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Critical Legal Issues: WORKING PAPER SERIES

TO DISCLOSE OR NOT TO DISCLOSE?
ELIMINATING MATERIALITY FROM GOVERNMENT'S PRE-TRIAL *"BRADY"* ANALYSIS

By
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> *"Until recently, my faith in the criminal system, particularly the judicial system[,] was unwavering, but what some members of the prosecution team did nearly destroyed that faith. Their conduct has consequences for me that they will never realize and can never be reversed."*
>
> Theodore F. Stevens, April 7, 2009 Motion Hearing, Transcript at 41, *United States v. Stevens*, No. 08-CR-231 (D.D.C.) (Sullivan, J.).

The unique role of the prosecutor in our nation's justice system never faces greater scrutiny than in the months following a glaring *Brady* violation in a high-profile criminal case. The most recent example of this phenomenon arose during the corruption prosecution of former Alaska Senator Ted Stevens. In the wake of a trial that was rife with instances in which prosecutors relied on their own questionable evaluations of "materiality" and failed to disclose exculpatory evidence, Senator Stevens's conviction was set aside and the charges against him dismissed.

This is not the first time that the American legal community's focus has zeroed in on the complex issues related to *Brady* evidence, materiality, and discovery obligations in criminal trials. Half a decade ago, another high profile

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prosecution – the Detroit "Sleeper Cell" case, the first major terrorism prosecution following the events of 9/11 – unraveled when rampant *Brady* violations were revealed post-trial.[1]

Earlier still, *The New York Times* published a headline expose of prosecutorial misconduct in the New York area, noting: "Misconduct by prosecutors has become a national concern in recent years, highlighted last month in a United States Supreme Court decision to throw out a Texas inmate's death sentence because prosecutors had deliberately withheld critical evidence."[2]

No one questions Justice Sutherland's observations regarding the role of a prosecutor in our system of justice:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He 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

[1]*See* Sept. 2, 2004 Memorandum & Order, *United States v. Koubriti*, No. 01-CR-80778 (E.D. Mich.) (Rosen, J.) (describing post-trial efforts to determine the magnitude of "a pattern of conduct" that was "prevalent and pervasive" whereby prosecutors failed to disclose exculpatory evidence and "materially misled the Court, the jury and the defense").

[2]Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action is Rare After Misconduct or Mistakes*, NEW YORK TIMES, Mar. 21, 2004.

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> conviction as it is to use every legitimate means to bring about a just one.[3]

But, when it comes to requiring its federal prosecutors to disclose to the defense *all* evidence favorable to the accused, the Department of Justice ("DOJ") flatly refuses and has instead resisted every effort to add such an obligation to Rule 16 of the Federal Rules of Criminal Procedure.

The discovery obligations of federal prosecutors with respect to pre-trial disclosures to defense counsel are governed by the Constitution, the Rules of Criminal Procedure, and applicable state and local rules of professional conduct.[4] These three sets of requirements, as they stand today, are not co-extensive. *Brady v. Maryland* and its progeny impose a constitutional duty on the prosecution to disclose "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment . . . ."[5] That pronouncement sounds simple enough, but its practical application has proven to be anything but simple.

In United *States v. Giglio*, 405 U.S. 150 (1972), the Supreme Court held that the duty imposed by the Due Process Clause, as interpreted in *Brady*, extends to require pre-trial disclosure of impeachment evidence as well as

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[3]*Berger v. United States*, 295 U.S. 78, 88 (1935).

[4]*See* 28 U.S.C. § 530B (requiring federal prosecutors to abide by state and local federal court ethical standards); *see also* Guidance for Prosecutors, *infra* n.20 ("Rules of Professional Conduct in most jurisdictions also impose ethical obligations on prosecutors regarding discovery in criminal cases.").

[5]373 U.S. 83, 87 (1963).

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evidence that is otherwise exculpatory. The Court has likewise extended *Brady*'s mandate to reach favorable evidence that the defendant has not requested, as well as evidence that is within the control of government actors besides the prosecutor.[6]

Brady does not, however, require the prosecution to disclose *all* exculpatory and impeachment information; it need disclose only that which is "material."[7] While the doctrine has been expanded over the years to apply to a broader range of types of evidence, it has simultaneously and significantly been narrowed through an increasingly restrictive interpretation of the "materiality" component. This narrowing trend was made plain in *United States v. Bagley*, 473 U.S. 667 (1985), and again more recently in *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), where the Supreme Court explained that evidence is "material" only where there is a reasonable probability that the verdict would have been different absent the government's suppression of evidence.

