

No.

20-7756

IN THE

ORIGINAL

Supreme Court, U.S.  
FILED

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SUPREME COURT OF THE UNITED STATES

BRANDON TANDEM - PETITIONER

vs.

THE PEOPLE OF THE STATE OF COLORADO - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE COLORADO COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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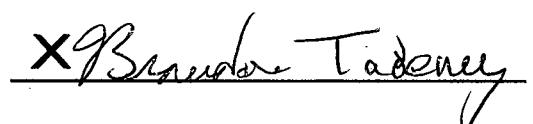
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I hereby certify that this brief complies with all requirements of Rules 10-14 (Petitioning for certiorari) Rule 29 (Filing and service on opposing party or counsel) Rule 30 (Computation and extension of time) Rules 33.2 and 34 (Preparing pleadings on 8 1/2 x 11 inch paper) Rule 39 (Proceedings in forma pauperis) including all formatting requirements set forth in these rules.

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**PETITION FOR WRIT OF CERTIORARI**

Pursuant to Rules 10-14, the petitioner, Brandon Tademy, respectfully petitions this United States Supreme Court to issue a writ of certiorari to the court of appeals in the above-captioned case. The petitioner sets forth the following grounds in support of this petition.

**STATEMENT OF JURISDICTION**

The date on which the highest state court decided my case was July 9, 2020, and a copy of the order denying certiorari appears at Appendix 2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. United States Constitutional Amendments V and XIV Rights to Due Process of Law.
2. United States Constitutional Amendment VI Right to Compulsory Process.

**STATEMENT OF THE ISSUES**

- I. Whether the district court erroneously denied the petitioner's motion to dismiss or other appropriate sanctions for destruction of evidence, in violation of the petitioner's state and federal constitutional right to due process.
- II. Whether the district court erroneously failed to instruct the jury regarding uncorroborated accomplice testimony, in violation of the petitioner's state and federal constitutional right to due process.
- I. Whether the district court erroneously allowed the jury unsupervised access during deliberations to the audiotape of the jail calls, in violation of the petitioner's state and federal constitutional right to due process.

### **STATEMENT OF THE CASE AND FACTS**

The petitioner, Brandon Tademy, was charged with first degree murder. (R. CF pp. 8-10.) This charge arose from allegations that on November 3, 2015, Eric Hines was shot and killed outside of his room at the Sand and Sage Motel. (R.CF pp.8-10.) Mr. Tademy's defense was that he did not shoot Mr. Hines and that the only witness who identified him as the shooter, Irina Malaya, was not credible because she was motivated to cooperate with the prosecution.

A Jury trial was conducted November 28 through December 1, 2017, at the conclusion of which the jury found Mr.Tademy guilty of first degree murder. (R. CF pp. 234; R. Tr. 12/1/17 pp. 134.) On December 7, 2017, the district court sentenced Mr. Tademy to life without parole in the Department of Corrections. (R. CF pp. 234; R. Tr. 12/7/17 pp.7.).

On appeal, the Court of Appeals affirmed Mr. Tademy's conviction and sentence in an unpublished opinion. (Appendix.) Mr. Tademy now seeks certiorari review by this Unites States Supreme Court.

## **SUMMARY OF THE ARGUMENT**

The district court erroneously denied Mr. Tademy's motion to dismiss or other appropriate sanctions for destruction of evidence, where (1) the evidence was destroyed by Detective Michael Martinez; (2) the evidence possessed exculpatory value that was apparent before it was destroyed; (3) Mr. Tademy was unable to obtain comparable evidence by other reasonably available means, and (4) dismissal or reduction of the charge were proper sanctions under the circumstances of this case.

The district court erroneously failed to instruct the jury regarding uncorroborated accomplice testimony, where (1) the prosecution's case is based on the uncorroborated testimony of Irina Malaya, (2) no other evidence exists of Ms. Malaya's testimony identifying Mr. Tademy as the shooter, and (3) the evidence of Mr. Tademy's guilt in this case is not overwhelming.

The district court erroneously allowed the jury unsupervised access during deliberations to the audiotape of the jail calls between Mr. Tademy and Ms. Malaya, where (1) this constituted testimonial evidence by Ms. Malaya which was subject to supervision by the court, and (2) the failure to supervise the jury's access to the audiotaped jail calls placed undue emphasis on this specific piece of evidence, which caused unfair prejudice to Mr. Tademy.

