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Expert Analysis

Renewing Efforts to Enforce 'Brady v. Maryland'

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The repeated violations of the *Brady* rule by federal prosecutors, sometimes in high-visibility cases, resulting in indictment dismissals and conviction reversals, is both troubling and perplexing. The *Brady* obligation is clear and has been on the books since 1963. Why then are prosecutors so reluctant to abide by it? An overzealous desire to win by increasingly aggressive prosecutors may be the answer. Self-imposed restraint by the Department of Justice has not proven effective.

The recent spate of *Brady* violations has led to a renewed focus by a variety of institutions seeking a way to ensure better compliance with a rule designed to guarantee fairness and to protect the innocent.

The 'Brady' Standards

Brady v. Maryland held that a criminal defendant's due process rights are violated if the government withholds exculpatory evidence material to the defendant's guilt or punishment.[1] In *Giglio v. United States*, the Supreme Court expanded *Brady* to include impeachment evidence.[2] Accordingly, prosecutors have a constitutional duty to disclose exculpatory and impeachment evidence "favorable to an accused." This obligation stands regardless of whether the defendant has specifically requested the production of such evidence.[3]

Of course, prosecutors understand that even where evidence should have been disclosed because of its exculpatory or impeaching nature, a new trial will not be ordered unless the evidence is deemed material. As articulated by the U.S. Court of Appeals for the Second Circuit, evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Rule 16 of the Federal Rules of Criminal Procedure is the general criminal discovery rule but does not speak to 'Brady' or 'Giglio' material.

Upon appellate review, impeachment evidence is considered to have been material if the witness was the sole source of evidence linking the defendant to the crime or the witness' credibility was linked to a critical element of the prosecution's case.[4] Unfortunately, this standard often is applied incorrectly by lower courts and prosecutors to define *Brady* obligations in the pre-conviction and discovery phases of a proceeding.

Statutory Rules

Rule 16 of the Federal Rules of Criminal Procedure is the general criminal discovery rule but does not speak to *Brady* or *Giglio* material. This failure is compounded by the fact that local rules in many districts also do not fully address *Brady* and *Giglio*. According to a report issued by the Federal Judicial Center, of the 97 federal districts, only 37 reported having a relevant local rule, order, or procedure specifically governing disclosure of *Brady* material.

In the Second Circuit, only the District of Connecticut and Northern District of New York have such provisions. Within the 37 districts, the materials vary greatly with respect to: 1) the type of information defined as *Brady* material; 2) whether the information is disclosed automatically or only upon request; 3) the timing of the disclosure; 4) whether the government has a continuing duty to disclose; and 5) whether sanctions for failure to disclose *Brady* materials are available.[5] Of course, these vagaries contribute to the problem.

The District of Massachusetts' criminal discovery rules establish a series of "automatic" discovery obligations imposed on prosecutors and defendants; the Massachusetts rules also mandate that the government disclose any information that could "cast doubt" on the defendant's guilt, the admissibility or credibility of any evidence, or the degree of the defendant's culpability under the U.S. Sentencing Guidelines.[6]

In the District of Connecticut, prosecutors have a continuing duty to produce all *Brady* and *Giglio* material to the defense within 14 days of the arraignment.[7] The Northern District of New York similarly requires the production of *Brady* material within 14 days after arraignment, while *Giglio* material should be produced no less than 14 days prior to the start of jury selection.[8]

The disparate, and often non-existent, rules governing a prosecutor's obligation to produce exculpatory and impeachment evidence prompted the American College of Trial

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Lawyers (ACTL) to suggest the amendment of Federal Rule of Criminal Procedure 16 to codify the government's obligation to disclose information required under *Brady* and *Giglio*. A 2003 report relayed the experience of federal court practitioners across the country that "federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court…often producing little, if any, favorable information for months, in some cases not until trial is underway and in other cases not at all."[9]

