

John Leo Brady: The defense lawyer's best friend

By: Denis M. deVlaming

The holding in *Brady v. Maryland*¹ dates back to 1963. It has been the law ever since then yet is incredibly underutilized by the defense bar throughout the United States. That court holding along with *United States v. Bagley*² and *Kyles v. Whitley*³ have predominately dictated the requirements of the prosecution to turn over all material that include the following: (1) all information that would exonerate the accused; (2) all exculpatory information; (3) all information that would lessen the punishment; (4) all material impeachment of the government's evidence or witnesses; and (5) any evidence that would support a valid defense. But the defense has to ask for it.

The facts in *Brady* are worth discussion. John Leo Brady was on trial for first-degree murder in the state of Maryland. His lawyer conceded guilt (as the evidence was overwhelming) but sought to save him from capital punishment. He was charged with a codefendant named Boblit. Brady was found guilty and sentenced to death. After all appeals and post-conviction matters were concluded, Brady learned that the state had withheld a statement made by his codefendant which, although implicated Brady in the crime, excluded him as the actual killer. Brady argued that this statement violated due process by not being turned over to his former defense team. His position was that had the jury learned that he did not do the actual killing, that the jury would have voted to spare his life. The United States Supreme Court did not reverse his conviction but did reverse for a new sentencing hearing. The opinion in *Brady* is significant in that most lawyers believe that the principles in *Brady* have to do with the prosecution turning over evidence that would *exonerate* the accused. In actuality, it was not exonerating in nature but rather it was exculpatory and impeaching in nature.

There are several common misconceptions of *Brady* obligations. Unfortunately, they are shared as much by the defense as they are by the prosecution. Those misconceptions include: (1) prosecutors only have to turn over exonerating evidence; (2) only *Brady* evidence in the hands of the prosecution has to be turned over to the defense; (3) evidence that falls under *Brady* can be given to the defense the day of trial; (4) prosecutors do not have to look for *Brady* material. They only have to turn it over if they come across it; (5) prosecutors never have to turn over their handwritten notes as they are privileged and are considered work product. All of the above are widespread misconceptions. As noted above, prosecutors are required to turn over far more than exonerating evidence. All evidence that would fall under *Brady* in the hands of law enforcement and other investigative agencies is chargeable to the prosecution. In other words, if the police know, even when they do not tell the prosecutor, the government is charged with knowing. *Kyles v. Whitley* made it very clear:

“The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.”
(Kyles at 437).

Furthermore, the prosecution cannot provide vast amounts of evidence which may contain *Brady* material at a time so close to trial that it cannot be properly reviewed and utilized (see *Miller*

v. United States⁴ and Perez v. United States⁵). And it may not hide Brady material of which it is actually aware in a huge open file in the hope that the defendant will never find it. Doing so would indicate that the government is acting in bad faith in performing its obligations under Brady (See United States v. Skilling⁶). Nor may they “dump” mountains of documents on the defense left unguided as to materiality (see United States v. Bortnovsky⁷).

Although the government does not have to turn over inadmissible evidence to the defense as ruled in Wood v. Bartholomew⁸ (results of a polygraph given to a government witness) it does have to turn over anything that might lead to admissible evidence. For example, although the results of a polygraph examination may not be required to be turned over, the fact that the pretest interview differs from the posttest interview in immaterial ways, would in fact require disclosure because it contains material impeachment that could be used to cross-examine the witness at trial. The only way the prosecutor would not be required to turn over such impeachment would be if the witness was withdrawn from the prosecution witness list. This is permitted when impeachment information is present but never when such information would exonerate the accused. There are no exceptions when that is the case.

So, what does the defense lawyer do to require the prosecution to fulfill its obligations under Brady? The wrong answer is to do nothing and expect the prosecutor to fulfill his or her obligations. A specific Brady motion needs to be filed and calendared for hearing. Specific areas need to be listed for the prosecutor to search and report back on. If no motion is filed, it is the prosecutor that decides what to look in to and what to turn over. The reasoning behind the filing of a specific motion can be found in United States v. Bagley:

“The more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption... The reviewing court may consider directly any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant’s case”
(Bagley at 682-3)

As an example, the following may be requested for the prosecutor to search for, obtain and disclose to the defense:

1. Emails (prosecutor to police, police to prosecutor, state witnesses to police or prosecutor and police or prosecutor to witness, lay and expert)
2. Text messages and instant messages
3. Any messages between officers or officer to station
4. Two-way dispatch messages
5. 911 calls
6. Audio and/or videotapes (including those captured via body cameras or cell phone cameras)
7. Any records stored, sent or received via Dropbox or similar cloud computing or FTP (file transfer protocol) websites

