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Introduction: Prosecutorial Ethics and the Right to a Fair Trial: The Role of the Brady Rule in the Modern Criminal Justice System

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SYMPOSIUM

PROSECUTORIAL ETHICS AND THE RIGHT TO A FAIR TRIAL: THE ROLE OF THE *BRADY* RULE IN THE MODERN CRIMINAL JUSTICE SYSTEM

INTRODUCTION

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An argument often made over the last half century against the Fourth Amendment exclusionary rule is that ordinary citizens lose faith in the criminal justice system when guilty defendants go free because reliable evidence of guilt is suppressed when police violate a defendant's right to be free from unreasonable searches and seizures.[1] That may be the case. However, ordinary citizens and lawyers and judges alike should be truly alarmed when they see the criminal justice system unable to distinguish between innocent and guilty defendants. The credibility of the criminal justice system is completely dependant upon its ability to ensure that innocent people are not convicted.

It is too late in the day to believe that innocent defendants are not convicted of crimes in America, nor can we avoid the fact that innocent defendants have been convicted not just as a result of innocent errors. The release of defendants exonerated after years in

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1 *See* United States v. Leon, 468 U.S. 897, 908 (1984) ("Indiscriminate application of the exclusionary rule, therefore, may well 'generat[e] disrespect for the law and the administration of justice.'").

prison is evidence of a system that eventually works, but, at the same time, it is also evidence of a system that is subject to terrible error resulting in costly human tragedy. It raises ongoing questions about those who may languish in prison wrongfully convicted and never exonerated. It is fashionable to joke about how all prisoners are innocent—just ask them. But tragically, some are.

The rules governing prosecutors are few and direct. A prosecutor may not deliberately misrepresent the truth as in *Miller v. Pate*, where the prosecutor represented a pair of shorts found a mile away from the murder scene as blood-stained even though the prosecutor knew the stains were paint—not blood. The state used a chemist from the State Bureau of Crime Identification who testified that the stains were blood, and the prosecutor referenced the blood-stained shorts in his final argument. The Supreme Court said that "The Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."[2] Forty years later issues concerning the integrity of some crime labs persist.

The due process clause also requires the prosecutor to correct perjured testimony.[3] Moreover, the prosecutor's duty does not stop with the direct facts of the crime itself, but extends to perjured testimony that goes to matters of credibility—such as when the witness denies that he has received a promise of leniency or other compensation in return for his testimony.[4] Yet, almost a half century later, cases still arise where witnesses misrepresent what they receive in return for their testimony, and prosecutors remain silent or, worse, participate in that misrepresentation.[5]

These rules are intended to promote the reliability of the guilt-determining process by reducing the possibilities for wrongful convictions. It is an outrage that violations of these most basic duties continue to occur today because they are such basic trip wires intended to prevent miscarriages of justice. A prosecutor may not knowingly use perjured testimony.[6] Perjury creates the same duty whether it goes to an essential fact of the case or to a collateral matter. The prosecutor must correct a witness's false statement that he had not received a promise of leniency in return for his testimony.[7] Moreover, the prosecuting attorney's ignorance is no excuse. The prosecuting attorney trying a case has a duty to find out whether

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2 Miller v. Pate, 386 U.S. 1, 7 (1967).
3 Alcorta v. Texas, 355 U.S. 28 (1957).
4 Napue v. Illinois, 360 U.S. 264 (1959).
5 *See, e.g.*, Kyles v. Whitley, 514 U.S. 419 (1995).
6 Mooney v. Holohan, 294 U.S. 103 (1935).
7 *Napue*, 360 U.S. 264.

promises have been made to her witnesses.[8] Any other rule would encourage willful blindness on the part of the attorney trying the case Yet anyone who was around the Cuyahoga County Courthouse long after the decisions in *Napue* and *Giglio* knows that accomplices and jailhouse snitches routinely deny that any promises had been made, and prosecuting attorneys equally routinely let those denials stand without correction. The continued importance of jailhouse snitch testimony and incidences of jailhouse snitch perjury indicate that we have not come very far in our pursuit of ensuring that juries be made aware of the currency of exchange for testimony.

