No. 20-6570 and 20A110

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON BERNARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THIS IS A CAPITAL CASE
PETITIONER IS SCHEDULED TO BE EXECUTED DECEMBER 10, 2020, AT 6:00 P.M. EASTERN TIME

RELATED PROCEEDINGS

(*Updated since the time Mr. Bernard's Petition for Writ of Certiorari was filed*)

United States District Court for the Western District of Texas, Waco Division:

United States of America v. Brandon Bernard, No. W-99-CR-070 (2)

United States of America v. Brandon Bernard, No. W-04-CV-164

United States Court of Appeals for the Fifth Circuit:

United States of America v. Brandon Bernard, No. 00-50523

United States of America v. Brandon Bernard, No. 13-70013

United States of America v. Brandon Bernard, No. 18-70008

United States of America v. Brandon Bernard, No. 19-50837

United States of America v. Brandon Bernard, No. 19-70021

United States District Court for the Southern District of Indiana:

Brandon Bernard v. T.J. Watson, No. 2:20-CV-616

United States Court of Appeals for the Seventh Circuit:

Brandon Bernard v. T.J. Watson, No. 20-3379

Supreme Court of the United States:

Brandon Bernard v. United States of America, No. 02-8492

Brandon Bernard v. United States of America, No. 14-8071

Brandon Bernard v. United States of America, No. 18-6992

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I. SUMMARY OF ARGUMENT IN REPLY

The government's brief in opposition fails to engage with the fundamental issues at stake in this case. The government stubbornly refuses to acknowledge its own responsibility for frustrating Petitioner's right to a fair sentencing or to a meaningful post-conviction review process. But habeas is an equitable remedy, and the government's unclean hands are central to the question whether Petitioner's second 2255 motion should be deemed "successive" and barred from review, or whether the Court should interpret the habeas statutes flexibly, as it did in *Panetti v. Quarterman*, 551 U.S. 930 (2007), to accommodate review of his claims of government misconduct. At the same time, the government unfairly minimizes the significance of the evidence it suppressed and fails to address in a straightforward way how testimony about the structure of the "212 PIRU Bloods" from a highly qualified law enforcement expert could have placed Petitioner's culpability and the prospects of his "future dangerousness" in an entirely different light, persuading at least one juror to vote to spare his life. The government has not succeeded in discounting the important objections raised by numerous thoughtful federal appellate judges who agree with Petitioner that the Fifth Circuit's approach to § 2255(h) gives scant importance to Brady and incentivizes prosecutorial misconduct. In short, this Court's guidance is still called for, and this is the case in which to provide it.

II. ARGUMENT

A. The government's attempts to absolve itself of misconduct are unpersuasive.

As plainly stated in the Petition, the fundamental of component of the *Brady* violation here was the suppression of Sgt. Hunt's expert opinion – an opinion highly favorable to Bernard because it undercut the aggravating factor of future dangerousness and strengthened the mitigating factor that other equally culpable individuals (and indeed more culpable, as discussed *infra*) were not facing a sentence of death. The government confines its arguments entirely to the "continuing threat" aggravator, barely mentioning the "equally culpable co-defendants" mitigator. The government does not deny that it never disclosed Sgt. Hunt's expert opinion to any defense attorney charged with protecting Petitioner's life, despite continuously (to this day, *see* BIO at 22) representing that it had an open file policy that would have resulted in the disclosure of that opinion testimony, had the open file meaningfully existed in practice.

Unable to claim that it disclosed Sgt. Hunt's expert opinion as required by a half-century of well-settled law, the government argues that Petitioner has not proven that the government was aware of her opinions at the time of the trial. BIO at 23. While admitting that the record shows that, prior to the Petitioner's trial, the government asked Sgt. Hunt to "go back to see if any" of the participants in the murder "were on this chart…" BIO at 23, the government – remarkably – denies that this testimony supports any inference that Sgt. Hunt ever communicated her opinion of the "analysis of the hierarchy" to the government, *id*.

