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COMMENTARY: *BRADY* FROM THE PROSECUTOR'S PERSPECTIVE

Steven M. Dettelbach[†]

I would like to provide a prosecution perspective on *Brady*, even though I am now a defense attorney. I want to thank Case for having this program and for having me, and I want to thank Professor Giannelli for his upcoming and past work on this topic. As a member of this local community, I take pride when I see somebody from Cleveland play such an important role in an important debate. We have a few such people in the debate of DNA and exonerating evidence, including Professor Giannelli and my partner Jim Wooley. Cleveland really can be proud of itself.

I am very conscious of the fact that I am talking to an audience of experts. What I hope I can do is give you a different perspective, and it is admittedly limited. Although I am now a defense attorney, I come from many years as a federal prosecutor.

I don't know that I can talk with expertise about every prosecutor's office. They are all different, but I will give you what I learned in my years as a federal prosecutor. I will try to apply my experience to Professor Giannelli's proposal that we need additional objective discovery rules to handle *Brady* evidence.

There are three things I remember learning as a prosecutor related to the issue of exculpatory evidence.

First, on almost my first day as a prosecutor in Washington D.C., a very senior appellate prosecutor came in and lectured to all the baby prosecutors on *Brady*. The first thing he said stuck with me for all these years, and I will clean it up a little bit for this audience.

The senior prosecutor said "When you learn about a piece of the evidence, if you say, 'Oh, heck,' then it is *Brady*." And he followed it up by—and I will clean this up a little bit, too—"There is no case and no criminal that is worth your integrity and your career," which is a

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unique and compelling way to explain to prosecutors, in their own terms, in their own language, the necessity of complying with the requirements of *Brady*.

Second, my personal experience was that prosecutors actually felt the fear of personal consequences in making these decisions. I think that often led to open file discovery and going beyond what the rules require in certain jurisdictions.

Third, I still remember reading a memo by Stephen Trott that is lore in the Department of Justice and is pounded into every young Department of Justice prosecutor. Stephen Trott, who was the head of the Criminal Division and later became a judge on the Ninth Circuit, wrote a memorandum concerning the use of informants and cooperating witnesses. The two lessons from the memorandum that every prosecutor is taught: One. Don't do it unless you have to. Two. Corroborate, corroborate, corroborate. From a prosecutor's perspective, you never want to have any necessary part of your case depend upon the credibility of a cooperator alone.

Those are three overview points that provide a prosecutor's perspective on these issues.

I think it is also worth talking about the defense perspective and how we got to this state of affairs in the law. We ought to examine what caused the development of the materiality requirement, which we heard about from the first panel and Professor Giannelli. Specifically, we heard that the materiality requirement is a very strict requirement and narrows *Brady* significantly.

There is actually a tension between today's panels on this issue—we are hearing on the current panel that we have to get rid of the materiality requirement, but we heard on the first panel that the narrowness of the materiality requirement is why we feel comfortable imposing a *Brady* rule on plea negotiations. So there must be some reconciliation of the issue.

I think part of the reason for the materiality requirement is a self-defense mechanism on the part of the criminal justice defend against very talented and creative pool of defense attorneys. This is what happens in many cases, and I think this is every prosecutor's worst nightmare. They try a case. They try to do the right thing. They try to make these discovery decisions. They get a conviction, and afterwards the case is scrutinized under a microscope, in the view of perfect hindsight, with incredibly creative and aggressive defense attorneys making arguments about why things were exculpatory or relevant to the trial, when in reality the trial was about totally

different matters. Again, this is the prosecutor's perspective, but that's the fear.

Moreover, I think this fear is shared by courts. I think courts have developed this materiality requirement in order to serve as a self-defense mechanism and to protect from second guessing rightful convictions. I don't think anybody is claiming that in the scheme of the criminal justice system, one hundred and ninety-four or even nineteen thousand is the majority or even a significant proportion of criminal convictions over the last twenty years. And as a self-defense mechanism, unfortunately, we have had a narrowing of the *Brady* rule by this materiality requirement to prevent against the kind of armchair quarterbacking and second guessing that gives no finality in the criminal justice system. That's not to say it is right, but I believe that is how we got to where we are now.

We live in a constitutional system, but it is also a democracy. And I think in the long run, the vast majority of people, of voters, want to have reliable enforcement and reliable consequences to define criminal conduct. So it is a difficult balancing act that we are doing here between a defendant's rights and the will of the majority to impose sanctions on criminal conduct.

Those are general overview comments. But I want to get to Professor Giannelli's point in his upcoming piece, which is whether or not there should be additional specific rules of discovery that help us thread this needle. I think there should be such rules, because there is no way in a system with human beings that you can rely totally on subjective determinations.

The more objectivity that we get in the system, the better. But I have a caveat to Professor Giannelli's proposal, which is that there has to be a balancing. I think that the imposition of these rules, then, has to come with a presumption that somehow limits the ability to make *post hoc* challenges based on novel theories when the rules themselves have been complied with. So if the prosecutor follows the rules and does all the things required by such rules—even though it might not be constitutionally required in certain cases—then we ought to reward that conduct by limiting the second guessing that goes on after the fact.

There is a model for this: the Jencks Act. With the Jencks Act, we addressed what we should do with prior statements. We have said it is too messy for a prosecutor to figure out if the prior statement of a witness is somehow impeachable, whether it is perfectly consistent with the trial testimony or not. The prosecutor, therefore, has to give all of the statements over to the defense.

But the rule also comes with certain mechanical restrictions: timing for the release of *Jencks* statements may differ from what the defense counsel might want, or the uses of a statement might be limited in certain circumstances. There is also litigation about what constitutes a prior statement that is covered by the act and what doesn't. Are summaries covered? In some places they are covered; other places they are not. But if prosecutors follow the written rules, they have some comfort that they will not somehow be punished later for failing to produce certain material.

This model can be applied to *Brady* material. It might not be a perfect model, but it is a model that rewards good behavior based upon defined rules. I think we ought to consider doing that.

I don't think that as a political matter—and this is coming from my experience as counsel on the Senate Judiciary Committee—we are going to get to 'yes' by simply forcing a series of what will be viewed as pro-defense rules down the mouth of the Department of Justice and the community.

I don't think that's going to happen because it isn't a political possibility given the general community's feeling about crime. The community is rightfully schizophrenic on this issue. They hate it when a guilty person is acquitted, but they also hate it when an innocent person is convicted. We have to be careful about the balance.

One of the things I fault both the Justice Department and the ABA for is that neither has truly created an inclusive group to make this balancing happen. To be fair, it is hard. We tried to create an inclusive group a few years ago around the issue of contacts with represented persons. We found that it is very, very hard to get the people in the room talking to each other. That's why I think that these kinds of conferences and these kinds of dialogues are so very important. You cannot get to a solution that makes sense unless you get buy-in from all the different communities involved.