

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2021

GALVIN GIBSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER *BRADY* AND *NAPUE* CLAIMS WHICH RELATE TO A FIRST TRIAL WHICH RESULTED IN A HUNG JURY ARE COGNIZABLE IN A § 2255 MOTION OR WHETHER THE APPEAL OF THE RETRIAL BARS THE ISSUES?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

1. Galvin Gibson, Petitioner.
2. United States of America, Respondent.

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The Petitioner, GALVIN GIBSON, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 858 Fed. Appx. 211 (9th Cir. 2021).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its judgment on September 7, 2021. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

28 U.S. Code § 2255 - Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

On August 13, 2009, a grand jury returned an Indictment charging Vagan Adzhemyan, Galvin Gibson, and co-defendant Suren Garibyan with conspiracy to commit kidnaping, in violation of 18 U.S.C. § 1201(c) (count one), and kidnaping, in violation of 18 U.S.C. § 1201(a)(1) (count two). A First Superseding Indictment was filed on October 1, 2009, which added two counts against Gibson: manufacturing marijuana, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (count three), and felon in possession of ammunition, in violation of 18 U.S.C. § 922(g)(1)

(count four).¹

On December 9, 2009, the government filed a motion to preclude necessity, duress, and justification defenses at trial. Adzhemyan filed his opposition on December 23, 2009, and the district court reserved ruling on the motion until trial. On January 19, 2010, defendants' trial commenced. On February 11, 2010, before closing arguments, the district court granted the government's motion to preclude necessity, duress, and justification defenses. The jury was unable to reach a verdict and (seven not guilty, five guilty), on February 18, 2010, the district court declared a mistrial.

Gibson's second trial, from which the direct appeal was taken, commenced on April 27, 2010. The jury found Adzhemyan guilty of all counts against him, and found Gibson guilty of all counts except count four (felon in possession of ammunition). On February 13, 2012, the district court sentenced Adzhemyan to 360 months' imprisonment, five years' supervised release, and a \$200 special assessment; the district court sentenced Gibson to 324 months' imprisonment on counts one and two, five years' imprisonment on count three, all to be served concurrently, five years' supervised release, and a \$300 special assessment. The district court also ordered defendants to pay restitution of \$16,763.54 to the hospital that treated the victim, Sandro Karmryan ("Karmryan"), for the injuries he sustained as a result of the

¹ Garibyan pled guilty to kidnaping and conspiracy on December 30, 2009.

kidnapping.

A direct appeal was taken to the Ninth Circuit Court of Appeals which affirmed the convictions of both Adzhemyan and Gibson. Gibson filed a petition for certiorari which was denied.

Gibson then filed a timely petition at the district court under 28 U.S.C. § 2255, which the district court summarily denied. The district court granted a certificate of appealability, however, as to all grounds raised by Gibson. An appeal followed in a timely manner to the Ninth Circuit.

The Ninth Circuit affirmed the district court's order denying Gibson's § 2255 motion in an unpublished decision. This petition has followed in a timely manner.

REASONS FOR GRANTING THE WRIT

WHETHER *BRADY* AND *NAPUE* CLAIMS WHICH RELATE TO A FIRST TRIAL WHICH RESULTED IN A HUNG JURY ARE COGNIZABLE IN A § 2255 MOTION OR WHETHER THE APPEAL OF THE RETRIAL BARS THE ISSUES?

OVERVIEW

The district court denied relief on Gibson's § 2255 motion finding that Gibson could not establish prejudice and based that conclusion on the Ninth Circuit's prejudice holding in the initial direct appeal. The district court's reliance on the Ninth Circuit's direct appeal decision was fundamentally flawed, however, because the initial direct appeal was taken as to the second trial, only, not the first trial. The first trial had resulted in a hung jury, seven not guilty, five guilty.

Although the district court had ultimately granted the Government's motion to exclude a necessity justification defense at the first trial, it did so only after both sides had rested their cases. That is, the jury was permitted to hear all of the necessity defense evidence in the first trial, and having heard it, even without a necessity defense jury instruction, the jury was close to acquitting Gibson. Had the *Brady* and *Napue* evidence not been suppressed, but used in the first trial (and the district court would have permitted its use, because it had permitted the necessity defense evidence to come in at the first trial), then the Court cannot be confident that the outcome of

the first trial would not have been an acquittal instead of a hung jury.

