

No. _____

IN THE
Supreme Court of the United States

PEDRO RAMIREZ-RIVERA,
Petitioner,
v.

UNITED STATES.
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Attorneys are obliged to disclose exculpatory evidence known to exist after the defendant has been convicted by trial by jury but while the conviction is being reviewed on direct appeal and the conviction has not become final.

I. Petition For Writ of Certiorari

Pedro L. Ramirez-Rivera respectfully petitions this Court for a writ of certiorari to review the judgment of August 2, 2019 by the United States Court of Appeals for the First Circuit affirming the decision of the United States District Court for the District of Puerto Rico holding that *Brady v. Maryland*, 373 U.S. 83 (1963) does not require the Government to disclose exculpatory or impeachment evidence learned to exist after the conviction by jury trial but while a direct appeal is pending from that criminal conviction.

II. Opinion Below

This petition seeks review of a decision of the United States Court of Appeals for the First Circuit which affirmed the decision of the United States District Court for the District of Puerto Rico denying a petition for new trial. (USDC-PR Criminal Case No. 12-200) The decision of the United States Court of Appeals for the First Circuit is reported as *United States v. Pedro L. Ramirez-Rivera*, No. 17-1053, 933 F.3d 20 (1st Cir. 2019). (See Appendix A)

III. Statement of Jurisdiction

Jurisdiction of this Court is invoked under Title 28 United States Code,

Section 1254(1) and Part III of the Rules of the Supreme Court of the United States. Judgment by the United States Court of Appeals for the First Circuit was entered on August 2, 2019 and timely Motion for Rehearing En Banc was denied on September 17, 2019. Therefore, this petition is timely filed pursuant to Supreme Court Rule 13.1 and 13.3.

IV. Constitutional Provision Involved

United States Constitution, Amendment Fourteenth: “[N]o State [shall] deprive any person of life, liberty or property, without due process of law.” Suppression of evidence favorable to an accused by the Government violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

V. Statement of the Case

This petition involves a question of constitutional proportions not yet categorically resolved by this Supreme Court of the United States. That is the Government’s *Brady* disclosure obligation of exculpatory evidence obtained after conviction, but before the conviction has been affirmed on appeal. Disclosure of exculpatory evidence known by the Government to the defense is the cornerstone of the constitutional requirement of due process of law. The leading case from the Supreme Court of the United States, *Brady v Maryland* 373 U.S. 83 (1963) did not

expressly circumvent this right to trial and sentence and did not expressly excluded its requirement while the conviction is on direct appeal. There is no federal case that directly ruled as this. All of the cases relied upon by the US Court of Appeals for the First Circuit are *Brady* disclosure requests on post conviction proceedings after judgment of conviction has been sustained on direct appeal. There is one case from the Court of Appeals of the State of California that found a *Brady* violation in the failure of the government to disclose to the defense new impeachment evidence found while the case was on appeal. Being a *Brady* violation of such importance to the administration of justice, limiting its application as done in this case by the US Court of Appeals for the First Circuit is a manifest violation of a constitutional right.

On June 20, 2012 Pedro Ramirez Rivera was charged with violations of the RICO statute, Title 18 United States Code Section 1962, as an alleged member of a drug organization known as the “Organization of United Narcotraffickers” (“ONU”). He was charged with the murder of “Pekeke”, a member of the rival gang “Rompe ONU”. (USDC-PR No. 12-200) On February 15, 2013 Pedro Ramirez-Rivera was found guilty after jury trial and was sentenced to life imprisonment. An appeal followed. While the conviction was pending review on direct appeal, the Government acquired knowledge of contradictory statements of different cooperating witnesses that pointed out to different authors for the murder

of Pekeke for which Ramirez Rivera was convicted. The government did not disclose this exculpatory evidence to the defense before the conviction became final, but after the conviction was affirmed and mandate sent to the District Court. The defense learned about these contradictory testimonies when the government introduced them in evidence in another subsequent trial against the members of the rival gang “Rompe ONU” and claimed that the rival gang was the one who murdered Pekeke. Ramirez-Rivera immediately sought disclosure and moved for new trial.

The US District Court as well as the US Court of Appeals for the First Circuit held that *Brady* disclosure applies before and during trial only. Once trial ends with the conviction, the Government’s obligation under *Brady* ends too.

VI. Reasons for Granting the Writ

To avoid an innocent person from being deprived of his liberty based upon the Government’ suppression of exculpatory evidence. The Court shall clarify that *Brady* requirement extends until the conviction becomes final on direct appeal.

