No. 20-5318

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Dimitri Rozenman – PETITIONER

vs.

David Shinn, et al. – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Dimitri Rozenman #253132

ASPC-Tucson/Santa Rita Unit/P.O. Box 24401

Tucson, AZ 85734-4401

QUESTION(S) PRESENTED

1. Whether the United States District Court ("U.S.D.C.") erred in its finding that, in order to obtain relief under Arizona v. Youngblood, 488 U.S. 51 (1988), Petitioner, in addition to establishing bad faith, needs to prove either that evidence was tampered with or lost.

2. Whether the U.S.D.C. erred in its finding that evidence posted on the internet satisfies the disclosure requirement of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

3. Whether the state court erred in its finding that a Brady violation requires proof of tampering; and

> Whether the U.S.D.C. erred in its finding that Order 8.1 does not clearly apply to recordings.

4. Whether the state court erred in its finding that Petitioner did not establish evidence of bad faith on the part of detectives for their failure to preserve evidence; and whether the state court erred in its finding that Petitioner failed to link bad faith to evidence presented in the case.

LIST OF PARTIES

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

[X] 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:

Dimitri Rozenman, Petitioner

vs.

David Shinn, Director of the Arizona Department of Corrections, Rehabilitation, and Reentry; and

Mark Brnovich, Attorney General for the State of Arizona, Respondents.

RELATED CASES

State of Arizona v. Dimitri Rozenman, No. CR2009-007039-001, Maricopa County Superior Court, Judgment Entered, June 3, 2013.

State of Arizona v. Dimitri Rozenman, No. 1 CA-CR13-0898 and 1 CA-CR13-0458 (Consolidated), Judgment Entered, January 1, 2015. (Appendix G)

State of Arizona v. Dimitri Rozenman, No. CR-15-0058-PR, Arizona Supreme Court, Judgment Entered, August 24, 2015. (Appendix H)

State of Arizona v. Dimitri Rozenman, No. CR2009-007039-001, Maricopa County Superior Court, Rule 32 Post-Conviction Relief ("PCR"), Judgment Entered, September 28, 2016. (Appendix D)

State of Arizona v. Dimitri Rozenman, No. 1 CA-CR-16-0722 PRPC, Arizona Court of Appeals, Division One, Judgment Entered, December 7, 2017. (Appendix E)

State of Arizona v. Dimitri Rozenman, No. CR-17-0614-PR, Arizona Supreme Court, Judgment Entered, May 28, 2018. (Appendix F)

Dimitri Rozenman v. Charles L. Ryan, et al., No. CV-18-01789-PHX-MTL, United States District Court, District of Arizona (Habeas), Judgment Entered, November 21, 2019. (Appendix B), Report and Recommendation, Entered July 10, 2019. (Appendix C)

Dimitri Rozenman v. Charles L. Ryan, et al., No. 19-17561, United States Court of Appeals, Ninth Circuit, Judgment Entered, May 15, 2020. (Appendix A)

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TABLE OF AUTHORITIES CITED

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 A to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States district court of appears at Appendix B to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the state appellate court appears at Appendix G to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was May 15, 2020.

[X] 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. _____.

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 _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied 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. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution to the United States of America, Fourteenth Amendment, Due Process Clause states:

> nor shall any State deprive any person of life, liberty, or property, without due process of law;

28 U.S.C. §2254 (d)(1), states, in relevant part:

> Resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States;

28 U.S.C. §2254 (d)(2), states, in relevant part:

> Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

On March 18, 2010, a jury found Petitioner guilty of conspiring to murder his ex-wife, Jana Rozenman ("J.R."), and guilty of criminal damage to the cars of J.R.'s family. These first convictions were overturned because the State violated Brady v. Maryland, 373 U.S. 83 (1963) (hereinafter "Brady").

