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September 20, 2012

The President of the United States
c/o The Pardon Attorney
Office of the Pardon Attorney
1425 New York Avenue, N.W.
Washington, D.C. 20530

Re: Governor Don Eugene Siegelman

Dear Mr. President:

I understand that Governor Don Eugene Siegelman is applying to you for a commutation of his sentence. I recommend that you grant his application. In my opinion, it has undeniable merit. I make this recommendation to you without qualification. You have a copy of his application and his other letters. I write to express one participant's views of the reasons for the granting of clemency.

I am a former attorney for Gov. Siegelman. I do not now represent him. Nevertheless, you may wonder at a lawyer writing a personal letter for a former client, like a drafter arguing motions construing the statute he drafted. In *Hilder v. Dexter*, [1902] App. Cas. 474, 477, Lord Halsbury observed, "[T]he worst person to construe [a statute] is the person who [was] responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed." That sentiment may appeal to you. On the other hand, I take comfort in another view. In *Kosak v. United States*, 465 U.S. 848, 856-57 & n.13 (1984), Justice Marshall countered, "[I]t is significant that the apparent draftsman" of the statute so construed it, and "it seems to us senseless to ignore entirely the views of its draftsman." That sentiment, too, may well appeal to you. As his former lawyer, I have had a unique opportunity to observe him, in and out of court, and to stay with him in his home and meet his family, his wife, and two children. In short, I know the man personally, not only as a client. At the same time, I also made arguments in court on his behalf and attended his trial. Appropriately discounted for admitted bias, it would be senseless to ignore entirely my recommendation.

Background: You may find some details from my background relevant in evaluating my recommendation. I have been a participant in the federal criminal system of justice for more than fifty years. I served as a line prosecutor in the Department of Justice under Attorney General Robert F. Kennedy in the organized crime program, in which he took a close personal interest. In fact, I was one of a number of lawyers with him in his office in an organized crime meeting on the morning of November 22, 1963. I have also had close contact on a number of legal reform projects with other attorney generals, as diverse as John N. Mitchell and Elliot L. Richardson. I have been a

chief counsel for Sen. John L. McClellan, the Chairman of the Senate Subcommittee on Criminal Laws and Procedures. Working for the Senator to reform the federal criminal justice system, I drafted the 1968 court-order wiretap legislation and the 1970 racketeering legislation (RICO). I also worked for a year in 1985-1986 as a Senate Judiciary Committee minority counsel for Senator Joseph R. Biden, Jr., holding hearings and drafting white-collar crime control legislation. (I add that my work came to fruition more easily when I worked for a senator in the majority than the minority, a fact with which you may have some familiarity.) In addition, from 1977-1979, I was the chief counsel and staff director for Congressman Louis Stokes, the Chairman of the House Select Committee on Assassinations, in the congressional investigation of the government's performance in two of the most important homicides in the twentieth century (President John F. Kennedy and Rev. Martin Luther King, Jr.). I also served in 1988 as a consultant to Congressman John Conyers, Jr., drafting legislation and holding hearings. My time with Congressman Conyers played a crucial role in the passage of 18 U.S.C. § 1346, *overturning McNally v. United States*, 483 U.S. 350 (1987). Last, I served as a consultant to Congressman Stokes in the drafting and passage of Pub. L. No. 102-526, "President John F. Kennedy Assassination Records Collection Act of 1992." Since 1965, I have taught (or been on leave) criminal law at the Cornell Law School or the Notre Dame Law School. Finally, I have been a sometimes-successful defense or plaintiffs' counsel, over the years, throughout the United States, in numerous trials and appeals, including to the Supreme Court.

Standard for Prosecutors: To be a great prosecutor, you must always remember that you serve in the Department of **Justice**. In *Berger v. United States*, 295 U.S. 78, 88 (1935), Justice Sutherland rightly observed:

> [A Federal prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all ... and whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.

That view of the administration of justice did not obtain in the prosecution of Governor Siegelman. Sadly, it was political from its institution to his imprisonment.

Political Prosecution: While I readily concede that the relevant prosecuting officials deny the facts that establish the selective prosecution of the Governor, I see no reason to credit their routine denials into the teeth of substantial evidence of the fundamentally political character of the prosecution of the Governor and others as well as the politically motivated firing of United States attorneys. UNITED STATES HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, *Allegations of Selective Prosecutions in Our Federal Criminal Justice System* (Prepared for Chairman John Conyers, Jr., by the majority staff, April 17, 2008) (Conclusion: "Unfortunately, Department [of Justice] leadership has refused [to repair the damage to its reputation for impartiality by these allegations] and the damage is thus ongoing."), summarizes the damming evidence. *See also Did Ex-Alabama Governor Get a Raw Deal?* (CBS television broadcast Feb. 24, 2008, 5:00 PM), *available at* http://www.cbsnews.com/2100-18560_162-3859830.html (last visited Sept. 20, 2012). As important as this letter is to the Governor, I recognize that I should not extend it

beyond your reasonable patience. I will not. I will here only review the major points of contention in the prosecution of the Governor. I begin by setting out the necessary context.

