

July, 1996

Disclosing Officer Misconduct

A Constitutional Duty

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(A prosecutor's constitutional duty to disclose exculpatory information to the defense includes releasing some officers' personnel information.)

"[T]he government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result...This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.... [T]his is as it should be."¹

A recent U.S. Supreme Court decision concerning the government's constitutional duty to disclose information favorable to the accused contained the language in the beginning quote. Implicit in this language is a reaffirmation of the prosecutor's role as the representative. . .of a sovereignty...whose interest. . .in a criminal prosecution is not that it shall win a case, but that justice shall be done."²

Personnel information concerning law enforcement officers who testify against the accused may be as important to the defense as evidence directly affecting innocence.³ Prior instances of lack of candor, prior bad acts, or a reputation for untruthfulness can be used to impeach an officer's testimony against the accused and are fundamental ingredients to a defendant's right to a fair trial.

The Court's recent decision involving a prosecutor's constitutional duty to disclose exculpatory information comes at a time when law enforcement is under tremendous scrutiny in society as a whole and in the courtroom. Now more than ever before, defense attorneys are attacking their clients' prosecution by attacking those who are responsible for the investigation, fueling ever-increasing

numbers of requests for information contained within law enforcement personnel files.

The disclosure of law enforcement personnel information often implicates sensitive professional and privacy interests, particularly in cases where the officer has been exonerated or the matter is personal in nature. Accordingly, while the defendant's right to a fair trial is paramount, the defendant does not have a right to "everything known to the prosecutor."⁴

This article examines the government's duty to provide information relating to personnel and disciplinary matters concerning law enforcement officers who will testify on the government's behalf. The article first reviews relevant case law establishing the government's legal duty to disclose exculpatory information. Then, it addresses the need for law enforcement agencies and prosecutors to establish policies concerning the general types of information required to be disclosed and methods by which this information can be maintained, retrieved, and disseminated to prosecutors when necessary.

DISCLOSURE OF EXCULPATORY INFORMATION

In the landmark decision of *Brady v. Maryland*,⁵ the U.S. Supreme Court recognized that fundamental notions of fairness and due process within the meaning of the 5th and 14th amendments require the government to provide evidence favorable to the defense. *Brady* clearly established that in a criminal case, the accused has a right to any exculpatory evidence, i.e., any evidence in the government's possession that is favorable to the accused and that is material to either guilt or punishment, irrespective of the good or bad faith on the government's part in failing to disclose such information.⁶

In *Brady*, the defendant was convicted of first-degree murder and sentenced to death. *Brady* testified about his participation in the crime but stated his companion actually committed the murder. Prior to trial, *Brady* requested copies of statements provided by the companion. The government provided some of those statements but failed to provide the statement in which the companion admitted killing the victim. *Brady* did not learn of this statement until after he was convicted and sentenced.

The Supreme Court agreed with *Brady's* contention that the government's failure to provide the companion's statement amounted to a denial of his right to due process of law guaranteed by the 14th amendment. The Court concluded that while the statement did not affect *Brady's* culpability relating to the first-degree murder charge, the companion's statement was relevant for purposes of *Brady's* punishment. The Court elaborated on the defendant's constitutional right to discover exculpatory

evidence in a criminal proceeding by concluding that “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.”⁷

From this decision emerged the term “Brady material,” which is used by both attorneys and law enforcement officers to describe exculpatory material that, according to the Brady rule, must be provided to the defense if material to guilt or punishment. The focus of this article is not to define the universe of Brady material but rather to identify the types of information concerning the conduct of law enforcement officers that falls within the Brady rule.

BRADY MATERIAL: IMPEACHING WITNESSES

The Supreme Court extended the Brady rule to include material affecting a witness’ credibility. In *Napue v. Illinois*,⁸ the Supreme Court held that the prosecutor’s use of false testimony that goes to the credibility of a witness violates due process.

