No. 20-5795

IN THE SUPREME COURT OF THE UNITED STATES

DONALD MITCHELL TEDFORD,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF FOR PETITIONER

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The Brief in Opposition to the Petition for a Writ of Certiorari filed by Donald Tedford contains matters which both compel a response and which demonstrate why a compelling need exists for the petition to be granted.

If the Attorney General of Pennsylvania's position is ultimately upheld, Tedford will be executed as the last act of a tragedy of prosecutorial misconduct, critical failures by his prior counsel to act in a zealous and timely fashion, and the indifference of the Courts to the grave injustice that happens when the search for truth becomes irrelevant and is sacrificed on the altar of expedience.

From the outset of this case, an unbroken chain of acts of prosecutorial misconduct have occurred that began when the Commonwealth assured Tedford's trial counsel that it had provided him with all of the discovery information that both the Rules of the Commonwealth of Pennsylvania and the United States Constitution require that he receive. To be sure, that pre-trial process was corrupted not only by the categorical misrepresentations by the Commonwealth that it had fulfilled its statutory and Constitutional duty up to that point but also by the incompetence and pitiful complacency of Tedford's trial counsel who did absolutely nothing to probe further to discover critical evidence about this most highly disputable case.

Once the trial process was over and Tedford's appeals began, the Commonwealth categorically asserted for two and half decades that the initial representation by the District Attorney's Office was correct and that no information

was to be left in its files that should have been disclosed. The Courts uniformly accepted those representations and, when Tedford's initial lawyers did not adequately challenge them, readily dismissed his claims, allowing his case to stay on the track for execution.

Thus, in its initial stance prior to trial and in the position it steadfastly held during the appellate process, the Commonwealth purported to exercise its solemn Constitutional and ethical duty by assuring the Courts that all discovery had been provided and that nothing further remained for Tedford to review. Implicit in that representation was that the procedural due process protections afforded by the Rules of the Commonwealth of Pennsylvania and the substantive due process protections afforded by the Brady doctrine had all been fulfilled.

It became apparent, however, that these representations were simply wrong and, whether committed advertently or inadvertently, they formed part of a systematic denial of due process that has continued until this very day.

For the first 25 years since the death penalty was imposed, the Commonwealth stood by its representation that it had disclosed everything to Tedford in pre-trial discovery. But after the letter of March 4, 2011, in which the Pennsylvania State Police acknowledged that they had collected over 800 documents constituting crime reports, incidents reports, interviews, investigative action, property received, medical information, suspect information, diagrams, reports by the local police and psychiatric reports all in direct connection to the murder of Jeanine Revak, it became painfully obvious that Tedford's receipt of only

about 40-45 percent of that number of documents represented a complete failure of the procedural due process rights he has arising from the application of state discovery rules and the Fourteenth Amendment due process rights he has under the doctrine of Brady v. Maryland, 373 U.S. 83 (1963).

Upon the revelation of this catastrophic failure by the Commonwealth, the system should have demanded that the Commonwealth reconcile this unexplained and unexplainable deficiency and make available all of those documents that should have been disclosed in the normal discovery process prior to trial. At a minimum, that would have satisfied certain procedural due process interests of Tedford lest the Rules of the Pennsylvania Court system be rendered a nullity. But instead, the Commonwealth dug in its heels and opposed any further disclosure.

Instead of repudiating the relentless series of improper misrepresentations the Commonwealth made to every level of the Court system in Pennsylvania and to the federal Courts considering the matter on habeas review, the Commonwealth sought the Courts' support in an ongoing effort to keep Tedford and the public from knowing the full details about what it had improperly hidden for over two decades.

But while today the denials of the existence of these other discoverable materials are not repeated, an assertion has now been made that makes a mockery of the Brady doctrine and invites this Court to become an accomplice by way of indifference in the continuing violation of the basic principles of the adversary system and what is supposed to be its paramount concern that the truth be sought in all respects.

For in the Commonwealth's present pleading there is the preposterous assertion that, since the Commonwealth did not keep track of the materials it gave to Tedford prior to trial, before the Commonwealth exercises its duty to review and disclose to him the materials to which he is entitled on multiple levels, Tedford is somehow obligated to inventory for the Commonwealth the evidence it has already given him. See, Commonwealth's Brief at pages 25-26. While the Commonwealth intends to do nothing now, it asserts that "upon receipt of [Tedford's documents], the Commonwealth would do another good faith review of the 823 pages in the PSP file to determine whether the law requires anything additional to be produced to Tedford." Commonwealth Brief at page 26.

