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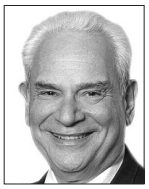
WHITE-COLLAR CRIME

Expert Analysis

'Brady' Obligations In the Twenty-First Century

We regret to inform you of news about violations of the principle of *Brady v. Maryland*. No, you have not inadvertently picked up an old copy of this newspaper. The steady stream of cases reversed for prosecutorial violations of the duty to disclose exculpatory evidence continues unabated. That this should happen in the federal system is remarkable, because federal prosecutors for the most part get to choose the cases they bring, unlike their state counterparts, who have cases from the street thrust upon them by arresting officers.

And, perhaps more remarkable is that a majority of the U.S. Supreme Court recently turned a blind eye to the issue in a case that presented a depressing picture of the mind-set that appears to exist among prosecutors. What explains this departure by some prosecutors from the standards of fairness and decency? Is it "trickle-down American exceptionalism" in which the "we're number one" mentality is a precursor to a run for public office or the grab for the golden ring in private practice? Particularly in an era of draconian sentences in white-collar cases, it is time for a wholesale reevaluation of disclosure and discovery in criminal cases.



By **Elkan Abramowitz**

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Prosecutorial Failures

In *Brady v. Maryland*, the Supreme Court held that the prosecution's suppression of evidence "favorable to an accused" violates due process where such evidence is "material either to guilt or punishment."[1] In *Giglio v. United States*, this principle was extended to include evidence that impeaches a witness' credibility.[2] Unfortunately, too many prosecutors nationwide continually have displayed a cavalier attitude regarding these obligations.

In Alaska, federal prosecutors continue to deal with the fallout from their failure to comply with their *Brady* obligations. First, after multiple revelations of prosecutorial misconduct, including the failure to produce favorable discovery pertaining to the key government witness, the government was compelled to dismiss with prejudice all charges against U.S. Senator Ted Stevens, who had been convicted of seven felony ethics violations.[3] Now, in related cases, the government is contemplating whether to retry two members of the Alaska State House of Representatives, Vic Kohring and Peter Kott, who had their convictions for conspiracy, extortion, and bribery vacated by the U.S. Court of Appeals for the Ninth Circuit in March for similar prosecutorial failures.[4]

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In an opinion, concurring in part and dissenting in part, Ninth Circuit Judge Betty B. Fletcher opined that the remedy of a new trial ordered by the majority was insufficient and that the indictments should be dismissed, stating, "[t]he prosecution's refusal to accept responsibility for its misconduct is deeply troubling and indicates that a stronger remedy is necessary to impress upon it the reprehensible nature of its acts and omissions."[5]

In the Southern District of Florida, the U.S. Attorney was publicly reprimanded and sanctioned under the Hyde Act for bad faith after prosecutors withheld DEA reports and other evidence in violation of *Brady*.[6] In Montana, a federal district judge found that although the government's "incompetence" in failing to comply with its discovery obligations by producing evidence to the defendants of the extreme bias of one of the government's witnesses did not justify dismissal, it did justify an instruction to the jury that the government had failed to honor its constitutional obligations and that, as a sanction, the jury was prohibited from considering the witness' testimony completely as against one of the defendants and was to view the testimony with "great skepticism and with greater caution than that of other witnesses" as against the other defendants.[7]

The Supreme Court's View

Despite the flagrant nature of many of these violations, the Supreme Court's March 2011 decision in *Connick v. Thompson*[8] reveals disagreement among the justices as to how liability for this type of wrongdoing should be assigned. The Court rejected a jury's finding that the New Orleans District Attorney was liable for *Brady* violations that resulted in the wrongful 18-year imprisonment (14 of which were on death row) of John Thompson. The 5-4 majority opinion has been called "mean" and "deliberately callous."[9] Substantively, the dissent points out that as a result of the majority's decision, "[t]he prosecutorial concealment Thompson encountered…is bound to be repeated."[10]

In the mid-1980s, Mr. Thompson was prosecuted by the New Orleans District Attorney's Office in two separate trials for armed robbery and murder. After the murder conviction, the prosecution successfully argued that Mr. Thompson should be sentenced to death because he was already serving a term of life imprisonment for the robbery. Days before Mr. Thompson's scheduled execution, a private investigator discovered a crime lab report from the armed robbery investigation in the New Orleans police files, which revealed that a swatch of fabric bearing the robber's blood had been tested to reveal that the perpetrator had blood type B. This evidence had never been produced to Mr. Thompson, who had blood type O, but was intentionally suppressed by an assistant prosecutor on the case.