In *Napue*, the defendant was tried for murder. The government’s main witness, also implicated in the murder, falsely testified that he received no consideration in return for his testimony. The government, knowing that testimony to be false, failed to correct the record. The Supreme Court concluded that the jury’s evaluation of the truthfulness and reliability of testimony may affect the determination of guilt or innocence and that “. . .it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend.”⁹

ABSENCE OF BAD FAITH IS NO DEFENSE

The Supreme Court subsequently used the Brady rule to expand the principle announced in *Napue*. In *Giglio v. United States*,¹⁰ the assistant U.S. attorney (AUSA), who presented the case before a grand jury, made an unauthorized promise of leniency to the main government witness, a co-conspirator in the case. The AUSA who tried the case was unaware of this earlier promise. The witness testified falsely at trial that he received no consideration for his testimony.

The Supreme Court in *Giglio* reversed the conviction, holding that the AUSA’s promise was attributable to the government, regardless of the absence of bad faith on the part of the prosecutor who tried the case.

The Court believed evidence of this promise would impact the credibility of this key government witness and that the jury was entitled to consider this evidence when weighing the testimony of the witness.

As a result of *Brady and Giglio*, the government is constitutionally required to disclose any evidence favorable to the defendant that is material to either guilt or punishment, including evidence that may impact on the credibility of a witness. Furthermore, the defendant's failure to request favorable evidence does not leave the government free of this obligation because constitutional error results ". . .if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. "11

DUTY TO DISCOVER BRADY MATERIAL

In its 1995 decision in *Kyles v. Whitley*,¹² the Supreme Court ruled that a prosecutor's constitutional duty to provide exculpatory evidence to a defendant includes a related duty to exercise reasonable diligence to discover or learn of the existence of such evidence. In *Kyles*, the defendant was convicted and sentenced to death for the murder of a woman in a grocery store parking lot. The Supreme Court, in reversing the conviction, identified information that had been improperly suppressed by the government. This information pertained to the government's investigation and statements made by witnesses who testified at trial.

Key to the government's investigation was the assistance of an informant who called police to report that he had just purchased a car from his friend, Kyles, that matched the description of a car belonging to a victim of a murder he heard reported on the news. The informant met with detectives and began assisting in the investigation.

Throughout his involvement in the investigation, the informant often gave contradictory and sometimes self-incriminating statements. For example, the informant admitted to changing the license plates on the stolen car twice after purchasing it from Kyles.¹³ The Supreme Court was especially troubled with the government's suppression of the informant's statements in light of the defense's theory that Kyles had been framed by the informant.¹⁴

Also crucial to the government's case at trial was the testimony of eyewitnesses who identified Kyles as the killer. The Supreme Court found that disclosure of their pre-trial statements would have drastically weakened the government's case.¹⁵

For example, one witness provided a statement contemporaneous to the incident in which he admitted that he was at the scene but did not actually see the incident. This witness also stated that the only time he saw the assailant was when the assailant was attempting to flee the scene and described him as a black teenage male with a moustache and shoulder-length hair.¹⁶

However, at trial, this witness testified that he not only saw the assailant but that he also saw him struggle with the victim and remove a small .32—caliber handgun from his pocket and shoot the victim in the head. Furthermore, he omitted to mention the description that he provided earlier of the assailant--a description that did not resemble Kyles.¹⁷

The Supreme Court believed that “[a] jury would reasonably have been troubled by the adjustments to [the witness’] story... (and the statements) would have fueled a withering cross-examination, destroying confidence in his story and raising a substantial implication that the prosecutor had coached him to give it.”¹⁸ The Court determined that the net effect of the information withheld from the defendant raised a reasonable probability that the outcome would have been different, and thus, its suppression violated the defendant’s right to a fair trial.¹⁹

Even though some of the information favorable to the defense was not disclosed to the prosecutor until after trial, the prosecutor still is held accountable for a Brady violation.²⁰ The Supreme Court in Kyles ruled that the prosecutor is held to a disclosure standard based on what all the government’s officers knew at the time. ²¹

The Court took the opportunity to elaborate on the prosecutor’s role in instilling confidence in the trial’s outcome by not only ensuring that the duty to provide exculpatory information is strictly adhered to but also by imposing a duty to learn of such information.²² The Court imposed a duty on prosecutors to exercise diligence in discovering all evidence favorable to the defense within the government’s possession and reasoned that this duty flows naturally from the power of the prosecutor to determine what information will remain undisclosed as not material to either guilt or punishment. In its ruling, the Court stated:

On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not [alone] amount to a Brady violation...But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely effect of all such

evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police.²³

The "duty to learn" thus extends the prosecutor's obligation not only to ensure that all exculpatory information is provided to the defense but also to undertake reasonable steps to ensure that the prosecutor is aware of all such material in the government's possession.

