

Government Disclosure Obligations in Criminal Cases

Jack L. Gruenstein and Mohamed N. Bakry

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Sen. Ted Stevens, R-Alaska, was the longest-serving Republican senator in U.S. history. While seeking re-election in 2008, he was indicted by a federal grand jury on seven counts of failing to properly report gifts to a public official. The charges arose out of Stevens' friendship with Bill Allen, an oil service company executive, who pleaded guilty to bribing several Alaskan state legislators. The charges involved renovations made to Stevens' home and gifts from VECO Corp. that together exceeded \$250,000. Stevens pleaded not guilty, and, at the conclusion of his trial, was convicted on all counts, which carried a maximum penalty of 35 years' imprisonment. As a consequence of his indictment and conviction, Stevens was not re-elected.

In February 2009, prior to Stevens' sentencing, FBI agent Chad Joy filed a whistleblower affidavit alleging that prosecutors and other agents had conspired to withhold and conceal evidence from Stevens' lawyers that could have resulted in a verdict of "not guilty." Joy alleged that prosecutors intentionally sent Rocky Williams, a key witness, back to Alaska after he performed poorly during a mock cross-examination. Williams later notified the defense attorneys that his testimony would have undercut the prosecution's claim that VECO had spent its own money renovating Stevens' house. Joy further alleged that the prosecutors intentionally withheld *Brady* material, including redacted prior statements of a witness, and a memo from Allen stating that Stevens probably would have paid for the goods and services if

asked. Joy also asserted that Allen gave gifts to FBI agents, helped an agent's relative get a job, and had an inappropriate relationship with a female agent.

As a result of Joy's affidavit and claims by the defense that prosecutorial misconduct had caused an unfair trial, the U.S. District Court for the District of Columbia held a hearing to determine whether a new trial should be ordered. At that hearing, the court held the prosecutors in contempt for failing to deliver documents to Stevens' counsel. Soon after, newly minted U.S. Attorney General Eric Holder submitted a motion of the United States to set aside the verdict and dismiss the indictment with prejudice. Holder, who had taken office only three months earlier, wanted to send a message that prosecutorial misconduct would not be tolerated on his watch. The motion was granted and Stevens' conviction was vacated.

The *Stevens* case apparently generated much soul-searching at the Department of Justice on the question of a prosecutor's obligation to provide discovery to defense counsel. In 2012, a report on the *Stevens* prosecution was released by special counsel, *In re Special Proceedings*, Misc. No. 09-0198, p. 12. In part, the report found that "the investigation and prosecution of U.S. Senator Ted Stevens were 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."

As a result of the *Stevens* debacle, the Justice Department wrote internal guidelines instructing prosecutors to turn over more information to defense attorneys prior to trial. These guidelines were not made public by the department, and only in rare cases were they shared with defense counsel. Since the guidelines provide that they do not create any additional rights for criminal defendants or for any other person, many prosecutors seemingly continue to opt for nondisclosure of many of the items identified in the guidelines.

A March 3 article in USA Today, titled "Rules to Keep Federal Prosecutors in Line Revealed," brought attention to the issue. The paper, in accordance with the Freedom of Information Act, obtained and published copies of the department's internal guidelines, including those for the U.S. attorney for the Eastern District of Pennsylvania. A comparison of the guidelines with the traditional sources of federal criminal discovery demonstrates that, in most cases, the guidelines are more generous than the common practices of the Department of Justice.

Under current federal law, there are three basic sources of discovery: Federal Rule of Criminal Procedure 16, the Jencks Act, codified at 18 U.S.C. Section 3500 and Federal Rule of Criminal Procedure 26.2; information covered by *Brady v. Maryland*, 363 U.S. 83 (1963); and information covered by *Giglio v. United States*, 405 U.S. 150 (1972).

