Due Process and Brady Issues

March 25, 2022

CJA – Training

N.H. District Court – NH

Donna J. Brown and Anthony Sculimbrene

Brady v. Maryland Litigation

- Pre-trial
- In the middle of trial
- Post-trial and pre-sentencing
- Post guilty plea
- Remedies

Brady v. Maryland Litigation

Pre-trial

Need to make written request for discovery BEFORE filing supplemental discovery motion

- LCrR 12.1 (a) **Motion Practice** - Discovery Motions. Discovery motions shall be filed within thirty (30) days after the arraignment.
- LCrR 16.3 **Motions Seeking Routine Discovery -** No motion seeking discovery covered by LCrR 16.1 shall be filed unless the opposing party has failed to comply with a **written request** for the discovery sought by the motion.

“We don’t have it.” ¯_(ツ)_/¯ 1
Brady material not in actual possession of Prosecutors

Prosecution

- “*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it **does not possess**.” *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) *U.S. V. Alrai*, Doc. 170: 8

Defense

- “[t]he prosecution has an affirmative **obligation to learn of potentially favorable evidence** and provide it to the defense.” *Id*. at *15 (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). *U.S. v. Alrai*, Doc. 164:15.

“We don’t have it.” ¯_(ツ)_/¯ 2
Brady material not in actual possession of Prosecutors

Prosecution

- For purposes of *Brady*, the government cannot be expected to produce information held by a **third party**, as only evidence that is “actually known to the government is subject to the *Brady* standard.” *U.S. v. Alrai*, Doc. 170: 8

Defense

- “[o]nce inside the stacks [of the third party] with permission to rummage about for prosecution evidence, the **federal authorities must search for and retrieve defense evidence bearing on the same question**.” *United States v. Cerna*, 633 F. Supp. 2d 1053, 1060 (N.D. Cal. 2009). *U.S. v. Alrai*, Doc. 174: 2-3.

“We don’t have it.” ¯_(ツ)_/¯ 3
Brady material not in actual possession of Prosecutors

Prosecution

- “*Brady* does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel.” *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002).

Defense

- A third party can be an “arm of the prosecutor” where it is “involved with the investigation or presentation of the case to the grand jury[,] . . . interview[ed] witnesses or gathere[ed] facts,” or “review[ed] documents or develop[ed] prosecutorial strategy.” *United States v. Stewart*, 433 F.3d 273, 299 (2d Cir. 2006).

“We don’t have it.” ¯_(ツ)_/¯ 4
Brady material not in actual possession of Prosecutors

Prosecution

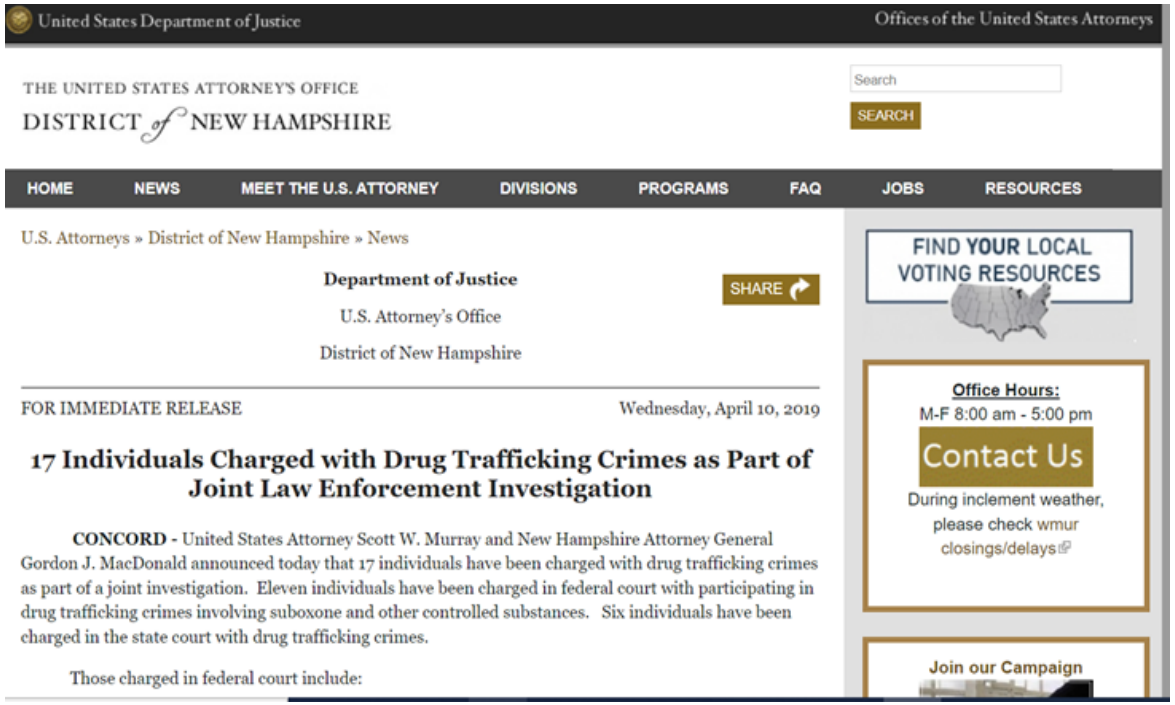
- …Defendant has failed to establish that “the failure to discover the evidence was not due to a lack of diligence on the part of the defendant.” *Josleyn*, 206 F.3d at 151. *U.S. v. Alrai*, Doc. 170: 11.

Defense

- The government cannot now claim that Mr. Alrai should have subpoenaed the documents, data, and facts Naviloff considered when the Government both expressly and impliedly represented that, if they existed, they had been provided to the defense. *U.S. v. Alrai*, Doc. 174: 7.

