Full Disclosure

Using *Brady v. Maryland* to train law enforcement officers.

BY **JUDGE BARBARA HERVEY** AND **SADIE FITZPATRICK**

MUCH MEDIA ATTENTION HAS RECENTLY BEEN DIRECTED AT ALLEGATIONS OF MISCONDUCT BY STATE ACTORS IN THE INVESTIGATION AND PROSECUTION OF CRIMINAL CASES HERE IN TEXAS. While many complaints have proven to be meritless, the fact remains that mistakes have been made and our system is in need of repair. This is not the fault of one act or one group of actors—it is a system-wide problem that we can and will fix. All of us should take great pride in the knowledge that Texas leads the nation in many reforms, particularly in the area of education and training. Other states and several federal organizations have recognized our progress and have asked for our help in developing their own programs, using Texas as a model. *Brady: A Simple Approach*, a training video for law enforcement, is yet another venture that we have been told is the first of its kind in the nation.

The Court of Criminal Appeals and the State Bar of Texas collaborated to produce this 58-minute video based on *Brady v. Maryland*,[1] a seminal U.S. Supreme Court case governing the disclosure of favorable evidence in criminal cases. Our goal in producing this video is to continue our effort to train participants in the criminal justice system and to continue to lead the nation in positive changes within our system. Similar training is being conducted with judges, prosecutors, and defense attorneys, and including law enforcement in this group is vital to our education and training reform. TCLEOSE credit has been secured for this video.

After a few introductory comments, the video begins with Brownwood Chief of Police Mike Corley. His role in the video is not to instruct officers on the law, but rather to share his story about how he learned to keep an open mind throughout the investigation of a case. Chief Corley was the lead investigator in a brutal rape case that occurred in 1985. A suspect was identified by a photographic lineup and was subsequently convicted and sentenced to two life sentences. In 2008, 23 years after the crime, DNA evidence cleared the suspect and he was released from prison. Further DNA testing identified the actual offender, who was already in a federal prison on an unrelated charge. Chief Corley's work was no doubt thorough and complete, but the case is a clear reminder of the importance of continued education on the newest science and investigatory techniques so that the best procedures are used. And if mistakes are made, we must learn from them and apply those lessons in the future.

The second segment of the video addresses the specific law that governs the disclosure of favorable evidence in criminal cases and is delivered by Austin Chief of Police Art Acevedo. Chief Acevedo discusses the 1963 case of *Brady v. Maryland*,[2] in which the U.S. Supreme Court held that the suppression by the prosecution of evidence favorable to an accused 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.

Under *Brady* and its progeny, a defendant must show three things to establish a *Brady* claim:

(1) The State failed to disclose evidence, regardless of the prosecution's good or bad faith;

(2) The withheld evidence is favorable to him; and

(3) The evidence is material, that is, there is a reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.[3]

Chief Acevedo details what is required under each of these prongs and then discusses several key U.S. Supreme Court and Texas cases (*Brady v. Maryland*,[4] *United States v. Bagley*,[5] *Kyles v. Whitley*,[6] *Ex parte Richardson*,[7] and *Ex parte Miles*[8]) to highlight the following critical points:

- Although Article 39.14 of the Texas Code of Criminal Procedure provides that offense reports and investigative reports prepared by the police are protected from discovery as work product of the police, the privilege derived from the work-product doctrine is not absolute, and the duty to reveal material exculpatory evidence as dictated by *Brady* overrides the work-product privilege.[9]
- Knowledge of possession of exculpatory evidence by the State will be imputed to prosecutors through State agents.[10]
- "[T]he individual prosecutor has a duty to learn of favorable evidence known to others acting on the government's behalf in a case, including the police."[11]
- "Favorable evidence" is that which "if disclosed and used effectively . . . may make the difference between conviction and acquittal."[12]
- Favorable evidence includes exculpatory and impeachment evidence.[13]
- "Exculpatory evidence" is evidence that "tends to justify, excuse, or clear the defendant from alleged fault or guilt."[14]
- "Impeachment evidence" is evidence offered to disparage, excuse, or clear the defendant from alleged fault or guilt.[15]
- Evidence "is 'material' if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different."[16]
- In other words, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[17]
- A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome of the trial."[18]
- There is no "good faith" exception to the duty to disclose.[19]

- The duty to disclose is material, favorable evidence continues post-conviction.[20]
- Due process requires reversal if the State, regardless of whether the defense made a request, failed to disclose favorable to the defense.[21]

In the third and final portion of the video, Chief James McLaughlin (Ret.), executive director and general counsel of the Texas Police Chiefs Association, leads officers through a series of hypothetical scenarios based on real cases. It is important to know the law, but it is imperative to apply those concepts to actual facts in order to gain a true understanding of the constitutional obligation under *Brady*. **TBJ**

NOTES

1. 373 U.S. 83 (1963).
2. *Id.*
3. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002).
4. 373 U.S. 83 (holding that the prosecution's suppression of favorable evidence to the accused violated due process).
5. 473 U.S. 667 (1985) (identifying the proper materiality standard to apply under *Brady*).
6. 514 U.S. 419 (1995) (holding that the defendant was entitled to a new trial because the net effect of the state-suppressed evidence favoring him raised a reasonable probability that its disclosure would have produced a different result at trial).
7. 70 S.W.3d 865 (Tex. Crim. App. 2002) (granting relief under *Brady* where the State failed to disclose the existence of a diary kept by a former police officer, which would have provided him with powerful impeachment evidence against the only eyewitness).
8. 359 S.W.3d 647 (Tex. Crim. App. 2012) (holding that the State violated *Brady* when it failed to disclose two police reports that identified other potential suspects for the shooting).
9. *Ex parte Miles*, 359 S.W.3d 647, 670 (Tex. Crim. App. 2012) (citing *Hampton*, 86 S.W.3d at 612); *Thomas v. State*, 837 S.W.2d 106, 113–14 (Tex. Crim. App. 1992).
10. *Ex parte Castellano*, 863 S.W.2d 476, 485 (Tex. Crim. App. 1993); *Ex parte Adams*, 768 S.W.2d 281, 292 (Tex. Crim. App. 1989).
11. *Kyles*, 514 U.S. at 437.
12. *Bagley*, 473 U.S. at 676.
13. *Id.*
14. *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992).
15. *Id.*
16. *Ex parte Kimes*, 872 S.W.2d 700, 702 (Tex. Crim. App. 1993).
17. *Kyles*, 514 U.S. at 435.
18. *Kimes*, 872 S.W.2d at 702.
19. *Brady*, 373 U.S. at 87.
20. *See, e.g., Miles*, 359 S.W.3d 647; *Richardson*, 70 S.W.3d 865.
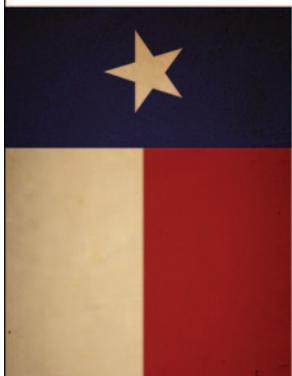21. *Bagley*, 473 U.S. at 682.

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