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Defenders Getting Their Due in Pursuit of Mr. Brady

It would be difficult, if not impossible, to overstate the importance of the Supreme Court's ruling in *Brady v. Maryland*[1] to the pursuit of justice for those who face criminal charges. In his excellent *Brady* primer published in the November 2018 issue of *The Champion*, Denis deVlaming frames *Brady* evidence (as it has come to be known) as the defense lawyer's best friend.[2] If *Brady* is the defense lawyer's best friend, he is not the type of friend who calls often without prompting. Even though prosecutors have an affirmative obligation to produce *Brady* materials regardless of whether there has been a request,[3] defense lawyers hoping to get their due from *Brady* should not sit idly by waiting for a *Brady* call. More often, it is the active pursuit of *Brady* evidence by the defense, through pleadings, independent digging, and pointed requests, that results in disclosure or discovery of the type of exculpatory evidence that can be critical to building an effective defense for trial.

The original *Brady* holding was refined and expanded by subsequent cases. At the 50-year anniversary of *Brady v. Maryland*, the Special Litigation Division of the District of Columbia Public Defender Service summarized the modern *Brady* rule as follows:

> *Brady* and its progeny impose on the prosecution a duty to learn of and disclose to the defense all favorable, material information known to … the prosecution team. The prosecution must disclose this information at such a time and in such a manner as to allow the defense to use the favorable material effectively — which, as a practical matter, means well before trial if not at the outset of the case, because the due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.[4]

Request Not Required, but It Triggers a Higher Duty

The prosecution's *Brady* obligations rise above those of responding to requests. Prosecutors are required to seek out and disclose information that is favorable to the defense. When found, such information must be turned over even when there has been no request from the defense.[5] In fact, the Supreme Court recognized that in this sense, the *Brady* rule is a departure from the strict adversarial system: "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model."[6] And yet, as the Supreme Court's 1976 opinion in *United States v. Agurs* makes clear, "[a] specific request … puts the prosecutor on notice of information considered important by the defense, and, therefore, the prosecutor is under a higher duty with respect to evidence requested than if no request or just a general request was made."[7] To put it

BY V. NATASHA PERDEW SILAS

more boldly, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[8]

Failed Disclosures Violate Due Process Regardless of Prosecutor's Intent

"[T]he suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent."[9] Suppression is a violation because the rule is not designed to punish a prosecutor for guile, but rather it is aimed at ensuring a defendant a fair trial.

Impeachment Materials; Other Discovery Rules

It is clear that anything that might be considered impeachment material for government witnesses is covered under *Brady* and must also be turned over to the defense.[10] For example, evidence that a witness has a problem with drug and alcohol abuse is always potentially impeaching and must be turned over to the defense.[11] For a more complete list of what materials might be considered impeaching, defense counsel should read Deputy Attorney General David Odgen's expansive Jan. 4, 2010, memorandum to all federal prosecutors laying out the process by which department prosecutors are expected to ensure compliance with *Brady* and the materials that the Department considers covered by *Brady*.[12]

The government's obligation to provide *Brady* materials in a timely manner is neither lessened by the fact that such material also constitutes material that must be produced later pursuant to the Jencks Act, 18 U.S.C. § 3500, nor by the fact that it need not be produced pursuant to Rule 16. "*Brady* always trumps both Jencks and Rule 16."[13]

Even Otherwise Secret or Privileged Materials Are Subject to *Brady*'s Requirements

Though grand jury proceedings are secret, exculpatory materials containing grand jury testimony must be produced to defense counsel separate and apart from the Jencks Act.[14] Also, although courts sometimes disagree about the extent to which *Brady* obligations trump other privileges, the argument that such privileges must give way often succeeds because *Brady* is rooted in the Due Process Clause of the Constitution.[15]

In *Murdock v. Castro*,[16] for example, the prosecutor informed the trial court that a prosecution witness and participant in the crime had written a letter to his attorney claiming that the defendant, Charles Murdoch, was not involved in the crime and that his statements to the contrary had been elicited under coercion. Because the letter was addressed to the witness's attorney and thus subject to the attorney-client privilege, the trial court ordered the prosecution to return the letter to the witness's attorney and ruled that Murdoch's attorney could not use the letter to impeach the witness. In the litigation that followed, the Ninth Circuit grappled with the extent to which state and common law privileges must give way when they conflict with the Sixth Amendment right to confront and cross-examine adverse witnesses. Ultimately, the Ninth Circuit sided with the defendant, holding that "evidentiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment."[17]

