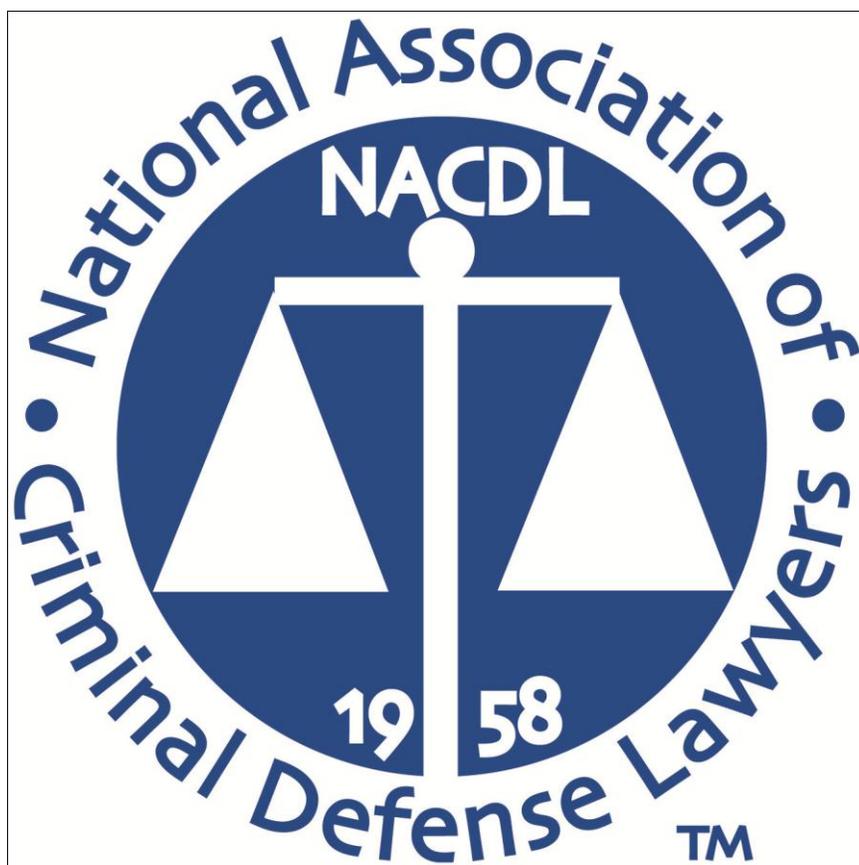


National Association of Criminal Defense Lawyers

Proposed Discovery Reform Legislation and Commentary



**Adopted by the Board of Directors
May 20, 2011**

18 USC § 3014. Duty to Disclose Favorable Information (New)

- (a) In any criminal prosecution, the attorney for the government shall provide to the defendant all information, data, documents, evidence or objects that—
 - (1) may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed; and
 - (2) are within the possession, custody or control of the United States, or the existence of which is known, or by the exercise of reasonable diligence would become known, to the attorney for the government.
- (b) The attorney for the government shall disclose the information, data, documents, evidence or objects described in subsection (a) without delay after arraignment, and prior to the entry of any guilty plea pursuant to an agreement with the government, or if such information is not then known, immediately upon its existence becoming known, without regard to whether the defendant is proceeding to trial or has entered or agreed to enter a guilty plea.
- (c) The obligation described in subsections (a) and (b) shall be discharged notwithstanding section 3500(a) of this title or any other provision of law (including any rule or statute), *provided that* where the materials to be disclosed under this section are “classified information” as defined by the Classified Information Procedures Act, that Act’s protective procedural provisions shall apply.
- (d) Upon motion of the United States, the court may issue an order to protect against the immediate disclosure to a defendant or to a defendant and counsel for a defendant, of material otherwise required to be disclosed under subsection (a), if—
 - (1) the disclosure is favorable to the defendant solely because it would provide a basis to impeach the credibility of a potential witness, and
 - (2) the United States establishes a reasonable basis to believe that:
 - (i) the identity of the witness is not already known to any defendant, and

- (ii) disclosure of the impeaching information to a defendant or to a defendant and counsel for a defendant would reasonably present a threat to the safety of the witness or of any other person.

