Discovery in DC Criminal Cases

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Initial Discovery Requests

- At arraignment, it is a helpful practice to serve and file a request for discovery, *Brady*, and preservation of evidence
- Doing this at an early stage strengthens arguments about spoliation and untimely disclosure
  - It also makes it easier to follow up on a request via email or formal *Rosser* letter
- Rule 16 requests must be made in writing; stating it orally for the record is insufficient
- To save time and paper, you need not write the date and defendant's name on each request. Just give a copy to the clerk and they will scan it in to the record

Reciprocal Obligations

- If neither party requests it, neither party must disclose it. So, consider whether you want to disclose your discovery or expert before making a request
- (b)(1)(A) Documents and tangible objects
  - Only if you make a request under (a)(1)(C)
  - Only if the government makes a request under (b)(1)(A)
  - Only if you intend to introduce as evidence in chief at the trial, as opposed to impeachment evidence
- (b)(1)(B) Examinations and tests
- (b)(1)(C) Expert notice

Initial Discovery Request

- Viewing Letters. The government's practice of waiting until a trial date is set is inconsistent with Rule 16.
  - Specify that the letter should include your investigator, representative, or expert
  - Also specify that the letter must say "view", "inspect", and "photograph"
  - The letters need not expire in 30 days
- Request statements and reports relating to co-defendants as well

Lay Witness Information

- Also inconsistent with Rule 16 is the government's practice of redacting lay witness names and contact information from police reports and other documents. Demand it in every case.
- *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966).
  - Witnesses, particularly eyewitnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them…A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined. The current tendency in the criminal law is in the direction of discovery of the facts before trial and elimination of surprise at trial. A related development in the criminal law is the requirement that the prosecution not frustrate the defense in the preparation of its case.
  - It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eyewitnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview.

Lay Witness Information

- The government claims the reason for its practice is to protect the safety of the witnesses, but the caselaw says they must present substantiated grounds for their fear of witness intimidation.
  - *See Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010)
  - *United States v. Edelin*, 128 F.Supp.2d 23, 31 (D.D.C. 2001)(suggesting that the government must show by a preponderance of evidence that early disclosure might jeopardize life or safety)
  - *Boyd v. United States*, 908 A.2d 39, 62 (D.C. 2006)(suggesting that the witness' privacy or safety concern must be "compelling");
  - *United States v. Snell*, 899 F. Supp. 17, 20 (D. Mass. 1995)(noting that the government's anticipated concerns about witness safety "can be dealt with in motions for protective orders or motions for exemption from pretrial disclosure" on a case-by-case basis).
- It might be worth noting in your motion that you do not oppose a protective order or limiting disclosure of the information to the defense attorney and investigator.

Lay Witness Information

- Identifying information should also be disclosed under *Brady* because the defense cannot assess the value of the information in a witness' possession without knowing who the witness is, what his basis of knowledge is, and what biases he has.
- Judge Fisher in 2010 CF1 2883 (government offered to set up a meeting at USAO)
  - "[T]hat's not what you're required to do. If you have a witness who has exculpatory material, you have to turn it over. If there's a danger, you legitimately believe that there's a risk of danger to them, then you bring it to the Court's attention and then maybe some sort of secondary circumstance is arrived at. But you just don't have the right to sort of determine where under what circumstances they're going to be interviewed…that's not what *Brady* I think commands. So I think you have to provide the information so they can try to talk to them individually."
- Judge Leibovitz in 2010 CF1 7811:
  - "[T]he whole point of Brady disclosure is, one way or another (a) that witness has to be available to the defense to present that witness' testimony at trial, if that's what they want; and (b) the defense has to be in a position to use whatever investigative leads it wants to and is capable of using, if that's what they want to do.

