

OCTOBER TERM, 2018
IN THE SUPREME COURT OF THE UNITED STATES

RANDOLPH LYLE MOORE, Petitioner,

v.

WILLIAM GITTERE, Warden;
ADAM LAXALT, Attorney General, State of Nevada; Respondents.

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

A. The Nevada Supreme Court decided a federal question in rejecting Moore's claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963).

Moore's claim was that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). The suppressed evidence was that the State threatened a key witness, Angela Saldana, with the death penalty, coached her testimony, and provided her with police reports so she would testify exactly as her handlers wished. This evidence would have impeached her. This evidence is material because Saldana was the most important witness in the prosecution of Moore.

The Nevada Supreme Court found that this claim was "procedurally barred absent a demonstration of good cause and prejudice." App. 018. The court then considered whether the State's violation of *Brady* constituted good cause and prejudice. App. 018-22. This was consistent with longstanding Nevada law recognizing that "[g]ood cause and prejudice parallel the second and third *Brady* components; in other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." App. 019 (quoting *State v. Bennett*, 81 P.3d 1, 8 (Nev. 2003)).¹

And so the Nevada Supreme Court evaluated the merits of Moore's *Brady* claim. *See Rippo v. Baker*, 137 S. Ct. 905, 907 n.* (recognizing Nevada procedural default was not independent of merits of federal claim). First, the Nevada Supreme

¹ See also *Rippo v. State*, 423 P.3d 1084, 1099-1100 (Nev. 2018); *Lisle v. State*, 351 P.3d 725, 728 (Nev. 2015); *State v. Huebler*, 275 P.3d 91, 95-96 (Nev. 2012); *Mazzan v. Warden*, 993 P.2d 25, 37 (Nev. 2000).

Court noted the elements required for successful *Brady* claim: (1) favorable evidence (2) that the State suppressed and (3) that is material. *See* App. 019. The court found that the evidence would be favorable evidence possessed by the State. App. 021. But, the court concluded, the evidence was not material. App. 021-22. In finding that the evidence was not material, the Nevada Supreme Court relied on this Court’s cases and its own cases construing *Brady*. *See* App. 022 (citing *Wearry v. Cain*, 136 S. Ct. 1002 (2016); *Turner v. United States*, 137 S. Ct. 1885 (2017)); *see also* App. 022 (citing *Huebler*, 275 P.3d at 98).²

There can be no question that the Nevada Supreme Court considered the merits of Moore’s *Brady* claim. The State nonetheless argues that an adequate and independent state ground bars this Court’s consideration of the Nevada Supreme Court’s judgment. *See* Br. in Opp. at 3-6. Though an adequate and independent state ground would bar this Court’s consideration, the Nevada Supreme Court’s ruling does not rely on an independent bar. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (“This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question . . .”). A decision is not independent of federal law if it is resolved by addressing the federal question. *Id.* at 735 (“[I]f the decision

² The Nevada Supreme Court quoted *Huebler*, 275 P.3d at 202: “Normally evidence is material if it creates a reasonable doubt.” App. 022. The previous sentence from the *Huebler* decision shows how interwoven the federal constitutional question and the state procedural question are: “Prejudice for purposes of a *Brady* violation requires a showing that the withheld evidence is ‘material.’” *Huebler*, 275 P.3d at 202.

of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims . . . a federal court may address the petition.”). The Nevada Supreme Court decided Moore’s *Brady* claim by finding it meritless.

Indeed, the State appears to concede that the Nevada Supreme Court resolved Moore’s *Brady* claim by noting that “the Nevada Supreme Court held that the allegedly withheld evidence was not material under *Brady*.” Br. in Opp. at 6; *see also id.* at 7 (“Nevada’s articulation and application of federal law pursuant to *Brady* and its progeny is accurate.”). The State also acknowledged that the Nevada Supreme Court relied on this Court’s *Brady* precedents. *See* Br. in Opp. at 6 (quoting Nevada Supreme Court quoting *Wearry*, 136 S. Ct. 1002, for *Brady* materiality standard).

Because the Nevada Supreme Court answered the federal question of Moore’s *Brady* claim, this Court may consider the federal question presented here.

B. The Nevada Supreme Court misapplied *Brady* by requiring a higher showing of prejudice than is required by this Court’s precedents.

The Nevada Supreme Court’s published opinion notes that suppressed evidence is material only if it is “crucial” to the State’s case. App. 006 (“Saldana’s secondhand testimony was not a crucial part of the State’s case.”). This is not the correct standard. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial,

understood as a trial resulting in a verdict worthy of confidence.”). And as noted in the Petition for Writ of Certiorari, the Nevada Supreme Court’s use of a higher standard is not unique to Moore’s case. *See Pet. for Writ of Cert.* at 12-13 (noting other cases).