The court may delay disclosure under this subsection until a reasonable time before the date set for trial, but no less than 30 days, and only so long as the preconditions specified herein continue to exist. The court may permit the United States to make its application under this subsection under seal to the extent necessary to protect the identity of the witness, but any *ex parte* submissions shall be summarized for the defendant in sufficient detail to permit the defense a meaningful opportunity to be heard on the question, including the need for any such protective order or its scope.

(e) No provision of this section may be waived by any defendant except in open court, and upon a factually supported finding that the proposed waiver is knowingly, intelligently and voluntarily offered and that the interests of justice so require.

(f) At any time prior to entry of judgment, upon motion of a defendant or on its own motion, if there is reason to believe the attorney for the government has failed to comply with subsection (a) or (b), the court shall determine whether the United States is in compliance and if not, the extent of and reason for any non-compliance. The court shall enter its findings in the record.

(g) Remedies –

(1) If the court determines that the United States has failed to discharge its duty under subsection (a), or has failed to discharge its duty in a timely manner under subsection (b), the court shall order appropriate remedial measures. Relief may include postponement or adjournment of the proceedings, exclusion or limitation of testimony or evidence, ordering a new trial, dismissal, or other appropriate remedies. In fashioning a remedy, the court shall consider the totality of the circumstances, including the seriousness of the violation, its impact on the proceeding, whether the failure resulted from innocent error, negligence, or knowing conduct, and the effectiveness of alternative remedies to protect the defendant's and the public interest in assuring fair prosecutions.

(2) If the court grants relief under subparagraph (f)(1), on a finding that the failure was due to negligence or knowing conduct by the United States, it may order that the defendant recover from the United States the defendant's costs and expenses incurred as a result of the failure, including reasonable attorney's fees (without regard to the terms of any fee

agreement between the defendant and defense counsel). For purposes of this subparagraph, “the defendant” includes any federal public defender or community defender agency, and also includes the fund for providing court-appointed counsel under the Criminal Justice Act (section 3006A of this title).

(h) Harmless error. On the hearing of any appeal or writ of certiorari initiated by a criminal defendant presenting an issue of fact or law under this section, the court shall apply the harmless error rule only if persuaded beyond a reasonable doubt that the error or defect did not affect the defendant's substantial rights.

Notes on Proposed Section 3014

The Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), recognized the constitutional importance of disclosure of information favorable to the accused, bearing on either guilt or punishment. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly," and a prosecution in which favorable information is withheld from the accused "does not comport with standards of justice." *Id.* at 87-88. The suppression of information favorable to the accused presents an obvious risk of conviction of the innocent and of the imposition of unjust, excessive, and unduly costly sentences. Ten percent of the 225 cases to date in which individuals have been exonerated by DNA evidence, according to the Innocence Project, were cases in which the suppression of favorable information had actually been raised.¹

Although the rule in *Brady v. Maryland* is properly understood as imposing on the prosecution an "affirmative duty to disclose evidence favorable to a defendant," *Kyles v. Whitley*, 514 U.S. 419, 432 (1995), the impact of that decision as a protection against mistakes in the criminal justice system has been dulled over decades by uncertainty as to what information was covered, when it had to be disclosed, and what remedies applied for a violation. The Department of Justice maintains that *Brady* does not reach information which "may not, on its own, result in an acquittal." U.S. Attorney's Manual 9-5.001.² Some courts agree. *See Ellsworth v. Warden*, 333 F.3d 1 (1st Cir. 2003). Following decisions of some circuits, the Department further maintains the position that information may be suppressed so long as it would not have changed the result at trial. *United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001); *United States v. Causey*, 356 F. Supp. 2d 681 (S.D. Tex. 2005); *see generally* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 *Hastings L.J.* (forthcoming 2011)(manuscript at 116-17)(on file with author).

These restrictions set a standard that is difficult to meet in an appellate posture, where a defendant seeks to overturn the result of a trial. However, this "materiality" standard has also been used to determine the scope of the prosecutor's obligation at the pretrial or in-trial stages as well, permitting the prosecution to withhold favorable information if it correctly estimates that the accused (1) will not learn of the suppressed evidence or (2) will be unable to prove later that it would have changed the result. *Id.* The consequence is that the prosecutor at trial is not called upon by these decisions to act with any greater generosity in ensuring a fair trial than would be required to avoid reversal. Because there is usually no remedy other than a new trial, if a reversal is required, there is little incentive, under the current implementation of *Brady v. Maryland* for a prosecutor to provide more information than is absolutely essential, or to provide it until the last possible moment.

Moreover, following a suggestion from the Supreme Court, *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (*per curiam*), some courts hold, as the Department of Justice maintains, that admissibility of the information is a precondition to trigger a prosecutor's disclosure obligations. *Madsen v. Dormire*, 137 F.3d 602 (8th Cir. 1998); *United States v. Derr*, 990 F. 2d 1330, 1335-36 (D.C.

Cir. 1993). Thus, many prosecutors condition disclosure on whether the information is admissible evidence.

This is problematic for two reasons. First, even inadmissible information may lead to admissible evidence proving that an accused is innocent, as the Supreme Court recognized in *Wood*. Second, “inadmissible” information sometimes is nevertheless required to be admitted under the compulsory process clause of the Sixth Amendment, as the Supreme Court has held in such cases as *Washington v. Texas*, 388 U.S. 14 (1967), *Chambers v. Mississippi*, 410 U.S. 284 (1973), *Green v. Georgia*, 442 U.S. 95 (1979), and, most recently, *Holmes v. South Carolina*, 547 U.S. 319 (2006). All these well-known cases involved reversal of convictions where evidence was formally inadmissible under the rules of evidence, but where its exclusion nevertheless violated the Right to Present a Defense founded in the Compulsory Process Clause. See generally Peter Westen, *Compulsory Process*, 73 Mich. L. Rev. 71, 120-21 (1974).

As a consequence, the promise of *Brady v. Maryland* has not been fulfilled. See Laural Hopper and Shelia Thorpe, Federal Judicial Center, *Brady v. Maryland* Material in the United States District Courts: Rules, Order and Policies (Mar 31, 2007) [http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/\\$file/bradyma2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf). This 2007 Judicial Center Report surveys a few of the articles written about the failure of the government to fulfill the “special role played by the American prosecutor in the search for truth in criminal trials”— i.e. “not that it shall win a case, but that justice shall be done.”

One author investigated the “dissonance between *Brady*’s grand expectation to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise.” Further, the author proffers that the lack of specific local court rules imposing obligations on prosecutors impedes compliance. Others argue that current disciplinary mechanisms provide little remedy.

Id. at 3-4 (footnotes omitted). See also *United States v. Mannarino*, 850 F. Supp. 57, 59, 71 (D. Mass. 1994) (finding that prosecutors had consistently, for many years, shown an “obdurate indifference to . . . disclosure responsibilities,” prompting the district to adopt an extensive discovery rule).

In addition to considerations of constitutionality and fundamental notions of justice, federal prosecutors have an ethical obligation to disclose favorable information to accused persons regardless of the potential impact of the evidence on the verdict (materiality) and prior to a guilty plea proceeding or trial. See ABA Formal Ethics Opinion 09-454. As the Supreme Court recognized, the “obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations than under the federal constitution.” *Cone v. Bell*, 129 S Ct. 1769 (2009); see Model Rules of Professional Conduct R. 3.8(d) (2008); 28 U.S.C. § 530B (state rules of professional ethics made binding on federal prosecutors). The proposed ABA Standards for the Prosecution Function also reflect this view of the prosecutor’s disclosure obligations.

What must be disclosed

This proposal uses the terminology of “favorable” to describe the information and other matter required to be disclosed. Favorable information “is any information in the possession of the government – broadly defined to include all Executive Branch agencies [and local agencies and other entities participating in the investigation or prosecution of the case, as well as their agents of whatever sort] – that ‘relates to’ guilt or punishment and that tends to help the defense by either bolstering the defense case or impeaching potential prosecution witnesses.” *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). This includes all “information,” not limited to “evidence” or “potential evidence.” The formulation “information, data, documents, evidence or objects” tracks the forms in Rule 16 of the Rules of Criminal Procedure and is intended to be inclusive. It does not use the term “exculpatory” or “impeaching” or refer to distinctions between these categories of information. Though commonly used in discussions of the *Brady* doctrine, the word “exculpatory” is nowhere found in the Supreme Court’s main opinion in *Brady*, which twice describes as “favorable” the information to be disclosed. The use of the term “favorable” is most common in local rules adopted by district courts. Hopper, *supra* at 12.

