Pace University
DigitalCommons@Pace

Pace Law Faculty Publications | School of Law

11-1989

The Right to Evidence

Bennett L. Gershman
Pace University School of Law, bgershman@law.pace.edu

Follow this and additional works at: http://digitalcommons.pace.edu/lawfaculty

Part of the Constitutional Law Commons, Criminal Procedure Commons, and the Evidence Commons

Recommended Citation
Bennett L. Gershman, The Right to Evidence, N.Y. St. B.J., Nov. 1989, at 52, available at http://digitalcommons.pace.edu/lawfaculty/623/.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

Helpful Practice Hints

The Right to Evidence

BENNETT L. GERSHMAN*
White Plains

ALTHOUGH ITS theoretical basis may be disputed, nobody questions the proposition that a person charged with a crime has a constitutional right to present a defense.[1] Presenting a defense naturally requires access to proof. Access includes not only the availability of evidence, but also its permissible use. Consider some examples: A defendant wants to testify, but his lawyer's threats drive him off the stand. A witness who might be expected to give favorable testimony for the defense appears at trial but refuses to testify. A defense witness wants to testify, but because the defendant failed to notify the prosecutor about the witness, is precluded from giving such proof. Evidence that might exculpate a defendant has been suppressed by the prosecutor, or has been lost or destroyed by the police. The evidence in all of these cases as a practical matter is inaccessible to support the defense. Does the defendant have any remedy? This article discusses the types of evidence that theoretically are accessible to a defendant, some of the practical and legal barriers that can obstruct a defendant's access to such proof, and the constitutional protections afforded a defendant if access is impermissibly denied.

A defendant supposedly has broad, constitutionally-guaranteed access to evidence to prove his defense. Some of this evidence may be in the defendant's possession or under his control. He has a constitutional right, derived from several constitutional sources, to give the fact-finder his own testimony.[2] He also has the right under the sixth amendment's compulsory processs clause to require the appearance of any witness to give testimony.[3] If the defendant is an indigent and if a proper showing is made, he has access at government expense to investigative and expert assistance and testimony.[4]

Some evidence, although in the prosecutor's possession and control, may also be accessible to a defendant. Prosecution witnesses, assuming they are known by the defense, can be interviewed before trial[5] and cross-examined during trial.[6] Discovery rules enable a defendant to examine before trial a broad array of tangible evidence.[7] Also accessible is any materially exculpatory information in the prosecutor's possession.[8] Given the variety of evidentiary and procedural safeguards surrounding the fact-finding process, and assuming unobstructed access to evidence, our adversary system might be expected to produce reliable and fair results. Such is often not the case, however. Barriers exist that obstruct a defendant's access to proof.

Although common law rules disqualifying a defendant from testifying have been abolished,[9] restrictions upon the defendant's own testimony exist. Relevancy and reliability considerations limit a defendant's ability to offer his own testimony. If reasonable, such restrictions probably will be upheld. In *Nix v. Whiteside*,[10] for example, a defendant was prevented from testifying when his attorney threatened to expose anticipated falsehoods. No constitutional right of the defendant was infringed, the Supreme Court concluded, because although a defendant has a right to testify, he has no right to testify falsely, nor a right to the assistance of an attorney to abet that plan. In a close decision, the Court recently struck down a ruling by a state court restricting on reliability grounds a defendant's hypnotically-refreshed testimony. In *Rock v. Arkansas*,[11] the defendant underwent hypnosis to refresh her memory about the details of her shooting her husband. She sought to testify to facts she remembered as a result of the hypnosis but the court would not permit her testimony, concluding that hypnotically refreshed testimony was inherently unreliable and therefore *per se* inadmissible. The Supreme Court held this to be constitutional error. Although a state may impose reasonable restrictions on the presentation of evidence, the Court noted, the absolute barring of a defendant's post-hypnotic testimony was "arbitrary and disproportionate" to the purposes behind the state's evidentiary safeguards.[12] The testimony could have been restricted had the

---

* Professor of Law, Pace University.

1 *Compare* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 127-131 (1974) (Compulsory Process Clause as basis for the right to present a defense) *with* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713, 793 (1976) (spirit and history of Bill of Rights as basis for such right).