Prior to the second trial, Petitioner invoked his right to proceed pro se and represented himself during trial. Petitioner filed a pretrial motion for leave to interview witnesses and obtain documentary evidence. (United States District Court (U.S.D.C. Doc. 33, Ex. E) (hereinafter "Doc. 33"). The motion requested:

> **Question 16**: Please provide a copy of the Policies and Procedure Manual for dealing with obtaining, transferring, and retaining audio-video evidence.
>
> **Question 17**: Please provide a copy of the Policies and Procedures Manual for preservation of the chain of custody for all evidence (Id. At 10)

Petitioner conducted pro se pretrial interviews of Phoenix Police Department ("PPD") Sgt. Long and Detective ("D") Carmody ("D.C."). (Respondents' Limited Answer to Petition for Writ of Habeas Corpus ("Answer") Exs. FFF and III, Attachments 6 and 7) (hereinafter Doc. 13, 14). In response to questioning, Sgt. Long told Petitioner that he was not aware of any guidelines for preservation of evidence (Id. At 7). Later, the same day, Petitioner asked D.C. to provide PPD procedures for "retaining audio-video evidence" (Id. At 17, ln. 13-16) and whether police "have any of those guidelines" (Id. ln. 24-25), D.C. explicitly replied, "No, sir." (Id. at 18, ln. 1).

Following trial, the prosecution conceded (Doc. 33, Ex. F at 2): "in this case, defendant undertook multiple interviews in which he asked whether the police had any policies or guidelines regarding collection or preservation of evidence. These questions were asked prior to trial and were addressed prior to trial ... Here, prior to

trial, the defense did request procedures from the police department relating to collection preservation of evidence and was told that such policies did not exist."

At trial, Detective Warner ("D.W.") testified (Answer, Doc. 13 and 14, Ex. EE at 29-30) that he did not impound any of the three (3) recordings of Petitioner's meeting with Levi Najar[1] ("L.N."), nor the confrontation call[2], for over four months because the chain of custody requires evidence to remain with the detective rather than being impounded. (Id. Ex. Z at 153-163).

Similarly, Detective Egea ("D.E.") testified (Id. Ex. Y at 142-144) that he intentionally did not impound the death notification recording (State trial Ex. 100), for over a month because he found it "ridiculous" to impound evidence, since to do so would entail a hardship of a 40-mile roundtrip from his precinct to the impound facility. (Doc. 13 and 14, Ex. Y at 83-86).

The trial revealed some evidence of collusion between J.R. and L.N. The record of the meeting between Petitioner and L.N. indicates that L.N. told Petitioner that J.R. offered him money to do away with Petitioner[3]. There may have been additional statements by L.N. designed to provoke and incriminate Petitioner, but since the recordings at issue were not properly preserved, we are left in the dark.

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[1] Trial ex. 96 (Hawk) and Ex. 97 (audio/video and transmitter). On these recordings Petitioner's responses to L.N.'s proposition to murder J.R. are entirely inaudible. Appendix B at 7, ln. 8-10. E.g., on Ex. 96, responses are inaudible at 14 min./38 sec. and at 16 min./48 sec. The video of the audio/video recording is pitch black for almost the entire recording, making it impossible to ascertain what Petitioner is saying at the inaudible portions. Although Appendix B at 7 states Petitioner agreed by nodding, since recordings were not properly preserved it is impossible to know what Petitioner nodded to.

[2] Trial Ex. 90, Petitioner supposedly, upon learning that J.R. and her parents had been killed, asked L.N. when he will return to work. (Appendix B at 6).

[3] Trial Ex. 96 at 24 min./40 sec.

J.R. testified (Doc. 13 and 14, Ex. FF at 128) that 7 days after Petitioner's arrest, L.N. showed up at her residence demanding payment in the amount of $175,000. During the meeting, J.R. attempted to appease L.N. by telling him he would get paid, but not right away: "I told him, I said, you have to understand I can't. I said, those $175,000 is not going to be, you know, one lump sum ... It will probably be over a period of time." (Id. at 131). J.R. testified (Id. Ex. GG at 36-37) that the reason she told police about her agreement to pay L.N. $175,000 was because she felt threatened by L.N.

J.R.'s telephone records (State trial Ex. 74) show that within 48 hours prior to Petitioner's meeting with L.N., she called L.N. 22 times. Despite the presence of the telephone records, both J.R. (Doc. 13 and 14, Ex. FF at 61) and L.N. (Id. Ex. T at 108) audaciously testified that they never talked to each other on the phone. However, Detective Stewart testified (Id. Ex. LL at 107-108) that when he met with J.R., a day prior to surveillance, she already told him that she spoke with L.N. on the phone several times.

