

---

# CONTENTS

---

<b>Acknowledgments</b>	xv
<b>About the Authors</b>	xvii
<b>Introduction</b>	1
<b>CHAPTER 1</b>	
<b><i>Brady</i> Information</b>	<b>13</b>
A. The Supreme Court Cases	14
1. <i>Brady v. Maryland</i> (1963): Evidence Favorable to the Defense and Material to Either Guilt or Punishment Must Be Disclosed	14
2. <i>Giglio v. United States</i> (1972): Evidence Affecting Credibility Falls within the <i>Brady</i> Rule	16
3. <i>United States v. Agurs</i> (1976): The Government's Failure to Disclose Nonmaterial Information Will Not Lead to Reversal	17
4. <i>United States v. Bagley</i> (1985): Material Undisclosed Evidence Is That Which Undermines Confidence in the Outcome of the Trial	20
5. <i>Kyles v. Whitley</i> (1995): The Court Refines the Materiality Standard	22
6. <i>Brady</i> in the Supreme Court since <i>Kyles</i>	25
7. <i>Youngblood v. West Virginia</i> (2006): Summarizing <i>Brady</i> Law	30

B. The Three Elements of a <i>Brady</i> Violation	31
1. Favorable to the Accused	32
a. “Exculpatory” Information versus “Impeachment” Information	32
b. “ <i>Brady</i> Material” versus “ <i>Brady</i> Information”	33
c. Inadmissible Evidence May Be Producing under <i>Brady</i>	33
2. Suppression by the Government	36
a. Where Must the Government Search for <i>Brady</i> Information?	36
b. Prosecutors’ Good Faith or Bad Faith Does Not Matter	37
3. Prejudice to the Defendant: Has Confidence in the Outcome of the Trial Been Undermined?	38
a. Evidence Found to Be Material	38
b. Evidence Found Not to Be Material	41
c. “Cumulative” Evidence	43
C. Other Considerations Regarding What Must Be Produced	44
1. <i>Brady</i> Does Not Require Open File Discovery	45
2. Prosecutor’s Work Product	45
3. Confidential Informants	47
D. The <i>Brady</i> Rule at the Trial Court Level	47
E. Common Procedural Considerations	49
1. Timing of <i>Brady</i> Disclosures	49
2. Form of <i>Brady</i> Disclosures	53
3. In Camera Review of Potential <i>Brady</i> Information	54
4. Identifying Material Exculpatory Information within a Larger Production	55
5. Disclosing <i>Brady</i> Information before a Guilty Plea	57
6. The Due Process Protections Act	59

## CHAPTER 2

### Rule 16 of the Federal Rules of Criminal Procedure— Part One: Discovery from the Government

A. Rule 16(a) Discovery Available from the Government	65
1. Requests by the Defense	65
a. Form and Specificity of the Request	66
b. Withdrawing the Request	67
c. Requests in a Multidefendant Case	68
2. Rule 16(a)(1)(A) through (C)—Defendant’s Statements—Generally	68
a. Defendant Must Request the Statement	69

b. Meaning of “Statement”	69
c. Method of Producing Statements	71
3. Rule 16(a)(1)(A)—Defendant’s Oral Statements	71
a. “Oral” Statement	72
b. “Substance of the Statement”	73
c. Relevance	74
d. Statement Made by the Defendant	75
e. Before or after Arrest	76
f. Statement Made to a Known Government Agent in Response to Interrogation	76
g. Government’s Intent to Use the Statement at Trial	78
4. Rule 16(a)(1)(B)—Defendant’s Written or Recorded Statements	80
a. Written or Recorded Statement by the Defendant	81
(i) Relevance	81
(ii) “Written or Recorded Statement”	83
(iii) Government’s Possession, Custody, or Control	83
(iv) Knowledge or “Due Diligence”	87
b. Written Record Containing the Substance of the Defendant’s Statement in Response to Interrogation by a Known Government Agent	89
c. The Defendant’s Grand Jury Testimony	90
5. Rule 16(a)(1)(C)—Organizational Defendants	91
6. Defendant’s Prior Criminal Record	93
7. Documents and Objects	96
a. Threshold Requirements	97
(i) Writings or Tangible Things	97
(ii) Government’s “Possession, Custody, or Control”	99
b. Categories of Discoverable Documents and Objects	99
(i) Items “Material to Preparing the Defense”	99
(a) <i>United States v. Armstrong</i>	100
(b) Meaning of “Material”	102
(c) Defendant’s Request	105
(d) Burden to Show Materiality	106
(e) Material Buildings or Places	108
(ii) Documents to Be Used in the Government’s Case-in-Chief	108
(a) Obligation to Specify Documents for Use at Trial	108
(b) Government’s Case-in-Chief	111
(c) Government’s Intent	111
(d) “Use”	112
(iii) Defendant’s Documents	114
c. Inspection and Copying	115

