Florida State University Law Review

Volume 7 | Issue 2 Article 4

Spring 1979

State v. Sobel, 363 So.2d 324 (Fla. 1978)

Michael T. Webster

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation

Michael T. Webster, *State v. Sobel, 363 So.2d 324 (Fla. 1978)*, 7 Fla. St. U. L. Rev. 311 (1979) .
https://ir.law.fsu.edu/lr/vol7/iss2/4

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

CASE COMMENTS

Constitutional Law—DUE PROCESS NOT VIOLATED BY STATE'S DESTRUCTION AND NONDISCLOSURE OF TAPE RECORDING OF CRIMINAL TRANSACTION—*State v. Sobel,* 363 So. 2d 324 (Fla. 1978).

In *State v. Sobel*[1] the Florida Supreme Court found that the prosecution met its requisite burden in showing that the accused was not prejudiced by the state's inadvertent destruction of a tape recording of the criminal transaction for which the defendant was charged. The court, however, failed to emphasize the need for systematic procedures that could be followed by the various state law enforcement agencies in order to preserve tape recordings and other discoverable evidence. Moreover, the court failed to clearly mandate that sanctions would be imposed on the law enforcement agencies for failure to promulgate such preservation procedures.

Working with a confidential informant, Miami police officers planned a controlled drug buy from Robert Sobel in order to gather incriminating evidence against him. A policewoman, Officer English, was assigned to pose as the informant's girlfriend during the drug buy. Prior to the prearranged meeting, Officer English was outfitted with an electronic transmitter. Other officers were to be stationed near the site of the buy in a car equipped with receiving and recording equipment.[2]

Pursuant to the plan, Officer English and the informant went to the Grove Pub in Coconut Grove, which was the site of the prearranged meeting with Sobel. When Sobel arrived at the pub, he and the informant had a discussion out of the presence of Officer English. She did not hear the conversation, nor did she hear Sobel make any inculpatory statements as Sobel, the informant, and Officer English walked from the pub to Sobel's car. The drug sale took place in the car after it had been driven from the pub.[3]

Three police officers, Hampton, Jewett, and Gayle were stationed in the surveillance car.[4] Officer Hampton testified that she heard bits and pieces of conversation through the receiver as Sobel and the others walked to Sobel's car although she did not remember exactly what she heard.[5] Officer Gayle testified that he could not make out

---

1. 363 So. 2d 324 (Fla. 1978), *rev'g,* 349 So. 2d 747 (Fla. 3d Dist. Ct. App. 1977).
2. *Id.* at 326.
3. *Id.*
4. Brief of Petitioner on Merits at 12. The respondent adopted the petitioner's statement of the facts. Brief of Respondent on Merits at 2.
5. Brief of Petitioner on Merits at 12.

any particular conversation through the receiver and turned the recorder off shortly after Sobel's car had been driven from the pub. He also testified that the surveillance car attempted to follow Sobel's car, but was blocked by traffic.[6]

Officer Gayle was the only person to play back and hear the recording after returning to the police station.[7] He testified that he heard only noises and static and "nothing that was clear enough for me to understand or make sense [*sic*]."[8] Officer Gayle then put the tape back in the reusable tape bin. From there, the tape was either lost or recorded over. The transmitter and receiver were tested at the police station, found to be malfunctioning, and submitted for repair.[9]

A fourth person, Sal Calcaterra, joined Sobel and the others in Sobel's car before leaving the pub.[10] Sobel drove, and Calcaterra was in the right front seat of the car. The informant and Officer English were in the back seat.[11] Calcaterra removed two packets of drugs from his person and handed them to the informant.[12] Both the informant and Officer English agreed that Sobel never handled the drugs nor the money that was paid for them. They both testified that Sobel took part in a discussion over the price of the pills although neither remembered Sobel's exact words. Sobel denied that he took part in any conversation regarding the drugs.[13]