In 2004, prompted, in part, by the ACTL's report, the Advisory Committee on Criminal Rules of the Judicial Conference of the United States commenced discussions about whether an amendment to Rule 16 was needed. Notwithstanding voiced opposition from the Justice Department, the Advisory Committee voted 8-4 to forward proposed Rule 16 amendments to the Judicial Conference's Standing Committee on Criminal Rules in March 2006.[10] The issue has lingered before that committee, perhaps to assess the impact of the Department of Justice's effort to address the stated concerns by revising portions of the United States Attorneys' Manual regarding the government's disclosure obligations.[11]

As recently as April 2009, U.S. District Court for the District of Columbia Judge Emmet G. Sullivan, after a bad experience in the Senator Ted Stevens case, wrote the Advisory Committee urging it once again to propose an amendment to Rule 16 requiring the disclosure of all exculpatory information to the defense. Judge Sullivan observed that despite modifications to the U.S. Attorneys' manual, *Brady* violations continued to occur.[12]

Setting forth the need for such an amendment, Judge Sullivan wrote:

> An amendment to Rule 16 that requires the government to produce all exculpatory information to the defense serves the best interests of the court, the prosecution, the defense, and, ultimately, the public. …Moreover, such a rule would also provide clear guidance to the prosecutor and indeed protect prosecutors from inadvertent failures to disclose exculpatory information. Finally, a federal rule of criminal procedure mandating disclosure of such information—whether or not the information is requested by the defense—would ensure that the defense receives in a timely manner all exculpatory information in the government's possession.[13]

The Need for Reform

From the beginning of the Stevens case, the prosecutor's conduct was in issue, including complaints of the government's intentional concealment of exculpatory and impeachment evidence. Ted Stevens, who was convicted on seven felony counts of ethics violations, was charged with failing to report on a Senate disclosure form approximately $250,000 of goods and services received in connection with the renovation of one of his personal homes.

The Jan. 4 Guidance reiterates the discovery obligation of federal prosecutors as set forth in Rule 16, 'Brady' and 'Giglio,' and then sets forth a four-step plan to be followed by government attorneys in every criminal case.

The government concealed information from the defense that evidence existed that the government's star witness had told the government that Senator Stevens would have paid bills for work done on his home had he received them. At trial, the government elicited a contradictory statement from the witness. According to defense lawyers, "the prosecutors went so far as to affirmatively redact the favorable information from an interview memorandum when they disclosed other portions of the memorandum to the defense."[14]

According to Judge Sullivan, the *Brady/Giglio* violations were not revealed until five months after the verdict was returned. As a result of these and other allegations of impropriety, Attorney General Eric Holder took the unusual step of moving to dismiss the indictment against Mr. Stevens stating that he had "concluded that certain information should have been provided to the defense for use at trial."[15]

Judge Sullivan is not the only member of the judiciary frustrated with the government's *Brady* decisions. Also confronted with numerous *Brady* violations by the government, U.S. District Judge Mark L. Wolf, sitting in the District of Massachusetts, found it necessary to release two reputed mob figures from lengthy terms of incarceration.

The alleged mobsters, Vincent Ferrara and Pasquale Barone, were convicted of the murder of Vincent Limoli. The government's case against Messrs. Ferrara and Barone rested primarily on the testimony of Walter Jordan, an accomplice who cooperated with the government and testified that Mr. Ferrara had directed Mr. Barone to murder Mr. Limoli. Mr. Barone was convicted of conspiring with Mr. Ferrara to kill Mr. Limoli and was sentenced to life in prison. Mr. Ferrara pled guilty to the Limoli murder and other charges.

Shortly after his guilty plea, Mr. Ferrara told probation employees that he had not been involved in the Limoli murders, but had agreed to plead guilty because he found himself in an "untenable" position of facing a wrongful conviction and resulting life sentence. Indeed, on multiple occasions, government witness Jordan had recanted his statements about Mr. Ferrara's involvement in the murder. "[T]he only source of direct evidence on those charges, [Jordan], had told the government at least twice that Barone told him that Ferrara had not ordered the Limoli murder." Although these statements were memorialized by law enforcement authorities, they were not produced to the defendants until the September 2003 evidentiary hearings held in conjunction with Messrs. Ferrara and Barone's petitions for habeas corpus.[16]

As a result, Mr. Barone was released from prison pursuant to an agreement with the government. Over government objection, Judge Wolf granted Mr. Ferrara's motion to vacate the judgment against him, finding a reasonable probability that Mr. Ferrara would not have pled guilty to, been convicted of, or sentenced on the murder charges if the required disclosures had been made.

