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**Civil Liability for Police
Failure to Disclose Exculpatory Evidence**

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Introduction

An important recent decision from a federal appeals court emphasizes the obligation of police officers to disclose all exculpatory evidence about criminal defendants to prosecutors and spells out some parameters for potential civil liability stemming from failure to do so.

Brady v. Maryland: the Prosecutor’s Duty

The U.S. Supreme Court, in the landmark case of [Brady v. Maryland](#), #490, 373 U.S. 83 (1963), established clearly that prosecutors have an affirmative duty, as a matter of constitutional law, to disclose all known exculpatory evidence to the accused in a criminal proceeding. If the prosecution suppresses evidence favorable to an accused, it violates due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

What is “exculpatory evidence”? It is any evidence in the possession of the government that could be favorable to the accused. It includes not only evidence relevant to the issue of guilt, but also evidence relevant to the issue of the appropriate punishment. And

subsequent cases have also made it crystal clear that “exculpatory evidence” includes evidence reflecting on whether witnesses against the accused are credible, which might be used by the defendant’s attorney at trial for purposes of impeachment. [Giglio v. United States](#). 450 U.S. 150 (1972).

If a witness against the defendant is testifying, in part, because they have been offered the prospect of their own potentially lighter sentence on pending criminal charges, or even a promise not to prosecute them, this must be disclosed, as must such motivations for testifying as the promise of a financial reward for doing so. The motivation of the witness for testifying, and the possibility that they might be motivated by something other than a desire to tell the truth (or even have a powerful motive to lie), is material highly valued by defendants and their counsel for use in court.

Police officers are often witnesses in criminal proceedings, and the principles in [Brady](#) and [Giglio](#) mandate that facts (such as any indication of having written false reports in the past) bearing on an officer’s veracity and credibility must also be disclosed.

Additionally, the courts have held that this obligation on the part of the prosecution is an ongoing one, one that even extends beyond a finding of guilt in a criminal trial. A prosecutor who comes into possession or knowledge of exculpatory evidence after a trial, therefore, is required to then disclose it to the defendant or his counsel, who can use the information in the context of post-trial motions, direct appeals of a conviction or sentence, and in seeking habeas relief in state or federal court.

Under these decisions, the expectation is that law enforcement agencies that have investigated a crime and developed the evidence that a prosecutor is going to use to carry out a prosecution will make the prosecutor also aware of potentially exculpatory evidence, as defined by the caselaw, so that the prosecution may disclose it to the defense.

[Brady](#) and its progeny have also firmly stated that the “good faith” or “bad faith” of a prosecutor in failing to disclose exculpatory evidence does not matter.

The consequences of failing to do so, in the context of a criminal prosecution can be severe. The U.S. Supreme Court, in [Kyles v. Whitley](#), #93-7927, 514 U.S. 419 (1995), for example, ruled that a failure to disclose exculpatory Brady material means that a conviction cannot be upheld if a reasonable probability is found that the evidence would have produced a different trial result. If a habeas petitioner establishes such a “reasonable probability, the error committed cannot be found “harmless.”

What about when the exculpatory evidence is not in the hands of a prosecutor, but in the possession of a law enforcement investigating agency? In [United States v. Blanco](#),

#03-10390, 2004 U.S. App. Lexis 26815, 392 F.3d 382 (9th Cir. 2004), the court reasoned that:

“exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does. That would undermine Brady by allowing the investigating agency to prevent production by keeping a report out of the prosecutor’s hands until the agency decided the prosecutor ought to have it, and by allowing the prosecutor to tell the investigators not to give him certain materials unless he asked for them.”

Understandably, therefore, prosecutors are concerned that police officers understand the nature of the obligation to disclose exculpatory evidence, and the consequences of failure to do so, to encourage officers to bring such material to the prosecutor’s attention. Both prosecutors’ offices and police departments have conducted training about Brady obligations.

The Duty to Disclose Applied to Law Enforcement

A recent decision of the U.S. Court of Appeals for the Ninth Circuit emphasizes the application of this duty on law enforcement by exploring it in the context of potential police civil rights liability under 42 U.S.C. Sec. 1983 for failure to comply.

This case, [Tennison v. City and County of San Francisco](#), #06-15426, 2009 U.S. App. Lexis 13885 (9th Cir.), was filed by two men in California who wound up serving close to 13 years being incarcerated on a conviction for murder in a purportedly gang-related murder before being set free based on a finding of factual innocence.

