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## Criminal Procedure - Prosecutor's Duty to Disclose Evidence to the Defense - Boteler v. State

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CRIMINAL PROCEDURE—PROSECUTOR'S DUTY  
TO DISCLOSE EVIDENCE TO THE DEFENSE—  
*Boteler v. State*, 363 So. 2d 279 (Miss. 1978).

On July 23, 1976, E. L. Boteler resigned from his position as director of the Mississippi State Highway Department. Subsequently, Boteler was tried and convicted by a jury on two counts of embezzlement in the circuit court of the First Judicial District of Hinds County, Mississippi.<sup>1</sup>

On appeal to the Mississippi Supreme Court the defendant contended that the prosecution defied the circuit judge's order for discovery by failing to give the defense counsel notes of a statement made by the defendant to a state witness.<sup>2</sup> The statement in question involved notes taken by the director of a legislative audit committee during an interview with the defendant six days after the defendant had resigned as director of the Mississippi Highway Department.<sup>3</sup> The notes allegedly showed that the defendant told the audit committee director a story different from the one he told from the witness stand. During the trial, this information was used by the prosecution to undermine the defendant's credibility by showing the jury that the defendant's prior statement contradicted his sworn testimony.<sup>4</sup>

At the trial the state conclusively established, and the defendant conceded, that he had caused state funds to be issued to a fictitious entity and then used the funds for his personal benefit.<sup>5</sup> The defendant, however, testified that the money was issued to repay him for money he had previously advanced to the highway department for the purpose of funding a lobbying effort in Washington.<sup>6</sup> Therefore, "the only issue at trial became Mr. Boteler's credibility, as it reflected upon the state of his mind and the existence or lack of criminal intent."<sup>7</sup>

The defendant based his appeal on the due process prohibition of

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<sup>1</sup>*Boteler v. State*, 363 So. 2d 279 (Miss. 1978), *cert. denied*, 47 U. S. L. W. 3742 (1979). Defendant was indicted on a third charge of embezzling \$100,000, but was not tried on this count.

<sup>2</sup>*Id.* at 283.

Prior to trial the defense counsel filed a motion for discovery and inspection which was granted by the circuit court judge. The motion, in pertinent part, called for the state to provide the defendant with "any relevant written or recorded statement or confession made by defendant or copies thereof within the possession, custody or control of the State of Mississippi, the existence of which is known or by the exercise of due diligence, may be known to the attorneys for the State of Mississippi." Brief for Appellant at 39, 363 So. 2d 279 (Miss. 1978).

<sup>3</sup>363 So. 2d at 283.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 281.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 283.

prosecutorial suppression of evidence found in *Brady v. Maryland*.<sup>8</sup> Boteler argued that the failure of the prosecution to disclose the notes violated a constitutional duty to reveal inculpatory, as well as exculpatory evidence.<sup>9</sup>

The Mississippi Supreme Court disagreed and affirmed Boteler's conviction citing *United States v. Agurs*<sup>10</sup> which held that the prosecution does not have a constitutional duty to routinely deliver its entire file to the defense counsel.<sup>11</sup> The court elaborated by stating that the proper standard in judging "*Brady* material" should be the materiality of the evidence to the issue of guilt or innocence rather than the impact of the undisclosed evidence on the defendant's ability to prepare his defense.<sup>12</sup> The latter standard was held to be unacceptable by the court because it would "encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense."<sup>13</sup>

### PROSECUTORIAL DISCLOSURE

The prosecutor's constitutional duty to disclose evidence to the defendant has evolved from a long line of cases, beginning with *Mooney v. Holohan*.<sup>14</sup> In *Mooney* the defendant applied for a writ of habeas corpus, charging that his conviction for murder was obtained by the prosecutor's intentional use of perjured testimony.<sup>15</sup> The United States Supreme Court condemned such conduct, stating that the due process requirement has not been met

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Boteler contended that a defendant in an embezzlement case can rely on proof that he acted in good faith as an absolute defense to the charges against him. See *Commonwealth v. Schad*, 218 Pa. Super. 359, 280 A.2d 655, 657 (1971); *Commonwealth v. Wiener*, 340 Pa. 369, 17 A.2d 357, 360 (1941); which held that the test is "not whether the defendant had the right to withhold this money but whether in good faith he believed he had such right." *Id.*

<sup>8</sup>373 U. S. 83 (1963).

<sup>9</sup>363 So. 2d at 284.

<sup>10</sup>427 U. S. 97 (1976).

<sup>11</sup>363 So. 2d at 284-85.

The Mississippi Supreme Court did not discuss the assignment of error raised in the defendant's brief that the court order required delivery of the material sought regardless of the constitutional requirement. It can only be presumed that the "relevant material" standard is no broader than the constitutional requirements.

