CIVIL RIGHTS

Turner v. United States and New York's Call for Criminal Justice Reforms regarding *Brady* evidence

By Cory Morris and Zach Segal

The Supreme Court in *Turner v. United States* ("*Turner*") held that a criminal conviction cannot be overturned due to the government withholding favorable evidence to the accused when that evidence is not considered material under *Brady v. Maryland*.[1] The increasing amount of exonerations, prosecutor misconduct and the exposure of undisclosed exculpatory evidence, has advocates calling for reforms to the constitutional requirements of *Brady v. Maryland*.

False convictions that are the result of withheld exculpatory evidence undermine the legitimacy and efficacy of the United States criminal justice system. While *Brady* violations are not unique to New York, specifically the Nassau[2] and Suffolk counties district attorney's offices, the consequences across the country are varied, ranging from incarceration[3] to a slap on the wrist. In California, the problem was evidently so rampant that the legislature[4] made the intentional withholding of exculpatory evidence a felony offense.

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The longstanding rule is "[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."[5] 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."[6] "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model . . . 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."[7]

Not only does this place a burden on the prosecutor to provide such information but it squarely falls upon defense counsel to investigate and advocate for the production of such material. What is materiality? The seminal case, *United States v. Bagley*, held that "[t]he 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." Ten years later, in *Kyles v. Whitely*, "The question is . . . whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Therefore, "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."

Criminal defendants often plead guilty without ever seeing the evidence that could prove their innocence. "New York is one of four states — with Louisiana, South Carolina and Wyoming — whose 'Blindfold Law' does not require witness statements or police reports to be turned over to the defense until the day a trial begins."[8] The New York State Bar Association proposed the repeal the Blindfold Law saying it would require prosecutors to turn over electronic police reports, records of property recovered from defendants, witness statements, and the defendant's own sworn statement, all within 15 days of arraignment on an indictment.

The *Turner* decision highlights the importance for the Legislature to act to ameliorate such *Brady* issues before any such violation can occur. In *Turner*, the Supreme Court made clear that for withheld evidence to render a reversal — although impeachable — the defendant must satisfy a materiality requirement under *Brady* so to produce a different outcome if the evidence was presented to defendants prior to trial. How judges are to make that determi-

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nation in the vacuum of an appellate review will likely be difficult at best, if not with little guidance or benchmark to utilize in making this determination after a guilty verdict.

Turner, which will soon be a documentary, occurred in 1984, and received great publicity. Seven men gathered on a street corner in Washington D.C. Then one suggested robbing someone. One defendant saw the victim walking with shopping bags. The defendants, deciding to rob her, followed her into an alley, beat her, and sodomized her with a pipe. The victim was found dead by a street vendor. Defendants were indicted less than a year later and the government presented a group attack theory.

The government relied on testimony from several sources including a boy, 14, who saw the attack and overheard a defendant say they had to kill the victim. Also, one of the defendant's girlfriends and her friend, who saw the attack and sodomizing, and a passerby who overheard the defendants saying they needed money, pointed at the victim, and followed her into an alley. Based on this evidence, the defendants could not attack the group theory so they attacked each other by trying to implicate each other as more culpable. After a week of deliberation, a guilty verdict for defendants was returned.

During postconviction efforts, notes were discovered in the prosecutors' case file that were withheld during trial. The withheld evidence included, *inter alia*: The identity of a man, McMillan, who was seen by Freeman, the man who discovered the victim's body (following the murder, McMillan was charged with beating and robbing two women in the neighborhood); testimony from William Luchie, who along with two others, walked through the alley where the victim was and heard moans and groans; Ammie Davis told the government she saw James Blue join defendants in their attack; the fact that the witness/girlfriend and friend were high on PCP; and the 14-year-old boy's aunt testified she never heard about an attack, even though the boy initially testified his aunt told him not to talk about what he saw.

The *Turner* defendants sought reversal, arguing the evidence could have enabled them to produce an alternate theory to the government's group attack by discrediting the witnesses and implicating McMillan. The lower courts disagreed, and the Supreme Court affirmed.

Finding the *Brady* evidence before a trial seems to greatly change, not only the defense attorney's strategy, but the consequences of such a violation. 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."[9]

The Nassau County case "follows a recent case in which a Suffolk prosecutor resigned[10] after a judge dismissed a murder charge mid-trial when the defense showed evidence had been withheld."

What was that *Brady* evidence in Suffolk County? Defense attorney Brendan Ahern described it as "being the size of two telephone books, stacked two inches high, included confessions from multiple people claiming to be the shooter…"[11] After the strong reaction from both offices, the resignations of the attorneys from both counties was almost immediate. This, however, is different than the later exposure of such evidence where a judge and not a jury will review what *Brady* material was withheld.