After releasing the defendants, Judge Wolf took the unusual step of reporting the government attorney's conduct to bar officials. When the prosecutor received only a "behind closed doors" reprimand from his boss, Judge Wolf wrote a series of letters to the Attorney General expressing irritation with the Justice Department's disciplinary arm, the Office of Professional Responsibility.[17]

Expressing concern over the lack of discipline imposed on the prosecutor of the Ferrara and Barone case, in his letter to the Attorney General, Judge Wolf wrote that "[t]he department's performance in the…matter raises serious questions about whether judges should continue to rely upon the department to

investigate and sanction misconduct by federal prosecutors."

Although the Stevens and Ferrara/Barone cases are high-profile, they are not the only ones dealing with incomplete disclosures by the government. In *United States v. Chapman*,[18] the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of an indictment charging the defendants with securities fraud after the government failed to disclose to the defense more than 650 pages of documents, including rap sheets, plea agreements, cooperation agreements, and other information related to government witnesses, as they were compelled to do under *Brady* and *Giglio*.

Although the case involved hundreds of thousands of pages of discovery, the assistant U.S. attorney in charge failed to maintain a log of disclosed and nondisclosed materials. Rather, the attorney repeatedly represented to the court that he had fully complied with the government's *Brady* and *Giglio* obligations.

Ultimately, the prosecution admitted its error, after the completion of some government witnesses' testimony, and the district court dismissed the indictment. The Ninth Circuit found that the trial court did not abuse its discretion, but properly relied on its supervisory powers in finding that the government attorney "acted flagrantly, willfully, and in bad faith." Further, the trial court found that the defendants would be prejudiced by a new trial and that no lesser sanction could remedy the harm done.

Justice Department Reaction

At the behest of the Attorney General, a working group was convened in 2009 to review the Justice Department's "policies, practices, and training related to criminal case management and discovery and to evaluate areas for improvement." As a result, on Jan. 4, 2010, the Department of Justice issued a new document titled "Guidance for Prosecutors Regarding Criminal Discovery."

The Guidance reiterates the discovery obligation of federal prosecutors as set forth in Rule 16, *Brady* and *Giglio*, and then sets forth a four-step plan to be followed by government attorneys in every criminal case.[19] Step one is the gathering and reviewing of discoverable information. The prosecution team is the primary source for all exculpatory and impeachment information, and includes agents and law enforcement offices, as well as other government agencies in certain complex cases.

Step two is conducting a review of the information after it has been collected. The Guidance states a preference for such review to be conducted by the prosecutors themselves where possible. After the review is complete, the third step is making the required disclosure. The Guidance provides that exculpatory information should be disclosed reasonably promptly after discovery of such evidence, regardless of whether it has been memorialized in a document. Finally, the Guidance instructs prosecutors to make a record of the disclosure.

In addition, Deputy Attorney General David W. Ogden directed the U.S. Attorney's Offices across the country to identify a discovery coordinator and develop discovery practices to be applied in their offices. Acknowledging that disparities and local variation exist in discovery practices across the offices, Mr. Ogden noted that "[i]nconsistent discovery practices among prosecutors within the same offices…can lead to burdensome litigation over the appropriate scope and timing of disclosures, judicial frustration and confusion, and disparate discovery disclosures to a defendant based solely on the identity of the prosecutor who happens to have been assigned a case."[20]

Commentators have opined that the new Justice Department policies still fall short. Ellen S. Podgor, a law professor at Stetson University College of Law and author of the White Collar Crime Prof Blog, objects to the Guidance's failure to acknowledge that the government's discovery obligations have the force of constitutional, statutory and administrative law. She also takes issue with the fact that individual offices are left to create their own individual rules. In order to "do justice," Ms. Podgor believes that clearer discovery rules and statutes need to be set forth by independent parties rather than a group of prosecutors and law enforcement representatives.[21]

Conclusion

If overzealousness (as demonstrated in the recent dismissals in *United States v. Ruehle*)[22] rather than ignorance, is at the heart of the problem, the Department of Justice strictures will not solve the problem. Courts must intervene and develop national standards with sanctions for willful failures, that will apply to all federal prosecutions.

