University of Dayton Law Review

Volume 39 | Number 3 Article 5

5-1-2015

# Uncle Ted Teaches a Lesson: The Fairness Is Disclosure of Evidence Act Challenges a Flawed Exculpatory Evidence Disclosure System

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## Cover Page Footnote

My sincere appreciation extends to the people who made this publication possible for me: Mick Leddy, for your kind mentorship through both my 1L & 2L years; Matthew Walker, for your much-needed encouragement through my mid-semester Comment topic change; Kyle Bradley, for your excellent pointers; Professor Thaddeus Hoffmeister, my faculty advisor and a master of federal criminal law; Professor Julie Zink, for teaching me all the truly important skills of legal research and writing; and my best law school friend, Josephine Broussard—I would not have survived our first year of Law Review without you! I am also grateful to my mother, Virginia, and brother, Scott, and for all my wonderful family and friends for your encouragement through my major decision to change professions; I was lucky to have your support throughout law school.

# UNCLE TED TEACHES A LESSON: THE FAIRNESS IN DISCLOSURE OF EVIDENCE ACT CHALLENGES A FLAWED EXCULPATORY EVIDENCE DISCLOSURE SYSTEM

*Sonja N.Y. Kawasaki*[*]



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[*] Juris Doctor, 2014, University of Dayton School of Law. My sincere appreciation extends to the people who made this publication possible for me: Mick Leddy, for your kind mentorship through both my 1L & 2L years; Matthew Walker, for your much-needed encouragement through my mid-semester Comment topic change; Kyle Bradley, for your excellent pointers; Professor Thaddeus Hoffmeister, my faculty advisor and a master of federal criminal law; Professor Julie Zink, for teaching me all the truly important skills of legal research and writing; and my best law school friend, Josephine Broussard—I would not have survived our first year of Law Review without you! I am also grateful to my mother, Virginia, and brother, Scott, and for all my wonderful family and friends for your encouragement through my major decision to change professions; I was lucky to have your support throughout law school.

## I. INTRODUCTION

In short order—from initial indictment to jury conviction between summer and fall of 2008—a federal corruption case against Alaska's beloved U.S. Senator Ted Stevens brought swift end to a long and industrious political career.[1] In a horrendous abuse of public trust, Stevens had accepted gifts from an oil service corporation and its CEO in aggregate worth of over $250,000 in seven years, primarily in the form of renovations to his Girdwood, Alaska ski resort community "chalet."[2] Known to his constituents as "Uncle Ted," the 84-year-old World War II veteran who was serving his sixth full term, the longest-serving Republican in U.S. Senate history,[3] had deviously avoided paying for the "things of value" then further disregarded the integrity of the office he held by intentionally failing to acknowledge the gifts on his financial disclosure forms—as expressly required under the Ethics in Government Act (EIGA).[4] In concealing the gifts, his corrupt conduct amounted to misrepresentation in violation of 18 U.S.C. § 1001, and he was charged with seven counts of making false statements.[5] "Like any other criminal defendant, Senator Stevens is presumed innocent unless and until he is proven guilty in a court of law," promised Matthew Friedrich, Acting Assistant Attorney General for the U.S. Department of Justice Criminal Division on the day of Stevens's indictment.[6]

And proven guilty in a court of law, he was.[7] Three months after his

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[1] *See* Jeffrey Toobin, *Casualties of Justice*, NEW YORKER, Jan. 3, 2011, at 39, *available at* http://www.newyorker.com/magazine/2011/01/03/casualties-of-justice; *see also* Gail Russell Chaddock, *Ted Stevens Plane Crash: How 'Uncle Ted' Reshaped Alaska*, CHRISTIAN SCI. MONITOR, (Aug. 10, 2010), http://www.csmonitor.com/USA/Politics/2010/0810/Ted-Stevens-plane-crash-how-Uncle-Ted-reshaped-Alaska (explaining that Ted Stevens, known as "Alaskan of the Century" and "Uncle Ted," and who had been present when the U.S. Senate voted for Alaska's statehood, had worked as a staunch advocate on behalf of Alaska for over 40 years, bringing major projects and funding to the 49th State, even helping it to consistently and notoriously claim the No. 1 "pork per capita" state ranking).

[2] Indictment ¶¶ 15, 26, 27 United States v. Stevens, No. 08CR00231, 2008 WL 2894791 (D.D.C. July 29, 2008) [hereinafter Stevens Indictment]; Linton Weeks & Pam Fessler, *Q&A: Inside The Indictment of Ted Stevens*, NPR (July 29, 2008, 5:19 PM), http://www.npr.org/templates/story/story.php?storyId=93045719.

[3] *See* Chaddock, *supra* note 1; Weeks & Fessler, *supra* note 2; *see also* Aaron Blake, *Begich's Entry Tees Up First Tough Reelection Race in Stevens' Career*, THE HILL (Feb. 27, 2008, 7:11 PM), http://thehill.com/homenews/campaign/1137-begichs-entry-tees-up-first-tough-reelection-race-in-stevenss-career.

[4] Stevens Indictment, *supra* note 2, ¶¶ 8, 9.

[5] *See generally* Stevens Indictment, *supra* note 2 (describing all seven counts against Stevens).

[6] Matthew Friedrich, Acting Ass't. Att'y Gen., Press Conference on Indictment of U.S. Senator (July 29, 2008) (transcript available at http://www.justice.gov/criminal/pr/2008/07/07-29-08_pressconference.pdf).

[7] *See* Neil A. Lewis, *Alaska Senator Is Guilty Over His Failures to Disclose Gifts*, N.Y. TIMES, Oct. 28, 2008, at A1, *available at* http://www.nytimes.com/2008/10/28/washington/28stevens.html?pagewanted=all.

indictment, the District of Columbia jury of his peers returned the verdict; upon leaving the court, a defiant Senator Stevens urged Alaskans to re-elect him, even so.[8] "I will fight this unjust verdict with every ounce of energy I have . . . I am innocent,"[9] he proclaimed. "This verdict is the result of the unconscionable manner in which the Justice Department lawyers conducted this trial."[10] Within a week from the verdict was to be Stevens's day of reckoning with his constituents: "I ask that Alaskans and my Senate colleagues stand with me as I pursue my rights. I remain a candidate for the United States Senate."[11] The majority of the Alaskan electorate would not believe the Senator; the conviction proved fatal to Stevens's 40-year senate career.[12] The verdict demonstrated to the nation that even a prominent citizen—a sitting United States Senator, repeatedly selected by his constituents by wide vote margins to serve the best interests of his state[13]—would be assured service of justice in the face of such wrongdoing.

The trouble was, by the measure of our system of *fair* justice, Stevens's conviction had been wrongfully procured.[14] At the same time Stevens lost his re-election bid, Barack Obama was elected President, and Obama thereafter appointed Eric Holder to head the Department of Justice as the U.S. Attorney General.[15] By April of 2009, Holder had reviewed Senator Stevens's case (the Stevens Case) and directed U.S. District Court Judge Emmet Sullivan to vacate Stevens's conviction and dismiss the indictment which had led to it.[16] A newly-appointed team of federal prosecutors investigating the case cited the basis for the dismissal as prosecutors' failure to produce "information that the government was constitutionally required to provide to the defense for use at trial."[17] In short, the DOJ had learned that its prosecutors had suppressed evidence tending to favor Stevens's side of the story—prosecutors had not provided Stevens with *exculpatory evidence* as required under the Due Process Clause of the U.S. Constitution.[18]

With this cloud of suspected egregious prosecutorial misconduct looming heavily over the Justice Department, renewed calls for reform to

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Paul Kane, *Sen. Ted Stevens Loses Reelection Bid*, WASH. POST (Nov. 19, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/18/AR2008111803227.html; *see also* Chaddock, *supra* note 1.
[13] Blake, *supra* note 3 (noting Stevens's first election in 1970 and his consistent election wins by over 66% of the votes ever since).
[14] *See* Toobin, *supra* note 1, at 39.
[15] *Id.*
[16] United States v. Stevens, No. 08-cr-231 (EGS), 2009 WL 6525926, at *1 (D.D.C. Apr. 7, 2009).
[17] *Id.* at *2.
[18] *See* Brady v. Maryland, 373 U.S. 83, 86 (1963).

the system were immediate, and they have persisted ever since.[19] "How could this have happened?"[20] The high-profile Stevens Case only highlights what many citizens worry about with a potential for abrogation of our rights—given our capable yet imperfect system of justice—and reminds us it is probably happening more than we would like to think. The frightening notion that well-educated, specially-trained individuals who are supposed to protect us from further harm, may instead turn out to be "the bad guys," naturally does not comport with our ingrained American sense of justice.

On a fishing trip to a remote area of Alaska in September of 2010, Stevens died in a small plane crash,[21] underscoring the tragic end of a life widely perceived as wrongfully tainted by prosecutorial misconduct. Special counsel appointed by Judge Sullivan to investigate the acts of the prosecutors involved with the case released a findings report on March 15, 2012.[22] No doubt to strike emphasis, on that same day Alaska's remaining Republican U.S. Senator, Lisa Murkowski, who served with Stevens prior to his lost bid for re-election, introduced her proposed bill, the Fairness in Disclosure of Evidence Act (FIDOE).[23] This legislation attempts to codify guidance to federal prosecutors in disclosure of evidence tending to favor a defendant; it proposes express laws that have otherwise been foreign to our system of procedural due process.[24]

This Comment will explore the general issues surrounding prosecutorial suppression of exculpatory evidence and will assess the merits of FIDOE's codification of disclosure of exculpatory evidence rules. In Part II, a background of this Comment will be presented, detailing more precisely the Stevens Case as an illustration and outlining the current state of the disclosure law, guidance, and standards governing what is expected of prosecutors in

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[19] *See, e.g.*, Robert M. Cary, *Exculpatory Evidence: A Call for Reform After the Unlawful Prosecution of Senator Ted Stevens*, 36 No. 4 LITIG. 34, 34 (2010); Mark Memmott, *Report Slams Sen. Stevens' Prosecutors*, NPR (Mar. 15, 2012, 10:15 AM), http://www.npr.org/blogs/thetwo-way/2012/03/15/148668283/report-slams-sen-stevens-prosecutors ("[T]he government's actions during the Stevens case have led to calls for new laws and federal rules to govern prosecutors' conduct.") (internal quotation marks omitted); Letter from Laura W. Murphy, Director, and Jesselyn McCurdy, Senior Legislative Counsel, ACLU, to James Sensenbrenner, Jr., Chairman, Robert C. Scott, Ranking Member, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security (Apr. 18, 2012) (relating ACLU's stance with regard to the committee hearing on the prosecution of Stevens).

[20] Cary, *supra* note 19, at 34.

[21] *See* Chaddock, *supra* note 1.

[22] *See* Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re* Special Proceedings, 842 F. Supp. 2d 232 (2012) (Misc. No. 09-0198 (EGS)), 2012 WL 858523.