Is the government seriously asking this Court to believe that, having asked Sgt. Hunt specifically to examine these questions, the government never bothered to get an answer from her? That dubious proposition, even if the Court accepted it at face value, would not absolve the government of misconduct. Clearly, the government was aware that the chart and Sgt. Hunt's opinions regarding that chart (developed in part from doing what the government had specifically asked her to do), could either be inculpatory or exculpatory. If it failed to inquire of her, and she possessed the exculpatory information, the government still violated its *Brady* obligations. Under *Kyles v. Whitely*, 514 U.S. 419 (1995) it is irrelevant whether a member of the investigating team actually relayed the suppressed *Brady* material to the prosecutor trying the case. But the record here strongly suggests – if not conclusively proves – that she did. And a careful reader will note that the government has *never declared that she did not*.

The government contends the Court should excuse its failure to disclose Sgt. Hunt's opinion because Petitioner knew what his role in the gang was. BIO at 2, 12, and 24-25. This contention misconceives the important difference between *a fact* known to the defense and *evidence* known to the defense.[1] Here, the evidence was Sgt. Hunt's expert opinion; Bernard did not know of the existence of that opinion and could not have reasonably learned of it simply by virtue of knowing his own position in the gang.

[1] "[E]vidence is not 'suppressed' if the defendant knew of the evidence and could have obtained it through the exercise of reasonable diligence." *United States v. Walker*, 746 F.3d 300, 306 (7th Cir. 2014)

Although the Fifth Circuit made a similar passing remark in a footnote when declining to authorize a successive petition, *In re: Bernard*, 826 F. App'x 356, 358 n.2 (5th Cir. Sept. 9, 2020), if taken as a sweeping proposition this comment is contrary to decades of *Brady* jurisprudence. Courts have regularly found *Brady* violations where the evidence is unknown to the defendant, and he knows only the fact that the evidence would support. Otherwise, the government would never be required to disclose witnesses who could testify to a defendant's innocence – since that would be a fact of which the defendant himself would be aware. In *Brady* itself, the suppressed material was a statement by the defendant's companion that he, not Brady, committed the murder. Yet Brady would have known which of them committed the murder, just as Petitioner had at least some idea of his rank in the gang,

United States v. Severdija, 790 F.2d 1556 (11th Cir. 1986), illustrates the distinction. There, the government failed to turn over a law enforcement report by Ensign Barker of what the defendant had said to Barker, which was consistent with his defense. The government argued that the statement was not *Brady* material because the defendant "was certainly aware of any statements he had made[.]" *Id.* at 1159. The court explained that the government's position ignored "the independent significance of Barker's written statement." *Id.* Here, Sgt. Hunt's opinion likewise had "independent significance" as evidence of Bernard's bottom-rank position in the PIRU gang.

Cases that are contrary to the government's position and the Fifth Circuit's footnote can be easily multiplied. *See, e.g., Goudy v. Basinger*, 604 F.3d 394, 399 (7th

Cir. 2010 (state failed to turn over witness statements identifying someone other than the defendant as the shooter, where the defendant knew whether he was the shooter and, because he was present at the shooting, would have known who the shooter was); *Toliver v. McCaughtry*, 539 F.3d 766, 771 (7th Cir. 2008) (witness statement that "tended to show" that another individual perpetrated a killing alone and that defendant tried to dissuade him from doing so was *Brady* material, where defendant would have known both that he didn't aid the killing and did attempt to talk the perpetrator out of it); *Sawyer v. Hofbauer*, 299 F.3d 605, 609 (6th Cir. 2002) (reversing denial of habeas petition; evidence showing that semen stain on victim's underwear was not defendant's was *Brady*, where defendant would have known whether he was the source of the semen). Even the Fifth Circuit has applied this distinction, contrary to its recent footnote. *See, e.g., Mahler v. Kaylo*, 537 F.3d 494, 497 (5th Cir. 2008) (reversing denial of habeas petition; state withheld witness statements supporting defendant's self-defense claim that fight between groups was ongoing when he shot victim, where defendant would have had personal knowledge that the fight was ongoing).

