

No.

IN THE

Supreme Court of the United States

TROY ALAN LYNDON
Petitioner

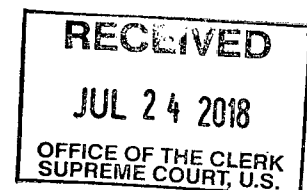
v.

SECURITIES AND EXCHANGE COMMISSION
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the District Court err in allowing an agency of the United States to contest and withhold exculpatory evidence when prosecuting a civil enforcement case against an individual?

Did the District Court err in allowing an agency of the United States to contest and withhold evidence it had obligated itself to provide in the parties' settlement agreement?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Troy Alan Lyndon, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals, filed on 03/14/2018.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, which was unpublished, was issued on 03/14/2018, and is attached as Appendix A. The Ninth Circuit Appeals Court's one-page order denying reconsideration is attached as Appendix B. The financial judgment of the United States District Court for the District of Hawaii is attached as Appendix C. The Consent Order is attached as Appendix D. The Consent Agreement (settlement) is attached as Appendix E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Ninth Circuit Court of Appeals for which petitioner seeks review was issued on 03/14/2018, in which the Ninth Circuit Court of Appeals' upheld the ruling of the United States District Court of Hawaii. This petition is filed within 90 days of the Ninth Circuit Court of Appeals' denial of the Petitioner's Motion for Rehearing, under Rules 13.3 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

- *United States Constitution, Amendment 5 provides, in relevant part:* No person shall . . . be deprived of life, liberty, or property, without due process of law;

• *United States Constitution, Amendment 14 provides, in relevant part:* No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The Respondent sued the Petitioner in a civil case before the United States District Court for the District of Hawaii. Shortly thereafter, the parties entered into a no-admit, no-deny settlement agreement, which became formalized as a Consent Order, which settled the matter, except as to damages; meaning the amount to be disgorged from Petitioner if Respondent pursued a financial claim in further proceedings. Accordingly, this case never went to trial. Throughout opinions and decisions by the District Court and Appellate Court, attached hereto as Exhibits, Petitioner is continually referred to as a person who acted in a criminal manner, even referring to him as someone who has "not learned his lesson" (see page 32) - such a comment was not addressed by the appellate court, but clearly demonstrates the court judges thinking that Petitioner was guilty without a trial.

Accordingly, anyone reviewing this Writ should properly understand that Petitioner's settlement was a no-admit, no-deny agreement. No court or ruling authority has ever determined that Petitioner has committed a violation of securities laws, ever.

In the District Court proceedings, the Respondent refused to comply with Petitioner's discovery requests for relevant evidence, though the Consent Order specifically states that discovery shall be provided to assist in the calculation of any disgorgement amounts (see page 41, last sentence in section XI and page 45 in Consent Settlement). The District Court refused to enforce Petitioner's discovery requests numerous

times, despite requests he disclosed to the court early on in the parties' Rule 26 Joint Report. The only reason the Petitioner signed the settlement was because he expected that the auditors and audited financials, once entered into discovery, would clear him of any claims for ill-gotten gains.

The District Court granted the SEC a blank check in the form of a judgment for \$3.7 million, without performing any diligence while denying Lyndon's discovery requests. It was later discovered, after the district court proceeding had concluded with Petitioner, that the SEC disclosed to the court they were in possession of auditor testimony and the company's audited financials, when seeking damages against a co-defendant. This event and the few pages released by the SEC proved that they were in possession of this relevant financial information and willfully, knowingly kept it from the court and from Petitioner. The SEC further sought to keep this evidence hidden in related proceedings before the Appellate Court and the U.S. Bankruptcy court in Hawaii. The auditor's testimony stated plainly that, after a complete review and audit of all transactions, no wrongdoing had been found.

The information requested, detailed audit work product and the relation of such work product to the company's audited financial, is in the possession of Respondent and unavailable to Petitioner, would show that the damages due from Petitioner would be zero.

In the Ninth Circuit Court of Appeals, Petitioner argued that this refusal of the District Court to order the turnover of evidence violated his federal constitutional right to Due Process.

The Ninth Circuit rejected Petitioner's argument on the merits and affirmed the lower court ruling without addressing any of his 26 arguments in Doc 27 (4-2-2015), pages 19-30 of case 14-16733.

