NOTE

AMENDING FOR JUSTICE'S SAKE: CODIFIED DISCLOSURE RULE NEEDED TO PROVIDE GUIDANCE TO PROSECUTOR'S DUTY TO DISCLOSE

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I. INTRODUCTION

"I wouldn't wish what I am going through on anyone," Senator Ted Stevens commented after losing his seat in the United States Senate on November 18, 2008.[1] Senator Stevens lost the race largely because a criminal conviction damaged his reputation.[2] After Senator Stevens endured months of contentious litigation, the jury convicted the longest serving Republican senator in United States history on seven felony counts of ethics violations.[3] Six months later, the presiding judge, the Honorable Emmet Sullivan, vacated the conviction at the request of Attorney General Eric Holder because of blatant failures to disclose exculpatory evidence.[4] Senator Stevens[5] brings a high-profile example to the continuing discussion of the problems inherent in the criminal disclosure rules. His case exemplifies how the current structure of the material disclosure standard often results in the suppression of material evidence.

A criminal prosecutor possesses considerable authority over the evolution of a criminal proceeding.[6] As a result, one of a prosecutor's primary responsibilities is to ensure that trials are fair.[7] The Constitution,[8] the opinions of the Supreme Court,[9] the Model Rules of Professional Conduct,[10] and the American Bar Association's Standards for Criminal

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1. Carl Hulse, *Democrats Gain as Stevens Loses His Senate Race*, N.Y. TIMES, Nov. 19, 2008, at A1.

2. *See id.*

3. *Id.*; Neil A. Lewis, *Senator is Guilty over His Failures to Disclose Gifts*, N.Y. TIMES, Oct. 28, 2008, at A1.

4. Adam Clymer, *Ted Stevens, 86, Helped Shape Alaska in 40 Years in Senate*, N.Y. TIMES, Aug. 11, 2010, at A12; Carrie Johnson & Del Quentin Wilber, *Holder Asks Judge to Drop Case Against Ex-Senator; Justice Dept. Cites Prosecutors' Behavior During Stevens Trial*, WASH. POST, Apr. 2, 2009, at A1.

5. Regardless of the public disapproval Senator Stevens has received from his "bridge-to-nowhere," Senator Stevens is a sympathetic character in this instance because the justice system failed him. If the justice system can fail a sitting United States senator, it can certainly fail the rest of the American population as well. Later, before his case could have been tried again, Senator Stevens died in a plane crash on August 9, 2010. William Yardley & Liz Robbins, *Ex-Senator From Alaska Is Killed in Air Crash*, N.Y. TIMES, Aug. 11, 2010, at A10.

6. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure . . . .").

7. 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.").

8. U.S. CONST. amend. XIV, § 1 (Due Process Clause); *Brady*, 373 U.S. at 87 ("We now hold 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.").

9. *Kyles*, 514 U.S. at 437–38; *Brady*, 373 U.S. at 87; Berger v. United States, 295 U.S. 78, 88 (1935).

10. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009) ("The prosecutor in a criminal case

Justice[11] establish this obligation. Accordingly, a criminal prosecutor must not only convict the guilty but must also ensure that the innocent are not convicted.[12] Pursuant to that responsibility, a prosecutor must disclose material evidence to the defense.[13]

Beginning in *Brady v. Maryland*,[14] and continuing to *Strickler v. Greene*,[15] the Supreme Court's line of cases established the framework underlying a criminal prosecutor's duty to disclose.[16] The Supreme Court has held that the material evidence standard[17] consists of three components: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must be willfully or inadvertently suppressed by the State; and (3) "prejudice must have ensued."[18]

While the Supreme Court's precedent establishes a clear standard, its subsequent interpretation and application have created an array of complexity.[19] Too often, prosecutors have interpreted their disclosure obligations inconsistently.[20] The current standard requires a sensitive case-

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shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . .").

11. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-3.11(a) (3d ed. 1993) [hereinafter ABA STANDARDS] ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.").

12. *Berger*, 295 U.S. at 88 ("[The prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guild shall not escape or innocence suffer.").

13. Strickler v. Greene, 527 U.S. 263, 281–82 (1999); *Kyles*, 514 U.S. at 437; United States v. Bagley, 473 U.S. 667, 682–84 (1985); United States v. Agurs, 427 U.S. 97, 110–11 (1976); Giglio v. United States, 405 U.S. 150, 153–54 (1972); *Brady*, 373 U.S. at 87.

14. *Brady*, 373 U.S. 83.

15. *Strickler*, 527 U.S. 263.

16. *Strickler*, 527 U.S. at 281–82; *Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. at 682–84; *Agurs*, 427 U.S. at 110–11; *Giglio*, 405 U.S. at 153–54; *Brady*, 373 U.S. at 87.

17. *Brady*, 373 U.S. at 87.

18. *Strickler*, 527 U.S. at 281–82.

19. *See* Kevin C. McMunigal, *The Craft of Due Process*, 45 ST. LOUIS U. L.J. 477, 487–89 (2001). Professor Kevin McMunigal notes that the Supreme Court's cases dealing with prosecutorial disclosure of exculpatory evidence create a lot of "confusion" and "practical application problems remain." *Id.* McMunigal primarily attributes this confusion to the lingering ambiguity of the rule's scope. *Id.* at 488; *see also* Jannice E. Joseph, *The New Russian Roulette:* Brady *Revisited*, 17 CAP. DEF. J. 33, 35 (2004) ("While the United States Supreme Court's central holding in *Brady* was favorable to defendants, subsequent cases demonstrated that the contours of *Brady* were not clear.").

20. Am. Coll. of Trial Lawyers, *Proposal: Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 94 (2004). ("With neither a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently . . . ."). The article goes on to state:

> Federal prosecutors, largely focusing on the word "exculpatory," have interpreted the *Brady* disclosure obligation in a variety of ways. A number of

by-case analysis to determine whether disclosure is required.[21] These case-by-case determinations of the evidence's materiality have failed to produce clear guidelines for when prosecutors need to disclose exculpatory evidence.[22] More problematic, these varying prosecutorial interpretations have undermined *Brady*'s constitutional significance.[23] The lack of clarity inherent in the standard exposes the prosecutor to cognitive biases when he attempts to determine which evidence to disclose and which to conceal.[24]

With the advent of modern technology, post-conviction DNA evidence sheds some empirical light on how prosecutorial suppression of material evidence undermines *Brady*'s constitutional significance and constitutes a major cause of wrongful convictions.[25] Post-conviction DNA evidence has exonerated more than two hundred criminal defendants, and according to some research, almost half of those cases involved prosecutorial misconduct.[26] Nearly a half century after *Brady*, prosecutors still fail to disclose material evidence.[27] Some research even suggests that 16%–19% of reversals in capital cases are attributable to the non-disclosure of exculpatory evidence.[28] These numbers are quite difficult to swallow while holding a confident belief that the criminal justice system convicts the guilty but spares the innocent. Could it be true that one out of every five

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> prosecutors have interpreted *Brady* narrowly and believe that a prosecutor's *Brady* obligation is limited solely to turning over information that someone other than the defendant has confessed to the crime at issue. Many prosecutors do not focus on the critical language of the *Brady* decision, which requires disclosure of evidence that *tends to* exculpate or reduce one's penalty. Others, knowing of favorable evidence, have tried to predict its effect on the outcome of the case in deciding whether to disclose. Still others do not view *Giglio* or impeachment material as part of the *Brady* exculpatory disclosure obligation. And yet others have separated the timing of the disclosure of exculpatory or guilt-related evidence from the disclosure of mitigating or punishment-related evidence.

Id. at 103–04.

21. McMunigal, *supra* note 19, at 485. The Supreme Court's standard from "the line of cases from *Brady v. Maryland* through *Strickler v. Greene* on prosecutorial disclosure of exculpatory evidence" is the "product of a gradual, case-by-case process of accretion." *Id.*

22. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 509 (2009) ("[C]ase-by-case determinations of the materiality of undisclosed evidence have failed to produce clear guidelines for prosecutorial disclosure of exculpatory evidence.").

23. Am. Coll. of Trial Lawyers, *supra* note 20, at 95. After its review of the issue, the subcommittee of the Federal Criminal Procedure Committee of the American College of Trial Lawyers report stated, "[t]his Committee believes that the constitutional mandate of *Brady* has been undermined by varying prosecutorial interpretations . . . ." *Id.*

24. *See* Burke, *supra* note 22, at 483 ("[T]he current constitutional standard amplifies cognitive biases that will distort even an ethical prosecutor's application of *Brady* and systematically lead to under-disclosure of exculpatory evidence.").

25. *Id.* at 509–10.

26. *Id.* at 510 & n.179.

27. *Id.* at 509 ("Forty-five years have passed since the Court announced its decision in *Brady*, and yet the widespread failure of prosecutors to disclose *Brady* material is well known.").

28. *Id.* at 510 n.180.

prosecutors in capital cases that are reversed results from prosecutors intentionally concealing evidence? The issue, however, is not limited to a prosecutor's intent to conceal evidence. Rather, what these statistics point out is that our system is flawed because of the lack of clearly defined rules that fail to counteract the cognitive biases inherent in the disclosure decisionmaking process.

