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In 1963, the United States Supreme Court held in *Brady v. Maryland* "that the 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."[1] This obligation applies to both the guilt and sentencing stages of trial, and the prosecutor's duty to turn over exculpatory evidence is triggered even if the defense does not request it.[2] This firmly established principle was reiterated and reinforced again in the 1990s in *Kyles v. Whitley*, wherein the Court stated that a defendant is entitled to a new trial or sentencing proceeding if there is a reasonable probability that the disclosure of the suppressed evidence would have produced a different result.[3]

Yet despite these long recognized constitutional responsibilities, some prosecutors fail to honor *Brady*. As *Kyles v. Whitley* seems to suggest, the Orleans Parish District Attorney's Office when it was under the stewardship of District Attorney Harry Connick fell short of meeting its duty under *Brady*.[4] Over the past two years, the U.S. Supreme Court has confronted two more cases dealing with failures of the Orleans Parish District Attorney's Office to live up to its *Brady* obligations. Last term the Court considered the case of *Connick v. Thompson*[5]. John Thompson was prosecuted, convicted and sentenced to death in Orleans Parish, Louisiana for the murder of New Orleans businessman Raymond Liuzza, Jr. The killing was observed by a witness who provided a clear description of the perpetrator: an African American male, six feet tall, with closely cropped hair.[6]

A few weeks earlier an armed robbery had occurred. During the scuffle, the perpetrator's blood soiled the pants of one of the victims. A swatch of clothing with the perpetrator's blood was sent for analysis to the New Orleans Police lab. Following the murder, an informant approached the family and offered to provide information in exchange for money. This conversation was recorded. The snitch claimed to be able to provide another witness to the murder, and the name of the murderer. Based on the snitch's information, John Thompson was arrested for the Liuzza murder. When Thompson's photograph appeared in the local media following his arrest, families of the juvenile victims of the armed robbery told authorities that Thompson was the robber.[7]

Thompson was tried and convicted first on the armed robbery charge. He was sentenced to 49 years without the possibility of parole. At his murder trial, Thompson chose not to testify on his own behalf because the armed robbery conviction would have been used to impeach his credibility and show that he had a history of violence. Thompson was convicted of murder and sentenced to death.

Several weeks before Thompson's May 1999 execution date, defense investigators discovered that prosecutors failed to hand over exculpatory evidence which would have cleared Thompson of the armed robbery charge. Two days before the armed robbery trial, prosecutors received the results of the blood tests from the crime lab. The armed robber whose blood stained the pants of one of the victims was blood Type B. Thompson's blood is Type O. Although the defense had specifically requested that the prosecutors hand over "all scientific test results," the District Attorney's Office intentionally withheld the crime lab report. Worse, when prosecutors moved the evidence from the police property room and checked the evidence into the court property room for trial, the blood-stained swatch of cloth disappeared.[8]

Having wrongfully convicted Thompson of armed robbery, the prosecutors proceeded with the murder trial. Again the prosecution failed to hand over powerfully exculpatory evidence, including the original eyewitness' description of the murderer. Thompson was not six feet tall with

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close cropped hair. He stood five feet eight inches, and wore his hair in a large Afro at the time of the murder. Prosecutors also failed to hand over the audio tape of their informant, which showed that he was paid for his information. And what of the additional witness the informant led the police to? He became the prosecution's key witness – a six foot tall African American nicknamed Kojak because of his close cropped hair.[9]

In 1994, five years prior to Thompson's execution date, Gerry Deegan, one of his prosecutors, contracted terminal cancer. As Deegan lay dying of cancer, he confessed to another former prosecutor that he had withheld the blood evidence. Making matters worse, the confession remained secret for the next five years while Thompson awaited execution on death row. The evidence only came to light after Thompson's investigator found an old microfiche of the lab results.[10]

The Louisiana Court of Appeals vacated both of Thompson's convictions. Specifically, the court held that the armed robbery conviction, which was tainted by the *Brady* violation, unconstitutionally deprived Thompson of his right to testify in his murder case. Louisiana decided to drop the armed robbery charges and retry Thompson for murder. On retrial, it took the jury 35 minutes to acquit Thompson.[11]

Because of the *Brady* violations and the resulting wrongful convictions, Thompson endured eighteen years in prison; he spent fourteen of those eighteen years on death row. He faced seven different execution dates.