When examining the evidence post-conviction, it is practicable for the standard of review to provide for reversal only upon a showing that the suppressed information was material to the defendant's case. Determinations of materiality can and should be made in light of all of the evidence adduced at trial. But it defies logic to allow a partisan prosecutor to withhold admittedly

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[6]*See United States v. Agurs*, 427 U.S. 97 (1976); *Kyles v. Whitley*, 514 U.S. 419 (1995).

[7]373 U.S. at 83.

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favorable evidence by speculating before the trial starts that, even if his suppression of evidence is later discovered, he will be able to defend it by stating his belief that the evidence would not make a difference to the trial's outcome. Without knowing the theory or strength of the defense case, or how the prosecution itself will fare at trial, a prosecutor cannot possibly predict the likelihood that the verdict would be no different if favorable evidence is withheld. Allowing a prosecutor who is aware of favorable evidence within the government's possession to make that determination pre-trial "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."[8] But, as the relevant case law now stands, that is as far as the Supreme Court has interpreted the Constitution to go, and nothing in the Federal Rules of Criminal Procedure has yet taken this constitutional minimum any further.

Some district courts, however, have begun to require prosecutors to disclose *all* favorable evidence, without regard to any materiality analysis.[9] Also, overarching ethical standards are not as limited as the Supreme Court's *Brady* decisions. Under the so-called McDade Amendment, which has received little, if any, attention in the context of recent discussions of *Brady* and

[8] *Brady*, 373 U.S. at 87-88.

[9] *See, e.g., United States v. Naegele*, 468 F. Supp. 2d 150, 153 (D.D.C. 2007) (Friedman, J.); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198-99 (C.D. Cal. 1999) (Pregerson, J.); L.R. D. Mass. 116.2.

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discovery obligations, federal prosecutors are bound by ethical rules applicable in the states where they practice:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.[10]

Such state and local rules generally require *broader* pre-trial disclosure than that which is constitutionally mandated.

For example, Rule 3.8(d) of the ABA's Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." The concept of materiality is wholly absent from this provision. As the Comment to Rule 3.8(d) makes clear, nondisclosure is the *exception*, not the rule, and is only permitted where the tribunal is satisfied that disclosure "could result in substantial harm to an individual or to the public interest."

Most jurisdictions have adopted local rules that mimic the ABA's Model Rule 3.8(d) and do not include a materiality component.[11] While "the prudent

[10] 28 U.S.C. § 530B.

[11] *See, e.g.*, PA. R. PROF'L CONDUCT 3.8(d); D.C. R. PROF'L CONDUCT 3.8(e); N.Y. R. PROF'L CONDUCT 3.8(b); FLA. R. PROF'L CONDUCT 4-3.8(c); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.09(d).

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prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure" in order to comply with applicable ethical rules, such ethical rules require more of the prosecutor than *Brady* and *Bagley* do.[12]

The absence of any materiality component in these rules of professional conduct eliminates a prosecutor's ability to ethically justify nondisclosure by claiming that the information at issue is unreliable or only minimally negates guilt.[13] But the ABA has observed that "disciplinary authorities rarely proceed against prosecutors."[14] Thus, while the existence of these ethical pronouncements by bar associations across the nation means that prosecutors may not ethically hide behind materiality arguments to justify nondisclosure of favorable evidence, the infrequency with which such rules are enforced underscores the need for a formal amendment to the Rules of Criminal Procedure.

Perceiving the immensity of the *Brady* problem, the American College of Trial Lawyers called for a sweeping amendment to Rule 16 of the Federal Rules of Criminal Procedure nearly seven years ago. Described in a 2003 position paper adopted by the College's Board of Regents, this amendment would have, *inter alia*, eliminated any materiality component from a prosecutor's pre-trial

[12]*Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) (Stevens, J.); *see also Kyles*, 514 U.S. at 437.

[13]ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454, at 5 (July 8, 2009).

[14]*Id.* at 2.

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disclosure analysis.[15] In the wake of the implosion of the Detroit terrorism case, and at the request of the College, the Federal Judicial Conference's Advisory Committee on the Federal Rules of Criminal Procedure formed a "*Brady* subcommittee" to consider adding to Rule 16 a requirement that *all* exculpatory or impeaching information known to the prosecution be disclosed pre-trial without further speculation as to whether such information would ultimately prove material.