The government next suggests that a scribbled chart seized from an unknown high school student should be deemed the functional equivalent of expert opinion testimony from an experienced law enforcement officer with specialized knowledge. Sgt. Hunt had dedicated fourteen years of her professional career to studying and understanding local gangs, including the one at issue in Petitioner's trial. ROA.19-70021.2315. That is precisely what made her opinions so powerful. And what elevated

the value of the police-created chart is that Sgt. Hunt endorsed as accurately portraying the hierarchy it depicted. But the value of her opinions didn't end with just endorsing the relative positions of the gang members portrayed on the chart. Her wealth of knowledge extended far beyond that, since she knew what roles those members had by virtue of their position in the chart. For example, she identified Tony Sparks, who was more than 30 rankings above Brandon, an enforcer or a recruiter within the gang. ROA.19-70021.2320-21. According to Sgt. Hunt, Sparks' positioned on the chart indicated the "he put in a lot of work into the organization and became a very trusted member of the group." ROA.19-70021.2322. By "work," Sgt. Hunt meant Sparks participated in a number of violent criminal acts, such as "licks, robberies, assaults, shootings, thefts, burglaries, all of which have been notated on his gang file." *Id.* Because of his age, Sparks did not face the death penalty, even though he participated in the Bagleys abduction and their prolonged attention. Terry Brown did not face the death either because of his age – he was only two months and 9 days short of 18. Brown's actions in the offenses essentially mirrored Bernard's. Like Sparks, Sgt. Hunt testified that Brown was positioned far above Brandon in the gang hierarchy, as was Christopher Vialva, the ringleader in the crimes, ROA.19-70021.2321, who has since been executed. The government's attempt at conflating the specialized knowledge of an esteemed law enforcement expert with a layperson's personal knowledge strains credibility. *See Skipper v. South Carolina*, 476 U.S. 1, 7-8 (1986) (respecting defendant's good conduct in jail, a jailer is typically a better witness than a defendant's family member).

With regard to the chart produced by law enforcement, the government ignores the basic but unavoidable problem of admissibility. The scribbled chart – apparently produced by an anonymous high school student – was not self-authenticating. And who could be called to authenticate it? The unknown teenager who produced it, presumably himself a gang member? Even if so, testimony from such a witness would have paled in significance compared to the views of a decorated police sergeant who was the Vice President of the Texas Gang Investigators Association. ROA.19-70021.2315..

B. Petitioner has diligently pursued the pending claims since he discovered the government's malfeasance.

The government contends that the Court should not hear this Petition, complaining that Petitioner has engaged in an "inexcusable delay." BIO at 14. The record not only offers no support for that conclusion, it affirmatively disproves it. Petitioner filed the underlying *Brady/Napue* motion with the district court more than **621 days** before the government chose to set an execution date for Petitioner, *Compare* WDTX:dkt. 661 [ROA.19-70021.2245-2312] *with* WDTX:D.C. Dkt. 698 [BIO at 4], and has been diligently seeking relief ever since. The Fifth Circuit only denied en banc review on November 6, 2020. Under the rules of procedure that apply to everyone else, Petitioner's petition for certiorari would not even be due until April 5, 2010.[2] And in fact, Petitioner and this Court could have benefit from waiting until

[2] In light of the ongoing pandemic, this Court has extended the time for filing a petition of certiorari from 90 to 150 days from the lower court's final judgment. See Supreme Court Order List: 589 U.S. (March 19, 2020); Sup. Ct. R. 13.

that time to consider this Petition since a clearly defined circuit split may emerge by then. But the government forced an accelerated time frame by setting an execution date while this appeal process was ongoing, in tension with 18 U.S.C. § 3596(a).

Moreover, the government afforded Petitioner only 55 days' notice of his execution date, which triggered a 30-day window to prepare his clemency submission. Since receiving only 55 days' notice, Petitioner's three-attorney defense team has worked feverishly developing mitigation material for clemency, submitted a clemency petition, argued that petition before the Acting Pardon Attorney, presented two additional motions to sentencing court, and developed and filed a § 2241 in the Southern District of Indiana, which was just appealed to the Seventh Circuit.

The reality of the situation is that because the government unilaterally made the discretionary decision to execute Petitioner on short notice, his small legal team has been stretched unfairly thin. In that brief few weeks, counsel have been diligent in pursuing all avenues of relief on Petitioner's behalf. This work included two motions and replies before the sentencing court; preparing and filing a lengthy and well-supported clemency petition; making a formal presentation to the Department of Justice Pardon Attorney; filing a § 2241 habeas petition and motion for stay in the Southern District of Indiana; preparing and filing an appeal and emergency motion for stay to the Seventh Circuit; *and* preparing for the petition for certiorari and emergency motion for stay that are now pending before this Court.

