Brady v. Maryland and Its Legacy—*Forging a Path for Disclosure*

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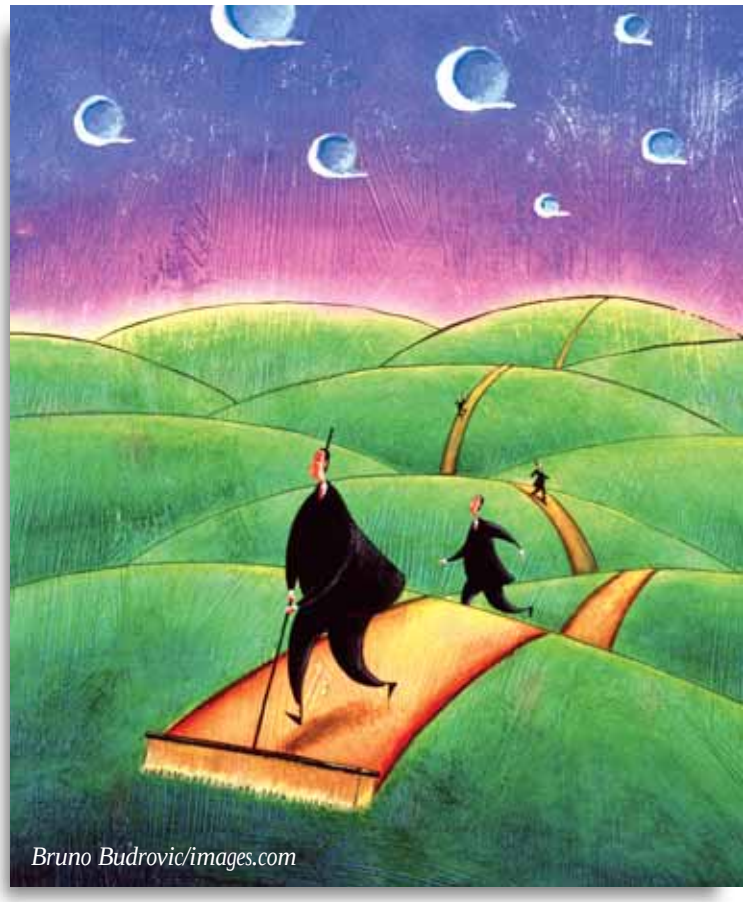
John Brady was 25 years old when he was arrested and charged with first-degree murder. He had bounced around from job to job and engaged in an affair with another man's wife, Nancy Boblit Magowan, and was dealing with the fact that she was pregnant with his child. On June 22, 1958, Brady gave Nancy a post-dated check for $35,000 and told her he would have that amount of money within the next two weeks.[1]



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Along with Nancy's brother, Donald Boblit, Brady and Nancy conspired to rob a bank. To pull off the robbery and make a clean getaway, the two decided, at Brady's suggestion, to steal a car from a mutual friend named William Brooks. Late on June 27, 1958, Brady and Boblit placed a log across the road near Brooks' home and waited for him to come home. When Brooks drove up to the log, he got out of the car to move it. At that point, either Brady or Boblit hit him over the head with a shotgun, placed him in the backseat, and took his wallet. Brady then drove to a secluded field where he and Boblit walked Brooks to a clearing at

the edge of the woods and one of the men strangled Brooks to death with a shirt.[2]

After their arrests, Brady and Boblit both gave several statements to law enforcement in which the facts changed from one statement to the next. However, Brady consistently denied the actual killing of Brooks and maintained that Boblit had strangled Brooks with a shirt. Boblit also gave a series of statements to the police and, in all but one of them, he claimed that Brady was the actual killer of Brooks.[3]

The key confession at the heart of *Brady v. Maryland*, was Boblit's fifth statement, which was taken on July 9, 1958. In that statement, Boblit admitted that he had hit Brooks on the head with a shotgun. He also stated that after they got back into the car, he (Boblit) had planned to shoot Brooks, but that Brady suggested strangulation instead. Boblit admitted that he strangled Brooks and that he and Brady had carried the body into the woods.[4]

