



## UNDERSTANDING EXCULPATORY EVIDENCE AND HOW IT MAY IMPACT CONVICTIONS

### The U.S. Supreme Court Provides Further Explanation of *Brady v. Maryland*

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Over the last two decades, law enforcement has become increasingly aware of how a failure to produce exculpatory evidence to a defendant facing trial may impact a conviction of the defendant. Through a number of cases, law enforcement is well aware that the failure to notify the prosecutor that exculpatory evidence exists may not only impact the conviction of the defendant but may also lead to civil liability for the investigators and the agency.

In its 2017 term, the United States Supreme Court further defined the contours of a *Brady* violation and how the violation would be applied to a conviction based on whether the exculpatory evidence that was withheld was material to the conviction.<sup>1</sup>

#### Foundation Case History

A short history of the cases on the issue of exculpatory evidence provides the foundation for understanding the role of law enforcement in ensuring that the Constitutional requirements are met.

***Brady v. Maryland***,<sup>2</sup> was a murder case involving two individuals who participated in a murder. The two individuals, Brady and Bobilt were tried separately for the murder. Both were convicted and sentenced to death. Prior to Brady's trial, which was first, the prosecutor allowed Brady's attorneys to see statements made by Bobilt regarding the murder. The prosecutor did not share one of Bobilt's statements, which was made on July 9, 1958 in which Bobilt said that he was the one that actually did the killing. At trial, Brady took the stand and admitted that he participated in the murder, but testified that he did not do the actual killing. In closing argument, Brady's lawyer acknowledged to the jury that Brady was guilty of murder in the 1<sup>st</sup> degree but asked the jury to spare Brady from the death penalty. After the trial, Brady's attorneys learned of Bobilt's statement where he admitted to the actual killing and appealed under the theory that if they had had the opportunity to use this statement, Brady may have not been sentenced to death.

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<sup>1</sup> *Turner v. U.S.*, slip op. No. 15-1503 (Decided June 22, 2017).

<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

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In *Brady*, the United States Supreme 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.”

In conclusion, the Supreme Court agreed with the United States Court of Appeals that Brady was not entitled to a new trial as to guilt or innocence of the 1<sup>st</sup> degree murder charge, but was entitled to a new trial on the punishment phase.

***Giglio v. United States***,<sup>3</sup> was a forgery case involving Giglio and an alleged co-conspirator, Robert Taliento were involved in a scheme of passing forged money orders.

“The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge \$ 2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and [Giglio] was indicted; thereafter, [Taliento] was named as a coconspirator with [Giglio] but [Taliento] was not indicted.”

Taliento testified against Giglio at Giglio's trial. During cross-examination, Giglio's lawyer attempted to discredit Taliento with questions about whether the government had given him a deal in exchange for his testimony. Taliento said that he did not get a deal and thought he could still be prosecuted notwithstanding his cooperation with the government and his testimony. In closing argument, the Assistant U.S. Attorney prosecuting the case told the jury that Taliento did not receive any promises that he would not be indicted.

After his conviction, Giglio filed a motion for a new trial after finding out that Taliento had received a promise from the Assistant U.S. Attorney that handled the grand jury, that Taliento would not be prosecuted. The Court noted that the Assistant U.S. Attorney, who prosecuted Giglio's case, was unaware of the promise made by the AUSA who handled the grand jury. The Court detailed the confusion:

An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola, that if he testified before the grand jury and at trial he would not be prosecuted. DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been made to Taliento. The United States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted.

The United States Supreme Court held that when evidence, bearing on the credibility of a witness, is withheld from the defendant, irrespective of the good or bad faith of the prosecution, then there may be a violation of Due

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<sup>3</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

Process, requiring the granting of a new trial, if the undisclosed exculpatory evidence has “any reasonable likelihood of [having] affected the judgment of the jury. In following *Brady*, the Court noted that the exculpatory evidence withheld must be material.

