No. 19-8164

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC T. TOLEN — PETITIONER,

v.

JEFF NORMAN — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE EIGHT CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether or not the Lower Court committed a manifest err of law in finding that "counsel's extensive litigation concerning the two seized boxes demonstrates that Tolen does not have a substantial ineffective assistance of counsel claim," and Tolen has not demonstrated that the claim has "some merit." Yet, simultaneously the Lower Court correctly determined that "[N]either Tolen nor his lawyers presented any Brady claim to the trial court."**

II. **Whether or not the Lower Court committed a manifest err of law in that the Court's analysis of Petitioner's Ineffective Assistance of Counsel claim is based entirely upon whether or not there was "extensive litigation concerning the withheld evidence" instead of whether or not a distinct Brady claim was made before the State trial court or whether or not "Tolen's trial counsels brought into focus [to the State trial court] the contention that the prosecutor withheld exculpatory evidence".**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner is a 1985 graduate of the University of Missouri-Columbia School of Law. From the period of 1987 to 1999 he was employed by the United States Department of Justice, as an Assistant United States Attorney for the Eastern District of Missouri. Petitioner was licensed to practice law in the States of Missouri (1985), Illinois (1986) and Kansas (1987). Petitioner was also admitted before the United States Supreme Court and the United States District Court for the Eastern District of Missouri. However, as a result of the challenged convictions, Petitioner has either surrender his license or been disbarred in the above-mentioned jurisdictions. However, for more than fifteen years immediately before his arrest in 2007, Petitioner was AV rated.

CORPORATE DISCLOSURE STATEMENT

There is no corporate involvement in this case.

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ORDERS AND JUDGMENTS OF COURT BELOW

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original conviction of Petitioner in the Circuit Court of the County of St. Louis, Missouri was not reported.

The original conviction of Petitioner was appealed to the Missouri Court of Appeals for the Eastern District of Missouri, which affirmed the conviction in all respects in *an* opinion reported at **State v. Tolen**, 304 S.W.3d 229 (Mo. App. E.D. 2009)

The decision of the Missouri Court of Appeals to deny Petitioner's Motion for Rehearing and/or Transfer to the Missouri Supreme Court is not reported.

The decision of the Missouri Supreme Court to deny Petitioner's Application for Transfer is reported at **State v. Tolen**, 2010 Mo. Lexis 114 (Mo. 2010).

The decision of the United States Supreme Court to deny Review of the State Court opinion by Petition for Writ Certiorari is reported at **Tolen v. Dormire** 562 U.S. 861 (October 4, 2010).

The decision of the Magistrate Judge, in her Report and Recommendation to deny Petitioner's Motion for Summary Judgment pertaining to his Federal Habeas Corpus proceeding, is reported at **Tolen v. Dormire**, 2011 U.S. Dist. Lexis 144018 (E.D. Mo., Nov. 16, 2011).

The decision of the District Court to deny Petitioner's Motion for Summary Judgment and adopt the Report and Recommendation of the Magistrate Judge pertaining to his Federal Habeas Corpus proceeding is reported at **Tolen v. Dormire**, 2011 U.S. Dist. Lexis 142588 (E.D. Mo., Dec. 12, 2011).

The decision of the Magistrate Judge, in her Report and Recommendation to deny Petitioner's Petition for Habeas Corpus Relief is reported at **Tolen v. Norman**, 2014 U.S.

Dist. Lexis 85135 (E.D. Mo., March 11, 2014).

The decision of the District Court to deny Petitioner's Petition for Habeas Corpus Relief is reported at **Tolen v. Norman**, 2014 U.S. Dist. Lexis 82794 (E.D. Mo., June 18, 2014). **(Appendix 6)**

The Order of the Eighth Circuit Court of Appeals to deny Certificate of Appealability relating to Petitioner's Petition for Habeas Corpus Relief is reported at **Tolen v. Norman**, 2015 U.S. App. Lexis 2496 (8th Cir., Feb. 18, 2015).

On December 10, 2015, the District Court denied Petitioner's **First Rule 60(b) Motion** for Relief from Judgment and Order in an opinion reported at **Tolen v. Norman**, 2015 U.S. Dist. Lexis 165425 (E.D. Mo., December 10, 2015).

The Judgment of the Eighth Circuit Court of Appeals to deny Certificate of Appealability relating to his **First Rule 60(b) Motion** is not reported, but entered on April 1, 2016.

