THE National Association of Criminal Defense Lawyers CHAMPION

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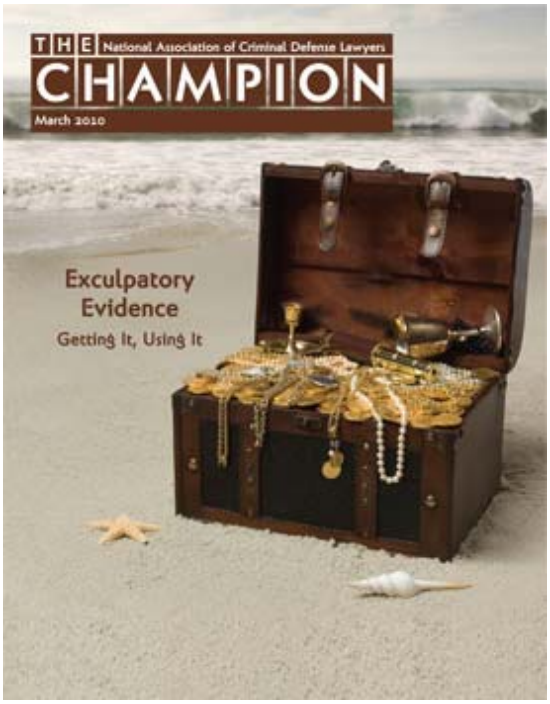

President's Column
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I Hate to Tell You This

By Cynthia Hujar Orr

When I am describing Brady evidence, I like to tell the story about a phone call I received from a wonderfully professional prosecutor in San Antonio. I got a call from Assistant U.S. Attorney Charlie Strauss. He said, “Cynthia, I hate to tell you this.” And then he went on to tell me about some favorable evidence he had just learned. If the prosecutor “hates to tell you something,” then it is Brady evidence.

Most civil lawyers, even longtime practitioners, believe that criminal cases are tried after full disclosure of the evidence to both parties in the case. They assume that lawyers exchange witness lists, conduct depositions, and submit interrogatories and requests for admissions, and thereafter determine whether the case should be settled or tried.

However, based on the faulty assumption that every accused person will kill, threaten, and manipulate witnesses, most criminal discovery is left to the discretion of the prosecutor.1 A recent search for criminal charges stemming from defendant discovery abuses showed very few such cases. Further, in those few jurisdictions where criminal discovery is more akin to civil discovery, the assumption has proven to be false. In those rare instances where security concerns are genuine, courts successfully employ protective orders to prevent abuse of the process.

The Federal Rules of Criminal Procedure were recently amended to require broader discovery by the defendant even though the accused has no burden of proof. Thus, the defendant is obligated to provide reciprocal discovery. If the defendant wishes to present an alibi defense or one based on public authority, he must provide advance notice to the government or lose the right to present the defense. This hardly seems fair since the accused should enjoy the right to remain silent and to the effective assistance of counsel from the beginning of the process to its end. Discovery requirements imposed upon the accused at the pretrial stage make him give up those rights before he knows whether the prosecution can meet its burden of proof.

And yet the government is required to concede nothing up front. Currently, it is not even required to produce the prior statements of witnesses until each witness has testified. Nor must it produce evidence favorable to the accused prior to trial.2 But waiting until trial renders the effective use of such evidence by the defense of marginal value at best. Once the trial is underway, courts are loath to burden jurors with a continuance or recesses lasting more than a matter of minutes.

While the prosecution burden of proof is a high one, it should not be eased by allowing a trial by ambush, by requiring a roadmap produced by the defense through the pretrial disclosure of defense strategy, nor by requiring the release of privileged information, especially if no up-front disclosures are required by the party with the burden of proof. Nor should the definition of Brady evidence relied upon by the DOJ or the U.S. Attorneys' Manual require prosecutors to exercise discretion regarding the merits or materiality of the evidence. If they would hate to tell us about it, it should be disclosed. Simply put, evidence favorable to the defendant should be produced. And it should be produced pretrial, when counsel can make meaningful use of it.

The rights of the accused are too great, the duty of prosecutors to seek justice is too important, and the human fallibility of prosecutors in the exercise of their discretion is too evident to allow this unbalanced procedure to continue. Legislators should act to reform our system to provide full and early disclosure of the prosecution's evidence, witness statements, and favorable evidence. They should halt the practice of requiring defense disclosures before the presentation of the prosecutor's case-in-chief. Only in this way can we subject a flawed system of justice to the crucible of robust adversarial testing. Only when we allow the strong and well-armed advocacy for the accused can we no longer pretend to have confidence in the results.3

Notes

1. This is true in the Federal System. The only required discovery is the defendant's statements and evidence material to the defense. Absent motion practice, the decision regarding whether something is material is left to the discretion of the prosecutor.
2. Brady v. Maryland, 373 U.S. 83 (1963), requires the production of favorable evidence at trial. Some juridisctions recognize that in order to comport with due process, this disclosure must be made sufficiently in advance of trial so that the defendant may utilize the evidence. In the alternative, coursts can grant continuances for the same purpose.
3. I once ask a classroom of fifth graders, "How many of you think a guilty person should have a really good lawyer?" A few hands went up in the room. And I asked, "How many of you think that an innocent person deserves a really good lawyer?" All of the hands shot up. Then I asked, "How will we know the difference?"

National Association of Criminal Defense Lawyers (NACDL)
1660 L St., NW, 12th Floor, Washington, DC 20036
(202) 872-8600 • Fax (202) 872-8690 • assist@nacdl.org