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IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

COMMONWEALTH OF VIRGINIA

V.

GEORGE HUGUELY

SUPPLEMENTAL AUTHORITIES

DECISION WHETHER TO PERMIT BRADY HEARING

I.

Relief under Brady still requires due diligence

It appears to the Commonwealth as a result of the proceedings of July 31, 2012 that the Court is being urged to adopt an interpretation of leading Brady-related cases that is inconsistent with the decisions themselves and inconsistent with the manner in which they have been understood by other courts in subsequent cases. The principal cases at issue include United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985) and Kyles v. Whitley, 514 U. S. 419, 115 S. Ct. 1555 (1995). The defense suggests that 'so called' modern cases in the Brady line of authority represent a break with prior precedent and dispense with any need for the accused to exercise due diligence to investigate his own case, even when it comes to information that is readily discoverable and originates with non-state actors.

Among cases decided before Bagley and Kyles, for example, is the case of United States v. Bi-Co Pavers, Inc., in which it was alleged that the government failed to turn over a letter favorable to the defendant before trial. The letter in question was sent by Bi-Co's civil legal counsel to the government to correct information contained in an affidavit that was given to the

grand jury. The company's criminal counsel was not informed of the letter by the government until after the completion of the trial. Regarding this alleged Brady violation the Court wrote,

> Bi-Co also argues that the government's failure to provide a copy of the letter to its counsel violated the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Brady requires that the government disclose material evidence favorable to the defendant, suppression of that evidence by the prosecution will result in a reversal of the conviction. United States v. Brown, 628 F. 2d 471, 473 (5th Cir. 1980). The government is not obliged, however, to furnish a defendant with information he Could have obtained with any reasonable diligence. United States v. Prior, 546 F. 1254, 1259 (5th Cir. 1977). As noted above the letter here could have been obtained by Bi-Co with reasonable diligence, and, therefore no Brady violation has occurred.

United States v. Bi-Co Pavers, Inc., 741 F. 2d 730, 736 (5th Cir. 1984).. While the Bi-Co example might be an especially clear one relating to the due diligence duty to investigate, this line of authority is followed today.

Post-Bagley and post-Kyles cases containing such language are commonplace. If Bagley and Kyles were intended to eliminate the due diligence requirement from Brady doctrine, the cases themselves do not say so and they certainly have not had that effect. Simply put, the Bagley and Kyle cases don't say what the defendant suggests of them.

The Bagley case addressed specifically the lower court's conclusion that the failure to disclose evidence favorable to the defense required automatic reversal. 105 S. Ct. at 3379 and 3385. In its decision the Supreme Court attempted to formulate from among different standards a single standard of materiality for Brady purposes. Although no majority joined in this portion of the Court's opinion the Bagley decision resulted in language that has become accepted as a component of Brady doctrine on the issue of materiality. A "constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. 105 S. Ct. at 3381. The Court found,

> ...the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused." The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

105 S. Ct. at 3383.

Bagley does not address the due diligence requirement of Brady doctrine. Neither does Kyles. The Kyles decision is no more than a refinement of the materiality standard articulated in the Bagley case, perhaps because the specific rule suggested in Bagley failed to receive support from a majority of the Court. The Kyles Court found that there was reason to "question whether the Court of Appeals evaluated the significance of the undisclosed evidence under the correct standard, 115 S. Ct. at 1560 and 1569, and took the opportunity to clarify the materiality requirement that was articulated in the Bagley decision.

Scores of cases decided after Bagley and Kyles demonstrate the continued vitality of the due diligence aspect of Brady doctrine. There is an analytical distinction among cases, relating to whether the absence of due diligence constitutes a substantive and procedural bar to Brady relief, or whether the absence of due diligence is a component of the "suppression" prong of the Brady standard. But both lines of cases maintain the due diligence requirement in the post-Bagley and post-Kyles era. On the one hand, evidence cannot be said to have been suppressed 'if the defendant knows or should know of the essential facts that would enable him to take advantage of it.' United States v. Brown, 650 F. 3d 581, 588 (5th Cir. 2011), quoting United States v. Skilling, 554 F. 3d 529, 575 (5th Cir. 2009). On the other hand, Judge J. Harvey Wilkinson's decision in the case of Stockton v. Murray, is an example of the due diligence issue

described in the language of a substantive and procedural bar to Brady relief. Being "(a)ware of the existence of potentially exculpatory information, a defendant cannot sit idly by in the hopes that the prosecution will discover and disclose that information and, when the prosecution does not do so, seize upon the prosecution's conduct as grounds for habeas relief." 41 F. 3d 920, 927 (4th Cir. 1994). More recently, the Third Circuit made clear in the case of United States v. Pellulo, 399 F. 3d 197 (3rd Cir. 2005) that,

> Our jurisprudence has made clear that *Brady* does not compel the government" 'to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.'" *Starusko*, 729 F.2d at 262 (quoting *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir.1979)); *see also United States v. Dansker*, 565 F.2d 1262, 1265 (3d Cir.1977). It is equally clear, however, that defense counsel's knowledge of, and access to, evidence may be effectively nullified when a prosecutor misleads the defense into believing the evidence will not be favorable to the defendant. *See, e.g., United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir.1986) (finding suppression where government appraised defense counsel of the existence of certain tapes but also stated that those tapes would be of "no value"); *Hughes v. Hopper*, 629 F.2d 1036, 1039 (5th Cir.1980).

