

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARCUS ALLEN

— PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marcus Allen

(Your Name)

P.O. Box 3000

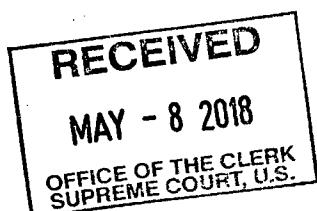
(Address)

Forrest City, Arkansas 72336

(City, State, Zip Code)

N/A

(Phone Number)



QUESTION(S) PRESENTED

- I. Did lower court violate petitioner's rights under the Fourteenth Amendment of Equal Protection under the law, when petitioner provided evidence the Government committed a Brady violation but lower courts still denied petitioner's 2255 motion, motion for new trial, certificate of appealability and petition for rehearing?
- II. Was it a plain error, when lower courts failed to uphold the integrity of the judicial proceedings and vacate the petitioner's sentence knowing the Government had committed a Brady violation.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 20, 2017.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 7, 2018, and a copy of the order denying rehearing appears at Appendix B.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment: Section 1 [n]o state shall make or enforce any which law, that shall abridge the privileges or immunities of the United States nor shall any state deprive any person of life, liberty or property without due process of; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI (Sec. 2) of the Constitution

"The Constitution, and the laws of the United States which shall be made in pursuant tojereof and all treaties made or which shall be made under the authority of the under the authority of the supreme law of the land and the judges in every state shall be bound thereby....

STATEMENT OF THE CASE

This case is a result of an investigation by ATF into a burglary which occurred in Caruthersville, Missouri on or about February 21, 2014. The burglary resulted in the theft of several firearms, electronic devices, jewelry and other items. One of the items taken was sold on Craigslist by a seller in Little Rock, Arkansas. On March 6, 2014, the Craigslist seller was located and had possession of a laptop stolen from the burglary and methamphetamine on his person. The individual became the confidential source (CS) in the investigation. The "CS" informed law enforcement he sold the firearms from the burglary to Mr. Allen and had been purchasing methamphetamine from Mr. Allen. Based on this acquired information alone the ATF obtained and executed a search warrant on March 6, 2014 at 7815 Burnelle. Allen was there and firearms and controlled substances were located in the residence. Based on the evidence recovered Mr. Allen was indicted on a three-count superseding indictment:

Count 1: Felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1) and 924(e).

Count 2: Possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. §924(c).

Count 3: Possession with intent to distribute controlled substances in violation of 21 U.S.C. §841(a)(1).

Mr. Allen filed for a motion to suppress and Franks hearing which the district court denied. On November 19, 2014 Mr. Allen was found guilty by jury trial. On June 18, 2015 Mr. Allen was

sentenced to 360 months. A final judgment and commitment order was entered on June 22, 2015. Mr. Allen filed a timely notice of appeal on June 22, 2015. On direct appeal petitioner argued suppression issues and Franks hearing. On July 12, 2016 the Eighth Circuit Court of Appeals affirmed district court orders. The petitioner filed a timely petition for rehearing en banc which was denied on August 18, 2016. Petitioner is now filing for a writ of certiorari which was denied. Then petitioner filed a 2255 motion and motion for new trial with district court which was denied without a certificate of appealability. The petition filed for certificate of appealability with court of appeals and appeal judge's order denying motion for new trial both were denied and as well petition for rehearing.

REASONS FOR GRANTING THE PETITION

Petitioner raises questions under Rule 10(a):

By denying petitioner's 2255 motion, motion for new trial, certificate of appealability and petition for rehearing after petitioner produced evidence that the government had committed a Brady violation. The lower courts of the Eighth Circuit have so far departed from the accepted and usual course of a judicial proceedings in every other circuit that the need for this court's supervisory power is warranted.