[23] *See* Press Release, Lisa Murkowski, Senator Introduces Bipartisan Bill to Enforce Ethical Legal Prosecutions (Mar. 15, 2012), http://www.murkowski.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=5b41d548-ab47-464f-a627-8b1702b75145 [hereinafter Murkowski Press Release].

[24] *Id.* FIDOE was introduced in March 2012 during the 112th Congress and was referred to the Senate Judiciary Committee for hearings. *See* Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012). Although the bill died in committee during the 112th Congress, a staff member with Senator Murkowski's office informed this Comment author in November 2013 that FIDOE will likely be reintroduced, without changes, in a subsequent Congress. This Comment therefore examines the legislation as it was originally introduced in 2012. By the time this Comment was submitted for the publication process, the bill had not yet been reintroduced.

safeguarding the due process rights of a criminal defendant. Part II will also introduce FIDOE's component facets. Part III will analyze FIDOE in depth, including: evaluating the aspects of the Act which are similar to the current regime and those that are different to the justice process; examining how effective such legislation might be in light of the known problem areas; and analyzing FIDOE's interface with our current governing case law, guidance, and standards. Part III will next apply FIDOE to the failures of Stevens to examine its hypothetical results. In Part IV, this Comment offers recommendations to U.S. lawmakers for improvements upon FIDOE before its passage. Part V concludes this Comment.

## II. BACKGROUND

### *A. The Ted Stevens Case Suggests a Re-Examination of the System is Necessary*

That "the government did not play fair with Ted Stevens" is "indisputable."[25] What had begun in 2004 as an investigation by the Federal Bureau of Investigation (FBI) into a potentially corrupt plan to build a private prison in Alaska eventually revealed that a number of state legislators were soliciting and accepting bribes from an oil-services firm CEO.[26] The CEO of the VECO Corporation, Bill Allen, emerged as the central figure in the web of corruption that entangled elected members of the state legislature; as the source of the bribes, Allen ultimately accepted a deal in May 2007, pleading guilty to charges of bribery and conspiracy for his part in enticing four state legislators.[27] What was more, by the terms of that plea deal, Allen was to play a key role in assisting federal prosecutors—in making more cases against prominent politicians who had succumbed to illegal corruption.[28] It was clear that federal prosecutors were already aiming to use Allen—the trusted, longtime friend of Ted Stevens, known to have overseen the expansion and repairs of the senator's Alaska home while he worked in Washington, D.C.[29]—as a star witness against the sitting senator.[30]

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[25] Toobin, *supra* note 1, at 39.

[26] *Id*. at 39–40. A group of legislators caught up with the bribery schemes fancied themselves the "Corrupt Bastards Club," with the Speaker of the House having distributed baseball caps embroidered with the acronym "CBC." *Id.* With most of the politicians acceding to bribes of meager thousands of dollars, "the atmosphere was one of brazenness." *Id.* at 40.

[27] *Id.* Among the four legislators Allen acknowledged his guilt in bribing was Ted Stevens's son, state senator Ben Stevens. *Id.*

[28] *Id.*

[29] *See* Del Quentin Wilber, *Attorney for Stevens Tells Jurors Alaska Senator 'Is Honest,' Did Not Lie*, WASH. POST, Sept. 26, 2008, at A03, *available at* http://articles.washingtonpost.com/2008-09-26/politics/36834130_1_allen-and-veco-seventh-full-term-bill-allen; *see also* Dermot Cole, *'Gator Arms' Claim Shows Prosecutor Had No Clue About Ted Stevens*, FAIRBANKS DAILY NEWS-MINER (Mar. 15, 2012, 1:29 PM), http://www.newsminer.com/gator-arms-claim-shows-prosecutor-had-no-clue-about-ted/article_b61d6c07-c3ce-5307-88b1-818f226f37fb.html?mode=story ("If [Stevens] did anything wrong, it was that he was too close to a guy like Allen . . . . ").

[30] *See* Toobin, *supra* note 1, at 40.

Yet the government's case against Stevens was "dubious from the outset."[31] The government could never actually charge Stevens with something as substantial as bribery, and there was never an allegation of quid pro quo dealings with VECO, even though it had been awarded major federal contracts.[32] In its late July indictment, the prosecution could only muster that Stevens had accepted "more than $250,000"—a relatively paltry amount for someone who could have likely afforded to pay it—in "free labor, materials, and other things of value" related to renovations, improvements, repair, and maintenance of the chalet,[33] without disclosing so in seven years of annual EIGA forms.[34] Facing his seventh senate bid, Stevens felt that he could win re-election "only if he had already beaten the case against him"; thus, Stevens himself demanded expedited proceedings, requesting that his trial take place within seventy days of the indictment.[35] Stevens maintained that he had paid the bills for the work, at $160,000, believing the whole time that his payments covered the entire cost.[36] "You can't fill out a form and report what was kept from you from the deviousness of someone like Bill Allen," stated Stevens's attorney.[37]

The prosecution's collective failures in supplying exculpatory evidence during the Stevens Case have become the most notorious example of discovery violations in our criminal justice system's most-recent history.[38] Although there is dispute whether the withholding of exculpatory information was intentional or inadvertent,[39] it is now widely regarded that, had the prosecution turned over the exculpatory information that it held, as it was obligated to do, there was a good chance that Stevens would have been spared by an acquittal.[40]

As an exculpatory evidence illustration, the Stevens Case is a sad tale of disorganization and haste, lack of consistent methodology,

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[31] *Id.* at 41.

[32] *Id.*

[33] *See* Stevens Indictment, *supra* note 2, ¶¶ 19–25; *see also* Toobin, *supra* note 1, at 41.

[34] Stevens Indictment, *supra* note 2, ¶ 82.

[35] Toobin, *supra* note 1, at 41.

[36] Neil A. Lewis, *Stevens Is Challenged at Ethics Trial*, N.Y. TIMES (Oct. 21, 2008), http://www.nytimes.com/2008/10/21/washington/21stevens.html?_r=0.

[37] Wilber, *supra* note 29.

[38] *See, e.g.*, Peter A. Joy, *The Criminal Discovery Problem: Is Legislation a Solution?*, 52 WASHBURN L.J. 37, 37–38 (2012).

[39] *Compare* Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, *In Re* Special Proceedings, 842 F. Supp. 2d 232 (2012) (Misc. No. 09-0198 (EGS)), 2012 WL 858523 [hereinafter Schuelke Report] (finding certain pieces of exculpatory evidence intentionally withheld), *with* DEP'T OF JUSTICE OFFICE OF PROF'L RESPONSIBILITY, INVESTIGATION OF ALLEGATIONS OF PROSECUTORIAL MISCONDUCT IN *UNITED STATES V. THEODORE F. STEVENS* 25–27 [hereinafter OPR Report] (finding no intentional withholding violations).

[40] *E.g.*, Charlie Savage & Michael S. Schmidt, *Inner Workings of Senator's Troubled Trial Detailed*, N.Y. TIMES, Mar. 16, 2012, at A19, *available at* http://www.nytimes.com/2012/ 03/16/us/politics/report-details-inner-workings-of-troubled-ethics-trial-of-senator-ted-stevens.html?_r=0.

insufficient oversight by supervisors, and general finger-pointing.[41] Stevens prosecutors had never conducted a comprehensive and effective review for exculpatory evidence.[42] During discovery, "Stevens prosecutors responded to the defense requests issue by issue, granting some and refusing others," and for an investigation which yielded thousands of documents and hundreds of hours of surveillance tapes, the discovery process in general was "draining and time-consuming."[43] In the aftermath of the trial, several items have been acknowledged as clear candidates for disclosure under prosecutor due process obligations.[44]

Among the worst of undisclosed exculpatory evidence, trial testimony given by Bill Allen had left the jurors with the "mistaken impression that Allen had been telling authorities all along that Stevens had cooked up a cover story about wanting to pay all the bills" without a true intention of doing so.[45] Highly injurious to Stevens's defense was the now-infamous cross-examination incident of the "Torricelli note," so-named for its reference to Robert Torricelli, a New Jersey senator who was forced from office for accepting illegal gifts.[46] In a 2002 memo, which Stevens's counsel had given to the prosecution during discovery,[47] Stevens had written to Allen:

> Thanks for all the work on the chalet. You owe me a bill—remember Torricelli, my friend. Friendship is one thing—compliance with these ethics rules entirely different. I asked Bob P[ersons] to talk to you about this so don't get P.O.'d at him—it just has to be done right. [48]

Not surprisingly, the defense planned to seize an opportunity to use the note as demonstrative of Stevens's good intentions from very early on.[49] But during defense cross-examination on the stand, Allen testified that even though asked to, he had not sent Stevens the bill because, in speaking with Stevens's friend Persons, Persons had said, "[O]h, Bill, don't worry about getting a bill . . . Ted is just covering his ass."[50] Thus, Allen's testimony "turned Stevens's best evidence against him. It seemed to show that the

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[41] *See* Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NPR (Mar. 15, 2012, 5:56 PM), http://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case.

[42] Schuelke Report, *supra* note 39, at 3.

[43] Toobin, *supra* note 1, at 42.

[44] *See, e.g.*, OPR Report, *supra* note 39, at 25–27.

[45] Johnson, *supra* note 41.

[46] Toobin, *supra* note 1, at 43.

[47] *See* Dermot Cole, *Forgery Claim Shows Prosecutor Was Clueless About Ted Stevens*, FAIRBANKS DAILY NEWS-MINER (Mar. 16, 2012), http://m.newsminer.com/forgery-claim-shows-prosecutor-was-clueless-about-ted-stevens/article_47d3a039-a558-5b53-9ab0-ee7074a7eb2e.html?mode=jqm; *see also* Toobin, *supra* note 1, at 44. The note was given to the prosecution in early April 2008. *Id.*

[48] Toobin, *supra* note 1, at 43.