1. 373 U.S. 83, 87 (1963).
2. 405 U.S. 150 (1972).
3. *United States v. Agurs*, 427 U.S. 97, 101 (1976); *United States v. Bagley*, 473 U.S. 667, 682 (1985).
4. *United States v. Wong*, 78 F.3d 73, 79 (2d Cir. 1998) (citing *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993)).
5. Federal Judicial Center, "*Brady v. Maryland* Material in the United States District Courts: Rules, Orders, and Policies" ("Advisory Committee Report") at pp. 10-12 (May 31, 2007) (available at http://www.uscourts.gov/rules/BradyFinal2007.pdf). The report also noted the wide disparity in state court policies.
6. Local Rules of the United States District Court, District of Massachusetts, Rules 116.1-117.1 (April 1, 2008).
7. Local Rules of Criminal Procedure, United States District Court, District of Connecticut, Appx. §A(10)-(11) and §D (Dec. 1, 2009).
8. Local Rules of Practice, United States District Court, Northern District of New York, Section XI. Criminal Procedure, §§14.1(b)(2), 14.1(d)(1).
9. American College of Trial Lawyers, "Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16" at p. 11 (March 2003) (available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=62).
10. Advisory Committee Report at pp. 6-7.
11. United States Attorneys' Manual §9-5.000.
12. Letter to the Honorable Richard C. Tallman from Emmet G. Sullivan (April 28, 2009) (available at http://lawprofessors.typepad.com/files/exhibit-b---judge-sullivan-letter.pdf).
13. Id. at p. 3.
14. Letter to Attorney General Michael B. Mukasey from Brendan V. Sullivan, Jr., Counsel to Ted Stevens, regarding *United States v. Stevens*, No. 08-231: Request for Investigation of Misconduct (Oct. 28, 2008).
15. Press Release, Department of Justice, "Statement of Attorney General Eric Holder Regarding *United States v. Theodore F. Stevens*" (April 1, 2009).
16. *Ferrara v. United States*, 384 F. Supp.2d 384, 387-88 (D. Mass. 2005).
17. John Gibeaut, "The 'Roach Motel,'" ABA Journal (July 2009).
18. 524 F.3d 1073 (9th Cir. 2008). See also *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009) (reversing conviction of Brocade CEO for options backdating where prosecutor withheld *Brady* material).
19. Memorandum for Department Prosecutors from David W. Ogden, Deputy Attorney General, regarding Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010).
20. Memorandum for Heads of Departments Litigating Components Handling Criminal Matters and All United States Attorneys from David W. Ogden, Deputy Attorney General, regarding Requirement for Office Discovery Policies in Criminal Matters (Jan. 4, 2010).
21. Ellen S. Podgor, "New DOJ Discovery Policies Fall Short," White Collar Crime Prof Blog (Jan. 5, 2010).
22. In relying on his supervisory powers to dismiss the case against former Broadcom CFO William Ruehle, Judge Cormac Carney wrote, "Based on the complete record now before me, I find that the Government has intimidated and improperly influenced the three witnesses critical to Mr. Ruehle's defense. The cumulative effect of that misconduct has distorted the truth-finding process and compromised the integrity of the trial." Transcript of Proceedings, *United States v. Ruehle*, No. SACR 08-00139 (C.D.Cal. Dec. 15, 2009). See also David Frankel and Eric Tirschwell, "DOJ Issues Criminal Discovery Guidance: What Will it Mean?" NYLJ (Jan. 25, 2010) (commenting on new DOJ policy).