

No. _____

IN THE
Supreme Court of the United States

TRACY LYNN COPE, Petitioner

vs.

RANDY LEE, Warden, Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Criminal Justice Act
Attorney for Petitioner

No. _____

IN THE
Supreme Court of the United States

Tracy Lynn Cope, Petitioner

vs.

Randy Lee, Warden, Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, pursuant to Supreme Court Rule 39.1 and Title 18 U.S.C. §3006A(b), asks leave to file the attached Petition for Writ of Certiorari and to proceed *in forma pauperis*. Petitioner, who is presently incarcerated, has previously been determined indigent and qualified for appointment of counsel under the Criminal Justice Act by the United States Court of Appeals for the Sixth Circuit.

Dated this 1st day of October, 2020.

Respectfully submitted,



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QUESTION PRESENTED

Whether the Sixth Circuit's property applied the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in denying Petition relief where in the underlying state court matter, the prosecution violated Cope's due process rights as provided for under Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose that a victim-witness at his criminal trial had served as confidential informant for the police.

INTRODUCTION

This case presents and important issue concerning the proper application the AEDPA deference standard where there was a clear violation of Petitioner's due process rights as described in Brady v. Maryland that resulted in a conviction at trial and a resulting 40 year sentence.

Petitioner submits that the Sixth Circuit's opinion below "involved an unreasonable application of, clearly established Federal law, as determined by this Court", that is, Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, by failing to disclose that a victim-witness at his criminal trial had recently served as confidential informant for investigating Kingsport Police Department. Despite this admitted omission of information from the defense, the Sixth Circuit, and preceding lower courts, concluded that no prejudice occurred. Petitioner submits this conclusion is in contravention of this Court's precedent.

LIST OF PARTIES

All parties appear in the caption of the case.

CORPORATE DISCLOSURE

The petitioner is not a corporation, has no parent corporation, and is not owned in any part by a publicly held company.

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The opinion of the Court of Appeals for the Sixth Circuit reviewing the District Court's "Judgment in a Criminal Case" is unpublished and reprinted in Appendix A. The Order Denying the Petition for Rehearing En Banc is reprinted in Appendix A.

JURISDICTION

The Judgment of the Court of Appeals of the Sixth Circuit was entered on March 16, 2020. A petition for panel rehearing was timely filed on April 16, 2020 after an extension was permitted on March 31, 2020. The petition for rehearing was denied on May 4, 2020. This Petition for Certiorari was filed within one hundred fifty (150) days of that date pursuant to the extension issued by this Court on April 17, 2020 resulting from the COVID-19 pandemic. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

RULES INVOLVED IN THIS CASE

United States Supreme Court Rules, Rule 10(c):

A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

United States Constitution, Amendment XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

28 U.S.C. §§ 2254(d) of the Antiterrorism and Effective Death Penalty

Act (AEDPA):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) 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; or

(2) 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

This matter concerns an appeal of a denial of *habeas* relief brought pursuant to 28 U.S.C. § 2254 arising out of a conviction for especially aggravated kidnapping, kidnapping, and false imprisonment following a trial in the Criminal Court for Sullivan County at Blountville, Tennessee. Petitioner pursued a petition for habeas corpus under 28 U.S.C. § 2254 that was denied by the United States District Court for the Eastern District of Tennessee and again by the United States Court of Appeals for the Sixth Circuit.

The essence of Petitioner's petition is that the State of Tennessee violated his due Process Rights as applied in Brady v. Maryland, 373 U.S. 83 (1963) at trial in 2007 where the State failed to reveal to the defense that a critical witness and alleged victim who testified against Mr. Cope at trial was also an informant for the Kingsport Police Department who had arrested Petitioner. The Sixth Circuit concluded that "the non-disclosure of witness Callahan's status as a confidential informant was not material to Cope's later trial." Cope v. Lee, 804 F. App'x 370, 371 (6th Cir. 2020). Petitioner submits that Sixth Circuit misapplied this Court's precedent, including Strickler v. Greene, 527 U.S. 263 (1999) in its result.