2 *Rock v. Arkansas*, 107 S. Ct. 2704, 2709 (1987); *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975); *In re Oliver*, 333 U.S. 257, 273 (1948). *But see People v. Washington*, 71 N.Y. 2d 916, 521 N.Y.S. 2d 531, 523 N.E. 2d 818 (1988).

3 *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Pennsylvania v. Ritchie*, 107 S. Ct. 989 (1987). *But see People v. Gisendanner*, 48 N.Y. 2d 543, 423 N.Y.S. 2d 893, 399 N.E. 2d 925 (1979).

4 *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See* N.Y. County Law § 722-C.

5 *United States v. Nobles*, 422 U.S. 225 (1975).

6 *Davis v. Alaska*, 415 U.S. 308 (1974); *Alford v. United States*, 282 U.S. 687 (1931).

7 Fed R. Crim. P. 16; N.Y. Crim. Proc. L. art. 240.

8 *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976).

9 *Ferguson v. Georgia*, 365 U.S. 570, 573-582 (1961).

10 475 U.S. 157 (1986).

11 107 S. Ct. 2704 (1987).

12 *Id.* at 2711.

HeinOnline -- 61 N.Y. St. B.J. 52 1989

lower court made specific, case-related findings of unreliability.

A defendant has a constitutional right of access to the testimony of defense witnesses unimpeded by arbitrary barriers. In *Washington v. Texas*,[13] for example, the Supreme Court struck down a statute that prevented persons charged as accomplices from testifying for one another. By preventing a defendant from access to his accomplice's testimony, the Court observed, "the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[14] However, preclusion of the testimony of a defense witness as a sanction for his attorney's failure to comply with a pretrial discovery request by the prosecutor did not infringe upon the defendant's constitutional right to compulsory process or due process. In *Taylor v. Illinois*,[15] the Supreme Court held that barring defense evidence, although a "drastic" sanction, is appropriate when the discovery violation is "willful and blatant" and "motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence."[16] Here the Court visited the sins of defense counsel upon the client, depriving the latter of evidence that might have exonerated him.

Rules of evidence may deny a defendant access to relevant witness testimony. In *Chambers v. Mississippi*,[17] the state's hearsay rule coupled with its "voucher" rule prevented a defendant charged with murder from introducing testimony from a witness who previously had confessed to the killing. Since there was no showing that the proposed testimony was unreliable, applying the above rules of evidence to deny the defendant access to this exculpatory testimony was held to be fundamentally unfair and a denial of due process. Had these archaic rules not been so skewed against the defendant, the result probably would have been different. Similarly, a defendant was denied the right to confront his accuser when he was prevented from using confidential juvenile court records to cross-examine the prosecution's principal witness. Defense access to such information, the Supreme Court held in *Davis v. Alaska*,[18] was paramount to the state's policy of protecting juvenile offenders from embarrassment caused by such disclosure.

Testimonial privileges may also deny a defendant access to crucial proof to support his defense. In *Roviaro v. United States*,[19] the prosecutor's refusal to disclose to the defense the identity of an undercover informer who had taken a material part in a narcotics investigation denied the defendant a fair trial. The Supreme Court held: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."[20] However, not all claims of privilege can be overridden to provide a defendant access to proof. A witness's assertion of the privilege against self-incrimination to refuse to testify for a defendant, for instance, might not constitute an impermissible denial of proof.[21] Although this is a controversial subject, the courts generally do not require a prosecutor to confer immunity on a witness in order to provide a defendant access to such testimony.[22] On the other hand, judicial threats or other governmental conduct that induces a defense witness to refuse to testify can unconstitutionally deny a defendant access to evidence. Such was the case in *Webb v. Texas*,[23] where the trial judge's strong admonition to the sole defense witness against committing perjury "effectively drove the witness off the stand," thereby abridging the defendant's due process right to a fair trial.[24]

Absent some showing of materiality, however, the denial of access to witnesses probably will be upheld. In *United States v. Valenzuela-Bernal*,[25] the prosecutor immediately deported eyewitnesses to the defendant's crime without affording defense counsel an opportunity to interview them. The Supreme Court rejected the claim that this conduct unconstitutionally infringed upon the defendant's access to evidence. The defendant cannot establish a constitutional violation, the Court said, without "some plausible showing of how [the witnesses'] testimony would have been both material and favorable to the defense."[26] Since the defendant did not show any specific prejudice, no constitutional violation was demonstrated.