Context: Governor Don Eugene Siegelman was the 51st Governor of Alabama from 1999 to 2003. Having been a Rhodes Scholar at the University of Oxford from 1972 to 1973, he stands alone as having served in four statewide elective positions: Secretary of State, Attorney General, Lieutenant Governor, and Governor. Uniquely, in Alabama politics, Governor Siegelman appealed to white voters and African-Americans. Indeed, in his 1998 election to governor, he won 57 percent of the votes cast, carrying the African-American community by more than 90 percent. Governor was also the first modern governor of Alabama to have an integrated inaugural ceremony. As such, he promised to undue the Southern strategy of the Republican Party, in particular that of Karl Rove in Alabama.

Stolen Re-election: Governor Siegelman went to bed the night of his run for re-election in 2002 thinking, based on the Associated Press reporting, that he had won a hard-fought campaign only to wake up and learn that 3,000 uncounted votes had been "found" in a small upstate Republican county that resulted in the election of his opponent, Bob Riley. Republican election officials "found" the lost votes after the Democratic observers had left for the night. The switch of the votes on the machine was, however, strangely limited to the Governor's slot; votes for the other candidates did not change. Because Republicans dominated the key positions in the county (court and prosecutor) and the attorney general's office, the Governor had no effective legal remedy to vindicate this election malfeasance. In sum, fair observers believed that the Republicans stole the Governor's Mansion while he was asleep in it. Subsequently, Alabama law changed to prevent similar vote recounting without bipartisan observers.

Meritless Prosecution: Already in the 2002 campaign, rumors circulated that the Governor was in trouble with the federal prosecutors. Indeed, in 2004, at the behest of the same prosecutors who tried his ultimate indictment, a grand jury in the Northern District of Alabama indicted him, Paul Hamrick, his chief of staff, and Dr. Phillip Bobo, one of the Governor's supporters, for conspiracy to defraud the United States. (Dr. Bobo secured a severance; his trial resulted in a conviction, but the court of appeals reversed it for insufficient evidence. The court also questioned whether Dr. Bobo received a fair trial based on the prosecutor's conduct. The principal prosecutor was the same as the principal prosecutor who tried the Governor. *See United States v. Bobo*, 344 F.3d 1076, 1080 n.9 (11th Cir. 2003)). After the severance, United States District Court U.W. Clemon heard the case. In 1980, President James E. Carter, Jr., appointed Clemon, a prominent civil rights lawyer, as Alabama's first black federal judge. Judge Clemon held a preliminary hearing on the admissibility of coconspirator declarations and found as a fact that the prosecutors had *no* evidence of the Governor's involvement in the alleged conspiracy; he observed from the bench that the prosecution was "unfounded." The prosecutors then dropped the charges against him.

White House Intervention: The Governor's political troubles, however, were not yet over. His then defense counsel informally heard from the local prosecutors that the other possible charges against him did not merit prosecution, but the next thing he knew, the White House (Karl Rove)

intervened with the Department of Justice, which then directed the local prosecutors to go back over the investigation. In addition, the Department told the local prosecutors that it would make key decisions about any prosecution. I also had contact with one White House official, a close friend and one in a position to know, who instead of denying the allegations, curtly replied, "They will never prove it."

Failed RICO Indictment: In 2005, the same prosecutors secured another indictment, but this time in the Middle District of Alabama to secure a more compliant judge. They achieved their objective. In 2002, President George W. Bush appointed Mark E. Fuller as United States District Judge. Judge Fuller had, however, a conflict of interest in the Governor's trial; he held an undisclosed grudge against him for the Governor's investigation of Fuller's unlawful payroll practices when the Governor was the Attorney General and Fuller was the Republican District Attorney in the 12th Judicial Circuit in Alabama. The new indictment charged that the Governor ran the State of Alabama as a criminal "enterprise" under RICO through a "pattern of racketeering activity," that is, extortion, bribery, and fraud. The grand jury also indicted two other state officials, Paul Hamrick, the Governor's chief of staff, and Mack Roberts, his transportation director. In addition, the grand jury indicted the Governor and Richard M. Scrushy, the chief executive officer for HealthSouth (who had recently secured an embarrassing not guilty verdict in 2005 in his much-ballyhooed trial for security fraud in a jury trial in Birmingham), for bribery in connection with a state medical regulatory board, and the Governor for obstruction of justice. Again, it looked like a chagrined Department of Justice sought a second chance against Scrushy in a different jurisdiction.

