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'Brady': Second Circuit Upends Prosecutorial Practice

In July of this year there was a little-noticed opinion issued by the U.S. Court of Appeals for the Second Circuit in *United States v. Rodriguez*. Although it has so far received scant attention in legal circles, it should have a palpable effect on prosecutorial practices regarding the critical issues of the scope and timing of *Brady* disclosures by the government.

Scope of 'Brady' Disclosures

The government is constitutionally required to disclose exculpatory and impeachment information to the accused,[1] and such disclosures must be sufficiently specific and complete to be useful to the defense.[2] In practice however, "sufficiently specific and complete to be useful" often translates into the government providing the defense with nothing more than the identity of a witness who has favorable defense information, while providing no details about the content of that information. The defendant must then try to interview the witness. But what if the witness refuses to speak with the defense, or provides information to the defense materially different from that provided to the government? Has the government complied with its *Brady* obligations?

If the witness declines to be interviewed or fails to disclose the favorable information, the only remedy typically resorted to by the defense prior to *Rodriguez* was to subpoena the witness to testify at trial. Just as typically, the government maintained that this completely satisfies the defendant's constitutional right of meaningful access to favorable information, citing *United States v. LeRoy*[3] and *United States v. Grossman*.[4] Those cases have been widely relied upon for this broad proposition that the government need only disclose the information permitting the defense to subpoena the witness with *Brady* information, namely, his or her identity and perhaps contact information.[5] But the holdings of *LeRoy* and *Grossman* were much narrower. Notably, those cases held only that the government is not obligated to disclose a *Brady* witness' grand jury testimony; they are silent as to whether the substance of the testimony must be provided. Armed with the Second Circuit's *Rodriguez* decision, discussed below, defendants can successfully argue that the government's perennial practice of providing only the identity of a *Brady* witness may be constitutionally deficient.

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Timing of 'Brady' Disclosures

The second critical feature of the government's *Brady* obligations is the timing of its disclosure of favorable information to the defense. *Brady* information must be disclosed in sufficient time so that the defense will have a reasonable opportunity to use it. It is axiomatic that the closer to trial the disclosure is made, the less opportunity a defendant will have to make meaningful use of it.[6] Of course, whether the government's disclosure of favorable material was sufficient in scope and in timing can only be analyzed retrospectively, after trial. Accordingly, government prosecutors have tremendous discretion in predicting how nondisclosure, narrow disclosure, or untimely disclosure of favorable information will be viewed after trial. The *Rodriguez* case sharply reminds practitioners of the perils attendant to the government's stingy exercise of that discretion.

'United States v. Rodriguez'

On appeal from his conviction for conspiracy to possess and distribute cocaine in the Southern District of New York, Ramiro Rodriguez claimed that his rights under *Brady* and the Confrontation Clause were violated by the government's failure to take notes of and to disclose the previous lies made by its cooperating witnesses to the government.[7] Mr. Rodriguez suggested that the government deliberately refrained from memorializing the witness' statements in order to evade its disclosure obligations.[8]

The proof against Mr. Rodriguez consisted mainly of the testimony of two cooperating witnesses, Patricia Lopez, a self-described drug dealer, and Noel

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Espada, one of her customers. Both witnesses testified pursuant to cooperation agreements with the government and both acknowledged having participated in multiple meetings with the government prior to testifying. Of particular import, during Ms. Lopez's direct testimony, the prosecution disclosed for the first time (solely through its questioning of Ms. Lopez) *Brady* impeachment material, namely that she initially lied "about everything" to the government prior to entering into a cooperation agreement. This predictably prompted defense counsel to request additional information about the substance of those lies. The prosecutor refused, stating that defense counsel was free to elicit such information on cross-examination. The trial court found that the government had satisfied its obligations. The Second Circuit remanded the case for a hearing as to the materiality of the information that the government failed to disclose timely to the defense.