To place the Petition in context, the following facts are taken from the Sixth Circuit opinion below:

This habeas case arises out of a bizarre factual context that spanned from shortly after 10:00 p.m. on August 28, 2005, until around 4:30 a.m. on the morning of August 29, 2005, in the city of Kingsport, Tennessee. In short, Cope, who was delirious from not sleeping for several days and smoking cocaine, forced his girlfriend, Amanda Wilson, and another female, Jakia

Ford, from Wilson's apartment to her van. Cope drove Wilson and Ford around Kingsport for a few hours, eventually letting Ford get out of the van, and then drove Wilson to Callahan's apartment. While there, Cope forced Wilson and Callahan to sit and stand in various places in the apartment and attempted to force them to undress. Callahan eventually ran out of the apartment, and Kingsport Police Department officers arrived shortly thereafter. For a detailed factual background, see *State v. Tracy Lynn Cope*, No. E2009-00435-CCA-R3-CD, 2010 WL 2025469, at *1-3 (Tenn. Crim. App. May 20, 2010), *perm. app. denied* (Tenn. Sep. 22, 2010). But we note that the Tennessee court mistakenly said that the officer testified that he saw Cope holding Callahan in a chokehold; instead, the officer testified that Cope held *Wilson* in a chokehold.

On May 2, 2007, a Sullivan County, Tennessee, jury convicted Cope of one count of especially aggravated kidnapping, one count of aggravated kidnapping, and one count of false imprisonment. At trial, the State called four witnesses, two of which were Callahan and Wilson. Callahan and Wilson told largely the same story, with a few differences about the exact sequence of events inside Callahan's apartment.

On June 27, 2007, Cope was sentenced to a total of forty years' imprisonment. [*Id.*] The Tennessee Court of Criminal Appeals affirmed the judgment on direct appeal, and the Tennessee Supreme Court denied Cope permission to appeal. *Cope*, 2010 WL 2025469. While Cope was incarcerated, another inmate named Arthur Harris, told Cope on November 21, 2012, that Callahan served as a confidential informant for the Kingsport Police Department in Harris's case. Police records from Harris's case revealed that on January 16, 2007, Callahan agreed to purchase \$160.00 worth of crack-cocaine from Harris.

Cope v. Lee, 804 F. App'x at 371-372. (additional internal citations omitted). From there, the Sixth Circuit opinion reviews the procedural history of Petitioner's efforts to correct the wrong that had occurred from the State's intentional withholding of Brady material as to Callahan's status as an informant. *Id.* at 373.

Petitioner pursued his state court post-conviction remedies once he learned of the Brady violation. *Id.* Having exhausted his state court remedies, Mr. Cope

pursued his habeas rights in the federal district court, which was dismissed. Id. Finally, on April 3, 2019, the Sixth Circuit granted a Certificate of Appealability on two issues: (1) whether Cope's Due Process rights were violated under Brady v. Maryland, and (2) whether that claim is procedurally defaulted. Id. The latter issue was conceded by the United States and was treated as if it were not procedurally defaulted. Id.

The Sixth Circuit may not grant habeas relief unless the State court judgment “(1) 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; or (2) 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.” 28 U.S.C. § 2254(d)(1)-(2). A state court’s finding of fact is presumed correct unless petitioner rebuts the presumption by “clear and convincing evidence.” § 2254(e)(1).

Petitioner submits that the Sixth Circuit’s opinion below was contrary to this Court’s application of Brady and its progeny and therefore, this infringement on Petitioner’s Due Process rights has been allowed to stand.

REASON FOR GRANTING THE PETITION

This matter involves an important federal question in that it involves an all too common scenario: a state court prosecution resulted in a conviction and extraordinarily long sentence in part due to a Brady violation that, had it not occurred, the outcome at trial more probably than not would have been different.

