

U.S. Supreme Court Strips Nearly Executed Exoneree of Compensation



By Jeff Deskovic

Condones Prosecutorial Misconduct

John Thompson was arrested for capital murder in New Orleans. At some point after that he was arrested for attempted robbery. Prosecutors calculated that if they could first convict him of the attempted robbery, he would be prevented from testifying at the murder trial out of fear that the prior conviction would be brought up. Aided by a Brady violation consisting of hiding a swatch of clothing containing blood from the actual perpetrator as well as the lab report indicating the blood type, he was convicted of

robbery.

Then, with Thompson unable to testify in his own defense during the murder trial, he was convicted and sentenced to death. Within a month of execution, a private investigator was able to locate the lab report. Both convictions were overturned, and with Thompson testifying at the murder retrial, he was acquitted within an hour. All told, he served eighteen years in prison wrongfully, fourteen of which were spent on death row.

Thompson then sued DA Connick for failing to train his prosecutors, and that such lack of training led to the evidence withholding and ultimately for his wrongful convictions, winning a \$14 million award. The Circuit Court upheld the award in an

eight to eight decision. Connick appealed to the US Supreme Court, and on March 29, 2011, in a five to four vote, the court ruled that the DA's office could not be held responsible for failing to train prosecutors about their obligation to turn over exculpatory evidence based on a single instance, thereby Thompson would receive nothing. Justice Clarence Thomas wrote the majority opinion, in which Roberts, Scalia, Kennedy, and Alito joined. Scalia filed a concurring opinion which Alito joined. Justice Ginsburg wrote the dissenting opinion, in which Breyer, Kagan, and Sotomayor joined.

The majority held that a District Attorney could not be held liable for "a single

Brady violation;" that four other convictions reversed based upon Brady violations in the ten years before Thompson's robbery conviction were insufficient to put the DA on notice that Brady was either not understood nor being complied with because they involved different variations of Brady violations; that the prosecutor's act of withholding was deliberate and therefore no amount of training would have prevented it; that law school was sufficient training for prosecutors that the DA was entitled to rely upon; and that Brady merely requires turning over exculpatory evidence and not merely evidence which, if tested, might yield exculpatory material.

Continued on page 19

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Continued from page 18

Analysis

I disagree with both the opinion of the majority as well as the outcome.

I take issue with the majority's holding that Thompson's claim is based upon "a single Brady violation." As I see it, the act of hiding the blood swatch was one violation, hiding the lab report was another, while the continued suppression of both for five years once the other prosecutors discovered it was another instance, making it at least three. I also reject the attempted trivialization by the majority of the enormity of what happened in this case by means of focusing on the number of violations. In real life, the prosecutor hid evidence which if tested could have proven Thompson's innocence, for the express purpose of not only wrongfully convicting him twice but very nearly executing him. Even one instance should be enough to warrant both compensation and punishment.

Thompson should have won with his argument that District Attorney Connick provided inadequate training to his prosecutors.

The four other convictions that were overturned based upon the "dissimilar" Brady violations were sufficient to alert DA Connick that there was an actual or constructive pervasive Brady problem throughout his office, and that the practice was so persistent and widespread as to practically have the force of law. First, while Brady violations that go uncaught by the courts and defense attorney's likely would escape notice, four reversals on Brady grounds were enough to make clear even to the most dense of observers that there was a big problem. Second, the fact that

Connick did nothing after the reversals sent a clear signal to all in that office that they had a blank check to continue to commit violations. Thirdly, the fact that there was a written instruction circulated throughout the DA's office on the subject of Brady directing prosecutors to "turn over what you have to turn over by law, but no more" could only have reinforced that conclusion. Such an instruction reeking of such begrudging language could only be interpreted as encouraging bending and inevitably breaking of Brady rules. Fourthly, regardless of the differing types of violations, a Brady violation is a Brady violation.

Turning to the argument that the prosecutor's actions were intentional and therefore no amount of training would have prevented it, while I agree that's true, proper training might have prompted one of the other five prosecutor's who knew about the violation to have come forward before they did far sooner than before the lab report was discovered with Thompson nearly being executed.

Law school is insufficient to teach prosecutors the law regarding Brady and thus obviating the need for Brady training. If it was sufficient, why is it that both DA Connick and his assistants got the answers wrong when asked questions about Brady requirements? Furthermore, it is clear that if the head of the DA's office and his two senior prosecutors did not understand Brady, there is no way that they could possibly have provided sufficient training to the junior prosecutors.

I also disagree with the majorities definition of Brady material, to wit, evidence that is exculpatory, excluding evidence which, if tested, could be exculpatory. Such a sleight of hand definition could

only encourage prosecutors to refrain from obtaining test results in order to get out of turning over information to defense attorney's. Such an approach reduces a trial from a search for the truth to simply being about winning thus setting the stage for wrongful convictions. Instead, the dissent's position lends itself to accuracy: If it could be exculpatory, turn it over.

Commentary

I believe in substantive justice which I define as outcomes that go right to the heart of an issue and can truly be said to be a just outcome given the facts, as opposed to an inflexible, uncaring framework that elevates procedure over justice leaving the average onlooker dumbfounded at the utter lack of common sense and fairness. After all, the law was made for man, not the other way around.

Given that Thompson served eighteen years in prison and was very nearly executed, clearly he deserved compensation. There is no amount of money that could ever make that up to him or to his family. For the US Supreme Court to render a decision leaving him with no compensation is morally wrong. Surely one does not need a law degree or years of legal training to see that.

Therefore, even if the Supreme Court did not agree with the arguments his attorney's advanced in order to win the compensation, they should have overruled the lower courts rationale while concurring with the result. Those familiar with reading legal opinions know that there is a such thing as a reviewing court deciding a case by "dissenting in opinion while concurring in result," and a court overturning the prior ground by which the court below them decided a case while still ruling for the winning party on a different basis. Such a decision in this case

would have been a step towards restoring confidence in the court system that parties wronged by authorities can turn to them for redress, instead this ruling demonstrates all too clearly it is a system that is rigged in favor of authorities. Heads law enforcement wins, tails wronged citizens lose. When justice does occur in the courts, it is still because of the system, but despite it.

Rather than celebrating their victory, the State of Louisiana should step up to the plate and voluntarily compensate Thompson. While they are at it, they should pass a law allowing all of their exoneree's to seek compensation under state law.

This case illustrates the need for incarcerative as well as financial penalties for rogue prosecutors who engage in clear cut, intentional misconduct. Connick and his assistants used the legal system to pull off a kidnapping, while also using it to try to execute him. What if the average citizen committed kidnapping or attempted murder? Would there be an incarcerative penalty? Why should there not be for these prosecutors? Is it somehow less egregious that they did so in a courtroom while also using flowery talk as an attempt to make it look more dignified? Or is it that the law is intended for some but not others? Not only should they be punished, but they should also have immunity stripped thus enabling them to be sued personally.

Turning to Thompson's lawyers, it appears as though they did not assert all of the grounds that they could have. Although without question Connick did not adequately train his office, he also failed to supervise them. This argument appears not to have been made.

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