

CRIMINAL/CONSTITUTIONAL

Focus on FOIL: Finding Brady Evidence in *People v. Ulett*

By Cory Morris

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*”), highlights why every criminal defense attorney should utilize the Freedom of Information Law (FOIL). *Ulett* came to the high court by a Criminal Procedure Law (CPL) § 440.10 motion to vacate the judgment of conviction based on, *inter alia*, the prosecutor suppressing video evidence from the defense.

It is without question that some prosecutors withhold evidence from defendants.¹ In *People v. Ulett*, the prosecutor withheld a video referenced by both sides — the prosecutor, however, denying its existence at summation. That the withheld evidence was found in a FOIL request, post-conviction, is something the Court of Appeals remarked upon in two sentences: “In fact, there was a video from a surveillance camera in the lobby and the prosecutor had reviewed it before the trial. Nevertheless, it was only years after the verdict — pursuant to a Freedom of In-

formation Law request — that the District Attorney’s office sent defense counsel a copy.” Just like the Bronx defenders did for the defendant in *Ulett*, all criminal defense attorneys can file a FOIL request at any time asking for agency records, from written records to various types of video recordings.

People v. Ulett

In *People v. Ulett*, the defendant was convicted of a murder that occurred outside an apartment building in Brooklyn; “however . . . the People violated their constitutional obligation to disclose a surveillance video that captured the scene at the time of the shooting, including images of the victim and a key prosecution witness.” The Court of Appeals held that the “[f]ailure to produce this video raises a reasonable probability that its disclosure would have produced a different result at trial,” reversing the Appellate Court. A “second witness” testified he saw the defendant in *Ulett* walk “toward him holding something in his waistband” and the People introduced video evidence to corrob-



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rate this testimony. Another witness, Cream, “stated that he and the victim were outside 48 St. Paul’s Place when defendant came around the corner and began arguing with the victim before pulling out a gun and shooting him.” Most peculiar is the summation of the trial:

Referencing testimony that the building had surveillance cameras in the lobby, defense counsel pointed out that no video from those cameras had been introduced:

“Where is that video surveillance? Wouldn’t you think, ladies and gentlemen, that if there was video camera surveillance at 48 St. Paul’s Place, that would be very important, that possibly could show what it was that took place; don’t you think it would have shown who actually shot [the victim]? We don’t have that video.”

The prosecutor responded:

“[Y]ou heard from [defense counsel] that there are video cameras inside 48 St. Paul’s Place; inside the lobby, okay. Common sense, ladies and gentlemen, you saw that

the police recovered video footage from [defendant’s apartment building], . . . which is around the corner in the direction of flight that the defendant went. Isn’t it common sense that they went to the building where the actual event took place in front of? And isn’t it common sense that you would have seen that video if there had been a video?”²

However, the prosecutor knew there was video and “the prosecutor had reviewed it before the trial.”³ After a conviction, a FOIL request produced that video. After its receipt, “defendant moved to vacate his conviction pursuant to CPL 440.10, arguing that the evidence was both material and favorable to the defense and therefore the People’s failure to disclose it violated their obligations under *Brady v. Maryland* (373 US at 87).”

New York’s Freedom of Information Law

FOIL mandates that within five business days of receiving a request for a record, an agency shall either (1) make the record available to the requestor; (2) deny the request in writing; or (3) furnish a written ac-

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TRUSTS AND ESTATES UPDATE

By Ilene Sherwyn Cooper

Discovery of Matrimonial Records

In *In re Wichman*, the Surrogate’s Court, Bronx County, was confronted with an unopposed motion by the decedent’s sister to unseal the matrimonial records concerning an alleged prior marriage of their predeceased father, and to permit her counsel, and counsel for an alleged niece and nephew of the decedent (“claimants”) to copy pertinent portions of those records for purposes of determining kinship. Alternatively, the petitioner sought to have the file transferred to the Surrogate’s Court for an *in camera* review.