The Order of the Eighth Circuit Court of Appeals denying Petitioner's Petition for Rehearing En Banc and Rehearing by Panel in Cause No. 16-1098 was entered on May 11, 2016, and is reported at **Tolen v. Norman**, 2016 U.S. App. Lexis 8725.

The Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit was denied by the U.S. Supreme Court in an opinion reported at **Tolen v. Cassady**, 137 S.Ct. 115. (October 3, 2016).

On March 26, 2019, the District Court denied Petitioner's **Second Rule 60(b) Motion for Relief from Judgment and Order** in an opinion reported at **Tolen v. Norman**, 2019 U.S. Dist. Lexis 50235 (E.D. Mo., March 26, 2019) **(Appendix 5)**

On August 2, 2019, the District Court denied Petitioner's **First Rule 59(e) Motion to Alter or Amend Judgment** in an opinion reported at **Tolen v. Norman**, 2019 U.S. Dist. Lexis 129147 (E.D. Mo., August 2, 2019) **(Appendix 4)**

On October 7, 2019, the District Court denied Petitioner's **Second Rule 59(e) Motion to Alter or Amend Judgment** in an opinion reported at **Tolen v. Norman**, 2019 U.S. Dist. Lexis 173447 (E.D. Mo., October 7, 2019) **(Appendix 3)**

The Judgment of the Eighth Circuit Court of Appeals affiming the District Court's opinion and denying a Certificate of Appealability relating to Petitioner's **Second Rule 60(b) Motion** was entered on February 13, 2020 and is reported at **Tolen v. Norman**, 2020 U.S. App. Lexis 6048. **(Appendix 2)**

The Order of the Eighth Cicuit Court of Appeals denying Petitioner's Petition for Rehearing En Banc and Rehearing by Panel in Cause no. 19-2858 was entered on March 17, 2020, and reported at **Tolen v. Norman**, 2020 U.S. App. Lexis 8533. **(Appendix 1)**

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under **28 U.S.C. § 1254 (1).**

STATEMENT OF THE CASE

FACTS NECESSARY TO UNDERSTAND THE QUESTIONS PRESENTED

In Petitioner's **Second Rule 60(b) Motion**, Tolen argued that his trial counsel's conduct fell below an objective standard of reasonableness and that had trial counsel acted differently, i.e. filed and argued a **Brady** violation claim pertaining to the two suppressed boxes containing exculpatory evidence among other material, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Also, because there exists a true **Brady** violation claim relating to the two seized and suppressed boxes, Petitioner's ineffective assistance of counsel claim is a "substantial one" and there is cause for Tolen's procedural default. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); see also *Guzman v. Denney*, 692 Fed. Appx. 323 (8th Cir. 2017).

However, it is Petitioner's belief that the Lower Court committed a manifest err of law in making its adjudication that "counsel's extensive litigation concerning the two seized boxes demonstrates that Tolen does not have a substantial ineffective assistance of counsel claim" and "Tolen has not demonstrated that the claim (**Brady**) has 'some merit'." This is true because the Lower Court **simultaneously determined** that "neither Tolen nor his lawyers presented any Brady Claim to the trial court." **Obviously, because Tolen's trial counsel failed to file any distinct Brady claim to the State trial court, this is tantamount to an explicit finding [made by the Lower Court] of ineffective assistance of counsel.** Hence, it is Tolen's position that his trial counsels committed misconduct since it was objectively unreasonable for them **not** to have "presented a Brady claim to the trial court."

Because of the nature of a **Brady** violation, i.e. the State withholding of exculpatory evidence, the review of such claims require **greater scrutiny** than most other **Fourteenth Amendment Due Process** claims which utilize the **Harmless Error Rule**. However, the Lower Court has instead **substituted** the standard of review by which the United States Supreme Court established for a **Brady** claim, which is, "not only a fair trial; but also, a trial resulting in a verdict worthy of confidence," to the **lesser standard** given to a general **Fourteenth Amendment Due Process** claim.

Further, and just as egregiously the Court has failed to particularly identify within each of the four motions and two hearings which it has cited as the basis of its decision, specifically where Petitioner's trial counsels met their duty to "extensively litigate" Tolen's **Brady** violation claim under the general standard for an ordinary Due Process violation.