[49] *Id.*

[50] *Id.*

Torricelli note was actually part of [his] cover–up rather than proof of his innocence."[51] Yet on the fifty-five different occasions that prosecutors and the FBI interviewed Allen, he never alluded to this; it was not until the eve of trial that Allen incorporated the Persons anecdote into his accounting.[52]

And although prosecutors recognized the significance of the evolution, even during cross examination when Allen denied that the claimed "cover your ass" angle was a recent addition to his story, prosecutors did not take steps to inform the defense of the contradiction of testimony.[53] More unbelievable, in the months following the trial and conviction of Stevens, Eric Holder's newly-appointed prosecution team uncovered something that had never been disclosed before: in an interview with five Stevens prosecutors nearly half a year before the trial, Allen had said he never even recalled speaking with Persons at all, let alone mentioning that Persons had asserted Stevens was only meaning to "cover his ass."[54] Though the inconsistency clearly favored Stevens, at least by the time prosecutors became aware of Allen's newly-materialized covering-his-ass anecdote, no prosecutors revealed this information at any time before or during the trial.[55]

Another significant piece of exculpatory information known to the prosecution, yet never disclosed, was that Allen himself insisted to both prosecutors and an FBI agent, on two separation occasions, that the $250,000 in renovations reflected in VECO records was incorrect; the value of the work on the Stevens chalet "could not have been more than $80,000."[56] Finally, rounding off the winning roster of Stevens's undisclosed exculpatory evidence relevant to the government's key witness, Bill Allen—prosecutors failed to inform Stevens of important impeachment information that could have destroyed Allen's credibility: an allegation that in once carrying on a sexual relationship with a 15-year-old prostitute, Bambi Tyree, Allen was then involved in inducing her to a false sworn statement.[57] And although Tyree's accounting of the inducement by Allen had been memorialized in FBI notes in 2004, even when Stevens attorneys specifically inquired with prosecutors as to rumors about Allen's questionable relationships and his credibility, prosecutors responded that "the government conducted a thorough investigation and was unable to find

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[51] *Id.*
[52] Schuelke Report, *supra* note 39, at 18, 19.
[53] *Id.* at 26.
[54] Toobin, *supra* note 1, at 44.
[55] *Id.*; *see also* Schuelke Report, *supra* note 39, at 26.
[56] Schuelke Report, *supra* note 39, at 23–25; *see also* OPR Report, *supra* note 39, at 25.
[57] Carrie Johnson, *Justice Department's Handling of Sen. Stevens Case to be Aired on Capitol Hill*, NPR (Mar. 27, 2012, 9:50 AM), http://www.npr.org/blogs/thetwo-way/2012/03/27/149455988/justice-departments-handling-of-sen-stevens-case-to-be-aired-on-capitol-hill; *accord* OPR Report, *supra* note 39, at 25; Schuelke Report, *supra* note 39, at 28.

any evidence to support it."[58]

Of final impact to Stevens's defense would have been the disclosure of the statements of a witness who had worked on the chalet renovations, Rocky Williams.[59] During prosecution interviews, Williams had repeatedly corroborated Stevens's story, saying that Stevens had told him he wanted to pay for all the renovations, and that along with Stevens, Williams himself believed that bills sent to Stevens by Allen and VECO included all costs associated with the renovations.[60] Williams, however, had fallen ill while in Washington D.C. for the trial, and prosecutors sent him home to Alaska on the day of opening statements without informing the defense; he was thus unavailable for sworn testimony that likely would have otherwise revealed his corroborating evidence.[61] Thus, by way of illustration of the Stevens Case, it is apparent that failures to disclose exculpatory evidence—whether intentional or inadvertent—can unfairly disadvantage a criminal defendant.

### *B. Our Principles of Justice Place the Burden on the Prosecutor to Disclose Exculpatory Evidence*

A defendant in a criminal case has no general constitutional right to discovery.[62] However, a prosecutor's suppression of evidence favorable to the accused—evidence that would tend to exculpate him of guilt or reduce his penalty (collectively recognized as "exculpatory evidence")[63]—lends itself to an unfair trial and thus is a constitutional violation of due process.[64] A government—with its superior investigative resources and access to critical evidence discovered by its law enforcement officials—is well situated to encounter exculpatory evidence during a criminal inquiry.[65] As such, when in possession and aware of such evidence, a prosecutor's duty to relay the information to the defense is fundamental—less we run the risk of deprivation of rights guaranteed by the Constitution[66] and procurement of a defendant's conviction which is "inconsistent with the rudimentary demands of justice."[67] "Society wins not only when the guilty are convicted but when criminal trials are fair," the U.S. Supreme Court has decreed; "our system of administration of justice suffers when any accused is treated unfairly."[68]

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[58] Johnson, *supra* note 57; *accord* Schuelke Report, *supra* note 39, at 28; OPR Report, *supra* note 39, at 25.

[59] *See* Schuelke Report, *supra* note 39, at 6–7, 28; *accord* OPR Report, *supra* note 39, at 26.

[60] *See* Schuelke Report, *supra* note 39, at 6–7, 28; *accord* OPR Report, *supra* note 39, at 26.

[61] Schuelke Report, *supra* note 39, at 8; *accord* OPA Report, *supra* note 39, at 26.

[62] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

[63] *See* United States v. Bagley, 473 U.S. 667, 679–80 (1985) (dismissing differences between exculpatory evidence and impeachment evidence for purposes of materiality under *Brady*).

[64] Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

[65] BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5:1 (2d ed. 2012).

[66] *See* Pyle v. Kansas, 317 U.S. 213, 216 (1942).

[67] *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935) (finding prosecutor's "deliberate deception" by use of known perjured testimony was unjust).

[68] *Brady*, 373 U.S. at 87.

A "fair trial" is a trial which results in a verdict "worthy of confidence"; suppression of exculpatory evidence has the effect of undermining the confidence in the outcome of a trial.[69] Thus, if withholding the defendant's favorable evidence were permissible, a prosecutor would be granted broad opportunity to serve as an "architect" in a proceeding, which does not comport with our standards of justice.[70] A prosecutor's role is more than that of an advocate, "[h]e is a representative of the government";[71] his job is not merely to "win," but rather, to ensure that justice is served.[72] Therefore, a prosecutor "is in a peculiar and very definite sense the servant of the law" whose aim is to ensure both that "guilt shall not escape or innocence suffer."[73] Several authorities currently mold the prosecutorial obligation to disclose exculpatory evidence, including rulings by the Supreme Court;[74] model rules of professional attorney conduct; [75] statutes and procedural disclosure rules;[76] and guidelines issued by states or the federal government, such as the Department of Justice's United States Attorneys' Manual.[77]

1. Prosecutorial Guidance for Disclosure of Exculpatory Evidence

a. Constitutional Requirements Promulgated by the U.S. Supreme Court

Our formulation of the prosecutorial duty to disclose exculpatory evidence has been shaped and refined by the U.S. Supreme Court, especially over the last half-century. In *Brady v. Maryland*, its 1963 seminal case on the subject, the Court confirmed that the right of the defendant to his favorable evidence is founded foremost under the Due Process Clause of the Fourteenth Amendment.[78] In this case, the defendant Brady had testified on his own behalf and had admitted to participation in a murder, but claimed that another charged defendant had committed the actual killing.[79] Unbeknownst to Brady, the other defendant had confessed to the actual homicide, and although Brady's counsel had requested the other defendant's extrajudicial statements, the prosecution withheld the statement containing the other defendant's confession.[80] Therefore, defense counsel's strategy became to concede Brady's involvement, but focus on urging the jury to

[69] Kyles v. Whitley, 514 U.S. 419, 434 (1995).
[70] *Brady*, 373 U.S. at 88.
[71] GERSHMAN, *supra* note 65, at § 5:1.
[72] Berger v. United States, 295 U.S. 78, 88 (1935).
[73] *Id.* (emphasis added).
[74] *See* discussion *infra* Part II.1.a.
[75] *See* discussion *infra* Part II.1.b.
[76] *See* discussion *infra* Part II.1.b.
[77] *See* discussion *infra* Part II.1.b. Specific state guidance is beyond the scope of this Comment.
[78] Brady v. Maryland, 373 U.S. 83, 86 (1963).
[79] *Id.* at 84.
[80] *Id.*

avoid the death penalty.[81] Because of his admitted involvement, Brady's conviction was upheld—but the Court affirmed that the evidence withheld was still "material" to Brady's *sentence*.[82] The Court announced that suppression of requested evidence which is favorable to an accused "violates due process where the evidence is *material either to guilt or to punishment* . . . ."[83] The Court further held that such suppression amounted to a wrongful prejudicial violation of the defendant's rights, "irrespective of the good faith or bad faith of the prosecution."[84] Such exculpatory evidence, when *material* as defined by the Court, is commonly known now as "*Brady* material."[85]

In examining impeachment evidence in 1972 with *Giglio v. United States*, the Court further contemplated which types of information, held in the prosecution's control, would violate a defendant's due process rights if not disclosed.[86] The defendant in *Giglio* was convicted of passing forged money orders and sentenced to a five-year prison term.[87] Prosecutors had not disclosed to the defense that its key witness, the defendant's co-conspirator, a teller who had cashed several of the forged money orders, was told by a previously-assigned Assistant U.S. Attorney that he would not be prosecuted by the government if he testified against Giglio.[88] Such information, useful to Giglio's defense strategy, thus was not available to Giglio's attorney for use in discrediting the witness.[89] When pressed during trial about a "deal" with prosecutors, the witness actually indicated there had not been one; the prosecutor then confirmed that the witness "received no promises that he would not be indicted."[90] The Court concluded that, "[w]hen the 'reliability of a given witness may well be determinative of guilt or innocence,'" suppression of evidence affecting witness credibility violates *Brady*—that is, is *material*—if the information would have had "any reasonable likelihood" of affecting the judgment of the jury.[91] The Court repeated its previous case law point that, even when false evidence was not solicited, when knowingly left uncorrected, due process error results.[92] The Court further elaborated that it mattered not whether the previous prosecutor had failed to relate the details of the agreement to his associate; the Court stated, "[t]he prosecutor's office is an entity and . . . is

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[81] *Id.*
[82] *Id.* at 87–90.
[83] *Id.* at 87 (emphasis added).
[84] *Id.*
[85] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281 (1999); United States v. Agurs, 427 U.S. 97, 106–07 (1976).
[86] Giglio v. United States, 405 U.S. 150, 151–54 (1972).
[87] *Id.* at 150.
[88] *Id.* at 150–53.
[89] *Id.* at 151.
[90] *Id.* at 151–53 (internal quotation marks omitted).
[91] *Id.* at 154 (quoting Napue v. Illinois, 360 U.S. 264, 269, 271 (1959)).
[92] *Id.* at 153 (citing *Napue*, 360 U.S. at 269).

the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."[93] Thus, the Court proposed that prosecution office procedures and regulations should be established to assure communication of all relevant information to every attorney who ultimately works on a case.[94]

Three other significant cases provided the Court opportunity to elaborate upon our *Brady* and *Giglio* rules.[95] In examining its prior holdings in 1975, the Court established in *United States v. Agurs* that a defendant's right to a fair trial is jeopardized when the prosecution introduces trial testimony that it knew or should have known was perjured.[96] In 1985, with *United States v. Bagley*, the Court disclaimed differences between exculpatory and impeachment evidence for the purposes of *Brady*, and clarified that irrespective of any defense requests or lack of such requests for exculpatory information—that *favorable evidence is material*, and thus constitutional error results simply from suppression whenever there is a "reasonable probability" that undisclosed evidence could lead to a different result.[97]

*Bagley* heavily informed the opinion of *Kyles v. Whitley* in 1995, where the Court emphasized and honed several points.[98] First, the *Bagley* reasonable probability standard does not question whether a defendant would receive a different verdict in light of exculpatory evidence, but rather if, in the absence of nondisclosure, the defendant would receive a fair trial, one producing "a verdict worthy of confidence."[99] Next, the Court explained that materiality is not a test for insufficiency of incriminating evidence against exculpatory evidence; the inquiry is whether the favorable evidence could "reasonably be taken to put the whole case in such a different light" that confidence in the verdict would be undermined.[100] Of final significance, the Court in *Kyles* stressed that materiality shall not be measured item-by-item, but rather consideration shall be made for an overall cumulative effect of any exculpatory evidence.[101] Although this measure assigns discretion to the prosecutor, it nonetheless imposes a corresponding burden; the prosecution alone is privy to that which is undisclosed, and thus must gauge the likely "net effect"—ensuring disclosure when the limit of "reasonable probability" is attained.[102] Furthermore, the Court elaborated, such prosecutor assaying "in turn means that the individual prosecutor has a

