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### Forward: Defining and Enforcing the Federal Prosecutor's Duty to Disclose Exculpatory Evidence

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# Foreword

## Defining and Enforcing the Federal Prosecutor's Duty to Disclose Exculpatory Evidence

by James P. Fleissner\*  
and Patrick Emery Longan\*\*

Mercer University's Walter F. George School of Law was pleased to host the Thirteenth Annual Georgia Symposium on Ethics and Professionalism on October 4th and 5th, 2012. This series of symposia was made possible by the vision of the Honorable Hugh Lawson, United States District Judge for the Middle District of Georgia. In 1999, Judge Lawson oversaw the settlement of a matter involving allegations of

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litigation misconduct, and as part of the settlement, four of Georgia's law schools each received an endowment to fund symposia dedicated to ethics and professionalism. The symposium series began in 2001 and rotates among Mercer University, Georgia State University, the University of Georgia, and Emory University.

For several reasons, we chose the topic of the federal prosecutor's duty to disclose exculpatory evidence—commonly known as the *Brady* obligation in homage to the Supreme Court case that created it. First, there have been several high-profile cases in recent years in which prosecutors have been found by courts to have not fulfilled their *Brady* obligations, the most notorious being the prosecution of former United States Senator Ted Stevens.<sup>1</sup> Second, Congress has turned its attention to the issue. In 2012, Senator Murkowski introduced the Fairness in Disclosure of Evidence Act “[t]o require the attorney for the Government to disclose favorable information to the defendant in criminal prosecutions brought by the United States, and for other purposes.”<sup>2</sup> The introduction of the Murkowski bill, which was the subject of a Senate Judiciary Committee hearing in 2012, highlighted the need for robust debate on the merits of federal criminal discovery reform and the alternative approaches to achieving that end. Third, we sought to use the occasion to feature Mercer's expertise and emphasis on criminal procedure, as exemplified particularly by its new LL.M. Program on Federal Criminal Practice and Procedure.<sup>3</sup>

The Symposium began with a dinner and welcoming keynote by Andrew Goldsmith, the National Coordinator of Criminal Discovery Initiatives for the United States Department of Justice. Mr. Goldsmith described the efforts of the Department of Justice, under Attorney General Eric Holder, to educate federal prosecutors about their discovery obligations and to ensure that those obligations are being fulfilled. He communicated the Department of Justice's position that discovery violations are rare, current remedial measures are sufficient, and further reform efforts are unnecessary and potentially harmful to law enforcement.

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1. The court that oversaw the *Stevens* case commissioned attorney Henry Schuelke to investigate and report on the allegations of prosecutorial misconduct. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2009, In re Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012), available at [http://legaltimes.typepad.com/files/Stevens\\_report.pdf](http://legaltimes.typepad.com/files/Stevens_report.pdf).

2. S. 2197, 112th Cong. (2012), available at <http://www.govtrack.us/congress/bills/112/s2197/text>.

3. *LL.M. Program*, ACADEMIC PROGRAMS, <http://law.mercer.edu/academics/llm> (last visited Mar. 5, 2003).

The next day we had four panels, each with a principal speaker and two responders. Bruce Green, the Louis Stein Professor at Fordham Law School, presented his paper regarding the legislative approach to federal criminal discovery reform. His responders were Professor Fleissner and Peter Joy, Hitchcock Professor of Law at Washington University. Professor Bennett Gershman from Pace University School of Law spoke regarding "Lessons from the Schuelke Report," and his responders were Marc Treadwell, United States District Judge for the Middle District of Georgia, and Seth Kirschenbaum, a former Assistant United States Attorney who is now a prominent defense lawyer in Atlanta. Professor Kevin McMunigal, the Ben C. Green Professor of Law at Case Western University School of Law, made his presentation about the best way to enforce the *Brady* obligation and, in particular, discussed using punishment, education, or both. His responders were Professors Jennifer Laurin of the University of Texas School of Law and Roberta Flowers of Stetson University College of Law. We finished the day with a session led by Rory Little, Professor of Law at the Hastings College of Law, regarding the American Bar Association Criminal Justice Standards. Cynthia Roseberry, Executive Director of the Federal Defender for the Middle District of Georgia, and Charysse Alexander, the Executive Assistant United States Attorney for the Northern District of Georgia, provided the responses.

We hope the proceedings and the articles that follow will contribute meaningfully to the ongoing debate about the best ways to define and enforce the federal prosecutor's obligation to turn over exculpatory evidence. The prosecutor occupies an inherently difficult position in our system of justice. The Assistant United States Attorney has the power of the federal government behind him or her and is duty-bound to be an advocate for the government. Yet we expect, and have a right to expect, that this lawyer will understand and respect that prosecutors ultimately are "ministers of justice" and will routinely deliver evidence to adversaries in full knowledge that the evidence may lead to defeat of the government's case. That is asking much of a lawyer. The least we can do for that lawyer, from whom so much is expected, is to provide clear guidance about the scope of the duty of disclosure. The least we can do for defendants, whose constitutional rights to due process are at stake, is not only to provide that guidance but also to find the best means of enforcing the obligation. Academic discussions and symposia occur far from the arena, but we hope this Symposium was one step toward a better understanding of the scope of the *Brady* obligation and a more reliable means of enforcing it.

We wish to extend our thanks to all the speakers who were with us for the Symposium and to the Mercer Law Review members who made sure

the proceedings went smoothly. We are grateful to Judge Lawson for his leadership and generosity in the creation of the endowment for these symposia. Finally, as always, we extend our thanks to Yonna Shaw, without whom neither the event nor this publication could have occurred.