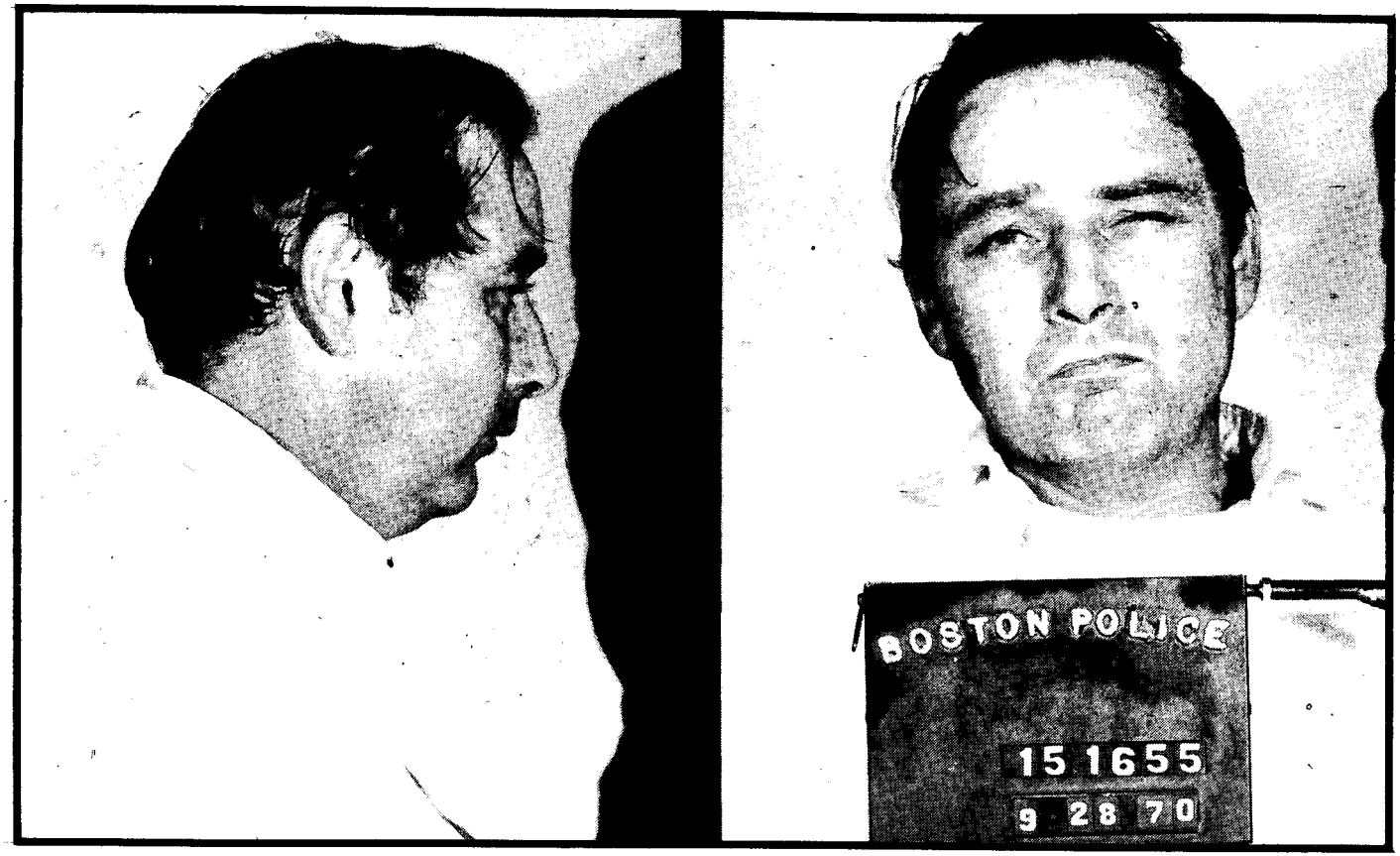
Briefcases



In the matter of Lefty Gilday

by Harvey A. Silverglate

On December 31, Massachusetts's highest court affirmed the 1972 bank-robbery and first-degree-murder conviction of William M. Gilday Jr. — even though Gilday, who was sentenced to death for the 1970 slaying of Boston police officer Walter A. Schroeder, produced evidence that the prosecutor in his case suppressed potentially exculpatory evidence, evidence concerning inducements used to obtain testimony from a prosecution witness. In along with Stanley R. Bond, Robert J. Valeri, Susan E. Saxe, and Katherine A. Power. The five defendants were accused of having planned and carried out the robbery of the Brighton branch of the State Street Bank and Trust Company on September 23, 1970. The case gained great notoriety not only because a policeman was killed, but also because there were indications that the defendants were a combination of ex-convicts and student radicals [illegible]

conviction, and it is the story of Fleischer's testimony that raises the specter of "bought" prosecution testimony, the specter that so disturbs observers of criminal-court proceedings in Massachusetts and elsewhere in the country.