The Second Circuit rejected straight away the shocking notion that the government's disclosure obligations are tied to whether the information was memorialized (which would conflate *Brady* obligations with those arising under the Jencks Act). "When the Government is in possession of material information that impeaches its witnesses or exculpates the defendant, it does not avoid the obligation under *Brady/Giglio* to disclose the information by not writing it down."[9]

The court re-emphasized its prior rulings that *Brady* information, of both the exculpatory and impeachment variety, must be disclosed in a "manner that gives a defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial."[10] Of particular importance, the court expressed the view that merely affording a defendant the opportunity to question a witness *on the stand at trial* may not constitute a reasonable opportunity under *Brady*. The court recognized that competent counsel may not take the risk of using the trial setting for such discovery. "[I]n some circumstances, telling the defendant that a witness lied, but leaving it for defense counsel to find out what the lies were by questioning the witness before the jury, might as a practical matter foreclose effective use of the impeaching or exculpatory information. Defense counsel would be in the difficult position of having to question the witness blindly in the jury's presence, not knowing whether the answers elicited might seriously incriminate or prejudice the defendant."[11]

Here, the court's admonition calls sub silencio into question the government's standard reliance on *LeRoy* and *Grossman* in limiting the scope of its *Brady* disclosures. Under the court's reasoning in *Rodriguez*, when a *Brady* witness refuses to speak to the defense pretrial, the government cannot blithely rely on the defendant's ability to subpoena the witness to testify at trial. Instead, *Rodriguez* suggests that the government ignores at its peril its obligation to advise the defendant of the substance of that favorable information in sufficient time for the defendant to make use of it. This recent rebuke by the Second Circuit echoes its earlier view, set forth in *Leka*, that the government's putting the defense in the position of calling a *Brady* witness cold to the stand is "suicidal [for the defense]" and not an opportunity for use as required by due process.[12]

Armed with the Second Circuit's 'Rodriguez' decision, defendants can argue that the government's practice of providing only the identity of a 'Brady' witness may be constitutionally deficient.

Given the collision between the decisions in *Rodriguez* and *Leka* with the narrow view of the scope and timing of *Brady* disclosures taken by the government reflexively in many cases, the government should discard its current practice. In fact, the Department of Justice, undoubtedly in recognition of the problems that persist in this area, revised the U.S. Attorney's Manual in late 2006 to call upon prosecutors, except in limited situations, to disclose favorable material pretrial.[13]

Conclusion

However, this relatively new policy statement regarding the timing of such disclosure, does not address sufficiently the scope of such disclosures. To ensure the constitutionally mandated "reasonable opportunity for use," the policy needs to go one important step farther—to require the government in all cases to accompany its mere identification of a *Brady* witness with a summary of that witness' pertinent favorable information. Instead of requiring defense attorneys to embark on the "suicidal" mission of calling a witness cold at trial, such an amended policy will ensure that the government complies with *Brady*. In the meantime, *Rodriguez* arms the defense with a powerful argument to compel complete and timely production of *Brady* information.

1. *United States v. Rodriguez,* No. 05-3069, 2007 U.S. App. LEXIS 17508, at *11 (2d Cir. July 24, 2007) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)).
2. Id. at *12-13 (citing *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001)).
3. 687 F.2d 610 (2d Cir. 1983).
4. 843 F.2d 78 (2d Cir. 1988).
5. See, e.g., *United States v. Oshatz*, 700 F. Supp. 696, 698 (S.D.N.Y. 1988) (holding that the government met its *Brady* obligations by identifying witnesses that may possess information helpful to the defense: "It is now up to [the defendants] to subpoena these witnesses to take advantage of any exculpatory information they might furnish.") (citing *LeRoy* and *Grossman*).
6. See *Leka*, 257 F.3d at 100; see also *United States v. Coppa*, 267 F.3d 132, 142-43 (2d Cir. 2001).
7. Our colleagues Barry Berke and Eric Tirschwell recently published a perceptive piece on the importance of a uniform requirement for note-taking in witness interviews by government prosecutors and law enforcement agents in light of the *Rodriguez* case. NYLJ, Outside Counsel, "New Rule Proposed on Note Taking in Criminal Cases," Sept. 6, 2007, at p. 4.
8. *Rodriguez*, 2007 U.S. App. LEXIS 17508, at *7-8.
9. Id. at *3.
10. Id. at *13 (citing *Leka*, 257 F.3d at 100, 101 and *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006)).
11. Id. at *18-19.
12. *Leka*, 257 F.3d at 103.
13. See U.S. Attorneys' Manual §9-5.001 (Oct. 19, 2006); id. Comment E (noting that "[p]rosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation").