DISCUSSION OF BRADY AND OTHER HISTORY / BACKDROP TO THE LAURIE LIST

Brady v. Maryland, 373 U.S. 83 (1963)

- Majority opinion by Justice Douglas
- Brady and co-defendant Boblit were convicted of murder and sentenced to death in the Maryland state courts, after separate trials. Brady's trial came first.
- Brady during trial admitted involvement but said Boblit was the actual killer
- The prosecution provided in discovery, several statements by Boblit, but withheld a statement where Boblit admitted that Botlit killed the victim. They withheld that statement throughout Brady's trial, and state court appeal.
- HOLDING: We now hold that the 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, irrespective of the good faith or bad faith of the prosecution.

BRADY'S PROGENY IN THE US SUPREME COURT– KEY DECISIONS

Giglio v. United States, 405 U.S. 150 (1972)

- witness and participant in crime testified that he received no promise of leniency from the government.
- The prosecutor believed this to be true. However, another assistant prosecutor from his office, DiPaula, had handled the grand jury proceedings. Dipaula had promised the witness that he would not be indicted if he testified at the grand jury and at trial.
- The lower court held this to be irrelevant because the assistant prosecutor had no authority to make that promise and the trial prosecutor didn't know about it.
- The Court: "neither DiPaola's authority nor his failure to inform his superiors or his associates is controlling." The promise of any one prosecutor to the witness is imputed to the entire prosecutor's office.
- The Court held that Giglio was entitled to a new trial.

United States v. Bagley, 473 U.S. 667 (1985)

- overruled a prior line of decisions that set forth different standards for *Brady* violations, with a less favorable standard of review applying where the defendant had not made a specific pre-trial request for disclosure of exculpatory evidence.
- After *Bagley*, it made no difference whether the defendant had made a pretrial request for disclosure of exculpatory evidence.

- Nevertheless, the custom persists – virtually all defense lawyers send prosecutors a discovery letter that includes a specific request for disclosure of exculpatory evidence.

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

- refined the materiality standard, and held that the defendant was entitled to a new trial based on the suppression of 7 different items of exculpatory evidence. Majority reasoned that the cumulative impact of these 7 items, if disclosed and admitted at trial would have created a "reasonable probability... that the result of the proceeding would have been different."
- . The state courts, federal courts and 4 of 9 justices, all disagreed, so this decision had the effect of 'changing the meaning of the standard' without actually changing the wording of the standard.
- 5-4 decision, with the 4 conservative justices dissenting on the basis of their view that disclosure of the exculpatory evidence would not have resulted in a reasonable probability of a different outcome.

WHAT IF DEFENDANT PLEADS GUILTY?

The *Brady* and *Laurie* decisions hold that a prosecutor violates the defendant's right to due process if the case proceeds to trial and the prosecution failed to disclose exculpatory evidence, whether it is substantive evidence (e.g., DNA evidence rules out the defendant as source of trace evidence found on victim's body), or impeachment evidence (e.g., police officer witness committed misconduct in the past which impeaches her credibility). For purposes of trials, there is no distinction between suppression of substantive evidence and suppression of impeachment evidence.

However, the distinction between substantive evidence of innocence and impeachment evidence does matter if the defendant pleads guilty. *Ruiz v. United States*, 537 U.S. 873, 123 S. Ct. 284, 154 L. Ed. 2d 124 (2002) (the Fifth and Sixth Amendments of the Federal Constitution do not require the government to disclose material impeachment evidence prior to entering into a plea agreement with a criminal defendant; impeachment information is special in relation to a trial's fairness, not in respect to whether a plea is voluntary).

ANTECEDENTS TO BRADY AND LAURIE

Canons of Professional Ethics (1908). Canon 5 states in relevant part:

> The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the

secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

Berger v. United States, 295 U.S. 78 (1935). The Court stated in one of the most oft-quoted passages[1] in the history of criminal procedure:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

- Justice Sutherland, writing for the majority, cited no authority at the end of that passage. At the conclusion of the opinion, however, the Court cited several cases decided by state courts that granted new trials based on prosecutorial misconduct, and that emphasized the special responsibilities of the prosecutor.
    - For example, the New York Court of Appeals in 1918 stated: "It was the duty of the court and of the district attorney to see to it that [the defendant's] fate which hung in the balance for so long was not prejudiced or settled by any forbidden or untoward methods."
    - A Kentucky Court in 1888 stated the prosecutor's role as follows: "The Commonwealth desires and is entitled to the conviction of the guilty by fair and honorable means, and upon competent testimony; but it does not desire a conviction by any other means."
    - A California court stated in 1889: "Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust."

