

No. 19-2946

IN THE

Supreme Court of the United States

JACK ALBERT CHAPPELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

Under *Brady v. Maryland*, 373 U.S. 83 (1963), does prosecutorial misconduct and mishandling of evidence constitute a *Brady* violation when the Government prosecuting attorney refused to disclose critical information regarding the drugged and intoxicated state of Government witness Leslee Ball and knowingly permitted her to testify at trial.

II. TABLE OF CONTENTS

I.	QUESTION PRESENTED.....	i
II.	TABLE OF CONTENTS.....	ii
III.	TABLE OF AUTHORITIES.....	iii
IV.	PETITION FOR WRIT OF CERTIORARI.....	1
V.	OPINIONS BELOW.....	1
VI.	JURISDICTION.....	1
VII.	CONSTITUTIONAL PROVISIONS INVOLVED.....	1, 2
VIII.	STATEMENT OF THE CASE	2
	1. Drugged & Intoxicated Government Witness Testifies at Trial..	3
	2. Direct Appeal.....	6
IX.	REASONS FOR GRANTING THE WRIT	7
	A. TO AVOID FUTURE PROSECUTORIAL MISCONDUCT RELATING TO THE HANDLING OF EVIDENCE AND DEPRIVATION OF A CRIMINAL DEFENDANT'S DUE PROCESS RIGHTS TO A FAIR TRIAL, THIS COURT SHOULD REVIEW THE BRADY VIOLATION STANDARD AS OUTLINED UNDER <i>BRADY V. MARYLAND</i> , 373 U.S. 83 (1963) AND ITS PROGENY.	
X.	CONCLUSION.....	12
XI.	APPENDIX.....	13
	i. Order Denying En Banc Motion.....	14
	ii. Order Denying Appeal	15
	iii. Judgment on Criminal Case	24
	iv. Order Denying Defendants Motion for New Trial	32

III. TABLE OF AUTHORITIES

Cases

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963).....	i, ii, 2, 5, 6, 7, 8, 9, 10
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	5
<i>Imbler v. Pachtman</i> , 424 U.S. 409, 427 (1976).....	7
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	6, 7
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	6, 7
<i>United States v. Chappell</i> , 990 F.3d 673 (8th Cir. 2021)	5, 6, 8
<i>United States v. Dones-Vargas</i> , 936 F.3d 720, 722 (8th Cir. 2019)	5
<i>Youngblood v. West Virginia</i> , 547 U.S. 867, 869 (2006).....	7

Statutes

28 U.S.C. § 1254	1
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Constitutional Provisions

United States Constitution, Amendment V	1
United States Constitution, Amendment XIV	2

IV. PETITION FOR WRIT OF CERTIORARI

Mr. Chappell, an inmate currently incarcerated at FCI Victorville Medium in Victorville, California, by and through Theodore Sandberg, counsel of record, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

V. OPINIONS BELOW

The judgment of the originating case by the United States District Court for the District of North Dakota was filed on September 9, 2019. The decision by the United States Court of Appeals for the Eighth Circuit affirming the United States District Court judgment, reported as *United States v. Chappell*, 990 F.3d 673 (8th Cir. 2021) was filed on March 10, 2021. Petition for rehearing *en banc* to the United States Court of Appeals for the Eighth Circuit was denied on April 23, 2021.

VI. JURISDICTION

Mr. Chappell's Direct Appeal and subsequent petition for rehearing *en banc* to the United States Court of Appeals for the Eighth Circuit was denied on April 23, 2021. Mr. Chappell invokes this Court's jurisdiction under 28 U.S.C. 1254, having timely filed this petition for a writ of certiorari within ninety days of the United States Court of Appeals for the Eighth Circuit judgment.

VII. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person

be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

United States Constitution, Amendment XIV:

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.

U.S. Const. amend. XIV.

