

Federal Criminal Procedure

The Department of Justice's New Guidance on the Production of Exculpatory and Impeachment Evidence: A Piecemeal Approach to the Problem of Prosecutorial Misconduct

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In 1963, the United States Supreme Court issued its landmark decision in *Brady v. Maryland* holding that a prosecutor's suppression of favorable material evidence violates the Due Process Clause of the Constitution, regardless of the prosecutor's intent.¹ Although a prosecutor's obligation to produce exculpatory evidence is firmly established law, a recent series of high-profile cases have increased awareness and highlighted concerns about whether prosecutors are faithfully discharging their obligation to produce exculpatory evidence or are engaging in other forms of misconduct. The dismissal of rape charges against members of the Duke University lacrosse team, the dismissal of corruption charges against United States Senator Ted Stevens, the dismissal of options backdating charges against two senior Broadcom executives, and the dismissal of manslaughter charges against Blackwater security guards in Iraq have heightened the scrutiny of prosecutorial conduct. In response to these cases, on January 4, 2010, the Department of Justice issued a series of memoranda outlining the procedures federal prosecutors must follow in complying with their legal and ethical obligations to produce exculpatory and impeachment evidence and ensure that all criminal defendants receive a fair trial.

This article proceeds in three parts. First, it describes a prosecutor's discovery obligations under the Constitution, various statutes, Federal Rules of Criminal Procedure, and DOJ's United States Attorney Manual ("USAM"). Part II describes the recent guidance set forth in DOJ's discovery memoranda ("DOJ Discovery Guidance" or "Guidance"). Part III evaluates DOJ's Guidance and explains that although the Guidance is a step in the right direction, further reform is likely needed to address the continuing issues of prosecutorial conduct and

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to ensure that criminal defendants have access to all exculpatory evidence in defending against criminal charges.

Discovery Obligations of Federal Prosecutors

A prosecutor's discovery obligations are firmly established in the law, derived from several sources including the U.S. Constitution, statutory mandates from Congress, the Federal Rules of Criminal Procedure, and the DOJ's internal guidance.

Constitutional Principles: Brady v. Maryland and United States v. Giglio: In two landmark decisions, the Supreme Court made clear that a prosecutor's failure to provide the defense with any information that would tend to exculpate criminal defendants, or that would tend to impeach the character or testimony of a government witness, violates the Due Process Clause of the United States Constitution. In *Brady v. Maryland*, the Court reiterated that the relevant inquiry is not whether a defendant is guilty of the charged crime; rather, the real inquiry is whether the conduct of a federal prosecutor compromises the constitutional right to a fair trial. The Court emphasized the role of prosecutors in safeguarding constitutional ideals stating:

A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice.²

The Court noted that while a prosecutor is engaged in the adversarial process, he advocates for a client whose sole interest is the pursuit of justice. As a result, the Court held that a prosecutor's suppression of evidence favorable to an accused upon request violates due process where the evidence is *material* to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.³

In *Giglio v. United States*, the Supreme Court extended the *Brady* rule to impeachment evidence, holding that a prosecutor's failure to disclose a promise of leniency allegedly made to an unindicted co-conspirator who was a key witness at the defendant's trial violated the Constitution's Due Process Clause.⁴ The Court held that because impeachment evidence falls within the *Brady* rule, prosecutors have a duty to disclose any material

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leniency or immunity agreement between the government and a prosecution witness. In so holding, the Court stated that the materiality standard is satisfied "when the reliability of a given witness may be well determinative of guilt or innocence."⁵

Taken together, *Brady* and *Giglio* set forth the minimal constitutional requirements that prosecutors must follow in providing the defense with potentially exculpatory evidence.

Statutory Obligations: the Jencks Act: In *Jencks v. United States*,⁶ the Supreme Court overturned the conviction of an actor convicted for falsely claiming he was not a member of the Communist Party. Two federal informants gave crucial testimony but the government refused to produce their written reports to the defense. The Court held that prosecutors must produce documents relied upon by government witnesses in criminal proceedings and attempted to establish various rules and procedures for a prosecutor's disclosure of evidence. Endorsing the Court's decision, Congress passed the Jencks Act requiring the government to produce transcripts and other notes or documents related to testimony by government witnesses.⁷ Under the Act, the defense may compel the production of any witness statement if (a) the witness is testifying for the government and (b) the statement "relates to the subject matter" of the witness's testimony. This disclosure, however, is conditional upon a witness's testimony, and a federal prosecutor cannot be compelled to produce witness statements prior to the conclusion of a witness's testimony on direct examination at trial. After the government witness testifies, the court can, on the defendant's motion, order the United States to produce any witness statements in its possession. Alternatively, the court may recess the trial, if necessary, to grant a defendant access to the witness statements. The emerging trend is that prosecutors turn over those statements before a witness testifies to minimize disruption of the trial.

