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SECOND CIRCUIT REVIEW: CRIMINAL LAW:
DISCLOSING IMPEACHMENT EVIDENCE UNDER 'BRADY'

MARTIN FLUMENBAUM - BRAD S. KARP

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In this month's column, we address a significant decision issued last month in which the United States Court of Appeals for the Second Circuit took the extraordinary step of granting a petition for a writ of mandamus so that it could determine the scope and timing of a defendant's right to obtain exculpatory and impeachment material under *Brady v. Maryland*¹ and *Giglio v. United States*.²

In *In re United States*,³ the Second Circuit, in an opinion written by Judge Jose A. Cabranes and joined by Judge Jon O. Newman and Judge Stefan R. Underhill (United States District Court for the District of Connecticut, sitting by designation), granted the government's petition for a writ of mandamus and ordered the district court to vacate a discovery order that required the government promptly to provide defendants with all exculpatory and impeachment materials. In granting the government's petition, the Second Circuit narrowly interpreted a defendant's constitutional right to obtain favorable impeachment evidence in the government's possession.

Facts and Proceedings

Defendants were indicted on various counts relating to a large-scale stock fraud and money-laundering scheme. In late 2000 and early 2001, before a trial date had been set, defendants moved to compel the government to disclose all exculpatory and impeachment material in its possession. The district court (Judge I. Leo Glasser) granted defendants' motion, relying on its own prior ruling in *United States v. Shvarts*.⁴

In *Shvarts*, defendants moved for an order to compel the government to disclose all exculpatory and impeachment material under *Brady* and *Giglio*. In response, the government agreed to provide defendants with all exculpatory material encompassed under *Brady*, but refused to provide any impeachment material, stating that it would turn over such material sufficiently in advance of a witness' testimony so as to be of use to defendants. The district court ordered the government to promptly provide the impeachment material to defendants. It reasoned that impeachment material should be treated the same as exculpatory material under *Brady*, and that the material should be turned over to the defendant "upon request." The district court then examined the Jenks Act, 18 U.S.C. § 3500, which provides that no statement or report in the government's possession made by a government witness or prospective witness shall be the subject of discovery until that witness has testified on direct examination. It found that its order was not inconsistent with the Jenks Act because the constitutionally derived *Brady* rule trumped the statutory Jenks rule. In keeping with the underlying policy behind Jenks, however, the district court stated that the government could move ex parte for a modification of its discovery obligations where it believed that the immediate disclosure of impeachment material would pose a serious threat to the life or safety of a government witness or prospective witness. The government did not appeal this order.

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In this case, the district court found itself confronted with the identical situation as in *Shvarts* and, consistent with that ruling, ordered the government immediately to provide defendants with all exculpatory and impeachment material. In response, the government filed a petition for a writ of mandamus, seeking an order compelling the district court to vacate the portion of its ruling related to the production of impeachment material.

Petition for Mandamus

In its opinion, the Second Circuit first examined the availability of mandamus review, noting that the extraordinary remedy of mandamus is rarely available to review pretrial discovery orders. The court stated that it would examine a pretrial discovery order on a petition for a writ of mandamus only where a petitioner demonstrates “(1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice.”⁵

Evaluating these factors, the Second Circuit found the remedy of mandamus appropriate under these circumstances. First, the court found that this issue presented a novel and significant question of law. It noted that no court of appeals has held that the government is required to provide exculpatory and impeachment materials immediately upon a defendant’s request and that the district courts in this Circuit have provided divergent views on the issue. Moreover, the court found that the timing of the disclosure of these materials could be of critical importance in many cases.

Second, the court found that the government had no other available remedy. Pretrial discovery orders generally are not appealable prior to entry of final judgment. As such, without mandamus relief, the government would either be required to comply with the district court’s order or risk a finding of contempt for failure to comply. Although noting the district court’s allowance for an ex parte petition to modify the government’s discovery burden where immediate disclosure would pose a serious threat to the life or safety of a witness, the court found that compliance with the district court’s order could lead to witness tampering or undermine undercover and ongoing investigations involving these witnesses even though there was no evidence that the life or safety of a prospective witness was in danger.⁶

Finally, noting the divergence of district court opinions on this issue, the Second Circuit observed that resolution of this legal issue would aid in the administration of justice.

The government has a constitutional duty under *Brady* to disclose favorable evidence to the defendant that is “material” either to guilt or punishment. This obligation is intended to protect a defendant’s constitutional right to a fair trial by ensuring that evidence favorable to the defendant is made available to the defendant.