I. Eighth Circuit Court of Appeals

A. Standard for Certificate of Appealability

28 U.S.C. §2253(c)(2) provides that a United States Court of Appeals may issue a certificate of appealability under 28 U.S.C. §2253(c)(1) only in cases where inmate makes a substantial showing that he has been denied a constitutional right, to make requisite showing, inmate must demonstrate jurists can debate whether (or for that matter agree that) inmate's petition for writ of habeas corpus should have been resolved in a different manner or that issues presented were adequate to deserve encouragement to proceed further and although inmate need not demonstrate that his appeal will succeed. He must prove something more than absence of frivolity or existence of mere good faith. Melek v. Friel, 279 Fed. Appx 659 (10th Cir. 2008).

1. Substantial showing of a denial of a constitutional right:

A. The petitioner had a constitutional right under the Sixth Amendment and Brady to evidence necessary in the preparation of his defense. The government failure to disclose the Jonathan

Smith interview transcripts and ATF Agent Ryan Becker's investigation report (1)(see report) to the petitioner before trial violated his rights under the Sixth Amendment and Brady. This failure also violated the petitioner's rights under the Fourteenth Amendment of due process. The obligation of the prosecution to turn over any favorable evidence to the defendant, first announced in Brady is one aspect of the due process right.

2. Debatable Issue

A. With Agent Ryan Becker's investigation report (1) as evidence of the government's Brady violation a jurist could have debated the petitioner's petition should have been resolved in a different manner, and

b. Agent Becker's report (1) presented with the petition for rehearing was adequate enough to deserve encouragement to proceed further as claimed by the Tenth Circuit.

3. Argument that Agent Becker's investigation report (1) was material and exculpatory evidence.

The petitioner filed a FOIA request to obtain Agent Becker's investigation report (1). App'x D, E. (See Letter and Report). This report alone proves the government suppressed evidence and violated the petitioner's rights under Brady, the Sixth and Fourteenth Amendments. The report also provides that there was two interviews with Jonathan Smith (see App'x E, Report pg. 2 at 5). One initially with Cpd Terry Privett and then with Agent Becker, so there were transcripts, but most importantly this report proves that Agent Becker had no corroborated evidence that the petitioner was involved in anything criminal or suspicious with Jonathan Smith or anything criminal or suspicious

at 7815 Burnelle proving there was no probable cause for the search warrant because there was not a fair probably that contraband would have been found without the evidence of criminal or suspicious activity, making the investigation report material and exculpatory evidence.

II. Plain Error Claim

In order to prevail on a claim of plain error the petitioner must show that the appeals court committed an error that is clear or obvious and that error affected his substantial rights, and that error seriously affected the fairness, integrity, or the public reputation of the judicial proceedings.

A. The Plain Error

The appellate court denied the petitioner's application for a certificate of appealability and the appellate judge's order denying motion for new trial (222), with the evidence the government had committed a Brady violation, Agent Ryan Becker's investigation report (1).

1. This error was clear and obvious because: The petitioner submitted Agent Ryan Becker's investigation report (1) with his rehearing to backup his claim that the government committed a Brady violation.

2. This error affected the petitioner's substantial rights because: The appellate court violated the petitioner's rights under the Fourteenth Amendment of equal protection under the law. After the petitioner submitted Agent Becker's report (1) as evidence that the government had committed a Brady violation, the court knew the government had violated the petitioner's rights under Brady with this evidence but the court still denied the

petitioner a certificate of appealability and motion for new trial and this denied him equal protection under the law. Under law the petitioner met the standard for a certificate of appealability and a new trial.

3. The error seriously affected the fairness and the integrity of the judicial proceedings because: The appellate court failed to uphold the law which they are bound by and grant a certificate of appealability, and a new trial, knowing the government had committed a Brady violation. Under Article VI of the Constitution (Sec. 2) "the Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby."

