UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2024 Robert O. Dawson Conference on Criminal Appeals

May 1-3, 2024
Austin, Texas

Brady v. Maryland, the Michael Morton Act, and the Texas Disciplinary Rules

Carson Guy

Author Contact Information:
Carson Guy
Texas Court of Criminal Appeals
Austin, Texas

carson.guy@txcourts.gov
512.463.1575

Carson Guy
Texas Court of Criminal Appeals
201 W. 14th Street, Room 106
Austin, Texas 78701

phone: (512) 415-9865
carson@carson-guy.com

BACKGROUND, EDUCATION AND PRACTICE

Carson Guy has been Judge Hervey's Research Attorney since 2013. Carson earned his Bachelor of Arts from Texas State University in 2007 and his Juris Doctor from St. Mary's School of Law in 2011.

He was a member of the American Inns of Court from 2010 to 2023. Carson served on the national American Inns of Court Membership Committee from 2018 to 2023. He was a member of the Texas Bar Journal Board of Editors from 2016 to 2019 and was an advisory member from 2020 to 2023. Carson has written and coauthored many articles, including in the Texas Bar Journal, in the SMU Law Review, and for CLE presentations. He has also presented at many legal education courses on various topics.

Carson lives in Lampasas with his wife, Jessica, his two children, Stratton and Claire, and their Sheepadoodle, Walter.

TABLE OF CONTENTS

I. DISCLAIMER

The views expressed in this paper are mine alone. They are not endorsed by the Texas Court of Criminal Appeals (CCA). This paper is for informational purposes. Do your own independent research.

II. INTRODUCTION

Discovery is a hotly debated topic that is in flux. This paper examines federal and state criminal discovery laws, as well as ethical rules governing a prosecutor's duty to disclose, but this paper is not a comprehensive review of all discovery issues. There are a lot of excellent resources available for people interested in learning more.

III. WHETHER TO DISCLOSE

Whether a prosecutor must disclose favorable evidence raises difficult legal and ethical questions. A prosecutor is more than just an advocate.[1] A prosecutor's goal is to see that justice is done. Professor Gershman has said, "A trial is not a sporting contest, and the defendant is not a pawn in a game of chess."[2] The United States Supreme Court has cautioned that "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[3]

IV. SOURCES OF DISCOVERY OBLIGATIONS

There are three sources of discovery discussed in this paper: (1) constitutional, (2) statutory, and (3) ethical. Due process requires the State to disclose certain kinds of material evidence.[4] The seminal case is *Brady v. Maryland*.[5] Criminal discovery in Texas is governed by Article 39.14 of the Texas Code of Criminal Procedure,[6] which the legislature revamped in 2013 when it enacted the Michael Morton Act.[7] Ethical disclosure obligations derive from the Texas Rules of Professional Conduct, specifically Rule 3.04 and Rule 3.09.[8]

V. *BRADY*

A. The Case

John Brady and Charles Boblit were charged with capital murder for murdering the victim while committing robbery.[9] Brady said he participated in the robbery but not the killing. Both men were convicted and received the death penalty.[10] After trial, Brady learned that Boblit previously confessed to the murder, but the prosecution suppressed that evidence for Brady's trial.[11]

On appeal, the Maryland Court of Appeals held that suppression of the confession denied Brady due process and remanded the case to reconsider the question of punishment only.[12] A petition for a writ of certiorari was filed, which the United States Supreme Court granted.[13]

B. The Rule

The United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or

---

[1] PROF. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5:1 (2d ed. 2023).

[2] *Id.*

[3] *United States v. Agurs*, 427 U.S. 97, 108 (1976).

[4] 373 U.S. 83 (1963).

[5] *Id.*

[6] TEX. CODE CRIM. PROC. art. 39.14.

[7] MICHAEL MORTON ACT, 83d Leg., R.S., ch. 49, § 2, 2013 TEX. GEN. LAWS (eff. Jan. 1, 2014).

[8] TEX. R. PROF'L CONDUCT 3.04 & 3.09, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

[9] *Brady*, 373 U.S. at 85.

[10] *Id.* at 84.

[11] *Id.*

[12] *Brady*, 373 U.S. at 85.

