New York Law Journal

Police Misconduct Records: Court Allows Police To Police Themselves

Criminal defendants should be able to obtain records of police misconduct.

By **Cory Morris** | November 25, 2020

Photo: Sutterstock

Courts, police and prosecutors are still refusing to produce records of police misconduct. Criminal defendants should be able to obtain records of police misconduct, if not under the statutory Criminal Procedure Law (CPL), then under the New York state and U.S. constitutions.

The People of the state of New York are at a pivotal moment in terms of whether the repeal of Civil Rights Law §50-a will actually have any impact on police misconduct. In *People v. Randolph*, 2020 NY Slip Op 20231 (Suff. Sup. Ct. 2020), the court endorsed a decision by the Suffolk County Police Department (SCPD), itself, as to whether a claim of police misconduct against it is founded or unfounded. The SCPD was run by James Burke, police chief, until he was accused and convicted of crimes relating to police misconduct by the U.S. government. In endorsing the SCPD designation, the *Randolph* court determined

relevancy and accessibility not based on the content of the records but based on a unilateral designation by the police department itself!

The central issue in *Randolph* was whether the people were ready for trial under the new statutory scheme. The prosecution shall not be deemed ready for trial for purposes of CPL §30.30 until it has filed a proper certificate of readiness. Absent an individualized finding of exceptional circumstances, CPL §245.20(2) requires that the prosecutor take affirmative steps to cause records to be made available for discovery where such records exist but are not within their control.

In *People v. Randolph*, the defense attorney challenged a finding of readiness because SCPD misconduct records were not produced and the court held,

> Pursuant to CPL 245.20(1)(k), as part of automatic initial discovery, the People must provide "All evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case, that tends to: ... (iv) impeach the credibility of a testifying prosecution witness ..." The legislative history of the repeal indicates that the original passage of Civil Rights Law §50-a was enacted "in order to prevent criminal defense attorneys from using these records in cross-examinations of police witnesses during criminal prosecutions [and] ... narrowly interpreted [to] prevent access to both the records of the disciplinary proceedings themselves and the recommendations or outcomes of those proceedings." 2020 Sess. Law News of NY Legis. Memo Ch. 96. Furthermore, the decision in this case must respect the legislative intent that there "shall be a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article." CPL 245.20(7).

People v. Randolph, 2020 NY Slip Op 20231 (Suff. Sup. Ct. 2020) (external quotation marks omitted and internal citations preserved).

However, the repeal of the law should be read in light of the atrocities experienced across the country where the innocent are jailed, evidence is withheld and the rights of the accused violated, all of which remained hidden from "the People" for 40 years by a section of the "Civil Rights Law" which did nothing to protect civil rights. Suffolk County and the SCPD witnessed this firsthand, in the federal convictions of both its long-time chief of police and its district attorney in Suffolk County, New York. In essence, the Suffolk County Court in *Randolph* held that *such records are denied because of the internal police designation that such records are unfounded or the officer was exonerated*.

In Suffolk County, complaints against a police officer are investigated by the SCPD Internal Affairs Bureau and are not subject to review by citizens or an independent panel. The court in *Randolph* found that "in cases involving exonerated and unfounded allegations, there is no good faith basis for cross examination by the defendant's counsel and as such it is not evidence or information that tends to or has an inclination to impeach a police witness."

Obviously, the SCPD bureau lost its opportunity for legitimacy several federal prosecutions ago. The Suffolk County court also did not consider whether the SCPD may not be completely forthright when considering a complaint of officer misconduct. If not intentionally, unintentional bias in favor of police exoneration may prevent a full and fair review of complaints made to the SCPD Internal Affairs Bureau.

The *Randolph* court suggested Freedom of Information Law (FOIL) as a solution to obtain records of police misconduct complaints, which, in theory should take only five business days to obtain but in reality often require a lawsuit to obtain compliance from the SCPD after months, or even years, of delay. As a country, we should have learned from *Foster v. Chatman*, 136 S. Ct. 1737 (2016) where the defendant was "convicted of capital murder and sentenced to death in a Georgia court" only to later use an open records law to prove that a racist prosecutor violated his civil rights.

The court in *Randolph* did order that the People must provide any available Internal Affair Bureau files "involving any witness that they intend in good faith to call at a hearing and/or trial to the defendant involving substantiated or unsubstantiated allegations ..." Why should production be limited if it contains evidence favorable to the accused? While *Foster v. Chatman* dealt with a Georgia conviction, New York has its own unique history as to what happens when evidence is precluded from production until years after a conviction, as seen in *People v. Ulett*.

