

FEDERAL DEFENDER PROGRAM

United States District Court
Northern District of Illinois
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CAROL A. BROOK
Executive Director

July 5, 2012

Senator Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Senator Charles E. Grassley
Ranking Member
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Chairman Leahy, Ranking Member Grassley and Members of the Committee:

Thank you for soliciting my views on the potential ramifications of Senate Bill 2197, the "Fairness in Disclosure of Evidence Act of 2012."

You first ask for my response to a fellow criminal defense lawyer's concern that the bill could result in new trials or reversals absent any prejudice to a defendant. Under the bill's specific language and carefully calibrated remedial provisions, I do not believe the bill would support this result in the district court or on appeal.

In the District Court

As you know, the bill requires attorneys for the government to provide to the defendant all evidence that "may reasonably appear to be favorable to the defendant," subject to various exceptions, including invocation of the Classified Information Procedures Act, requests for delays in disclosure and requests for protective orders.

If, despite these protections, a district court finds the government has not complied with the bill's provisions, it "shall order an appropriate remedy." None of the remedies listed in the bill are mandatory, nor is the list exclusive. What is mandatory, is that the district court consider the "totality of the circumstances" in fashioning a remedy and that in doing so, it consider:

(1) "the seriousness of the violation,"

(2) "the impact on the proceeding,"

(3) "whether the violation resulted from innocent error, negligence, recklessness, or knowing conduct," and

(4) “the effectiveness of alternative remedies to protect the interest of the defendant and the public in assuring fair prosecutions and proceedings.”

Of these four considerations, the importance of the non-disclosed evidence is central to three of them. Only the question of whether the non-disclosure resulted from innocent error, negligence, recklessness or knowing conduct can be divorced from the importance of the evidence to the defendant’s case, and even there, it is likely that the most egregious conduct will correlate to the significance of the evidence in question.

Therefore, because the “totality of the circumstances” test controls, and the remedy must be appropriate to the importance of the violation, a new trial would not be the appropriate remedy if the violation was minor, had little or no impact on the proceeding, and the resulting trial was fair, even if the court made a finding of knowing conduct. Other remedies might could be imposed, but not a new trial. Recognizing this, the bill lists a variety of possible remedies, leaving it to the district court to determine the appropriate remedy in the particular circumstances of the case within the parameters of the Act.

In the Court of Appeals

Nor will the bill result in reversals on appeal absent prejudice to the defendant. The bill requires that the standard of review conform to the standard used for reviewing the claimed denial of other fundamental constitutional rights. That standard originated in *Chapman v. California*, 386 U.S. 18, 24 (1967), which held: “[T]he beneficiary of a constitutional error . . . [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” This is the standard used to review all constitutional errors other than structural errors like the complete denial of the right to counsel.

Currently, the appellate courts use a “materiality” standard to review alleged *Brady* violations, which has resulted in a tangled mess. See *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 247 U.S. 97 (1976). Changing this standard to the standard used to review all other claimed non-structural constitutional violations will bring more clarity to the law. It will also allow the government to show, both in the district court and on appeal, that the claimed error did not affect the verdict. Only structural constitutional errors require reversal regardless of prejudice and the bill does not turn disclosure violations into structural errors.

The Bill Would Not Compel Open File Discovery

It is important to note that the phrase “open-file” has no standardized meaning. In some districts, like the Eastern District of Wisconsin, there is a clear definition of what “open file” means written into the rules. In others, it is up to the individual prosecutor to decide whether

to turn over more than is required and even whether to say that in a particular case there will be an open-file policy. Sometimes this means that the defense is entitled to everything it would otherwise be entitled to under the discovery rules without having to make a request. To other prosecutors, it means opening up to the defense all of the files in their possession. And to still others, it means that they will reach out beyond their agents' offices to provide the defense with relevant documents.