VIII. STATEMENT OF THE CASE

Jack Albert Chappell ("Chappell") was convicted by jury on March 1, 2019, on two counts. Count I: One count of Conspiracy to Distribute and Possess with Intent to Distribute a Controlled Substance. Count II: One count of Conspiracy to Commit Money Laundering. On September 6, 2019, Chappell was sentenced to 360 months on Count I, and a concurrent 240 months for Count II. Chappell filed his Notice of Appeal on September 7, 2019. Chappell asserts that the District Court improperly denied Chappell a new trial when evidence was discovered after the trial that the Government prosecuting attorney knowingly permitted witness Leslee Ball to testify when she was under the influence of alcohol and methamphetamine at the time of her testimony; and when evidence was discovered after the trial that the Government knowingly and intentionally withheld Witness Ball's intoxication. This witness and

the evidence of her intoxication is significant, crucial, and critical information for the Defense of Mr. Chappell, the Government's intentional and purposeful withholding of this information at trial constitutes a *Brady* violation. Chappell requests oral argument on this matter.

1. Drugged and Intoxicated Government Witness Testifies at Trial

At the trial, the Government produced a cooperating civilian witness named Leslee Ball (hereinafter referred to as "Ball"). Ball corroborated dates, times, places, and activities of Chappell relating to all of the other witnesses. Ball was different than any of the other witnesses produced by the Government because Ball was a long-time friend of Chappell; Ball was the reason Chappell was in North Dakota from California; Ball was the person who introduced Chappell to each of the other alleged co-conspirators and co-witnesses; Chappell often stayed with Ball while in North Dakota; and Ball had known Chappell from time together in Arizona prior to their meetings in North Dakota. In sum, Ball was the key and crucial witness for the Government because she provided testimony of direct and personal knowledge which was profoundly condemning against Chappell. She was the lynchpin, as it were, to the Government's case connecting Chappell to an alleged illegal drug operation in Bismarck, North Dakota.

After the trial, evidence was discovered that Ball was intoxicated with alcohol and drugs while on the stand during trial; and it was discovered that the Government knew she was intoxicated and knowingly and intentionally hid that evidence from the Defense and the Court. On June 5, 2019, via a telephone call to Chappell's legal

counsel, Theodore Sandberg, (hereinafter referred to as “Sandberg”), Ball said she was intoxicated while on the witness stand during Chappell’s trial. Ball informed Sandberg that she had consumed Methamphetamine the evening prior; that she was still under the influence of Methamphetamine when she took the witness stand; that she had been consuming alcohol to intoxication the entire day leading up to her testimony – including literally drinking alcohol in the car immediately before entering the Courthouse for her testimony. Ball indicated that she was both “drunk” and “stoned” when she took the stand. This statement was corroborated by Ball in recorded telephone calls at the jail to Chappell.

Ball also informed Sandberg that she was approached by the Government officials prior to taking the stand, less than an hour before taking the stand, on the day of her testimony. She was asked directly by the Government if she would pass a drug test, and she told the Government, “No.” She also informed the Government that she had recently overdosed on drugs a few days prior to testimony.

Ball also informed Sandberg that she had been advised by the Government to hire a lawyer, and she had tried to find a lawyer to represent her before she testified but could not secure counsel. None of this information was provided by the Government to Sandberg or the Court at trial. Ball was known to have serious drug and alcohol problems, and outside of the hearing of the jury, Sandberg requested that the Court order a drug test for Ball before she testified. The Court ruled that it was unable to compel a drug test of the witness. Chappell contends that the Government

refused giving her a drug test, despite knowledge of her drug and sobriety issues, and despite her admission that she was stoned and drunk.

At Chappell's trial, the Court ruled that it found no signs of impairment. The Government presented Ball as a sound, fair, sober, and fit witness. Worse, Ball presented herself as a sound, fair, and fit witness. At no point did the Government disclose knowledge of Ball's intoxication; nor of the Government's knowledge of Ball's compromised condition.

Ball communicated with Chappell through the jail telephone system (all calls were recorded), and then contacted Chappell's legal counsel on June 5, 2019 via telephone and told him about her intoxicated state at trial. On that date, Sandberg reduced Ball's statement to writing in an affidavit. Ball stated she was eager to submit an affidavit in support of her statements, and she was also willing to testify in Court in support of those statements.

During this time, Ball spoke with Chappell on the phone (while Chappell was in jail in Rugby, N.D). Chappell asserted he spoke with Ball via the recorded jail phone system many times between May 11, 2019 and June 11, 2019. Recordings of all these jail calls were obtained and received and presented to the District Court as part of Chappell's motion for a new trial. In these conversations, Ball reiterated her tale of intoxication during her testimony; her assertion that she had told the Government about her intoxication; and that she had been asked by the Government about passing a drug test – which she had answered “No.” Chappell's request for a new trial was dismissed by the District Court.

