***BRADY* MOTIONS – CRIMINAL CASES - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I am Tain Kell.*

Tain, we are at that time of year when we are setting jury trial calendar dates for the upcoming months, filing ethics disclosures, making Rule 3.15 reports. Don’t you miss any of this fun stuff?

*No…..*

Today, we are going to discuss *Brady* motions and how they should be handled.

*Brady motions are the topic of the day. [Something funny about the “Brady Bunch,” Tom Brady, etc.]*

**START IN THE BEGINNING – *BRADY v. MARYLAND***[[1]](#endnote-1)

1. “[T]he 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.”[[2]](#endnote-2)
2. The prosecution must disclose evidence in its possession that is favorable to the defendant because
	1. [t]he *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but [is required] to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.[[3]](#endnote-3)
3. Throughout this episode, we are going to refer to “*Brady* Material.” Because there is so many different types of information that could arguably be included within the larger definition of “*Brady* Material,” it will be an easier reference for everyone involved.

**TYPES OF *BRADY* MATERIAL**

1. It is clear that the prosecution must turn over exculpatory information concerning the defendant’s case
	1. Obviously, *Brady* encompasses witness statements that are favorable to the accused.[[4]](#endnote-4)
	2. Where the evidence of guilt is not overwhelming, the fact that one expert rendered a report that the hair was not suitable for testing should have been disclosed – particularly where the State called another expert who rendered expert testimony about that same hair sample.[[5]](#endnote-5)
	3. There are cases where it was found to be a *Brady* violation for the State to withhold portions of toxicology reports relating to the victim that showed the victim had illegal drugs in his system at the time of the crime.[[6]](#endnote-6)
	4. Violation found where the State withheld parole records of the defendant from other offenses where testing revealed that the defendant was intellectually disabled.[[7]](#endnote-7) (That was an issue in the defense of the case)
	5. HOWEVER, there is no violation of *Brady* for the State to fail to disclose juror data which showed that a juror on the panel of potential jurors had previously served and whether or not that prior jury had returned a particular verdict.[[8]](#endnote-8)
2. This includes information about any deals or agreements between the State and a witness.[[9]](#endnote-9)
	1. “Thus, ‘[t]he [S]tate is under a duty to reveal any agreement, even an informal one, with a witness concerning criminal charges pending against that witness[.]’”[[10]](#endnote-10)
	2. Information about “deals” between the prosecution and witnesses are also said to fall under the close cousin of *Brady*, *Giglio.*[[11]](#endnote-11)
3. A “Motion to Reveal the Deal” is a shorthand reference to *Giglio*.

**WHO ACTUALLY IS IN POSSESSION OF THE FAVORABLE MATERIAL IS NOT RELEVANT**

1. Occasionally, it is argued that the prosecutor was not in possession of any “*Brady* Material” but that the law enforcement agency was actually in possession of the information, completely independent of the prosecutor.
	1. That is no defense to an alleged *Brady* violation
2. “It is irrelevant that a police agency may have possessed the favorable evidence without the knowledge of the prosecutor; the law places the responsibility and ultimate burden on the prosecutor for the failure to provide the favorable evidence to the defendant if any part of the prosecution team possessed and suppressed the favorable evidence.”[[12]](#endnote-12)

**WHAT MUST DEFENDANT PROVE TO ESTABLISH A *BRADY* VIOLATION?**

1. The defendant must show:
	1. The State possessed evidence favorable to the defendant;
	2. The defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence;
	3. The State suppressed the favorable evidence; and
	4. Had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different.[[13]](#endnote-13)
2. Obviously, the 4th prong can be the most difficult for the defendant to establish
3. The Georgia appellate courts have attempted to further define the 4th Prong
	1. “To establish the fourth prong, often referred to as materiality, a defendant does not need to show that he necessarily would have been acquitted, but only that the State's evidentiary suppression undermines confidence in the outcome of the trial.”[[14]](#endnote-14)
	2. When analyzing an alleged *Brady* violation, particularly the 4th prong, “we must evaluate [the withheld] evidence in the context of the entire record.”[[15]](#endnote-15)

