REPORT BY THE FEDERAL COURTS COMMITTEE,
CRIMINAL JUSTICE OPERATIONS COMMITTEE
AND MASS INCARCERATION TASK FORCE

REVISITING THE FAIRNESS IN DISCLOSURE OF EVIDENCE ACT OF 2012 FOR FEDERAL CRIMINAL DISCOVERY REFORM

The Federal Courts Committee, Criminal Justice Operations Committee and Mass Incarceration Task Force of the New York City Bar Association ("City Bar") submits this report to urge Congress and the Biden Administration to enact meaningful criminal discovery reform in federal court. The persistent violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including in recent federal criminal prosecutions, underscores the urgent—and continuing—need for reform. While there has been some recent effort to make improvements through the Due Process Protections Act of 2020 (DPPA), including through the issuance of standing orders under Rule 5(f) of the Federal Rules of Criminal Procedure, the City Bar believes that the time is ripe for a broader legislative solution.

We propose that Congress and the Biden Administration consider the key principles from the Fairness in Disclosure of Evidence Act of 2012 (S.2197), a bill which did not ultimately pass, to develop meaningful reform in federal criminal discovery. Introduced after revelations of misconduct in the prosecution of the late Senator Ted Stevens, the bipartisan bill, introduced by Senator Lisa Murkowski (R-AK), was designed to combat *Brady* violations and ensure that criminal defendants have access to evidence that casts doubt on the prosecution's allegations of guilt. We believe that Congress and the Biden Administration should consider enacting similar legislation that would protect defendants' constitutional rights while respecting the legitimate interests of the prosecution. Making such reform would also enhance the credibility and legitimacy of criminal trials by reducing the risk that the jury will be deprived of information necessary to render a fair and accurate verdict.

I. INTRODUCTION AND SUMMARY

The City Bar, founded in 1870, has about 25,000 members practicing throughout the nation and in more than fifty foreign countries. It includes among its membership lawyers in many areas of law practice, including present or former federal prosecutors as well as lawyers who represent defendants in criminal cases. The Federal Courts Committee is charged with studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts. The Criminal Justice Operations Committee is comprised of

attorneys who practice criminal law, representing both defendants and the prosecution, and engages in policy analysis and legislative review in the area of criminal law and justice. The Mass Incarceration Task Force examines ways to reduce mass incarceration in the United States.

One area of particular concern for the City Bar is the persistence of *Brady* violations in federal court: incidents in which evidence that exculpates a defendant or impeaches the prosecution's witnesses is not disclosed by prosecutors.[1] The 2008 prosecution of the late Senator Ted Stevens was perhaps the most notable incident of this sort, but *Brady* violations continue to occur in federal court. Even well-meaning prosecutors can violate their *Brady* obligations inadvertently, with catastrophic effects on criminal defendants. While the prosecution's failure to disclose evidence is, by its nature, likely to go undetected in most instances, the incidents discovered recently suggest an "epidemic of *Brady* violations."[2] In one recent case tried before the U.S. District Court for the Southern District of New York, the court vacated the defendant's convictions and dismissed the indictment for "serious and pervasive" disclosure failures, noting that such problems had arisen before and "cry out for a *coordinated, systematic* response."[3]

Recognizing the magnitude of the problem, late last year Congress enacted the DPPA, which requires federal judges to remind prosecutors of their *Brady* obligations at the outset of each criminal case.[4] While the DPPA is undoubtedly a step in the right direction, its requirements are minimal and recent events indicate that more is needed to safeguard the fairness of criminal trials. In particular, the City Bar urges Congress and the Biden Administration to revisit the principles set out in the Fairness in Disclosure of Evidence Act of 2012 (S.2197) (the "Act").[5] Widely endorsed by various legal organizations, the Act was designed to incentivize the disclosure of evidence favorable to the defense while protecting the government's legitimate interests.

II. THE FAIRNESS IN DISCLOSURE OF EVIDENCE ACT

The Act provided that in a criminal prosecution brought by the United States, the attorney for the Government had a duty to disclose to the defendant favorable information.

The key subsections are excerpted below:

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[1] *See, e.g.*, *Brady v. Maryland*, 373 U.S. at 87 ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"); *United States v. Giglio*, 405 U.S. 150, 154 (1972) (extending *Brady* to impeachment evidence).

