

No. _____

In the

SUPREME COURT OF THE UNITED STATES

DENNIS RILEY,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Ohio Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner was indicted on three felonies. He pleaded not guilty, requested and received discovery, and prepared for trial. Prior to trial, Petitioner changed his plea to guilty and was sentenced. Thirteen days after sentencing, the defense learned that the prosecution concealed and suppressed a substantial body of evidence which showed improper behavior by the only officer in the case. The defense expert was unchallenged in his opinion that the officer's behavior was inappropriate and unacceptable.

The Trial Court ruled that even though some of the suppressed evidence was impeachable evidence, it was not discoverable. The Court also held that the rest of the suppressed evidence was not exculpatory and, thus, not discoverable.

The Fourth District Court of Appeals, Ohio, held, because the Defendant pleaded guilty, he was never entitled to impeachment or exculpatory evidence. The Ohio Supreme Court refused to review the case. The questions presented are:

1. Whether the court of appeals erroneously ruled that a defendant is not entitled to impeachment or exculpatory evidence if he pleads guilty at any stage of the proceeding, even after receiving discovery.

2. Whether the trial court below, after admitting evidence is impeachment evidence, erroneously held that *Brady v. Maryland*, 373 U.S. 83, 87 (1963), does not require impeachment evidence to be disclosed to the defense during discovery.
3. Whether the trial court below erroneously held that evidence of a personal and potentially intimate relationship between the only investigative officer and accuser in a criminal case is not evidence that is materially exculpatory for the defense and therefore is not required to be disclosed during discovery.
4. Whether the trial court below erroneously held multiple internal investigations conducted by the police and sheriff's departments into the only investigative officer's conduct, character, and participation in alleged criminal activity is not materially exculpatory for the defense and therefore is not required to be disclosed during discovery.
5. Whether the court of appeals incorrectly stated that the petitioner did not claim that the suppressed evidence was exculpatory.

LIST OF PARTIES

1. DENNIS RILEY, Defendant and Petitioner
2. STATE OF OHIO, Plaintiff and Respondent

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OPINIONS BELOW

The order of the Supreme Court of Ohio, filed on March 14, 2018, declining to accept jurisdiction of the appeal from the Fourth Appellate District of Ohio for Washington County is reported at *State of Ohio v. Dennis Riley*, Case No. 2017-1481, and is reprinted in the Appendix hereto, p. 1.

The Entry of the Fourth Appellate District of Ohio for Washington County denying reconsideration of its June 27, 2017, decision filed September 5, 2017, is reported at *State of Ohio v. Riley*, Case No. 16CA29, and is reprinted in the Appendix hereto, pp. 2-6.

The Decision and Judgment Entry of the Fourth Appellate District of Ohio for Washington County was filed June 27, 2017, and is reported at *State of Ohio v. Riley*, Case No. 16CA29, and is reprinted in the Appendix hereto, pp. 7-43.

The Decision of the Washington County Common Pleas Court, Marietta, Ohio, filed on September 13, 2016, denying Defendant's Motion to Dismiss and Motion for Issuance of Court-Ordered Subpoenas is reported at *State of Ohio v. Riley*, Case No. 16 CR 5, and is reprinted in the Appendix hereto, pp. 44-47.

JURISDICTION

On May 12, 2016, defendant pleaded guilty to one felony count in the Court of Common Pleas, Washington County, Ohio. Defendant was sentenced on July 1, 2016. Thirteen days later, the defense discovered a significant amount of evidence which had been withheld by the state. Claiming a denial of Due Process under the Fifth Amendment to the Constitution of the United States, defendant asked the trial court to permit him to withdraw his plea and proceed with his case with the new evidence. Defendant asserted that the evidence was discoverable under the *Brady* line of cases. On September 13, 2016, the trial court denied Defendant's claim. *See* App. D, p. A-48.

On June 27, 2017, the Fourth Appellate District Court for Washington County, Ohio, denied defendant's appeal, ruling that the suppressed evidence was not exculpatory and, in addition, that defendant, by entering a guilty plea, waived any right to request suppressed evidence. *See* App. C, pp. A-3, A-32.

On September 5, 2017, the Fourth Appellate District Court for Washington County, Ohio, denied Defendant's Motion to Reconsider, holding that upon pleading guilty, defendant waived his right to Due Process (a fair trial). *See* App. B, pp. A-6, A-7.

On March 14, 2018, the Supreme Court of Ohio denied defendant's request for a review by the Ohio Supreme Court. *See* App. A, p. A-1.

The jurisdiction of this Court to review denial of constitutional rights is invoked under Article III, Section 2, and under the Fifth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, AND POLICIES AT ISSUE

Article III, Section 2, of The United States Constitution

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original

jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Fifth Amendment to The United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The United States Supreme Court has established, in a series of cases, *Brady*, *Bagley*, and *Giglio*, that the State must provide material, exculpatory and impeachment evidence to Defendant. Failure to do so denies Defendant Due Process and a fair trial.