**DELAYED DISCLOSURE OF *BRADY* INFORMATION**

1. There are times when the prosecutor makes a disclosure but it is rather late in the process of the criminal trial
	1. The timing of the disclosure may amount to a *Brady* violation
2. “In the case of an untimely disclosure, a defendant must show that an ‘earlier disclosure would have benefited the defense and that the delayed disclosure deprived him of a fair trial.’”[[16]](#endnote-16)
3. “Whether a disclosure at trial is timely enough to satisfy *Brady* depends on the extent to which the delay in disclosing the exculpatory evidence deprived the defense of a meaningful opportunity to cross-examine the pertinent witness at trial, whether earlier disclosure would have benefited the defense, and whether the delay deprived the accused of a fair trial or materially prejudiced his defense.”[[17]](#endnote-17)
4. The cases suggest that it is insufficient for a defendant to merely point out that discoverable material was delivered late in the discovery process. What must be shown is that the delayed disclosure would have benefited the defense or that the delay deprived the defendant of a fair trial.[[18]](#endnote-18)

**EXAMPLES**

1. *Downer v. State*, 2022 WL 4349309, S22A0632 (Ga. 9/20/2022)
	1. Brown and Downer broke into victim’s home to rob it, thinking the victim was out of town. The victim was not out of town and the victim confronted Brown and Downer once they entered the victim’s home. The victim was killed in the attack and home invasion.
	2. Brown pleaded guilty and, as a part of his plea agreement, the State agreed that they would “allow a low-key wedding at the jail.”
	3. Both Brown and his wife testified at the trial (and their testimony was material)
	4. None of this information about the wedding was made known to the defendant.
	5. During the trial, Brown and his wife repeatedly referred to one another as their “husband” or “wife”
		1. The wife’s son testified at the trial and testified that Brown was now married to his mother
		2. In a custodial interrogation, the defendant referred to Brown and his wife as being married to one another

Holding: The Ga. Supreme Court held that defendant’s counsel had the opportunity to cross-examine Brown and his wife about their relationship and chose not to do so. The defendant was fully aware that Brown had received a plea deal in exchange for testifying against the defendant. Therefore, even though the defendant was no aware of the portion of the plea agreement that allowed for the wedding to occur, the defendant was fully aware of consideration being given to Brown prior to his testimony. No *Brady* violation.

* 1. See *Hood*, which held, “although full scope of witness's “possible incentives to cooperate with the State was not made known to the jury, the jury was nonetheless aware there was reason to regard his testimony with skepticism” and defendant was therefore unable to establish the fourth *Brady* prong.”[[19]](#endnote-19)
1. *Schofield v. Palmer*, 279 Ga. 848, 851-852 (2005)
	1. This is an Augusta death penalty case
	2. Defendant and wife were divorcing. The evidence showed that the defendant enlisted his nephew in a plan to kill both defendant’s wife and their 15 year old child as part of a home invasion. The nephew pled guilty and testified. Another witness was able to verify portions of the nephew’s account of the events. Death verdict was returned.
	3. Prior to trial, the defense filed motions relating to *Giglio* material and specifically asked to have any “deals” revealed. The prosecutor fully disclosed the extent of the nephew’s plea agreement and made no other disclosures.
		1. During the habeas portion of the litigation (after direct appeals exhausted), defense counsel became aware of reports of an unidentified confidential informant.
		2. GBI testified that the existence of the CI had not been made known to the prosecutor due to their internal policy of protecting the identity of CI’s.
		3. It became clear that the witness who corroborated the nephew’s account was the CI but the defense wanted to know if that witness had been paid for his information.
		4. The habeas court eventually ordered the GBI file be produced for in camera inspection and, within the file, was evidence of payments to the witness of $500, approximately a week after the defendant was arrested.

HOLDING: The Ga. Supreme Court began by noting the good faith or bad faith of the prosecutor is irrelevant to a *Brady* analysis.[[20]](#endnote-20) “Because the reliability of a particular witness may be determinative of guilt or innocence, impeachment evidence, including evidence about any deals or agreements between the State and the witness, falls within the ***Brady*** rule.”[[21]](#endnote-21) The Court noted that it is irrelevant whether the information was in possession of the prosecutor or the law enforcement agency.[[22]](#endnote-22) In ordering a new trial, the Court held that it could not endorse the intentional withholding of important information and then ended the analysis with a quote from *Brady* itself:

Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.[[23]](#endnote-23)

