Criminal Law:
NY Rule to Hold Prosecutors Accountable for Discovery Violations Should Be Considered in Maine

by Timothy Zerillo, Esq.

Several years ago I wrote an article for *Maine Lawyers Review*, urging criminal defense attorneys to look beyond the Maine Rules of Criminal Procedure for the discovery their clients needed to mount a vigorous defense. While it remains true that the spirit and law of *Brady v. Maryland* and progeny need to be pressed by the defense bar, it is equally true that prosecutors need to be held to their *Brady* obligations by the Courts.

New York is doing exactly that. On January 1, 2018, a new rule will go into effect in New York which requires that prosecutors search their files and disclose all evidence favorable to a criminal defendant at least 30 days before trial. This rule was handed down by NY Court of Appeals Chief Judge Janet DeFiore after a fifteen-month study on prosecutorial misconduct and its role in wrongful criminal convictions.

The New York discovery rule is the first of its kind known to this author. It permits NY judges to bring contempt charges against prosecutors who fail to disclose exculpatory material. Moreover, it will make it difficult for a prosecutor to claim that her or she was not aware of the missing material.

The New York rule imposes a model order on discovery, which will be ordered at the defendant's arraignment. It requires, like *Brady* and its progeny, that NY prosecutors search for discoverable material, ordering: "The District Attorney and the Assistant responsible for the case have a duty to learn of such favorable information that is known to others acting on the government's behalf in the case, including the police, and should therefore confer with investigative and prosecutorial personnel who acted in this case and review their and their agencies' files directly related to the prosecution or investigation of this case."

Further, the model NY Rule defines broadly what is "favorable" evidence to defendant requiring disclosure. Timely disclosure must be automatically made no later than 30 days prior to a felony trial and 15 days prior to a misdemeanor trial.

New York's standing order does not break new ground as to *Brady's* ongoing requirements. Rather, it creates a standing order that covers old ground. In *United States vs. Bagley* (1985), the U.S. Supreme Court held that regardless of the request, general or specific, favorable evidence is material, and constitutional error results from its suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Likewise, the Supreme Court has already held that the prosecutor has a duty to learn of favorable evidence. In *Kyles vs. Whitley* (1995), the Supreme Court held that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

Why then did New York have to issue a standing order if the law was already so well-established for decades? The answer is simple: it was sometimes ignored. Further, the NY study affirmed what we already knew: a prosecutorial failure to provide *Brady* material is among the leading causes of wrongful convictions. When a prosecutor's *Brady* requirements are ignored, due process is always violated and a wrongful conviction can be the end result.

Maine is not immune to this cancer. It is more than certain that the vast majority of prosecutors do an excellent and ethical job of disclosing evidence. However, one prosecutor who cuts corners and hides evidence can wreck countless lives. The NY discovery rule is an attempt to prevent the devastation that can be wrought from a wrongful conviction.

Several high profile Maine cases have raised eyebrows related to the failure to disclose discovery. The Vladek Filler matter, a Hancock Court gross sexual assault case, is the only case in Maine in which a prosecutor has been disciplined by the Bar. There, the state withheld the alleged victim's 911 calls, exculpatory statements, and interviews with law enforcement. The cause and effect of this culling of the evidence was quite clear. In his first trial, Filler was convicted. In his second trial, after obtaining the required *Brady* material, he was acquitted.

Recently, I was pleased to be co-counsel with Amy Fairfield in the Anthony Sanborn murder case post-conviction review. This was a review of Mr. Sanborn's conviction for the gruesome death of a teenage girl in 1989. Mr. Sanborn, who was 16 years old at the time of the murder, was convicted in 1992, and sentenced to 70 years in prison.

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Therein we learned that over 4,000 documents were kept in the home of the lead detective and had gone undisclosed for 25 years. After five-weeks of post-conviction hearings, the state and Mr. Sanborn agreed that his 70-year sentence was cruel and unusual in violation of the 8th Amendment.

We like to think that we do things differently in Maine. There is generally an underlying honesty and comradery between the prosecution and the defense. However, these cases, and many more examples I have not mentioned, underscore the point that even Maine prosecutors can run afoul of their *Brady* obligations. If Maine cares about justice for criminal defendants, then a rule similar to the New York rule should be considered.

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