Government Possession

- Within the possession, custody or control of the government,
  - "The government" includes any and all agencies and departments ** of the Executive Branch of the government and their subdivisions, not just the Justice Department, the FBI, the GSA-OIG, and other law enforcement agencies.
    - *See United States v. Safavian*, 233 F.R.D. 12, 14 (D.D.C. 2005)(citing *United States v. Santiago*, 46 F.3d 885, 893-94 (9th Cir. 1995); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989); cf. *United States v. Brooks*, 966 F.2d at 1503)
- The existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government
  - There is room to challenge *Myers v. United States*, 15 A.3d 688 (D.C. App. 2011), which found WMATA is not part of the prosecution team. We know USAO and MPD can get video footage immediately, upon request, when they want it.
  - Information from MPD Internal Affairs and the Office of Police Complaints is equally accessible to USAO and, sometimes, the officers

Materiality

- books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof that are:
  1. material to the preparation of the defendant's defense
  2. intended for use by the government as evidence in chief at the trial
  3. obtained from or belong to the defendant

- Need not prove that it is exculpatory
- May want to offer the court an *ex parte* explanation of why the evidence is helpful to your case

Materiality

- Anything that could be material at trial or helpful to your investigation or material to a motion **
  - Lay witness contact information
  - Video footage
  - Evidence of bias
    - Officers' emails, text messages, and photographs on personal cell phones
  - Evidence of selective or vindictive prosecution

Examinations

- (a)(1)(D) Reports of examinations and tests
  - physical or mental examinations
  - scientific tests or experiments
    - Field tests (argue duty to preserve / spoliation)
    - Samples
    - Records (gas chromatographs and mass spectra)
    - Equipment (machine calibration, maintenance, accuracy / reliability)
    - Facility accreditations
    - Standards and validation
    - Training, policies, protocols, and instructions

Experts

- (a)(1)(E) Expert witness
  - a written summary of the testimony of any expert witness that the government intends to use during its case-in-chief at trial
  - the witnesses' opinions
  - the bases and the reasons for those opinions
  - the witnesses' qualifications
- A motion based on USAO's most common practices might include the following complaints:
  - The government provided names or resumes of potential drug experts, but did not identify which expert would testify or summarize their testimony.
  - The defense is not in a position to prepare a thorough motion to exclude the testimony, or a thorough *voir dire*, or a thorough cross-examination.
  - Undersigned counsel does not have adequate time to obtain and review prior transcripts of either witness.

Experts

- Sample language for a motion to exclude
  - Strict enforcement of the notice requirement enables the defense to prepare to challenge both the admissibility and the weight of the opinion testimony. The defense is substantially prejudiced by the vagueness, deficiency, and untimeliness of the notice.
  - The notice provided here is so broad and so vague that it is unclear what the opinion will be, let alone whether that opinion is sufficiently complex, informed, and ascertainable. Without greater specificity, the defense cannot consult its own expert to review the government witness' methods or conclusions. Nor can we prepare the type of effective rebuttal envisioned by the Rule.

Experts

- Caselaw
  - Consider *United States v. Jackson*, 51 F3d 646 (7th Cir. 1995), *Murphy-Bey v. United States*, 982 A.2d 682, 687 (D.C. 2009), and *Ferguson v. United States*, 866 A.2d 54, 59 (D.C. 2005). Where a notice describing an opinion by a narcotics expert related specifically to actual evidence in that case, the government "satisfied – although barely – the requirements of Rule 16." Here, by contrast, it appears the potential witnesses have not even examined the evidence in this case. According to the notice, the physical evidence has not yet been tested and returned by the lab.
  - The Court of Appeals adopted a three-part test for admissibility of expert testimony in *Dyas v. U.S.*, 376 A.2d 827, 832 (D.C. 1977):
    - the subject matter must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average [juror],
    - the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth, and
    - expert testimony is inadmissible if the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.
  - The local rule "is to be construed consistently with the federal rule." *Waldron v. United States*, 370 A.2d 1372, 1373 (D.C. 1977). According to the *Notes of Advisory Committee on Rules*, Federal Rule 16(a)(1)(E) is intended to "minimize surprise that often results from unexpected expert testimony[,]...provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination...[and] to permit more complete pretrial preparation by the requesting party."