[2] *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (dissent from denial of rehearing en banc); *see also, e.g.*, *id.* at 631-32 (listing examples of cases involving *Brady* violations); Vida B. Johnson, *Federal Criminal Defendants Out of the Frying Pan and into the Fire? Brady and the United States Attorney's Office*, 67 Cath. U. L. Rev. 321 (2018) (listing numerous other *Brady* violations and concluding that a single U.S. Attorney's Office "violates *Brady* multiple times a year"). One contributing factor, particularly in complex white-collar cases, is the difficulty of handling the enormous volume of electronic information collected during the government's investigation, potentially involving multiple law enforcement agencies.

[3] Opinion & Order, *United States v. Nejad*, 487 F. Supp. 3d 206, 207, 214 (S.D.N.Y. 2020).

[4] *See* Press Release, Senator Dan Sullivan (Oct. 22, 2020), https://www.sullivan.senate.gov/newsroom/press-releases/sullivan-durbin-due-process-protections-act-signed-into-law. (All sites last visited Nov. 4 2021).

[5] *See* Fairness in Disclosure of Evidence Act of 2012, available at: https://www.congress.gov/bill/112th-congress/senate-bill/2197.

(a) DEFINITIONS.—In this section—

(1) the term "covered information" means information, data, documents, evidence, or objects that may reasonably appear to be favorable to the defendant in a criminal prosecution brought by the United States with respect to—

(A) the determination of guilt;

(B) any preliminary matter before the court before which the criminal prosecution is pending; or

(C) the sentence to be imposed . . . .

(b) DUTY TO DISCLOSE FAVORABLE INFORMATION.—In a criminal prosecution brought by the United States, the attorney for the Government shall provide to the defendant any covered information—

(1) that is within the possession, custody, or control of the prosecution team; or

(2) the existence of which is known, or by the exercise of due diligence would become known, to the attorney for the Government.

(c) TIMING.—Except as provided in subsections (e) and (f), the attorney for the Government shall provide to the defendant any covered information—

(1) without delay after arraignment and before the entry of any guilty plea; and

(2) if the existence of the covered information is not known on the date of the initial disclosure under this subsection, as soon as is reasonably practicable upon the existence of the covered information becoming known, without regard to whether the defendant has entered or agreed to enter a guilty plea.

(d) RELATIONSHIP TO OTHER LAWS.—

(1) IN GENERAL.—Except as provided in paragraph (2), the requirements under subsections (b) and (c) shall apply notwithstanding section 3500(a) or any other provision of law (including any rule or statute).

(2) CLASSIFIED INFORMATION.—Classified information . . . shall be treated in accordance with the Classified Information Procedures Act.

(e) PROTECTIVE ORDERS.—

(1) IN GENERAL.—Upon motion of the United States, the court may issue an order to protect against the immediate disclosure to a defendant of covered information otherwise required to be disclosed under subsection (b) if—

(A) the covered information is favorable to the defendant solely because the covered information would provide a basis to impeach the credibility of a potential witness; and

(B) the United States establishes a reasonable basis to believe that—

(i) the identity of the potential witness is not already known to any defendant; and

(ii) disclosure of the covered information to a defendant would present a threat to the safety of the potential witness or of any other person.

. . .

(h) REMEDIES.—

(1) REMEDIES REQUIRED.—

(A) IN GENERAL.—If the court determines that the United States has violated . . . subsection (b) or . . . subsection (c), the court shall order an appropriate remedy.

(B) TYPES OF REMEDIES.—A remedy under this subsection may include—

(i) postponement or adjournment of the proceedings;

(ii) exclusion or limitation of testimony or evidence;

(iii) ordering a new trial;

(iv) dismissal with or without prejudice; or

(v) any other remedy determined appropriate by the court.

(C) FACTORS.—In fashioning a remedy under this subsection, the court shall consider the totality of the circumstances, including—

(i) the seriousness of the violation;

(ii) the impact of the violation on the proceeding;

(iii) whether the violation resulted from innocent error, negligence, recklessness, or knowing conduct; and

(iv) the effectiveness of alternative remedies to protect the interest of the defendant and of the public in assuring fair prosecutions and proceedings.