United States Supreme Court Rule 10(c) applies here where the Sixth Circuit “....has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Tracy Lynn Cope is currently serving a 40-year sentence at 100% after being convicted at a trial where it is undisputed that the State withheld exculpatory information from the defense. The prosecution violated Cope’s due process rights as provided for under Brady v. Maryland by failing to disclose that a critical victim-witness at his criminal trial had served as confidential informant for the Kingsport Police Department.

Mr. Cope’s 14th Amendment due process rights were violated at trial. “There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” Strickler v. Greene, 527 U.S. 263, 281-82 (1999); see also Hutchison v. Bell, 303 F.3d 720, 732-33 (6th Cir. 2002).

The panel concluded that the first two of the Strickler requirements were met. Cope v. Lee, 804 Fed. App’x. at 373. It is undisputed that trial witness and victim Debbie Callahan worked as a confidential informant (CI) and that this information was

withheld from the defense. Id. While the offense at issue happened on August 28, 2005, Callahan served as a CI on January 16, 2017, prior to when she testified at trial against Mr. Cope on May 1-2, 2007. Despite how close in time her CI status was to when she testified, this information was withheld from Mr. Cope.

The question for the Sixth Circuit was whether this withholding information concerning Callahan's status was material under Strickler. Materiality does not equate to a test for sufficiency of the evidence. Once a Brady error is found, it cannot be harmless because a Brady violation necessarily means the State withheld favorable, material evidence that undermines confidence in the outcome of the trial. Kyles v. Whitley, 514 U.S. 419, 435 (1995) ("... once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review.). As the Supreme Court has further explained:

Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.

Robinson v. Mills, 592 F.3d 730, 735 (6th Cir. 2010), citing United States v. Bagley, 473 U.S. (1985) (emphasis added).

Here, the defense was deprived of the opportunity to demonstrate to the jury the full extent of Callahan's credibility issues and Mr. Cope was convicted without the defense knowing about Callahan's status as an informer. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or

innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Robinson, 592 F.3d at 735 citing Napue v. Illinois, 360 U.S. 264, 269 (1959).

Robinson is most analogous to the situation here where, the Tennessee Court of Criminal Appeals found that

"[a]lthough certain details were corroborated by a number of other witnesses, the State's theory was established principally by Kim Sims, the only eyewitness to the crime." Robinson, 1999 Tenn. Crim. App. LEXIS 116, 1999 WL 61062, at *2. Since Sims' testimony was the basis of the State's theory and the only testimony in conflict with Robinson's, impeachment of Sims by the defense was crucial to the outcome of the case and the determination of Robinson's guilt or innocence hinged on the jury's critique of Sims' truthfulness and reliability. As this Court has observed, "[c]onsiderable authority from the Supreme Court and our court indicates that a defendant suffers prejudice from the withholding of favorable impeachment evidence when the prosecution's case hinges on the testimony of one witness." Harris v. Lafler, 553 F.3d 1028, 1034 (6th Cir. 2009).

Robinson v. Mills, 592 F.3d at 736 (internal citation omitted).

The testimony of Ms. Callahan was the only direct witness testimony regarding the extent of Cope's and Callahan's interactions critical in assessing the evidence in support of Count 2 of the indictment which was specific to Callahan. Therefore, as it pertains to Count 2, Callahan was the key to the State obtaining a conviction. Therefore, the ability to confront her with her CI status would have been critical.

While the Sixth recognized that a confidential informant's status is relevant and is more than merely cumulative impeachment evidence, it still concluded that the denial

of habeas relief was reasonable. Cope v. Lee, 804 Fed. App'x. at 374. In reaching this conclusion, the court relied on the fact that the State had the testimony of Wilson to corroborate that of Callahan as to what happened inside Callahan's apartment. Id. The problem with relying on this point is that it disregards the fact that Callahan initially allowed Cope inside, that Callahan was able to leave the apartment, and that she remained away from the scene for several hours. Thus, Wilson was not able to corroborate the entirety of what occurred in Callahan's apartment or what the extent of the interactions between Callahan and Cope were. As the Sixth Circuit points out, Cope's trial counsel did point out inconsistencies in the testimony of Wilson and Callahan, but he was deprived of the ability to fully exploit those inconsistencies because he did not know of the additional impeachment material applicable to Callahan.

