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# The Brady Rule: Has Anyone Here Seen Brady, 6 J. Marshall J. of Prac. & Proc. 77 (1972)

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# THE BRADY RULE: HAS ANYONE HERE SEEN BRADY?†

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In 1963 the United States Supreme Court decided *Brady v. Maryland*,[1] a constitutionally triumphant decision, stating:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[2]

This important decision, which was partially concealed beneath the surface of a busy and turbulent term, was soon to be applauded by legal scholars all over this country. The coming of this long-awaited rule of law could be foreseen in earlier Supreme Court decisions. The awful spectre of prosecutorial suppression had stalked across the pages of those decisions for more than a decade.[3] Thus, the *Brady* rule was pulled by the Supreme Court, yelling and screaming, into an unenlightened age of criminal discovery.

The principal impulse for *Brady* grew out of an acknowledgment by the Supreme Court that the defendant's facilities for gathering evidence are greatly disproportionate to those of the Government's. Since the average defendant has neither the manpower nor resources available to the Government in its investigation of crime, the state is obliged to share the proceeds of its discoveries with the defense where that evidence is favorable to the latter's cause. The duty of law enforcement agencies to conduct an impartial investigation and collect all the evidence relating to the commission of an offense is manifest. When a person is ultimately charged with a crime, the findings of the police should be equally available to him as to the prosecution. The Government's responsibility to the defendant is no less than the duty it owes to any other member of society, for the investigation of crime should be designed not only to convict the guilty but to free the innocent.

No informed person can be other than unhappy about the

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[1] 373 U.S. 83 (1963).

[2] *Id.* at 87.

[3] Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28

serious defects in the present state of discovery in American criminal procedure. Today the only effective means of criminal discovery for the defense lawyer is the interview with his client. In this dark age of discovery, *Brady* assumes great importance. However, the reform of criminal procedure embarked upon by the Supreme Court under the able leadership of Chief Justice Earl Warren has apparently come to an end, and so, too, has the expansion of the *Brady* doctrine. Recent Supreme Court decisions are beginning to reflect entirely too little concern for the inherent inequality of the litigating positions between a defendant and the Government. Therefore, this article is designed to expose the decline of the authority of *Brady* and suggest what lawyers may do to stave off its further deterioration.

First, it must be understood that *Brady* acknowledged the prosecution's advantage in its search for evidence by reason of the special powers it possesses. For instance, there are many occasions when witnesses feel obliged to talk to the FBI or police but will not speak to defense counsel. Furthermore, witnesses who are not inclined to speak to either side can be forced by the state to testify before a grand jury under the compulsion of a subpoena. These discovery devices are unavailable to the defense. The imbalance of these investigatory facilities inevitably harms the defendant and can lead to an ill-prepared defense and therefore an unfair trial. It was this obvious inequity that led to the birth of *Brady*. Since the advent of *Brady* signaled a new era in criminal procedure, the history of its progeny should be briefly traced.

As a prelude the Supreme Court decided *Napue v. Illinois*,[4] wherein the Court held that a lie told by a government witness, which did not concern any of the facts of the case but involved his credibility, tainted the conviction and necessitated a new trial. In *Napue* the witness testified that no one had promised him consideration for his testimony, when in fact an assistant district attorney had. The Court, in scalding language, denounced the Government for this failure of disclosure, and reversed Napue's conviction.

More recently, the Supreme Court again struck out at prosecutors in *Giglio v. United States*,[5] reprimanding them for not divulging a witness' known false testimony in a situation almost identical to *Napue*. The prosecution in *Giglio* was forced to acknowledge that an assistant United States attor-

(1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

[4] 360 U.S. 264 (1959).

[5] 405 U.S. 150 (1972).

ney promised the witness he would not be prosecuted if he cooperated, but the assistant who tried the case pleaded his unawareness of that promise. The Court, in rejecting this excuse, emphasized:

> The prosecutor's office is an entity and, as such, it is the spokesman for the government. A promise made by one attorney must be attributed, for these purposes, to the government.[6]

Thus, *Giglio* expanded the frontiers of *Brady* by bringing within its territorial limits the principle that the state cannot stand by and allow false testimony to go uncorrected, even though unsolicited, and cannot escape the responsibility of the actions of one attorney in the United States Attorney's office, even though disavowed by another.