The Ninth Circuit accepted the Government's argument on appeal of the denial of the § 2255 motion that the *Brady* and *Napue* claims were not cognizable and were *barred* because the *Brady* and *Napue* issues had been raised in the appeal of *the retrial* - *but this was a retrial in which the Court did not permit the introduction of necessity defense evidence which had been permitted in the first trial and hung the jury*, therefore the initial direct appeal in terms of determining prejudice from the *Brady* and *Napue* violations did not decide the issue as it would have been presented in terms of the first trial's evidence. Nevertheless, without further discussion the Ninth Circuit found the claim "barred":

1. Gibson contends that the district court erred in denying his Brady and Napue claims, arguing that those claims pertained to the first trial, which ended in a hung jury, and not the second trial, which resulted in a conviction. The government contends that these claims are identical to claims raised and rejected on direct appeal and are thus barred in this habeas proceeding. The district court rejected the claims because we had rejected those claims on direct appeal. If the claims were raised in the direct appeal, then, as the district court found, they are barred. *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985).

United States v. Gibson, 858 F. App'x 211, 212 (9th Cir. 2021).

The error in this analysis derives from the fact that the Ninth Circuit's prejudice determination in the initial direct appeal was made only in the context of the case as it was presented at the second trial, at which no necessity or justification defense

evidence was permitted. As to that trial, Gibson would agree that the *Brady* and *Napue* violations were not sufficiently prejudicial to require retrial. The same is not true, however, as to the effect of the *Brady* and *Napue* violations on the first trial in which the *Brady* and *Napue* evidence would have strongly supported the necessity defense.

This fundamental analytical flaw caused the district court to erroneously deny Gibson relief on both his *Brady* and *Napue* claims and the Ninth Circuit affirmed expressly holding that the claims were barred.

Brady and *Napue* claims as applied to a mistrial are not barred because they were presented on direct appeal of a retrial, certainly not when the trial court has barred at the retrial the defense presented at the first trial which hung the jury. That is the issue presented by this petition.

ARGUMENT

Gibson argued in his § 2255 motion that his kidnaping conviction must be vacated based on the *Brady* and *Napue* violations in his case.

The District Court denied relief holding:

With regard to Gibson's claim that his trial counsel was ineffective because he failed to investigate, discover, or use evidence of the Karmryan FBI Investigation or the Reports, Gibson, also, argued that his default should be excused because of cause and actual prejudice. However, Gibson cannot prove actual prejudice because the Ninth

Circuit already held that the probative value of further evidence attacking the credibility of the victim was outweighed by potential confusion of the issues for the jury, especially given the “overwhelming evidence of [Gibson’s] guilt.” See *Gibson*, 598 F. App’x. at 489.²

What the Ninth Circuit wrote in the direct appeal decision about the *Brady* violation was:

5. Defendants have not shown a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), or *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). To establish a *Brady* violation, a defendant must show that 1) the evidence at issue was favorable to the accused; 2) the evidence was suppressed by the government; and 3) the defendant was prejudiced by the suppression. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). A defendant is not prejudiced under *Brady* unless the suppressed evidence is material, meaning that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 280 (citation and internal quotation marks omitted). Because of the overwhelming evidence of their guilt, Defendants have not shown the required reasonable probability that the result at trial would have been different absent the alleged violations.

United States v. Gibson, 598 Fed. Appx. 487, 489 (9th Cir. 2015).

As this Court has explained, “the term ‘*Brady* violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence -- that is, to any suppression of so-called ‘*Brady* material’ -- although, strictly speaking, there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is

² *United States v. Gibson*, 598 Fed. Appx. 487 (9th Cir. 2015).

a reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. at 281.

There is no dispute about that proposition, but the dispute in this habeas proceeding as it relates to this petition is which proceeding is at issue for determining the prejudice caused by the suppression of the *Brady* evidence. Gibson argues that the trial at issue is *the first trial*.

The District Court based its ruling on the Ninth Circuit’s decision on the appeal of the *second trial*. The District Court erred in applying the holding of the Ninth Circuit on the appeal of *the second trial*, in determining the materiality of the *Brady* evidence for purposes of the *first trial*. The direct appeal appellate decision affirmed the verdict and judgment following the retrial. The Ninth Circuit weighed the prejudicial impact of the *Brady* violation in the context of the result of the second trial, after the Ninth Circuit had upheld the exclusion of the necessity defense evidence from that second trial.

Gibson would readily concede that as to the second trial, which excluded all evidence of the necessity defense and which then resulted in a unanimous jury verdict, that the suppression of the *Brady* material relating to Karmryan was harmless, that is, there was no reasonable probability that it affected the outcome of *that* trial.

But the *Brady* evidence was suppressed from both the first and second trials.

At the first trial, the District Court permitted the defense to discuss the necessity defense evidence in opening statement and permitted use of the necessity defense as a legal basis to both admit evidence and cross-examine witnesses, Karmryan as well as others throughout the entire trial until both the Government and defense rested.