We certainly have not eradicated the perjury issue, but in 1963, the United States Supreme Court recognized that the prosecutor's duty to see that justice is done involved more than just correcting perjured testimony. In *Brady v. Maryland*, the Court said:

> 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.[9]

Brady is as important for the type of evidence involved as it was for the holding. The evidence was not a bombshell that would have exonerated the defendant. At Brady's trial, he admitted to participation in the felony. His attorney conceded his guilt on the felony-murder charge but insisted that Brady's accomplice committed the murder.

Brady's attorney requested to see statements made by the accomplice. Several statements were produced but not the one where the accomplice admitted shooting the victim. The withheld confession also implicated Brady in the murder, indicating that Brady wanted to strangle the victim. It was questionable how much the accomplice's confession would help Brady in the punishment determination of life or death. Not much is clear from *Brady* except the general principle that 1) the prosecutor has a duty to disclose 2) evidence favorable to an accused 3) upon a request of a defendant 4) that is material to questions of guilt or punishment. The Court did not define materiality. *Brady* seemed to stand for, though unstated in the opinion, a broad test of materiality: that the evidence which the prosecutor must produce need only be helpful; it need not be clearly decisive. A jury exposed to the accomplice's confession admitting

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[8] Giglio v. U.S., 405 U.S. 150 (1972).

[9] Brady v. Maryland, 373 US 83, 87 (1963).

that he shot the victim could still return a death sentence against Brady. In *Giglio v. United States*, the *Brady* duty to disclose was extended to impeachment evidence.[10]

Brady seemed to herald a new day and a recognition of a prosecutor's higher duty to see justice done even beyond the not-insignificant task of correcting perjured testimony. It is the prosecutor who knows or should know, despite heavy caseloads and insufficient preparation time, where the weak spots and inconsistencies are in case files. The prosecutor or the police know when witnesses have come forward with information that does not match the suspect who became the defendant. It is the prosecutor or the prosecutor's investigator who knows of inconsistencies in statements made by witnesses who will be called at trial and whose memories had to be refreshed in order to overcome those inconsistencies. It is the natural competitive nature of the adversary to want only the favorable evidence to surface at trial. But it is the higher duty of the prosecutor under *Brady* to ensure that justice is done, and that *favorable* evidence for the defendant is disclosed to the defense attorney. That favorable evidence, under these circumstances, is the inconsistencies, so that the defense attorney can cross-examine the witness about those inconsistent statements. *Brady* conditioned that duty upon a request from the defense so that the prosecutor was not obligated to prepare the defense counsel's case. However, the condition made the duty non-existent when defense counsel had no knowledge of the favorable evidence. The natural response to such a rule was for defense attorneys to make broad general requests for "all *Brady* material."

The Supreme Court's next step was to create a three part test in *United States v. Agurs*,[11] which distinguished between specific requests, as the one made in *Brady*, and general requests. The Court began to backtrack on the meaning of materiality. In *Agurs*, the Court divided *Brady* into three categories:

> (1) Where a prosecution witness commits perjury, the prosecuting attorney has an obligation to come forward with information without a request from the defense attorney. Where the prosecuting attorney fails to do so, a resulting conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

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[10] *Giglio*, 405 U.S. 150.
[11] 427 U.S. 97 (1976).

(2) Where, as in *Brady*, there is a specific request for favorable information which is ignored, the same test must be applied as for perjury: the resulting conviction must be set aside if there is any reasonable likelihood that the withheld evidence would have affected the jury's judgment. The Court said there is rarely a reasonable excuse to ignore a specific, relevant request.