DISCOVERY OF PERSONNEL MATTERS

Material Information

When reviewing decisions that apply the Brady-Giglio principles to law enforcement personnel and disciplinary information, it becomes apparent that few generalizations are possible. For example, allegations of misconduct that are part of a pending investigation generally are not required to be disclosed because they are preliminary or speculative.²⁴

In *United States v. Veras*,²⁵ the U.S. Court of Appeals for the Seventh Circuit held that the government improperly suppressed information concerning a pending investigation into allegations that an officer lied in a search warrant affidavit and stole money during the execution of warrants. The government did not disclose the information because at the time it was required to provide discovery, the allegations consisted only of the word of a convicted drug dealer and perjurer who was in a position to benefit if the allegations were proven true.²⁶

The court concluded that the government improperly suppressed the material, contrary to Brady-Giglio. The court reasoned that the information should have been disclosed to the defense because the information was of a serious nature and involved the credibility of a representative of the government. In addition, the government took the allegations seriously enough to initiate an investigation. ²⁷

Some generalizations concerning the government's disclosure obligations with respect to personnel or disciplinary information are possible. However, when formulating agency policies concerning what information will be shared, it is incumbent on police legal advisors and prosecutors to review the relevant case law in their jurisdictions. Generally, relevant portions of documents containing the following categories of information should be provided to prosecutors:²⁸

- Any finding of misconduct, such as a disciplinary letter, that reflects on the officer—witness’ truthfulness
- Any finding of misconduct that indicates that the officer-witness may be biased
- Any credible allegation of misconduct, subject of a pending investigation, that reflects on the truthfulness or possible bias of the officer-witness, and
- Any past criminal charge or pending criminal charge brought against the officer—witness.

Allegations of misconduct that are unsubstantiated or result in the officer’s exoneration generally are not considered impeachment material, and thus, need not be shared with the prosecutor. However, cases may arise where consideration should be given to disclosing the information to the prosecutor, particularly where the officer’s credibility is significant to the prosecution. Some courts have required a review of a personnel file by the trial court judge for possible impeachment material, even where the officer has been exonerated.²⁹

Need for Coordination and Communication

As a result of *Kyles* and the Court’s imposition of a duty to learn of Brady—Giglio material, it is apparent that prosecutors and law enforcement agencies need to establish guidelines to ensure that prosecutors receive sufficient information concerning law enforcement witnesses to meet their discovery obligations. Prosecutors also should be made aware of the sensitive professional and privacy interests at stake and the need to maintain the confidentiality of personnel and disciplinary matters, unless disclosure is required.

Prosecutors and law enforcement agencies may find it beneficial to discuss the government’s obligation to provide personnel and disciplinary information in their jurisdictions and perhaps create a formal policy to foster consistency in resolving this difficult issue. Suggested topics of discussion include: 1) The types of disciplinary information that must be disclosed; 2) the degree of certainty that misconduct has occurred, which triggers disclosure; 3) the stage in the investigation when disclosure must be made; and 4) the extent to which prosecutors may retain law enforcement personnel information in their systems of records for future retrieval.

Agencies also should inform officers and other investigative personnel of their responsibility to advise prosecutors with whom they are working of potential impeachment information prior to testifying. As part of court-ordered discovery, a prosecutor also may request a particular employee's personnel file be reviewed for potential impeachment material.³⁰ Procedures should be developed detailing how this request is made, whether there should be a showing that the employee is likely to testify, who in the agency should process the request and review the file, and what is the appropriate form of response.

