The Bill Blackwood
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Best Practices for Dealing with Texas Peace Officers Who Have Brady Issues (*Brady v. Maryland*)

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By
Darren D. Brockway

The Colony Police Department
The Colony, Texas
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ABSTRACT

Law enforcement agencies in Texas and across the United States have been routinely negatively exposed for the continued employment of officers who are deemed unfit for duty due to documented ethical issues. These officers are not only a detriment to their agency's public trust, but they are also not fit to testify as witnesses in court proceedings. A United States Supreme Court decision, *Brady v. Maryland* (1963) supported the aforementioned statements and although around for several years, it seems to be creating havoc in law enforcement agencies within the last decade. Under this Supreme Court decision, it states that both peace officers and prosecutors have an affirmative duty to disclose all exculpatory evidence to the accused, including peace officers with integrity issues. These officers are commonly referred to as "Brady Officers." Examples include officers who commit an act of premeditated, dishonest, and malevolent conduct, which includes criminal actions.

Consequently, law enforcement executives must make it a priority to create and enforce policies that do not tolerate such conduct from their employees and terminates them upon sustained allegations. The policy should also require the law enforcement agency to conscientiously report such infractions to their local prosecuting jurisdictions. A multitude of media which included case law, articles, and other publications were reviewed for this subject matter and it is clear that the public demands ethical conduct from their law enforcement jurisdictions, without exception. Law enforcement agencies must act accordingly towards any "Brady Officer" in order to maintain that expectation and must further ensure the timely reporting of those officers to their prosecuting jurisdictions.

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INTRODUCTION

More than ever, today's law enforcement agencies in the United States, especially in Texas, have been subjected to probes, investigations, and inquiries from a multitude of special interest entities regarding the ethics of their agencies (Lisko, 2011). An old United States Supreme Court decision, handed down in 1963, seems to be wreaking havoc on law enforcement executives, especially within the last few years. The case decision is entitled *Brady v. Maryland* (1963). Under this Supreme Court decision, it states that peace officers and prosecutors have an affirmative duty to disclose all exculpatory evidence to the accused, including peace officers with integrity issues (Braaten, 2011). Subsequent case law *Kyles v. Whitley* (1995) expanded *Brady v. Maryland,* (1963) obligations to law enforcement to report officers who have been disciplined for untruthfulness or creditability issues to the prosecution, who are then required to turn that information over to the accused (Lisko, 2011).

The creditability of every witness, especially law enforcement officers, for the prosecution is subject to scrutiny by the defense (Van Brocklin, 2010). Police officers who have been disciplined for lying or falsifying documents cannot be put on the stand to testify because they lack credibility. To make matters worse, whether or not the prosecution was aware of the disciplinary record for untruthfulness by the law enforcement officer makes no difference (Van Brocklin, 2010).

In 2009, an officer in a large metropolitan police department in Texas was discovered to have been disciplined over 15 years ago for falsifying an arrest report and other acts of untruthfulness (Eiserer, 2009). The prosecuting jurisdiction was not aware of the discipline and the officer had testified in numerous cases. The prosecution

discovered the infraction and the case was dismissed because “Brady” requirement to report the officer’s lack of creditability to the defense (Eiserer, 2009). The prosecution in that jurisdiction is now having to go back and review all cases the officer testified in and those cases could ultimately end up being dismissed or overturned (Eiserer, 2009). Since 2005, the same exact situation played out in Oklahoma, Washington, Arizona, Massachuysetts, and California, where hundreds of cases were reviewed and subsequently dismissed because of failure to comply with Brady standards (Lisko, 2011). Each of the same agencies are also engaged in lawsuits from freed defendants who are suing on the grounds of not providing due process (Lisko, 2011). Therefore, law enforcement agencies should terminate officers who have been disciplined for untruthfulness and provide the names of those officers to the prosecuting jurisdiction because of the officer’s lack of ability to testify in court.

POSITION

Although the *Brady v. Maryland* (1963) decisions were handed down in 1963, the ramifications of that decision can cause irrefutable damage if a law enforcement agency does not have a clear cut policy to be in compliance. According to Braaten (2011), as law enforcement officers, there is no such thing as a little integrity; it is something one either has or does not have. This simple mentality should be the norm for law enforcement agencies, but many agencies do not have a policy to address Brady issues. Law enforcement agencies should have a clear cut policy for untruthfulness and the consequence of any untruthfulness is termination of employment (Braaten, 2011). This policy should also have clear plan of action for ensuring the information is turned over to the prosecution (Braaten, 2011). Failure to take this kind of stance will not only

sabotage any court proceeding the officer may testify in, but will bring integrity questions for the entire department (Goldstein, 1975).

Before further discussion can continue, it must be established what types of untruthfulness are and are not covered under Brady. Untruthfulness that is within the scope of duty for the law enforcement officer is not covered under Brady (Albert & Noble, 2009). This would include denigrations used in operations, interrogations, or apprehensions. What Brady does cover are substained violations of unthruthfulness when not engauged in the above mentioned scenerios. This would entale untruthfulness or falsifications on government documents, testimony, or during internal investigations (Albert & Noble, 2009). Also included would be sustained violations of an officer's failure to report criminal behavior from other officers when witnessed (McCormack, 1987). This also known as maintaining "the code of silence" (Albert & Noble, 2009).

