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WHITE-COLLAR CRIME

'Brady' and Sentencing

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Brady v. Maryland, 373 U.S. 83 (1963), has long been misconstrued by litigants on both sides of the "v." as only applying to the guilt phase of a criminal proceeding. That is a mistake: *Brady* applies at sentencing and never more so than right now. Recent U.S. Supreme Court decisions expanding the discretion of federal judges at sentencing should revitalize the importance of *Brady* at this critical stage of a criminal case. When the Supreme Court broadened what a sentencing court can consider, it tacitly expanded the scope of information that must be disclosed at sentencing under *Brady*.

Because the scope of what is relevant for courts to consider at sentencing has broadened, the government cannot hide behind the "materiality" prong of *Brady* to justify nondisclosure. In complex white-collar prosecutions, the revitalization of *Brady* at sentencing is particularly important, as the government may be uniquely positioned to disclose information concerning the role of the defendant in the charged crime, the mitigation of losses by victims, and the extent of "reasonably foreseeable pecuniary harm." Consider this: Information in the hands of the government that could lower a defendant's fine or his jail sentence by one day can be *Brady* material to which the defense is entitled.

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'Brady' obligations extend to the sentencing phase

One of the oft-overlooked aspects of *Brady* is that the decision expressly extends the government's disclosure obligation to the sentencing phase in addition to the guilt phase of criminal proceedings. *Brady*, 373 U.S. at 87. Indeed, much has been written about the government's *Brady* obligations during the guilt phase, but strikingly little attention has been paid to the punishment phase of criminal proceedings. Why? The answer may well be that prosecutors and defense attorneys alike believe that guilty pleas extinguish all trial rights and that *Brady* obligations end there. Some prosecutors may think of *Brady* myopically as only addressing evidence that relates to whether a defendant is guilty and, consequently, once a defendant pleads or has been convicted there cannot by definition be any *Brady* evidence.

Further, government plea agreements often require defendants to waive their entitlement to additional *Brady* disclosures, although many only waive the right to receive such disclosure in connection with the plea, not sentencing. These misconceptions, combined with the fact that an overwhelming proportion of federal criminal proceedings end in convictions — 90% in 2004, the vast majority of which, 96%, are resolved by a guilty plea — means that *Brady* receives scant attention at sentencing. Bureau of Justice Statistics, Compendium of Federal Justice Statistics 59 (2004), www.ojp.-usdoj.gov/bjs/fed/htm.

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Now, in light of recent Supreme Court jurisprudence that greatly expands the discretion of the judiciary at sentencing, it is more critical than ever to remember that the government's obligations under *Brady* carry over into the critical sentencing phase.

The recent change to the sentencing process heralded by *U.S. v. Booker*, 543 U.S. 220 (2005), and its progeny should revitalize the application of

Brady rights at sentencing. Two recent decisions by the Supreme Court have expanded the wide discretion of sentencing judges post-*Booker*. Both decisions overruled circuit court panels that had rejected sentences that departed from the Federal Sentencing Guidelines range. The two cases authorize sentencing courts to consider almost all of the elements of a particular case when fashioning a sentence, including even the broader policy implications of the case at hand. In short, sentencing judges now enjoy far greater discretion and may consider factors that were previously off limits.

'Gall,' 'Kimbrough' further expand discretion of judges

In *Gall v. U.S.*, 128 S. Ct. 586 (2007), the Supreme Court held that appellate courts may not presume the unreasonableness of sentences that fall outside the guidelines range. See also *U.S. v. Jones*, 531 F.3d 163, 171 (2d Cir. 2008). The court held that the same abuse-of-discretion standard of review for sentencing decisions applied whether a sentence was inside or outside the guidelines range.

Decided the same day, *Kimbrough v. U.S.*, 128 S. Ct. 558 (2007), addressed whether a sentencing court was entitled to rely on its own view of policy matters addressed by the U.S. Sentencing Commission. The case dealt with the hot-button issue of the 100-to-1 ratio of powder to crack cocaine underlying guidelines sentencing ranges. The court held that, consonant with the guidelines being advisory, a sentencing court may deviate from the guidelines based on its own policy judgments, even if different from those embodied in the guidelines.

Considering 'Brady' 'materiality' at sentencing

For *Brady* purposes, the import of these cases is clear: Judges may consider a broader range of sentencing information. Thus, one of the key justifications relied on by prosecutors not to disclose information has been severely undermined.

Brady requires disclosure only if the information is favorable to the accused and "material" to the determination of guilt or punishment. "Materiality" is generally a high hurdle, requiring a reasonable probability that "the result of the proceeding would have been different" had the evidence been disclosed; a "reasonable probability" is one sufficient to undermine confidence in the outcome of the proceeding. *U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

With *Booker* and its robust progeny, however, the "materiality" threshold should be much easier to meet at the sentencing phase than in the guilt phase. Given the lack of attention paid to *Brady* rights at sentencing, it is unsurprising that the materiality standard at sentencing has not been well defined in the case law.

Indeed, only a handful of decisions have given this standard any shape at all. See e.g., *U.S. v. Weintraub*, 871 F.2d 1257, 1264-65 (5th Cir. 1989); *U.S. v. Quinn*, 537 F. Supp. 2d 99, 117-18 (D.D.C. 2008). But surely any difference in a prison term — or in a fine or in conditions of supervised release — could be material under *Brady*.

As the Supreme Court expands the scope of information that a court can consider at sentencing, so too must a prosecutor recalibrate his or her decision to withhold evidence that previously would have been immaterial to the court's determination of the appropriate sentence. Because many facts can now be relevant to a sentence, *Brady* disclosure issues should become a field of battle for defendants preparing for or challenging their sentences. And judges are unlikely to look favorably upon prosecutors who fail to disclose information that could have affected their sentencing determination (as to jail, fine or supervised release).

In many cases, of course, it will be the defendant who has equal or even exclusive access to material information about his or her individual circumstances and mitigating facts, and *Brady* will not apply. But there are situations in which the government will be the party with exclusive access to such information.

Material information in white-collar fraud cases

For instance, in large white-collar fraud cases, the government may have information not available to the defense about "reasonably foreseeable pecuniary harm" that could affect how loss is measured. Likewise, it may be the government that can provide information on mitigation of losses by victims, or on loss causation attributable to a particular defendant — all potentially material information to a court's assessment of loss in a given case.

In addition, the government may be in the best position to understand the defendant's role in the charged crime. Designations such as manager, supervisor or leader can have a significant impact on a sentence, and a prosecutor who has spent years investigating a complex white-collar fraud may know far more about the relative positions of the participants than an individual defendant.

As a final example, consider the sentencing statistics examined by the court in *Kimbrough*: The government may have exclusive access to data pertaining to a sentencing policy that the court may deem relevant. If this information could be material to the defendant's sentence, it must be disclosed under *Brady*.

In sum, while certain sentencing information was "material" even under the previously mandatory guidelines, the scope of information that is material for *Brady* purposes at sentencing has expanded coextensively with the Supreme Court's expansion of judicial discretion in sentencing. Defense attorneys would do well to be insistent about their right to receive *Brady* material at sentencing, and prosecutors who seek to fulfill their constitutional duty under Brady will need to be cognizant of their expanded obligations in light of the Supreme Court's progressive chipping away at the Federal Sentencing Guidelines. NLJ