Though inspired by *Brady v. Maryland* and the precedent on which that decision relied, it is the intent of this provision to eclipse the disagreements and confusion found in post-*Brady* decisions not only by using the original term of “favorable” but also by specifying that the subject to which the information is relevant includes not only the guilt determination and sentencing, but also any preliminary matter, such as determination of a detention motion or a motion to suppress. Some jurisdictions have adopted this by rule, *id.*, while some circuits have so declared. *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) (*Brady* doctrine applies in context of motion to suppress); *Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) (same); see *United States v. Jones*, 686 F.Supp.2d 147, 2010 WL 565478 (D. Mass. 2010); *Magallan v. Superior Court*, 121 Cal.Rptr.3d 841 (2011); *People v. Geaslen*, 54 N.Y.2d 510 (1981). Some circuits have assumed that *Brady* applies to pretrial determinations, without deciding, *United States v. Williams*, 10 F.3d 1070, 1077 (4th Cir. 1993); *United States v. Stott*, 245 F.3d 890, 902 (7th Cir 2001); while others have resisted the idea, *United States v. Bowie*, 198 F.3d 905, 912 (D.C. Cir. 1999). This statute resolves the question in favor of requiring disclosure of information favorable to the accused in relation to any determination to be made in the context of the criminal proceeding.

Despite *Brady* being a constitutional doctrine, the government consistently argues, and many courts have ruled, that the restriction on the disclosure of “statements” found in 18 USC §3500(a) (the “*Jencks* Act”) applies even to statements that are “favorable.” In other words, some courts hold that the *Jencks* Act “trumps” *Brady*. See, e.g., *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994). The result is that such favorable information might not be disclosed until after a witness testifies on direct examination or possibly not at all if the witness is not called to testify. This proposed statute would clarify the relationship between these directives by requiring the prompt disclosure of statements favorable to the accused notwithstanding the restriction found in §3500.³ Similarly, as to “favorable” information, etc., that it covers, the disclosure provisions of this statute will prevail

over any other statute or rule, except as expressly provided herein with respect to classified information.

Consistent with the constitutional and ethical imperatives codified by this provision, the proposal does not require a request by the defense in order to trigger the attorney for the government's disclosure obligation.

Reasonable Diligence

The "reasonable diligence" referred to in paragraph (a)(2) will ordinarily include, at a minimum, appropriate inquiries addressed by the attorneys for the government to the agents and employees of any federal, state or local agency or other person or entity participating or cooperating in the investigation or prosecution of the case and of any related case, and to other federal agencies reasonably likely, in the circumstances of the case, to be in possession of information that would be disclosable under paragraph (a)(1).

Waivers

Because of strong public policy in favor of disclosure of favorable information, and the imbalance in the plea negotiation process, only judicially approved waivers of the rights assured by this statute are permitted.

Timing of disclosure

Timing of disclosure has been another significant issue. Although many districts by local rule require that "*Brady*" material be disclosed promptly after arraignment, *see* Judicial Center Report, *supra*, circuit courts have permitted suppression of favorable information so long as it is disclosed – even at the last minute – in time for the defense to make some use of it. *United States v. Copp*a, 267 F.3d 132 (2d Cir. 2001).

The requirement in this proposal that the attorney for the government disclose the information "without delay" is consistent with the original purpose of the *Brady* decision and the existing practice in many districts and avoids tactical considerations from interfering with the prosecutor's ethical and constitutional obligations to the accused. The proposal is not one that leaves to the prosecutor the option of speculating that the information or evidence might later not be considered to have been "material." Experience has proven that backward-looking appellate standards are an insufficient protection for fairness prior to the trial or negotiation of cases. Rather, any evidence that is favorable to the accused should be turned over at the earliest opportunity.