Since on the recordings Petitioner's responses to L.N.'s proposition to have J.R. murdered are inaudible (see Footnote 1) and the recordings were not impounded, the authenticity of the recordings was a crucial trial issue. In the closing argument, the prosecution emphasized the importance of that fact to the jury: "the fact that Detective Warner had those disks for four months, not unusual, not anything against police procedure. Dimitri would like you to believe that. It's just not true." (Id. Ex. PP at 153).

Following the trial, upon Petitioner being convicted on both counts, Petitioner's friend at last, discovered PPD Operations Order 8.1 ("Order 8.1") (Doc. 33 attached to Ex. A at 1) (also attached as Ex. 3 to Answer, Doc. 14 Ex. FFF and III). Page one of Order 8.1 is the only relevant page and is reproduced here in its entirety. (infra at p. 8)

1. **RESPONSIBILITY FOR PROPERTY**

   A. Employees will be responsible for the disposition of any property coming into their possession during the course of their shift.

   B. All property will be impounded prior to the end of shift, with the following exceptions:

      (1) When authorized by a supervisor:

         (a) Employees will provide their supervisor with a verbal or written descriptive inventory of the property.

         (b) The property will be kept in a secure location until formally impounded.

         (c) The bureau commander must approve secure locations that are used solely for the purpose of temporary property storage.

         (d) Impounded items will be kept on Department property.

      (2) Impounding of cash, jewelry, items of value, drugs, and drug paraphernalia will not be delayed.

   C. Found property where ownership can be established will be returned to the owner.

   D. Personal property where ownership is not disputed

      (1) Property will be processed and returned to the owner after being photographed.

      (2) Officers will document the release of property to the owner in the narrative section of the Departmental Report (DR).

      (3) A property invoice will not be created for property not impounded.

   E. Personal property where ownership is disputed

      (1) Officers may seize and impound property based on probable cause.

      (2) Property will be returned when ownership is determined through appropriate legal proceedings, consent of all parties, or proof of ownership.

   F. Prior to impounding any property, employees will carefully examine the invoice and all items to ensure the items are properly identified and processed.

2. **CATEGORIES OF PROPERTY** - There are four categories of property:

Evidence (E)	Any property that can be used to prove or disprove the commission of a crime
Found (F)	Any property that comes into custody of the Department from any source not needed for the prosecution of a crime, contraband, or an unknown owner
Safekeeping (K)	Any property not defined as evidence that is to be temporarily held pending its return to the rightful (known) owner
Prisoner's (P)	Any personal property of an arrested person that cannot be released to another person or held by the jail at the time of arrest

Following direct appeal, Petitioner filed a state petition for post-conviction relief ("PCR") (Id. Ex. FFF and III). In addition to presenting Order 8.1, Petitioner also presented an under-oath deposition of William Lee (Id. at Ex. 5). The deposition states that Lee was a PPD officer for 22 years (Id. Ex. 5 at 4-5) and that PPD D.W. provided false testimony when he testified that the chain of custody requires evidence to remain with the detective and not to be impounded (Id. at 8). Additionally, in Reply to the State's PCR Response (Doc. 33, Ex. C), Petitioner included the Affidavit of Frank Rogers. Affiant Rogers stated that he was the Assistant Director of PPD Laboratory Bureau when he retired after 35 years with the PPD. The affiant further stated that D.E. lied when he testified that it would take a 40-mile roundtrip to impound evidence. According to affiant Rogers, there are numerous impound property annexes within 4-5 miles of D.E.'s workplace. (Cf..Doc. 13, 14, Ex. Y at 83-86).

In response to Petitioner's introduction of the affidavit of Gregg Stutchman to the state PCR court (Doc. 33, Ex. D), which explained how the recordings at issue in this case could have been altered, counsel for the State conceded that trial evidence alone established this fact. (Id. Ex. KKK at 9)[4].

