ORIGINAL

No. 18-7172

IN THE SUPREME COURT OF THE UNITED STATES

TOMAS MARCO KEEN, Petitioner

vs.

STATE OF WASHINGTON, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

Tomas Keen 310445
Petitioner, pro se
MCC-WSRU C-2-04
PO Box 777
Monroe, WA 98272

QUESTIONS PRESENTED

1. Does the prosecutor have a duty to disclose exculpatory information relating to threatened--but not filed--charges during plea negotiations?

2. Does the prosecutor have a duty to disclose exculpatory information that is located in the court file of a different defendant's case?

LIST OF PARTIES

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Tomas Marco Keen respectfully asks that this Court issue a writ of certiorari to review the judgment below.

OPINION BELOW

The opinion of the highest state court to review the merits--The Court of Appeals of the State of Washington, Division Two--appears at Appendix A to this petition and is unpublished.

JURISDICTION

The highest state court--The Supreme Court of the State of Washington--decided not to accept discretionary review of this case on June 27, 2018. A copy of that ruling appears at Appendix B.

A timely motion to modify that ruling was thereafter denied on September 5, 2018, and a copy of that order denying modification appears at Appendix C.

The jurisdiction of this court is invoked under 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

> **Fourteenth Amendment, Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Keen was arrested on February 17, 2010 following a car theft that led to pursuit by a citizen and ended in Keen discharging a firearm at the pursuer. Police found in Keen's possession a firearm and keys to a vehicle that were

reported stolen two days earlier. Based on these items, Police applied for a warrant to "search the residence and curtilage and any vehicles" at Keen's property. When the warrant was issued, however, it ordered officers to "search the residence" and nothing further. Despite this limitation, officers proceeded to search all of the vehicles parked at Keen's residence, including a Mazda belonging to his acquaintance Michael Sanders. Officers found in the trunk of this vehicle two weapons that turned out to be stolen from the same location as the items in Keen's possession. A week later, Sanders was arrested and charged with burglary and firearm offenses for the weapons in his vehicle.

Sanders's attorney moved to suppress all evidence seized from the Mazda based on police exceeding the scope of the warrant--searching more than just the residence. The Prosecutor, taking active steps to stop litigation of this motion, conceded to Sanders and his attorney that the evidence taken from the vehicle was inadmissible and agreed to dismiss the firearm offenses--the burglary charge remained due to evidence found at Sanders's home during a subsequent search. Because the Prosecutor's concession made further litigation unnecessary, the motion never went before a judge.

Meanwhile, the Prosecutor was using that same evidence, the weapons seized from the Mazda, to coerce Keen into accepting a plea offer. Keen was initially charged with attempted murder for discharging the firearm at his pursuer. The Prosecutor approached Keen with a plea offer for first degree assault and warned that if he did not accept, the State would proceed to trial on the attempted murder before filing additional charges for first degree burglary with firearm enhancements based on the weapons seized from the Mazda. The Prosecutor informed Keen that the Mazda being on his property was sufficient nexus between Keen, the weapons, and the crime. (It is

important to note, as confirmed by Sanders's plea statement, that Keen did not participate in the burglary.) It was only upon receiving this information that Keen agreed to enter an Alford plea with regard to intent for the first degree assault: maintaining that while his actions were reckless he only intended to scare the pursuer into ending the chase, but not to injure him--a fact that should have compelled a second degree assault.

Keen's attorney did not have a duty to investigate the evidence because the threatened offenses were uncharged. There was no link between the crimes that counsel was defending and the evidence from the Mazda. The result is a Brady violation: at the same time that the Prosecutor was conceding to Sanders that police exceeded the scope of the warrant, which rendered the weapons inadmissible, he kept that information from Keen and used those same weapons as leverage to induce a guilty plea.

Keen only became aware of this information in 2015 when he and Sanders met again in prison. As soon as Sanders informed him of the motion to suppress, Keen started a public-records battle with the prosecutor's office that finally resulted in delivery of the document. Shortly after, Keen raised his Brady claim through a collateral attack on his judgment and sentence (Appendix D) in Washington's Cowlitz County Superior Court. That court then transferred the motion to Washington's court of appeals, which then denied the claim stating that the information would not have changed the outcome of the proceeding and that Keen did not exercise due diligence in discovering the information. And, as stated in the jurisdiction section, Washington's highest court denied review.

REASONS FOR GRANTING THE PETITION

Two reasons compel a writ of certiorari: (1) the State's duty to disclose includes exculpatory information relating to

threatened-but-uncharged offenses during plea negotiations, and (2) the information's existence in a public court file does not always diminish the State's disclosure duty. These are both questions of first impression that allow this Court to plainly articulate how Brady operates in the context of plea negotiations.

1. **Exculpatory information relating to threatened-but-uncharged offenses during plea negotiations falls under Brady's command to disclose.**

During plea negotiations, the Prosecutor threatened to proceed to trial and, after that, add additional charges for burglary. The Prosecutor, however, knew that the evidence underlying the threatened but uncharged offenses was seized beyond the scope of the warrant and therefore was inadmissible. That information--of the evidence's inadmissibility--should have been disclosed to Keen and the failure to do so is a Brady violation.

In Brady v. Maryland, this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith by the prosecution." 373 U.S. 83, 87 (1963). This Court later said the duty to disclose such evidence is applicable even when there is no request by the accused, and that duty encompasses impeachment evidence as well as exculpatory evidence. See United States v. Agurs, 427 U.S. 97, 107 (1976), and United States v. Bagley, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682; see also Kyles v. Whitley, 514 U.S. 419, 433-34 (1995). The result is the familiar three factor test: a Brady violation occurs where the evidence was (1) favorable to the accused, (2) suppressed by the state, and (3) material.

