Professor Gershowitz was quoted in an article on law360.com concerning the effects a Supreme Court Ruling from Tuesday could have on white collar cases. Professor Gershowitz comments on the level of training local district attorney’s receive in Brady issues.

http://www.law360.com/topnews/articles/235344/brady-s-white-collar-effects-limited-experts-say

White Collar Reach Of High Court Brady Ruling Limited

By Evan Weinberger

Law360, New York (March 29, 2011) -- The U.S. Supreme Court ruled Tuesday that criminal defendants could not sue local prosecutors' offices based on a single discovery violation, a decision that legal experts say could have a limited effect on white collar cases at the local level.

In a 5-4 decision, the high court found that a district attorney's office could not be held liable under Section 1983 of the U.S. Code for failing to train assistant district attorneys on the necessity of turning over exculpatory evidence, known as Brady material, even if a pattern or history of misconduct could be established — reversing a 2008 decision by the U.S. Court of Appeals for the Fifth Circuit.

The ruling will have a larger effect on issues related to street crime cases like murder and domestic violence, but the white collar world should take note of it as well, Dane S. Ciolino, a professor at Loyola University New Orleans College of Law, said.

“In white collar cases, what [constitutes] Brady evidence is sometimes a more subtle issue than in street crime cases,” he said.

Brady issues frequently come up in white collar cases, and often it can be more difficult to determine whether evidence turned up in a search can be helpful to the defense, the way DNA can be in a murder case, Ciolino said.

“The documents are not so obvious as conflicting blood or DNA evidence,” he said.

In writing the majority opinion, Justice Clarence Thomas acknowledged that a separate Supreme Court ruling allowed for a hypothetical lawsuit against a city that failed to train police officers on the proper use of lethal force.

But he said attorneys should be familiar with the proper disclosure of Brady material following a rigorous legal education, as well as continuing education programs, and that further training was not necessary.

“A district attorney is entitled to rely on prosecutors’ professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in 'the usual and recurring situations with which [the prosecutors] must deal,'” Justice Thomas wrote.
He was joined in the decision by Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Samuel Alito.

The case before the Supreme Court involves former death row inmate John Thompson and the $14 million damages award he received in 2007 from a jury that found Orleans Parish District Attorney Harry F. Connick of New Orleans ultimately responsible for prosecutors’ concealing blood samples and other evidence — leading to a reversal of Thompson's conviction on armed robbery and murder charges.

The jury held Connick liable for failure, through deliberate indifference, to put training policies in place to protect defendants from Brady violations committed by prosecutors. That ruling was affirmed in a split en banc decision in 2008 by the U.S. Court of Appeals for the Fifth Circuit, which held that because Brady violations were “a highly predictable consequence” of a district attorney's office's failure to train prosecutors, Thompson did not have to prove the office had a history of misconduct.

J. Gordon Cooley, the Morgan Lewis & Bockius LLP partner who has represented Thompson for nearly 20 years, said the decision would set a dangerously high bar for wronged defendants.

"What happened to John Thompson in this case is both deeply troubling and fully warrants civil accountability, in our view," Cooley said. "If prosecutors’ offices cannot be held accountable under the facts of this case, it is difficult to imagine when they would be accountable."

The Orleans Parish District Attorney's Office could not immediately be reached for comment Tuesday.

In a dissenting opinion, Justice Ruth Bader Ginsburg said that the district attorney's offices actions in the Thompson case constituted a pattern of repeated Brady violations on their own, adding that the district attorney's office had nearly two decades to exonerate Thompson but chose not to.

She noted that a private investigator working on Thompson's defense turned up the exculpatory blood samples by chance just weeks before Thompson's scheduled execution. Had that discovery not been made, Thompson would have been executed, Justice Ginsburg said.

“The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility — made tangible by [Section 1983] liability — for adequately conveying what Brady requires and for monitoring staff compliance,” Justice Ginsburg wrote in a dissent signed by Justices Stephen Breyer, Sonia Sotomayor and Elana Kagan.

