The Ethics of Discovery: *Brady* and its progeny, Rule 16, Rules of Professional Conduct and GRAMA - What it means to wear the white hat

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What does it means to wear the white hat

John Brady was arrested and charged in July 1958 with first-degree murder. Brady and his girlfriend Nancy Boblit Magowan were expecting a child. They needed money. Desperate, Brady and Nancy's brother Donald Boblit, decided to rob a bank. As part of the plan they needed a getaway car and plotted to steal Brooks' car. Brooks was a mutual friend. Brady and Boblit stole Brooks' car at gunpoint, struck Brooks and drove him to a secluded field where one of two men strangled him to death. Upon arrest both men gave several statements to the detectives. Brady denied the murder numerous times and fingered Boblit. Boblit did the same, giving several statements, claiming in all but one that Brady committed the murder. In Boblit's fifth statement he admitted to strangling Brooks.

Both men were convicted in separate trials of first-degree murder and sentenced to death. In Boblit's trial the prosecutor used his confession to convict and justify his death sentence. The confession was never presented at Brady's trial or disclosed to the defense.

In 1963, these facts led the United States Supreme Court in *Brady v. Maryland 373 U.S. 83,* to establish the *Brady* rule and placed an affirmative constitutional duty on prosecutors to disclose exculpatory evidence to a defendant. The Court held that withholding evidence violated due process "where the evidence is material either to guilt or to punishment" and held that under Maryland state law that the material withheld would not have exculpated Brady but was material to the punishment he would receive.

Brady Material

Since the holding in *Brady*, numerous courts at both the state and federal level have interpreted *Brady* to require prosecutors to disclose material exculpatory evidence to the defense. Exculpatory evidence is material if "there is a reasonable probability that that his conviction or sentence would have been different had these materials been disclosed."

Thus, a prosecutor has a duty to learn of favorable evidence known to other prosecution and investigative agencies acting on the prosecution's behalf, including police agencies. *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.

"Rumor" and *"speculation"* is not evidence that must be revealed pursuant to *Brady. United States v. Agurs* (1976) 427 U.S. 99, 109, fn. 16.)

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

In June 1966, Taliento, a teller, at Manufacturers Hanover Trust Company cashed several forged money orders. His actions were discovered by his employers. When questioned by the FBI Taliento admitted that he had provided Giglio with the signature cars from one of the bank's customers which Giglio then used.

Taliento is promised immunity from prosecution by Assistant U.S. Attorney DiPaulo for his testimony against Giglio. Taliento then testifies against Giglio before a grand jury which indicts Giglio.

Assistant U.S. Attorney Golden subsequently represents the prosecution against Giglio. DiPaulo did not inform Golden of his agreement with Taliento. Prior to trial Taliento informs Golden no agreement was made. DiPaulo consulted with Golden prior to the trial and emphasized that Talieto would most certainly be prosecuted if he did not testify but that if he did, the "good judgment and conscience of the government" would determine if Taliento would be prosecuted. After Giglio was convicted and sentenced and while woking on his appeal Giglio's attorney discovered evidence regarding Talieto and the government.

The *Giglio* facts led the United States Supreme Court to expand Brady. The High Court held that regardless of whether the failure to disclose between DiPaulo and Golden was intentional or negligent, the prosecutor as the representative of the Government, was still responsible and that the promise made by of one attorney was still attributable to the government reasoning that Taliento's testimony was crucial to the prosecution's case and without it there would not have been an indictment or possible conviction. Consequently, Taliento's credibility was a factor and his agreement with DiPaulo was potentially exculpatory and was Brady material. The ruling in *Giglio* created the *Giglio* material rule.

Giglio material is impeachment evidence or information that could be used to impeach a government witness's credibility.

Examples of evidence impeaching a prosecution witness's credibility, *United States v. Bagley* (1985) 473 U.S. 667, 676. include:

- Contrary, conflicting statements.
- False Reports.
- Inaccurate statements and reports.
- Other evidence contradicting prosecution witness statements and/or reports.
- Promises or offers of leniency, or other inducements, express or implied.
- Felony convictions.

- Misconduct involving moral turpitude.
- Misdemeanor convictions involving moral turpitude.
- Pending criminal charges.
- Parole or Probation status.
- Reputation for untruthfulness.
- Alcohol and/or drug use.
- Gang membership.
- Bias toward the defendant.

Brady Violation

Failing to disclose evidence may result in a *"Brady violation.* There are three components to a *Brady* violation, S*trickler v. Greene* (1999) 527 U.S. 263, 281-282:

1. The evidence at issue must be favorable to the accused because it is exculpatory, or because it is impeaching.
2. The evidence must have been suppressed by the State, either willfully or inadvertently.
3. Prejudice must have ensured.