Robert Sobel was later charged on a two-count information with sale or delivery and possession of a controlled substance.[14] Prior to the trial, the state filed a form discovery response indicating that Sobel had not been the subject of any electronic surveillance. Later, during the depositions of Officers English and Hampton, the defense learned of the electronic surveillance and the tape recording.[15] The defendant then filed a motion to dismiss the information on the ground that the police had destroyed the tape recording of the criminal transaction. The trial court found the recordings to be valueless and thus denied the motion to dismiss.[16] Although the defense did not move to exclude the testimony of Officer English or the informant at trial, a motion to dismiss was made again following the testi-

6. *Id.* at 6.
7. 349 So. 2d at 748.
8. Brief of Petitioner on Merits at 14.
9. 363 So. 2d at 326.
10. Calcaterra was charged as a codefendant. He was acquitted in a separate trial. 349 So. 2d at 748 n.1.
11. *Id.* at 748.
12. Brief of Petitioner on Merits at 3.
13. 349 So. 2d at 748.
14. 363 So. 2d at 325.
15. Brief of Petitioner on Merits at 10.
16. *Id.* at 10-11, 15.

mony of Officer English. The trial judge again denied the motion and restated that the tapes were valueless to the defense.[17] The jury found Sobel guilty of possession and sale of a controlled substance, lysergic acid.[18]

On appeal, Sobel argued two errors to the Third District Court of Appeal. First, he argued that he was charged with the sale and possession of lysergic acid, while the proof adduced at trial was that the substance was in fact lysergic acid diethylmide (LSD).[19] Since the two substances are listed in separate schedules of the controlled substance statute,[20] Sobel contended that there was a fatal variance between the charge and the proof presented and that the variance required reversal of his conviction.[21] Second, Sobel argued that he was denied due process since the police destroyed the tape recording of the transaction which was the basis of the charges for which he was convicted.[22] Sobel alleged that the recording would have corroborated his claim that he was not actively involved in the sale and that he never possessed the illegal substance.[23]

Without addressing the variance between the charge and the evidence presented at trial, the Third District Court of Appeal reversed Sobel's conviction. The court reasoned that because Sobel's conviction was based on the alleged inculpatory remarks that Sobel had made in the presence of Officer English and the informant, and because there was a dispute as to what was actually said, the tapes were considered critical to the defense. This fact, combined with conflicting testimony regarding the effectiveness of the transmitter and the mere possibility that the tapes could have served to corroborate Sobel's allegations warranted a holding by the appellate court that suppression of the tapes constituted a violation of due process requiring reversal of the conviction. The court stated that when a question arises concerning the materiality of evidence in the state's possession, it ordinarily would remand to the trial court for a determination of whether the omitted material would reflect on the defendant's guilt. Since the tapes had in fact been destroyed,

---

17. *Id.* at 15-16.
18. 349 So. 2d at 748.
19. *Id.*
20. *See* FLA. STAT. § 893.03(1)(c)9, (3)(a)7 (Supp. 1978).
21. 349 So. 2d at 748.
22. U.S. CONST. amend. XIV, § 1 provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

A violation of due process was found in Brady v. Maryland, 373 U.S. 83 (1963), where 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." *Id.* at 87.

23. 349 So. 2d at 748.

the court held that no such examination on the question of materiality was possible.[24]

The Supreme Court of Florida granted the state's petition for writ of certiorari to review the dismissal of the charges against Sobel.[25] The supreme court reversed the district court of appeal, holding that the trial court did not err in denying Sobel's motion to dismiss the charges against him, despite the destruction of the tape. Although the state conceded that the tape would have been discoverable under Florida Rule of Criminal Procedure 3.220(a)(1)(iii),[26] the supreme court did not impose any sanction authorized by Florida Rule of Criminal Procedure 3.220(j)(1).[27]

The Supreme Court of Florida purportedly based its decision in *Sobel* on two United States Supreme Court decisions: *Brady v. Maryland*[28] and *United States v. Agurs.*[29] In *Brady* two men, Brady and Boblit, were convicted of first-degree murder and sentenced to

---

24. *Id.* at 748-49.

