Florida Rule of Criminal Procedure 3.113

Discovery requirements and obligations under rule 3.220 and understanding Brady v. Maryland and Giglio v. United States

By
Denis M. deVlaming
Board Certified in Criminal Trial Law
Clearwater, Florida

CLE Credits

GENERAL: 2.0

ETHICS: 1.0

CERTIFICATION CREDITS

CRIMINAL APPELLATE LAW: 2.0

CRIMINAL TRIAL LAW: 2.0

JUVENILE LAW: 2.0

Florida Rule of Criminal Procedure 3.113

Effective May 16, 2016 Rule 3.113 (minimum standards for attorneys in felony cases) will be required. It reads: "before an attorney may participate as counsel of record in the Circuit Court for any adult felony case, including post-conviction proceedings before the trial court, the attorney must complete a course, approved by the Florida Bar for continuing legal education credits, of at least 100 minutes and covering the legal and ethical obligations of discovery in a criminal case, including the requirements of Rule 3.220, and the principles established in Brady v. Maryland, and Giglio v. United States."

Florida is the ONLY state in the United States that requires this course

Why???

Appeals and Post Conviction Claims

…the courts were seeing some disturbing trends in discovery, Brady and Giglio violations

Former prosecutor in terror case charged with hiding evidence

Associated Press

DETROIT — A former federal prosecutor and a State Department official were indicted Wednesday on charges of conspiring to conceal evidence during a botched terrorism trial that was a setback for the Bush administration.

Former Assistant U.S. Attorney Richard G. Convertino, 45, and State Department Regional Security Officer Harry Raymond Smith III, 49, face charges of conspiracy, obstruction of justice and making false declarations.

The indictment stemmed from the prosecution of four North African immigrants accused of operating a terrorist cell in Detroit. The case was the nation's first major terrorism trial after the 2001 attacks and was hailed by the Bush administration at one point as a victory in the war on terror.

Two of the four men, Karim Koubriti and Abdel-Ilah Elmardoudi, were convicted in 2003 of conspiring to provide support to terrorists.

However, a federal judge overturned the verdicts at the Justice Department's request after prosecutors discovered that documents that could have helped the defense were not turned over by the government as required.

Convertino was the lead prosecutor in the case, and Smith helped in the investigation and testified for the government at the trial.

The indictment said Convertino and Smith conspired to keep from defense lawyers photographs of a Jordanian hospital that would have undermined the government's argument that the alleged Detroit cell made surveillance sketches of the place.

Convertino also elicited testimony from Smith and an FBI agent that the sketch matched the hospital and its surrounding area, even though the photographs contradicted that description, the indictment said.

Convertino said the Justice Department is using the charges to retaliate against him for a pending whistleblower lawsuit.

Wrongly convicted man to get $16.65M

D.C. will pay the 64-year-old, cleared by DNA evidence, who spent 27 years in prison.

Associated Press

WASHINGTON — The District of Columbia agreed Thursday to pay $16.65 million to a man who spent 27 years in prison for a rape and murder he didn't commit.

The amount is about $617,000 for every year Donald Eugene Gates spent in prison. Gates was freed in 2009 after DNA evidence cleared him in the 1981 rape and murder of 21-year-old Georgetown University student Catherine Schilling. A federal jury on Wednesday found that two city police officers fabricated and withheld evidence in the case, and city officials agreed to a settlement Thursday as the jury was getting ready to decide damages in the case.

"...two city police officers fabricated and withheld evidence in the case..."

The 64-year-old Gates, who now lives in Tennessee, previously received more than $1 million from the federal government for its role in his conviction.

The settlement with the city brings his total compensation to $18 million.

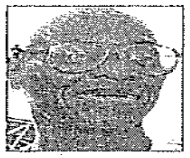
Gates said in a telephone interview Thursday that he was "elated" with the settlement.

"Today, justice was served. Long-awaited justice was served," Gates said.

Gates said he's been dealing with medical issues and hasn't had a social life since he left prison, but he said he does go to church and that it was God who "walked with me through all those years" in prison and since then.

Of the settlement, he said: "I'm going to put it to good use, that's for sure."