## **ARGUMENT**

### **I. The district court erroneously denied the petitioner's motion to dismiss or other appropriate sanctions for destruction of evidence, in violation of the petitioner's state and federal constitutional right to due process.**

#### **A. Standard of Appellate Review and Record Reference**

The regulation of discovery matters lies within the discretion of the trial court and thus is reversed for and abuse of discretion. See People v. Dill, 904 P.2d 1367 (Colo. App. 1995).

In this case, Mr. Tademy preserved this issue for appellate review by filing a Motion for Sanctions for a Discovery Violation and Destruction of Evidence, which the district court denied after a hearing. (R CF pp. 38-41; R. Tr. 8/30/17 pp. 114- 115.)

#### **B. Applicable Law**

The Due Process Clause of the Fourteenth Amendment mandates that the state disclose to criminal defendants' favorable evidence which is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); People v. Greathouse, 742 P.2d 334, 338-39 (Colo. 1987). In Brady, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process, irrespectively on the good faith or bad faith of the prosecution." Brady. 373 U.S. at 87.

To demonstrate that the state's failure to preserve potentially exculpatory evidence violated the Due Process Clause of the United States or Colorado Constitution, a defendant must establish that (1) the evidence was destroyed by the prosecution; (2) the evidence possessed exculpatory value that was apparent before it was destroyed; and (3) the

defendant was unable to obtain comparable evidence by other reasonably available means. People v. Simpson, 93 P.3d 551, 556-557 (Colo. App. 2003).

In selecting the remedy for destruction of evidence, "the court must weigh the significance of the evidence lost or destroyed and the conduct of the prosecution which led to its loss or destruction." People ex rel. Gallagher v. District Court, 656 P.2d 1287, 1293 (Colo. 1983). In fashioning a sanction to achieve the goal of eliminating a due process violation, a court must strive to restore as nearly as possible the level playing field that existed before the discovery violation. People v. District Court, 808 P.2d 831,837 (Colo. 1991). In appropriate cases, dismissal or reduction of the charge is a proper sanction. Gallagher, 656 P.2d 1287, 1293 (upholding reduction in charge from first degree to second degree murder when police officers failed to preserve victim's hands in condition suitable for trace metal test).

### C. Facts and Analysis

Mr. Hines was shot outside his motel room on November 3, 2015. Numerous witnesses were on the grounds of the motel during the shooting. However, the lead detective for this homicide, Michael Martinez, only obtained a statement from one of the witnesses, Brandon Case. Mr. Case was driving in the area shortly after the shooting and gave a description of the suspect vehicle, the driver of that vehicle, and the suspect. Mr. Case's statement was audio and video recorded, but that recording could not be located by the prosecution and was presumably destroyed.

On November 17, 2015, approximately two weeks after the shooting, Kenneth Sipes provided information that he knew who shot Mr. Hines. According to Mr. Sipes, he was playing dice with Mr. Hines and the shooter right before the shooting, and the motive for

the shooting was the result of the dice game. The evidence indicated that Mr. Hines was in fact playing dice before he was killed, as two bloody dice were found in his pants pockets: The person described by Mr. Sipes as the shooter did not match the description of Mr. Tademy. The interview of Mr. Sipes was audio and video recorded, but it could not be located by the prosecution and was presumably destroyed.

On August 25, 2017, approximately four days prior to the scheduled trial in this matter, the defense discovered it had not previously received a master witness list created by Detective Martinez early in the case. This master witness list included the moniker "Two Face." After Mr. Hines was shot, someone wrote "Two Face Did It" on the door of Mr. Hines' motel room where he was shot, indicating who shot Mr. Hines. The master witness list also indicated that Detective Martinez had connected "Two Face" to an individual named Omar King however, Detective Martinez's investigative report indicated that he was unable to connect an individual to the moniker "Two Face," and Detective Martinez falsely testified at the preliminary hearing in this case that he was unable to connect an individual to "Two Face." This master witness list also indicated that there were other alternate suspects in the shooting which had not been previously disclosed to the defense, including someone who had gotten into a fight with Mr. Hines right before the shooting, as well as individuals with the monikers "Dizzy Loco" and "Marbles." (R. Tr.8/25/17 pp. 20-21.)

To exacerbate matters, the prosecutors did not follow up with Detective Martinez to obtain this information prior to August 25, 2017, and this master witness list was only discovered due to the defense's subpoena. (R. Tr. 8/30/17 pp. 99-1 OO.) As a result of this discovery violation, the defense moved for dismissal of the case, or at least a reduction of the charge. (R CF pp. 3 8-41; R. Tr. 8/25/17 pp. 7; 8/30/17 pp. 95-96; 98.) After a hearing,

the district court denied the motion for dismissal of the case and the motion for reduction of the charge, and instead ordered for a continuance of trial. (R. Tr. 8/30/17 pp. 114-115.)