The Supreme Court in *Brady* ruled that “the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment.”⁷ The Second Circuit noted that while the *Brady*

Court appeared to be using the word “material” in its evidentiary context—to refer to evidence that has some probative value—subsequent Supreme Court authority has changed its meaning. “Material” evidence for purposes of disclosure under *Brady* recently has been defined to apply to evidence that, if suppressed, would undermine confidence in the outcome of the trial.⁸ Thus, recent Supreme Court decisions have held that the government violates its obligation under *Brady* where it has suppressed evidence that “could reasonably [have been] taken to put the whole case in such a different light as to undermine confidence in the verdict.”⁹ The result of this change is that the government’s duty of disclosure has shifted from an evidentiary test of materiality that easily could be applied to any piece of evidence, to a “result-affecting” test that requires the government to predict whether there is a reasonable probability that suppression of a particular piece of evidence would change the outcome of the trial.¹⁰

Moreover, inasmuch as the government only violates its requirement of disclosure under *Brady* if confidence in the verdict is undermined, the timing of the disclosure of evidence under *Brady* requires the government to anticipate whether the outcome of the trial would have been different if the evidence had been disclosed earlier. Thus, there is no *Brady* violation if the evidence is disclosed in sufficient time for its effective use at trial.

Burden on Government

The Second Circuit recognized that the current formulation of the *Brady* test creates a burdensome responsibility for the government: it requires the government to use foresight to examine the significance of undisclosed evidence in light of the strength of all of the evidence and then to predict whether disclosure of the then-undisclosed evidence would create a reasonable probability that the outcome of the trial would be different.¹¹ The Court held that the government’s responsibility under *Brady* does not require a district court to require the production of all impeachment evidence to defendants immediately upon request.

The Second Circuit noted that the parties in this case agreed that the district court had used the terms *Brady* and *Giglio* material to mean all exculpatory and impeachment evidence, without regard to its materiality.¹² As such, the district court’s order improperly required the government to produce a broader scope of evidence than is required under *Brady*. Similarly, the Second Circuit found that the district court’s order that the evidence be turned over immediately upon defendant’s request exceeded the obligations imposed by *Brady*. The Court rejected the district judge’s reliance on the “upon request” language in *Brady*, quoted above, as a temporal requirement. It explained that the “upon request” language, in fact, merely referred to the Supreme Court’s earlier reliance on a defendant’s request to determine whether the government was required to produce the evidence.¹³

‘Brady,’ Jenks Act

The Jenks Act is the congressional response to the Supreme Court’s decision in *United States v. Jenks*,¹⁴ which held that a criminal defendant has a due process right to inspect, for impeachment purposes, prior statements government witnesses have made to

government agents. The Jenks Act was passed to limit the government's responsibility to turn over these prior statements. The Act provides that no prior statement of a government witness shall be the subject of discovery until that witness has testified on direct examination.¹⁵

The Second Circuit agreed with the district court that, where the government's obligations under *Brady* conflict with its obligations under the Jenks Act, the former must prevail. Inasmuch as the district court's decision applied to all exculpatory and impeachment evidence, without regard to its materiality under *Brady*, the Court found that the district court's order—to the extent it applied to evidence not considered “material” under *Brady*—violated the Jenks Act. As such, the district court exceeded its authority in issuing its order.

The Second Circuit explained that it grounded its decision on the fact that the district court had expressed its order as a matter of general constitutional law, requiring the immediate disclosure of all exculpatory and impeachment evidence based on its interpretation of *Brady* and its progeny. The Second Circuit thus found that the district court erred as a matter of law and noted that “[t]his case presents no occasion to consider the scope of a trial judge's discretion to order pretrial disclosures as a matter of sound case management.” As such, the Court remanded the case to the district court to determine the appropriate scope of a discovery order “as a matter of sound case management.”

Conclusion

In light of a district court's ability to exercise its discretion to order pre-trial disclosure as a matter of sound case management, the Second Circuit's decision likely will not have a dramatic impact on the scope and timing of the disclosure of exculpatory and impeachment materials. This decision, however, confirms the Second Circuit's willingness to restrict the government's obligations to provide a defendant with *Brady* material.

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Martin Flumenbaum and Brad S. Karp are partners in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison. They specialize in civil and criminal litigation. Lara Shalov, a litigation associate at the firm, assisted in the preparation of this column.

ENDNOTES

- 1 373 U.S. 83 (1963).
- 2 405 U.S. 150 (1972) (*Brady* obligation applies to impeachment material).
- 3 267 F.3d 132 (2001).
- 4 90 F. Supp. 2d 219 (E.D.N.Y 2000).
- 5 *In re United States*, 903 F.2d 88, 89 (1990).
- 6 267 F.3d at 138-39.
- 7 *Brady*, 373 U.S. at 87.
- 8 267 F.3d at 141 (discussing line of Supreme Court authority following *Brady*).
- 9 267 F.3d at 139 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).
- 10 *Id.* at 142.
- 11 *Id.* at 143.
- 12 The district court stated that “[i]t is sufficient to acknowledge . . . the constitutional obligation, without the necessity to discuss the requirement of “materiality” as a precondition to its violation.” *Shvarts*, 90 F. Supp. 2d at 226.
- 13 Today, the government may be found to have violated *Brady* even where a defendant did not request the evidence. *United States v. Bagley*, 473 U.S. 667, 682 (1985).
- 14 353 U.S. 657 (1957).
- 15 18 U.S.C. § 3500.