As these startling statistics demonstrate, the current material evidence standard fails to provide defendants sufficient access to exonerable evidence.[29] As Professor Alafair S. Burke explains, "the Court's standard of materiality invites prosecutors to systematically undervalue it. Because of cognitive biases, prosecutors will overestimate the strength of their case in the absence of the evidence at issue, underestimate the potentially exculpatory value of the evidence, and therefore fail to recognize materiality even when it exists."[30] The innocent, not the guilty, bear the cost of that failure.[31] This Note addresses the complexities in the current standard that leave prosecutors vulnerable to cognitive bias. Part II provides an overview of the criminal prosecutor's obligation to disclose material evidence. Part III examines how, under the present standard, cognitive bias affects the prosecutor's decisionmaking process, causing even prosecutors acting in good faith to under-disclose.[32] Part IV demonstrates how objective guidelines could ameliorate cognitive bias in decisionmaking.[33] This Note argues for the implementation of bright-line rules to guide prosecutorial discretion. It urges a solution that identifies the salient facts from the case law and enumerates those facts into a codified *Strickler* three-prong standard.[34] A bright-line standard should exist requiring disclosure when any of the following scenarios are present:[35]

(1) Prior perjury or false testimony of a government witness;
(2) Promises of immunity to a government witness;
(3) Monetary rewards to key government witnesses;
(4) Mental impairments of a government witness;
(5) Information reflecting bias or prejudice of a government witness against defendant;
(6) Confessions to the crime by others; and
(7) Inconsistent or contradictory scientific tests.[36]

Such bright-line disclosure rules will confine a prosecutor's discretion within substantive, clear lines by enumerating uniform and demonstrable

29. *Id.* ("The *Brady* doctrine has failed to accomplish its objective of providing defendants access to material exculpatory evidence . . . .").

30. *Id.* at 499.

31. *Id.* at 510–11 ("[T]he costs of that failure are borne not by the guilty, but by the innocent.").

32. *See infra* Part III.

33. *See infra* Part IV.

34. *See infra* Part IV.

35. *See infra* Part IV.A.

36. Am. Coll. of Trial Lawyers, *supra* note 20, at 103.

standards that would require disclosure.[37] Doing so will reduce the opportunity for cognitive bias to creep into a prosecutor's decisionmaking process.[38] By counteracting the cognitive bias inherent in the present standard, a codified solution would prevent unintentional under-disclosure and, ultimately, ensure a defendant's constitutional rights are better preserved.[39]

II. PROSECUTOR'S DUTY TO DISCLOSE: THE MATERIAL EVIDENCE STANDARD

A. *Special Role of the Prosecutor to Ensure a Fair Trial*

The prosecutor's first and foremost responsibility is to administer justice.[40] The prosecutor is placed in a unique position in regard to the adjudication process.[41] He possesses substantial authority over all aspects of a criminal proceeding, especially with regard to evidence.[42] As a result, he has the dual responsibility to ensure that the guilty shall not escape and the innocent shall not suffer.[43] A criminal prosecutor is called to heightened responsibilities because "[he] 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."[44] Thus, a prosecutor's role in a criminal prosecution is not to win a case, but rather, to ensure justice shall be done.[45]

In regards to disclosing material evidence, the Supreme Court has consistently stressed that the prosecutor has a constitutional duty to ensure the accused receives a fair trial.[46] Because of his control over evidence,

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37. *See infra* Part IV.A.

38. Burke, *supra* note 22, at 509.

39. *See id.* at 509–11.

40. Berger v. United States, 295 U.S. 78, 88 (1935).

41. *Id.*

42. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

43. *Berger*, 295 U.S. at 88.

44. *Id.*

45. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); ABA STANDARDS, *supra* note 11, § 3-1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict.").

46. U.S. CONST. amend. XIV, § 1; United States v. Agurs, 427 U.S. 97, 110–11 (1976) ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' This description of the prosecutor's duty illuminates the standard of materiality that governs his obligation to disclose exculpatory evidence." (internal citation omitted)); Brady v. Maryland, 373 U.S. 83, 87–88 (1963) ("We now hold 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. . . . 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.").

only the prosecutor can know what evidence is undisclosed.[47] As a result, he has the sole responsibility to determine when disclosure is needed.[48] "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."[49]

B. *The Duty to Disclose: The Material Evidence Standard and Its Evolution*

The Supreme Court first articulated a prosecutor's constitutional duty to disclose material evidence in *Brady v. Maryland*.[50] The Court set forth a standard that required a prosecutor to turn over "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[51] The Court held that suppression of material evidence violated the Due Process Clause of the Fourteenth Amendment.[52]

Since *Brady*, the Supreme Court has elaborated on the prosecutor's obligation to disclose material evidence.[53] In its most recent case, *Strickler*,[54] the Court extracted the most relevant concepts from its five previous cases[55] and provided a concise summary of what each contributed to the material evidence standard:

> [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. . . . [T]he duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence. Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

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47. Kyles v. Whitley, 514 U.S. 419, 437 (1995). Although there may be instances where the police may not pass along all the evidence to the prosecutor, in most instances, a prosecutor receives all the evidence the police uncover. Therefore, for the purposes of this Note, it will focus on the practical realities rather than the exception where the police hide unfavorable evidence from prosecutors.

48. *Id.*

49. Berger v. United States, 295 U.S. 78, 88 (1935).

50. *Brady*, 373 U.S. at 87.

51. *Id.* In *Brady*, the prosecution turned over witness statements at the defense's request but withheld particular testimony of a companion who confessed to the actual killing. Only after the accused was tried, convicted, and sentenced was the confession discovered. *Id.* at 84.

52. *Id.* at 87.

53. Strickler v. Greene, 527 U.S. 263, 281–82 (1999); Kyles v. Whitley, 514 U.S. 419, 437 (1995); United States v. Bagley, 473 U.S. 667, 682–84 (1985); United States v. Agurs, 427 U.S. 97, 110–11 (1976); Giglio v. United States, 405 U.S. 150, 153–54 (1972).

54. *Strickler*, 527 U.S. 263.

55. *Id.* at 280–81; *Kyles*, 514 U.S. at 437; *Bagley*, 473 U.S. at 676; *Agurs*, 427 U.S. at 110–11; *Brady*, 373 U.S. at 87; Berger v. United States, 295 U.S. 78, 88 (1935).

> proceeding would have been different." Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."[56]

After retracing the evolution of the material evidence standard, the *Strickler* Court articulated a three-prong standard.[57] To qualify as material evidence: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) the evidence must have been willfully or inadvertently suppressed by the state; and (3) "prejudice must have ensued."[58]

The Court, however, did not stop there. For the first time in thirty-five years, the Court added a bright-line rule to the standard.[59] The Court determined that if a witness's trial testimony differs from his initial perceptions recorded in undisclosed documents, it would establish the material character of the documents.[60] *Strickler* represented a substantial step forward because it enumerated a clear guideline that brought greater substance to the Court's standard.[61] Although this is a step in the right direction, prosecutors still need additional bright-line rules to provide guidance for discharging their *Brady* obligations.

C. *FRCRP: Discovery Rule 16 Omits the Material Evidence Standard*

Rule 16 of the Federal Rules of Criminal Procedure governs discovery in federal criminal cases.[62] In general, Rule 16 only requires prosecutors to disclose certain limited information at a defendant's request: oral statements made by the defendant,[63] summaries of expert testimony,[64] copies of documents the government intends to use at trial,[65] and reports of scientific tests and medical examinations.[66] Although these minimal enumerated items represent a gradual expansion of the disclosure obligation, significant flaws still exist in the rule.[67] First, this list of

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56. *Strickler*, 527 U.S. at 280–81 (quoting *Kyles*, 514 U.S. at 437–38; *Bagley*, 473 U.S. at 682; *Brady*, 373 U.S. at 87 and citing *Bagley*, 473 U.S. at 676; *Agurs*, 427 U.S. at 107).

57. *Id.* at 281–82.

58. *Id.*

59. *See id.* at 295–96.

60. *Id.*

61. *See id.*

62. FED. R. CRIM. P. 16 (2009).

63. *Id.* at 16(a)(1)(A).

64. *Id.* at 16(a)(1)(G).

65. *Id.* at 16(a)(1)(E).

66. *Id.* at 16(a)(1)(F).

67. Am. Coll. of Trial Lawyers, *supra* note 20, at 102 ("Although Rule 16 has gradually expanded the scope of discovery required in criminal cases, it still does not require the government to timely disclose to the defendant favorable information that is material either to guilt or

discovery items is rather limited[68] and fails to adequately address the considerable gaps in the standard.[69] Secondly, Rule 16 completely omits the *Brady* material evidence standard.[70] Even though the defense may try to file a *Brady* motion to permit additional discovery beyond Rule 16, the elusive scope of the standard often fails to unearth evidence critical to the defense.[71]

Despite Rule 16's limited contribution to the standard, the Criminal Rules Advisory Committee has repeatedly considered whether to include a *Brady* amendment into the Federal Rules.[72] Since the Supreme Court decided *Brady* in 1963, the Criminal Rules Advisory Committee has addressed changes to Rule 16 over forty separate times.[73] Twenty-two of those occasions dealt directly with a *Brady* amendment.[74] Of the *Brady* proposals, five occurred within the first five years of the Court's *Brady* opinion.[75] The remaining seventeen occurred in the last six years to date.[76]

1. The Recent History: 2004–2010

After an affirmative decision to keep a *Brady* amendment out of Rule 16 in 1968, the Advisory Committee revisited the proposal for the first time in 2004.[77] This resulted in the establishment of a subcommittee

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sentencing. This limited disclosure makes the defense of a federal criminal case especially difficult, considering the government's ability to control the flow of information to the defendant . . . and the inability of the defense to compel disclosure.").

