From the President

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Brady at 50

Many years ago I was asked to talk at an annual meeting of a statewide prosecutors' association. They wanted me to speak from a defense perspective about common prosecutorial mistakes. Really, this was their idea. I accepted happily.

I began my talk by telling the prosecutors that they were all accomplished trial lawyers who argued passionately and well for the interests of the government. I complimented them on their public service, and on their ability to convict and punish lawbreakers. This went over pretty well.

I told them they had a problem, however, because their convictions were no good. *Brady* violations were so rampant and pervasive that post-conviction lawyers regarded new trials as theirs for the asking on the basis of undisclosed exculpatory information. What good did it do, I asked, to obtain convictions so vulnerable to challenge? Even worse, by dismantling such an important safeguard, they were corrupting the process and endangering innocent people. The room went silent as I categorized the information typically withheld by prosecutors, and the areas within law enforcement agencies where they routinely failed to search for exculpatory information. I suggested improved training and a more critical review of their own cases. I said any strategic cost of over-production seemed a negligible price to pay for more accurate and reliable convictions. Accurate and reliable convictions would also better withstand post-conviction challenges, and seeking them in the first place would improve the criminal justice process for all.

When I was done they thanked me and wished me well. They never invited me back.

Isaac Harrell

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In the years that followed, the routine violation of *Brady* would emerge from the relative obscurity of low-level prosecutions into public awareness through such high profile cases as the rape prosecution of the Duke lacrosse players and the corruption case against U.S. Sen. Ted Stevens.[1] In 2011, the New Orleans District Attorney's office would assert incorrectly in oral argument to the Supreme Court that the disclosure of the obviously exculpatory information at issue was merely prudent, not mandated by law.[2] And a career prosecutor in Virginia regarded as a dean of prosecuting attorneys would testify to a federal district court that he routinely withheld exculpatory information from certain defense lawyers and defendants because he did not trust them.[3]

Many fine prosecutors are scrupulous about the production of exculpatory information. This column is not about them. Nor is this a column about biased, conviction-obsessed, unethical prosecutors. This column is an acknowledgement that the current structure is inadequate to fulfill the constitutional mandate of *Brady*. Relying on prosecutors to recognize, obtain, and produce information favorable to the defense does not work. Fifty years of this experiment is enough; it has been a failure; no longer may we entrust the fate of the accused to a process in which the information that might be the key to freedom or the preservation of a life can be withheld by the government.

The current structural failure is not caused simply by prosecutors making deliberate decisions to violate their constitutional duty. Most prosecutors are dedicated public servants who seek to discharge all of the requirements of their office. At the same time, however, they lack the training and motivation to discover and produce the information that might help the defendant they are trying to convict.

Why is this so? First, it is questionable whether prosecutors receive any training at all on the *Brady* mandate, or what it includes, beyond the mere terms "exculpatory" and "favorable to the defense." They read the cases, but they do not understand the concepts. Prosecutors do not recognize exculpatory information because they do not know how defense attorneys can use it to prove innocence, an affirmative defense, reasonable doubt, or mitigating circumstances. Given the breadth of daily *Brady* violations, this explanation is more charitable than the conclusion that such failures are deliberate. What training there is inexplicably perpetuates misinformation, classic examples of which include the belief that information is not exculpatory unless it proves innocence, impeachment material is not exculpatory, or that specific requests trigger a different standard.

Another obstacle is the effect of confirmational bias. Prosecutors believe the defendants they prosecute are guilty. Determinations of whether information is favorable to the defense are affected by a tendency to interpret information as more consistent with guilt than nonguilt.

A third problem is an unwillingness to search for informa-

tion that conflicts with the hypothesis of guilt or might weaken the government's case. The carnage of wrongful convictions is a good argument for an approach within the prosecutorial function that tries to disprove guilt before indictment much like the scientific method tries to disprove a hypothesis before publication. Such an approach would better protect the innocent from wrongful prosecution and would force the systematic search of police files for favorable information that *Brady* requires. Instead, the current *Brady* regime imputes constructive knowledge of police information but leaves discovery to prosecutors unmotivated to search and law enforcement unwilling to share.

The systemic violation of *Brady* must stop. Towards this end, NACDL seeks codification of the government's obligation to provide to the defense all information favorable to the accused. On March 15, 2012, with NACDL support, concerned U.S. senators introduced bipartisan legislation to achieve needed discovery reform in criminal proceedings — The Fairness in Disclosure of Evidence Act of 2012. This Act was introduced on the heels of Special Counsel Henry F. Schuelke III's report to Judge Emmet Sullivan on prosecutorial misconduct in the late Sen. Ted Stevens case. In addition, the NACDL Task Force on Discovery Reform is developing model state disclosure legislation to aid legislators to ensure due process for those accused of crime.

NACDL calls upon legislators to address the persistent problems with disclosure of exculpatory information. The time has come for recognition that the current structure has failed to ensure fairness and accuracy in the criminal justice system.

Notes

1. The list of victims of the government's failure to comply with this constitutional requirement continues to grow. Summaries of stories like those of former Sen. Stevens, Lindsey Manufacturing, Edgar Rivas, and Anthony Washington are available in NACDL's *Human Cost of Brady Violations* paper.

2. *See* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf at 51-52, *Smith v. Cain*, __U.S.___, 132 S. Ct. 627 (2012) (Scalia, J.: "May I suggest that you stop fighting over whether it should be turned over? Of course it should have been turned over.").

The defendant in *Connick v. Thompson*, 131 S. Ct. 1350 (2011) was one month from execution when an undisclosed lab report was discovered that would later lead to his acquittal. The reasoning of the Court's five-member majority in overturning a $14 million verdict against the district attorney substantially undercut the notion that civil liability is a sufficient deterrent to nondisclosure. *See* http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/the-myth-of-prosecutorial-accountability-after-connick-v.-thompson:-why-existing-professional-responsibility-measures-cannot-protect-against-prosecutorial-misconduct].

3. "I have found in the past when you have information that is given to certain counsel and certain defendants, they are able to fabricate a defense around what is provided." *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 567 n.24 (E.D. Va. 2011) Despite the findings by two federal courts that these actions are not only unconstitutional, "but abhorrent to the judicial process," the prosecutor continues to insist he has done nothing wrong. See Answer of Respondent Paul B. Ebert, *In the Matter of Paul B. Ebert*, VSB Docket No. 12-053-088558, *available at* http://valawyersweekly.com/vlwblog/files/2011/09/Answer-of-Respondent-Paul-B-Ebert.pdf. ■