Federal Rules of Criminal Procedure – Rules 16 and 26.2: Neither *Brady*, its progeny, nor the Jencks Act creates a right to broad pre-trial discovery in criminal cases. Federal Rule of Criminal Procedure 16 bridges that gap and ensures the sharing of information between the prosecution and the defense in federal criminal cases.⁸ Rule 16 requires prosecutors to disclose certain evidence to the defense, including: (a) the substance of a defendant's oral statements to the government that the prosecutor intends to use at trial, and (b) the defendant's written or recorded statements within the government's possession that the prosecutor knows – or should know – exist.⁹ The government is also under a continuing

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duty to disclose any relevant information that becomes available to it prior to or during trial.¹⁰

The provisions of the Jencks Act have been substantially incorporated into Rule 26.2 of the Federal Rules of Criminal Procedure.¹¹ Rule 26.2 extends the provisions of the Act, providing that the statements of both government and defense witnesses, other than the criminal defendant, are subject to production at trial. The Rule does not alter Jencks' schedule for production of statements, nor does it relieve a defendant seeking production of Jencks material from the necessity of making a request for production at the trial stage of the proceeding.

United States Attorney Manual: The USAM contains an explicit provision regarding the disclosure of exculpatory and impeachment information.¹² Although the USAM states that the disclosure of exculpatory material and impeachment evidence is part of the constitutional guarantee to a fair trial, it also provides that the obligations do not create a general right to discovery in criminal trials. The USAM defines "material" evidence as evidence for which there is a reasonable probability that effective use will result in a defendant's acquittal. The USAM also urges prosecutors to adopt a broad view of materiality in determining whether evidence is material, thus warranting disclosure. Further, the USAM requires the disclosure of information that, while not material, is "significantly probative" of the issue before the court. Therefore, while the USAM contemplates the disclosure of exculpatory and impeachment evidence beyond the minimum constitutional requirement, it provides little detailed guidance on what should or should not be produced.

The Department of Justice Issues Guidance on the Production of Exculpatory and Impeachment Evidence

The timing of DOJ's release of its three discovery memoranda in January 2010 was not a coincidence. In the wake of a series of high-profile dismissals, DOJ bore the brunt of intense public scrutiny after these dismissals angered federal judges, grabbed the public's attention, and called into question the DOJ's ability to fulfill its mission of ensuring the fair and impartial administration of justice. The first two memoranda are brief. The first¹³ lists several initiatives that will be implemented throughout the country to improve discovery throughout DOJ; the second memoranda¹⁴ directs all United States Attorneys and DOJ department heads to develop a discovery policy for prosecutors in their respective offices by

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March 31, 2010 incorporating the relevant district court precedent from their respective jurisdictions.

The third and most substantive memorandum is entitled "Guidance for Prosecutors Regarding Criminal Discovery" (previously identified as "DOJ Discovery Guidance" or "Guidance"). The DOJ Discovery Guidance identifies four specific steps prosecutors should take in evaluating and disclosing material exculpatory and impeachment evidence. Although the DOJ Discovery Guidance is a step in the right direction because prosecutors are encouraged to adopt a broad view of their discovery obligations, it lacks the specificity required to ensure prosecutors adhere to their discovery obligations and to eliminate or significantly reduce errors that could affect a defendant's fair trial.

Step 1: Gathering Potentially Discoverable Information: *Brady* obligations only extend to information in the possession of members of a "prosecution team." The DOJ Discovery Guidance expands on DOJ's policy obligating federal prosecutors, in preparing for trial, to "seek all exculpatory and impeachment information from all members of the prosecution teams."¹⁵ The Guidance broadly defines who may be members of a "prosecution team" as including federal, state, and local law enforcement agents and all other government officials participating in the investigation and prosecution of a criminal defendant. However, the Guidance provides that the scope of a "prosecution team" is flexible and will depend on the complexity of the particular case.

The DOJ Discovery Guidance squarely places responsibility on the prosecutor to determine what materials to review. Further, to ensure broad disclosure, the Guidance mandates that the prosecutor review all potentially discoverable material within the custody or control of the prosecution team. This includes: (a) investigative agency files; (b) confidential informant, witness, and source files; (c) case investigation files and evidence; (d) documents or evidence in the possession of civil attorneys and regulatory agencies; (e) substantive case-related communications; (f) potential *Giglio* information relating to law enforcement witnesses; (g) potential *Giglio* information relating to non-law enforcement witnesses; and (h) information obtained in witness interviews.

