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Due Process Protections Act Sends a Message to the Government

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On Oct. 21, 2020, President Trump signed into law the Due Process Protections Act (DPPA) requiring federal judges to issue an order at the outset of all criminal proceedings that "confirms" the government's *Brady* disclosure obligations and the "possible consequences" of *Brady* violations. The next week, judges in the Southern District of New York (SDNY) began issuing written orders directing the government to make the *Brady* disclosures and warning of the potential consequences for failing to comply with the orders. The DPPA's new requirements are especially timely in light of recent high-profile *Brady*-related controversies arising in the SDNY and elsewhere. While the DPPA does not alter the government's substantive *Brady* obligations, it sends a meaningful message to federal prosecutors, lays the foundation for potential contempt-of-court and sanctions recourse for *Brady* violations, and could therefore prove a useful tool for federal criminal practitioners.

The 'Brady' Obligation To Disclose Exculpatory Evidence

In the landmark case of *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court recognized that, to protect individuals' Constitutional rights to due process and a fair trial, prosecutors must disclose to the defense all known information "favorable to an accused" that is "material either to guilt or punishment." *Brady* and its progeny establish that prosecutors have an affirmative duty to seek out and disclose to the defense all material evidence that is favorable to the accused and is known to the government. The *Brady* obligation also requires prosecutors to disclose what is known as *Giglio* materials—information that can be used to impeach the trial testimony of a government witness—sufficiently in advance of trial to permit its effective use by the defense at trial. *Giglio v. United States*, 405 U.S. 150 (1972). These are continuing obligations that apply to materials that become known to the government, even after trial, and even if the government does not credit them. The suppression of favorable information violates a defendant's right to due process irrespective of prosecutors' good or bad faith and

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may justify setting aside a conviction.

The Supreme Court has recognized that a "prudent prosecutor will resolve doubtful questions in favor of disclosure." *United States v. Agurs*, 427 U.S. 97, 108 (1976). This seemingly clear principle has not always been strictly followed. For example, in a number of recent high-profile white collar cases, courts have found the federal prosecutors had failed to timely disclose *Brady* or *Giglio* material in their possession. And a study conducted by the National Registry of Exonerations concluded that half of all murder exonerations between 1987 and 2017 involved the government's concealment of exculpatory evidence at trial.

Ultimately, a prosecutor's failure to disclose such evidence is difficult to uncover, despite its lasting implications on a criminal defendant's rights and a trial's fairness. Various remedial measures have been proposed and debated, such as revamped training of prosecutors' disclosure obligations; imposition of systematic rules that would best ensure such materials are timely disclosed; adoption of an "open-file" policy permitting the defense broad access to government's case files; the expanded use of specialized *Brady* "clean teams" to review the government's files for potential *Brady* and *Giglio* material; an exception to law enforcement and prosecutorial immunity for *Brady* violations; and a strengthened requirement that prosecutors must have contemporaneous notes of all witness statements, irrespective of the statements' consistency with prior statements or relevance to the case. While the DDPA does not impose these systematic changes, it nonetheless brings this important disclosure obligation to the fore of federal criminal proceedings.

The Due Process Protections Act and Related Court Orders

The DPPA amends Federal Rule of Criminal Procedure 5, which governs a defendant's initial appearance before the court, to insert a new Rule 5(f). New Rule 5(f) provides:

> 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.

The recently issued 'Brady' orders heighten the emphasis on the significance of 'Brady', reflecting a recognition that something has gone amiss such that such reminders to prosecutors are even necessary.

The statute also requires each judicial council—the regional governing bodies of each federal circuit's judiciary—to promulgate a model order that a district court "may use" for these purposes "as it determines appropriate."

The DPPA was proposed in the wake of the DOJ's suppression of *Brady* material during the 2008 prosecution of the late U.S. Senator from Alaska, Ted Stevens, for false statements associated with alleged ethics violations, and passed by unanimous consent in both the U.S. Senate and House of Representatives.

The DPPA became law on Oct. 21, 2020. The following week, federal judges in the SDNY began issuing written orders on their open criminal dockets implementing the requirements of the DPPA. Most of these orders are substantially identical, indicating the form of order likely to be used by many SDNY judges going forward. They generally summarize the relevant *Brady* and *Giglio* law; state that the government must disclose *Brady* materials to the defense "promptly after its existence becomes known to the Government so that the defense may make effective use of the information in the preparation of its case"; and enumerate potential consequences for failure to comply with the order, including granting a continuance, imposing evidentiary sanctions, imposing sanctions on any responsible lawyer for the government, and dismissing charges before trial or vacating convictions after a trial or guilty plea.

