Brady Summaries and the Obligation to Disclose Favorable Evidence

By Steven F. Molo and Lucas M. Walker

Prosecutors and defense attorneys are well acquainted with the familiar rule of *Brady v. Maryland*, 373 U.S. 83 (1963): The government must disclose to criminal defendants evidence that is favorable to their defense. One issue that has arisen in connection with that duty, however, is *what* precisely the government must hand over. In their role as *Brady* gatekeepers, prosecutors have sometimes taken to giving defendants *summaries* of evidence (such as notes of witness interviews and the like), rather than providing the raw evidence itself. That practice may not satisfy *Brady*.

Disclosing Evidence vs. Summarizing Evidence

The U.S. Supreme Court has consistently described prosecutors' *Brady* obligation as an "affirmative duty to disclose *evidence*." *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (emphasis added). Its *Brady* cases have thus involved the nondisclosure of such things as crime-lab reports, witness statements, notes, and other documents. *See Connick v. Thompson*, 131 S. Ct. 1350, 1358 (2011) (crime lab report); *Cone v. Bell*, 556 U.S. 449, 460 n.10, 470–71 (2009) (witness statements, "documents," and "undisclosed notes"); *Brady*, 373 U.S. at 84 ("extrajudicial statements"). Summaries by their nature are not *evidence*. They are only the prosecution's *description* of the evidence in its possession. There are thus strong arguments that a "disclosure" via summary is not a *Brady* disclosure at all.

Even if summaries do not inherently contravene *Brady*, they still present unnecessary risks of mistake and misrepresentation. The prosecutor must ask himself or herself not only which *items* to disclose, but which *aspects* of those items to describe—adding one more filter between favorable evidence and the defendant. While a prosecutor may normally have to decide whether, say, a police report should be turned over, the summarizing prosecutor can be even more discriminating, deciding that only certain information in the report (this but not that witness statement, this but not that officer observation), merits mention in the summary. The more finely grained that inquiry becomes, the greater the risk that favorable evidence will be screened out and suppressed.

More critically, written summaries require characterization of the evidence. The prosecutor assumes the role not merely of compiler, but of *interpreter*. Describing evidence rather than disclosing it affords the prosecutor an opportunity to put his or her own spin on damaging evidence. And even minor edits can have a significant impact on how a document is interpreted in light of the case as a whole.

Summaries at Work

In *Brown v. United States*, 650 F.3d 581 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012) (No. 11-783) (where your authors filed an amicusbrief supporting the petition for a writ of certiorari), Merrill Lynch executive James Brown was convicted of perjury for denying before a

grand jury that Enron treasurer Jeff McMahon had guaranteed that Enron would buy back barges it sold to Merrill Lynch. According to government notes of an interview with McMahon, when asked whether he had made the alleged guarantee, McMahon flatly answered no, he had "never guaranteed to take out w/ Rate of Return." The one-paragraph summary the prosecution disclosed of that interview, however, read much differently. It omitted McMahon's assertion that he "never guaranteed" a buyback. Instead, it said only that "McMahon does not recall any guaranteed take out." Thus, what began as an outright denial of the guarantee at the center of the case became—once processed through the prosecution's filter—a mere memory lapse.

Reasonable minds can disagree over just how different "no" and "I do not recall" are as a linguistic matter, just as they can debate whether such an edit is inadvertent or an affirmative misrepresentation. But regardless of how one answers those questions, it is clear that a competent defense lawyer might make much of the distinctions on cross-examination. It is also clear that such questions would never arise if the government turned over the actual favorable *evidence* in its possession, instead of just summaries. The defense would receive the raw notes of the witness's statements, and that evidence would speak for itself.

Summaries also played a role in the botched prosecution of former Alaska Senator Ted Stevens. Among other instances of prosecutorial misfeasance, prosecutors "disclosed" the content of dozens of interviews with a crucial witness in a summary letter comprising fewer than a dozen lines. In dismissing the indictment against Senator Stevens (after he had been convicted and defeated for reelection in the span of eight days), the district court remarked that "the use of summaries is an opportunity for mischief and mistake." Tr. of Mot. Hr'g 9, *United States v. Stevens*, No. 08-231 (D.D.C. Apr. 7, 2009).