However, further growth of the *Brady* rule was stunted by the Burger Court in *Moore v. Illinois*,[7] a murder case arising in Cook County, Illinois. There the petitioner, convicted of the shotgun slaying of a bartender, contended that he was denied due process because the state failed to disclose a favorable pretrial statement and a diagram demonstrating that a key government witness could not have seen the shooting. The Court, dramatically divided, rejected the petitioner's *Brady* claims, holding that in light of all the evidence, the misidentification of the petitioner by only one witness was not material to the issue of guilt.

Significantly, in *Moore* the prosecution "presented its entire file to the defense, and no further request for disclosure was made."[8] The Court made clear its intention to adhere to the principles of *Brady* and *Giglio*, but felt "that the present record embraces no violation of those principles."[9]

The majority opinion in *Moore* drew an infuriated dissent from Justice Marshall, joined by Justices Douglas, Stewart, and Powell. Lashing back at the majority, Justice Marshall exclaimed:

> There can be no doubt that there was suppression of evidence by the state and that the evidence the state relied on was 'false' in the sense that it was incomplete and misleading.
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> . . . .
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> My reading of the case leads me to conclude that the prosecutor

[6] *Id.* at 154.

[7] 408 U.S. 786 (1972).

[8] *Id.* 795. Apparently the statement which became the subject of this appeal was inadvertently overlooked by the prosecutor. Government counsel stated that either it was not in his file when delivered to the defense attorney or may have been unseen by the defense lawyer.

[9] *Id.* at 789. *Moore*, more than any other case, demonstrates the change in the chemistry of the Supreme Court and its attitude toward the enforcement of certain constitutional rights.

> knew that evidence existed that might help the defense, that the defense had asked to see it, and that it was never disclosed.[10]

Although the Supreme Court in *Moore* left the *Brady* rule intact, they reshaped it somewhat by stating:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence is of a favorable character for the defense, and (c) the materiality of the evidence.[11]

This sentence, overcrowded with precepts, forms the center of gravity of the *Brady* rule. Clearly, the evidence suppressed must be favorable and material on the issue of guilt or punishment and must be requested by defense counsel.

However, there are cases where the Government's concealment of favorable evidence was so shocking that the Court was forced to reverse the conviction even though defense counsel had not specifically demanded the production of that proof.[12]

Some prosecutors and courts have a bad habit of using the word "exculpatory" in defining *Brady* material. Although that word was used in the *Brady* opinion, the restatement of the rule in *Moore* clearly relates to "favorable" evidence. Obviously, there is a vast difference between "favorable" evidence and that which is "exculpatory."

Since the *Brady* decision, as analyzed in *Moore,* appears to be terminal, the questions which inevitably follow in the path of this decree essentially involve details of implementation.

## Implementing Brady

Since the request requirement, as a predicate to the invocation of the *Brady* injunction, was reinforced in *Moore,* every lawyer should make a demand for all *Brady* material in advance of trial. This is easily accomplished in a pre-trial motion requesting all evidence in the Government's possession or under its control which is favorable to the defense.

Possible areas where favorable evidence might be located should be specified. For instance, in a bookmaking case counsel may be able to say that he suspects witnesses have been inter-

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[10] *Id.* at 808, 810.

[11] *Id.* at 794.

[12] Miller v. Pate, 386 U.S. 1 (1967); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); United States *ex rel.* Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963); Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955); People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885 (1956).

viewed who have designated the defendant as a bettor rather than an acceptor of wagers. In a robbery case, the suggestion may be made that witnesses may have been interviewed who were unable to identify the defendant as the one who committed the robbery. Honest suggestions of this nature which can be made in good faith are limitless and achieve two purposes: (1) they alert the prosecution to areas of evidence which should be reviewed by him, and (2) these specific demands may embarrass the overzealous prosecutor into divulging statements of a favorable nature.