25. 363 So. 2d 324. The writ was granted because there was a conflict between the Third District Court of Appeal's decision in *Sobel* and the decisions of the Second District Court of Appeal in State v. Smith, 342 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1977) and the Fourth District Court of Appeal in Ludwick v. State, 336 So. 2d 701 (Fla. 4th Dist. Ct. App. 1976).

Although two errors were argued on appeal to the Third District Court of Appeal, the court only addressed the denial of due process in reversing the conviction. The Florida Supreme Court, however, did address both points on appeal in reversing the appellate court thereby reinstating the conviction. In the interest of the scope and clarity of this comment, the author has elected to address only the denial of due process resulting from the destruction of the tape.

26. FLA. R. CRIM. P. 3.220(a)(1)(iii) provides that the prosecutor shall disclose to the defense counsel and permit him to inspect, copy, test and photograph the following information and material within the state's possession or control: "Any written or recorded statement and the substance of any oral statements made by the accused and known to the prosecutor, together with the name and address of each witness to the statement."

27. FLA. R. CRIM. P. 3.220(j)(1) provides:

> If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order such party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

Although the rule lists a full range of sanctions available to the trial court, the only effective sanction in a situation like *Sobel* is dismissal. As pointed out in United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), the sanction of excluding the testimony of the witnesses to the inculpatory statement would totally destroy the state's case and have the same effect as a dismissal. Even though the sanctions allowed under rule 3.220(j)(1) are expressed in discretionary terms, it is also true that the discretion of the court is limited by the constitutional concepts of due process. As stated by the Supreme Court in United States v. Agurs, 427 U.S. 97 (1976), the issue is not applying the rules of criminal procedure, but rather guaranteeing the defendant's right to a fair trial mandated by the due process clause of the fifth amendment to the Constitution. The Court expressly made their construction of that clause applicable to the states through the due process clause of the fourteenth amendment.

28. 373 U.S. 83 (1963).

29. 427 U.S. 97 (1976).

death. Prior to trial, Brady's counsel had specifically requested examination of any statements made by Boblit. The prosecution, however, withheld a document in which Boblit had admitted doing the actual killing. The Maryland Court of Appeal held that the suppression of the evidence by the prosecutor denied Brady due process of law, and thus remanded the case for a new trial on the question of punishment, but not on the question of guilt.[30] The Supreme Court upheld the Maryland Court of Appeal by stating: "We now hold 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."[31]

Brady was distinguished thirteen years later in *United States v. Agurs.*[32] Agurs, a young female, checked into a hotel with Sewell, a man who was carrying two knives. Fifteen minutes later, three employees heard Agurs screaming for help. As they entered the room, they found Sewell on top of Agurs trying to stab her in the chest. The employees separated the two and Agurs left the room. Sewell was dead on arrival at the hospital. An autopsy of Sewell showed that he had several deep stab wounds and a number of slashes on his arms and hands. A physical examination of Agurs one day after the incident revealed no cuts or bruises, except needle marks on her upper arm. At her trial, Agurs contended that her actions were taken in self-defense. She was convicted of second-degree murder.[33]

After the trial, the defense counsel learned that Sewell had a prior criminal record including guilty pleas to charges of assault and carrying a concealed weapon. The defense counsel moved for a new trial, asserting that the prosecution's failure to produce Sewell's prior criminal record (although defense counsel had made *no request* for the production of the prior criminal record) adversely affected Agurs' self-defense argument.[34] The trial court denied the motion for the new trial, but on appeal, the court reversed, holding that the jury might have returned a different verdict if they had known of Sewell's prior criminal record. The prosecution appealed and the Supreme Court reversed, holding that there was no due process violation. The Court reasoned that since the prior criminal record of Sewell was not requested by the defense, and since a review of the record still convinced the trial judge of Agurs' guilt

30. 373 U.S. at 83.
31. *Id.* at 87.
32. 427 U.S. at 103.
33. *Id.* at 98-100.
34. *Id.* at 100.

beyond a reasonable doubt, the conviction was valid.[35]

