St. John's Law Review

Volume 77
Number 1 *Volume 77, Winter 2003, Number 1*

Article 3

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THE UNEVEN PLAYING FIELD,† PART III, OR WHAT'S ON THE DISCOVERY CHANNEL

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The last time the Supreme Court spoke on the issue of discovery in criminal cases was in *Kyles v. Whitley*.[1] In *Kyles*, the Court expanded the duties of prosecutors by requiring them to act with due diligence to turn over all exculpatory or, as it is more commonly referred to, "*Brady*"[2] material. The Court determined that the prosecutor's obligation to disclose is not contingent on whether the material was under the actual control of prosecutors. Rather, the due diligence requirement pronounced in *Kyles* pivots on whether prosecutors can, by exercising due diligence, obtain the exculpatory evidence, thereby mandating its turnover to the defense.[3]

New discovery requirements, even those from the Supreme Court, are slow to trickle down to local prosecutors and state authorities.[4] Prosecutors resist implementing new measures which burden themselves.[5] Moreover, in state practice there is a

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† Thomas F. Liotti and Christopher Zeh, *The Uneven Playing Field: Part I, Ethical Disparities Affect Criminal Cases*, THE ATTORNEY OF NASSAU COUNTY, March, 2000 at 5, 14, 15, and 16 and the New YORK STATE BAR ASSOCIATION, CRIMINAL JUSTICE SECTION JOURNAL, Winter, 1999, Vol. 7, No. 2 at 75; NEW YORK STATE BAR ASSOCIATION ONE ON ONE (a publication of the General Practice Section) Summer 2000, Vol. 2, No. 2 at 21; 17 TOURO L. REV. 2 (2001); VERDICT (a publication of the National Coalition of Concerned Legal Professionals) April, 2002, Vol. 8, No. 2 at 3–23; *The Uneven Playing Field: Part II, Ethical Disparities Cloud Cases*, THE ATTORNEY OF NASSAU COUNTY, April, 2000 at 5.

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1 514 U.S. 419 (1995).

2 Brady v. Maryland, 373 U.S. 83, 87 (1963).

3 *Kyles*, 514 U.S. at 437–38.

4 *See, e.g.*, Commonwealth v. Smith, 615 A.2d 321, 323–24 (Pa. 1992) (noting deliberate failure of the prosecution to turn over exculpatory evidence despite the holding in *Brady*).

5 *See* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 246–47 (describing prosecutors resistance to overall constraints on

tendency to skirt these requirements or to ignore simply important federal decisions.[6] Since courts rarely admonish prosecutors, dismiss cases, or make referrals to grievance committees for non-disclosure, the penalty for prosecutors for nondisclosure, aside from convicting the innocent, or at least those who might be found not guilty, is de minimis. Thus, prosecutors have little incentive to follow the holding of *Kyles*.

It appears, however, that times are changing. For example, the Second Circuit has displayed a vigorous interest in discovery issues and a willingness to reverse convictions based upon discovery abuses. Most recently, in *United States v. Gil*,[7] the Second Circuit reversed the mail fraud conviction of a heating and air-conditioning contractor because of the prosecution's discovery abuses.[8]

Gil allegedly committed mail fraud by over-billing the Off-Track Betting Corporation (OTB).[9] Prior to trial, the defendant made numerous demands for discovery, continually invoking *Kyles v. Whitley* as the burden of the prosecution. Two days before the start of trial, the prosecutor turned over three thousand pages of so-called "3500 material."[10] None of the information was highlighted as *Brady* material. Amidst the voluminous 3500 material was a memorandum from an OTB employee that indicated that the manner in which the defendant billed had been approved by OTB[11]—thus Gil's defense of entrapment by estoppel became more viable. Yet the defense did not find the memo until five months after the trial ended.[12] The Second Circuit criticized the prosecutors for not making this memo available sooner and for not disclosing it pursuant to the numerous discovery demands that had been made.[13] Because

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their broad exercise of discretion).

[6] *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 67 (2000) (highlighting constant prosecutorial resistance and attack on *Brady* obligations and the violations thereof).

[7] 297 F.3d 93 (2d Cir. 2002).

[8] *Id.* at 95–96.

