

JUL 29 2019

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No. 19-5470

IN THE

SUPREME COURT OF THE UNITED STATES

SPENCER TRACY HOLLOWAY — PETITIONER

(Your Name)

vs.

NOAH NAGY, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SIXTH JUDICIAL CIRCUIT COURT FOR OAKLAND COUNTY

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

PETITION FOR WRIT OF CERTIORARI

Spencer Tracy Holloway #186399

(Your Name)

141 First Street

(Address)

Coldwater, MI. 49036

(City, State, Zip Code)

(Phone Number)

ORIGINAL

10

QUESTION(S) PRESENTED

During Petitioner's postconviction proceedings, Petitioner raised a claim the prosecutor failed to disclose favorable evidence to the defense. The state court applied a *fourth* element to the claim of *Brady* violation, which is contrary to the clear standards in *Brady v. Maryland*, 373 U.S. 83 (1963) holding. The following question is presented:

I

WHETHER THE SIXTH JUDICIAL CIRCUIT COURT FOR OAKLAND COUNTY DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF *BRADY V MARYLAND*, 373 U.S. 83 (1963) HOLDING?

II

WHETHER THE STATE OF MICHIGAN DEPRIVED PETITIONER OF DUE PROCESS OF LAW BY REFUSING TO ADDRESS HIS CONSTITUTIONAL CLAIM DENYING A LIBERTY INTEREST CREATED BY STATE LAW?

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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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

For cases from **federal courts**:

The opinion of the United States court of appeals 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 is unpublished.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 United States district 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 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix F 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 is unpublished.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 Michigan Court of Appeals court appears at Appendix E 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 _____.

[] 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: _____, 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. § 1254(1).

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

The date on which the highest state court decided my case was October 30, 2018.
A copy of that decision appears at Appendix C.

[] A timely petition for rehearing was thereafter denied on the following date: April 30, 2019, and a copy of the order denying rehearing appears at Appendix D.

[] 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

United States Constitution Amendment Fourteen:

Section 1. All person 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 law; nor deny to any person within its jurisdiction the equal protection of the laws^{14,26,27,28}

STATEMENT OF THE CASE

A. 1986 Trial Proceedings:

The case arose out of the shooting death of Ricky Gracey in the City of Troy, Michigan in 1984. Ricky Gracey was one of the two armed men who hid in bushes outside of the home of Portia Jones and attacked her, her two children, and friend Kathy Combs when they returned home just after midnight on May 30, 1984. (Tr. V.II., 22-23). Gracey and the other assailant, Calvin Estes, had intended to rob Ms. Jones as they believed there was a substantial amount of money and drugs in the home. (Tr. 7/22/186, 186-189). Portia Jones, Kathy Combs and the two children were able to get inside the home, and exchange gunfire with the assailants. (Tr. V.II., 29-36). Ricky Gracey was shot and lay wounded near the front door. During the altercation, Ms. Combs made several calls to Andre Williams and asked for help. (Tr. V.II. 44-46). Williams, Charles Obey and Petitioner responded to the call from Ms. Combs for help and drove to the home, arriving about twenty minutes after the initial phone call. (Tr. V.II., 61-63). Obey and Petitioner were armed (Tr. V. II., 158-160). At then end of the night Mr. Gracey was dead and his body had been dumped in an alley in Detroit.

On July 25, 1986, Petitioner was convicted after a trial by jury in the Sixth Judicial Circuit Court for the County of Oakland, of first-degree murder and possession of a firearm during the commission of a felony. He was sentenced to a mandatory life sentence without parole and additional two years for felony firearm. In 1985, Charles Obey, was tried

and convicted of second-degree murder and sentenced to 10 to 35 years in prison. In 1985, Portia Jones was tried separately and acquitted. Andre Williams never stood trial for his involvement in Ricky Gracey's death. He testified for the prosecution against both Charles Obey and Petitioner. At both trials he was repeatedly asked and he repeatedly stated that he was not offered any type of leniency in exchange for his testimony. Mr. Williams has executed an affidavit which states he was promised by both the Troy Police as well as assistant prosecuting attorney Gary Chopp that he would not be prosecuted for his involvement in the killing in exchange for his testimony for the prosecution.

At trial, Andre Williams testified that he had known Petitioner for a number of years and he recently worked with Petitioner in the drug business. (Tr. V.II., 140-143). He stated on the night of Gracey's death he received several calls from Kathy Combs who told him that someone was trying to break into Ms. Jones house where she was with Ms. Jones and her two children. (Tr. V.II., 141-146). Williams, Petitioner, and Obey drove to the Jones home in response to the distress calls. Williams stated that during the ride to Ms. Jones house there were no discussion about what they were going to do once they arrived. (Tr. V.II., 156-157). When they arrived he observed a man lying in the front of the porch. (Tr. V.II., 158-160). The man was decedent Ricky Gracey. All three men got out the car, Mr. Obey with a .38 caliber handgun and Petitioner with an Uzi. As Williams walked up to the porch, he observed Gracey move his arm and hand and mumble something. Gracey was lying on his back and had blood on the upper part of his body. (Tr. V.II., 158-163). According to

Williams, Obey and Petitioner asked Gracey who had sent him but received no answer.

Williams stated that he heard shots fired in rapid succession and that although he could not remember how Petitioner held the gun, Obey pointed his gun at Gracey. Both Petitioner and Obey fired their weapons into Gracey. (Tr. V.II, 174-177). Williams testified that he did not observe a weapon in the man's possession when he initially walked past. (Tr. V.II., 172-173). He testified that he watched Petitioner check the man's pockets and found a plastic bag and pieces of rope. (Tr. V.II., 171-172). He stated that he did not see anything in the man's hands or the vicinity of the body. (Tr. V.II., 178-185). Williams testified that the three of them loaded the body into the trunk of the car. Williams and Obey then collected the weapons and drove the body to an alley in Detroit where they dumped it. (Tr. V.II. 182-185). He was never charged in connection with Gracey's death.