After his exonerations, Thompson filed a federal civil rights law suit pursuant to 42 U.S.C. § 1983, against Harry Connick, Sr., the District Attorney for Orleans Parish. A jury awarded Thompson $14 million and the District Attorney appealed the judgment. It was this issue – whether Thompson was entitled to the jury award in the civil rights suit – that was before the U.S. Supreme Court in *Thompson v. Connick*. In a five-to-four decision, the U.S. Supreme Court decided that Thompson was not entitled to the damage award, despite the intentional and wrongful *Brady* violation, because Thompson did not show that the District Attorney engaged in a pattern of deliberate indifference in his failure to train his Assistant District Attorneys with respect to their *Brady* obligations.[12]

The four dissenters in *Thompson*, however, detailed the egregious *Brady* violations that they believed supported the damage award. According to these justices, the District Attorney and his office "misperceived *Brady's* compass,"[13] and the record showed that four prosecutors over a period of nearly twenty years repeatedly failed to turn over exculpatory evidence.[14] Justice Ginsburg in her dissent stated:

> "What happened here . . . was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady's* disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under [the federal civil rights statute, 42 U.S.C.] § 1983."[15]

This term, the Court once again confronts *Brady* violations committed by the Orleans Parish District Attorney's Office when it was headed by District Attorney Connick. In *Smith v. Cain*, the Court must determine whether the prosecutors' violation of *Brady* entitles Juan Smith to a new trial.[16] The state's case hinged on the testimony of an eyewitness who placed Smith at the crime scene and identified Smith as the shooter.[17] However, the prosecutor failed to turn over multiple prior inconsistent statements by this eyewitness as well as statements by other witnesses that raised considerable questions about the credibility of the eyewitness and the reliability of his identification.

The Court heard oral arguments in Smith's case on Tuesday, November 8, 2011. The Court's questioning of Donna Andrieu, the Assistant District Attorney representing the state, was pointed, critical and relentless. Most of the justices appeared to find the actions of the District Attorney deeply troubling. For example, Justice Ginsburg seemed astounded that the prosecution would even argue that the eyewitness' inconsistent statements were not material.[18] Likewise, Justice Kennedy told the assistant prosecutor, "you say that's immaterial. I find that incredible."[19] And Chief Justice Roberts bluntly pointed out "if you were the defense lawyer you really would like to have that statement where he said: I couldn't identify them."[20] Even Justice Scalia thought the evidence ought to have been turned over; his chief concern was whether the error rose to a level which would entitle Smith to relief. Most of the other justices asked questions that seemed to indicate that not only did they find the evidence material but also they believed there was a reasonable probability that the suppression of the evidence affected the outcome of the case.

Consider this exchange between the Assistant District Attorney and Justice Kagan:

> JUSTICE KAGAN: Ms. Andrieu, did your office ever just consider confessing error in this case?
> MS. ANDRIEU: I'm sorry?
> JUSTICE KAGAN: Did your office ever consider just consider confessing error in this case? You've had a bunch a time to think about it. Do you know? We took cert. a while ago. I'm just wondering whether you've ever considered confessing error.[21]

Ms. Andrieu did not appear willing to confess error at this time. The Court, however, will be making its judgment on the District Attorneys' conduct sometime in the next six or seven months.

[1] 373 U.S. 83, 87 (1963).
[2] *See United States v Bagley*, 473 U.S. 667 (1985).
[3] 514 U.S. 419, 422 (1995). Defendant Kyles was prosecuted in Orleans Parish, Louisiana.
[4] *See* http://www.scotusblog.com/?p=131456.
[5] 131 S.Ct. 1350 (2011).
[6] *See* http://themoderatevoice.com/105277/the-false-imprisonment-of-john-thompson-connick.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] 131 S.Ct. at 1356-57.
[12] *Id.* at 1366.
[13] *Id.* at 1370.
[14] *Id.*
[15] *Id.*
[16] No. 10-8145 (2011).
[17] For an informative description of the *Smith* case and the oral argument, *see* http://www.scotusblog.com/?p=131157 and http://www.scotusblog.com/?p=131456.
[18] *Smith v. Cain*, No. 10-8154, Oral Arg. at 29, 31 (Nov. 8, 2011).
[19] *Id.* at 32.
[20] *Id.* at 31.
[21] *Id.* at 50.