I became involved in the Governor's defense because of the racketeering charges. Early on, I decided that the prosecutors had sufficiently pleaded their RICO indictment. I also explained to the Governor that the indictment must have originated at the Department of Justice, because the personnel in the United States Attorney's Office lacked the sophistication to draft it or to try it without Departmental help. In fact, the local prosecutors had Departmental substantial assistance at the trial. Further, I explained that the RICO charge gave the prosecutors considerable advantages over the trial of his precious indictment. The advantages were in the scope of joinder in the new trial of unrelated offenses not available in his previous trial for the other offenses, inhibited the court from granting severance at the request of the other defendants, made the introduction of evidence of other crimes required, though not generally admissible in the trial of lesser offenses, extended the statute of limitations longer than for lesser offenses, and raised the possibility of an enhanced sentence whether or not the jury convicted him. In sum, defending a well-designed and factually supported RICO was extremely difficult. I then told him what he already knew: the jury's view of the evidence introduced at the new trial would determine his fate. In fact, the new jury flatly rejected the new RICO charges against the Governor and his chief of staff as well as his transportation director. In short, it gutted the prosecutors' case. In fact, the new RICO charge turned out bogus and abusive. The prosecutors did not get their RICO conviction, but they still enjoyed its special advantages at trial, including an enhanced sentence, as noted below. Sadly, the Governor's failed RICO prosecution illustrates an apparent new trend in major trials by the Department of Justice: bringing questionable RICO charges, not to secure a conviction, but to obtain its crucial trial advantages. Other, apparent, examples are the failed RICO prosecutions of

Conrad M. Black, Baron Black of Crossharbour, and former Atlanta, Georgia, Mayor James E. Williams.

Inference With Primary Election: Despite his ongoing RICO trial, the Governor ran for the Democratic nomination for governor. The polls had him ahead of his principal opponent, Lt. Governor Lucy Baxley. All concede, he was the best candidate to face the sitting Governor, Bob Riley. So that the trial would not continue past the primary date, and the Governor could secure his fully anticipated not guilty verdict, the defense counsel for the defendants jointly offered to stipulate to the authenticity of financial records the prosecutors sought to introduce one-by-one on a day-after-day basis, unilaterally delaying the trial's conclusion. The prosecutors refused the offer; the court said the government had a right to put in its case, again illustrating their and his blatantly political biases. As soon as it became apparent that the trial would not finish before the primary date, the polls shifted, Baxley shot up, won the primary, but, as expected, lost the 2006 general election by a 58-42 percent vote. In sum, by artificially extending the length of the trial, aided and abetted by Judge Fuller, the prosecutors unquestionably attempted to affect which candidate faced the Republican governor seeking re-election. Such politically partisan conduct has no place in the work of the Department of Justice.

Unethical Trial Publicity: Daily during the trial, after court let out, the prosecutors would eagerly hold mini-press conferences in front of the courthouse, reviewing for the evening news (it inevitably covered it) the significance of the evidence they introduced to establish the Governor's guilt, well knowing that the court had not sequestered the jury. This conduct squarely violated Department of Justice regulations in U.S. ATTORNEY'S MANUAL § 1-7.520 that narrowly circumscribes dealing with the press in criminal matters; it also plainly violated the ALABAMA RULES OF PROFESSIONAL CONDUCT, RULE 3.6, *Trial Publicity*, that sets the standard for federal prosecutors under 28 U.S.C. § 530B; 28 C.F.R. § 77.2 (2006) (implementing regulations), the McDade Amendment, an amendment that grew out of the failed RICO prosecution of Congressman Joseph M. McDade, whom I had the honor to defend to a not guilty jury verdict in 1996. In fact, after I reviewed the evidence against the Congressman (much of it strikingly similar to the evidence against the Governor), I made an unsuccessful personal plea to the Department to end the Congressman's misguided prosecution to avoid an embarrassing verdict for McDade, ironically an early proponent of RICO. Beyond serious objection, these egregious ethical violations were calculated efforts to affect the fairness of the trial. Representing the defense team, I specifically brought the conduct of the prosecutors and the relevant ethical standards to Judge Fuller's attention in a conference during the trial. The prosecutors did not deny my allegations. Reflecting another example of his bias conduct of the trial, Judge Fuller ignored the defense complaints. The press conferences continued. The defense had to respond in kind. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048-52 (1991) (discipline of criminal defense attorney for speaking out against prosecution held unconstitutional; "[H]istory shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. ... The inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner['s] ... speech in issue involved criticism of the government."). A primary obligation of a Department of Justice prosecutor is seeing that the defendant gets a fair trial. Talking to the jury about the evidence and

its significance, through a manipulated press, is the antithesis of seeking justice. It aptly illustrates the political character of the Governor's prosecution and the biased conduct of United States District Judge Fuller.

Canned Testimony in Exchange for a Prosecution Deal: On the crucial points in the prosecution, the witnesses the prosecutors called to the stand gave canned testimony that the prosecutors rehearsed with them until they "got it right." In our adversary system, most witnesses by either party are "woodshedded." (In contrast, British barristers do not talk to witnesses until they take the stand; they believe anything else taints the truth finding process.) Woodshedding is not my complaint. My complaint is that the prosecution "bought" the testimony they wanted, trading charges or sentencing deals to get it. Deals, too, are not my complaint. After a complicit witness turns state's evidence, where the prosecutors say, "Tell me what happened," they are seeking the truth. But when they say, "Testify so as to incriminate my target," they are not seeking the truth, but to secure a conviction. That has nothing to do with justice. Moreover, we know precisely how the prosecutors secured witness testimony in this investigation: The prosecutors offered the two state officials against whom they brought indictments (along with the Governor) a deal, if, but only if, they would incriminate the Governor. They unequivocally told us that was the case. Courageously, both of them turned the prosecutors down, because they would not lie to save themselves.