(3) Where there is a general request for all *Brady* material or no request at all, the prosecutor has a limited duty to disclose obviously exculpatory material. Here the standard for materiality and, hence, reversal is whether the undisclosed evidence creates a reasonable doubt of guilt that did not otherwise exist. That determination is made within the context of the entire record. Justices Brennan and Marshall dissented arguing that the Court's standard undermined the role of the jury allowing the judge to determine whether the withheld evidence probably would have resulted in an acquittal.[12]

The years since *Brady* and *Agurs* have not strengthened the prosecutor's duty to disclose and see that justice is done. Since *Agurs*, the Court has substantially watered down the prosecutors duty, or at least diminished the consequences for failing to turn over favorable evidence to the defense. The Court eliminated the tougher test for materiality when a prosecutor fails to comply with specific request.

In *United States v. Bagley*,[13] the government ignored a specific request and withheld information that two principal prosecution witnesses had contracts with the ATF for money for information. Instead the government purposely mislead the defense counsel by producing false affidavits from the witnesses that they had no promises of rewards. Rather than recognize the egregiousness of the prosecutor's behavior, the Supreme Court diminished the standard for evaluating such behavior. The Court eliminated the distinction between specific and general requests and applied the lesser standard to both: a conviction will be reversed "only if there is a reasonable probability that had the evidence been disclosed the result would have been different."[14]

Although the United States Supreme Court has said that when in doubt a prosecutor should disclose, the rules do not encourage

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[12] *Id.*

[13] 473 U.S. 667 (1975).

[14] *Id.* at 682 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

disclosure and are not helpful. Rather than encouraging pretrial disclosure of favorable evidence material to questions of guilt or punishment, these rules encourage prosecutors not to disclose. The result is not pretrial disclosure, but years of post-conviction proceedings in an attempt to discover evidence that should have been disclosed. Convictions are overturned only where the failures to disclose were truly egregious.[15] My friends and former students who are or who have been prosecuting attorneys always tell me that I do not understand when we discuss this subject. They tell me that their caseload is overwhelming and they do not have time to prepare their own cases, let alone prepare the defense attorneys' cases for them. They also assure me that they are not in the business of convicting innocent defendants. While that last assurance is admirable, they miss the point. They are deciding who is innocent and who is guilty. They make mistakes, and they are crippling the adversary system. Ohio is like every other state. Defendants have been convicted where evidence was withheld at trial.

One such case is *State v. Larkins*,[16] where the defendant was convicted of a 1981 robbery and murder in 1986. For years he tried unsuccessfully to gain access to police reports in his case. Bishop Alfred Nickles of Cincinnati filed a public records request with the Cleveland Police Department in 1999 and, without objection from the prosecutor, received the reports. The police reports revealed that: 1) the description of the robbers given by eyewitnesses did not match Larkins; 2) a description of "Road Dog," the second shooter, given by a potential suspect, Todd Hicks, did not match Larkins as to height, complexion or hair style; 3) the police relied on a confidential informant; 4) a witness, Sonja Belcher, who was present when the robbery was planned, did not identify Larkins as one of the planners, and said she saw both robbers after it was known Larkins left town; 5) Henderson, a co-defendant who turned state's witness, named Larkins only after the police told her that Larkins was known by the nickname, "Road Dog;" and 6) Henderson lied on the stand concerning her past criminal convictions. Moreover, it was also discovered that Henderson lied when asked whether the State had promised her anything in exchange for her testimony. Although Henderson claimed she was testifying without any promises from the State, the Assistant Prosecutor wrote a letter on her behalf to the parole board, indicating that he promised her that he "would do everything possible to help her get off parole" because she was

[15] *Cf.* Kyles v. Whitley, 514 U.S. 419 (1995).
[16] 2006 WL 60778 (Ohio App. 8th 2006).

initially reluctant to return to Ohio to testify at trial. The Court of Common Please granted a new trial which was affirmed by the Court of Appeals. When the case was remanded for a new trial, the state continued to argue *for four years* that the police records were non-discoverable and could not be used at the new trial. During that four-year delay, two witnesses died and others disappeared. Ultimately, the trial judge dismissed the indictment as the appropriate remedy rather than order a retrial of the defendant. The Court of Appeals upheld the dismissal order.[17]