The DOJ strenuously opposed any such amendment, promising instead a revision to the United States Attorneys Manual ("USAM") with regard to its disclosure obligations as an alternative that would eliminate any need for an amendment to Rule 16. But when the revision was finally opened to the Committee, it did not require that *all* exculpatory or impeachment information be disclosed; rather, it only required disclosure of that which was "significantly" probative of the issues before the court and that which cast "substantial" doubt upon the accuracy of any evidence, including witness testimony. *See* USAM § 9-5.001. Disappointed, the Advisory Committee forwarded to the Standing Committee on Rules of Practice and Procedure a proposal to amend Rule 16 to add the following subsection:

> (H) Exculpatory or Impeaching Information. Upon a defendant's request, the government must make available all information that is known to the attorney

[15] *See* Am. College of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16* (Mar. 2003) (available on the "Publications" page of the ACTL website).

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> 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.[16]

While not a cure for all *Brady* violations, the proposed amendment would have eliminated any pre-trial materiality analysis, deprived errant prosecutors of their first line of defense, and provided uniformity in the treatment of *Brady* discovery among the district courts. As set out in the Advisory Committee Notes to the proposed amendment:

> [The proposed amendment to Rule 16] is based on the principle that fundamental fairness is enhanced when the defense has access before trial to any exculpatory and 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.
>
> * * *
>
> [The proposed amendment] requires prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the prosecution or investigation of the case without further speculation as to whether this information will ultimately be material to guilt.[17]

If life made sense, the Advisory Committee's proposal would have gone on to become an addition to Rule 16 that, while narrower than the College's original

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[16]Laural Hooper & Shelia Thorpe, *Brady v. Maryland Material in the United States District Courts: Rules, Orders and Policies*, FED. JUD. CTR., May 31, 2007, at 23 (app. A).

[17]*Id.*; *see also id.* at 10-15 (examining the range of local rules in the federal courts regarding disclosure of *Brady* material and demonstrating that some district courts already require that information favorable to the accused be turned over without regard to materiality).

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proposed language, would have eliminated the pre-trial use of materiality and clearly delineated a prosecutor's obligation to turn over *all* favorable information. The DOJ's continued opposition, however, was more successful before the Standing Committee, and the proposed amendment died there.[18]

Less than two years later, in the wake of the revelations surrounding the *Brady* violations in the Stevens case, Attorney General Holder – with a nod to Justice Sutherland – delivered this message to all United States Attorneys at a swearing-in ceremony:

> Your job as assistant U.S. Attorneys is not to convict people. Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored. Any policy that is in tension with that is to be questioned and brought to my attention.[19]

Doubtless with those words in mind, a Working Group within DOJ was formed to undertake a thorough review of DOJ's policies, practices, and training related to discovery and to evaluate areas of improvement. The Working Group recently concluded its review and, on January 4, 2010, Deputy Attorney General

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[18]*See* Jud. Conf. Advisory Comm. on Crim. Rules, Minutes of Oct. 1-2, 2007 Meeting, at 5, *available at* http://www.uscourts.gov/rules/Minutes/CR10-2007-min.pdf.

[19]Nedra Pickler, *U.S. Attorneys Told to Expect Scrutiny; Senator's Case Leaves Taint, Holder Says*, THE BOSTON GLOBE, Apr. 9, 2009, at 8.

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David W. Ogden issued three memoranda outlining the resulting "new" guidance.[20]

While there is much that is excellent in the resulting Guidance for Prosecutors – particularly for those who read and heed its detailed enumeration of what sorts of information constitute *Brady* material and where to look for such material – when it turns to a discussion of what prosecutors are required to disclose to the defense, we are right back to "same old, same old." The superb "search and identify" mission initiated by the new Guidance sadly does not require that *all* its fruits be disclosed to the defense, but only that which a *prosecutor* considers serious enough to raise a reasonable probability of a defense verdict. As before, the Guidance calls upon prosecutors to take a broad view of materiality and err on the side of disclosure, but the fact remains that the same partisans (the prosecutors reviewing the evidence and preparing the case for trial) remain the sole judges of what passes as "material." Even more problematically, the Guidance for Prosecutors repeatedly ignores state and local ethical rules (and the McDade Amendment) when listing the sources that establish "[t]he discovery obligations of federal prosecutors."

[20] *See* Memorandum to Department Prosecutors (Jan. 4, 2010) (Re: Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group) (hereinafter "Issuance Memo"); Memorandum to Department Prosecutors (Jan. 4, 2010) (Re: Guidance for Prosecutors Regarding Criminal Discovery) (hereinafter "Guidance for Prosecutors" or "Guidance"); Memorandum to all United States Attorneys (Jan. 4, 2010) (Re: Requirement for Office Discovery Policies in Criminal Matters) (hereinafter "Memo to U.S. Attorneys").