Nick Bailey: The testimony of Nick Bailey, the principal witness against the Governor, is a conspicuous counter-example. At first, he testified truthfully, telling the investigators and prosecutors that the Governor knew nothing about the swindles he had going on the side. (In fact, the prosecutors obtained a plea from Bailey on two counts of conspiracy to commit bribery, but after he testified, they secured from Judge Fuller a reduction in Bailey's sentence.) If the Governor trusted him; it was his mistake; the Governor liked people and immediately trusted them. Too bad for him. They told Bailey that was not what they wanted to hear. Eventually, Bailey had to go over his testimony with the prosecutors until they trained him what to say. But he did not lie well. They finally hit on the technique of making Bailey write out his testimony repeatedly until he knew the script. Despite their duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to turn over exculpatory evidence, the defense team never received these multiple efforts by Bailey "to get it right." Sadly, the prosecution of the late Senator Theodore F. Stevens, Sr., is not exceptional. The ethics of prosecutors today is too often to win at any costs. They will never find out anyway. Without Bailey and his manufactured testimony, the case against the Governor is at best inadmissible hearsay. These prosecutors manufactured the evidence against the Governor and so tried it for blatantly political reasons.

Bribery Theory: Moreover, the whole charge of bribery was bogus. If the prosecutor's theory of benefit becomes general law, political campaigns everywhere will have to change their current practices and plans for the future. In sum, the alleged bribe money went to a fund set up for a lottery campaign; it did not go to the Governor, either directly or indirectly. The prosecutors argued (and the trial and appellate courts blithely accepted) the proposition that the Governor *personally* benefited, because the money left over in the lottery fund money went to pay off a bank loan for the Democratic Party, the primary debtor, on which the Governor was a secondary

cosigner. They were simply oblivious to the customs of political campaigns in this country, to which you can surely testify. As you well know, such signatures are purely formal; they register the approval of the political figure to raising money for the campaign. The Party pays the debt as soon as it can, if not immediately, later. No one, not even the bank, looks to purely political, secondary cosigners for recovery on the note. Beyond the customs of campaigns, which ought to control, the prosecutor and the court overlooked the basic distinction between an "absolute" liability and a "contingent" liability. While counsel made argument to the court, Judge Fuller simply did not, or more likely would not, understand the argument and passed it off "as a jury argument." If it was a "benefit" to the Governor, for example, why did the prosecutors, who were looking to hang his scalp to the nearest lodge pole, not charge him with tax evasion for a failure to include the figure in his tax returns as "income"? In fact, such *contingent* debits (or credits) are neither burdens nor benefits until they become *absolute*. *See, e.g.*, *Brown v. Helvering, Commissioner of Internal Revenue*, 291 U.S. 193, 199-200 (1934) ("As to each such commission there arose the obligation -- a *contingent* liability -- to return a proportionate part in case of cancellation. But the mere fact that some portion of it might have to be refunded in some future year in the event of cancellation or reinsurance did not affect its quality as income. ... When received, the general agent's right to it was *absolute*.") (deductions from absolute income for contingent expenses disallowed; emphasis added; citations omitted), stating the well- and long-established rule. The primary signer is *liable*; it is his debt; the secondary cosigner is not *liable* until the primary signer defaults; until he does, the debt is a *contingent* liability. A *contingent* liability is of no legal or economic significance until it becomes, if ever, *absolute*. In context of political campaigns, that contingence is, in fact, too remote to be a "benefit" to anyone. Yet it was the basis for finding liability and calculating the level of the Governor's bribery offense for sentencing purposes. What's more, unbeknown to the jury that thought it found him not guilty of the RICO offense, the court could, and did, use the RICO related facts for sentencing on bribery, because each used a different burden of proof (reasonable doubt as opposed to preponderance of the evidence). *See United States v. Campbell*, 491 F.3d 1306, 1317 n.14 (11th Cir. 2007) (citing *United States v. Watts*, 519 U.S. 148, 155 (1997)).

Other Errors: I could multiply these examples of questionable prosecutor tactics and equally questionable judicial decisions. The litany is long: — mishandling allegations of juror misconduct, including an agreement between the foreman and another juror "to get" the Governor prior to the submission of the case to the jury; — mishandling the statute of limitations defense; — failure to police serious hearsay objections; — failure to discipline the trial tactics of the prosecutors; — comments to the jury on the failure of defendants to take the stand by a seasoned prosecutor; — the numerous mistakes in the jury instructions, including failing to grant the defense request for special instructions on creditability where the government obtains turncoat testimony by granting substantial reductions in concededly just punishment; — the vicious and manifestly vindictive denial of appellate bail by Judge Fuller (reversed by the Eleventh Circuit) without even the pretense of the required hearing; — the approximately seven-year sentence to a 63-year-old man (the prosecutors wanted 30 years), carefully sandwiched to avoid reversal on appeal as arbitrary between the sentences of two real, prodigiously crooked governors who profited mightily from their perfidy, Edwin W. Edwards of Louisiana (10 years for racketeering), and George H. Ryan, Sr., of Illinois (6.5 years for racketeering); and other miscellaneous matters.

