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A PRACTICAL GUIDE TO BRADY/KYLES MOTIONS:

Getting What You Want
Getting What You Need

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SOME BASIC INFORMATION ABOUT BRADY CLAIMS

I. THE DIFFERENCE BETWEEN DISCOVERY AND BRADY

It is important to distinguish between the kind of discovery we are entitled to under state and local statutes, rules and customs, and the U.S. Constitutional requirement that the State turn over to the defense all exculpatory evidence (Brady material).

Every state is free under the U.S. Constitution to establish whatever discovery rules it wants. Some states provide virtually no discovery at all. For example, New York does not even require the State to give defense counsel a witness list. This does not violate the U.S. Constitution. Other states require total discovery. For example, Florida gives the defense an absolute right to take a sworn deposition of all prosecution witnesses (including police officers and crime victims) prior to trial. This too is constitutional. The discovery rules of most states fall somewhere in between these extremes. And in general, the U.S. Constitution doesn't care how a state deals with discovery.

The Constitution is concerned with only one aspect of discovery – prior to trial, the prosecution must turn over to the defense all exculpatory evidence in its actual or constructive possession. Failure to do so is a violation of Due Process Clauses of the Fifth and Fourteenth Amendments. This rule applies regardless of how a state has chosen to structure its discovery process. The main U.S. Supreme Court cases that establish this right are:

Kyles v. Whitley, 514 U.S. 419 (1995)
Brady v. Maryland, 373 U.S. 83 (1963)
Strickler v. Greene, 527 U.S. 263 (1999)
Youngblood v. West Virginia, 547 U.S. 867,126 S.Ct. 2188 (2006)

The generic term applied to the exculpatory evidence the State has a an obligation to turn over under the Due Process Clause of the United States Constitution is "Brady material."

II. WHAT COURTS DO BRADY, KYLES AND YOUNGBLOOD APPLY TO?

The State has an obligation to disclose all Brady material in every court where a defendant's guilt or innocence may be determined. This includes Magistrate Courts. Moreover, the State's obligation to disclose all Brady material does not end after trial. It continues throughout the appellate and habeas processes, in all State and Federal Courts.

III. THE PROBLEM OF "OPEN FILE" DISCOVERY

It has become custom in many courts and with many prosecutors that discovery in criminal cases operates on a streamlined "open file" process. Under the open file system, defense counsel is permitted to look at the State's file on the case, and the prosecution's discovery obligations are then satisfied.

This sounds good in theory – after all, why bother with time-consuming motions and arguments when the State is willing to let you look at everything they have?

In practice, though, every defense lawyer knows that "open file" discovery doesn't work anything like it is supposed to. The files we are shown often do not contain some police reports, witness statements, and other crucial documents. Materials that contradict the State's case or support a defense are frequently missing. Evidence that corroborates the defendant's story is mysteriously absent. Items that would impeach the police are nowhere to be found.

Not only is the discovery often empty of anything that would help the defense – prejudicial and damaging evidence that we could prepare to refute (if only we knew about it) is also frequently absent. Sometimes it seems that no trial is complete without the prosecutor producing a "surprise" witness, statement, or piece of evidence that never made it into their "open file" discovery.

The practice of "open file" discovery has become the customary way of doing things in many places not because it is good, or even legal, but because "that's the way it's always been done." Many judges and prosecutors even assume that because it has been around so long, it must be legally required. Even worse, many prosecutors and judges assume that by providing open file discovery, the State has satisfied it's disclosure obligations under Brady. This is, of course, completely wrong. *The U.S. Supreme Court, in Strickler v. Greene, 527 U.S. 263, 283, 119 S.Ct. 1936, 1949 (1999), explicitly held that a prosecutor's open file discovery policy in no way substitutes for or diminishes the State's obligation to turn over all exculpatory evidence pursuant to Brady.*

Regardless of what customs, practices and traditions may have grown up around discovery, the fact remains that the U.S. Constitution supercedes local "open file" customs. And fortunately for the defense bar, this means we get a lot more information than most "open file" policies provide. If we are to get meaningful discovery, we must use those resources to compel the courts and prosecutors to follow the law, and release the information our clients need to get a fair trial.

IV. WHAT IS BRADY MATERIAL?

Brady says that the prosecution must disclose any information or material that is:

- A. Material (and)
- B. Relevant to guilt *or* punishment. (and)
- C. Favorable to the accused. (and)
- D. Within the actual or constructive knowledge or possession of anyone acting on behalf of the State.

