CRIMINAL CONSTITUTIONAL

Courts Order Prosecutors to Comply With *Brady*

By Cory Morris

Over 50 years and 200 exonerations later — new rules require the New York State Judiciary to order prosecutors to comply with *Brady v. Maryland*...

Starting in 2018, New York State judges presiding over a criminal case must issue an order to, *inter alia*, remind prosecutors of their obligations under *Brady v. Maryland*. 2018 will mark the 55th anniversary of the Supreme Court's decision in *Brady v. Maryland*, a decision which prohibited the suppression by the prosecution of material evidence favorable to a criminal defendant. By adopting new rules to require judges to issue such orders, the objective is to increase the quality of justice in New York.

Over half a century later, *Brady v. Maryland* is still good law yet continued *Brady* violations highlight the enormous social impact of certain prosecutors yet complete lack of accountability for prosecutors who withhold exculpatory evidence. "New York state has had 234 cases since 1989 in which defendants have been exonerated, according to The National Registry of Exonerations. Eighty-eight involved the withholding of exculpatory evidence."[1] It is no wonder that the New York State Justice Task Force states that "there currently is a public perception that misconduct (particularly prosecutorial misconduct) is prevalent in the criminal justice system and that responsible attorneys are not being appropriately disciplined." A foreseeable issue in the future will be whether this rule and such court orders changes that lack of accountability.


Cory Morris

Brady v. Maryland and its progeny hold that "[t]he 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."[2] The "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[3] "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. This is because the prosecutor's role transcends that of an adversary. The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest... in a criminal prosecution is not that it shall win a case, but that justice shall be done."[4] Longstanding law and this rule serve as a reminder, not only to the prosecutor to provide such exculpatory information but also upon defense counsel to investigate and advocate for the production of such evidence.

At the beginning of November, 2017, the New York Times reported that "Chief Judge Janet DiFiore . . . announced a measure aimed at reminding prosecutors to obey their duty to actively look for and hand over exculpatory evidence in a timely manner."[5] Characterized as "unusual" and "meant to make criminal trials fairer," the Times described this measure as "ordering an entire state judiciary to prompt prosecutors to obey their obligations to both actively look for and speedily hand over exculpatory evidence . . . giv[ing] judges throughout New York the power to level contempt charges against prosecutors who withhold such evidence, a key component in wrongful convictions." A quinquagenary change of sorts, the rule may appear to the public about as advisory to prosecutors who willfully withhold evidence as the surgeon general's warning to smokers that cigarettes kill and cause cancer.

The rule requires that an order be directed at both defense attorneys and prosecutors. Important for the defense bar, "[a]ll judges who preside over criminal cases in New York state will order prosecutors to disclose information favorable to the defense at least 30 days before a trial on a felony."[6] Described as groundbreaking, the order is designed to direct attorneys, both prosecutors and defense attorneys, to comply with longstanding constitutional law and their ethical obligations. The rule was prompted by the New York State Justice Task Force observation that "underreport[ing]" of misconduct was an issue and proposed that such orders remind prosecutors that "[o]nly willful and deliberate conduct will constitute a violation of this order or be eligible to result in personal sanctions against a prosecutor." This rule should end the practice of *Brady* evidence being turned over to defense counsel on the eve of trial.

The rule, however, does not seek to remove the nearly impenetrable immu-

(Continued on page 27)

FUTURE LAWYER'S FORUM

Spousal Refusal

By Rochelle Verron

There appears to be an epidemic where consultants or attorneys believe that when a spouse executes a "spousal refusal" that they do not need to provide their financial documentation. Well this is just not true. When a person enters into a nursing facility while having a spouse in the community, both the institutionalized applicant/spouse and the community spouse have to disclose all financial documentation to their local Department of Social Services (i.e., Medicaid). Failure to provide documentation for both will result in a denial of Medicaid coverage.

Pursuant to Title 18: Section 360-4.10(c)(2)[1], at the time of application of the institutionalized spouse for Medicaid, all resources (only resources that exceed the maximum community spouse resource allowance) of both the institutionalized spouse and community spouse are considered available. Furthermore, Title 18: Section 360-4.10(c)(3)[2], If the community spouse should fail or refuse to cooperate in providing necessary information about his or her resources, then such refusal will be a reason for denying Medicaid for the institutionalized spouse.