The federal appeals court found that homicide investigators involved in the case were not entitled to summary judgment on the basis of either qualified or absolute immunity on claims for malicious prosecution.

The court emphasized that the obligation to reveal exculpatory evidence to the accused’s defense attorney applies to police, not just to prosecutors. The plaintiffs claimed that the two San Francisco homicide investigators “withheld exculpatory evidence and manufactured and presented perjured testimony during the investigation and prosecution” of them for murder.

Material allegedly not turned over to the prosecutor included a taped confession to the murder itself by another individual and notes of interviews with individuals, which would have aided the defense.

In the case, a number of men in a pickup truck were chasing a vehicle driven by Roderick Shannon. Shannon's car crashed into a fence, after which these men surrounded and beat him. One of them then shot and killed him.

The investigators developed evidence implicating John Tennison and Antoine Goff in the murder. After they were arrested, an investigator was contacted by Chante Smith, who indicated that she saw the men chasing Shannon. She identified Lovinsky Ricard as the shooter, and also indicated that neither of the arrestees had been present at the scene of the incident. Ricard denied being present.

Tennison and Goff were convicted. While it is true that a memo incorporating the identification of Ricard, etc. was placed in a police file given to prosecutors, it was allegedly "buried," with the investigators failing to discuss it with the prosecution or otherwise bring it to the prosecutor's attention, and nothing about this was disclosed to the defense.

A month following the conviction, while post-trial motions were still being heard by the trial court, other city police officers in a gang task force arrested Ricard on unrelated drug charges, and they questioned him concerning the Shannon murder, among other things. Surprisingly, he admitted to being the shooter for the murder, supplied details of the crime that were consistent with the known evidence and with the version of the incident previously revealed by witness Smith. During the interview, he was unidentified and disguised with a hood on the videotape.

While one officer subsequently stated that he provided a copy of the videotaped confession to one of the two homicide investigators, apparently neither the prosecutor nor the defense attorney received disclosure of the existence of the video or the confession. This was, however, inadvertently revealed during the third day of a new trial motion hearing.

The trial court declined to grant a new trial, partially based on inconsistencies in the confession, and the two defendants were sentenced for the murder.

It was only 13 years later that a federal court, on the basis of this information, granted the two men habeas relief and they were set free.

They sued the inspectors for violating their rights to disclosure of Brady material. In addition to information about the videotaped confession, there were also factually disputed issues concerning a reward of \$2,500 purportedly requested by the investigators from a Secret Witness Program, which the plaintiffs implied might have had something to do with encouraging witnesses against them to identify them as being involved in the crime,

including one witness who, at one point, changed her story, stating that she had not actually witnessed the murder, and then changed it back again, stating that she had.

On the plaintiffs' lawsuit against the investigators, the federal appeals court rejected the investigators' defense that the duty to disclose exculpatory evidence was not theirs, but the prosecutor's alone.

The appeals court pointed to language in [Youngblood v. West Virginia](#), 547 U.S. 867 (2006), in which the U.S. Supreme Court stated that Brady is violated when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor." It also cited [Newsome v. McCabe](#), 256 F.3d 747 (7th Cir. 2001) for the proposition that it was clearly established, as long ago as 1979 and 1980, that police could not withhold exculpatory information about fingerprints and the conduct of a lineup from prosecutors.

The appeals court rejected the inspectors' argument that the plaintiffs had to show that they acted in bad faith in order to impose liability. No such showing is needed, the court found, to impose federal civil rights liability on police for failure to disclose to prosecutors exculpatory evidence. While mere negligence would not be enough, the court believed that a plaintiff could prevail if they showed that officers "acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors."

The Tennison court also pointed to [Steidl v. Fermon](#), #96- 2017, 494 F.3d 623 (7th Cir. 2007), in which the Seventh Circuit rejected the argument that "police officers violate due process 'only if they deliberately withhold or conceal exculpatory evidence from the prosecutor.'"

"[S]upervisors may be liable for their subordinates' violation of others' constitutional rights when they 'know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference.' "

In the immediate case, the court found, there was evidence that the inspectors acted with reckless indifference to the plaintiffs' rights. The placement of statements concerning what was learned from witness Smith in a file, further, only served to bury it, not disclose it, in the absence of actively bringing it to the prosecutors' attention.

"Evidence that a person, known to the officers, has told the officers that they have arrested the wrong people, has identified the people involved, including the shooter, and described the cars and the chase in a manner consistent with the evidence, should not have been buried in a file, but should have been made known to the

prosecutor. Moreover, Smith's statements contradicted the account of their key witness, and the notes included a hand-drawn map of the incident, based on her statements."

