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The Due Process Protections Act: Congress Directs Judges to More Actively Prevent and Remedy Prosecutorial *Brady* Violations

by Avi Weitzman and David Salant

The Due Process Protections Act ("DPPA"), enacted in October 2020, requires 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. Federal courts nationwide have started issuing "*Brady* orders" implementing this new rule. These requirements are especially timely in light of recent high-profile *Brady*-related controversies. 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 may prove a useful tool for federal criminal practitioners.

The *Brady* Obligation. In the landmark case *Brady v. Maryland*, 373 U.S. 83 (1963), the United States 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." Under *Brady* and its progeny, prosecutors have an affirmative duty to seek out and disclose to the defense all material evidence known to the government that is favorable to the accused. The *Brady* obligation also requires prosecutors to disclose what is known as *Giglio* material—information that can impeach the trial testimony of a government witness—sufficiently timely to permit its effective use by the defense at trial. *Giglio v. United States*, 405 U.S. 150 (1972). These continuing obligations 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 may justify setting aside a conviction.

A prosecutor's failure to disclose such evidence is difficult to uncover, despite its serious implications for a defendant's rights and a trial's fairness. Remedial measures have been proposed and debated, including revamped training of prosecutors' disclosure obligations; imposition of systematic rules to ensure timely disclosure; adoption of an "open-file" policy permitting the defense broad access to government's case files; the expanded use of specialized "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 DPPA and Implementing Court Orders. The DPPA inserts a new Rule 5(f) within Federal Rule of Criminal Procedure 5, which governs a defendant's initial court appearance:

> 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.

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The rule 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 as it determines is appropriate."

The DPPA was proposed in the wake of the DOJ's suppression of *Brady* material during the 2008 federal prosecution of late U.S Senator Ted Stevens for false statements associated with alleged ethics violations. The U.S. Senate and House passed the bill by unanimous consent, and it became law on October 21, 2020.

The following weeks, federal judges, particularly in the SDNY, began issuing written orders on their open dockets implementing the DPPA. In general, these orders define *Brady* and *Giglio* materials; require their "prompt" disclosure to the defense for use at trial; 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.

The written orders by SDNY judges also take a stance on the important issue of the prosecutors' duty to collect and review documents outside their immediate 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 only 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."

DPPA's Likely Effects. The DPPA does not purport to change federal prosecutors' substantive obligations under *Brady*, *Giglio*, or related governing law. It simply highlights the matter at the start of all criminal proceedings by crystallizing 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. *Brady* orders already issued pursuant to the DPPA 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. Failure to comply with the order also subjects the government or individual prosecutors to a potential contempt-of-court "sanction," which could have the effect of civil or even criminal consequences for contemnors. The DPPA thus resolves a major frustration in the *Stevens* case, during which the presiding District Court Judge expressed frustration over his inability to impose contempt sanctions on the government given the lack of a prior written court order requiring the prosecutors to abide by their *Brady* obligations.

Though unaddressed by the DPPA, some judicial districts have adopted local rules requiring certain materials be disclosed to the defense at a particular time, ranging from at arraignment, to 28 days after arraignment, to reasonably promptly upon discovery. The law's requirement that each circuit's judicial council promulgate a model *Brady* order (for use at each court's discretion) may have the additional effect of harmonizing *Brady* disclosure standards within and across districts, should courts rely on model orders with specific disclosure deadlines.

Ultimately, while the DPPA does not change or expand governing *Brady* law, it sends a meaningful message to the government. These reminders are especially timely in light of serious *Brady* concerns recently raised in high-profile cases. In one such case, a prominent U.S. Attorney's Office 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).

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