Regardless of how it is defined, however, it does not appear to my fellow defenders or to me that the proposed legislation would compel an open-file policy. What the legislation would do is require prosecutors to disclose favorable evidence earlier without having to determine whether each piece of evidence is "materially" favorable. This would save time and would result in the disclosure of more favorable evidence than is currently disclosed. Indeed, it seems likely that the biggest impact of the legislation would be to ensure that most of the evidence the prosecution previously should have but often was not turning over under *Brady* will now be disclosed. It is of course possible that there would be cases where the entirety of the case files would need to be disclosed, but those cases would be in the minority.

It is for these reasons that many commentators, organizations and practitioners recommend the elimination of the materiality requirement. They believe it is not a workable standard prior to trial and that it is virtually impossible for prosecutors to make such fine distinctions in our adversary system. In fact, Professor Bibas noted in his article, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?* (available in *Criminal Procedure Stories* (Carol Steiker ed. 2006)):

[P]olice and prosecutors who become too convinced early on of a suspect's guilt may simply fail to appreciate or investigate contrary leads. Even if they come across exculpatory evidence, they may minimize or not see its significance. **(In other words, even if they see that the evidence is exculpatory, they may not see how it is material.)** They may thus conclude that because a piece of evidence does not change their own minds about guilt, it would not change jurors' minds either and so is not *Brady* material. This over-stringent perspective could lead prosecutors to decide that nothing is *Brady* material unless it persuades them to dismiss a case [Emphasis added, footnote omitted.]

Professor Alafair S. Burke of Hofstra University School of Law writes: "The definition of 'material' exculpatory evidence is so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's general right to withhold evidence from the defense." *Revisiting Prosecutorial Disclosure*, 84 Ind. L.J. 481, 483 (2009).

Professor Daniel S. Medwed at University of Utah S.J. Quinney College of Law, analyzes the problem as one of cognitive bias. He says: "The tension between the prosecutor's dual role of zealous advocate and minister of justice peaks in the context of *Brady* decisions, leaving the

prosecutor acutely vulnerable to cognitive bias.” Medwed, *Brady’s Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, 1542 (2010). Moreover, he suggests that “[c]ognitive biases can prompt a prosecutor who has already charged the defendant with a crime and is now conducting a pretrial materiality assessment to ‘engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt.’” Medwed at 1542, *quoting* Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1593-1601 (2006).

Professor Susan Bandes makes a similar point in her article, *Loyalty to One’s Convictions, the Prosecutor and Tunnel Vision*, 49 How. L.J. 475, 493-94 (2006). She points out what we all already know – “loyalties, cognitive biases and emotional commitments” are an inherent part of the human condition. Moreover, “[l]oyalty to a particular version of events may develop at a very early stage, and may prove mightily resistant to reconsideration.” Therefore, Professor Bandes suggests that reforms regarding prosecutorial disclosure of evidence will be most effective “when they take into account the actual dynamics at work,” including human cognitive limitations.

Removing the requirements that prosecutors determine the meaning of the term “material” and determine which pieces of evidence are material, comports with Professor Bandes’ suggestion that we take into account all aspects of the problem. A determination that evidence is favorable is easier to make than a determination that the evidence is both favorable and material, and, importantly, leaves far less room for the entry of unconscious cognitive bias.

Ethical rules already require prosecutors to provide this kind of broad discovery. American Bar Association Model Rule of Professional Conduct 3.8(d) requires prosecutors to timely disclose “all evidence or information known to [them] that tends to negate guilt . . . or mitigates the offense.” Interpreting this provision in Formal Opinion 09-454, issued July 8, 2009, the ABA makes clear that a prosecutor’s ethical obligations are broader than its legal obligations.

The increasingly restrictive interpretation given to the materiality requirement was of such great concern to the American Bar Association that at its August 8-9, 2011 annual meeting it adopted a Resolution urging elimination of the requirement. The Resolution urges all government prosecutors to disclose information that tends to negate guilt or mitigate the offense charged or the possible sentence without a showing of materiality. *See* ABA Res. 105D, American Bar Association House of Delegates (August 8-9, 2011), *available at* <http://www.abanow.org/2011/07/2011am105d/>.

