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# New Supreme Court Decision Illustrates a Big, Old Problem

Police must disclose to prosecutors and prosecutors disclose to the defense any evidence.

➤ By Pam McDonald and Randy Means



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he Supreme Court decision in *Brady v. Maryland*, 373 U.S. 83 (1963), though decided nearly 50 years ago, still has not been properly institutionalized by police and prosecutors. Many law enforcement officials mistakenly see Brady as being all about the mandatory disclosure of officer credibility problems (when such officers are to testify in criminal proceedings) but that issue is the smallest branch of the Brady river. Some police officials and (amazingly) some prosecutors are not familiar with the Brady rule at all or think it is strictly a federal court phenomenon.

The new case of *Smith v. Cain*, decided by the United States Supreme Court on Jan. 10, 2012, illustrates this problem in a most painful way. The Supreme Court reversed Smith's five murder convictions, because the surviving would-be sixth murder victim made verbal statements at the scene (and soon thereafter), which were recorded in an officer's notes but were never provided to the defense – even though the statements were inconsistent with the victim's later account to the police, and with his trial courtroom testimony.

The belief that police should not tell prosecutors about evidence that is 'harmful' to the state's case, or that the prosecutor should not give such evidence to the defense, is contrary to the government's legal duties under Brady. The government must disclose evidence – that helps the defense

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– to the defense. The information that we might most hate to disclose is what we must disclose.

## The Violent Facts

*Smith v. Cain* is a compelling case. Three armed men pushed their way into a private home, demanding money and drugs. The gunmen ordered everyone to the floor, but when a woman emerged from a back bedroom and the gunmen ordered her to the floor, she ran back to the bedroom. The intruders then opened fire, killing five people. Smith, the first gunman to enter the residence, ordered a sixth victim, Boatner, to stand up, and put his gun under Boatner's chin.

When Boatner asked what the gunmen wanted, Smith struck him in the back of the head with the gun, knocking Boatner to the floor with a severe head laceration. One of the perpetrators was also shot in the head and was found alive at the scene but gravely injured. A court later decided he was incompetent to stand trial due to brain damage from the gunshot to the head.

## The Notes - The Problem

The lead investigator's notes indicated that Boatner stated verbally on the night of the murders that he could not identify the perpetrators except that they were black males. Five days after the murders, the lead investigator and Boatner talked again, and the investigator's notes from that conversation indicated Boatner said he "could not ID anyone because he couldn't see faces" and he "would not know the perpetrators if he saw them."

However, Boatner later identified Smith from photo lineups and at trial told the jury he had "no doubt" Smith was the gunman he stood "face to face" with during the crime. No other witnesses or physical evidence put Smith at the crime scene.

It took less than four pages for all but one of the Supreme Court justices to agree that the defense was entitled to know about Boatner's prior inconsistent statements and that Brady required the prosecution to disclose them. The failure to make that disclosure was the reason Smith's five murder convictions were undone.

The Supreme Court opinion does not indicate whether police had disclosed to the prosecutor the investigator's notes containing the prior inconsistent statements. In any event, it was the prosecutor's duty to ask the police for any evidence that would be materially beneficial to the defense, and police would have a corresponding duty to tell of such evidence. It is unclear in the law whether the police have an affirmative constitutional duty to tell of such evidence when they are not asked for it. It is rather clear, though, that best practice would be for police to disclose Brady material to the prosecutor even if they are not asked for it.

### The Legal Rule

"Under Brady, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment," the Court reminds in *Smith v. Cain*. Boatner's initial statements, recorded in the investigator's notes, claiming that Boatner could not identify the perpetrators, were clearly favorable to the defense. The defense would certainly have used those statements to challenge Boatner's credibility as a witness and possibly the lead investigator's credibility (depending on his testimony) when Boatner told the jury he had "no doubt" about identifying Smith as the first gunman.

"Evidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different," the Court reiterates, citing *Cone v. Bell*, 556 U.S. 449 (2009), which is only reminiscent of a number of earlier decisions. The likelihood that the outcome would have been different does not have to be particularly high. It only has to be great enough to "undermine confidence in the outcome of the trial," the Court said.

Since the State's case substantially relied on Boatner convincing the jury that Smith was the perpetrator, the investi-

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gator's notes of Boatner's earlier statements asserting an inability to identify perpetrators was certainly "material" because those statements would cast doubt on his later "positive" identifications. So, because Boatner's earlier statements, as documented in the investigator's notes, were both favorable to the defense and material to the trial outcome, the prosecutor was obligated under Brady to provide the investigator's notes to the defense. The failure to make that disclosure was ultimately fatal to the case.

### It Didn't Have to Be

If the information about Boatner's earlier statements had been divulged to the defense, the prosecutor could very likely have mitigated its damaging effect. Boatner viewed over 80 photographs before positively identifying Smith "immediately" when presented with Smith's photo, then stating he would "never forget that face." While viewing one of the earlier lineups, he stated one of the photos was similar to the perpetrator (Smith) and gave distinguishing details.

There were also notes and corroborating testimony that on the night of the crime, Boatner made additional statements that were consistent with this identity of Smith. He recalled that the first gunman, the one who put the gun under his chin, had a lot of gold in his teeth and had a short haircut. Some additional police notes indicated Boatner gave a partial description of the man who came through the door first and who struck him with the gun, but he was unable to provide details about the other men involved except to say they were black males.

As the investigation progressed, Boatner's identification of Smith was credible enough to convince the investi-

gators that Smith was involved, despite Boatner's reticence to identify the gunmen the night of the crime. The same factors that caused the investigators to excuse his earlier comments would likely have been convincing to the jury as well, if only the prosecutor had made the required Brady disclosure and then dealt with it. It might well have been that the damage to the case would have been minimal, once the statements were put in context with other facts favoring Boatner's credibility.

It is imperative that police disclose to prosecutors and prosecutors disclose to the defense any evidence that is helpful to the defense. The question of "materiality" cannot be answered properly before one can see how the trial unfolds. It is unwise to assume that evidence favorable to the defense will turn out not to be "material."

In any event, it is the prosecutor's duty to learn of any such evidence in the possession of the police. The prosecutor does not get a 'pass' for not actually knowing what the police have, so the police are not doing the prosecutor any favor by hiding from the prosecutor evidence that police might think harmful to their case. The trick is not to hide such evidence, but rather to expose it and try, within the truth, to minimize its damage to the case. If indeed the evidence is so damaging that it truly undermines the case, then conviction is not the appropriate result anyway.

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