Coerced Jury Verdict: I will conclude this letter with how the court handled the jury on the question of its verdict. They went out. They came back twice, obviously hopelessly hung. Not once, but twice, the second time over the Governor's vigorous objections, Judge Fuller gave the jury the so-called "dynamite charge" (*Allen v. United States*, 164 U.S. 492 (1896). The jury deliberations continued to run on close to the Fourth of July holiday. Adding to the dynamite charge, the judge told the jury something like (I quote it from memory), "He had a federal job, and he could wait as long as it took the jury to reach a verdict." The impact of the judge's dynamite charge and his I-can-stay-here-forever comment to the jury was palpable to those in the courtroom. To avoid sitting through the holiday hung, with no end in sight, the jury manifestly compromised its otherwise sound judgment. It returned its split verdict on Thursday, June 29, 2006, the weekend before the Fourth of July. Basically, the jury eviscerated the government's RICO charge, but it still convicted the Governor and Scrushy on the bogus bribery charge—sliced and diced also as honest services mail fraud and conspiracy—and the Governor for obstructions of justice. That last conviction, too, was bogus; the Governor merely followed advice of experienced and competent counsel to clear up some ambiguities in the purchase of a motorbike where the facts showed that he previously turned down a free bike from Honda. Whatever his motive might have been, it was not "corrupt," as the statute requires.

I have not received and do not intend to receive any compensation of any kind for this letter.

In sum, I recommend that you commute the unjust sentence of Governor Don Eugene Siegelman.

Respectfully,

G. Robert Blakey
William J. and Dorothy K. O'Neill Professor of Law

CASES OF BRADY VIOLATIONS AND PROSECUTORIAL MISCONDUCT

By **John T. Floyd**
John T. Floyd Law Firm
Jun 3, 2012

We have maintained a continuing interest in cases dealing with **Brady** violations and **prosecutorial misconduct**. The following is a comprehensive, although not exhaustive, review of federal and Texas cases dealing with these issues that are important to lawyers representing client in criminal cases.

Convict at All Cost Mentality

It is important to occasionally review these cases to remember the egregious depths to which some rogue prosecutors will stoop to "convict at any cost." This is not our soap box, it is a reality. Some prosecutors have forgotten, or never learned, that their primary duty is to do justice, not simply convict those unfortunate souls caught in the cross-hairs.

Deprivation of Fair and Impartial Trial

Prosecutorial misconduct, either through deliberate violations or the knowing use of perjured testimony or inflammatory arguments before a jury, is designed to deprive a defendant of a fair and impartial trial, and this unethical behavior must be understood and ever guarded against.

For the criminal defense lawyer these cases make good fodder for creative "discovery letters" and motions for discovery.

BRADY VIOLATIONS

U.S. SUPREME COURT

Brady v. Maryland (U.S. 1963) held that a prosecutor under the Fifth and Fourteenth amendments has a duty to disclose favorable evidence to defendants upon request, if the evidence is "material" to either guilt or punishment.

Giles v. Maryland (U.S. 1967): After having been convicted of rape in a Maryland state court, defendants brought a post-conviction proceeding, alleging that the prosecution denied them due process of law by suppressing evidence favorable to them and by the knowing use of perjured testimony against them. The presiding judge in the post-conviction proceeding ordered a new trial on the ground that the petitioners' evidence did not sustain the allegation of knowing use of perjured testimony by the prosecution, but did establish the suppression of evidence concerning the credibility of witnesses and the issue of consent, which constituted a denial of due process. This judgment was reversed by the Court of Appeals of Maryland on the ground that the evidence allegedly suppressed would not materially affect the determination of the petitioners' guilt or the punishment to be imposed, and that the prosecution's failure to disclose it was not so prejudicial as to warrant the granting of a new trial on the basis of the denial of due process. Supreme Court vacated the judgment of the Maryland Court of Appeals and remanded the case for further proceedings, even though the court did not agree on an opinion.

Giglio v. United States (U.S. 1972): Withheld promise of immunity to con-conspirator upon whose testimony the Government's case depended required reversal of conviction because "evidence of any understanding or agreement as to a future prosecution would be relevant to [co-conspirator's] credibility and the jury was entitled to know of it."

United States v. Agurs (U.S. 1976): Prosecutor has a due process duty to disclose evidence about a victim's criminal record, except (1) when the victim's record was not requested by defense counsel and no inference of perjury by witness created; (2) if the trial court remains convinced of defendant's guilt after the withheld evidence is reviewed in light of entire trial record; and (3) the trial judge's firsthand appraisal of the record is thorough and reasonable.