The District of Columbia's Office of the Attorney General had defended the actions of police in the case. After the settlement, Attorney General Karl Racine said in a statement: "No amount of money can compensate Mr. Gates for his loss of freedom. Mr. Gates has shown extraordinary fortitude and dignity, and we wish him well as he proceeds with his life."



It was found that two city police officers made up and withheld evidence in Donald Gates' case.

Gates' conviction has been criticized over the years by his lawyers for a series of flaws. His conviction was based in part on the testimony of FBI hair analyst Michael P. Malone, whose work came under fire in the late 1990s. Malone testified that hair from Gates matched hair found on the victim's body, which was found in Washington's Rock Creek Park. But an FBI inspector general report later found that Malone gave false testimony in another case. And the hair analysis technique he used has also been discredited.

Gates' lawyers filed a civil lawsuit against the city and police in late 2010 alleging police misconduct in the case.

The lawyers argued police violated Gates' constitutional rights by feeding a paid police informer information and allowing him to testify falsely.

Lawyers for the city argued police did not do anything unconstitutional, but jurors disagreed and found Wednesday that two police officers had withheld evidence and one of the men had fabricated evidence.

On Thursday, one of Gates' attorneys, New York-based lawyer Peter Neufeld, called for an audit of other murder cases that the two men worked on.

After Gates' exoneration in 2009, the United States Attorney's Office for the District of Columbia spent over four years reviewing cases involving FBI analysis of hair and fiber evidence.

The office identified more than 100 cases for review, and ultimately set aside four other convictions as a result.

In Gates' case, DNA testing was also able to determine the real killer in 2013, but that man had died the previous year.

Added to the oath of admission to the Florida Bar

"To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications"

Discovery in Florida

Rule 3.220

When and how do discovery obligations begin?

Rule 3.220(a) states “After the filing of the charging document, a defendant may elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, by filing with the court and serving on the prosecuting attorney a "Notice of Discovery” which shall bind both the prosecution and defendant to all discovery procedures contained in these rules.”

Circumventing the rule

This rule may not be circumvented by the defendant filing a public records request under Chapter 119, Florida Statutes which are nonexempt as a result of a codefendant's participation in discovery. Even in cases where a defendant knowingly or purposely shares in discovery obtained by a codefendant will the court deem participation in discovery.

Time limits

Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and allow him to inspect, copy, test, and photograph the following:

Prosecutor's obligations

1) A list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged *or any defense* thereto or to any similar fact evidence to be presented at trial.

2) Category A-C witnesses ("A" witnesses deposed without leave of court; "B" good cause needed; "C" no deposition unless court determines witness should be in another category). Defendant can depose ANY witness listed by co–defendant who may testify at joint trial or hearing.

Choosing wrong category

Ward v. State, 165 So.3d 789 (Fla. 4th DCA 2015)

The state must designate, in discovery, the expert status of a police officer who will testify as an expert witness as a category "A" witness. The state's reference to listed police officers in portion of exhibit relating to reports or statements of experts was insufficient to comply with its discovery obligation regarding the designation of detective as an expert witness.

3) The statement of any person whose name is furnished in compliance with the rules. This includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. It is specifically intended to include all police and investigative reports of any kind prepared for in or in connection with the case but shall not include the notes from which those reports were compiled (But watch for *Brady*)

4) Any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements.

5) Any written or recorded statements and the substance of any oral statements made by a codefendant.

6) Those portions of recorded grand jury minutes that contain testimony of the defendant.

7) Whether the state has any material or information that has been provided by a confidential informant (note: See rule in paragraph 13)

8) Whether there has been any electronic surveillance, including wiretapping, of the premises of the defendant or of conversations to which the defendant was a party and any documents relating thereto.

9) Whether there has been any search or seizure and any documents relating thereto.

10) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons (Note: State must disclose results of hair analysis not just analysis was done. See: *Allen v. State*, 854 So.2d 1255 (Fla. 2003))

11) Any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant.

12) Any tangible papers, objects or substances in the possession of law enforcement that could be tested for DNA.

When it comes to providing discovery…

The state need only "tell" not "provide" the defense notice of the existence of tangible discovery.

EXAMPLES:

McKenzie v. State, 153 So.3d 867 (Fla. 2014)

Where the state lists "electronic surveillance of conversations" in its "discovery exhibit" after the defendant elects to engage in discovery, the defendant is placed on notice that such exists and cannot complain that he was not provided it where he took no steps to acquire the recordings.