As is often the case with "bought" prosecution witnesses, Fleischer was himself vulnerable. He was not exactly a stranger to the defendants, nor to the bank robbery [illegible]

ises or threats made to a prospective government witness, or deals made with that witness, which might have some effect on the witness's decision to testify and on the testimony. The idea is that a jury should know of any such deal so that jury members can evaluate its likely impact on the witness's motivations and biases in giving testimony incriminating to the defendant.

Such inducements to prosecution witnesses have ordinarily taken one or both of two forms. Sometimes a witness is himself or herself vulnerable to prosecution for having participated in either the crime at hand or in another crime, and the prosecutor is able to trade leniency or complete immunity from prosecution in exchange for testimony against the defendant. At other times, a witness is of a disposition to accept favors from police or prosecutors in exchange for testimony. Such favors might include (aboveboard) substantial sums of money, jobs, a new identity, or (under the table) drugs or even license to commit certain future crimes. Sometimes a combination of both carrots and sticks is necessary. The problem with this kind of informant/witness arrangement, of course, is the possibility that, given sufficiently powerful incentives, the witness will say anything he or she thinks the prosecutor wants to hear. Witnesses, particularly those facing the death penalty, have been known to listen quite closely as prosecutors tell them what the DA believes the truth to be.

* * *

In the Gilday case, the real issue in the murder trial was whether it was Gilday or someone else who, while waiting outside the bank in a white car, shot Officer Schroeder. Gilday testified at his trial, admitting complicity in planning the bank robbery but denying that he actually participated in it or pulled the fatal trigger. He claimed that he was asleep at the time of the shooting

upholding the conviction, the Supreme Judicial Court added particular weight to a general concern: that the most alarming trend in the criminal courts today is the use by prosecutors of carrot-and-stick measures to get witnesses to testify — often without disclosing these carrots and sticks, and often with little regard to their effects on the witnesses' truthfulness.

It is difficult to tell, from reading the record of the case, whether Gilday was the one who pulled the trigger of the gun that killed Schroeder. The five-judge panel of the Supreme Judicial Court that heard the case expressed unanimous confidence that Gilday did in fact do it; there are disturbing aspects to the case that may leave some with a lingering doubt. On the issue of whether Gilday received a fair trial, hoever, there must be less doubt. He did not.

Perhaps it was not to be expected that any court would easily grant a new trial to "Lefty" Gilday, who has become a notorious figure in a notorious case. Gilday, whose life was saved when the United States Supreme Court declared the death penalty unconstitutional shortly after his sentence was pronounced, had been indicted on murder and robbery charges in October of 1970, [illegible] who met at Brandeis University and planned a series of bank robberies in order to finance revolutionary activities. The notoriety of the case in turn made it a highly visible prosecution for the office of the Suffolk County DA at the time, Garrett M. Byrne, and for his assistant prosecutor, John T. Gaffney. As with just about any much-publicized prosecution, there was ample temptation for the district attorney's office to take short cuts.

Also indicted was one man who never came to trial: Michael Fleischer, another Brandeis student, who turned up as an important witness against Gilday, as well as against Susan Saxe, who was tried later, when she was apprehended after several years as a fugitive. (Katherine Power has never been found; Bond and Valeri ended up in prison, where Bond was killed by a homemade bomb.) The DA's handling of Fleischer formed the main basis of Gilday's latest attack on his [illegible] robbery. In fact, when the five defendants were indicted for murder and armed robbery, Fleischer was indicted as an accessory after the fact to both crimes. The record of the case discloses, as well, that the district attorney told Fleischer's lawyer that there was enough evidence to have Fleischer indicted as an accessory *before* the fact, thereby exposing him to the death penalty. Fleischer was thus strongly motivated to cooperate with the authorities.

Long ago, the US Supreme Court ruled that it was a solemn obligation of the prosecutor to disclose to the defendant, and to his or her lawyer, any information or evidence in the possession of the government that would tend to exculpate or exonerate the defendant or mitigate the degree of guilt or punishment. Subsequent court decisions have held that this so-called "Brady rule" requires the prosecutor to disclose, among other things, any information relating to prom- [illegible] the time of the shooting.

The prosecution's ability to prove that Gilday's participation went further than he admitted depended upon the credibility of testimony that he was the gunman. One witness, Francis Goddard, was uncertain, and could say only that Gilday's appearance was consistent with that of the man who pulled the trigger. Another witness, Andrew Gaudette, who had earlier identified a photograph of Gilday as that of the triggerman, failed to identify Gilday in the courtroom, and instead picked out a newspaper reporter as the man who shot Schroeder. Another witness, Bernard Becker, identified Gilday at the trial, although documents uncovered by Gilday disclosed that Becker had earlier told the police that he could not describe the man who shot Schroeder.