The regulations clearly state that if the community spouse fails or refuses to provide necessary information (i.e., financial documentation), then Medicaid can and will be denied.


Rochelle Verron

When providing this information to a community spouse, they immediately believe that upon the institutionalized spouse's admission into the nursing facility, they should file for divorce. The community spouse believes that divorce will alleviate him or her from having to disclose finances to Medicaid; however, this is only true if the divorce took place outside of the look-back period. Medicaid will still require financial documentation for the community spouse up until the divorce. By divorcing the institutionalized spouse will not defeat the look-back period.

When the community spouse "hands over" the documentation, the next step is what is within that financial documentation. Medicaid will review the financial documentation for any "questionable" transactions that may have taken place within the look-back period. It is possible that the community spouse transferred or "gifted" assets to a friend or family member other than the spouse or disabled child, during the look-back period. If this is so, then it could result in a period of non-coverage for the institutionalized spouse. It is important to note that Medicaid has the authority not only to "request" documentation, but can "question" the documentation as well.

Most often, it is a struggle to have the community spouse understand that what he or she transacted within the last five-years impacts the institutionalized spouse's eligibility for Medicaid. Sometimes it is even helpful to show the regulation(s) to the client. What happens when a community spouse refuses and never hands over the documentation? The institutionalized spouse can file for an undue hardship waiver. When filing for an undue hardship there are specific elements that must be satisfied and the burden lies with the applicant. The concept of the undue hardship[iii] is for the applicant to prove that — the institutionalized spouse is otherwise eligible for Medicaid, the community spouse's whereabouts are unknown or community spouse lived separate and apart form the institutionalized spouse immediately prior to institutionalization, and the institutionalized spouse will be discharged from the nursing home without receiving the care he or she desperately needs, if Medicaid does not approve his or her Medicaid application.

If you have a Medicaid application with these surrounding circumstances it is important to make sure that if the community spouse does refuse to cooperate, all elements of an undue hardship are satisfied. An undue hardship waiver will almost always be argued at an Administrative Fair Hearing (Medicaid Appeal), especially in Suffolk County.

Note: Rochelle Verron is a part-time evening student at Touro Law Center and Juris Doctorate candidate for May 2018. Rochelle is the Competition Editor for Touro Law Center's Moot Court Honors Board. Rochelle works full-time with Law Office of Shannon Macleod with offices located in Babylon and Southampton, New York.

[1] New York Code Rules and Regulations Title 18: Section 360-4.10(c)(2)
[2] New York Code Rules and Regulations Title 18: Section 360-4.10(c)(3)
[3] New York Code Rules and Regulations Title 18: Section 360.4 10(a)(12)

Courts Order Prosecutors to Comply With Brady *(Continued from page 16)*

nity from civil suit enjoyed by prosecutors[7] or place criminal sanctions upon such willful constitutional violations, but rather places the onus squarely upon judges to issue these orders and then enforce such orders, if violated. What does this mean for Long Island, New York? The remedy, or complete lack of remedy,[8] will no doubt vary with a judge's discretion as it has for over half a century.

A problem acknowledged among the profession and public, consequences for *Brady* violations across the country range from incarceration,[9] to a slap on the wrist. In California, the problem was evidently so rampant that the legislature[10] made the intentional withholding of exculpatory evidence a felony offense. While *Brady* violations are not unique to New York — specifically the Nassau[11] and Suffolk County district attorney offices —New York is unique in adopting this set of rules for judges presiding over criminal matters. Ultimately, the remedy that existed previously, contempt of court and reporting of attorney misconduct, was one that existed with the state court judges presiding over such criminal trials for quite some time. We need no look further than our own legal community for evidence that such remedies are rarely exercised, if ever.