It is helpful to examine each of these factors individually, to get a clear idea of exactly what kind of material the State is required to turn over:

A. WHAT DO WE MEAN BY MATERIAL?

Materiality is the most confusing aspect of the Brady standard. Materiality is often though of in terms of the standard the defense must meet to get a conviction reversed when a Brady violation is discovered after trial. In this context, materiality is usually defined as whether there was a reasonable probability that the result of the trial would have been different if the exculpatory material had been turned over before trial.

Courts have recognized, however, that this standard is not appropriate as a guide for whether information must be turned over before trial. Those courts have usually adhered to the language of Brady, Bagley and Kyles, all of which speak of the obligation to turn over anything that is relevant to guilt or punishment and is exculpatory or favorable to the defense. See, for example, U.S. v. Sudikoff, 36 F.Supp. 2d 1196 C.D.Cal. 1999), U.S. v. McVeigh, 954 F.Supp. 1441 (D.Colo. 1997); Boyd v. United States, 908 A.2d 39 (D.C. Ct. App. 2006).

B. WHAT IS "RELEVANT TO GUILT *OR* PUNISHMENT?"

This simply establishes that Brady material consists of anything that is helpful to the defense at either the guilt *or* sentencing phase of a case. For example, assume that a robbery victim identified the defendant as one of two people who robbed him, but also told police that the defendant prevented the other robber from injuring him. This would be Brady material because it is relevant to mitigating punishment – even though it actually helps establish the defendant's guilt.

C. WHAT IS "FAVORABLE TO THE ACCUSED?"

As used in Brady, the terms "favorable to the accused" and "exculpatory" are not limited to evidence that goes towards proving that the defendant is innocent of the charges. Brady material is defined much more broadly, and the prosecution has the obligation to turn over many things that don't directly go towards a claim of innocence.

For the purposes of Brady analysis, material that is favorable to the defense is anything that meets the following criteria:

- It is exculpatory – meaning that it tends to show that the defendant is innocent of the charges or has a defense to the charges. . . . or
- It tends to show that the defendant is guilty of a lesser offense than the top charge he is facing. . . . or
- It may mitigate sentence. . . . or
- It can be used to impeach a state witness, or otherwise cast doubt on the prosecution case. Impeachment evidence must be turned over even if has nothing to do with the defendant's innocence.

Again, it is a good idea to look at each of these criteria individually:

C-1. WHAT DO WE MEAN BY " IS EXCULPATORY?"

The most important thing to understand about the term "is exculpatory," is that it is not limited to things that prove the defendant did not commit the crime. Rather, it includes any information or material that might lead the jury to conclude that the defendant should be found not guilty of any of the crimes charged.

One constructive way of analyzing whether something "is exculpatory" is to look at the different general categories (or genres) of defenses in criminal cases, and ask ourselves whether the evidence we want to discover helps establish any of those categories. These genres (within which almost all defenses fit) are as follows:

1. The criminal act never occurred. (Frame-up, for example)
2. The criminal act occurred, but the defendant was not the one who did it. (Alibi, for example)
3. The criminal act occurred, the defendant committed it, but it wasn't legally a crime. (Self-defense, for example)
4. The criminal act occurred, the defendant committed it, but it wasn't the crime charged. (Lesser included offense, for example)
5. The criminal act occurred, the defendant committed it, but he was not legally

responsible. (Insanity, for example)

Any material that might help to establish any of these categories is Brady material, and must be disclosed. Moreover, it doesn't matter whether the defendant has committed to raising a defense with that information. As long as the material would help to establish a defense, it must be turned over, and it is for the defense lawyer to determine whether and how he or she wishes to use it.

Along the same lines, any material that is inconsistent with the prosecutor's theory of the case is Brady material, regardless of whether and how defense counsel is going to use that material.

Due process also requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks. Kyles v. Whitley, 514 U.S. 419, 442 n.134, 445-451 (1995).

To sum up:

$ Any material that helps the defense attack the reliability, thoroughness, or good faith of the police investigation must be disclosed under Brady. This is a terrific tool for prying loose police reports that show inconsistent behavior or statements by police, incompetence or failure to follow guidelines or protocols for investigation, and general sloppiness in investigating the crime or in failing to follow leads or investigate anything that wouldn't help convict your client. It is also very useful for obtaining information about informants, deals and other crimes that may have given witnesses a motive to lie in your case, or given the police a motive to frame your client.

$ Even if something would not be admissible at trial, if it fits within the definition of Brady material, it must be disclosed. The key to Brady is that the defense must be given all favorable information – it is then up to defense counsel to figure out a way, if possible, to use it. Contrary to what many prosecutors believe, the fact that a document or piece of information may be inadmissible does not relieve them of their obligation to disclose it under Brady.