<sup>12</sup>*Id.* (quoting *United States v. Agurs*, 427 U. S. 97, 112 n.20 (1976)).

<sup>13</sup>363 So. 2d at 285 (quoting *United States v. Agurs*, 427 U. S. 97, 112 n. 20 (1976)). The opinion concluded that for a number of reasons the defendant's right to a fair trial was not violated by a failure to disclose the notes to him. The first reason was that the notes by themselves, without the benefit of explanation from the person who wrote them, do not reveal either inculpatory or exculpatory evidence. Second, the pretrial discovery order was not sufficient to require the prosecution to reveal the notes to the defendant. Finally, the defendant was put on notice of the notes' existence since he saw the notes being written during the interview.

<sup>14</sup>294 U. S. 103 (1935).

<sup>15</sup>*Id.* at 110.

if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.<sup>16</sup>

In *Pyle v. Kansas*,<sup>17</sup> the Court broadened the ruling by not only condemning the knowing use of perjured testimony, but also explicitly stating that the deliberate suppression of evidence favorable to the defendant is "a deprivation of rights guaranteed by the Federal Constitution. . . ."<sup>18</sup> In two subsequent cases the *Mooney* standard was again expanded, although somewhat conservatively. In *Alcorta v. Texas*,<sup>19</sup> the Supreme Court condemned the prosecutor's knowing failure to correct perjured testimony relating solely to the issue of punishment. Then in *Napue v. Illinois*,<sup>20</sup> the Court found a denial of due process when the prosecutor knowingly failed to correct unsolicited perjured testimony that related solely to the credibility of a state witness.

The development from *Mooney* to *Napue* constituted the first stage in the evolution of the prosecutor's constitutional duty to disclose evidence to the defendant. In these cases the prosecutor's misconduct was the principal basis for a finding of a due process violation.

The focus changed during the second stage of the case law development with the landmark case of *Brady v. Maryland*.<sup>21</sup> In *Brady* the court for the first time directly addressed the issue of the fairness of the trial to the defendant. *Brady* specifically emphasized that the critical element in disclosure is the impact of nondisclosure upon the fairness of the proceeding, holding that the "good faith" or "bad faith" of the prosecution is irrelevant in the issue of due process.<sup>22</sup> The court elaborated on its holdings by stating that the underlying principle "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."<sup>23</sup>

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<sup>16</sup>*Id.* at 112. However, the writ of habeas corpus did not issue since the defendant had not exhausted all remedies available to him under state law. *Id.* at 113-15.

<sup>17</sup>317 U. S. 213 (1942).

<sup>18</sup>*Id.* at 216.

<sup>19</sup>355 U.S. 28 (1957).

<sup>20</sup>360 U.S. 264 (1959). In the opinion the Court held that a new trial is required if "the false testimony could. . . in any reasonable likelihood have affected the judgement of the jury." *Id.* at 271.

<sup>21</sup>373 U.S. 83 (1963).

<sup>22</sup>*Id.* at 87. "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request 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." *Id.*

<sup>23</sup>*Id.*

Four years later, in *Giles v. Maryland*,<sup>24</sup> the Supreme Court was faced with its first post-*Brady* suppression case. In *Giles* the introduction of new evidence,<sup>25</sup> plus the suppression of favorable evidence,<sup>26</sup> was sufficient basis for the Court to remand the case to determine whether the due process rights of the petitioner had been violated.<sup>27</sup> Justice Fortas, in a concurring opinion, attempted to define a broad standard for disclosure. The Justice stated that "the state's obligation is not to convict, but to see that, so far as possible, truth emerges."<sup>28</sup> In elaborating, Justice Fortas appeared to support the disclosure of all evidence except information which is "merely repetitious, cumulative, or embellishing of facts otherwise known to the defense . . . , or without importance to the defense for purposes of the preparation of the case."<sup>29</sup> It is also important to note that Justice Fortas believed that in judging an alleged due process violation it should be immaterial whether or not a request was made for the suppressed evidence. He stated: "I see no reason to make the result turn on the adventitious circumstances of a request. If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event."<sup>30</sup>

In 1972, the Court directed its attention to a clear example of a "good faith" suppression of evidence in *Giglio v. United States*.<sup>31</sup> In *Giglio*, the trial prosecutor was unaware that the previous assistant U. S. attorney had promised a key prosecution witness immunity from government prosecution.<sup>32</sup> Since he was unaware of the earlier agreement, the prosecutor did not correct a false statement concerning the promise during the trial.<sup>33</sup> Nevertheless, in spite of the prosecutor's good faith, the Court ordered a new trial.<sup>34</sup> The Court, quoting from the *Napue* opinion, stated that "a new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .'"<sup>35</sup> Hence, *Giglio* reaffirmed the *Brady* rule

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<sup>24</sup>386 U.S. 66 (1967).