While it might start with the police and the prosecutor, it seems clear that the problem is systemic. In the Suffolk County case, "[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. Other examples are "the reversal of Gabriel Hubbard's 2011 murder conviction because of a Brady violation, sanctions last year against the chief of the Homicide Bureau in the Dante Taylor case for the withholding and destruction of evidence, findings of withheld material in the 2009 Rudolph Bisnauth case and withheld and destroyed evidence in the ongoing trial of John Bittrolff."

In both of the above cases stemming out of Long Island, New York, all sides — the defense attorneys, prosecutors and judges — were able to quickly apprehend a problem prior to the trial. Afterwards, the fallout becomes much more difficult to gauge. One thing the Supreme Court in *Turner* makes clear is that while withholding exculpatory evidence violates the constitutional mandate of *Brady v. Maryland*, the evidence will be reviewed against the backdrop of a guilty verdict and by a judge, not a jury.

These cases and the outcry against such violations bolster the enormous responsibility that prosecutors and defense attorneys shoulder. Whether by discretion or legislation, the constitutional mandate of *Brady v. Maryland* is yet to be fulfilled. Reform is necessary and the consequences, or lack of consequences, for such violations undermine the public's confidence in our justice system.

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[1] Turner v. United States, 137 S.Ct. 1885, 1895 (2017).
[2] 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.
[3] 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.
[4] 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.
[5] Brady v. Maryland, 373 U.S. 83, 87 (1963).
[6] Kyles v. Whitley, 514 US 419, 437 (1995).
[7] United States v. Bagley, 473 U.S. 667 (1985) (quoting *Berger*, 295 U.S. at 88.)
[8] Molly Crane-Newman, *Advocates rally against N.Y. law that keeps evidence from defense lawyers until day of trial*, Daily News (August 22, 2017, 3:06 PM), http://www.nydailynews.com/new-york/advocates-denounce-law-evidence-defense-lawyers-article-1.3433202.
[9] Murphy, *supra* note ii.
[10] 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.
[11] Greg Wehner, *UPDATE: Prosecutor Resigns After Murder Case Against Messiah Booker Crumbles Due To Withheld Evidence*, The Southhampton Press (May 10, 2017 11:31 AM), http://www.27east.com/news/article.cfm/Flanders/518282/Plea-Deal-Reached-In-Trial-Of-Messiah-Booker.
[12] Andrew Smith, *Suffolk DA's office struggled to comply with key legal rule*, Newsday (May 14, 2017), http://www.newsday.com/long-island/suffolk/suffolk-da-s-office-struggled-to-comply-with-key-legal-rule-1.13633786

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Everyday our justices serve the public and the litigants in a timely, effective manner, while consistently meeting increasing demands including effective case management, handling overwhelming case filings and meeting the needs of non-English speaking litigants while ensuring accessibility to the court system. Despite the overwhelming responsibility and duties, our justices consistently treat all with dignity and respect. It is heard in the halls of the Suffolk County Courts that this is a great place to practice law. There is a sense of collegiality and professionalism not as evident in other courts. Much of the credit goes to our judges, who adhere to high ethical standards, impartiality and create an atmosphere of professionalism and civility. Our judiciary effectively build the public's trust and confidence in our system of justice in Suffolk County, while maintaining the autonomy of the judiciary necessary to hear cases courteously and decide impartially.

We should be proud of the men and women who comprise the Suffolk County State and Federal Judiciary. They honor the court's duty to serve the public with integrity and respect, adhere to the concept of the rule of law that all are equally protected by the law, and strive to administer high quality justice. In their free time, many of our judges give generously of their time and expertise to the Suffolk County Bar Association. Members of our judiciary serve on our board of directors, chair many prestigious committees, serve on the faculty at Suffolk Academy of Law programs and collaborate with the bar on many events.

Judiciary Night gives our members the opportunity to let our judiciary know how much we value their hard work and commitment to a highly functioning court system, ensuring respect for the rule of law and fairness in the administration of justice, while maintaining the professionalism so evident in the Suffolk County courts.

This year we will have as our Honored Guests, the Hon. Sandra L. Sgroi and the Hon. Hector D. LaSalle, Associate Justices of the Supreme Court of the State of New York, Appellate Division, Second Department. The evening is a time of collegiality between bench and bar, which truly makes us a remarkable Association. I welcome and encourage all members of the SCBA to attend this prestigious event in honor of our esteemed judiciary who exemplify competency, together with the integrity and civility that is the hallmark of our Association.