Jules v. State, 178 So.3d 475 (Fla. 4th DCA 2015)

Defendant failed to establish discovery violation, prior to and during trial, that no money had been recovered from search of defendant, before State offered evidence that money had been recovered from defendant's jeans pocket. State disclosed laboratory reports in discovery, which listed defendant's jeans and advised to "see property receipt for description of the items that were discovered in pocket of the jeans". Property receipts that were in the state's possession were turned over to defendant and defendant had the opportunity to review the documents indicating the presence of the money and the defense never moved to compel production.

Testifying informants

RELATIVELY NEW **13) Whether the state has any material or information that has been provided by an informant witness including:**

(a) the substance of any statement allegedly made by the defendant about which the informant witness may testify.

(b) a summary of the criminal history record of the informant witness.

(c) the time and place under which the defendant's alleged statement was made.

(d) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony.

(e) the informant witness‘ prior history of cooperation, in return for any benefit, as known to the prosecutor.

14) If the court determines, in camera, that any police or investigative report contains sensitive information into related with other crimes or criminal activities and the disclosure of the contents may seriously impair law enforcement, the court may prohibit or partially restrict the disclosure.

Case law example

Demings, sheriff v. Brendmoen , **158 So.3d 622 (Fla. 5th DCA 2014)**

The trial court granted an order requiring the sheriff to disclose an operation plan which was intended to identify violations of the "computer pornography and child exploitation prevention act". The Sheriff was not made a party to that hearing. A motion for rehearing was filed by the Sheriff where an in camera inspection was requested. The court denied the request. The Sheriff appealed by requesting a certiorari review. The District Court ruled that the trial court judge should have granted an in camera inspection of the information requested by the defense to determine "materiality" as well as whether the sensitive law enforcement information may be exempt from disclosure under Rule 3.220(b)(2).

15) The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed to maintain fairness. (*Richardson inquiry*)

16) As soon as practical after the filing of the charging document the prosecutor shall disclose to the defendant any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations (emphasis added). ie Brady

Disclosure to the prosecution

(discovery does not have to be elected)

After the filing of the charging document and subject to constitutional limitations, the court may require a defendant to:

1) appear in a lineup

2) speak for identification by witnesses to an offense

3) be fingerprinted

4) pose for photographs not involving reenactment of the scene

5) try on articles of clothing

6) permit the taking of specimens of material under the defendant's fingernails

7) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof

8) provide specimens of the defendant's handwriting

9) submit to a reasonable physical or medical inspection of the defendant's body

Defendant's obligations

1) Within 15 days after receipt by the defendant of the Discovery Exhibit furnished by the prosecutor the defendant shall furnish a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing (emphasis added)

2) Within 15 days after receipt of the prosecutor's discovery exhibit the defendant shall serve a written discovery exhibit which shall disclose to and permit the prosecutor to inspect, the following information and material that is in the defendant's possession or control:

a) **The statement of any person listed by the defendant (other than the defendant)**

b) **Reports or statements of experts, that the defendant intends to use as a witness at trial or hearing (NEW RULE as of May 2018) made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons (Reverses Kidder v. State, 117 So.3d 1166 (Fla. 2nd DCA 2013).**

c) **Any tangible papers or objects that the defendant intends to use in the hearing or trial.**

Getting out of discovery

If the prosecutor files a motion for protective order it will automatically stay the times provided for in the rule. If the protective order is granted, the defendant may, within two days thereafter, or at any time before the prosecutor furnishes the information or material that is the subject of the motion for protective order, withdraw the defendant's notice of discovery and not be required to furnish reciprocal discovery.

***Question*: What if the defense has learned material from the written discovery provided so far?**

Restricting disclosure

The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party.

Matters not subject to discovery

Work product:

Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

EXCEPTION: ???

THAT’S RIGHT, BRADY!