[4] Notwithstanding the fact counsel for the State conceded that all recordings could have been altered, it is important to put emphasis on and clarify the findings of the U.S.D.C. (Appendix B). On this point, the district court recognized (Id. at 11, ln. 19-21) that the State's forensic sound expert impeached himself on cross examination when he testified that, in a 4-month period, all not impounded recordings could have been altered. The foundation for the sounds expert's impeachment was laid when he testified on direct examination that the recordings cannot be altered (Id. at 13, ln. 8-11). Although the U.S.D.C. relied on the decision of the state court of appeals (Id. at 11, ln. 28, cf. Appendix G), when it asserted that the date -- 1899 is not from the header that the State's forensic sound expert prepared, Petitioner explained in the district court (U.S.D.C. Doc. 5, Attachment B at 5-6) how the state court of appeals misread the expert's testimony, i.e. the date 1899 is in fact from the header prepared by the State's forensic sounds expert. Moreover, the district court's Order (Doc. 23-1) accepted the State's ... (continued on next page)

Without holding the requested evidentiary hearing, the state PCR court/trial judge (Appendix D at 3) made the following relevant findings:

- Brady Violation: "Defendant does not, however, address the fact that experts who testified at the trial failed to find any indicia of the recordings having been tampered with or altered."
- Youngblood Claim: "Defendant ... correctly cites the law but fails to link his claims to the evidence presented in the case. At no time has he been able to establish bad faith on the part of law enforcement or the failure to preserve evidence."
- "...the integrity of the evidence [i.e. recordings] was a crucial issue addressed at trial."

The PCR court's findings are the last reasoned decision of the state courts.

Upon recommendation of the magistrate judge (Appendix C), the U.S.D.C. (Appendix B) denied Petition for Habeas Corpus. On May 15, 2020, the Ninth Circuit Court of Appeals (Appendix A) denied certificate of appealability.

... expert's header with the date 12-30-1899. (located beneath FLEX8E#1329). Ultimately, it is Doc. 33, Exhibit D at 2 that explains how any date can be programmed into a HAWK recording.

REASONS FOR GRANTING THE PETITION

Summary of Argument

1. The holdings of Arizona v. Youngblood , 488 U.S. 51 (1988), do not require, in addition to establishing bad faith, to prove either tampering or a loss of evidence. The U.S.D.C. erred in its finding that in order to obtain relief under Youngblood, Petitioner's requirement extends beyond the showing of bad faith.

2. Similarly, the district court erred when it found that having evidence (PPD Order 8.1) posted on the internet satisfied the disclosure requirement of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Not only is it the government's duty to disclose to defendant all material evidence that is favorable to the accused, United States v. Bagley, 473 U.S. 667, 682 (1985), but moreover, in Strickler v. Greene, 527 U.S. 263 (1989), and Banks v. Dretke, 540 U.S. 668 (2004), this Court held that defense can reasonably rely on representation of the government.

3. The state PCR court erred when it found that Brady violation required proof of tampering. Thus, the findings of the state PCR court are an objectively unreasonable application of federal law under 28 U.S.C. §2254 (d)(1). According to the Court's holdings in Strickler, 527 U.S. at 281-282, only three elements needed to be satisfied in order to establish a Brady violation: (1) evidence is material because it is either exculpatory or impeaching; (2) evidence was suppressed either willfully or inadvertently; and (3) defendant suffered prejudice, i.e., there is a reasonable probability that had the newly discovered evidence been disclosed, the outcome of trial would have been different.

Considering the state court's finding that "the integrity of evidence was a crucial issue," the reasonable probability of a different outcome is easily established when discovery of Order 8.1, which clearly applies to recordings, undermines the integrity of crucial evidence. Moreover, since detectives decided not to impound the recordings, it means that what L.N. told them - that Petitioner wanted his ex-wife killed - must not pan out to be true. This impeaches L.N. and brings into doubt his story that he observed Petitioner slash tires of the cars of J.R.'s family. Therefore, the suppression of Order 8.1 creates a reasonable probability of a different outcome on both counts. It would bring disrepute to our system of criminal justice to hold a person in prison when newly discovered material facts undermine the very evidence that the PCR court determined to be crucial.

