

No. ____-_____

IN THE
SUPREME COURT OF THE UNITED STATES

RICKY THOMPSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At trial, the petitioner sought to prove the existence of two separate conspiracies. One in Ohio and the other in Tennessee. During discovery, the petitioner was given a copy of a “sealed” affidavit describing the government’s Ohio investigation but refused. The detail in the affidavit was offered to establish the “materiality” of the undisclosed information. The Court of Appeals held that to establish “materiality”, the petitioner must offer more than the content of the “sealed” affidavit and its implications.

Did requiring the assertion of detail known only to the government to show “materiality” impermissibly raise the threshold?

PARTIES TO THE PROCEEDINGS

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

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Petitioner Ricky Thompson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is contained in the Appendix as A.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2018. (Pet. App. A.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment and Fed. R. Crim. P. 16.

STATEMENT OF THE CASE

This case began in June of 2014 as a small prostitution/heroin conspiracy in the Middle District of Tennessee. The co-conspirators in Tennessee traveled back to their home state of Ohio to purchase heroin from Ricky Thompson. While the testimony at trial varied, at most, 25 trips were made to Toledo, Ohio, to purchase heroin. The conspiracy ended when the petitioner was arrested in March of 2017.

In response to a Bill of Particulars, the government disclosed that there was a separate and ongoing investigation in the Northern District of Ohio and that Thompson was among the targets. The only insight provided by the government was an affidavit filed by an FBI agent in support of the search warrants. That affidavit was kept under seal by order of the US District Court in Northern District of Ohio. The affidavit described an investigation into the petitioner that covered the entire conspiratorial time frame.

The government, despite repeated demands, refused to disclose any information gathered by the Federal Government in the Northern District of Ohio yet proceeded as if the Tennessee conspiracy was a branch of that larger conspiracy. The trial court denied petitioner's demands for production as "moot" following the government's assurance that it complied with its ongoing disclosure obligation. The Court of Appeals agreed with the District Court's reliance upon the government's assurance and went on to hold that Thompson did not meet his burden of showing that additional discovery would be material to his defense.

REASON FOR GRANTING THE PETITION

The 6th Circuit's treatment of the petitioner's *Brady* and discovery violation claim imposed an impossible standard for making the threshold showing of materiality.

THE PROOF AT TRIAL AND THE CONTENT OF THE FULMER AFFIDAVIT ESTABLISH MATERIALITY AS CONTEMPLATED BY BRADY AND FED. R. CRIM. P. 16.

"A defendant must make a threshold showing of materiality, which requires a presentation of 'facts which would tend to show that the government is in possession of information helpful to the defense.'" *United States v. Santiago*, 46 F.3d 885, 894 (9th Cir. 1990). Specifically, a document is material under Rule 16 if its pretrial disclosure will enable a defendant "significantly to alter the quantum of proof in his favor." *United States v. Caro*, 597 F.3d 608, 621 and n.15 (4th Cir.2010) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)); see also *United States v. Pesaturo*, 519 F. Supp. 2d 177, 190 (D. Mass. 2007) (reviewing Rule 16 materiality standards across jurisdictions). "Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio*, 405 U.S. at 154).

Thompson's activity in Ohio from June 2014 to March 2016 was central to the government's case in chief. In his affidavit Agent Fulmer described the investigative techniques employed by the Ohio task force included interviewing informants and cooperating witnesses, physical surveillance, short-term and long-term undercover operations, reverse undercover drug operations, consensual monitoring, recording of telephonic and non-telephonic communications, analyzing telephone pen register and caller identification system data, and court-authorized electronic surveillance. (R. 344, Sealed Affidavit, page 2, paragraph 2, Page ID# unavailable to counsel) The affidavit also claims "almost" daily surveillance of Thompson from November 2015 until his arrest in March 2016. (R. 344, Sealed Affidavit, page 17, paragraph 26, Page ID# unavailable to counsel) Law enforcement used every method of investigation available yet claimed the information gained to be immaterial.

The Court of Appeals opinion required the impossible to make a threshold showing of materiality. Thompson could only know the nature of what might be in the government's possession. It would seem

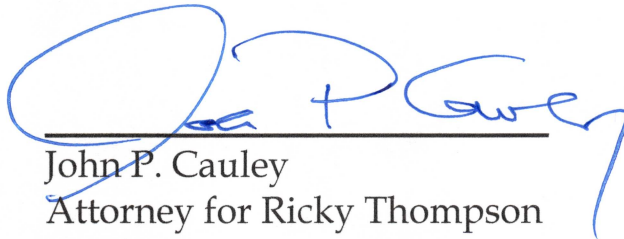
reasonable, given the duration of the investigation and the resources employed, to assume that the Task Force had a substantial amount of relevant information.

Justin Howard, for example, was a target of the Ohio investigation and “the” witness upon whose testimony drug quantity was based. Howard told the jury that he did not stop distributing drugs to Thompson until after the petitioner’s arrest in March 2016. (Transcript, R. 425, Page ID# 2063-2065) Howard also claimed that he sold the petitioner between 200 and 400 grams of heroin at a time and met with him at least once a week and as often as three times a week. (Transcript, R. 423, Page ID# 1774-1777) If Thompson were under constant surveillance from November 2015 to March 2016 then his contact, or lack of contact, with Howard would be useful for impeachment purposes and, potentially, sentencing. “Impeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule.” *United States v. Bagley*, 473 U.S. 667, 676 (1985) (citing *Giglio*, 405 U.S. at 154).

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be granted.

Respectfully Submitted,



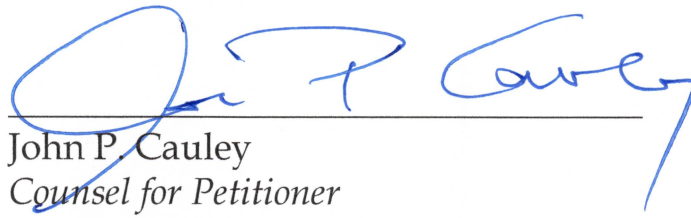
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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I hereby certify that on this the 14th day of March, 2019, one copy of the Petition for Writ of Certiorari in *Ricky Thompson v. United States of America*, No. 19-_____ was served via FedEx overnight delivery on all parties required:

Solicitor General of the United States
Room 5614
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950 Pennsylvania Avenue, N. W.
Washington, DC 20530-0001
(202) 514-2203

I declare under penalty of perjury that the foregoing is true and correct.



John P. Cauley
Counsel for Petitioner

Dated March 14, 2019

APPENDIX "A"