That observation is no less true in other prosecutions. Summaries present prosecutors with dangerous temptations to selectively cull and frame the "favorable" evidence they choose to disclose. To prevent further abuses, defense attorneys and courts should demand that the government turn over the *actual* favorable *evidence* it possesses, not repackaged and reprocessed *summaries* reflecting its sweetened, condensed version of the evidence.

The Broader Problem: *Brady* Disclosures and "Materiality"

The use of summaries points to another, more fundamental problem with current *Brady* practice. Prosecutors are required to disclose favorable evidence only where that evidence is deemed "material" to the prosecution—i.e., the evidence would create a "reasonable probability" of a different result at trial. As the Supreme Court has put it, the prosecutor has "discretion" to "gauge the likely net effect of all [favorable] evidence," and is required to disclose that evidence only when it cumulatively "ris[es] to a material level of importance." *Kyles*, 514 U.S. at 437–38. That approach poses inherent administrative difficulties.

To begin, no matter how honestly a prosecutor seeks to fulfill his or her *Brady* duty, cognitive biases inevitably influence judgments about what evidence qualifies as "material." Like any other zealous advocate, the prosecutor will tend to credit information consistent with his or her

existing theories, and discount inconsistent evidence. The prosecutor risks underestimating the value of exculpatory evidence and thus overlooking the possibility that it would prove material to the defense at trial.

That task is further complicated by the fact that the trial *has yet to happen*. The prosecutor must speculate about what other evidence will ultimately be introduced at trial (despite unresolved admissibility questions) and how the evidence in question might fit into the defendant's theory of the case. A prosecutor may not fully appreciate what is material until hearing the defense's strategy in its opening statement if not later.

Nor can those problems be mitigated through judicial oversight. Courts have even less pretrial insight into how evidence will fit into the trial record. Unlike prosecutors, they do not even know the full extent of the case against the defendant until trial.

Different Approaches in Different Courts

Such concerns have rightly led some courts to conclude that materiality should not be assessed pretrial.As one court put it, "prosecutors are neither neutral . . . nor prescient, and any such judgment" about whether evidence would affect a trial's outcome "necessarily is speculative on so many matters that simply are unknown or unknowable before trial begins." *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). That court, like others, thus required the government to disclose *all* favorable evidence, "without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial." *Id.*; *see also United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005); *United States v. Carter*, 313 F. Supp. 2d 921, 924–25 (E.D. Wis. 2004); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198–99 (C.D. Cal. 1999).

That approach makes eminent sense. Requiring the government to disclose all favorable evidence largely renders a prosecutor's self-discipline and ability to objectively assess the case for and against a defendant moot. While some discovery disputes are probably inevitable (including over whether evidence is "favorable" or not), removing materiality from the equation eliminates one significant source of conflict and after-the-fact recriminations. It is also likely to make convictions more secure. When materiality is off the table, prosecutors need not worry about incorrectly predicting before trial whether a court, acting with the benefit of hindsight, will later find that evidence was likely to affect the outcome.

Despite its benefits, the all-favorable-evidence approach to *Brady* is far from universal. The nation's 94 federal judicial districts follow almost as many different approaches regarding disclosure of favorable evidence. The Federal Judicial Center (FJC) recently conducted a comprehensive review of *Brady* practices in federal courts, surveying judges, U.S. Attorney's offices, and defense lawyers. Hooper et al.,Fed. Judicial Ctr., *A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases* (Feb. 2011). That study found that only 38 districts "have a local rule or standing order that codifies the government's obligations to disclose exculpatory and/or

impeachment material in either very general or specific terms, and/or provides timing requirements for the disclosure of exculpatory and/or impeachment material." *Id.* at 11.

Differences among those 38 districts abound, most prominently with respect to whether prosecutors must disclose *all* exculpatory information, regardless of materiality. Although 28 districts retain *Brady*'s materiality requirement, 10 dispense with it altogether. A few even have "open file" policies, allowing defense counsel to inspect the government's entire case file as a matter of course.