Obviously, based upon a review of the motions and hearings referenced by the Lower Court, as well as the entire State court record, it is fair to say that there is **no** evidence whatsoever that Petitioner's trial counsels met their duty to make a distinct **Brady** claim or bring in focus to the trial court the contention that the prosecutor withheld exculpatory evidence. Nor did Petitioner's trial counsel's conduct conform to the general requirement for prosecuting a **Fourteenth Amendment Due Process** claim.

The Lower Court's failure to conduct any analysis of whether or not Petitioner established the elements necessary for a valid **Brady** claim constitutes a manifest err of law and fact. Because there are no facts within the State court record that are contrary to the uncontroverted facts contained within Petitioner's October 14, 2008 Affidavit, the facts set forth in this motion, and the exhibits that have been filed in support of the **Second Rule**

60(b) Motion, as well as the entire State court record, it is abundantly clear that Petitioner has established a **Brady** claim violation since the new evidence, i.e. two boxes containing exculpatory evidence, is sufficient to undermine confidence in the verdict[1]. *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016). See also, *Giglio v. United States*, 405 U.S. 150, 153-154 (1972) and *Smith v. Cain*, 565 U.S. 73, 75 (2012).

ARGUMENT

COMES NOW Petitioner, Eric T. Tolen, and respectfully motions this Court to grant his Petition For Writ of Certiorari, pursuant to **Title 28 U.S.C. §1254(1)** and **Rules 10, 12 and 13 of the Rules of the Supreme Court of the United States**. In support of this Petition, Mr. Tolen states the following.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Initially, it should be stated that the Eighth Circuit Court of Appeals, in its panel decision, summarily affirmed the judgment of the District Court, without providing any comment or discussion of any of the issues presented to the lower court for its disposition. **(Appendix 2)** As such, the Eighth Circuit has specifically adopted the holding of the District Court. Therefore, all references made herein are to the findings and determinations made by the District Court in its review of Petitioner's **Second Rule 60(b) Motion**. **(Appendix 3, 4 and 5)**.

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[1] During Petitioner's sentencing before the State trial court, both the Court and State Prosecutor agreed to accept Petitioner's uncontroverted Affidavit as substantive evidence, in lieu of his live testimony. **(Appendix 7)**

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

QUESTION I

Whether or not the Lower Court committed a manifest err of law in finding that "counsel's extensive litigation concerning the two seized boxes demonstrates that Tolen does not have a substantial ineffective assistance of counsel claim," and Tolen has not demonstrated that the claim has "some merit." Yet, simultaneously the Lower Court correctly determined that "[N]either Tolen nor his lawyers presented any Brady claim to the trial court."[2]

Applicable Rule of Law

"The Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 683 (1985). See also, *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

"Once a reviewing court applying Bagley had found constitutional error there is no need for further harmless-error review. Assuming, arguendo, that a harmless-error inquiry were to apply, a Bagley error could not be treated as harmless, since 'a reasonable

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[2] All reference to the Exhibits relating to the Questions presented, are to those exhibits originally submitted with and attached to Petitioner's **Second Rule 60(b) Motion**, as well as those exhibits identified in Petitioner's **Second Motion to Alter or Amend Judgment** of the United States District Court.

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'." *Kyles v. Whitley*, 514 U.S 419, 435 (1995), citing *United States v. Bagley*, 473, 667, 682 (1985).

"Once there has been Bagley error as claimed in this case, it can not subsequently be found harmless under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), *Kyles v. Whitley*, 514 U.S. 419 (1995). In short, once a Brady violation is established, **Harmless Error Rule** does not apply. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

The United States Supreme Court has now firmly held that a "[P]etitioner is entitled to not only a fair trial; but also, a trial resulting in a verdict worthy of confidence. To prevail on his Brady claim, a Petitioner need not show that he more likely than not would have been acquitted had the new evidence been admitted. He must show only that the new evidence is sufficient to undermine confidence in the verdict." *Wearry v. Cain* 136 S.Ct. 1002, 1006 (2016). See also, *Smith v. Cain*, 565 U.S. 73, 76 (2012).

Analysis

In Tolen's **Second Rule 60(b)(6) Motion**, the matter before the Lower Court was whether or not Petitioner's trial counsel presented before the State trial court a **Brady** violation claim pertaining to the two seized and withheld boxes which contained materially favorable exculpatory evidence. Also, whether or not Tolen's post-conviction counsel was ineffective for failing to assert an ineffective assistance of counsel claim on that matter.[3] It has been Tolen's position before the Lower Court that his trial counsels committed misconduct since it was objectively unreasonable for them **not** to have "presented a Brady claim to the trial court." *Strickland v. Washington* 466 U.S. 668, 688 (1984).