Even DNA testing that excludes a defendant from the crime that he has been convicted of has not always resulted in the prosecution's admitting error in Ohio. Fred Luckett was convicted as a serial rapist in 1979. At trial and for more than twenty years thereafter, Luckett maintained his innocence. A rape kit was done on the first victim, and a laboratory slide from the kit was found in the hospital twenty years later, with the first victim's name etched on the slide, just before it was to be destroyed. The slide was made from a vaginal swab smeared on to its glass surface just 90 minutes after the first rape. A leading DNA laboratory in Maryland determined that the semen preserved on the slide was not Luckett's. The victim of this rape, a 52 year old widow, identified Luckett as the rapist. Rape kits were not done on the second and third victims. All three victims identified Luckett as the rapist. He was convicted at trial and pleaded no contest to the third rape on the promise of no additional time.

A motion for a new trial was filed based upon the DNA test. At the hearing on the motion for a new trial, the state claimed that the DNA test was inconclusive because there was no reason to believe that the rapist had ejaculated or that the victim had not engaged in consensual

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[17] *Id.* at 9-10 ("Finally, we agree that Larkins has suffered prejudice from the state's discovery violation, and that this is the extraordinary case where the prejudice cannot be cured by a new trial. Almost 20 years have elapsed since the 1986 trial. The court noted that eight witnesses for the defense were deceased, six witnesses for the defense had unknown addresses, and 10 witnesses for the state were without addresses. Larkins' inability to present these witnesses speaks for itself, wholly apart from issues relating to the typical degradation of memories occurring over long periods of time. Ordinarily, those witnesses who previously testified but are now unavailable could have their prior testimony presented under Evid.R. 804(B)(1). But to do so in a retrial of this case would be useless as none of the witnesses who gave the prior testimony could be questioned about the exculpatory evidence withheld in the case. In short, to conduct a new trial at this stage would be meaningless as Larkins' ability to use the exculpatory evidence would be negligible, at best, thus making the retrial itself futile. We therefore find that the court did not abuse its discretion by dismissing the indictment as a sanction for the state's failure to divulge exculpatory evidence under Crim. R. 16(B)(1)(f). In arriving at this conclusion, nothing we have said here should be construed as a comment on the outcome of the first trial. The dismissal of an indictment as a sanction for a discovery violation is not the same thing as the reversal of a conviction for want of sufficient evidence."); *see also* THE OHIO ASS'N OF CRIMINAL DEFENSE LAWYERS, BROKEN DUTY: A HISTORICAL GUIDE TO THE FAILURE TO DISCLOSE EVIDENCE BY OHIO PROSECUTORS 1 (2005).

sex with another person. However, at the original trial, prosecutors introduced the slide to show that the victim was raped. That victim died since the first trial and was unavailable to testify. The victim's son testified that after she was widowed, his mother had no social life and was very unlikely to have engaged in consensual sex. The judge who presided at the first trial granted the motion for the new trial, and the state appealed. The Court of Appeals reversed the order granting a new trial, and Luckett remained in prison until he was paroled.[18]

What should be the penalty for a prosecutor's purposeful failure to disclose favorable evidence to the trial court and to the defendant? Disciplinary action was taken against an assistant prosecutor who was prosecuting a child rape and molestation case. At a pretrial hearing,