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[93] *Id.* at 154 (citing RESTATEMENT (SECOND) OF AGENCY § 272 (1958)).
[94] *Id.* at 154.
[95] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 442–43 (1995).
[96] United States v. Agurs, 427 U.S. 97, 103 (1976).
[97] United States v. Bagley, 473 U.S. 667, 676–77 (1985); *see also Kyles*, 514 U.S. at 433–34.
[98] *Kyles*, 514 U.S. at 434–38.
[99] *Id.* at 434.
[100] *Id.* at 435.
[101] *Id.* at 436–37.
[102] *Id.* at 437.

duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[103]

In 1999, *Strickler v. Greene* provided the Court opportunity to elucidate upon—and somewhat restrain—the scope of the requirement of release of *Brady* material.[104] The Court noted that the term "*Brady* violation" was sometimes used to refer to any breach of a general, broad obligation to disclose exculpatory evidence. In drawing upon a prosecutor's duty to serve as an advocate of justice, the Court noted that such "special status" actually "explains both the basis for the prosecution's broad duty of disclosure and our conclusion that *not every violation* of that duty necessarily establishes that the outcome was unjust."[105] Therefore, the Court clarified that "strictly speaking," a "*real* '*Brady* violation'" would never flow unless suppressed exculpatory evidence—that is, suppressed *Brady* material—would have actually held reasonable probability of producing a verdict more favorable to the defendant.[106] Thus, with *Strickler*, the Court appears to have confirmed that the government's belief in the defendant's guilt, the strategy of the prosecution, and the subjective judgment of the prosecutor play a definitive role in the obligation to release of *Brady* material.

Thus, through a series of amalgamated opinions, the Supreme Court has promulgated guidance on prosecutorial duty to disclose exculpatory evidence favorable to a criminal defendant. However, the constitutional requirements of disclosure under the *Brady* line of cases are merely a starting point in that they "only establish[] a floor"—the "minimum extent" of a prosecutor's obligation.[107] Notably, however, the Court has never proposed the timeframe in which favorable evidence disclosures must be made.[108]

b. Items Further Shaping Prosecutorial Duty of Disclosure

There are other sources of guidance that also induce federal prosecutors to disclose favorable evidence. One influential canon is found in the American Bar Association (ABA) Model Rules of Professional Conduct, adopted as the professional ethics rules by nearly every state.[109] Model Rule 3.8(d), widely adopted verbatim or in comparable substantive

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[103] *Id.*
[104] *See* Strickler v. Greene, 527 U.S. 263, 280–82 (1999).
[105] *Id.* at 281 (emphasis added).
[106] *Id.* (emphasis added).
[107] Kirsten M. Schimpff, *Rule 3.8, the Jencks Act, and How the ABA Created A Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1739 (2012).
[108] *Id.* at 1736
[109] *See id.* at 1731 (explaining that proponents of broader disclosure requirements have been most successful within the area of ethics laws adopted and enforced by the states).

verbiage,[110] indicates that a prosecutor "shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [shall] disclose to the defense . . . all unprivileged mitigating information known . . . ."[111] States can legally enforce the ethics rule against both state prosecutors and federal prosecutors, since federal law subjects federal government attorneys to the ethical standards of the state in which they practice.[112] Model Rule 3.8(d) effectively imposes broader disclosure obligations than what has been deemed required under the Constitution.[113]

Other sources which inform prosecutor disclosure obligations are requirements at the federal level alone.[114] One such source is 18 U.S.C. § 3500, known as the Jencks Act,[115] which provides that once a prosecution witness has given direct examination testimony, on motion from the defendant, the court must order the United States to produce prior statements made by that witness to the defense, when related to the testified subject matter.[116] Although the timing element of the Jencks Act is seen as "necessary in part to protect government witnesses from harassment, intimidation, and tampering,"[117] the Act has been strictly enforced by the courts, and thus nonetheless provides defendants with an opportunity to examine witness statements for the purposes of questioning credibility and for potential impeachment.[118] Federal Rule of Criminal Procedure 26.2 emulates the requirements of the Jencks Act, but imposes them in procedural form, requiring the prosecution to produce witness statements pertaining to direct examination witness testimony, upon motion of the defendant.[119]

Federal Rule of Criminal Procedure 16 outlines the discovery and

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[110] *See id.* at 1742–43 (noting that most states have adopted the rule verbatim, while others have modified the rule or else based the prosecutorial obligations on comparable provisions contained in the predecessor model code to the current Model Rules).

[111] MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009).

[112] 28 U.S.C. § 530B(a) (2012).

[113] Schimpff, *supra* note 107, at 1731.

[114] *See infra* notes 115–36 and accompanying text.

[115] *See* Olan G. Waldrop, Jr., *The Jencks Act*, 20 A.F. L. REV. 93, 94–96 (1978). The act is nicknamed for the decision of *Jencks v. United States*, 353 U.S. 657 (1957), where a union president was charged with falsely swearing in an affidavit not to be a member of the Communist Party. *Id.* at 94. The government had refused to turn over witness statements related to associated events. *Id.* at 95. The Court ruled that Jencks was entitled to inspection of the statements to decide if the statements could be useful to his defense. *Id.* In response, Congress enacted the Jencks Act in 1957, to limit the effect of the *Jencks* decision. *Id.* at 96.

[116] 18 U.S.C. §§ 3500(a)–(b) (2012).

[117] Schimpff, *supra* note 107, at 1737.

[118] *See id.* at 1737–38 ("[The Jencks Act] applies regardless of whether there is any realistic danger of interference with witnesses[,] . . . [and] courts have strictly enforced [its provisions].").

[119] *Compare* FED. R. CRIM. P. 26.2(a), *with* 18 U.S.C. § 3500(a)–(b).

inspection process obligations for both parties.[120] However, this rule is focused on the discovery process more generally, and so in contrast to the disclosure rules imposed on prosecutors by the Constitution, the furnishing of information is only required when elicited by the defendant's specific request.[121] Furthermore, the rule does not implicate exculpatory evidence *per se*; the defendant—upon request—need only be given access to items "material to preparing the defense."[122] Yet the rule does impose a *continuing* duty to disclose additional evidence or material "promptly"—even during trial—when the evidence is subject to discovery or inspection under the rule and either the opposing party had previously requested its production, or the court had ordered it.[123] The rule further compels compliance by authorizing penalties for failure to do so, including providing for a court order; granting of a continuance; and any other "just" remedy.[124]

Finally, Department of Justice policies under chapter 9-5.000 of the United States Attorneys' Manual (USAM) establish guidelines for exercise of judgment and discretion of its prosecutors with regard to disclosure obligations of exculpatory and impeachment information and potential impeachment information of government witnesses.[125] Chapter 9-5.001 names *Brady*, *Giglio*, and *Kyles* as the bases of constitutional authority for the requirement of disclosure of exculpatory evidence.[126] The USAM posits that, consistent with *Bagley*, such favorable evidence must be disclosed when there is reasonable probability that effective use of the evidence will result in an acquittal—but indicates that "it is sometimes difficult to assess the materiality of evidence before trial . . . ."[127] Therefore, prosecutors "must take a broad view of materiality and err on the side of disclos[ure] . . . ."[128] Chapter 9-5.001 further charges the federal prosecutor to seek all exculpatory evidence from all members of the "prosecution team," which includes federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the case.[129]

Of further significance, the USAM suggests that due process

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[120] *See generally* FED. R. CRIM. P. 16 (outlining "Government's Disclosure" in part (a) and "Defendant's Disclosure" in part (b)).

[121] *See* FED. R. CRIM. P. 16 (a)(1)(E) ("Upon a defendant's *request*, the government must permit the defendant to inspect and to copy or photograph [discovery materials] . . . within the government's possession, custody, or control . . . .") (emphasis added).

[122] *See* FED. R. CRIM. P. 16(a)(1)(E)(i).

[123] FED. R. CRIM. P. 16(c).

[124] FED. R. CRIM. P. 16(d)(2).

[125] *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL ch. 9-5.000, ch. 9-5001(F), (2010) [hereinafter USAM], http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm (last visited Oct. 13, 2014).

[126] *Id.* ch. 9-5.001(B).

[127] *Id.* ch. 9-5.001(B)(1).

[128] *Id.*

[129] *Id.* ch. 9-5.001(B)(2) (citation omitted).

dictates that disclosure of exculpatory evidence material to guilt or innocence should be made timely, to permit the defendant to make effective use of the information at trial.[130] This means that exculpatory information "must be disclosed reasonably promptly after it is discovered,"[131] and that impeachment information "will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently."[132] Yet, the USAM points to prosecutorial discretion with delivering of impeachment information when factoring other significant interests, such as witness security and national security.[133]

Furthermore, in response to the discovery botches of the Stevens Case, the DOJ issued its "Guidance for Prosecutors Regarding Criminal Discovery,"[134] a memorandum based on USAM Chapter 9-5.000 but containing a more detailed framework from which prosecutors should draw their guiding disclosure principles.[135] Among the guidance set forth, the memorandum cites the need for prosecutors to determine if review of potentially-discoverable information which has been collected by the entire prosecution team is necessary; encourages review of all potentially discoverable material within control of the prosecution team (including an investigative agency's files, confidential informant or witness files, substantive case-related communications, and information contained in witness interviews); explains the procedure for conduction the review; and outlines the steps for making the pertinent disclosures as well as creating a record of such disclosures.[136]

### *C. The Fairness in Disclosure of Evidence Act: Progressive Legislative Reform?*

Given the many instances when exculpatory evidence has not been released by prosecutors, resulting in unfair trials,[137] reform of and improvements to the existing regime have occupied the minds of many advocates for a long time.[138] Under the current guidance scheme available

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[130] *Id.* ch. 9-5.001(D) (citation omitted).
[131] *Id.* ch. 9-5.001(D)(1).
[132] *Id.* ch. 9-5.001(D)(2).
[133] *Id.*
[134] *See* Dep't of Justice, Statement for the Record, Hearing on the Prosecution of Senator Ted Stevens 2–3 (Mar. 28, 2012), http://www.justice.gov/ola/testimony/112-2/03-28-12-doj-statement.pdf.
[135] *See generally* David W. Ogden, Deputy Att'y Gen., Memorandum for Department Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), http://www.justice.gov/dag/discovery-guidance.html.
[136] *See id.*
[137] *See, e.g.*, cases cited *supra* Part II.B.1.a.
[138] *See, e.g.*, Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1545–54, 1557, 1566 (2010). Such proposed reforms have included: imposing responsibility on supervisors for subordinates' *Brady* violations, and providing for disciplinary actions against such supervisors; more stringent, pro-active review by state ethics boards; "Prosecution Review Boards" charged directly with evaluating disciplinary claims; providing for civil liability; actual criminalization of *Brady* violations; public exposure of prosecutors who commit *Brady* violations; rewarding prosecutors financially for

to prosecutors, the reasons for suppression resulting in constitutional error run a gamut—from simple inadvertent lapses of judgment to egregious intentional misconduct.[139] However, "[d]eterring prosecutors from the deliberate suppression of *Brady* evidence . . . is not the gravest danger in this area of criminal law. The most pressing problem relates to how well-meaning prosecutors tend to interpret their constitutional disclosure obligations in a way that all too often leads to withholding."[140] Therefore, any reforms instituted must be considered in light of the range of a prosecutor's potential reasons for nondisclosure of *Brady* information—whether the problem originates with the prosecutor-advocate's invidious, strategic scheming, or merely because of a poor decision due to a simple lapse of judgment.[141]

