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Section 1983 Cases Arising from Criminal Convictions

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Cover Page Footnote

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SECTION 1983 CASES ARISING FROM CRIMINAL CONVICTIONS

*Gail Donoghue*¹

There are many cases where the reversal of a criminal conviction gives rise to a civil action under Section 1983.² In such cases, a plaintiff seeks to be compensated for time spent in prison as well as other damages normally claimed under Section 1983. What I would like to do today is point out some of the issues I think you should be aware of by reference to a case that I spent a great deal of time litigating.

Factually, our case involved a former member of the Black Panther Party who had been accused and prosecuted for shooting two police officers with a machine gun on Riverside Drive in 1971. He was tried twice for this crime. The first trial resulted in a hung jury and the second trial in a conviction. At the time that the police shootings took place, there were widespread incidents of police officers being shot across the United States. As a result, the FBI had become involved in a nationwide investigation of the Black Panther Party and other militant groups that advocated the

¹ J.D., Pace Law School, 1980; L.L.M., New York University School of Law, 1984. Ms. Donoghue taught at Pace Law School from 1982 to 1984. She then worked as an associate for three years at Warshaw, Burstein, Cohen, Schlesinger and Kuh. Since 1987, Ms. Donoghue has worked at New York City's Law Department's Office of the Corporation Counsel where she maintains the position of Chief of the Special Federal Litigation Division. Specifically, she heads the division that serves to defend the City and its officials in civil rights cases brought in federal court. In 1995, the Corporation Counsel presented Ms. Donoghue with a special recognition award for outstanding service. In addition to her vast responsibilities, Ms. Donoghue also serves on the faculty of Practising Law Institute's Conference on Section 1983 Civil Rights Litigation and Continuing Legal Education programs at the Association of the Bar of the City of New York.

² 42 U.S.C. § 1983 (2000):

Every person, who under color of any statute, ordinance, regulation, custom, usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action of law, suit in equity, or other proper proceeding for redress....

shooting of police officers in their literature and in their rhetoric. The FBI conducted an intense investigation separate and apart from the police department's investigation. The FBI developed an extensive file and ultimately prepared a report consisting of approximately 103 pages of individual witness statements taken by FBI agents. At some point, the report was provided to the Chief of the Police Department. However, this particular report was never produced to the criminal defense. It contained statements made to the FBI by the main witness against the plaintiff, which had never surfaced during the criminal prosecution. The plaintiff discovered this report because of circumstances that had nothing to do with the criminal proceeding. He came into possession of these documents as a result of discovery in a Section 1983 action that he brought against the FBI and the City of New York for engaging in a counterintelligence program against the Black Panther Party. The 103 page report contained material which should have been available to the plaintiff during the criminal prosecution. We were never able to determine the path the report took from the time it was provided to the Chief of the Department until it was subsequently discovered in the civil litigation. However, it was found that this packet surfaced in other prosecutions of other members of the Black Panther Party and was turned over in the course of those prosecutions.

The main witness against the plaintiff in his criminal case was a young woman who had allowed her home to be used as a safehouse by the plaintiff and other members of his group. As part of her testimony, she claimed to know of the plans for the shooting of the police officers. She testified in detail about the events on the night of the shooting. Her testimony included: what time the plaintiff left, that he left with a machine gun, and that when he returned home she helped him clean out spent bullet casings from a car that she believed was used in the shooting. This was the only testimony against the plaintiff directly tying him to the shooting of the police officers on Riverside Drive.

The interesting aspect about these cases when they come up in the civil context, is which questions are for the jury and which questions are for the judge. In the criminal context when you have

a *Brady*³ issue, the judge decides in the first instance whether or not documents constitute *Brady* material and should be disclosed. If the judge makes the determination that the plaintiff was entitled to those materials, he sets aside the conviction so that the plaintiff can have a new trial with the benefit of the *Brady* material he should have had the first time. The jury in the second criminal trial will then determine guilt or innocence and thus whether the *Brady* material would have made a difference. It is not that simple in the context of Section 1983 claims. Should the civil jury in a Section 1983 action decide in the first instance whether the materials were *Brady* and should have been turned over, or should the judge make that determination?