REASONS FOR GRANTING THE PETITION

This case presents an important issue over which the federal courts and administrative agencies are divided. *Brady v Maryland*, 373 U.S. 83 (1963) established that government prosecutors must disclose exculpatory evidence to meet the due process standards of the 14th Amendment; a/k/a the “Brady Doctrine”. While this doctrine has been observed by some federal agencies, the Securities and Exchange Commission has considered this doctrine irrelevant in its civil prosecutions. Subsequent decisions in the courts have extended the obligations required under *Brady* to certain civil proceedings prosecuted by the government, where a significant liberty interest of the defendant is at risk. (e.g. *United States v. Edwards*, 777 F.Supp.2d 985 (E.D.N.C. 2011); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir.1993); *EEOC v. Los Alamos Constructors, Inc.*, 382 F.Supp. 1373 (D.N.M.1974)).

Other courts have limited the application of the Brady Doctrine in civil cases. See, e.g., *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir.1985) (noting that “[a]n action for violations of the National Labor Relations Act is civil in nature, does not involve potential incarceration and violation of the Act does not carry with it the stigma of a criminal conviction”). Also, *United States v. Project on Gov't Oversight* (“POGO”), 839 F.Supp.2d 330, 342-43 (D.D.C.2012) held that “What is at stake in this case is money and reputation, not “whether someone will be locked away.” (referencing *Edwards*).

While these courts have reached decisions where *Brady* applies in some civil cases, and not in others, there is not a clear standard to be found that the SEC will respect. In SEC prosecutions, prosecutors hold the view that *Brady* does not apply to “ordinary” civil cases prosecuted by the government but does apply when there is something more

than an ordinary civil case, something more at stake than “money and reputation”. Further clouding the matter is the fact that multiple agencies of the federal government have adopted the Brady Doctrine voluntarily. For example: The Federal Maritime Commission, the Federal Deposit Insurance Corporation, and the Federal Energy Regulatory Commission.

The result of federal agencies with great power being allowed to “opt-in” to the Brady Doctrine in civil cases is that a defendant has differing rights depending on which agency of the federal government is suing him/her. Also, the kind of case being prosecuted by the government/plaintiff may or may not be of a kind where disclosure of exculpatory evidence is required. Without guidance from the Supreme Court, this is a guessing game in cases where the government can bring its considerable power to bear on a private defendant, choose a civil forum in which it isn’t bound by *Brady*, while continuing a criminal investigation. Due Process principles should not be optional when the government is using its power against a private individual.

The case at bar involves the prosecution of a civil lawsuit by the Securities and Exchange Commission against the Petitioner. While there was never present in the case a mechanism or result under which the Petitioner could be “locked away”, the penalties pursued by the Respondent certainly indicate a stigma the same as a criminal conviction of fraud, and damages that exceed what is available to a private plaintiff. The Petitioner’s financial future and personal and professional reputation in his industry for the rest of his life were at stake. After the SEC obtained their financial judgment by hiding requested evidence from him and the court, the FBI served him with a notice to appear before a grand jury. The Petitioner informed the US Attorney’s office of the exculpatory evidence, and, after

receiving it, the US Attorney cancelled the Petitioner's appearance and no criminal charges were ever filed.

As a result of this civil case, Petitioner has been in a financial prison for many years already, a life-sentence he cannot escape, as civil cases have no provision for a potential pardon or an opportunity to be granted clemency. In important ways, the government can, with the acquiescence and deference of a District Court, impose civil penalties that are more punitive than many criminal sanctions. Furthermore, in a civil proceeding, the Defendant does not have a right to counsel, regardless of his financial means. This tilts such proceedings even more in the direction of the government. A lower standard for due process and no right to counsel for the accused: the only trade-off for government attorneys is that they don't wield the threat of incarceration unless there's also a criminal investigation going on at the same time as there was in the case at bar. From the circumstances, it appears that SEC kept evidence from the U.S. Attorney as well. Upon learning of the exculpatory evidence from Petitioner, the U.S. Attorney canceled his Grand Jury appearance and abandoned any pursuit of criminal charges.