$ Even if the prosecutor thinks that the Brady material is unreliable or unbelievable, he or she must disclose it. It is for defense counsel, not the prosecutor to decide whether the Brady material is reliable enough to be used. For example: the excuse that "the other guy who confessed was crazy and unbelievable" does not relieve the prosecution from the due process obligation to inform the defense

about the "other guy and his confession."

C-2. WHAT DO WE MEAN BY "MITIGATE SENTENCE?"

Information or material that mitigates sentence is:

Anything that supports any argument you are permitted to make at sentence in support of a less-than-maximum sentence.

Anything the courts in your jurisdiction have held to be a mitigating factor at sentencing.

A good technique for supporting a demand for Brady material that mitigates sentence is to cite caselaw that either:

Has explicitly held that such material is relevant to sentence. . . . or
In which a court has considered such material in its sentencing determination, even if the case itself was not explicitly about that material.

C-3. WHAT DO WE MEAN BY "IMPEACH A STATE'S WITNESS?"

< Anything that is inconsistent with the testimony of a State's witness. This might include prior statements of that witness, or any other information from any other source that is inconsistent with the witness's testimony.

< Anything that is inconsistent with other prior statements of a State's witness.

< Any statements omitting something the witness later told the prosecutor, or testified to. This covers the very common situation where a State's witness at trial "remembers" for the first time that the defendant confessed to him. When the witness has such a miraculous recovered memory, any prior statements the witness made that did not include the alleged confession become Brady material, and must be turned over immediately.

D. WHAT IS "WITHIN THE KNOWLEDGE OR POSSESSION OF ANYONE ACTING ON BEHALF OF THE STATE?"

The important thing to recognize about this requirement for Brady material is that it is not limited to things that are within the actual knowledge or possession of the individual prosecutor on the case. All of the following are included:

- Anything actually known to or in the possession of anyone in the prosecutor's office.
- Anything actually known to or in the possession of the police, even if the prosecutor doesn't know about it.
- Anything actually known to or in the possession of anyone else acting on behalf of the State, even if the prosecutor doesn't know about it.

The prosecutor is therefore prohibited from hiding behind the excuse that "I didn't know about that." If the material was within the knowledge or possession of anyone working on behalf of the prosecution, the State is considered to have constructive knowledge or possession of that material, and must obtain and turn it over to the defense pursuant to Brady..

D-1. The Prosecutor's Duty to Seek Out Exculpatory Material

In Kyles v. Whitley, the U.S. Supreme Court explicitly said that the individual prosecutor has an affirmative duty to learn of any favorable evidence known to the other people and agencies acting on the government's behalf on the case, including the police. In Pennsylvania v. Ritchie, 480 U.S. 39 (1987), the Court also suggested that prosecutors may have a duty to examine the files of other government agencies, to find out whether they contain exculpatory materials.

V. USING YOUNGBLOOD v. WEST VIRGINIA, 547 U.S. 867, 126 S.Ct. 2188 (2006)

A. WHAT IS YOUNGBLOOD?

Youngblood is the latest pronouncement of the U.S. Supreme Court on Brady/Kyles issues. The best thing about Youngblood is that it reverses a decision a state court system that was routinely refusing to follow Kyles.

Youngblood involved a defendant accused of abducting three teenaged girls and sexually assaulting one of them. His defense was consent. After he was convicted and sentenced to 26-60 years in prison, a defense investigator discovered that the "victims" had written a letter bragging about how they framed Youngblood and how the entire incident was consensual. A police officer who saw the letter before trial refused to take custody of it, and told the person who had the letter to destroy it. The defense was never told about the letter until after Youngblood was convicted. The defense was never told about the police attempt to have it destroyed. Consequently, the jury never found out about the letter, and neither the "victims" nor the police officer were cross-examined about it at trial.

The defense filed a state habeas petition, but the trial judge denied the petition, holding

that the letter wasn't Brady material because it only went to impeachment, not innocence. The trial court also held that it was not Brady material because the police officer never gave the letter to the prosecutor, so the prosecution was not in possession of the material.

When the denial of Youngblood's habeas was appealed, the West Virginia Supreme Court of Appeals, by a 3-2 vote, affirmed. The majority did not address the specific Brady/Kyles claims, but merely held that the trial court did not abuse its discretion.

B. THE HOLDING OF YOUNGBLOOD

The U.S. Supreme Court reversed. It made following explicit findings, and ordered the West Virginia courts to follow them:

1. Impeachment material falls under Brady/Kyles and must be disclosed, even if it does not go to innocence.

2. If the police know about exculpatory information (including impeachment material) it is considered to be within the possession of the prosecution and must be disclosed pursuant to Brady/Kyles, even if the police never told the prosecutor about it.