The standard for whether or not material is *Brady* contains a number of factors to be considered.⁴ One important factor is whether or not this material would give rise to a reasonable probability that the verdict would have been different.⁵ Who is going to decide that in the context of a civil action alleging a *Brady* violation? In the case I have described to you, this question had still not been decided after three full days of motions *in limine* before the district judge. We went through hundreds of documents but never reached the question of whether any of it was *Brady*. In requesting that the district judge make *Brady* determinations, we analogized it to the criminal context where the Court makes the initial decision.⁶ It was our belief that certain of these materials were not *Brady*, and thus could be admitted as part of the plaintiff's case. That particular issue got deferred and the case ultimately settled without any resolution.

As a civil litigant raising a *Brady* claim, a plaintiff must prove that the *Brady* violation resulted in an unfair trial or unjust

³ See *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that suppression of evidence by the prosecution that is favorable to an accused who has requested it violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution).

⁴ See *United States v. Hughes*, 71 F. Supp. 2d 605, 610 (N.D. Tex. 1999). The defendant must prove: "1) the prosecution suppressed or withheld evidence; 2) the evidence was favorable to the defense; and 3) the evidence was material to either guilt or punishment." *Id.*

⁵ See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

⁶ See *Brady*, 373 U.S. at 83.

conviction.⁷ Therefore, the question that must be presented to the jury is whether or not the *Brady* material would have made a difference had it been available during plaintiff's trial. However, I see no reason why the court should not make the initial determination as to whether something is *Brady*. When you have a civil case based on *Brady*, you are not likely to have the intervening criminal court jury, because nine times out of ten, the prosecution declines to re prosecute after a reversal on *Brady* grounds. In our case, the plaintiff did not discover the *Brady* material until approximately ten years after his conviction. By the time the discovery was made, the sheer passage of time had caused the loss of both physical evidence and witnesses. It was on that basis that the prosecutor in our case made a determination not to retry the case. We believed, after years of working on this case, that the jury in the civil trial would have had great difficulty in deciding whether the *Brady* material would have made a difference and that simply presenting the evidence posed enormous trial management problems.

There were many problems that arose during the course of the trial. There were two criminal trials in our case. They each lasted a month. They each had approximately seven thousand pages of testimony. In both of these trials, there were nearly a thousand pages of cross-examination of the main prosecution witness against the defendant. How do you present a jury with all that testimony so it can assess the significance of the undisclosed statements in the context of full trial record? How do you present a jury with seven thousand pages of testimony? Logistically, it is an unbelievable nightmare. The district judge was not sure how to handle this. The plaintiff's attorney suggested summaries, which sounds good on the surface, but whose summaries? How long would it take to negotiate an agreement about what should be in the summaries? It is hard to find language that would not suggest innuendos, implications, and inferences that would be unacceptable to one side or the other. While summaries seemed like a possibility, it was apparent that they were not the answer.

⁷ See *Kyles*, 514 U.S. at 434. ("The question is not whether the defendant would more likely than not have received a different verdict with the concealed evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

The way we decided to handle the situation, because we were ready to start trial, was to offer all the trial testimony into evidence, and use whatever charts would be needed to highlight important portions of the record in the closing arguments. In the weeks before the trial, we started planning a power point presentation for closing arguments. Our plan was to put statements that were supposedly *Brady*, (which plaintiff said would have resulted in his acquittal), into context by showing a number of things: first, there was similar testimony by other witnesses; second, the witness herself had made similar statements in reports that were provided to the defense and third, there was other corroborating evidence. The use of a power point presentation would help keep the jury focused through a very detailed presentation.

Another complicated question that comes up for trial, is when guilt or innocence is relevant and hence, when testimony that bears on guilt or innocence in the underlying criminal proceeding may be admitted. Arguably, a *Brady* civil case should be limited to the *Brady* material that was not turned over and the trial record. A jury should be able to decide based on the trial record alone whether the *Brady* material would have made a difference. In a case where the plaintiff's claim is limited to the failure to provide the *Brady* material, evidence about whether or not the plaintiff is guilty or innocent should not be admissible. There may be circumstances, however, where the plaintiff's allegations are more complicated. In our case, the plaintiff took the position that he was an innocent man who was framed as a result of a plot instigated by the district attorney in conjunction with the New York City Police Department and the FBI. The plaintiff opened the door on his innocence or guilt, making it possible to offer some very damaging testimony about his guilt. Another aspect of our case was that the plaintiff considered himself a political prisoner and gave a lot of interviews, and made a lot of statements after his conviction, some which were incriminating. In the civil action, he sued for First Amendment violations because of the counterintelligence program of the FBI. He gave a deposition in which he made admissions about what he was doing the night the officers were shot which were at odds with innocence and corroborated testimony given against him at trial. This was relevant evidence in our case, because the plaintiff went beyond *Brady* allegations in claiming