The key issue in the prosecution would turn on the identity of the individual who actually strangled Brooks. While that question had little, if anything, to do with whether Brady and Boblit were guilty of first-degree murder, the question did have a potential impact on whether Brady or Boblit, or both, deserved the death penalty.[5]

Prior to Brady's trial, Brady's lawyer had asked the prosecutor for any confessions that either men had made. The prosecutor turned over all of Boblit's statements except the July 9, 1958 statement in which Boblit confessed to being the actual killer. Both Brady and Boblit were convicted, in separate trials, of first-degree murder and sentenced to death.[6]

A new lawyer for Brady read the transcript of Boblit's trial (during which the prosecution used the July 9, 1958 statement to convict Boblit), discovered the existence of the July 9, 1958 statement, which Brady's trial lawyer had never received, and filed a post-conviction motion requesting a new trial based on recently discovered evidence.[7] The trial court denied the motion, but the Maryland Court of Appeals reversed the decision and stated "the suppression or withholding by the state of material evidence exculpatory to an accused is a violation of due process."[8] The Maryland Court of Appeals refused to order a new trial on the issue of guilt, because the new evidence did not raise doubt as to that issue, but the court did order a new trial on the issue of whether Brady should receive the death penalty.[9]

After the Maryland Court of Appeals issued its ruling, Brady petitioned for *certiorari* to the United States Supreme Court. He sought a new trial on both guilt and punishment. The Supreme Court affirmed the ruling of the Maryland Court of Appeals and held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[10]

In so ruling, both the Maryland Court of Appeals and the United States Supreme Court found that the Due Process Clause of the 14th Amendment to the United States Constitution requires disclosure of exculpatory evidence. In so finding, the courts highlighted one of the touchstone constitutional principles which underlies our system of criminal justice in the United States: when the government seeks to deprive one of life or liberty, due process requires the prosecution, the very adversary which seeks to punish the accused, to provide the accused with the tools to defend themselves.

The History of *Brady v. Maryland*

To understand the seminal importance of *Brady v. Maryland*, one must understand the nature of exculpatory evidence and the Due Process Clause of the 14th Amendment to the United States Constitution. The Due Process Clause states that "No State…shall deprive any person of life, liberty, or property without due process of law."[11] In *Brady*, the Supreme Court invoked the Due Process Clause to hold "that the suppression of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[12]

Rendering its *Brady* decision in 1963, the Court relied on legal precedent dating back to 1935, tracing the prosecution's affirmative duty to disclose evidence favorable to a defendant back to early 20th century prohibitions against misrepresentation to the courts.[13] The Court defined exculpatory evidence as any evidence favorable to a defendant *and* material to the question of the defendant's guilt or the determination of a guilty defendant's punishment.[14] While the Court did not define "materiality" in its *Brady* decision, it would later hold that exculpatory evidence is "material" if there is a "reasonable probability" that disclosing it would have changed the outcome of the proceeding. In other words, a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome" of the trial.[15]

Since *Brady*, exculpatory evidence has, in fact, come to be known and referenced by criminal law practitioners as "*Brady* material." Also during that time, the United States Supreme Court continued to expand and clarify the definition of *Brady* material and the scope of the prosecution's duty to disclose it. For example, under the original holding in *Brady*,[16] the defense was still required to make specific pre-trial requests to prosecutors for exculpatory evidence. But then, in 1976, *United States v. Agurs*[17] reached the Supreme Court.

Linda Agurs was indicted for second-degree murder in the stabbing death of James Sewell, which occurred at a Northwest Washington, DC, motel on the afternoon of September 24, 1971. The prosecution's case centered on the allegation that Agurs was a prostitute, whom Sewell had encountered, and that the two went to the motel during the course of their encounter. During the trial, a motel employee testified that he had seen Sewell wearing a Bowie knife in a sheath when he and Agurs purchased the hotel room.[18]

The motel employee further testified that, a while later, he and two other employees heard a woman's screams from the room occupied by Agurs and Sewell. The employees forced their way into the room and found Agurs and Sewell struggling on the bed with Sewell's Bowie knife.[19] The prosecution further alleged, under the prostitution theory, that while Sewell was down the hall in the bathroom, Agurs rummaged through his clothes to steal more money, and Sewell caught her upon his return to the room. The prosecution alleged that when Sewell caught Agurs going through his clothes, Agurs grabbed the Bowie knife (which was among the clothes) and stabbed Sewell to death.[20]