I. The District Court

Judge Baker stated in her order (see App'x A, Order pg. 5 at 17) "the government was under no obligation to disclose this material" because the petitioner did not request the transcripts. But judge Baker knew under Brady v. Maryland, 313 U.S. 83 (1963) "the government must comply with its constitutional obligation to disclose any information known to it that is material to the guilt or punishment of the defendant whether or not the defendant request it." Judge Baker was bound by law to uphold the law and the integrity of the judicial proceedings. The mere allegations made by the petitioner warranted an evidentiary hearing as requested by the petitioner. Judge Baker also stated in her order (App'x C, pgs 5-16), "Absent such a request neither Rule 16 nor 18 U.S.C. §3500(b) requires the government to furnish such

material." The request for discovery was made by AFD Nicole Lybrand around April 21, 2014 (see App'x F, letter) before the petitioner had become pro se, so there is no foreseeable reason why the petitioner would have to make another request for discovery. The government had to give Arkie Bird the petitioner's standby counsel the discovery in this case. If the government had any intention to disclose Jonathan Smith's transcripts and Agent Becker's report (1) they would have then. There was no need for a request for the Jonathan Smith interview transcripts which are governed by 18 U.S.C. §3500 because Brady obligations are not altered or modified by the Jencks Act. Under United States v. McVeigh, 923 F.Supp. 1310 (D.C. Cir. 1996) "the government must provide defendant exculpatory and impeachment information pursuant to Brady well in advance of trial because Brady obligations are not altered or modified by the fact that information is contained in witness statement, production of which is governed by 18 U.S.C. §3500. Since purpose of Brady duty of disclosure is to give defendants fair opportunity to prepare their defenses well in advance of trial."

A. Plain Error Claim

In order to prevail on a claim of plain error a defendant must show that the district court committed an error that is clear or obvious, that error affected his substantial rights, and that error seriously affected the fairness, integrity or public reputation of the judicial proceeding.

The Plain Error

The district court failed to vacate defendant's sentence or grant a new trial knowing the government had committed a Brady violation by not disclosing Jonathan Smith's interview transcripts to the pro se petitioner before trial.

1. This error was clear and obvious because: When the petitioner bought to light in his 2255 motion and motion for new trial that the government had failed to disclose Jonathan Smith's transcript before trial. The district court knew the government had a constitutional obligation under Brady to disclose this evidence whether or not the defendant requested it but the district court still denied petitioner's 2255 motion and motion for new trial stating in its order (App'x A at 17) "the government was undre no obligation to disclose this material" without a request.

2. This error affected the defendant's substantial rights because: The district court violated the defendant's rights under the Fourteenth Amendment of equal protection under the law. The court knew under 28 U.S.C. 2255 and Rule 33 the defendant's sentence should have been vacated due to the suppression of the Jonathan Smith's transcripts.

3. This error seriously affected the fairness and the integrity of the judicial proceedings because: The district court failed to uphold the law which it is bound by and vacated the defendant's sentence knowing the government had committed a Brady violation.

B. 2255 Relief Claim

In order to obtain relief under a 2255 motion, the movant must allege a violation constituting "a fundamental defect which inherently results in a complete miscarriage of justice. United States v. Gomez, 362 F.3d 971, 974 (8th Cir. 2003).

The suppression of the Jonathan Smith's interview transcript and Agent Becker's investigation report (1) by the government was a violation that constituted a fundamental defect which inherently resulted in a complete miscarriage of justice because the government failed to live up to its Brady obligations and denied the petitioner his right to material and exculpatory evidence to prepare a proper defense. He was placed at a disadvantage and this denied him his right to a fair trial which is a complete miscarriage of justice.

C. New Trial Claim

In order for a criminal defendant to prevail on a Federal Rule of Criminal Procedure 33 motion for a new trial based on newly discovered evidence a defendant must satisfy a five part test.

1. The evidence must be newly discovered.
2. The failure to discover the evidence must not be the result of lack of diligence on the defendant's part.
3. The evidence must be material.
4. The evidence must be neither cumulative nor merely impeaching.
5. The evidence must indicate that a new trial would probably result in acquittal.

