Brady: What's gone wrong, and how to fix it

Written by Ed Swanson

With the recent release of the Schuelke Report on the systematic concealment of exculpatory evidence by federal prosecutors in the case against Senator Ted Stevens, the issue of *Brady* evidence is again in the news. But the failure of prosecutors to turn over *Brady* material – evidence favorable to a criminal defendant that is material to guilt or punishment – is not a new phenomenon. It's a problem defendants and their lawyers have faced for years in state and federal courts, and it has resulted in countless unjust convictions. The Scheulke report, though, provides an opportunity to revisit why *Brady* violations keep happening and what can be done to prevent them in the future.

To understand how to fix the discovery process so that prosecutors do not withhold exculpatory information from defendants, it's important to understand why *Brady* violations happen in the first place. There are, of course, situations where prosecutors deliberately conceal *Brady* material. The Stevens case is apparently one of those, as is the Lindsey Manufacturing prosecution last year in the Central District of California where a Foreign Corrupt Practices Act conviction was overturned for prosecutorial misconduct, including significant *Brady* violations.

More common, though, are cases where prosecutors don't intentionally violate their discovery obligations but instead simply fail to do the job right. One recurring problem is that prosecutors don't turn over the information because they don't ask the right questions to learn whether the files of their agents or of other prosecutors contain *Brady* material. It is not uncommon in federal court for requests for impeachment material on prosecution witnesses to elicit the response that "I don't have any," which may be a true statement, but only for want of effort to determine if impeachment material exists within the prosecutor's control. It happens more times than it should that, after denying possession of *Brady*, the prosecutor belatedly pays attention to getting impeachment after the trial begins or even after the witness takes the stand. Unfortunately, courts seldom take steps to discipline this behavior.

Another common problem is that prosecutors don't always know *Brady* when they see it. One reason for this is the way prosecutors interpret their *Brady* obligations. In the United States Attorney's Manual, federal prosecutors are instructed they must only turn over evidence "when there is a reasonable probability that effective use of the evidence will result in acquittal." That standard gives prosecutors a great deal of leeway to decide whether to reveal evidence that might damage their case. Evidence in the prosecutor's hands may be extremely helpful to the defense, but if the prosecutor believes it is not reasonably probable that its use would result in an acquittal, under the Justice Department's guidelines the prosecutor can decide to keep it from the defense. At best, this standard introduces uncertainty into the process. At worst, it can give a prosecutor an excuse to withhold *Brady* material intentionally. And, to be fair, it is often difficult for a prosecutor who may not know the theory of the defense to predict which documents or evidence might result in acquittal.

Whether it is done deliberately or through inadvertence, prosecutors fail to produce *Brady* material all too frequently. Unfortunately, it is often only in cases where the defendant has both experienced counsel and the funds to fight the case that *Brady* violations are discovered. Uncovering missing *Brady* material most alwayss require persistent motions practice and lengthy independent

investigation. Most criminal defendants do not have the means, and many defense attorneys do not have the time or the experience, to undertake such measures. As a result, we can be sure that those high-profile cases in which *Brady* violations are brought to light, such as the prosecutions of Senator Stevens and Lindsey Manufacturing, are just the tip of the iceberg.

One other factor contributes to defense counsel never learning of *Brady* information in the prosecution's file: plea agreements. In many cases it is only by putting the government's case to the test that *Brady* information comes to light. For example, I have tried cases in which *Brady* violations were uncovered only through cross-examination of a government witness or through review of grand jury transcripts not produced until trial. Had those cases settled before trial, the *Brady* material would have remained hidden in the file of the prosecutors or their agents.

There are at least three things that need to be done to fix this problem. First, Congress should pass a bill introduced in March by Senators Lisa Murkowski and Kay Bailey Hutchison to set a national standard for evidence production in federal courts and to clarify what prosecutors need to turn over. Under the Murkowski bill, prosecutors would be required to turn over any information "that may reasonably appear to be favorable to the defendant." This would provide clearer direction than the United States Attorney's Manual and make it easier for prosecutors to identify what to turn over.

Second, prosecutors should receive better training on their *Brady* obligations. All criminal defense attorneys know *Brady* means different things to different prosecutors. The same evidence will be turned over by one and withheld by another, because they have different understandings of their obligations. Each prosecutorial office should make it a priority to train its attorneys to understand how that office carries out its duties under *Brady*. That training should be informed by the U.S. Supreme Court's guidance in *Kyles v. Whitley*, that prosecutors faced with *Brady* questions should not be "tacking too close to the wind" but should resolve doubts in favor of disclosure. At a minimum, if in doubt, the prosecutor should submit the material to the court for *in camera* review.

Third, defense counsel need to be more aggressive in pressing for *Brady* material. This means more than just writing a discovery letter at the outset of the case asking for exculpatory evidence. It requires the defense to examine the case file to determine where *Brady* material might exist, to press the prosecutor to seek out material that the prosecutor may not yet have asked for, to be specific in making the requests, and to reveal as much about why the defense needs certain information as possible without jeopardizing the defense. It also means the defense has to be willing to take more cases to trial, since it is often only through the heat of trial that exculpatory information will come to light.

Ed Swanson, 2012