68. *Id.* at 101 ("Unlike the Federal Rules of Civil Procedure which provide for wide-ranging discovery and disclosure in the form of depositions, disclosure statements, requests for production, inspections and requests for admissions, interrogatories and expert reports, the Federal Rules of Criminal Procedure afford the defendant extremely limited access to government information.").

69. *See id*. at 104 ("[The rule's] disclosure obligations neither define the nature and/or scope of favorable information, nor require consultation with law enforcement officers, nor do they provide clear pre-trial or pre-plea deadlines for disclosure.").

70. *See* FED. R. CRIM. P. 16 (2009).

71. Am. Coll. of Trial Lawyers, *supra* note 20, at 102–03. ("In addition to disclosure under Rule 16, criminal defense lawyers can try to obtain *Brady* and *Giglio* material by filing a motion with the court. . . . *Brady-Giglio* motions, however, often fail to unearth evidence that is critical to the defense [because] [f]ederal prosecutors, largely focusing on the word 'exculpatory,' have interpreted the *Brady* disclosure obligation in a variety of ways.").

72. *See Subcomm. on Rule 16 to the Advisory Comm. on the Criminal Rules, Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States*, 111th Cong., Criminal Rules Committee Considered Proposed Amendment to Rule 16, Table of Contents (Comm. Print 2009) [*History of Rule 16 Amendments*], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Table%20of%20Contents.pdf (summarizing previous committee meetings).

73. *Id.*

74. *Id.*; *see infra* notes 99 and 101 and accompanying text.

75. *History of Rule 16 Amendments*, *supra* note 72.

76. *Id.*

77. Judicial Conf. Advisory Comm. on the Rules of Criminal Procedure, Meeting Minutes 8 (Oct. 24–25, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

dedicated to the efforts associated with a *Brady* amendment.[78] "At the subcommittee's request, the Federal Judicial Center compiled a survey of local rules, administrative orders, and relevant case law . . . ."[79] In April of 2005, the subcommittee used the information from the study to present a preliminary draft of a *Brady* amendment to the Advisory Committee.[80] The Advisory Committee subsequently voted 8-to-3 to endorse the amendment in principle but asked the subcommittee to continue its drafting efforts.[81]

In April 2006, the Advisory Committee temporarily suspended its consideration of an amendment.[82] The Advisory Committee wanted to give the drafters of the United States Attorneys' Manual (USAM) an opportunity to make the proposed change that would address a prosecutor's obligation to disclose material evidence.[83] At its next meeting in September of 2006, frustrated with the slow progress of the USAM amendment, the Advisory Committee resumed its consideration even though the USAM process had not yet finished.[84] The Advisory Committee approved a proposed amendment to Rule 16 codifying *Brady* and sent the proposal to the Standing Committee on Federal Rules of Practice and Procedure, recommending that it be published for public comment.[85] A month later, the Attorney General approved the USAM amendment, and although the Standing Committee recognized the positive benefits of a national uniform rule, it did not publish the amendment for public comment because it wanted to give the USAM changes enough time to have a measureable effect.[86] The Standing Committee recommended that the Advisory Committee reexamine the language of the proposed amendment to ensure that it did not create too great a burden on the government.[87] It also recommended that the Advisory Committee review the experiences of the courts with local rules on the same subject.[88]

In April of 2007, the Advisory Committee requested an updated study of local rules, administrative orders, and case law from the Federal Judicial

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Judicial Conf. Advisory Comm. on the Rules of Criminal Procedure, Meeting Minutes 10 (Oct. 26–27, 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

83. *Id.*

84. Judicial Conf. Advisory Comm. on the Rules of Criminal Procedure, Meeting Minutes 1–7 (Sept. 5, 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

85. *Id.*

86. *Id.*; Judicial Conf. Comm. on Rules of Practice and Procedure, Report Summary 9–10 (Mar. 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

87. Judicial Conf. Comm on Rules of Practice and Procedure, Report Summary 29 (Sept. 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf. .

88. *Id.*

Center.[89] After a brief two-month study, the Advisory Committee presented the research and a proposed amendment to the Standing Committee at its June 2007 meeting.[90] The Standing Committee opposed immediate publication but did not reject the amendment entirely.[91] It concluded, however, that further study should be methodically pursued.[92] It recommended that the Advisory Committee research the impact of USAM changes and investigate the experience of courts governed by local orders similar to the proposed *Brady* amendment.[93]

After eighteen months of little discussion, the most recent push for a *Brady* amendment came from the Honorable Emmet G. Sullivan in April 2009.[94] Judge Sullivan witnessed significant Department of Justice (DOJ) abuses of the *Brady* standard while presiding over *United States v. Stevens*.[95] In October 2009,[96] the Advisory Committee considered a request from Judge Sullivan to amend Federal Rule 16.[97] The matter was referred to the newly reconstituted subcommittee on Rule 16 for further study, and a report was delivered to the Advisory Committee in April 2010.[98] At the Advisory Committee's meeting on April 15–16, 2010, the Committee deferred action on enacting a *Brady* amendment for a later date.[99]

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89. Judicial Conf. Advisory Comm. on the Rules of Criminal Procedure, Meeting Minutes 3 (Apr. 16–17, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf; *see also* LAURAL HOOPER & SHELIA THORPE, FED. JUDICIAL CTR., *BRADY V. MARYLAND* MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 1 (2007).

90. Judicial Conf. Advisory Comm. on the Rules of Criminal Procedure, Meeting Minutes 3 (Apr. 16–17, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf; Judicial Conf. Comm. on Rules of Practice and Procedure, Meeting Minutes 31–39 (June 11–12, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

91. Judicial Conf. Comm. on Rules of Practice and Procedure, Meeting Minutes 39 (June 11–12, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf

92. *Id.*

93. Judicial Conf. Comm on Rules of Practice and Procedure, Report Summary 29 (Sept. 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

94. Letter from Emmet G. Sullivan, U.S. Dist. Judge, D.C., to Richard C. Tallman, Chairman, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR%20Suggestions%2009/09-CR-A-Suggestion-Sullivan.pdf.

95. *Id.*

96. Letter from Richard C. Tallman, Chairman Judicial Conference Advisory Comm. on the Rules of Criminal Procedure, to Emmet G. Sullivan, U.S. Dist. Judge, D.C. (June 2, 2009), *available at* http://www.mainjustice.com/files/2009/07/tallman-ltr-to-sullivan.pdf.

97. Letter from Emmet G. Sullivan to Richard C. Tallman, *supra* note 94.

98. ADVISORY COMM. ON CRIMINAL RULES, CRIMINAL RULES DOCKET 12, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010-CRDocket.pdf.

99. *Id.*; *see also* Judicial Conf. Advisory Comm. on Criminal Rules, Meeting Minutes 7–8 (Apr. 15–16, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Min

Currently, history is repeating itself as the most recent push for a *Brady* amendment to the Federal Criminal Rules has stalled again.

One thing is clear from the present history: contentious and consequential issues still exist in regard to a *Brady* amendment.[100] As for the DOJ's position, its new 2010 policy, enacted on January 4, 2010, adopts a "multi-faceted approach" to the issue, again illustrating both the DOJ's strong opposition to a codified rule and its long held belief that internal guidance will work properly to protect defendants from prosecutorial abuse or bias.[101] Others in opposition believe there is insufficient statistical evidence to require an external and independently enforced amendment to the Rule.[102] Supporters of the amendment, however, respond that empirical data is difficult to collect.[103] Many times, the defense will never discover that material evidence has been withheld.[104] In addition, they argue that an amendment would help ensure consistent application of the disclosure obligation.[105] Of primary importance, an amendment must provide clear guidance as to prosecutors' discretion.[106]

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utes/CR2010-04-min.pdf.

100. Judicial Conf. Advisory Comm. on Criminal Rules, Meeting Minutes 5 (Oct. 1–2, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

101. Letter from Paul J. McNulty, Deputy U.S. Attorney Gen., to David F. Levi, Judge, U.S. E. Dist. Court of Calif. 5 (June 5, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf; *see* Memorandum from David G. Odgen, Deputy Attorney Gen., to U.S. Dep't of Justice Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html. The DOJ's "multi-faceted approach" emphasizes "training, guidance, strong leadership, and more uniformity." Judicial Conf. Advisory Comm on Criminal Rules, Meeting Minutes 6 (Oct. 13, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR10-2009-min.pdf. The Department's approach includes a requirement that all federal prosecutors undergo discovery training, a requirement that each U.S. Attorney's Office designate an expert on discovery to advise prosecutors on individual cases, and the creation of a new position will be to oversee all of these changes. *Id.* The DOJ has also talked about creating an on-line database of material on *Brady* issues and is considering developing a manual to exclusively outline disclosure obligations. *Id.*

Although the DOJ's opposition to a codified rule can be inferred from its new 2010 policy, the Department has explicitly objected to a codified rule for years. *See, e.g.*, *id.* at 6; *History of Rule 16 Amendments*, *supra* note 72, at 2–3.