### ***1. Interview of Brandon Case***

Here, the recorded interview of Mr. Case was destroyed by state action, as the prosecution conceded. (R. Tr. 3/2/17 pp. 161.) However, the Court of Appeals' opinion states that the defendant "does not assert either that the evidence in [Brandon Case's] recorded interview possessed exculpatory value that was apparent before it was destroyed, or that he was unable to obtain comparable evidence by other reasonably available means." (Slip op. at ¶14.) To the contrary, Mr. Tademy specifically argued in his appeal that he "was unable to obtain comparable evidence by other reasonably available means. The fact that Detective Martinez wrote a report regarding Mr. Case's interview was insufficient because Detective Martinez's memory was limited to what he wrote in his report." (Reply Brf, pp. 3.) And although Mr. Tademy cannot know the exact exculpatory value of Mr. Case's interview because it was destroyed, the interview is presumed to possess exculpatory value because Mr. Case was the only witness interviewed at the scene of the shooting and his interview could have been used to impeach him at trial.

### ***2. Interview of Kenneth Sipes***

As for the recorded interview of Mr. Sipes, in which he stated that "Two Face" killed Mr. Hines, the district court found that Mr. Tademy had established each of the Greathouse factors for this destroyed interview. (CF pp. 64-67.) The Court of Appeals "agree[d] with this conclusion, although our reasoning differs somewhat from that of the trial court." (Slip op. at ¶16.) Accordingly, the only issue is whether the district court selected an adequate remedy for the destruction of evidence in this case.

***3. Dismissal or reduction of the charge are proper sanctions under the circumstances of this case***

In this case, the defense moved for dismissal of the charge, or at least reduction of the charge, as a sanction for the prosecution's destruction of significant exculpatory evidence regarding alternate suspects in this case. (R. Tr. 3/2/17 pp. 191-193.) The district court denied the defense's motion and instead gave the jury an instruction regarding Detective Martinez's destruction of evidence, but it was not worded like the instruction requested by the defense. (R. Tr. 1/30/17 pp. 142-143, 165.)

On appeal, Mr. Tademy maintains that the district court should have dismissed this case, or at least reduced the charge, due to the prosecution's destruction of exculpatory evidence. Here, the evidence lost or destroyed was significant because it related to alternate suspects in the shooting, and thus directly related to Mr. Tademy's defense that he was not the shooter. Moreover, Detective Martinez's conduct which led to the loss or destruction of the evidence suggests bad faith, particularly when combined with the fact that he also withheld from the defense the master witness list containing exculpatory evidence of possible alternate suspects.

Under these circumstances, dismissal is appropriate in Mr. Tademy's case to fulfill the second goal of sanctions, deterrence of improper police conduct. See People v. District Court, 656 P.2d at 1292 n. 11 (good faith or bad faith of police is significant in selection of appropriate sanction for due process violation); see also People v. Shaw, 646 P.2d 375, 381 n. 1 O (Colo. 1 982) ("the degree of governmental culpability involved in the loss or destruction of the evidence and the need to deter such conduct in the future" are factors in fashioning a remedy).

Dismissal of the charge against Mr. Tademy was appropriate because the prosecution destroyed the recording of Mr. Sipes interview, and then withheld a witness list naming alternate suspects, including the individual named by Mr. Sipes as the shooter. Mr. Tademy's case is similar to other cases in which the Colorado Supreme Court has upheld dismissal of charges due to discovery violations. For example, dismissal of charges was appropriate when the prosecution had been ordered to disclose a confidential informant who witnessed the crime and might have possessed exculpatory evidence, and thereafter the prosecution failed to make reasonable efforts to locate the informant. People v. Rodriguez, 645 P.2d 851, 853-54 (Colo. 1982); see also People v. Vigil, 729 P.2d 360,368 (Colo. 1986) ( dismissal of charges was appropriate when prosecution refused to comply with court's order to produce confidential informant for *in camera* hearing, and informant's testimony was necessary to determine legality of arrest and seizure of evidence); People v. Martinez, 658 P.2d 260,262 (Colo. 1983)(same).

Here, the district court's sanction of continuing trial so that the defense could conduct further investigations was insufficient because the officer's reports were incomplete, and the defense did not have complete information to interview other witnesses. Thus, the district court's continuance of trial and the jury instruction regarding the destruction of evidence did not achieve the goal of eliminating a due process violation by restoring a level playing field. Rather, dismissal of the charge was an appropriate sanction for the bad faith violation of due process in this case.