At Petitioner's trial, Andre Williams was repeatedly asked, and repeatedly denied that he was offered anything in exchange for his testimony. (Tr. 7/21/86; 50-51, 92-94). Detective Ewald Rollinger also testified that Williams was not offered any consideration in exchange for his testimony. (Tr. V.II., 7/22/86; 260). Williams also testified at Petitioner's trial that he actually observed Petitioner fire his weapon at Ricky Gracey. However, on cross-exam he admitted he previously stated he only heard the shots but did not actually observe the two men fire their weapons. (Tr. 7/21/86; 40, 49).

Nicholas (Nick) Scott testified for the prosecution. Scott testified that

he worked for Portia Jones selling drugs. He further testified that Andre Williams, Petitioner and Charles Obey all worked for him. He stated that the home where the shooting took place was the headquarters of a criminal organization. (Tr. 7/21/86, 98-100). Scott testified that the day after the shooting he heard Petitioner state that he sprayed the guy with the Uzi and that he did not hear Petitioner state anything about shooting in Gracey in self-defense. (Tr. 7/21/86, 107-108). Like Williams, Scott testified he was not offered anything from the prosecution in exchange for his testimony. (Tr. 7/21/86, 119). The prosecution used the testimony to bolster their argument that the shooting was not done in self-defense. (Tr. 7/25/86, 452).

Calvin Estes, an admitted co-conspirator of Ricky Gracey, was never charged with anything related to this case. Estes accompanied Gracey and others to the Jones' home that night as part of a plot to seize Ms. Jones and to rob the house for allegedly money and drugs. (Tr. V.II., 186-189). Estes' role was to secure the rear of the house, while Gracey secured the front (Tr. V.II., 190). Estes also admitted he was armed with a .38 and Gracey had a .45 or 9mm, but according to Estes, Gracey's gun had no ammunition clip. (Tr. V.II., 195-197). Gracey also had a bag and rope. (Tr. V.II., 195-197). He testified that he was never charged with a crime arising out of the incident. (Tr. V.II., 195-197).

Ewald Rollinger testified he was the officer-in-charge of the case, and did not become aware of the homicide until he received a call from the Detroit Police Department requesting detective response to Detroit in reference to a possible homicide that occurred in the City of Troy on

July 25, 1984. (Tr. V.II., 239). Sgt. Rollinger went to the Detroit Police Headquarters himself. (Tr. V.II., 239). Pursuant to that information received from the Detroit Police Department, Rollinger went to a Judge of magistrate seeking a search warrant for the home. (Tr. V.II., 230-240). Rollinger obtained that warrant and went out to the home of Portia Jones with several officers to assist in the recovery of evidence. Rollinger testified that during the pendency of the case, in over two years, he interviewed Andre Williams on more than one occasion. (Tr. V.II., 253). Rollinger testified that Williams did not receive a promise from him. (Tr. V.II., 253). Rollinger was asked by anybody? (Tr. V.II., 254). Rollinger then testified that Williams was not charged for his involvement with the murder of Ricky Gracey (Tr. V.II., 254). Rollinger was asked if Williams had been promised he will not be charged? Rollinger response was no. (Tr. V.II., 254).

Defendant counsel examined Rollinger on the method and procedure for taking witness statements. (Tr. V.II., 254-256). Counsel questioned Rollinger concerning his failure to seek warrant against Calvin Estes, the prosecutions witness and co-conspirator of Ricky Gracey. (Tr. V.II., 256-257).

On redirect, Prosecutor Chopp elicit testimony from Rollinger, why he did not seek to request a warrant from his office, or request authorization for an arrest of Calvin Estes and Andre Williams and further asked, did the prosecutor's office ever make a promise to any of the witnesses involved that they would -- or promise that they would not be charged with a crime in exchange for their testimony? Rollinger's response: "Not to my

knowledge." As officer in charge of the case, would you be aware of any promises like that, if any promises were made? I would believe I would be. (Tr. V.II., 258-260).

In closing arguments, the prosecution explicitly said that no promises had been made to any of the prosecution witnesses. (7/25/86, 450).

B. 2013 Post-conviction Proceedings & Appeals:

On February 22, 2013, Petitioner filed a second motion for relief from judgment in violation of *Brady v Maryland*, 373 U.S. 83 (1963), based upon the affidavit executed by key prosecution witness Andre Williams. The state trial court took judicial notice of Petitioner's claim stating:

Defendant now seeks relief from judgment on his claim of a *Brady* violation in that the prosecution failed to disclose that Williams had been promised that he would not be prosecuted in exchange for his testimony and that the prosecutor failed to correct Williams' perjured testimony in that regard. In support, he has submitted Williams' affidavit. He maintains that the affidavit is newly discovered evidence providing an exception to the bar against successive motions for relief from judgment. MCR 6.502(G)(2). Pet. App. at 14a-15a

After taking notice of Petitioner's *Brady* claim, the court stated:

"Thus, unless Defendant can show that evidence of an alleged promise not to prosecute is 'newly discovered,' whether there was a *Brady* violation will not be considered." Pet. App. at 15a.

