SB 492 ~ Fairness in Disclosure Act

Promotes clarity, efficiency, and fairness in pretrial discovery of favorable evidence

What is the "Brady duty" to disclose favorable evidence?

Fifty years ago in *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the United States Supreme Court recognized the constitutional duty of the prosecutor under the Due Process Clause to disclose evidence that is favorable to a person accused of a crime. "*Brady* evidence" includes both exculpatory and impeachment material that is relevant either to guilt or to punishment. *Kyles v. Whitley,* 514 US 419 (1995); *Giglio v. United States,* 405 US 150 (1972).

The duty to disclose *Brady* evidence is placed "inescapably" on the district attorney, who is charged with knowledge of any favorable *Brady* material of which the prosecutor's office or the investigating police agency is aware, irrespective whether nondisclosure is the result of negligence or design. *Youngblood v. West Virginia,* 547 US 867 (2006). The duty to disclose exists irrespective of the district attorney's good faith belief that all evidence has been produced. *Brady v. Maryland,* 373 US at 87.

Supreme Court and federal case law have found *Brady* violations where the government failed to disclose evidence which:

- Impeached the credibility of a prosecution witness (*Giglio v. US,* 405 US 150)
- Undermined the government's theory of the case (*Kyles v. Whitley,* 514 US 419)
- Revealed a state's witness's motive to lie (*Banks v. Dretke,* 540 US 668); (*Napue v. Illinois,* 360 US 264)
- Showed a witness's prior inconsistent statements (*Smith v. Cain*, 132 SCt 627)
- Showed prior illegal and/or dishonest conduct of a state's witness *(US v. Price,* 566 F3d 900 (9th Cir. 2009)

Why should this existing constitutional obligation be codified?

Codification is necessary because violations of the *Brady* duty to disclose are systemic and statewide. Law enforcement and district attorneys mistakenly or intentionally, but repeatedly:

- Assert that if statements or information are not reduced to writing, there is nothing to produce.
- Assert that if evidence is not "admissible," it need not be disclosed. Only the defense is motivated to uncover the admissibility of various bits of information; it is not for the government to determine what may or may not be useful.
- Assert that if statements or information are not "credible" (in their view), it is not "exculpatory."

What is the correct standard to use in a pre-trial context?

The issue of "materiality" ~ i.e., the relative importance of material in the entirety of evidence introduced at trial ~ is used only in a *post*-conviction context on appellate review. This standard is not applicable in the *pre*-trial context, however:

> "The 'materiality' standard usually associated with *Brady* . . . should not be applied to pretrial discovery of exculpatory materials . . . [Rather,] the proper test for pretrial discovery of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense, i.e., whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses . . .[I]f doubt exists, it should be resolved in favor of the defendant and full disclosure made . . . [T]he government [should therefore] disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case, even if the evidence is not admissible so long as it is reasonably likely to lead to admissible evidence." *Unites States v. Price,* 566 F3d 900, n. 14 (9th Cir. 2009)

Is there an ethical duty? The district attorney has an ethical duty to disclose evidence "that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing . . ." [Oregon Rules of Professional Conduct 3.8] The ABA recognizes the duty exists even if evidence isn't admissible, but would assist in plea negotiations, conducting pretrial defense investigations, planning of defense strategy, and advising the accused whether to plead. [ABA Formal Opinion 09-454]

What is the remedy if a *Brady* violation occurs?

Existing law in ORS 135.865 allows a court to exercise its inherent authority to monitor and control the discovery process. Remedies include allowing a party to inspect evidence, granting a continuance of trial, excluding admissibility of evidence, refusing to permit a witness to testify, or to "enter such other order as it considers appropriate." SB 492 makes no changes or additions to the court's authority.

What does it look like when the *Brady* obligation is ignored?

It is impossible to know the full extent to which *Brady* violations occur because the evidence never comes to light. Case examples abound in Oregon where the state failed to disclose: the inability of an eyewitness to identify a suspect from a photographic array; other suspects of a crime; multiple police contacts of a witness showing dishonest and criminal behavior; statements from a witness undermining the state's theory of motive; that a victim's injuries arose from a pre-existing condition.

The most recent, highly publicized example of egregious *Brady* violations occurred in the failed prosecution of United States Alaska Senator "Ted" Stevens. Senator Stevens and his wife were indicted on seven counts of failing to properly report gifts allegedly in the form of improvements to the Stevens' home. After trial, an FBI agent filed a whistleblower affidavit alleging that Assistant United States Attorneys and FBI agents had intentionally sent a key witness out of state after the witness performed poorly during mock cross-examination; intentionally withheld reports containing prior inconsistent statements of key witnesses; and knowingly allowed the key witness to perjure himself on the stand. Senator Stevens' verdict of guilt was overturned once these violations were belatedly disclosed. For a complete account of the *Brady* violations, see Special Counsel Henry F. Schuelke's report at https://www.documentcloud.org/documents/325801-court-report-on-stevens-ethics-case.html.

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