8. All electronic devices including but not limited to computers, laptops, iPads, cellular phones and smart phones that may contain discoverable material relative to the above prosecution
9. All social media accounts that may bear upon the above prosecution including but not limited to Facebook, Google, AOL, Yahoo, Twitter, Instagram, Snapchat and any online cloud backups which may contain information related to this prosecution
10. All handwritten notes of law enforcement officers to be reviewed in camera for Brady material
11. All handwritten or memorialized notes of the prosecutor concerning witness interviews of law enforcement officers, experts and lay witnesses involved in the above prosecution (in camera). Such notes are intended to include but are not limited to investigations and trial preparation of witnesses
12. Any and all medical records including psychiatric and clinical reports that may have relevance to the above prosecution or to any valid defense including those covered by HIPPA (in camera)
13. Any and all electronic devices including cell phones and computers belonging to witnesses listed by the government which may contain Brady material
14. The name and address of any witness known to the prosecution that has given a statement to the prosecution or law enforcement that is contrary to the prosecution's theory of the case including pre and post interviews conducted during polygraph testing
15. Any favorable treatment of any kind given or offered to any government witness in return for cooperation as well as any favorable treatment, money or anything of value requested by a state witness in return for cooperation
16. Any Facebook postings made by the alleged victim relevant to this case including those that were taken down but can be retrieved by the government
17. All contents of investigative files relative to this prosecution to include notes, memorandum and reports. This also applies to the notes of any witness coordinator.

In 2010 the Department of Justice provided guidance to all assistant United States attorneys handling criminal cases about their obligations under *Brady v. Maryland*. In that memorandum sent out to the Washington, DC circuit entitled "Memorandum for Department Prosecutors" it began by writing "Department policy states":

"It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant"

In the section entitled "what to review" the prosecutor is directed to look into the following (as well as other) non-exhaustive areas:

1. The investigative agency's entire investigative file, including documents such as electronic communications, inserts, emails, etc. should be reviewed for discoverable information. Should sensitive information ordinarily not discoverable be contained within the review

document, the entire document is not necessarily discoverable but rather only the discoverable information contained in it.

2. Confidential informant information should be reviewed in its entirety, including past cases in which the confidential informant cooperated. It should include all proffers, immunity and other agreements. Validation assessments, payment information, and other potential witness impeachment information should be included within this review.
3. Substantive case related communications may contain discoverable information. They are most likely to occur (a) among prosecutors and/or agents, (b) between prosecutors and/or agents and witnesses and/or victims, and (c) between victim-witness coordinators and witnesses and/or victims. Such communications may be memorialized in emails, memoranda, or notes. “Substantive” communications include factual reports about investigative activity, factual discussions of the relative merits of evidence, factual information obtained during interviews or interactions with witness/victims and factual issues relating to credibility (Note: material exculpatory information that the prosecutor receives during a conversation with a law enforcement officer or witness is no less discoverable than if that same information were contained in an email).
4. The prosecutor should not only look into any benefit that a witness may have in testifying against the defendant but also known conditions that could affect the witness’s bias such as: animosity toward the defendant, animosity toward a group of which the defendant is a member or with which the defendant is affiliated, relationship with victim, known but uncharged criminal conduct that may provide an incentive to curry favor with a prosecutor, and known substance abuse or mental health issues or other issues that could affect the witness’s ability to perceive and recall events.
5. Information obtained in witness interviews whether memorialized in writing or overheard by law enforcement officers or prosecutors. Any material variance in a witness’s statements should be memorialized and turned over to the defense as “Giglio” information.
6. Trial preparation meetings with witnesses are also subject to a “Brady” review. New information that is exculpatory or impeachment information should be disclosed to the defense.
7. Police officers’ notes should be reviewed to determine whether or not they contain material impeachment or exculpatory information. Particular attention should be paid to notes gathered during discussions with the defendant or material witnesses.

It should be noted in the above memorandum sent out to federal prosecutors that their duty is to “seek” all exculpatory and impeachment information from all members of the prosecution team. The word “seek” is important as it puts the onus on prosecutors to go out and find Brady material as opposed to Brady material finding them. As noted in *Kyles v. Whitley*:

“A prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case...”

That duty to learn means that the government cannot just sit back and turn over whatever Brady material is given to them, but they must go out and affirmatively search for it. And perhaps the reasoning behind that stringent requirement can be found in *United States v. Bagley*:

“By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversarial model. This is because the prosecutor’s role transcends that of an adversary. The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty... Whose interest... In a criminal prosecution is not that it shall win a case, but that justice shall be done.” (See also: Berger V. United States, 295 U.S. 78, 88 (1935))

That’s right, **BY REQUIRING THE PROSECUTOR TO ASSIST THE DEFENSE IN MAKING ITS CASE...** What a statement! The United States Supreme Court is telling the government that they have an obligation to help the defense to acquire all information that is termed “Brady material.” In other words, “hide the ball” is not only unacceptable but condemned. Defense lawyers need to wake up this sleeping giant named John Leo Brady and hold the prosecution to its obligations to go out and look for and turn over all Brady material. If and when they do, reasonable doubts will begin to appear.

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¹ 373 U.S. 83 (1963)

² 473 U.S. 667 (1985)

³ 514 U.S. 419 (1995)

⁴ 14 A.3d 1095 (D.C. 2011)

⁵ 968 A.2d 39 (D.C. 2009)

⁶ 554 F.3d 529 (5th Cir. 2009)

⁷ 820 F.2d 572 (2nd Cir. 1987)

⁸ 516 U.S. 1 (1995)