It would seem that the record of criminal convictions of government witnesses or any other information useful for impeachment purposes should come well within the reach of the *Brady* principle.

Counsel should stress to the court that the *Brady* material must be delivered before trial so that he might effectively use it. There are occasions when witnesses will have to be interviewed, documents secured, or time consumed in pursuing other investigatory leads. Furthermore, there is no valid reason why evidence favorable to the defense should not be disclosed before trial, since it should result in no prejudice to the Government. However, in most instances, courts, for one reason or another, have been reluctant to require the prosecution to produce *Brady* material at this early stage. Consequently, counsel should repeat his *Brady* demands during the course of the trial.

Usually, the court, acting on a *Brady* request, will require government counsel to deliver to the defense any material it considers favorable. This procedure should be strenuously objected to, and counsel should request that all unused evidence in the Government's file be turned over to the defense so they may decide whether or not it is favorable. This difficult judgment process should properly be left to the singlemindedness of defense counsel, as pointed out so well in an analogous situation in the famous *Jencks* case.[13] No one but defense counsel can be trusted with this decision. Counsel may want to advise the court that if there are names of secret informers or other information traditionally not subject to disclosure, such information may be withheld.

Since this procedure is usually unacceptable to the court, counsel, as a last resort, should have the government's file marked as a court exhibit and delivered to the presiding judge so that he may conduct an independent investigation to determine whether it contains any favorable evidence. Requiring the

[13] Jencks v. United States, 353 U.S. 657 (1957).

prosecutor to deliver the file to the court for judicial examination will often have the effect of producing one or two more statements favorable to the defense. Counsel should remind the court that witnesses who have appeared before the grand jury, and may have given favorable evidence, fall well within the precincts of the *Brady* rule. Therefore, grand jury testimony should be produced and marked as a court exhibit for preservation in the record in the event of appellate review.

The effective use of the *Brady* maxim is only limited by the boundaries of a trial lawyer's imagination. Recently, in a case in Cleveland,[14] counsel demanded, under the authority of *Brady*, the findings of the Government's investigation of trial jurors. The claim was made that the discovery of favorable facts in the background of a given juror should be delivered under the spirit and purview of *Brady*. Although the court rejected this claim, a complete record was made of counsel's demands. Because of the disposition of the case, however, the issue was never reviewed.

A more practical application may occur in a large metropolitan city like New York, where the district attorney in questioning a juror discovers that he served on another case in that courthouse, but defense counsel is uninformed as to the outcome of that matter. It would seem that under the spirit of *Brady* the disposition of that case should be divulged if the prosecutor has that information available to him. Counsel should persist in his *Brady* demands whenever possible during a trial, designating crevices in the case where favorable evidence might be found.

Under the *Napue* and *Giglio* interpretations of *Brady*, counsel should demand that the Government disclose to the defense any witnesses who have testified either falsely or erroneously. The use of this important precedent is all too often overlooked by defense counsel. In any complicated trial involving a large number of government witnesses, it is hard to imagine a case where the Government is not going to have at least one witness who testifies falsely about a certain fact, the truth of which is known to the Government.

When the Government discloses *Brady* material which exonerates the defendant, counsel should inquire whether that evidence was presented to the grand jury which indicted the defendant. If it was not, counsel should move for a dismissal of the indictment on the ground that the Government has an obligation to submit all evidence to an investigating grand jury.

[14] United States v. Connoisseur Publications, Ind. No. 68-319 (N.D. Ohio 1972).

