s underlying frustration with the government most certainly contributed to its sweeping remedy. But this frustration is not limited to one court in one case; it instead seems to be the tip of an iceberg indicating a deeper systemic problem with criminal discovery. Moreover, this problem is not new. It has been discussed and studied for

³¹⁴ *Id.* at 68.

³¹⁵ See *Shaygan*, 2009 WL 980289, at *1.

³¹⁶ The Supreme Court has noted this power of the judge as “to whose lightest word the jury properly enough give a great weight.” *Allison v. United States*, 160 U.S. 203, 207 (1985).

³¹⁷ *Rodriguez v. Marshall*, 125 F.3d 739, 749 (9th Cir. 1997).

³¹⁸ *Quercia v. United States*, 289 U.S. 466, 469 (1933); see, e.g., *United States v. Phila. & Reading R.R.*, 123 U.S. 113, 116–17 (1887).

³¹⁹ E.g., *Quercia*, 289 U.S. at 472 (overturning conviction where judge told jury that people who wipe their hands together as they speak are, in his experience, always lying, followed by, “I think that every single word that man said . . . was a lie.”).

³²⁰ See *Powell v. Galaza*, 328 F.3d 558, 563–66 (9th Cir. 2003).

³²¹ See *Navellier v. Sletten*, 262 F.3d 923, 943 (9th Cir. 2001).

³²² Locke Instruction *infra* note 330, at 4, paras. 6–7.

almost a decade; the time is ripe for an amendment to Rule 16 of the Federal Rules of Criminal Procedure.

V. CRIMINAL DISCOVERY REFORM

It is not necessary to reinvent the wheel in order to reform criminal discovery. The federal Advisory Committee on Criminal Rules proposed specific language to amend Rule 16 in 2006, by adding subsection (H) to Rule 16(a)(1):

(H) *Exculpatory or Impeaching Information.* Upon 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. The court may not order disclosure of impeachment information earlier than 14 days before trial.³²³

The proposed committee note began with a statement of commitment to fairness, and a citation to the ABA standards for prosecutors and defense attorneys as well as several *Brady* cases.³²⁴ It then explained:

The 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*.³²⁵ It requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that

³²³ FED. JUDICIAL CTR., *Brady Material*, *supra* note 119, at 23.

³²⁴ *Id.* at 23–24 (New subdivision (a)(1)(H) is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory or impeaching information known to the prosecution. The requirement that exculpatory and impeaching information be provided to the defense also reduces the possibility that innocent persons will be convicted in federal proceedings). See generally CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.11(a) (3d ed., 1993), available at http://www.abanet.org/crimjust/standards/pfunc_blk.html#3.11; MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2003). The amendment is intended to supplement the prosecutor's obligations to disclose material exculpatory or impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999), and *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

³²⁵ It is not clear why the Committee chose to cite *Kyles* for materiality rather than *Bagley*. *Bagley* established the "confidence in the outcome" standard that defines materiality to this day. See *United States v. Bagley*, 473 U.S. 667, 682 (1985). *Kyles* was decided ten years later, and established some interpretive rules that are more favorable to defendants (e.g., that the defendant does not have to show by a preponderance that he would have been acquitted in order to establish materiality, that it is not a sufficiency of the evidence test, that once a "real" *Brady* violation is established, there is no need for harmless-error review, and that materiality is to be assessed in light of the cumulative evidence that was suppressed). See *Kyles v. Whitley*, 514 U.S. 419, 434–48 (1995).

participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.³²⁶

The note explained that the proposed rule distinguishes exculpatory and impeachment information only for purposes of when disclosures have to be made and defines exculpatory information as any information that “tends to cast doubt upon the defendant’s guilt as to any essential element in any count in the indictment or information.”³²⁷ Finally, the proposed rule allows the government to apply for a protective order under Rule 16(d)(1) to delay disclosures if needed.³²⁸

This proposed amendment addresses problems identified by the government and by commentators regarding the definition of exculpatory, the timing of the disclosures, and the protection of witnesses. The amended version of Rule would be enforceable as a pretrial obligation, and would allow the government to move for protective orders in those cases where disclosure of witness names may be dangerous.