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[18] State v. Luckett, 761 N.E.2d 105, 112 (Ohio App. 8th 2001) ("There is simply no evidence in the record either that the individual who raped Martin ejaculated during the commission of the offense and/or that Martin was not otherwise sexually active at the time of the rape. Although appellee was asked to address these issues both by the trial court in its order granting an evidentiary hearing on the motion for a new trial, and by this court during oral argument, nothing more than speculation has been offered. We cannot presume that a rape victim is not sexually active at the time of the offense merely because she was fifty-one or fifty-two years old at the time she was victimized. Without answers to these questions the DNA evidence offered by the appellee is of little probative value and is insufficient to establish a strong probability of a different result in the eventuality of a new trial."); *but see id.* at 117-118 (Cooney, J., dissenting) ("Notwithstanding the fact that the record as a whole supports the trial court's decision to grant a new trial, the majority argues that the trial court should have required appellee to present evidence as to the source of the sperm that was found on the first victim and on her clothing hours after the attack, and should have determined whether the victim had consensual intercourse within forty-eight hours of the rape. It is uncontradicted that at the hearing on the motion for leave to file the motion for new trial, the trial court stated that the parties would be required to produce the evidence described above.

Essentially, the majority is placing the burden solely on the appellee to produce evidence outside his counsel's capability. It is important to note that the first victim is no longer alive; therefore, there is no way for the appellee to obtain information about any consensual sexual partners she may have had at the time of the attack. Furthermore, it was not the appellee's burden at trial, nor is it now his burden, to prove his innocence. Instead, as with all criminal trials, it was the prosecutor's burden to prove appellee's guilt beyond a reasonable doubt. Two theories of the source of the sperm have been set forth. First, as argued by the state at trial, the sperm belonged to the rapist. The majority argues that although DNA testing was unavailable, that the appellee should have used the secretion blood-type test to "potentially rule himself out as a suspect." The majority also implies that the appellee did not do so for strategic reasons. However, it was not the burden of the appellee to prove his innocence at trial; it was the state's burden to prove his guilt. Thus, if this test existed, the state could have used the secretion blood-type test which would have helped in determining the source of the sperm. However, the state also made a strategic choice not to test the sperm that was found on the rape victim within two hours of her attack. The second theory presented by the majority is that the sperm in question did not belong to the rapist at all but that its source was a possible consensual partner of the first victim. As noted by the majority, the purpose of a rape kit is to gather physical evidence. R.C. 2907.29. The sperm sample in question came from the prosecutor's evidence. Thus, as part of its investigation it was the role of the medical personnel or law enforcement officers to question the victim as to her other sexual partners as a means of identifying the source of the sperm. If the state had asked such routine questions of the victim, the prosecution would have been able to make a strong argument as to the source of the sperm. By contrast, it was not the appellee's role at trial to interrogate the victim as to her sexual habits.").

the assistant prosecutor falsely represented that DNA test results of semen on the victim's shirt had not come back when, in fact, he had been told that the test results indicated that the semen on the shirt was not the defendant's but the complainant-boy's. The assistant prosecutor also failed to inform the defense attorney during the plea negotiation and a plea hearing and sentencing that the boy had changed his story and acknowledged that the semen on the shirt was his own. The assistant prosecutor was suspended from the practice of law for a period of six months. The defendant ended up entering the same plea and receiving the same sentence.[19]

The issues that will be discussed in the following pages go to the very integrity of the criminal justice system. The prosecuting attorney has the key role in seeing that justice is done. The authors and panelists you will be reading are on the cutting edge of these issues. I want to thank them for their participation in this symposium.

[19] Office of Disciplinary Counsel v. Wrenn, 99 Ohio St. 3d 222 (2003) ("[T]he respondent knew that the DNA testing had been completed and that it was not [the defendant's] semen on the victim's shirt. The fact that the information was not yet provided in the form of a written report does not negate respondent's duty to disclose the information. In addition, the respondent knew that the victim had changed his story about the source of that semen and neglected to inform [the defendant's] counsel. Whether or not the DNA test results were implicated in the plea actually negotiated, the credibility of the victim certainly was an issue. Respondent's failure to disclose the information before the first plea was inexcusable and undermined the integrity of the criminal justice system. The failure to disclose this information violated four Disciplinary Rules and warrants the imposition of sanctions.").