(2) DEFENDANT'S COSTS.—

(A) IN GENERAL.—If the court grants relief under paragraph (1) on a finding that the violation . . . was due to negligence, recklessness, or knowing conduct by the United States, the court may order that the defendant [or] the attorney for the defendant . . . recover from the United States the costs and expenses incurred . . . as a result of the violation, including reasonable attorney's fees . . . .

. . .

(i) STANDARD OF REVIEW.—In any appellate proceeding initiated by a criminal defendant presenting an issue of fact or law under this section, the reviewing court may not find an error arising from conduct not in compliance with this section to be harmless unless the United States demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained.

III. THE CITY BAR'S REASONS FOR ENDORSING THE KEY PROVISIONS OF THE FAIRNESS IN DISCLOSURE OF EVIDENCE ACT TO DEVELOP FEDERAL CRIMINAL DISCOVERY REFORM

a. Appropriately Set a Broader Standard for Pretrial Disclosures

Like the Fairness in Disclosure of Evidence Act, any federal criminal discovery reform should appropriately set a broader standard for pretrial disclosures. As noted above, the Act

obligates prosecutors to produce to the defendant all "information, documents, data, evidence, or objects that may reasonably appear to be favorable to the defendant."

Historically, the Department of Justice ("DOJ") has contended that prosecutors are constitutionally obligated to produce information favorable to the defendant only if that information is "material to a finding of guilt"—that is, "when there is a reasonable probability that effective use of the evidence will result in an acquittal"—and only if it would be "admissible at trial."[6] As a matter of internal policy, DOJ requires prosecutors to produce information that is favorable to the defendant and "significantly probative of the issues before the court," no matter if it is admissible as evidence, but information that is "not significantly probative" or distracts from the "genuine issues" is "not subject to disclosure."[7]

The recurring problem of *Brady* violations stems, at least in part, from these standards for determining whether information favorable to the defense should be disclosed. A prosecutor asked to determine whether information is "materially" or "significantly" favorable to the defendant could easily reach a different conclusion than a defense attorney, a court, or a jury. Prosecutors understandably believe that the charges they have chosen to bring after investigation are well founded. They may not appreciate, or focus on, nuances of potential defenses to those charges (particularly when the potential defense is opaque and undisclosed to the prosecution) or the strength of evidence favorable to the defense. Often one piece of evidence that may not appear material standing alone might be material when taken with other evidence, or might be material to an issue that the prosecutors view as legally irrelevant. Even prosecutors who attempt in good faith to comply with DOJ policy may nevertheless fail to disclose evidence that could persuade the jury to acquit, in violation of the *Brady* rule.[8]

Any *Brady* reform should incorporate the Act's requirement that prosecutors consider whether the information in their possession "may reasonably appear to be favorable to the defendant," rather than whether that information could cause them to lose the trial. A prosecutor who applies this broader statutory standard is far more likely to produce all *Brady* material. In addition, this broader production of evidence would enhance the fairness and legitimacy of criminal trials. Indeed, in New York and elsewhere, the rules of ethics and professional responsibility require prosecutors to disclose a broader array of information irrespective of the prosecutor's view of its probative value or likelihood of materially affecting the verdict.[9] Such a

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[6] Justice Manual § 9-5.001(B)(1), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#9-5.001. While it is true that a court cannot *reverse* a conviction for constitutional error if the evidence that the prosecutor failed to disclose was not "materially" favorable to the defendant, it is not necessarily clear that a prosecutor's constitutional *duty* is limited to disclosing "materially" favorable evidence. *See, e.g.*, Janet C. Hoeffel & Stephen I. Singer, *Activating A Brady Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. Rev. L. & Soc. Change 467, 480-84 (2014).

[7] Justice Manual § 9-5.001(C).

[8] This problem has been thoroughly explored in the academic literature on *Brady* violations. *See, e.g.*, Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 Mercer L. Rev. 639, 646-47 & n.43 (2013).