8. Reports of Examinations and Tests	119
a. Covered Examinations, Tests, and Experiments	120
b. “Results or Reports”	121
c. Conditions for Disclosure	123
d. Other Considerations	124
9. Expert Witnesses	124
a. Conditions for Disclosure	125
(i) Defendant’s Request	125
(ii) Government’s Intent to Use during Case-in-Chief	126
(iii) Expert Testimony versus Lay or Fact Testimony	127
b. The “Written Summary”	130
(i) Summary of Opinions and Their Bases and Reasons	130
(ii) Statement of the Witness’s Qualifications	134
(iii) Method of Production	135
c. Reciprocal Expert Discovery Regarding Defendant’s Mental Condition	136
B. Express Limitations on Discovery from the Government	137
1. The Work-Product Exception	139
a. Common-Law Work-Product Protection in Criminal Cases	139
b. Scope of Immunity for “Work Product” under Rule 16(a)(2)	140
c. Waiving and Overcoming Work-Product Protection	143
d. Privileges and Redactions	146
2. Witness Statements	147
3. Grand Jury Transcripts	148

### CHAPTER 3

#### **Rule 16 of the Federal Rules of Criminal Procedure— Part Two: Discovery from the Defendant, Continuing Duties, and Court Oversight**

A. Rule 16(b) Discovery Available from the Defendant	151
1. Constitutional and Fairness Considerations	151
2. The 1975 Amendments to Rule 16	153
3. Defendant’s Request for Discovery and Government’s Compliance	156
4. Timing of Reciprocal Discovery	158
5. Documents and Objects to Be Used at Trial	159
a. Documents for Use in Defendant’s Case-in-Chief	160

b. Documents and Tangible Things	161
c. Defendant's Possession, Custody, or Control	162
d. Defendant's "Intent"	162
6. Reports of Examinations and Tests	165
7. Expert Witnesses	168
B. Express Limitations on Discovery from the Defendant	170
1. Comparison with Subsection (a)(2)	171
2. Exception for Scientific and Medical Reports	173
3. Documents Made by the Defendant or the Defendant's Agent during the Investigation or Defense	174
4. Statements to the Defendant or the Defendant's Agent	176
C. Continuing Duties of Disclosure	179
1. Duty to Supplement Disclosure	179
2. Timing and Manner of Disclosure	182
D. The District Court's Authority to Regulate Discovery	183
1. Protective and Modifying Orders	184
a. Good Cause	185
b. Ex Parte Showings	186
c. District Court's Discretion under Rule 16(d)(1)	187
2. Remedying Rule 16 Violations	191
a. Available Remedies	192
b. Punitive Remedies	195

## CHAPTER 4

<b>Witness Statements</b>	<b>197</b>
A. History of the Jencks Act	198
1. <i>Jencks v. United States</i>	198
2. Congress's Response—18 U.S.C. § 3500	200
3. Federal Rule of Criminal Procedure 26.2	202
B. Disclosures Required under Rule 26.2 and the Jencks Act	205
1. Meaning of "Statement"	205
a. Written Statements Made and Signed, Adopted, or Approved by the Witness	206
b. Substantially Verbatim Records Contained in a Recording or Transcription	211
c. Statements to a Grand Jury	212
2. Additional Limitations on Discoverability of Statements	212
a. Statement of the Witness	213

b. Statements That Relate to the Subject Matter of the Witness's Testimony	214
c. Possession of Statements	215
C. Timing of Jencks Disclosures and Motions to Produce	215
1. Timing of Disclosures	215
2. Motions to Produce Statements	218
D. Procedural Considerations	219
1. Adjudicating Disputes about Whether Material May Be Discoverable	219
2. Producing Portions of Documents	220
E. Sanctions for Failing to Produce a Statement	221
F. Interaction between Jencks and <i>Brady</i>	223

