Still in Its Infancy, the Due Process Protections Act Begins To Show Promise

On Oct. 21, 2020, President Trump signed the Due Process Protections Act. While the act does not contain the sweeping substantive changes to 'Brady' disclosures that were proposed in the FDEA, it represents an important step toward ensuring that the accused has access to exculpatory evidence that could prove their innocence.

By **Marc L. Greenwald and James Meehan** | February 02, 2021

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On Oct. 21, 2020, President Donald Trump signed the Due Process Protections Act into law. The DPPA, which amends Federal Rule of Criminal Procedure 5, is designed to provide greater procedural protection to defendants by facilitating their access to exculpatory evidence and to empower federal courts to sanction prosecutors who fail to comply with their disclosure obligations. The DPPA's sponsors expressed the hope that it will "help ensure that federal prosecutors respect the constitutional right of defendants to access favorable and potentially exculpatory evidence." While the long-term effect of the DPPA is an open question, in one SDNY case we have already seen its import in securing potentially exculpatory evidence early in criminal proceedings, leading to the pre-indictment dismissal of criminal charges against one of our clients.

'Brady' and the Disclosure of Exculpatory Evidence

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court for the first time imposed an obligation on the government to disclose exculpatory or mitigating evidence to the defendant. In *Brady*, the court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* thus established dual requirements to trigger a prosecutor's obligation to disclose: (1) the evidence must be favorable to the defendant; and (2) the evidence must be material to guilt or punishment. Exculpatory or mitigating evidence subject to disclosure is often referred to as *Brady* material.

Nine years later, in *Giglio v. United States*, 405 U.S. 150 (1972), the court extended the scope of disclosure to include evidence that could impeach the testimony of the government's witnesses. In the nearly fifty years since *Brady*, the focus of litigation has largely concerned whether evidence is "favorable" and "material" to the defendant, either directly or by impeaching a witness. A critical third issue, however, is the time by which the prosecution must disclose the evidence.

The *Brady* court did not address the timing of disclosure, and subsequent case law has failed to provide a bright line test. The Second Circuit recognized in *United States v. Coppa*, 267 F.3d 132, 142, 144 (2d Cir. 2001), for example, that it has "never interpreted due process of law as requiring more than that *Brady* material must be disclosed in time for its effective use at trial...or at a plea proceeding. ...There is no *Brady* violation unless there is a reasonable probability that earlier disclosure of the evidence would have produced a different result at trial." This inherently backwards looking standard requires that a prosecutor have the clairvoyance to evaluate *ex ante* whether, *ex post*, earlier disclosure of the evidence would have affected the outcome of the trial. Other circuits have established similarly amorphous standards.

The Department of Justice's official policy toward disclosure generally has been broader than what is constitutionally mandated. The U.S. Attorneys' Manual, for example, advises that federal prosecutors should disclose *Brady* material reasonably promptly after it is discovered. However, the manual provides for exceptions to this reasonable promptness rule, including for witness protection and for national security. Further, the U.S. Attorney's Office for the SDNY, among others, includes in its standard plea agreement a provision whereby the defendant agrees to waive any claim he or she may have had to *Brady* material.

Experience also has shown that while early disclosure may be the policy, it is not always the practice. In fact, faithful adherence to *Brady's* disclosure requirements has proved elusive. Recent studies have shown that a prosecutor's failure to disclose *Brady* material was the leading cause for exoneration after trial. A study released on Sept. 1, 2020 by the National Registry of Exonerations found that concealing exculpatory evidence was responsible for 44% of exonerations. Prosecutors were responsible for concealing evidence in 73% of exonerations. *Government Misconduct & Convicting the Innocent: The Roles of Prosecutors, Police & Other Law Enforcement* (//www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf), Nat'l Registry of Exonerations 75, 82 (Sept. 1, 2020)

One recent example of a prosecution team's failure to disclose *Brady* material received the attention of Congress, as it came during the trial of Alaska Senator Ted Stevens. Federal prosecutors charged Stevens with misconduct in relation to improvements he had done on a house in Alaska. The prosecution alleged that Stevens had not fully paid for the improvements, and therefore received a gift that should have been disclosed on his annual financial disclosure. After the jury returned a guilty verdict, the defense team uncovered exculpatory evidence that the government had failed to disclose, including witness statements that contradicted records introduced by the government during trial.

The district court ordered an investigation into the extent of the government's misconduct. The investigation revealed that the prosecution was "permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens' defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness." However, because there was no "clear, specific and unequivocal order of the court which commanded the disclosure" of the withheld information, the prosecutors could not be charged with criminal contempt. *In re Special Proceedings*, 1:08-cr-00231-EGS, Dkt. No. 435, Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, at 1 (April 7, 2009).

