

## **DISCOVERY OUTLINE UPDATE - November 2010**

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**NEW SECTION: SELECTIVE PROSECUTION** – Although the Supreme Court has created an extremely difficult standard in these cases, federal defenders have continued to persevere in the best defense tradition. That perseverance has resulted in several short term victories, and promises more to come. *See United States Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999)(allowing discovery on a crack prosecution selective prosecution claim in a thoughtful opinion on the subject), followed by *United States v. Daniels*, 142 F. Supp. 2d 140 (D. Mass. 2001)(denying motion to dismiss for selective prosecution due to fact that defense could not show similarly situated poor white neighborhoods where government failed to prosecute crack cases!).

**United States v. Bass**, 122 S. Ct. 769 (2002)(In death penalty case,.defense presented DOJ statistics showing that the United States charges African Americans with death-eligible offenses more than twice as often as it charges whites and that the United States enters into plea bargains more frequently with white than with African Americans. The Sixth Circuit upheld the district court’s order dismissing the death penalty notice where DOJ refused to comply with court order requiring discovery of information relative to government charging practices in death cases, but Supreme Court reversed saying “raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants* [under Armstrong].”)

**United States v. Armstrong**, 116 S.Ct 1480 (1996)(Although defendant entitled to obtain discovery in case alleging selective prosecution of African Americans in crack cases if defendant can produce some evidence that similarly situated white persons were not prosecuted; defendant not entitled to that discovery under Rule 16 (a) (1)( C ))

**United States v. Al Hedaithy**, 392 F.3d 580 (3d Cir. 2004)(district court found defense had presented sufficient evidence to warrant discovery, but determined that even if all facts were as the defense said, there would be no equal protection violation; the Third Circuit disagreed with the court’s process and held first, that the defense had **not** made a sufficient showing to warrant discovery and second, that the district court erred in finding there would be no equal protection violation if the discovery showed the decision to prosecute defendant was based upon race or ethnicity)

**United States v. Lewis**, 517 F.3d 739 (1<sup>st</sup> Cir. 2008)(Showing how wonderfully persistent the federal defenders are, this challenge was brought by Boston Federal Defender office requesting discovery on claim that persons who were African American and Muslim were being selectively prosecuted was rejected because the court said there was insufficient evidence of disparate treatment).

**United States v. Wallace**, 389 F. Supp. 799 (E.D. Mich. 2005)(Here too the Federal Defender office, this time in Detroit, brought a selective prosecution challenge. They showed that of the 61 pending federal firearms cases brought under Operation Safe Neighborhoods, 55 of the

defendants were African American. Again, the challenge was rejected based on insufficient evidence showing that similarly situated white persons were not prosecuted and based on lack of evidence of discriminatory intent). *See also* **United States v. Thorpe**, 471 F.3d 652 (6<sup>th</sup> Cir. 2006)(reversing district court’s grant of discovery based on defendant’s claim of selective prosecution under Project Safe Neighborhoods).

**United States v. Duque-Nava**, 315 F. Supp. 2d 1144 (D. Kansas 2004)(court found that traffic stop study conducted by John Lambert of New Jersey fame, although flawed, sufficient to show discriminatory effect, but not sufficient to show discriminatory intent, which court made clear would be almost impossible to prove in its courtroom), see also companion case of **United States v. Alcaraz-Arellano**, 302 F. Supp. 2d 1217 (D. Kansas 2004)(using same study, court found insufficient evidence of both discriminatory effect and intent).

## **BRADY V. MARYLAND**

Ethical Rules:

- A. Model Rule 3.8(d) - Prosecution must timely disclose “all evidence or information known to [them] that tends to negate guilt . . . or mitigates the offense.” No materiality requirement.
- B. ABA Formal Opinion 09-454 (July 8, 2009): Prosecution’s ethical obligations broader than its legal obligations, citing *Cone v. Bell*, 129 S. Ct. 1783 (2009); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995).

United States Attorney’s Manual, Section 9-5000 *et seq.*, requiring prosecutors “to go beyond the minimum obligations required by the Constitution and establish[ing] broader standards for the disclosure of exculpatory and impeachment information.” No enforcement mechanism, aspirational only, but worth citing.

Department of Justice Memoranda from Deputy Attorney General David W. Ogden dated January 4, 2010, establishing guidance for prosecutors regarding criminal discovery, at [www.justice.gov/dag](http://www.justice.gov/dag).