This statement indicates one of three deeply troubling conclusions, each of which requires the Court's intervention: a) the Commonwealth is unaware[1] of its

[1] Upon the filing of Tedford's Reply Brief, the attorney for the Commonwealth sent the following email to counsel:

Adam:
Respectfully, I request that you file an amended reply brief in the US Supreme Court that removes the allegations that in Mr. Tedford's case, I personally have engaged in professional misconduct and have performed my job incompetently. These harsh statements are inaccurate and defamatory. While there must be room for oratorical flair and zeal in the representation of clients, and while it is common for opposing counsel to disagree about the law and the facts at issue, I believe these two accusations cross a line and violate the Rules of the US Supreme Court Bar and the Pennsylvania Rules of Professional Conduct.
Thank you for your consideration of this request.
Sincerely,
Will

That this matter not be diverted further from the critical issues that involve Tedford's execution, the following must be clarified.

Constitutional duties in this regard; b) it is confused as to the legal standards this

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As stated in Tedford's initial Reply Brief, Tedford does not seek any sanction against any Commonwealth attorney and casts no personal allegation of any kind against William R. Stoycos nor can he, as Tedford is presently unaware of what is specifically contained in the hundreds of pages of withheld discovery.

The facts of this matter, which are essentially not in dispute, form the basis of Tedford's claim that a systematic violation of his due process rights has occurred throughout the course of this litigation. Prior to trial, Tedford's lawyer was assured he was given all the discovery available. He wrongfully accepted that assurance and Tedford went to trial fundamentally unprepared. For the following 25 years, Tedford claimed that other discovery existed, but he was consistently assured by the Commonwealth that none was to be found. The letter of March 4, 2011, demonstrates that this assurance was wrong.

A simple arithmetic calculation demonstrates that hundreds of pages of documents gathered directly in relation to this murder were not ever given to Tedford. It is now well over 30 years since the trial and he has still never seen this material. It should have been produced before trial. It should have been made available when the revelation of its existence was discovered. But it remains hidden from him.

The current position of the Office of the Attorney General on this matter is not supported by any precedent and is contrary to the categorical teachings of this Court that the obligation to determine the existence of Brady material and to disclose it immediately is squarely placed on the prosecution regardless of any preconditions on the defendant's actions. The obligation to turn over properly discoverable material, be it to correct a failure to abide by the Discovery Rules of Court pre-trial or the Brady obligation which a prosecutor carries throughout the course of a case, is not and has never been conditioned on a defendant providing an inventory of the information in his file. To accept the Attorney General's position is to contradict well-established jurisprudence in this area and cannot be sustained.

Again, Tedford has and had no intention of setting forth an *ad hominum* attack on the person of opposing counsel in this appeal. To the extent this Court would read his pleading in that way to any extent, he hereby amends it.

And while the Commonwealth's Brief in Opposition, which was filed one day late despite Tedford previously consenting to four extensions of time and to which Tedford filed no objection, certainly set forth various stinging remarks with respect to undersigned counsel, the focus must remain on this: a man is on death row for a crime he has consistently and strenuously claimed he did not commit and the evidence adduced against him at trail hardly made the finding of his guilt a foregone conclusion. Before he is executed, the demands of Due Process and our basic sense of fairness must call upon some Court somewhere to require that hundreds of pages of investigative reports on this murder be made accessible to him and to the public. A relentless search for the truth in a matter of this ultimate gravity requires nothing less.

Court has set down which govern that obligation; or c) the Commonwealth simply wishes to avoid the necessity of giving Tedford documents which it might already suspect could provide him the basis to seek further relief in the Courts.

In any event, the Commonwealth's position is wrong and cannot be supported by this Court.

There is absolutely no obligation for a defendant to state what the Commonwealth has already given him in discovery before the Commonwealth is obligated to given him what they are Constitutionally obligated to disclose under Brady. No case is cited for this proposition in the Commonwealth's brief and none exists. To the contrary, the law has always been that the obligation on the Commonwealth to disclose Brady material exists even if the defendant does not even make a request for such material. See, United States v. Bagley, 473 U.S. 667, 682 (1985); Kyles v. Whitley, 514 U.S. 419, 443 (1995). The government has an ongoing, affirmative duty to learn of the existence of any favorable material and to disclose it at any time such information is discovered. Kyles, Supra. at 437; Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987). An absolute duty is imposed on a prosecutor to gauge the potential effect of material in the government's file and, as this Court has admonished, a prosecutor "anxious about tacking to close to the wind will disclose a favorable piece of evidence," Kyles, Supra. at 439. That prosecutor will, if he or she is "prudent" always "resolve doubtful questions in favor of disclosure." United States v. Agurs, 427 U.S. 97, 108 (1976). This Court has been

clear: to resolve any doubts in favor of disclosure "is as it should be." Kyles, supra. at 437-438.

Whether the failure to disclose the information has been willful or inadvertent is immaterial; if the undisclosed evidence is sufficiently material, relief is mandated. Strickler v. Green, 527 U.S. 263, 281 to 282 (1999). Whether the information involves directly exculpatory information, information which would simply in its cumulative effect be favorable, or whether it involves impeachment of witnesses that may begin the toppling of a "house of cards of a key witness," disclosure is categorically mandated without any requirement whatsoever that the defendant do anything. See, Kyles, supra. at 436; Weary v. Cain, ___ U.S. ___, ___, 136 S.Ct. 1002, 1004 (2016).