Materiality Should Not Be the Lens Through Which Pretrial Disclosures Are Filtered

The precise holding in *Brady v. Maryland* centered on the issue of "materiality" of withheld evidence because the finding that the withheld evidence was material was necessary to find that a Due Process violation has occurred: "[T]he 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."[18] As a result, there is a great deal of post-conviction litigation over the issue of "materiality."[19] However, in the context of a pretrial request, materiality is a strained concept. Unlike in the post-conviction context, it is impossible to know pretrial what all the evidence will be and thus exceedingly difficult to evaluate when something is going to be material in the sense that it will have a reasonable probability of making a difference in the outcome.

The D.C. Circuit Court described pretrial materiality as follows: "Evidence 'is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.'"[20] Another court observed that unlike evaluation of a *Brady* claim in a post-conviction proceeding, "[t]he question before trial is not whether the government thinks that disclosure of the information ... might change the outcome of the trial going forward, but whether the evidence is favorable and must therefore be disclosed."[21] Even "[w]here doubt exists as to the usefulness of the evidence to the defendant, the government must resolve all such doubts in favor of full disclosure."[22]

The Court's Misplaced Trust in *United States v. Sen. Ted Stevens*

The most recent effort at reforming prosecutorial compliance with *Brady* obligations on the national level came after one of Congress' own became a victim of *Brady* violations, which led to his wrongful conviction. On July 30, 2007, federal agents stormed the home of Sen. Ted Stevens in Girdwood, Alaska. The FBI had been investigating whether Stevens had received undeclared benefits from a lobbyist, namely construction work on a vacation home that Stevens jokingly called his "chalet."

Stevens was indicted on July 29, 2008, just weeks before the Republican Primary in Stevens' bid for reelection. The indictment charged Stevens with seven counts of making false statements for failing to properly report the renovations to his vacation home as gifts where the government contended that the renovations were worth about $250,000 and it was claimed that Stevens had paid far less for the work.

The key prosecution witness was a man named Bill Allen, an oil executive who had previously pled guilty to bribing several Alaskan state legislators. Prosecutors argued to the jury that Sen. Stevens failed to disclose pricey renovations to his chalet that they claimed were gifted to him by Allen. The crux of the defense was a claim by Sen. Stevens that he had tried to get Bill Allen to send him a bill for the renovation work, writing to Allen: "Send me a bill. We have to do this ethically."[23]

Though Stevens' request for a bill from Allen was undisputed, the prosecution spun the note as an attempt by Sen. Stevens to cover himself. Though they were certainly entitled to argue their take on the evidence to the jury, the prosecution team apparently used their interpretation of the evidence as a justification to withhold critical corroborating statements about Stevens' desire to pay for the work from renovation foreman Rocky Williams.

And that is not all the prosecution withheld. Bill Allen had no less than 55 pretrial interviews with the government. By the time of trial, Bill Allen was saying that Sen. Stevens' note requesting the bill was just a cover story. Contrary to the impression created by the government in its presentation to the jury, Bill Allen had not characterized Sen. Stevens' claim as a cover story in any of his 55 prior interviews. He had only concocted the explanation in his final interview with prosecutors prior to the trial:

> The government team also left the jury with a mistaken impression that Allen had been telling authorities all along that Stevens had cooked up a cover story about wanting to pay all the bills. But in fact, the report says, Allen didn't mention that in 55 previous interviews with prosecutors and the FBI — only coming up with the account that helped the Justice Department on the eve of trial.[24]

Other more salacious information surfaced relating to Bill Allen. Specifically, a witness came forward to say that when she was 16, Allen flew her from Seattle to Anchorage five times for sex, paying her thousands of dollars in cash each time. Allen later asked the witness to sign a false affidavit denying the facts.