The affidavit was sent to Ball, but it was never signed, nor returned. On June 11, 2019, Ball called Chappell's legal counsel confirming receipt of the proposed affidavit. Since the June 11, 2019 conversation, Ball has not reached out to either Sandberg or Chappell. Ball did not call, write, or email. Ball left two different phone numbers, but she has been unreachable at either number since early June, 2019.

2. Direct Appeal

At the District Court, Chappell argued for relief from the Court due to an alleged violation of the *Brady* doctrine by the Government, to wit: Knowingly concealing a crucial witness' mental state, e.g., intoxicated on alcohol and methamphetamine, when presenting the witness at trial.

A panel of the United States Court of Appeals for the Eighth Circuit affirmed the District Court decision that the United States did not violate the law under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

The 8th Circuit panel ruled:

Even if the government "conceal[ed]" Ball's "mental state," Chappell cannot show that such evidence counts as "material" impeachment evidence. In *Dones-Vargas*, we upheld a denial of a *Brady* and *Giglio* challenge to undisclosed paid-witness testimony because the government's case "did not hinge" on that evidence when other witnesses testified to the same or similar facts. 936 F.3d at 722-23. Likewise, the government's case against Chappell "did not hinge" on Ball's testimony (*id.*), when, as the district court noted, five other witnesses presented "overwhelming and compelling" testimony against Chappell. Accordingly, we conclude that Chappell cannot establish "materiality." In turn, we conclude that the district court did not abuse its discretion in deciding against a *Brady* violation.

United States v. Chappell, 990 F.3d 673 (8th Cir. 2021).

Appellant Chappell asserts that the issue involves questions of exceptional importance, to wit: (a) Prosecutorial conduct relating to the handling of evidence; and (b) a criminal defendant's due process rights to a fair trial. These questions go to the very core of the criminal justice process.

IX. REASONS FOR GRANTING THE WRIT

A. To avoid future prosecutorial misconduct relating to the handling of evidence and deprivation of a criminal defendant's due process rights to a fair trial, this Court should review the Brady violation standard as outlined under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

In *Brady v. Maryland*, 373 U.S. 83, 88 (1963), this Court held that the prosecution must disclose any information or material that is (1) material and relevant to guilt or punishment; (2) favorable to the accused; and (3) within the actual or constructive knowledge or possession of anyone acting on behalf of the State. *Brady* and its progeny generally are understood to hold that any evidence that helps the defense attack the reliability, thoroughness, or good faith of the police investigation is discoverable. See generally, *Brady*, 373 U.S. 83 (1963); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985).

Even if the Government believes that the *Brady* material is unreliable or unbelievable, the Government still must disclose it. *Id.* at 88. It is for defense counsel, not the prosecutor to decide whether the *Brady* material is reliable enough to be used. *Id.*

Due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police

investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks. *Kyles v. Whitley*, 514 U.S. 419, 442 at n.134, 445-451 (1995). In other words, *Brady/Kyles* evidence is anything that is inconsistent with the testimony of a State's witness, and this might include prior statements of that witness, or any other information from any other source that is inconsistent with the witness's testimony. *Id.*

The Supreme Court has held that the *Brady* duty extends to impeachment evidence, as well as exculpatory evidence. *Youngblood v. West Virginia*, 547 U.S. 867, citing *United States v. Bagley*, 473 U.S. 667, 676 (1985). The prosecution has an ongoing constitutional responsibility to turn over all exculpatory material, whenever they find it, including during trial. *Imbler v. Pachtman*, 424 U.S. 409, 427, n.25 (1976).

Here, the District Court abused its discretion in finding that the Government did not commit a *Brady* violation when the Government refused to disclose critical information regarding the drugged and intoxicated state of Ball before and during her testimony.

The Government did not disclose, or attempt to disclose, evidence of Ball's intoxication during her testimony. In fact, the Government knowingly and intentionally concealed Ball's intoxication. Prior to Ball's testimony, Chappell requested, on the record, for Ball to be drug tested. Chappell had knowledge that Ball had recently overdosed. Ball's addiction and overdose were brought to the Court's attention.

If the Government had provided this information to Chappell, prior to Ball's testimony, a worthy and valid cross-examination and significant impeachment could have occurred. But, the Government failed to share that information.