The proposed federal statute, the Fairness in Disclosure of Evidence Act, attempts to remove the "guesswork" from the subjective control of the federal prosecutor, generally by providing rules of consistency for favorable evidence disclosure.[142] Introduced on March 15, 2012, FIDOE is sponsored by Senator Lisa Murkowski of Alaska and a bi-partisan group of co-sponsors.[143] It is intended to "help establish uniform standards for prosecutorial disclosure."[144] The legislation has received support by the ABA, the American Civil Liberties Union, and the National Association of Criminal Defense Lawyers.[145]

The following are among the general highlights of the Murkowski bill which differs from the current disclosure regime: the bill disregards what we have come to understand as "*Brady* material" relevant to disclosure and what may be deemed a *fair* trial under due process considerations, and instead governs the disclosure of so-defined "covered information" as that which "may reasonably appear to be favorable to the defendant" with regard to a determination of guilt, any preliminary matter before which prosecution

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abiding by Constitutional disclosure requirements; improvement of office training and policies; formal, internal review such as by office committees; pre-trial judicial review of all evidence; "open-file discovery," whereby all evidence known to the government is available to the accused; and simply encouraging hiring of "people who already have good values" who can be trained to be ethical prosecutors. *Id.*

[139] *See id.* at 1544.

[140] *Id.* at 1551.

[141] *See id.* at 1551 (noting the problems with nondisclosure of *Brady* material actually associated with the well-meaning prosecutor).

[142] *See generally* Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2 (2012).

[143] *See* Murkowski Press Release, *supra* note 23. The U.S. Senators named as co-sponsors of the bill are Republicans Lisa Murkowski (AK) and Kay Bailey Hutchison (TX), and Democrats Daniel Inouye (HI), Daniel Akaka (HI), and Mark Begich (AK). *Id.* Senator Inouye passed away on December 17, 2012. Derrick DePledge, *Sen. Daniel K. Inouye Dies at Age 88 of Respiratory Illness*, HONOLULU STAR ADVERTISER, (Dec. 17. 2012, 12:45 PM), http://www.staradvertiser.com/news/breaking/183853331.html?id=183853331. Senator Akaka retired in January 2013. *See Senators Praise U.S. Sen. Akaka's Service*, HONOLULU STAR ADVERTISER (Dec. 11, 2012, 3:48 PM), http://www.staradvertiser.com/news/breaking/183090611.html?id=183090611.

[144] Murkowski Press Release, *supra* note 23 (quoting Senator Inouye).

[145] Murkowski Press Release, *supra* note 23.

is pending, or any sentence to be imposed;[146] the bill introduces a definition for the "prosecution team," ensuring disclosure responsibility is inclusively imposed upon any individual prosecutor as well as the "Executive agency" for which he works, and any entity or individual working on behalf of, under the control of, or with the Government on the criminal prosecution;[147] the bill requires disclosure of information in possession of the government or which would become known by the exercise of due diligence;[148] and the bill specifies a timing requirement for disclosure to occur "without delay" upon arraignment and before the entry of any guilty plea, or as soon as "reasonably practicable" upon the existence of the evidence becoming known, irrespective of defendant's intent to enter a guilty plea.[149] The bill also enumerates remedies for noncompliance and a set standard of review for appeals.[150]

In invoking standards above our constitutional minimums and additionally addressing areas thus far left untouched by the Supreme Court, the implications of FIDOE are clearly far-reaching—FIDOE is an overhaul in comparison to the current federal disclosure of favorable evidence scheme. In critically analyzing FIDOE's constituent parts, examining its effectiveness and its weaknesses, and applying its elements to the disclosure errors of the Stevens Case as an illustration, this Comment will demonstrate that FIDOE would indeed provide fortification and expansion to due process protections of a criminal defendant, as sought by advocates of disclosure reform; this is especially so when disclosure would be of the sort intentionally withheld in bad faith, but FIDOE also supplies better guidance for the well-meaning prosecutor, compelling disclosure in specified instances and providing for increased opportunity to thoughtfully deliberate before making disclosures on certain occasions. However, the proposed legislation is not without its faults; some potential problem areas and conflicts would be created by the enactment of FIDOE, and improvements to FIDOE as drafted are in order.

## III. ANALYSIS

Even with reform legislation such as the Fairness in Disclosure of Evidence Act in place, because the soul of exculpatory evidence disclosure requirements lies with due process rights under the Constitution, *Brady* and its progeny and other sources guiding the prosecutorial duty[151] will likely continue to be relied upon as illustrative, teaching, and gap-filling implements by attorneys and the courts alike. Thus, whether FIDOE would

[146] S. 2197 § 2(a).
[147] *Id.*
[148] *Id.* § 2(b).
[149] *Id.* § 2(c).
[150] *Id.* §§ 2(g)–(i).
[151] *See* discussion *supra* Part II.B.1.

bring important improvements to the current federal disclosure regime—and whether, as the primary source of exculpatory evidence disclosure requirements, it can successfully replace the current regime—ultimately hinges upon whether it codifies or improves upon existing constitutional rules, whether it compels the prosecutor to properly act by improved instruction, what types of new weapons it supplies to the defense attorney's arsenal, whether it causes any detrimental effects to valuable aspects of the present regime, and whether it supplies its own operational complications. A critical examination of FIDOE's provisions and their application to the Stevens Case provides insight to these matters. One point to note, however, is that, as federal law—although implementation of similar legislation at the state and local levels would likely follow in time—FIDOE would not govern state and local prosecutorial disclosure requirements, which will thus continue to embrace our constitutionally-influenced case law rules, their own current laws and procedural rules, and other relevant forms of guidance.[152]

### *A. FIDOE Improves Upon Constitutional Requirements, Takes Aim at Case Law Loopholes, and Motivates Compliance, but is Not Without its Defects*

#### 1. FIDOE Definitions

The legislation as proposed generally codifies existing disclosure guidance and fundamentally advances the due process rights of defendants, but also leaves room for criticism. Under § 2(a), the definitions section of the proposed statute, FIDOE defines "covered information."[153] "Covered information" is deemed "information, data, documents, evidence, or objects" that "may reasonably appear to be favorable to the defendant" with regard to (1) the determination of guilt; (2) any preliminary matter before the court where a criminal prosecution is pending; or (3) the sentence that is to be imposed.[154] Defining covered information in this way is clearly an attempt to give parameters to what information must be disclosed, and from *Brady* and its expounding progeny, is analogous to the exculpatory *Brady* material which must itself be disclosed.[155]

Yet, although on its face the requirement for disclosure of *Brady* material and disclosure of covered information appear very similar, it is clear that the proposed new definition is more beneficial to a defendant—in that it suggests a lower initial threshold obligating the release of

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[152] *See* discussion *supra* Part II.B.1.
[153] S. 2197 § 2(a)(1).
[154] *Id.*
[155] *See supra* notes 78–85 and accompanying text (discussing the Supreme Court's treatment of disclosure requirements under *Brady*).

information. First, under the *Brady* line of cases, we have come to embrace the notion of "materiality,"[156] that *Brady* material need only be disclosed when it would hold "reasonable probability" of affecting the jury's decision to favor the defendant, thus producing a *Brady* error.[157] Further, our *Strickler* illuminating rule tends to effectively constrain the release of *Brady* material by acknowledging prosecutorial subjectivity and discretion as to whether—even if favorable to the defendant—the disclosure is merely necessary to avoid the *Brady* violation.[158] While FIDOE clearly contemplates the evidence disclosure relative to guilt or sentencing, aligning with the long-pronounced materiality rule of *Brady*,[159] the requirement of disclosure when it might "reasonably appear to be favorable to the defendant" delimits the ability of the prosecutor to consider his beliefs of guilt, to ponder his strategy in light of those beliefs, and to subjectively determine by his own measures whether the evidence is so immaterial that it would not result in a due process violation if not disclosed. "Reasonable appearance" *of favorability* is arguably a lower bar to disclosure than "reasonable probability" *of producing a better jury or sentencing result for the defendant*, because the latter requires initial "favorability" but additionally permits the prosecutor's further analytical deliberation, allowing for a second subjective step of his own judgment. Therefore, covered information encompasses a broader notion of what is required to be disclosed,[160] which could substantially better the criminal defendant's access to information over mere *Brady* requirements. Thus, it appears that the FIDOE definition of covered information would likely induce more disclosures by federal prosecutors in order to avoid a violation of the law—disclosures that under the current regime may have never materialized at all.

A second aspect of the definition of "covered information" that differs from our current regime is that the duty to disclose favorable evidence must not merely be provided where relevant to a determination of guilt or to punishment,[161] but also must be provided if favorable with regard to any "preliminary matter" before a court in which prosecution is pending.[162] Thus, this definition suggests a broader reach for required disclosures by affirmatively proclaiming that such exculpatory evidence,

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[156] *See supra* notes 82, 83, 85, 91, 97 and accompanying text.

[157] *See supra* notes 97–102 and accompanying text (discussing the Supreme Court's treatment of the "reasonable probability" standard).

[158] *See* discussion *supra* Part II.B.1.a on Strickler v. Greene.

[159] *See* discussion *supra* Part II.B.1.a on Brady v. Maryland.¶

[160] *See* Joy, *supra* note 38, at 53; *accord* Randy M. Mastro & Lee G. Dunst, *§ 112:21 Brady/Jencks Disclosures–Brady Material*, 10 BUS. & COM. LITIG. FED. CTS. (3d ed. 2012) ("The bill seeks to define the scope of exculpatory evidence that prosecutors are required to disclose. . . . [thus] eliminat[ing] the subjective materiality standard under *Brady*.").

[161] *See supra* notes 82–83 and accompanying text.

[162] Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2(a)(1)(B) (2012). Note, however, that under the Act, disclosure timing even with respect to any "preliminary matter" need not occur earlier than "after arraignment." *See id.* § 2(c)(1); *see also* discussion *infra* Part III.A.3 (examining FIDOE's timing requirements).

when known, *is relevant* to not only to trial or sentencing but also to *pre-trial* or *pre-plea* matters. These matters could potentially include such evidence when discovered: in advance of a bail hearing; within the prosecution's continuing investigation; in relation to any issues treated by pre-trial motions and hearings; at any point during the general discovery process; and during plea bargain negotiations. Not only does this aspect of the "covered information" definition enhance the defense's ability to obtain useful information early, and potentially allow its use to mitigate the defendant's circumstances along the way, but it also requires the prosecutor to assess what precisely is known at each procedural step and consider whether that evidence or information could reasonably favor the defendant with respect to that particular legal or procedural matter. This will likely not only induce more disclosures in general, but will induce more quality disclosures pertinent to each stage of the prosecution.

