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Hearing on "Ensuring that Federal Prosecutors Meet Discovery Obligations"

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Chairman Leahy, Ranking Member Grassley, and Distinguished Members of the Committee: I want to thank you for allowing me to testify today on the critical issue of how we can better ensure that federal criminal discovery complies with due process. I am privileged to be able to speak not only as a member of the criminal defense bar but also for the hundreds of lawyers in the federal defender system nationwide. I do not speak today, however, as a member of the Judicial Conference Advisory Committee on Federal Criminal Rules.

When I first began practicing law, the Supreme Court's decision in *Brady v. Maryland*[1] was only slightly more than a decade old, but there were already problems with its implementation. A famous story illustrating one of these problems, perhaps the main problem, was told by Jon Newman, then U.S. Attorney and later Chief Judge of the Second Circuit. At the 1968 Second Circuit Judicial Conference, Judge Newman recounted that he had recently given a large group of prosecutors a hypothetical bank robbery case where several tellers and one or two bank customers viewed a line up and all identified the defendant as the robber. Another eye witness was later found who said that the defendant was *not* the robber. Judge Newman asked the group of prosecutors how many believed they should disclose the name of the witness who said that the defendant was not the robber. Only two prosecutors raised their hands. Commenting that he thought he had described the clearest case for disclosure, Judge Newman wryly noted: "I dare say . . . that the obligation to disclose favorable evidence is not one fully appreciated by all prosecutors."[2]

It is important to recall that the reason the Court imposed that obligation on the prosecution was to make sure trials are fair. *Brady* was not about guilt or innocence, nor was it about prosecutorial misconduct; it was about fairness, a bedrock principle of our criminal justice system. Nowhere did the Court make that point more clearly than when it said: "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."[3]

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[1] 373 U.S. 83 (1963).

[2] *Discovery in Criminal Cases*, 44 F.R.D. 481, 500-01 (1968). *See also* the 1995 study conducted by the John Jay Legal Clinic at Pace Law School which came to a similar conclusion. In that study, the clinic sent out questionnaires to 62 New York prosecutors' offices, giving each office the same hypothetical and the same series of witness statements. It then asked each office which, if any, of the hypothetical witness statements it would turn over as *Brady* material. Thirty offices responded. Yet, even for those statements that seemed to be most clearly favorable to the defendant on the issue of guilt or sentencing, there was ***no*** unanimity on whether to disclose a single statement. The hypothetical involved a domestic violence prosecution in which the defendant had been charged with assault, aggravated harassment and menacing. The statements were: "It was all my fault;" "I instigated the whole encounter;" "I made him hit me;" "He didn't hurt me;" "I hit him too;" "I exaggerated what happened;" and "What's in the police report isn't true."

[3] 373 U.S. at 87.

And yet, based on case law, newspaper reports, and first-hand experience, it seems we have made little progress in the almost fifty years since *Brady* was decided.

Although *Brady* violations, by their very nature, are difficult to discover and many are undoubtedly never discovered, the federal reporters contain numerous cases where prosecutors failed to turn over favorable evidence. Sometimes the courts reverse, but more often they use hindsight to find that the evidence was not material in light of the evidence supporting the defendant's conviction.

From the newspapers and blogs we learn about headline-grabbing cases like the one that brought us here, or:

- *United States v. Berke*, out of the District of Massachusetts, where federal prosecutors moved to dismiss charges against the defendant immediately following a statement from Judge Richard G. Stearns that he was going to have to dismiss the charges himself because a law enforcement officer had destroyed "apparently exculpatory" and irreplaceable evidence in the case and prosecutors had not notified the defense when they learned that fact;[4] and

- *United States v. Sterling*, out of the Eastern District of Virginia, where, in a case against former CIA agent Jeffrey Sterling, who is accused of leaking information about the CIA's effort to provide flawed nuclear designs to Iran, Judge Leonie Brinkema struck two witnesses from the prosecution's witness list for failure to timely disclose impeachment information.[5]

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[4] Milton J. Valencia, *U.S. drops charges in Internet drug case*, Boston Globe (Jan. 18, 2012), *available at* http://articles.boston.com/2012-01-18/metro/30635935 1 prescription-drugs-defense-lawyers-phony-prescriptions.

[5] The government appealed Brinkema's decision to the Fourth Circuit; oral arguments were held on May 18, 2012. Carrie Johnson, *Documents reveal more potential evidence-sharing failures by Justice Dept.*, NPR (Nov. 10, 2011), *available at* http://www.npr.org/blogs/thetwo-way/2011/11/10/142206489/documents-reveal-more-potential-evidence-sharing-failures-by-justice-dept; Charlie Savage, *Appeals panel weighs question on press rights*, New York Times (May 18, 2012), *available at* http://www.nytimes.com/2012/05/19/us/politics/appeals-panel-weighs-press-rights-in-case-involving-reporter-james-risen.html.