Generally the nature of the request for discovery of information held by the prosecution triggers the standards to be used by a court in determining the materiality of suppressed evidence and the existence of due process violations. As stated in *Agurs,* "[t]he test of materiality in a case like *Brady* in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made."[36] *Agurs* standards were held to apply when there had been *no request* and when there had been only a general request for exculpatory information. *Brady* standards apply when *specific requests* have been made.[37] The major difference in the two standards is that in *Agurs* the suppressed evidence must have been material to the issue of guilt alone,[38] while in *Brady* the suppressed evidence could be material to either guilt or punishment to constitute a violation of due process.[39] Thus the *Brady* standard is much broader than the *Agurs* standard.

As in *Brady,* the Court in *Agurs* did not consider the good or bad faith of the prosecution. Instead, the Court concluded that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[40]

In *Sobel,* there was a specific request made by the defense for electronic surveillance material.[41] That being the case, *Brady* standards of materiality should have been applied. Nonetheless, the Florida Supreme Court in *Sobel* chose to emphasize the language from *Agurs* defining the materiality of the suppressed evidence.[42] The

35. *Id.* at 114.

36. *Id.* at 106.

37. *Id.* at 106-07. *See Brady,* 373 U.S. at 87.

38. "[I]f the omitted evidence creates a reasonable doubt [of guilt] that did not otherwise exist, constitutional error has been committed." 427 U.S. at 112.

39. 373 U.S. at 87.

40. 427 U.S. at 110.

41. Brief of Respondent on Merits at 4.

42. The Florida Supreme Court, citing *Agurs,* stated:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.
>
> . . . .
>
> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity,

misapplication of the narrower *Agurs* materiality standards adversely affected Sobel's chances.[43]

In both *Brady* and *Agurs* the suppressed evidence was not destroyed, but merely made unavailable to the defense. Thus a post-conviction determination of the materiality of the suppressed evidence could readily be made by the trial court by physical examination of the evidence. In *Sobel*, however, the evidence was unavailable because it was destroyed by the state. Therefore, its materiality was largely a matter of conjecture and could only be determined by methods other than physical examination by the trial judge.

In determining the materiality of lost or destroyed evidence it is helpful to look to the decisions of other courts which have been confronted with the same situation. The leading cases addressing this issue are *United States v. Bryant (Bryant I)*[44] and *United States v. Bryant (Bryant II).*[45] *Bryant I* and *Bryant II* involve the same facts of the same case considered at two different stages of the appellate process.[46] Bryant and his codefendant, Turner, were convicted of offenses involving the sale of drugs.[47] Upon learning that government agents had made a tape recording of the illegal transaction, defense counsel moved for discovery of the tape. At a hearing on the motion to compel discovery of the tape, the agent in charge of the tapes testified that no efforts had been made to preserve the tape and that it had been lost. The defense counsel then moved for dismissal of the charges. The motion was denied by the trial judge. Bryant and Turner appealed their convictions contending that due process had been violated by the prosecutor's nondisclosure of the tape.[48]

In the first appeal (*Bryant I*) Judge Skelly Wright stated that the tape was discoverable under rule 16, Federal Rules of Criminal Procedure[49] and the Jencks Act.[50] Judge Wright, formulating a balanc-

---

> additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

363 So. 2d at 326-27 (citations omitted).

43. 349 So. 2d at 747.

44. 439 F.2d 642 (D.C. Cir. 1971).

45. 448 F.2d 1182 (D.C. Cir. 1971).

46. *Id.* at 1183.

47. 439 F.2d at 644.