Step 2: Reviewing Potentially Discoverable Information: The next step in the discovery process is reviewing the information gathered from the prosecution team to determine

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whether such information should be disclosed to defense counsel. Although the DOJ Discovery Guidance directs prosecutors to develop a process for the review of information to ensure the identification of discoverable information, it also allows prosecutors to delegate the task of actual review to paralegals, agents, or agency counsel. That said, the Guidance makes clear that prosecutors remain liable for all *Brady* decisions. However, it does suggest that in cases involving "voluminous evidence," prosecutors should consider providing access to the voluminous documents to avoid the possibility that the review process "fails to identify material discoverable evidence."

Step 3: Disclosing Discoverable Information to Criminal Defendants: Step three involves prosecutors' actual discovery obligations in producing discoverable evidence to defendants. The DOJ Discovery Guidance contemplates that disclosure will be broader than the Supreme Court's pronouncements in *Brady* and *Giglio* as well as the requirements of the Jencks Act and the Federal Rules of Criminal Procedure. Even though the Guidance encourages prosecutors to provide broad and comprehensive discovery beyond their legal discovery obligations, it cautions that prosecutors also must balance broad discovery against other countervailing interests such as the protection of victims and witnesses, ongoing criminal investigations, and national security interests. Further, the Guidance states that "exculpatory information" should be turned over "reasonably promptly after discovery," while impeachment information, which depends on who the prosecutor will call as a government witness, will "typically be disclosed at a reasonable time" to "allow the trial to proceed efficiently," consistent with the Jencks Act and local court rules.

Step 4: Making a Record of Disclosures to Criminal Defendants: The last step in the discovery process is making a record of the disclosures. The Guidance states that prosecutors should make a record of when and how information is disclosed or otherwise made available to avoid subsequent litigation over discovery disclosures and non-disclosures.

Analysis of the DOJ Discovery Guidance

Although the Guidance encourages prosecutors to define their prosecution team broadly, the Guidance still leaves a prosecutor with the discretion to choose who is a member of the team. For example, in cases involving multi-district investigations, the prosecutor has

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discretion in deciding which agencies are part of the prosecution team and whether the agencies' files should be reviewed for relevant information. Furthermore, in cases involving parallel proceedings, prosecutors are not required to review the other agencies' files for discoverable information; rather, prosecutors are encouraged to simply "consider whether the relationship with the other agency is close enough to make it part of the prosecution team for discovery purposes."

Overall, DOJ's instruction to prosecutors to "err on the side of inclusiveness" in defining the prosecution team is a positive step in the right direction. Nonetheless, whether a defendant receives certain exculpatory evidence in the hands of other federal, state and local agencies, ultimately depends on how broadly or narrowly a particular prosecutor chooses to define the members of his or her team.

Another benefit of the Guidance is that it sets forth a comprehensive and well thought out list of documents that a prosecutor should review in considering his or her discovery obligations. However, one deficiency is DOJ's instruction regarding the recording and documentation of witness interviews. Although the DOJ Discovery Guidance does not require prosecutors and law enforcement agents to memorialize witness interviews, it notes that "generally speaking" witness interviews should be recorded or documented, except for trial preparation meetings. The Guidance requires that *if* witness interviews are memorialized, the government must memorialize "*material* variances" in witness interviews, even if such variances occur in a single interview. However, the Guidance gives agents and prosecutors the discretion to decide what constitutes a "material variance" and whether such variance needs to be memorialized in writing so that it can be turned over as *Giglio* information. The Supreme Court previously has held that evidence is material if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.¹⁶ Nonetheless, the exact contours of "materiality" and "reasonable probability" remain vague and are better suited to a neutral review by a court rather than an agent's subjective opinion while engaged in the adversarial process of building a criminal case.

Perhaps DOJ chose to require only that "material variances" be memorialized and leave agents and prosecutors to decide what constitutes a "material variance" in order to ensure that agents were not wholly discouraged from memorializing witness interviews. Still, DOJ's

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attempt to strike a balance falls short in this instance. Rather than limiting agents' obligations to record only material variances, the government should instead require that its agents record *all* variances so that a defendant can review the evidence and a court can determine whether these "variances" are material to the case.