1. *Anglin v. State*, 312 Ga. 503 (2021) (this is a little convoluted so follow along)
	1. On the evening before the murder trial began, the prosecutor advised defense counsel that the Sheriff had just told the prosecutor that someone else had confessed to killing the victim. Defense counsel asked for a 1 day continuance which was denied.
	2. On the final day of trial, the defendant called the Sheriff as a witness. He was initially questioned outside the presence of the jury. The Sheriff testified that about two months prior to trial, he received a phone call from a lady named Houseman. Houseman told the Sheriff that her boyfriend, Daniel Hale, believed law enforcement had the wrong man in custody. Daniel was the brother of the chief investigator who handled the investigation of the murder.
	3. The investigator then was called as a witness and initially testified outside the presence of the jury. The investigator testified that he was aware that his brother, Daniel, “ had confessed to killing the victim.” (Very different from the statement made by Sheriff). The jury was told that the Sheriff told the investigator some information about Daniel Hale and that the investigator had not attempted to contact the lady who had reported the information, they had not documented the call, that no formal interview of Daniel Hale was ever conducted and that there was no attempt to search Daniel’s home or search his phone records.
		1. The jury was not told that the investigator’s brother actually admitted to killing the victim.
	4. During the motion for new trial, a private investigator for the defendant testified that Houseman (lady) told the investigator that Daniel Hale had told her that he had killed the victim and that “the devil made him do it.” Houseman then indicated that Daniel was heavily under the influence of drugs when he made the statement and that Daniel later said he was joking.
		1. Daniel was called as a witness during the motion for new trial and denied killing the victim or ever telling anyone that he had killed the victim.

HOLDING: There were multiple layers of hearsay in these alleged statements. The defense did not call either of the women who reached out to the Sheriff to report the alleged confession during the motion for new trial. The only evidence at the motion for new trial was Daniel who testified that he never made such a statement. The defense indicated that they would have admitted the testimony to prove that the investigation was “shoddy” and unreliable and that they were not attempting to prove that Daniel actually was the murderer. The Court noted that the defendant was able to make those points during the trial without having to introduce the hearsay-laden testimony. The Ga. Supreme Court concluded that the defendant failed to establish that “an earlier disclosure would have benefited his defense or that the delay deprived him of a fair trial.”[[24]](#endnote-24)

1. *State v. Thomas*, 311 Ga. 407 (2021)
	1. Murder case based upon a drug deal gone wrong. There was evidence that a Maroon Nissan Altima was used by the defendant to accomplish the rip off and murder. Glenn owned the Altima in question and, at the time of trial, she had pending felony shoplifting charges pending in another circuit.
	2. During the motion for new trial hearing, it was established that Glenn had the pending charges and that before trial, the lead prosecutor and his investigator visited her in her home. She was handed a subpoena and was told that if she did not testify, both Glenn and her mother would be subpoenaed. At the courthouse the next week, Glenn testified that she met with the prosecutor and was told that if she answered the state’s questions “as they wanted her to answer them, then her case will go away.” At the motion for new trial hearing, Glenn testified that her trial testimony was untrue.
		1. Also in the motion for new trial hearing, a nolle prosequi order was introduced from the other circuit where all of Glenn’s felony charges were dismissed. The reason given for the dismissal was “contacted by Fulton County DA’s Office. Ms. Glenn testified for the State in a murder case. Asked for nolle prosequi.”
		2. The prosecutor on the murder case testified that he was unaware that Glenn had pending charges when he spoke with Glenn prior to trial. However, he did recall speaking with a lawyer for the defendant on trial who asked the prosecutor something about Glenn’s criminal history which had been provided in discovery. The prosecutor then testified that he never contacted anyone about nolle prossing Glenn’s charges and did not know who might have contacted the other circuit to have those charges dismissed.
		3. The defendant’s trial attorney testified at the motion for new trial hearing that she was aware that Glenn had shoplifting charges but that she believed those were misdemeanor charges. Glenn did not speak with the defense lawyer leading up to trial so she never got an answer as to whether Glenn was expecting assistance on the shoplifting matter in exchange for her testimony.
	3. Based upon the evidence, the trial judge found that a *Brady* violation had occurred and granted a new trial.

HOLDING: The trial court’s decision to grant a new trial was upheld on appeal. In a lengthy analysis, the Ga. Supreme Court noted that witness credibility was a matter within the purview of the trial judge. The State argued that the defendant could have learned of the information with the exercise of reasonable diligence. The Court held, “We are not persuaded that reasonable diligence requires criminal defense lawyers to cross-examine every State witness about a potential deal, just in case there is a deal that the State has improperly failed to disclose, and the State cites no authority for such a requirement.”[[25]](#endnote-25) The Court concluded by finding that the case was largely made through the testimony of an accomplice and the corroborating evidence (required when testimony from accomplice is introduced – discussed in prior episode of this podcast) was slight. Given that evidentiary posture, the appellate court could not say that suppression of the “deal” was not material in this case.