Different and complex problems are presented by the prosecutor's

---

[13] 388 U.S. 14 (1967).

[14] *Id.* at 23.

[15] 108 S. Ct. 646 (1988).

[16] *Id.* at 655. *See* Fed. R. Crim. P. 12 (court authorized to exclude testimony of undisclosed alibi witness). *See also* Note, *The Preclusion Sanction - A Violation of the Right to Present a Defense*, 81 YALE L. J. 1342 (1972).

[17] 410 U.S. 284 (1973).

[18] 415 U.S. 308 (1974).

[19] 353 U.S. 53 (1957).

[20] *Id.* at 60-61. *See also United States v. Nixon*, 418 U.S. 683 (1974) (executive privilege); *Matter of Farber*, 78 N.J. 259, 394 A. 2d 330 (1978) (reporter's privilege). *But see People v. Tissois*, 72 N.Y. 2d 75, 531 N.Y.S. 2d 228, 526 N.E. 2d 1086 (1988) (Social worker privilege).

[21] *United States v. Turkish*, 623 F. 2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *United States v. Bowling*, 666 F. 2d 1052 (6th Cir. 1981).

[22] *See* Gershman, *The Prosecutor's Obligation to Grant Defense Witness Immunity*, 24 CRIM. L. BULL. 14 (1988).

[23] 409 U.S. 95 (1972).

[24] *Id.* at 98. Prosecutorial conduct also can interfere with a defendant's right to present witnesses. *See* B. Gershman, *PROSECUTORIAL MISCONDUCT* § 9.10(b) (1985).

[25] 458 U.S. 858 (1982).

[26] *Id.* at 867.

HeinOnline -- 61 N.Y. St. B.J. 53 1989

denial to the defense of access to exculpatory evidence. A rule of constitutional materiality has developed whereby suppressed evidence is measured by the extent of its prejudice to the defendant's ability to present his defense. To be sure, there is no constitutional requirement that a prosecutor disclose to the defense all investigatory work done on a case,[27] nor is there a rule obligating a prosecutor to disclose his entire file to defense counsel.[28] By the same token, the landmark case of *Brady v. Maryland*[29] held that a prosecutor is duty-bound to disclose to the defense materially favorable evidence. "Evidence is material," the Supreme Court stated in *United States v. Bagley*,[30] "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." Denying a defendant access to such proof violates due process regardless of the prosecutor's good or bad faith.[31] The legal analysis here focuses on the character of the evidence, not of the prosecutor.

When a defendant is denied access to evidence because such evidence is no longer available, different considerations come into play as practical concerns clash with constitutional doctrine. As a threshold matter, the prosecutor's duty to disclose exculpatory information generally includes the obligation to preserve such evidence from loss or destruction.[32] Illustrative of such evidence are destroyed handwritten notes of interviews with witnesses,[33] erased videotapes or sound recordings,[34] lost blood, sperm, urine, or other scientific evidence,[35] and unretained items found at the crime scene.[36] If no constitutional duty existed, the disclosure requirement under *Brady v. Maryland* would be an empty formality that could be "easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal."[37] In contrast to the suppression of exculpatory evidence, the prosecutor's good or bad faith in making evidence inaccessible becomes critical.

The Supreme Court in two recent cases has addressed the prosecutor's responsibility to preserve exculpatory evidence for access by a defendant. In *California v. Trombetta*,[38] the Supreme Court addressed for the first time the prosecutor's responsibility to preserve favorable evidence for the defendant's later use. In *Trombetta*, law enforcement officials destroyed breath samples taken from the defendant and used in his prosecution for intoxicated driving. The California appeals court reversed the conviction, finding that the failure to preserve evidence used against the defendant violated due process. The Supreme Court disagreed. Although a duty to preserve evidence was not ruled out, "that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." To meet this standard of materiality, the Court concluded, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[39]