CONCLUSION

The increasing frustration of trial court judges with criminal discovery is the strongest evidence yet that criminal discovery must be reformed. When judges begin to complain, and more importantly, begin looking for alternative ways to achieve justice, it is time for rule makers to take notice. Criminal discovery has long been viewed as a problem between prosecutors and defendants, prosecutors and their own consciences, or defendants and the criminal justice system. The *Grace* trial demonstrates that criminal discovery has become a problem for district court judges who are endowed with the authority to manage their own dockets and the power to control trials in their courtroom, but who are also asked to ensure that justice is done.

Amending Rule 16 would provide uniformity throughout the federal system.³²⁹ It would create clear obligations that would not require prosecutors to step into the shoes of defense counsel to determine materiality. It would ensure fair trials for defendants. Most importantly, it would

³²⁶ FED. JUDICIAL CTR., *Brady Material*, *supra* note 119, at 23.

³²⁷ *Id.* at 24

³²⁸ *See id.* (“The government may apply to the court for a protective order concerning exculpatory or impeaching information under the already-existing provision of Rule 16(d)(1), so as to defer disclosure to a later time.”).

³²⁹ An Advisory Committee member expressed concern about “so much variation nationwide” among different prosecutors regarding their discovery obligations. *See Minutes, supra* note 116, at 6.

give trial judges the authority they need to safeguard “both the rights of the accused and the interests of the public in the administration of criminal justice.”³³⁰

³³⁰ CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.1(a), *available at* <http://www.abanet.org/crimjust/standards/trialjudge.html#6-1.1>.

APPENDIX: LOCKE JURY INSTRUCTION

[¶ 1] Ladies and gentlemen, you are now going to hear the continued cross examination of Mr. Robert Locke. Mr. Locke's cross-examination will continue but only on the area of his special relationship with the United States Attorney's Office and the prosecution team, including federal agents. Before the examination continues I am going to explain to you why the government will not be allowed to do redirect examination of Mr. Locke and why you can not consider any proof offered by Mr. Locke in deciding any issue regarding Mr. Bettacchi. I will also explain why you should consider any proof offered by Mr. Locke with skepticism.

[¶ 2] 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. The conduct of any criminal case has a defined process. The process is governed by the United States Constitution, the laws enacted by the United States Congress, and Rules of Criminal Procedure recommended by the United States Supreme Court and adopted by the United States Congress. Each case is also governed by various orders of the presiding court setting forth a detailed procedural plan, and rulings on specific legal issues that arise in the case.

[¶ 3] 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. The United States Supreme Court has determined that when a defendant is on trial in the federal court, prosecutors have a constitutional obligation to turn over to the defendant evidence that is favorable to the accused either because it is exculpatory or because it is impeaching, that is, the proof may provide information that undermines the credibility of any witness called by the prosecution in the case. The government and its agents cannot suppress any such proof either willfully or inadvertently. The rules of criminal procedure place an obligation on the government and its agents to produce certain kinds of evidence or proof if it is requested by the defendants or ordered by the court. The suppression by the prosecution of evidence favorable to an accused violates the due process of the law where the evidence is material to the question of guilt, irrespective of the good faith or bad faith of the prosecution. 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. As a sanction for this inexcusable dereliction of duty the Court has entered an order that prohibits consideration of any proof offered by Robert Locke in the case brought against Robert Bettacchi.

[¶ 4] Thus, you may not consider testimony of Robert Locke when you decide the charges pending against Robert Bettacchi. Locke's testimony is stricken in its entirety as it relates to Robert Bettacchi.

[¶ 5] Having made this ruling the court does not mean to suggest that you should give any more credence to Robert Locke's testimony as to any of the other defendants. Indeed, you should examine Locke's entire testimony with great skepticism and with greater caution than that of other witnesses. In evaluating his testimony you should consider the bias that he has displayed toward W.R. Grace, his relationship with the prosecution team and the extent to which those matters may have influenced his testimony.

[¶ 6] You will have to decide what weight to give to Locke's testimony if any but you should be very cautious about making a determination of criminal liability for any defendant based upon his proof.

[¶ 7] The issues I have described have been fully addressed by the Court, and an adequate remedy is in place to allow the trial to move forward. It remains your duty to give dispassionate consideration to the proof in the record, within the confines of my instructions to you, and to reach a verdict based on the facts before you and not on any other ground.³³¹

³³¹ Locke Jury Instruction, (Apr. 28, 2009, 5:06 PM), available at <http://www.mtb.uscourts.gov/mtid/images/1150.pdf>.