The Petitioner was deprived of property in this case, as reflected in the multimillion dollar judgment entered against him; the Petitioner was also deprived of liberty in this case, as reflected in the damage done to his reputation, and the resultant damage done by this large judgment to his ability to obtain employment in his field. This was done without due process, as the Petitioner was denied evidence (financial in nature) that was material to the matter before the District Court; the amount of damages. It is Petitioner's position that this evidence would show the amount of damages to be zero, effectively nullifying any impact of the Consent Judgment against him. He signed the no-admit, no-denial settlement without the assistance of an attorney because he expected the government to act morally right. He

never considered that his own government would intentionally hide exculpatory evidence to wrongfully obtain a financial judgment it knew was fraudulent.

The Respondent's position throughout these proceedings has simply been a form of "Brady doesn't apply to civil cases". That gross simplification avoids taking into consideration the vast resources and considerable power of a government agency as a plaintiff (or defendant) in a civil case. When the SEC initiated its case against Petitioner, a parallel criminal investigation was underway. No criminal charges were ever brought against the Petitioner. Were the Petitioner able to pay the enormous judgment entered against him by the District Court, none of that money would go to a "victim". The purpose of the civil case was to punish the Petitioner. No other purpose was served. The only real difference between this case initiated by the government, and a criminal case, apart from venue, is that incarceration was not an available penalty. That there was a criminal investigation pending at the time the suit was filed, indicates that Petitioner was simply being pursued by the government in every way at their disposal. They chose to pursue the Petitioner in a way calculated as the best way to produce a win. Any other motive would have the Respondent voluntarily handing over the evidence requested by the Petitioner. Petitioner doesn't understand how the settlement agreement, Consent, can require the SEC to provide discovery, but yet the courts empowered them to breach the settlement in a manner only favorable to them – in this case, to breach the SEC's obligation to provide discovery in its possession relevant to the calculation of disgorgement.

Criminal cases are clearer such that the government's purpose has been enunciated by the Supreme Court: "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78

(1935), a sentiment reflected in an inscription on the headquarters of the Department of Justice. Why should the government's purpose be any different in a civil enforcement action? In the case at bar, the Respondent was not seeking damages on behalf of some victim, it was engaged in a law enforcement function. The government's only purpose in this civil enforcement proceeding remains identical to that of criminal prosecutions: that justice be done.

The body of statutes that allows the government to pursue civil cases against defendants was not intended to be a way for the government of opt-out of justice and due process to pursue winning cases. The Brady doctrine reflects an acknowledgement that when seeking to punish its citizens, the State's interest is not to win the case, but to ensure that "justice shall be done."

It must be clearly understood and appreciated that the Department of Justice elected to not bring criminal charges against the Petitioner. In a proceeding based on such charges, Brady would require that the prosecution turn over the requested evidence. Because the US Attorney cancelled Petitioner's Grand Jury appearance upon notification of SEC's possession of exculpatory evidence, we can plainly see that SEC was also hiding this evidence (auditor testimony and financials) from both the FBI and the US Attorney's office. Should the SEC continue to pursue prosecutions while hiding exculpatory evidence, you can be sure they are watching SCOTUS' ruling on this case to learn if it can continue to refer cases for criminal prosecution while intentionally withholding exculpatory evidence from other government prosecutors.

Outside of a small handful of cases, the application of Brady to civil proceedings remains an "open question". The resources of government agencies make for an uneven playing field in any proceeding and allowing the government to opt-out of Due Process by pursuing their target in a civil case is not in keeping with the pursuit of Justice. In the case

at bar, substantial civil penalties have been levied against the Petitioner; penalties that are at least as stringent as those under many criminal statutes.

The Brady rule announced in the 1963 Supreme Court case *Brady v. Maryland*, prevents one-sided prosecutions in which the defendant and the court are kept in the dark about information that might show that he's innocent. The government's job as prosecutor is not to obtain convictions, but to do justice.

In order for defendants to know their rights when sued by the government, the Supreme Court needs to resolve the "open question" of the application of Brady to civil matters, at least when the government is the original plaintiff, so that it may provide clear guidance that the lower courts may follow.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: June 28, 2018

Respectfully submitted

/s/ TROY LYNDON, Petitioner

Pro Se

A handwritten signature in black ink, appearing to read 'Troy Lyndon', with a stylized flourish at the end.