Depositions

Rule 3.220(h) Discusses the taking of depositions. Of note:

- **"no deposition shall be taken in a case in which the defendant is charged only with a misdemeanor or a criminal traffic offense when all other discovery provided by in the rule has been complied with unless good cause can be shown to the trial court" (emphasis added).**
- **However, this prohibition against the taking of (misdemeanor) depositions shall not be applicable if following the furnishing of discovery by the defendant, the state then takes the statement of a listed defense witness pursuant to section 27.04, Florida Statutes (SAO investigation).**

- **Depositions of children under the age of 18 shall be videotaped unless otherwise ordered by the court.**
- **Defendant shall not be present however good cause may allow it if (a) the need is present for effective discovery and (b) there is no intimidating effect on witness. (h)(7)**
- **Telephonic depositions (when agreed by the parties and witness) do not have to be sworn. The rule provides they can, however, be used for impeachment purposes. Rule 3.220(h)(8)**

Either side may talk to the other's witnesses

(without deposition)

3.220(i) reads "…Neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case."

Catch All

“On a showing of materiality, the court may require such other discovery to the parties as justice may require.”

Sanctions

3.220(n)(1) reads:

"If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing into evidence the material not disclosed, or enter such other order as it deems just under the circumstances." (emphasis added)

The sanction of striking a witness

State v. Sullivan, 173 So.3d 1133 (Fla. 2nd DCA 2015)

"the trial court errs when it imposes the severe sanction of prohibiting a party from calling a witness without considering whether the potential prejudice to the non-offending party could be overcome with a less severe sanction."

The sanction of eliminating evidence

Bryant v. State, 186 So.3d 25(Fla. 4th DCA 2016)

Five-week recess for defendant to conduct DNA testing cured any prejudice resulting from state's mid-trial disclosure of pants containing DNA evidence linking defendant to murder, even though defendant insinuated during his opening statement that there was no DNA evidence linking him to the murder. Trial court allowed both parties to give a second opening statement after recess which allowed both sides to take into account new evidence from both experts. Defendant rejected trial court's repeated offers to grant a mistrial.

(2) A willful violation may result in sanctions. They may include, but are not limited to, contempt proceedings as well as the assessment of costs incurred by the opposing party, when appropriate.

Brady and Giglio

First off…

You need to know who John Leo Brady was

Who was "Brady"? - A quiz

Brady was a defendant being prosecuted in the state of Maryland for:

1)Robbery

2) Home burglary

3)Commercial burglary

4)Murder

5)Arson

The Brady decision was based on:

1) A sentencing issue

2) An issue that would have exonerated Brady

3) An error that resulted in the reversal of Brady's conviction by the U.S. Supreme Court

This was Brady…

Brady was on trial for first degree murder in the state of Maryland along with a codefendant named Boblit. Brady's lawyer conceded guilt to the jury but argued that his life should be spared from execution. Brady was convicted and sentenced to death. After all appeals and postconviction 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 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. In 1963 the United States Supreme Court agreed in Brady v. Maryland and reversed for a new sentencing hearing.

COMMON MISCONCEPTIONS OF BRADY OBLIGATIONS

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 don't 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**

Brady covers more!

Prosecution must turn over to the defense:

1) Evidence that tends to exonerate the accused
2) Evidence that materially impeaches any fact or witness
3) Evidence that would lessen the punishment
4) Any evidence that supports a valid defense to the charge
5) Any material exculpatory evidence*
6) And more… (later)

*Exculpatory evidence is material if there is a reasonable probability that the conviction or sentence would have been different had these materials been disclosed

The motivation behind Brady

"By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary 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." (emphasis added)

United States v. Bagley, 473 U.S. 667 (1985) – footnote 6; Berger V. United States, 295 U.S. 78, 88 (1935)

Kyles v. Whitley, 514 U.S. 419 (1995)

"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)**

Florida Supreme Court agrees…

"To comply with Brady, the individual prosecutor has a duty to learn of any favorable evidence and to disclose that evidence to the defense."

***Knight V. State*, 225 So. 3rd 661 (Fla. 2017)**

You HAVE to file a motion!

"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 682-83**

And…

“When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable”

(Bagley at 681)

But Beware!

"When a defendant makes only a general request under <u>Brady</u> it is the state that decides what information must be disclosed. The prosecutor's decision on disclosure is final."