A. Facts Giving Rise to this Case

The facts in this case are substantially agreed upon. Defendant Riley was arrested, indicted, plead not guilty, filed for discovery, all while being represented by counsel. On the eve of a Motion to Suppress hearing and in the face of significant potential punishment, Defendant Riley entered into a plea agreement with the State. Defendant pleaded guilty on May 12, 2016, and was sentenced pursuant to the plea agreement on July 1, 2016. On July 14, 2016, Defense Counsel discovered that the State had suppressed significant evidence. Four separate areas were concealed by the State. First, the only officer in the case had been the subject of an internal investigation by his department because of his behavior in this case. Secondly, after the officer's department conducted the internal investigation, it turned the matter over to the County Sheriff's Office for an independent investigation. Thirdly, there existed 517 text messages between the only officer in

the case and the minor accuser. Fourth, there were tape recordings that implicated the mother of the minor accuser and the investigating officer in a possible separate criminal enterprise.

The State was aware of the four areas and chose to suppress them.

None of the above facts are disputed.

Defendant filed for relief on the basis that *Brady v. Maryland* line of cases required that the defendant be given access to exculpatory and impeachment evidence. The trial court denied defendant's motions claiming that, even though some of the evidence was impeachment evidence, it was not discoverable under the *Brady* cases. The trial court held that the balance of the suppressed evidence was not exculpatory and, thus, not discoverable. *See* App. D, pp.

B. The Appellate Court Proceedings

On September 30, 2016, defendant filed his Notice of Appeal from the trial court's decision. On June 27, 2017, the appellate court issued its decision denying defendant's appeal, holding that because the defendant pleaded guilty, he was not entitled to seek access to any withheld evidence. The appellate court also held that some of the evidence was not

exculpatory and that any impeachment evidence was barred by the guilty plea. *See App. C, pp.*

On July 6, 2017, defendant filed for reconsideration; and on September 5, 2017, the appellate court ruled that the guilty plea by the defendant constituted a waiver of any rights to Due Process or to a Fair Trial. *See App. B, pp.*

C. The Ohio Supreme Court Proceedings

On October 20, 2017, defendant petitioned the Ohio Supreme Court to grant a review of the appellate court decision. The Ohio Supreme Court summarily denied to hear the case. *See App. A, p. 1*

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review is warranted because the law in Ohio now permits prosecutors to conceal exculpatory evidence in discovery if defendants plead guilty any time before trial.

The Supreme Court of Ohio, by refusing to review the Riley decision, has empowered prosecutors to hide exculpatory evidence if they can convince defendants to plead guilty at any stage of the proceedings. While this may seem incredible, it is now the standard in the Fourth District of Ohio.

This absolute bastardization of the entire right to the discovery by a criminal defendant, not to mention the cancellation of all of the rights defined by the Brady-line of cases, is now the law in Ohio. The Appellate Court failed to comprehend the distinction between a common sense explanation of the rights of one who pleads guilty upon being charged versus the rights of one who pleads not guilty, demands discovery, prepares for trial, but finally ends up entering a plea arrangement.

It is notable that defendant in the Riley case believed that the mistakes made by the trial judge and

the court of appeals would make his case the leading case for the integrity of the system and the right to complete discovery. The opposite has become true in that the Fourth District Court of Appeals is now using the Riley case as justification for denying discovery to any defendant who pleads guilty at any stage of the criminal proceeding.

In support of its ruling, the Appellate Court said that *United States v. Ruiz*, [526 U.S. 622, 628, and 633, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002)] was dispositive. (Even though the court agreed that “...we recognize the factual distinctions between *Ruiz* and appellant’s case, . . .”) (Entry of Application for Reconsideration, page 3.)

In *Ruiz*, the defendant was offered a California “fast track” sentencing if she would plead upon arrest. Defendant refused. California indicted the defendant, and then she pleaded guilty. After some obfuscation by the Ninth Circuit, the United States Supreme Court ruled that defendant in this set of facts was not entitled to preguilty plea discovery. No one would ever disagree with that ruling. The Riley case is completely different. Riley was arrested, represented by counsel at his arrest, indicted, pleaded not guilty at his arraignment, filed for and received discovery, was given a trial date, and filed a Motion to Suppress prior to trial. On the eve of the motion hearing, Riley and the State entered into and agreed upon a plea

arrangement.

Thirteen days after plea and sentencing, while Defendant was awaiting transfer to a correctional facility, the defense discovered that significant evidence had been concealed and suppressed by the State. The Trial Court held that some of the evidence did not rise to the level of being exculpatory and that some of it was impeachment, but impeachment evidence was not anticipated to be discoverable under *Brady*.

