



BRADY/GIGLIO

Avoiding Icebergs




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BRADY V. MARYLAND



“Society wins not only when the guilty are convicted but when criminal trials are fair: our system of justice suffers when any accused is treated unfairly.”

What must be disclosed per Brady?



- Exculpatory Evidence
- False reporting by a witness
- Criminal History – Crimes of moral turpitude
- Parole or probation status
- Contradictory evidence to witness statement
- Inaccurate statements contradicting some expertise
- Finding of misconduct
- Reputation for untruthfulness
- Religious, racial or personal bias
- Promises, plea deals, inducement, immunity, etc.
- ONLY IF SUBSTANTIATED OR CREDIBLE

What to Disclose (con't.)

- No requirement to provide information equally available to the defendant (be careful with this one)
- Must disclose favorable evidence
- Must disclose impeachment evidence
- Allegations must be substantial and not a simple conflict of testimony
- If the defendant has only made a general discovery request, the prosecutor must only produce "obvious" exculpatory information

○ *United States v. Bagley*, 473 U.S. 667, 682

UNITED STATES V. AGURS

- Must disclose exculpatory information even if it is not requested
- This does not mean a prosecutor must disclose the entire file
- **MUST BE MATERIAL**

Impeachment Evidence:

- The character of the witness for truth or veracity
- A bias, prejudice, sympathy, corruption or other motive
- Inconsistent statements
- Convictions involving moral turpitude
- False reports
- Pending criminal charges
- Parole or probation status
- Evidence undermining an experts' expertise
- Evidence of racial, religious, or personal bias
- **DOES NOT APPLY IF DEFENDANT PLEADS**

Rule 806 – Impeaching a Non-testifying Witness

- Must disclose impeachment evidence of a non-testifying declarant:
 - Co-Defendants
 - Co-conspirators
 - Accountant
- The declarant's statement must be offered for the truth of the matter
- Same rules as impeaching a testifying witness
 - Co-Defendants
 - Accountant

GIGLIO V. UNITED STATES

- Where the iceberg lurks
- Duty to disclose information that is attributed to the government – even if you don't know it exists
- Does not matter if by negligence or design
- Individual prosecutors have a duty to learn of ANY favorable evidence known to others acting on the government's behalf. *Kyles v. Whitley*
- Does not include preliminary information or speculation
- REQUIRES MATERIALITY

What is government per Giglio?

- Factors re: government agency
 - Part of the prosecution team
 - The agency played an active role in the prosecution
 - The prosecutor has access to discoverable material of the agency
 - The prosecutor has obtained other information from the agency
 - The agency has shared information with the prosecutor
 - Decisions about the case were made jointly with the agency
 - The prosecution and agency shared personnel or resources
 - Degree to which the prosecution's interests and the agency's interests diverge
 - Is the prosecution required to go through a formal process to access the information from the agency
 - The office conducted investigations, served warrants, etc.
 - MUST BE MATERIAL

What is Material?

- 1. Did the lack of the evidence result in a lack of confidence in a trial verdict
- 2. The favorable evidence could reasonably be taken to put the whole case in such a different light that confidence in the verdict is undermined
- 3. Once such error is found, it cannot be harmless error
- 4. The evidence must be examined collectively, not item by item

Three Part Test

- 1. Has there been a failure to disclose evidence?
- 2. Is the evidence favorable to the accused
- 3. Does the evidence create a sufficient probability that confidence in the outcome of the proceeding is undermined?

Touchstone – Turn over

- Any evidence that is inconsistent with any element of the crime charged
- Any information that casts doubt on the accuracy of any evidence
- Any information that casts doubt on a witnesses' testimony
- IF IN DOUBT, DISCLOSE

CALIFORNIA V. TROMBETTA

- Preserving evidence
 - MUST BE MATERIAL
- “[M]ust both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”
- Did not need to preserve intoxalizer results
- Do not need to preserve “all material that might be of conceivable evidentiary significance. *Arizona v. Youngblood*

Where to look for Discovery Information

- Documentary evidence
- Physical evidence
- Documents from parallel proceedings
- Substantive case related communications
 - Factual discussions about the investigation
 - Factual discussions about merits of the evidence
 - Factual information from interviews
 - Factual issues related to credibility
- Criminal Histories or other witness impeachment information
- Government agencies

How to Provide Discovery

- “[D]efendant’s right to discover exculpatory evidence does not include the unsupervised authority to search through the [Government’s] files.”
 - *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987)
- Forms of production
- Format
 - How accessible do you need to make the information
- Resolving conflicts
- Recording what discovery has been produced
- Protecting information from unauthorized disclosure
- Issues with co-defendant cases
 - Protecting confidential information between defendants

Limitations on Discovery

- Rule 16(e) – The prosecution can impose reasonable limitations on further dissemination of discovery
- Rule 16(f) – The Court can order that discovery be “denied, restricted or deferred” and can limit dissemination of discovery

When to Disclose/Timing of Discovery

- Brady material is a TRIAL right
- No constitutional requirement pre-plea
 - *United States v. Ruiz*, 536 U.S. 622, 629 (2002)
- Must give defendant time to conduct meaningful investigation/meaningful trial preparation
- Timeliness may vary when there are confidentiality/safety concerns

DISCLOSING OFFICER INFORMATION

- When is it necessary
 - How close in time
 - How close of a relationship to the crime charged
 - Was a lie about a significant matter
 - Was it a lie under oath
 - Was there an explanation for the lie
- May request an in camera review
- May request limiting cross-examination
- Office List
- Request in camera review
- Request record be sealed
 - Rule 16(f), Utah R. Crim. Pro.

Review Conduct in Light of Charges

- The charges against the defendant
- The underlying facts
- Known or anticipated defenses
- The officer's role in the case
- The assigned judge's history of ruling on such matters
- Assess potential impeachment information:
 - Nature of the conduct or alleged conduct
 - Reliability of the information that the misconduct occurred
 - Past history of disclosures relating to the conduct or alleged conduct

Considerations in disclosing re: Officers

- Motive to testify falsely
- Has a particular relevance to the case
- Prior mis-identification
- Substantiated claims of unlawful force if force is an issue
- Evidence of police misconduct in handling the case

Rights of Victims

- Right to be informed as to the level of protection and harm that can be provided. UCA 77-38-3(1)(a)
- Right to be informed and assisted in their role
- Right to clear explanation of relative proceedings
- Right to request HIV testing
- Right to be informed of DNA profile from rape kit
- Right to know if there is a match to the DNA profile
- Right to know if the DNA is not going to be tested
- Right to know if rape kit will be destroyed

Rights of Victims con't

- Let victim know what information is being disclosed about them
- Consider asking for a ruling under R 16(f) that victim information cannot be disseminated
- Understand any safety, privacy, or dignity issues discovery may cause
- **MUST BALANCE RIGHTS OF VICTIMS WITH OBLIGATION TO PROVIDE DISCOVERY**

Potential victim items to protect

- Name of the victim
- Video dissemination (of victim OR defendant)
- Financial information/records
- “Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone.” Rule 16(f)

Legal/Ethical Considerations

- Rule 3.3 Candor Towards the Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel , Utah Rules of Professional Conduct
- Rule 16 Discovery, Utah Rules of Criminal Procedure