This scenario clearly falls well within the framework described in Robinson which applied the Kyles and Bagley cases to a very similar scenario. To have concluded as the court did that the denial of habeas relief was not unreasonable is to reject the reasoning and conclusion of the precedent set forth in Robinson.

The Robinson Court favorably quoted the Ninth Circuit: "It makes little sense to argue that because [the defendant] tried to impeach [the key witness] and failed, any further impeachment evidence would be useless. It is more likely that [the defendant] may have failed to impeach [the key witness] because the most damning impeachment evidence in fact was withheld by the government." Id. at 735, quoting United States v. Serv. Deli Inc., 151 F.3d 938, 944 (9th Cir. 1998).

A defendant has the constitutional right to impeach a witness by showing bias.

Davis v. Alaska, 415 U.S. 308, 316-17 (1974). If a defendant is denied this right, then a new trial must be granted, except if the error was harmless. United States v. Stavroff, 149 F.3d 478, 481 (6th Cir. 1998). However, "once a reviewing court applying [the] Bagley [materiality analysis] has found constitutional error there is no need for further harmless-error review." Kyles, 514 U.S. at 435. Robinson, 592 F.3d at 737. Materiality does not equate to a test for sufficiency of the evidence. Once a Brady error is found, it cannot be harmless because a Brady violation necessarily means the State withheld favorable, material evidence that undermines confidence in the outcome of the trial. Kyles v. Whitley, 514 U.S. at 435 (1995) (".. once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review.).

"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Robinson, 592 F.3d at 735, citing Napue, 360 U.S. at 269. The Sixth Circuit, having concluded that Callahan's status as an informant was relevant and not cumulative, then concluded that nevertheless, the Tennessee Court of Criminal Appeals conclusion "was not so unreasonable as to violated AEDPA's 'highly deferential' standard." Cope v. Lee, 804 Fed. App'x. at 374. While it is a high standard to meet, Petitioner submits that here, where Sixth Circuit and Supreme Court law on the issue of Brady violations where confidential informants are concerned, it is so clearly established that the Tennessee Court of Appeals conclusion was unreasonable.

Section 2254(d) reflects the view that habeas corpus is a “guard against extreme malfunctions in the state criminal justice systems,” not a substitute for ordinary error correction through appeal....As a condition for obtaining habeas corpus from a federal court the state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” Harrington v. Richter, 562 U.S. 102-103 (2011) (further citation omitted).

Petitioner recognizes that habeas relief is not easily available, nor is it unattainable. Section 2254(d) reflects the view that habeas corpus is a “guard against extreme malfunctions in the state criminal justice systems,” not a substitute for ordinary error correction through appeal. Jackson v. Virginia, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment). As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair minded disagreement. Harrington, 562 U.S. at 102-03.

Petitioner submits that where the Brady violation is clear, there can be no reasonable disagreement as to the impact on the trial and resulting conviction. An alarming result has occurred because of the State’s withholding of impeachment material and the only remaining avenue to Petitioner is for this Court to grant this Petition and correct the terrible wrong that occurred. Under these facts, where it is

indisputable that the State withheld Brady material, that it had a negative impact on the defense on the defense, and that the result was a 40 year sentence at 100% for an offense where no weapon was used and no serious bodily injury resulted, this can be said to be nothing less than an "extreme malfunction in the state criminal justice system."

Mr. Cope respectfully implores this court to grant the Petition.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit so that the Petitioner may pursue habeas relief.