Moreover, the trial court, after its Analysis of Williams' affidavit stated:

"If this Court were to find Williams' claim that he was promised he would not be prosecuted in exchange for his testimony credible, then it would have to find that every other witness who testified regarding

the alleged promise also perjured himself." In addition, "Defendant obtained a pretrial discovery order that, in part, directed the prosecutor to make available "any and all promises, agreements or offers of any consideration and/or compensation to any Prosecution witness." While discussing Defendant's discovery motion at trial, the prosecutor stated on the record that any *Brady* material would be shared with Defendant. Thus, this Court would also have to find that the prosecutor made an affirmative misrepresentation to the Court regarding the alleged promises. This Court declines to do so." Pet. App. at 17a-18a.

The court went on to state:

Furthermore, the fact that more than 28 years have passed from the time of the alleged promises were made in July of 1984 until Williams executed his affidavit in September 2012, weights heavily against a finding that the evidence was newly discovered. Pet. App. at 18a.

The trial court then applied state standards for newly discovered evidence that conflicts with the federal holding of *Brady, supra* by stating:

"In any regard, this Court finds that Defendant has not met his burden of satisfying all four elements of the *Cress* test. Arguably, the first three are met: The affidavit was not executed until 2012, the evidence is not cumulative, and the trial counsel sought discovery of and cross-examined Williams extensively on any threats or promises made in exchange for his testimony. However, the fourth prong, that the new evidence makes a different result probable on retrial, has not been met." Pet. App. at 18a.

The trial court lastly, stated:

...this Court concludes that this is not the rare case in which

necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence and a different result is probable on retrial. Defendant's successive motion for relief from judgment does not fall under the newly discovered exception of MCR 6.502(G) and is prohibited. As a result, Defendant's motion is DISMISSED. Pet. App. at 20a.

C. 2017 Post-Conviction Proceedings & Appeals:

On April of 2017, Petitioner filed a "Motion to Vacate the October 2, 2013 and Motion to Amend and Supplement his 2013 Motion for Relief from Judgment on the Basis of additional "new evidence," after the Michigan Supreme Court ruling in *People v Swain* 499 Mich 920 (2016) and *People v Watkin*, 500 Mich 851 (2016). Pet. App. at 2a.

The trial court accepted the motion as properly filed, then ordered the Oakland County Prosecutor's office to respond. Petitioner filed a subsequent Reply Motion. The trial court ruled:

"Defendant's motion for leave to file reply to prosecutor's brief in opposition is granted, and the same is accepted and will be considered. Defendant's motion to expand the record and request for discovery is denied." Pet. App. at 2a.

The trial court explicitly stated:

On February 22, 2013, Defendant filed his second motion for relief from judgment purportedly based on the newly discovered evidence that "*the prosecution failed to disclose to the defense that their key witness, Andre Williams, had been promised he would not be prosecuted for his extensive role in the offense in exchange for his testimony against defendant.*" Via an October 2, 2013 Opinion and Order (filed October 4, 2013), this Court dismissed Defendant's successive motion as contrary to Michigan law. Pet. App. at 3a

* * * * *

Defendant now argues that the trial court erred by rejecting his 2013 successive motion for relief from judgment because, three years later, the Supreme Court ruled that courts cannot use the newly discovered evidence factors outlined in *People v Cress*, 468 Mich 678 (2003), to "the procedural threshold of MCR 6.502(G)(2) motion." *People v Swain*, 499 Mich 920 (2016). *In other words, Defendant argues that his motion has to be substantively decided (rather than procedurally rejected or dismissed).*" Pet. App. at 4a.

The trial court continued:

"Defendant's reliance on *People v Swain*, 499 Mich 920 (2016) is misplaced because the same was decided after Defendant's 2013 motion and appeals were denied. Defendant has not argued (much less established that Swain announced a retroactive change in the law that demands reconsideration of specific legal ruling already issued by the Court of Appeals and Supreme Court on appeal in this case." Further, the Court's October 2013 Opinion substantively considered Defendant's newly discovered evidence argument. The Court concluded that the same did not amount to newly discovered evidence. This analysis and conclusion would support the procedural bar." Pet. App. at 5a.

The trial court applied "*the of the case doctrine*." then stated:

Assuming it was have been so considered, the Court would adopt its 2013 Opinion in full as a substantive denial. The Court will also note that Williams' credibility was challenged at length at trial. And Scott was not a witness to the actual crime. Defendant's defense was one of self-defense. He did not deny shooting the victim lying on the ground. The jury did not believe Defendant. Simply, Defendant

cannot possibly establish actual prejudice. At best, Defendant offers impeachment evidence on a collateral matter. For over 100 years, our Supreme Court has reasoned "*Ordinarily a new trial will not be granted because of newly discovered evidence to impeach a witness.*" *People v Grissom*, 492 Mich 296, 346 (2012); quoting *Spray v Ayotte*, 161 Mich App 593, 595 (1910). Pet. App. at 5a.

Lastly, the trial court rejected Petitioner's motion as stated:

Defendant's current motion is a flagrant attempt to get around both MCR 6.502(G)(2) and MCR 6.508(D)(2) by seeking to vacate or supplement a prior 6.500 motion that was dismissed, appealed to the Court of Appeals, denied again, then appealed to the Michigan Supreme Court, which again denied.

For the foregoing reasons, Defendant's Motion to Vacate Order of October 3, 2013, and Motion to Amend and Supplement Defendant's 2013 motion for relief from judgment on the basis of new evidence not discovered before the filing of the 2013 motion is DENIED. Pet. App. at 6a.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH *BRADY V MARYLAND*, 373 U.S. 83 (1963) HOLDING.

Petitioner was denied his Fourteenth Amendment rights to due process and a fair trial, where the prosecution failed to disclose that their key witness had been promised he would not be prosecuted for his role in the offense. United States Const. Amend. XIV.

