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Thursday, March 19, 2015

Buoying *Brady's* burden

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It doesn't take a chokehold or a gunshot for police misconduct to turn deadly. Prosecutorial concealment can be enough.

Just ask Debra Milke. Prosecutors in Phoenix built their murder case against her on the testimony of Detective Armando Saldate Jr., but never bothered to disclose the detective's history

of violating *Miranda* and providing false statements under oath, nor did they disclose an internal police evaluation that found Saldate's "image of honesty, competency, and overall reliability must be questioned." Based on Saldate's uncorroborated testimony that Milke had confessed to taking part in her son's murder - a claim that could have been impeached had the misconduct been disclosed - Milke was convicted and sentenced to death.

Twenty-three years later, in 2013, the 9th U.S. Circuit Court of Appeals threw out Milke's conviction on the grounds that prosecutors had violated *Brady v. Maryland*, the constitutional doctrine that requires them to disclose favorable, material evidence to the defense. Prosecutors set about retrying Milke, intending to rely on Saldate's testimony again, even though Saldate said he would invoke his Fifth Amendment privilege against self-incrimination.

But Tuesday, the criminal case against Milke finally came to an end. The Arizona Supreme Court announced it would not revisit the Arizona Court of Appeals' Dec. 11 decision that Milke could not be retried. In that decision, the Court of Appeals declared that the concealment of Saldate's misdeeds amounted to "egregious misconduct" on the part of prosecutors and "resulted in a flagrant denial of due process." This concealment left "a severe stain on the Arizona justice system" and "call[ed] into question the integrity of the system." According to the Court of Appeals, the only way to restore legitimacy to the state's judicial system and to deter future such misconduct was to impose the double jeopardy bar against retrial.

This decision is significant because it speaks to the national debate about police misconduct. It shows that when prosecutors ignore police misconduct, they don't simply erode the public's trust. They also violate constitutional protections designed to prevent wrongful convictions. This in-court, procedural side of police misconduct is too often overlooked in the debate about policing abuses, but the failure to disclose evidence of police misconduct carries with it life-and-death consequences for criminal defendants.

This failure to disclose is a symptom of a much larger problem. The *Brady* doctrine, as articulated by the U.S. Supreme Court, requires prosecutors to turn over all favorable, material information known to any member of the prosecution team, including the police. But *Brady* violations are so common that five federal appellate judges recently decried "an epidemic of *Brady* violations abroad in the land." The basic problem is that *Brady* asks prosecutors to make disclosures that weaken their own cases and, thus, cut against their own self-interest in winning.

Brady compliance becomes even more difficult when the evidence that must be disclosed concerns police misconduct. That is because police fear such disclosures will cost them their jobs. This fear has fueled an astounding resistance to disclosing anything related to police misconduct - a resistance that manifests itself in two main forms.

First is prosecutors' lack of access to police personnel files. In California, for example, police personnel records are made confidential by statute and no one - not even prosecutors carrying out their *Brady* duties - can review them without first getting a court order. Even where there are no statutory protections for the personnel files, there are logistical impediments to prosecutors' accessing records of police misconduct: There's no comprehensive system for tracking misconduct across jurisdictions. So, officers who rack up credibility problems in one agency can transfer to another, even within the same state, without the misconduct following them.

The second hurdle to prosecutors' disclosing police misconduct is their partnership with the police. Local prosecutors rely on the goodwill of the police on a daily basis. Prosecutors who disclose police misconduct, even pursuant to *Brady*, risk law enforcement's wrath. This conflict of interest is one reason district attorneys struggle to police the police.

The challenges facing local prosecutors, however, are an opportunity for the Department of Justice, because it doesn't face the same logistical and political constraints as district attorneys. DOJ officials could make it a priority to investigate cases like Milke's to see if the officers and prosecutors who left "a severe stain" on the justice system in one case had committed similar misconduct in other cases. Back in 2013, the 9th Circuit referred Milke's case to the DOJ "for possible investigation into whether Saldate's conduct, and that of his supervisors and other state and local officials, amounts to a pattern of violating the federally protected rights of Arizona residents." Federal authorities apparently declined to press the investigation very far, but they may want to reconsider now that the Arizona court system has added its own concerns to those voiced by the federal judiciary.

How many defendants lost life or liberty because prosecutors suppressed Saldate's credibility problems? There's no way to know without a thorough investigation. And for anyone who doubts the need for such an investigation, consider that Saldate, by his own admission, interrogated up to 100 murder suspects, investigated 300 murder cases, and participated in more than a thousand felony investigations. Not including Milke, at least three people on death row had Saldate work on their cases, and there has been no public accounting of how many more capital convictions may have had Saldate's fingerprints on them.

Indeed, the DOJ could investigate Saldate's cases as a way to launch a larger initiative aimed at identifying defendants convicted because police misconduct was not disclosed. Such an initiative would shine much-needed light on police misconduct while simultaneously vindicating the civil rights of the wrongfully convicted and demonstrating that police misconduct must not be swept under the rug.

Dishonest cops and the prosecutors who protect them pose a serious threat to civil rights, not just on the streets of Ferguson, Cleveland and Staten Island, but in courtrooms around the country. Where local authorities don't address this problem, the federal government should.

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