The jury returned guilty verdicts against Sen. Stevens at the conclusion of the trial. He lost his bid for reelection and died in a plane crash two years later, but not before the Department of Justice did an about-face when a new team of prosecutors took over and uncovered substantial exculpatory evidence that unquestionably should have been turned over to the defense.[25]

The Schuelke Report About the Ted Stevens Prosecutors

The evidence withheld by the federal prosecutors in the Ted Stevens case ultimately led to appointment of a special investigator to review the possibility of criminal contempt charges against the offending federal prosecutors.[26] The 500-page Report of Special Counsel Henry Schuelke III was submitted to the court on April 7, 2009.[27] The Schuelke report found that "[t]he investigation and prosecution of U.S. Sen. Ted Stevens were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Sen. Stevens' defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness."[28]

Despite Schuelke's findings of significant, widespread, and at times intentional misconduct, he could not recommend that any of the government's attorneys be prosecuted for criminal contempt because, despite specific and extensive *Brady* motions filed by Stevens' counsel, there were no specific orders in the case that the prosecutors had to turn over *Brady* materials. In order for a person to be guilty of criminal contempt, it must be proven pursuant to 18 U.S.C. § 401(3) that the contemnor disobeyed an order that was sufficiently "clear and unequivocal at the time it is issued."[29] There was no such order in the case. To the contrary, Judge Sullivan had affirmed several times that prosecutors had a duty to make *Brady* disclosures, but he had declined to enter a specific order:

> I'm not going to write an order that says, "follow the law." We all know what the law is. The government — I'm convinced that the government in its team of prosecutors is thoroughly familiar with the decisions from our circuit and from my colleagues on this court, and that they, in good faith, know that they have an obligation, on an ongoing basis to provide the relevant, appropriate information to defense counsel to be utilized in a useable format as that information becomes known or in the possession of the government, and I accept that.[30]

History would prove how wrong Judge Sullivan was to trust the representations of the Justice Department prosecutors in the Ted Stevens case. And it was likely irksome to Judge Sullivan that it was his own refusal to "write an order that sa[id] follow the law" that prevented the prosecutors from being held accountable. One of Sen. Stevens' former lawyers, Rob Cary, has written a gripping account of the case that is definitely worth reading.[31] According to Cary, if something so egregious could happen to a U.S. senator (whose counsel demanded *Brady* compliance at every turn), it could happen to anyone.

The Due Process Protections Act

Given the fact that the victim of the Department of Justice's *Brady* violations was a member of Congress with four decades of tenure, it is not surprising that congressional hearings followed the release of the Schuelke report. Some members of Congress called for the prosecutors involved in the Ted Stevens case to be fired by the Department of Justice.[32] Ultimately, the Department of Justice disciplined two prosecutors on the six-person team.[33]

As for the fact that there had been no possibility of criminal contempt charges due to the absence of a specific order requiring *Brady* disclosures, Congress addressed this by enacting the Due Process Protections Act (DPPA) that mandates the entry of an order requiring *Brady* disclosure in every federal criminal case.[34] Legislators passed the Act with broad bipartisan consensus, by unanimous consent in the Senate and by a voice vote in the House of Representatives.

Some have criticized the Due Process Protections Act for not going far enough. The statute does not ensure that *Brady* is disclosed because it fails to require the government to affirmatively certify that it has met its *Brady* obligations. It does not require the government to comply with *Brady* during plea negotiations, and it does not require the government to adopt an open file policy:

> Some may say that the DPPA's flexibility and limited scope cause it to fall short of Congress' stated goal. For example, the DPPA does not require that federal prosecutors provide *Brady* material in the context of plea negotiations. It does not require the government to certify in a court filing that they satisfied their *Brady* obligations. Nor does it require the government to follow an "open file" discovery policy that some prosecutors' offices have adopted to ensure that *Brady* obligations are met.[35]

David Ogden's 2010 Memorandum to DOJ Prosecutors

In the wake of the scandal that ensued over information withheld in the Sen. Ted Stevens prosecution, Deputy Attorney General David Ogden issued an important memorandum to Department of Justice prosecutors on Jan. 4, 2010. According to Ogden, "Responding to the very painful experi-

ence of the failed Sen. Ted Stevens prosecution, early in 2010 we implemented changes in Department policy meant to provide direction and resources to prosecutors in fulfilling their obligations to disclose favorable information."[36] That memorandum is Section 9-5.000 in the Justice Manual (formerly the United States Attorneys' Manual).[37]

Whether a defense attorney is in federal court or not, the memorandum is a helpful outline of the steps a prosecutor should take to comply with *Brady*. The four-step process is as follows: Step 1 — Gathering and Reviewing Discoverable Information; Step 2 — Conducting the Review; Step 3 — Making the Disclosures; and Step 4 — Making a Record. The memorandum includes information about whom to consider as part of the prosecution team for *Brady* purposes, what materials to look for and review, when to make disclosures, and how to document them. Although the memorandum does not create enforceable remedies for attorneys seeking disclosures in criminal cases, it does provide a road map concerning where prosecutors and defense attorneys can look for potential exculpatory materials.