Agurs unsuccessfully argued at trial that she acted in self-defense. About a month after she was convicted and sentenced, her attorney discovered that Sewell had a prior criminal record for assault and carrying dangerous weapons. The importance of that information was simple: Sewell's prior record evidenced his prior violent conduct, which could have helped Agurs support her defense theory of acting in self-defense.[21]

The prosecution had not disclosed

Sewell's prior offenses to Agurs' defense attorney. During the course of the post-conviction litigation concerning the non-disclosed evidence, the government argued that because the defense attorney had not specifically requested Sewell's prior record, the government was under no obligation to disclose it.[22]

The United States Supreme Court disagreed and held that, for *Brady* purposes, a defendant's failure to make a request of the government for favorable evidence does not relieve the government of the obligation to turn over exculpatory evidence. In other words, the prosecution must disclose exculpatory evidence *regardless* of whether the defense has requested it.

Impeachment Material Is Exculpatory Evidence

Another case that forged the path of current *Brady* jurisprudence was *Giglio v. United States*,[23] wherein the United States Supreme Court began to treat impeachment material as the legal equivalent of exculpatory material. "Impeachment evidence" is, of course, evidence that can be "used to undermine a witness's credibility."[24] In *Giglio*, the Supreme Court recognized the value of impeachment material to criminal defendants and to their juries when performing what is often the central role of a jury in a criminal trial: assessing the credibility of government witnesses.

In *Giglio*, the prosecution failed to disclose a promise for leniency made to a key prosecution witness in exchange for testimony against the defendant. The prosecution had promised the witness he would not be prosecuted for the same charge if he testified against Giglio before the grand jury and at trial. The Supreme Court held, as it had in *Napue v. Illinois*,[25] that when the reliability of a given witness may be determinative of guilt or innocence, the nondisclosure of evidence affecting the credibility of a witness falls within the *Brady* doctrine.[26] In so holding, the Court clarified and broadened the *Brady*[27] definition of "exculpatory evidence."

In *United States v. Bagley*,[28] the United States Supreme Court continued to legally equate impeachment evidence with exculpatory evidence for *Brady* purposes. In *Bagley*, the prosecution had failed to disclose impeachment evidence related to contracts between the prosecution and its trial witnesses whereby the government paid money to those witnesses based upon the information they provided to the prosecution.

In *Bagley*, the Supreme Court considered and rejected the reasoning of the lower court, which had drawn a distinction between impeachment evidence and exculpatory evidence and held that impeachment evidence was more important than exculpatory evidence. Citing *Giglio*,[29] the Supreme Court specifically "rejected any such distinction between impeachment evidence and exculpatory evidence" and reiterated that, when the reliability of a given witness may be determinative of guilt or innocence, the nondisclosure of evidence affecting the credibility of that witness falls within the *Brady* rules.[30]

The significance of *Bagley* in *Brady* jurisprudence is that, while *Giglio* found error in failing to disclose a *specific* type of *impeachment* evidence, *Bagley* generally and definitively held that *there is no distinction between "impeachment evidence" and "exculpatory evidence"* for *Brady* purposes.[31] Both types of evidence have equal footing within the law. One type is no more or less important than the other, and they are legally synonymous for purposes of defining the prosecution's duty to disclose *Brady* material and analyzing its failure to do so.

Prosecutors Must Review Their Evidence for *Brady* Material

The rejection of any distinction between impeachment evidence and exculpatory evidence was further solidified in 1995 in *Kyles v. Whitley*.[32] In *Kyles*, the prosecution failed to turn over evidence related to multiple witness descriptions of the suspect which were inconsistent with one another, tape recordings and written statements of an informant which were inconsistent, a computer printout of automobile license numbers which indicated the defendant's car was not at the location where the informant had told police it was at the time of the crime, and evidence linking the informant to other crimes.