3. The prosecutor has an affirmative duty to seek out and learn of any exculpatory material in the possession of anyone else acting on the government's behalf in the case, including the police.

VI. WHAT MUST WE DO TO GET BRADY MATERIAL?

A. HOW TO DEMAND BRADY MATERIAL

It is very tempting to store a form Brady motion on your computer, and file it in every case, just changing the defendant's name and case number. Unfortunately, the more general our demand is, the easier it is for the prosecution to weasel out of its obligations. By specifically tailoring our demand to the factual needs of our case, we make it difficult for the State or the Court to claim that they didn't know something existed or was relevant.

This does not mean that we can't use the computer, or we can't use similar language in our Brady motions. It does mean, however, that our Brady motions must contain sufficient facts about the individual case to make our demand specific. At the very least, this means that we should include facts in our demand that refer to:

T The prosecution witnesses we want information about. For example:
T "Any and all information bearing on the truthfulness, bad character or bad reputation of State's witness John Smith, including but not limited to:

complete adult criminal record; complete juvenile record; any contempt citations issued against the witness; any past instances of dishonesty, fraud, lying or violence on the part of the witness that is known to the State or its agents; any history of mental illness . . ."

- The specific documents (or at least the kind of documents) we want to get. For example:

  - "The name, address and telephone number of any witness who at any time identified someone other than the defendant as the person who committed the robbery charged in this case; any and all reports that mention in any way that a witness, whether named or unnamed, identified someone other than the defendant as the person who committed the robbery charged in this case; the name, address and telephone number of any witness who at any time stated that the defendant was not the person who committed the robbery charged in this case; any and all reports that mention in any way that a witness, whether named or unnamed, stated that the defendant was not the person who committed the robbery charged in this case."

- The specific evidence we think may be out there that fits within Brady. For example:

  - "Any medical or scientific records (including but not limited to the results of any tests and the complete raw data upon which those test results were based) that indicate that the defendant was not the person who committed the crimes charged. This request is intended to encompass, but not be limited to all blood testing, DNA testing, serology testing, fingerprint testing, hair sample testing

- When enumerating the things you are asking for in your motion, use the phrase "including, but not limited to" as a way of preventing the court or the prosecutor from claiming that you unnecessarily limited the scope of your request.

In order to make specific demands for Brady material, we have to do several things before writing the motion:

- Know your theory of defense. It is impossible to think of things that may be exculpatory if we haven't figured out what our defense is.

- Investigate. Often it will be impossible to complete an investigation before motion papers are due. When that happens, do the best you can to base the specifics of your Brady motion on what you know about the facts of your case. Then supplement your requests for Brady material as you learn more about the

case.

T Follow up on what you learn. When you get some Brady material, investigate it, and then make demands for additional material on anything your follow-up investigation turns up.

B. WHEN TO DEMAND BRADY MATERIAL

The Brady process is not just for pre-trial. The prosecution has an ongoing constitutional responsibility to turn over all exculpatory material, whenever they find it. Imbler v. Pachtman, 424 U.S. 409, 427,n.25, 96 S.Ct. 984 (1976), held that "after a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."

This means that demanding Brady material is something we should be doing throughout the case. For example, Brady applications can be made at any of these times:

- In pre-trial motions
- Just before trial begins – to make sure that nothing has come up that the prosecutor has neglected to mention
- After the prosecutor's opening – to make sure there is nothing that may be in conflict with what the prosecutor has just told the jury.
- After the direct examination of every State's witness – to make sure the prosecutor doesn't possess something that contradicts the testimony the witness just gave.
- After the prosecutor's closing – for the same reason you ask for it after his or her opening.
- Before sentencing – to make sure the State is not withholding anything that would mitigate sentence.

In your pre-trial motions and prior to sentencing, it is important to make the motion in writing and to get the State's response and the court's decision (if any) in writing.

When you make Brady applications during trial, be sure to **make them on the record**, and to get the State's response and the court's ruling **on the record**. This is absolutely essential if we are to have a remedy when we discover months later that the State lied about something.

C. BRADY DURING POST-CONVICTION

When Brady material turns up after a defendant has been convicted and sentenced, a state post-conviction or habeas corpus petition is usually the appropriate way to raise the issue. This is standard practice. But what can be done when the Brady material is discovered after the defendant has not only been convicted, but lost his or her appeal, and lost a post-conviction case? In such cases, there are usually serious procedural problems with filing a second, or successor habeas. In particular, the defendant must show cause why he did not raise the claim in his first petition, and actual prejudice from the violation.

In Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 1949 (1999), the U.S. Supreme Court held that when a defendant files a successor habeas under Brady, if he proves that the State withheld evidence, that will constitute cause for not presenting the claim earlier.

It is essential that we take advantage of this law by:

- Remaining vigilant for concealed Brady material even after conviction.
- Raising the claim even after a first habeas has failed.

VII. REFUTING THE PROSECUTOR'S ARGUMENTS – USING KYLES v. WHITLEY, 514 U.S. 419, 115 S.Ct. 1555 (1995) AND OTHER CASES

The most significant Brady case of the past 30 years has been Kyles v. Whitley, 514 U.S. 419 (1995). The importance of Kyles lies in the fact that the U.S. Supreme Court took the opportunity to explicitly refute virtually every excuse prosecutors have traditionally used to avoid turning over Brady material at trial, and to avoid reversals on appeal and habeas corpus when they are caught in a Brady violation. It is therefore essential that we become familiar with Kyles, and use it at every opportunity to refute the State's arguments.

The following is a list of many rulings from Kyles that are helpful in refuting common incorrect arguments made by the prosecution – at trial, appeal, and post-conviction:

Materiality: The State Argues that the Withheld Material Would Not Have Resulted in an Acquittal

Kyles: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Governments evidentiary suppression 'undermines confidence in the outcome of the trial.'"

Materiality: The State Argues that Even Without the Withheld Material, the Evidence was Sufficient to Convict

Kyles: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. . . . None of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone."

Materiality: The Prosecutor Argues on a Brady Appeal of Post-Conviction that "The Withheld Evidence Wasn't Important"

Kyles: The U.S. Supreme Court suggests that defense counsel look to (and cite) the prosecutor's closing argument at trial to show that the State argued that the subject matter of the withheld evidence was very important. In Kyles, for example, the prosecution withheld evidence that cast doubt on the credibility and observational powers of a witness. On appeal, the State argued that this wasn't material under Brady, because the witness was not important. During closing argument at trial, though, the prosecutor had vehemently argued that those same witnesses were very important and highly credible. The Supreme Court viewed this as a strong indication that the withheld information about the witness' credibility was material.

Harmless Error: The State Argues that Even Though there was a Brady Violation, it was Harmless Error

Kyles: Once a reviewing court has found constitutional [Brady] error, there is no need for further harmless-error review . . . . [a Brady error] could not be treated as harmless."

The Prosecutor Says, "I Didn't Know About that Information – the Police Never Told Me

Kyles: "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

The Prosecutor Says, "None of the Items We Failed to Disclose Would Have Changed the Jury's Mind."

Kyles: Brady does not require "a series of independent materiality decisions" for each individual piece of information withheld. Rather, it requires, "a cumulative evaluation" to determine

whether the cumulative effect of all the pieces of information the State failed to disclose rises to the level of Brady materiality.

The Prosecutor Says, "That Stuff Is Confidential and/or Privileged

If there is a possibility that the material falls under some privilege or confidentiality provision, you are still entitled to it if it is exculpatory under Brady. If the prosecutor raises a claim of privilege, the solution is for the judge to examine the material *in camera*. If the judge determines that it is exculpatory, it must be turned over to the defense. Pennsylvania v. Ritchie, 480 U.S. 39 (1997); U.S. v. Stiffler, 851 F.2d 1197, 1201-1202 (9th Cir. 1988); U.S. v. Carreon, 11 F.3d 1225 (5th Cir. 1994).

Finally, Kyles determined that the following kind of information is all Brady material that must be disclosed:

- Inconsistent descriptions by different witnesses of the criminal.
- Inconsistent descriptions by different witnesses of the crime.
- The fact that some of the witness's descriptions of the criminal matched the police informant
- That there were pending charges against the police informant
- That there was an ongoing investigation of the police informant concerning other crimes.
- That the police informant made inconsistent statements to the police about the crime and about his accusation of the defendant
- That the police had other leads and information that they failed to follow up on or investigate, that could have pointed the finger at someone other than the defendant.
- That before accusing the defendant, one of the witnesses previously said that she had not actually seen the crime
- That a witness's description of the crime and/or the criminal became more "accurate" and more certain after the witness met with police and/or prosecutors, or after the witness testified at a first hearing or trial.
- That a witness's prior statements omit significant details or facts that the witness "remembered" at trial.
- That a witness's trial testimony omitted significant details or facts that the witness mentioned in prior statements.
- That a witness or informant made statements that incriminated himself in the crime charged against the defendant.

Please read Kyles before making your next Brady demand.