A Call for Congress to Reform Federal Criminal Discovery

March 8, 2012

We, the undersigned, are current and former judges, prosecutors, law enforcement officers, defense lawyers and others, all with substantial professional experience within the criminal justice system. We call upon Congress to address the persistent problems with discovery in the federal criminal justice system by immediately enacting legislation that clarifies federal prosecutors' obligations to disclose information to the defense and that provides appropriate remedies when prosecutors fail to do so.

Over the past few years, we have seen a troubling number of cases involving failures to disclose evidence to the defense pursuant to *Brady v. Maryland* and its progeny. Most notable was the prosecution of the late Senator Ted Stevens. The U.S. Department of Justice (DOJ) moved in April 2009 to set aside Senator Stevens's 2008 conviction and dismiss the indictment after discovering that prosecutors had withheld evidence they were required to disclose—evidence that would have impeached the trial testimony of a key government witness and bolstered the Senator's defense. While the complete findings of a subsequent, court-ordered investigation into the prosecution have not yet been publicly revealed, we know the investigation concluded that the prosecution had been "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated [Senator Stevens's] defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."[1]

In addition to the Stevens case, a string of recent cases has emerged in which the defense eventually discovered undisclosed evidence that was constitutionally required to have been disclosed. For example, in December 2011, a judge in the Central District of California vacated the government's conviction of the Lindsey Manufacturing Company and two of its executives for violations of the Foreign Corrupt Practices Act. The judge found that the government had "recklessly failed to comply with its discovery obligations" pursuant to *Brady*, among other forms of misconduct throughout the prosecution.[2] A month later, federal prosecutors in Massachusetts moved to dismiss charges against defendant Andrew Berke related to an illegal Internet pharmacy. The prosecutors' dismissal immediately followed a statement from the trial judge that he was going to have to dismiss the charges himself based on the fact that a law enforcement officer had destroyed "apparently exculpatory" evidence in the case and prosecutors had not notified the defense when they learned of this fact.[3] In 2009, federal prosecutors in the District of Montana failed to disclose compelling information impeaching a key witness's credibility in the criminal case against W.R. Grace Corporation and three of its former executives.[4] All defendants in the case were ultimately found not guilty. Around the same time, in the District of Massachusetts, a federal prosecutor failed to produce prior inconsistent statements of a police officer witness in the prosecution of Darwin Jones, charged with possessing a

[1] Order at 3, *In re Special Proceedings*, Misc. No. 09-0198 (D.D.C. Nov. 11, 2011) (quoting from Report to the Honorable Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's April 7, 2009 Order at 1).
[2] *United States v. Aguilar*, 2011 U.S. Dist. LEXIS 138439 at *3 (C.D. Cal. Dec. 1, 2011).
[3] Milton J. Valencia, *U.S. Drops Charges in Internet Drug Case*, Boston Globe, Jan. 18, 2012.
[4] Order, *United States v. W.R. Grace et al.*, No. CR-05-07-M (D. Mont. Apr. 28, 2009).

firearm as a felon. When the violation was discovered, the court reprimanded the prosecution for its "dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court,"[5] though ultimately decided sanctions were not warranted in this particular case as the violation had been "unintentional rather than deliberate."[6]

Failure to disclose *Brady* evidence is a constitutional violation that by its very nature often goes undiscovered—anything that the government chooses not to disclose to the defense generally remains unknown. So, it is impossible to know how often these violations occur. Still, a 2010 USA Today investigation documented 86 cases since 1997 in which judges found that federal prosecutors had failed to turn over evidence that they were legally required to disclose.[7] Reports by a host of organizations have reached similar conclusions about the frequency of these violations. Suffice it to say that *Brady* violations—which include both intentional misconduct and inadvertent errors—occur with sufficient frequency that Congress must act.

Our experience leads us to believe that the vast majority of prosecutors act in good faith to fulfill their constitutional and legal obligations. However, federal courts, the DOJ and other entities have for years articulated inconsistent, shifting, and sometimes contradictory standards for criminal discovery, leaving it up to individual prosecutors to navigate this legal maze and determine the scope of their obligations to disclose information.

The constitutional obligation to disclose such evidence arises from the 1963 U.S. Supreme Court decision in *Brady*, which held that prosecutors have a constitutional obligation to provide the defense with "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[8] That obligation alone can cause confusion. As a group of former DOJ officials wrote in an *amicus* brief filed in *Connick v. Thompson* in 2010, "complying with *Brady* and its progeny is not always simple or self-evident."[9] The difficulty primarily arises because prosecutors must make a judgment call about whether evidence is sufficiently "material" that *Brady* and subsequent cases would require disclosure of the evidence to the defense. The Supreme Court has held that evidence is material "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[10] Materiality does not require a showing that the defendant "would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial."[11] When a prosecutor tries to determine whether particular evidence meets this test for

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[5] *United States v. Jones*, 686 F. Supp. 2d 147, 148 (D. Mass. 2010) (citing *United States v. Jones*, 620 F. Supp. 2d 163, 165 (D. Mass. 2009)).
[6] *Id.* at 149.
[7] Brad Heath and Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today, Sep. 23, 2010.
[8] 373 U.S. 83, 87 (1963).
[9] Brief for *Amici Curiae* Former Federal Civil Rights Officials and Prosecutors Wan J. Kim *et al.* in Support of Respondent at 2, *Connick v. Thompson*, 131 S.Ct. 1350 (2011) (No. 09-571).
[10] *Smith v. Cain*, No. 10-8145, slip op. at 2-3, 132 S. Ct. 627 (Jan. 10, 2012) (citing *Cone v. Bell*, 556 U.S. 449, 469-70 (2009).
[11] *Id.* at 3 (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) (internal quotation marks omitted).

materiality before trial begins, the prosecutor necessarily engages in speculation and even guesswork about the hypothetical impact that the evidence will have in the future trial. Oftentimes, the prosecutor simply cannot know for certain what the impact of the evidence will be.