In *Brady v. Maryland*, 373 U.S. 83 (1963) the 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 faith or bad faith of the prosecution." at 87.

More recently, in *Strickler v. Greene*, 527 U.S. 263 (1999), the Court noted that "there are three components of a true *Brady* violation: 1) the evidence at issue must be favorable to the accused because it is exculpatory, or because it is impeaching; 2) the evidence must have been suppressed by the State, either willfully or inadvertently; and 3) prejudice must have ensued." at 281-282.

Andre Williams was intimately involved with the death of Ricky Gracey and the attempted cover up of the crime. He drove Petitioner and Charles Obey to Portia Jones home, he disposed of Gracey's body as well as the firearms used in the shooting. It simply defies reason that the prosecution would just choose not to prosecute Williams unless they received something in return. As Mr. Williams affidavit makes clear he was

promised he would not be prosecuted in exchange for his testimony against Petitioner. Pet. App. 23a. The prosecution did not disclose this material evidence to the defense, nor did they correct Williams' false testimony when he was repeatedly asked if he was offered leniency and he denied the same. In addition, trial counsel Richard Lustig filed a Motion for discovery and specific request for additional *Brady* material on April 29, 1986. Pet. App. at 26a-28a. That Motion was granted in an order on May 14, 1986. Pet. App. at 33a.

The failure to disclose this promise in violation of the Petitioner's due process rights pursuant to *Brady v Maryland*, 373 U.S. 83 (1963). Clearly, despite his testimony at trial to the contrary, Mr. Williams was not prosecuted for his role in the death of Mr. Gracey in exchange for his testimony against Petitioner. Williams was arrested on July of 1984, and booked on suspicion of murder. He was questioned repeatedly asked by Detroit Police Detective and Troy Police Detectives regrding Gracey's death. He was then held in the Troy City Jail until he testified against Charles Obey. He was promised first by Troy Police and then by Oakland County Assistant Prosecutor Gary Chopp that if he cooperated he would not be charged in connection with Gracey's death or his involvement in dumping the body and hiding the guns. Specifically, he was told by assisting prosecutor Chopp that they were "*not looking to charge anything but homicide and that he would not be charged.*" Pet. App. at 24a.

Two years later, Detective Ewald Rollinger of the Troy Police Department contacted Williams in California and told him to return to Michigan to testify against Petitioner. According to Williams' affidavit,

Detective Rollinger then told Williams that the case was still "open" and that Willimas could be prosecuted for his role in the shooting at any time. The Oakland County Prosecutor office purchased Williams airline ticket, and he was told when to be at the airport. Neither before trial or during trial did the prosecution disclose any of this information. The promise of leniency in exchange for testimony is directly relevant to Williams credibility.

Similarly, because the evidence suggests a motive for testimony favorable to the defense. *United States v Bagley*, 473 U.S. 667, 676 (1985). Indeed, defense counsel Richard Lustig repeatedly asked Williams if he was offered anything in exchange for his testimony specifically because a response in the affirmative would have been favorable to his client.

Finally, there is a reasonable probability that had the evidence been disclose the outcome would have been different. Petitioner does not dispute that he was present and did play a role in the shooting death of Mr. Gracey. What he does dispute, and has from the beginning of this case, is that he acted with deliberate intent, with malice aforethought, sufficient of a conviction for murder in the first-degree. Andre Williams was the prosecution's key witness as he drove Petitioner to the home and he was one of the only two witnesses who testified at trial who were present when the shooting occurred. It is his testimony that led the jury to the conclusion that Petitioner acted deliberately and in cold blood. Clearly, Williams was key to the prosecution's case, and thus his credibility was directly at issue.

testified that he observed Petitioner and Obey fire their weapons multiple times into Gracey. (Tr. V.II., 171-178). Finally, he stated that he watched as Petitioner went through Gracey's pockets and he did not see a gun. (Tr. V.II., 180).

Clearly, Williams testimony and thus, his credibility were critical to a finding of first degree murder. He was the first witness the prosecution called, and the prosecution relied heavily on his testimony during closing arguments. Any questions as whether ther is a "*reasonable probability*" that a jury would have convicted Petitioner of first-degree murder, not whether it was reasonably probable he would have been found not guilty on all counts. On the limited question of whether Petitioner acted with premeditation and deliberation, the evidence against him was extraordinarily weak. Without Williams' testimony, or if it was known to the jury that Williams was testifying in exchange for a promise not to be prosecuted, indeed that the prosecution was actually flying him back from California specifically to testify against Petitioner, it is reasonably probable that the outcome of the trial would have been different. *Brady, supra*.

Petitioner respectfully ask this Court to take notice that the state court applied a "fourth" component to his *Brady* claim. Pet. App. 11a. Petitioner contends no "diligence" component is a part of the standard as established in the *Brady* decision. The state trial court went on to say:

"If this Court were to find Williams claim that he was promised he would not be prosecuted in exchange for his testimony credible, then it would have to find every other witness who testified regarding the alledged promise also perjured himself. In addition, Defendant

obtained a pretrial discovery order that, in part, directed the prosecutor to make available any and all promises, agreements or offers of any consideration and/or compensations to any Prosecution witness." While discussing Defendant's discovery motion at trial, the prosecutor stated on the record that any *Brady* material would be shared with Defendant. Thus, this Court would also have to find that the prosecutor made an affirmative misrepresentation to the Court regarding the alleged promises. This Court declines to do so." Pet. App. at 17a-18a.