See: *<u>Johnson v. Butterworth</u>*, 713 So.2d 985 (Fla. 1998)

As an example, the following may be requested for the prosecutor to search for, obtain and disclose to the defense (to exclude work product and privileged information):

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, Snap Chat 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 where questionable *Brady* material may be located (an in camera review by the judge may determine disclosure). 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 HIPAA (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 as well as any witness or evidence that would support a valid defense

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 (to include all agencies that contributed to the prosecution) that include notes, memorandum and reports. This also applies to the notes of any witness coordinator.

ABA Rule 3.8

ABA Model Rules of Professional Conduct Rule 3.8 - Special Responsibilities of a Prosecutor requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in conjunction with sentencing, to disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor."

(It provides an escape clause for an in camera production when timely disclosure could endanger a witness or otherwise unfairly prejudice the prosecution before trial)

So include that along with the more specific “Brady” motion

Then get them to reply to your granted requests

Does the defense have a duty to "look" for Brady?

There is some law out there that suggests the defense has a duty to conduct a "due diligence" search for *Brady* by looking in areas equally available to it (See: *Denton V. State*, 246 So. 3rd 413 (Fla. 4th DCA 2018); *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011). And no suppression was found when the information was "in a source where a reasonable defendant would have looked." (*United States v. Wilson*, 901 F.2d 378, 381 (4th Cir. 1990). Or if a search of public records could reveal the same information, there is no *Brady* violation (*Grant v. Lockett*, 709 F.3d 224, 231 (3rd Cir. 2013).

But not so where the material is in the hands of the investigative agencies not accessible to the defense

It has been held that the "burden-shifting" prosecution argument of due diligence has been rebuked by the United States Supreme Court. "This due diligence defense places the burden of discovering exculpatory information on the defendant and releases the prosecutor from the duty of disclosure. It relieves the government of its *Brady* obligations."

"…Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."

***Banks v. Dretke*, 540 U.S. 668, 695 (2004)**

In a nutshell

"A rule thus declaring 'prosecutor may hide, defendant must seek', is not tenable in a system constitutionally bound to accord defendants due process"

Banks v. Dretke, **540 U.S. 688, 696 (2004)**

DUTY TO PRESERVE

Once the police or State possesses "materially exculpatory evidence" there is a duty to preserve it. Destruction may be cause for a due process dismissal.

What happens when they lose or destroy the evidence before the defense can see or test it?

Youngblood **holds "If the evidence in question is only potentially useful, as opposed to clearly exculpatory, then a criminal defendant must prove bad faith on the part of the police to make out a due process violation. (See *Arizona v. Youngblood*, 488 U.S. 51 at 57 (1988))**

Get the last word!!!

Consider asking for a special jury instruction that is actually found in *Youngblood* (Pages 59-60):

"If you find that the state has allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest."

Do you know what "double blind" perjury is?

Due process is violated when a prosecutor makes a deal with defense counsel but exacts a promise that the lawyer will not tell his client so that the client can testify that "no deal" has been given for his trial testimony. *Brady* requires disclosure!

(See: *Hayes v. Brown*, 399 F.3d 972, 981 (9th Cir. 2005); *Napue v. Illinois*, 360 U.S. 264 (1959); *Phillips v. Ornoski*, 673 F.3d 1168, 1183,1186 (9th Cir. 2012))

Consider the case out of Louisiana of *Wearry V. Cain*, 136 Sup.Ct. 1002 (2016)

The U.S. Supreme court reversed due to *Brady* violations that included:

1)The State failed to disclose that a testifying witness told fellow inmates that the state's "star" witness told him to "make sure Wearry gets the needle cause he jacked me over" and

2)Another testifying witness said that the "start" witness "told him what to say and that it would help him get out of jail"

3)And another testifying witness said on the stand that he was not testifying for a deal when in fact he contacted authorities for that very reason (and that was withheld)

4)And a medical record was withheld that would have proven that the facts in the testimony of a state witness could not have happened due to injury

Not one of the reasons for a Brady violation had to do with "exonerating" the defendant, Wearry. But they ALL amounted to material impeachment of critical witnesses and the defense was entitled to this information to use in cross examination

Did you know you may be entitled to the prosecutor's witness preparation notes???

WHAT? Are you kidding me!!!

That's right. You are entitled to MATERIAL IMPEACHMENT OR CONTRADICTORY STATEMENTS of a witness the prosecutor expects to call for trial. It doesn't matter that it occurs in a prosecution witness preparation meeting. IT'S BRADY, plain and simple.