**HOW TO HANDLE A *BRADY* MOTION**

1. This section of the podcast is our attempt to offer ideas of how to handle a *disputed* issue involving *Brady*.
	1. To be clear, the mere fact that a defendant may have filed a motion under *Brady* or *Giglio* does NOT require the trial judge to become an investigator
	2. Instead, we are examining our thoughts on how a disputed *Brady* issue might be handled by the trial judge
2. Make a factual record –
	1. Ensure there was a request filed
	2. Allow defendant to identify what it is they believe exists that was not disclosed
		1. This should not open the door to a fishing expedition by the defendant for things that “might” be exculpatory
	3. Allow prosecutor to respond
	4. Only then consider whether an in camera inspection of the State’s file is appropriate.
3. “We hold that a trial court is not required to conduct an in camera inspection of the state's file in connection with a ‘general’ *Brady* motion unless, after the state has made its response to the motion, the defense makes a request for such an inspection.”[[26]](#endnote-26)
	1. Although the relevant cases are somewhat dated, there is case law that suggests that where the defendant makes a request for an in camera inspection and has identified information that, if found, would be material to the defense, the trial court is under an obligation to conduct such an inspection.[[27]](#endnote-27)
	2. “A court is required to make an in camera inspection of the prosecution's file ‘upon the request of a defendant dissatisfied with the State's response to the defendant's request for exculpatory material.’”[[28]](#endnote-28)
4. I do not think there is a mandate that what was reviewed by the trial court be copied and made a part of the record – but I do think that is a good practice.
	1. Consider Bates-numbering of what was reviewed and filing it under seal with the Clerk.

**OTHER *BRADY* CASES**

1. *Byrd v. Owen*, 272 Ga. 807 (2000) (habeas corpus case where failure to provide the immunity agreement to the defendant was found to justify new trial
2. *Wood v. Bartholomew*, 516 U.S. 1 (1995) (US Supreme Court held that withholding evidence of a failed polygraph exam by the star witness was not a *Brady* violation because the test results themselves were not admissible and there was no evidence that those results would likely lead to admissible evidence – 5 to 4 decision and the overwhelming evidence of guilt was cited)

So, that’s all for our episode dealing with *Brady* motions in criminal cases

To recap, *Brady* includes exculpatory information

But it also includes evidence that relates to impeachment

There is no requirement that the trial judge initiate some investigation merely because a *Brady* motion is filed

But if there is a hearing and the defense claims dissatisfaction with the State’s responses, it appears the judge is mandated to conduct an in camera inspection

The outline is full of statutory and case citations and that outline can be found at **goodjudgepod.com**.

Reach out to us on goodjudgepod@gmail.com with all of your podcast topic ideas

**I’m Wade Padgett**

*And I’m Tain Kell…did you know that comedy star Chevy Chase was a drummer in a band that included both Donald Fagan and Walter Becker? Their band was known as The Leather Canary but later, Fagan and Becker went on to form the band known as Steely Dan.*