Those cases are far from the only recent cases where courts have found *Brady* violations. Other examples include ***United States v. Noriega et al.*** (Lindsey Manufacturing**)**, 2011 U.S. Dist. LEXIS 138439 (C.D. Cal. Dec. 1, 2011) (Judge Howard Matz vacated the convictions under the Foreign Corrupt Practices Act of Lindsey Manufacturing Company and two of its executives after finding that federal prosecutors had committed numerous, repeated errors in their handling of the case between 2008 and 2011, including "recklessly fail[ing] to comply with [their] discovery obligations" under *Brady* although the government assured the Court that it had turned over all relevant material before trial began.

Finally, consider the experiences of lawyers like my federal defender colleagues who are in the trenches daily. Although the cases we see rarely make headlines, they all too often involve fights over what is, was, or should be turned over under *Brady*.

As this Committee clearly recognizes by the fact of its holding this hearing, every one of those cases - big and small - means that a human being was treated unfairly and our justice system did not work as it should. Confidence in our justice system is critical to its continued viability. As is pride. When I meet with lawyers and judges from other countries they always express admiration and sometimes even disbelief at how hard we work to be fair. And of course, all of this litigation costs us time and money, and prevents us from focusing on other cases.

So, the questions become, what is the problem and how best to fix it?

What is the Problem?

Numerous commentators have grappled with this question. They have pointed to factors as diverse as the difficulty of placing prosecutors in conflicting roles as architects of the government's case and the defense case; a "win at all cost" mentality; vague and sometimes conflicting sets of rules; cognitive bias; tunnel vision; overwork; lack of supervision; and an overall culture of nondisclosure. [6]

Nonetheless, transcripts of grand jury testimony of an FBI agent containing exculpatory information, as well as two relevant witness interview memoranda, were not delivered to the defense until well into the trial); ***United States v. Daum et al.*** (District of Columbia) (Judge Kessler stated that "there [was] not the slightest doubt" that federal prosecutors had violated their constitutional obligations to turn over exculpatory information in a conspiracy case against attorneys charged with using staged photos in a federal drug case to dupe jurors. Prosecutors failed for two years to disclose information provided by a previously undisclosed witness until three weeks before trial. Judge Kessler stated: "In this day and age with all the publicity going on about Brady issues, not just the (Ted) Stevens trial, the series that is running these days in the Washington Post, so many other cases that are being dug up, it is hard to fathom why the government would not be super, super attentive to the issue of what is and what isn't Brady." Mike Scarcella, *In conspiracy case, judge chides DOJ over exculpatory evidence*, Legal Times (April 27, 2012), *available at* http://legaltimes.typepad.com/blt/2012/04/in-conspiracy-case-judge-chides-doj-over-exculpatory-evidence.html); *United States v. Gupta*, 11 CR 907 (JR)(S.D.N.Y. Mar. 27, 2012) (Judge Rakoff rejected DOJ prosecutor's argument that it had no obligation to review SEC interview memos of 44 potential witnesses for potentially exculpatory material because investigations were not joint and ordered disclosure of all *Brady* material), *available at* http://lawprofessors.typepad.com/files/gupta-brady-ruling.pdf.

[6] See, e.g., Rachel Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2091-98 (2010) (pressure to win and general list of reasons); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467, 488 (2009) (tunnel vision); Paul C. Giannelli, *Prosecutorial Ethics and the Right to a Fair Trial: The Role of the Brady Rule in the modern Criminal Justice System*, 57 Case W. Res. L. Rev. 593, 601 (2007) (belief that defendant is guilty); Alafair S. Burke, *Improving prosecutorial Decision Making:*

In the end, however, it is the lack of clarity - the vague and inconsistent standards - that everyone seems to agree is the biggest obstacle to a consistent practice of disclosing *Brady* material.[7] As The Constitution Project noted in its March 27, 2012 letter to Chairman Leahy and this Committee commending its decision to hold a hearing to review the findings of the Special Prosecutor's Report on the Ted Stevens Case: "[F]ederal 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."

Currently, every prosecutor in every U.S. Attorney's office is left with the task of predicting which pieces of evidence will be "material" to the defense. But the definition of "material" varies from court to court and rule to rule. Compare, for example, the court's statement in *United States v. Naegele*, 468 F. Supp. 2d 150, 153 (D.D.C. 2007), 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, that is, all favorable evidence that is itself admissible or that is likely to lead to favorable evidence that would be admissible, or that could be used to impeach a prosecution witness," with this statement from the U.S. Attorney's Manual: "While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question."[8] Such predictions before trial even begins require powers beyond the capability of mere mortals.

And then there are the ethical rules, recognized by virtually every bar association and the Supreme Court, which are broader than the language of *Brady* itself.[9] ABA Model Rule of Professional Conduct 3.8(d)(2008), provides:

> The prosecutor in a criminal case 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Some Lessons of Cognitive Science , 47 Wm. & Mary L. Rev. 1587, 1611 (2006) (cognitive bias).

[7] *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 Cardozo L. Rev. 1961, 2016 (2010).

[8] U.S. Attorneys' Manual, sec. 9-5.001(B)(1)(2010).

[9] *See* Model Rules of Professional Conduct, R. 3.8(d) (2008); Model Code of Professional Responsibility, DR. 7-103(B) (2004); ABA Standing Comm. On Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

Commenting on this provision in *Cone v. Bell*, 129 S. Ct 1769, 1783 n.15 (2009), the Supreme Court said: "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."