Five part test:

1. The evidence that the government failed to disclose the Jonathan Smith's interview transcripts and Agent Becker's investigation report (1) is new discovered evidence because Agent Becker's investigation report (1) was obtained from a FOIA request dated December 1, 2016 and received after April 28, 2017. (See letter, Appx D).

2. The petitioner has taken every step of the court process from direct appeal to a writ of certiorari and filed many motions. So the failure to discover this evidence was not due to lack of diligence.

3. The government's case was built solely on the statements made by Jonathan Smith in his interviews with law enforcement and this makes the transcripts of these interviews and Agent Becker's investigation report material evidence.

4. The investigation report (1) proves that Agent Becker had no cooroborated evidence that the petitioner was involved in anything criminal or suspicious with Jonathan Smith or that there was anything criminal or suspicious at 7815 Burnelle making the report exculpatory evidence and neither cumulative nor merely impeaching.

5. The government's Brady violation proves that the government engaged in prosecutorial misconduct and a new trial would probably result in an acquittal because a reasonable fact finder could have not found guilt beyond a reasonable doubt with the evidence that the government engaged in prosecutorial misconduct. The essential element of the crimes charged could not be viewed with a worthiness of confidence due to the misconduct.

D. Prosecutorial Misconduct Claim

In order to prevail on a claim of prosecutorial misconduct. A defendant must show that the prosecutor's conduct was improper and secondly that the prosecutor's improper actions prejudicially affected the defendant's substantial rights so as to deprive him of a fair trial. United States v. Mullins, 446 F.3d 750, 757 (8th Cir. 2006).

1. The prosecutor's conduct was improper because they had a constitutional obligation under the Sixth and Fourteenth Amendments and brady to disclose Agent Becker's investigation report (1) and Jonathan Smith's interview transcripts to the petitioner before trial and failed to do so.

2. The government failure to disclose this evidence prejudicially affected the petitioner's substantial rights so as to deprive him of a fair trial because he was deprived of his right to evidence to prepare a proper defense, as to defend himself effectively. He was placed at a disadvantage without the evidence and this deprived him his right to a fair trial.

E. Evidentiary Hearing Claim

A petitioner is entitled to an evidentiary hearing on a 28 U.S.C. §2255 motion unless the motion and the files and records of case conclusively show that the petitioner is entitled to no relief. To obtain an evidentiary hearing the petitioner must (1) allege facts not conclusions warranting relief, (2) raising matters not refuted by the files and the record of the court, and (3) show that the matters raised resulted in prejudice.

1. Facts Warranting Relief

A. The government failed to disclose the interviews with

Jonathan Smith and law enforcement and Ryan Becker investigation report #1 denying defendant right to a fair trial.

2. Matters not refuted by the files and the record of the court.

A. The government can not produce any file or record from the court that the defendant received the transcripts or investigation report #1.

3. Matters Raised Resulted in Prejudice

A. The government failure to provide transcripts and the investigation report #1 was prejudicial to the defendant because they denied the defendant his constitutional right to a fair trial and his constitutional right to defend himself effectively.

F. Closing Argument to Show the Importance to Public of Issue

The important consideration for accepting a petition for review is the importance to the public of the issue.

A. Issue in Petition: "Equal Protection under the Law"

B. The importance to the Public: "To keep public's good faith in the judiciary, to know no matter the outcome, the court will uphold the law and grant equal protection under the law.

The public's good faith in the constitution the laws that govern the land and its judges can not be upheld knowing that the rights guaranteed by the constitution of due process and equal protection under the law are being violated by the courts. The petitioner backed his claim with clear evidence that the government had committed a Brady violation (see App'x E). He was guaranteed relief under the law. No other circuit would have denied petitioner relief with evidence to backup his claim of a Brady violation. The lower courts have clearly violated the petitioner's rights under

the Fourteenth Amendment of equal protection under the law. Their actions have directly impacted the fairness, integrity, and public reputation of the judicial proceedings. The judicial proceedings can not be viewed with a worthiness of confidence in the eye of the public and well/should this court and for this reason this petition should be granted.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: 4-25-18