Eight years earlier, the highly-respected American College of Trial Lawyers submitted a *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16* (Approved by the Board of Regents March 2003), which also proposed eliminating the materiality requirement at the trial court level and recommended that Rule 16 of the Federal Rules of Criminal Procedure be amended to provide that all exculpatory information

in any form be disclosed promptly and in advance of trial. 41 Am. Crim. L. Rev. 93, 102-03 (Winter 2003).¹

The courts too have urged elimination of the requirement. *See, e.g., United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005), where the court reasoned that because the materiality standard is a post-conviction standard, “it is not the appropriate one for prosecutors to apply during the pretrial discovery phase.” Instead, the court ruled that: “The government is obligated to disclose all evidence relating to guilt or punishment which might be reasonably considered favorable to the defendant’s case. . . .” *Safavian* at 17.

All of this is to say that elimination of the materiality requirement is not a new idea, and that its ramifications have been pondered and considered from a variety of viewpoints over the course of many years. Whether its elimination would in fact compel open-file discovery in some form or another is not at all clear.

The Impact of Open-File Discovery on Length of Cases and on the Court

You ask what impact open-file discovery would have on the length of cases and on the court. My answer is based on two assumptions. The first is that the requirements of Rule 16 of the Federal Rules of Criminal Procedure would continue to govern discovery procedures. The second is that the innovative procedures currently being developed by the Department of Justice and Administrative Office of the U.S. Courts Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) for the production of electronically stored information will be mandatory and will allow defense lawyers to easily open, read and organize the electronically stored discovery they receive. With these rules in place, the prosecution would not be permitted to simply flood the defense with documents, creating one more mountain for the defense to climb. Under those circumstances, open-file discovery could shorten the length of cases, result in fewer continuances, produce more guilty pleas earlier in the process, remove the courts from some pretrial discovery litigation and result in less posttrial litigation, fewer appeals, and fewer retrials. It should also result in fairer proceedings in both perception and fact.

As discussed above, a determination that evidence is favorable is easier and less subjective than a determination that the evidence is “material.” In that way alone, the elimination of the materiality requirement makes the prosecution’s job easier and shortens the case. It stands

¹ After the American Trial Lawyers’ call for reform and a number of highly publicized cases involving *Brady* violations, the Department of Justice in 2006 added stronger language to the section of the U.S. Attorney’s Manual on *Brady*. However, violations continued and, on January 4, 2010, following the decision in the Stevens case, the Department of Justice issued what are known as the “Ogden Memos” creating a working group that later recommended more institutionalized training and oversight on *Brady*. These actions, while commendable, have also proved insufficient, as violations continue to occur. (See for example the cases cited in my written testimony to the Committee.)

to reason that the fewer decisions the prosecutor must make about what evidence to disclose, the earlier the prosecutor will be able to disclose the evidence.

Early disclosure would have a number of positive consequences, some obvious and some more subtle. Delays in disclosure, of course, result in delays in filing pretrial motions and in delays in recommending to clients whether they should go to trial or plead guilty. The obvious consequence of these delays is that the case takes longer. The less obvious consequence is that clients who must wait long periods of time tend to lose faith in their lawyers, in the prosecutor and in the criminal justice system. When I must repeatedly tell my client that I have no new information and that I cannot file any motions until I receive the discovery, my client becomes disheartened, perhaps thinking I am not fighting hard enough. At that point, my client might file a motion requesting a new lawyer. This uses up more of everyone's time and leaves us with one more person, and perhaps one more family, disillusioned with the criminal justice system. On the other hand, if I do file motions asking the court to rule on my discovery requests, which also happens, then I am using up more of everyone's time in a different way.

If the unhappy client's request for a new lawyer is not granted, that person becomes more resistant to accepting his or her lawyer's advice. When that occurs, cases that might otherwise end up in guilty pleas may end up in trial. Or, if that person loses faith in the prosecutor, he or she may find it impossible to believe that any plea offer is being made in good faith and refuse to accept all offers even when it may be in the person's best interest.