The decedent died, intestate, survived by his sister. He was divorced, never had children, and his parents predeceased him. Based on her knowledge at the time, the decedent’s sister filed a petition for letters of administration, together with an affidavit of heirship, listing herself as

the decedent’s sole distributee. Thereafter, she was informed by her counsel that her father had previously been married, that he had a son of that marriage, who had since deceased, and that the son’s children were claiming to also be the decedent’s distributees. In support of their contention, the claimants submitted, *inter alia*, copies of the son’s death certificate listing one of the claimant’s as his daughter, and the father’s first wife as his mother; the son’s birth certificate, listing the decedent’s father and his first wife as his parents, the son’s certificate of marriage, listing the decedent’s father, as his father, and a certificate of disposition by the New York County Clerk stating that a judgment of divorce between the decedent’s father and his first wife had been entered.

The sister opposed the claimants’ position and moved to examine her father’s



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divorce records in order to ascertain whether the son was listed as her father’s child, or whether paternity was disputed. In support thereof, the sister argued that her father and his prior spouse, as well as the purported son of that marriage were long deceased, that the claimants did not oppose the application and that no one would be harmed by the relief sought.

Pursuant to the pertinent provisions of Domestic Relations Law §235, the record in a matrimonial action shall not be available to any person other than a party, or the attorney or counsel of a party, except by order of the court. The section further provides, *inter alia*, that the confidentiality accorded by the section shall expire 100 years after the date of filing, at which time it shall be fully subject to public inspection.

Within this context, the court noted that

before access to matrimonial records can be ordered, it must be demonstrated that disclosure is warranted, and that special circumstances exist for breaching the confidentiality otherwise accorded the information. Given the present record, i.e., that no father was listed on the son’s death certificate, that the parties to the matrimonial action, and the alleged son of that marriage, were deceased, that the application was unopposed, and that 100 years had not elapsed since the entry of the judgment of divorce, the application was granted to the extent of providing for the court’s *in camera* examination of the matrimonial records for the purpose of ascertaining whether there was a son of the marriage.

***In re Wichman*, N.Y.L.J., June 14, 2019, at p. 28 (Sur. Ct. Bronx County).**

Expert Witness

In *In re De Sanchez*, the court addressed

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“The Killers,” with its double-crosses within double-crosses.

After thanking Nick, Swede, in actions consistent with Hemingway’s story, stretches out on his bed, and faces the wall, implying his acceptance of death. This is Hemingway’s ending, which launches the Huston-Veiller-Siodmak story. The film brings the two killers into Swede’s room. Their gunfire flashes in the darkness. Swede’s maimed hand, formerly gripping the bedpost, falls limp, dangles lifeless.

Now come the answers to what the enigmatic Swede did wrong and why he chose not to run. The man who puzzles over Swede is Riordan (Edmund O’Brien), an insurance investigator whose company had insured Swede’s life. Riordan’s quest for answers, his continuing presence among an array of malevolent characters, all of whom were involved in a payroll robbery — the matrix within which all action unfolds — Riordan’s quest forms the frame for a sequence of flashbacks that cumulatively tell the story.

As to the payroll-robbery sequence, it’s another example of cinematographer Woody Bredell’s mastery. Again working atop a crane, Bredell has this sequence unfold as a panoramic dumb show: though there is a voice-over, the robbers are themselves mute, as they are seen, intermingled with factory employees, passing through entrance gates, walking along the company streets, ascending stairs to the payroll office, training guns on the paymasters, filling their tool bags with cash. They then descend the stairs, fall in behind a truck rumbling toward the gates, and finally run to three parked cars, which

speed away from the scene. This sequence, entire, marked by precision, fluidity, is nothing less than balletic.