Other Proposed Solutions

Legislative

Former trial attorney Thomas Dybdahl has written about potential legislative solutions in his book, *When Innocence Is Not Enough: Hidden Evidence and the Failed Promise of the Brady Rule* (2023). Dybdahl argues that legislative solutions are needed to mandate open file discovery by the prosecution to actually solve the problem.

Judicial

In the absence of legislation mandating open file discovery, Jason Kreag proposed a simple judicial colloquy of questions that can be asked by a judge to get prosecutors on the record about whether they have complied with their *Brady* obligations:

> There are many potential questions judges could pose to prosecutors to increase their compliance with their disclosure obligations. Local practice, state ethical rules, and existing pretrial procedures will influence which questions should be asked. However, here are five questions judges could use in most jurisdictions. The first four questions are designed to be asked during a pretrial hearing or before accepting a guilty plea. Judges should ask the fifth question after the prosecution's case in chief or after the defense's opening statement.
>
> 1. Have you reviewed your file, and the notes and file of any prosecutors who handled this case before you, to determine if these materials include information that is favorable to the defense?
>
> 2. Have you requested and reviewed the information law enforcement possesses, including information that may not have been reduced to a formal written report, to determine if it contains information that is favorable to the defense?
>
> 3. Have you identified information that is favorable to the defense, but nonetheless elected not to disclose this information because you believe that the defense is already aware of the information or the information is not material?
>
> 4. Are you aware that this state's rules of professional conduct require you to disclose all information known to the prosecutor that tends to be favorable to the defense regardless of whether the material meets the *Brady* materiality standard?
>
> 5. Now that you have heard the lines of cross-examination used by the defense and have a more complete understanding of the theory of defense, have you reviewed your file to determine if any additional information must be disclosed?
>
> Finally, in addition to these questions, the judge should remind prosecutors throughout the proceedings that she is prepared to conduct an in-camera review of any information that the prosecutor is on the fence about disclosing."[38]

Jason Kreag notes in his *Stanford Law Review* essay that there is growing recognition that *Brady* violations are rampant. Indeed, he notes, Chief Judge Alex Kozinski of the Ninth Circuit succinctly summarized the problem in an opinion: "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."[39]

NACDL produced a report in 2014 in collaboration with the Veritas Initiative regarding the need for judicial intervention to ensure that prosecutors comply with their Due Process obligations. The report was titled *Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases*.[40] In that white paper, the authors reported the findings of a study of 620 decisions in which a court ruled on the merits of a *Brady* claim.[41]

How Defense Lawyers Can Be Proactive

It has been 60 years since the Supreme Court's decision in *Brady v. Maryland*. And yet, it is clear that defense lawyers still are not receiving all the *Brady* evidence to which they are entitled. According to one commentator, "prosecutors regularly withhold evidence from the defense that could blow holes in their cases."[42] The

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rate of withholding of such evidence is inherently unknowable. Even if one analyzes only the 3,368 known cases in which defendants have been exonerated by DNA and other evidence in the United States since 1989 as maintained by the Michigan College of Law database of exonerations, 57% list "official misconduct" as a contributing factor. Within the category of official misconduct, *Brady* violations are the leading type of misconduct cited. For this reason alone, defenders cannot afford to be passive in their *Brady* explorations.

Florida criminal defense attorney Denis deVlaming said:

> What must the defense lawyer do to require the prosecution to fulfill its obligations under *Brady*? "Do nothing" is the wrong answer. The defense lawyer cannot sit back and expect the prosecutor to fulfill his or her obligations. A specific *Brady* motion must be filed and calendared for hearing. Specific areas must be listed for the prosecutor to search and report back on each area. If defense counsel does not file a motion, it is the prosecutor who decides what to look into and what to turn over to the defense.[45]

How can defense lawyers be proactive?

1. *Specific Brady Letters and Motions:* Specific requests are so vitally important. Realize that one of the many reasons that *Brady* evidence may not be turned over is rooted in who is determining when something is exculpatory. Prosecutors famously view cases differently than defense lawyers. A prosecutor's faith in her case can sometimes skew the evaluation of the exculpatory quality of the evidence being reviewed. Since defense lawyers have a better idea of what they would consider exculpatory, it is important to make specific requests. The *Brady* request letter should lay out the charges, elements, all potential defenses, and any factual tailoring that can be done based on the facts of the client's case. The letter should also lay out the potential mitigating sentencing factors. Remember that *Brady* is itself a sentencing case. Therefore, make those requests broad enough to cover sentencing.