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Moreover, the Memo to U.S. Attorneys accompanying the Guidance states clearly that the Guidance is "not intended to establish new disclosure obligations." And, as before, the Guidance is ringed round with the usual caveats that it "is not intended to have the force of law or to create any rights, privileges or benefits." The Advisory Committee's proposal would have done all of those needed things. Put simply, the DOJ missed its opportunity to at last take one small step forward and "do the right thing."

Those who truly understand what is at stake in how the *Brady* problem is ultimately resolved are compelled to question whether prosecutors really grasp – or take seriously enough – their disclosure obligations. For example, United States District Judge Paul L. Friedman, sitting on a panel at the ABA's 2009 Annual Meeting in Chicago, invoked strong language on the issue: "I don't think prosecutors understand their *Brady* obligations. . . . Judges should not accept representations that, 'We know our obligations and we're meeting them."[21] Judge Friedman went on to comment that, while materiality has its place in an appellate court's post-conviction analysis, "it sure as hell shouldn't be the standard the prosecutor applies."[22]

It is impossible to imagine a justifiable basis upon which a prosecutor, who is tasked with seeking the truth and not with securing convictions, would

[21]Barbara Grzincic, *Corruption Trials, Chicago-Style*, THE DAILY RECORD, July 30, 2009, *available at* http://mddailyrecord.com/ontherecord/2009/07/30/corruption-trials-chicago-style/.

[22]*Id.*

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reasonably suggest that anything less than *all* favorable information should be provided to defense counsel. The limited circumstances in which there might exist good cause to deny, defer, or restrict discovery would warrant a protective order under Federal Rule of Criminal Procedure 16(d)(1). But such instances are the exception and certainly do not justify granting prosecutors wide latitude to speculate pre-trial about an appropriate theory of defense and what might be "material" to it. Prosecutors are already ethically bound to disclose to defense counsel *all* favorable information of which they are aware, without regard for materiality. There can be no legitimate reason for a fair-minded prosecutor (who is focused on finding the truth and ensuring that justice is served) to shield favorable information from a criminal defendant.

The justification for DOJ's unwillingness to alter in any way its perception of its prosecutors' discovery obligations likely stems from its belief, stated in the Issuance Memo accompanying the Guidance, that "incidents of discovery failures are rare in comparison to the number of cases prosecuted." DOJ used that same "red herring" to no avail before the Advisory Committee years ago. Even "rare" violations of *Brady* are unacceptable. But to call such violations "rare" turns a blind eye to the undisputable fact that most *Brady* violations are simply never discovered. Defendants generally have no idea their rights have even been violated. The very nature of *Brady* violations – that evidence was suppressed – means that defendants learn of violations in their cases only fortuitously, when the evidence happens to surface through an alternate

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channel. Indeed, playing down the extent of the *Brady* problem, while at the same time continuing to provide the means to keep it hidden by way of a pre-trial materiality analysis, comes with no grace whatsoever. Neither does bolstering the alleged non-existence of a *Brady* problem by comparing what *Brady* violations do rise to the surface to all cases prosecuted, when more than 96% of "all cases prosecuted" are guilty pleas without discovery issues.[23]

Furthermore, it should be plain to those who assess the current state of affairs honestly that the reported cases in which convictions were later vacated due to sustained claims of *Brady* violations are only the tip of the iceberg. No mechanism for measuring the number of instances in which *Brady* violations go undetected could possibly exist, but we can easily see that the tip of the *Brady* iceberg is substantial and continues to grow. *See* Habeas Assistance & Training Project, *Summaries of Successful Cases Under Brady v. Maryland* (Sept. 27, 2009) (containing 138 pages describing cases in which state and federal *Brady* claims were sustained, or where cases were remanded for further examination of possible *Brady* violations) (hereinafter "Project Report").

While the Project Report contains only a sampling of state and federal *Brady* cases, it does convey a real sense of the extent to which too many prosecutors have paid nothing but lip service to the mandate of *Brady*.

[23]*See* U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases, Fiscal 2008*, Dec. 30, 2009, *available at* http://www.ussc.gov/general/20091230_data_overview.pdf ("The vast majority of convicted defendants plead guilty. In fiscal year 2008, more than 96% of all offenders did so, a rate that has been largely the same for ten years.").

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Suppression of materially favorable evidence or information is neither rare nor isolated. Examples of other cases in which convictions are reversed due to *Brady* violations – in other words, where courts determine post-trial that *material* exculpatory evidence was withheld from the defense – are not difficult to find. The list of cases set forth in the margin[24] is not meant to be exhaustive and does not begin to be – it is merely offered to provide some additional examples of the types of *Brady* claims that have been raised by defendants, examined by federal courts, and sustained on appeal.