**District Attorney’s Office v. Osborne**, 129 S. Ct. 2308 (2009)(*Brady* does not extend to post-conviction proceedings). Cf. **D’Amario v. Davis**, 2010 WL 537807 (D. Colo. 2010)(limiting *Osborne*).

**Youngblood v. West Virginia**, 126 S. Ct. 2188 (2006)(after conviction in sexual assault case, defense determined that a note that supported defense of consent had previously been shown to state trooper who had requested it be destroyed; Supreme Court in interesting sparring between majority and Justice Scalia, remanded to state court to obtain the benefit of the full court’s view of the *Brady* issue, since only the dissent had written an opinion on why it thought the note was *Brady* material)

**Banks v. Dretke**, 124 S. Ct. 1256 (2004) (In open file capital case, government’s failure to disclose facts that witness was a paid police informant and that a pretrial transcript showed coaching of another witness were impeaching and material facts, violating *Brady* regardless of government’s good or bad faith – a rule that “prosecutor may hide, defendant must seek,” is untenable)

**United States v. Ruiz**, 122 S. Ct. 2450 (2002)(Overruling the 9th Circuit, the Supreme Court here holds that the constitutional requirement that impeachment information be disclosed before trial does **not** apply in plea agreement situations and that the Fifth and Sixth Amendments do **not** require prosecutors to disclose any impeachment information before a plea is entered. So much for voluntary pleas.)

**United States v. Rodriguez**, 496 F.3d 221 (2d Cir. 2007)(fact that government did not make written notes of witness’s lies does not exempt government from turning over the information under *Brady* - interesting discussion of whether simply telling the defense that a witness lied, without giving the defense the specifics of the lies, meets *Brady*’s requirements)

**United States v. Stevens**, 2009 WL 652596 (D.D.C. April 7, 2009)(granting government’s motion to vacate conviction based on its failure to disclose exculpatory evidence to the defense); see 2009 WL 6525927 (D.D.C. Jan. 21, 2009) for history of Senator Stevens’ case.

**United States v. Cerna**, 633 F. Supp.2d 1053 (N.D. Cal. 2009)(court may order pre-trial disclosure of non-Jencks *Brady* material)

**United States v. Yevakpor**, 419 F. Supp. 2d 242 (N.D.N.Y. 2006)(“Given the current state of affairs in our nation, when surveillance occurs both with and without our knowledge, a great danger to liberty would exist if Government could pick and choose segments of recordings for use in prosecution, destroy the remainder, and then argue that the defense must show that the destroyed evidence contained exculpatory or otherwise potentially useful and relevant information.”)

**Ferrara v. United States**, 456 F.3d 278 (2d Cir. 2008)(Wholly exculpatory evidence may be required to be disclosed prior to plea if it makes plea unknowing).

**United States v. Rodriguez**, 496 F.3d 221 (2d Cir. 2007)(exculpatory oral statements must be disclosed under *Brady*, evidence need not be itself admissible if would lead to admissible evidence.)

**Gantt v. Roe**, 389 F.3d 908 (9th Cir. 2004) (*Brady* violation found despite fact that defense could have discovered it themselves, that fact does not “absolve” prosecution from its responsibilities)

**United States v. Ellsworth**, 333 F.3d 1 (1<sup>st</sup> Cir. 2003)(Noting that the circuits are split on whether *Brady* requires the disclosure of evidence that would not be admissible at trial, the First Circuit sides with the majority of courts and holds that even inadmissible evidence is subject to

Brady if it is “so promising a lead to strong exculpatory evidence that there could be no justification for withholding it.”)

**Leka v. Portuondo**, 257 F.3d 89 (2d Cir. 2001)(The prosecution withheld testimony of eyewitness, a former police officer. The court held that the suppressed testimony was material. The court noted the testimony would have likely had a seismic impact on the outcome of the trial given the credibility of a former police officer appearing as a defense witness. The court further noted that the eventual limited disclosure of the eyewitness testimony was “too little, too late.”)