While reinforcing the *Bagley* holding, which "disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes,"[33] the Court went further and found that the 14th Amendment[34] places a duty on the prosecutors "to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."[35]

Thus, *Kyles* expanded *Giglio's* focus on the prosecutor as "spokesman for the government"[36] and specifically imposed an affirmative duty on that spokesman to obtain and disclose all *Brady* material in the possession of anyone acting on behalf of the prosecution. In other words, the failure of prosecutors to provide *Brady* material to criminal defendants cannot be excused by the failure of prosecutors to learn or know about it, and that is true without regard to whether the ignorance was in good faith or bad faith. Thus, whether the prosecution's failure to disclose *Brady* material was based on the failure of exculpatory information in law enforcement files to make its way into the prosecution's office file, or simply based on a prosecutor's failure to read those entire files, *Kyles* held that it was *Brady* error nonetheless.[37]

The Systemic Nature of *Brady*-Related Prosecutorial Misconduct

The overriding problem in all *Brady*-related cases is prosecutorial government's failure to disclose evidence favorable to the criminal defendant, whether "impeachment" or "exculpatory," and it is a problem that continues in jurisdictions across the United States. In fact, the systemic nature of the problem is illustrated by the fact that the United States Supreme Court, which grants review in only the rarest of cases in which a petition for writ of certioriari is filed, has granted certiorari and rendered opinions in cases centering upon withheld *Brady* material in each decade following the year *Brady* was decided, 1963.

Brady violations are, by definition, violations of an individual citizen's 14th Amendment right to due process of law: the backbone of American criminal justice. Unfortunately, those violations have been so pervasive within the American criminal justice system that, as recently as February 2004, the United States Supreme Court once again found itself considering yet another case involving evidence withheld from the defense which would have impeached a prosecution witness. Addressing the *Brady* violation in that case, the Court eloquently summarized the issue in *Banks v. Dretke*:

> A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. "Ordinarily we presume that public officials have properly discharged their official duties." We have several times under-

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scored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations to refrain from improper methods to secure a conviction…plainly resting upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. The prudence of the careful prosecutor should not be discouraged.[38]

Of course, most prosecutors well deserve the "ordinary presumption" that they properly discharge the many legal and ethical duties of criminal prosecution, including the duty to disclose *Brady* material. Thus, it is important to note that the goal of educating the legal community and general public about *Brady*-related issues and violations is not to gratuitously attack a class of dedicated public servants. Indeed, as the United States Supreme Court stated in *Brady*,[39] the point of due process is not to punish the misdeeds of offending prosecutors, but to ensure that defendants have fair trials.

Brady did not create a "loophole" in 1963 that allows criminal defendants to walk free, and the cases that have, in the 40 years since, consistently reaffirmed its holding and further defined its scope, did not merely serve to widen a loophole. At most, *Brady* and its progeny require that convicted defendants be granted new, *fair* trials when exculpatory evidence was withheld from them before their previous, *unfair* trials.[40] Notably, in the *Brady* case itself, there was no chance that John Brady would walk free. The most he could hope for was to avoid the death penalty and receive a life sentence.[41] While Brady was not innocent of murder, he may well have been innocent of the degree of murder that called for the ultimate punishment of death. *Brady* simply held that the prosecution could not withhold evidence that might assist the jury in making either of those determinations.[42]

Regardless of the facts of a particular case, when a *Brady* issue arises, it encompasses the guiding precept of our system of criminal justice: the protection of the accused but presumed innocent citizen. "Innocence…is not a technicality to the criminal process. It is the main touchstone of the criminal process. The justice system must not only strive to convict the guilty, but also to acquit the innocent."[43] ■

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Endnotes

1. Bibas, Stephanos, *The Story of Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence*, Criminal Procedure Stories, Carol S. Steiker, ed., Foundation Press (2006)
2. *Ibid*
3. *Ibid*
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6. *Ibid*
7. *Ibid*
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9. *Ibid*
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14. *Brady v. Maryland*
15. *US v. Bagley*, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985) (*quoting Strickland v. Washington*, 466 U.S. 668, 694 (1984)
16. *Brady v. Maryland*
17. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976)
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26. *Giglio v. US*
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32. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)
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34. United States Constitution, 14th Amendment
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37. *Ibid*
38. *Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (citations omitted).
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