

New York Law Journal

NEW YORK, FRIDAY, JULY 13, 2001

©2001 NLP IP Company

'Brady' Violation Overturns 1990 Murder Verdict

BY MARK HAMBLETT



Judge Jacobs

THE PROSECUTION's failure to tell the defense about an off-duty police officer who witnessed a murder has led the U.S. Court of Appeals for the Second Circuit to reverse a Brooklyn man's conviction 10 years after trial.

Saying Brooklyn prosecutors "for a critical time actively suppressed" information about the officer, and only revealed his identity on the eve of trial, the Second Circuit ordered that prisoner Sami Leka be retried within 90 days or released.

The court said that the prosecution's failure to tell Mr. Leka's attorneys about the potentially "seismic" testimony contradicting that of two other eyewitnesses to the shooting, violated his constitutional rights under the Supreme Court's ruling in

Brady v. Maryland, which requires prosecutors to turn over exculpatory evidence to the defense.

"Here, it is ridiculous to think that the prosecution did not know what a police officer saw as a witness to a shooting," the court said in granting Mr. Leka's petition for a writ of habeas corpus in *Leka v. Portuondo*, 00-2002.

Mr. Leka was convicted in 1990 of shooting Rahman Ferati on a Brooklyn street. Two eyewitnesses, who made up the bulk of the prosecution's case, testified that they noticed two men sitting in a white car, walked about five car lengths down the street, and then heard shots ring out.

One of the witnesses, Elfran Torres, said he saw a man he identified at trial as Mr. Leka firing a gun in a downward motion.

But unbeknownst to the defense, off-duty police officer Wilfredo Garcia saw the incident from the window of his second-

'Brady' Violation Overturns Murder Conviction

Continued from page 1, column 4

floor apartment. Lawyers for Mr. Leka later learned that Officer Garcia would have testified that he heard gunfire, saw a light-colored car pull up in front of a man on the street, and then saw muzzle flashes coming from inside the car.

Officer Garcia's observations might have cast doubt on two aspects of Mr. Torres' testimony: that the car had been stationary before the gunshots, for as long as it took Mr. Torres and his companion to walk five car lengths, and that the man Mr. Torres allegedly saw firing in a downward motion was Mr. Leka.

After trial, Mr. Torres, when shown a picture of the victim, said it was actually the victim he saw firing a gun in a downward motion.

Nonetheless, Mr. Leka's conviction was upheld on appeal, and his petition for a writ of habeas corpus was denied by Eastern District Judge David Trager.

On the appeal to the Second Circuit, Mr. Leka argued that 22 months after he first requested *Brady* material, Kings County Assistant District Attorney Kenneth A. Rigby finally revealed the name and address of Officer Garcia.

And when an investigator working for defense lawyer Joseph Benfante used a ruse to contact Officer Garcia for an interview, Kings County Supreme Court Justice Phillip E. Lagana granted a prosecution request for a protective order directing the defense to stay away from the officer.

At the trial, the defense never called Officer Garcia to the witness stand, even though it was given an opportunity to interview him — a decision that the defense later attributed to the protective order and the paucity of information about the officer's potential testimony

On the appeal, Second Circuit Judge Dennis Jacobs said, "Garcia's observations tended to undermine the testimony of both eyewitnesses sponsored by the prosecution."

"[A]s a police officer, Garcia was a trained observer whose testimony we think would likely have been credited," Judge Jacobs said. He added, "after the prosecution identified Garcia, it took successful steps to prevent the defense from interviewing him: and the prosecution never disclosed at any time to the defense the true nature of Garcia's testimony."

Judge Jacobs noted that the protective order was "broader, however, than anything needed to protect Garcia," and it "foreclosed access to Garcia in the small window between the date the prosecution first disclosed his identity and the date that the defense mounted its case."

"The government argues that its disclosure on the eve of trial (consisting of Garcia's name and presumably address) was sufficient to permit the defense to learn all that it needed to know," Judge Jacobs said. "We address that contention and determine that the disclosure was too little, too late."

And maybe the defense blundered by not pursuing the matter aggressively with the trial judge and seeking reconsideration of the protective order, the appeals court said, but "the prosecution is in no position to fault the defense for cutting corners when the prosecution itself created the hasty and disorderly conditions under which the defense was forced to conduct its essential business."

Judge Jacobs also said it was fruitless for the State to argue that the defense's failure to petition the trial court for leave to seek out Mr. Garcia

can "be seen as a default or a neglect, or even as an election."

"The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought," Judge Jacobs said. "A responsible lawyer could not put Garcia on the stand without essential groundwork. And a responsible lawyer in the midst of the pressures and paranoias of trial may well deploy scarce trial resources doing other things."

Judges Fred I. Parker and Sonia Sotomayor joined in the opinion.

Michael S. Sommer of McDermott, Will & Emery, who represented Mr. Leka on appeal, said the case represented "an egregious injustice" that took over a decade to correct.

"We are greatly disturbed that the D.A.'s office, which could have righted this wrong at any time, forced us to carry this battle all the way to the U.S. Court of Appeals for the Second Circuit," Mr. Sommer said.

Kings County District Attorney Charles J. Hynes said in a written statement that he would appeal the decision to the U.S. Supreme Court.

"While I have the utmost respect for the U.S. Court of Appeals for the Second Circuit, I believe their decision today is wrong. The jury's verdict in the original case against Sami Leka has been upheld by Federal Eastern District Court Judge David Trager and four defense motions in the New York State courts to set aside [the verdict] or grant a new trial have been denied."

Robert E. Rice and Tomasita L. Harrison of McDermott, Will & Emery joined Mr. Sommer on the appeal. Assistant District Attorneys Michael Gore, Leonard Joblove and Victor Barall represented the State.