Federal legislative efforts to expand *Brady* protections followed the Stevens trial. In 2012, Senator Lisa Murkowski introduced the Fairness in Disclosure of Evidence Act, S. 2197, 112th Cong., § 3014(a)(1) (2012). The FDEA would have removed *Brady's* materiality element, and required the government to disclose evidence "that may reasonably appear to be favorable to the defendant." It also would have required federal prosecutors to disclose exculpatory evidence: "(1) without delay after arraignment and before the

appear to be favorable to the defendant. It also would have required federal prosecutors to disclose exculpatory evidence: (1) without delay after arraignment and before the entry of any guilty plea; and (2)...as soon as is reasonably practicable upon its becoming known, without regard to whether the defendant has entered or agreed to enter a guilty plea."

At a judiciary committee hearing to consider the FDEA, Deputy Attorney General James Cole expressed DOJ's opposition to the bill, and testified as to the negative repercussions DOJ believed would follow its passage. The bill thereafter languished in the judiciary committee, never reaching the Senate floor.

Due Process Protections Act

After receiving broad bipartisan support in Congress, and being met with silence (at least publicly) from DOJ, on Oct. 21, 2020, the President signed the DPPA, P.L. 116-182 (Oct. 21, 2020). The DPPA amends Federal Rule of Criminal Procedure 5 by inserting the following language as subsection (f)(1):

> In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.

The DPPA further provides that the judicial council for each federal district shall draft a model order that the district court may enter. The intent of the DPPA is "to remind prosecutors of their obligations under Supreme Court case law."

While the DPPA does not contain the sweeping substantive changes to *Brady* disclosures that were proposed in the FDEA, it represents an important, albeit incremental, procedural step toward ensuring that the accused has access to exculpatory evidence that could prove his or her innocence. For example, with the mandate that the court issue an order reminding the prosecutor of her *Brady* obligations at the first hearing at which counsel is present, it is likely that the prosecution will make *Brady* disclosures a priority earlier in discovery.

The DPPA also strengthens a court's ability to enforce and remedy *Brady* violations. In the case of Senator Stevens, the absence of an official order requiring disclosure of the withheld material limited the court's ability to hold accountable the prosecutors who suppressed the evidence. Alaska Senator Dan Sullivan, the DPPA's co-sponsor, invoked the misconduct that occurred during Stevens' trial in a press release lauding the DPPA's passage. The DPPA now cures that Stevens' trial deficiency by requiring that the Rule 5(f) order warn the prosecution of the potential consequences for failing to comply with its *Brady* requirements.

The Eastern District of Virginia's model order, for example, advises that *Brady* violations could result in the court "vacating a conviction or disciplinary action against the prosecution." The Western District of New York's model order similarly states that *Brady* violations could result in "exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, or sanctions by the Court." As of this writing, neither the SDNY nor the EDNY have issued model orders.

Although the DPPA does not itself require that *Brady* material be disclosed by a date certain, it is likely that courts will include such a time in their new Rule 5(f) orders. In fact, several district courts have already done so. Judges in the SDNY, for example, have issued orders requiring prosecutors to "make good-faith efforts to disclose [*Brady* material] to the defense as soon as reasonably possible after its existence becomes known to the Government, so as to enable the defense to make effective use of the information in the preparation of its case."

As defense lawyers, we have seen the impact of the DPPA first hand. Shortly after passage of the act, federal prosecutors charged Mouhame Sanogo, a 22-year-old African American, in a complaint with participating in an armed robbery in Harlem. According to the complaint, the victim purported to identify Sanogo a few minutes after the robbery.

At Sanogo's initial appearance, we were appointed to represent him and asserted that this was a case of mistaken identity. Magistrate Judge Stewart Aaron denied bail, but issued an order under Rule 5(f) that the prosecution was to turn over any evidence it uncovered as part of its investigation that could prove that Sanogo did not participate in the robbery. The prosecutors agreed to have their agents search for and provide to the defense videos of the incident the agents recovered during their canvass of the location of the robbery.

After reviewing the videos, we discovered a key piece of evidence that proved Sanogo's innocence: the man in the video who allegedly engaged in the robbery was wearing different sneakers than those Sanogo was wearing that night. The government agreed to drop the charges against Sanogo. Judge Aaron's Rule 5(f) DPPA order thus played a key role in securing the dismissal of criminal charges brought against an innocent man.

Conclusion

The DPPA is a welcomed step toward ensuring the accused have access to a fair and informed trial. Even though it does not substantively modify the nature of evidence required to be disclosed, the early admonition will likely put *Brady* disclosures at the forefront of prosecutors' concerns.

Further, because the DPPA requires that courts enter an order that includes warnings on the consequences for failing to disclose *Brady* material, courts will be further empowered to enforce violations, addressing a key deficiency exposed by Senator Stevens' trial.

Marc L. Greenwald *is a partner and* **James Meehan** *is an associate at Quinn Emanuel Urquhart & Sullivan.*