Furthermore, the state court applied state standards for newly discovered evidence to Petitioner's federal *Brady* claim stating:

"In any regard, this Court finds that Defendant has not met his burden of satisfying all four elements of the Cress test. Arguably, the first three elements of the test are met: The Affidavit was not executed until 2012, the evidence is not cumulative, and trial counsel sought discovery of and cross-examined Williams extensively on any threats or promises made in exchange for his testimony. However, the fourth prong, that the new evidence makes a different result probable on retrial has not been met." Pet. App. at 18a.

The state trial court decision conflicts with the decision rendered in *Brady*. Another point Petitioner would like to highlight, is the fact that after his 2013 proceedings, the Michigan Supreme Court overruled *People v Lester*, 232 Mich App 262 (1998) decision, which rejected a "diligence" requirement be overcome by all Michigan prisoners to establish a true *Brady* claim. See *People v Chenault*, 495 Mich 142, 143-145 (2014). *Chenault*, also an Oakland County case, decided by the Michigan

Supreme Court while Petitioner's postconviction appeals were pending.

In addition, Nicholas Scott was another critical prosecution witness. He denied at trial that he had been given any promises. And, the investigating Detective Rollinger denied that any of the prosecution witnesses had been given consideration for their testimony. There is new evidence pertaining to promises and inducements given to Nick Scott.

In closing arguments, the prosecution said that no promises were made to any of the prosecution witnesses. (7/25/86, Tr. V.II., 450). Petitioner has since discovered that promises and consideration were in fact given to the two critical prosecution witnesses, Andre Williams (as Petitioner claimed in his 2013 motion) and Nicholas Scott, during the time of Petitioner's trial.

At trial Nick Scott testified that Petitioner, Charles Obey and Andre Williams worked for him to distribute heroin. Scott testified that he worked directly for Portia Jones out of the drug headquarters at Jones' home in Troy. Tr. V.II., 99-100). He testified that he became aware of the Gracey shooting when he was called by Portia. He discovered that Petitioner, Obey and Williams were on their way to Ms. Jones' home to see what was going on. The next day, he encountered Ms. Jones, Williams, Obey and Petitioner at Danny McNeil's house. According to Scott, Petitioner was walking through the house with the Uzi, saying he had sprayed Gracey, and never mentioned self-defense. (Tr. V.II., 106-108).

On July 25, 1984, D/Sgt. Rollinger admits in his Troy Police incident Report interview with Detroit Homicide Detective Sgt. Williams Rice that he had no knowledge that a crime had been committed in the City of Troy,

until he was informed by Sgt. Rice. Pet. App. at 57a-58a. Based upon that conversation, Rollinger requested a Search Warrant at the north Adams Road home, stating that he was investigating the Gracey homicide. In pertinent part, Rollinger states that Williams Rice was apparently informed of the Gracey homicide by Nick Scott as illustrated:

(D) Affiant on July 25, 1984, working in conjunction with Sgt. Rice learned from him that on July 25, 1984, he talked to one Nicholas Scott, a male adult person, who stated that he is an acquaintance of Portia Sturdivant. Scott told Rice that on May 29, 1984, he received a phone call from Portia D. Sturdivant and she stated that she needed help, there had been trouble at her house at North Adams Road, City of Troy. The next day, she, Charles Obey and Spencer Holloway had shot a guy at her home . . . wrapped the body in blankets and had taken the body into Detroit and dumped it on the eastside of that city. Pet. App. at 60a.

There is clear chronological showing of Scott's involvement with the authorities investigating the Gracey shooting, specifically, the federal authorities, the Troy Police Department and the Oakland County Prosecutor's office. This can be gleaned from the following reports from homicide statements and Troy Police Department:

- July 24, 1984, Angela Davis Exculpatory Statement that describes Nick Scott as primary suspect who committed the crime. Pet. App. at 55a-56a.
- July 25, 1984, D/Sgt. Rollinger's Affidavit For Search Warrant that acknowledge he had no knowledge of the Gracey shooting in the City of Troy until informed by Sgt. Rice and Nick Scott. Pet. App. at 60a-62a.
- June 6, 1985, indicate a money order #A8521702 for \$169.00 paid

by Oakland County Prosecutor's office to Nick Scott for reimbursement of airfare. Pet. App. at 63a.

- February 24, 1986, reveals that Oakland County Prosecutor's office along with the Troy Police Department shared investigative expenses in the case. Pet. App. at 64a-66a.

- July 17, 1986, A Material Witness Order For Protection of Nicholas Scott was filed by presiding Judge to take Scott into immediate custody by Georigan authorities. Pet App. at 67a.

These material documents were never disclosed to the defense at trial.

In addition, the prosecution suppressed material evidence with federal law enforcement officials, that Scott was a confidential informant in an ongoing federal investigation and received immunity for his continuous cooperation with federal and state officials. This cooperation resulted in dismissal of pending drug charges in Wayne County. The federal task force grand jury transcripts show the following:

- On May 21, 1985, Nicholas Scott testified before a federal task force grand jury, where he was granted use immunity for his cooperation in providing information on the Young Boys Incorporated drug operation and consideration to have pending charges against him in Wayne County dropped. Pet. App. at 41a-49a.
- On May 6, 1986, Scott testified at a second grand jury, where he was then advised that his immunity deal remained intact and the government had in fact contacted the Wayne County Prosecutor's office and arranged for the pending state drug charges against him to be dismissed. Pet. App. at 50a-54a.

The issue of federal promises/arrangements with any of the prosecution witnesses was directly addressed at trial, but the prosecutor

made a direct misrepresentation to the court. Defense counsel Richard Lutsig addressed the court and Prosecutor Gary Chopp when known federal agents were present in the courtroom. He asked whether any of the witnesses for the prosecution were under any federal obligation to receive favor or leniency:

Counsel Lustig: I have one matter, Your Honor.

