TO: The Task Force on Conviction Integrity and Post-Conviction Review

FROM: Elliot Nash; Jordan Rowland

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RE: Overview of Cases and Other Relevant Issues in Post-Conviction Review

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I. Brady v. Maryland

Brady v. Maryland[1] requires the prosecution to turn over evidence favorable to the defense upon request if the evidence is material to either culpability or punishment.

i. Background.

In 1958, John Brady and Charles Boblit were arrested for the murder of William Brooks, who was strangled to death after being robbed. Brady and Boblit were tried separately. Brady was tried first and he made a pre-trial request to the prosecution for all statements made by Boblit. The prosecutor turned over a statement made by Boblit in which Boblit admitted to participating in the robbery but asserted that Brady was the one who strangled Brooks. At Brady's trial, Brady testified that he had participated in the robbery, but that it was Boblit who had killed Brooks. Brady was convicted of first-degree murder and sentenced to death.

After Brady's trial, the prosecutor revealed for the first time a different pre-trial statement by Boblit in which Boblit admitted that he, not Brady, was the one who strangled Brooks. Brady filed a motion for a new trial on the basis that the prosecution had violated the Due Process Clause by failing to disclose that statement before trial. On review, the Supreme Court concluded that the suppression of favorable evidence is akin to presenting false or perjured testimony, and violates the Due Process Clause. The Court reasoned that if the jury had learned that Boblit had killed Brooks, it might not have sentenced Brady to death. The Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

ii. Modifications and Clarifications.

Since the Brady ruling, the Court has refined the disclosure obligation in several key ways. First, it expanded the scope of the Brady duty to cover materials that could be used to show bias on the part of government witnesses, such as information about promises, rewards, or inducements made in exchange for their testimony or anything else that could impeach the credibility of those witnesses on the stand.[2] Second, the Court held that the Brady disclosure requirements apply

[1] Brady v. Maryland, 373 U.S. 83, 84 (1963).

[2] Giglio v. United States, 405 U.S. 150, 154–55 (1972) (expanding the scope of the Brady obligation to include evidence of witness credibility when "reliability of a given witness may well be determinative of guilt or

even without a specific defense request.[3] Third, prosecutors must "timely" deliver Brady material to allow the defendant to make effective use of the material at trial.[4] Fourth, the prosecution has an affirmative obligation to search its files and the files of law enforcement officers who worked on the case for material evidence.[5] In other words, all exculpatory evidence possessed by law enforcement is classified as Brady material regardless of whether the specific prosecutor in charge of the case has actual knowledge of its existence.[6]

II. Strickland v. Washington

Strickland v. Washington[7] established that "the Sixth Amendment right to counsel is the right to effective counsel," and set forth a two-prong test for an ineffective assistance of counsel claim. The defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

i. *Background*.

In September of 1976, David Leroy Washington went on a crime spree, including three murders. Washington surrendered to the police and confessed to the third murder. The state indicted Washington and appointed William Tunkey as his attorney. Against Tunkey's advice, Washington subsequently confessed to the other two murders, pleaded guilty to all three, and waived his right to a jury. During his plea colloquy, Washington explained that his actions were the "result of extreme stress and anxiety," and further stated, falsely, that he had no prior criminal record. Washington nonetheless accepted responsibility for his crimes. The trial judge responded that he had "a great deal of respect for people who . . . admit their responsibility."

At sentencing, Tunkey decided not to present any evidence concerning Washington's character and emotional state, and simply referred the court to Washington's prior statements. By presenting no new evidence, Tunkey prevented the state from cross-examining Washington on his claims of emotional distress and the absence of a significant prior criminal record, and he blocked any state attempt to introduce psychiatric evidence of its own. The judge sentenced Washington to death. In post-conviction proceedings, Washington claimed that he was denied effective assistance of counsel because, among other things, Tunkey should have offered expert testimony about Washington's emotional state, and positive character witnesses. The trial court rejected Washington's claim, and the case was accepted by the Supreme Court for review.