"We don't have it." ¯_(ツ)_/¯ 5 – *"Some other prosecutor has it."*

U.S. v. Gupta, 848 F.Supp.2d 491, 493 (2012)(Where the U.S. Attorney's Office conducts **a joint investigation with another state or federal agency**, [] the prosecutor's duty extends to reviewing the materials in the possession of that other agency for *Brady* evidence.)



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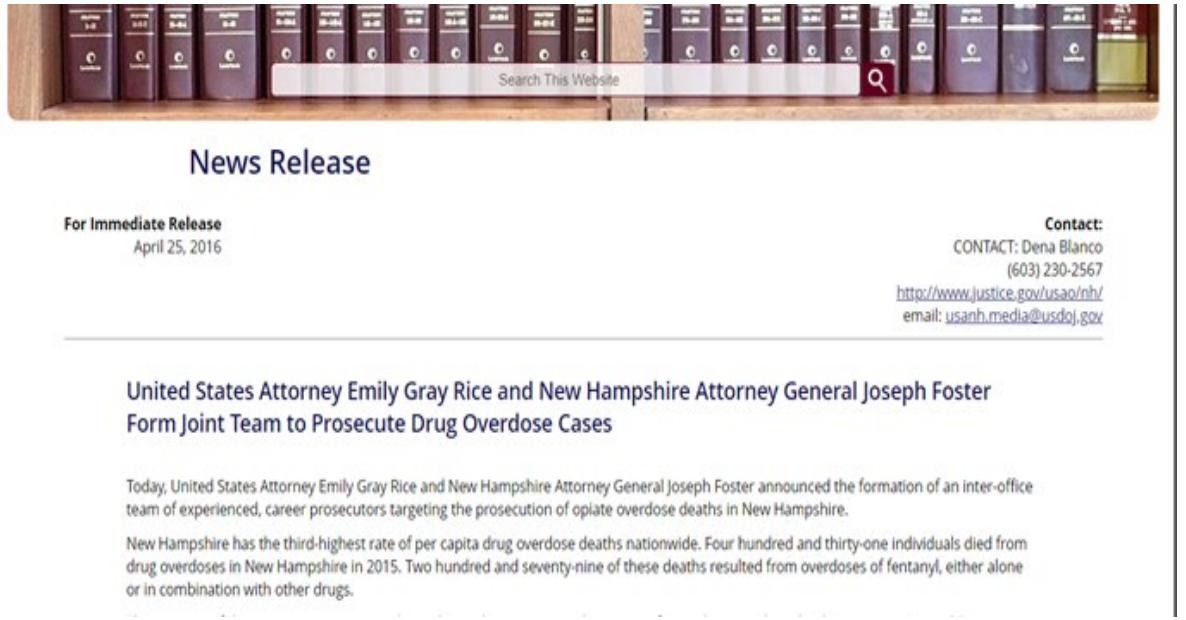
FOR IMMEDIATE RELEASE

Wednesday, April 10, 2019

17 Individuals Charged with Drug Trafficking Crimes as Part of Joint Law Enforcement Investigation

CONCORD - United States Attorney Scott W. Murray and New Hampshire Attorney General Gordon J. MacDonald announced today that 17 individuals have been charged with drug trafficking crimes as part of a joint investigation. Eleven individuals have been charged in federal court with participating in drug trafficking crimes involving suboxone and other controlled substances. Six individuals have been charged in the state court with drug trafficking crimes.

Those charged in federal court include:



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News Release

For Immediate Release
April 25, 2016

Contact:
CONTACT: Dena Blanco
(603) 230-2567
http://www.justice.gov/usao/nh/
email: usanh.media@usdoj.gov

United States Attorney Emily Gray Rice and New Hampshire Attorney General Joseph Foster Form Joint Team to Prosecute Drug Overdose Cases

Today, United States Attorney Emily Gray Rice and New Hampshire Attorney General Joseph Foster announced the formation of an inter-office team of experienced, career prosecutors targeting the prosecution of opiate overdose deaths in New Hampshire.

New Hampshire has the third-highest rate of per capita drug overdose deaths nationwide. Four hundred and thirty-one individuals died from drug overdoses in New Hampshire in 2015. Two hundred and seventy-nine of these deaths resulted from overdoses of fentanyl, either alone or in combination with other drugs.

“We don’t have it.” ¯_(ツ)_/¯ 6
Oops – We Didn’t Preserve It.

Prosecution

- If the defendant is suggesting that UWMB should have kept its entire IT infrastructure as Alrai left it until after the completion of the criminal case, the government knows of no such obligation under any rule of discovery and the defendant has not pointed to one. *U.S. v. Alrai*, Doc. 170: 23.

Defense

- If the government permits (or blindly allows) a third party to destroy evidence, that is enough to warrant dismissal. *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993).
- **Preservation letter** from defense explaining **exculpatory nature of evidence** important.

“We don’t have it.” ¯_(ツ)_/¯ 7
Oops – We Didn’t Preserve It - more.
(Cell phone data from victims and informants)

- Where investigator admitted that he knew the victim’s cell phone contained evidence of recent drug use, case remanded as district court erred by rejecting the defendants’ due process claim related to failure to preserve victim’s cell phone. *United States v. Johnson*, 996 F.3d 200, 215 (4th Cir. 2021);
- If the government truly doesn’t have access to the third-party evidence, like cell phone, consider Rule 17 (c) subpoena. “Rule 17(c) implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor.” *In re Martin Marietta Corp*., 856 F.2d 619, 621 (4th Cir. 1988).