48. Id. at 646.

49. FED. R. CRIM. P. 16(a)(1)(A) provides: "Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government . . . ."

50. The Jencks Act provides:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government

ing test to be used by the trial court, remanded the case for a consideration of the degree of negligence or bad faith involved on the part of the government, the importance of the lost evidence, and the evidence of the guilt adduced at trial in order to come to a determination that would serve the ends of justice.[51] He issued a strong warning that "sanctions for nondisclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation."[52] On remand the trial court learned that the agents had played the tape and found it to be almost entirely unintelligible. The trial court followed the directives of Judge Wright and held that the convictions must stand.[53]

Bryant II was an appeal from the judgment of the trial court after remand. The court in *Bryant II* affirmed the convictions, but reiterated that "[i]n the future, of course, investigative agencies will not be allowed to excuse nonpreservation of evidence by claiming that it contained nothing of interest to defendants."[54] The court also noted that it was the right of the defendant to discover such evidence and decide for himself its usefulness.[55]

In evaluating the due process requirements of disclosure, the court in *Bryant I,* subtly altered the materiality requirements of *Brady.* Citing *Brady,* the court in *Bryant I* stated that the standard of constitutional coverage (materiality) turned on the extent to which the evidence is "favorable" to the accused.[56] Then, presaging the Supreme Court's opinion in *Agurs* by seven years, the court in *Bryant I* stated that due process applies to all evidence which "might have led the jury to entertain a reasonable doubt about

> witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter to which the witness has testified. . . .

18 U.S.C. § 3500(a), (b) (1970). The Act's definition of "statement" included "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness (to an agent of the government) and recorded contemporaneously with the making of such oral statement . . . ." *Id.* at § 3500(e)(2).

51. 439 F.2d at 653.
52. *Id.* at 652 (footnote omitted) (emphasis in original).
53. 448 F.2d at 1183-84.
54. *Id.* at 1184.
55. *Id.* at 1184 n.1.
56. 439 F.2d at 647-48.

[defendants'] guilt."[57] Thus, unlike *Brady*, the *Bryant I* due process requirements did not include evidence material to the *punishment* of the accused. Although applying a narrowed *Brady* standard of materiality, the court held that where there was substantial room for doubt as to the effect of the disclosure of the contents of the tape, the test for materiality would be generously applied in favor of the accused. The court concluded that the tape recording of the drug transaction was absolutely crucial to the question of guilt and as such was well within the constitutional concerns for due process.[58]

All of Florida's District Courts of Appeal, the First District in *Farrell v. State,*[59] the Second District in *State v. Smith,*[60] the Third District in *Sobel v. State,*[61] and the Fourth District in *Ludwick v. State*[62] have had an opportunity to address the narrow question of the materiality of a tape recording of a drug transaction and the resulting violation of due process for its loss. An analysis of those cases will illustrate the general conformity with the standards of materiality as set forth in *Brady*.

As a point of reference, keep in mind the *Brady* standard: due process is violated when the state, after a specific request, withholds evidence which is favorable to the accused and material to either guilt or punishment. *Farrell v. State* was the first Florida appellate case addressing the due process implications of inadvertent destruction of the tape recording of a drug transaction. In *Farrell,* the court expressly applied *Brady* standards in reversing the convictions for delivery and possession of cocaine.[63] Curiously, the *state* stipulated that the taped conversation was material and could have been used in support of the defense. Moreover, Chief Judge Boyer, in his concurring opinion, stated that due process is violated when the destroyed evidence is material and the defendant is *prejudiced* by the destruction. At first glance it might appear that Judge Boyer expanded the *Brady* standard. However, this inconsistency can be harmonized by equating the *Brady* "evidence favorable to the accused" with Judge Boyer's "prejudice to the defendant."[64] Although

57. *Id.* at 648 (footnote omitted).
58. *Id.* at 648.
59. 317 So. 2d 142 (Fla. 1st Dist. Ct. App. 1975).
60. 342 So. 2d 1094 (Fla. 2d Dist. Ct. App. 1977).
61. 349 So. 2d 747 (Fla. 3d Dist. Ct. App. 1977), *rev'd,* 363 So. 2d 324 (Fla. 1978).
62. 336 So. 2d 701 (Fla. 4th Dist. Ct. App. 1976).
63. 317 So. 2d at 143-44.
64. *Id.* at 144. In *Sobel,* the Florida Supreme Court stated: "We agree and hold that a defendant is not denied due process where the contents of a lost or destroyed tape recording *would not have been beneficial to the accused, thus demonstrating a lack of prejudice.*" 363 So. 2d at 328 (emphasis added).

not expressly stated by Judge Boyer, it is logical to assume due to his unqualified reliance on *Brady,* that in Florida prejudice to the defendant occurs when evidence material to either guilt or punishment is suppressed by the state.

