The Five Areas in Which Discovery Reform Is Most Needed

Timothy P. O'Toole

In *Brady v. Maryland*, the Supreme Court interpreted the due process clause to include a requirement that the government look for and disclose to the defense favorable information within the possession of the prosecution team.[1] In the 53 years since *Brady*, the Supreme Court has repeatedly reaffirmed the importance of this constitutional protection, and its importance has also been repeatedly confirmed at all levels of government. As the Department of Justice recognized in the wake of the *Brady* violations that tainted the trial of Senator Ted Stevens, the failure to timely and completely disclose such information can seriously impact the administration of justice:

> Any discovery lapse, of course, is a serious matter. . . . [E]ven isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.[2]

Despite this recognition, discovery failures — and particularly *Brady* violations — have persisted. As noted by one member of the Ninth Circuit in *United States v. Olsen*, "*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend."[3] Indeed, several Circuit Courts, including the Second,[4] Fourth,[5] Sixth,[6] and Ninth,[7] have all commented on the epidemic of *Brady* violations in recent years, ranging from failing to disclose witness biases and credibility concerns to plainly hiding exculpatory evidence. In light of these persistent issues, the question is whether anything can be done to ensure uniform adherence to the *Brady* rule. I propose here five reforms that would amount to a good start.

I. Eliminate the So-Called "Materiality Requirement" in the Pre-Trial Context

In my opinion, the biggest cause of *Brady* errors arises from confusion created by the context in which the Supreme Court's *Brady* cases have been decided. The *Brady* case itself, as well as every other case examined by the Supreme Court involving the *Brady* rule, arose in the post-conviction context — that is, the trial was over, the defendant had been convicted, favorable evidence was discovered that was known to the prosecution but not disclosed to the defense, and the question before the Supreme Court was whether the suppression of this evidence warranted a new trial. In this context, the Supreme Court developed a materiality requirement — a rule, similar to a harmless error rule, in which the Court will reverse a conviction only if the suppressed evidence, if known to the jury, would have created a reasonable probability of a different result. Like most harmless error rules, even this standard requires a certain amount of legal creativity, in asking a reviewing court to imagine a different trial and then imagine what the likely outcome of that trial would be. But, at least in the post-trial context, there is some reasoned basis for doing so, as there is a complete trial record and 50 years of Supreme Court guidance about how to apply the materiality test to the trial record.

Serious problems arise, however, when this materiality concept is applied in the pre-trial setting. In that setting, a prosecutor in possession of a piece of favorable evidence has no reasonable basis to determine materiality — there is no trial record, a prosecutor has little or no idea what the defense investigation has produced or what the potential defenses are, and the prosecutor has little basis for estimating the ultimate strength of his or her own trial evidence. Nonetheless, and despite several suggestions from Supreme Court Justices that the materiality concept has no application in the pre-

trial setting,[8] federal prosecutors (and many state prosecutors) attempt to apply this materiality rule in deciding whether to disclose favorable evidence at the pre-trial stage — in effect asking themselves before they have seen their own witnesses at trial and before they are likely to have any meaningful understanding of the defense: Having seen this new piece of favorable defense evidence, am I still reasonably confident I will prevail at trial?

The mere identification of the standard suggests why it is so fraught with peril. Any prosecutor, including one acting in complete good faith, is unlikely to view a particular piece of evidence as creating a reasonable possibility of a different result at trial. Indeed, if the evidence placed significant doubts in the prosecutor's mind about the defendant's guilt or the government's ability to pursue the case, the prosecutor likely would drop the case. Thus, if the new evidence doesn't persuade them to drop the case, *ipso facto*, the evidence is not material, and need not be disclosed. This is the sort of simplistic reasoning that I have seen used to justify withholding evidence in many cases, and it is the sort of reasoning that a pre-trial materiality requirement necessitates because there is no record to go on and a prosecutor is thus left to speculate about the power of a particular piece of evidence in the dark. This sort of speculation is an impossible task, and one that often results in critical evidence not being subjected to the adversarial process and potentially to scrutiny by the factfinder. The impossibility — and some would say irrationality — of this inquiry is also why many courts have eliminated the materiality requirement in the pre-trial context, both as a matter of law,[9] and as a matter of ethics.[10] If courts would uniformly adopt such a rule, or if the Supreme Court would state forthrightly that *Brady* requires the disclosure of favorable evidence pre-trial, but necessitates reversal post-trial only if a non-disclosure was material, it would go a long way toward reducing the number of *Brady* disputes that arise and the number of *Brady* violations that ultimately occur.