United States v. Bagley (U.S. 1985): Refined *Brady* by holding that a prosecutor's duty to disclose material favorable evidence exists regardless of whether the defendant makes a specific request. The Court said "favorable evidence" is "material" if there is a reasonable probability that disclosure of the evidence would have produced a different outcome. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."

Kyles v. Whitley (U.S. 1995): Accused entitled to a new trial because of the prosecution's failure to comply with the due process obligation to disclose material evidence favorable to the accused concerning his possible innocence of the crime because the net effect of the withheld raised a reasonable probability that the evidence's disclosure to competent counsel would have produced a different result.

Even if the prosecutor was not personally aware of the evidence, the State is not relieved of its duty to disclose because "the State" includes, in addition to the prosecutor, other lawyers and employees in his office and members of law.

Strickler v. Greene (U.S. 1999): Held that a *Brady* violation occurs when: (1) evidence is favorable to exculpation or impeachment; (2) the evidence is either willfully or inadvertently withheld by the prosecution; and (3) the withholding of the evidence is prejudicial to the defendant.

Cone v. Bell (U.S. 2009): Observed, without specifically holding, that a prosecutor's pre-trial obligations to disclose favorable or impeaching evidence, either to guilt or punishment, "may arise more broadly under a prosecutor's ethical or statutory obligations" than required by the **Brady/Bagley** post-conviction "materiality" standard of review. The court distinguished the post-conviction setting where the reviewing court must make a constitutional determination of whether the withheld evidence is material to the prosecutor's pre-trial broader ethical obligations to disclose, which requires a "prudent prosecutor [to] err on the side of transparency, resolving doubtful questions in favor of disclosure."

FIRST CIRCUIT COURT OF APPEALS

Mastracchio v. Vose: Brady violation because knowledge of witness payments or favors made by the Witness Protection team is discoverable.

SECOND CIRCUIT COURT OF APPEALS

United States v. Matthews (2nd Cir. 1994): Rule 16 violation because the government attorney withheld a letter written by the defendant instead of disclosing it within a timely manner.

Leka v. Portuondo(2nd Cir. 2001): *Brady* violation because off-duty policeman's undisclosed observations would have contradicted testimony of other witnesses.

Disimone v. Phillips (2nd Cir. 2006): *Brady* violation because exculpatory statement would have allowed the defense to investigate another party's involvement.

THIRD CIRCUIT COURT OF APPEALS

United States v. Pelullo (3d Cir. 1997): *Brady* violation because an FBI agent's undisclosed notes and FBI surveillance tapes could have been used to impeach government witness whose credibility was central to case.

Virgin Islands v. Fahie (3d Cir. 2005): Prosecutorial "bad faith" is "probative to materiality" as well as relevant to determining a remedy.

FOURTH CIRCUIT COURT OF APPEALS

Spicer v. Roxbury (4th Cir. 1999): *Brady* violation because prosecutors did not disclose witness's prior inconsistent statement that he did not see the defendant.

Monroe v. Angelone (4th 2003): That while some *Brady* material which comes to light post-trial may not constitute a violation because of redundancy, this does not "excuse [pre-trial] discovery obligations." While "materiality" may exist as a prosecutorial defense in the post-trial setting, it is not a license to make "materiality" determinations pre-trial.

FIFTH CIRCUIT COURT OF APPEALS

Guerra v. Johnson (5th Cir. 1996): *Brady* violation for failure to disclose police intimidation of key witnesses and information regarding suspect seen carrying murder weapon minutes after shooting.

United States v. Sipe (5th Cir. 2004): *Brady* violation because the cumulative effect of undisclosed statement, criminal history of witness, and benefit to testifying aliens undermined credibility of a key witness.

United States v. Miller (5th Cir. 2008): Brady violation because undisclosed referral letter could have been used to impeach witness at trial.

LaCaze v. Warden La. Corr. Inst. For Women (5th Cir. 2011): Brady violation because prosecution withheld material concerning promise made to co-defendant.

SIXTH CIRCUIT COURT OF APPEALS

Schledwitz v. United States (6th Cir. 1999): Brady violation because Government witness portrayed as neutral and disinterested expert had actually been investigating defendant for years.

Joseph v. Coyle (6th Cir. 2006): Brady violation because witnesses' undisclosed testimony transcripts, notes on witness interviews, and immunity agreement would have impeached prosecution's crucial witness.

O'Hara v. Brigano (6th Cir. 2007): Brady violation because undisclosed written statement by victim could have been used to impeach victim's testimony.

SEVENTH CIRCUIT COURT OF APPEALS

United States v. Boyd(7th Cir. 1995): Brady violation for failure to disclose drug use and dealing by Government witness and "continuous stream of unlawful favors" including phone privileges, presents, and special visits.

Crivens v. Roth (7th Cir. 1999): Brady violation because failure to disclose crimes committed by Government witness is *Brady* even when witness used aliases.

EIGHTH CIRCUIT COURT OF APPEALS

White v. Helling (8th Cir. 1999) found a Brady violation in a 27 year old murder case because the Government did not disclose that its chief eyewitness had originally identified someone else and identified the defendant only after several meetings with the police.