Disclosure approaches also vary widely among U.S. Attorney's offices—again, particularly with respect to materiality. The FJC counted no fewer than *seven* different approaches to how U.S. Attorney's offices "determine whether information is material under the Constitution in their district." FJC, *2011 Summary*, at32. That lack of uniformity is in part by design. Justice Department guidance instructs *each* of the U.S. Attorney's offices to develop its own discovery strategy, based on local practices and judicial expectations. *See* Memorandum from David W. Ogden, Deputy Att'y Gen. (Jan. 4, 2010). And while the U.S. Attorneys' Manual urges prosecutors to "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence," U.S. Attorneys' Manual §9-5.001(B)(1), the Justice Department has consistently opposed efforts to eliminate any materiality requirement—claiming, among other things, that case law and the manual provide sufficiently clear guidance. FJC, *2011 Summary*, at 3–4.

Prospects for Reform?

There are some hints that the Supreme Court might be receptive to tightening *Brady*'s requirements along the lines we have suggested, recognizing that prosecutors have a duty to disclose *all* favorable evidence, regardless of its perceived materiality. The Court came close to doing that a little over a decade ago in *Strickler v. Greene*, where it distinguished the breach of prosecutors' "broad obligation to disclose exculpatory evidence" from "a real '*Brady* violation.'" 527 U.S. 263, 281 (1999). The Court indicated that prosecutors' duty to disclose is breached whenever the government suppresses favorable evidence. But, it continued, a breach of that duty does not amount to a full-blown *Brady* violation (or require reversal of a conviction) "unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* That discussion seems to say that the government must disclose favorable evidence without regard to materiality; materiality comes into play only when determining whether a failure to disclose was harmless error. Yet despite that language, prosecutors have continued to follow the Supreme Court's earlier statements that *Brady* disclosures are required only when evidence is deemed material pretrial.

More recently, several justices again voiced the belief that *Brady* requires prosecutors to turn over all favorable evidence in the first instance, treating materiality as a separate issue. During oral argument in *Smith v. Cain*, four justices (Scalia, Kennedy, Ginsburg, and Sotomayor), disputed a state attorney's assertion that *Brady* mandates disclosure only where evidence is material. *See* Tr. of Oral Arg. 46-52, *Smith v. Cain*, 132 S. Ct. 627 (Nov. 8, 2011) (No. 10-8145).

Justice Ginsburg, for example, opined that evidence "that is favorable to the defense, has to be turned over, period. I thought [that] was what *Brady* requires." *Id.* at 51. Similarly, Justice Scalia stated that "surely [the evidence at issue] should have been turned over," which was a separate question from whether it "wouldn't have made a difference." *Id.* at 52. And both Justice Kennedy and Justice Sotomayor made a point of distinguishing what they saw as the "two components to *Brady*": whether evidence should have been disclosed and, if so, whether it would have affected the outcome. *Id.* at 46 (Justice Sotomayor); *id.* at 48–49 (Justice Kennedy). As Justice Kennedy put it, a prosecutor cannot "determine [his] *Brady* obligation by the test for the *Brady* violation"; they are "two very different things." *Id.* at 48–49.

Although the remarks at oral argument in *Cain* are not authoritative statements of the law, they are an encouraging sign. Together with *Strickler*, they indicate that the Court may be willing to eliminate any materiality requirement for triggering prosecutors' *Brady* disclosure obligations. Indeed, the strength of the comments in *Cain* suggests that at least some justices believe the Court has already done so.

Defense counsel thus would be well advised to insist that prosecutors disclose all favorable evidence, regardless of materiality. District courts may prove receptive to arguments highlighting the inherent problems with affording prosecutors discretion over disclosure, particularly where the government seeks to use specially prepared summaries in lieu of actual evidence. Even if such requests do not succeed at the trial level, asserting the argument throughout the litigation may tee up the question for later appellate or even Supreme Court review. Should the question reach the Court in an appropriate case, there are promising signs that the Court may recognize a more robust *Brady* duty than has thus far been enforced.

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