The unavoidable reality of the Brady decision is that any law enforcement officer who has been disciplined for untruthfulness can no longer function in the same law enforcement capacity (Van Brocklin, 2010). If an officer cannot testify in court, then they cannot take any enforcement action of any form. Whether the infraction was 15 years ago or 15 minutes ago, the fact that the infraction exists makes the law enforcement officer an un-credible witness (Lisko, 2011). Agencies that allow employees to remain employed in the same capacity and/or do not report the infraction to the prosecution are not acting in good faith and lack credibility for the entire agency (Van Brocklin, 2010). Understandably, it is a difficult decision to terminate an officer, especially if the violation was his or hers first disciplinary infraction (Eiserer, 2009).

Because it does not matter if the prosecution was aware of the infraction, the Brady decision will negate any testimony from the officer and could cause dangerous criminals to go free.

Because of the clear ramifications to the contrary, a law enforcement agency's policies should also be expanded to report any officer with truthfulness issues to the prosecuting attorney's office so that "Brady" requirements can be met (Lisko, 2011). Some law enforcement agencies are finding out the hard way that the practice of remaining silent has not only brought corruption allegations, but opens the department up for civil liability for not operating in good faith (Albert & Noble, 2009). In other words, doing nothing will guarantee current, past, or future court testimony being negated and department heads will be forced to explain why they did not communicate with the prosecution and allowed a convicted felon to go free. Some law enforcement agencies have created and maintain a "Brady Watch List" to segment with the prosecutor's office to keep an eye on officers who may have some Brady issues in order to keep the lines of communication open (Kamp & Nalder, 2008).

COUNTER POSITION

During research for this paper, two negative views surfaced regarding the aforementioned proposed standards. The issue of civil service or other appeal process adopted by the respective jurisdiction will negate termination, and Brady requirements to furnish an officer's disciplinary record rests solely on the prosecution. The first negative view point has substance. There are cases where law enforcement agencies have a clear and well defined policy and terminate officers for infractions of untruthfulness only to have the officer(s) reinstated because of civil service or other

appeal processes (Eiserer, 2009). In this scenario, it would seem counterproductive to terminate an officer in this circumstance, only to have the officer reinstated afterwards. Some new department heads have, after shortly arriving to an agency and investigated the disciplinary files of all officers, later terminated officers who could not pass the Brady test (Lisko, 2011). Many of the terminated officers got their jobs back on appeal.

The other negative view point is that *Brady v. Maryland* (1963) only requires the prosecution to furnish the disciplinary record of an officer to the accused. There are some law enforcement agencies who will aggressively oppose sharing their agency's disciplinary records with anyone (Van Derbeken, 2010). Some law enforcement agencies may also take the stance that it is the prosecutors' duty to check disciplinary records of all officers who are going to testify and failure to do is a result of derelict of duty on their part (Van Derbeken, 2010). In simpler terms, if they (prosecutors) were not worried about it, then the law enforcement agencies should not be worried about it. It is surprising that many law enforcement agencies have no policy to address any of the aforementioned issues or some law enforcement executives may feel that their sole duty ends when handing down disciplinary action for issues of untruthfulness (Lisko, 2011).

Again, the first negative view point has its merits. It is true that because of civil service or other appeal boards some officers who were terminated for untruthfulness did, in fact, get their jobs back and were re-instated with back pay(Eiserer, 2009). However, if a law enforcement agency is going to combat corruption and take a true strong stance on integrity, then the department head has no other alternative but to terminate the officer(s). Department heads can control where the officer with Brady

issues is assigned after being re-instated (McCormack, 1987). The department head would have no choice but to assign the officer to a position that did not require any enforcement action to be taken (McCormack, 1987). This can seem frustrating and pointless, but this action will help remove any possible future civil litigation being levied against the law enforcement agency executive or the agency itself. It is much easier for a law enforcement executive to defend against lawsuits when appropriate action was taken against an officer who had been caught lying, but due to a process beyond their control, the officer was reinstated (McCormack, 1987). It would also be imperative that a formal reporting system to the prosecution's office be in place (Lisko, 2011). When a law enforcement agency takes the appropriate steps to be in compliance with *Brady v. Maryland* (1963), then the law enforcement agency can stand by the claim that the agency's integrity will not be negotiable (Albert & Noble, 2009).