[13] *Id.*

punishment, irrespective of the good faith or bad faith of the prosecution."[14]

C. Preservation of Error

To preserve a *Brady* claim for appellate review, the defendant must comply with Rule 33.1 of the Texas Rules of Appellate Procedure.[15] Thus, if grounds for a *Brady* claim become apparent at trial, the defendant must object.[16] If the grounds only become apparent after final arguments have concluded, to preserve error, the claim should be raised in a motion for new trial or at least at the hearing on the motion.[17]

D. Suppression

1. <u>The Basics</u>

Evidence is suppressed if the State failed to disclose evidence "which had been known to the prosecution but unknown to the defense."[18] But a prosecutor generally has no duty to disclose information that the defense already knows,[19] nor must it furnish a defendant with exculpatory or mitigating evidence that is fully accessible to the defendant from other sources.[20] Suppression must be proven by a preponderance of the evidence.[21]Due Diligence

If the State need not furnish evidence that is fully accessible to the defendant from other sources, is that another way of saying that a defendant must use due diligence? Although it appears that the CCA has not definitively weighed in on the issue, at least one court of appeals and several federal courts have.[22] The

---

[14] *Id.* at 87.

[15] *See Pena v. State*, 353 S.W.3d 797, 807 (Tex. Crim. App. 2011); TEX. R. APP. P. 33.1. Rule 33.1 states that, to preserve error for appellate review, a party must make a timely objection specifically stating why the judge should rule in his favor unless the grounds were apparent from the context. TEX. R. APP. P. 33.1(a). It also requires that the objection complied with the Texas Rules of Evidence. *Id.* 33.1(a)(1)(B). Finally, the defendant must obtain a ruling on the objection, or the record must show that the trial court refused to rule and that the party objected to that refusal. *Id.* 33.1(a)(2).

[16] *See Pena*, 353 S.W.3d at 807.

[17] *Id.* at 807-08. This is because "[t]he introduction of evidence after the conclusion of closing arguments is prohibited." *Id.* at 808 (citing TEX. CODE CRIM. PROC. art. 36.02).

[18] *Agurs*, 427 U.S. at 103.

[19] *See Havard v. State*, 800 S.W.2d 195, 204 (Tex. Crim. App. 1989) (no duty to disclose evidence that the defense already knows about); *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (no *Brady* violation where the State was accused of failing to disclose a letter because the defendant knew that the letter existed and its contents because he wrote it). In *Hayes*, the Court said that the defendant's statement did not fall "within the *Brady* rule." It seems that the Court meant that the duty to disclose was not triggered.

[20] *See Harm v. State*, 183 S.W.3d 403, 407 (Tex. Crim. App. 2006) ("[T]he state is not required to . . . furnish appellant with exculpatory or mitigating evidence that is fully accessible to appellant from other sources).

[21] *Keeter v. State*, 175 S.W.3d 756, 760 (Tex. Crim. App. 2005).

[22] *See e.g.*, *United States v. Laines*, 69 F.4th 1221, 1231 (11th Cir. 2023) ("Even if the evidence were exculpatory, Laines also cannot establish that he could not have obtained the evidence with reasonable diligence" because it was fair to presume that he knew what was on his own cell phone and noting that he could have examined it during discovery); *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992) (citing *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980)) ("Evidence cannot be regarded as 'suppressed' by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence); *United States v. Stuart*, 150 F.3d 935, 937 (8th Cir. 1998) (citing *White*, 870 F.2d at 337) ("Evidence is not suppressed if the defendant has access to the evidence prior to trial by the exercise of reasonable diligence."); *Keeter v. State*, 105 S.W.3d 137 (Tex. App.—Waco 2003), *rev'd on other grounds* 175 S.W.3d 756 (Tex. Crim. App. 2005) (holding that the State has no duty to disclose evidence the applicant could have found using due

Title search: Brady v. Maryland, the Michael Morton Act, and the Texas Disciplinary Rules

Also available as part of the eCourse
The Brady/Watkins/Morton Acts

First appeared as part of the conference materials for the
2024 Robert O. Dawson Conference on Criminal Appeals session
"*Brady v. Maryland*, the Michael Morton Act, and the Texas Disciplinary Rules"