<sup>25</sup>*Id.* at 74. The new information consisted of interviews with the rape victim which were inconsistent with the victim's trial testimony.

<sup>26</sup>*Id.* at 70-71. The evidence allegedly suppressed consisted of: 1) information that a caseworker had advised that the rape victim be placed on probation; 2) a report that the victim had a sexual encounter with two men five weeks after the alleged rape, followed by the filing and eventual withdrawal of a rape charge; and 3) facts concerning a hearing in which the victim was committed to a girl's school.

<sup>27</sup>*Id.* at 74.

<sup>28</sup>*Id.* at 98. The majority opinion did not deal with the materiality issue.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 102.

<sup>31</sup>405 U.S. 150 (1972).

<sup>32</sup>*Id.* at 152.

<sup>33</sup>*Id.* at 152-53.

<sup>34</sup>*Id.* at 155.

<sup>35</sup>*Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)).

that the principal basis for a finding of due process violation will be the fairness of the trial to the defendant and not the prosecutor's misconduct. Yet, in the next suppression case, *Moore v. Illinois*,<sup>36</sup> the Court appeared to focus more on the strength of the prosecutor's case, than upon the fairness of the trial in judging the undisclosed evidence.

In *Moore*, the defendant contended he was denied due process in his trial for murder because the prosecution failed to reveal that one of the witnesses had "misidentified" the defendant. The Supreme Court affirmed the conviction by concluding that the evidence suppressed was not sufficiently material to justify a new trial.<sup>37</sup> The Court stated that two eyewitnesses had positively identified the defendant as the killer and that none of the items allegedly withheld by the prosecution impeached that identification.<sup>38</sup> The dissent,<sup>39</sup> however, felt that the suppressed evidence might "have been of substantial assistance to the defense,"<sup>40</sup> and the failure to disclose the evidence denied the defendant a fair trial.<sup>41</sup> In explaining the need for a broader duty of disclosure, Justice Marshall said that "while frivolous information and useless leads can be ignored, if evidence is clearly relevant and helpful to the defense, it must be disclosed."<sup>42</sup> Justice Marshall, as Justice Fortas had done in *Giles*, was once again recognizing the need for the prosecution to reveal all helpful evidence to the defendant so that he can properly prepare his defense.

#### AGURS DISCLOSURE STANDARDS

In 1976, the Supreme Court decided the most important non-disclosure case since *Brady, United States v. Agurs*.<sup>43</sup> The case represents the third stage in the development of the prosecutor's constitutional duty to disclose evidence to the defendant. *Agurs* is basically an accumulation and clarification of the different rules established since the *Mooney* decision. The court of appeals, reversing the district court, had held that the prosecution's failure to disclose certain evidence was a due process violation and required a new trial because the evidence "might have led the jury to entertain a reasonable doubt about appellant's guilt."<sup>44</sup> The Supreme Court reversed, holding that the court of appeals had incorrectly interpreted the *Brady* rule and therefore had applied a wrong standard of review.<sup>45</sup> The correct rule,

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<sup>36</sup>408 U.S. 786 (1972).

<sup>37</sup>*Id.* at 796-98.

<sup>38</sup>*Id.* at 796-97.

<sup>39</sup>*Id.* at 800 (Marshall, J., dissenting, joined by Douglas, Stewart, Powell, JJ.).

<sup>40</sup>*Id.* at 801.

<sup>41</sup>*Id.*

<sup>42</sup>*Id.* at 809.

<sup>43</sup>427 U.S. 97 (1976).

<sup>44</sup>*Id.* at 1253 (quoting *Levin v. Katzenbach*, 363 F. 2d 287, 291 (D.C. Cir. 1966)).

<sup>45</sup>427 U.S. at 102.

the Court said, is that a reversible error has occurred "if the omitted evidence creates a reasonable doubt that did not otherwise exist."<sup>46</sup> Applying this rule to the circumstances, the Court decided that the suppressed evidence did not create a reasonable doubt in the context of the entire record. The Court explained that the defendant's prior criminal record which had not been disclosed by the prosecution did not contradict any evidence offered by the prosecutor.<sup>47</sup>

In *Agurs* the Court outlined the circumstances under which evidence must be disclosed to the defense. The Court stated that the *Brady* rule arguably applies in three different situations.<sup>48</sup>