Also under § 2(a), the "prosecution team" working on a criminal case is defined.[163] The prosecution team is similar in concept to that referenced by USAM chapter 9-5.001(B)(2) and utilized by the DOJ in its prosecutor guidance.[164] FIDOE's prosecution team includes both (1) the "Executive agency"—incorporated by reference to 5 U.S.C. § 105 as "an Executive department, a Government corporation, and an independent establishment"[165]—that brings a criminal prosecution on behalf of the United States,[166] as well as (2) "any entity or individual, including a law enforcement agency or official, that . . . acts on behalf of[,] . . . under the control of[,] . . . [or] participates, jointly with the Executive agency . . . in any investigation with respect to the criminal prosecution."[167] Under the first aspect of the defined prosecution team, typically the Executive department will simply be the Justice Department's U.S. Attorney's Office prosecuting a case, so most of the time, the codified definition would merely coincide with our current notions of with whom the disclosure duty lies. Further, in many senses, this notion is a codification of the *Giglio* rule that the prosecutor's office is one entity, and information known to one member of the entity is considered known to the entire entity for the purposes of favorable evidence disclosure.[168] However, the incorporation of the Executive agency into the definition of the prosecution team could have some significance when, for example, private attorneys are contracted for particular purposes, such as special independent investigative counsels.[169]

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[163] *See* S. 2197 § 2(a)(2)(A).
[164] *See supra* notes 129, 136 and accompanying text.
[165] 5 U.S.C. § 105 (2006).
[166] S. 2197 § 2(a)(2)(A).
[167] *Id.* § 2(a)(2)(B).
[168] *See supra* notes 93–94 and accompanying text.
[169] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 659–60 (1988) (finding constitutional EIGA's provision for the appointment of special independent counsels to investigate and prosecute certain high-ranking Government officials for violations of federal criminal laws).

Therefore, the Executive agency reference expressly clarifies that any entity or individual holding the power to disclose exculpatory evidence may be burdened with the obligation to do so, irrespective of private or independent disposition, so long as the criminal prosecution is being conducted on behalf of the United States.

Further, the second component of the definition of prosecution team expressly reaches all other potential entities or individuals who may provide support to the Executive agency. Such persons could include those who work for any U.S. law enforcement agencies, such as the FBI; the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the U.S. Marshals Service; or Customs and Border Protection, and could even reach state or local prosecutors or law enforcement who may be working jointly in any manner with the Executive agency. Moreover, defining this second set of individuals who are participating on behalf of, under the control of, or jointly with the federal prosecutor could mean that even government informants or witnesses may be required to relate acquired exculpatory information to the prosecutor. In some ways, this component of the prosecution team definition is a mere codification of the *Kyles* rule that favorable evidence in the hands of others acting on the government's behalf is necessarily favorable evidence which must be obtained and managed by the prosecution—or risk constitutional error.[170] Yet in other ways, this definitive codification lends far more credibility to an argument by the defense that posits the disclosure requirement upon any players reachable by the statute's language.

Codifying an overarching definition for the prosecutorial team enhances a defendant's exculpatory-evidence-seeking mission because all players who are in a position to violate the disclosure requirements are expressly designated therein and are thus made aware of their duty under the law. The widely-cast net over such actors could lead to more disclosures, and could also lead to more disclosure violations from which error could result. However, with such far-reaching implications, the Executive agency will undoubtedly become responsible for conferring training upon all such players involved with the criminal prosecution to understand what exculpatory evidence is and why it must be relayed to the prosecutor. Thus, the Executive agency will need to activate solid guidance to ensure methodical compliance with such reporting.

2. Duty to Disclose Favorable Information

Section 2(b) imposes the duty to disclose favorable information.[171] Under § 2(b), the prosecutor shall exercise his duty to disclose the covered

[170] *See supra* notes 102–03 and accompanying text.
[171] S. 2197 § 2(b).

information whenever that information is (1) "within the possession, custody, or control of the prosecution team," [172] or (2) whenever the "existence" of the information is known, "*or by the exercise of due diligence would become known*," to the government prosecutor.[173] In light of the definition of "covered information" previously discussed,[174] the first prong of the duty provides for sensible compelling of disclosure of the favorable evidence.

The second prong of the exercise of the duty, however, provides something different to the disclosure regime. First off, it suggests that mere awareness of the potential "existence" of covered information should compel the duty to disclose, which implies that specificity of the information is not necessary to invoke the duty—which leads to a deduction that it would be possible that such information could ultimately turn out *not to be* covered information as contemplated by the statute. But the second prong of the duty goes even further, suggesting that the prosecutor must exercise due diligence to pursue information to enlighten himself if he even suspects exculpatory evidence merely *exists*—so that he may disclose it. Therefore, both components of the second prong of duty would likely lead to a due diligence pursuit of exculpatory information, either because it is initially suspected but not per se *known*, or because the smart prosecutor-advocate would not likely want to disclose the mere existence of "potential" exculpatory information without understanding its specific nature and whether it would ultimately be "covered," therefore requiring disclosure.

While one may say the second prong of the duty requirement codifies the *Kyles* rule that a prosecutor holds "a duty to learn of any favorable evidence" known to others acting on the government's behalf, which is also guidance proffered by the DOJ,[175] one could also argue that the specific text of FIDOE takes this too far, by imposing an affirmative duty to continually investigate any minor possibility for uncovering exculpatory evidence. A criticism of the second prong of the duty would be that simply by incorporating the word "existence," the duty becomes too vague, which places too much of a burden on the prosecutor and the government's resources, given the breadth of scenarios where a prosecutor may suspect covered information "exists." Further, the prosecutor's subjective belief regarding existence or lack thereof of exculpatory evidence could render many appeals questioning not only what the prosecutor absolutely knew, but also what he was open-endedly required to ascertain, regardless of if any information may exist which is exculpatory. Imposition of such a duty may be too broad to require of the government advocate.

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[172] *Id.*
[173] *Id.* (emphasis added).
[174] *See supra* notes 153–60 and accompanying text; *see also supra* Part III.A.1.
[175] *See supra* notes 102–03,129, 136, and accompanying text.

Moreover, this portion of the statute does not appear to give clear guidance to the prosecutor who may be well-meaning in his attempt to abide by it; his duty to "chase down" exculpatory "leads" could be too encompassing when truly scrutinizing the proposed language.

3. Timing

Under current Supreme Court case law, timing of disclosures has not been addressed with specificity.[176] Rather, timing guidance is offered by sources such as the ABA Model Rules, which propose "timely" disclosure;[177] the Jencks Act and Federal Rule of Civil Procedure 26, both of which restrain the release of witness statements until after the witness has testified in trial;[178] Federal Rule of Civil Procedure 16, which requires prompt disclosure of requested discovery material and continual duty to disclose where requested material has not yet been produced;[179] and the USAM, which advocates for prompt disclosure of exculpatory information and reasonable timeliness of disclosure of impeachment information before trial, so long as the prosecutor "balance[es] the goals of early disclosure against other significant interests," such as witness security and national security.[180] Some district and state courts, however, have adopted their own rules with regard to timing.[181] For instance, some courts apply a standard that disclosure must be made immediately, subject to timing restrictions by the Jencks Act,[182] while others use a measure of prejudice as a standard—that so long as disclosure has been given in time for the defendant to effectively use it at trial, no due process violation has occurred.[183] Yet FIDOE imposes the most specifically-rigorous timing requirements of any

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[176] *See* Schimpff, *supra* note 107, at 1736.

[177] *See supra* notes 109–13 and accompanying text.

[178] *See supra* notes 114–17 and accompanying text.

[179] *See supra* notes 121, 122 and accompanying text.

[180] *See supra* notes 128–31 and accompanying text.

[181] *See, e.g.*, United States v. Snell, 899 F. Supp. 17, 19 (D. Mass. 1995) (citing a local rule providing for automatic discovery).

[182] *E.g.*, *id.* ("[The applicable local rule] is quite clear, and appropriately melds the concerns of the Jencks act and *Brady v. Maryland*. If the evidence at issue is conceded to be *Brady* material, then it must be turned over immediately, unless the Government meets the requirements for exempting [or delaying] the information from disclosure . . . namely, [that it] would be detrimental to the interests of justice.") (internal quotation marks omitted).

[183] *See, e.g.*, Moreno v. Commonwealth, 392 S.E.2d 836, 842 (Va. Ct. App. 1990) ("Late disclosure does not take on constitutional proportions unless an accused is prejudiced by the discovery violations depriving him of a fair trial. So long as exculpatory evidence is obtained in time that it can be used effectively by the defendant, and there is no showing that an accused has been prejudiced, there is no due process violation . . . . It is the defendant's ability to utilize the evidence at trial, and not the timing of the disclosure, that is determinative of prejudice.") (internal citations omitted); United States v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001) ("[A]s a general rule, *Brady* and its progeny do not require immediate disclosure of all exculpatory and impeachment material upon request by a defendant . . . the time required for the effective use of a particular item of evidence will depend on the materiality of that evidence . . . [and] the particular circumstances of the case.").

sources informing the disclosure duty to date,[184] and adds some strong safeguards for defendants along with it.[185]

Section 2(c) of the proposed statute would require disclosure of covered information (1) "without delay after arraignment and before the entry of any guilty plea,"[186] and (2) continually, such that if covered information "is not known on the date of the initial disclosure," then "as soon as is reasonably practicable" upon such information becoming known, regardless of whether the defendant entered or agreed to enter a guilty plea.[187] That disclosure timing is initially enforced upon arraignment, *without delay*, means that a prosecutor may not withhold covered information known to him for any appreciable length of time beyond arraignment. Such a standard appears highly protective of a defendant's due process rights, especially in comparison to the mere prejudice standard some courts apply;[188] the prejudice standard thus appears more beneficial to the prosecution, while the proposed standard appears highly beneficial to the defense.

Further, in contrast to the guidance of the USAM,[189] the proposed rule initially requires the prosecutor to disclose covered information irrespective of consideration of witness security or national security[190]—but does provide for the ability for the United States to delay release of the information by filing a motion for protective order of it[191] when such information is solely for impeachment purposes;[192] when the potential witness is not likely already known to the defendant;[193] and when the

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[184] *See generally* Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2(c) (2012) (providing for timing of disclosure "without delay" after arraignment or continually, whenever exculpatory evidence becomes known to the prosecution team).

[185] *See generally id.* (posing timing requirements beneficial to a defendant and clarifying that the disclosure duty extends throughout the life of the criminal proceeding and beyond, even if defendant accepts a plea deal).

[186] *Id.* § 2(c)(1).

[187] *Id.* § 2(c)(2).