Last Term, in *Arizona v. Youngblood*,[40] the Court considered the applicable constitutional standard when the state fails to preserve evidence that might be useful to a defendant. The lost evidence in *Youngblood* was clothing worn by the victim of a sexual attack containing semen stains which the police failed to refrigerate and therefore preserve for subsequent testing. The Arizona Supreme Court reversed the conviction on the ground that the prosecution had breached its constitutional duty to preserve the semen samples so that timely testing could have been performed, possibly resulting in the complete exoneration of the defendant. The problem in *Youngblood*, as in *Trombetta*, was the absence of the evidence, thereby requiring courts to "face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."[41] Given this speculative task of measuring prejudice—not the case where exculpatory evidence has been suppressed—the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[42] Since there was no suggestion of bad faith on the part of the Arizona police in losing this evidence, denying the defendant access to such proof was constitutionally of no significance.

---

[27] *Moore v. Illinois*, 408 U.S. 786, 795 (1972).

[28] *United States v. Agurs*, 427 U.S. 97, 111 (1976).

[29] 373 U.S. 83 (1963). *See also People v. Cwikla*, 46 N.Y. 2d 434, 414 N.Y.S. 2d 102, 386 N.E. 2d 1070 (1979).

[30] 473 U.S. 667 (1985).

[31] *Brady v. Maryland*, 373 U.S. at 87.

[32] *California v. Trombetta*, 467 U.S. 479, 488 (1984).

[33] *Killian v. United States*, 368 U.S. 231 (1961); *United States v. Harrison*, 524 F. 2d 421 (D.C. Cir. 1975); *People v. Paranzino*, 40 N.Y. 2d 1005, 391 N.Y.S. 2d 391, 359 N.E. 2d 981 (1976).

[34] *United States v. Bryant*, 439 F. 2d 642 (D.C. Cir. 1971); *People v. Springer*, 122 A.D. 2d 87, 504 N.Y.S. 2d 232 (2d Dept. 1986); *People v. Saddy*, 84 A.D. 2d 175, 445 N.Y.S. 2d 601 (2d Dept. 1981).

[35] *Arizona v. Youngblood*, 109 S. Ct. 333 (1988) (semen samples); *California v. Trombetta*, 467 U.S. 479 (1984) (breath samples); *Colon v. Kuhlman*, 865 F. 2d 29 (2d Cir. 1988) (semen); *People v. Allgood*, 70 N.Y. 2d 812, 523 N.Y.S. 2d 431, 517 N.E. 2d 1316 (1987) ("rape kit").

[36] *People v. Kelly*, 62 N.Y. 2d 514, 478 N.Y.S. 2d 834, 467 N.E. 2d 498 (1984); *People v. Morgan*, 199 Colo. 237, 606 P. 2d 1296 (1980); *State v. Oliverez*, 34 Ore. App. 417, 578 P. 2d 502 (1978); *People v. Brown*, 194 Colo. 553, 574 P. 2d 92 (1978).

[37] *United States v. Bryant*, 439 F. 2d at 648.

[38] 467 U.S. 479 (1984).

[39] *Id.* at 489.

[40] 109 S. Ct. 333 (1988).

[41] *California v. Trombetta*, 467 U.S. at 486.

[42] *Arizona v. Youngblood*, 109 S. Ct. at 337.

HeinOnline -- 61 N.Y. St. B.J. 54 1989

Arizona v. Youngblood is an extremely troubling decision. Cases involving lost or destroyed evidence present factors that complicate the appropriate standard of review, and courts must balance these factors against the "over-riding concern with the justice of the finding of guilt."[43] The first complicating factor relates to the nonexistence of the evidence. Because the evidence is not available, it is virtually impossible to measure its exculpatory quality and its probable impact on the jury. Courts therefore must speculate on the exculpatory character and materiality of such evidence in weighing the appropriate sanction. In assessing materiality, some courts require the defendant to prove that the evidence would have been exculpatory.[44] After *Arizona v. Youngblood*, however, it is questionable whether showing that the evidence is exculpatory even matters, if it cannot also be demonstrated that the prosecutor or police acted in bad faith in losing or destroying the evidence. This standard can produce serious miscarriages of justice.[45] Just as with other standards recently imposed by the Supreme Court on police or prosecutorial behavior, showing bad faith destruction seems virtually impossible.[46] Of course, the circumstances of the loss or destruction might raise a strong inference of bad faith.[47] Moreover, what does "bad faith loss or destruction" really mean? Does it mean a willful destruction in order to intentionally prejudice a defendant's rights? Or can reckless or grossly negligent behavior suffice to meet the bad faith test? Other Supreme Court decisions applying "bad faith" language are equally imprecise as to its meaning.[48] It should be noted that state courts are not required to follow this "bad faith" *Youngblood* test, but can impose on prosecutorial and police conduct much more stringent standards.[49]

