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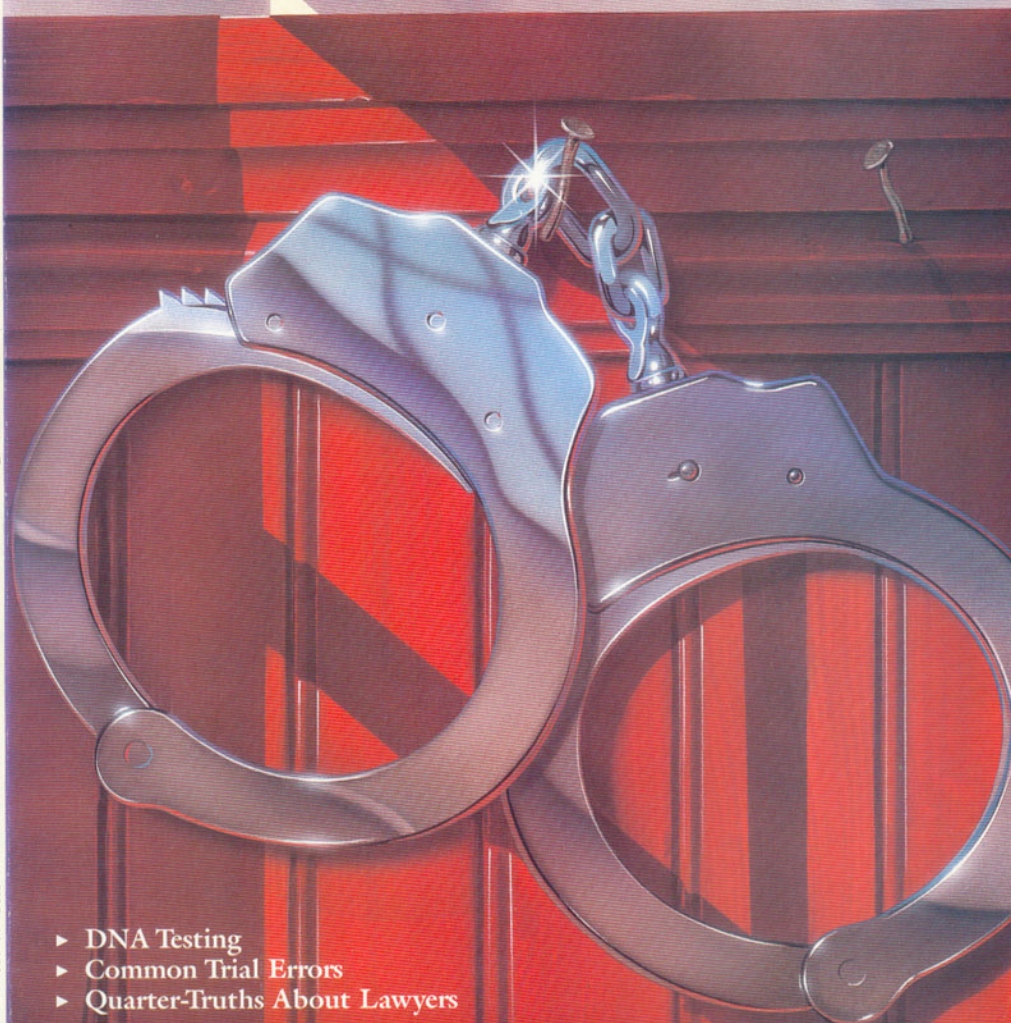

- DNA Testing
- Common Trial Errors
- Quarter-Truths About Lawyers

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Protecting the Innocent: Seeking Disclosure of Exculpatory Evidence

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One of the most important yet most underused arrows in the quiver of any criminal defense lawyer is the request for disclosure of exculpatory evidence. This device, known as the *Brady* motion, requires disclosure by the prosecution of material evidence favorable to the defendant.[1] This article will discuss the constitutional basis of this requirement and the duties of both prosecutor and defense counsel before and during trial. It will then analyze how appellate courts review this issue after a conviction and discuss what happens when such evidence is lost or destroyed. Finally, some practical tips for attorneys will be presented.

