

BRADY MATTERS

Troy Rawlings, Davis County Attorney

April 10, 2014 UPC Spring Conference

I. Scenarios

Christmas Eve Shooting that Didn't Happen (Or did it?):

Get out of here; Don't tell the County Attorney; Delete Spillman entries related to; Deny to County Attorney and Defense counsel that there is video of the incident...

Vehicle Roll-Over Incident and Keys to the Range Kingdom:

Duplicate keys to Privately Owned Shooting Range; Disputed contract provided...

II. Are these (above) examples of Brady Material if the officers involved are witness in one of your cases? Yes, No and Why?

III. What is Brady – Giglio information?

Prosecutors are required to disclose to the defense evidence favorable to a defendant which is either exculpatory or impeaching and is material to either guilt or punishment. Evidence is "favorable" to the defendant if it either helps the defendant or hurts the prosecution. (*In re Sassounian* (1995) 9 Ca1.4th 535,543-544.) In *Strickler v. Greene* (1999) 527 U.S. 263, 280, the United States Supreme Court stated: In *Brady* this Court held "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 v. Maryland, supra*, 373 U.S., at 87. We

have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, [*United States v. Agurs* (1976) 427 U.S. 97, 107], and that the duty encompasses impeachment evidence as well as exculpatory evidence, [*United States v. Bagley* (1985) 473 U.S. 667,676]. Such evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id* at 682; see also [*Kyles v. Whitley* (1995) 514 U.S. 419, 433-434].

In order to ensure compliance with these rules, **the United States Supreme Court on more than one occasion has urged the "careful prosecutor" to err on the side of disclosure.** (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 440; *United States v. Agurs*, *supra*, 427 U.S. at p. 110.)

Obligations under *Brady* continue even after a case has concluded (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260-1261).

Please Review, Among Many Things:

Utah Rules of Criminal Procedure: Rule 16

Utah Rules of Evidence: Know 404; 405; 406, 407; 607; 608; 609; 613

Examples of Judicially Determined Brady Material Categories:

1. False reporting by a prosecution witness;
2. Criminal History – When? Moral Turpitude + / Pending criminal charges against a prosecution witness;
3. Parole or probation status of the witness;
4. Evidence contradicting a prosecution witness's statements or reports;
5. Evidence undermining a prosecution witness's expertise (e.g., inaccurate statements);
6. A finding of misconduct by a Board of Rights or Civil Service Commission that reflects on the witness's truthfulness, bias or moral Turpitude;
7. Evidence that a witness has a reputation for untruthfulness;
8. Evidence that a witness has a racial, religious or personal bias against the defendant individually or as a member of a group;
9. Promises, offers or inducements to the witnesses, including a grant of Immunity.

What is Not Brady?

From the Los Angeles County District Attorney's Office, September 20, 2010:

Allegations that cannot be substantiated, are not credible, or have been determined to be unfounded are not considered impeachment material and therefore will not be included in the Brady Alert System. (Refer to Section III., "The Brady Alert System," below.) The prosecution has no obligation to communicate preliminary, challenged or speculative information. (*United States v. Agurs, supra*, 427 U.S. at p. 109, fn. 16.) Pending criminal or administrative investigations are considered preliminary in nature and will not be included in the Brady Alert System. If a deputy district attorney has any question whether information falls within his or her individual *Brady* obligations, the Brady Compliance Unit is available for consultation.

IV. How do you make the determination as to what is Brady - Giglio? Who is involved? Who has access to it in your office? Should we have a uniform State Policy / Practice?

From the Los Angeles County District Attorney's Office, September 20, 2010:

PRIMARY RESPONSIBILITIES OF THE BRADY COMPLIANCE UNIT

1. Maintain the Brady Alert System (LA DA's Intra-Office System Below);
2. Collect and maintain *Brady* material;
3. Consult with deputy district attorneys to determine whether *Brady* material exists in a particular case or against a particular witness;
4. Consult with deputy district attorneys to determine when it is appropriate to disclose potential *Brady* impeachment information to the defense;
5. Consult with deputy district attorneys to determine when it is appropriate to seek ex parte, in camera review by the court of potential *Brady* material, as well as to develop and maintain pleadings for this purpose; and
6. Advise deputy district attorneys on issues relating to the Brady Protocol and on relevant case law.