The Court's Memorandum and Order dated March 26, 2019 acknowledges Tolen's arguments, but denied Petitioner's claims based on the court's erroneous factual determination that "Tolen's trial counsel appropriately raised a Brady violation claim as a Fourteenth Amendment Due Process violation. As a result, Tolen cannot establish that he has a substantial ineffective assistance of counsel claim." (**Appendix 5, First Memorandum and Order, pg. 1**).

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[3] The District Court March 26, 2019 Memorandum and Order made no explicit finding that Tolen's post-conviction counsel performance constituted ineffective assistance of counsel. However, by advancing to the ultimate issue of whether or not Petitioner's trial counsel was ineffective as well as whether or not Petitioner's Brady violation claim is a "substantial one", it would appear that the District Court implicitly found that Tolen's claim of ineffective assistance of post-conviction counsel is meritous. If this was not so, the Court would not have needed to reach the questions of whether Petitioner's trial counsel provided ineffective assistance of counsel in accordance with the *Strickland* standard. Nor would it had needed to address whether or not Petitioner's Brady violation claim is a substantial one. Both of these issues were explicitly addressed and ruled upon by the Court.

In the March 26, 2019 Memorandum and Order, the **only** and **sole** reason given by the District Court for denial of Petitioner's **Rule 60(b)(6) Motion** was that "Tolen's trial counsel appropriately raised a **Brady** violation claim as a **Fourteenth Amendment Due Process** violation based upon the motion to dismiss eight counts against Petitioner." The District Court provided **no other** reason, rationale, explanation, nor made any reference to other trial counsel's motion(s) or pleading(s), contained within the State court record, as the basis or justification for its factual determination. (**Appendix 5, First Memorandum and Order, pgs. 7-8**).

However, in the District Court's August 2, 2019 Memorandum and Order, the Court **now admits** and **concedes** that "Tolen correctly notes that the motion to dismiss concerned a separate audiotape, **not** the seized boxes." (**Appendix 4, Second Memorandum and Order, pg. 6**). Further that "[N]either Tolen nor his lawyers presented any **Brady** claim to the trial court. *Brady v. Maryland,* 373 U.S. 83 (1963)."[4]

Nevertheless, the Court **now** holds, for the very first time, that because Tolen's trial counsel previously litigated in the State trial court "four filed motions concerning two file boxes the prosecutors seized from his car, my prior conclusion stands: counsel's extensive litigation concerning the two seized boxes demonstrates that Tolen does not have a substantial ineffective assistance of counsel claim." **(Appendix 4, Second Memorandum and Order, pgs. 2-3 and 7**).

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[4] In the present case, Petitioner's trial counsel had a duty to obtain from the State all materially favorable evidence, including exculpatory evidence. Their failure to obtain this evidence or "present any Brady claim to the trial court" is an explicit instance where prejudice is presumed. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

For the very first time in this legal proceeding, the District Court has **changed** its legal theory, reasoning, and rationale for the denial of **Petitioner's Ineffective Assistance of Counsel** and **Brady** violation claims. The Court now holds "Tolen does not have a substantial ineffective assistance of counsel claim," arising out of the two boxes suppressed by the State that contained Petitioner's exculpatory evidence. Although not specifically stated in the Court's August 2, 2019 Memorandum and Order the Court infers that it was sufficient for purposes of the Due Process Clause contained within the **Fourteenth Amendment** to the United States Constitution that Tolen's trial counsels presented and argued four motions [merely] pertaining to the two seized boxes and **not** a specific **Brady** claim.

This **new legal standard** established by the Lower Court, makes irrelevant the determination of whether or not the motions themselves state a **distinct Brady** violation claim in accordance with *Brady v. Maryland,* 373 U.S. 83 (1963). Nor does it matter whether or not "Tolen's trial counsels brought into focus [to the State trial court] the contention that the prosecutor withheld exculpatory evidence." (See *Tolen v. Norman,* 2014 U.S. Dist. Lexis 82794, June 18, 2014, pgs. 3-4).