The duty to disclose exculpatory evidence originated in the prosecutor's duty to correct false testimony. This duty cannot be minimized because it ensures a defendant's right to a fair trial, as mandated by the Constitution's due process clause.[2] This duty has also been interpreted to include other information that is commonly in the prosecutor's possession, such as impeachment evidence that is relevant to prosecution witnesses.[3]

Evidence required to be disclosed can be classified into three categories. First, exculpatory evidence is information that would excuse or clear the defendant from alleged fault "so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."[4] This includes any confessions by others to the crime[5] and evidence that could cast doubt upon the defendant's guilt, uncover other leads or defense theories, or discredit the police investigation.[6]

Second, impeachment evidence receives the same constitutional treatment as exculpatory evidence and can take many forms. This principle developed from *United States v. Bagley*.[7] Any testimony or evidence (e.g., a document or photo) that a juror could consider as an indication of bias for the prosecution must be provided, so that a prosecution witness's credibility can be properly evaluated. These include government promises of immunity, leniency, financial assistance, or other forms of assistance to the witness; the witness's prior inconsistent statements[8]; the record of prior criminal convictions[9]; probation status[10]; payment of money or rewards to the witness[11]; and proof of any understanding or agreement with a witness in a related prosecution.[12] All these can constitute *Bagley* impeachment material.

Finally, mitigating evidence that can be used to lessen punishment should be disclosed under *Brady*.[13] This could include evidence that the defendant had no prior criminal record, that restitution was made, or that the defendant was provoked before committing the offense.

Duties Before Trial

Prosecutor. The scope of the prosecutor's disclosure duty extends beyond disclosing information the prosecutor has or personally knows about to disclosing information possessed by the prosecutor's predecessor or office colleagues[14] or staff and others who participated in investigating or evaluating the case.[15] The prosecutor's "file" should not be interpreted too narrowly, because some physical evidence may be found outside the case file. Both prosecution and defense counsel should be alert to the possibility that other (less obvious) items may not appear in the file.[16] For example, tape recordings or documents seized at the scene may be in a police desk drawer or file.

Also, for purposes of disclosure under *Brady*, information known to the police should be imputed to the prosecution,[17] and a prosecutor's good faith is irrelevant when determining whether a constitutional violation has occurred.[18] For example, it is of no moment that the prosecutor did not interview the police officer who knew of the exculpatory evidence. Just because the prosecutor was busy or the officer did not seek out the prosecutor does not change the fact that exculpatory evidence was not disclosed.

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Ignorance also is no defense. "If evidence highly probative of innocence is in [the prosecutor's] file, he should be presumed to recognize its significance even if he has actually overlooked it."[19]

Even if the defense makes a general request for exculpatory evidence or does not make a request at all, a prosecutor still has a duty to disclose "if the evidence is clearly supportive of a claim of innocence." Prosecutors are under no duty to *create* exculpatory evidence. However, they should be alert to information that they should have known about or was in their control. For example, one prosecutor's failure, due to time constraints, to run a routine Federal Bureau of Investigation or National Crime Information Center check on his witness did not excuse him of his constitutional duty to disclose favorable evidence to the defendant.[20]

Defense counsel. The *Brady* rule places requirements on defense counsel as well. Counsel should be as specific as possible in framing a request in a *written* pre-trial *Brady* motion. Counsel should also request neutral or negative exculpatory evidence, such as a witness's failure to make a positive identification of a defendant.[21] In one important case, the request was considered specific enough for the trial judge to agree to review the police report in camera; later the judge ordered the prosecutor to disclose a police statement by an eyewitness that he could not positively identify the defendant. Even a witness's failure to mention the defendant in his statement can be exculpatory.[22]

There is no substitute for effective preparation. Defense counsel has a responsibility not only to make a thorough investigation, but also to exercise diligence in discovery.[23]

The availability of in camera inspection should not be overlooked when a prosecutor either is uncertain of the materiality of evidence[24] or refuses to turn over the requested material. In such a case, defense counsel should move for an in camera examination since "the right of the accused to have evidence material to his defense cannot depend on the benevolence of the prosecution."[25]

Further, defense attorneys should keep in mind that the prosecutor, whose aim is to secure a conviction, is likely to view evidence and information differently than would the defense attorney or a neutral party. For example, where the prosecutor anticipates a self-defense theory, evidence of a worn safety mechanism on a rifle would not be viewed as exculpatory. If the defense is that an accident occurred, however, such evidence is not only exculpatory, it is crucial. Since the prosecutor is more likely to have ordered a ballistics investigation, this information would be in the expert's report, and may not be available otherwise to the defense.