The Jencks Act and Rule 26.2 require that statements of witnesses be produced only after their direct testimony. Under the act, production is limited to substantially verbatim transcripts or adopted statements, such as signed statements, signed confessions, grand jury testimony, court testimony and depositions. Strictly speaking, this does not include agents' reports, such as FBI 302s or DEA

6s, summarizing interviews of witnesses. But these reports generally are provided in advance of trial by the U.S. Attorney's Office for the Eastern District of Pennsylvania. The guidelines appear to formalize such disclosure by stating, in part, "Although the act does not require pretrial production of these materials—they should be made available before trial. This serves three purposes: it prevents last-minute and disruptive continuances to give defense counsel an opportunity to review this material, it facilitates defendants pleading guilty, knowing the evidence against them, and it maintains our credibility with the court," per U.S. Attorney Zane D. Memeger's "Discovery Best Practices."

Brady materials are those that are exculpatory, either on the issue of guilt or imposition of sentence. In many instances, a prosecutor can withhold such information based upon his or her own view that the materials requested are not exculpatory. The guidelines, however, seem to reject this approach by concluding: "We should take a broad view of exculpatory material. Many times we do not know the full nature of the defendant's defense and cannot foresee exactly what will be relevant to it. Hence, producing all such material, even if its materiality is dubious, is advisable."

Giglio material is information that can be used to impeach the prosecution's witnesses, such as prior inconsistent statements, prior convictions punishable by death or more than one year imprisonment (or involving acts of dishonesty or false statements), plea or immunity agreements, nonsubject letters, and the substance of other government promises. While not exculpatory per se, as in *Brady*, such materials can have a profound impact on the credibility of the government's witnesses, whether they are civilian or law enforcement. This type of evidence is precisely what was withheld in *Stevens*' case and led to the findings of contempt and the vacating of his conviction.

In many instances, the government's case may rise or fall on the testimony of one or two witnesses whose testimony lacks corroboration. Therefore, particularly where the defense attorney's only chance to mount an effective defense is by attacking the credibility of the prosecution's witnesses, broad disclosure of *Giglio* materials is of paramount importance. Credibility evidence, if withheld, lessens the chance of a fair trial and just result, and may compel the defendant to plead guilty and forfeit his or her right to trial. Once a defendant pleads guilty and is sentenced, discovery of prosecutorial misconduct for withholding evidence and a subsequent successful appeal become less probable.

The internal guidelines acknowledge the importance of *Giglio* information, and even direct the prosecutor to determine whether any government law enforcement witness has information in his or her file that falls under *Giglio*. Additionally, the guidelines state, "We are responsible for producing *Brady* and *Giglio* material even if it is contained in agents' rough notes—or even in our own notes. ... Thus, for key witnesses as well as notes of a defendant's interview, agents' rough notes should be reviewed by the [assistant U.S. attorney] or by the recording agent for such material." This language is remarkable to defense attorneys because it echoes the sentiments and arguments of many Pennsylvania practitioners, arguments that have been made in court for decades. However, a determination by the prosecutor that adverse information exists regarding a law enforcement agent is of no moment without disclosure to the defense.

With the publication of the guidelines by USA Today, the contrast between the law of federal criminal discovery and the internal guidelines is apparent. The question now facing a court in the Eastern District becomes how it will reconcile the post-*Stevens* disclosure policy of the Department of Justice, and the local U.S. attorney, with the day-to-day actions of the individual U.S. attorneys.

With the guidelines now known to the criminal defense bar, the second question is whether the prosecutors will be seen as disingenuous for opposing discovery requests that the internal guidelines instruct them to hand over to defense counsel. Even though the guidelines make clear that no substantive rights are created for anyone, courts may find themselves in an intellectual predicament when faced with the difficult task of ruling on motions for discovery based, in part, on reliance upon the guidelines by defense attorneys.

Clearly, the question is not whether Pennsylvania attorneys involved in cases with the local U.S. Attorney's Office will use these guidelines in their discovery requests and motions, but, when they do, how the government and courts will respond. And, most importantly, will these guidelines lead to new case law and therefore new rules regarding mandatory discovery?



Jack L. Gruenstein chairs the white-collar crime practice group at Marshall Dennehey Warner Coleman & Goggin. Contact him at jgruenstein@mdwcg.com. Mohamed N. Bakry is an associate within the practice group. Contact him at mnbakry@mdwcg.com.