[9] *Id.* at 95.

[10] *See* 18 U.S.C. § 3500 (2002) (stating procedural rules applicable to demands for production of statements and reports of witnesses); *see also Gil*, 297 F.3d at 96.

[11] *Gil*, 297 F.3d at 95–96.

[12] *Id.* at 98.

[13] *See id.* at 107 ("The government has not otherwise undertaken to justify its failure to find and timely deliver the Bradford memo, and there is no obvious explanation for this failure in light of the defendant's numerous requests for such

the memorandum was material to the defendant's conviction, the Second Circuit remanded the case for a new trial.[14]

Seizing upon the Second Circuit's commitment to a criminal defendant's right to exculpatory material as evidenced in *Gil*, this Article gives a brief overview of Supreme Court and Second Circuit jurisprudence in the field of *Brady* material. Further, this Article briefly examines the import of *Gil* with particular reference to sanctions that are currently imposed and what sanctions that should be imposed against prosecutors who fail to disclose *Brady* material.

I. THE DEFENDANT'S RIGHT TO EXCULPATORY MATERIAL

Brady v. Maryland established the prosecution's obligation to turn over any exculpatory material to the defense.[15] The mere failure to turn over evidence, however, is not sufficient to establish a *Brady* violation. Rather, a *Brady* violation in the Second Circuit requires that (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "the evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued."[16] These requirements are firmly rooted in Supreme Court jurisprudence.

In *United States v. Bagley*,[17] the Court held that prejudice ensues where there is a "reasonable probability that, had the evidence been disclosed to the defense, the result . . . would have been different."[18] This standard, in effect, requires the trial court to make a determination of the skill and ability of trial counsel.[19] *Brady* material is a lethal weapon in the hands of an

documents.").

[14] By the time of the reversal, the defendant had already served over six months of a three year sentence, had expended considerable sums for legal fees, and had forfeited a luxury yacht to the United States government. Moreover, the defendant had been barred from doing business with municipalities including the City of New York. These were a few of the consequences of non-disclosure which prosecutors failed to recognize. Gil had made an application for bail pending appeal that was denied.

[15] 373 U.S. 83, 87 (1963).

[16] Leka v. Portuondo, 257 F.3d 89, 98 (2d Cir. 2001) (quoting Strickler v. Greene, 527 U.S. 236, 281–82 (1999)); *see also* United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001).

[17] 473 U.S. 667 (1985).

[18] *Id.* at 682.

[19] *See id.* at 683.

effective advocate.[20] The Supreme Court suggests that *Brady* material becomes less prejudicial if defense counsel is ineffective during trial.[21] Under the Sixth Amendment, the defendant has a constitutional right to prudent and effective counsel. Denying the admission of *Brady* material based on an attorney's ineptitude further hampers the criminal defendant's constitutional right to effective assistance of counsel. No court should be permitted to deny a *Brady* violation because the defense lawyer was ineffective; the *Bagley* Court stated as much.[22]

In construing whether there is a "reasonable probability" that a different outcome would have occurred, the Court has stated that if *Brady* material would enable the defense to attack the "thoroughness and even the good faith of the investigation," then a *Brady* violation may have occurred.[23] For example, in *Gil*, the *Brady* material might have assisted the defendant in an entrapment by estoppel defense.[24] While the Court in *Gil* did not pass upon the admissibility of that evidence, it concluded that there was a "reasonable probability" that it would have affected the outcome.[25]

Aside from articulating the materiality standards for a *Brady* violation, the Court has also addressed the nature of the prosecution's obligation to turn over *Brady* material. *Kyles* cemented the affirmative nature of the prosecution's duty to disclose exculpatory material.[26] In *Kyles*, the defendant was convicted by a Louisiana jury of first-degree murder and sentenced to death. Following the affirmance of his conviction on direct appeal, it was revealed that the prosecutor had withheld evidence favorable to the defendant,[27] including eyewitness statements taken by the police, statements from an informant who never testified, and a computer printout of license

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[20] *See id.* at 682–83.

[21] *See id.*

[22] *See id.*

[23] Kyles v. Whitely, 514 U.S. 419, 445 (1994).