4. In light of the evidentiary value of Order 8.1 and two under oath statements from the retired PPD personnel, showing that D.W. and D.E. lied under oath at trial, the state court's finding, that Petitioner did not present evidence of bad faith, was an objectively unreasonable determination of fact under §2254 (d)(2). Similarly, the state court's finding that Petitioner failed to "link his claim to the evidence presented in this case" is also an objectively unreasonable determination of fact under §2254 (d)(2). Since the same court found that the integrity of the recordings was a crucial issue at trial, this implies, that the recordings were likewise crucial for the prosecution's case-in-chief.

Argument

1. The district court erred in its finding that in order to obtain relief under Arizona v. Youngblood, 488 U.S. 51 (1988), Petitioner needed to prove either

that the evidence was tampered with or lost in addition to establishing bad faith (Appendix B at 9-12).

There is nothing in Youngblood's holdings that requires Petitioner, in addition to establishing bad faith, to prove that evidence was either tampered with or lost. Although the U.S.D.C.'s Order (Id. at 11, ln. 9) relied on Youngblood, 488 U.S. at 57, for the proposition that: "Youngblood analysis is only triggered where the defendant can point to some loss of evidence" (quoting Id. at 11, ln. 7-8), that very section of Youngblood refutes the assertion of the U.S.D.C. :

> Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which **no more can be said** than that it could have been subjected to tests, the results of which might have exonerated the defendant (emphasis added).

To require a defendant, in addition to establishing bad faith, to prove that evidence was either tampered with or lost would require an impossible. Since Petitioner's responses, to proposition to have his ex-wife murdered, are inaudible (see Footnote 1, supra), the responses could have been audible and exculpatory had the recordings been properly preserved.

The reason why this Court should review and grant this Petition is articulated in Youngblood, 488 U.S. at 58:

> Requiring a defendant to show bad faith in the part of police ... confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves **by their conduct indicate** that the evidence could form a basis for exonerating the defendant (emphasis added).

In finding that Youngblood required Petitioner to prove tampering or a loss of evidence, in addition to establishing bad faith, the U.S.D.C. has departed so far from the holdings of this Court as to require this Court to exercise its supervisory power and review this petition.

2. The District Court erred in its finding that having evidence posted on the internet satisfies the disclosure requirement of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

As part of its finding, the U.S.D.C. observed: "The Phoenix Police Department's Operational Orders are available online, accessible instantaneously to anybody with just a few clicks of the mouse" (Appendix B at 13, ln. 21-23). But Petitioner proceeded pro se and during the relevant time he was a pretrial detainee confined within the walls of the Phoenix 4th Avenue Jail. Neither access to the internet, not a computer, nor a mouse, were available to Petitioner. Therefore, the U.S.D.C.'s finding that Order 8.1 was accessible to Petitioner failed to account for the fact that Petitioner was incarcerated. And just because PPD Operational Orders are available on the internet now, it does not mean that they were accessible or available at the time of trial.

It is well-established that the prosecution has a duty to disclose all material evidence in its possession that is favorable to the accused. United States v. Bagley, 473 U.S. 667, 682 (1985). And as this Court reiterated "[A] rule ... declaring prosecutor may hide, defendant must seek, is not tenable in a system constitutionally bound to accord defendants due process." Banks v. Dretke, 540 U.S. 668, 124 S. Ct. 1256, 1275, 157 L. Ed. 2d1166 (2004).

More importantly, this Court, relying on Strickler, 527 U.S. at 283-84, announced in the holdings of Banks v. Dretke, 504 U.S. 668 (2004), that

defendant "cannot be faulted for relying on ... representation [of the government]." Petitioner's case presents an even stronger argument for suppression than does Banks, since the Petitioner relied not merely on the force of Brady itself, but also on affirmative representation by Sgt. Long, that he had no awareness of guidelines for preservation of evidence; and on representation of Det. Carmody that no guidelines for retaining audio/video evidence existed.

The U.S.D.C. has departed so far from this Court's holdings in Banks v. Dretke, supra, Brady v. Maryland, supra, and its progeny as to require this Court to exercise its supervisory power and grant relief.

3. <u>The state court erred in its finding that in order to establish a Brady violation, Petitioner needs to prove tampering</u>.

In order to establish a Brady violation, Petitioner needs to satisfy the three elements of Strickler v. Greene, 527 U.S. at 281-82. These elements are: (1) evidence is favorable to the defense, because it is either exculpatory or impeaching; (2) evidence was suppressed; and (3) defendant was prejudiced, i.e., there is a reasonable probability of a different outcome at trial.