[9] *See* New York City Bar Association, Committee on Professional Ethics, Formal Op. 2016-3, at 1 (New York's ethics rules "obligate[] a prosecutor to disclose to the accused any relevant information known to the prosecutor that tends to negate the defendant's guilt or mitigate the charges or sentence regardless of the extent of its significance."); *id.* at 3 (discussing positions taken by courts in various states); available at

paradigm shift is necessary, as prosecutors may not be endeavoring to turn over all such evidence, under the belief that appellate courts will reverse convictions for *Brady* error only if "there is a 'reasonable probability' that disclosure would have changed the outcome of the case."[10]

b. Provide More Guidance on the Timing of Required Disclosures

We think that any *Brady* reform must also provide more guidance on the timing of the required disclosures. The Fairness in Disclosure of Evidence Act also provides guidance: that favorable information must be disclosed "(1) without delay after arraignment and before the entry of any guilty plea; and (2) if the existence of [such] information is not known on the date of the initial disclosure[,] . . . as soon as is reasonably practicable upon the existence of the [favorable] information becoming known, without regard to whether the defendant has entered or agreed to enter a guilty plea."

Constitutional due process requires the government to disclose *Brady* material in time for the defense to make "effective use" of the evidence, and DOJ policy similarly requires "reasonably" prompt disclosure.[11] These timing requirements, however, have been far from clear in practice, and courts have sometimes struggled with what "effective use" means in the *Brady* context.[12] Under the Act, if favorable information is known to the prosecutor, that prosecutor should disclose such information "without delay" or "as soon as is reasonably practicable," in the absence of serious countervailing concerns (which we address in Part D below). This would be a departure from current practice, which leads to disclosure of some *Brady* and *Giglio* material on the virtual eve of trial—or not at all, if the defendant pleaded guilty at an earlier stage, fearing that a "trial penalty" will be imposed in the form of a longer sentence if they proceed to trial or even delay a guilty plea until close to trial.

We recognize that some courts have suggested alternative default deadlines for *Brady*, *Giglio*, or Jencks Act disclosures. The Act also provides that, even for information that is subject to a protective order, 30 days before trial should be the latest date by which *Brady* disclosures should be made before any trial or guilty plea, subject to exceptions for compelling circumstances. We think that providing more clarity on the timing of disclosures will be helpful to the prosecution and defense and would avoid unnecessary disputes and delays.

c. Trial Courts Should be Authorized to Fashion an Appropriate Remedy for Disclosure Violations

We think that any reform should make plain what the potential remedies are for any disclosure violation beyond what is provided under standing orders issued under Rule 5(f) of the Federal Rules of Criminal Procedure. As provided in the Fairness in Disclosure of Evidence Act, trial courts should be authorized to fashion an appropriate remedy, which could include postponing

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https://www.nycbar.org/pdf/report/uploads/20073140-2016-3_Prosecutors_Ethical_Obligations_PROFETH_8.22.16.pdf.

[10] *E.g.*, *United States v. Kirk Tang Yuk*, 885 F.3d 57, 86 (2d Cir. 2018).

[11] Justice Manual § 9-5.001(D).

[12] *See, e.g.*, *Leka v. Portuondo*, 257 F.3d 89, 100-03 (2d Cir. 2001) (discussing the timing of *Brady* disclosure).

the proceedings, excluding evidence, awarding costs and attorneys' fees, ordering a new trial, or dismissing the indictment.[13]

Among this list, we recognize that awarding of costs and attorneys' fees has not been a common remedy for a *Brady* violation or under Rule 5(f) orders, but providing such monetary sanctions in the most egregious cases should be authorized given that delayed or withheld *Brady* evidence can require extensive briefing and fact investigation, at considerable expense to the defendant. Courts should consider the totality of the circumstances and the availability of alternative remedies, ensuring that any remedy is proportional to the seriousness of the violation and the prosecution's level of culpability. While courts already have the power to order most of these remedies in the event of *Brady* or other discovery violations, we believe that articulating the consequences of such violations in a new federal statute would be useful.

d. Extend Appellate Court Standard of Review to include *Brady* Violations

We also believe that the appellate standard of review proposed in the Fairness in Disclosure of Evidence Act should be part of any new legislation. Under the prevailing appellate standard, a reviewing court cannot reverse a conviction because of a *Brady* violation unless the defendant establishes a "reasonable probability" that the failure to disclose affected the verdict.[14] Defendants often have difficulty meeting this standard, as the appellate court may not be able to fully appreciate the potential impact of the suppressed evidence. The Act shifts the burden: if the defendant establishes a violation of the Act, the reviewing court cannot disregard the error as "harmless" unless the government "demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained." Appellate courts already apply this well-established standard to a wide variety of constitutional errors in recognizing the importance of fair trials.[15] In extending this standard to *Brady* violations, the prosecution also should be incentivized to comply with its obligation to actively search its files for information favorable to the defense.

e. Reviewing the Department of Justice's Prior Opposition to *Brady* Reform

We recognize that when the Fairness in Disclosure of Evidence Act was introduced, DOJ opposed the Act on several grounds.[16] While we cannot predict what DOJ's position may be regarding any new legislative effort to reform federal criminal discovery, it may be instructive to review DOJ's prior opposition.

