The Washington Post

A Standard for Fair Trials

By Albert D. Brault and Timothy F. Maloney
Sunday, May 17, 2009

When dismissing the charges against former Alaska senator Ted Stevens recently, the trial judge noted that the prosecutorial failures to turn over exculpatory evidence in that case were symptomatic of a larger problem within the Justice Department. Indeed, such failures are happening across our criminal justice system.

Three weeks ago, the Supreme Court reversed the death sentence of a Vietnam veteran because a Tennessee prosecutor withheld witness statements that directly contradicted the state's version of the case.

Last month a federal judge cited "serious, serious problems here in the way evidence has been selectively produced" in an environmental crimes prosecution against the chemical and material company W.R. Grace, which was ultimately acquitted.

In February, the conviction in a notorious Texas murder case was overturned because the prosecution failed to disclose that a key eyewitness had failed to identify the defendant in a photo lineup and that later prosecutors showed the witness a photo of the defendant to help him identify the accused at trial.

These problems are hardly new. A 2003 report of the American College of Trial Lawyers noted that "federal prosecutors routinely defer [disclosures of exculpatory material] unless ordered by the trial court . . . often producing little, if any favorable information for months, in some cases not until trial is underway, and in other cases, not at all."

A 2007 study by the Federal Judicial Center found widespread inconsistencies in how courts interpret which evidence is favorable to the accused, when it must be disclosed and how much effort prosecutors must make to find it.

Prosecutors have been required to make such disclosures since the 1963 Supreme Court decision in *Brady v. Maryland*, stemming from a case in which a defendant was wrongfully convicted of murder because the state withheld the confession of a co-defendant who admitted to being the killer. In reversing the conviction, Justice William O. Douglas said: "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."

Although *Brady* was decided 46 years ago, violations continue to proliferate. Some evidence is withheld because of intentional misconduct. Other times, prosecutors blame crushing caseloads. There is an inherent tension between a prosecutor's desire for a conviction and the requirement to disclose evidence that may jeopardize the prosecution.

But the American College of Trial Lawyers report diagnosed a major part of the problem: What is exculpatory is often in the eye of the beholder, and the beholder is always the prosecutor, who has exclusive access to the government's evidence. It noted that "federal prosecutors, largely keying on the word 'exculpatory,' have interpreted the Brady disclosure obligation in a variety of ways. A number of prosecutors . . . believe that a prosecutor's Brady obligation is limited to turning over information that someone other than the defendant has confessed to the crime at issue."

Some prosecutors do not view impeachment evidence, which casts doubt on the credibility of government witnesses, as being subject to disclosure. Still other prosecutors believe some exculpatory evidence can be withheld until sentencing.

To reduce subjectivity, the American College of Trial Lawyers recommend adopting discovery rules that create "clear, bright lines" and codify court decisions interpreting *Brady*. Although a federal rules committee voted to recommend adoption, they were rejected in 2006 in the face of Justice Department opposition.

Since then, in the wake of widespread *Brady* violations in the Baltimore City state's attorney's office, the Maryland Court of Appeals has adopted many of the trial lawyers group's recommendations in state court rules. Prosecutors in Maryland are now explicitly required to disclose inconsistent witness statements, evidence that might impeach government witnesses, details of all plea bargains with witnesses and other exculpatory evidence. Case law already required most of this evidence to be produced, but the new rules provide bright lines about making diligent, good-faith efforts to seek exculpatory materials and to produce it to defense counsel on a timely basis. These rules are already reducing confusion and disputes about what the Supreme Court meant when it mandated disclosure of "evidence favorable to the accused."

On April 28, Emmett Sullivan, the trial judge in Ted Stevens's case, joined the call to adopt such rules at the federal level. He observed that "such a rule would eliminate the need for the court to enter discovery orders that simply restate the law in this area, reduce discovery disputes, and help ensure the integrity and fairness of criminal proceedings."

Attorney General Eric Holder, who terminated the Stevens prosecution, has been outspoken on *Brady* issues, telling prosecutors that "your job is not to win cases. Your job is to do justice." Because "doing justice" is too often subjective, federal prosecutors need clear rules. The federal judiciary and Congress should consider the emerging success of the Maryland discovery rules and act now. Otherwise, the guarantee of a fair trial promised by the Brady decision will remain illusory in too many cases.

Albert D. Brault and Timothy F. Maloney are Maryland lawyers who serve as fellows of the American College of Trial Lawyers and who helped draft the new Maryland discovery rules.

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