At trial, the State's sound expert, Jeff Smith, testified (Answer, Doc. 13 and 14 at Ex. U, p. 72) that he decided not to perform the authentication analysis. And rightfully so, since he admitted on cross examination that in 4 months, all recordings could have been altered. (See Footnote 4, supra.)

Defense sound expert, James Reames, testified (Doc. 13 and 14, Ex. KK at 22-23, 82) that there is no way to establish tampering because the recordings are not original but are copies and, even if someone could find an alteration, that alteration could have happened during the copying process from the

original to a copy. Given Reames' testimony, had the jurors known that the detectives lied as to why they did not impound the recordings, in which tampering is impossible to establish, it is reasonable to believe that jurors would have concluded that the original recordings must have been exculpatory.

Showing that the state court's analysis of Brady conflicts with this Court's decision in Strickler, 527 U.S. at 281-82, is not enough to entitle Petitioner to relief. Petitioner must also satisfy the first and third elements of Strickler v. Greene, supra, i.e., that the undisclosed evidence is impeaching and that there is a reasonable probability that the outcome of the trial would be different had the evidence been disclosed.

The U.S.D.C. asserts "that Order 8.1 does not clearly apply to police property, such as recordings" (Appendix B at 14, ln. 18-19). Order 8.1 is clear cut. Page one (1) of Order 8.1 states: "**All** property will be impounded prior to the end of the shift" (emphasis original). At the bottom of page 1 are four (4) categories of property; evidence being one of them. Evidence is therein defined as "Any property that can be used to prove or disprove the commission of a crime." Since recordings were used to prove the State's case, according to Order 8.1, they had to be impounded prior to the end of shift. Moreover, Petitioner presented to the state PCR court Rogers' affidavit and Lee's disposition in support of Order 8.1, while the State did not present any evidence to contradict the fact that Order 8.1 applied to recordings. Under very similar circumstances, this Court in Norris v. State of Alabama, 294 U.S. 587, 592-95 (1935), held that since prosecution did not present any evidence to contradict the evidence presented by the defense, the evidence presented by defense must be valid and correct. Accordingly, Order 8.1 impeaches D.W. and D.E.

The prejudice element of Strickler v. Greene, supra, is easily satisfied here as well. Since the PCR court found that the integrity of the recordings was

a crucial issue at trial, it means the newly discovered Order 8.1 undermines the very evidence the PCR court deemed crucial in prosecution of the case and creates a reasonable probability of a different outcome at trial. In summation the prosecution emphasized the importance of the detectives' alleged compliance with PPD procedure.

Although the U.S.D.C. Order (Appendix B at 6, ln. 27—at 7, ln. 4) asserts that a detective testified that in an **unrecorded** conversation Petitioner allegedly admitted to a murder for hire plot, the detective who provided this testimony was D.E. (Answer, Doc. 13 and 14, Ex. Y at 76). D.E.'s credibility is impeached by Order 8.1. Importantly, the U.S.D.C. (Appendix B at 7, ln. 12-15) does not refute the fact that the State's every piece of evidence can potentially be attributed to the officers' malfeasance. The State's entire case hinged on the only physical evidence in this case – the recordings that were not impounded.

Upon satisfying the 3 elements of Strickler v. Greene, supra, the accepted course of judicial proceedings is to grant Petitioner relief. The state court has departed so far from the accepted course that it necessitates the exercise of this Court's supervisory power.

At trial, the evidence against Petitioner in the criminal damage count relied entirely on the testimony of L.N. who, months prior to the alleged murder conspiracy, purportedly observed Petitioner slash the tires of cars belonging to J.R.'s family (Doc. 13 and 14, Ex. Q at 106-115). In convicting Petitioner of criminal damage, the jury undoubtedly relied on the fact that L.N.'s testimony was consistent with the recordings. Has jurors known that the detectives lied about why they did not impound the recordings, they would have made a reasonable inference that L.N.'s story - that Petitioner wanted J.R. killed - must not have proved to be true. This would bring L.N.'s entire

story into doubt. The jury was deprived of this vital evidence in assessing the credibility of L.N.'s testimony. Thus, the Brady violation creates a reasonable probability of a different outcome in both counts.