## RECENT DEVELOPMENTS UNDER BRADY

The co-existence of *Brady, Napue, Giglio,* and *Moore* has spawned a mass of authority which is beginning to reach unmanageable proportions. It would be hazardous to attempt to formulate any principles from this large collection of cases, except to say that the Supreme Court's recent restrictive treatment of *Brady* is beginning to spread into the lower courts. These decisions have left anything but a clear-cut trail. Indeed, a dangerous concept which could effectively emasculate the *Brady* rule is beginning to infiltrate into this body of law. In a number of cases, circuit courts have found that the Government had suppressed certain evidence, but fancying themselves as trial strategists, these appellate courts have concluded that divulgence of this evidence at trial would not have changed the result.[15]

In the Second Circuit, where *Brady* has suffered its greatest damage, the court has openly said that the appellant must show that the suppressed evidence "would probably have produced a different verdict."[16] This mutation of the *Brady* rule loses sight of what actually causes the defendant's prejudice: the grave disparity between investigatory facilities. Consequently, the real damage is achieved before the trial or in the early stages of the litigation, and it is to that period, rather than the highly speculative impact on the jury, that the court's attention should be addressed.

Surely the Government's suppression of favorable evidence, as in the confession cases, has a dramatic impact upon the integrity of the jury's verdict. Suppression of such evidence should require a new trial in every case. This rationale was adopted in a number of well reasoned cases.[17]

If the *Brady* rule is to be demeaned by making its application turn on the facts of each case, courts will have created the *Betts*[18]*-Brady* brand of nightmare and an open invitation to perennial appellate review.

In a case relied upon by the Supreme Court in *Napue,* this claim was rejected as out of hand:

> A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Nor does it avail [the state] . . . to contend that defendant's guilt

[15] United States v. Keogh, 391 F.2d 138 (2d Cir. 1968); Kyle v. United States, 297 F.2d 507 (2d Cir. 1961).

[16] Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961).

[17] United States *ex rel.* Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); United States *ex rel.* Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963); Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963).

[18] 316 U.S. 455 (1942).

> was clearly established or that disclosure would not have changed the verdict . . . we may not close our eyes to what occurred; regardless of the quantum of guilt or the asserted persuasiveness of the evidence, the episode may not be overlooked.[19]

The Second Circuit, however, in a later case, shouting from the bottom of the legal pit it had dug for itself in *Kyle* and *Keogh*,[20] attempted partial restitution by holding:

> Due process requires, however, that a different rule be applied when prosecutorial suppression has caused the evidence not to be presented at trial. At least where the suppression is deliberate, the defendants need only show that the evidence is material and could, in any reasonable likelihood, have led to a different result on retrial . . . .
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> . . . .
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> In these cases, where there has been a considered opinion to suppress and where the 'value of the information could not have escaped the prosecutor's attention' . . . it is not necessary to engage in any exact determination of the degree of prejudice to the defendants.[21]

The Second Circuit has also treated differently those cases in which a request was made for *Brady* material and ignored by the prosecution, and those situations where no demand was made. For instance, the court in *Keogh* pointed out:

> [T]o invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system. The request cases also stand on a special footing; the prosecution knows of the defense's interest and, if it has failed to honor this even in good faith, it has only itself to blame.[22]

This twofold rule should impress upon counsel the critical importance of making a broad and comprehensive demand for *Brady* material both before and during trial.

In an effort to preserve the *Brady* rule, counsel should persuade appellate judges to resist the temptation of becoming trial strategists and of deciding the usefulness of any particular piece of evidence to the defense. When the court engages in these tactics, it plays a dangerous game with jurisprudence. Surely defense counsel is in a much better position to decide how this concealed evidence would be helpful to his client. A reasonable doubt can be created in a juror's mind by the smallest piece of evidence or a single word. When guilt or innocence

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[19] People v. Savvides, 1 N.Y.S.2d 554, 557, 154 N.Y.S.2d 885, 887 (1956). *See also* Judge Magruder's concurring opinion in Coggins v. O'Brien, 188 F.2d 130, 139 (1st Cir. 1951).

[20] Note 15 *supra*.

[21] United States v. Mele, 462 F.2d 918 (2d Cir. 1972).

[22] 391 F.2d at 148.

trembles in the trial balance, the slightest impeaching evidence may alter the scales, turning defeat into victory. If this practice engaged in by appellate judges continues unabated, *Brady* will inevitably lose much of its meaningfulness to an accused.