Mooney v. Holohan, 294 U.S. 103 (1935)

- In the California state courts, Mooney was convicted of murder and sentenced to death. The death sentence was commuted to life in prison

[1] Cited in 4303 decisions across the country according to Westlaw.

- Mooney sought leave to file a habeas petition in the US Supreme Court, contending that the prosecution obtained his conviction through the knowing use of perjured testimony, and suppressed impeaching testimony known to the prosecution. He submitted exhibits which proved these contentions. Mooney contended his conviction, obtained through these means, violated due process of law under the federal constitution.
- The CA AG did not deny the facts as set forth above. Instead, the CA AG said that action by the prosecution, as opposed to a ruling by the trial court, can never constitute due process or a violation of due process of law.
- The unanimous Court rejected this "narrow view of the requirement of due process"
- It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.
    - The Court did not cite any authority in support of these strong statements.
- The appellate procedure in the state court is also fascinating: during the appeal, the State filed a motion asking for the judgment to be set aside and for petitioner to be granted a new trial. The appellate courts of CA denied the motion, stating that they only had jurisdiction to hear the appeal, that appellate review is limited to the record below, and that there was no evidence in the record below that the prosecution was obtained through perjured testimony or that the prosecution withheld exculpatory evidence.

Pyle v. Kansas, 317 U.S. 213 (1942)

- This case extended Mooney one set further. A prosecution obtained through perjured testimony, and the knowing suppression of evidence favorable to the accused, violates due process, even if the prosecutor is not proven to have <u>deliberately</u> solicited perjured testimony.
- The procedure below? In the Kansas state courts, Pyle was convicted of murder, in a trial where the prosecution obtained the incriminating testimony by threatening two witnesses with incarceration, and suppressed exculpatory testimony from two other witnesses. After Pyle's appeal resulted in affirmance, the Kansas prosecutors went after a different person for the same murder, and presented completely inconsistent testimony, which incriminated the new

> defendant, and exonerated Pyle. This all occurred while Pyle was sitting in prison serving a life sentence for the murder.

Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950). This is an example of a Circuit Court recognizing the prosecutor's duty to disclose exculpatory evidence, even if the prosecutor views it to be inadmissible, prior to the Brady decision. The Court stated:

> [This] case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314.

History of the Rule in New Hampshire

In the wake of *Brady*, the Court did not always interpret the rule consistently or correctly. One NH case decided in the wake of Brady held that prosecutor's duty to disclose exculpatory evidence does not arise unless defense makes a request for such evidence, although the same Court had held two years prior that the duty exists independent of any request by the defense. *State v. Lemire*, 115 N.H. 526, 531 (1975)(defense must make request to trigger the obligation); *State v. Dukette*, 113 N.H. 472 (1973) (defendant's right to due process was denied when exculpatory evidence was not provided, even though defendant had not requested it, because "essential fairness, rather than the ability of counsel to ferret out concealed information underlies the duty to disclose").

Ultimately, of course, the Court decided the landmark *Laurie* case, bringing the Brady principle to bear upon information concealed in police personnel files, and developing an independent analysis of these issues under the State Constitution.

The State Constitution has the "favorable proofs" clause, which is not present in the United States Constitution: Criminal defendants have an explicit right "to produce all proofs that may be favorable to [them]." In *Laurie*, the Court relied on this clause in adopting a standard more favorable to the defendant than the "reasonable probability" standard utilized in the federal courts.

The *Laurie* Court, however, did not cite any New Hampshire authorities decided prior to *Brady*. It's hard to find NH decisions that talk about the special responsibilities of the prosecutor, prior to the 1970s. The Court did not quote the famous passage from the *Berger v. United States* case, or even cite the case at all, until 1997.