The US Court of Appeals for the First Circuit found that *Brady* obligation is limited to exculpatory and/or impeachment evidence known by the Government while the case is on trial and prior to sentence. See: Opinion and Order, August 2, 2019, Appendix A pps. 18-19. The US Court of Appeals for the First Circuit relied

in the cases of *United States v. Maldonado-Rivera*, 489 F.3d 60 (1st Cir. 2007); *Dist. Attorney's Office for the Third Judicial Dist. V. Osborne*, 557 U.S. 52 (2009); *Tevlin v. Spencer*, 621 D.3d 59 (1st Cir. 2010) and *Skinner v. Switzer*, 562 U.S. 521 (2011).

First it is important to highlight that the issue here is not whether the government has a *Brady* obligation to disclose exculpatory evidence during a post conviction proceeding (habeas corpus, Title 28 United States Code Sections 2254 or 2255) and after the conviction has become final. All of the cases cited and relied upon by the US Court of Appeals for the First Circuit involved post conviction proceedings filed after the conviction became final when it was affirmed on direct appeal. *Tevlin v. Spencer* (during the post conviction proceedings, the defense requested disclosure of the original fingerprints); *United States v. Maldonado-Rivera* (the government acquired knowledge of the exculpatory evidence during the post-conviction proceedings); *Dist. Attorney's Office for the Third Judicial Dist. v Osborn* (Brady constitutional requirement does not extent after the conviction is final)

A criminal conviction does not become final until the time to appeal has elapsed or the conviction has been affirmed on appeal. The social interest in the finality of judgments is attained when the conviction is upheld on appeal.

Therefore, there are significant differences between the convicted person rights on appeal and on collateral proceedings.

This Supreme Court of the United States held in *United States v. Addonizio*, 442 U.S. 178, 184 (1979) that:

"When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice."

In *United States v. Frady*, 456 U.S. 152, 164 (1982) this Supreme Court of the United States stated as follows:

"Because it was intended for use on direct appeal, however, the 'plain error' standard is out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal."

Therefore, there is a significant difference in the cases relied upon by the US Court of Appeals for the First Circuit to deny a *Brady* disclosure right to Ramirez-Rivera while his conviction is being reviewed on appeal. None of the cases cited resolved this issue.

A case was found of the Court of Appeals of the State of California, Fourth District, *People v. Garcia*, 17 Cal.App.4th 1169 (1993); 22 Cal.Rptr.2d 585 which

recognized a constitutional *Brady* violation for failure of the government to disclose to the defense while the conviction was on appeal evidence discovered during the appeal process regarding the reliability of the government expert witness. The Court held:

“The duty of disclosure, however, does not end when the trial is over. ‘[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.’ (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25 [47 L.Ed.2d 128, 141-142, 96 S.Ct. 984]; See also: *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261 [275 Cal. Rptr. 729, 800 P.2d 1159]; rule 5-220, Rules Prof. Conduct of State Bar; ABA Model Code Prof. Responsibility, DR 7-103(B), EC 7-13; ABA Model Rules Prof. Conduct, rule 3.8(d).)” *Id.* p. 1179

In *Thomas v. Goldsmith*, 979 F.2d 746, 749-750 (9th Cir. 1992) the US Court of Appeals for the Nine Circuit without much explanation recognized a duty of the government to turn over to the defense exculpatory evidence during an habeas corpus proceedings as part of the government constitutional duty under *Brady v. Maryland*.

“The state's duty to turn over any semen evidence in its possession is not extinguished by Thomas' failure to argue the existence of such an obligation in the district court. In light of the obvious exculpatory potential of semen evidence in a sexual assault case, neither a specific request nor a claim of right by the petitioner is required to trigger the state's duty of disclosure. See: *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976).” *Id.* at p. 750 fn 2

The US Court of Appeals for the First Circuit reliance on *Skinner v. Switzer*,

131 S.Ct. 1289 (2011) is inapposite. That case addressed the issue whether a request for a DNA result could be made within a civil rights action under Title 42 USC Section 1983. The only reference to *Brady* was as follows:

“Nor do we see any cause for concern that today's ruling will spill over to claims relying on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); indeed, *Switzer* makes no such assertion. *Brady* announced a constitutional requirement addressed first and foremost to the prosecution's conduct pretrial. *Brady* proscribes withholding evidence "favorable to an accused" and "material to [his] guilt or to punishment." *Cone v. Bell*, 556 U.S. ___, ___, 129 S.Ct. 1769, 1772, 173 L.Ed.2d 701 (2009). To establish that a *Brady* violation undermines a conviction, a convicted defendant must make each of three showings: (1) the evidence at issue is ‘favorable to the accused, either because it is exculpatory, or because it is impeaching’; (2) the State suppressed the evidence, ‘either willfully or inadvertently’; and (3) ‘prejudice . . . ensued.’ *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); see *Banks v. Dretke*, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004).” Id at p. 1300

There was no issue in that case whether the prosecution had a *Brady* obligation to disclose the results of a DNA obtained after conviction, but while it was being reviewed on direct appeal. This issue has not been resolved by this Supreme Court of the United States. There is language to the effect that the *Brady* disclosure requirement does not apply after the conviction is final. But there is nothing said about the time while the conviction is being reviewed on direct appeal and is not yet rendered final.