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innocence") (citation omitted); United States v. Bagley, 473 U.S. 667, 676 (1985), *citing* Giglio, 405 U.S. at 154 ("Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule.").

[3] United States v. Agurs, 427 U.S. 97, 110–11 (1976) (clarifying that the disclosure requirement is not contingent on a specific request by the defendant).

[4] Cone v. Bell, 556 U.S. 449, 470 n.15, 129 S. Ct. 1769, 1783 (2009), *citing* ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense[.]").

[5] Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

[6] Id.

[7] Strickland v. Washington, 466 U.S. 668, 671, 104 S. Ct. 2052, 2056 (1984).

ii. *Holding and Clarification on Counsel's Duty to Investigate*.

The Supreme Court affirmed Washington's sentence and established a two-prong test to establish a valid claim of ineffective assistance of counsel. First, a convicted defendant must show that the attorney's representation fell below "an objective standard of reasonableness." Second, a defendant must prove that the attorney's inadequate representation prejudiced the defendant. A defendant is prejudiced when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Applying this new standard to Washington's counsel, the Court found neither deficiency nor prejudice.

Subsequently, the Supreme Court has clarified that defense counsel has a general duty to investigate a defendant's background, and that a decision to limit investigation and presentation of evidence must be supported by reasonable efforts and judgment.[8]

III. State v. Petro

In State v. Petro, the Supreme Court of Ohio was confronted with a case in which the appellant asserted that the trial court erred in overruling the defendant's motion for a new trial on the ground of newly discovered evidence, which was material to the defendant, and which he could not with reasonable diligence have ascertained and produced at the trial.[9] The Court found that the decision to grant a new trial upon the ground of newly discovered evidence is "necessarily committed to the wise discretion of the court, and a court of error cannot reverse, unless there has been a gross abuse of that discretion."[10] This is a high bar for the defendant to meet.

The defendant brought forth newly discovered evidence in the form of the coroner's testimony.[11] There was a dispute regarding the time of death of the victim, and there was a discrepancy between what the coroner told the detectives at the crime scene and what the coroner later testified to in court.[12] However, the Court found that this "testimony would merely impeach that of the coroner," and this was not sufficient by itself to conclude that the trial court committed error in denying appellant's motion for a new trial.[13]

This case set up the six-part test for granting a motion for a new trial in a criminal case based on newly discovered evidence. "It must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before

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[8] See Sears v. Upton, 561 U.S. 945, 952 (2010) (concluding that the "cursory nature" of a defense counsel's investigation into mitigation evidence was constitutionally ineffective); Porter v. McCollum, 558 U.S. 30, 40 (2009) (holding that an attorney's failure to interview witnesses or search records in preparation for penalty phase of capital murder trial constituted ineffective assistance of counsel); Rompilla v. Beard, 545 U.S. 374 (2005) (concluding that a defendant's attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate); Wiggins v. Smith, 539 U.S. 510 (2003) (holding that attorney's failure to investigate defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable).

[9] State v. Petro, 148 Ohio St. 505, 506, 76 N.E.2d 370 (1947).

[10] Id. at 507–08 (quoting State v. Lopa, 96 Ohio St. 410, 411, 117 N.E. 319 (1917)).

[11] Id. at 508.

[12] Id. at 509.