The suppression of favorable evidence produces *"prejudice"* to a defendant only if the suppressed evidence is *"material."* Evidence is *"material'* only if '"there is a reasonable probability' that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense." *Strickler v. Greene, supra.* at pp. 289.

Cases (2010-2012) Discussing Brady

United States Supreme Court

Smith v. Cain, 132 S. Ct. 627, 181 L. Ed. 2d 571 (2012)

Holding: The Supreme Court, Roberts, Chief Justice, held that witness's statements to police, made on night of murder and five days after murder, were material for purposes of *Brady*.

Connick v. Thompson, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011)

Holdings:

1. Prior, unrelated *Brady* violations by attorneys in his office was insufficient to put district attorney on notice of need for further training.
2. Need for training was not so obvious that district attorney's office was liable on failure-to-train theory when nondisclosure of blood-test evidence had resulted in defendant's wrongful conviction and in his spending 18 years in prison.

Skinner v. Switzer, 131 S. Ct. 1289, 179 L. Ed. 2d 233 (2011) (*Brady* not implicated in DNA claims involving inmates.)

Unlike DNA testing, which may yield exculpatory, incriminating, or inconclusive results, a successful *Brady* claim necessarily yields evidence undermining a conviction: *Brady* claims therefore rank within the traditional core of habeas corpus and outside the province of § 1983. Pp. 1298 – 1300.

Wetzel v. Lambert, 132 S. Ct. 1195, 182 L. Ed. 2d 35 (2012) (Failure to disclose a "police activity sheet" was not a violation of *Brady*.)
Cash v. Maxwell, 132 S. Ct. 611, 181 L. Ed. 2d 785 (2012) (Failure to disclose information about witness was not a *Brady* violation.)

10th Circuit (Utah)

United States v. Sierra, 390 F. App'x 793 (10th Cir. 2010)

Holdings:

1. Even if photo lineup was unconstitutionally suggestive, informant's identification of defendant was sufficiently reliable.
2. There was no evidence that government destroyed photo lineup materials in bad faith.
3. Destroyed photo lineup materials were not material to trial.
4. Sufficient evidence supported conviction.

Tiscareno v. Anderson, 639 F.3d 1016 reh'g granted, opinion vacated in part, 421 F. App'x 842 (10th Cir. 2011)

Holdings:

1. Addressing an issue of first impression, state law requiring DCFS to report and investigate cases of child abuse did not create a *Brady* obligation.
2. It was not clearly established that child services agency had a duty pursuant to *Brady.*

United States v. Rivera, 478 F. App'x 509 (10th Cir. 2012) (Government's failure to notify defendant of eyewitness's changed testimony did not violate *Brady*.)

Utah State Courts

Tillman v. State, 2012 UT App 289, P.3d 318 (Defendant's *Brady* claim was procedurally barred because he waited longer than one year to file the petition.)

State v. Dick, 2012 UT App 161, P.3d 445 (Prosecution's failure to disclose information about rebuttal witnesses prior to trial did not constitute a *Brady* violation.)

State v. Hamblin, 2010 UT App 239, P.3d 300 (Even if the State's failure to disclose evidence showing that Brother, not the Defendant sodomized the victim with a light bulb amounted to a *Brady* violation, and even if the State's amendment of the information is not considered adequate disclosure pursuant to *Brady,* we nevertheless conclude that such errors were harmless.)

State v. Cecil, 2012 UT App 280, P.3d 22 (The State's failure to produce recordings did not violate *Brady*.)

State v. Santonio, 2011 UT App 385, 265 P.3d 822, 830 cert. denied, 275 P.3d 1019 (Utah 2012) (The government's failure to provide access to the disk did not violate *Brady* because the Defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information.)

State v. McHugh, 2011 UT App 62, 250 P.3d 1006 (State's failure to disclose alleged recordings containing witness's statements did not constitute *Brady* violation and thus did not violate defendant's right to due process.)

State v. Doyle, 2010 UT App 351, 245 P.3d 206 (State's failure to disclose witness's plea agreements with state did not amount to a *Brady* violation.)

