BRADY

The Next Step for Law Enforcement

April 2010

Article Source: http://www.llrmi.com/articles/legal_update/brady_next_step.shtml
Printable Version: http://www.patc.com/weeklyarticles/print/brady_next_step.pdf

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©2010 Lou Reiter, Co-Director, Legal & Liability Risk Management Institute - Some of you probably have never heard of *Brady*[i] or *Giglio*[ii] cases. Neither case has had much direct impact on your police tasks. Or maybe you've just been lucky. These cases and subsequent cases are now causing new considerations in today's policing.

The Supreme Court decided *Brady* in 1963 and *Giglio* in 1972. Steve Rothlein, another PATC instructor, wrote about the interpretation of these cases and implication for police investigators in the October 2007,PATC Newsletter. *Brady* essentially required the prosecutor to turn over to the criminal defense any material that might be exculpatory; or help in the defense. *Giglio* required the prosecutor to turn over any material that could be used to attack the credibility of witnesses. The Supreme Court further delineated the provisions of *Brady* in its decision in *Strickler*[iii] laying out the three components for a violation:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;

2. That evidence must have been suppressed by the State, either willfully or inadvertently;

3. And prejudice must have ensued.

Two developments seemed to have hastened the impact of these decisions on normal policing. In the early 1990s the Innocence Project began using DNA to successfully overturn convictions of persons charged with sexual assault and homicide. The second development seems to have stemmed from the 1995 *Kyles*[iv] case. This now required the prosecutor to affirmatively search out exculpatory material for discovery. U.S. Attorneys who were planning to prosecute criminal defendants began to call police departments and ask whether the agency knew of any credibility problems with police witnesses; specifically any discipline of officers for lying or false reporting.

These changes, and the concepts embodied in these Supreme Court cases, now present every police agency with three issues of concern. The first is the necessity to establish a protocol with your local prosecutor on how to address exculpatory materials in prosecutions. Not all prosecutor offices have dealt with this directly. It's the prosecutor's responsibility to determine what should be turned over to the criminal defense. But recent court cases have indicated that local police agencies can't hide behind the prosecutor and may have some liability if it does not ensure that the prosecutor is made aware of the materials. Remember that the prosecutor has "prosecutorial immunity" and you don't! It might be time to get together with your local prosecutor and develop checklists for significant crimes (sexual assault, robbery and homicide) that delineate all possible relevant exculpatory investigative materials. Using these lists will assist both the investigator and prosecutor in fulfilling this discovery requirement. As an added protection, you might want to validate in writing what you turned over to the prosecutor and whether you identified any items that you thought might be exculpatory.

The second issue is what materials must the investigator keep? There is no clear consensus on what these are. What about handwritten notes made by the investigator? How about contacts with informants that don't pan out? Could surveillance logs and license plate checks be exculpatory? What about due diligence and investigator time-logs? What documentation is made of the work of other investigators or field officers when their actions don't result in any tangible evidence? How about lists of possible suspects or phone numbers that are checked? Now you're probably saying this would be nonsense and too time consuming. Whether that's true or not becomes irrelevant when you are deposed or called to testify 15 or 20 years later during a wrongful conviction lawsuit. We need to get away from the case folder or box of disjointed documents. All of these cases need to look like a professional murder investigation book. It's time to develop and use specific checklists of possible items to be included in the investigation, whether they are, or whether you made a conscious decision that they were not applicable in this particular case.

The last issue concerns officer credibility. If an officer can no longer testify in court without a credibility challenge, is he or she reliable? Can they be any further value to the agency? What if they end up being the only witness in another officer's fatal shooting of a subject; how comfortable would that officer feel? Do you have enough empty non-enforcement assignments where you can put this type of officer?

Some police agencies have taken the step of saying, "If you lie, you fly," essentially saying that the officer will be terminated if he or she lies during an administrative investigation or in the process of testimony or affidavit preparation. While that's a laudatory and professional approach, not all elements in the criminal justice system agree. Several court decisions, arbitration proceedings, and Civil Service outcomes have not upheld termination. This is usually when the lying concerns a policy or procedural violation; not one dealing with court or affidavit testimony.

A police agency should adopt a specific policy addressing truthfulness and the consequences of giving false/misleading statements or reports. This should also indicate that should sustained discipline be lowered during any subsequent appeal, the officer would still lose his/her police authority.

A question often asked during PATC seminars on administrative investigations is what you should do if an employee initially lies and then recants and comes forward with a truthful account. This really depends on your overall evaluation of the employee's performance and ability to continue to function as a law enforcement officer. The end goal of any such investigation is to determine the truth of what occurred. When the employee comes forward with the truth, regardless what motivated it, you still need to address the initial response. But, it

would be prudent to term it as a failure to fully cooperate with the investigation, rather than lying. *If you label it untruthfulness, you're creating a potentially career ending outcome*.

Actions steps:

1. Meet with you local prosecutor and assist that office in developing a protocol for your agency to follow in ensuring that exculpatory material is provided to, and highlighted for, that office's consideration in discovery.

2. Develop a template for investigators to use in organizing their case files, specifically in the high liability crimes such as homicide and sexual assault. This should include detailed checklists.

3. Create and train all police employees in the elements of these significant cases and the necessity for proper discovery of exculpatory evidence.

4. Create a written policy and provide specific training that truthfulness is expected by all employees and false statements or reports will be a terminating offense. This policy should also state that should an outside appeal process lower the level of discipline, the sworn employee will lose his/her police powers and not be allowed to function in an enforcement capacity.

CITATIONS:

[i] *Brady v. Maryland*, 373 U.S. 83 (1963)
[ii] *Giglio v. United States*, 450 U.S. 150 (1972)
[iii] *Strickler v. Greene,* 527 U.S. 263, 119 S. Ct, 1936, 144 L. Ed. 2d 286 (1999)
[iv] *Kyles v. Whitley,* 514 U.S. 419, 115 S. Ct. 1555, 1565, 131 L. Ed. 2d (1995)