So put it in your motion!

Want proof?

A Florida prosecutor was preparing his witnesses for trial in a murder case where self-defense was in issue. Witnesses were inconsistent on whether a shotgun or hand gun was fired first (a critical fact). The prosecutor withheld his notes taken from a police officer witness during trial preparation that case doubt on that fact (witness stated he first thought he heard firecrackers). The death sentence was reversed for a new penalty phase by the State Supreme Court citing the Brady obligation of turning over material impeachment (prosecutor's notes)

***Young v. State*, 739 So.2d 553 (Fla. 1999)**

Is inadmissible evidence subject to Brady?

The prosecution is not required to turn over "Brady information" in matters involving inadmissible evidence BUT they are required when the information "might lead to admissible evidence".

(See *Wood v. Bartholomew*, 516 U.S. 1 (1995))

If the results of a polygraph are inadmissible, the state may not have to provide them to the defense (Wood v. Bartholomew). But what about the pre test or post test interview? Did the subject lie there or change his "story" as to the offense facts? If it constitutes *material impeachment* then it has to be turned over.

In other words, even if you are not entitled to the document, report or record, you ARE entitled to ALL Brady material in those records

So when the prosecutor takes the position that the records are not subject to disclosure, your response is that you are not asking for the records, you are asking for the information IN THOSE RECORDS that falls under *Brady* to be disclosed to you.

What should be disclosed?

- **Any information that tends to cast doubt on the defendant's guilt with respect to any essential element in any charged count.**
- **Any information that links someone other than the defendant to the crime.**
- **Any physical evidence, testing, or reports tending to make guilt less likely.**
- **Any information regarding the failure of any witness to make a positive identification of a defendant.**

- Any evidence that tends to lessen punishment
- Any information that tends to support an affirmative defense (self defense, insanity, alibi)
- Any exonerating evidence
- Any exculpatory evidence (as defined by case law)
- Any material impeachment or material inconsistent statements

There is only one way to insure Brady compliance…

- ✓ ***FILE A BRADY MOTION***
- ✓ ***CALENDAR IT FOR HEARING***
- ✓ ***GET THE COURT TO GRANT THE MOTION (prosecutor to review exempt records for Brady; and turn over the other material requested for defense review)***
- ✓ ***SET ANOTHER HEARING FOR THE PROSECUTOR TO CONFIRM REVIEW OF EXEMPT RECORDS AND STATUS OF ALL ITEMS TO BE TURNED OVER (ITEM BY ITEM)***
- ✓ ***ASK THE JUDGE FOR A "BRADY SCHEDULING HEARING" TO CONTINUE DISCLOSURE BY THE GOVERNMENT***
- ✓ ***HAVE THE JUDGE RULE THAT ANY ISSUES AS TO "MATERIALITY" QUESTIONED BY THE PROSECUTOR SHOULD RESULT IN AN INCAMERA REVIEW BY THE JUDGE TO MAKE THE CALL***

The Feds have a memo

MEMORANDUM FOR DEPARTMENT PROSECUTORS

Subject: Guidance for Prosecutors Regarding Criminal Discovery (January 2010)

Lists the "gathering and reviewing of criminal discovery" as it relates to *Brady v. Maryland* and *Giglio v. United States*.

Covers:

"Where to look"

"What to review"

"Making the disclosure"

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.

So *WHEN* does it have to be disclosed?

The State must "timely deliver" Brady material to the defense.

"Timely pretrial disclosure" is defined in Miller v. United States, 14 A.3d 1094 (D.C. 2011) as "the defense's ability to meaningfully use the information" (see also Perez v. United States, 968 A.2d 39 (D.C. 2009) and Kyles V. Whitley, 514 U.S. 419, 437 (1995))

And they can't "dump" it on you!

United States v. Bortnovsky, 820 F.2d 572 (2nd Cir. 1987) holds that the government does not fulfill its obligation under *Brady* merely by providing mountains of documents to defense counsel who are left unguided as to which documents would be discoverable under *Brady*. (see also United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) and United States v. Hsia, 24 F.Supp.2d 14 (D.D.C. 1998)

When can the prosecution withhold Brady?