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[13] Other available remedies, though not identified in the Act, include vacating the defendant's plea agreement, suspending the offending prosecutors from practicing before the court, or referring them to the appropriate disciplinary committees.

[14] *Strickler v. Greene*, 527 U.S. 263, 289 (1999).

[15] *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 15-16 (1999) (errors in jury instructions); *Chapman v. California*, 386 U.S. 18, 24 (1967) (improper comments on defendant's decision not to testify).

[16] *See* Testimony of Deputy Attorney General James M. Cole to the Senate Judiciary Committee (June 6, 2012), available at https://www.justice.gov/opa/speech/deputy-attorney-general-james-m-cole-testifies-senate-judiciary-committee. The quotations that we attribute to the Department of Justice come from this testimony.

DOJ principally argued that *Brady* violations are "aberration[s]" and that "new rules are unnecessary" because the problem could be solved by "enhanced guidance, training, and supervision to ensure that the existing rules and policies are followed." Unfortunately, DOJ's suggestions have not sufficiently mitigated the *Brady* violations.[17] As explained above, the ambiguity of the "existing rules" and the difficulty that even well-meaning prosecutors have in applying them appear to be significant contributing factors to *Brady* violations.

DOJ also expressed concern that the Act would compromise witness safety in drug and gang cases; impinge on the privacy interests of victims in sex-crime cases; and require the unnecessary disclosure of classified information in national security cases.[18] However, most federal criminal cases present none of these risks. DOJ prosecutes a broad swath of white-collar crimes, frauds and false statements, immigration offenses, and non-violent drug offenses.

To address risks that may arise in certain cases, the Act contains exceptions that address DOJ's concerns. Most significantly, the Act allows prosecutors to obtain protective orders to delay certain disclosures that "would present a threat to the safety of the potential witness[es] or any other person." Such protective orders are already common, even in some cases where there is no particularized showing of need. If necessary, this provision could be modified to permit courts to issue protective orders in other situations, such as where there is a serious risk of witness tampering that does not implicate physical safety. The Act also provides that "[c]lassified information . . . shall be treated in accordance with the Classified Information Procedures Act," which is the existing mechanism for limiting disclosures of classified information. Notably, several state and local jurisdictions have adopted and applied disclosure rules that are similar to the Act or require even broader "open file" discovery, apparently without serious adverse consequences.[19]

The final concern articulated by DOJ was that the Act would "invite time-consuming and costly litigation," fueled by the prospect of attorneys' fees. While there may be more litigation resulting from the attorney's fee provision, the Act provides safeguards to weed out frivolous claims. The Act requires proof of, at a minimum, government negligence before the court can award attorneys' fees, and whether to award such fees is left to the court's discretion. We do not believe that any incremental uptick in litigation should preclude reforming criminal discovery in federal court, nor does it outweigh the need for additional deterrence of *Brady* violations.

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[17] In the recent New York case described above, the court observed: "[I]n the last criminal case tried before the Undersigned, the Government also seriously breached its *Brady* obligations. Following that revelation, the Court was repeatedly assured by the leadership of the USAO that the matter was being taken seriously, would be systemically addressed through training, and would not reoccur. The record before the Court in this case belies those assurances." Opinion & Order, *United States v. Nejad*, 487 F. Supp. 3d at 214.

[18] For a thorough response to these concerns, which we summarize here, *see* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 Mercer L. Rev. 639, 669-72 (2013).

[19] *See* Ill. Sup. Ct. R. 412(c) ("Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor."); N.C. Gen. Stat. § 15A-903(a)(1) ("Upon motion of the defendant, the court must order: . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant.").

IV. CONCLUSION

We urge Congress and the Biden Administration to revisit the key principles from the Fairness in Disclosure of Evidence Act to develop real reform in federal criminal discovery. Disclosure reform of this sort is an essential step toward a fair and just criminal justice system for all.

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