II. Impose concrete timing requirements for the disclosure of Brady evidence

Another important way in which the criminal discovery system is failing involves timing. *Brady* says nothing about the timing of disclosures. To fill this gap, most lower courts use a flexible standard that requires disclosure in time to make effective use of the evidence at trial. On its face, this standard seems reasonable, since the point of requiring disclosure is to allow use of the evidence, and the point of any timing requirement is to require disclosure in time to allow the evidence to be used effectively. But in practice, such a malleable deadline creates the opportunity for gamesmanship. When must a certain piece of evidence be disclosed in time for use at trial? The answer to that question often depends on who's asking, with prosecutors timing their disclosures to how much time they believe the defense needs to make effective use of the evidence. Not surprisingly, the defense often disputes these timing estimates, complains about eve-of-trial disclosures, and courts are left to speculate about how much time is required for a defendant to incorporate new evidence into a defense theory as trial is approaching.

Recognizing that this sort of ambiguity is a recipe for unfairness and unnecessary disputes, some courts have taken a different route, imposing concrete deadlines for disclosure of favorable evidence. The most common deadline used by court rule is to require disclosure within 14 days of arraignment.[11] Courts have also taken it upon themselves to impose such deadlines by standing order.[12] If courts would uniformly adopt these concrete rules, it would go a long way in reducing or eliminating disputes about timing — disputes the current rules virtually compel, since the prosecution and defense will rarely agree about how far in advance of trial disclosures must occur to allow for effective use of the evidence.

III. Establish a procedure by which the government can document and justify for the court any decision to withhold favorable evidence for compelling reasons

Another important discovery reform involves the establishment of a procedure for use by the government if it seeks judicial permission to withhold otherwise disclosable evidence. The *Brady* rule is important, but in some cases there are legitimate reasons to excuse the government from its disclosure obligations. For example, if the government can demonstrate that a disclosure would threaten witness safety or national security, then a procedure should exist that would allow courts to limit or excuse the government from its discovery obligations. Such a procedure is important in its own right, and its existence would blunt or eliminate many of the government's stated concerns about discovery reform.

To be more specific, whenever the topic of discovery reform is mentioned, the government often

invokes concerns about witness safety or national security as reasons to disallow discovery entirely. But because there are many criminal cases in which no such concerns exist, the government's interests can be fully satisfied by addressing these issues on a case-by-case basis, in which the government is permitted to modify its obligations upon a showing that a disclosure would compromise witness safety, national security, a sensitive law enforcement technique or any other substantial government interest. But at the same time, such a rule would allow for full discovery in cases where those concerns do not exist, and would require that the government actually make some showing, generally subject to adversarial scrutiny, so that merely mouthing the terms "witness safety" or "national security" do not automatically prevent the disclosure of important evidence. Likewise, such a rule would allow courts to narrowly tailor any reduced disclosures in such a way — through redactions or protective orders — to ensure that discovery is provided to the fullest extent possible, consistent with any countervailing concerns.

IV. Mandate disclosure of evidence in a usable format

Another discovery issue that has been arising with more and more frequency in the electronic age involves disclosure of the evidence in a usable format. Many criminal investigations now involve the accumulation of rooms full of electronic information. When the government — which has often spent years accumulating and reviewing the evidence — discloses this evidence, it is important that it does so in a way that provides the evidence in usable form. This means that (1) the information is searchable if the original form is searchable; (2) the exculpatory material is readily identifiable (i.e., not buried in a "document dump" of largely irrelevant material); and (3) disclosure of information is made in a way that will allow the defense to reasonably investigate it (e.g., names and contact information for witnesses who possess favorable, material information).[13]

V. Empower courts to remedy *Brady* violations

A final reform to consider is the empowerment of courts to remedy *Brady* violations when they occur. To be sure, courts currently have such power, but the scope of their ability to dismiss cases or to take other serious action in response to a *Brady* violation often varies from court-to-court. On this issue, it is important to ensure that courts understand that they have a wide variety of tools available to remedy *Brady* violations. These may include (1) dismissal with or without prejudice, (2) an order precluding the introduction of a particular item of evidence, (3) an order that the government make a witness available to the defense, or (4) an instruction to the jury about the import of the government's suppression of evidence. It is also important to identify possible factors courts should consider in imposing a remedy for a *Brady* violation. These should include (1) the extent to which the suppression of evidence interfered with the defense investigation or preparation of the case, (2) the disappearance of witnesses that would have been available if timely disclosure had occurred, and (3) a showing that any tardy disclosure was made to secure a strategic advantage in the case. For a rule of constitutional disclosure to actually work in practice, it is important for courts, the government and the defense to understand what likely will happen when disclosure does not occur as mandated.