In addition to highlighting the prosecutors' obligations to produce *Brady* and *Giglio* material, the written orders by SDNY judges take a stance on the important issue of the prosecutors' duty to collect and review documents outside their possession. To establish what potential *Brady* material is "known to the government" and must therefore be disclosed, the SDNY orders define "the government" to include "*all federal state, and local law enforcement officers and other officials who have participated* in the investigation and prosecution of the offense or offenses with which the defendant is charged." This formulation is arguably broader than the case law requires, as some cases have extended the *Brady* disclosure obligation to include information in the possession of a "member of the prosecution team" or those who conducted a "joint investigation" with the prosecutors. See, e.g., *United States v. Morgan*, 302 F.R.D. 300, 304 (S.D.N.Y. 2014). By imposing an

obligation to disclose all *Brady* material known to any "officers and other officials who have participated in the investigation and prosecution," the SDNY *Brady* orders extend the duty to identify and collect potential *Brady* and *Giglio* material beyond just "members of the prosecution team."

Similar written orders have also been issued in other judicial districts besides the SDNY, although a nationwide search as of this writing indicates no comparable district-wide action has yet been taken.

Likely Effects of the DPPA

The DPPA does not purport to change federal prosecutors' substantive obligations under *Brady*, *Giglio*, or related governing law. It simply places the matter front and center at the start of all criminal proceedings by crystalizing the government's obligations into an order on every federal criminal docket. Issuance of a "*Brady* order" at the outset of every criminal proceeding may also expand the district court's flexibility to address *Brady* issues with remedies short of dismissal or *vacatur* of a jury verdict. Courts often conclude that, while the government should have disclosed alleged *Brady* or *Giglio* materials earlier, the nondisclosure did not materially prejudice the proceedings—an unenviable counterfactual analysis that asks courts to predict how the jury may have reacted to an undisclosed piece of exculpatory or impeachment evidence. The recent *Brady* orders issued in the SDNY identify a series of potential remedies for failure to comply with the order, including a trial continuance, evidentiary sanctions, sanctions on the responsible prosecutor, as well as dismissal of the indictment or vacatur of the conviction. Although not expressly identified in the recent SDNY orders, there is the possibility that failure to comply with the order could also subject the government or individual prosecutors to the "sanction" of contempt of court, which could have the effect of civil or even criminal consequences for contemnors.

Notably, the recently issued *Brady* orders in the SDNY do not identify a deadline for the production of *Brady* and *Giglio* material, other than to order that *Brady* material must be disclosed "promptly after its existence becomes known the Government," and that *Giglio* information "must be disclosed sufficiently in advance of trial in order for the defendant to make effective use of it at trial." By contrast, a number of judicial districts have adopted local rules requiring certain materials are disclosed to the defense at a particular time, ranging from at arraignment, to 28 days after arraignment, to reasonably promptly upon discovery. The DPPA's requirement that each circuit's judicial council promulgate a model *Brady* order (to be used at each court's discretion) may have the additional effect of harmonizing *Brady* disclosure standards within and across districts.

> While the DPPA does not alter the government's substantive 'Brady' obligations, it sends a meaningful message to federal prosecutors, lays the foundation for potential contempt-of-court and sanctions recourse for 'Brady' violations, and could therefore prove a useful tool for federal criminal practitioners.

Ultimately, while the DPPA does not actually change or expand governing *Brady* law, it sends a meaningful message to the government. The recently issued *Brady* orders heighten the emphasis on the significance of *Brady*, reflecting a recognition that something has gone amiss such that such reminders to prosecutors are even necessary. These reminders are especially timely in light of serious *Brady* concerns recently raised by a number of SDNY judges. In one of these cases, the U.S. Attorney's Office in the SDNY acknowledged being "responsible for substantial failures" in its handling of exculpatory evidence and has publicly "committed" to making "improvements to [its] policies, staffing, training, and technology." *United States v. Nejad*, No. 18 Cr. 224 (AJN), ECF No. 390 at 1, 4–5 (S.D.N.Y. Oct. 30, 2020). These are welcome reforms, and Congress's passage of the DPPA should serve as a further reminder that the prosecution's "interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).