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Outside Counsel

No Harm, No Foul – Second Circuit Redefines 'Brady'

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There was always some gray area in the law defining a prosecutor's Brady and Giglio obligations.

Prosecutors under Brady v. Maryland are obligated to disclose favorable evidence to the accused where such evidence is material either to guilt or punishment.[1]

Giglio v. United States requires disclosure of evidence that could be used to impeach government witnesses.[2]

But making a determination as to materiality of evidence is no easy task. In addition, circuit courts have varied in their rulings as to when the prosecution must disclose Brady/Giglio material. In granting an unusual government petition for mandamus of a district court's pre-trial ruling, the U.S. Court of Appeals for the Second Circuit in United States v. Coppa[3] recently attempted to clarify this aspect of a prosecutor's disclosure obligations. Yet, the Second Circuit's decision goes beyond the issue of timing and instead may radically alter a prosecutor's disclosure obligations.

The defendant in Coppa had been charged with various crimes involving securities fraud and money laundering. Before a trial date had been set, several defendants moved to compel the government to turn over forthwith exculpatory and impeachment evidence as required by Brady and Giglio respectively.

The government agreed to disclose immediately all exculpatory material, but refused to disclose impeachment material relating to potential government witnesses. The district court, relying on its prior holding in United States v. Shvarts,[4] held that the Due Process Clause of the Fifth Amendment required the government to turn over exculpatory and impeachment materials as soon after indictment as a defendant makes the request, and thus granted the defendants' motion and ordered the immediate disclosure of all impeachment material in possession of the government.

The government's petition for a writ of mandamus involved the relatively narrow but important issue of the timing of disclosure of Giglio material. Yet, after noting a series of Supreme Court cases addressing a prosecutor's disclosure obligations,[5] the Second Circuit held that the Brady obligation had shifted over time from (a) an evidentiary test of materiality that can be applied rather easily to any item of evidence (would this evidence have some tendency to undermine proof of guilt?) to (b) a result-affecting test that obliges a prosecutor to make a prediction as to whether a reasonable probability will exist that the outcome would have been different if disclosure had been made.

According to the Second Circuit,Bagley made the extent of the Brady disclosure requirement dependent on the anticipated remedy for a violation of the disclosure obligation. Thus, disclosure was only required when the prosecutor determined that there was a reasonable probability that the suppressed evidence would have altered the verdict if disclosed.[6]

This holding went far beyond the issue of timing with regard to Giglio material and instead redefined the substance of a prosecutor's disclosure obligations. Previously, a prosecutor under Brady/Giglio was required to disclose any material exculpatory information. After Coppa, a prosecutor may withhold even exculpatory information so long as the prosecutor predicts that there is no reasonable probability that disclosure might alter the outcome.

The Coppa holding is problematic for a number of reasons, the first being that it will often be extremely difficult for prosecutors to make such predictions. Prior to Coppa, prosecutors within the same office may occasionally have reached

different conclusions about whether certain evidence was Brady or Giglio material that must be provided to the defense. Some evidence, however, was so clearly within the Brady/Giglio parameters that it would be disclosed by any fair-minded prosecutor. To take the hypothetical posed in Coppa, if there are three eyewitnesses who tell investigators that someone other than the defendant committed the crime, such information would be disclosed because it would raise a reasonable probability that disclosure would result in a different outcome than if such information was withheld.[7]

Make a slight change to this hypothetical, however, and the Coppa holding illustrates how much the Second Circuit's recent decision has obscured the Brady/Giglio landscape: Suppose one witness had directly exculpatory information, but the witness was intoxicated at the time or had prior convictions for fraudulent or deceitful crimes. Under Coppa, a prosecutor may arguably withhold the existence of the witness. The prosecution would have to make a determination as to whether disclosure of the witness would have a reasonable probability of altering the outcome at trial. If the prosecution concludes that the witnesses' lack of credibility would make his or her testimony so incredible as to have no reasonable probability of affecting the outcome, the prosecutor could decide not to disclose the existence of the witness.

To pose another hypothetical, consider what would happen if a government witness had been convicted of ten crimes but the defense was only aware of five of the convictions. Prior to Coppa the answer was clear at least for most prosecutors: the prosecutor would disclose the other five convictions. But now the prosecution does not automatically have to disclose the additional convictions. The prosecutor must make a determination as to whether ten convictions as opposed to five actually makes a witness less credible, and, if so, whether the decrease in credibility would have a reasonable probability of altering the outcome.

Coppa essentially licenses prosecutors not to reveal exculpatory information. In addition, even if a prosecutor decides that disclosure of information is required, the prosecutor can withhold that information until the time when the prosecutor can predict that continued suppression might affect the outcome. That time would most likely be just before trial.

Yet, defendants often accept plea agreements well in advance of trial. A defendant thus might accept a plea agreement before learning of the favorable information. And whether the information is exculpatory or impeachment evidence, the defendant or the court likely will never learn of its existence.

Prosecutors are hardly in a position to make these difficult judgments. First, they are adversaries. Imagine in the civil arena if a party only had to disclose evidence that the party believed could advance an opponent's case (or worse, likely result in the opponent's victory). Although the vast majority of prosecutors are committed to achieving a just result, the adversarial nature of litigation might cause a prosecutor to err in favor of the cause he or she is advancing.

Second, a prosecutor is not familiar with the defense's case. This makes the prosecutor's determination of the value of disclosure even more difficult. Additionally, this raises the issue of whether the prosecutor's determination should be objective (A good defense lawyer might use this seemingly inconsequential bit of information to create doubt among the jury and so it must be disclosed) or subjective (Lawyer A always tries to portray the defendant as a victim of society, so Lawyer A would not use this bit of information and suppression thus would not affect the outcome.)

Finally, most prosecutors at least in the federal districts have not tried cases as defense attorneys, and could only guess at what use a skilled adversary might make of an item of exculpatory evidence. Presumably, when a disclosure determination is not clear-cut, inexperienced prosecutors will consult with colleagues who have tried cases as defense attorneys. Yet, a lack of defense experience might prevent a prosecutor from even recognizing that the information in question was exculpatory in nature a problem that existed prior to Coppa but that may now have been compounded.

Conclusion

In sum, the Coppa decision entrusts the prosecution with a great deal of discretion. The prosecutor becomes both adversary and adjudicator in a proceeding that will rarely be subject to further review. The message of Coppa may be that the government need not disclose evidence that is only slightly exculpatory or where failure to disclose would amount to harmless error. Appellate courts, however, generally get the benefit of a full record to decide harmless error. Given the breadth of the Coppa holding and its likely impact on settled practice, the appellate court may well have to revisit the issue again.[8]

1. 373 U.S. 83 (1963).

2. *SEC v. Bank of America Corp.*, 09 CV 6829 (JSR), 653 F.Supp.2d 507 (S.D.N.Y. Sept. 14, 2009).

3. 2001 U.S. App. Lexis 21535 (2d Cir. 2001).

4. 90 F.Supp.2d 219 (Glasser, J.) (E.D.N.Y. 2000) (requiring disclosure of *Giglio* material upon demand).

5. 4. See U.S. Securities and Exchange Commission's FY 2011 Performance and Accountability Report, available at http://www.sec.gov/about/secpar/secpar2011.pdf.

6. *Coppa*, 2001 U.S. App. Lexis at * 25.

7. Id. at *28-*29.

8. Indeed, the *Coppa* defendants have petitioned for a rehearing and/or a rehearing en banc.