## **DESTRUCTION OF EVIDENCE**

**United States v. Ramirez**, 174 F.3d 584 (5<sup>th</sup> Cir. 1999)(see above)

**United States v. Gomez**, 191 F.3d 1214 (10<sup>th</sup> Cir. 1999)(Customs’ destruction of marijuana day before indictment where it had given notice to defendant and prosecution of anticipated destruction 60 days earlier at time of seizure was in conformity with established procedure and not in bad faith – court suggests government consider modifying its drug destruction procedures)

## **MOTION FOR LIST OF WITNESSES**

**United States v. Falkowitz**, 214 F. Supp. 2d 365 (S.D.N.Y. 2002)(in non-violent, complex document case, defense made sufficient showing of need for list of witnesses)

**United States v. Savin**, 2001 U.S. Dist. LEXIS 2445 (S.D.N.Y. March 13, 2001)(court granted motion for witnesses based upon duration of alleged conspiracy and location of various witnesses)

**United States v. Rueb**, 2001 U.S. Dist. LEXIS 943 (S.D.N.Y. Feb. 6, 2001)(court granted motion for witnesses based upon voluminous nature of materials to review to prepare cross-examination, and considering limited nature of appointed counsels’ resources)

**United States v. Edelin**, 128 F. Supp. 2d 23 (D.D.C .2001)(Defendants requested additional discovery, including plea agreements and other witness information which had been sealed by the court to protect potential witnesses. The court determined that the defendants were dangerous and a threat to the government witnesses and ordered that the release of this information would “needlessly jeopardize the safety of potential witnesses and government informants.”)

**United States v. Gasparik**, 141 F. Supp. 2d 361. (S.D.N.Y. 2001)(In securities fraud case, government attempted to call witness it failed to include in its witness list. The defense argued that allowing this testimony created unfair surprise and prejudice as defense had reasonably relied upon the witness list the government supplied. The court ruled that the witness could not be called in the government’s case-in-chief, but could be called as a rebuttal witness.)

## **RULE 7(F) - BILL OF PARTICULARS**

**United States v. Sampson**, 2006 U.S. Dist. LEXIS 57881 (E.D. Va. August 17, 2006)(court granted motion for bill of particulars in fraud case, noting that it is especially important that the defendant have knowledge of which specific documents were fraudulent, what was fraudulent about them and the dates of the allegations)

**United States v. Savin**, 2001 U.S. Dist. LEXIS 2445 (S.D.N.Y. March 13, 2001)(court granted motion for bill of particulars, ruling that government's production of 85 boxes of documents containing over 100,000 pages of material did not meet its obligations to provide notice of the means and methods of the alleged conspiracy)

## **NATIONAL SECURITY**

**United States v. Moussaoui**, 2003 U.S. Dist. LEXIS 17253 (E.D. Va. 2003), on remand from 336 F.3d 279 (4<sup>th</sup> Cir. 2003)(Citing the fundamental right to compel production of witnesses who could provide favorable testimony, the district court struck the prosecution's death notice where prosecution refused to produce witnesses, citing national security)

**United States v. Lindh**, 198 F. Supp. 2d 739 (E.D. Va. 2002)(Holding that Rule 16 authorizes issuance of a protective order when national security issues are present)

## **NEW SECTION – ADAM WALSH ACT - 18 U.S.C. 3509(m) provides:**

(1) In any criminal proceeding, any property or material that constitutes child pornography (as defined by section 2256 of this title) shall remain in the care, custody, and control of either the Government or the court.

(2)(A) Notwithstanding Rule 16 of the Federal Rules of Criminal Procedure, a court shall deny, in any criminal proceeding, any request by the defendant to copy, photograph, duplicate, or otherwise reproduce any property or material that constitutes child pornography (as defined by section 2256 of this title), so long as the Government makes the property or material reasonably available to the defendant.

(2)(B) For the purposes of subparagraph (A), property or material shall be deemed to be reasonably available to the defendant if the Government provides ample opportunity for inspection, viewing, and examination at a Government facility of the property or materials by the defendant, his or her attorney, and any individual the defendant may seek to qualify to furnish

expert testimony at trial

**United States v. O'Rourke**, 470 F. Supp. 2d 1049 (D. Ariz. 2007)(fact that statute limits Rule 16 discovery available to defendants in internet child pornography cases is permissible even though statute prohibits government from copying computer hard drives or other material deemed to be "child pornography")

**United States v. Knellinger**, 471 F. Supp. 2d 640 (E.D.VA 2007) (finding that "§3509(m) requires, at a minimum, whatever opportunity for viewing is mandated by the Constitution)