Once Judge Boyer interpreted the *Brady* standard for violation of due process, various other courts followed suit. In *Ludwick v. State,* the Fourth District Court of Appeal used Judge Boyer's standard, but added that the burden was on the defendant to show the materiality of the destroyed tape and the resulting prejudice to the defendant.[65] The same court later applied this test and found a violation of due process in *Wiese v. State,*[66] but receded from that portion of *Ludwick* which placed the burden of proof of prejudice on the defendant.[67]

In *Sobel,* the Florida Supreme Court purportedly adopted the same standard used in *Wiese* and held that the state met its burden by showing that there was no prejudice to the defendant resulting from the inadvertent destruction of the tape recording.[68] By tracing its origins, the *Wiese* standard of materiality should be the same standard of materiality used by the United States Supreme Court in *Brady.* But in determining this standard of materiality, the court's abundant quotation of the *Agurs* standard created confusion. Further confusion was caused by the court's use of the *Bryant I* balancing test[69] because of the adoption by that court of an *Agurs*-type standard of materiality. Even though the standard of materiality was hopelessly obfuscated by the Florida Supreme Court in *Sobel,* it is abundantly clear that whichever standard of materiality it chose to apply, it should have been applied with deference to the accused.

In *Sobel,* the Florida Supreme Court did not find the tape recording to be material to the defense and thus found that its destruction did not violate due process.[70] But without a violation of due process, it was totally unnecessary for the court to discuss and adopt the *Bryant I* balancing test because that test is only applied in determining which sanction to apply once there has been a violation of

65. 336 So. 2d at 702-03.

66. 357 So. 2d 755 (Fla. 4th Dist. Ct. App. 1978). This case did not deal with the destruction of a tape recording of a drug transaction. The lost tape was of a discussion among a state's witness and co-perpetrator of the robbery, the state attorney, and others. The discussion took place after the crime while the state was preparing its case against Wiese. The court held that the state met its burden in showing lack of prejudice to the defendant. *Id.* at 757.

67. *Id.* at 758 n.1.

68. 363 So. 2d at 328.

69. The balancing test involved weighing "the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice." 439 F.2d at 653.

70. 363 So. 2d at 328.

due process. Nonetheless, the supreme court in *Sobel* quoted and adopted the balancing test of *Bryant I* as described in *Bryant II.*[71]

The Florida Supreme Court in *Sobel* appears to have missed the true intent of the *Bryant* cases. The *Bryant I* balancing test was applied on a one-time-only basis with explicit warnings to government agencies that *future* losses of discoverable evidence will not be condoned. The court in *Bryant I* held that sanctions for future losses of discoverable evidence will be invoked unless the government can show a good faith attempt to follow procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation.[72] In effect, the court in *Bryant I* instituted a prophylactic use of sanctions in order to deter state law enforcement agencies from being inattentive to the need for preserving discoverable evidence. Such a prophylactic rule has been used in other circumstances involving due process of law.

In *Elkins v. United States*[73] the Supreme Court explained that an exclusionary rule applied to evidence seized in violation of the fourth amendment and was intended to compel respect for the constitutional guaranty of due process in the only practical or effectively available way; that is, by removing the incentive to disregard it.[74] In *Bryant I* the court was also trying to deter state activity which could be violative of due process; the inadvertent destruction of discoverable evidence. In *Sobel,* the Florida Supreme Court quoted a weak version of the future sanction warning from *Bryant II.*[75] The court, however, did not follow through with the true thrust of the *Bryant* series by expressly warning state investigative agencies to adopt and strictly enforce preservation procedures or suffer sanctions for failure to do so.