102. Advisory Comm. on Fed. Rules of Criminal Procedure, Meeting Minutes 7 (Oct. 30, 2004), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

103. Judicial Conf. Comm. on Rules of Practice and Procedure, Meeting Minutes 37 (June 11–12, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

104. *Id.*

105. Letter from Paul J. McNulty, Deputy U.S. Attorney Gen., to David F. Levi, Judge, U.S. E. Dist. Court of Calif. 11 (June 5, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

106. Judicial Conf. Comm. on Rules of Practice and Procedure, Meeting Minutes 35 (June 11–12, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf

Not only would courts be more likely to enforce an objectively enumerated Federal Rule of Criminal Procedure, supporters argue, but without a new codified rule, prosecutors may treat their current case law-based disclosure obligations as of secondary importance to the explicit discovery obligations found in Rule 16.[107]

Spurred by the Advisory Committee reconvening to debate the issue once again,[108] this Note attempts to explain the inherent structural problems of the current standard, suggest the principal ways codification would address some of the structural issues, and offer some effective solutions as to how that codification could take place.

III. UNCLEAR LINES: A STANDARD WITHOUT RULES

At the heart of the current problem, Rule 16 and the Supreme Court fail to provide guidance to prosecutors for applying the *Brady* standard.[109] Individual prosecutors are left to their own judgment to fill in the gaps of the standard by determining what constitutes "material evidence."[110] Without clear guidelines, prosecutors determine materiality issues by relying heavily on a case-specific analysis.[111] An exclusive case-specific analysis,[112] what Professor Jeffrey Rachlinski terms "an insider perspective,"[113] leaves prosecutors more susceptible to the cognitive biases

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107. Am. Coll. of Trial Lawyers, *supra* note 20, at 104 ("In the absence of a procedural rule containing a clear definition of *Brady* material, requiring prosecutors to consult with law enforcement officers, and mandating a firm compliance timetable, the duty to disclose favorable information has become blurred and, at best, of secondary importance to the explicit discovery obligations and procedures found in Rule 16.").

108. *Justice Department Opposes Expanded* Brady *Rule*, MAIN JUSTICE, Oct. 15, 2009, http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-brady-rule/ ("The advisory committee meets again in April and could vote to open Sullivan's proposal to six-month public comment period. The standing committee meets in January, at which time the department is expected to provide a fuller picture of its efforts.").

109. Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 635 (2007) ("The lack of written policies for exercising discretion and the lack of transparency in the process are breeding grounds for inconsistency and potential arbitrariness in the way prosecutors in an office approach their work.").

110. Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 562–63 ("Irrespective of all these rules [Rule 16 and the Constitution], gaps exist with respect to the prosecutor's duty to provide discovery. . . . [P]rosecutors fill in the gap by considering broader concerns for a fair and expeditious process.").

111. Joy, *supra* note 109, at 636 ("Without written policies, the prosecutors making these decisions are left to determine, on their own, the proper way of handling a situation . . . .").

112. "Exclusive case-specific analysis" in this context is an approach to determining materiality issues by focusing on the relative comparison of in-case facts to one another while giving little attention to the comparison of facts across cases. A prosecutor that uses case-specific analysis will evaluate evidence within the context of the other facts in the case. This approach is highly associated with determining prejudice in material evidence cases. In contrast, an "across-case comparison" is an approach to determining materiality issues by focusing on the comparative similarities among facts from other cases. *See generally infra* note 111.

113. Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79

that affect disclosure decisions.[114]

A. *Cognitive Bias Results in Under-Disclosure*

Cognitive bias inherent in the human thought process presents a dangerous impediment to a defendant's access to material evidence.[115] Problematically, the current material evidence standard fails to counteract the known presence of cognitive bias inherent in its current structure.[116] As a result, the criminal justice system risks the wrongful conviction of innocent defendants.[117]

Studies in human nature reveal that the cognitive biases in the decisionmaking process not only make it difficult to identify materiality issues, but once material issues are identified, cognitive bias leads to unintentional undervaluing of the evidence.[118] Confirmation bias,[119] selective information processing,[120] and resistance to cognitive dissonance[121] are all forms of cognitive bias that are amplified by the current standard. The present standard, as it stands, unnecessarily subjects innocent defendants to a process that provides no correction for these known cognitive biases.[122]

OR. L. REV. 61, 65–66 (2000).

114. *Id.* "This insider perspective makes it difficult to identify cognitive illusions that might affect judgment." *Id.* Psychologists recognize a distinction between insider perspectives and outsider perspectives in that cognitive bias has less of an impact on outsider perspectives: "[P]eople can more easily identify cognitive biases when they treat a decision-making problem as one of a class of similar problems that many other people face than when they treat it as a unique problem that they face alone." *Id.* at 65.

115. *See* Burke, *supra* note 22, at 494 ("[The] materiality standard amounts not simply to a challenging doctrine, under which prosecutors are just as likely to misapply the standard in one direction as the other. Instead, the doctrine acts upon cognitive biases from which prosecutors, like all human decision makers, suffer. . . . [I]n applying *Bagley*'s materiality standard, [prosecutors] will do so by systematically underestimating, not overestimating, materiality.").

116. *Id.* at 499 ("[T]he Court's standard of materiality invites prosecutors to systematically undervalue it. Because of cognitive biases, prosecutors will overestimate the strength of their case in the absence of the evidence at issue, underestimate the potentially exculpatory value of the evidence, and therefore fail to recognize materiality even when it exists.").

117. *Id.* at 510–11 ("The *Brady* doctrine has failed to accomplish its objective of providing defendants access to material exculpatory evidence, and the costs of that failure are borne . . . by the innocent.").

118. *Id.* at 499.

119. Burke, *supra* note 22, at 495. For a detailed analysison the effects of confirmation bias, see Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 142–43 & n.96 (2011).

120. Burke, *supra* note 22, at 495 ("Selective information processing is the tendency for people to accept at face value information that is consistent with their existing beliefs, while devaluing inconsistent information.").

121. *Id.* at 495–96.

122. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 322 ("But the innateness of these cognitive biases . . . demands that we become aware of [the] cognitive processes and the tunnel vision they produce, and that we search for ways to neutralize them. Unfortunately, the criminal justice system

1. Confirmation Bias

Confirmation bias affects a prosecutor's collection of evidence.[123] Confirmation biases are errors in information processing that lead humans to collect evidence in a manner that tends to confirm their hypotheses, independently of whether they are true or not.[124] Confirmation bias research reveals that human reasoning unintentionally favors evidence that confirms one's working hypothesis.[125] Thus, in the course of acquiring knowledge, humans subconsciously seek information in a way that leads them to collect data that reflect one's viewpoint.[126] Professor Alafair S. Burke explains the impact of confirmation bias on a prosecutor:

> When a prosecutor initially reviews a case file, she does so to test the hypothesis that the defendant is guilty. Because of confirmation bias, she is likely to search the investigative file for evidence that confirms the defendant's guilt to the detriment of any exculpatory evidence that might disprove the working hypothesis. She may, for example, take note of the defendant's confession without questioning the circumstances under which it was elicited or a lack of self-verifying detail within the confession. She might search for a positive identification by an eyewitness without scrutinizing the reliability of the procedure used to obtain the identification.[127]

While simple awareness of cognitive bias may ease its effect, it is impossible to wholly eliminate cognitive bias from the decisionmaking process.[128]

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fails to do that. Rather, both institutional pressures inherent in the adversary system and explicit policy choices reinforce and exacerbate [their] natural tendencies . . . .").

123. Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y. & L. 315, 316–18 (2009).

124. *See* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, *in* STEREOTYPES AND PREJUDICE: ESSENTIAL READINGS 212, 212 (Charles Stangor ed., 2000); Burke, *supra* note 22, at 495.

125. Burke, *supra* note 22, at 495.

126. *Id.* ("For example, researchers have found that subjects asked to determine whether a person is an extrovert ask questions such as, 'What would you do if you wanted to liven things up at a party?' Any answer to this question could only support, and never disprove, the theory that the person being questioned was an extrovert.").

127. *Id.*

128. Findley & Scott, *supra* note 122, at 371 ("The challenge is [that] the cognitive biases that contribute to the problem are not easily suppressed by self-awareness, training, or practice. Unfortunately, research suggests that merely informing people about a cognitive bias, or urging a person to overcome the bias, is to some degree ineffective."); Rachlinski, *supra* note 113, at 99 ("The bias cannot be eliminated by warning people about the influence of the bias.").

2. Selective Information Processing

"Once the prosecutor has conducted a search of the file and determined that the defendant is guilty, he becomes subject to selective information processing. Selective information processing is the tendency of people to accept at face value information that is consistent with their existing beliefs, while devaluing inconsistent information."[129] As Burke describes, if a prosecutor believes that a defendant is guilty, she will unintentionally "give more weight to evidence that buttresses her existing beliefs than to contradictory evidence."[130] Selective information processing reinforces existing beliefs by the subconscious selective favoring of information consistent with those beliefs.[131] "In other words, [a prosecutor] will accept at face value any new inculpatory evidence, [such as] the testimony of an additional witness against the defendant, but she is likely to cast aside potentially exculpatory evidence as unreliable or irrelevant, such as evidence suggesting that the witness may be biased."[132]

3. Cognitive Dissonance

"A prosecutor's evaluation of [material evidence] may also be skewed by a resistance to cognitive dissonance."[133] The cognitive dissonance literature demonstrates that people have an instinctive drive to reduce dissonance by seeking ways to justify or rationalize their beliefs in light of contrary evidence.[134] Burke suggests:

> [H]ow this phenomenon might apply to a prosecutor who [brought] charges against a defendant only to be confronted later with evidence suggesting the defendant's innocence. To avoid the cognitive dissonance . . . [a] prosecutor is likely to discount the exculpatory value of the new evidence and overestimate the strength of her original case against the defendant.[135]

Cognitive dissonance theory suggests that humans will rationalize and justify existing beliefs even in light of explicit evidence to the contrary.[136]

As this research suggests, a completely objective analysis is virtually impossible due to cognitive human behavior.[137] Cognitive bias

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129. Burke, *supra* note 22, at 495.