1. *Brady v. Maryland*, 373 U.S. 83 (1963). [↑](#endnote-ref-1)
2. *Brady*, at 87. [↑](#endnote-ref-2)
3. *Schofield v. Palmer*, 279 Ga. 848, 851-852 (2005). [↑](#endnote-ref-3)
4. *Broom v. State*, 209 Ga. App. 42, 43 (1993). [↑](#endnote-ref-4)
5. *Nelson v. Zant*, 261 Ga. 358, 361 (1991). Note, this decision placed great weight in the circumstantial evidence presented at trial. [↑](#endnote-ref-5)
6. *Harridge v.State*, 243 Ga. App. 658, 659 (2000). [↑](#endnote-ref-6)
7. *Head v. Stripling*, 277 Ga. 403 (2003). [↑](#endnote-ref-7)
8. *Wansley v. State*, 256 Ga. 624, 625 (1987); *King v. State*, 273 Ga. 258, 263 (2000). [↑](#endnote-ref-8)
9. *Schofield v. Palmer*, 279 Ga. 848, 852 (2005); *Klinect v. State*, 269 Ga. 570, 572 (1998). [↑](#endnote-ref-9)
10. *State v. Thomas*, 311 Ga. 407, 414 (2021). [↑](#endnote-ref-10)
11. *Giglio v. U.S.*, 405 U.S. 150, 153-154 (1972). [↑](#endnote-ref-11)
12. *Schofield v. Palmer*, 279 Ga. 848, 853 (2005); citing *Kyles v. Whitley*, 513 U.S. 419, 437-439 (1995) and *Head v. Stripling*, 277 Ga. 403, 407-408 (2003). [↑](#endnote-ref-12)
13. *Brannon v. State*, 298 Ga. 601 (2016); *Hester v. State*, 292 Ga. 356 (2013); *Summerville v. State*, 332 Ga. App. 617 (2015); *Chandler v. State*, 309 Ga. App. 611 (2011); *State v. Hill*, 295 Ga. 716 (2014); *Schofield v. Palmer*, 279 Ga. 848, 852 (2005). [↑](#endnote-ref-13)
14. *Downer v. State*, 2022 WL 4349309, S22A0632 (Ga. 9/20/2022), citing *Anglin v. State*, 312 Ga. 503, 510 (2021); see also *Strickler v. Greene*, 527 U.S. 263 (1999). [↑](#endnote-ref-14)
15. *Downer v. State*, 2022 WL 4349309, S22A0632 (Ga. 9/20/2022), citing *Chavez v. State*, 307 Ga. 804, 813 (2020). [↑](#endnote-ref-15)
16. *Anglin v. State*, 312 Ga. 503, 510-511 (2021), citing *Dennard v. State*, 263 Ga. 453, 454 (1993), overruled on other grounds by *Sanders v. State*, 281 Ga. 36, 37 (2006). [↑](#endnote-ref-16)
17. *Anglin v. State*, 312 Ga. 503, 511 (2021), citing *In the Matter of Lee*, 301 Ga. 74, 78 (2017). [↑](#endnote-ref-17)
18. *Jones v. State*, 292 Ga. 593, 596 (2013); *Young v. State*, 290 Ga. 441, 443 (2012); *Burgan v. State*, 258 Ga. 512, 513-514 (1988). [↑](#endnote-ref-18)
19. *Ho*od v. State, 311 Ga. 855, 864 (2021) (the summary of the holding was quoted from the decision in *Downer*. [↑](#endnote-ref-19)
20. *Schofield v. Palmer*, 279 Ga. 848, 851 (2005). [↑](#endnote-ref-20)
21. *Schofield v. Palmer*, 279 Ga. 848, 852 (2005), citing *U.S. v. Bagley*, 473 U.S. 667, 676 (1985) and *Giglio*, at 154-155. [↑](#endnote-ref-21)
22. “It is irrelevant that a police agency may have possessed the favorable evidence without the knowledge of the prosecutor; the law places the responsibility and ultimate burden on the prosecutor for the failure to provide the favorable evidence to the defendant if any part of the prosecution team possessed and suppressed the favorable evidence.” *Schofield*, at 852. [↑](#endnote-ref-22)
23. *Brady*, at 87-88. [↑](#endnote-ref-23)
24. *Anglin*, at 513. [↑](#endnote-ref-24)
25. *State v. Thomas*, 311 Ga. 407, 416 (2021), citing *Gonella v. State*, 286 Ga. 211, 215 (2009). [↑](#endnote-ref-25)
26. *Tribble v. State*, 248 Ga. 274, 275 (1981)(“ we hold that the trial court is not required to conduct an in camera inspection of the state's file following a “specific” Brady motion unless the defense makes a request therefor). [↑](#endnote-ref-26)
27. *Tribble v. State*, 248 Ga. 274, 275 (1981)(“ In summary, we hold as follows: a) The trial court is not required to conduct an in camera inspection under a “general” Brady motion. b) After the state has made its response to the motion, the defendant may request an in camera inspection, and the trial court must comply with this request. c) The same rules apply with respect to a “specific” Brady motion.”). See also *Brown v. State*, 278 Ga. 544, 546 (2004)(“Furthermore, even though a trial court is required to make an in camera inspection in response to a proper request, a defendant still “ ‘bears the burden of showing prejudice to his case resulting from the prosecution's refusal to turn over documents or evidence.’ ”) [↑](#endnote-ref-27)
28. *Riley v. State*, 242 Ga. App. 720, 722 (2000). (This case resulted in a remand from appellate court to allow trial court to conduct the in camera inspection that should have been conducted prior to trial). [↑](#endnote-ref-28)