

Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, August 21, 2016
Re: *United States v. Harmon*, 2016 WL 4394586 (9th Cir. Aug. 18, 2016): **Grand Jury / Brady**:
Troubling decision rejects structural error for knowing, perjured snitch testimony to the grand jury.

Players: Decision by Judge Owens, joined by Judges Wallace and D.W. Nelson. Hard-fought appeal by NorCal CJA stalwart Ed Swanson, argued by Swanson & McNamara partner August Gugelmann.

Facts: Harmon, a defense lawyer, accepted crime proceeds from a client and then wrote him back checks from her account. *Id.* at *1. She was charged with money laundering: the core issue was whether Harmon *knew* the money came from crimes. *Id.* To get the indictment, a ND Cal AUSA presented actively-cooperating and paid witness “Yan Ebyam” to the grand jury *three times*. *Id.* at *1. “The grand jurors were curious about Ebyam’s relationship with the prosecution.” *Id.* Ebyam was thus asked if he had received any promises or benefits in exchange for his testimony. *Id.* He lied and answered, “no.” *Id.* At the second session, the AUSA asked if Ebyam was testifying under his own accord. He lied again, assuring that he was under no obligation to cooperate. *Id.* At the third grand jury session Ebyam was asked if he was receiving any benefits for his testimony. He lied yet a third time: “I’m not under indictment. I’m not getting any paychecks . . . there’s no secret benefit down the line.” *Id.* **[Ed. Note:** “And immediately, while he yet spake, the cock crew.” *Luke 22:59-62*]. Harmon was indicted, tried, and convicted: motions for dismissal and a *Brady* motion for a new trial were denied. *Id.* at *3.



Issue(s): “Harmon appeals from her convictions for money laundering. She argues that the prosecutor’s errors before the grand jury constitute structural error, requiring reversal. She also contends that the government’s failure to disclose impeachment evidence about a hostile defense witness mandates a new trial.” *Id.* at *1.

Held: “Because the grand jury errors are not structural, and any impeachment evidence immaterial, we agree with the district court’s well-reasoned analysis and affirm.” *Id.* at *1. “We hold that where the intentional misconduct by the prosecution goes to a witness’s credibility, it is not structural error.” *Id.* at *4.

Of Note: *Harmon* is a particularly troubling decision, with a disappointing new rule for the Ninth: knowingly presenting perjured testimony to the grand jury is *not* structural error (and is *per se* harmless error as a matter of law if sanitized by a *petit* jury’s verdict). Judge Owens concedes that both the Second and Tenth have acknowledged that dismissal of an indictment is possible for prosecutorial misconduct before the grand jury. *See id.* at *4 & n.7. The Ninth disclaims a circuit split, assuring us that Ebyam’s series of deliberate and overt lies were just “technical” – not “flagrant or egregious misconduct.” *Id.* Three years ago, another Ninth jurist warned, “There is an epidemic of *Brady* violations abroad in this land. Only judges can put a stop to it.” *United States v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (Kozinski, (former) C.J., dissenting from order denying the petition from rehearing *en banc*). Reading *Harmon*, fair to ask if progress has been made in putting a stop to that epidemic.

How to Use: “Under *Mechanik*, presenting false information to the grand jury affecting a witness’s credibility and withholding impeachment information – even if done intentionally, which we assume but do not decide – are *harmless as a matter of law* after a *petit* jury returns a guilty verdict.” *Harmon*, 2016 WL 4394586 at *4 (emphasis added). Putting aside that characterization of *Mechanik* (a Supreme Court case that involved *Federal Rules* error – not constitutional error), what can we now do to deal with a “holding [that] could encourage prosecutorial misconduct?” *Id.* The D.C. Circuit has it right: the time has come for a standing *Brady* disclosure order, entered in every criminal case. *See* <http://www.dcd.uscourts.gov/sites/dcd/files/StandingBradyOrder.pdf>

For Further Reading: During the *Stevens Brady* debacle, you’d read the news stories about the snitches and think that the nondisclosed impeachment was so bizarre that it had to have been cooked up by a screenwriter. <http://www.wsj.com/articles/SB10001424052702304459804577283300224390684> Déjà vu vu, all over again. *See* <http://www.nytimes.com/2011/05/22/us/22bcentrepreneur.html? r=0>