innocence and a widespread conspiracy to frame him. We intended to offer all his testimony by way of cross-examination. If the claim is limited, however, to whether the plaintiff got a fair trial, evidence of guilt or innocence that developed subsequent to the prosecution should not be relevant.

Another issue is whether or not collateral estoppel applies with respect to issues litigated in the context of the underlying criminal proceeding. The way these cases often come up is in the context of a motion to vacate the conviction. When the court reviews that motion, it may apply a state law standard as to what must be turned over, not necessarily a *Brady* standard. You should be sensitive to whether there are different standards under the criminal law in your state than under *Brady*, especially if the decision to set aside the verdict turned entirely on state law. For example, under New York Law, any prior statement of a trial witness must be turned over.⁸ This type of material is called *Rosario* material. It does not have to be exculpatory or inconsistent as under *Brady*. We pressed the issue of the different standards in attempting to exclude documents during the motion *in limine*. We argued that there were a lot of *Rosario* statements, which were not *Brady*, and hence should not come into evidence. The plaintiff however, argued that the statements were relevant to his claims of prosecutorial misconduct and conspiracy.

The issue of collateral estoppel turns on the established principles of law, the most important of which is whether the municipality was a party to the criminal proceedings. In our case, the municipality was not a party to the criminal prosecution because the district attorney is a state actor. However, the individual police officers who had originally been sued had been dismissed from the action, and the district attorneys had been dismissed because they had absolute immunity. Thus, the only remaining defendant was the municipality. We argued that we were not collaterally estopped by anything that had taken place in the criminal proceeding and the court agreed. But let us suppose, if the district attorney remained in the case, should he be estopped? Was he a party to the criminal prosecution? I do not know what

⁸ *People v. Rosario*, 9 N.Y.2d 286, 173 N.E.2d 881, 213 N.Y.S.2d 448 (1961) (holding any statement made by a government witness must be made available to the defense for purposes of cross-examination and impeachment).

the answer is to that question. I think it is an interesting issue, because the district attorney is the prosecutor, and the prosecution represents the people, and the people are a party in a criminal proceeding.

Discussion Between Participants

PROFESSOR SCHWARTZ: The district attorney is sued personally under the *Brady* claim, correct?

MS. DONOGHUE: Under *Brady*, it is hard to keep the prosecution in the case because generally the decision whether or not to turn a document over comes within the prosecutorial function. However, he could remain in the case where other prosecutorial misconduct is claimed.

PROFESSOR SCHWARTZ: If the district attorney is sued officially, then the question is going to be whether the district attorney is a municipal policymaker. If so, then it is a claim against the municipality, so collateral estoppel would not apply. However, if the district attorney is a state policymaker, then it becomes a claim against the state, and the Eleventh Amendment would come into play.

MS. DONOGHUE: Trying to get your case in a posture where individual defendants have immunity is a good position because it forces the plaintiff to prove a *Monell* case.⁹ The plaintiff would not only have to prove there was a *Brady* violation, which resulted in an unfair trial, but also that there was a failure to train or supervise with respect to the turning over of *Brady* material. The failure to train or supervise can be a difficult standard to meet because most prosecutor's offices have extensive training programs on *Brady*, provide substantial supervision and have practices with respect to supervision which are followed. It is

⁹ See *Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 660 (1978) (holding that a local government may not be sued under § 1983 based solely on the fact that an employee or agent of the local government inflicted the injury. The government can, however, be held responsible when the injury was inflicted through the execution of a government policy or custom).

difficult to prove a widespread practice of withholding *Brady*, because what evidence is the plaintiff going to have to prove that the *Brady* material was withheld? In our case, the plaintiff intended to offer a list of reported decisions in which courts had found that materials were withheld. The plaintiff came up with about twenty decisions over a twenty-year period for all five county prosecutor's offices. We made a motion *in limine* to keep these decisions out on various grounds. We argued that twenty reported decisions spanning a period of twenty years could not be the basis for liability for the following reasons: first, it was hearsay; second, it would result in the litigation of each and every one of those cases to determine the circumstances under which material was withheld; and third, there are well over four-hundred thousand criminal proceedings. Therefore, twenty reported decisions of *Brady* violations does not constitute a widespread practice.

