

Wall Street Journal Commentary

How New York Courts are Keeping Prosecutors in Line

Evidence that supports the accused is supposed to be turned over to the defense. Ted Stevens would know.

By *Emmet G. Sullivan*

Nov. 17, 2017 6:09 p.m. ET

A good prosecutor never forgets the government's constitutional obligations. Every prosecuting attorney has a legal and ethical duty to seek out and turn over to the defense all evidence favorable to the accused that is in the possession of any government official, including the police. The Supreme Court made this clear in a 1963 case, *Brady v. Maryland*, and a line of subsequent rulings over five decades.

The trouble is what to do about prosecutors who deliberately ignore these rulings. Most prosecutors operate under high ethical standards, but a small minority intentionally withhold evidence that might lead to acquittal, which too often results in innocent people serving lengthy prison sentences.

One solution is for judges, at the start of each new case, to issue what's known as a Brady order. The order notifies prosecutors of their legal and ethical obligations, reminding them of their duty to seek out—and then to turn over to the defense in a timely fashion—evidence favoring the accused.

A judge-issued Brady order ensures that busy prosecutors will make finding and turning over such material a priority. It's one thing for prosecutors to know they are supposed to follow the law. But it's far more likely to actually happen when a judge's order tells them exactly what is expected, and what the consequences are for noncompliance.

A Brady order also ensures that prosecutors who commit intentional misconduct can be held accountable. Often it takes years for a wrongly convicted defendant to discover that exculpatory evidence was withheld. By that time, the statute of limitations for bringing disciplinary or criminal charges against the prosecutor may have already expired. If a Brady order is in place, however, the prosecutor can be held in contempt of court or subjected to other judicial sanctions.

As of 2015, roughly 28 of the 94 federal district courts nationwide have promulgated rules clarifying the disclosure obligations of prosecutors who appear before them. But only a fraction of federal and state judges nationwide have standing orders focused on the duty to disclose exculpatory evidence.

In New York state courts, at least, that is about to change, thanks to a groundbreaking rule issued last week by Chief Judge Janet DiFiore and Chief Administrative Judge

Lawrence Marks. Starting on Jan. 1, 2018, trial judges statewide will be required to issue Brady orders in all criminal proceedings. This is the first rule of its kind in the nation, though I hope my colleagues in the federal and other state courts will follow suit.

My wake-up call to the importance of Brady orders came when I presided over the deeply flawed trial of Ted Stevens, the longtime U.S. senator from Alaska. In October 2008, Stevens was nearing the end of his seventh term, and was almost certain to be re-elected, when he was found guilty of lying on Senate disclosure forms about the cost of renovations to his vacation home. Stevens's name was tainted, and he lost re-election, altering the course of events in the Senate.

Just six months later, it was revealed that federal prosecutors had concealed numerous pieces of evidence that very likely could have resulted in Stevens's acquittal. Among the more egregious examples: Rather than call a witness whose testimony would have supported Stevens, the government flew the witness home to Alaska. The prosecution also concealed that its star witness had an illegal sexual relationship with an underage prostitute, whom he had asked to lie about their relationship.

Henry Schuelke, the special prosecutor I appointed to investigate the misconduct, found that Justice Department lawyers committed deliberate and "systematic" ethical violations by withholding critical evidence pointing to Stevens's innocence. Yet Mr. Schuelke also found that I was powerless to act against the wrongdoers, because I had not issued a direct, written court order requiring them to abide by their ethical and constitutional obligations to disclose favorable evidence.

The experience led me to change my own courtroom practice. I now issue a detailed, standing Brady order in every criminal case before my court. This reminds the prosecutors who appear before me exactly what is required of them, and it ensures that any who intentionally withhold evidence can be held accountable.

Over the past eight years, I have made concerted efforts to persuade my colleagues on the federal bench to do the same. In 2009 I urged the Judicial Conference Advisory Committee on the Rules of Criminal Procedure to propose amendments requiring the disclosure of all exculpatory information to the defense.

But the committee chose not to act, saying that the number of affected cases did not suggest "that the problem is so severe as to warrant a rule change." While the egregious intentional misconduct of the Stevens case thankfully does not happen every day, failure to comply with constitutionally required disclosures does occur. Judges have a responsibility to take action against unethical prosecutors, and to exercise their supervisory authority to prevent Brady violations before they happen.

By mandating that judges throughout New York issue Brady orders, Chief Judges DiFiore and Marks have taken a bold stance that will no doubt be noticed by their colleagues across the nation. It is my hope that other states, and our federal court system, soon will follow New York's lead.

Mr. Sullivan is a U.S. district court judge for the District of Columbia.