130. *Id.*

131. Jane L. Risen & Thomas Gilovich, *Informal Logical Fallacies*, *in* CRITICAL THINKING IN PSYCHOLOGY 110, 121 (Robert J. Sternberg, Henry L. Roediger III & Diane F. Halpern eds., 2007).

132. Burke, *supra* note 22, at 495.

133. *Id.*

134. *Id.* at 495–96.

135. *Id.* at 496.

136. *Id.* at 495–96.

137. Findley & Scott, *supra* note 122, at 307–08. In referring to the product of these cognitive

substantially impacts prosecutorial discretion.[138] Not only does cognitive bias affect how prosecutors gather information, but it also affects what weight they give to the information they collect, and subsequently, how they instinctively rationalize and justify their existing beliefs even in light of explicit contrary evidence.[139] Ultimately, because our present material standard fails to recognize or counteract these cognitive biases, the current structure invites cognitive error.[140] Because of cognitive biases, when prosecutors err in applying the standard, they tend to underestimate, not overestimate, materiality.[141]

B. *Uncovering Under-Disclosure: The Sources of Cognitive Bias*

As noted, the structure of the current system leaves wide discretion in the hands of the prosecutor.[142] In applying a standard, broad discretion when combined with a lack of guidance results in a lack of uniformity.[143] In the absence of uniform disclosure rules across circuits, prosecutors are essentially the ones who make the discretionary case-by-case determination of whether evidence is material.[144] Therefore, the prosecutors, rather than

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biases as "tunnel vision," Professors Keith Findley and Michael Scott note: "The tendency toward tunnel vision is . . . innate; it is part of our psychological makeup. . . . [It] is so ubiquitous, even among well meaning actors in the criminal justice system." *Id.* The undeniable presence of these cognitive biases is so pervasive that Findley and Scott term the phenomena "[t]he inevitability of tunnel vision." *Id.* at 396.

138. *See id.* at 307–08, 395–97; Rachlinski, *supra* note 113, at 102. For empirical data on the subject, see O'Brien, *supra* note 123, at 318–31.

139. Burke, *supra* note 22, at 494–96. For further discussion of how a prosecutor's office environment magnifies the effect of cognitive bias on individuals, see Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 310 (2006) (arguing that "group dynamics" of a prosecutor's office exacerbate individual cognitive bias).

140. *See* Burke, *supra* note 22, at 494–96; Findley & Scott, *supra* note 122, at 395–97; Rachlinski, *supra* note 113, at 102; *see also* O'Brien, *supra* note 123, at 316–18.

141. Burke, *supra* note 22, at 499 ("The *Brady* doctrine has failed to live up to its vision of providing defendants access to exculpatory evidence. . . . [T]he Court's standard of materiality invites prosecutors to systematically undervalue it. Because of cognitive biases, prosecutors will overestimate the strength of their case in the absence of the evidence at issue, underestimate the potentially exculpatory value of the evidence, and therefore fail to recognize materiality even when it exists.").

142. *See* Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis —Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 87 (2008) ("Federal prosecutors wield broad discretion with little guidance . . . .").

143. Joy, *supra* note 109, at 630 ("Under *Brady* . . . the prosecutor has the discretion to determine *what* constitutes exculpatory evidence and *when* to disclose it. This has led to inconsistent decisions with some prosecutors turning over to defendants material other prosecutors fail to disclose . . . ."). *See generally* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1517 (2000) ("In not providing guidance that is specific to a case . . . consistency in the decision-making process is not achieved.").

144. Joy, *supra* note 109, 630–31 ("Under *Brady* . . . the prosecutor has the discretion to determine *what* constitutes exculpatory evidence and *when* to disclose it . . . . The prosecutor makes these decisions secretly, usually based on personal judgment, and those decisions are not subject to

the courts, fill in the gaps of the material evidence standard.[145] With a plethora of cases available to choose from, it is easy to see how prosecutors in different jurisdictions with substantially similar facts can come to vastly different conclusions about whether evidence is material.[146] Even though factual consistencies across cases exist,[147] rather than compiling a cohesive body of law, prosecutors narrowly focus on the word "exculpatory," interpret *Brady* in a variety of ways, and selectively choose cases to define the lines of the standard for the purpose of their instant case.[148] Accordingly, the material evidence standard suffers from a lack of coherence, consistency, and uniformity in its application.[149] The lack of uniformity and the absence of objective guidelines leave defendants vulnerable to the effects of cognitive bias on the decisionmaking process.[150]

C. *Attacking the Source: Adding an Across-Case Component to Case-Specific Analysis*

The inherent problem in the structure of the current standard is its over-emphasis on a case-specific analysis.[151] Rather than encompassing factual

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any established oversight mechanisms.").

145. Levenson, *supra* note 110, at 562 (describing a prosecutor's gap-filling function in deciding what charges to bring). "[G]aps exist with respect to the prosecutor's duty to provide discovery." *Id.* "[T]he role of the prosecutor is to fill the gaps . . . [by] exercising their judgment." *Id.* A "clear[ ] example of a prosecutor's responsibility to fill in the gaps in the rules is a prosecutor's duty to provide discovery to the defense." *Id.*

146. Joy, *supra* note 109, at 630.

147. *See infra* Part IV.

148. Am. Coll. of Trial Lawyers, *supra* note 20, at 94, 103–04 ("With neither a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently . . . . Federal prosecutors, largely focusing on the word 'exculpatory,' have interpreted the *Brady* disclosure obligation in a variety of ways. A number of prosecutors have interpreted *Brady* narrowly and believe that a prosecutor's *Brady* obligation is limited solely to turning over information that someone other than the defendant has confessed to the crime at issue. Many prosecutors do not focus on the critical language of the *Brady* decision, which requires disclosure of evidence that *tends to* exculpate or reduce one's penalty. Others, knowing of favorable evidence, have tried to predict its effect on the outcome of the case in deciding whether to disclose. Still others do not view *Giglio* or impeachment material as part of the *Brady* exculpatory disclosure obligation. And yet others have separated the timing of the disclosure of exculpatory or guilt-related evidence from the disclosure of mitigating or punishment-related evidence.").

149. *Id.*; Albert D. Brault & Timothy F. Maloney, Editorial, *A Standard for Fair Trials*, WASH. POST., May 17, 2009, at A23 ("A 2007 study by the Federal Judicial Center found widespread inconsistencies in how courts interpret which evidence is favorable to the accused, when it must be disclosed and how much effort prosecutors must make to find it."). *See generally* FED. JUDICIAL CTR., *supra* note 89, at 7–21.

150. *See supra* Part III.A; *see also* Burke, *supra* note 22, at 499; *supra* note 148 and accompanying text.

151. Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 470 (2009) (arguing that the current standard "fails to provide explicit guidance on the need to look at conduct beyond an examination of a specific set of facts" and as a consequence, the standard

concepts that can apply across cases to determine whether the evidence is material, the current standard leads prosecutors to exclusively compare facts in the case with other facts from the same case.[152] Rachlinski terms this tendency the "insider perspective."[153] A prosecutor who takes an "insider perspective" will over-emphasize case-specific analysis when examining whether evidence is material.[154] As Rachlinski explains, an "insider perspective" is an adoption of an inside view of a problem, where a person treats the decisionmaking process as a unique experience that she faces alone.[155] An "outsider perspective," on the other hand, takes an external, holistic view of a problem.[156]A person takes an "outsider perspective" when she treats a decisionmaking problem as one of a class of similar problems that many others face.[157] Applying these paradigms to the law, a prosecutor with an "insider perspective" places a heavy emphasis on case-specific analysis,[158] whereas a prosecutor with an "outsider perspective" places an emphasis on a comparative across-case analysis[159] when approaching materiality issues.

Obviously, a case-specific analysis is inherently necessary to the concept of materiality, especially with the materiality standard's emphasis on prejudice.[160] It is a necessary requirement because in order to be material, the evidence must be prejudicial.[161] In order to be prejudicial, the evidence must affect the outcome of the case.[162] To determine whether evidence affects the outcome of the case, the specific facts of a case have to be examined in relation to one another.[163] Even though this type of analysis is necessary, however, it is not sufficient when performed alone.[164]

Some commentators have recognized that when a prosecutor over-emphasizes case-specific analysis, he is most susceptible to cognitive

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suffers from a "one-dimensional consideration of a single case").

152. *Cf.* Rachlinski, *supra* note 113, at 66. *Id.* Other commentators have also recognized this inherent problem, although each has his or her own term to describe it. Findley & Scott, *supra* note 122, at 307–08, 349 (labeling the problem as "tunnel vision" to be resolved by implementing elements from "outside the tunnel"); Podgor, *supra* note 151, at 470 (referring to the problem as a "one-dimensional consideration of a single case" and extolling the need for additional rule-based safeguards against bias); Taslitz, *supra* note 139, at 325 (identifying the problem as "internal deliberation" to be cured by "external deliberations").

153. Rachlinski, *supra* note 113, at 66.

154. *See id.* at 100.