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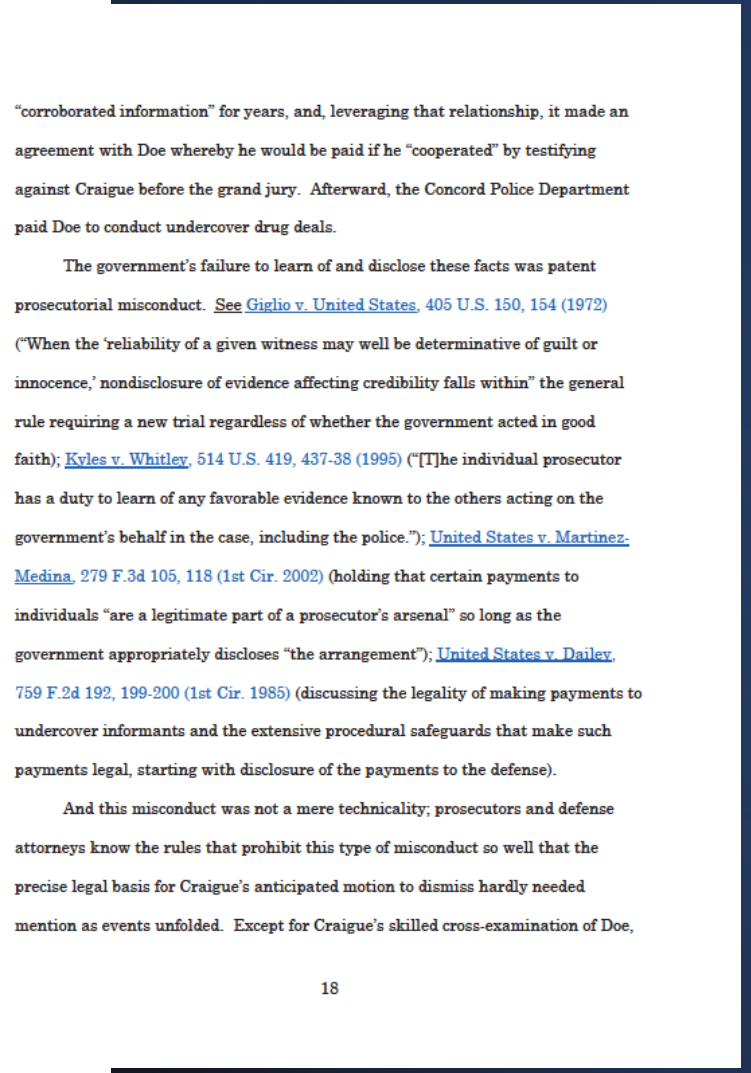
- **Preservation letter** from defense explaining **exculpatory nature of evidence** important.

Demand Letter – Include quote from *US v. Craigue*:

- As I am sure you are aware, the prosecution's discovery obligations extend beyond those documents in your actual possession:
- "The government's failure to learn of and disclose these facts was patent prosecutorial misconduct. *See Giglio v. United States*, 405 U.S. 150, 154 (1972)("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within" the general rule requiring a new trial regardless of whether the government acted in good faith); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)"



"corroborated information" for years, and, leveraging that relationship, it made an agreement with Doe whereby he would be paid if he "cooperated" by testifying against Craigue before the grand jury. Afterward, the Concord Police Department paid Doe to conduct undercover drug deals.

The government's failure to learn of and disclose these facts was patent prosecutorial misconduct. See Giglio v. United States, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within" the general rule requiring a new trial regardless of whether the government acted in good faith); Kyles v. Whitley, 514 U.S. 419, 437-38 (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."); United States v. Martinez-Medina, 279 F.3d 105, 118 (1st Cir. 2002) (holding that certain payments to individuals "are a legitimate part of a prosecutor's arsenal" so long as the government appropriately discloses "the arrangement"); United States v. Dailey, 759 F.2d 192, 199-200 (1st Cir. 1985) (discussing the legality of making payments to undercover informants and the extensive procedural safeguards that make such payments legal, starting with disclosure of the payments to the defense).

And this misconduct was not a mere technicality; prosecutors and defense attorneys know the rules that prohibit this type of misconduct so well that the precise legal basis for Craigue's anticipated motion to dismiss hardly needed mention as events unfolded. Except for Craigue's skilled cross-examination of Doe,

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Include Supporting Legal Authority and Facts in Demand Letter

- *Kyles v. Whitley*, 514 U.S. 419, 437-38 (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.")

- *Kyles* requires the production of evidence that supports a defense argument attacking the "thoroughness and good faith of the investigation"

Demand Letter….