Petitioner's legal team therefore has an extremely demanding workload, driven entirely by the arbitrary scheduling of Petitioner's execution date. In no other

circumstance would an attorney in good faith agree to take on such a large volume of work in such a limited of time, as such a quantity of work over a compressed temporal space invites degraded performance and error. The problem has been especially acute for Mr. Owen, who represented Orlando Hall (his client of twenty years), who was executed on November 19, 2020. Mr. Owen's obligations to Mr. Hall kept him from turning his focus exclusively to Petitioner's case until November 20.

Given that the government alone is responsible for the accelerated pace of all the legal proceedings surrounding Petitioner's scheduled execution, it should not now be heard to complain that the proceedings are unable to proceed at a more orderly pace, as they should, given the weight of the issues. The government's contentions that defense counsel have been dilatory are belied by the facts.

C. The government's bold accusation that Petitioner could have brought his *Brady*/*Napu*e claims earlier ignores that its misconduct kept him from doing so.

Throughout its response, the government tries to lay the fault at Petitioner's feet for not bringing the pending *Brady*/*Napu*e claims in his initial § 2255 petition, BIO at 3, 18, conveniently overlooking the fact that its suppression of the underlying facts prevented Petitioner from advancing these claims earlier. The government can make no credible claim that Petitioner either knew of Sgt. Hunt's testimony or could have learned of it through due diligence. As explained in *Banks v. Dretke*, 540 U.S. 668, 695 (2004), and *Strickler v. Greene*, 527 U.S. 263, 283 n. 23 (1999), when the government represents that it has an open file policy, the defense need not "scavenge for hints of undisclosed *Brady* material[.]"

D. The government's response fails to meaningfully address the impact of its misconduct on the sentencing outcome.

The government declares that "no reasonable probability exists that either the gang diagrams or Sergeant Hunt's 2018 testimony or both would have caused the jury to recommend a sentence of life imprisonment rather than death." BIO at 26. But in making this blithe pronouncement, the government fails even acknowledge a critical mitigating factor that the jurors were called upon to evaluate when deciding Brandon's fact – a factor that would have been greatly strengthened by the very evidence that the government suppressed.

To decide whether Mr. Bernard deserved to die for his role as an accomplice to Stacie Bagley's murder, the jury was charged with making findings about several aggravating and mitigating factors, and then weighing them. Here, the centrally important aggravating factor related to future dangerousness, asking whether Bernard was "likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others." ROA.19-70021.359. The centrally important mitigating factor asked whether "Another defendant or defendants who may be equally culpable in the crime will not be punished by death." ROA.19-70021.361. A death sentence could be returned only if "upon consideration of whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death[.]" ROA.19-70021.366.

The government's response completely overlooked this weighing process. This amounts to a critical flaw in its attempt to reconstruct the jurors' sentencing logic, since jurors could easily have concluded – if armed with Sgt. Hunt's expert opinions – that Petitioner presented little danger to others, such that he could be safely confined in prison if his life were spared. This is a commonsense conclusion because Petitioner's marginal position within the gang did not suggest that he would be easily recruited into a prison gang, contrary to the government's presentation at trial.

Likewise, the jurors, armed with Sgt. Hunt's opinions, could have concluded that it was unfair for Petitioner to face a death sentence while neither Brown nor Sparks would, since their positions of leadership within the gang suggested a level of culpability far greater than Petitioner's. This is hardly fanciful, since both Brown and Sparks had equal or greater roles in the offenses and the gang and yet did not face a death sentence at all. The comparison to Brown is especially compelling, since his offense conduct parallels Bernard's, yet Brown escaped a possible death sentence because at the time of the crime he was just under 18, as opposed to 18 like Bernard.

A reasonable juror's view of both of these factors could have been significantly altered by Sgt. Hunt's opinions. Her information would have simultaneously weakened the case for the "continuing threat" aggravator while strengthening the case for the mitigating factor of "equally culpable co-defendants not facing death." The suppressed Brady material therefore fundamentally alters the sentencing calculus in a way that cannot be deemed harmless.

III. CONCLUSION

The Court should grant certiorari and issue an accompanying stay of execution.

Respectfully submitted,

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