## CHAPTER 5

### Subpoenas for Documents 225

A. Standards for Obtaining Documents by Subpoena	227
1. <i>Bowman Dairy</i>	229
2. <i>Nixon</i>	231
3. Applying the <i>Nixon</i> Test	234
a. Relevancy	234
b. Admissibility	235
(i) Standards for "Admissibility"	235
(ii) Contingent Admissibility; the Problem of Impeachment Evidence	237
(iii) Other "Admissibility" Issues	240
c. Specificity	240
d. Burden on the Subpoena Recipient	243
e. Subpoenas Returnable Pretrial	244
f. Other Restrictions on Rule 17(c) Subpoenas	246
4. Limits of the <i>Nixon</i> Test	248
a. Should the <i>Nixon</i> Test Apply to Third-Party Subpoenas?	249
b. Should the <i>Nixon</i> Test Apply to Subpoenas for Evidence Material to the Defense?	251
B. Obtaining or Challenging a Subpoena	254
1. Obtaining a Pretrial Subpoena	254
a. Motion Required	254
b. Procedure on Motion; Ex Parte Motions	256
2. Obtaining a Trial Subpoena	258
a. No Motion Required	258

b. Rule 17(c)(3)	258
c. Subpoenas Directed to Lawyers	260
3. Motions to Quash or Modify Subpoenas	261
a. Standards and Procedures for Motions to Quash or Modify	261
b. Materials Considered; In Camera Review	262
c. “Modifying” a Subpoena	263
d. Standing to Challenge Subpoenas	264
C. Return of Subpoena	265
D. Logistical Matters	267
1. Form and Service of Subpoenas	267
2. Subpoena Expenses and Cost-Shifting	270

## **CHAPTER 6**

### **Other Federal Rules and Statutes Permitting or Requiring Discovery**

	<b>273</b>
A. Notice of Alibi: Rule 12.1	274
1. Historical Context	274
2. Requirements of Rule 12.1	276
a. Government Request for Notice of Alibi Defense	276
b. Defense Obligation	276
c. Government Reciprocal Obligation	277
d. Continuing Duty to Disclose New Information and Exceptions to the Rule	278
e. Inadmissibility of Notice of Alibi Defense	278
3. Exclusion of Witnesses	279
a. Generally	279
b. Exclusion of Witnesses for Government Noncompliance	280
c. Exclusion of Witnesses for Defense Noncompliance	280
d. Newly Discovered Witnesses	282
B. Notice of Insanity Defense: Rule 12.2	282
1. Historical Context	282
2. Requirements of Rule 12.2	282
a. Defense Obligation to Notify of Insanity Defense	282
b. Defense Obligation to Notify of Expert Evidence of Mental Condition	283
c. Mental Examinations	283
d. Inadmissibility of Mental Condition Notice and Statements during Mental Examination	284
3. Sanctions for Noncompliance	286

C. Notice of Public Authority Defense: Rule 12.3	287
1. Historical Context	287
2. Requirements of the Rule	288
a. Defense Obligation	288
b. Government Obligation	288
c. Continuing Duty and Additional Time	289
d. Inadmissibility of Withdrawn Intention	289
3. Sanctions for Noncompliance	289
D. Notice of Evidence the Government Intends to Use in Its Case-in-Chief: Rule 12(b)(4)(B)	290
E. Depositions: Rule 15	292
1. Unavailability of the Witness	295
2. Materiality of the Testimony	299
3. Other Factors	300
4. Depositions by Consent	302
F. Grand Jury Material: Rule 6(e)	302
1. Scope of Grand Jury Secrecy	303
a. Matters Occurring before the Grand Jury	303
b. Limits of Grand Jury Secrecy	304
2. Means of Obtaining Material under Rule 6(e)	305
a. Rules 16 and 26.2 (Jencks)	305
b. Disclosure under Rule 6(e)(3)(E)	306
3. “Particularized Need”	306
4. Disclosure “Preliminary to or in Connection with a Judicial Proceeding”	308
5. Disclosure to Support a Claim That the Indictment Should Be Dismissed	310
G. Disclosure under Evidence Rule 404(b) and Other Federal Rules of Evidence	313
1. Other Crimes, Wrongs, or Acts: Rule 404(b)	313
2. Other Evidence Rules	319
a. Past Sexual Behavior: Rule 412	319
b. Convictions More Than Ten Years Old: Rule 609	319
c. Writings Used to Refresh Memory: Rule 612	320
d. Residual Exception to the Hearsay Rule: Rule 807	322
e. Summary Charts: Rule 1006	323
H. Title III—Electronic Surveillance	324
1. Disclosing the Surveillance “Inventory”	324
2. Disclosing Electronic Surveillance and the Application for and Court Order Approving the Electronic Surveillance	326



