No. 20-6190

IN THE

Supreme Court of the United States

BRADLEY FREEMAN,
Petitioner,
v.

STATE OF NEW MEXICO,
Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

REPLY BRIEF IN SUPPORT OF CERTIORARI

Charles D. Agoos
Attorney of Record
Assistant Appellate Attorney
Law Offices of the Public Defender
1422 Paseo De Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890
Charles.Agoos@lopdnm.us

February 11, 2021

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

INTRODUCTION

The State of New Mexico's position is that when police officers hide material evidence of misconduct from the District Attorney's Office and the FBI, there can be no *Brady* violation. *But see Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

Mr. Freeman clarifies that (1) he presented substantial evidence that the Otero County Sheriff's Department withheld material evidence of entrapment in his case, and (2) the lower court denied his *Brady* claim on federal constitutional grounds.

1. **The State of New Mexico withheld material evidence of police misconduct.**

After the *Brady* evidence became public, the District Attorney dismissed every pending case involving Officer Marchand. In the nolle prosequi, which Mr. Freeman attached as an exhibit to his motion for plea withdrawal, the District Attorney identified four categories of evidence withheld by the Otero County Sheriff's Office.

Marchand's own written admission. The District Attorney's letter specifically mentions OCSO File No. SO-063-17, an incident report from April 25, 2017, in which Officer Marchand made a partial, written admission to using illegal drugs with suspects. Despite requests from prosecutors and an FBI grand jury subpoena, the Sheriff's Department withheld the evidence until after Mr. Freeman's guilty plea.

Reports from other law enforcement officers. The exhibit describes accounts from other officers of Officer Marchand engaging in serious misconduct. The reports were withheld from the District Attorney until after Mr. Freeman's pled guilty.

Reports from other defendants. The District Attorney also acknowledged that many other defendants submitted complaints to the Sheriff's Department that Officer Marchand used drugs with them while undercover. These reports were similarly not disclosed by the Sheriff's Department until after Mr. Freeman's plea.

Marchand's employment applications. The Sheriff's Department "lost" Officer Marchand's original employment application and had him complete a second employment application on August 1, 2017, which the Sheriff's Department also withheld until after Mr. Freeman's plea. The applications and questionnaires completed by Officer Marchand contain numerous inconsistent and false statements concerning drug use and other matters, which could have corroborated entrapment.

Although Mr. Freeman knew that he had been entrapped, he was completely unaware of any of the above suppressed evidence in support of his defense.

2. Mr. Freeman fairly presented his federal constitutional claim below.

At the motion hearing, Mr. Freeman's appointed counsel referred to the suppressed evidence of entrapment as *Giglio* material, but repeatedly clarified that the suppressed evidence went beyond mere impeachment purposes to the element of entrapment. *E.g.* Resp't. App. at 6a. As soon as defense counsel began to argue the merits of Mr. Freeman's constitutional claim, he cited *United States v. Calderon*, 829 F.3d 84 (1st Cir. 2016), a case involving a *Brady* claim. Resp't. App. at 5a. *Cf. Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004)). In *Calderon*, the First Circuit recognized that *Brady* material is a species of "newly discovered evidence," 829 F.3d at 88, and defense counsel cited the case for

the proposition that a more defendant-friendly standard of prejudice applies to *Brady* claims than other newly discovered evidence claims, 829 F.3d at 90.

In response, the State of New Mexico argued: "I'd also point out that we know that this was not information had by the State at the initiation of this case because [appointed defense counsel] himself was a prosecutor at the initiation of this case." Resp't. App. at 14a. Indeed, Mr. Freeman's appointed counsel at the motion hearing had been the prosecutor who presented his case to the grand jury and obtained the indictment. In rebuttal, Mr. Freeman's appointed counsel attempted to defend himself: "And I'm not saying the State was withholding evidence." Resp't. App. at 17a. The context makes clear that by "the State," appointed counsel was referring to himself or perhaps the District Attorney's Office more broadly. Certainly, appointed counsel's extemporaneous comment does not alter the legal analysis under *Brady*.

In his petition for a writ of certiorari from the New Mexico Supreme Court, Mr. Freeman wrote: "Specifically, this case presents the issues (1) whether a *Brady* violation may establish grounds for the withdrawal of a guilty plea, and (2) whether a *Brady* violation may render a guilty plea involuntary or unknowing."

3. The lower court denied Mr. Freeman's federal constitutional claim.

The District Court of Otero County denied Mr. Freeman's *Brady* claim because "his decision to plea[d] guilty was made after a risk/benefit analysis," and made various factual findings in support of its finding of a risk/benefit analysis. The district court's finding that Mr. Freeman "knew he had an entrapment defense to the charges" was subsidiary to its finding that Mr. Freeman engaged in a "risk/benefit

analysis." That the lower court did not expressly find that the State suppressed evidence is irrelevant; it ruled that notwithstanding the alleged *Brady* violation, Mr. Freeman's claim failed as a matter of law because he had already pled guilty.

This Court has jurisdiction to review the order. 28 U.S.C. § 1257; *Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012) (Section 1257 grants jurisdiction to review lower state court judgments if the highest state court denies discretionary review); *see also Wearry v. Cain*, 136 S. Ct. 1002, 1008 (2016) ("This Court, of course, has jurisdiction over the final judgments of state postconviction courts, see 28 U.S.C. § 1257(a), and exercises that jurisdiction in appropriate circumstances."). Importantly, there is nothing in the record to suggest any independent and adequate state law ground for the lower court's order. *Cf. Foster v. Chatman*, 136 S. Ct. 1737, 1746-47 (2016).

Here, Mr. Freeman's claim is properly before this Court, and the proper remedy is to reverse the order denying plea withdrawal and to remand for the proper application of law to Mr. Freeman's case.

Conclusion

This case is an ideal vehicle for resolving the question presented.

Respectfully submitted,

Charles D. Agoos
Attorney of Record
Assistant Appellate Attorney
Law Offices of the Public Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890
Charles.Agoos@lopdnm.us