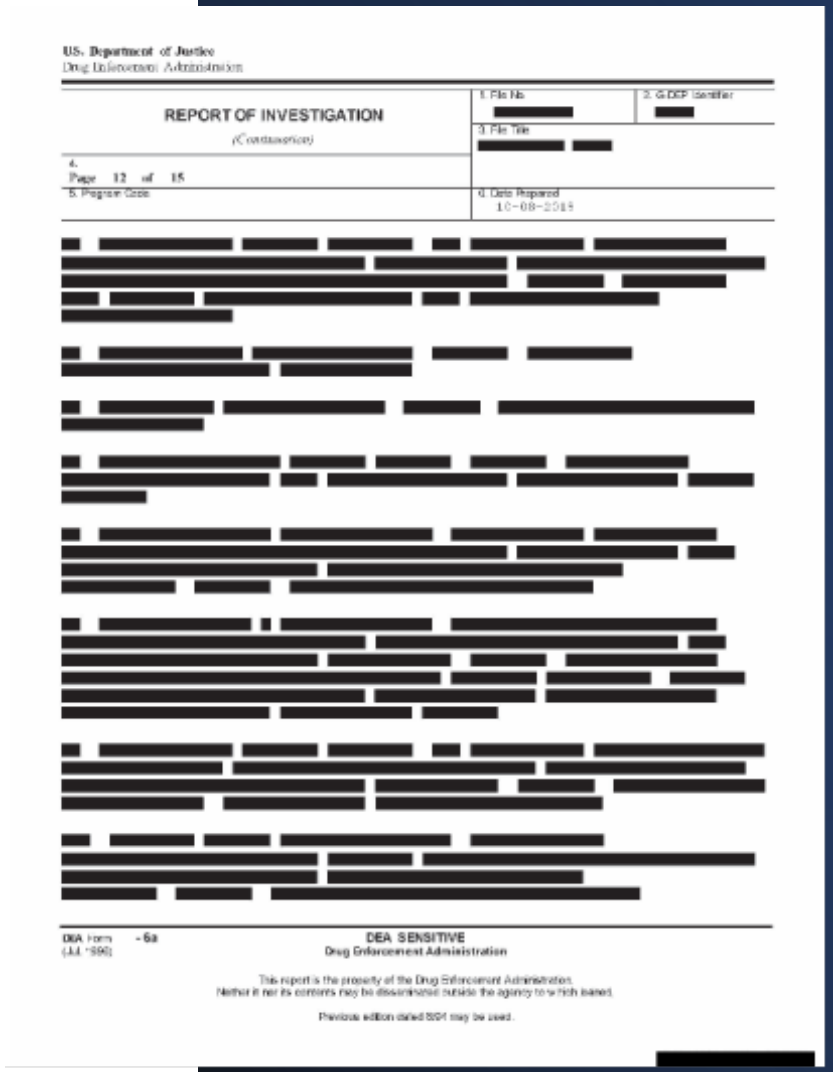
- Consistent with *Brady* and *Kyles*, please contact every law enforcement officer connected with the investigation of this case, regardless of whether you intend to call them as a witnesses at trial, and ask them about any *Brady* material regarding the cooperating witness, John Smith. We make this demand as the government has a special duty to seek out *Brady* materials on cooperating/incentivized witnesses:
- By definition**, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government** and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. *U.S. v Bernal-Obeso*, 989 F. 2d 331 (9th 1993); quoting *Lee v. United States*, 343 U.S. 747, 757 (1952).

Information on Cooperating witnesses

- The defendant requests that this Court order the production of any **unredacted proffers**, statements or similar information that details the scope of the informant's criminal activity as this information is relevant to the likely sentence the informant was facing when he decided to cooperate and/or testify for the government.
- "[T]he exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *U.S. v. Chan*dler, 326 F.3d 210, 218–19 (3rd Cir. 2003), citing *Davis v. Alaska,* 415 U.S.308, 316-317 (1974).

Sample *Jenks/Giglio* Disclosure

- But, "…redaction without authority of the Court was tantamount to **permitting the 'fox to guard the hen house.'"**
- *U.S. v. Hackett*, 2011 WL 5323506, at *2 (N.D.W.Va.,2011)



U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION
(Continuation)

1. File No. [redacted] 2. G-DEP Identifier [redacted]
3. File Title [redacted]
4. Page 12 of 15
5. Program Code
6. Date Prepared 10-08-2015

[redacted]

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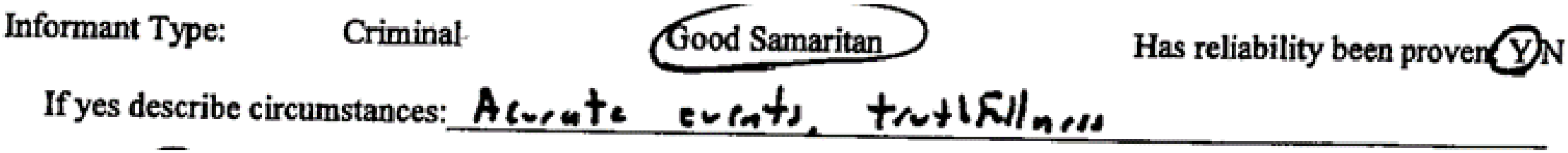
[redacted]

Make specific requests for unredacted information on cooperating witnesses and ask for copies of:

- Any Cooperating Individual Agreement(s);
- Any Cooperating Individual Questionnaires;
- Any information about the Cooperating individual(s)'s "Record of Reliability;"
- Any internal information about _____ kept by the _____Police Department/_____Drug Task Force, including, but not limited to, information regarding detentions and/or arrests of _____ where charges were not filed;
- Any information from or about _____ or any other person about the scope and history of _____'s criminal activity;
- Any information about _____'s involvement in other criminal investigations;
- Any information that _____ violated the terms of his Cooperating Individual Agreement;
- Any payments or other consideration made to _____ in this or any other criminal investigation.

From “Cooperating Individual Questionnaire”

- **Definition of “Good Samaritan” I** = Person with 6-page criminal history, including suspended prison time hanging over his head, who gets arrested and gets a no-time disposition on new charges after agreeing to set up and/or testify against your client.