The other counter view point that a law enforcement agency is not held accountable for not furnishing information to the prosecution when an officer has Brady concerns is more of myth than a fact. It is true that many agencies have gotten away with not reporting Brady officers to the prosecution and that the issue has never surfaced (Eiserer, 2009). However, it does not eradicate the fact that the agency is not in compliance with *Brady .v Maryland* (1963) and as stated earlier, it is inconsequential whether or not the prosecution was aware of an officer's Brady issues before or after testimony in court (Lisko, 2011). The fact the prosecution failed to furnish this information to the defense (or the accused) is indisputable. The end result is that the defense has legal and valid claim to remove any testimony from the officer and, more importantly, have the case dismissed or reversed (Van Derbeken, 2010). It is not hard

to imagine what the consequences would be to a law enforcement agency should no systems and practices to address officers with Brady issues in place and a convicted criminal was released because Brady requirements were not met. Pretending or hoping the aforementioned scenario never plays out is not realistic. Law enforcement agencies are being inundated with open records request for officers' disciplinary files from individuals and attorneys as a matter of routine (Eiserer, 2009). If a department is not civil service, then the information must be released (Eiserer, 2009). Defense attorneys are looking for explicatory information in officer's personnel file that will benefit their client, while also waiting to see if the prosecution will furnish this information as required under *Brady v. Maryland* (1963) (Albert & Noble, 2009). If this does not occur, the defense has a more than good chance of getting the case dismissed. Civil service law enforcement agencies may be able to not release the disciplinary files under open records, but they are required to if they are subpoenaed (Eiserer, 2009). Open records requests for officers' personnel files has become a standard of normal practice for defense attorneys. Attorneys across the nation are exploiting law enforcement agencies' lack of compliance to *Brady v. Maryland* (1963) for their clients benefit and at law enforcement agencies'' expense (Lisko, 2011).

RECOMMENDATION

The public has a reasonable expectation that law enforcement officers tell the truth when it comes to documents, statements, or testimony (Goldstein, 1975). If a law enforcement agency does not demand the same expectation or retains officers who have been shown to not tell the truth, then the law enforcement agency can be legitimately labeled as unethical or corrupt (Goldstein, 1975). During completion of this

research, one re-occurring theme continuously surfaced towards law enforcement executives on handling officers who have sustained acts of untruthfulness, and that was to unilaterally terminate that officer's employment. This stance is based on the findings of *Brady v. Maryland* (1963) (Braaten, 2011). Simply stated, if an officer has a sustained act of any form of untruthfulness, the officer can never testify in open court because of the high probability of being declared an un-creditable witness. It is also the responsibility of law enforcement executives to ensure Brady officers are reported to the prosecutor's office straightaway to prevent any past, present, and future cases from being sabotaged due to the prosecution's lack of knowledge of the situation and later failing to provide the information to the defense (Lisko, 2011).

Although *Brady v. Maryland* (1963) is nearly 50 years old, many law enforcement agencies appear to not be aware of the full ramifications of not having a clear practice or policy for dealing with Brady officers. Many law enforcement agencies that do have a clear and concise policy in place are only because the end result of ramifications for not following *Brady v. Maryland* (1963) in the first place (Lisko, 2011). Those agencies have endured high profile situations within the media and paid "lots of money" to defendants who later sued for lack of due process (Van Derbeken, 2010). The key to not having a high profile media event and subsequent lawsuits, like the ones mentioned, is prevention (Lisko, 2011). A vibrant plan and practice can address all of the Brady requirements as well as address what to do if the officer's terminated for untruthfulness, including assigning the re-instated officer to a duty that requires no enforcement actions, which is really the only option for law enforcement executives.

This policy and practice will identify what is Brady material, the consequence of termination for officers who commit Brady violations, and will require immediate notification of Brady material to the agency executive and prosecution (Lisko, 2011). Otherwise, law enforcement agencies who fail to act proactively with *Brady v. Maryland* (1963) will scramble to act reactively when negative implications begin to unfold (McCormack, 1987).

Law enforcement executives who take the stance that they will not terminate Brady officers because of various appeals processes are missing the mark on ethical practices (McCormack, 1987). Clearly, law enforcement executives who fail to terminate Brady officers subject the department to civil liability because criminal cases can be dismissed and jailed defendants can argue wrongful conviction. Even worse, defendants who committed heinous acts can go free and re-offend or place a legitimate risk to the public.

Law enforcement agencies that take the position that sole responsibility of fulfilling the requirements of Brady rests solely on the office of the prosecutor are sadly misinformed (Lisko, 2011). One only needs to read the citation of *Brady v. Maryland* to understand that the responsibility to furnish the information is shared between law enforcement and the prosecution. Even worse, law enforcement agencies that fail to furnish the information because of political or other similar reasons deserve questions of ethical practices for not have public's safety as the highest priority (McCormack, 1987**)**.

It is common knowledge within the law enforcement community that the frequencies of open record requests for officers' disciplinary records are at an unprecedented high. This is partly because defense attorneys are capitalizing on law

enforcement agencies who fail to be proactive with their Brady requirements (Lisko, 2011). Any contradiction from law enforcement agencies to the proposed actions in regards to *Brady v. Maryland* (1963) will guarantee a proverbial can of worms to be opened, especially during a high profile criminal case. This issue is important to the law enforcement community because not only is a law enforcement agency's standing within the community at stake, but the issue of the public's safety can be put at risk. Law enforcement executives should emulate the agency's stance that the safety of the public and their trust in their officers is not and will not be negotiable (Goldstein, 1975). All it takes is one case to be dismissed because Brady requirements were not followed to undo all efforts to maintain the public's trust a law enforcement agency has vigorously maintained.

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