**II. The district court erroneously failed to instruct the jury regarding uncorroborated accomplice testimony, in violation of the petitioner's state and federal constitutional right to a fair trial and due process.**

#### A. Standard of Appellate Review and Record Reference

Appellate courts review jury instructions *de novo* to determine whether they accurately inform the jury of the governing law People v. Carter, 402 P.3d 480, 489 (Colo. App. 2015). When considering whether a defendant is entitled to requested instructions, courts consider the evidence in the light most favorable to the defendant. Mata-Medina v. People, 71 P.3d 973, 979 (Colo. 2003).

This issue is preserved for appellate review because the defense requested a jury instruction regarding uncorroborated accomplice testimony, which the district court denied. (R. CF pp. 231; R. Tr. 12/1/17 pp. 8-10.)

#### B. Applicable Law

Colorado courts have consistently upheld the giving of supplemental instructions, even when unnecessary, if those instructions properly state the law. People v. Dunlap, 124 P.3d 780 (Colo.App. 2004). The failure to give requested instructions is not harmless beyond a reasonable doubt when evidence of the defendant's guilt is not overwhelming. People v. Cruz, 903 p .2d 1198, 1200 (Colo.App. 1995).

A jury instruction warning the jury to act with care and caution when considering accomplice testimony is to be given only when the prosecution's case is based on uncorroborated testimony of an accomplice. People v. Montoya, 942 P.2d 128 7, 1293 (Colo. App. 1996). The propriety of a trial court's refusal to give this instruction thus turns on whether corroborating evidence of the accomplice's testimony exists in the record. *Id.* Evidence to corroborate an accomplice should identify the defendant and show his connection with the offense, rather than merely tending to prove that an offense has been committed. *Id.*

### C. Facts and Analysis

At Mr. Tademy's trial, only one witness identified Mr. Tademy as the individual who killed Mr. Hines. Irina Malaya, who cooperated with the prosecution to avoid being charged in this case and to avoid having her children taken away from her, testified that she drove Mr. Tademy away from the scene after he killed Mr. Hines. (R. Tr. 11/29/17 pp. 192.) All the other evidence simply established that someone killed Mr. Hines, but no other evidence established that it was Mr. Tademy who killed Mr. Hines.

Accordingly, the defense tendered a jury instruction regarding uncorroborated accomplice testimony, which tracked the language of the Colorado model jury instructions. COLJI D:05 (2016). (R. CF pp. 231.) The district court denied this tendered jury instruction, ruling that there was corroboration of Ms. Malaya's testimony. (R. Tr. 12/1/17 pp. 10.)

However, corroborating evidence should identify the defendant and show his connection with the offense, rather than merely showing that an offense has been committed. Montoya, 942 P.2d at 1293. The fact that Ms. Malaya's testimony correctly stated the location of the shooting and identified Mr. Tademy as the shooter is not sufficient corroboration of Mr. Tademy being the shooter in this case. First, Ms. Malaya cannot corroborate her own testimony. More importantly, Ms. Malaya's correct statement about the location of the shooting merely shows that she knew where the shooting occurred, it does not establish that Mr. Tademy was the shooter. Additionally, evidence of the jail calls between Mr. Tademy and Ms. Malaya only further indicates that Ms. Malaya was trying to implicate Mr. Tademy as the shooter but does not constitute evidence which actually corroborates Ms. Malaya's identification of Mr. Tademy as the shooter.

Furthermore, the videotapes of the shooting simply show an individual shoot Mr. Hines, but the identity of the shooter is obscured, and Ms. Malaya is the only witness who testified that Mr. Tademy was the shooter on the videotape. Moreover, the videotapes of the shooting shows that the individual Ms. Malaya claimed to be Mr. Tademy was wearing dark-colored or black pants, while the shooter was wearing light-colored pants. Additionally, there was no physical evidence from the crime scene tying Mr. Tademy to the shooting.<sup>1</sup> as such, the evidence of Mr. Tademy's guilt was not overwhelming.

Here, the district court erroneously failed to instruct the jury to be cautious about the uncorroborated testimony of Ms. Malaya. This jury instruction was particularly important in this case because the only evidence that Mr. Tademy was involved in the shooting of Mr. Hines came from the testimony of Ms. Malaya. This jury instruction properly reflected the relevant law, it was not duplicative of any other instruction, and it would not have confused the jury. Under these circumstances, the district court should have given the jury the tendered instruction regarding uncorroborated accomplice testimony.