[24] *See* United States v. Gil, 297 F.3d 93, 106 (2d Cir. 2002) ("Although the government discounts the significance of the memo, and reasonable minds can differ about that (the district judge, for one), the government runs a certain risk when it turns over so late documents sought by the defense for so long.").

[25] *Id.* at 105.

[26] *See Kyles*, 514 U.S. at 454.

[27] *Id.* at 421–22.

numbers of cars parked at the crime scene on the night of the murder.[28] In reversing Kyles' conviction, the Court expanded the disclosure duties created in *United States v. Agurs*.[29]

In *Agurs*, the Court determined that "a defendant's failure to request favorable evidence did not leave the Government free of all obligation" to disclose exculpatory material.[30] In *Kyles*, the Court went one step further. While the Court noted that constitutional requirements were less onerous than those of the ABA Standards for Criminal Justice[31] and the ABA Model Rules of Professional Conduct,[32] it still imposed a substantial responsibility on prosecutors. Pursuant to *Kyles*, prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[33]

Following the Court's lead, the Second Circuit has made it clear that the defendant's right to exculpatory evidence is a most serious consideration. Specifically, in *United States v. Payne*,[34] the Second Circuit rejected the notion that the prosecution's state of mind has any bearing on the defendant's right to receive exculpatory evidence. The court stated:

> Under *Brady* and its progeny, the government has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense. The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government's investigation. Where the government's suppression of evidence amounts to a denial of due process, the prosecutor's good faith or lack of bad faith is irrelevant.[35]

Furthermore, the Second Circuit has also been attentive to the defendant's right to receive exculpatory material promptly. In *Leka v. Portuondo*,[36] the court reversed a murder conviction and held that delayed disclosure to the defense of key witnesses, identified nine days before opening arguments and twenty-three

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[28] *Id.* at 453–54 (noting that Kyle's license plate number was not on the list).
[29] 427 U.S. 97 (1976).
[30] *Kyles*, 514 U.S. at 433.
[31] STANDARDS FOR CRIMINAL JUSTICE § 3-3.11(a) (3d ed. 1993)
[32] MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1984).
[33] *Kyles*, 514 U.S. at 437.
[34] 63 F.3d 1200 (2d Cir. 1995).
[35] *Id.* at 1208.
[36] 257 F.3d 89 (2d Cir. 2001).

days before the defense began its case, constituted "suppression" of evidence by the Government under *Brady*.[37] It should be noted, however, that the Second Circuit has set a rational limit on the defendant's right to receive timely exculpatory material. In *United States v. Coppa*,[38] the court rejected the notion that the Government has a constitutional duty to disclose *Brady* and *Giglio v. United States*[39] material *immediately* after the indictment has been delivered.[40] Therefore, a failure to provide immediate disclosure does not constitute suppression of evidence.

Coppa was only a mild retreat. In *Gil*, the Second Circuit re-emphasized the gravity of the prosecutor's obligation to make timely disclosure. The court held that disclosure of *Brady* material one to two days prior to trial is not sufficient time for adequate preparation by trial counsel.[41] In light of *Gil*, *Leka*, and *Coppa*, the amount of time sufficient for adequate preparation is unclear. It is important to recognize, however, that there is a link between the time for preparation and the "suppression" and prejudice findings necessary to establish a *Brady* violation.

By finding a *Brady* violation in *Gil*, the court had to conclude that the prosecutors "suppressed" *Brady* material by withholding it until two days prior to trial and that the suppression of the exculpatory information was prejudicial to the defendant.[42] In addressing the prejudice prong of the *Brady* test, the court referenced *Leka*:

> When . . . [an exculpatory] disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may

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[37] *Id.* at 98–101.

[38] 267 F.3d 132 (2d Cir. 2001).

[39] 405 U.S. 150, 154 (1972) (noting that favorable evidence includes not only evidence that tends to exculpate the accused but also evidence that is useful to impeach the credibility of a government witness).

[40] *Coppa*, 267 F.3d at 146. *But see* United States v. Shvarts, 90 F. Supp. 2d 219, 224–29 (E.D.N.Y. 2000) (holding the Due Process clause of the Fifth Amendment requires the prosecution to disclose all exculpatory and impeachment materials as soon after an indictment as such materials are requested).