Local prosecutors face vastly different challenges and funding environments than do their federal counterparts when it comes to training, and they will be the ones most affected by Tuesday’s ruling. Most major white collar cases come out of U.S. Attorney offices rather than from the offices of local district attorneys.
Most local district attorneys do not have the necessary training in Brady issues, and their offices frequently do not have the resources to provide that training, said Adam Gershowitz, a professor at the University of Houston Law Center.

Because of that, the failure to turn over evidence is “accidental misconduct” on the part of prosecutors because they do not know that a witness's changed testimony or some other piece of evidence could help a defendant's case, he said.

“Lots of accidental misconduct happens all the time,” Gershowitz said.

That is a stark contrast from the federal level, where federal prosecutors undergo rigorous training on Brady issues.

“Brady violations are rare, and generally prosecutors are very, very careful to comply with their Brady obligations,” said Thomas Kirsch, a partner at Winston & Strawn LLP and a former federal prosecutor.

That is not to say that Brady violations never happen, as the overturning of former Alaska Sen. Ted Stevens’ corruption conviction in April 2009 showed.

That case highlighted another way in which the defendants in major white collar cases brought on the federal level may be unlikely to end up in the same position as Thompson — they have more resources, said Martin J. Siegel, a Houston appellate lawyer who wrote a brief supporting Thompson on behalf of several law schools.

“Because white collar defendants often have more experienced, privately retained and more numerous counsel, they can sometimes detect constitutional violations before it's too late to correct them, i.e. before conviction,” he said in an email. “Contrast that with Thompson's experience.”

Thompson was represented by Morgan Lewis & Bockius LLP partners J. Gordon Cooley and Michael Banks.

The case is Connick v. Thompson, case number 09-571, in the U.S. Supreme Court.
Professor Gershowitz was quoted in an article in the April issue of the *ABA Journal* that discusses the split of state supreme courts over searches of cell phones during an arrest.


**States Split Over Warrantless Searches of Cellphone Data**

Posted Apr 1, 2011 2:49 AM CDT
By Stephanie Francis Ward

What do a cellphone and a cigarette package have in common? Both can be found on someone during an arrest, and law enforcement may open them up without a warrant and see what's inside, says the California Supreme Court.

The January opinion involves a Motorola Razr phone found in the sweatshirt pocket of a man arrested in April 2007 for selling the drug Ecstasy to a police informant. A Ventura County sheriff's officer, who was listening in on the transaction through a wireless transmitter, seized suspect Gregory Diaz's cellphone after he was detained. There, the officer made a warrantless search of the phone's text messages, finding the message, "6 4 80," meaning six pills for $80.

Since the phone was the defendant's personal property and it was found on him when he was arrested, the court in *People v. Diaz* said the search was constitutional.

But the Ohio Supreme Court came up with different results in a case with a similar fact pattern. In *Ohio v. Smith*, the high court held in 2009 that unless an officer's safety is at stake or there's an emergency, the Fourth Amendment prohibits warrantless searches of cellphones seized during a lawful arrest.

**LEVEL OF PRIVACY**

The cases differ over whether the cellphone's extensive amount of electronic information gives the owner the expectation of privacy. Ohio Justice Judith Ann Lanzinger said that a cellphone's ability to store extensive data gives owners a higher level of privacy, requiring a warrant.

"Once the cellphone is in police custody," the judge said, "the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone is neither lost nor erased."

However, California Justice Ming W. Chin, writing for the state's majority, declined to distinguish cellphones from other seized items. He said the phone was a personal object discovered during custodial arrest and could be searched without a warrant. He also cited three U.S. Supreme Court Fourth Amendment cases, all of which were decided more than 30 years ago, and likened the phone to such items as a cigarette package and personal clothing.
Diaz's attorneys plan to appeal the case to the Supreme Court. In 2010 the high court turned down a cert petition for Smith.

Meanwhile, the number of cases involving the search of a cellphone is growing. About 50 cases address warrantless searches of cellphones, says Adam Gershowitz, associate professor of law at the University of Houston Law Center and author of the 2008 law review article "The iPhone Meets the Fourth Amendment," published by the UCLA Law Review.

About three-quarters of the existing opinions go the way of Diaz, Gershowitz says, while the rest are similar to Smith.