Another complicating factor in cases of lost evidence is the nature of the sanction to be imposed. Whereas under *Brady* a court can remand for a new trial in which the suppressed evidence can be produced, such relief is meaningless where crucial evidence is permanently unavailable. The choice in such cases often is between affirmance and dismissal, which may explain the Supreme Court's decision in *Youngblood* to opt for such a restrictive standard. Since dismissal is the most extreme sanction, lesser sanctions might be adopted, such as excluding the particular item of prosecution evidence to which the lost evidence relates,[50] or giving the jury an appropriate limiting instruction.[51] Ironically, under the standard in *Youngblood*, courts could affirm a conviction involving lost evidence even though the nondisclosure of that same evidence might under the *Brady v. Maryland* standard require a new trial.

In sum, although a defendant has a right to present a defense, gaining access to evidence to prove that defense may be futile. As we have seen, constitutional protections for access to evidence often are nonexistent or of limited utility. The aspiration of our adversary system to be a Search for the Truth theoretically may be attainable, but practically may be a mirage.

---

[43] *United States v. Agurs*, 427 U.S. at 112.

[44] *State v. Oliverez, supra.*

[45] *See Colon v. Kuhlman, supra* (valuable evidence destroyed which, if preserved, could have absolved defendant).

[46] *Oregon v. Kennedy*, 456 U.S. 667 (1982) (need to show prosecutor's intent to goad defense attorney into seeking mistrial); *United States v. Lovasco*, 431 U.S. 783 (1977) (need to show prosecutor intentionally delayed charging defendant to gain tactical advantage or for harassment purposes); *Wayte v. United States*, 470 U.S. 598 (1985) (need to show prosecutor brought charges because defendants were asserting their rights).

[47] *See Hilliard v. Spalding*, 719 F. 2d 1443 (9th Cir. 1983); *United States v. Pollock*, 417 F. Supp. 1332 (D. Mass. 1976); *People v. Springer, supra; People v. Harmes*, 38 Colo. App. 378, 560 P. 2d 470 (1976).

[48] *See e.g., United States v. Dinitz*, 424 U.S. 600, 611 (1976).

[49] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See also People v. Isaacson*, 44 N.Y. 2d 511, 406 N.Y.S. 2d 714, 378 N.E. 2d 78 (1978).

[50] *People v. Morgan*, 199 Colo. 237, 606 P. 2d 1296 (1980); *State v. Oliverez*, 34 Ore. App. 417, 578 P. 2d 502 (1978); *People v. Hitch*, 12 Cal. 3d 641, 527 P. 2d 361, 117 Cal. Rptr. 9 (1974).

[51] *Arizona v. Youngblood*, 109 S. Ct. at 335; *U.S. v. Quiover*, 539 F. 2d 744 (D.C. Cir. 1976).

Foundation Memorials

A fitting and lasting tribute to a deceased lawyer can be made through a memorial contribution to The New York Bar Foundation. This highly appropriate and meaningful gesture on the part of friends and associates will be felt and appreciated by the family of the deceased.

Contributions may be made to The New York Bar Foundation, One Elk Street, Albany, New York 12207, stating in whose memory it is made. An officer of the Foundation will notify the family that a contribution has been made and by whom, although the amount of the contribution will not be specified.

All lawyers in whose name contributions are made will be listed in a Foundation Memorial Book maintained at the New York State Bar Center in Albany. In addition, the names of deceased members in whose memory bequests or contributions in the sum of $1,000 or more are made will be permanently inscribed on a bronze plaque mounted in the Memorial Hall facing the handsome courtyard at the Bar Center.

Contributions to the Foundation are tax deductible.

HeinOnline -- 61 N.Y. St. B.J. 55 1989