[41] *See supra* notes 7–14 and accompanying text. *Cf. Coppa*, 267 F.3d at 146. It should be noted that if the trial judge in *Coppa* simply issued a scheduling order of immediate disclosure rather than characterize the obligation as a constitutional mandate, the circuit would likely have upheld the ruling as being within the judge's sound discretion. Thus, trial judges have the power to help ensure a defendant's right to *Brady* material is not compromised by prosecutorial suppression.

[42] United States v. Gil, 297 F.3d 93, 101–05 (2d Cir. 2002).

> be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case.[43]

In other words, the defense's ability to employ the exculpatory disclosure as part of the trial strategy is pertinent to the prejudice analysis.[44] It was clear that, in a case involving disclosure similar to *Gil*, no such opportunity existed. Thus, the Second Circuit stated:

> Although the Bradford memo was produced before trial, the defense was not in a position to read it, identify its usefulness, and use it. It was among five reams of paper labeled "3500 material," delivered sometime on the Friday before Monday trial, at a time presumably when a conscientious defense lawyer would be preoccupied working on an opening statement and witness cross-examinations, and all else.
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> Moreover, disclosure on the eve of trial "may be insufficient unless it is fuller and more thorough than may have been required if the disclosure had been made at an earlier stage." The two-page memo was not easily identifiable as a document of significance, located as it was among reams of documents, and indexed as Dorfman 3500 material on page twelve of the exhibit list. Although the government discounts the significance of the memo, and reasonable minds can differ about that (the district judge, for one), the government runs a certain risk when it turns over so late documents sought by the defense for so long.
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> The prosecution contended on appeal that it received the Bradford memo from OTB "only days before" the government produced it to the defense. But . . . the government concedes that an OTB investigator saw the Bradford memo at some point during the grand jury investigation . . . . The government is reasonably expected to have possession of evidence in the hands of investigators, who are part of the "prosecution team." The government thus constructively possessed the Bradford memo long before it was turned over to the defense.
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> The government has not otherwise undertaken to justify its failure to find and timely deliver the Bradford memo, and there

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[43] *Id.* at 106 (quoting Leka v. Portuondo, 257 F.3d 89, 101 (2d Cir. 2001)).

[44] *See id.*

> is no obvious explanation for this failure in light of the defendant's numerous requests for such documents.[45]

Recognizing that the government suppressed material, exculpating evidence, the court reversed the conviction and remanded for a new trial.[46] The holding of the Second Circuit in *Gil* reaffirms a defendant's right to exculpatory material and provides an impetus for prosecutors to avoid such abuses in the future.

II. REMEDY FOR THE WRONG

With court rulings protecting a criminal defendant from discovery abuses, one wonders why the prosecutors involved in *Brady* violation cases such as *Kyles* and *Gil* are not disciplined or sanctioned. The Jencks Act,[47] which governs demands for production of statements and reports of witnesses, limits the remedy for failure to disclose to striking the testimony and, if the interests of justice require, it permits a mistrial to be declared.[48] The Jencks Act does not provide for dismissal of charges, nor does it provide for any monetary or disciplinary sanctions against the prosecution. It should be amended to allow for such penalties. This would provide a necessary remedy, especially for courts that have been characteristically weak in imposing sanctions against prosecutors. Limited remedies, such as striking testimony or declaring a mistrial, do not reflect the stern opposition to discovery misconduct such as that espoused by the Second Circuit.

Gil reminds us that, until prosecutors are seriously punished for their failure to disclose *Brady* and *Kyles* materials in a timely manner, discovery abuses will continue. If the courts are serious about providing meaningful discovery, then they must provide real remedies with serious consequences for prosecutors who fail to comply with the requirements of *Brady*, *Kyles*, and *Gil*.

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[45] *Id.* at 106–07 (internal citations omitted). The exculpatory memo in *Gil* became known as the "Bradford Memo," named after a deceased employee of OTB. *See Gil*, 297 F.3d at 96.

[46] *See id.* at 108.

[47] *See* 18 U.S.C. § 3500 (d) (2000).

[48] *See id.*; United States v. DeFranco, 30 F.3d 664, 667 (6th Cir. 1994).