Nor is it uncommon for federal judges to exclude evidence procured from warrantless cellphone searches. "Judges are offended by the idea," Gershowitz says, "but they aren't willing to go to the mat about it. And a bunch of cases plead out." Yet Gershowitz doesn't think the Supreme Court will grant cert on Diaz, either.

In its cert petition for Smith, Ohio argued that cellphones have become so common and that their storage capacity is so extensive, lawful search guidance from the U.S. high court is necessary. Smith's lawyers countered that it wasn't the right time for the high court to take the case, because cellphone technology is changing so rapidly.

"The Supreme Court isn't ready for this, but the day is coming," Gershowitz says, adding that the high court did ask for further briefing in Smith. "Courts are flailing around in the dark, and they don't know what to do."

A bright-line rule would be helpful, he adds, perhaps involving a time limit for police to search cellphones, or guidelines about how far law enforcement could dig into someone's cellphone data.

**FOURTH AMENDMENT FOCUS**

*Diaz* cites landmark Fourth Amendment cases *United States v. Robinson*, where in the early 1970s a police officer frisked a suspect and found 14 vials of heroin in a crumpled cigarette package, and *United States v. Edwards*, a 1974 opinion in which police took a detainee's clothing to search for paint chips a few hours after he was arrested for breaking into a post office. It also cites *United States v. Chadwick*, a 1977 opinion involving a warrantless search of a footlocker, which turned out to be filled with marijuana. Police arrested individuals while they were loading the item into the trunk of a car.

But in the *Diaz* dissent, Justice Kathryn M. Werdegar agreed with the *Smith* majority. "Never before has it been possible to carry so much personal or business information in one's pocket or purse," Werdegar wrote. "The potential impairment to privacy if arrestees' mobile phones and handheld computers are treated like clothing or cigarette packages, fully searchable without probable cause or a warrant, is correspondingly great."
Diaz declined to cite an unpublished 2007 federal district court ruling that kept out a defendant's cellphone data, based on a warrantless search of the device. In that case, United States v. Park, a judge in the Northern District of California found that officers who searched the defendant's cellphone and obtained phone numbers and a call log went "far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence."

Park, however, is cited in Smith, in which police went through Antwaun Smith's cellphone call log after he was arrested in 2007 for trafficking and possession of cocaine, possession of criminal tools and evidence tampering.

Officers reviewed the call log to confirm that the cellphone they found showed a call made to a government witness, who allegedly set up a drug deal with him. Although the record doesn't indicate when the search of the phone was done, testimony showed that a portion of the search happened when officers returned to the police station.

A jury found Smith guilty on all counts. His conviction was upheld in the state appellate court, but reversed and remanded by the Ohio Supreme Court.

In Ohio, law officers no longer go through cellphone data without a warrant, says Timothy Young, director of the Ohio public defender's office.

"They get a warrant, period," says Young, who worked on Smith. Stephen K. Haller, his opposing counsel, agrees. "I think they're a little scared now," says Haller, the Greene County, Ohio, prosecutor.

GET IT WHILE YOU CAN

The opposite is happening in California, says Jason Leiderman, a Ventura, Calif., lawyer who represents Diaz. "Cops will go through anything and everything they can until the courts tell them not to," he says. "The word is out among law enforcement that you should be searching these phones while you can."

According to the California attorney general's office, cellphones and laptop computers that are used as data storage devices are searchable if they are found on a person's body at the time of arrest. Data that could be searched would likely include text messages, photos and calendars. However, the office notes that it's unlikely either device could be used legally by law enforcement as a search tool without a warrant, so officers could probably not use them to access someone's e-mail or bank records.

Leiderman disagrees. "Until this mess gets hashed out, my advice is don't keep stuff on your smartphone, or don't keep your smartphone on your person," he says. Generally, he adds, cellphone data that police want to see comes from arrests involving alleged drug sales, vice, gangs and stolen property.
But there's nothing stopping police from looking at the data in any sort of arrest. He advises Californians to keep their cellphones in the center console while in vehicles.

"My clients e-mail me, they text me and they send me pictures of stuff from crime scenes," Leiderman adds. "It's concerning—'What if I get pulled over?'"