**III. The district court erroneously allowed the Jury unsupervised access to audiotapes during deliberations, in violation of the petitioner's state and federal constitutional right to a fair trial.**

**A. Standard of Appellate Review and Record Reference**

Control over the use of exhibits during jury deliberations remains within the discretion of the trial court. Frasco v. People, 165 P.3d 701, 704 (Colo. 2007). As it is reviewed for an abuse of discretion, a court's refusal to exclude or otherwise limit the use

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<sup>1</sup> Contrary to the Court of Appeals' statement of the facts, the evidence introduced at trial did not establish that Mr. Tademy had a pistol. (Slip op. at ¶4)

of an exhibit will generally be overturned when it is manifestly arbitrary, unreasonable, or unfair. DeBella v. People, 233 P.3d 664, 667 (Colo.2010).

This issue is preserved for appellate review because the defense objected to the jury having unsupervised access to the audiotape of the jail calls between Mr. Tademy and Ms. Malaya. (R. Tr. 12/1/17 pp. 118.)

#### **B. Applicable Law**

The trial court in criminal proceedings has an obligation, much as it does with regard to the admissibility of evidence generally, to assure that juries are not permitted to use exhibits in a manner that is unfairly prejudicial. Frasco, 165 P.3d at 704. Trial courts must ultimately retain discretionary control over which jury exhibits will be allowed to go to the jury room and under which, if any, restrictions. Id. at 705. Trial courts must oversee with caution jury use of trial exhibits effectively substituting for trial testimony. Id. At 704. Without mandating time limitations on jury access or particular limiting instructions concerning jury use of such exhibits, a trial court is obligated to exercise its discretion to guard, as with jury review of specific trial testimony itself, against the risk that testimonial exhibits will be given undue weight or emphasis. Id.

#### **C. Facts and Analysis**

During jury deliberations in Mr. Tademy's case, the jury asked, "May we please have a computer to review exhibits on compact discs." (R. CF pp. 218.) Defense counsel objected to the jury having unfettered access to the CDs containing the audiotape of the jail calls between Mr. Tademy and Ms. Malaya and the videotape of the shooting from surveillance cameras. (R. Tr. 12/1/17 pp. 118.) Defense counsel requested that the jury listen to the audiotape and/or watch the videotape in open court. (Id.)

The district court denied defense counsel's request, and instead gave the jury unsupervised access to all of the audiotaped and videotaped evidence but limited the jury's access to the jail calls to one hour. (Id. at 125-127.) The court also gave the jury a cautionary instruction regarding the audiotapes and videotapes. (R. CF pp. 219.) Defense counsel objected to this instruction as being an insufficient remedy for the court allowing the jury unsupervised access to the jail calls. (R. Tr. 12/1/17 pp. 133.)

On appeal, the defendant asserts that the district court erroneously gave the jury unsupervised access to the audiotape of the jail calls between Mr. Tademy and Ms. Malaya, where this constituted testimonial evidence and thus subject to limited access by the jury during deliberations. The district court's failure to supervise the jury's access to the audiotaped jail calls placed undue emphasis on this specific piece of evidence, which caused unfair prejudice to Mr. Tademy. The court's one hour limit on the jury's ability to listen to the jail calls during deliberations did not minimize the undue emphasis on this evidence because this time limit may have caused the jury to feel **more** pressure to listen to the jail calls as much as possible in one hour. In fact, the jury came back with a verdict in less than 1 hour and 40 minutes after the court decided to give the jurors unsupervised access, thus suggesting that the jury unduly focused on the audiotaped jail calls for one hour, and then quickly returned a verdict soon thereafter. (R. Tr. 12/1/17 pp. 133).<sup>2</sup>

Given the lack of physical evidence identifying Mr. Tademy as the shooter in this case, it is likely that such undue emphasis substantially influenced the verdict and the

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<sup>2</sup> After the district court decided to give the jury access to the audiotaped jail calls in the jury room, the court recessed at 3:20 p.m. The court then reconvened at 5:01 p.m. to announce the jury's verdict. During this 1 hour and 40 minutes, the court staff had to give the jury the laptop computer on which to hear the audiotapes and set up the audiotapes on the laptop computer. The jury then had to listen to the audiotapes, deliberate, and inform the court that it had reached a verdict. The court then had to reconvene the parties before going back on the record.

fairness of the proceedings against Mr. Tademy, and the district court's error in allowing the jury unsupervised access to the jail calls during deliberations was not harmless error.

### CONCLUSION

For the foregoing reasons, this United Supreme Court should grant the Petition for Writ of Certiorari to correct the Colorado Supreme Court's and the Court of Appeals erroneous rulings in this matter.

Respectfully submitted this 10 day of Feb, 2021.

X Brandon Tademy

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