155. *Id.*

156. *See id.*

157. *See id.*

158. A case-specific analysis examines evidence by looking at facts within the case and comparing them to other facts in the same case.

159. An across-case analysis examines evidence by comparing the immediate case facts to the facts in other cases.

160. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

161. *Id.*

162. *Id.*

163. *Id.*

164. *See supra* note 148 and accompanying text.

bias.[165] Ultimately, an exclusive in-case comparison roots the prosecutor's discretion solely in relativity.[166] This type of exclusive case-specific analysis, therefore, eliminates the potential to identify factual concepts, situations, or patterns across cases that can bring objective guidelines to the standard.[167] Consequentially, an absence of objective guidelines increases the possibility that cognitive bias will creep into the decisionmaking process.[168] To ameliorate cognitive bias, therefore, the standard must also include an across-case comparison that can base discretion within objective guidelines.

Accordingly, an effective definition of material requires a two-step inquiry. First, the in-case inquiry must ask how the evidence relates to the other facts in the case. Second, an across-case inquiry must ask how the evidence relates to factual concepts and situations of other disclosure cases. This type of workable and effective concept of materiality provides clear guidance by grounding prosecutorial discretion in the objective markers of other cases and, subsequently, limits the effects of cognitive bias.

By introducing objective guidelines from across-case similarities, we are able to provide guidance to prosecutors. No longer would a prosecutor be left to his own discretion and focus exclusively on how in-case facts relate. Rather, he has objective markers on which to compare the facts of his case to the facts of other cases. Consequentially, the chance that the prosecutor can be unknowingly influenced by cognitive bias is reduced. Objective markers will help draw prosecutors' attention to material tendencies, and accordingly, will help counteract the cognitive bias that takes place when comparing, examining, and synthesizing in-case facts.

Currently, the present standard's prejudice requirement incorporates the case-specific analysis.[169] The across-case comparison, however, is not included in the present standard.[170] A codified *Strickler* three-prong standard that enumerates precedential-based, bright-line rules would effectively incorporate an across-case comparison. Therefore, by identifying and enumerating specific scenarios from the case law that are highly suggestive of materiality, we can accomplish this two-part inquiry to determine whether evidence is material.[171] We can create a set of enumerated objective rules that provides guidance to prosecutorial discretion by extracting the common principles across material evidence cases.[172]

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165. *See supra* note 152.
166. *See supra* note 152.
167. *Id.*
168. *Id.*
169. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).
170. *See id.*
171. *See infra* Part IV.
172. *See infra* Part IV.

IV. A NEEDED SOLUTION: PROVIDING CLEAR LINES FOR PROSECUTORIAL DISCRETION

A. *Bright-Line Rules Bring Guidance to the Standard*

Given cognitive bias concerns, Congress should institute bright-line rules for prosecutorial disclosure in future cases that mirror factual scenarios where the Supreme Court has already found similar evidence material.[173] A comprehensive review of the case law provides the types of situations that should trigger disclosure:

(1) Promises of immunity or favorable government treatment of witnesses;[174]
(2) Prior inconsistent statements of government witnesses regarding defendant's criminal conduct;[175]
(3) "Prior perjury or false testimony of government witness";[176]
(4) Monetary rewards or inducements of key government witnesses;[177]
(5) "Confessions to the crime in question by others";[178]
(6) Information reflecting bias or prejudice by government witness against defendant;
(7) "Witness statements that others committed crime in question";[179]

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173. There is recognition among commentators that the current standard is susceptible to cognitive bias because of an over-reliance on case-specific analysis and that inserting objective external elements would help ameliorate bias. *See supra* Part III.C.

174. Giglio v. United States, 405 U.S. 150 (1972) (finding that the prosecution's failure to disclose immunity promised to the government's crucial witness, which was relevant to his credibility, was a violation of due process and justified a new trial); Am. Coll. of Trial Lawyers, *supra* note 20, at 103 & n.57.

175. Am. Coll. of Trial Lawyers, *supra* note 20, at 103 & nn.58–59.

176. *Id.* at 103; *see* Kyles v. Whitley, 514 U.S. 419, 441–43 (1995) (finding a *Brady* violation when prosecution suppressed original statements given to police from its "two best witnesses," which differed drastically from the witnesses' testimony on the stand explaining the sequence of events, description of the killer, and the type of car with "detailed clarity"); United States v. Arnold, 117 F.3d 1308, 1318 (11th Cir. 1997); United States v. Alzate, 47 F.3d 1103, 1110–11 (11th Cir. 1995); DeMarco v. United States, 928 F.2d 1074, 1077 (11th Cir. 1991) (vacating defendant's conviction where the prosecutor failed to correct the government's essential witness's perjured testimony that he would receive nothing in exchange for his testimony); United States v. Stevens, 593 F. Supp. 2d 177, 178, 182 (D.D.C. 2009) (chronicling a pattern of government failure to turn over exculpatory evidence).

177. Banks v. Dretke, 540 U.S. 668, 674–78 (2004) (finding that the prosecution suppressed evidence about key witnesses status as a paid informant, which would have severely undermined his credibility); United States v. Bagley, 473 U.S. 667, 683–84 (1985) (reversing and remanding because the prosecution failed to disclose that the key witnesses were paid for their testimony); Am. Coll. of Trial Lawyers, *supra* note 20, at 103.

178. Am. Coll. of Trial Lawyers, *supra* note 20, at 103; *see also* Brady v. Maryland, 373 U.S. 83, 86 (1963) (finding that the prosecution's suppression of a confession by defendant's accomplice to the actual act of killing was a violation of due process).

179. Am. Coll. of Trial Lawyers, *supra* note 20, at 103; *see also* United States v. Robinson, 39

(8) "Information about mental or physical impairments of government witnesses";[180]

(9) "Inconsistent or contradictory examinations of scientific tests";[181] and

(10) Failure of witness to make positive identification of the defendant.[182]

These enumerated scenarios serve as the objective markers of the "outsider perspective." Enumerating these salient facts forces prosecutors to compare facts across cases. An across-case comparison counteracts the cognitive bias in the decisionmaking process. Accordingly, these enumerated scenarios bring the type of "outsider perspective"[183] that provides guidance to prosecutorial discretion.

If prosecutors are going to continue to play a crucial role in our criminal justice system, we need to recognize the structural weaknesses that prevent them from doing justice.[184] No matter how objectively one may try to analyze a situation, a mind is inherently biased in its analysis.[185] Therefore, we can better achieve justice by introducing objective guidelines and self-correcting restraints into an inherently biased cognitive process.[186] By using these enumerated scenarios as bright-line rules that require disclosure, the new standard would introduce the type of objectivity that would help mitigate the influence of cognitive biases on prosecutors' disclosure decisions.[187]

B. *A Codification Solution*

The Advisory Committee should recommend that Congress codify these enumerated scenarios into Rule 16 of the Federal Criminal Rules. Even if the enumerated scenarios are codified, however, it will be up to the Advisory Committee to determine what type of impact the enumerated

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F.3d 1115, 1118–19 (10th Cir. 1994) (upholding the order for a new trial when defendant was convicted of distributing cocaine but the government failed to disclose testimony from a codefendant that another former codefendant was the drug courier responsible for the crime).

180. Am. Coll. of Trial Lawyers, *supra* note 20, at 103 & n.60.

181. *Id.* at 103 & n.61.

182. Kyles v. Whitley, 514 U.S. 419, 445 (1995) ("[T]he effective impeachment of one eyewitness can call for a new trial . . . ."); Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (finding that reliability depends in part on the accuracy of prior description); Neil v. Biggers, 409 U.S. 188, 199–200 (1972) (finding that reliability of identification following impermissibly suggestive lineup depends in part on accuracy of witness's prior description); Am. Coll. of Trial Lawyers, *supra* note 20, at 103; *see also* Kyles, 514 U.S. at 444 (finding the identification by the prosecution's "two best witnesses" would have been severely undermined by use of the witnesses' suppressed statements).

183. *See* Rachlinski, *supra* note 113, at 66.

184. Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 395–96 (2009) (arguing that external deliberation is needed to check internal deliberation).

185. Burke, *supra* note 22, at 494–96.

186. *See id.*

187. *Id.* at 509.

across-case facts should have on the prosecutor's duty. The Committee could choose to treat them either: (1) as bright-line rules, which would require mandatory disclosure; (2) as prompting an in-camera discussion of materiality;[188] or (3) as favorable evidence, warranting disclosure if the the evidence is prejudicial.[189]

1. Bright-Line Rule Approach

This Note advocates for a bright-line rule approach. Under a bright-line rule approach, the presence of an enumerated scenario would qualify as a de facto finding of material evidence, necessitating disclosure.

The Committee should adopt the enumerated scenarios as bright-line rules, not because all enumerated scenarios in every situation will be material, but because something more than a pronouncement of the standard is necessary to limit the effects of cognitive bias on the criminal justice system.[190] In numerous other criminal procedure situations, there are clear preferences for objective rules instead of subjective standards.[191] For example, the Court has carved out per se rules rendering searches of automobiles reasonable, not because exigent circumstances would justify the government's conduct in every such case, but because of the belief that there will be exigent circumstances in enough of the cases to justify the rule.[192] This should also be the case with prosecutorial disclosure.[193] The justification for mandatory disclosure rules in federal criminal cases is that the mere presence of an enumerated scenario—whether actually material or not—has a substantial probability of affecting the outcome of a case, a probability that should not be left to the prosecutor alone to weigh.