The State argues that the Nevada Supreme Court did not impose a higher standard by using the word “crucial,” insisting that the court applied the correct standard. Br. in Opp. at 6. The State is wrong. The Nevada Supreme Court, in reasoning that Saldana’s testimony was not “crucial,” conducted a weighing analysis; the court imagined giving Saldana’s testimony less weight, and then reweighing the remaining evidence to calculate how much inculpatory evidence remained. *See App. 006.* The prejudice from such evidence is not merely impeachment of Saldana, but impeachment of the integrity of the State’s case—the prejudicial effect of learning that the State threatened Saldana with the death penalty, provided her with police reports, and then coached her testimony. This is especially important in light of a major defense theme at trial: that the State was using improper tactics to coerce all of the witnesses’ testimony. By asking only whether Saldana’s testimony was “crucial,” as compared to the other testimony, the Nevada Supreme Court requires not only that suppressed evidence would

undermine confidence in the verdict, but also that the evidence be crucial to the State's case.³

C. Moore's *Brady* claim is meritorious.

The State argues that Moore's *Brady* claim lacks merit because defense counsel knew of the basic underlying facts of this claim. *See* Br. in Opp. at 7-15. But there are significant differences between the facts the State asserts were known at trial and the facts underlying Moore's current *Brady* claim. *Compare* Br. in Opp. at 7-15 *with* Pet. for Writ of Cert. at 2-9.

Moore alleges that Robert Peoples, a lifelong criminal, and Beecher Avants, a district attorney investigator, worked together to threaten Saldana until she gave exactly the testimony they wanted. They threatened to send her to prison; they threatened her with execution. They provided her with police reports so she would get the details correct. And then during subsequent retrials, they repeated the process of coercion and threats.

This is categorically different from the State's description: Angela Saldana, encouraged by Peoples, contacted members of law enforcement, had a sexual relationship with one codefendant, promised marriage to another codefendant, and received \$2,000. *See* Br. in Opp. at 8-9. Absent from the State's recitation is any

³ The Brief in Opposition does not address the Nevada Supreme Court's two other misapplications of *Brady*. It was error for the Nevada Supreme Court to require Moore "to demonstrate that the withheld evidence would have affected the outcome of the penalty hearing." Pet. for Writ of Cert. at 12. And the Nevada Supreme Court misapplied *Brady* by requiring Moore to show that the withheld evidence would "affirmatively undermine the evidence presented to the jury as to Moore's involvement, the motive for the murders, or the aggravating circumstances." *Compare* Pet. for Writ of Cert. at 12 *with* Br. in Opp.

indication that Saldana was threatened, that she was provided with police reports, or that her testimony was manufactured.

Notably, the Nevada Supreme Court did not base its decision on what defense counsel knew at the time of trial. *See* App. 021-022. Rather, the Nevada Supreme Court accepted Moore's assertions as true, assumed this evidence was suppressed, and agreed that the evidence is favorable. *Id.* This was, in part, necessary because no evidentiary hearing was permitted on this claim. *See* App. 021 n.5.

The Nevada Supreme Court disagreed with Moore about materiality. But, as discussed above, the court applied the wrong materiality standard. *See* Argument § B above. Applying the correct standard, the suppressed evidence was material. Evidence is material if there exists "any reasonable likelihood" that the withheld evidence would have affected the jury's judgment. *Giglio v. United States*, 405 U.S. 150, 154 (1972). "[I]t is not a sufficiency of the evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *See Kyles*, 514 U.S. at 434-35.

The withheld evidence here would have affected the jury's judgment for two reasons. First, Nevada has a corroborative evidence rule, which requires the State to present corroborating evidence to the testimony of coconspirators. *See* Nev. Rev. Stat. § 175.291; *Heglemeier v. State*, 903 P.2d 799 (Nev. 1995). With the exception

of Saldana, the inculpatory evidence from this case came from coconspirators.⁴

Thus, Saldana's testimony was a necessary prerequisite to Moore's conviction.

Second, as presented to the jury, Saldana was the only witness free from State coercion. The other inculpatory witnesses were cross-examined about their involvement, and were either not prosecuted at all or received favorable treatment. The addition of evidence that the State threatened and manufactured Saldana's testimony would have affected the jury's judgment because the jury would have seen that every witness offering inculpatory testimony was compelled by the threat of prosecution. This is in addition to the cross-examination that Saldana already faced because of her sexual relationship with one codefendant, her agreement to marry a different codefendant, and her receipt of \$2,000 for testifying. *See* Br. in Opp. at 8-9.

In light of Saldana's unique role in the State's case, the jury's verdict is unworthy of confidence, and the State's suppression of evidence prevented Moore from receiving a fair trial.

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⁴ To take the State's list of inculpatory witnesses as demonstrative examples, *see* Br. in Opp. at 13: Rusty Havens testified he was part of planning the homicides and agreed to participate; Tom Akers testified he was present for conversations planning the homicides and that he aided the homicides by driving; and John Lucas told officers that he helped dispose of the weapons. The State also lists Lisa Licata and Michelle Gray, who testified that a knife found at the crime scene belonged to a codefendant. The testimony of Licata and Gray had nothing to do with Moore.

CONCLUSION

For the foregoing reasons, Moore respectfully requests that this Court grant his petition for writ of certiorari.

DATED this 7th day of November, 2018.

Respectfully submitted,

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