Robert J. Valeri and Michael Fleischer were the two government witnesses in the case who were also defendants, but who had not yet been tried. While it did not come out at Gilday's trial, Valeri received substantial benefits from the district attorney, including a deal by which he pleaded guilty to the lesser charge of manslaughter rather than face the first-degree-murder charge. He also was given some money and other considerations by the DA while he was in jail.

Fleischer, however, would appear from a fair reading of the record to have been the single most damaging witness against Gilday. His testimony (which came in the government's rebuttal case, after Gilday's testimony) directly contradicted Gilday's principal contentions. Specifically, Fleischer testified that he was in the apartment to which all of the participants returned after the bank robbery and fatal shooting; that Saxe and Power at that point accused Gilday of being "trigger-happy"; and that Gilday said, "What did you want me to do? The cop was right there, he was only 30 seconds behind you."

Fleischer's testimony was, obviously, devastating to Gilday. Moreover, Fleischer made a good witness, as he was a Brandeis student of good appearance, whereas Bond and Gilday had prior criminal records. Gilday's trial attorney, noted Boston criminal-defense lawyer Daniel F. Featherston Jr., tried to find out, and hence demonstrate to the jury,

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(The author is a Boston criminal-defense and civil-liberties lawyer who this week begins a regular column on legal topics, with emphasis on the criminal-justice system. A member of Silverglate's firm represented Susan Saxe at her trial; neither he nor anyone in the firm ever represented William Gilday, at trial or on appeal.)

The problem with the usual informant/witness arrangement, of course, is the possibility that, given sufficiently powerful incentives, the witness will say anything he or she thinks the prosecutor wants to hear. Witnesses have been known to listen quite closely as prosecutors tell them what the DA believes the truth to be.

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the nature of Fleischer's incentives for testifying. (One motive was readily apparent: Bond testified that it was Fleischer, and not Gilday, who was in the car from which the fatal shot was fired.) When Featherston asked Fleischer whether he had made any deal with the prosecutors in exchange for his testimony, Fleischer said no. When asked squarely what his motive was for testifying, Fleischer responded simply that "the reason why I was testifying is because we now have a situation where a man has been killed." When Featherston asked Gaffney (on the record, but in the jury's absence) whether there was any deal, Gaffney was noncommittal, and merely told Featherston that he (Featherston) was entitled to cross-examine Fleischer on the subject. The trial judge, Superior Court Chief Justice Walter H. McLaughlin (now retired), rather than demand that Gaffney respond more precisely to Featherston's question, supported Gaffney's silence.

Years later, when Saxe was apprehended and tried, it came out at her trial that at the time of Fleischer's arrest, his Philadelphia lawyer, Benjamin Lerner, did indeed have a meeting with DA Byrne and trial prosecutor Gaffney. According to Lerner's file memorandum on that meeting, Lerner made it clear to Byrne and Gaffney that Fleischer would cooperate in testifying against the others only if he could emerge from the whole ordeal with no criminal record whatsoever. After an extended discussion among the three of them, Byrne and Gaffney conferred privately. Then they called Lerner back into the room to announce that they agreed to the deal. Furthermore, according to Lerner's memo, "this agreement would be explained to Fleischer in such a way so that he could truthfully answer on the witness stand that no promises had been made to him in order to induce him to testify for the Commonwealth."

Thus, Fleischer's "non-deal" with the District Attorney was something of a subterfuge. The theory was that if Fleischer were not directly told that he would wind up with no criminal record, then the deal could not influence his testimony, and hence it would not have to be disclosed to the jury. The hitch in this theory, which was pointed out by the Supreme Judicial Court in its recent opinion, was that Lerner *did* say to Fleischer that "it was in his best interests to testify in the case." The Supreme Judicial Court saw through this artifice, and stated that "the prosecutor, from common experience, was chargeable with knowledge that Fleischer testified with expectations of leniency," even if he were not told every detail of the deal. The Court held that the jury was entitled to know these facts, "since they were pertinent to the issues of bias and credibility of the witness." The Court said that to fail to call this evasive arrangement what it really is would be "in effect (to) approve the evasion" of the rule prohibiting the prosecutor from remaining silent while a defense witness lies about what was promised to him, "by means of (an) artful device."

Stephen J. Sherman

Susan Saxe: her trial brought out the Lerner memo.