It was only after both the Government and defense rested their cases that the District Court revisited its consideration of the Government's opposition to the necessity defense and ruled that there would be no closing argument permitted and no jury instruction given on the necessity defense. The District Court did *not* instruct the jury to disregard any of the evidence that it had heard about the necessity defense and the jury was allowed to consider it in their deliberations at the first trial. The result of this was that the jury hung, seven to five for acquittal, and a mistrial was declared resulting in the second trial.

At the second trial, which was the judgment under review in the Ninth Circuit's direct appeal appellate decision, the District Court permitted no necessity or justification defense:

Prior to the second trial, the government moved to exclude argument and evidence related to necessity, justification, or any related defense based on the district court's ruling at the prior trial. [72-81] Defendants presented no new evidence in support of a justification defense. The district noted that it had already ruled that "no defense of necessity or justification is legally permissible" . . .

Government Answer Brief, Appeal No. 12-50081, p. 28.

This is the context in which the § 2255 habeas claim must be evaluated. The District Court failed to give any consideration to the impact of the suppression of the *Brady* evidence on the first trial or the probability that the suppression of this evidence, with a jury which already had tilted in favor of the defense would more likely than not have reached a not guilty verdict had the *Brady* evidence been available to the defense. Had the *Brady* evidence been available we know that the District Court would have permitted its use, because the District Court permitted the use of necessity evidence through and including the conclusion of the presentation of evidence and each side announcing rest.

The District Court's reliance on the direct appeal appellate decision was completely misplaced and indeed establishes that the District Court erred in its resolution of the issue. That the Ninth Circuit found no prejudice *as to the second trial* by the suppression of the *Brady* evidence has no bearing on the question whether the suppression of the *Brady* evidence was prejudicial as to the first trial. It is self-evident given the hung jury in favor of acquittal without this evidence that the Court cannot be confident that the outcome of the first trial would have been the same had the evidence not been suppressed.

The District Court denied relief on the *Napue* claim similarly in reliance on the

Ninth Circuit's decision in the direct appeal *of the second trial*.

Gibson's *Brady* and *Napue* claims were already litigated during his direct appeal and the Ninth Circuit already held that those claims were meritless. See *Gibson*, 598 F. App'x. at 489-490. Gibson failed to set forth any basis for this Court to hold otherwise.

It is true that in the Ninth Circuit's appellate decision *as to the second trial* the Ninth Circuit found no *Napue* violation because it found no proof of false testimony and no prejudicial effect as well.

To establish a *Napue* violation, the defendant must show that the testimony was "actually false," the government knew or should have known that the testimony was actually false, and the false testimony was material. *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011). Defendants have not shown that the victim gave "actually false" testimony. Nor have they shown that the alleged false testimony was material, in light of the overwhelming evidence of their guilt.

United States v. Gibson, 598 Fed. Appx. at 489.

But that opinion was based on the Government's argument that the testimony at issue was limited to that of Karmryan *in the second trial*, because this was an appeal of the second trial verdict. The Government argued on appeal that any false testimony by Karmryan was made *in the first trial*:

Nor did the government knowingly present false testimony. First, defendants' *Napue* claim is based on Karmryan's denial at the first trial that he was an organized crime member, but that statement has no bearing on these convictions, because Karmryan gave no such testimony at the second trial, at which defendants were convicted. Moreover, the reports do not demonstrate that Karmryan was an organized crime

member or that the government was aware of such membership.

Government Answer Brief, Appeal No. 12-50081, p. 35.

So we see that the appellate decision which the District Court relied upon to deny relief as to both the *Brady* and *Napue* claims was a decision cabined by an evaluation of the evidence at the second trial, not the evidence at the first trial. The reliance upon that decision caused the District Court to err in denying relief as to both the *Brady* and *Napue* claims. Viewed in the correct context, the impact of the suppression of the evidence and false testimony of Karmryan in the first trial, the Court cannot be confident that Gibson would not have been acquitted.

The Government argued and the Ninth Circuit agreed that these claims were “barred.” The Government argued that the claims were simply not cognizable because they related to a trial which ended without a verdict and sentence, but alternatively argued that if they were cognizable, that they were barred by the direct appeal decision from the retrial. The Ninth Circuit accepted the Government’s argument that the claims were barred by the decision on the direct appeal. Gibson’s claims were based on the conduct of the Government in the first trial, not the second trial. The claims were not and could not be barred by either the mistrial or by the appeal of a different trial, the retrial. This is a case of first impression but arising out of a scenario which exists in virtually every mistried case, that is, a recurring issue

which merits resolution by this Court.

CONCLUSION

Petitioner Galvin Gibson respectfully requests this honorable Court grant this petition for certiorari to decide this important issue of first impression.

Respectfully submitted,

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