I have happened to notice that there are two Federal agents in the Courtroom who, I believe, were part of the investigatory team involving Portia Jones and Butch Jones in Federal court.

I also believe that the material witnesses in this case may be removed from Michigan and in soe type of situation.

Thre were an order entered by this Court as to turnover of any help that the Troy Police and anybody else associated with the Troy Police may have given to the witnesses as to payment for or rewards for testifying.

I would like to inquire while they are here as to whether or not these witnesses are in Federal custody, and/or are in the witness program and/or are being paid monies, and while they are here, I know it may not be an appropriate time, except that they are present in the courtroom, and I was wondering whether or not the Court could inquire of Counsel.

Mr. Chopp: Yes, Your Honor. I was informed by a representative of the Federal Government that they might be interested in listening as any observer would to this trial.

I do represent to the Court, that to the best of my knowledge, and I am going to verify it in a second, that the witnesses are not under any special protection program by the Federal Government and have not been and will not be promised or paid any money in return for their testimony.

One moment, Your Honor.

The Court: Sure.

Mr. Chopp: That's correct, Your Honor. There is absolutely no Federal assistance being given to these witnesses according to what information I have received from Detective Rollinger, and he has been the officer in charge of the case ever since its inception back in July of 1984. Pet. App. at 39a-40a.

These statements were untrue. Petitioner discovered long after trial that Scott had testified before two federal grand juries; a year prior to his arrest, and two months, prior to his trial. Scott's informant status was never disclosed or known at Petitioner's trial, contrary to *Banks v Dretke*, 540 U.S. 668, 701-702 (2004). If the police knew about his informant status, or favorable treatment given to him, this information should have been disclosed pursuant to *Kyles v Whitley*, 514 U.S. 415 (1995). The prosecutor had an affirmative duty to seek out and learn of any favorable material in the possession of anyone acting on the government's behalf in the case, including the police. *Id. Kyles*, 514 U.S. at 437. The prosecution must also reveal the contents of plea agreements with key witnesses, *Giglio v U.S.*, 405 U.S. 150, (1972), and under some circumstances may be required to disclose the identify of undercover informants who possess evidence critical to the defense. *Roviaro v U.S.* 353 U.S. 53 (1957).

Petitioner had "the right to impeach the State's witnesses against him on the grounds of pecuniary bias in the case," especially since Nick Scott was a "key witness" and in fact, he had received payments on his expenses incurred in testifying against Petitioner.

At Petitioner's trial, the prosecutor asked significant questions

concerning Nick Scott during his closing arguments to the jury, and he emphasized that Scott wasn't getting any sort of a deal: as stated:

"What do we know about Nick Scott as a person who is speaking to us? Is he truthful? What do we know about him? Is he telling a lie, does he have an interest in the outcome of the case? We know no promises were made to him. And, in fact we heard from the evidence quite clear that no promises were by any law enforcement officials to any of these witnesses. And somehow they came in and talked anyway." (Tr V. II., 450).

As stated by the *Banks* court, "*nothing in Roviaro*," or any other decision of this Court, suggests that the State can examine an informant at trial, withholding acknowledgement of his informant status in the hope that defendant will not catch on, so he will make no disclosure motion. *Banks*, 540 U.S. at 688.

The prosecutor never disclosed Nick Scott's informant status, nor did the prosecutor inform the defense exactly who the federal representative was who he had spoken to. Furthermore, the *Banks* court stated "*Kyles* instructed that the materiality standard for *Brady* claims is met when 'favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks*, *supra*.

This Court should find that the State's suppression of favorable evidence involving Andre Williams and Nicholas Scott should reasonably be taken to place Petitioner's case in such a different light as to undermine confidence in the verdict. Petitioner has shown a reasonable

probability of a different result had defense counsel been given this favorable evidence to impeach these key witnesses.

II THE STATE OF MICHIGAN DEPRIVED PETITIONER OF DUE PROCESS OF LAW BY REFUSING TO ADDRESS HIS CONSTITUTIONAL CLAIM.

Petitioner was denied Due Process of Law where the State of Michigan courts refused to address his claim that State officials suppressed evidence favorable to him under *Brady v. Maryland*, 373 U.S. 83 (1963) holding.

In *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), the court said "*The Fourteenth Amendment's Due Process Clause protects persons against deprivation of life, liberty, or property.*" The *Wilkinson* court also said "*A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty" . . . or it may arise from an expectation or interest created by state laws or policies.*" citing to *Wolff v McDonnell*, 418 U.S. 539, 556-558 (1974).

In 1989 Michigan established a procedure for collateral review of criminal convictions. An uniform system of procedure was created under Michigan Court Rules 6.501 *et seq.* *People v Reed*, 449 Mich 375, 388 (1995). The *Reed* court explained "The specific purpose for creating the postconviction procedure was to provide finality of judgments affirmed after one full and fair appeal and to end repetitious motions for new trials. MCR 6.508(D) is identical to the federal standards for habeas corpus relief under 28 U.S.C. 2255. Postconviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice." *Reed, supra*, at 381.

Petitioner contends subchapter 6.501 created a liberty interest for all

prisoners to present errors committed during their state court proceedings. While Michigan Court Rule 6.508(D) outlines the procedural requirements to be entitled to relief, it is quite a different question as to whether a person should be entitled to have a full and fair hearing to determine whether a constitutional claim should be addressed.

As pleaded in Argument I, *supra*, Petitioner received information which showed favorable evidence was suppressed by the prosecution. Once Petitioner was armed with this new evidence, he retained counsel and pursued relief under subchapter 6.501. The Sixth Judicial Circuit Court declined to address Petitioner's *Brady* claim as stated:

"Thus, unless Defendant can show that evidence of an alleged promise not to prosecute is '*newly discovered*,' whether there was a *Brady* violation will not be considered." Pet. App. at 15a.

