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Federal Appeals Court Should Reject Total Immunity for Prosecutors.

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Kareem Bellamy spent 14 years in prison for a murder he didn't commit, thanks to prosecutorial misconduct by the Queens County District Attorney's Office. The U.S. Court of Appeals for the Second Circuit is hearing oral argument April 26 to decide whether Bellamy can get relief for this gross injustice. The case is crucial not just for Bellamy's future, but also because it illustrates the shocking degree to which prosecutors can routinely violate the law with impunity.

Under the landmark Supreme Court case *Brady v. Maryland*, prosecutors must give the defense any material evidence favorable to the accused. But the Queens County D.A.'s Office found a way to skirt this obligation. For years, the office paid witnesses massive amounts of money to testify against defendants like Bellamy. This is classic "*Brady* material," because defendants would obviously want to know (and be able to argue to a jury) that the witnesses against them were, in effect, being bribed by the government.

But the D.A.'s Office employed a "don't ask, don't tell" policy to avoid its constitutional duties. Using a "Chinese Wall" tactic, the office concealed information about these payments from trial prosecutors, so that these prosecutors could plausibly say that they were unaware of any evidence to disclose.

Bellamy was one of many victims of this policy. He was convicted of murder, based largely on the testimony of a crucial state witness who had been promised substantial monetary benefits by the D.A.'s Office before she testified. Yet those promises—which would have severely undercut her testimony at trial—were never disclosed to the defense. (Nearly 13 years later, a state judge vacated Bellamy's conviction, upon the credible confession of another individual.)

The silver lining, one might suppose, is that Bellamy could at least be compensated for his injury. After all, we have a federal civil rights statute (usually called "Section 1983" after its place in the U.S. Code), which says that any state actor who violates "any rights, privileges or immunities secured by the Constitution … shall be liable to the party injured." That's exactly what happened here.

But the Supreme Court has manufactured a handful of legal doctrines that place major hurdles in the way of civil rights plaintiffs like Bellamy. First and foremost, the court has held that prosecutors have absolute immunity for any claims of prosecutorial misconduct. In other words, no matter how egregious, willful or harmful the violation, you can never sue an individual prosecutor for violating your constitutional rights.

Until now, the limited alternative available to plaintiffs like Bellamy was to sue cities and counties for the misconduct of their employees. Establishing such "municipal liability" under Section 1983 is possible, but difficult. It's not enough to show that a city official committed a constitutional violation; you also have to show that this violation was part of an established "policy or practice."

In Bellamy's case, however, that shouldn't have been hard to prove. There was ample evidence that the D.A.'s Office was regularly, intentionally following the "Chinese Wall" policy that blocked him from getting the evidence he was due. Even if he couldn't recover from the individual prosecutors, he should have been able to recover from their employer—the city of New York.

But last May, the district court judge in Bellamy's case, Ann Donnelly, issued an opinion granting summary judgment to the city, effectively cutting off this avenue of relief as well. Her reasoning was that the city could only be liable for "administrative" decisions by the DA's Office (like hiring or firing, or office-wide policies), not for prosecutorial decisions. And in her view, the office's policy of intentionally keeping their prosecutors in the dark about *Brady* material was "prosecutorial" in nature, rather than "administrative." Therefore, she said, there couldn't be any liability. But this decision was a radical departure from Second Circuit precedent, which clearly permits municipal liability when administrative policies directly lead to constitutional violations in the course of prosecutions.

Donnelly's opinion is now on appeal, and the case is being argued April 26 before the Second Circuit. If the order is upheld, it will effectively eliminate the last vestige of accountability for misconduct by prosecutorial offices, and it will deny civil rights plaintiffs like Bellamy any chance of redress. The case has therefore attracted numerous amicus briefs in support of Bellamy—including briefs by the Innocence Project and associations of criminal defense lawyers—urging the Second Circuit to reverse.

In a larger sense, however, the case throws into sharp relief the stark lack of accountability for prosecutors generally. Prosecutors wield enormous power in our criminal justice system, especially in light of the fact that over 95 percent of criminal convictions today are obtained through plea bargaining, not jury trials. Yet the Supreme Court has decided—without textual or historical justification—that prosecutors ought to be shielded from all liability for their misconduct. That policy judgment not only denies justice to victims like Bellamy, but also ensures that prosecutors may operate without accountability for their misdeeds.

The Second Circuit should reverse the lower court's ruling against Bellamy, lest plaintiffs like him be denied their last chance to vindicate their constitutional rights. But perhaps even more importantly, we should take a step back and reconsider whether it's appropriate to give the most powerful actors in our criminal justice system total immunity for unlawful misconduct.

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