V. What affirmative obligation do you have to seek it? What does that mean? What steps required? Post-Conviction Integrity Unit?

- a. United States Attorney's Office Policy (i.e. a form letter to officers seeking Brady disclosure);
- b. Reach out to the agency for Discipline / I.A. Investigations / Personnel Files?;
- c. POST?;
- d. Run Criminal Histories on all witnesses?;
- e. Civil litigation issues (divorce example)?.

VI. How do you disseminate the information? How do you document that you have? (Do You Have An Open File Policy)?

[See Sample Letter from Deputy Davis County Attorney Jason Nelson]

September 28, 2011
Michael J. Boyle
Michael J. Boyle, P.C.
2506 Madison Avenue
Ogden, Utah 84401
Fax: (801) 394-4923

RE: State of Utah v. XXXXXXXXXXXXXXXX, Case No. 666666666

Mr. Boyle,

As we have previously discussed, I am aware of information that I believe must be disclosed in this case pursuant to the requirements of *Brady*. Specifically, this information relates to Deputy XXXXXXXXXXXXXXXX, an officers involved in this case. My office does not have a copy of the complete files related to the investigations involving those officers, and therefore cannot provide those files to you.

We do, however, have some information that can be reviewed at our office. Specifically, we have the case file for *State v. YYYYYY*, case 000000000000. Deputy XXXXXXXXXXXXXXXX was involved in that case, and there is a video of the incident. You are welcome to come to our

office to review the video in that case and compare it to Deputy XXXXXXXXXXXXXXX's police report. It is my belief that the report is contradicted by what is shown in the video.

Also, Troy Rawlings has some information related to an investigation involving another officer who may testify in this case, ZZZZZZZZZZZZZZZZZ, and that information can be obtained from Troy and also reviewed at our office.

Very truly yours,
Jason C. Nelson
Deputy Davis County Attorney

From the Los Angeles County District Attorney's Office, September 20, 2010:

[Access and Dissemination]

"Every deputy district attorney can access the Brady Alert System to determine whether information on a particular witness exists. The system will confirm whether information exists regarding the witness, provide a brief summary of the Brady information, and, if appropriate, alert the deputy to contact the Brady Compliance Unit for further details.

Deputy district attorneys shall access the Brady Alert System at least 30 days before trial to determine whether impeachment information exists for any material law enforcement or governmentally-employed expert witness.

Any information learned from accessing the Brady Alert System shall be noted in the District Attorney file. The deputy appearing in court on a case shall have the responsibility of notifying the defense of any information learned from the Brady Alert System. A notation shall be made in the District Attorney file indicating the date, a description of the information disclosed, and the manner by which notification was made (i.e., in writing or on the record). Any information learned from the Brady Alert System shall be conveyed to the defense only on the particular case being litigated before the court.

Misuse of the Brady Alert System will subject a District Attorney employee to disciplinary action up to, and including, discharge."

VII. What is your potential liability for violating Brady?

- a. The Case itself?**
- b. Utah State Bar?**
- c. Personal Civil Liability?**
- d. Potential Criminal Liability?**

YOUR POLICIES AND PRACTICE MATTER

- Center for Prosecutor Integrity;
- NY Times Editorial RE: Prosecutorial Misconduct

(PUBLIC PERCEPTION/ THEY ARE YOUR JURORS);

- Kent Hart in Salt Lake Tribune:

January 18, 2013

Kent R. Hart is executive director of the Utah Association of Criminal Defense Lawyers.

“...cases suggest a larger problem throughout the nation and in the state of Utah. Commonly, prosecutors assure defense attorneys that they have turned over all of the evidence in the case. Then, on the eve of a trial or just before an important court hearing, prosecutors announce that they have located new evidence that has become available.

This scenario is apparently based on prosecutors' interpretation of the law as only requiring them to disclose exculpatory evidence if and when, in their subjective judgment, it becomes material. Under this misguided application of the law, prosecutors essentially argue that they only need to disclose evidence when they subjectively believe that the defendant could find the evidence helpful.

For these reasons, the **National Association of Criminal Defense Lawyers has asked Congress and state legislators to enact laws that require prosecutors to disclose all evidence in criminal cases.**”