The present holding by the District Court and adopted by the Eighth Circuit Court of Appeals applies the **Harmless Error Rule** instead of the United States Supreme Court holding in *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) to the specific finding of the Lower Court that "[N]either Tolen nor his lawyers presented any Brady claim to the Trial Court". The Eighth Circuit opinion directly contradicts United States Supreme Court precedent, in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *United States v. Bagley*, 473 U.S. 667, 683 (1985), *Kyles v. Whitley* 514 U.S. 419 (1995), *Smith v.*

Cain, 565 U.S. 73, 76 (2012) and *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016). It also conflicts with the Eighth Circuit precedent, *Odem v. Hopkins*, 192 F.3d 772, 776 (8th Cir. 1999); as well as **all other Circuit Courts of Appeal** precedent.

Unbelievably; the District Court has even contradicted its prior legal holding regarding Petitioner's initial **Brady** violation claim brought in **Ground Four** of Tolen's **Petition for Writ of Habeas Corpus Relief**.[5] Obviously because the Lower Court specifically determined that "neither Tolen nor his lawyers presented any Brady claim to the trial court," this is tantamount to an explicit finding of ineffective assistance of counsel had the Lower Court applied the correct and applicable structural discovery error standard set forth in U.S. Supreme Court precedent, instead of the **harmless error** analysis.

A structural discovery error occurs when the government withholds materially favorable evidence and there is a reasonable probability that disclosure would have altered the result of the trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); See also, *U.S. v. Bagley*, 473 U.S. 667, 682 (1985); *U.S. v. Agurs*, 427 U.S. 97, 112-13 (1976). In such a circumstance, a finding that the error was harmless beyond a reasonable doubt is necessarily precluded. See *Kyles v. Whitley*, 514 U.S. 419, 435 (1996) (once unconditional suppression error found, no need for harmless error review), See also, *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016).

Clearly, it was objectively unreasonable for Tolen's trial counsels to fail to "present any Brady claim to the trial court." *Brady v. Maryland*, 373 U.S. 83 (1963). See *Strickland*

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[5] **See** *Tolen v. Norman,* 2014 U.S. Dist. Lexis 82794 pgs. 3-4 (June 18, 2014). **(Appendix 5)**

v. Washington 466 U.S. 668, 688 (1984). Trial counsel's misconduct in not obtaining and utilizing the withheld exculpatory evidence can not be justified since its use would have led to materially favorable evidence that proved Petitioner's actual innocence. In this instance, "[P]rejudice is presumed [in that] counsel entirely failed to subject the prosecution's case to meaningful adversarial testing." *Garza v. Idaho*, 139 S.Ct. at 744 (2019).

QUESTION II

Whether or not the Lower Court committed a manifest err of law in that the Court's analysis of Petitioner's Ineffective Assistance of Counsel claim is based entirely upon whether or not there was "extensive litigation concerning the withheld evidence" instead of whether or not a distinct Brady claim was made before the State trial court or whether or not "Tolen's trial counsels brought into focus [to the State trial court] the contention that the prosecutor withheld exculpatory evidence".

Applicable Rule of Law

"A Brady claim is a distinct violation of the Fourteenth Amendment Due Process clause and the suppression of evidence favorable to an accused is itself sufficient to amount to a denial of due process." *Brady v. Maryland*, 363 U.S. 83, 87 (1963). Although the duty to disclose evidence favorable to an accused is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), a Petitioner's "trial counsel must bring into focus [to the State trial court] the contention that the prosecutor withheld exculpatory evidence." *Tolen v. Norman*, 2014 U.S. Dist. Lexis 82794 (E.D. Mo., June 18, 2014). See also, *United States v. Bagley*, 473 U.S. 667, 683 (1985), *Odem v. Hopkins*, 192 F.3d 772, 776 (8th Cir. 1999), and *Turnage v. Fabian*, 606 F.3d 933, 937 (8th Cir. 2010).

"The prosecutor must disclose evidence favorable to the defendant if the defendant so requests." See *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 522 U.S. 263, 281-82 (1999) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). See also, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) and *Wearry v. Cain*, 136 S.Ct. 1002 (2016).

In *Strickland v. Washington*, 466 U.S. 668, 688 (1984) the Supreme Court held, "[R]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler v. Sullivan*, 466 U.S. 335, 336 (1980). From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also had a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S. 68-69 (1932)."