Respectfully submitted,

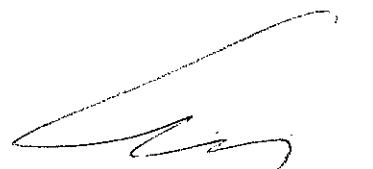


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CERTIFICATE OF SERVICE

I, Christopher B. Sullivan, certify that, pursuant to Rule 29, I have served the Motion to Proceed in Forma Pauperis and the Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit upon each party to the above proceeding required to be served, or that party's counsel, by depositing an envelope containing the above documents in the United States mail, postage prepaid. I further certify that all parties required to be served have been served: Herbert H. Slatery, III, Attorney General and Reporter, Andree Sophia Blumstein, Solicitor General for the State of Tennessee; and Michael M. Stahl, Senior Assistant Attorney General, P.O. Box 20207 Nashville, TN 37202-0207.

This the 1st day of October 2020.



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APPENDIX

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Doc. No. 1 Cope v. Lee, 804 Fed. Appx. 370 (6th Cir. March 16, 2020)

Doc. No. 2 Cope v. Lee, Sixth Cir. No. 18-5730, Order Denying Petition for Rehearing En Banc, May 4, 2020.

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0159n.06

Case No. 18-5730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRACY LYNN COPE,)
Petitioner-Appellant,)
v.)
RANDY LEE, Warden,)
Respondent-Appellee.)

FILED
Mar 16, 2020
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF
TENNESSEE

Before: MERRITT, MOORE, and MURPHY, Circuit Judges

MERRITT, Circuit Judge. Petitioner Tracy Lynn Cope appeals the district court's denial of his petition for habeas corpus under 28 U.S.C. § 2254. Cope's primary claim on appeal is that the State of Tennessee violated his Due Process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), at his trial back in 2007 by not disclosing that one of its witnesses, Debbie Callahan, served briefly as a confidential informant in an unrelated case about six months before Cope's trial. We agree with the Tennessee trial and appellate courts and the district court below that the non-disclosure of witness Callahan's status as a confidential informant was not material to Cope's later trial.

I.

The Supreme Court in *Strickler v. Greene*, 527 U.S. 263 (1999), stated the following about *Brady* claims:

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“[T]here is never a real ‘*Brady*’ violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”

Id. at 281–82. Because there is not a reasonable probability that the evidence concerning Callahan’s status as a confidential informant would have produced a different verdict in Cope’s trial, we hold that Cope suffered no prejudice and thus affirm the district court’s denial of the writ.

Although this case involves Cope’s procedural rights as a criminal defendant, we provide a brief factual summary, and mention further facts where relevant. This habeas case arises out of a bizarre factual context that spanned from shortly after 10:00 p.m. on August 28, 2005, until around 4:30 a.m. on the morning of August 29, 2005, in the city of Kingsport, Tennessee. In short, Cope, who was delirious from not sleeping for several days and smoking cocaine, forced his girlfriend, Amanda Wilson, and another female, Jakia Ford, from Wilson’s apartment to her van. Cope drove Wilson and Ford around Kingsport for a few hours, eventually letting Ford get out of the van, and then drove Wilson to Callahan’s apartment. While there, Cope forced Wilson and Callahan to sit and stand in various places in the apartment and attempted to force them to undress. Callahan eventually ran out of the apartment, and Kingsport Police Department officers arrived shortly thereafter. For a detailed factual background, see *State v. Tracy Lynn Cope*, No. E2009-00435-CCA-R3-CD, 2010 WL 2025469, at *1–3 (Tenn. Crim. App. May 20, 2010), *perm. app. denied* (Tenn. Sep. 22, 2010). But we note that the Tennessee court mistakenly said that the officer testified that he saw Cope holding Callahan in a chokehold; instead, the officer testified that Cope held *Wilson* in a chokehold.