[13] Id.

trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence."[14]

IV. The Reid Technique

The Reid Technique, or the Reid Method, is an interrogation technique that was popularized in the 1950s by John E. Reid, a psychologist, polygraph expert, and former Chicago police officer.[15] Reid "developed a reputation as someone who could get criminals to confess," which gave him enough notoriety to establish a training agency for interrogators.[16] Reid even went on to create a manual, *Criminal Interrogation and Confessions*,[17] which is widely used in police departments, sheriff's offices, and other law enforcement agencies in the United States.[18] The Reid Method was even used in the infamous case of the Central Park Five.[19]

The Reid Method consists of three steps: "(1) Factual Analysis; (2) the Behavioral Analysis Interview (BAI); and (3) interrogation."[20] The first step is relatively straightforward and involves analyzing available evidence to "eliminate improbable suspects [and] develop possible suspects or leads."[21] The next step is the Behavioral Analysis Interview (BAI), which is the "non-accusatory question and answer session with a witness, victim, or suspect."[22] During this step, the investigator is encouraged to ask "structured behavior provoking questions to elicit behavior symptoms of truth or deception from the person being interviewed."[23] It also "facilitates the eventual interrogation of guilty suspects" by establishing rapport with the suspect through non-accusatory questioning.[24]

The final, and most important, step of the Reid Technique is the interrogation. According to the Reid Manual, only people who the investigators believe to be guilty should be interrogated.[25] There are nine steps to an interrogation under this method, but they can actually be reduced to three major components: "(1) tell the suspect you already know for sure he committed the crime, and cut off any attempts on his part to deny it; (2) offer the suspect more than one scenario for how he committed the crime, and suggest that his conduct was likely the least culpable, perhaps even morally justifiable (minimization); (3) overstate the strength of the evidence the police have

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[14] Id. at the syllabus.
[15] Douglas Starr, *The Interview*, The New Yorker (Dec. 2, 2013), https://www.newyorker.com/magazine/2013/12/09/the-interview-7.
[16] Id.
[17] Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, *Criminal Interrogation and Confessions* (5th ed. 2011) [*hereinafter* Reid Manual].
[18] Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 Seattle J. for Soc. Just. 301, 302 (2017).
[19] Starr, *supra* note 15.
[20] Kozinski, *supra* note 18, at 310.
[21] John E. Reid & Associates, Inc., http://www.reid.com/educational_info/critictechnique.html (last accessed Oct. 30, 2020).
[22] Id.
[23] Id.
[24] Id.
[25] Id.

inculpating the suspect – by inventing non-existent physical evidence or witness statements, for example – and assuring him he'll get convicted regardless of whether he talks."[26]

According to the Reid organization, upwards of 80 percent of those interrogated according to the Reid Technique confess.[27] These results are achieved through various methods meant to "overcome the suspect's natural inclination not to incriminate himself."[28] "First and foremost, the suspect must be isolated and not allowed access to a lawyer, friend, or family member; he must get the impression that he must face this ordeal by himself, with no help from anyone outside the interrogation room."[29] The Reid Manual suggests certain "interrogation room décor [cramped and bleak], suspect-friendly snacks, and sartorial and hygiene tips" to help nudge the suspect "into believing that the interrogator is his friend[.]"[30]

The investigator is also taught to never accept denials, and if the suspect attempts to deny the accusations, the investigator will "bat it away."[31] These interrogations often go uninterrupted for hours, "with the suspect alternatively badgered and cajoled to admit his guilt."[32] "Once that goal is achieved, the interrogator's next task is to obtain a narrative of the crime, preferably written out in the suspect's own handwriting, where he does not merely admit to the crime, but provides vivid detail – detail that tends to corroborate the declarant's participation in the crime and also helps establish the requisite volitional level that justify a higher level of crime, e.g., murder rather than manslaughter."[33]

[26] Kozinski, *supra* note 18, at 311–12.
[27] Starr, *supra* note 15. As an additional point, the Innocence Project has found that "in approximately 25% of the wrongful convictions overturned with DNA evidence, defendants made false confessions, admissions or statements to law enforcement officials." Innocence Project, *False Confessions Happen More Than We Think* (Mar. 14, 2011), https://www.innocenceproject.org/false-confessions-happen-more-than-we-think/.
[28] Kozinski, *supra* note 18, at 312.
[29] Id.
[30] Id.
[31] Starr, *supra* note 15.
[32] Kozinski, *supra* note 15, at 313.
[33] Id. at 313.