The DOJ should be commended for reinforcing the fact that prosecutors remain liable for all discovery violations and for encouraging prosecutors to develop a comprehensive review program. The Guidance also moves in the right direction by suggesting that prosecutors consider simply providing defendants with full access to "voluminous documents" in order to avoid the possibility of inadvertently withholding material evidence. It is too early to tell whether prosecutors will accept this guidance and provide broader access to criminal defendants, or instead whether the more methodical review process will ultimately slow down the production of documents to defense counsel and impact a defendant's ability to review all of the materials provided.

The distinction between exculpatory and impeachment evidence, and the disparate timeline for turning over evidence to the defense, is the biggest Achilles heel in the otherwise constructive Guidance. The Guidance insists on maintaining a distinction between (a) exculpatory information (related to proof of a charged offense), which should be turned over "reasonably promptly after discovery"; and (b) impeachment information (related to an inconsistent witness statement) which should be disclosed, if at all, only at "a reasonable time before trial" and consistent with the Jencks Act. By perpetuating the distinction between exculpatory information and impeachment information, the Guidance risks that prosecutors will narrowly read *Giglio* and forget to fulfill its mandate that "impeachment information" can also be exculpatory. Indeed, by permitting a delay in turning over "impeachment" information, the Guidance may inhibit defendants from identifying useful information from an equivocating witness that challenges the government's version of the case.

This aspect of the Guidance is particularly vexing in that the DOJ Discovery Guidance also fails to give prosecutors any meaningful advice on when to turn over Jencks material. As a practical matter, the production of Jencks material varies widely from jurisdiction to jurisdiction, with some jurisdictions requiring the turnover of material months before trial and others requiring the disclosure only at midnight on the day a witness is to testify. It

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seems odd given DOJ's emphasis on consistency in other areas of the criminal process such as sentencing guidelines, that it remains unwilling to ensure its prosecutors comply with discovery obligations in a uniform manner. After all, why should a defendant in Washington, D.C. get witness statements earlier in the criminal process than a defendant charged with the same offense in Alaska? The Guidance's limited emphasis on *Giglio*'s exculpatory impeachment evidence, combined with its failure to encourage the early disclosure of *mere* "impeachment information" under Jencks, leaves prosecutors with far too large a range of discretion in determining the scope and timing of disclosures made under *Brady*, *Giglio*, and the Jencks Act. It also increases the risk that prosecutors will narrowly view *Giglio* and fail to timely turn over exculpatory, impeachment evidence on witnesses that casts doubt upon the accuracy of prosecution evidence. Until DOJ remedies this problem, the issue of prosecutorial misconduct is likely to remain.

Conclusion

In its conclusion, the DOJ states "[t]his guidance does not and could not answer every discovery question because those obligations are quite fact-specific." If federal prosecutors across the country actually execute the principles contained within the Guidance, the DOJ would be in a much better position to ensure that prosecutorial disclosures are aligned with the Department's broad definition of discoverable information. However, the fact-specific nature of the discovery inquiry is a barrier to the implementation of the Guidance's requirements: although the Guidance seeks to implement a uniform approach to discovery disclosures, it does not create a single set of rules, and DOJ offices, with divergent views on *Brady* and *Giglio* information, are still tasked with interpreting and executing these guidelines. Consequently, the effectiveness of the DOJ's policies and guidelines on individual trials will have to be assessed after the policies have been applied for a few years.

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¹ 373 U.S. 83 (1963).

² *Id.* at 87–88.

- ³ *Id.* at 87.
- ⁴ 405 U.S. 150 (1972).
- ⁵ *Id.* at 154.
- ⁶ 353 U.S. 657 (1957).
- ⁷ 18 U.S.C. § 3500 (1957).
- ⁸ See Fed. R. Crim. P. 16 advisory committee notes to the 1974 amendment (stating that the Rule is "revised to give greater discovery to both the prosecution and the defense").
- ⁹ Fed. R. Crim. P. 16 (1966).
- ¹⁰ *Id.*
- ¹¹ Fed. R. Crim. P. 26.2 (1980).
- ¹² U.S.A.M. § 9-5.001 (2006).
- ¹³ This memorandum is entitled "Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group."
- ¹⁴ This memorandum is entitled "Requirement for Office Discovery Policies in Criminal Matters."
- ¹⁵ U.S.A.M. § 9-5.001 (2006).
- ¹⁶ In *Kyles v. Whitley*, 514 U.S. 419 (1999), the Supreme Court held that evidence is material if there is a "reasonable probability" that, had the existence been disclosed to the defense, the result of the proceeding would have been different.

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