# Brady, Materiality, and Disclosure: Turner v. United States

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The Supreme Court just decided Turner v. United States, rejecting the *Brady* claims of several defendants convicted of a brutal and highly publicized murder in Washington, D.C. Although the Court ruled in the prosecution's favor, it also encouraged prosecutors to provide defendants with all evidence that may be helpful to the defense, even if that evidence does not cast material doubt on the prosecution's case.

**Facts.** The prosecution's evidence tended to show that in 1985, over a dozen young men gathered in a Washington, D.C. park. They decided to rob someone, and selected Catherine Fuller, who happened to be passing by, as their victim. They shoved her into an alley, beat her, stole her money, carried her into an empty garage, tore off her clothes, sodomized her with a pipe, and left her to die. The murder was highly publicized and helped to cement Washington's reputation as a dangerous city.

**Trial evidence.** The prosecution's evidence consisted primarily of the following:

- Testimony from two members of the group, who were cooperating with the prosecution in hopes of leniency.
- Testimony from a witness who was present in the park and heard the group talk about committing a robbery and pick out Ms. Fuller as their victim, and saw the group push her into the alley.
- Testimony from a teenager who looked into the alley as the attack was taking place.
- Testimony from two women who saw a "gang of boys" attacking the victim, recognized some members of the group, and watched part of the sexual assault.
- A recorded statement by one of the defendants, admitting his role in a larger group attack.

The defendants did not dispute that a large group had killed Ms. Fuller, but each defendant argued that he had not been a member of the group. Eight defendants were convicted and two were acquitted.

**Postconviction proceedings.** In 2010, the defendants began post-conviction proceedings with the assistance of an innocence project. The prosecution provided its case file to the defendants, who found several pieces of previously undisclosed evidence in the file, including:

- The fact that James McMillan was seen near the garage shortly after Ms. Fuller's death. McMillan was arrested around the same time for beating and robbing two women; he later sexually assaulted and killed another woman.
- The fact that another witness stated that he walked by the garage around the time of the attack, that the garage was closed, and that he heard groaning from inside.
- The fact that a person who was arrested for disorderly conduct told police that she had seen a man named James Blue commit the murder by himself.
- Impeachment evidence for several prosecution witnesses. For example, one admitted lying in one portion of her statement to investigators, another "vacillated" under questioning by police, and the aunt of the teenage witness denied that he told her about the assault even though he told police that he had described the incident to her.

The defendants argued that, taken "together, this evidence would have permitted the defense to knit together a theory that the group attack did not occur at all—and that it was actually McMillan, alone or with an accomplice, who murdered Fuller." The prosecution acknowledged that this evidence was favorable to the defense, but denied that it was "material" under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *See Cone v. Bell*, 556 U.S. 449 (2009) ("[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."). The D.C. trial court found that the evidence was not material and an intermediate appellate court agreed. *See Turner v. United States*, 116 A.3d 894 (D.C. Ct. App. 2015).

**Supreme Court ruling.** The Court affirmed. The majority viewed the new evidence as "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards." Essentially, the majority viewed the new evidence as inconsistent with the group attack theory, and saw the group attack theory as impregnable:

The problem for petitioners is that their current alternative theory would have had to persuade the jury that both [cooperating codefendants] falsely confessed to being active participants in a group attack that never occurred; that [the defendant who made the recorded statement] falsely implicated himself in that group attack and, through coordinated effort or coincidence, gave a highly similar account of how it occurred; that [the teenager], a disinterested witness who recognized petitioners when he happened upon the attack . . . wholly fabricated his story; that [two other witnesses] likewise testified to witnessing a group attack that did not occur; and that [the witness from the park] in fact did not see petitioners and others, as a group, identify Fuller as a target and leave the park to rob her.

As to the undisclosed impeachment evidence, the majority viewed this as largely cumulative.

**Dissent.** Justice Kagan dissented, joined by Justice Ginsburg. She argued that the undisclosed evidence could have changed "the whole tenor of the trial." She suggested that the defendants could have come together around a common defense instead of each attempting to distance himself from the group's actions:

[T]he issue here concerns the difference between two criminal cases. The Government got the case it most wanted—the one in which the defendants, each in an effort to save himself, formed something of a circular firing squad. And the Government avoided the case it most feared—the one in which the defendants acted jointly to show that a man known to assault women like Fuller committed her murder. The difference between the two cases lay in the Government's files—evidence of obvious relevance that prosecutors nonetheless chose to suppress.

**Comments/analysis.**

*Why did the Court take the case?* The majority opinion describes the case as "legally simple but factually complex." In other words, it's an application of *Brady* to a specific factual scenario that breaks no new legal ground. The Court isn't usually in the business of taking such cases, so why did it take this one? One answer is that the defendants' claims of innocence may have seemed stronger at the certiorari stage. A number of media outlets had covered the case in stories questioning the convictions, including the Washington Post, the Guardian, and NPR. SCOTUSblog suggests that perhaps the Justices wanted to remedy what looked like wrongful convictions, but became convinced after more careful examination that the convictions were appropriate.

*Are prosecutors constitutionally obligated to disclose information that is favorable, but not material?* Although some view *Turner* as not breaking new doctrinal ground, I think it does tee up one interesting legal question. Leave North Carolina's statutory discovery requirements and the ethics rules aside. Does *Brady* require the disclosure of information that is favorable, but does not rise to the level of being material? I have always thought that the answer was no, because *Brady* itself refers to evidence that is "favorable to an accused . . . [and] material either to guilt or to punishment." 373 U.S. at 87. *See also, e.g.,* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 Ind. L.J. 481, 487 (2009) ("Unless exculpatory evidence is material, due process does not require its disclosure, and the evidence is not, in any fair sense, 'true' *Brady* evidence.").

In *Turner*, however, the Court edged closer to saying that the answer may be yes. At oral argument, the prosecution stated that it had recently adopted a new discovery policy requiring disclosure of any evidence "that a defendant might wish to use," i.e., any favorable evidence. The majority, citing *Kyles v. Whitley*, 514 U.S. 419 (1995), stated that "this is as it should be." Justice Kagan wrote in dissent that she and the majority "agree . . . that [exculpatory and impeaching] evidence ought to be disclosed to defendants as a matter of course. . . . Constitutional requirements aside, turning over exculpatory materials is a core responsibility of all prosecutors." I am not ready to say that the disclosure of favorable but non-material evidence is now a constitutional command, but the Court certainly seems to view generous disclosure as a best practice.

**Further reading.** The *Washington Post* story about the opinion is here. It links to some of the *Post's* prior stories about the crime, including those that raised questions about the defendants' convictions, and has a heartbreaking photograph of the victim with her son shortly before her death.