Even Bredell’s “static” scenes are striking. Swede’s burial occurs at twilight, set against a lowering sky, on a knoll punctuated by the occasional headstone and a few skeletal trees. The few mourners, clustered in threes and fours, form a memorable tableau vivant. Except for Riordan, those present are either cynical types, exemplified by Swede’s former manager, or well-meaning fools, exemplified by “Charleston,” who unknowingly brought Swede to his ultimate destruction. And this scene probably best represents what noir was: the fusion of the visual with the thematic. The visual: a singular mise-en-scene — central within the array of all visual elements was a signature low-key, high-contrast lighting style that created an atmosphere of despair. The thematic: in this world the actions of both the evil and the ignorant can — no comfort to the innocent — bring a person down.

Many films employ the device of flashbacks-within-a-frame. It is a structure that most resembles actual life, inasmuch as our world is populated by adults who are in something of a quandary, itself only to be resolved by recapitulation; indeed, adulthood, which presupposes a strengthened self-awareness, is attended by a continuing effort to recall the past and draw meaning from it. This general scheme certainly works in “The Killers.” Swede’s past — intertwined with that of his treacherous cohorts — is unearthed layer by layer, but in this film the flashback performs an additional, indispensable function.

After depicting the horrifying execution of Swede, the remainder of the film comes almost as a relief; that is to say, if the viewer can take murder as a large, bitter first dose, he can, through flashbacks, more easily swallow successive smaller doses of larceny, brutality and betrayal. Indeed, probably the only way the viewer can take such a cynical narrative is to take it in these manageable pieces, hence the reliance on flashbacks is here particularly intelligent.

“The Killers” was widely praised upon its release all those years ago. Life magazine reported that the film had “...not a dull moment . . . nothing but menacing action managed with supreme confidence.” It received three Academy Award nominations — for direction, editing, and musical score. As to this last, composer Miklos Rozsa infused into the film a score that was by turns poignant and tragic. Rendered vocally, “The More I Know of Love (The Less I Know)” is softly melancholic; rendered instrumentally, with its speeding up of tempo, its unnervingly loud volume, its discordant notes, its string section gone mad, the score could serve as heart-breaking theme music for all love gone sour. The entire score is marked by an over-arching cacophony, a violence, consistent with Robert Siodmak’s visual presentation of evil, which sees the weak and dim-witted gobbled up, for the nourishment they provide, by the shrewd, the unsentimental, the predatory. In its wild mood swings, Rozsa’s music, implying — exactly realizing a disordered world, is an aural nightmare.

As to the actors and the characters they played, never was a cast better suited to play the vipers that inhabit the nest: Jack Lam-

bert (Dum-Dum); Jeff Corey (Blinky); Albert Dekker (Big Jim Colfax).

And Ava Gardner (Kitty); her name makes her sound innocuous, cuddly, but she is essentially a big, ferocious cat with ever-extended, unretractable claws. In casting Gardner as the femme fatale, Siodmak employed an actress whose allure was central to the character she played, was pivotal to the plot. Gardner’s/Kitty’s magnetic good looks were guaranteed to attract Swede into the conspiracy; he is the passive dance partner who will follow wherever Kitty leads. (Alfred Hitchcock, in casting Kim Novak in “Vertigo” twelve years later, likewise selected an actress whose drop-dead good looks were essential to the character she portrayed, were an indispensable component of the plot. Without the engine of each actress’s respective beauty, both vehicles — “The Killers” and “Vertigo” — would shudder to a halt, their plots unbelievable.)

I conclude by again mentioning the three Academy nominations, the critical acclaim, the popular success that “The Killers” enjoyed upon its release in 1946. But what did the originator of the story think of its film treatment? In his “Papa Hemingway,” A. E. Hotchner wrote of the hyper-critical author’s panning of nearly all screen treatments of his stories. The film Hemingway liked, the only one consistent with his vision, was “The Killers.” High praise indeed!

Note: A member of the SCBA, William E. McSweeney is a resident of Sayville. His articles on film have appeared in our pages, and in those of The Suffolk County News and The New York Times.

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knowledge of the receipt of the request with a statement setting forth the approximate date when the request will be granted or denied.⁴ If there is a denial of records, an administrative appeal must be made prior to commencing a special proceeding under Article 78 of the Civil Practice Law and Rules. Public Officers Law § 89(4)(c) now mandates an award of reasonable attorney’s fees and other litigation costs under certain circumstances.