United States v. Barraza-Cazares (8th Cir. 2006): Held that a co-defendant's statement is exculpatory evidence because it is relevant to co-defendant's role in the offense.

NINTH CIRCUIT COURT OF APPEALS

United States v. Strifler (9th Cir. 1988): Brady violation when, after request by defendant, Government does not disclose information in probation file relevant to witness's credibility on ground that it was privileged.

Singh v. Prunty (9th Cir. 1998): Brady violation because of "favorable deal" given to a star witness and not disclosed.

United States v. Santiago (9th Cir. 1995): Brady violation because prosecutor had knowledge of and access to inmate files, including the defendant's files held by Bureau of Prisons.

TENTH CIRCUIT OF APPEALS

Banks v. Reynolds (10th Cir. 1995): Brady violation because prosecutors did not disclose another individual or individuals had been arrested for the same charge.

Gonzales v. McKune (10th Cir. 2001): Forensic evidence relative to low sperm count in semen recovered from victim exculpatory because defendant did not have low sperm count.

ELEVENTH CIRCUIT COURT OF APPEALS

Jacobs v. Singletary (11th Cir. 1992): Witness statements to a polygraph examiner which were contrary to witness' trial testimony is exculpatory because the conflicting statements were relevant to defendant's claim of innocence.

D.C. CIRCUIT OF APPEALS

United States v. Brooks (D.C. Cir. 1992): Brady violation if a specific request is made by defendant and Government does not search records of police officer/witnesses.

United States v. Cuffie (D.C. Cir. 1996): Brady violation because undisclosed evidence of witness's prior perjury could have impeached witness, even though the witness had been impeached by a cocaine addiction, cooperation with prosecution, incentives to lie, and violation of oath as police officer.

TEXAS COURT OF CRIMINAL APPEALS

Ex parte Mowbray (Tex. Crim. App. 1996): Brady violation because prosecutors failed to disclose exculpatory expert report.

Leza v. State (Tex. Crim. App. 2011): Defendant attached two letters on direct appeal that his appellate counsel received from an assistant district attorney, apparently in relation to another case altogether. These letters informed appellate counsel that, since the defendant's trial, a certain Bexar County deputy sheriff, not a witness at either phase of the defendant's own trial, had been charged with aggravated perjury and abuse of official capacity. When the relevance of these charges to defendant's circumstances was not immediately apparent to appellate counsel, she contacted the assistant district attorney for additional information, but none was provided. Appellate counsel now avers that she believes the letter was most likely sent to her by mistake, but in an abundance of caution she brings a claim that the State has violated the appellant's due-process rights under Brady by suppressing evidence favorable to him at the time of his trial. Obviously, the letters upon which the defendant now relies are not any part of the appellate record in this case, and we could not predicate any appellate relief upon them even if they did establish a Brady violation. We therefore overrule the defendant's [Brady claim]—without prejudice, of course, to pursue any Brady claim that further investigation might turn up pursuant to his initial application for post-conviction writ of habeas corpus brought under Article 11.071 of the Code of Criminal Procedure.

Pena v. State (Tex. Crim. App. 2011): Brady violation because prosecution failed to disclose to defendant the audio portion of a videotape containing statements he made to the police.

PROSECUTORIAL MISCONDUCT

U.S. SUPREME COURT

Mooney v. Holohan (U.S. 1935): Misconduct through "knowing use" of perjured testimony to convict a criminal defendant in violation of "due process" of law. Acts and omissions by a prosecutor can violate "the fundamental conceptions of justice which lie at the base of our civil and political institutions."

Berger v. United States (U.S. 1935): Prosecutor engaged "misconduct" through his trial tactics by "misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said, and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous manner."

Alcorta v. Texas (U.S. 1957): Due process violated by prosecution's "passive" use of perjured testimony.

Napue v. Illinois (U.S. 1959): Held that "the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment."

Banks v. Dretke (U.S. 2004): Misconduct in capital murder case because prosecution withheld information that would have discredited two prosecution witnesses, including one who was a paid I police informant and the other had coached by prosecution before testifying.

TEXAS COURT OF CRIMINAL APPEALS

Stein v. State (Tex. Crim. App. 1973): Misconduct warranting reversal of conviction when prosecution repeatedly violated trial court order not to make personal remarks about defendant or present arguments outside the evidence.

Boyde v. State (Tex. Crim. App. 1974): Misconduct when prosecution deliberately elicits testimony from witness about defendant's guilt.

Dexter v. State (Tex. Crim. App. 1976): Misconduct when prosecution attempted to link defendant to "organized crime" by placing physical material not introduced into evidence marked "organized crime" before jury.

Ex Parte Adams (Tex. Crim. App. 1989): Misconduct warranting reversal of conviction because prosecution suppressed favorable evidence, knowingly used perjured testimony, and deceiving trial court during the defendant's capital murder trial.

Duggan v. State (Tex. Crim. App. (1989): Misconduct and reversal of conviction required when prosecution fails to correct perjured testimony.