Brady Categories

- INFORMATION THAT ANY GOVERNMENT WITNESS OR INFORMANT MAY HAVE SOME BIAS IN FAVOR OF THE GOVERNMENT
- INFORMATION THAT ANY GOVERNMENT WITNESS OR INFORMANT MAY HAVE SOME BIAS AGAINST MY CLIENT
- INFORMATION THAT ANY GOVERNMENT WITNESS OR INFORMANT MAY BE UNTRUSTWORTHY OR INCREDIBLE
- INFORMATION THAT ANY GOVERNMENT WITNESS OR INFORMANT'S ACCOUNT OR RECOLLECTION MAY BE UNRELIABLE
- INFORMATION THAT MAY TEND TO DISCREDIT THE TESTIMONY OF A GOVERNMENT WITNESS OR INFORMANT
- INFORMATION THAT MAY TEND TO DEMONSTRATE ACTUAL INNOCENCE

Timeliness

- *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. App. 2011).
  - [E]xculpatory evidence must be disclosed in time for the defense to be able to use it effectively, not only in the presentation of its case, but also in its trial preparation." The American Bar Association's Standards for Criminal Justice specify that disclosure of exculpatory information is to be made 'at the earliest feasible opportunity' and 'as soon as practicable following the filing of charges.'
  - 'A prosecutor's timely disclosure obligation with respect to *Brady* material can never be overemphasized, and the practice of delayed production must be disapproved and discouraged.' We expect this constitutional duty to be taken both literally and seriously; '[a] rule . . . declaring [that the] prosecution may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process.' Deferral of disclosure of what might well (and in fact did) turn out to be critically important exculpatory information, until the night before opening statements as a part of a Jencks package, is not compatible with the Constitution, with our case law, or with applicable professional standards.
  - [I]t is important to recognize that 'the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use.' This is so, in part, because 'new witnesses or developments tend to throw existing strategies and preparation into disarray.' The sequence of events in this case…'illustrates how difficult it can be to assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available.'
  - [O]pportunity for a responsible lawyer to use the information with some degree of forethought

Regulation and Remedies

- (c) Continuing duty to disclose prior to and during trial.
  - If, at trial, it appears the government could, with due diligence, obtain something they haven't yet turned over, request disclosure on the record
- (d)(1) Protective and modifying orders.
  - You can make an *ex parte* proffer about materiality
  - You can also request the government provide materials to the court for review in camera
- (d)(2) Failure to comply with a request.
  - at any time during the course of the proceedings, the Court may:
    - order disclosure or inspection,
    - grant a continuance,
    - exclude evidence, or
    - enter such other orders as it deems just under the circumstances
      - This includes dismissal

Relief Requested

- Dismissal **
- Dismissal for want of prosecution
  - If the government made no efforts to respond to the request before the trial date, argue that the delay is unnecessary under Rule 48(b), which does not require a constitutional speedy trial rights violation
- Exclude testimony
- Exclude tangible evidence you couldn't view
- Exclude examinations not provided immediately
- Permit introduction of documents that were provided late that would otherwise be hearsay
- An adverse inference by the factfinder
  - These materials were exclusively within the possession of one party; you may conclude that if they had been provided to the defense to examine or test that the results would have been unfavorable to the government
  - Or instruction 2.300

Continuances

- Some prosecutors will argue that a continuance (or seventh continuance) is a sufficient remedy for any discovery violation. This is problematic for several reasons.
  - Even clients who are released on PR (many of whom have probation-like conditions), have a right to a speedy trial
  - Argue that the client should not have to choose between her right to discovery/*Brady* and her right to a speedy trial
    - *Edelen v. United States*, 627 A.2d 968, 970-971 (D.C. 1993).
      - This court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor's duty of seasonable disclosure under *Brady*, **or that if such disclosure is made, the burden may then be shifted to the defendant, under pain of waiver, to request a continuance or similar remedy.**
  - Emphasize that good or bad faith doesn't matter; this isn't a punishment for the prosecutor misbehaving, it is a remedy to protect the integrity of the trial. The Court should make efforts to impose sanctions that ensure that the trial can proceed speedily and fairly.

Continuances

- The U.S. Supreme Court established a test for assessing whether a criminal defendant's speedy trial rights have been violated. *Barker v. Wingo*, 407 U.S. 514 (1972). Courts must balance four factors:
  1. the length of the delay,
  2. the reasons for the delay,
  3. the defendant's assertion of her right, and
  4. prejudice to the defendant resulting from the delay.
- The four *Barker* factors are interrelated and "must be considered together with such other circumstances as may be relevant" in the "difficult and sensitive balancing process" by which the court determines whether a defendant's speedy trial right has been denied. *Graves v. United States*, 490 A.2d 1086, 1091 (D.C. 1984).

Thank You