Why "Good Samaritan" reference constitutes *Brady* material beyond its relevance to credibility of Cooperating Witness

- [The suppressed statements] would have raised **opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation**…[as the undisclosed statements of the cooperating witness] to the police were replete with inconsistencies and would have allowed the jury to infer that [the cooperating witness] was anxious to see Kyles arrested for Dye's murder.
- **Their disclosure would have revealed a <u>remarkably uncritical attitude</u> on the part of the police.** *Kyles v. Whitley*, 514 U.S. 419, 445 (1995)

Attacking Good Faith of Investigation

- Calling Informant “Good Samaritan”

=

- a remarkably uncritical attitude

Brady Obligations now in Rule 5

- On October 21, 2020, the President signed into law the **Due Process Protections Act**, Pub. L. N. 116-182, 234 Stat. 894 (Oct. 21, 2020). The law, which became effective on enactment, amends **Rule 5 of Federal Rules of Criminal Procedure** 5 (Initial Appearance) by adding a requirement that trial judges "[i]n all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present," issue an oral and written order: (1) confirming the prosecutor's disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; and (2) **notifying the prosecution of the possible consequences of violating the order.** The amendment to Rule 5 further requires that each judicial council promulgate a model order for use by judges.

Discovery motion – Make it factually specific or you might get this…

- ENDORSED ORDER denying without prejudice MOTION to Compel *Brady/Giglio* Material as to Defendant. Text of Order: Denied without prejudice to renewing if circumstances warrant - **the government is well aware of its disclosure obligations and defendant does not suggest that those obligations have not been met**. So Ordered.

Show the court specific facts supporting a belief that the government has not done their due diligence in investigating its cooperating witness(es)

- Undersigned counsel has reviewed John Smith's (cooperating witness) file in the Sullivan County Superior Court. Despite his admissions that he distributed methamphetamine and fentanyl, crimes that are felonies in both state and federal court, his charges were reduced to one misdemeanor offense. Despite Mr. Smith's lengthy criminal record, including his serving state prison time for drug distribution, he received a suspended jail sentence on this charge. *See* Attachment 1.
- The defendant shared this information with the government and asked that they inquire as to whether the above-described disposition was related to Mr. Smith's statements to the Drug Task Force.
- The government's response was that their *Brady* obligations only extend to evidence in their **actual possession** and did not extend to evidence possessed by **other prosecutorial agencies**.

Lack of Possession as an excuse

- The prosecutors in U.S. v. Craigue did not have possession of the suppressed evidence;
- The prosecutors in U.S. v. Bundy did not have possession of the suppressed evidence;

Brady v. Maryland Litigation

In the middle of trial

What is our fear of raising *Brady* violations in the middle of trial? Answer: Judge not wanting to keep the jury waiting while the issue is sorted out. (see quotes from *U.S. v. Craigue* trial transcript…)

Hopefully we can work out this issue so "we **do not keep the jury waiting** while that issue is being determined."

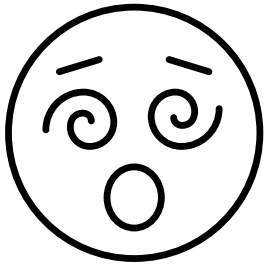
"I'm just hoping to do it outside of the presence of the jury and take the morning time, perhaps, to accomplish that **so that we don't have to have them wait** while we do that."

"I will definitely get here [early] **so that we don't keep the jury waiting.**"

THE COURT: "Well, I think that way we can **keep the trial moving and ultimately take a break, and then the jury is not twiddling its thumbs while we do it.**"

Don’t keep the jury waiting, BUT ask for time to “regroup.”
U.S. v. Osorio, 929 F.2d 753, 758 (1st Cir. 1991).

- In considering the prejudice to a defendant's case from delayed disclosure of evidence, we have held it “incumbent upon a party faced with such a situation **to ask explicitly that the court grant the time needed to regroup, or waive the point**…
- [A defendant's] claim that he was unfairly surprised is severely undermined, if not entirely undone, by his neglect to ask the district court for a continuance to meet the claimed exigency.
- The court rejected defense counsel’s claim that he did not have time to “reflect calmly” as to why he did not ask for a continuance.



United States v. Bundy, 968 F.3d 1019 (9th Cir. 2020) (Lesson to make specific discovery demands)

- Bundy family charged with obstructing government officials trying to remove their cattle from federal land and Bundys said they were “ready to do battle with the BLM.” (Bureau of Land Management) The government's case included the allegation that the Bundys recruited armed followers by intentionally deceiving them into believing that the Bundys feared for their lives because government snipers surrounded their ranch.
- **Defense made very specific pre-trial *Brady* requests for**: 1) materials showing the presence of armed officers in tactical gear taking positions around the Bundy Ranch; and 2) evidence to support their claim that the impoundment operation was over-militarized. The government denied the existence of these items.
- After new evidence was discovered during trial, the defense moved to dismiss alleging prosecutorial misconduct as government failed to provide evidence regarding: 1) video surveillance of the Bundy Ranch and 2) the presence of FBI and BLM tactical units armed with AR-15 rifles.

United States v. Bundy, 968 F.3d 1019 (9th Cir. 2020)

- As more evidence was discovered, the district court dismissed the indictment with prejudice, finding in part, that the government had been:
- **"misleading in its earlier representations;"**
- Even though some of the evidence disclosed mid-trial had "similar information [that] had been produced earlier," the written and repetitive nature of the evidence would have strengthened the defense theory;
- **"retrying the case would only advantage the government by allowing it to strengthen its witnesses'** testimony based on all the knowledge gained from the information provided by the defense and revealed thus far."

- MR. MIRHASHEM: There's a couple of issues, your Honor. First, under Federal Rule of Criminal Procedure 26.2 and the Jencks Act, 18, United States Code, 3500, I do ask for production of all of this witness's statements. **Some of the stuff that he said on his direct examination is not stuff that was in prior reports**, and I want to make sure that, as required by court rule, we are provided with every single document that contains a statement made by this witness as defined in that rule. That's my first request.
- THE COURT: Okay. And has the government provided all of this witness's statements?
- MR. DAVIS: Yes, your Honor.
- THE COURT: Are there any that you have not provided?
- MR. DAVIS: Not to my knowledge.