[188] *See supra* note 183 and accompanying text.

[189] *See supra* notes 131–33 and accompanying text.

[190] *See* S. 2197 §§ 2(c)(1), (c)(2); *see also id.* § 2(d)(1) (stating that disclosure requirements "shall apply notwithstanding [the Jencks Act] or any other provision of law"). However, FIDOE provides an exception to disclosure for designated "classified information," as determined by the Classified Information Procedures Act (CIPA), and such classified information would implicate national security. *See id.* § 2(d)(2). CIPA defines "classified information" as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in . . . the Atomic Energy Act . . . ." Classified Information Procedures Act § 1, 18 U.S.C. App. 3 (2012). Because such classified information requires a determination under CIPA before a prosecutor can withhold it, FIDOE could also constrain a prosecutor's discretion to determine whether favorable evidence would impact "national security" as currently appears permitted. *See supra* notes 130–33 and accompanying text. However, the interaction between FIDOE's disclosure requirements and items that expressly concern "national security," when designated under CIPA, is beyond the scope of this Comment.

[191] S. 2197 § 2(e)(2); *see also id.* § 2(e)(1).

[192] *Id.* § 2(e)(1)(A).

[193] *Id.* § 2(e)(1)(B)(i).

disclosure could present a threat to the safety of the witness or of *any other person*[194] —which could be reasonably interpreted to account for national security. This narrow stipulation for supply of protective orders and the requirement of filing of a motion with the court, however, diminishes the prosecutor's ability to act with his own discretion with regard to matters of witness and national security.

Additionally, it is notable that initial disclosure duty is imposed *even when the defendant plans to enter or has entered a guilty plea*.[195] Because a defendant's right to exculpatory evidence is founded on his constitutional right to a *fair trial*,[196] and in theory, entry of a guilty plea suggests the defendant is acknowledging his guilt, some courts do not hold that a disclosure duty exists to avoid constitutional error in the pre-plea context.[197] A majority of courts, however, do find that a prosecutor has a pre-plea duty to disclose *Brady* material.[198] Therefore, it is evident that FIDOE would resolve this division of authorities in the plea context and require disclosure irrespective of negotiated plea agreements.

Furthermore, the construction of the second FIDOE timing provision essentially requires any newly-discovered covered information to be proffered to the defense during the life of the criminal prosecution and even beyond.[199] Under the second timing provision, disclosure of covered information not known at any previous point in time must be disclosed "upon the existence [of it] becoming known . . . ."[200] Such phrasing, unencumbered by any further qualifiers or limitations, supplies open-ended authority to induce the Executive agency to produce the covered information continually, which appears to include any point in time beyond conviction at trial and beyond sentencing.[201] Because a defendant's due process right to exculpatory evidence is fundamentally intended to supply a fair trial,[202] in providing for disclosure of evidence which becomes known to the Executive agency *after a trial*, FIDOE provides an extension of protections beyond those which have been constitutionally imposed. Otherwise, courts are currently "all over the board" as to whether disclosure of exculpatory

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[194] *Id.* § 2(e)(1)(B)(ii).
[195] *Id.* § 2(c)(2).
[196] *See supra* notes 63–64 and accompanying text.
[197] Daniel Conte, *Swept Under the Rug: The* Brady *Disclosure Obligation in A Pre-Plea Context*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 74, 83–84, 86–87 (2012).
[198] *Id.* at 87.
[199] *See* S. 2197 § 2(c)(2).
[200] *Id.*
[201] *See id.* Recall that the definition of "covered information" includes favorable evidence which may impact determination of guilt, preliminary court matters, or sentencing; the interpretation that covered information must be produced even beyond trial and sentencing does not appear to conflict with the definition of covered information. *See supra* notes 153–60 and accompanying text; *see also supra* Part III.A.1.
[202] *See supra* notes 63–64 and accompanying text.

information is necessary upon conviction by a jury.[203] Thus, FIDOE would resolve this question, providing for greater protections for a defendant by expressly extending disclosure requirements beyond his trial conviction.

4. Relationship to the Jencks Act & Protective Orders

Of significance to the passage of FIDOE in its current form, the duty to disclose the favorable evidence "without delay" [204] under the FIDOE timing provisions will apply under § 2(d) "notwithstanding section 3500(a)"[205]—meaning that FIDOE acknowledges its favorable evidence disclosure timing requirements may conflict with Jencks Act stipulations, and except for the possible pursuit of a protective order,[206] FIDOE appears to intend to implement timing duties to trump Jencks Act timing constraints.[207] While expressly addressing the proposed timing conflict with the Jencks Act as FIDOE does, this language would not necessarily create a seamless relationship between the two laws.

Under the Jencks Act, once a government witness has testified on direct examination—but no sooner—the defendant may move for the court to order production of that witness' prior statements for examination and use by the defense with regard to related subject matter.[208] While in practice, the Jencks Act assists a defendant by providing opportunity to unearth witness credibility and impeachment material,[209] it was nonetheless enacted in part to protect a witness from the harassment, intimidation, and tampering which may flow from earlier disclosure of his identity and statements.[210] Thus, with the proposed FIDOE language requiring disclosure without delay, *despite* the requirements of the Jencks Act, the Jencks Act and FIDOE appear to work at philosophical odds with one another; on the one hand, the former works to constrain the release of information, to protect a witness and prevent witness tampering, while on the other hand, the latter would attempt to broaden the defendant's immediate right to exculpatory material.

Yet two items may soften FIDOE's potential philosophical conflict with the protections of the Jencks Act. Foremost, disclosure of any evidence under FIDOE necessarily must initially turn on whether that evidence is "covered information" as defined by § 2(b).[211] Thus, a

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[203] Brendan Max, *The Duty to Disclose Exculpatory Evidence Discovered After Trial*, 94 ILL. B.J. 138, 140 (2006).
[204] S. 2197 § 2(c)(2).
[205] *Id.* § 2(d)(1).
[206] *See supra* notes 190–94 and accompanying text.
[207] *See supra* notes 115-18 and accompanying text.
[208] *See supra* notes 115–18 and accompanying text.
[209] *See supra* note 118 and accompanying text.
[210] *See supra* notes 115–17 and accompanying text.
[211] *See supra* notes 153–60 and accompanying text; *see also supra* Part III.A.1.

prosecutor in possession of a witness statement should continue to comply with timing constraints of the Jencks Act unless for some reason that witness statement has itself produced covered favorable evidence. A possible scenario whereby a government witness statement produces favorable evidence could be one in which an individual initially poses a story which corroborates a defendant's alibi, but who later recants to proffer a different statement that aids the prosecution. Such opposing statements would be "covered" because the original statement is exculpatory, and moreover, the inconsistency of the two statements is impeaching. In contrast, where a government witness had always held firm on his statement that aids the prosecution, such a statement would not be "covered information" as defined by FIDOE and thus need not be produced "without delay." Thus, the government witness whose statements could not be deemed covered information under FIDOE, and who ultimately appears during trial, will be protected by the Jencks Act and will only have his statements produced after his testimony on direct examination is given.

The second area worth examining which could soften FIDOE's potential philosophical conflict with the Jencks Act is that upon motion of the United States, § 2(e) provides for court protective orders which delay disclosure of the release of even covered information[212] when (1) it appears that the value of such covered information would be solely as a basis to impeach the witness,[213] *and* (2) the government establishes a reasonable basis to believe that the identity of the witness is not already known to the defendant *and* (3) disclosure of the covered information would pose a threat to the safety of the potential witness.[214] This provision of FIDOE seems on its face an attempt to align with the protective philosophy of the Jencks Act in that it allows the government to guard the safety of its witness—but in scrutinizing it, appears a mere token acknowledgment of Jencks rationale, falling operationally short of actual witness protection.

First, the protective order provision places a heavier burden on the prosecution for initial proof, contrary to the automatic protection provided a witness under the Jencks Act. Next, because of the use of the conjunctive "and" in two locations of the provision, all three conditions must be met before a court may issue a protective order. Further, on the outset, § 2(e) is confusing because it seems so restrictive. For instance, the first prong of the provision suggests that whenever covered information would provide *more than* a mere basis for impeachment, a protective order will not follow. Thus, for example, where the covered information is merely the fact that a government witness was given a deal in exchange for testimony, thus *solely impeaching his credibility*, the first prong would be met. However, where

[212] Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2(e)(2) (2012).
[213] *Id.* § 2 (e)(1)(A).
[214] *Id.* § 2(e)(1)(B).

*statements* by a government witness were made which tend to exculpate the defendant, meeting the definition of "covered information," the statements of the witness would never be protectable by court order. Next, even if the first prong is met, under the second prong of the provision, if any of two additional conditions are *not* met—if *either* the witness is already known *or* the witness' safety is not threatened—again, a protective order against the release of covered information would then be unavailable. Moreover, from a practical standpoint, it would likely be difficult for the government to establish the required "reasonable basis to believe" that the safety of a witness could be threatened.

Therefore, it appears that overall, while the Jencks Act would not be repealed, it would be marginalized by enactment of FIDOE in its current form. The Jencks Act would only continue to be clearly useful in instances where a witness has never proffered a statement favorable to the defense which could be construed as covered information, which indeed would likely be most instances. However, FIDOE otherwise appears to expand a defendant's rights at the expense of Jencks Act protections of witnesses against such ills as potential intimidation or witness tampering before trial. As for its protective orders provision, FIDOE appears to be too operationally restrictive to provide much in the way of meaningful support from which a protective order would ever materialize.

5. Noncompliance and its Remedies and the Defendant's Costs

FIDOE provides motivation for a prosecutor's compliance with his disclosure duties under the Act.[215] First, unlike the current disclosure regime, FIDOE provides procedural safeguards under § 2(g) when noncompliance is suspected as to the duty to disclose and timing provisions.[216] Prior to entry of a judgment, a defendant can file a motion or the court may address such a failure sua sponte if there is mere "reason to believe" the failure exists.[217] A key aspect of this procedural measure which is beneficial to the defense is that, seemingly rather than requiring the defendant to demonstrate his basis for a claim of noncompliance, the *government* must "show cause why the court should not find the United States is not in compliance" of either its disclosure duties under § 2(b) or its timing duties under § 2(c) of the Act.[218]

However, a critique of this proposed approach would be that the defense would not need much indication of noncompliance before filing its motion, since the heavier burden is carried by the prosecution, which could thus lead to filings of superfluous motions. In addition, due to the

[215] *See generally id.* §§ 2(g), (h)(1)–(2).
[216] *See generally id.* § 2(g).
[217] *Id.* § 2(g)(1).
[218] *Id.*

prosecutor's obligation to show cause or risk being found noncomplying, this provision could be abused by defense attorneys to compel information or evidence from the prosecution team which may not have been covered information *reasonably* appearing favorable to the defendant. Therefore, a possible effect of such abuses could be that the prosecutor-advocate will be induced to reveal more information than had been intended, potentially jeopardizing the government's strategy.