CONCLUSION

The constitutional duty to disclose exculpatory information to the defense plainly includes some law enforcement personnel information. Determining the extent to which the government has an obligation to provide personnel and disciplinary information concerning officers who may testify is a complicated endeavor, not subject to simple generalizations and often raising sensitive privacy and professional issues. It is, therefore, essential that law enforcement agencies and prosecutors develop policies to guide the resolution of this issue and to provide notice to officers as to what information will be subject to discovery.

Endnotes

1 *Kyles v. Whitley*, 115 S.Ct. 1555, 1568 (1995).

2 *Kyles* at 1568, quoting *Burger v. United States*, 295 U.S. 78, 88 (1935)

3 See *Giglio v. United States*, 405 U.S. 150; *Napue v. Illinois*, 360 U.S. 264 (1959); *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996).

4 *United States v. Agurs*, 427 U.S. 97, 106 (1976).

5 373 U.S. 83 (1963)

6 *Giglio v. United States*, 405 U.S. 150 (1963)

7 *Brady* at 87.

8 360 U.S. 264 (1959).

9 *Id.* at 269.

10 405 U.S. 150 (1963).

11 *United States v. Bagley*, 473 U.S. 667 (1985) (addressing the "materiality standard" required in *Brady*).

12 115 S.Ct. 1555 (1995)

13 *Id.* at 1572.

14 Id. at 1563.

15 Id. at 1570.

16 Id.

17 Id.

18 Id.

19 Id. at 1565. The Court noted that the opinion does not address the standard of materiality applied in cases where the prosecutor knowingly uses perjured testimony; a standard that is more favorable to the defense requiring only a showing of a reasonable likelihood that the false testimony could have affected the outcome. Id. at 1565, n. 7, citing *Agurs v. United States*, 427 U.S. 97 (1976). See also *Gilday v. Callahan*, 59 F.2d 257, 267 (1st Cir. 1995)

20 See *Kyles* at 1568, citing Brief for Respondent at 25, 27, 30 and 31.

21 Id. See also *Giglio* at 154.

22 *Kyles* at 1568. The Court wrote that: “Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of the truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial’s outcome as to destroy confidence in its result.”

23 Id. at 1567. In *United States v. Hanna*, 55 F.3d 1456 (9th Cir.1995), the court, applying *Kyles*, found that the government failed to demonstrate that it inquired into obvious inconsistencies between an officer’s testimony and his written report concerning his discovery of a weapon in the defendant’s possession. The court sent the case back to the district court for a further factual determination of whether a Brady violation occurred.

24 *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Diaz*, 922 F.2d 998 (2d Cir. 1990) cert. denied, 500 U.S. 925 (1991) (prosecution has no Brady obligation to communicate preliminary or speculative information).

25 51 F.3d 1365 (7th Cir. 1995).

26 Id. at 1374.

27 Id. at 1374-1375. While concluding that the evidence should have been disclosed, the court further held that the conviction would not be reversed because the evidence would not have altered the outcome at trial, as the officer would simply have denied the allegations at trial and defense counsel would not have been able to bring in extrinsic evidence to rebut the denial. Id. at 1375. 28 A separate issue, not addressed in this article, is the extent to which such information would be admissible against the officer-witness under the applicable rules of evidence. Application of the rules of evidence will narrow what ultimately may be used to impeach a witness. Generalizations on the impact of such rules on what is allowed as impeachment material are also difficult. For example, in *United States v. Ortiz*, 5 F.3d 288

(7th Cir. 1993), the court held that the trial court was well within its discretion in excluding a letter from an officer's personnel file indicating that he falsely reported hours of court attendance. The trial court concluded that this information was not sufficiently relevant to warrant its admission. Compare this to *Dreary v. Gloucester*, 9 F.3d 191 (1st Cir. 1993), in which the court held that a 10-year old disciplinary finding that an officer falsified overtime records was admissible.

29 See *United States v. Kiszewski*, 877 F.2d 210, 215 (2d Cir. 1989)

30 One court has held that *Kyles v. Whitley* requires that the prosecutor personally review the personnel file and may not delegate this duty to the agency. *United States v. Lacy*, 896 F. Supp. 982 (N.D.Cal. 1995), government's appeal filed 9/15/95, No. 95—10398.