Mr. Thompson's execution was stayed and the armed robbery conviction was vacated. The Louisiana Court of Appeals also reversed the murder conviction, concluding that the robbery conviction unconstitutionally deprived Mr. Thompson of his right to testify in his own defense at the murder trial. Mr. Thompson was retried and acquitted on the murder charge after the jury deliberated for only 35 minutes. Mr. Thompson then brought an action against the district attorney's office alleging that its conduct caused him to be wrongfully convicted and incarcerated for

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18 years. The issue ultimately before the Supreme Court was whether a district attorney's office may be held liable under 42 U.S.C. §1983 for a single *Brady* violation—the suppression of the bloody swatch and lab report.

An individual deprived of a constitutional right by a person acting under color of law may bring suit under 42 U.S.C. §1983. Although individual prosecutors are immune from liability under section 1983 for actions taken in their prosecutorial role, a municipality or local government may be held liable where a plaintiff demonstrates he was injured as a result of "official municipal policy." It is recognized that a municipality's failure to train its employees may give rise to such a claim where the failure to train amounts to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact."[11]

Typically, a plaintiff is required to prove a pattern of similar constitutional violations by the untrained employees to demonstrate "deliberate indifference." Although the New Orleans District Attorney did not dispute that the office's failure to produce the bloody swatch and lab report constituted a *Brady* violation, they argued that Mr. Thompson did not and could not prove a pattern of similar violations.

Mr. Thompson asserted that liability from a "single-incident" can attach, referring to the Supreme Court's decision in *Canton v. Harris*,[12] which "left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations may not be necessary to show deliberate indifference" where the constitutional violation is the "highly predictable consequence" of a failure to train.[13] In *Canton*, the Court hypothesized that a city's actions in arming its police force with deadly weapons without training them in the constitutional use of deadly force, "could reflect the city's deliberate indifference to the 'highly predictable consequence,'" that an individual's constitutional rights would be violated.

The *Thompson* majority found, however, that a failure to train prosecutors in their *Brady* obligations did not fall within the narrow type of single-incident liability referenced in *Canton*. While police officers require specialized training to acquire legal knowledge regarding the constitutional use of deadly force, prosecutors trained in the law are already "equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." Moreover, attorneys are subject to continuing legal education and ethical requirements which serve to further reinforce their compliance with and knowledge of their constitutional duties.[14]

A four-judge dissent authored by Justice Ruth Bader Ginsburg took issue with the majority's finding that the *Brady* violation in Mr. Thompson's case was aberrational, opining that the record proved "long-concealed transgressions that were neither isolated nor atypical." The dissent pointed not only to the suppression of the bloody swatch, but also to other instances in which the district attorney's office failed to produce exculpatory and impeachment evidence in the robbery and murder cases. Specifically, prosecutors did not provide Mr. Thompson with eyewitness reports of the murderer as six feet tall with "close cut hair"—a description which accurately described one of the government's key witnesses against Mr. Thompson, but not Mr. Thompson himself who was five feet eight inches tall and wore his hair in a "large Afro."

Further, the government failed to produce evidence that another of its key witnesses had been promised a cash reward by the murder victim's family for information leading to a conviction. According to the dissent, these omissions, taken together, provided sufficient grounds for a jury to reasonably conclude that the prosecutors in the New Orleans District Attorney's office routinely ignored their *Brady* obligations.[15]

Moreover, the dissent found "abundant" evidence supporting the jury's finding that additional training on *Brady* was "obviously necessary" to ensure such violations would not occur. The District Attorney and other top officials in the office evinced a misunderstanding of *Brady* both before and during trial and although the District Attorney testified that the need for *Brady* training was obvious, the office never provided such training.[16] The evidence supported a conclusion by the jury that "cavalier approach… and observation of *Brady* requirements contributed to a culture of inattention to *Brady*" in the office and that deliberate indifference to the state of affairs directly caused the violations in the *Thompson* case.[17]

Rule 3.8(d) of the Model Rules of Professional Conduct, which has been determined to be broader than the constitutional obligation established by 'Brady,' requires the production of exculpatory evidence without regard to its materiality or anticipated impact on the outcome 'so that the defense can decide on its utility.'