Ex parte Castellano (Tex. Crim. App. 1993): Misconduct and reversal of conviction required when perjured testimony by a police officer, although privately motivated, is utilized because such testimony is "imputable" to prosecution.

TEXAS COURTS OF APPEALS

Rogers v. State (Tex.App.—Houston [1st Dist.] 1987): Misconduct warranting reversal because prosecutor's cross-examination of both defendant and defendant's character witnesses was characterized by misconduct, including the assumption of inflammatory facts not in evidence, prejudicial remarks that expressed the prosecutor's personal opinions, and improper bolstering. Even though defendant failed to preserve many of the errors by timely objection, the errors were so pervasive that appellant was denied a fundamentally fair and impartial trial. The prosecutor's questions and side-bar comments only served the purpose of inflaming and

prejudicing the jurors, and the record supported a finding that the prosecutor was not acting in good faith. The prejudicial effect of the prosecutor's remarks would not have been removed by instructions to disregard. The prosecutor's misconduct was so serious and pervasive that it undermined appellant's right to due process of law.

Young v. State (Tex.App.—Dallas 1988): Misconduct because prosecutor in jury argument tried defendant for fictitious attempted offense against police officers, and, thus, prosecutor engaged in calculated misconduct to deprive the defendant of fair and impartial trial.

Ramirez v. State (Tex.App.—Austin 2002): Misconduct and reversal of conviction required because due process violated by prosecution's knowing use of perjured testimony.

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Basically, if there was a "reasonable probability" that a defendant would not have been convicted but for the prosecution withholding material evidence, then that conviction cannot stand.

Florida Supreme Court Tosses Capital Murder Conviction After Prosecutors Fail to Disclose Information About Key Witness

Recently, the Florida Supreme Court reversed a capital murder conviction based on a *Brady* violation. Prosecutors charged the defendant in this case, *Simpson v. State*, with killing two people in 1999. One of the victims was working at the time as a confidential informant for a local sheriff. The informant himself was "heavily involved in the drug trade in Jacksonville," according to the Supreme Court. The bodies of the drug dealer/informant and his girlfriend were found in his house. Both victims were "hacked to death with an axe."

The defendant was charged with the murders several years later. The key evidence at trial was the testimony of another drug dealer–who claimed the defendant had confessed committing the killings to him–and DNA evidence found near the crime scene. At trial, the defense argued that three other men who were part of the drug trade, including the state's key witness and the informant's son, likely conspired to commit the killin themselves. The defendant denied playing any role in the murders.

The jury ultimately convicted the defendant of both murders and sentenced him to death. The Florid Court affirmed the convictions on direct appeal in 2009. Several years later, the defendant filed a peti post-conviction relief. As relevant here, he alleged multiple *Brady* violations on the part of the state tainted his conviction.

This time, the Supreme Court agreed with the defendant. Specifically, the Court found that the state's failure to disclose, prior to trial, the fact that the deceased drug dealer's son was also a paid confidential informant was material. Essentially, the Court said that information would have given the defense another avenue to impeach the son's testimony at trial. And given the overall lack of direct evidence implicating the defendant in the murders, that might have been enough to sway the jury into an acquittal. Accordingly, the Supreme Court said the defendant was entitled to a new trial.

By Lorenzo Jo nson, Contributor

Imprisoned for 22 years for a crime he didn't commit. Freed July 11, 2017.

Dec 12, 2016, 02:34 PM EST
Updated Dec 12 2017

To be clear, this article in is no way directed at those government agents and prosecutors who do not abuse their power to seek or maintain false convictions. But since 1989, almost 2,000 people have been exonerated of crimes they never committed -- a number that just scratches the surface of the true tally of wrongful convictions. Most of these people were sentenced to the death penalty, life sentences, or decades in prison. The average time they spent in prison was between 13½ and 15 years. And again, that's only those who were fortunate enough to be exonerated. The rest of us -- and there are many of us -- have to fight daily to expose our innocence and the injustice we have suffered.

When wrongful convictions are viewed as mistakes while new records of exonerations are set yearly, we have to ask: are we turning a blind eye to injustice or does society just not want to call it for what it really is?

In exoneration cases over the last two years, prosecution misconduct was responsible for 75% of the wrongful convictions. Prosecutors' practices of abusing their authority take many forms: false confessions, false witnesses, withholding favorable evidence, and much more. These tactics are used daily to secure false convictions. The chosen victims? The poor and less fortunate. Sadly, in many instances, our criminal justice system has actively encouraged these prosecutors to get guilty verdicts by any means necessary, and then stand by the most questionable convictions.

The Supreme Court decision *Brady v. Maryland* (1963) holds that if prosecutors fail to provide favorable evidence that is material either to guilt or to punishment in response to a case discovery request, this failure violates due process. The use of materiality as an element of determining *Brady* disclosures has created huge problems, however. Prosecutors have often used the claim that evidence wasn't "material" to guilt or punishment as an excuse for failing to disclose favorable evidence. This is wrong -- materiality is impossible to