Duties During Trial

Prosecutor. The prosecutor's duty to disclose exculpatory evidence continues throughout trial.[26] Merely producing the evidence, though, does not necessarily satisfy this duty. Disclosure should be made early enough to permit the defendant to make effective use of the material at trial and to give the defendant the opportunity to use it in the defense.[27] In federal cases, the Jencks Act[28] places another requirement to disclose—after direct examination of a prosecution witness and on the defendant's motion—any statement by that witness that the prosecution has that relates to the witness's testimony.

Defense counsel has a responsibility to investigate thoroughly and exercise diligence in discovery.

The requirements of the Jencks Act, however, should not be confused with those of the *Brady* rule. Timely disclosure that satisfies the first may not satisfy production under the second since *Brady* requires *pre-trial* disclosure of exculpatory evidence. *Brady*, in fact, may override the Jencks Act when circumstances require disclosure before trial. One court noted, however, that in some situations the prosecutor's compliance with the Jencks Act does satisfy *Brady*.[29]

Defense counsel. Defense counsel should request *Brady* material on the record both before trial and when the prosecution rests.

After each witness has testified in direct examination, the defense should move that the court order the prosecutor to produce for the defendant's inspection, outside the presence and hearing of the jury, the following: any previous statements, reports, or grand jury testimony made by others that materially contradict the witness's testimony; any police arrest and conviction records of the witness; and any offers of immunity made to the witness.

At the earliest time permitted in a jurisdiction—but certainly once the prosecution has rested its case in chief—the defense lawyer should broaden the scope of the request to include information on prosecution witnesses who did not testify. The defense should seek their entire grand jury testimony (depending on the jurisdiction), any written or recorded statements, and any notes or memoranda not yet produced for the defendant's inspection that were prepared in connection with the case by law enforcement officers or agents who did not testify.

The basis of this request is that if a witness for the prosecution did not testify it can be inferred that the testimony would not have added to the prosecution's case, leading to a conclusion that it might help the defendant's case. Naturally each case stands on its own and none of these recommendations should be applied mechanistically.

If the court declines to grant the request, the defense lawyer should ask for an in camera inspection of the documents. The attorney should also ask the court to make available evidence deemed favorable to the defendant, copy all such items turned over to the court, mark them as court's exhibits, seal all exhibits not produced for the defendant's inspection, and make all these exhibits part of the record in the case for review.

Post-Trial Review

Under the pre-1985 standard of review, cases would be reversed based on the entire record. Reversal was required only if the omission was "of sufficient significance to result in the denial of the defendant's right to a fair trial."[30]

This law addressed three nondisclosure situations. First, where the prosecution knew or should have known that its case included perjured testimony and failed to correct it, reversal was required if there was "any reasonable likelihood that the false testimony could have affected the judgment of the jury." Second, if the prosecution failed to respond to a specific request, reversal was required if the suppressed evidence "*might have* affected the outcome of the trial." Third, if defense counsel made only a general request or did not make a request, reversal was required if the suppressed evidence created a "*reasonable doubt* that did not otherwise exist."[31]

In 1985, the U.S. Supreme Court re-

formulated the standard in the *Bagley* case. The standard for cases based on perjured testimony was changed to a "materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." This is equivalent to the *Chapman v. California*[32] harmless-error standard. This standard is the prosecution's toughest burden: reversal is required unless there is no reasonable doubt that the error was harmless.

Moreover, *Bagley* removed the distinction between "specific request" and "general or no request" cases. The standard identified by the Supreme Court in *Strickland v. Washington*[33] was found to be "sufficiently flexible" for these situations: the undisclosed evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome."[34]

Finally, the question of materiality and the possible effect of the withheld evidence on a verdict is a mixed question of fact and law and is thus reviewable by the federal courts.[35] This is crucial in seeking habeas corpus review of state court convictions.