"In certain Sixth Amendment contexts, prejudice to the defense is presumed for purposes of Strickland test. For example, no showing of prejudice is necessary if the accused is denied counsel at a critical stage of his trial or left entirely without the assistance of counsel on appeal. Similarly, prejudice is presumed if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. And prejudice is presumed when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken. This final presumption applies even when the defendant has signed an appeal waiver." *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019). See also, *United States v. Cronic*, 466 U.S. 648, 659 (1984) (prejudice presumed when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," the adversarial process itself becomes presumptively unreliable.) *Craige v. Burt*, 2019 U.S. Dist. Lexis 159573 (E.D. Mich. Sept. 19, 2019).

Analysis

The court **now** holds that it is sufficient that Petitioner's trial counsel "presented and extensively litigated **four motion** pertaining to the two boxes," irrespective of whether or not the motions themselves set forth a distinct **Brady** violation claim or theory.

On pages 6 and 7 of the August 2, 2019 Memorandum and Order, the court states in pertinent part as follows:

> In my second order denying reconsideration pursuant to **Rule 60(b)**, [No. 85], I determined that Tolen failed to demonstrate that he had a substantial claim of ineffective assistance of counsel ... I stated that Tolen's trial counsel filed a motion to dismiss eight counts against him that pertained to the two seized boxes. [No. 85, citing No. 112]. **Tolen correctly notes that the motion to dismiss concerned a separate audiotape, not the two seized boxes.**
>
> Tolen argues that this difference demonstrates a manifest error of fact that should change my analysis under *Martinez*. This argument is unsupported by the trial court record. **Throughout trial court proceedings, Tolen's counsel extensively litigated the use and return of the seized boxes.** Trial counsel filed four motions to return the seized boxes, [No. 86-3], 2) recuse the St. Louis County prosecutor's office for viewing the seized documents, (No. 16-A at 88, 90-91], 3) suppress the seized documents and return them, [Id. at 110], and 4) vacate the first trial and hold a new one, because the seized boxes were not returned in a timely manner. The trial court held hearings on

these motions twice. [See Nos. 23-13, 16-A at 18]. **As a result, my prior conclusion stands: counsel's extensive litigation concerning the two seized boxes demonstrates that Tolen does not have a substantial ineffective assistance of counsel claim.**

It is Tolen's position that his trial counsels committed misconduct since it was objectively unreasonable for them **not** to have "presented a Brady claim to the trial court." Moreover, the present holding by the Lower Court directly contradicts its prior holding, and the legal authorities cited by the court pertaining to the denial of Petitioner's **Brady** violation claim asserted in **Ground Four** of Tolen's **Petition for Writ of Habeas Corpus,** pursuant to **Title 28 U.S.C. §2254.** See, **Tolen v. Norman,** 2014 U.S. Dist. Lexis 82794 (E.D. Mo., June 18, 2014). **(Appendix 6, pgs. 3-5)**

This **new** legal standard established by the Lower Court makes irrelevant whether or not a distinct Brady claim was made to the State trial court or whether or not "Tolen's trial counsels brought into focus the contention that the prosecutor withheld exculpatory evidence." Instead, it excuses Petitioner's trial counsels' failure to make a distinct **Brady** claim and **substituted** the legal standard for that of a general appeal to a **Fourteenth Amendment Due Process** violation, i.e. whether or not there was "extensive litigation concerning the withheld evidence". *Turnage v. Fabian,* 606 F.3d 933, 937 (8th Circuit 2010). By doing so, the Lower Court has disregarded the United States Supreme Court's mandatory requirement that trial counsel either (1) make a distinct Brady claim to the State trial court, or (2) that counsel bring into focus the contention that the prosecutor withheld

exculpatory evidence. "The prosecutor must disclose evidence favorable to the defendant if the defendant so requests." See *Banks v. Dretke*, 540 U.S 668, 691 (2004); *Strickler v. Greene*, 522 U.S. 263, 281-82 (1999) (citing *Brady v. Maryland*, 373 U.S. 83 (1963). See also, *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) and *Wearry v. Cain,* 136 S. Ct. 1002 (2016).

Clearly, it was objectively unreasonable for Tolen's trial counsels to fail to "present any Brady claim to the trial court." *Brady v. Maryland*, 373 U.S. 83 (1963). See *Strickland v. Washington* 466 U.S. 668, 688 (1984). Trial counsel's misconduct in not obtaining and utilizing the withheld exculpatory evidence can not be justified since its use would have led to materially favorable evidence that proved Petitioner's actual innocence. In this instance, "[P]rejudice is presumed [in that] counsel entirely failed to subject the prosecution's case to meaningful adversarial testing." *Garza v. Idaho*, 139 S.Ct. at 744 (2019).