Examples addressing mid-trial discovery issues from the *Craigue* trial

Continued… Examples addressing mid-trial discovery issues from the *Craigue* trial

- MR. MIRHASHEM: **The second point is I want to make sure that we've been provided with all *Giglio* material with respect to this witness and also ask if the Court would allow me to voir dire him on a particular credibility issue outside the presence of the jury.**

Evidence about cooperating witness in *U.S. v. Craigue* revealed mid-trial…

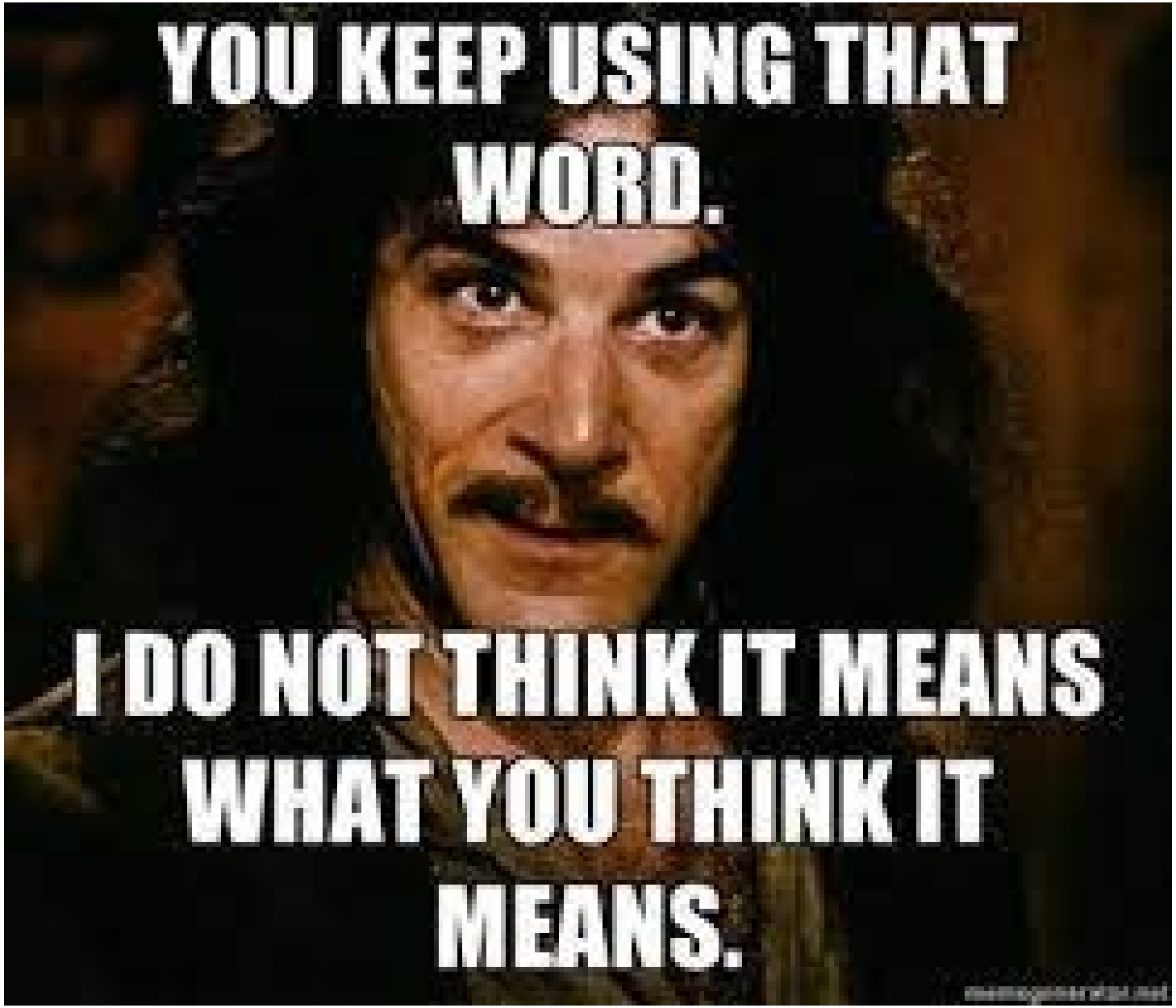
- MR. MIRHASHEM: He agrees to be a CI in exchange for…being a **<u>good samaritan.</u>**

- ….and [as was revealed in the middle of trial] monetary rewards.

Definition of "Good Samaritan" II

- Person who avoids talking to law enforcement about the death of a co-worker and only assists law enforcement when he is paid to testify before the grand jury.

Good Samaritan



Continued… Examples addressing mid-trial discovery issues from the *Craigue* trial

- MR. MIRHASHEM: So at the end of his direct yesterday, I believe it was, I made a Jencks request and I made a *Giglio* request. The Supreme Court has repeatedly said there is no obligation on the part of the defense to make a request. Congress just passed the Due Process Act of 2020 to say -- now we say it at every arraignment -- the government has a duty to go and ferret out this kind of evidence. **We are going to file multiple motions about this, how -- and including prosecutorial misconduct, because they should have told this to us two years ago. They should have inquired two years ago.**

Continued… Examples addressing mid-trial discovery issues from the Craigue trial

- MR. MIRHASHEM: [T]he government of the United States should have disclosed this information to us two years ago under their obligations under *Kyles*, *Brady*, *Giglio*, the Due Process Act of 2020. You know, the *Stevens* case was dismissed with prejudice. **How many times does the Department of Justice have to be told you've got to find exculpatory evidence and turn it over to the defense.**