Brady is animated by the "overriding concern with the justice of the finding of guilt." Agurs, 427 U.S. at 112. Justice concerns are especially pronounced where prosecutors possess material exculpatory evidence. In these cases they will perceive the greatest chance of aquittal or possible suppression of material evidence and therefore have the greatest incentive to resolve through plea bargains. See generally Kevin C. McMunigal, Disclosure and Accuracy, 40 Hastings L.J. 957, 990-92 (1989). Because negotiated pleas of guilty are "no more foolproof than full trials to the court or to the jury," that "overriding concern" is equally applicable in the context of a guilty plea. Brady, 397 U.S. at 757 (the Court cannot "say that guilty plea convictions hold no hazards for the innocent").

Keen asks this Court for the following rule: where the prosecutor is aware of material exculpatory information during plea negotiations, that information must be disclosed regardless of whether it relates to the charged offense or threatened-but-uncharged offenses. The duty to disclose turns on the impact the information has on the decision to plead guilty or not, nothing more. In explaining whether information is material during the plea stage--thus giving rise to a disclosure duty--the Ninth Circuit applied a clear test: "[e]vidence is 'material' if 'there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to plead and would have gone to trial.'" Ruiz, 241 F.3d at 1166.

Keen established in his collateral attack that had he known the evidence underlying the threatened charges was inadmissible he would have insisted on proceeding to trial. This satisfies the prejudice requirement and reveals the Prosecutor had a duty to disclose the information. This Court should confirm that duty.

2. **Even when exculpatory information is located in a public court file--in certain circumstances--the Prosecutor has a duty to disclose.**

The decision of Washington's Court of Appeals is an outlier in the field of due process jurisprudence, narrowly construing the Brady obligation in the context of guilty pleas and suppression motions. Its order dismissing Keen's Brady claim relied on Keen's lack of diligence because the exculpatory information was located in a court file:

> Keen contends that he did not become aware of the motion to suppress in the other defendant's case until encountering the other defendant in 2015. But the motion could have been discovered before trial through the exercise of due diligence.

[Appendix A at 2]

But the exception to the Brady requirement relied on by the court is not, or should not be, so expansive. Instead, there are instances where information in a public court file--unbeknownst to the defendant, but known to the State--must be disclosed by the State. This is one of those cases.

Under Brady and its progeny, the government has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense. See e.g., Kyles v. Whitley, 514 U.S. 419 (1995); United State v. Agurs, 427 U.S. 97, 108-10 (1976). Nonetheless, evidence is not considered to have been suppressed within the meaning of the Brady doctrine if the defendant or his attorney "'either knew, or should have known, the essential facts permitting him to take advantage of [that] evidence.'" United States v. Zackson, 6 F.3d 911, 918 (2nd Cir. 1993) (quoting United States v. LeRoy, 687 F.2d 610, 618 (1982), cert. denied, 459 U.S. 1174 (1983). Because of this, documents that are part of the record are not deemed suppressed if defense counsel should have known of them and failed to obtain them because of a lack of diligence in his own investigation. See United States v. Bermudez, 526 F.2d 89, 100 (2d Cir. 1975) (state's

investigative files were not suppressed since defense counsel, who represented one of the defendants in the state proceedings, could have discovered them "with the exercise of due diligence.").

But here the information was not part of Keen's record--it was filed by Sanders's attorney--and the simple fact that the document was in another defendant's court file does not eliminate the State's disclosure obligation. In Unites States v. Payne, the federal ciruit court held that where defense counsel is not aware of the facts that would lead to discovery of the information the State retains the duty to disclose:

> Nor are we persuaded that the government's duty to produce the Wilkerson affidavit was eliminated by that document's availability in a public court file. We have seen in the record of the present case no indication that Payne's counsel was aware of facts that would have required him to discover the affidavit through his own diligent investigation on behalf of his client. Although Payne was aware before his trial that Wilkerson had initially pleaded not guilty to charges directly relating to the December 18 sale, inter alia, and that she did not elect to plead guilty until the brink of her scheduled trial, he had no apparent reason to believe that Wilkerson had filed an affidavit containing sworn denials of her involvement in narcotics sales at the Baltic apartment.
>
> [63 F.3d 1200, 1209 (2d Cir. 1995)]

This case is nearly a carbon copy. Here, the State was aware of the motion to supress, but Keen was not. Moreover, there is no reason that Keen should have known about the motion, especially given that it was not litigated. Under these unique facts, the State retained the duty to disclose the information. Holding otherwise places an unreasonable and unnecessary burden on defense attorneys--forcing them to search every court file in the county for information that may or may not exist.

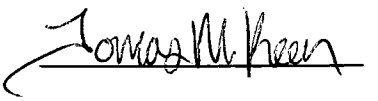
The error in this case is clear: the Prosecutor had a duty to inform Keen that the evidence underlying the threatened additional charges was inadmissible. Further, that duty did not evaporate simply because the information was located in a public court file. Although this Court has not

addressed these specific question before, it should take the opportunity to do so now. Superior Court Rule 10(c). The state of due process jurisprudence, if left how Washington interprets it, invites prosecutors to threaten additional charges that rest on evidence they know to be inadmissible in order to induce guilty pleas. This Court should void that invitation and take this opportunity to clearly articulate how Brady requirements operate during plea negotiations.

CONCLUSION

This Court should grant Keen's petition for writ of certiorari.

Respectfully submitted this 3rd day of December, 2018.



Tomas Marco Keen
Petitioner, pro se