Accordingly, a bright-line rule approach would effectively confine prosecutorial discretion within substantive, clear lines. Having these

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188. This Note will not discuss the relative advantages and disadvantages of an *in camera* solution. For a discussion of an in-camera approach, see Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984). In addition to an *in-camera* solution, other commentators have recommended countering cognitive bias through open-file discovery. For an approach that proposes a prophylactic rule requiring prosecution to turn over all evidence, see generally Burke, *supra* note 22. For further discussion of open-file discovery and its implementation in the State Criminal Rules of North Carolina, see Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

189. For an example of how enumerated scenarios can be used more clearly to define the favorable evidence prong of the material evidence standard, see Am. Coll. of Trial Lawyers, *supra* note 20, at 101–04.

190. *See* Burke, *supra* note 22, at 508; Bennet L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 (2006) ("[I]t is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations."); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1148 (2005) ("Withholding favorable evidence . . . seems to be the norm.").

191. Burke, *supra* note 22, at 508.

192. *Id.*

193. *Id.* at 509.

objective markers will counter inevitable bias in the human decisionmaking process. Not only would a bright-line rule bring needed clarity to disclosure, but it would also promote administrative efficiency and ensure a more consistent application of the current standard. Furthermore, while it may not deter all appellate litigation, it would undeniably reduce the number of appeals falling under these enumerated scenarios. Accordingly, requiring mandatory disclosure of an enumerated scenario will help eliminate prosecutors' disparate interpretations of the material evidence standard, it will provide prosecutors clear guidance of when evidence is "material," and ultimately, it will promote equal treatment of similarly situated defendants under the law.[194]

2. Heightened Favorable Evidence Approach

Alternatively, if the Committee decides not to adopt a bight-line rule approach, the Committee should adopt a heightened favorable evidence approach. Under a heightened favorable evidence approach, the presence of an enumerated scenario would qualify as a de facto finding of favorable evidence, requiring disclosure if prejudice exists.

Arguably, this approach provides more guidance than the current standard because it brings prosecutors' attention to specifically enumerated scenarios. At the same time, the enumerated scenarios fit hand and glove with the Court's understanding of favorable evidence as most recently articulated in *Strickler*.[195] Although material evidence and favorable evidence often have been used interchangeably, *Strickler* clearly distinguished the two.[196] In *Strickler*, the Court asserted that three components made up *Brady*'s material evidence standard.[197] The first of these components was favorable evidence.[198] Rather than another term for material evidence, favorable evidence is a distinct type of evidence.[199] When combined with prejudice and suppression, favorable evidence becomes material evidence.[200]

In essence, the Court in *Strickler* explained that favorable evidence tends to suggest materiality, but unlike material evidence, favorable evidence falls just short of indicating prejudice on its own.[201] With such an

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194. Am. Coll. of Trial Lawyers, *supra* note 20, at 115 (explaining that enumerated factors will provide the type of guidance to a prosecutor's disclosure decisions that "will help eliminate disparate interpretations of the *Brady* obligation by both prosecutors and defense counsel and give prosecutors clear guidance, thereby promoting equal treatment of similarly situated defendants under the law").

195. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

196. *Id.*

197. *Id.* The Supreme Court held that evidence is "material" if it is: (1) favorable to the accused; (2) willfully or inadvertently suppressed; and (3) prejudicial. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. From the Court's definition of material, favorable evidence is something much stronger than relevant evidence. The Court did not define the first prong of material evidence as simply any evidence. Its deliberate choice not to do so indicates that favorable evidence must be more than any

understanding in mind, the material standard would be clarified by listing the enumerated scenarios as instances of favorable evidence.[202] Just as favorable evidence tends to suggest materiality, the occurrence of an enumerated scenario also tends to suggest materiality.[203] Essentially, the presence of an enumerated scenario, though not material in itself, places the prosecutor on notice of likely material evidence. Therefore, listing numerous instances of favorable evidence in a codified rule would specifically alert a prosecutor to the most generic instances that normally require disclosure and would give a prosecutor a heightened awareness for when material evidence may be present. This heightened awareness would help prevent cognitive bias from creeping into a prosecutor's decisionmaking process by grounding a prosecutor's discretion in these enumerated across-case facts.[204] Although treatment of the enumerated scenarios as a heightened awareness of favorable evidence would not limit discretion as much as a bright-line rule, it still helps ameliorate the cognitive bias problem.[205] Moreover, by using the enumerated scenarios as heightened favorable evidence, *Brady*'s and *Strickler*'s distinction between material evidence and favorable evidence is preserved.[206]

Whether a bright-line rule or a favorable evidence approach is taken with regard to the enumerated scenarios, both make materiality a two-part inquiry and bring an "outsider perspective" to prosecutorial discretion.[207] In addition to case-specific analysis, both approaches force an across-case fact comparison, which helps ground prosecutorial discretion in objective markers.[208] In turn, these objective guidelines help counteract the present standard's inherent cognitive bias.[209] By limiting the cognitive bias that leads to unintentional under-disclosure, a codification of the enumerated scenarios will help criminal prosecutors better understand their disclosure responsibilities, will instill far greater confidence that the rules are being

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relevant piece of evidence. However, favorable evidence falls short of material evidence and is distinct from material evidence because it lacks an element of prejudice. Favorable evidence fails to indicate prejudice on its own. Accordingly, to the Court, favorable evidence is heightened evidence that tends to suggest materiality and is highly likely to be material, but on its own, is not material. *Id.*

202. *See supra* note 189.

203. *See supra* note 201.

204. *See supra* Part III.C.

205. *See supra* Part III.C.

206. Strickler v. Greene, 527 U.S. 263, 281–82 (1999); Brady v. Maryland, 373 U.S. 83, 87 (1963).

207. *See* Rachlinski, *supra* note 113, at 66.

208. Am. Coll. of Trial Lawyers, *supra* note 20, at 101 ("Because the prosecutor alone can know and weigh what is undisclosed, he is faced with serious and potentially conflicting responsibilities: to decide whether information is exculpatory, and, if so, whether and when it should be disclosed to the accused. [Therefore, a] rule of criminal procedure would provide welcome guidance in carrying out these responsibilities, and would thereby help to ensure fair trials and sentencing."); *see also supra* Part III.C.

209. *See supra* Part III.C.

consistently applied, and ultimately, will help ensure that wrongful convictions do not occur.[210]

V. CONCLUSION

The debate over a proposed amendment to Rule 16 resumed on October 14, 2009 and recently culminated on April 16, 2010 as the Criminal Rules Advisory Committee, again, declined to take any action to adopt a codified rule.[211] There can be no doubt, however, that the debate is not going away any time soon. Quite the opposite. The Advisory Committee has wrestled with the issue since the Supreme Court first articulated the material evidence standard in *Brady* over forty-five years ago and it will continue to contentiously debate the issue as long as prosecutorial non-disclosure pervades the criminal justice system.

It will not be long before the Criminal Rules Advisory Committee reconsiders the issue again. The next time around, however, the Advisory Committee will be faced with three new issues. First, the Advisory Committee will want to discover what impact the USAM amendments had on prosecutorial disclosure. Second, the Advisory Committee will have to evaluate the success of the DOJ's "multi-faceted approach" in addressing prosecutorial error.[212] And finally, the Committee will want to consider whether an empirical study of all ninety-four federal jurisdictions should be conducted.[213]

Indeed, the hope of the USAM addressing and providing a solution to prosecutor disclosure abuses was a compelling reason why the Advisory Committee put off an amendment proposal in 2006[214] and indefinitely suspended their consideration in 2007.[215] Although the Advisory Committee hoped to discover the USAM's effect by 2010, the Committee's discussions with the Federal Judicial Center revealed that measuring the efficacy of the USAM's changes does not easily lend itself to research using the Federal Judicial Center.[216] Since those discussions, however, new ideas for how to study the effect of the USAM's changes have surfaced.[217] Indeed, four years have passed since the DOJ's 2007

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210. Am. Coll. of Trial Lawyers, *supra* note 20, at 101.

211. Memorandum from Sara Sun Beale, Professor, to Criminal Rules Advisory Comm. (Sept. 20, 2009), *in* ADVISORY COMM. ON CRIM. RULES, MEETING IN SEATTLE, WASHINGTON ON OCTOBER 13–14, at 198 (2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR2009-10.pdf; *see supra* Part II.C.1.

212. *See supra* note 101 and accompanying text.

213. *See supra* notes 102–03.

214. Judicial Conf. Advisory Comm. on the Rules of Criminal Procedure, Meeting Minutes 44–45 (Apr. 3–4, 2006), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf.

215. *History of Rule 16 Amendments*, *supra* note 72, at 1;ADVISORY COMM. ON CRIMINAL RULES, *supra* note 98, at 12.

216. Judicial Conf. Advisory Comm. on Criminal Rules, Meeting Minutes 7 (Apr. 15–16, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR2010-04-min.pdf.

217. Professor Sara Sun Beale of Duke University has proposed that there is a way to measure

changes to the USAM, and the Advisory Committee will be quite interested in exploring these new methods to study the USAM's effect.[218] However, even if such a study could be undertaken, the results may not have a significant impact. Given the internal nature of the USAM and its lack of judicial enforceability,[219] it is highly likely that the Advisory Committee may still conclude that USAM internal "policy" should not supersede the adoption of a codified and independently enforced amendment to the Rule.