Finally, responding to the majority's interpretation of *Canton*, the dissent found unsupported the majority's assumption that all attorneys are fully equipped with the necessary tools to properly apply and adhere to the requirements of *Brady* and stated: "as this case so vividly shows, a municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor *Brady* rights may be no less 'deliberately indifferent' to the risk of innocent lives" as the hypothetical posed in *Canton*.[18]

Conclusion

The prosecutors' obligation to disclose exculpatory information is grounded not only in the Constitution's due process requirements, but also in their ethical obligation to fairly administer justice. Rule 3.8(d) of the Model Rules of Professional Conduct, which has been determined to be broader than the constitutional obligation established by *Brady*, requires the production of exculpatory evidence without regard to its materiality or anticipated impact on the outcome "so that the defense can decide on its utility."[19] While courts frequently consider whether prosecutors have complied with their disclosure obligations under *Brady*, they rarely report such violations to disciplinary authorities.[20]

In addition, given prosecutorial immunity and the Supreme Court's reluctance to assign liability for the egregious violations typified in *Thompson*, there is little to hold prosecutors accountable for their conduct. Nevertheless, U.S. Attorney General, Eric Holder, has "pledged to raise the bar of professionalism" by reinforcing federal prosecutors' understanding of rules governing discovery in criminal cases through additional training,[21] and on Jan. 4, 2010, the Justice Department issued a 10-page guidance memo for prosecutors regarding criminal discovery.[22]

Further, the Advisory Committee on Criminal Rules is considering an amendment to Federal Rule of Criminal Procedure 16 to incorporate the government's constitutional obligation to provide exculpatory and impeachment evidence to the defense. Notably, however, discussions of such an amendment have been ongoing since the late 1960s and the federal judiciary currently is split on the need for amending the rule that governs discovery in federal criminal cases.[23] Hopefully, recent incidents will spur real change.

1. 373 U.S. 83, 87 (1963).
2. 405 U.S. 150, 154 (1972).
3. Neil A. Lewis, "Justice Department Moves to Void Stevens Case," The New York Times (Apr. 1, 2009).
4. *United States v. Kohring*, ___ F.3d ___, 2011 WL 833263 (Mar. 11, 2011); *United States v. Kott*, 2011 WL 1058180 (Mar. 24, 2011).
5. *Kohring*, 2011 WL 833263, at *17.
6. *United States v. Shaygan*, 661 F. Supp.2d 1289 (S.D.Fla. 2009). The Hyde Amendment "provides for the award of attorney's fees and [related litigation] costs to a prevailing criminal defendant who establishes that the position the government took in prosecuting him was vexatious, frivolous, or in bad faith." Id. at 1320 (citations omitted).
7. Order and Jury Instructions, *United States v. W.R. Grace*, 05-cr-00007 (D.Mont. Apr. 28, 2009).
8. ___ S. Ct. ___, 2011 WL 1119022 (Mar. 29, 2011).
9. Dahlia Lithwick, "Cruel but Not Unusual," Slate.com (April 1, 2011).
10. 2011 WL 1119022, at *17 (Ginsburg, J., dissenting).
11. *Canton v. Harris*, 489 U.S. 378, 388 (1989).
12. Id.
13. 2011 WL 1119022, at *8 (citing *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 409 (1997)).
14. Id. at *10.
15. The district court concluded that Mr. Thompson could introduce evidence of other *Brady* violations, in addition to the blood evidence, to support his "deliberate indifference" argument. The jury was instructed that it could rely on such evidence in making its determination. Id. at *23 n.11 (Ginsburg, J., dissent).
16. As evidence that District Attorney Harry Connick had notice of the need for *Brady* training, Mr. Thompson pointed to four state appellate court decisions reversing convictions from Mr. Connick's office for *Brady* violations in the 10 years preceding Mr. Thompson's trial. Id. at *8.
17. Justice Ginsburg stressed that the dissent's opinion did not endorse respondeat superior liability under Section 1983, stating that "Connick was directly responsible for the *Brady* violations in Thompson's prosecutions not because he hired prosecutors who violated Brady, but because of his own deliberate indifference." Id. at *30 n.28.
18. Id. at *30.
19. American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 09-454, "Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense" (July 8, 2009). The parallel provision in New York is Rule 3.8(b) of the Professional Conduct Rules.
20. Federal Judicial Center, "A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases Final Report to the Advisory Committee on Criminal Rules" ("National Survey of Rule 16") at p. 9 (Feb. 2011).
21. Joe Palazzolo, "Holder Assures Judges Professional Standards Will be Raised at the Department of Justice," New York Law Journal (May 5, 2009).
22. David W. Ogden, Deputy Attorney General, Memorandum for Department Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010).
23. "National Survey of Rule 16," at pp. 3, 8.