'Ulett' and FOIL

Some prosecutors withhold evidence from defendants. This fact—prosecutors violating the accused's constitutional rights—was the subject of a recent decision by Southern District of New York Judge Alison J. Nathan. See Tom McParland, *Judge Orders SDNY Prosecutors To Respond to Alleged 'Brady' Violations in Money-Laundering Case Against Iranian Banker (https://www.law.com/newyorklawjournal/2020/06/10/judge-orders-sdny-prosecutors-to-respond-to-alleged-brady-violations-in-money-laundering-case-against-iranian-banker/#:~:text=A%20federal%20judge%20has%20ordered,violation%20of%20U.S.%20economic%20sanctions.)*, N.Y.L.J. (June 10, 2020).

The New York Court of Appeals, in vacating a conviction and granting a new trial to the defendant in *People* v*. Ulett*, 2019 NY Slip Op 5060 (2019) (*Ulett*) made it clear why FOIL is powerful but it comes after the corrupted trial, constitutional violation(s) and jail time.

FOIL can serve as a check upon prosecutors who fail to comply with the spirit and intent of *Brady* where "[t]he prosecution is required to disclose information that is both favorable to the defense and material to either defendant's guilt or punishment."

"By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model of criminal prosecution in America because 'the prosecutor's role transcends that of an adversary. The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United States v. Bagley*, 473 U.S. 667 (1985) (quoting *Berger*, 295 U.S. 78, 88 (1935)).

Ulett demonstrates the result of withholding video evidence of a shooting—a new trial ordered. The video evidence in *Ulett* was withheld by the trial prosecutor but produced after conviction. Just like the constitutional mandate of *Brady,* New York's FOIL requires government agencies including the police department and the prosecutor's office provide non-exempt records responsive to a FOIL request. However, those FOIL exemptions, such as a purported active investigation or the alleged invasion of personal privacy, require a civil court action to challenge and obtain the exculpatory evidence.

In *Ulett*, justice equated to an overturned conviction, the waste of judicial resources and zero accountability for a prosecutor who withheld evidence. Evidence must be produced to the accused before, not after, a bad conviction and an appeal.

With *Randolph,* it appears, the right of access to "exonerated and unfounded allegations" are currently foreclosed.

'Brady' and 'Ulett' After 'Randolph'

Along with the repeal of Civil Rights Law §50-a, the sweeping criminal justice reforms that took effect on Jan. 1, 2020 recognize that continued *Brady* violations highlight the enormous social cost of complete lack of accountability for prosecutors who withhold exculpatory evidence. "New York state has had 234 cases

since 1989 in which defendants have been exonerated. Eighty-eight involved the withholding of exculpatory evidence." Susan DeSantis, *Judges Ordered to Direct Prosecutors to Turn Over Information Favorable to Defense (https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/11/07/judges-ordered-to-direct-prosecutors-to-turn-over-information-favorable-to-defense/)*, N.Y.L.J. (Nov. 8, 2017).

According to the New York State Justice Task Force, the law changed because of the public perception that misconduct is prevalent in the criminal justice system and that responsible attorneys are not being appropriately disciplined. This and the repeal of Civil Rights Law §50-a were to ensure that the public had the ability to review police misconduct records under FOIL and that the prohibition on disclosure in litigation was removed.

How does the *Randolph* decision comport with *Brady* if the police determine that the complaint is unfounded? Three decades ago in *People v. Vilardi*, 76 N.Y.2d 67 (1990), the New York Court of Appeals held that "where the prosecutor was made aware by a specific discovery request that the defendant considered the material important to the defense" there was a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. "By identifying the material sought, the defendant provided notice to the prosecution and eliminated its need to review extensive files and speculate about the usefulness of the documents to defendant." When the accused demands information about incidents of police misconduct it is not for the police or the prosecutor to unilaterally determine whether disclosure is warranted.

"In our judicial system, 'the public has a right to every man's evidence.'" *Trump v. Vance*, 140 S. Ct. 2412 (2020) (quoting Fn. 1) (citing 12 Parliamentary History of England 693 (1812)). Since the earliest days of the Republic, "every man" has included the President of the United States. Why then is the Suffolk County Police Department, or any other police agency, above the law?

Conclusion

The court in *Randolph* did not consider that both the former Suffolk County Police Chief and Suffolk County District Attorney were federally prosecuted and the Defendant and the public have no way of knowing whether internal review by the Suffolk County Police Department affords a fair review of police misconduct complaints.

Misdirecting a criminal defense attorney to the long and arduous FOIL process ignores the mandate of *Brady v. Maryland*, the Constitutional safeguards enjoyed by the accused and allows the public to question whether there can be "equal justice under law." (This phrase was suggested in 1932 by Cass Gilbert Jr. and John R. Rockart of the architectural firm that designed the building. Chief Justice Charles Evans Hughes and Justice Willis Van Devanter subsequently approved this inscription, as did the U.S. Supreme Court Building Commission, which Hughes chaired (and on which Van Devanter served).)

Cory Morris *holds an advanced degree in psychology, is an adjunct professor and a CASAC-T whose law practice focuses on accountability, civil rights, criminal and social justice issues.*