Brady v. Maryland Litigation

Post-trial and pre-sentencing

Right to discovery after conviction…

- It is well-established ... that a defendant's rights at sentencing differ considerably from his pre-conviction rights. *United States v. Stile*, 845 F.3d 425, 430 (1st Cir. 2017)

But, *Brady* inquiry is not over after conviction…

- Under *Brady v. Maryland*, the prosecution must disclose to the defendant evidence that is favorable to the accused and **"material either to guilt or to punishment."** *U.S. v. Weintraub*, 871 F.2d 1257, 1260 (5th Cir. 1989); quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Post-conviction lesson from *U.S. v. Alrai* – Post-Conviction Motion for Discovery (…or the sentencing guidelines can be your friend)

- The sentence in this case will be determined, in large part, by the amount of loss this Court determines was sustained by United Way and the Robert Allen Group ("RAG").
- The government sent a letter to U.S. Probation and Pre-Trial Services recommending an 18-level increase and it is anticipated that the government will rely on the testimony of Naviloff for that calculation.
- As Mr. Naviloff was the sole government expert to testify as to the amount of loss in this case, **his credibility and the reliability of his conclusions will be the central issue at the sentencing hearing.**
- *See* Case 1:18-cr-00192-JL Document 138: 3.

Post-Conviction Lessons from *U.S. v. Kelly*

- In a lesson learned from *U.S. v. Alrai*, I decided to research the credibility of the cooperating trial witnesses as the PSR and/or government were relying on their testimony to increase the guideline range.
- I asked for a state court Case Summary Report on one of the the cooperating witnesses and learned that he was in jail on the date he claimed to be involved in drug distribution with co-defendants.
- While this seemed like enough evidence to ask for a new trial, I was concerned that the government would argue that the above information was not “material” under *Brady* as there was a second cooperating witness at trial.

Cooperating Witness II

How Government portrayed him at trial of Hardy/Kelly…

- A “former drug addict” who hit “rock bottom” after a personal tragedy who turned to drugs and was only selling them to support that addiction.

PACER search revealed that the Government had evidence that portrayed him as…

- One of “the biggest meth dealers in the entire state” who stored “large bags of meth in his garage.”

I suspect that information that the second cooperating witness was one of the biggest meth dealers in the state was here…

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION
(Continuation)

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10-08-2019

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Brady v. Maryland Litigation

Post guilty plea

The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. Although the Fifth and Sixth Amendments provide, as part of the Constitution's "fair trial" guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors…a defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees…

U.S. v. Ruiz, 536 U.S. 622, 623 (2002)

From *State v. Stroud* motion to withdraw plea…

- …while a guilty plea may waive a defendant's right to exculpatory evidence as to guilt or innocence, *see generally United States v. Ruiz*, 536 U.S. 622 (2002), **the favorable evidence that should have been disclosed prior to sentencing here was material to sentencing**, not guilt or innocence.

Ferrara v. U.S., 456 F.3d 278 (1st Cir. 2006)

- Where the lower court based its finding that the defendant made a knowing and voluntary plea based on“conclusions that a solid factual foundation undergirded [his] plea;”
- The government failed to disclose the recantation of a key witness;
- The government impliedly “represented falsely to the petitioner” that it had provided all exculpatory evidence prior to his plea;
- We “conclude that the petitioner's plea was constitutionally infirm under the rule announced in *Brady v. United States*.

Brady is important to sentencing…

- 97% of federal convictions and 94% of state convictions are the result of guilty pleas.
- *Missouri v. Frye*, 566 U.S. 134, 143 (2012)

Check PSR and/or Government letters Regarding sentencing guideline recommendations based on cooperating individuals

- Under *Brady v. Maryland*, the prosecution must disclose to the defendant evidence that is favorable to the accused and "material either to guilt or to **punishment.**"
- Is the guideline calculation based on testimony of persons with significant credibility issues?
- Investigate that witness and make post-guilty plea *Brady* demands on issue of punishment.

Brady v. Maryland Litigation

Remedies

New Trial

- "A new trial is required if [the *Brady* violation] could . . . in any reasonable likelihood have affected the judgment of the jury." *Government of Virgin Islands v. Fahie*, 419 F.3d 249, 252 (3rd Cir. 2005), quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972).

U.S. v. Osorio, 929 F.2d 753, 763 (1st Cir. 1991)

- When confronted with **extreme misconduct** and prejudice as a result of delayed disclosure, this court will consider invoking its **supervisory powers** to secure enforcement of "better prosecutorial practice and reprimand of those who fail to observe it."

Other Remedies - The applicable remedy analysis for a *Brady* violation is as follows:

- a *Brady* violation requires a remedy of a **new trial**;
- such new trial may require **striking evidence**;
- a **special jury instruction**;
- or other **additional curative measures** tailored to address persistent prejudice; and
- if the lingering prejudice of a *Brady* violation has removed all possibility that the defendant could receive a new trial that is fair, the indictment must be dismissed. *U.S. v. Pasha*, 797 F.3d 1122, 1139, 418 U.S.App.D.C. 258, 275 (C.A.D.C.,2015)

While this Court correctly cited First Circuit precedent stating that dismissal is only a proper remedy for “serious and blatant prosecutorial misconduct…” (From U.S. v. Alrai - Motion to Dismiss II)

- The defendant could not find any First Circuit case where the prosecution knowingly:
- 1) withheld *Brady* material regarding a key government witness;
- 2) repeatedly made false pre-trial representations that it had complied with discovery obligations;
- 3) repeatedly made pre and post-trial attacks on defense counsels’ attempts to litigate the *Brady* violation;
- 4) engaged in vexatious post-trial litigation denying their *Brady* violations, wherein they wasted valuable court resources;
- 5) failed to show any contrition for their conduct; and
- 6) failed to give the Court any assurances that the misconduct will not happen again.