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On May 2, 2007, a Sullivan County, Tennessee, jury convicted Cope of one count of especially aggravated kidnapping, one count of aggravated kidnapping, and one count of false imprisonment. [R. 9-1 at 10–12] At trial, the State called four witnesses, two of which were Callahan and Wilson. Callahan and Wilson told largely the same story, with a few differences about the exact sequence of events inside Callahan’s apartment.

On June 27, 2007, Cope was sentenced to a total of forty years’ imprisonment. [*Id.*] The Tennessee Court of Criminal Appeals affirmed the judgment on direct appeal, and the Tennessee Supreme Court denied Cope permission to appeal. *Cope*, 2010 WL 2025469.

While Cope was incarcerated, another inmate named Arthur Harris, told Cope on November 21, 2012, that Callahan served as a confidential informant for the Kingsport Police Department in Harris’s case. [R. 9-17 PageID# 958–62] Police records from Harris’s case revealed that on January 16, 2007, Callahan agreed to purchase \$160.00 worth of crack-cocaine from Harris. [R. 9-17; Pet.’s Br. at 24]

On February 7, 2013, Cope filed a motion for consideration of post-judgment facts in the Tennessee Supreme Court, asserting that the State did not disclose that Callahan served as a confidential informant in Harris’s case. *See Tracy L. Cope v. State*, No. E2013-02590-CCA-R3-ECN, 2014 WL 4161480, at *3 (Tenn. Crim. App. Aug. 21, 2014), *perm. app. denied* (Tenn. Jan. 15, 2015). Cope then filed a second petition for post-conviction relief on March 15, 2013, which the Sullivan County Criminal Court also dismissed, and the Tennessee Court of Criminal Appeals affirmed. *See id.*

On April 15, 2013, Cope filed a petition for a writ of error coram nobis in the Sullivan County Criminal Court. [R. 9-17] The Sullivan County Criminal Court dismissed the petition on October 1, 2013. [R. 9-18 at 153–57] The Tennessee Court of Criminal Appeals affirmed the

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dismissal on August 21, 2014, and the Tennessee Supreme Court denied Cope review. [R. 9-22]; see *Cope*, 2014 WL 4161480, at *8.

Finally, on April 17, 2015, Cope filed a petition for a writ of habeas corpus in this case in the federal district court. [R. 1] The district court dismissed Cope's petition on June 20, 2018. [R. 19] On April 3, 2019, this Court granted a Certificate of Appealability on two issues: (1) whether Cope's Due Process rights were violated under *Brady v. Maryland*, and (2) whether that claim is procedurally defaulted. [R. 14 at 8]

II.

"We review *de novo* a district court's decision to grant or deny habeas relief and review its factual findings for clear error." *Robinson v. Mills*, 592 F.3d 730, 734 (6th Cir. 2010) (citing *Anthony v. DeWitt*, 295 F.3d 554, 560 (6th Cir. 2002)).

The parties agree that Cope's *Brady* claim is not procedurally defaulted and that the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) apply because the Tennessee courts adjudicated Cope's *Brady* claim on the merits.¹ [State's Br. at 10]; *Cope*, 2014 WL 4161480, at *3-8. We thus assume, without deciding, that Cope's *Brady* claim is not procedurally defaulted and proceed to the merits.

We may not grant Cope habeas relief unless the State court judgment "(1) 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in

¹ The Tennessee Court of Criminal Appeals found that Cope untimely filed his petition for writ of error coram nobis but addressed the merits of his claim, agreeing with the Tennessee trial court that due process considerations required tolling the statute of limitations. See *Cope*, 2014 WL 4161480, at *7.

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the State court proceeding.” 28 U.S.C. § 2254(d)(1)-(2). A state court’s finding of fact is presumed correct unless petitioner rebuts the presumption by “clear and convincing evidence.” § 2254(e)(1).