**Author Note: It is *Giglio* that requires a law enforcement officer’s discipline/history to be examined to determine if the officer has anything in their background that would impact their credibility as a witness. Although we most often see Federal Prosecutors seeking information about an officer’s history when they are a named witness in a federal prosecution, this is a Constitutional Right of Due Process issue and thus must be considered with respect to any officer who the agency is aware has any history of dishonesty if the officer is going to testify as a witness against a defendant in a criminal case.**

In *Turner v. United States*, the United States Supreme Court reviewed the murder conviction of several individuals who were convicted of the kidnapping and murder of Catherine Fuller. The Court noted that the centerpiece of the Government’s case against the defendants was the testimony Harry Bennett and Calvin Alston, both of whom confessed to being participants in this group attack and both of whom cooperated in the prosecution in return for leniency.

The Court noted that the government put on several witnesses that corroborated the testimony of Bennett and Alston. The testimony of Alston and Bennett described them and the defendants hanging out at a park and deciding to rob someone. Alston, pointed out Catherine Fuller as a target as she walked down the street. The robbery involved shoving Fuller into an alley where the group proceeded in beating her before dragging her into a garage and sodomizing her with a pole.

Several other witnesses were offered including Melvin Montgomery who testified that he saw the group of defendants gathered in the park being noisy and singing about needing money. Montgomery said he then heard someone say they were “going to get her” while pointing to a woman standing on the corner of street. Montgomery also described the group splitting up going in different directions toward the woman. A fourteen-year-old, Maurice Thomas knew the defendants and described looking down the alley and seeing the defendants attacking the woman. Thomas also reported hearing one of the defendants saying, after the fact that they “had to kill her.” Two witnesses Eleby and Jacobs said they were looking for Smith, who was Eleby’s boyfriend at the time when they heard screams coming from the alley where the boys were beating somebody. Eleby and Jacobs identified the various defendants beating Fuller and said they witnessed Defendant Rouse, sodomize Fuller with the pole. In addition to all of this corroborating evidence, one of the charged defendants had confessed describing how he was part of a large group that dragged Fuller into the alley, robbed her, assaulted her, and dragged her into the garage.

The seven defendants sought post-conviction relief based on the prosecution’s withholding of exculpatory evidence. The Court outlined the exculpatory evidence at issue.

1. *The identity of James McMillan.* Freeman, the vendor who discovered Fuller’s body in the alley garage, testified at trial that, while he was waiting for police to arrive, he saw two men run into the alley and stop near the garage for about five minutes before running away when an officer approached. One of the men had a bulge under his coat. Early in the trial, codefendant Harris’ counsel had requested the identity of the two men to confirm that her client was not one of them. But the Government refused to disclose the men’s identity.

In their postconviction review of the prosecutor's files, petitioners learned that Freeman had identified the two men he saw in the alley as James McMillan and Gerald Merkerson. McMillan lived in a house which opens in the back onto a connecting alley. In the weeks following Fuller's murder, but before petitioners' trial, McMillan was arrested for beating and robbing two women in the neighborhood. Neither attack included a sexual assault. Separately, petitioners learned that seven years after petitioners' trial, McMillan had robbed, sodomized, and murdered a young woman in an alley.

2. *The interview with Willie Luchie.* The prosecutor's notes also recorded an undisclosed interview with Willie Luchie, who told the prosecutor that he and three others walked through the alley on their way to an H Street liquor store between 5:30 and 5:45 p.m. on the evening of the murder. As the group walked by the garage, Luchie "heard several groans" and "remembers the doors to the garage being closed." App. 25. Another person in the group recalled "hear[ing] some moans," while the other two persons did not recall hearing anything unusual. *Id.*, at 27, 53; *id.*, at A992. The group continued walking without looking into the garage or otherwise investigating the source of the sounds. They did not see McMillan or any other person in the alley when they passed through.

3. *The interviews with Ammie Davis.* Undisclosed notes written by a police officer and the prosecutor refer to two interviews with Ammie Davis, who had been arrested for disorderly conduct a few weeks after Fuller's murder. Davis initially told a police investigator that she had seen another individual, James Blue, beat Fuller to death in the alley. Shortly thereafter, she said she only saw Blue grab Fuller and push her into the alley. Davis also said that a girlfriend, whom she did not name, accompanied her. She promised to call the investigator with more details, but she did not do so.