Prosecutors are serving the public, not engaged in misconduct (Union Leader Op-Ed 2/15/2022 (Why do they do it?)

- "…most prosecutors who engage in the suppression of evidence do so 'not because they are hatching diabolical plots' but instead 'out of what they regard as the noblest of motives; **the need to convict the guilty and reduce the scourge of crime**.'" Doc. 245: 3 *U.S. v. Alrai,* citing Joseph F. Lawless, *Prosecutorial Misconduct: Law, Procedures, Forms*.

- Prosecutors are public servants. In many cases, prosecutors forego the larger financial rewards that may be offered in the private sector because they want to serve their communities.
- This includes seeking justice for victims of homicides, frauds, robberies, assaults and child sexual abuse. **We also are tasked with targeting the drug traffickers who flood our communities with fentanyl, methamphetamine, and other dangerous drugs.**
- **We are representing all the residents of the Granite State as we pursue justice and protect public safety.**

Dismissal- with Prejudice

- **Prejudicial reckless misconduct may warrant dismissal** because "[o]therwise, a prosecutor who sustains an erroneous view of her *Brady* violations over time will be inadequately motivated to conform her understanding to the law." *United States v. Ahrensfield*, 2011 WL 13289665, at *4 (D.N.M., 2011); quoting *Government of Virgin Islands v. Fahie*, 419 F.3d 249, 256 (3rd Cir. 2005);
- "A **pattern of constitutional violations** may indeed be used to show recklessness on the part of a prosecutor."

"How many times does the Department of Justice have to be told you've got to find exculpatory evidence and turn it over to the defense?"

- Giglio v. U.S., 405 U.S. 150 (1972) - Evidence of any understanding or **agreement as to a future prosecution** would be relevant to credibility of cooperating witness.
- U.S. 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.
- U.S. 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
- U.S. 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.
- U.S. 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.
- U.S. v. Miller, (5th Cir. 2008) - *Brady* violation because **undisclosed referral letter** could have been used to impeach witness at trial.
- Conley v. U.S., 415 F.3d 183, 187 (1st Cir. (2005) -Government failed to disclose impeachment evidence, including the **FBI memorandum regarding credibility of cooperating witness**, in its possession prior to trial.
- U.S. v. Aviles-Colon, 536 F.3d 1, 20 ((1st Cir. (2008) – The **suppressed DEA reports regarding the cooperating co-defendant**, or evidence developed on the basis of the DEA reports, could have been important for impeachment purposes at trial.
- U.S. v. Theodore Stevens, (2009) – Government moved to dismiss post-conviction based on government suppression of multiple exculpatory evidence including **evidence that undermined the credibility of a key government witness**. An investigation ordered by the judge concluded that federal prosecutors engaged in "significant, widespread and, at times, intentional misconduct."
- U.S. v. Wilson, (D.C. Cir. 2010) - Failure to disclose **internal investigation of police officer/witness** impeachable evidence because it demonstrated incentive to cooperate with government.
- U.S. v. Ignasiak, (11th Cir. 2012) - **Failure to disclose payment to government's expert witness** and **his excused criminal activity** constituted impeachment evidence.
- U.S. v. Sadr Hashemi Nejad, 521 F. Supp. 3d 438 (S.D.N.Y. 2021) – Court vacated conviction based on joint motion to dismiss based on repeated failures to disclose exculpatory evidence. Once the government discovered the non-disclosure, "it **did not forthrightly inform the defense of the existence**" of the document and instead **"undertook to 'bury it'** in a list of previously disclosed documents."
- U.S. v. Bundy, 968 F.3d 1019 (9th Cir. 2020) Dismissal with prejudice warranted after mid-trial disclosure of **evidence that both supported the defendant's theory of the case and undermined the government's case.**
- U.S. v. Imran Alrai, (2021) - Case No. 1:18-cr-00192-JL New trial ordered due to multiple *Brady* violations including **suppression of evidence material to credibility of key government expert witness**. (*See* Doc. 269:3 (Footnote 2) citing State v. Laurie, (1995) as further evidence of pattern of constitutional violations.)
- U.S. v. Nathan Craigue (2021) - Case No. 1: 19-cr-00142-LM Government moved to dismiss mid-trial when it was revealed that a **key government witness was paid for his grand jury testimony**.

Do we see a pattern here?

- A pattern of calling witnesses with significant credibility issues and then "turning a bind eye" towards those issues by either failing to investigate those credibility issues and/or failing to disclose those credibility issues.
- **In their refusal to inquire about the above requested information, the prosecution turns a "blind eye to the manifest potential for malevolent disinformation" being presented to the jury as it is "tactically advantageous" for them to do so**. *Commonwealth of Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1114 (9th Cir. 2001). Courts have fashioned a set of precise rules designed "prophylactically to prevent damaging false testimony from happening in the first place." *Id*. These rules include the prosecutor's "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case. *Id*. at 1117, quoting *Kyles v. Whitley*, 514 U.S. at 437.

Use the above quote to argue that…

- *Brady* rules are not just there to protect the "drug traffickers who flood our communities with" illegal drugs or those alleged to have committed a "massive fraud" against a charity.
- These rules serve to protect the integrity of the criminal justice system and the disclosure of prosecutorial misconduct is important to give the public "assurance that the proceedings [are] conducted fairly to all concerned" and discourage perjury and "misconduct of participants." *quoting U.S. v. Craigue 19-cr-142-LM 11/23/21*
- *https://www.nhd.uscourts.gov/sites/default/files/Opinions/2021/21NH181P.pdf*