There can be no doubt that the Eighth Circuit has committed a manifest err of law in that its present decision not only conflicts with, but also contradicts the United States Supreme Court **holdings** in *Brady v. Maryland*, 363 U.S. 83, 87 (1963), *United States v. Bagley*, 473 U.S. 667, 683 (1985), *Kyles v. Whitley,* Id. at 514 U.S. 434 and *Wearry v. Cain,* Id. at 136 S. Ct. 1006, among other United States Supreme Court decisions. It also conflicts with the Lower Court's prior legal determination in this case involving the very same issue where this court held "Tolen's current **Brady** claim is **distinct** from any theory presented to the State courts and is procedurally barred." (*Tolen v. Norman,* 2014 U.S. Dist. Lexis 82794 (June 18, 2014, pg. 4)).

Finally, as stated above, the Eighth Circuit Court of Appeals, in its panel decision, has

specifically adopted the holding of the District Court. The Eighth Circuit decision that analysis Petitioner's Ineffective Assistance of Counsel claim arising out of an explicit Brady violation claim is erroneous because it is based entirely upon whether or not there was "extensive litigation concerning the withheld evidence" **instead of** whether or not a **distinct Brady Claim** was made before the State trial court. The Eighth Circuit opinion conflicts with the precedent of **all other Circuit Courts of Appeal** that have applied *Brady v. Maryland*, 373 U.S. 83 (1963); *Banks v. Dretke*, 540 U.S. 668 (2004); *Strickler v. Greene*, 522 U.S. 263 (1999); *Kyles v. Whitley*, 5144 U.S. 419 (1995) as well as *Wearry v. Cain* 136 S. Ct. 1002 (2016) to these significant ineffective assistance of counsel claims which arose out of Brady violations in State courts.

Both of the Eighth Circuit decisions as denoted above are manifestly incorrect. The reasoning offered by the court below does not withstand scrutiny. The opinion is contrary to United States Supreme Court precedent and the explicit language of this court. Granting of a Writ of Certiorari is warranted in this exceptional and sensitive case involving an important constitutional issue that has national importance and urgency.

If the opinion below is not reversed or modified it will effectively create a precedent where Ineffective Assistance of Counsel claims arising out of Brady claims are reviewed based upon (1) the Harmless Error Rule, and (2) whether or not there was "extensive litigation pertaining to the use and return of withheld evidence," **instead of** whether or not a Petitioner's trial counsel made a **distinct Brady** claim motion, or "brought into focus [to the State trial court] the contention that the prosecution withheld exculpatory evidence".

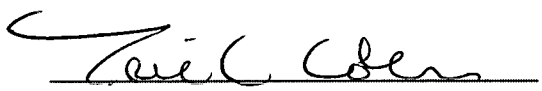
There remains no doubt that the lower court's application of the Harmless Error Rule as well as its New Legal Standard for determination of an ineffective assistance of counsel claim,

arising out of a Brady claim, i.e. whether there was extensive litigation concerning the withheld evidence, is contrary to firmly established United States Supreme Court precedent. As previously stated, "[P]rejudice is presumed if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Garza v. Idaho*, 139 S.Ct. 738, 744 (2019).

RELIEF SOUGHT

WHEREFORE, Petitioner prays that this Honorable Court issue a Writ of Certiorari, and based upon the pleadings and exhibits previously filed by Petitioner and Respondent with the Lower Courts, as well as any additional briefs requested by the Court, that this Court issue its ruling on the merits of Petitioner's **Second Rule 60(b)(6) Motion**.

Respectfully Submitted,



Eric T. Tolen, Pro se
Jefferson City Correctional Center
8200 No More Victims Road
Jefferson City, Missouri 65101

CERTIFICATE OF SERVICE

I CERTIFY THAT ONE TRUE AND CORRECT COPY OF THE ATTACHED Petition for Writ of Certiorari and Separate Appendix were sent by first-class U.S. mail in a properly-addressed envelope with first-class postage duly paid before 5:00 p.m. on March 25, 2020, to the attorney of record for all of the parties in this action at the address listed below:

Mr. Stephen David Hawke
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102

SIGNED on March 25, 2020

Eric C Tolen
ERIC T. TOLEN, Petitioner