2. *Pretrial Conference:* Use the pretrial conference to ask the judge to drill down on what the prosecutor is doing to comply with *Brady*. The prosecution should be required to specify which agents it considers to be part of the "prosecution team" for *Brady* purposes. Make the point that *Brady* trumps the Jencks Act, not the other way around. Drill down on timing. Ask that the prosecutor affirmatively represent that she has presently provided all *Brady* materials to date. In this vein, defense counsel's questions can be modeled after Jason Kreag's essay. As an alternative, defense counsel can consider filing a motion asking the court to conduct the colloquy. Deadlines should be set. Make the case that the evidence should be disclosed immediately or as early as possible. After all, disclosures often point to the need for additional investigation, and defense investigations may proceed more slowly because defense lawyers do not have badges.

3. *Search for Brady on Your Own:* In every case, there are known "knowns" and known "unknowns." Defense lawyers should ask themselves these questions: "If there were *Brady* evidence out there for my client's case, what would it look like? Can I request such evidence through subpoenas or Open Records Act requests?" One thing defense counsel can do is request disciplinary records from the law enforcement officers involved in the case. Furthermore, if the prosecutor leaves out an important agency when she identifies whom she considers part of the prosecution team, take that as an opportunity to request the investigation records from that agency. Subpoena those records. It always helps when the prosecutor knows that defense counsel is out there digging. This may inspire more disclosures.

4. *Go Back With Specifics:* Once defense counsel finds a tidbit, she should use that small item to show the court that the prosecution has not complied. Reference Judge Sullivan's statement in the Ted Stevens case. Judge Sullivan said he was not going to enter an order for the government to comply with the law, but he found later that despite representations to the contrary, the government's lawyers were actively hiding *Brady* evidence.

5. *Make Your Record:* Even though the suggestion here is that defense counsel should be proactive in gathering *Brady* materials as a means to get the information and spur the government on in its obligations, let's not forget that in the appropriate case defense counsel can and should receive powerful remedies if she is actually able to establish a *Brady* violation. To do so, however, defense counsel must make her record.

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Notes

1. Brady v. Maryland, 373 U.S. 83 (1963).

2. Denis deVlaming, *John Leo Brady — The Defense Lawyer's Best Friend*, THE CHAMPION, November 2018, at 12.

3. United States v. Agurs, 427 U.S. 97, 106 (1976).

4. Special Litigation Division of the District of Columbia Public Defender Service, *Brady v. Maryland Outline* at 6 (2013) (internal quotation and citations omitted), available at https://www.pdsdc.org/docs/default-source/default-library/brady-outline-final-2013.pdf?sfvrsn=a12fcff8_1 (last visited Jan. 29, 2023).

5. *Agurs*, 427 U.S. at 103-07.

6. United States v. Bagley, 473 U.S. 667, 475 n.6 (1985). For further discussion, see Stephanos Bibas, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?* (2005), available at https://scholarship.law.upenn.edu/faculty_scholarship/77.

7. *Agurs*, 427 U.S. at 106.

8. *Id.*

9. *Brady*, 373 U.S. at 87.

10. Strickler v. Greene, 527 U.S. 263, 280 (1999), citing Giglio v. United States, 405 U.S. 150 (1972), including inconsistent

statements of witnesses, Smith v. Cain, 565 U.S. 73 (2012).

11. United States v. Stroop, 121 F.R.D. 269, 274 (E.D.N.C. 1998); *see also* United States v. Smith, 534 F.3d 1211, 1222 (10th Cir. 2008) ("drug use of a witness should be disclosed under *Brady*").

12. Guidance for Prosecutors Regarding Criminal Discovery, available at https://www.justice.gov/archives/dag/memorandum-department-prosecutors.

13. United States v. Safavian, 233 F.R.D 12, 16; *see also* United States v. Poindexter, 727 F. Supp. 1470, 1485 (D.D.C. 1989) ("The *Brady* obligations are not modified merely because they happen to arise in the context of witness statements.").