Worse, the Government made active efforts to conceal this information. Thus, Chappell was without a serious evidentiary weapon against the Government's most critical witness, due entirely to the Government's concealment of the evidence.

The District Court abused its discretion by finding that the *Brady* rule was not violated and by not granting a new trial.

On Appeal, the 8th Circuit Panel stated: Chappell anchors the appeal of his conviction to an alleged, but unproven lie. To grant relief, we need more. The record leaves us with no room to reverse his sentence, either. *United States v. Chappell*, 990 F.3d 673 (8th Cir. 2021).

Chappell asserts that the Court has placed a very heavy burden on the Defendant, shifting the burden both at trial and post-conviction. To accept the District Court's and 8th Circuit Panel's conclusion as correct would mean that the Government would not have to answer any questions about its conduct at the trial. Instead, according to the above logical conclusion, the Defendant is tasked with affirmatively cross-examining a witness without all of the facts, which is a dangerous and troubling requirement. The above logical conclusion of the District and the Circuit would require the Defendant to produce evidence which the Government knowingly holds but has refused to share.

The serious issue with the Government's position, and the District Court's ruling, and the 8th Circuit's affirmance is that they all result in an absurd conclusion, reduced to this summary: The Government knows the evidence, does not share the evidence (actually hides the evidence from the Court and the Defense and the Jury), and profits from the evidence; and the Defendant is forced to recreate the evidence in full to prove, absurdly, that the Government indeed withheld the evidence.

Where is the line between a requirement that the Defendant cross-examine to discover evidence at trial; and outright shifting of the burden to the Defendant at trial due to a Prosecutor's intentional hiding of evidence?

The law should not hold that a criminal defendant must engage in any activity at trial! (E.g., shifting the burden). The law cannot be saying that a criminal defendant must engage in a specific line of cross-examination in order for a *Brady* violation to occur. The law cannot be saying that the Prosecutor may lie in trial; omit evidence in trial; allow knowingly false or misleading testimony at trial – and the only remedy for the Defense is to divine both the evidence and the lie; and then to engage in a cross-examination on the heretofore unknown evidence and lie. Under such a standard, the Eighth Circuit would create law whereupon the Prosecutor gets a free pass under the law despite the obvious intentional false conduct, merely because the Defendant did not catch them in the act, at trial, at that exact moment in time.

Nor can the law honestly be reduced to a logical conclusion that requires a defendant to prove something at trial (the *Brady* violation, in this case) with information that did not come to the Defendant's knowledge until after the trial.

Nor can the law be so obtuse as to prevent the Government from answering in Court, on the record, at a hearing, on this allegation? Can the law truly be so constructed that the Defendant must find, secure, and produce a cooperating Government witness? How, in all fairness and equity and due process, can a Defendant meet such a standard, or produce such evidence?

In this case, the Government, the District Court, and the 8th Circuit are all aware that the troubled witness did not provide any further evidence after her post-trial telephone calls to the Defendant and Defense counsel. But the calls to the Defendant, in the jail, were indeed recorded.

And the Defendant must ask: Is it truly remarkable to the District Court and the 8th Circuit Panel that a witness would be hesitant to re-appear in a U.S. District Court to address an issue that could possibly be charged as perjury? The record was established by the Defense that the witness was providing information about her interactions with the Government up until the point that the Defense counsel advised her to seek her own counsel. Perhaps the District Court and the 8th Circuit Panel are asking Defense counsel to not advise her to seek counsel, and trap her into a sworn document or sworn court testimony without warning her of potential perjury? That would seem quite unethical, but at least the Defense counsel would have produced the witness.

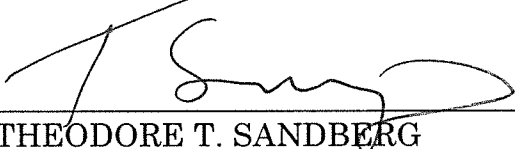
It cannot be lightly noted that the Government did nothing to find the offending witness following Chappell's motion. The Government declared that the witness was missing and would not try to produce her. Isn't that highly convenient? But again, throughout this *Brady* argument, the Government has been given a complete pass and required to do little, if anything, to answer for its own troubling conduct at trial.

X. CONCLUSION

For the foregoing reasons, Mr. Chappell respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

DATED: this 3rd day of June, 2021.

Respectfully submitted,



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