PROFESSOR SCHWARTZ: Did the judge give any indication as to how he would rule on whether negligence would be sufficient to make out a *Brady* violation in a Section 1983 claim or did the plaintiff have to prove intent? In the criminal sphere, negligence would be enough, but the Supreme Court has held that in Section 1983 due process claims negligence is not enough.¹⁰

MS. DONOGHUE: I think the judge determined that the standard was going to be intent. The plaintiff was going to have to show that there was an intent to withhold these materials. The plaintiff had a negligence claim. However, because he had not filed a timely notice of claim, that negligence claim was barred. This was a blessing for us, because we thought the most the plaintiff could show here was that there may have been some negligence in how these documents were handled. There was no way the plaintiff was going to show a deliberate, intentional policy on the part of the district attorney.

PROFESSOR SCHWARTZ: The Fourth Circuit decided a case on this issue. The judges split right down the middle, half of

¹⁰ *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

them said the plaintiff has to show intent, the other half said negligence is sufficient.¹¹

MS. DONOGHUE: Under *Brady*, a plaintiff does not have to show anything. The mere fact that material was not turned over is all a plaintiff has to show. Therefore, the intent element is an interesting one. If you get one of these cases, you have to hit the books. You have to know *Brady* pretty well, as well as the criminal procedure law in your state. You will have to address immunity issues and trial presentation issues. We settled our case for less than a half million dollars to compensate for twenty-five years of incarceration and twenty-five years of attorney's fees. To the extent we could not really definitively establish why this packet of FBI documents had not reached the plaintiff, we felt uncomfortable. We thought a jury might have been sympathetic to the fact that the plaintiff was charged with a serious crime and should have had the documents. We thought that the mere fact that the plaintiff did not have the packet might have led the jury to compensate him. We were pretty confident that the jury would not return a runaway verdict either, because the evidence of guilt was strong.

Another case that I worked on during its pre-trial stage was *Baba-Ali v. City of New York*.¹² A lot of money was on the table in this case. It involved a man who was prosecuted for sexual abuse of his child.¹³ The prosecution relied on the medical examination by a city physician who said that the child had been raped by her father.¹⁴ In subsequent years, that evaluation was discredited.¹⁵ His conviction was reversed but he was not prosecuted. We were concerned about this case. A lesson was learned from what happened in the civil trial. The jury came away feeling that the doctor who had performed the discredited medical evaluation was the only person in this child's life who cared about

¹¹ *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000). An equally divided en banc court held that a negligent miscommunication between officers and the prosecutor did not deprive the plaintiff of any Fourteenth Amendment right, and, therefore, there was no § 1983 liability. *Id.* at 658.

¹² 979 F. Supp. 268 (S.D.N.Y. 1997).

¹³ *Id.* at 272.

¹⁴ *Id.* at 271.

¹⁵ *Id.* at 272.

what might have happened to her. As a result, the jury was unwilling to say that what the doctor did was deliberate and intentional lying in order to convict this man of a crime he did not commit. I think the guilt or innocence aspect is always there. Jurors do not want to give money to someone they feel committed a crime. The problem, however, is what the jury is going to be asked to decide. The proper jury instruction is that: you must find by a preponderance of the evidence that the jury in the criminal trial would not have found the plaintiff guilty beyond a reasonable doubt if it had been aware of the *Brady* material.¹⁶ I can not tell you how many hours we talked about this, how many pizzas and bottles of soda went down trying to figure out how we were going to ask the judge to deal with this issue. They are great cases, lots of work but very challenging.

¹⁶ See *Strickler v. Greene*, 527 U.S. 263, 280 (1999); see also *U.S. v. Bagley*, 473 U.S. 667, 683 (1985).