About 9 months later (after petitioners were indicted but approximately 11 weeks before their trial), a prosecutor learned of the investigator's notes and interviewed Davis. The prosecutor's notes state that Davis did not provide any more details, except to say that the girlfriend who accompanied her was nicknamed "'Shorty.'" *Id.*, at 267-268. About two months later, which was shortly before petitioners' trial, Blue murdered Davis in an unrelated drug dispute.

During the postconviction evidentiary hearing, the prosecutor who interviewed Davis testified that he did not disclose Davis' statement because she acted "playful" and "not serious" during the interview and he found her to be "totally incredible." *Id.*, at 269-272. Additionally, the prosecutor stated that he knew Davis had previously falsely accused Blue of a different murder, and on another occasion had falsely accused a different individual of a different murder.

4. *Impeachment of Kaye Porter and Carrie Eleby.* Kaye Porter accompanied Eleby during an initial interview with homicide detectives. Porter agreed with Eleby that she had also heard Alston state that he was involved in robbing Fuller. An undisclosed prosecutorial note states that in a later interview with detectives, Porter stated that she did not actually recall hearing Alston's statement and just went along with what Eleby said. The note also states that Eleby likewise admitted that she had lied about Porter being present during Alston's statement and had asked Porter to support her.

5. *Impeachment of Carrie Eleby.* A prosecutor's un-disclosed note revealed that Eleby said she had been high on PCP during a January 9, 1985, meeting with investigators.

6. *Impeachment of Linda Jacobs.* An undisclosed note of an interview with Linda Jacobs said that the detective had "question[ed] her hard," and that she had "vacillated" about what she saw. *Id.*, at A1009.

The prosecutor recalled that the detective “kept raising his voice” and was “smacking his hand on the desk” during the interview. *Id.*, at A2298-A2299.

7. *Impeachment of Maurice Thomas.* An undisclosed note of an interview with Maurice Thomas’ aunt stated that she “does not recall Maurice ever telling her anything such as this.” *Id.*, at A1010; see *id.*, at 295-296.

The Court noted that the prosecution did not argue on appeal that the evidence was not exculpatory or that it was not required to be disclosed under *Brady*. Instead the prosecution, in its argument to the Supreme Court, argued that although it was exculpatory and favorable to the defendants, it was not material to the outcome of the case and therefore the convictions should stand.

The Court asserted that: “Evidence is ‘material’ within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different... A ‘reasonable probability’ of a different result is one in which the suppressed evidence ‘undermines confidence in the outcome of the trial... In other words [the defendants] here are entitled to a new trial only if they establish the prejudice necessary to satisfy the materiality inquiry.’” (citations omitted).

The Court concluded that based on the evidence in the record, there was no reasonable probability that the outcome of the trial of these defendants would have been different if the exculpatory evidence had been disclosed and allowed into evidence.

#### **Bottom Line:**

- **The prosecutor has an obligation to disclose exculpatory information to the defense in a criminal case.**
- **The prosecution’s obligation cannot be avoided by law enforcement not giving the information to the prosecutor.**
- **Exculpatory evidence includes any information, which bears on the credibility of a witness who will testify in the prosecution’s case.**
- **Good or bad faith on the part of the prosecutor is irrelevant to whether or not a *Brady* violation has occurred.**
- **There is no *Brady/Giglio* violation if it is determined that the exculpatory evidence that the prosecution failed to turn was not material to the case.**
- **There are numerous court cases where law enforcement has been found liable for a violation of the *Brady* rule where a wrongful conviction has occurred.**
- **The obligation of prosecutors to disclose exculpatory evidence, through court decisions, is also the obligation of law enforcement.**
- **Note, that law enforcement has fulfilled their obligation when they turn over exculpatory evidence to the prosecutor for consideration.**