Petitioner was denied due process of law by state officials who refused to address his *Brady* claim and this Court should find certiorari review is necessary to allow Petitioner the opportunity to have his constitutional claim heard and addressed by the Court. U.S. Const. Amend XIV; *Wilkinson, supra*.

SUPREME COURT RULE 10

Petitioner understands that Certiorari Review involves questions of exceptional importance. Under Supreme Court Rule 10(c), this Court will consider granting certiorari, where a state court has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner has clearly shown the Sixth Judicial Circuit Court for Oakland County did decide Petitioner's *Brady* claim in a way that conflicts with multiple relevant Supreme Court decisions. As outlined in the Argument 1, *supra*, *Brady* and its progeny clearly established the Fourteenth Amendment's protection against State actions which deny a person a fair trial. However, in relation to Petitioner's prosecutorial misconduct claims, this petition involves questions of exceptional importance as to: 1) What should be the standard for a discovery violation when specific requests are made by motion, and on the record in a state court, and the state never says it provided favorable evidence to the defense; and 2) Petitioner reasonably relied on the prosecution's duty to disclose such evidence.

In addition, under Supreme Court Rule 10(b), this Court considers whether Certiorari should be granted where a "*state court of last resort has decided an important federal question in a way that conflicts with the decision* . . . *of a United States Court of Appeals.*"

Petitioner contends this Court should find the state court's decision conflicts with several United States Court of Appeals for Sixth Circuit decision and Certiorari should be granted. See *Harris v Lafler*, 553 F.3d 1028 (6th Cir. 2009), *Robinson v Mills*, 592 F.3d 730 (6th Cir. 2010)

(equating the prejudice prong of *Brady* with materiality); *Blackston v Rapelje*, 780 F.3d 340 (2015) cert. denied, 2015 U.S. Lexis 7364 (2015); and *Thomas v Westbrooks*, 849 F.3d 659 (6th Cir. 2017).

Petitioner contends that the Sixth Circuit faced a similar set of facts in *Harris v Lafler*, 553 F.3d 1028 (6th Cir. 2009). That case involved a shooting in which both the prosecution's key witness as well as the defendant were jointly involved. The police arrested Richard Ward, a friend of the Defendant Karl Harris, about a month after a shooting incident. Harris was convicted of second degree murder based primarily on the testimony of Ward. Harris filed a motion for a new trial, and was granted an evidentiary hearing. At the hearing, it was discovered that Ward was promised to be released as long as he testified against Harris. In addition, he was told not to tell anyone that he was promised anything in exchange for his testimony. At Harris' preliminary examination, Ward was asked by defense counsel several times if he was promised anything in exchange for his testimony. He repeatedly denied that any promises had been made. Ward refused to testify at Harris' trial, invoking his Fifth Amendment right. However, the trial court allowed the state to introduce his previous preliminary exam testimony.

The court held that the withheld promises of leniency to Ward were plainly relevant to Ward's credibility, and similarly were favorable evidence as it was impeachment evidence, thereby satisfying the first two components of *Brady*.

The court spent more time analyzing the third component of *Brady*, holding that the disclosure of the withheld evidence did create a

reasonable probability that the outcome of the trial would have been different. The court, in relevant part, stated:

Ward, to begin with, was not a run-of-the-mill witness. He was the key witness for the prosecution. Ward gave an eyewitness, on the scene account of the shooting that explicitly identified Harris as the gunman. And his testimony not only implicated Harris, but also implicated Ward as an accomplice in the murder, giving the testimony a highly credible veneer. *Harris* at 1033.

Andre Williams was the same caliber of witness against Petitioner. He was the only eye witness to testify. In addition, he implicated himself by testifying that he drove Petitioner and Obey to the scene and that he disposed of the body and the guns, thereby giving his testimony a "credible veneer."

The Harris court stated further,

In view of the State's failure to produce the three statements made to Ward, Defendant counsel had little to work with in challenging Ward's credibility. *There was no public filed immunity deal*, Ward's testimony seemed credible on its face as he implicated himself. Even though he the transcripts reveals defense counsel suspected Ward had been promised leniency in exchange for his testimony, he had no way to prove it. He asked Ward six times whether the police or prosecutor had offered him any kind of deal, and each time Ward denied same. *Id.* at 1034.

Similarly, Petitioner's counsel Richard Lustig suspected Williams had been told he would not be charged in connection with the crime if he testified against Peitioner. This would be obvious to anyone in the criminal

legal field given Andre Williams' admitted involvement in the crime and at the time of Petitioner's trial two years had passed since the killing and Williams had not been charged. However, like defense counsel in *Harris*, Lustig had no means to convey this truth to the jury. The prosecution did not disclose it, and Williams repeatedly denied that he had been offered anything.

In *Harris*, the 6th Circuit concluded that because Ward's testimony was "*the centerpiece*" of the prosecution's case, his testimony seemed credible on its face because he was both an eyewitness and implicated himself in the crime, and due to the witness's repeated denials of promises made in exchange for testimony, as well as the prosecution's failure to correct the record, that it undermined their confidence in the conviction. *Id.* at 1034.