In Nassau County, New York, notes were withheld that contradicted a police officer's grand jury testimony in a domestic violence case. In Nassau County, "the prosecution declined to share ethics review findings, and [the court] ordered [the District Attorney's] office to turn over its files so he can decide whether to impose sanctions." The Nassau County case "follows a recent case in which a Suffolk prosecutor resigned[12] after a judge dismissed a murder charge mid-trial when the defense showed evidence had been withheld."

In Suffolk County, New York, a murder trial was to be held "before State Supreme Court Justice John B. Collins . . . by a 12-member jury"[13] before defense attorney Brendan "Ahern described [the *Brady* evidence] as being the size of two telephone books, stacked two inches high [and] included confessions from multiple people claiming to be the shooter…" Additionally, "[t]he material also included interviews of people who said a white male possessed the murder weapon, a 9-mm pistol, up until 520 days after the arraignment" of the African American defendant who stood before Justice Collins. Both of these cases highlight the problem of which this rule seeks to ameliorate.

The resignations of the prosecuting attorneys from both counties was almost immediate albeit, to date, both former prosecutors have moved over to solo practices without suffering the remedies that this rule seeks to implement. With the recent election of Suffolk County District Attorney Timothy Sini, perhaps this rule can play a part in addressing the *Brady* problem within Suffolk County and ensuring that the role of prosecutor is one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Note: Cory Morris is a civil rights attorney, holding a Master's Degree in General Psychology and currently the Principal Attorney at the Law Offices of Cory H. Morris. He can be reached at http://www.coryhmorris.com.

[1] Susan DeSantis, *Judges Ordered to Direct Prosecutors to Turn Over Information Favorable to Defense*, NY Law Journal (Nov 08, 2017 at 10:28 AM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/11/07/judges-ordered-to-direct-prosecutors-to-turn-over-information-favorable-to-defense/.

[2] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[3] Kyles v. Whitley, 514 US 419, 437 (1995).

[4] United States v. Bagley, 473 U.S. 667 (1985) (quoting *Berger*, 295 U.S. at 88.)

[5] Alan Feuer and James C. McKinley, Rule Would Push Prosecutors to Release Evidence Favorable to Defense, NY Times (Nov. 8, 2017), https://nyti.ms/2hUwCLj.

[6] See DeSantis *supra*, note i.

[7] Evan Bernick, *It's Time to End Prosecutorial Immunity*, Huffington Post (August 12, 2016), https://www.huffingtonpost.com/evan-bernick/its-time-to-end-prosecuto_b_7979276.html.

[8] See, e.g., David M. Schwartz and Andrew Smith, *Suffolk judge texted prosecutors from bench, could face sanctions*, Newsday (December 8, 2017), https://www.newsday.com/long-island/suffolk/suffolk-judge-recuses-texting-1.15355271.

[9] M. Alex Johnson, *Ex-Texas prosecutor first in history to be jailed for withholding evidence*, NBC News (Nov. 8, 2013), https://www.nbcnews.com/news/other/ex-texas-prosecutor-first-history-be-jailed-withholding-evidence-f8C11566289.

[10] Cal. Penal Code § 1424.5 (West); see Lorelei Laird, *California makes it a felony for prosecutors to withhold or alter exculpatory evidence*, ABA Journal (Oct. 5, 2016), http://www.abajournal.com/news/article/california_makes_it_a_felony_for_prosecutors_to_withhold_or_alter_exculpato.

[11] Bridget Murphy, *Nassau prosecutor loses job after failing to disclose evidence*, Newsday (June 1, 2017), http://www.newsday.com/long-island/crime/nassau-prosecutor-loses-job-after-failing-to-disclose-evidence-1.13700120?view=print.

[12] Joye Brown, *Prosecutor Glenn Kurtzrock steps down in Suffolk*, Newsday (May 10, 2017), http://www.newsday.com/long-island/columnists/joye-brown/a-prosecutor-steps-down-in-suffolk-1.13605730.

[13] Greg Wehner, *UPDATE: Prosecutor Resigns After Murder Case Against Messiah Booker Crumbles Due To Withheld Evidence*, The Southampton Press (May 10, 2017 11:31 AM), http://www.27east.com/news/article.cfm/Flanders/518282/Plea-Deal-Reached-In-Trial-Of-Messiah-Booker.