Counsel should also argue that if appellate courts continue to turn their backs on these official misadventures engaged in by prosecutors, they will have sponsored prosecutorial irresponsibility. The only way these disgraceful failures in the administration of justice can be corrected is by reversing convictions and granting new trials.

Despite repeated warnings by appellate courts against these tactics, prosecutors persist in exploiting the unfair advantage of withholding evidence they believe is harmful to their cases. If they are not taught once and for all that this conduct will not be tolerated, these abuses are bound to continue. No greater responsibility rests with any court than that of insuring the fair prosecution of criminal cases.

Another trend emerging in some decisions subverting the *Brady* doctrine involves the defendant's knowledge of the favorable evidence. A number of courts have seized upon collateral language from a concurring opinion in *Giles v. Maryland*,[23] a descendant of *Brady*, providing: "[A]ny allegation of suppression boils down to an assessment of what the State knows . . . in comparison to the knowledge held by the defense."[24] Accordingly, courts have held that if a defendant knows of the existence of favorable evidence, the Government has no duty to disclose this material in their file.[25] Although there appears to be a surface logic in these decisions, a closer inspection shows that they are constructed on a faulty premise, which substantially undermines the validity of the conclusions reached. There are many occasions when the defense may know of the existence of witnesses, or even possible documentary evidence in the form of police records, but that evidence is unavailable. More often than not, the witnesses will not speak to defense counsel, and the subpoenaing of some forms of police records is impracticable. Therefore, these decisions of low visibility have inflicted critical wounds on the *Brady* rule. It will thus be all too easy for prosecutors now to argue, in instances where evidence has been withheld, that the defense had or should have had knowledge of those sources.

In this area of controversy, the only constitutionally accep-

[23] 386 U.S. 66 (1967) (White, J. concurring).

[24] *Id.* at 96.

[25] United States v. Ruggiero, 469 F.2d 1404 (2d Cir. 1973), *aff'd*, 308 F. Supp. 798 (S.D.N.Y. 1970); Moynahan v. McDonald *et al*, 471 F.2d 700 (2d Cir. 1973); *see, e.g.*, Xydas v. United States, 445 F.2d 660 (D.C. Cir. 1971).

table rule should be based upon a clear showing that the concealed evidence was not only known to the defense, but was also available and easily producible at trial. For instance, where witnesses cannot be found or will not speak to defense counsel, there is no valid reason why, under *Brady's* mandate, this evidence should not be divulged to the defense. If these senseless distinctions are allowed to continue to debase the *Brady* rule, it will eventually lose its impact as a working legal principle.

## CONCLUSION

Courts must hold prosecutors to their duty to conduct themselves as seekers of justice, rather than advocates privileged to win their cases by any means available. Civilized standards of justice require that prosecutors reveal all evidence which may have any value to the defense if the concept of fair trials is to remain meaningful. Allowing prosecutors and judges to decide what evidence will be helpful to the defense desperately interferes with the adversary process. In most instances the delivery of the requested evidence is not harmful to the Government but, on the other hand, is usually most helpful to the accused. Withholding *Brady* evidence from the defense is inexcusable.

Today the Government's monopoly of investigative agencies in criminal cases means that a defendant faces a far more efficient fact-gathering adversary than he did a decade ago. Prosecutors are now in a better position than ever to hinder a defendant's access to witnesses before trial. Under these frightening circumstances, the *Brady* doctrine assumes even greater importance, and must not be allowed to deteriorate.

Finally, it must be said that in today's constitutional climate there is little an accused can find to please him in the current developments in the criminal trial process. The greatest challenge facing the courts today is one of avoiding indifference and steeling themselves against the hysterical cry of the crowd for law and order. Today, in the zeal to punish offenders either identified with organized crime, or those who appear to be guilty, appellate courts have occasionally resorted to unworthy means in affirming convictions. The disingenuous treatment of precedent and the slipshod handling of case facts are becoming all too common. These unfortunate techniques are often employed to rationalize results that otherwise could not be legally justified. Our courts must resist these temptations and bravely meet these challenges. And when they succeed, as we know they can, courage and leadership will have played a significant part in this profound achievement.