With the early, complete discovery that should come with open-file, the converse will more often be true. Knowing that all evidence has been disclosed, fewer pretrial motions will be filed since many pretrial motions seek, in one way or another, more information. Early and complete discovery also gives the defense time to adequately prepare well ahead of trial instead of being given information on the eve of trial, requiring requests for continuances and more litigation. Early discovery also makes it possible for defense counsel to knowledgeably advise their clients about the wisdom and consequences of pleading guilty and, somewhat counter-intuitively, makes it more likely that defendants will decide to plead guilty once they see not only all of the evidence but that their lawyer has had time to properly investigate the case based on that evidence. *See Don DeGabrielle & Mitch Neurock, Federal Criminal Prosecutions: A View From the Inside of the U.S. Attorney's Office*, 43 Hous. Law. 32, 34 (2005).

Early and more complete discovery also reduces posttrial litigation, both in the district court and on appeal. In addition, it clearly goes a long way toward preventing wrongful convictions. *See generally* The Pew Charitable Trusts, The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf.

According to a study conducted by the Federal Judicial Center in 2007, numerous federal districts require early disclosure of *Brady* evidence, including names of potential witnesses and impeaching material. There is no indication that, having made the change, any of those jurisdictions reverted back to restricted discovery. Laurel Hooper & Sheila Thorpe, Federal Judicial Center, *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* (May 31, 2007), available at www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/.../bradyma2.pdf.

The federal study shows that the following 22 federal districts require by local rule that *Brady* material be disclosed early in the process:

At arraignment or other date set by court:

Middle District of Alabama, Southern District of Alabama,

Five days after arraignment:

Northern District of Florida, Southern District of Georgia, Western District of Pennsylvania

Seven days after arraignment:

District of Hawaii, District of Idaho, Western District of Michigan, Northern District of West Virginia

Ten days after arraignment:

District of Connecticut, Eastern District of Michigan, Western District of Missouri, District of Nebraska

Fourteen days after arraignment:

Northern District of New York, Southern District of Florida, Middle District of Tennessee, Western District of Texas, District of Vermont

Ten days after not guilty plea:

Western District of Oklahoma

Ten-twenty days after not guilty plea:

Northern District of California

Ten days after defendant's request:

Southern District of West Virginia

Open-File:

Eastern District of Wisconsin

A number of states also have created what amounts to open-file discovery, requiring early discovery of all favorable evidence without regard to materiality, including the names and addresses of all persons known to the prosecution who may have relevant information as well as impeaching information on potential witnesses. See for example: Arizona (Ariz. R. Crim. P. 15)); Colorado (Colo. R. Crim. P. 16); Illinois (Ill. S. Ct. R. 412(d)); Massachusetts (Mass. Crim. P. 14(a)(1)(A)); North Carolina (N.C. Gen. Stat. Sec. 15A-903); Ohio (Ohio R. Crim. P. 16). Because of their success, the discovery rules followed in these states are often cited. See generally The Pew Charitable Trusts, The Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* (2007); John Schoeffel, *Criminal Discovery Reform in New York: A Proposal to Repeal C.P.L. Article 240 and to Enact a New C.P.L. Article 245*, The Legal Aid Society (April 1, 2009), available at www.legal-aid.org; Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 Hastings L.J. 1321 (2011).

The state experience mirrors the federal experience. No state has gone back to its prior discovery rules or has found that the broader discovery rules put more witnesses at risk. As pointed out by the Director of the D.C. Public Defender Service, Maryland Attorney General Douglas Gansler, a former Assistant United States Attorney, implemented open-file discovery when he became Attorney General, recognizing that it is a better way to conduct prosecutions. Avis Buchanan, *Fairer Trials and Better Justice in D.C.*, Wash. Post, Oct. 28, 211, available at http://www.washingtonpost.com/opinions/fairer-trials-and-better-justice-in-dc/2011/10/25/gIQATkFMQM_story.html.

In short, I do not believe the proposed legislation would allow new trials or reversals where there was no prejudice to the defendant. The bill is carefully written to provide different remedies for different types of violations just for that reason. It is my view that the proposed legislation would instead create clearer and simpler responsibilities for the prosecution while concomitantly creating a fairer, faster and more transparent system of justice, that also saves money.

Sincerely,

Carol A. Brook