Advocating For Broad Brady Orders Under New Criminal Rule

By **Brian Heberlig, Bruce Bishop and Nicholas Silverman** (February 12, 2021)

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On Oct. 21, 2020, former President Donald Trump signed into law the Due Process Protections Act.

The act requires district courts to issue, at the first court appearance in every criminal case, an order confirming the prosecution's disclosure obligations under the 1963 U.S. Supreme Court decision in Brady v. Maryland and its progeny, and the possible consequences of violating such order.

The act calls for promulgation of model orders but gives district courts discretion whether to use those models or formulate their own orders.

Though the act requires the court to confirm the prosecution's Brady obligations, it does not define the content of those obligations. A key role for defense counsel at initial appearances will be to advocate for a broad and meaningful Brady order. Here are four of the key open questions that should be the subject of defense counsel advocacy.

What information must be disclosed?

The scope of the Brady disclosure obligation in the pretrial context has been subject to extensive litigation for decades. Prosecutors often urge the post-trial standard — that the failure to disclose exculpatory evidence requires vacating the verdict only if the evidence was material, i.e., if there is any reasonable likelihood it could have affected the verdict. That materiality determination can only be made retrospectively, in light of the trial record taken as a whole.[1]

But the Due Process Protections Act now requires entry of Brady orders at the outset of every case. As numerous courts — including the U.S. District Court for the District of Columbia in the 2005 U.S. v. Safavian case — have ruled, it makes little sense to allow prosecutors to "look at the case pre-trial through the end of the telescope an appellate court would use post-trial."[2]

The factors on which retrospective Brady materiality depends — the availability, identity and testimony of witnesses; the documentary and physical evidence; the court's evidentiary and legal rulings and jury instructions; and the jury's deliberations and verdict — simply are unknown and unknowable before trial begins.

Focusing on those yet-unknown factors, the Safavian court held, would "permit ... prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of a trial."[3]

A better approach in the pretrial context is simply to require disclosure of evidence favorable to the accused, without consideration of its likely effect at trial.[4] In the 1999 Strickler v. Greene decision,[5] the Supreme Court recognized that the term "Brady violation" is sometimes used more broadly than what it termed a true post-trial Brady violation, "to refer to any breach of the broad obligation to disclose exculpatory

evidence."[6]

The court explained that that disclosure obligation arises from both the due process clause and "the special role played by the American prosecutor in the search for truth in criminal trials," as the representative of a sovereign whose interest is "not that it shall win a case, but that justice shall be done."[7]

As the Supreme Court recognized in the 1976 U.S. v. Agurs decision,[8] where evidence clearly has substantial value to the defense, elementary fairness requires it to be disclosed.[9] Where doubt exists as to its usefulness to the defense, prosecutors must resolve such doubt in favor of disclosure.[10] If they do not, under the act they will now be on notice of enforceable consequences.

When must information be disclosed?

Because Brady concerns trial fairness, not discovery, some courts have been reluctant to set deadlines, requiring only that Brady material be disclosed in time for effective use at trial.[11] Under this amorphous test, some prosecutors have delayed disclosures until the eve of trial, a practice that can lead to continuances, new trials or even dismissals.[12]

District courts have broad discretion, however, to enter case-management orders requiring disclosure of exculpatory or impeachment information by a set time before trial.[13] The new Federal Rule of Criminal Procedure 5(f)(1) now appears to require, or at least strongly suggest, such an order in every case. At a minimum, it affirms that that trial courts have the authority to enter enforceable orders requiring timely disclosure.

Defense counsel should advocate for a requirement that Brady information be disclosed "promptly after its existence becomes known to the Government," as the U.S. District Court for the Southern District of New York required in a Rule 5(f) order in the 2020 case U.S. v. Shalon.[14] Alternatively, a specific early deadline will ensure that prosecutors do not sit on exculpatory evidence until the eve of trial, after opportunities for use in trial preparation have been lost.

Whose information must be disclosed as part of the prosecution team?

As the Supreme Court confirmed in the 1995 decision in Kyles v. Whitley,[15] prosecutors must learn of and disclose favorable information known to any person or entity acting on the government's behalf in the case.[16]

In addition, where a case depends on testimony from or about a particular agency, prosecutors must disclose exculpatory or impeaching information in the agency's possession, even if the agency is not itself part of the prosecution team.[17] Defense counsel should advocate for these requirements to be stated expressly in orders under new Rule 5(f).

What consequences will ensue?