Defendants deciding whether to plead guilty must also have access to favorable information. The withholding of such information is "impermissible conduct by the government depriving [the defendant] of his ability to decide intelligently whether to plead guilty." *Ferrara v. United States*, 384 F. Supp. 2d 384, 389 (D. Mass. 2005), *aff'd*, 456 F.3d 278 (1st Cir. 2006). *See* ABA Op. 09-454. Where the defendant has negotiated an agreement to plead guilty upon arraignment, the attorney for the government still must provide the disclosure unless a waiver is accepted. However, when a defendant pleads guilty with no prior agreement – more likely to be a surprise to the government — prior disclosure is not required.

Nothing in this statute suggests, or is intended to suggest, that the duty of the United States to disclose later-discovered favorable information terminates at any time. Procedures and remedies for such cases are not addressed in this statute, however.

Protective Order

In recognition of the concerns that may arise in disclosing impeachment information relating to some prosecution witnesses, express provision is made for a protective order to be entered which would allow such disclosure at a time closer to trial. Procedural protections are implemented in order to protect the due process rights of the accused to the extent that the government obtains permission to proceed, to some degree, *ex parte* in making its application. See *United States v. Abuhamra*, 389 F.3d 309, 321 (2d Cir. 2004). Such concerns are not likely to arise in connection with disclosure of statements favorable to the accused made by witnesses.

Nevertheless, this provision mirrors current practice by indicating that the burden is on the government to justify concealing favorable information, and that the court should consider lesser remedies than preventing disclosure altogether, such as allowing disclosure to defense counsel who would be restricted, under a protective order, from disclosing the information, or certain aspects of the information, to the defendant. See *United States v. Rezaq*, 156 F.R.D. 514, 524 (D.D.C. 1994).

With respect to information that is “classified information,” this provision accepts the protective provisions in the Classified Information Procedures Act, §6(c) and (e), which requires dismissal if the defense is precluded from the use of favorable classified information and permits use of summaries in lieu of the evidence if the court “finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”

Remedies

It is also important that prosecutors recognize the ramifications of failing to adhere to this constitutional norm, now protected by this statute, and judges need authority beyond their supervisory powers to enforce the requirement of discovery and protect against pretrial gamesmanship that elevates an adversarial perspective over the demands of fair procedure and the search for truth. Thus, a statute with clear mandates and provisions for non-compliance serves the judicial process with the accompanying mechanisms to assure compliance with law. See Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 Cardozo L. Rev. 1943 *et seq.* (2010). “Brady violations and instances of prosecutorial misconduct have to be addressed in real time. Appellate opinions that find prosecutorial misconduct years after the violation has occurred have very little, if any, deterrent effect.” *Id.* at 2033. Thus, judicial oversight early in the process will not only avert any problems related to disclosure but will be helpful to prosecutors in making pretrial disclosure decisions.

Appellate review

Given the serious consequences which may flow from the failure to disclose favorable information, and the fundamental constitutional concerns which led to the

Brady decision, this provision requires that the standard of review on appeal or certiorari approximate the scrutiny required to be given to the claimed denial of fundamental constitutional rights.

¹ Emily M. West, Innocence Project, Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 225 DNA Exoneration Cases 6 (August 2010), http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf

² http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm

³ There is a question as to the continuing effectiveness of §3500. The Criminal Rules Advisory Committee recognized in 1979, when recommending Rule 26.2 to the Judicial Conference for adoption, that §3500 is “purely procedural” and is thus subject to modification or even being superseded, pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(b), by the Rules amendment process. Accordingly, §3500 has been supplanted by the adoption of Rule 26.2 and the various Rules amendments extending Rule 26.2’s reach to adversarial proceedings other than (and prior to) the trial, such as detention and suppression hearings at which §3500 did not authorize disclosure. Congress’ later comments on this history reinforces the same notion, that §3500 is viewed as superseded and repealed by Rule 26.2. *See* Sen. Rep.96-553 (Jan. 17, 1980) on S. 1722, (96th Cong, 2d Sess) (recounting the history of federal criminal code reform efforts in its introductory statement). Rule 26.2 does not include the restriction on disclosure reflected in §3500(a).