

# Recent Case Report

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## Tennison v. City of San Francisco

(9<sup>th</sup> Cir. 2009) 548 F.3d 1293

### Issues

(1) If officers were aware of evidence that tended to exonerate a suspect, can they satisfy their duty to disclose the information by mentioning it in a memo that was included in the file sent to prosecutors? (2) Must officers reveal that a person confessed to a crime after someone else had been convicted?

### Facts

In the Hunter's Point area of San Francisco, several men in a pickup truck were chasing a car driven by Roderick Shannon. When Shannon's car crashed into a fence, the men converged on Shannon and beat him. Then someone fired a shot and killed him.

In the course of their investigation, homicide inspectors developed probable cause to believe that John Tennison and Antoine Goff were involved. After the men were arrested, one of the inspectors received a phone call from a woman named Chante Smith who said she saw the people who had chased Shannon, and she identified two of them as Luther Blue and Lovinsky Ricard. She also said that Ricard was the shooter. When the inspector asked if Tennison and Goff were also there, she said no. When questioned, Ricard denied any involvement.

Although a memo covering these developments was included in the file that was sent to prosecutors, the inspectors did not discuss it with the prosecutor on the case or otherwise call it to his attention. The defense attorneys were also unaware of it. Tennison and Goff were convicted.

One month later, SFPD Gang Task Force officers arrested Ricard on a narcotics warrant. Because they had worked on the Shannon case, they *Mirandized* him and questioned him about the murder. The interview was videotaped and Ricard "was disguised under a hood and unidentified." During the interview, he admitted that he was the shooter and he provided details that were consistent with those furnished by Smith. One of the officers testified that he gave a copy of the video to one of the inspectors, but it appears that neither the video nor the fact that Ricard had confessed were disclosed to the DA or the defense attorneys until it was revealed inadvertently on the third day of a hearing on a motion for a new trial. Despite the new information, the motion was denied (mainly because of inconsistencies in Ricard's confession) and Tennison and Goff were sentenced to state prison.

Nearly 13 years later, this information was disclosed at a habeas corpus proceeding in federal court. As a result, Tennison and Goff were declared factually innocent and released from prison. They then filed a federal civil rights action against the inspectors on grounds they had withheld exculpatory evidence in violation of *Brady v. Maryland*.<sup>1</sup> When the district court ruled that the inspectors were not entitled to qualified immunity, the inspectors appealed.

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<sup>1</sup> (1963) 373 U.S. 83.

## Discussion

At the outset, the court pointed out that, while prosecutors certainly have a duty to disclose exculpatory evidence, so do officers. As the court observed in *U.S. v. Blanco*, “[E]xculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it, where an investigating agency does.”<sup>2</sup> With this in mind, the court addressed the two issues on appeal.

**FAILURE TO DISCLOSE SMITH’S STATEMENT:** The inspectors argued that they had not, in fact, withheld the information furnished by Smith because they had placed a summary of her statement in the file sent to the DA. But the court ruled this was not enough—that officers must affirmatively notify prosecutors that such evidence exists. As the court explained:

Placing notes regarding Smith’s statements in the police file did not fulfill the Inspectors’ duty to disclose exculpatory information to the prosecutor. Evidence that a person, known to the officers, has told the officers that they have arrested the wrong people, has identified the people involved, including the shooter, and described the cars and the chase in a manner consistent with the evidence, should not have been buried in a file, but should have been made known to the prosecutor.

**FAILURE TO DISCLOSE RICARD’S CONFESSION:** The inspectors argued that the failure to disclose Ricard’s confession did not constitute a *Brady* violation because, (1) defense counsel was eventually notified of the confession at the hearing on the motion for a new trial, and (2) the confession was “inherently unbelievable.” But the court ruled that the disclosure occurred “much too late” to be of value at the hearing and, furthermore, if there were questions about the reliability of Ricard’s confession “it was the prerogative of the defendant and his counsel—and not of the prosecution—to exercise judgment in determining whether the defendant should make use of it.” The court then ruled that Ricard’s confession “certainly undermines confidence in the outcome of the trial,” and thus “it would have been clear to a reasonable officer that such material should have been disclosed to the defense.”

For these reasons, the court affirmed the district court’s ruling that the inspectors were not entitled to qualified immunity on either of the two allegations.

## Comment

The importance of furnishing exculpatory evidence to defense counsel was highlighted this past week when a district court judge in Washington D.C. dismissed all charges against former U.S. Senator Ted Stevens who had been convicted of lying on a Senate disclosure form. Attorney General Eric Holder requested the dismissal when he learned that prosecutors had failed to turn over exculpatory evidence to Stevens’ lawyers. The trial judge subsequently ordered a criminal investigation into the conduct of the prosecutors. POV

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<sup>2</sup> (9<sup>th</sup> Cir. 2004) 392 F.3d 382, 388. ALSO SEE *Youngblood v. West Virginia* (2006) 547 U.S. 867, 869-70 [“Brady suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor.”].