The appeals court easily disposed of the defendants' argument that they were entitled to absolute immunity with respect to obligations to disclose the Ricard confession, rejecting the argument that they were somehow involved as advocates in the prosecutorial process rather than engaged in police-type investigative work. Nor were they entitled to qualified immunity, as their conduct, if as alleged, violated clearly established constitutional rights.

This important decision highlights the importance of good and thorough training of officers on the obligation to disclose exculpatory evidence. In cases involving serious crime, failure to do so may result in innocent persons serving long prison sentences, as well as significant civil liability if the facts subsequently come out and those convicted are exonerated.

A number of other recent cases bolster this conclusion:

In [Moldowan v. City of Warren](#), #07-2115/2116/2117, 2009 U.S. App. Lexis 14238 (6th Cir.), an arrestee was convicted of kidnapping, assault with intent to commit murder, and criminal sexual conduct. The conviction was reversed, based on new evidence and discredited testimony. After a new trial, the arrestee was acquitted, but he spent a total of twelve years in incarceration. The arrestee sued, claiming that nine law enforcement defendants fabricated evidence against him, failed to disclose exculpatory evidence, and pursued his prosecution and his retrial without probable cause.

A federal appeals court rejected all claims based on testimony presented at trial, for which absolute immunity exists. A police detective's alleged suppression of a witness's statement, however, which cast serious doubt on, if not entirely discrediting, the identification of the arrestee as the offender, if true, would have violated the duty to disclose exculpatory evidence. A police officer who destroyed certain evidence, however, was not shown to have had any idea that it could have exonerated the arrestee, and therefore could not be held liable.

In [Moore v. Hartman](#), No. 08-5370, 2009 U.S. App. Lexis 14942 (D.C. Cir.), in a malicious prosecution lawsuit, the trial court erred in holding that the existence of a grand jury indictment conclusively proved the existence of probable cause. The indictment only established a rebuttable presumption of probable cause, and the plaintiff could prevail if he showed that the indictment was produced by "fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith."

Finally, in [Johnson v. Guevara](#), #05C1042 (N.D. Ill. June 22, 2009), a federal jury awarded \$21 million to a reputed gang leader who claimed that a former Chicago police detective framed him for a murder. After his murder conviction was reversed on appeal, a gang member stated at a second trial that the detective had coerced him and directed him to pick the arrestee out of a lineup and identify him as the killer. The award includes \$21 million in compensatory damages and \$15,000 in punitive damages against the detective. Claims against the city were not tried during the trial of claims against the detective, and remain pending. The plaintiff served over eleven years in prison before his conviction was overturned on the basis that his identification was tainted.

In light of these cases, police departments should place even more emphasis than before on training officers on the need to systematically comply with Brady obligations.

Resources

- Brady Disclosure Requirements, IACP Model Policy and Concepts Paper (Apr. 2009).
- Brady v. Maryland: Importance of Honesty and Integrity, IACP Training Key #624 (2009).
- [Disciplinary Consequences of Peace Officer Untruthfulness Part I - Job Applications](#), 2008 (9) AELE Mo. L. J. 201 (Sep. 2008).
- [Disciplinary Consequences of Peace Officer Untruthfulness Part II - Employee Dishonesty](#), 2008 (10) AELE Mo. L. J. 201 (Oct. 2008).
- [Brady Is Middle-Aged—but Is Compliance in Its Infancy for Some Agencies?](#) by Julie Risher, 75 (6) Police Chief (Jun. 2008).
- [Should Police Officers Who Lie Be Terminated as a Matter of Public Policy?](#) by Elliot Spector, 75 (4) Police Chief (Apr. 2008)
- [The Discovery Process and Personnel File Information](#), by Richard G. Schott, J.D., 72 (11) FBI Law Enforcement Bulletin 25 (Nov. 2003).
- [Police Officer Truthfulness and the Brady Decision](#), by Jeff Noble, 70 (10) Police Chief (Oct. 2003).
- [Issues in Case Management: Brady impeachment material](#), by Julie Risher, 109th IACP Annual Conference (Oct. 2002).
- Officer Liability for Failure to Disclose Exculpatory Evidence, by Mark Newbold, 68 (5) Police Chief (May 2001).

- Keeping Files on the File Keepers: When Prosecutors are Forced to Turn Over the Personnel Files of Federal Agents to Defense Lawyers, by Lis Wiehl, 72 Wash. L. Rev. 73 (Jan. 1997).

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