I. The Freedom of Information Act	329
1. Exemptions from Disclosure	329
2. Timing	332
3. Using FOIA to Obtain Records	333

## **CHAPTER 7**

<b>Inherent Authority</b>	<b>335</b>
A. The Basis for Inherent Authority	336
1. Inherent Authority Generally	336
2. Inherent Authority as Applied to Criminal Discovery	337
3. Scope and Limits of Inherent Authority	340
B. Witness Lists	346
1. Witness Lists under the Federal Rules	346
2. Inherent Authority to Order Disclosure of Witnesses	348
a. Court May Apply a Balancing Test	348
b. List Limited to Case-in-Chief Witnesses	350
c. Government Requests for Defense Witness Lists	350
C. Confidential Informants	352
1. <i>Roviaro v. United States</i>	352
2. Applying <i>Roviaro</i> 's Balancing Test	354
a. Degree to Which the Confidential Informant Was Involved in the Alleged Conduct Giving Rise to the Indictment	355
b. Whether the Informant Has Information That Supports the Defense	356
c. Government's Interest in Withholding the Informant's Identity	356
3. Making the Informant Available to the Defense	357
D. Physical Identifying Evidence of the Defendant: Handwriting Exemplars, Voiceprints, and Fingerprints	359

## **CHAPTER 8**

<b>Discovery Obligations under Ethical Rules</b>	<b>363</b>
A. Rule 3.8(d) Applies to Federal Prosecutors Practicing in States That Have Adopted It	364
B. Information Favorable to the Defense: ABA's Model Rule of Professional Conduct 3.8(d)	365
C. Rule 3.8(d) in the Courts and before Disciplinary Authorities	370

**CHAPTER 9****Department of Justice Criminal Discovery Policies 373**

- A. The Justice Manual 374
  - 1. What Must Be Disclosed 374
  - 2. Where to Look 375
  - 3. Timing 377
  - 4. Enforcement 378
- B. Department of Justice's 2010 Discovery Guidance 378
  - 1. Gathering and Reviewing Discoverable Information 379
    - a. Where to Look 379
    - b. What to Review 380
  - 2. Conducting the Review 381
  - 3. Making the Disclosure 381
  - 4. Making the Record 382

**CHAPTER 10****Special Considerations: Witness Safety and National Security 383**

- A. Witness Safety 383
  - 1. Rule 16(d)(1) Protective Orders 383
  - 2. Confidential Informants 384
- B. National Security: The Classified Information Procedures Act 385
  - 1. Purpose of CIPA 385
  - 2. What Information Is Confidential 386
  - 3. Pretrial Conferences 386
  - 4. Procedure for Protective Orders 387
  - 5. Standard for Restricting Discovery of Classified Material 387
  - 6. Defendant's Notice of Intent to Use Classified Information 392
  - 7. Use of Classified Information at Trial or Pretrial Hearing 393
  - 8. Interlocutory Appeal 396

<b>CHAPTER 11</b>	
<b>Enforcement and Sanctions</b>	<b>397</b>
A. Remedies Governed by Rule or Statute	398
1. Rule 16	398
2. Jencks	399
3. Remedies beyond What the Rules Provide	399
B. <i>Brady</i> , Due Process, and Supervisory Powers	400
1. <i>Brady</i>	400
2. Due Process and Supervisory Powers	403
a. Government Misconduct That “Shocks the Conscience”	403
b. Government Misconduct and Supervisory Powers	404
c. Sanctioning the Defendant	404
C. Methods of Enforcement and Sanctions	406
1. Remedial Orders	406
2. Punitive Sanctions	408
a. Striking or Excluding Evidence	409
b. Punitive Jury Instruction	411
c. Dismissal	412
D. Contempt	414
<b>Table of Cases</b>	<b>417</b>
<b>Index</b>	<b>449</b>