How to Fix the Problem?

Although we commend the Department of Justice for its continuing efforts to change what we see as a culture of nondisclosure, events make clear that its efforts alone are not enough. Neither the 2006 changes to the *Brady* section of the U.S. Attorney's Manual[10] or the positive changes outlined in the memoranda from Deputy Attorney General David Ogden to all U.S. Attorney's offices in January 2010 can fix (or have fixed) the overarching problem.[11]

To make that happen, we need Congress' help. We need this body to put the force of law behind the idea that due process requires the disclosure of all favorable evidence. Congress understands the importance of laws. After all, it is Congress is entrusted to pass our nation's laws. We believe that passage of the "Fairness in Disclosure of Evidence Act of 2012" would go far to make the promise of *Brady* a reality. By passing *this* law, you would be sending a powerful message, not only to prosecutors, but to the entire country – a message that we believe in the importance of fairness in even the most difficult of situations and we are willing to put the imprimatur of our Legislative Branch behind it.

What does the bill do? First, it eliminates the term "materiality." That alone removes what most see as the biggest obstacle to achieving fairness in discovery. Instead of analyzing

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[10] In 2009, after a lengthy trial earlier that year where the jury convicted the Commissioner of the Department of Streets and Sanitation and a co-defendant in Chicago of four counts of fraud, the district court judge was forced to throw out the verdict and order a new trial after learning that the prosecutors had failed to turn over exculpatory evidence, stating that he had "lost confidence in the integrity of the verdict." *United States v. Alfred Sanchez & Aaron DelValle*, 2009 U.S. Dist. LEXIS 119398 (N.D. Ill. Dec. 22, 2009). *See also United States v. McDuffie*, 2009 U.S. Dist. LEXIS 75737 (E.D. Wash. Aug. 13, 2009) (Where federal prosecutors failed to disclose key fingerprint evidence until after direct examination of its expert during trial, judge vacated verdict and ordered new trial). In addition, in 2010, USA Today ran its own investigation of federal prosecutors, documenting 86 cases since 1997 where judges found that federal prosecutors had failed to disclose favorable evidence. Brad Heath and Kevin McCoy, *Prosecutors' Conduct Can Tip Justice Scales*, USA Today Sept. 23, 2010.

[11] *See* cases cited in footnote 5 as examples of the continuing problem. *See also* what is called the "Africa Sting" Foreign Corrupt Practices Act case tried in December of 2011, where the court struck part of a prosecution witness' testimony after discovering that the prosecution had withheld notes referencing exculpatory post-arrest statements made by a defendant. Mike Scarcella, *Judge chides prosecutors in FCPA case over secret notes*, Legal Times (Dec. 15, 2011), *available at* http://legaltimes.typepad.com/blt/2011/12/judge-chides-prosecutors-in-fcpa-case-over-secret-notes.html.

each piece of evidence to determine whether it fits into a hypothetical defense theory of the case, the prosecutor can simply decide whether the evidence "reasonably appears to be favorable." That is a much easier, and far less subjective, standard to apply. The standard also eliminates the problem of predicting whether evidence will be admissible, when the fact of admissibility should not be the touchstone of the rule, even if admissibility could actually be predicted pretrial.

The bill also makes clear that evidence favorable to sentencing must be disclosed. It is ironic indeed that even though *Brady* was a sentencing case, few prosecutors believe they are obligated to disclose *Brady* evidence for sentencing purposes. And yet we know that all but 3% of federal cases result in pleas and sentences. Thus, enactment of this provision of law would impact virtually every person standing before a sentencing judge in the future.

By requiring *Brady* disclosure "without delay after arraignment and before entry of any guilty plea," the Fairness in Disclosure bill was prescient. Precisely one week after the bill was introduced, the Supreme Court decided two major criminal justice cases, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012). Both cases state what every good criminal defense lawyer already knew – that representation of a client during plea negotiations is a critical stage of the proceedings and requires effective representation by counsel. What seems new after these decisions is the idea that we now must receive discovery, including (and perhaps especially) *Brady* material prior to advising our clients on whether to accept a plea offer. The Fairness in Disclosure bill would eliminate any confusion on this point.

Finally, the bill would create much needed uniformity among and within U.S. Attorney's offices. What must be disclosed and when would be much clearer, not only to the prosecutors, but importantly, to defense counsel as well.

The significance of the *Brady* decision cannot be overstated. This Committee obviously recognizes that. What the Committee may not know is how the *Brady* decision affects our clients and their families, and so I will close with this story: After John Leo Brady, the defendant in the *Brady* case, was finally released from prison, he moved to Florida and became a truck driver. He started a family and was never in trouble again. When his son was old enough to understand, he explained to him what he had done and what happened in his case. Shortly after that, his son sought out the telephone number of his father's lawyer, Clinton Bamberger, and called him. What he said to Mr. Bamberger was, thank you for saving my father's life.

Again, I would like to express my deep thanks to this Committee for inviting me to testify before you today.