Thus, the state's highest court agreed that the prosecutor had committed a serious misdeed which had the effect of violating a right to which Gilday was entitled. Ordinarily, a finding that a prosecutor suppressed important evidence of this nature would be enough to cause the court to vacate the conviction and grant the defendant a new trial. The Gilday case, however, was not the ordinary case, and it was not to be treated in an ordinary fashion. The court concluded that the evidence of guilt against Gilday was overwhelming, and that even though Fleischer's testimony "included attribution to Gilday of admissions that he killed the policeman," this testimony was merely "cumulative" of the other damning evidence presented.

The court thus put itself into the position of the jurors, and concluded that had the jury known about the suppressed deal between the prosecutors and Fleischer, it would not likely have changed its verdict. The court drew this conclusion while recognizing "the peril to the defendant's rights" when "the appellate court speculates, long after the fact, as to the jury's reasoning if the case as presented before them had been different." This, one would think, is an understatement, in a system where it is up to the jury, and not a court or judge, to weigh evidence of guilt versus innocence.

The Supreme Judicial Court, in short, declined to address itself to the serious prosecutorial abuse demonstrated by the case — the problem which criminal trial lawyers have concluded is of epidemic dimensions and constitutes perhaps the single most disturbing problem in criminal prosecutions today. The court not only refused to grant the request for a new trial, but did not order any action taken against the district attorney's office, because "our concern is not to punish the prosecutor, but rather to avoid an unfair trial to the accused."

Such casual dismissal of admittedly serious impropriety can hardly be expected to deter prosecutors from refraining from similarly unlawful conduct in future cases. (It is especially disturbing that such conduct was found in the Gilday case, where

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the defendant was at the time facing the death penalty if convicted.) Nor is the district attorney's insistence that Fleischer was a relatively unimportant witness — a proposition the Supreme Judicial Court said it agreed with — likely to enhance respect for the intellectual integrity of the criminal-justice system. After all, Fleischer, through his lawyer, was given a deal that was certainly among the most favorable ever offered to a participant/witness in a case where a policeman was killed — no criminal record whatever in exchange for testimony. If the DA was willing to offer that much for Fleischer's testimony, one need not ponder the question of whether the testimony was important to the prosecution's case. What does appear evident is that the depreciation of the importance of Fleischer's testimony was the only way the courts could justify not granting Gilday a new trial.

Any legal analysis which understates the importance and impact of Fleischer's testimony, and which therefore denigrates the potential importance of the jury's learning about Fleischer's motives for testifying, cannot hold water. After all, while Fleischer testified that it was Gilday who pulled the trigger, Bond's testimony put Fleischer himself in the car from which the fatal bullet was fired. The district attorney, according to Lerman's memorandum, did after all threaten Fleischer with prosecution as an accessory before the fact of murder, which would have exposed him to the death penalty. By testifying that Gilday admitted to the murder, Fleischer instead escaped without so much as a minor conviction. Under the law as it was pronounced by the Supreme Court in the Brady case, the jury was supposed to be able to ask itself whether someone in Fleischer's position — with so much to win and so much to lose — had sufficient motive to lie and whether he did in fact lie. This question the jury obviously could not ask itself and respond to in a fully informed manner.

* * *

In contrast to the somewhat laissez-faire attitude of the court in this case, some other courts have taken more seriously the problem of prosecutorial overreaching or abuse that increases the likelihood of convicting an innocent person. In a recent case in New Jersey, for example, an intermediate appellate court, while refusing to vacate the defendant's conviction, suggested that the state's highest court take action against the offending prosecutor. Likewise, the United States Court of Appeals in Chicago warned prosecutors that repeated instances of the kind of prosecutorial misconduct that the court had been experiencing would in the future result in reversals of convictions.

The Supreme Judicial Court of Massachusetts managed to reach the result it did despite a vehement and emotional plea made by Gilday's chief appellate lawyer, William M. Kunstler of New York. In a motion asking the high court to reverse Gilday's conviction without even the need for oral argument, Kunstler wrote: "We live in troubled times when official morality is at an all-time low. Presidents, vice-presidents, attorneys general, senators, representatives, and hundreds of lesser-placed public officials on both federal and state levels have been revealed as thieves, liars, perjurers, and cheats. There is very little that the man and woman in the street can do about this except hold up their hands in shocked disbelief. But this court, and others, has the power to take the necessary action to deter those officials who come within its ambit so that some inroads can be made into the prevention of future evil that, if unchecked, may well destroy us all as a civilized society."

A prediction as dire as that, of course, requires supporting evidence only the future can provide. It will be one purpose of this column to keep an eye on prosecutorial methods; one hopes the Massachusetts courts will do the same. Meanwhile, William M. Gilday Jr. remains in state prison for the remainder of his life, while Michael Fleischer enjoys life on the outside, untainted by a criminal record. It is difficult, from reading the record of the Gilday case, to feel certain that a jury with all of the facts in front of it would have voted for exactly that outcome. ●