While one can with ease search out more examples similar to those listed in note 24, *supra*, the persistence of the problem was perhaps best capsulized in *United States v. Jones*, 609 F. Supp. 2d 113, 119 (D. Mass. 2009), where an exasperated court noted: "The egregious failure of the government to disclose plainly material exculpatory evidence in this case extends a dismal history of

[24]*See, e.g.*, *United States v. Torres*, 569 F.3d 1277 (10th Cir. 2009) (finding that prosecutors failed to disclose impeachment material); *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008) (finding that prosecutors suppressed rap sheets, plea agreements, and cooperation agreements relating to key witnesses); *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006) (finding that prosecutors failed to disclose a critical witness's recantation); *United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004) (finding that prosecutors suppressed special immigration treatment afforded to a prosecution witness); *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004) (finding that prosecutors failed to disclose benefits provided to government witnesses and bias information regarding the main government witness); *United States v. Rivas*, 377 F.3d 195 (2d Cir. 2004) (finding that prosecutors failed to disclose exculpatory material which might have led to an acquittal); *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002) (finding that prosecutors failed to produce exculpatory documentation in time for its effective use at trial); *In re Sealed Case*, 185 F.3d 887 (D.C. Cir. 1999) (finding that prosecutors failed to disclose information that was affirmatively favorable to defendant's assertion of innocence); *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995) (finding that prosecutors failed to disclose pretrial statements inconsistent with a witness's trial testimony); *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. F1993) (finding that prosecutors failed to disclose an agreement with a government witness); *United States v. Perdona*, 929 F.2d 967 (3d Cir. 1991) (finding that prosecutors failed to disclose the prior criminal record of the main government witness); *see also United States v. Shaygan*, No. 08-CR-20112, 2009 WL 980289 (S.D. Fla. Apr. 9, 2009) (sanctioning the government for, among other things, failure to disclose that critical prosecution witnesses were cooperating federal informants with compensation agreements).

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intentional and inadvertent violations of the government's duty to disclose in cases assigned to this court."

In light of the apparent magnitude of the *Brady* problem – measured by the egregiousness of the violations (such as those in the *Stevens* prosecution), by the volume of known violations, and by the hidden violations which we know exist but cannot count – the DOJ's claim in the Issuance Memo that such incidents are but "isolated lapses" is uninformed at best. Throughout time, there have always been prosecutors for whom winning is more important than doing justice. We are too regularly and too recently reminded of that, and it isn't pretty when we are. *See, e.g.*, Memorandum Opinion, *United States v. Slough*, No. 08-CR-360 (D.D.C. Dec. 31, 2009) (Urbina, J.) (dismissing the indictment filed against Blackwater Worldwide security guards based on violations of *Kastigar v. United States*, 406 U.S. 441 (1971), by assigned prosecutors who "repeatedly disregarded the warnings of experienced, senior prosecutors"); Transcript of Proceedings, *United States v. Ruehle*, No. 08-CR-139 (C.D. Cal. Dec. 15, 2009) (Carney, J.) (dismissing stock-option backdating indictments because the government "intimidated and improperly influenced" witnesses that were critical to the defense, and noting that the lead prosecutor "somehow forgot that truth is never negotiable"). While neither *Slough* nor *Ruehle* involve *Brady* violations, prosecutors who would engage in the prosecutorial misconduct there described – or other variations of it –

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presumably would not hesitate to look the other way to avoid turning over favorable information to the defense.

All the training in the world will not address the fact that injecting materiality into pre-trial *Brady* determinations is simply contrary to basic concepts of fairness and due process. DOJ's new Guidance for Prosecutors is obviously well-intentioned and so good in so many ways, but it stops short of dealing with the real problem by failing to remove materiality from its prosecutors' pre-trial discovery analysis. Until the Rules of Criminal Procedure are amended to reflect that materiality has no place in the prosecution's pre-trial assessment of its disclosure obligations, we will continue to hear periodic reports of convictions which must be revisited or vacated due to *Brady* violations. And those reported cases will only represent the tip of an ever-growing iceberg.

It is never too late "to do the right thing." Rules of professional conduct in a vast majority of jurisdictions have followed the ABA's lead and required disclosure of *all* that is favorable, and – as the recent DOJ memoranda acknowledge – such rules "impose ethical obligations on prosecutors regarding discovery in criminal cases." Moreover, the mandate of the McDade Amendment – a mandate which appears to have been largely overlooked by the DOJ and those examining the *Brady* problem to date – requires that such rules

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be followed and that the Attorney General "make . . . rules . . . to assure compliance" with state ethical rules.[25]

It is time.

[25]28 U.S.C. § 530B(b).

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