Criminal defense attorneys should utilize FOIL for access to information and, as in this case, to uncover records that tend to exculpate the defendant. “The Legislature enacted FOIL to provide the public with a means of access to governmental records in order to encourage public awareness and understanding of and participation in government and to discourage official secrecy.”⁵ An agency’s records “are presumptively open to public inspection, without regard to need or purpose of the applicant.” When faced with a FOIL request, an agency must either disclose the record sought, deny the request and claim a specific exemption to disclosure, or certify that it does not possess the requested document and that it could not be located after a diligent search.

As opposed to ordinary discovery, if litigation is pursued, there are attorney-fee award provisions within FOIL. Usually the courts will not grant an award of fees if the respondent(s) had a reasonable basis for the

denial or had a significant interest of which it sought to protect; however, the court must grant an award of fees if respondents fail to respond to a FOIL request, did not have a reasonable basis for the denial or failed to respond in a reasonable time. Like hiring a private investigator, an expert or pursuing a demand upon a prosecutor’s office for CPL discovery, *Ulett* shows why criminal defense attorneys should be utilizing FOIL in their practice.

Rediscovering *Brady v. Maryland*; FOIL

Just like the constitutional mandates of *Brady v. Maryland* and the Criminal Procedure Law, New York’s Public Officers Law (FOIL) mandates that agencies, such as the police department and the prosecutor’s office, provide non-exempt records responsive to a criminal defendant’s FOIL request.

Irrespective of FOIL, “[t]he prosecution is required to disclose information that is both favorable to the defense and material to either defendant’s guilt or punishment.”⁶ *Brady v. Maryland* (“*Brady*”) and its progeny hold that “[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁷ The “prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the po-

lice.”⁸ “By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. This is 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.”⁹

The *Brady* evidence in *Ulett*, produced only after a FOIL request was made, is profound: “the video captures something none of the eyewitnesses reported: an additional person at the scene interacting with the victim as he lay on the ground, which defense counsel could have used at trial in combination with the medical examiner’s report to argue that another shooter was potentially responsible for the victim’s death after he fell to the ground.” This FOIL request could have been made at any time, even prior to indictment.

Conclusion

FOIL should be regularly utilized by criminal defense attorneys. The FOIL production in *Ulett* is characterized by the New York Court of Appeals as “a video of the crime scene that captured events surrounding the murder, including the body of the victim as he fell to the ground. That video was relevant to a number of issues at trial [and] would also have provided leads for additional ad-

missible evidence. . . .” As prosecutors are required to comply with their professional and ethical obligations under *Brady v. Maryland*, equally important is the job of the criminal defense attorney to use all available means of investigation in representing the accused: Freedom of Information Law.

Note: Named a SuperLawyer, Cory Morris is admitted to practice in NY, EDNY, SDNY, Florida and the SDNY. Mr. Morris holds an advanced degree in psychology, is an adjunct professor at Adelphi University and is a CASAC-T. The Law Offices of Cory H. Morris focuses on helping individuals facing addiction and criminal issues, accidents and injuries, and, lastly, accountability issues.

1 See, e.g., Nina Morrison, What Happens When Prosecutors Break the Law?, NY Times (June 18, 2018), <http://bit.ly/bradyvio>.

2 Id. (external quotation marks omitted and emphasis added).

3 Id.

4 Public Officers Law § 89 (3)(a).

5 Matter of Alderson v. New York State Coll. of Agric. & Life Sciences at Cornell Univ., 4 N.Y.3d 225, 230, 792 N.Y.S.2d 370, 825 N.E.2d 585 (2005) (internal quotation marks and citation omitted).

6 People v. Ulett, 2019 NY Slip Op 5060 (2019).

7 *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

8 *Kyles v. Whitley*, 514 US 419, 437 (1995).

9 *United States v. Bagley*, 473 U.S. 667 (1985) (quoting *Berger*, 295 U.S. at 88.)