The Rules of Professional Conduct, Professionalism and Civility:

Professional Conduct Rule 3.8 Special Responsibility of a Prosecutor

> The prosecutor in a criminal case shall: . . .
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> (d) 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 connection with sentencing, disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Rule 14-301 Standards of Professionalism and Civility (all attorneys)

> Preamble
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> A lawyer's conduct should be characterized at all times by personal courtesy and *professional integrity* in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as a foundation for a just and peaceful society. . . .
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> (17) Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. *Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.*

(19) In responding to document requests and interrogatories, *lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure* of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

The prosecutor's Constitutional, procedural and ethical duties to disclose – all required but not all the same

Brady and progeny Constitutional	Rule 16, Crim. Pro. Procedural	Rule 3.8 Prof. conduct Ethical
• Exculpatory • Impeachment • "Favorable" • Limited to "material" evidence • Imputes knowledge of prosecutorial team, including law enforcement • No request required • Violation = reversal of conviction	• Upon request • Discovery obligation • Known to prosecutor • Prejudicial result • Violation = exclusion of evidence or testimony, dismissal of counts, mistrial, new trial , reversal of conviction	• All evidence and information • Not impeachment • Actual knowledge • No materiality requirement • Timely disclosure • No request required • Applies to sentencing • Violation = punishment of prosecutor

The knowledge requirement – does Utah case law interpretation really keep you safe?

State v Pliego, 974 P.2d 279 (Utah 1999).

Issue: Does rule 16(a) require a prosecutor to disclose to the defense records which he does not possess and of which he has no knowledge?

Holding: Rule 16(a) does not require prosecutor to obtain and produce records of other state agencies

- Knowledge requirement of rule 16(a) does not require prosecutor to make an "investigation on behalf of the defendant, searching for exculpatory and mitigating evidence." Id. at ¶ 9.
- Knowledge requirement under rule 16(a) includes the knowledge of prosecutor's staff and the investigating police officers. Id. at ¶ 13.
- Prosecutor not required to disclose materials in possession of another state agency – "Such a rule would place a herculean burden on the prosecutor to search through records of every state agency looking for exculpatory evidence on behalf of defendant." Id. at ¶ 18.
- Prosecutor's disclosure duty under rule 16(a) only arises when prosecutor, his staff, or the investigating officers come across exculpatory materials during their investigation. Id.

State v. Spry, 21 P. 3d 675 (Utah App. 2001).

Issue: Under rule 16(a) does the prosecution have a duty to disclose records to which it may have access to under GRAMA but which it does not possess or intend to use?

Holding: No.

- Internal affairs files may be relevant but prosecutor required to have knowledge of them before disclosure is required. Id. at ¶ 9.
- Relies on *Pliego.* Id. at ¶ 13.
- Undisputed that IA files are in possession of municipality's IA division. Id. at ¶ 15.
- No evidence in record to suggest that prosecutor's office "had knowledge of the internal affairs record (other than being apprised of its existence in this appeal), or *came across the same in the course of its investigation*." (emphasis added) Id. at ¶16.
- Prosecution has stipulated that it won't use the IA file in its prosecution. Id.
- No duty to disclose records to which it has access under GRAMA. Id. at ¶ 25.

Ethical questions: What is your duty to disclose if you, your staff or investigating police officers come across the existence of the IA file during the course of your investigation? What if the investigating officers know that IA files exist that detail their own conduct? Can you avoid *Brady* or Rule 3.8 disclosure requirements by relying on *Pliego* and *Spry*?

State v. Doyle, 245 P.3d 206 (Utah App. 2010).

- "In Utah, the State has two independent obligations to provide evidence to the defense. First, the State has a duty under the Due Process Clause of the United States Constitution to provide, without request by the defendant all exculpatory

evidence. Second, when required by court order the State must disclose evidence pursuant to Rule 16 of the Utah Rules of Criminal Procedure." Id. at ¶ 3. \

- For all lawyers, and especially for prosecutors, 'conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms . . . [and] we must be mindful of our obligations to the administration of justice, which is a truth-seeking process.'" (citations omitted) Id. at 10.
- "Prudence dictates that all parties – especially prosecutors and others in the business of justice – ought to err on the side of disclosure. Clearly, the better practice for the State is to disclose in a timely fashion any evidence conceivable required to be disclosed under Brady rather than to find itself in the awkward position of having to rationalize and defend nondisclosure on appeal" Id. at ¶ 12.

Impeachment information – Do prosecutors and law enforcement agencies share responsibility in discovering and disclosing this information or would you simply rather not "know" what your law enforcement witness' files contain?

- Open communication or leave it to agency to respond to defense subpoenas?
- Clear identification and understanding of what actions/conduct by officer constitute *Brady* material.
- How will such material be disseminated between agency and prosecutor and from prosecutor to defense counsel?
- Policies should be clear and consistent.
- Training