Prosecutors may withhold materially impeaching information (*except exonerating*) when:

1) The witness being impeached is withdrawn from the prosecution witness list (unless this witness impeaches another government witness set to testify)

2) The prosecution and defense are *actively* engaged in plea discussions. See *United States v. Ruiz*, 122 S.Ct. 2450 (2002)

…and if the defense knows of Brady, "no harm – no foul"

"A Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant"

Cormier V. State, 253 So. 3rd 75, 83 (Fla. 1st DCA 2018) and _Geralds V. State_, 111 So. 3rd 778, 787 (Fla. 2010) quoting _Occhicone V. State_, 768 So. 2nd 1037,1042 (Fla. 2000)

Giglio

A prosecutor may not knowingly offer (material) false testimony

Last motion to file…

After you feel that the State has prepared their case and spoken with all the witnesses they intend to call at trial, file one last motion:

MOTION TO DISCLOSE GIGLIO MATERIAL

The motion should be requesting the state to turn over any and all information which intends to impeach any of their witnesses. This includes inconsistent statements, material false statements and anything which would contradict a witness' previous testimony or statement to the police or prosecutor. The requested information should not be limited in scope but rather should include social media, text messages, email, telephone or in person discussions. In particular, if there are any material contradictions or impeachment found after depositions have been taken, that would be included in the *Giglio* material being requested.

Young V. State, 739 So. 2nd 553 (Fla. 1999)

The above case holds that normally protected notes taken by a prosecutor during a witness interview must be handed over to the defense if they contain information which is now contrary to what was previously stated, or related to, the prosecutor as it falls within the *Giglio* decision

Who was "Giglio"?

A key witness for the prosecution testified that he and Mr. Giglio forged $2300 in money orders and that he "still could be prosecuted". The prosecutor argued in closing that the witness "received no promises and that he would not be indicted." But, in fact, the grand jury prosecutor had, unbeknownst to the trial prosecutor, promised the witness that if he testified before the grand jury he would not be indicted. The trial prosecutor denied any knowledge of the promise and thus any knowing use of false testimony. The Supreme Court imputed the promise of the first prosecutor to the entire office and reversed the conviction.

Giglio Violations

A Giglio violation is demonstrated when it is shown:

(1) the prosecutor presented *or failed to correct* false testimony;
(2) the prosecutor knew the testimony was false; and
(3) the false evidence was material. (emphasis added)

Rivera v. State, 187 So.3d 822 (Fla. 2015
Brooks v. State, 175 So.3d 204 (Fla. 2015)
Riechmann v. State, 966 So.2d 298 (Fla. 2007)

Huggins v. State, 161 So.3d 335 (Fla. 2014)

"If a defendant claiming a *Giglio* violation successfully shows that the state knowingly presented false testimony, the *state bears the burden* of proving that the testimony was not material by showing that there is no reasonable possibility that it could have affected the verdict because it was harmless beyond a reasonable doubt"

“Knowing” refers to knowing before hand as well as learning of the falsehood while the witness is testifying (changes his/her story on the stand)

Florida Bar ethics Rule 4-3.3

(Giglio found in a bar rule)

"A lawyer shall not offer evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false."

What exactly are “reasonable remedial measures”???

- **Bring it to the court's attention**
- **Bring it to opposing counsel's attention**
- **If the witness changes his/her story on the stand, approach the bench or ask for a recess, then disclose**
- **Always try to *dissuade* the witness from giving false testimony before they testify if you suspect they will**

Hernandez v. State, 180 So.3d 978 (Fla 2015)

Mere inconsistencies in a witness' statement or differences in their testimony given at different times are not sufficient for a Giglio violation (nor witnesses that contradict each other).

In the Giglio context, the suggestion that a statement may have been false is simply insufficient. The defendant must conclusively show that the statement was actually false.

The test for materiality under *Brady* and *Giglio*

They are different. Under Brady the nondisclosed evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.

Under Giglio the prosecutor's knowing use of perjured testimony, or the prosecutor's failure to correct what he or she has subsequently learned was false testimony, is material if there is a reasonable probability that the false testimony may have affected the judgement of the jury.

See: Ventura v. State, 794 So.2d 553 (Fla. 2001); Jones v. State, 709 So.2d 512 (Fla. 1998)

QUESTIONS?

Denis@deVlaming.com