The Appellate Court also held that some of the evidence was not exculpatory and, although impeachment evidence existed, it was not exculpatory; but, none of this mattered because the Defendant pleaded guilty and, thus, under *Ruiz*, was not entitled to any of the suppressed evidence. The Appellate Court actually said that impeachment evidence is not available to any defendant if that defendant pleads guilty. That is way beyond the pale of *Ruiz*.

Under the holding in *Riley*, a prosecutor can withhold DNA evidence which conclusively proves a defendant not guilty. After vigorous negotiations, that prosecutor could convince a defendant to plead guilty, thus guaranteeing that the concealed evidence will never see the light of day.

II.

Review is warranted because the Trial Court and the Fourth District Court of Appeals incorrectly ruled that impeachment evidence does not have to be disclosed in discovery by the State under the *Brady* cases.

The evidence suppressed by the State could have been used by Defendant for impeachment purposes; therefore, the *Brady* Rule mandates its disclosure during discovery.

“Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.” *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Such evidence is “evidence favorable to an accused,” *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959).

When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within [the] general rule [of *Brady* [****20]. We do not, however, automatically require a new trial whenever ‘a combing of the prosecutors’ files after the trial has disclosed [***491] evidence possibly

useful to the defense but not likely to have changed the verdict . . . ‘**A finding of materiality** of the evidence is required under *Brady*. . . . A new trial is required if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .’ 405 U.S., at 154 (citations omitted).

In *Giglio*, the prosecution suppressed evidence of a deal it made with its primary witness, Taliento, not to prosecute Taliento in exchange for his testimony. In the case, this Court said, “Here the Government’s case depended almost entirely on Taliento’s testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento’s credibility as a witness was therefore an important issue in the case . . .” *Giglio* at 154. For that reason, this Court ordered the defendant be entitled to a new trial.

In the instant case, akin to the facts in *Giglio*, the prosecution’s case depended entirely upon the testimony of two witnesses: Officer Ellenwood and the defendant’s accuser. Officer Ellenwood had conducted multiple interviews with the accuser, including the initial interview upon which the indictment was based. The evidence suppressed shows that Officer Ellenwood and the accuser began a personal and potentially intimate relationship at some point during the

investigation of this case. The suppressed evidence also shows that Officer Ellenwood had multiple private, in-person rendezvous with the accuser that have not been documented or recorded in any way. Finally, the suppressed evidence contains two investigations into the conduct and character of Officer Ellenwood. The mere fact that these investigations took place could have been used by the defense to impeach Officer Ellenwood's character for truthfulness.

Rigorous cross examination is the weapon of truth in trial. Here, the defense was unaware of the significant body of material that existed which would have provided fuel for such cross examination. Knowing this evidence would have changed the position of the defense as to any plea agreement and waiving of a jury trial. The outcome of this case would be vastly different.

The importance of the concept of exculpatory and impeachment evidence at the trial level was recognized by the United States Supreme Court in *Kyles v. Whitley*, 514 U.S. 419 (1995) [quoting *United States v. Bagley*, 473 U.S. 667 (1985)], at page 443 when the Court said, "these developments would have fueled a withering cross examination . . ." and would have the effect of destroying confidence in the witnesses' stories. The Supreme Court obviously is aware that, in the trenches of criminal trial work, any

evidence that can be used to challenge the biases of any witness against a defendant is critical to a good defense.

III.

Whether the Appellate Court erroneously found that Defendant did not allege that the evidence the State withheld was exculpatory.

The Appellate Court said at paragraph 31 of its original decision:

We further observe that appellant did not allege that the evidence regarding Officer Ellenwood's relationship with the victim is exculpatory. Rather, appellant asserts that the evidence would have allowed him to impeach or discredit Officer Ellenwood and the victim. We therefore have no need to determine whether the *Ruiz* rule applies to both impeachment and exculpatory evidence, or if it is limited to impeachment evidence.

See App. C, p. 8.

The Defendant's appeal contained a third assignment of error which said that the Trial Court erred by refusing to find that the behavior of the

officer and the minor victim was relevant and material, thus discoverable. Based upon the assignment of error, it is clear that the Petitioner appealed to the Fourth District based on the materiality of the suppressed evidence, not solely on the fact that it was impeachment evidence. *Giglio* held that a finding of materiality of the evidence is required under *Brady*: . . . “A finding of materiality of the evidence is required under *Brady, supra*, at 87. A new trial is required if the false testimony could. . . in any reasonable likelihood have affected the judgment of the jury. . .” *Napue, supra*, at 271.

Petitioner contends that his third assignment of error in his appeal was sufficient to raise all of the *Brady* issues.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Fourth District Court of Appeals of Ohio for Washington County.

Dated: June 6, 2018

Respectfully submitted,

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