In addition to studying the impact of the USAM changes, the Advisory Committee will also want to evaluate the DOJ's "multi-faceted approach" to the issue of disclosure. Indeed, it appears that one of the primary reasons the Advisory Committee deferred action on an amendment in April 2010 was to consider whether the "ongoing efforts at the Department of Justice . . . [could] better address the discovery obligations of prosecutors."[220] While the DOJ's "multi-faceted approach" represents the most dramatic step taken by the government to date, the DOJ's failure over the last eight years to provide an effective internal solution provides little hope that another internal DOJ policy will eliminate non-disclosure inconsistencies or prosecutorial bias from occurring in the future. Accordingly, it is likely that the Advisory Committee may conclude that inter-departmental requirements, self-policing of violations, and federal prosecutors' "sincere desire to 'do the right thing'"[221] are not sufficient to deter this intrinsic problem.

Furthermore, one final element that will be important in the equation of a future amendment is whether the Advisory Committee believes an empirical study on the disclosure issue is even possible.[222] While the

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the efficacy of the USAM's affect on prosecutorial disclosure. Such a study would "emulate a model used by hospitals to improve the delivery of health care, whereby the hospital reviews the treatment of patients in cases selected at random." Judicial Conf. Advisory Comm on Criminal Rules, Meeting Minutes 6 (Oct. 13, 2009), *available at* http://www.uscourts.gov/uscourts/Rules AndPolicies/rules/Minutes/CR10-2009-min.pdf. Beale suggested the Department of Justice could have conducted this review in U.S. Attorneys' offices "to see if any undetected discovery problems had occurred." *Id.* at 6–7.

218. *See supra* Part II.C.1.

219. *See* Judicial Conf. Comm. on Rules of Practice and Procedure, Meeting Minutes 32 (June 11–12, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%2016%20Part%201.pdf ("[T]he committee would have no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases. [Furthermore,] the [USAM] is a purely internal document of the Department of Justice and not judicially enforceable.").

220. *See* Judicial Conf. Advisory Comm. on Criminal Rules, Meeting Minutes 6 (Apr. 15–16, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR2010-04-min.pdf.

221. *Id.*

222. *Id.* at 1–4. When the Standing Committee indefinitely suspended its consideration of a *Brady* amendment in 2007, it suggested that the Advisory Committee consider whether the continued study of the Rule 16 amendment proposal would be beneficial. *Id.* Primarily, it wanted the Advisory Committee to determine whether a comprehensive study of the current local rules was possible or beneficial. *Id.*

Federal Judicial Center has undertaken three previous studies, each were time pressured and underfunded.[223] Its report in 2007 was rather limited as acknowledged in the report itself.[224] Also, the Committee itself recognized that the 2010 survey would also be limited.[225] Accordingly, in April of 2010, the members of the Advisory Committee generally agreed that a more comprehensive survey that examined all ninety-four federal jurisdictions would be required to more effectively study the issue.[226] When this issue comes before the Advisory Committee again, the Advisory Committee will need to determine whether it believes that such a comprehensive study could be undertaken.[227] If the Advisory Committee believes that such an exhaustive study is possible and necessary, the proposed amendment may be years off, and its fate will rely extensively on that study. On the other hand, however, it may be more likely that the Advisory Committee concludes such a time-consuming, costly, and extensive review should not be undertaken.[228] No matter how under resourced or time pressured previous studies by the Federal Judicial Center have been, the one fact the 2004, 2007, and 2010 studies concluded is that prosecutorial suppression of material evidence is difficult to study empirically.[229] Many instances of suppression are never uncovered, and therefore, it is difficult to know the true impact of suppression.[230]

Although it remains to be seen what the Advisory Committee will conclude on these three issues, it is clear that circumstances have significantly changed over the last four years. First, *United States v. Stevens* brings a high-profile, emotionally sympathetic example to the present debate.[231] Not only is the case of Sentator Stevens, a well-known political figure, an example of the consequences at stake, but his mere involvement might hit close to home for decisionmakers. Indeed, his

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223. LAURAL L. HOOPER, JENNIFER E. MARSH & BRIAN YEH, FED. JUDICIAL CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6 (2004); *see infra* notes 224–27 and accompanying text.

224. HOOPER & THORPE, *supra* note 89, at 9.

225. When Judge Richard Tallman, the committee chairman, made his closing remarks on the issue to the Advisory Committee in October of 2009, he explained that due to the time required to perform the research of an empirical study, the Advisory Committee was unlikely to see a draft amendment for consideration at the next meeting in May 2010." Judicial Conf. Advisory Comm on Criminal Rules, Meeting Minutes 8 (Oct. 13, 2009), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR10-2009-min.pdf.

226. Judicial Conf. Advisory Comm. on Criminal Rules, Meeting Minutes 7–8 (Apr. 15–16, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR2010-04-min.pdf.

227. HOOPER, MARSH & YEH, *supra* note 227, at 2.

228. *Id.* at 12–14.

229. *See* HOOPER & THORPE, *supra* note 89, at 7–8; HOOPER, MARSH & YEH, *supra* note 224, at 4–5; *supra* note 227 and accompanying text.

230. *See* Judicial Conf. Comm. on Rules of Practice and Procedure, Meeting Minutes 37 (June 11–12, 2007), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Rule%20 16%20Part%201.pdf.

231. *See* Johnson & Wilber, *supra* note 4.

former colleagues will ultimately be the ones responsible for passing the Rule. Undoubtedly, his political prominence in relation to the issue will be influential. Secondly, his case seems to have brought an energized surge to amend led by prominent members of the federal judiciary.[232] Other circumstances will likely play a major role as well, for example, the impact of the new DOJ "multi-faceted approach,"[233] the increasing amount of commentators studying the issue,[234] and the case studies provided by states with full disclosure discovery laws.[235] States that require disclosure of all evidence will certainly provide another angle from which to evaluate the strengths and weaknesses of the current system and its alternatives.[236] Ultimately, one of the most significant changes this time around is that the current movement for an amendment seems to be refocusing the issue on unintentional cognitive bias rather than intentional abuse.[237]

To address the inherent structural flaws in the current rule and counteract the unintentional effects of cognitive bias, an amendment to Rule 16 needs to be adopted.[238] As this Note demonstrates, the absence of objective guidelines in the present discretionary standard permit a prosecutor to exclusively engage in the very type of case-specific analysis that is highly susceptible to cognitive bias.[239] Because of these cognitive biases, when prosecutors err in applying the standard, they tend to underestimate, not overestimate, materiality.[240] Accordingly, the present standard may cause even well-intentioned prosecutors to under-disclose material evidence.[241] This fact alone is the most compelling reason for a *Brady* amendment to date.[242] Unlike other causes of prosecutorial non-disclosure,[243] cognitive bias arguably poses the most serious threat to the criminal justice system because it not only affects every single prosecutor, but more importantly, human awareness alone cannot eliminate its

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232. *See* Letter from Emmet G. Sullivan to Richard C. Tallman, *supra* note 94.

233. Memorandum from Sara Sun Beale, *supra* note 211, at 198–99.

234. Joy, *supra* note 109, at 632–33 ("More recently, other commentators have argued that faulty judgment is more likely due to various unintentional cognitive biases that prosecutors have rather than assessing blame against the prosecutors.").

235. For a full discussion and analysis of North Carolina's open-discovery laws, see generally Mosteller, *supra* note 189.

236. *Id.*

237. Joy, *supra* note 109, at 632–33.

238. *See supra* Part III.B–C.

239. *See supra* Part III.C.

240. *See supra* Part III.A; *see also* Burke, *supra* note 22, at 494–96.

241. *See* Burke, *supra* note 22, at 494–96.

242. *See id.*

243. Joy, *supra* note 109, at 632–33 (reviewing the criticism, Professor Peter Joy believes that previous assertions of prosecutorial misconduct are attributable to one "of three institutional conditions: 'vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct'" (quoting Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400)).

presence.[244] Rather, fundamental structural changes are required.[245] Ultimately, across-case comparisons enumerated as objective rules in a codified standard will bring clarity to prosecutorial discretion.[246] These bright line rules will bring an "outsider perspective" to the analysis and will ameliorate the role that cognitive bias plays in the decisionmaking process.[247] Accordingly, such a solution would help ensure that "justice shall be done."[248]

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244. Findley & Scott, *supra* note 122, at 371 ("The challenge is difficult because the cognitive biases that contribute to the problem are not easily suppressed by self-awareness, training, or practice. Unfortunately, research suggests that merely informing people about a cognitive bias, or urging a person to overcome the bias, is to some degree ineffective.").

245. *See supra* Parts III & IV; *see also* Burke, *supra* note 22, at 499 ("Simply to ensure that defendants receive the material exculpatory evidence to which the Court believes they are entitled, the legal standards governing prosecutorial disclosure must be changed.").

246. *See supra* Part IV; *see also* Rachlinski, *supra* note 113, at 78 ("The logical adaptation to the influence of [cognitive] bias is a bright-line rule. A list of easily identifiable investments that are either *per se* legal or *per se* illegal would avoid the influence of the [cognitive] bias."); Joy, *supra* note 109, at 640–42 (concluding that a rule-like approach will provide certainty about the scope of the standard).

247. *See supra* Part III.C.

248. United States v. Agurs, 427 U.S. 97, 110–11 (1976) ("For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's [the government's] overriding interest that 'justice shall be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).