399 F. 3d at 213. The Pellulo case is factually distinct from the circumstances of the Huguely case, but the substance of the due diligence requirement is the same.

In Hoke v. Netherland, 92 F. 3d 1350 (4th Cir. 1996), the Fourth Circuit reversed the award of a writ of *habeas corpus* and remanded the case for reinstitution of the death penalty in a case in which three witness interviews supporting a position taken by the defendant were discovered after the completion of the trial. The statements related to previous consensual relations between the deceased and other individuals on prior occasions and were consistent with the defendant's contention that he had consensual relations with the deceased before the offense was committed. Applying the due diligence requirement of Brady, the Fourth Circuit found,

> ...The strictures of Brady are not violated, however, if the information allegedly withheld by the prosecution was reasonably available to the defendant. As we held in United States v. Wilson, 'where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a

> defendant is not entitled to the benefit of the Brady doctrine.' 901 F. 2d 378, 381 (4th Cir. 1990) (citation omitted). Here there is little doubt that had Hoke undertaken a 'reasonable diligent' investigation, he would have learned of Jones, Eastes, Griesert, and their relationships with Stell.

92 F. 3d at 1355. Under the circumstances the court found that the defense conducted only limited investigation into the deceased's prior relationships and that the police themselves learned of the relationships from sources with whom the defense attorney spoke or were readily accessible to the defendant. 92 F. 3d at 1355-1356. Due diligence would have led the defendant to the information he sought. In its absence he was not entitled to Brady relief.

The same approach was subsequently taken by the Fourth Circuit in United States v. Roane, 378 F. 3d 382 (4th Cir. 2004), which involved an allegation that witness statements providing the defendant with an alibi at the time of the offense were withheld in violation of Brady. It was not in dispute that the statements were withheld. However, citing the Wilson case previously provided to the Court by the Commonwealth, the Fourth Circuit ruled,

> ...Tipton's Brady claim must fail, however, because, 'where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the Brady doctrine.' United States v. Wilson, 9021 F. 2d 378, 381 (4th Cir. 1990). We have explained that information actually known by the defendant falls outside the ambit of the Brady rule. Fullwood v. Lee, 290 F. 3d 663, 686 (4th Cir. 2002). Obviously, Tipton knew who he was with on the evening of the Talley murder - he had no need for the Government to provide him with such information. Thus, no Brady violation has been shown, and we affirm the district court's ruling on the issue.

378 F. 3d at 402.

In addition to the above described cases, the due diligence requirement of Brady doctrine is clearly applicable to cases in the post-Bagley and post-Kyles eras. Among representative cases are included:

Owens v. Guida, 549 F. 3d 399 (6th Cir. 2008) Alleged Brady violation from failing to turn over letters between deceased husband and his paramour. Letters could have helped prove the relationship. Held no Brady violation as defendant knew of essential facts and could have proved the relationship through other sources.

Bell v. Bell, 512 F. 3d 223 (6th Cir. 2008) Alleged Brady violation from failing to disclose sentencing records of a cooperating witness. Held that sentencing records were available to defendant from another source.

Boss v. Pierce, 263 F. 3d 734 (7th Cir. 2001) Alleged Brady violation involved information police received from a defense witness. Held that reasonable diligence does not require counsel to ask witnesses about matters for which they could not reasonably be expected to have knowledge.

Westley v. Johnson, 83 F. 3d 714 (5th Cir. 1996) Alleged Brady violation from failing to provide copy of witness testimony in a related case. Held that transcript not suppressed because it was reasonably available from due diligence.

Barnes v. Thompson, 58 F. 3d 971 (4th Cir. 1995) Alleged failure to disclose information regarding the location of a gun at a crime scene proximate to the victim's body. Held that due diligence would have led attorney to attend the codefendant's trial and interview a police officer with knowledge of the issue.

United States v. Kluger, 794 F. 2d 1579 (10th Cir. 1986) Bank documents allegedly withheld that would have assisted in establishing a good faith defense in a bank fraud case. Held that information contained in the documents was readily available to defendant's from other sources, even though the documents themselves would not have been.

II.

The Virginia cases cited by the defense do not undermine the due diligence requirement of Brady

The case of Tuma v. Commonwealth has been appealed to the Virginia Supreme Court. The case of Bly v. Commonwealth, 280 Va. 656, 702 S.E. 2d 120 (2010), relates exclusively to the issue of materiality.

The case of Workman v. Commonwealth, 272 Va. 633, 636 S.E. 2d 368 (2006), does not undermine the existence of a due diligence requirement. Had the existence of the due diligence requirement been challenged the Workman case provided the means by which to address that issue. The question of due diligence is addressed in the opinion only to the extent that the Court found that "Workman cannot be faulted for relying on the Commonwealth's open file policy and cannot, on these facts, be found to have failed to exercise reasonable diligence." 272 Va. at 649. The suppressed statements at issue were obtained by law enforcement authorities. It was conceded that they were not disclosed. The first statement was obtained during the investigation of an unrelated case and never became part of the investigative file in the Workman case. 272 Va. at 641-644. Under the facts of the case it is unsurprising that the Court did not fault the diligence of defense counsel.

Respectfully submitted,

Warner D. Chapman
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CERTIFICATE:

I, Warner D. Chapman, hereby certify that true copies of the foregoing Supplemental Authorities were delivered this 7th day of August 2012 to counsel for the Defendant, Francis McQ. Lawence and Rhonda Quagliana, at 416 Park St., Charlottesville, Va 22902.

Warner D. Chapman