The court in *Sobel* cited the progeny of *Bryant I* and *Bryant II* as further support for its use of the balancing test. Close scrutiny of the cases cited, including *United States v. Carpenter,*[76] *United States v. Perry,*[77] and *United States v. Quiovers*[78] reveals that they do not provide any support for the ruling implicit in *Sobel* that a

71. *Id.* at 327-28. "But, under the more pragmatic balancing approach which we have adopted for these cases, the unintelligibility of the tapes—when combined with the very strong evidence of guilt adduced at trial—outweighs the negligence involved in the loss of the tape." *Id.* at 327.

72. 439 F.2d at 652-53.

73. 364 U.S. 206 (1960).

74. *Id.* at 217.

75. "In the future, of course, investigative agencies will not be allowed to excuse nonpreservation of evidence by claiming that it contained nothing of interest to defendants." 363 So. 2d at 327 (citing 448 F.2d at 1183-84).

76. 510 F.2d 738 (D.C. Cir. 1975).

77. 471 F.2d 1057 (D.C. Cir. 1972).

78. 539 F.2d 744 (D.C. Cir. 1976).

balancing test can be used without the threatened use of future sanctions. In other words, the *Bryant I* and *Bryant II* threat of future sanctions has not been softened by these subsequent decisions.

In *Carpenter* the defendant moved to dismiss the indictment charging unlawful distribution of cocaine and two counts of receiving stolen property. The basis for the motion was that a tape recording of the preliminary hearing testimony had been accidentally erased by a company making transcripts of the tape.[79] The court in *Carpenter* expressly distinguished these facts from those in *Bryant* and emphasized that the destruction of the tape was an inadvertent act done by a neutral third party and not by the government.[80]

In *Perry* the trial court suppressed the testimony of a witness because the minutes of his grand jury testimony had been inadvertently destroyed by either the state or by a private recording company.[81] Subsequently, the state was not able to comply with a discovery request for those minutes. The *Perry* court remanded the case for consideration of the degree of negligence or bad administrative judgment on the part of the state and the risk of prejudice to the defense caused by the unavailability of the grand jury minutes. Because *Perry* was a later case than *Bryant I*, the holding appears to withdraw from the imposition of the sanctions threatened in *Bryant I*. However, such is not the case. In *Perry*, the loss of the discoverable material occurred before the decision in *Bryant I*. Judge Skelly Wright, the author of the majority opinion in *Bryant I*, noted in his concurring opinion in *Perry* that "nothing we say here in any way affects our holding in *Bryant* establishing standards for sanctioning losses of Jencks Act statements occurring after the date of *Bryant*."[82] Therefore, although *Perry* used the *Bryant I* balancing test (which was a one-time-only test) after the date of *Bryant I*, it was clear from the facts of the case that the court was not receding from *Bryant I*'s threat of future sanctions.

In *Quiovers* the government failed to preserve tape recordings of a telephone conversation between an undercover agent and the defendant. The conversation occurred eight days after the sale of cocaine for which defendant was later indicted.[83] There was no evidence that the phone conversation mentioned the transaction for which the defendant was charged. Indeed, the defendant did not offer any reason to believe that the conversation would have aided

79. 510 F.2d at 739.
80. *Id.* at 740.
81. 471 F.2d at 1059.
82. *Id.* at 1068.
83. 539 F.2d at 745. Note that the missing recording was not of the criminal transaction itself, as distinguished from the facts in *Bryant* and *Sobel*.

his defense. In affirming the conviction the court stated that nothing in *Bryant I* required the automatic sanction of dismissal of the indictment for failure to preserve the tape. However, the court did suggest that the sanction of dismissal would be appropriate in three situations: where the loss of evidence is deliberate, where the agency has failed to prescribe systematic procedures for preservation, or where there is a substantial likelihood of serious prejudice to the defendant.[84] The court emphasized that it was not undercutting *Bryant I* in any way; rather, it was reiterating *Bryant I* in that the totality of the circumstances must be considered in determining what sanction to apply.[85]