Petitioner's case is identical. Williams repeatedly denied that he was offered any type of leniency in exchange for his testimony, and the prosecution failed to disclose that he was. As such, defense counsel was left with no meaningful opportunity to impeach Williams. Williams' testimony was "*the centerpiece*" of the prosecution's case, the jury was left with the impression as stated by the witness and bolstered by the prosecution that Williams was testifying simply out of moral obligation. This, and the fact he was present and implicated himself in the crime lends his testimony a "*highly credible veneer*." But for the prosecutor's misconduct in withholding that information from defense and failing to correct the record when Williams repeatedly denied any type of leniency in exchange for his testimony, the jury would be presented with a very

different case. There is a reasonable probability that the outcome of the trial would have been different.

In *Robinson v. Mills*, 592 F.3d 737, the 6th Circuit addressed Materiality in a factually similar case. In that case, the petitioner, Robinson, had been convicted in state court of first-degree murder after shooting a drug dealer in back of the head. *Robinson*, 592 F.3d at 733. At trial, Robinson sought to mitigate his offense by claiming that he shot the victim in defense. *Id.* Kim Sims, an eyewitness, testified against Robinson at trial, hers was the only testimony that tended to negate Robinson's claim of self-defense. *Id.* at 736. Robinson's attorney's attempted to impeach Sims as a witness by questioning her about her history of drug addiction and significant disparities between her trial testimony and her testimony at a pretrial hearing. *Id.* at 734. Despite Robinson's effort to impeach Sims, the jury convicted him of murder. *Id.* at 731-732.

Unknown to Robinson. Sims had accepted \$70 from the prosecution jurisdiction's police department in exchange for her cooperation as a confidential informant in unrelated prosecution against the murder victim's sister. *Id.* at 734. Sims had also served as a paid confidential informant for the police department at least seven other times. *Id.* Despite the states recognition that Sim's substantial connection to local law enforcement required appointment of a special prosecutor, the state never informed Robinson of Sim's status as a paid informant. *Id.*

Reviewing Robinson's petition for habeas, the court held that the prosecution's failure to inform Robinson of Sim's receipt of payment for

her services as a confidential informant warranted relief under *Brady*. *Id.* at 738.

In reaching that conclusion, the panel held that the evidence was "material" because Sims status as a paid informant was relevant to demonstrate bias in order to "call into question Sim's credibility and truthfulness." *Id.* We reached that conclusion even though Sim's services to the police were rendered in cases entirely unrelated to Robinson's. *Id.*

Here, the federal investigators were right in the courtroom when defense counsel Lustig asked on the record if there were any arrangements with prosecution witnesses! Defense counsel directly asked the question regarding deals with federal authorities, but the prosecutor denied that anything was going on between federal authorities and any prosecution witness. Pet. App. at 39a.-40a. This was clearly false. Scott had already testified twice in federal grand jury proceedings by the time of the pretrial hearing in July of 1986. Pet. App. at 41a-.54a.

It is simply not credible that neither the state prosecutor nor the federal agents in the courtroom would have had no knowledge of Scott's involvement with law enforcement agencies.

Like Sim's testimony in Robinson, Nicholas Scott's testimony was pivotal to the State's case against Petitioner. Scott's provided the only testimony that contradicted and/or undermined Petitioner's assertion that he shot Ricky Gracey in self-defense. Scott functioned under the Detroit Homicide Division and Federal Government as an informant and the primary witness between the years of 1984 thru 1987, prior to Petitioner's arrest and during his trial. The jury would likely been suspicious of Scott

and cautious about his testimony. The suppressed evidence supported the assertion that at the time of Petitioner's trial the prosecution witnesses were biased in favor of local and federal authorities.

The prosecution relied on the testimony of Andre Williams and Nicholass Scott to support its theory of the case, and to *disprove* and/or *defeat* Petitioner's defense of self-defense.

The Sixth Judicial Circuit Court in its 2017 Motion to vacate opinion stated:

"Assuming it was have been so considered, the Court would adopt its 2013 Opinion in full as a substantive denial. The Court will also note that Williams' credibility was challenged at length at trial. And Scott was not a witness to the actual crime. Defendant defense was one of self-defense. He did not deny shooting the victim lying on the ground. The jury did not believe Defendant. Simply, Defendant cannot possibly establish actual prejudice. At best, Defendant offers impeachment evidence on a collateral matter."

Pet. App. at 5a. n. 3.

But this assertion ignores the clear lesson of Robinson that impeachment on the basis of pecuniary bias is fundamentally different than impeachment on the basis of character for dishonesty or other bad acts. Indeed, the witness in Robinson - like the witnesses here - had been impeached on the basis of inconsistent testimony and past bad acts, but the court nevertheless held that evidence of financial relationship with the prosecuting jurisdiction was "*material*" for Brady.

Because of the importance of Scott's testimony to the State's case against Petitioner and because the jury was not presented with any

evidence of Scott's pecuniary bias, this Court should find the undisclosed evidence was material to the jury's determination of Petitioner's guilt. Since there was no evidence presented at trial that Scott had a financial interest and bias interest in the outcome of the case, this evidence cannot be properly considered "cumulative" as term is used in *Robinson*. The State's suppression of material that would have offered insight into why Scott actually testifying at Petitioner's trial violated his due process rights as articulated in *Brady v Maryland*, 373 U.S. 83 (1963).

In the context of a *Brady* claim, the reviewing court does not ask whether there was sufficient evidence to convict the defendant without the tainted evidence. *Kyles*, 514 at 434. Rather, we ask whether the purported *Brady* violation rendered the defendant's trial fundamentally fair. *Strickler*, 527 U.S. at 289-290. By focusing on the fairness of the defendant's trial, we protect his constitutional right to present a complete and full-throated defense. As this Court noted in *Brady*: "*Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.*" 373 U.S. at 87.

Petitioner contends he has satisfied Supreme Court Rule 10 requirements and Certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mr. Spencer Holloway

Date: July 26th, 2019