In assessing the nature of evidence that might reach the standard of prejudice and must therefore be disclosed, the prosecutor must realize that all the defendant needs to show is that the undisclosed evidence would undermine the confidence in the verdict, not that it would absolutely result in his acquittal. See, McGee v. McFadden, ___ U.S. ___, ___, 139 S.Ct. 2608, 2609 (2019) (Justice Sotomayor dissenting), quoting Kyles, supra. As this Court held in Cone v. Bell, 556 U.S. 449, 452 (2009), if the withheld evidence would have a reasonable probability of altering the assessment of at least one juror, the standard has been made out.

Any representation by Commonwealth to this point that no such Brady material exists in the enormous volume of documents it has withheld for over three

decades must be looked at with more than a jaundiced eye by this Court. The same Commonwealth that assured Court after Court in Pennsylvania and the federal system that no such discovery existed now must understand the deep skepticism any fair-minded person would have in accepting its representation that nothing within the mass of undisclosed evidence possessed by the Pennsylvania State Police, evidence which is specifically related to the particulars of investigation of this case, is at all relevant to issues of guilt or innocence. Is it even conceivably possible that no document within the hundreds of undisclosed pages could not possibly meet the standard of prejudice that this Court has laid out or, at a minimum, be disclosed to a defendant so he can determine if an application to a Court for relief regarding that evidence is warranted?

The Commonwealth's proposal makes a farce of the trial process. Procedural due process requires the Commonwealth to follow the Rules of Court by way of pre-trial discovery. The Commonwealth's position now is that after having recognized that the trial prosecutor's failed to fulfill their pre-trial obligations with respect to discovery, the Commonwealth is excused from having to remedy that violation since that violation of the rules has remain hidden until after the pre-trial process was over. Basic procedural due process norms can never embrace such a disregard of the basic rules Court.

But beyond that, having failed to acknowledge the existence of these materials in pleading after pleading, the Commonwealth again seeks a safe harbor from any sanction/remedy that should properly be placed against it either under the

Constitution or, even more specifically, under the Rules of Professional Conduct which obligate prosecutors to make timely disclosure of all evidence or information known to them that tends to negate guilt or mitigates the offense. See, Pennsylvania Rule of Professional Conduct 3.8.[2]

What Tedford seeks, however, is not a sanction against individual Commonwealth attorneys. His plea is for a remedy for the violation of his basic procedural and substantive due process rights that have occurred every day since the time the first misrepresentations were made to his trial counsel and through the moment that this Court is contemplating this present pleading.

To correct the incompetence of his prior counsel and the corruption of the system brought about by the Commonwealth's misrepresentations and its ongoing failure to acknowledge the reality of its Brady obligations here, the only proper remedy is to permit Tedford to view the materials that the Commonwealth now has hidden within the vault of the Pennsylvania State Police. If his lawyers can thereafter make a proper, good faith claim that there is something that Tedford has never received and that it does support a finding of the requisite level of prejudice to justify relief, the lower courts may order a hearing to determine whether the documents so withheld meet the standard of materiality this Court has carefully articulated.

Recently, this Honorable Court denied Certiorari in Reed v. Texas, ___ U.S. ___, 140 S.Ct. 686 (2000). In a concurring opinion, Justice Sotomayor detailed the

[2] The Pennsylvania Rules of Professional Conduct are a standard model of professional conduct generally adopted in most jurisdictions.

Brady claims made by the defendant in that case and observed that those claims cast a "pall of uncertainty" over the death penalty verdict rendered there. She further and properly observed that there was no "denying the irreversible consequence of setting that uncertainty aside." Id. at 689 to 690.

In the present case, any thoughtful examination of the evidence produced against Tedford will lead the observer to see that a similarly dark and ominous pall of uncertainty is cast over the issue of whether he is the true killer of Jeanine Revak. Indeed, any fair appraisal of that evidence (see, Tedford's Certiorari Petition, pages 2-7) will reveal that there is nothing of any real certainty about this case except that more of the truth is yet to be known.

Justice Sotomayor concurred in Reed v. Texas because she hoped that the state process would address the uncertainty there and offer a meaningful remedy. That hope cannot be extended to Tedford's case. The Pennsylvania Courts have fully embraced an attitude of indifference to the grave injustice that has occurred here. Those Courts have ratified the Commonwealth's distortion of its Brady obligations and have turned a deaf ear to the Commonwealth's imperious attitude that its clear violation of the procedural due process requirements of the discovery rules are excusable since that violation was hidden for a sufficient length of time and that it need not fulfill its Brady obligation in full until Tedford performs an act no Court has ever required of any defendant similarly situated.

This Honorable Court must not become a party to this farce. It must not help write the last act of this tragedy. It must not silence the truth and pass over this

case without giving it the careful scrutiny the grave injustices that have occurred here over time most earnestly demand.

CONCLUSION

The petition for a writ of certiorari should be granted.

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