The case relied upon by the government in its Government’s Brief was not

discussed by the US Court of Appeals for the First Circuit in its Opinion and Order. The case is more illustrative of the importance of the constitutional issue and the magnitude of a *Brady* violation that remains unresolved. In *Hebert v. Milyard*, No. 11-1561, September 28, 2012, 10th Cir.,¹ the state prisoner claimed in a 28 USC Section 2254 proceeding that while the murder conviction was reviewed on appeal the government should have acquired knowledge of another possible perpetrator of the murder of his wife that had been apprehended during that time. There was no evidence that the government was aware of that other defendant while the petitioner conviction was on appeal. The federal district court “assumed without deciding that *Brady* requires the disclosure of evidence discovered posttrial and before the conviction becomes final on appeal, but concluded that the evidence regarding Mr. White’s criminal history was not material.” *Id* at p. 3 The Tenth Circuit Court of Appeals recognized that in a pre-AEDPA case they have accepted the government’s concession that the duty to disclose continues through direct appeal; however were compelled by the *Osborne* case of the Supreme Court to conclude that “[t]he absence of clearly established federal law is dispositive [of Mr. Heber’s *Brady* claim] under Sec. 2254(d)(1).” *Id* p. 4

¹ This case is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The US Court of Appeals for the First Circuit wrongfully assumed that Ramirez-Rivera was claiming a *Brady* violation during post conviction proceedings. (“But they offer no persuasive reasoning or authority to support their habeas-is-not-a-postconviction contention.”)(Opinion and Order, August 2, 2019, Appendix A p. 19) It is not. Ramirez-Rivera claim is that there was a *Brady* violation by the government while his conviction was being reviewed on direct appeal and before the conviction became final. And since the Government did not disclose the exculpatory evidence while the appeal was pending, but after the conviction was affirmed on appeal and became final, Ramirez-Rivera only avenue to raise the *Brady* violation was as a motion for new trial. Therefore, the cases relied by the US Court of Appeal for the First Circuit to deny a *Brady* violation by the Government when it failed to disclose contradictory eyewitness evidence as to essential facts of the case while the trial and conviction was being reviewed on appeal are inapplicable.

The test for a *Brady* violation versus newly discovered evidence by the defense after the conviction is final are significantly different. The burden placed upon the defendant in the latter test is sometimes unsurmountable. Therefore, the *Brady* violation under these circumstances should not be treated lightly and disposed without adequate consideration of the underlying facts and applicable law.

In this case, the Government not only found contradictory eyewitness testimony regarding the essential fact of the murder of Pekeke, but it used it against the rival gang to convict them also for the murder of Pekeke. This is a serious implication upon the rightfulness use by the prosecutor of evidence of criminal conduct. On direct appeal, Ramirez-Rivera attacked the credibility of the eyewitnesses that point to him as the masterminded of Pekeke's murder. On direct appeal from the conviction, the US Court of Appeals for the First Circuit recognized that the evidence against the Ramirez-Rivera for the murder of Pekeke was essentially testimonial. While the case was being reviewed on appeal and before oral argument, the Government learned of testimonial evidence that contradicted the testimonies against Ramirez-Rivera. The government had a constitutional *Brady* duty to disclose this evidence to the defense and the Court at that time. They withheld that contradictory evidence while arguing before the US Court of Appeal for the First Circuit at oral argument that the testimonies of the witnesses they presented at trial against Ramirez-Rivera were credible to sustain the conviction. When the government attorney stood in front of the panel of the US Court of Appeals for the First Circuit, he was aware that contradictory testimony existed and that he had already used it before the Grand Jury to indict the counter gang group for the same murder of Pekeke.

The question whether there is a constitutional *Brady* duty of the prosecutor to disclose exculpatory and/or impeachment evidence to the defense while the conviction has not become final on appeal is an issue that has not been categorically resolved by this Supreme Court of the United States and/or any lower Federal Court. It involves a cornerstone right of Due Process of Law that should not be treated lightly. The decision of the US Court of Appeals for the First Circuit in this case failed to resolve this issue in this case. The US Court of Appeals for them this particular question of law and that the response to that question cannot be inferred and/or applied to this case. The fact remains that there is no clearly established federal law precedent dispositive of the *Brady* issue in this case. Fact that was the ground for the request for new trial.

This Court should issue a writ of certiorari in this case to rule that the prosecutor's due process obligation under *Brady v. Maryland* continues through direct appeal until the conviction is final. And remand this case to the US Court of Appeals for the First Circuit.

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