Therefore, *Bryant I* and *Bryant II* are still the leading authority in the District of Columbia Circuit for cases involving the loss of drug transaction recordings. The prospective use of sanctions for failure of the state to preserve such tapes, even unintelligible ones, is the standing rule.[86] Furthermore, the subsequent cases from the District of Columbia Circuit, cited by the Supreme Court of Florida in *Sobel,* have not watered down the tough threat of sanctions to state agencies stated in *Bryant I* and *Bryant II.*

In *Sobel* the Florida Supreme Court totally ignored the two levels of government culpability addressed in *Bryant I* and *Bryant II* that would give rise to the imposition of sanctions for the failure to preserve a tape recording of a criminal transaction. Although *Brady* stated that the good or bad faith of the prosecution was not to be considered in determining the existence of a violation of due process,[87] *Bryant I* indicates that the culpability of the state can be considered if there has been a violation of due process and recognizes a two-level approach in order to determine the appropriate sanction. The first level to be examined is the individual culpability of the agent destroying the tape. The second level to be examined is the culpability of the agency itself in not establishing and enforcing rigorous procedures designed to preserve evidentiary materials.[88]

Bryant I indicates that looking to the good faith of the individuals who lost the tape would be only the first level of the decision regarding sanctions for the loss.[89] If the loss occurred due to individual bad faith, sanctions would be imposed without looking at the second

---

84. *Id.* at 746.

85. *Id.* at 747. In its evaluation of the totality of the circumstances, the court specifically distinguished the facts of *Quiovers* from those of *Bryant* and *Sobel.* In rationalizing its decision not to impose sanctions on the government for its loss of the recording, the court noted that the missing recording was not of the criminal transaction.

86. 448 F.2d at 1184.

87. 373 U.S. at 87.

88. 439 F.2d at 652-53.

89. *Id.* at 651.

level of culpability. If, however, the loss occurred in "good faith" circumstances, as in *Sobel*, then the court should determine whether "earnest efforts" have been made to preserve the evidentiary materials. In evaluating such "earnest efforts," the court should look to see (1) if there is a standing rule in the agency that directs preservation of all potential evidence; and (2) whether the rule was adhered to.[90] *Bryant I* indicates that in situations of good faith losses (at level one), the state will be given "one free bite" before sanctions will be imposed for loss of evidence due to lack of strictly enforced agency rules directing preservation of all discoverable evidence.[91]

It is this second level of culpability, failing to have strictly enforced rules directing the preservation of all discoverable evidence, that the Supreme Court of Florida glosses over in *Sobel*. It is this level, which is the true heart of the *Bryant* cases, that receives only passing, oblique, lip service from the Florida Supreme Court.[92] It appears that the agencies of the state can continue to be lackadaisical in their preservation of discoverable evidence because the Florida Supreme Court has issued no warning that sanctions will be imposed in the future for failing to institute rules designed to preserve all discoverable evidence. By adhering to a single rationale for utilizing sanctions, when the defendant is prejudiced by the unavailability of discoverable evidence, the court has failed to recognize the prophylactic use of sanctions. The court also appears to be willing to place a high degree of trust in the veracity of interested parties to a criminal prosecution, the police officers themselves, in determining the materiality of the missing recording. Such trust runs against the reasons for prophylactic use of sanctions, and indeed seems to condone the loss of discoverable evidence if the law enforcement agency, in its unilateral judgment, can convince the court that the evidence would not have been of any help to the accused in his trial.

MICHAEL T. WEBSTER

---

90. *Id.* at 652.

91. *Id.* This "one free bite" is in accordance with the deterrence rationale behind the use of prophylactic sanctions. By only applying the sanction to future objectionable conduct, the court is giving adequate notice to the investigative agencies of the specific conduct which needs to be corrected. It would be illogical to try to deter conduct which has already occurred.

92. Even though the Florida Supreme Court quotes the warning of future sanctions from *Bryant II*, it does not explicitly explain why future sanctions were threatened in *Bryant II*, nor does it ever adopt in the case in chief the necessity of agency promulgation and strict enforcement of rules for the systematic preservation of discoverable material.