The next motivating factor for compliance is found under § 2(h), which expressly provides remedies when a violation has been found as to the disclosure of covered information, either with respect to outright nondisclosure or to delayed timing.[219] When noncompliance is found, in fashioning a remedy, the court must weigh several factors, which include the seriousness of the violation; the impact of the violation on the proceeding; and whether the violation was the result of innocent error, negligence, recklessness, or knowing conduct.[220] The remedy that the court may order could include postponement or adjournment of the proceedings; exclusion or limitations on evidence or testimony; an order of a new trial; dismissal; or any other remedy the court finds appropriate. [221] Although the remedies available for a court to draw upon in the event of noncompliance are not unordinary, simple enumeration of the potential remedies and factors the court might weigh to assess a remedy would likely provide further encouragement for better compliance.

A final motivating factor an individual prosecutor, and the Executive agency, will likely consider when acting toward compliance with disclosure and timing requirements is that, should the court find a violation, the court may order the United States to pay the reasonable attorney's fees of the defendant as provided by § 2(h)(2).[222] This remedy is available whenever the court finds that the violation was due to negligence, recklessness, or knowing conduct.[223] As with the other remedies expressed under § 2(h), simple enumeration addressing the defendant's costs in the event of noncompliance would likely encourage better compliance, especially in light of the relatively low threshold of "negligence" sufficing to invoke this provision. In addition, more so than the remedies aimed at court proceedings listed under § 2(h)(1)(B), in supplying the possibility that the government would have to pay the defendant's attorney's fee, § 2(h)(2) would especially motivate the Executive agency to promote compliance by its prosecutors, which could in turn lead to more rigorous training procedures and potentially to a higher ethical caliber for personnel over time.

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[219] *Id.* § 2 (h)(1)(A).
[220] *Id.* § 2(h)(1)(C).
[221] *Id.* § 2(h)(1)(B).
[222] *Id.* § 2(h)(2)(A).
[223] *Id.* § 2(h)(2)(A).

6. Standard of Review

The final notable aspect of FIDOE to be analyzed by this Comment is the fact that, under § 2(i), in an appellate proceeding initiated by a defendant, a reviewing court may not find the error resulting from noncompliance harmless unless the government can demonstrate *beyond a reasonable doubt* "that the error *did not contribute* to the verdict obtained."[224] Such a standard places a huge burden upon the prosecutor, assigning him the very difficult task of *proving a negative*, to an incredibly high standard. It would clearly be difficult to demonstrate that nondisclosure of covered information *did not in some way* contribute to a guilty verdict obtained. This burden on review obviously provides further incentive for continual and thorough compliance throughout the progression of a case. Thus, § 2(i) of FIDOE generally offers a defendant a great level of protection throughout the progress of a case as well as when nondisclosure of favorable information is an issue for review by an appellate court.

*B. Application of FIDOE to the Stevens Case Illustrates its Desired Results*

It is obvious how well suited FIDOE is to address the exculpatory evidence disclosure failings of a case like *Stevens*.[225] Even items such as Bill Allen's morphing story and conflicting testimony, as well as the impeachment information regarding Bambi Tyree,[226] would have clearly fallen under the umbrella of "covered information" deemed reasonably favorable to the defendant by FIDOE § 2(a), and a prosecutor would not have needed to ponder "probabilities" of whether such information would have been helpful to Stevens or not before his obligation to hand it over would kick in.[227]

Further, the disorganization and lack of consistent procedures present in the Stevens Case—and the subsequent blame-game that resulted from it—would not have been cultivated under the FIDOE regime, since at all points up to and including the trial, disclosure responsibilities would have rested on any member of the "prosecution team."[228] Clearly, even for the magnitude of a case like *Stevens*, this would have required all involved prosecutors and any FBI agents to know and understand their responsibilities—which would have led to promulgation from the top down of a thorough and systematic manner of rooting out and processing

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[224] *Id.* § 2(i) (emphasis added).

[225] *See supra* Part II.A (examining the exculpatory evidence issues involved in the Stevens Case).

[226] *See supra* notes 45–58 and accompanying text (discussing the evolution of Allen's story and conflicts in testimony and his involvement with the 15-year-old prostitute, Bambi Tyree).

[227] *See supra* notes 153–60 and accompanying text; *see also supra* Part III.A.1 (examining "covered information" and the "reasonable favorability" standard of FIDOE versus the "reasonable probability" standard of *Brady*).

[228] *See supra* notes 163–70 and accompanying text; *see also supra* Part III.A.1 (examining the meaning of the "prosecution team").

exculpatory evidence—and no acceptance of after-the-fact excuses for prosecution-team-member botches. Under FIDOE, too, it appears that anyone participating on behalf of, under the control of, or participating jointly with the "Executive agency" in an investigation would have held exculpatory evidence responsibilities;[229] therefore, as an informant, Bill Allen himself may have needed to be trained to understand what "favorable evidence" consisted of and to deliberately reflect upon, recollect, and report circumstances which met the definition, including in his dealings surrounding the Torricelli note.[230]

With respect to the FIDOE timing standard, it is obvious that at several points along the way and even during the Stevens trial, the prosecution team would have held an affirmative duty to disclose favorable information, without hesitation.[231] Thus, even for a relatively convoluted state of affairs, such as at the point the prosecution recognized Bill Allen's morphing story—in the final days counting down to the trial, and again immediately after the "cover your ass" testimony Allen gave on the stand[232]—those prosecutors who identified the discrepancy would have held a positive duty to report it "without delay." Further, under the timing requirement of FIDOE, information coming to light after Stevens's conviction, such as the interview documents revealing Allen's inability to recall speaking to Persons whatsoever,[233] would have been required disclosures at any later time upon its discovery.[234]

Finally, because FIDOE expressly addresses procedures for suspected noncompliance that place a burden on the prosecution,[235] and because of the remedies available in the event of noncompliance—including payment of the defense attorney's fees whenever a violation is due to even mere negligence[236]—the Stevens prosecutors would have naturally felt compelled to comply with FIDOE requirements at all times. Such an added sense of accountability would have likely led to stronger management over the prosecution team, better documentation and organization of evidence, and a systematic method for ferreting out exculpatory evidence favorable to Stevens's defense.[237]

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[229] *See supra* notes 163–70 and accompanying text; *see also supra* Part III.A.1 (examining which individuals may be considered to be participants in an investigation executed by the Executive agency).

[230] *See supra* notes 45–55 and accompanying text (discussing the story of the Torricelli note).

[231] *See supra* notes 186–88 and accompanying text (examining FIDOE's timing requirements).

[232] *See supra* notes 45–55 and accompanying text (discussing the evolution of Allen's story and conflicts in testimony).

[233] *See supra* note 54 and accompanying text.

[234] *See supra* notes 186–88 and accompanying text (examining FIDOE's timing requirements).

[235] *See supra* notes 215–18 and accompanying text; *see also supra* Part III.A.5 (examining the prosecution's burden under a noncompliance charge).

[236] *See supra* notes 219–23 and accompanying text; *see also supra* Part III.A.5 (examining enumerated remedies provided for noncompliance of FIDOE).

[237] *See supra* notes 41–44 and accompanying text (discussing the hasty, ill-organized manner in which the prosecution handled Stevens's evidence).

## IV. RECOMMENDATIONS

Some glaring issues should be addressed before passage of FIDOE. First, the overarching definition of the "prosecution team" may implicate such a wide range of responsible players that noncompliance by any one of them may be all but inevitable.[238] Lawmakers should recognize the potential consequences of this broad definition and instead consider limiting the prosecution's accountability toward the noncompliant acts of individuals who have only attenuated dealings with the prosecution or an investigation, such as participants who are not government employees. Second, lawmakers should expressly confront FIDOE's § 2(d) philosophical conflict with the Jencks Act, in light of Jencks's protective purpose,[239] and instead incorporate a means of preserving its protections for witnesses.

Next, under § 2(g), lawmakers should reconsider the available action for the defense to file a motion when vaguely suspecting missing disclosable exculpatory evidence, which then requires the prosecution to show cause *not* to be found noncompliant.[240] A proffered step to rein in potential frivolous filings and spread the burden could be a requirement for the defense to first outline its basis for the claim and make a more specific demand upon the prosecution. Further, under FIDOE's § 2(i) standard of review provision, the notion of using a reasonable doubt standard in the context of proving the negative implication that an error "did not contribute" to the verdict ultimately obtained creates too heavy of a burden for the prosecution to carry,[241] and could clearly result in guilty defendants walking free, even in the face of trivial and unintended disclosure mistakes. Lawmakers should thus address this provision either by lessening the beyond-a-reasonable-doubt standard to "clear and convincing," or alternatively, shifting the burden to the defense by using a "more likely than not" standard.

Finally, adding a provision to FIDOE which provides for a system similar to "open-file discovery"—whereby all evidence known to the government is available to the defendant[242]—but *beyond* the conclusion of a case by trial or acceptance of a plea deal, may further influence full compliance, while allowing the prosecution to better preserve its basis of strategy for the case. Adding such a layer of protection could also better perfect our criminal justice system, ensuring that innocent or less-culpable criminal defendants are given the most comprehensive access possible to evidence that may later exonerate them.

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[238] *See supra* notes 164–70 and accompanying text; *see also supra* Part III.A.1.
[239] *See supra* notes 204–10 and accompanying text; *see also supra* Part III.A.4.
[240] *See supra* notes 215–18 and accompanying; *see also supra* Part III.A.5.
[241] *See supra* 224 and accompanying text; *see also supra* Part III.A.6.
[242] *See* Medwed, *supra* note 138, at 1557–64 (discussing open-file discovery).

## V. CONCLUSION

The Fairness in Disclosure of Evidence Act takes hearty aim at a well-meaning but flawed system. The Stevens Case has highlighted the potential for error under the current disclosure regime and reinvigorated the debate over *what is fair* to a criminal defendant. Yet it is not difficult to imagine the many other criminal cases adjudicated throughout our nation through the years—whose defendants lacked the resources of an accused senator, and whose defendants did not receive the public notoriety of a powerful elected official—in which due process violations resulted from nondisclosure of exculpatory evidence. And even when error has been acknowledged, such lower-profile cases by and large have not served as a catalyst for major progressive change to the system. Thus, given the specific issues of the Stevens Case and their subsequent thorough treatment by the Department of Justice, the independent investigator appointed by Judge Sullivan, and various media sources and legal scholarship, *Stevens* provides for an unparalleled opportunity to address the flaws of the current disclosure guidance regime. We must seize upon the debacle of *Stevens* in order to refine the system, for the benefit of all citizens who would be subjected to an unfair chance against the federal government.

Though some of its questionable aspects have been discussed and recommendations have been made within this Comment, FIDOE as drafted provides a good start to overhaul the present disclosure-guidance scheme. A critical analysis of FIDOE indeed demonstrates major improvements over the current system to the rights of criminal defendants. And there is probably no better arena to push for such positive change than through actual legislation—formulated by and amongst the friends and colleagues personally impacted by the case of Senator Stevens. Thus, the conditions are ripe to repair the flawed regime in a manner that will provide needed safeguards for criminal defendants from all walks of life.