4. The state court erred in its finding that Petitioner did not establish evidence of bad faith on the part of detectives for their failure to preserve evidence. Additionally, the state court erred in its finding that Petitioner failed to link bad faith to the evidence presented in the case.

The state court's findings, described above and asserted by that court in its PCR Ruling (Appendix D at 3), are objectively unreasonable determination of facts under 28 U.S.C. §2254 (d)(2).

The PCR court had before it Order 8.1, the deposition of Lee, and the affidavit of Rogers, yet ignored all this evidence in making its determination. Additionally, not only did this same court determine that the integrity of the recordings was a crucial trial issue, but in summation, the prosecutor described the recordings as his best evidence (Doc. 13 and 14, Ex. PP at 147). At trial, the HAWK recording was admitted into evidence (Id. Ex. R at 13) and played for the jury (Id. at 31). The audio/video recording was entered into evidence later the same day (Id. at 33-34). During the direct examination of L.N. the State made great use of the recordings (Id. at 12-85). The confrontation call (state trial Ex. 90) was also played for the jury (Id. Ex. S at 11). The prosecutor made extensive use of that recording during the examination of L.N. (Id. at 6-14) and the examination of D.W. (Id. Ex. Z at 106-112 and Ex. BB at 95-109). For description of these recordings, see Footnote 1 and 2.

Thus, the PCR court's assertion that Petitioner failed to link the evidence to the claim of bad faith is rebutted by clear and convincing evidence

and, therefore, constitutes a unreasonable determination of the facts in light of the evidence presented in the state PCR proceeding.

When evidence is not preserved, and it is done in bad faith, the remedy is to either suppress the unpreserved evidence, from being admitted as evidence at a new trial, or, as here, when such evidence is central to the prosecution, it requires dismissal of the charges with prejudice. Had the State been unable to use the recordings to buttress the credibility of L.N. and had the jurors known that the detectives lied as to why they did not impound the recordings, Petitioner would be able to impeach L.N.'s credibility and cast doubt on his entire story. Therefore, a finding that the recordings were not preserved, and it was done so in bad faith, requires this Court to remand the criminal damage count for a new trial.

The case before this Court is an instance where the holdings in Arizona v. Youngblood, 488 U.S. 51 (1988), help establish Petitioner's innocence. Had the recordings been properly preserved, Petitioner would have been able to prove that he repulsed any murder propositions. To hold an innocent person in prison, whose conviction was obtained by misleading the jury and by violating the very principles this Court developed to prevent such conviction, undermines the integrity of the judicial system. Both the U.S.D.C. and the state court departed so far from the holdings of this Court as to abrogate the very principles on which the holdings are based. That is why it is necessary for this Court to exercise its supervisory power and grant this Petition. If, in the future, the same U.S. district and state courts disregard the guarantees of due process, cited in this Petition, scores of other defendants can suffer the Petitioner's fate. This is especially so, since the safeguards developed by this Court n Youngblood, Brady, and its progeny address questions of preservation and access to evidence that ate indispensable in any trial.

Considering the implications broadly, lying in court is grievously problematic beyond the Petitioner's case. An experiment conducted by a Duke University professor of psychology, Dan Ariely, demonstrated that even when only one person cheats such behavior quickly becomes more socially acceptable to others[5]. This is why it is important to grant this Petition to limit the ripple effect of police perjury.

In addition, the importance of granting this Petition is that police perjury, when left undisturbed by the courts, undermines the integrity of our legal system. It also erodes public trust in the ability of courts to correctly adjudicate cases. We all have a stake in ensuring that our criminal justice system reliably separates the guilty from the innocent. Permitting the police to get away with suppression and non-preservation of critical evidence not only risks convicting the innocent, but helps the guilty avoid detection and strike again.

The decision of the U.S.D.C. should be reversed. Count One, the conspiracy to commit murder, should be dismissed with prejudice and Count Two, the criminal damage, should be remanded for a new trial.

[5] See Ariely, Dan, The (Honest) Truth About Dishonesty, Chapter 8, where students, who observed only one student cheat, were more likely to engage in cheating. (Harper Perennial, 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Date: 07/29/20