The first situation, as in *Mooney*,<sup>49</sup> involves perjured testimony. If the perjured testimony is included in the prosecution's case, a new trial should be ordered "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."<sup>50</sup> Under this standard there will be an extremely strict duty on the prosecution to disclose this type of evidence. The Court indicated a strong disapproval of the use of perjury by the prosecution because it involves "a corruption of the truth-seeking function of the trial process."<sup>51</sup>

The second situation, typified by the facts in *Brady*,<sup>52</sup> involves the type of case in which the defense has made a specific request for information. In this category, the Court reasoned that "the [prosecutor's] failure to make any response is seldom, if ever, excusable."<sup>53</sup>

The third situation involves the category of cases where the prosecutor has received no request at all or receives only a general request for "*Brady* material." In this situation, exemplified by *Agurs*, the Court held that the duty to disclose arises only "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce. . . ." <sup>54</sup> In other words, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."<sup>55</sup>

<sup>46</sup>*Id.* at 112.

<sup>47</sup>*Id.* at 114.

<sup>48</sup>*Id.* at 103.

<sup>49</sup>See note 14 and accompanying textual material, *supra*.

<sup>50</sup>427 U.S. at 103.

<sup>51</sup>*Id.* at 104.

<sup>52</sup>*Id.* In *Agurs* the Court noted that, "a fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.*

<sup>53</sup>*Id.* at 106. The Court elaborated by saying:

[A]lthough there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.

*Id.*

<sup>54</sup>*Id.* at 107.

<sup>55</sup>*Id.* at 108.

The Court concluded:

[T]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial.<sup>56</sup>

#### APPLYING *AGURS* TO *BOTELE*

In applying the *Agurs* standard of materiality to the facts in *Boteler v. State*,<sup>57</sup> the second standard appears applicable, although the Mississippi Supreme Court applied the third standard. The second standard is exemplified by the facts in *Brady*. In *Brady*, the defense requested the prosecution to disclose all of a co-defendant's extrajudicial statements. The prosecution failed to disclose one of these statements. The Supreme Court held that the nondisclosure constituted a due process violation and hence, ordered a new trial.<sup>58</sup>

The factual situation in *Boteler* concerning the disclosure request was similar to the one in *Brady*. In *Boteler* the defense counsel requested before the trial, that the state submit all statements made by the defendant. The prosecutor failed to disclose either to the defense counsel or to the trial judge "notes of a lengthy statement made by defendant to a State's witness."<sup>59</sup> At trial, the statement and the witness's testimony were used to attack the defendant's credibility. On an appeal based upon this nondisclosure the Mississippi Supreme Court refused to find a due process violation.<sup>60</sup>

The *Agurs* standard required that *Boteler* be granted a new trial. First, the request by his counsel was more than a request for all exculpatory material or all "*Brady* material," it was a specific request for all statements made by the defendant in the state's possession.<sup>61</sup> Secondly, the request in *Boteler* was even more specific than the request in *Brady*, wherein the Supreme Court found a due process violation in the prosecution's failure to disclose certain evidence. Therefore, the failure of the prosecution in *Boteler* to allow the trial judge an opportunity to inspect the evidence, whether it proved to be ex-

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<sup>56</sup>*Id.* at 112-13.

<sup>57</sup>363 So. 2d at 279.

<sup>58</sup>373 U.S. at 86, 90. The new trial was restricted to the issue of punishment.

<sup>59</sup>363 So. 2d at 283.

<sup>60</sup>*Id.* at 285.

<sup>61</sup>See note 3, *supra*.



culpatory or inculpatory, prior to trial constitutes a violation of due process.<sup>62</sup>

### CONCLUSION

The holding in this case indicates that the Mississippi Supreme Court in the future will continue to focus on the guilt or innocence of a defendant, rather than on the procedural aspects of the trial. The court expressly rejected the argument that the standard of review "should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial."<sup>63</sup> Instead, the court attempted to determine whether the suppressed evidence would have changed the outcome of the jury trial. The criticism of using such a test is that it can weaken the defendant's procedural rights. These procedural rights are necessary to protect a defendant from the substantially greater investigative power of the state. This superior power is evidenced most clearly in the government's ability to uncover information concerning the alleged crime.

In order to correct this inequality, the procedural rights of a defendant and the defendant's ability to adequately prepare his defense must be recognized. Only if the courts are willing to declare a new trial, when these rights are violated, will the prosecution be motivated to recognize its disclosure requirements. Furthermore, the element of "surprise" in the criminal trial process must be minimized if the defendant is to be accorded a fair trial. Otherwise, the result will be that a defendant's procedural rights will become merely symbolic, rather than defining specific rights and duties.

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<sup>62</sup>*Id.* The Mississippi Supreme Court held that "the pretrial discovery order did not require the prosecution to deliver the notes." *Id.*

<sup>63</sup>363 So. 2d at 285.