Loss or Destruction of Evidence

The prosecution has a constitutional duty not only to disclose, but also to preserve, exculpatory evidence. Evidence is constitutionally material if it had apparent exculpatory value before it was destroyed and the defendant "would be unable to obtain comparable evidence by other reasonably available means."[36]

In *California v. Trombetta*, authorities' failure to preserve breath samples of suspects in drunk-driving cases did not violate defendants' due process rights. The court held that due process did not require that the samples be preserved in order to introduce test results at trial. However, one federal circuit has found an "obligation to preserve recordings once they have been created" even though there is no general duty to make them in the first place.[37]

The prosecution's destruction of marijuana, absent bad faith, has been held not to violate due process because the evidence—had it been preserved—was not likely to be exculpatory, and there were alternative means of challenging the prosecution's contention that the marijuana was found aboard a vessel.[38]

Similarly, *United States v. McKie*[39] held that lost cocaine—which was material evidence—was unlikely to be exculpatory. There was no substantial prejudice to the defendant and no bad faith on the part of the government.

In *Garrett v. Lynaugh*,[40] the defendant argued that the state's failure to make certain tests of the deceased's vaginal sample or preserve enough of the sample to allow the defendant to conduct such tests deprived him of potentially exculpatory evidence. The sample was requested to test for blood type. The Fifth Circuit held that no evidence had been destroyed in the *Trombetta* sense as there was no evidence left to preserve. The pathologist had used the entire sample in making tests he considered necessary. The court observed that "*Trombetta* does not require a state to conduct its investigation in any particular way or perform tests on raw data in any particular order. Nor does it require a state to conduct additional or more comprehensive tests."

The prosecution has a constitutional duty not only to disclose, but also to preserve, exculpatory evidence.

When the prosecution has informed the court that it has uncovered evidence beneficial to the defense but this evidence is later lost or destroyed, a different standard of review is applied. One circuit has adopted a three-part test to determine if the indictment should be dismissed due to loss or destruction of such evidence.[41] The relevant issues are—

- the degree of negligence or bad faith on the part of the government,
- the importance of the evidence lost, and
- the evidence of guilt adduced at trial.

A due process violation does not occur when the prosecution shows that "an earnest effort was made to locate" the lost evidence.[42]

Lessons Learned

After litigating these issues at trial and fighting such battles on appeal, I have learned several useful lessons. One for prosecutors is to avoid error by disclosing information that might be exculpatory, whether the prosecutor thinks it is credible or not. "It was for the jury, not the prosecutor, to decide whether the contents of an official police record were credible, especially where—as here—they were in the nature of an admission against the state's interest in prosecuting [the defendant]."[43]

I have also learned that—

- Defense counsel should always file a written motion for production of evidence favorable to the accused.
- If no written request was filed, defense counsel should make sure any oral request is on the record so it will have the same effect as a written request.[44] An oral request not on the record is legally equivalent to a formal written motion only when the parties agree that a request was made.[45]
- In appropriate cases, defense counsel should request exculpatory items. Examples include all prior misidentifications by eyewitnesses, impeachable convictions of prosecution witnesses, any arrangements made or offers extended to prosecution witnesses to obtain their testimony, the names and addresses of each person who testified before the grand jury and not at trial (in jurisdictions where grand jury transcripts are available), and the names of witnesses who were hypnotized.

Under guidelines developed by the American Bar Association (ABA), prosecutors should provide defense counsel with the names and addresses of witnesses and their written or recorded statements, and reports or statements made by experts, among other things.[46]

Prosecutors should also inform defense counsel about any electronic surveillance of the defendant's conversations or premises, any tests or experiments that may consume or destroy the subject of the test, and any evidence of other offenses the prosecutor intends to offer, according to the ABA guidelines.

In the final analysis, the issue of disclosure of exculpatory evidence is reduced to the one essential common to all issues in a criminal trial—zealous advocacy. The defense lawyer must challenge the system to function properly by ensuring that the prosecutor complies with due process either voluntarily or under the direction of a court order. □

Notes

1 Brady v. Maryland, 373 U.S. 83, 87 (1963).
2 United States v. Agurs, 427 U.S. 97, 103-05 (1976).