14. Tierney v. United States, 410 U.S. 914, 961 n.2 (1973).

15. See the discussion of privileges and how they apply when in conflict with the right to confront and cross-examine witnesses in Murdock v. Castro, 365 F.3d 699 (9th Cir. 2004); *see also* Jackson Teague, *Two Rights Collide: Determining When Attorney-Client Privilege Should Yield to a Defendant's Right to Compulsory Process or Confrontation*, AM. CRIMINAL L. REV., 2021 available at https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2021/04/58-2-Teague-Two-Rights-Collide.pdf.

16. 365 F.3d 699 (9th Cir. 2004).

17. Murdoch v. Castro, 365 F.3d 699, 702 (9th Cir. 2003), see Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).

18. *Brady*, 373 U.S. at 87.

19. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."); United States v. Bagley, 473 U.S. 667, 678 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."); *Agurs*, 427 U.S. at 108 ("But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.").

20. United States v. Russell, No. 22-20348-CR, 2022 WL 17736195, at *2 (S.D. Fla. Dec. 17, 2022), citing United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993).

21. *Safavian*, 233 F.R.D at 16.

22. *Id.* at 17.

23. Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NPR, March 15, 2012, available at https://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case (last visited Jan. 29, 2023).

24. *Id.*

25. William Yardley & Liz Robbins, *Former Senator Ted Stevens Killed in Plane Crash*, N.Y. TIMES, Aug. 10, 2010, available at https://www.nytimes.com/2010/08/11/us/11crash.html (last visited Jan. 29, 2023). *See also* Motion of the United States to Set Aside the Verdict and Dismiss the Indictment With Prejudice, available at https://www.nacdl.org/getattachment/07d3a96b-98b7-4586-92d3-fdf9a362e787/dojmtn.pdf.

26. See David Roth, Stephen R. Spivack & Daniel P. Golden, *Memo to Prosecutors: DOJ Focuses on Discovery Obligations*, 25(2) CRIMINAL JUSTICE (Summer 2010), available at https://www.bradley.com/-/media/files/insights/publications/2010/07/memo-to-prosecutors/files/reprint/fileattachment/memo2prosecutors-(2).pdf (last visited Jan. 29, 2023).

27. Report to the Honorable Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's April 7, 2009 Order, Executive Summary available at http://www.emptywheel.net/wpcontent/uploads/2012/03/stevens_report.pdf (last visited Jan. 29, 2023).

28. *Id.*

29. *See, e.g.*, Traub v. United States, 232 F.2d 43, 47 (D.C. Cir. 1955).

30. See United States v. Ted Stevens, D.D.C. 1:08-cr-00231-EGS, Document 64 (Transcript of Pretrial Conference) at 14-15 (Sept. 10, 2008).

31. ROB CARY, NOT GUILTY: THE UNLAWFUL PROSECUTION OF U.S. SENATOR TED STEVENS (2014).

32. See Charlie Savage, *Prosecutors Face Penalty in '08 Trial of a Senator*, N.Y. TIMES, March 24, 2012.

33. Prosecutor Joseph Bottini was suspended for 40 days. Prosecutor James Goeke was suspended for 15 days. A third prosecutor, Nicholas A. Marsh, committed suicide. Alaska Sen. Lisa Murkowski said that the Department's actions fell short. See Charlie Savage, *supra* note 32.

34. See Federal Rule of Criminal Procedure 5(f), which provides — (f) Reminder of Prosecutorial Obligation.

> (1) In general. 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.
>
> (2) Formation of order. Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.

35. Edward J. Loya Jr., *What Good Will the Due Process Protections Act Do?* NAT'L L. REV., December 17, 2020.

36. Foreword, KATHLEEN "COOKIE" RIDOLFI, TIFFANY M. JOSLYN & TODD FRIES, MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES (2014), available at https://www.nacdl.org/Document/MaterialIndifferenceHowCourtsImpedeFairDisclosure (last visited Feb. 1, 2023).

37. Go to www.justice.gov/jm/justice-manual.

38. Jason Kreag, *Essay: The Brady Colloquy*, 67 STANFORD L. REV. 2014, available at https://www.stanfordlawreview.org/online/the-brady-colloquy/ (last visited Feb. 1, 2023).

39. *Id.*, citing United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting).

40. KATHLEEN "COOKIE" RIDOLFI, TIFFANY M. JOSLYN & TODD FRIES, MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES (2014).

41. *Id.*

42. Jessica Brand, *The Epidemic of Brady Violations: Explained*, THEAPPEAL.ORG, available at https://theappeal.org/the-lab/explainers/the-epidemic-of-brady-violations-explained.

43. Denis deVlaming, *supra* note 2. ■

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