

**NACDL MODEL ORDER PURSUANT TO THE
DUE PROCESS PROTECTIONS ACT OF 2020**

**UNITED STATES DISTRICT COURT
DISTRICT OF [DISTRICT]**

IN RE: Criminal Discovery

ORDER

Unless otherwise ordered by the Court:

Pursuant to Federal Rule of Criminal Procedure 5(f), as amended by the Due Process Protections Act, Pub. L. No. 116-182 (Oct. 21, 2020), this Order confirms the prosecutor's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and notifies the parties of the possible consequences if the prosecution violates this Order.

A. Obligations

1. Within fourteen (14) days of this Order, the government must produce to the defense any information in its possession, custody or control that is favorable to the defendant with respect to either the defendant's guilt or punishment. This obligation applies regardless of whether the information itself would constitute admissible evidence and regardless of the government's assessment of the credibility or weight of the information. For purposes of this Order, "the government" includes federal, state, and local law-enforcement officers and other government officials, and any laboratories, agencies, organizations, or consultants who have participated in the investigation and/or prosecution of the offense(s) with which the defendant is charged. The prosecution has an obligation to seek from these sources all information subject to disclosure under this Order.
2. Beginning at the arraignment and continuing throughout the criminal proceeding, the prosecution shall make good faith efforts to disclose such information to the defense as soon as reasonably practicable after its existence is known, without regard to whether the defendant is proceeding to trial or has entered or agreed to enter a guilty plea. The prosecution must comply with this Order and provide the required information to the defense in time for the defendant to consider the information prior to finalizing any plea agreement. The fact that the information may be contained within a witness's statement and therefore constitute "*Jencks* material" does not change the government's obligations or the timing of the government's obligations under this Order.
3. The information to be disclosed by the prosecutor includes but is not limited to:
 - a. Information that is inconsistent with or tends to negate the defendant's guilt as to any element, including identification, of the offense(s) with which the defendant is charged;
 - b. Information that tends to mitigate the charged offense(s) or reduce the potential penalty;
 - c. Information that tends to establish an articulated and legally cognizable defense theory or recognized affirmative defense to the offense(s) with which the defendant is charged;
 - d. Information that casts doubt on the admissibility of evidence that the government anticipates using in the prosecution of the defendant;

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- e. Information that casts doubt on the credibility or accuracy of any evidence, including witness testimony, the government anticipates using at any stage of the matter;
 - f. Information concerning any person, other than the accused, who was suspected or identified at any time, or may reasonably be suspected, as being: (i) in the case of a one-person offense, the perpetrator; or (ii) in the case of an offense committed by multiple persons, as having played the part in the offense that the indictment attributes to the accused, notwithstanding what may be considered the strength of the evidence of the guilt of the accused;; and
 - g. Impeachment information, which includes but it not limited to: (i) information regarding whether any promise, reward, or inducement has been given by the government to any prospective witness; and (ii) information that identifies all pending criminal cases against, and all criminal convictions of, any such witness.
4. With respect to material required to be disclosed under paragraph 3(e) of this Order solely because it would provide the basis to impeach a potential prosecution witness, if the prosecution establishes a reasonable basis to believe that the identity of the witness is not already known to the defense, and if the government can establish that disclosure of the impeaching information would reasonably present a threat of safety to the witness, the Court may permit a delay of disclosure 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. In the event the prosecution believes that a disclosure under this Order would otherwise compromise witness safety, victim rights, national security, or any other substantial government interest, it may apply to the Court for a modification of the requirements of this Order, which may include *in camera* review and/or withholding or subjecting to a protective order all or part of the information. The prosecution will be permitted to make such an application under seal to the extent necessary to protect the identity of the witness or other government interest, but any *ex parte* submissions must be summarized for the defense in sufficient detail to permit the defense to be heard on the question, including the need for any such protective order or its scope.
5. Where doubt exists as to the usefulness or favorability of the information to the defense, the prosecution must resolve all such doubts in favor of full disclosure. If the government has identified any information which is favorable to the defendant but which the government believes it is not required to disclose, the government must notify the Court and the defense that it is withholding information and provide the basis on which the government believes it can withhold the information, so that he Court can consider whether to review the information *in camera* and/or order disclosure.
6. The government must produce the discovery governed by this Order in a readily usable format. If the discovery does not exist in such a format, and, as a result, the government is providing the information in a summary format, the summary must include sufficient detail and specificity to enable the defense to assess its relevance and potential usefulness. If the information is not in a format that can be provided to the defense, it must be made available to the defense for inspection.

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7. If the government uses a filter team to segregate potentially privileged material from the prosecution team, it must disclose this to the defense in a timely manner to allow the defendant the opportunity to request a hearing on the adequacy of the procedure.
8. If the defendant is an aggrieved person as defined in 18 U.S.C. § 2510(11) or as “aggrieved” is used in 18 U.S.C. § 3504, the government must so advise the defendant and set forth the detailed circumstances thereof, unless disclosure is prohibited by law, or the information is classified or protected by court order.
9. At any time prior to judgment that the record presents reasonable grounds for concern whether the prosecution has complied with this Order, the Court will conduct an inquiry to determine whether the prosecution has complied and, if not, the full extent of and reason for any non-compliance.

B. Consequences

1. If the prosecutor fails to comply with this Order, the Court, in addition to ordering production of the information, may:
 - a. Specify the terms and conditions of such production;
 - b. Grant a continuance;
 - c. Impose evidentiary sanctions, including excluding or limiting the admissibility of specified testimony or evidence;
 - d. Order a new trial;
 - e. Vacate the plea agreement;
 - f. Dismiss the indictment or information;
 - g. Require a senior official from the prosecutor’s office to investigate and explain the prosecution’s failure to comply with the Order and, if appropriate, address whether there is a systemic failure within the government that led to the failure at issue;
 - h. Appoint a special prosecutor to investigate the government’s failure to comply with the Order;
 - i. Implement contempt proceedings;
 - j. File a report with the appropriate disciplinary committee(s), including the Court’s committee on grievances and/or the state bar’s disciplinary committee (*see* 28 U.S.C. § 530B(a));
 - k. Impose a fine on the prosecutor(s);
 - l. Deny the prosecutor(s) the right to practice before the Court for a period of up to ninety days;
 - m. Order that the defendant (or, if applicable, any federal public defender agency or the fund for providing court-appointed counsel under the Criminal Justice Act) recover from the United States the legal costs and expenses incurred as a result of the prosecution’s lack of compliance, including reasonable attorney’s fees; or
 - n. Enter any other order that is just under the circumstances.
2. In fashioning an appropriate remedy, the Court will consider the totality of the circumstances, including the seriousness of the violation, its impact on the proceeding, the

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effectiveness of alternative sanctions to protect the public interest in assuring fair prosecutions, and whether the failure resulted from innocent error, negligence or knowing conduct. The Court may impose sanctions on the prosecution regardless of whether the defendant was prejudiced by the non-disclosure.

3. This Order binds the government regardless of whether the defense makes any request for information. The parties may not enter into any agreement to proceed other than in full and timely compliance with this Order without leave of the Court.

IT IS SO ORDERED.