Compounding the confusion surrounding *Brady* obligations are the separate, competing obligations established by local court rules, state ethics rules and other sources. For example, 49 states have adopted some version of Model Rule of Professional Conduct (MRPC) 3.8(d), which requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]"[12] MRPC 3.8(d) is not limited to information that would be deemed "material" pursuant to *Brady* but is meant to demand more extensive disclosure than the constitutional baseline of *Brady*.[13]

Further confusion exists beyond the scope of what must be disclosed to related matters, such as the timing of disclosures and prosecutors' obligations to seek out exculpatory evidence unknown to them. For example, the Jencks Act provides that federal prosecutors do not have to turn over prior witness statements to the defense until after the witness has testified.[14] Thus, prosecutors oftentimes withhold such statements—which are otherwise subject to *Brady* disclosure—until after the witness has testified, leaving the defense very limited time to understand and make use of the information during the trial.

In addition, the rare actions of some federal prosecutors who knowingly and intentionally violate their obligations are cause for even more concern. Currently, such misconduct often goes unpunished, as federal prosecutors are immune from civil liability, and criminal liability is extraordinarily rare. Further, state bar associations do not robustly enforce the rules against prosecutors who intentionally do not disclose information to the defense.[15]

Amid previous calls for reform, the DOJ has claimed that it could handle the problem of nondisclosure internally and added language to the U.S. Attorneys Manual instructing federal prosecutors to comply with constitutional requirements to disclose material evidence pursuant to *Brady*. Violations continued to occur despite this new guidance. Later, in the wake of the Stevens case, the U.S. Attorney General spoke out publicly and created a working group that reviewed discovery practices. The DOJ then issued additional guidelines and required additional training for line prosecutors as to their constitutional obligations. However, while commendable, these actions have not solved the problem, and violations have continued to occur.

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[12] *See* David Keenan *et al*., *The Myth of Prosecutorial Accountability After* Connick v. Thompson, 121 Yale L.J. Online 203, 221-33 (2011) (describing the versions of MRPC 3.8 adopted in the states). The McDade Amendment made state ethics rules applicable to federal prosecutors practicing in a state. 28 U.S.C. § 530B.

[13] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

[14] 18 U.S.C. § 3500.

[15] *See* Keenan *et al*., *supra* note 12, at 213-220 (discussing prosecutorial immunity from liability and several studies documenting the infrequency of state bar disciplinary actions).

We have concluded that *Brady* violations, whether intentional or inadvertent, have occurred for too long and with sufficient frequency that Congress must act. Self-regulation by the DOJ has been tried and has failed. It is ultimately not a solution to the injustices that continue to occur. Nor is an amendment to the Federal Rules of Criminal Procedure a solution. Such a proposal has been considered at least twice by the Advisory Committee on the Rules of Criminal Procedure, only to be rejected by either the Advisory Committee or the full Standing Committee on Rules of Practice and Procedure, at least partly in deference to the DOJ's attempts to address the issue internally. But, again, DOJ's own internal efforts have not remedied the problem.

Only federal legislation can adequately address these continued violations by federal prosecutors, creating a uniform standard for what must be disclosed and what remedies will exist for non-disclosure, and sending a strong message to the DOJ that there will be consequences when federal prosecutors violate their discovery obligations.

The legislation that we envision would do the following:

1. Provide that the scope of the prosecution's discovery obligation extends to all information—regardless of admissibility at trial—that could reasonably be considered favorable to the defendant, with respect to pretrial motions, guilt, impeachment of witnesses, or sentencing. Requiring disclosure of all "favorable" information requires less room for interpretation on the part of the prosecutors than a materiality standard.
2. Clarify that prosecutors have an obligation to exercise due diligence in obtaining any favorable evidence, beyond what is in their possession, from other parties involved in the investigation and/or prosecution, including federal, state and local law enforcement or other agencies.
3. Require that prosecutors disclose favorable information without delay, as soon as they become aware of it, thus clarifying that the Jencks Act does not trump this disclosure requirement. If the government has legitimate objections to disclosure due to concerns about a witness' safety, a desire to protect classified information, or other reasons, prosecutors may raise those concerns with the court, which can issue a protective order if appropriate.
4. Impose an appropriate remedy in the case of non-compliance, including exclusion of evidence or witness testimony, a new trial, dismissal of the charges, or other remedies to be determined by the court. Courts generally have the power to fashion appropriate remedies under their general supervisory powers, but this law would clarify that the court shall use that power to fashion an appropriate remedy each time a violation of the disclosure requirement has occurred.

The time has come for Congress to act. Clarifying *Brady* obligations will ultimately strengthen effective law enforcement. All previous attempts to cure this problem—a problem that goes to the heart of the fairness and accuracy of the criminal justice system—have failed. Nothing short of the legislation described above is adequate, and we urge Congress to take immediate action to enact it.

Signatories to Date:

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Affiliations are listed for identification purposes only. Signatories join this letter in their individual capacities, not on behalf of their respective organizations.

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