In sum, the sound administration of justice and fairness depends on such criminal discovery reforms like these occurring sooner rather than later.

Notes

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

2. David W. Ogden, Deputy Attorney General, *Memorandum for Department Prosecutors dated January 4, 2010 re: Issuance of Guidance and Summary of Actions Taken in Response to Report of the Department of Justice Criminal Discovery and Case Management Working Group*. *available at* http://www.justice.gov/dag/dag-memo.html. The memo summarizes the findings and recommendations of a working group convened after Senator Stevens' conviction in the United States District Court for the District of Columbia was vacated due to *Brady* violations. The Deputy Attorney General issued two *other related memos on the same day: (1) Guidance for Prosecutors Regarding Criminal Discovery available at* http://www.justice.gov/dag/discovery-guidance.html, and now codified at Section 165 of the United States Attorney's Criminal Resource Manual, and (2) *Requirement for Office Discovery Policies in Criminal Matters*, available at http://www.justice.gov/dag/dag-to-usas-component-heads.html

3. 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) (collecting cases); *see also United States v. Morales*, 746 F.3d 310, 311 (7th Cir. 2014) ("One would think that by now failures to comply with [*Brady*] would be

rare. But *Brady* issues continue to arise. Often, non-disclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a 'reasonable probability of a different result.'").

4. *See*, *e.g.*, *United States v. Mahaffy*, 693 F.3d 113, 133 (2d Cir. 2012) ("The government's failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with *Brady*.").

5. *See*, *e.g.*, *United States v. Parker*,790 F.3d 550, 554 (4th Cir. 2015) (vacating the defendant's conviction because federal prosecutors failed to disclose that key witness was under investigation by the SEC for fraud); *United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013) (finding *Brady* violation (but no prejudice) where federal prosecutors did not disclose proffer agreements with two government witnesses).

6. *See*, *e.g.*, *United States v. Tavera*, 719 F.3d 705, 714 (6th Cir. 2013) (vacating conviction based on *Brady* violations where federal prosecutors failed to disclose plainly exculpatory and material statements by government witness).

7. *See*, *e.g.*, *United States v. Mazzarella*, 784 F.3d 532 (9th Cir. 2015) (finding *Brady* violations (but no prejudice) where federal prosecutors failed to disclose bias information for several government witnesses, including an informal promise of immunity and communications about potential employment with the FBI); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (concluding "that the government violated its obligations pursuant to *Brady v. Maryland* . . . by withholding significant impeachment evidence relevant to a central government witness" and remanding for a new trial).

8. Bidish Sarma, *Do Supreme Court Justices Understand How Prosecutors Decide Whether to Disclose Exculpatory Evidence?* (March 17, 2016) *available at* https://www.acslaw.org/acsblog/will-the-supreme-court-reinvigorate-the-brady-doctrine-in-turner-and-overton/.

9. *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) ("The only question before (and even during) trial is whether the evidence at issue may be `favorable to the accused'; if so, it must be disclosed [under *Brady* and its progeny].")

10. *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (interpreting D.C. Rule of Professional Conduct 3.8(e) as requiring disclosure without regard to materiality and without regard to any sort of "triviality" analysis),

11. *See, e.g.*,N.D. N.Y. L. Crim. R. 14.1(a).

12. *See, e.g., United States v. Rodriguez,* No 08-cr- 1311, 2009 WL 2569116, at *12 (S.D. N.Y. 2009) (Patterson, J.) (court ordered government to turn over "*Brady* material . . . as it is discovered by the Government" and "*Giglio* material . . . twenty-one days before the commencement of trial"); *United States v. Smith,* No 02-cr-1LN, 2008 WL 906526, at *2 (S.D. Miss. 2008) (Lee, J.) (noting the magistrate's issuance of a "standard" order requiring the government "to produce as soon as possible all . . . *Brady* exculpatory materials").

13. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (requiring disclosures that are "sufficiently specific and complete" to permit effective use); *Eastridge v. United States*, 372 F. Supp.2d 26, 60 (D. D. C. 2005) (production of favorable grand jury transcripts to the defense was a "constitutional necessity").

Timothy P. O'Toole

a lawyer at Miller & Chevalier in Washington D.C., represents clients in a variety of white collar criminal and regulatory matters, with a primary focus on defending and investigating alleged violations of the economic sanctions and export controls laws.