The act requires that the Brady order confirm "the possible consequences of violating such order under applicable law." Those consequences include both remedies and sanctions. Remedies for Brady violations can include a trial continuance, exclusion of evidence, a midtrial supplemental opening statement by defense counsel to address evidence disclosed midtrial, curative instructions and dismissal with or without prejudice.

Potential sanctions can include reprimand, disqualification, referral to the U.S. Department of Justice's Office of Professional Responsibility or state bar associations, or institution of criminal contempt proceedings. Defense counsel should advocate for the Brady order to outline these remedies and sanctions with specificity.

What resources for advocacy are available?

The Due Process Protections Act has not been in place for long. So far, one circuit judicial council and a handful of district courts have issued short model orders that merely confirm the existence of the Brady obligation and state that failure to disclose in a timely manner may result in consequences including exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, disciplinary action or sanctions by the court.

U.S. District Judge Laura Taylor Swain in the Southern District of New York has issued longer orders worthy of review.[18] In addition, six years before the act, Judge Kurt Engelhardt — then of the U.S. District Court for the Eastern District of Louisiana, now of the U.S. Court of Appeals for the Fifth Circuit — issued an exemplary Brady order in U.S. v. Rainey,[19] a case arising out of the Deepwater Horizon explosion.

And U.S. District Judge Emmet Sullivan, who oversaw the case involving former Sen. Ted Stevens, R-Alaska, which was marred by Brady violations, has issued a standing Brady order at the outset of each case since then.[20]

These latter, more detailed orders strengthen the protection of defendants' rights, by requiring prompt production of all exculpatory or impeachment evidence material to guilt or punishment, by a set time or promptly when the government learns of such evidence, and by defining the prosecution team broadly to include all officials or entities who participated in the investigation or prosecution.

The Due Process Protections Act is a big step in the right direction toward ensuring that criminal defendants obtain the exculpatory information to which they are entitled. It is now up to defense counsel to advocate vigorously to make the Brady orders required by Rule 5(f) as fulsome and protective as possible.

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[1] Strickler v. Greene, 527 U.S. 263, 281 (1999); see Kyles v. Whitley, 514 U.S. 419, 436-39 (1995).

[2] United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005), reconsideration denied, 233 F.R.D. 205, 206-07 (D.D.C. 2006); accord, e.g., United States v. Bundy, 968 F.3d 1019, 1033 (9th Cir. 2020).

[3] Safavian, 233 F.R.D. at 16.

[4] See, e.g., Bundy, 968 F.3d at 1033 (because "'the retrospective definition of materiality is appropriate only in the context of appellate review,' ... 'trial prosecutors must disclose favorable information without attempting to predict whether its disclosure might affect the outcome of the trial'") (citations omitted); Safavian, 233 F.R.D. at 16 ("The question before trial is not whether the government thinks that disclosure of the information or evidence ... might change the outcome of the trial going forward, but whether the evidence is favorable and therefore must be disclosed.").

[5] 527 U.S. 263 (1999).

[6] Id. at 281.

[7] Id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[8] 427 U.S. 97 (1976).

[9] Id. at 110.

[10] See id. at 108; Kyles, 514 U.S. at 439; Safavian, 233 F.R.D. at 17.

[11] See, e.g., United States v. Coppa, 267 F.3d 132, 142 (2d Cir. 2001) (collecting cases).

[12] See, e.g., United States v. Alvin, 30 F. Supp. 3d 323, 330, 332 (E.D. Pa. 2014) (continuance); Leka v. Portuondo, 257 F.3d 89, 100-03, 107 (2d Cir. 2001) (new trial); Bundy, 968 F.3d at 1023, 1041-45 (dismissing indictment with prejudice).

[13] See, e.g., Coppa, 267 F.3d at 146.

[14] 2020 WL 6873447, at *1 (S.D.N.Y. Nov. 23, 2020).

[15] 514 U.S. 419 (1995).

[16] Id. at 437; accord Bundy, 968 F.3d at 1037 ("As a matter of law, the prosecution is deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation").

[17] See United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995).

[18] See Shalon, 2020 WL 6873447; United States v. Rodriguez-Perez, 2020 WL 6487509 (S.D.N.Y. Nov. 4, 2020).

[19] Discovery Order No. 1, United States v. Rainey, No. 12-cr-291, Dkt. 192 (E.D. La. Aug. 11, 2014).

[20] See Emmett G. Sullivan, "How New York Courts Are Keeping Prosecutors in Line," The Wall Street Journal, Nov. 17, 2017, available at https://www.wsj.com/articles/how-new-york-courts-are-keeping-prosecutors-in-line-1510953911.