“A prosecutor’s suppression of evidence violates a criminal defendant’s due process rights when the evidence is favorable to the accused and material either to guilt or punishment.” *Thomas v. Westbrooks*, 849 F.3d 659, 663 (6th Cir. 2017) (citing *Brady*, 373 U.S. at 87)). The Supreme Court has “rejected any . . . distinction between impeachment evidence and exculpatory evidence” in assessing whether such evidence is favorable for *Brady* purposes. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Cope satisfies the first two requirements of three-part test from *Strickler*, mentioned above. The evidence would have been favorable to Cope as impeachment material concerning Callahan, and the State did not disclose that information to Cope before trial. We thus deal here with the third requirement, whether the nondisclosure of that evidence prejudiced Cope’s trial. *See Strickler*, 527 U.S. at 281–82.

Prejudice occurs in the *Brady* context “where the evidence is material either to guilt or to punishment[.]” *Brady*, 373 U.S. at 87. For *Brady* purposes, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, on understood as a trial resulting in a verdict worthy of confidence.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The standard requires a showing of more than a “reasonable possibility” of a different result, *Strickler*, 527 U.S. at 291, but “does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal.” *Kyles*, 514 U.S. at 434.

In dismissing Cope’s *Brady* claim, the Tennessee Court of Criminal Appeals applied the coram nobis standard from *State v. Vasques*, 221 S.W.3d 514, 527 (Tenn. 2007).

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See *Cope*, 2014 WL 4161480 at *8. The *Vasques* standard and the materiality standard from *Brady* and its progeny are largely the same. Compare *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006), *Stickler v. Greene*, 527 U.S. 263, 281–82 (1999), and *Brady*, 373 U.S. at 87, with *Cope*, 2014 WL 4161480 at *8. The Tennessee Court of Criminal Appeals thus did not apply law contrary to that from the Supreme Court of the United States. See 28 U.S.C. § 2254(d)(1).

Nor did the Tennessee Court of Criminal Appeals unreasonably apply the *Vasques/Brady* standard. Although we question the state court’s suggestion that evidence that Callahan served as a confidential informant before Cope’s trial is not “relevant” and would be “simply cumulative” impeachment evidence, it is not so unreasonable as to violate AEDPA’s “highly deferential” standard. See *Harrington v. Richter*, 562 U.S. 86, 105 (2011); see also *Robinson*, 592 F.3d at 735 (explaining that jurors “frequently disregard [a confidential informant’s] testimony altogether as highly untrustworthy and unreliable”). Evidence that a victim-witness served as a confidential informant for the same law enforcement entity that investigated the present crime is certainly relevant. See *On Lee v. United States*, 343 U.S. 747, 757 (1952). Further, although Callahan may have been discredited because of her own testimony about her crack-cocaine addiction and prior arrests, evidence that Callahan served as a confidential informant would not have been simply cumulative.

But, in the end, we cannot say that the Tennessee Court of Criminal Appeals reached a decision that was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” See 28 U.S.C. § 2254(d)(2). The State had Wilson in addition to Callahan to testify about what happened inside Callahan’s apartment. Cope’s counsel had full opportunity to cross examine Callahan and Wilson at trial. While Callahan’s and Wilson’s testimony contradicted one another’s in some minor respects, Cope’s counsel brought this to light

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on cross examination. Additionally, Cope's counsel never alleged that Callahan changed her testimony for trial. There is also no evidence that the State paid Callahan to serve as a confidential informant. We thus cannot say, based on the record before us, that the Tennessee Court of Criminal Appeals unreasonably determined that the undisclosed evidence was immaterial.

We therefore **AFFIRM** the district court's denial of the writ.

No. 18-5730
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 04, 2020
DEBORAH S. HUNT, Clerk

TRACY LYNN COPE,
Petitioner-Appellant,
v.
RANDY LEE, WARDEN,
Respondent-Appellee.

ORDER

BEFORE: MERRITT, MOORE, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Filed: May 04, 2020

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Memphis, TN 38103

Re: Case No. 18-5730, *Tracy Cope v. Randy Lee*
Originating Case No.: 2:15-cv-00093

Dear Mr. Sullivan,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Michael Matthew Stahl

Enclosure