22 - 6687

No.:

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT DEE CARTER - PETITIONER

v.

DEON CLAYTON, (Warden) - RESPONDENT

ON A PETITION FOR A WRIT OF CERTIORARI TO TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Robert Dee Carter DOC #735513
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19603 E. Whippoorwill Lane
Atoka, Oklahoma 74525-8415

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Tenth Circuit depart *Brady* by artificially heightening the threshold for materiality based on Petitioner's *pro se* status as well as the charges he was convicted of.
2. Did the United States District Court for the Eastern District of Oklahoma improperly deny petitioners Rule 60(b) motion as being out-of-time when the court did not take into consideration that petitioner had filed a Rule 59 motion for reconsideration that tolls the time to file a Rule 60 motion. Then did the Appellate Court incorrectly deny me a COA based on a merit decision?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

- Carter v Clayton CIV 19-243-RAW-KEW U.S. District Court for the Eastern District of Oklahoma. Writ of Habeas Corpus – Judgement entered November 24th, 2020.
- Carter v Clayton CIV 19-243-RAW-KEW U.S. District Court for the Eastern District of Oklahoma. Motion for Reconsideration – Judgement entered August 25th, 2021.
- Carter v Clayton No. 21-7049 U.S. Court of Appeals for the Tenth Circuit. COA – Judgement entered February 17th, 2022
- Carter v Clayton CIV 19-243-RAW-KEW U.S. District Court for the Eastern District of Oklahoma. Rule 60 Motion – Judgement entered June 13th, 2022.
- Carter v Clayton No. 22-7031 U.S. Court of Appeals for the Tenth Circuit. COA – Judgement entered October 25th, 2022

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Dee Carter respectfully requests this Court grant a writ of certiorari. He seeks review of the decision of the Tenth Circuit Court of Appeals, denying him a certificate of appealability (COA).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the 10th Circuit denying COA on Rule 60 motion appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States District Court for the Eastern District of Oklahoma on Rule 60 motion appears at Appendix 2 to the petition and is unpublished.

The opinion of the United States Court of Appeals for the 10th Circuit denying COA on motion to reconsider/writ of habeas corpus appears at Appendix 3 and is unpublished.

The opinion of the United States District Court for the Eastern District of Oklahoma on motion to reconsider appears at Appendix 4 to the petition and is unpublished.

The opinion of the United States District Court for the Eastern District of Oklahoma on writ of habeas corpus appears at Appendix 5 to the petition and is unpublished.

JURISTICTION

The date on which the United States Court of Appeals for the Tenth Circuit decided my case was on October 25th, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> ... 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.

STATEMENT OF THE CASE

On April 29, 2015 agents of the Oklahoma State Bureau of Investigation (OSBI) and the Oklahoma Attorney General (OAG) office arrived at my home to execute a search warrant for the premises. At approximately 7:05 am OSBI agent Savory opened the storm door prior to "knock and announce". After she opened the storm door the agent proceeds to "knock and announce" several times before requesting Agent Whitney to breach the door. The resulting search ends with my arrest.

During the court proceedings my attorney (Jason May) filed for discovery materials and on June 16, 2015 he was provided 3 DVD's containing OSBI reports, Photographs, Videos, and interview. The certificate of posting did not describe in detail what OSBI reports were included. I accepted a plea agreement on January 22, 2016.

In September 2017 I requested my case file from May and after several letters received the full OSBI report in December 2017. May advised he had to get the full report from the DA's office. The full OSBI report (OSBI2015-372) contains individual reports from the agents involved in the investigation. The full report also contained a designation of record showing that parts of the report were given to the Carter County District Attorney's office on May 8th, 2015. The sub reports 1-6 were given to the DA's office, sub report 11, which contained Savory's report, and sub report 9, which contained Whitney's report, were not available at that time and are not shown to have been given to the DA's office until the full report was complete and released to the DA's office on October 28, 2015. There is no record that shows the DA's office provided the full report or the 2 sub reports to my attorney prior to my plea. May stated in later letter that he destroyed the original DVD's given to him during discovery and when asked would not state whether or not he had read the agents reports prior to advising me to plea.

The documents show that the DA's office failed to forward the Full OSBI report that contained the reports of the agent's actions during the service of the search warrant. That failure resulted in a violation of my Fourteenth Amendment due process guarantees as well as this Court's decision in *Brady v Maryland* 373 U.S. 83 (1963). The agent's reports described violations of Oklahoma Law and Constitution as well as a violation of my Fourth Amendment rights.

After exhausting my state court post-conviction procedures, I filed a 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Oklahoma. One of my nine grounds was about prosecutorial misconduct in covering up the unconstitutional and illegal actions (under Oklahoma law) of the OSBI agents. At the time I did not have the understanding to add the claim of a due process or *Brady* violation but did make the claim that my attorney had not received the agents reports. In a 16-page order denying the petition as time barred the district court ignored the fact the reports were not given to my attorney as that should have tolled the time under the equitable tolling doctrine. I filed a motion for reconsideration under Rule 59(e) and in that motion, I included the timeline showing where my attorney failed to receive the agents reports and specifically noted that was a violation of *Brady*. The District Court denied the motion stating in part that I was just rehashing arguments or presenting new legal theories. I was in fact pointing out that the District Court ignored the *Brady* error.

I filed for a COA in the Tenth Circuit Court of appeals denied it. The appeals court made a merit decision when it decided that the *Brady* violation (if proven) would not have been debatable as a denial of a constitutional right. I filed for a rehearing/rehearing *en banc* and was denied.

I then filed a Rule 60 motion in District Court explaining that the court failed to take into account the *Brady* violation and that the court holding that since I was there, I knew of the actions of the agents. The decision was contrary to the decision in *Fontenot v Crow* 4 F.4th 982 (10th Cir 2021) in which the court stated "the prosecution's obligation under Brady to turn over evidence in first instance stands **independent** of defendant's knowledge.(quoting *Banks v Reynolds* 54 F.3d 1508, 1517 (10th Cir. 1995)")(emphasis added). The court went against its own opinion when it ruled against me. The District Court denied my Rule 60 motion as being out-of-time. The District Court did not take into account that a motion for reconsideration tolls the time for filing a Rule 60 motion. I again filed for a COA in the Tenth Circuit Court of Appeals. The Appeals court again denied the COA. The Court claimed that even if the timeliness analysis is debatable the district court's "ultimate" decision is not.

The Appeals Court and District Court are ignoring the underlying due process violation. I have shown them case law from their own courts that are similar to mine except the other cases had paid counsel and was not a sex offense.

REASONS FOR GRANTING THE PETITION

1. **Did the United States Court of Appeals for the Tenth Circuit depart *Brady* by artificially heightening the threshold for materiality based on Petitioner's *pro se* status as well as the charges he was convicted of.**

The legal principles underlying *Brady* claims are well settled. Due process of law, guaranteed to defendants under the Fourteenth Amendments, bars prosecutors from suppressing

favorable evidence "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.: *Brady*, 373 U.S. at 87.

Favorable evidence includes both impeachment evidence and exculpatory evidence. See *United States v Bagley*, 473 U.S. 667, 676 (1985). The Court has since instructed that favorable evidence is "material" for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Cone v Bell* 556 U.S. 449, 469-70 (2009). In this regard, a defendant seeking relief under *Brady* need not show that he "more likely than not" would have been acquitted had the withheld evidence been disclosed. *Smith v Cain*, 565 U.S. 75 (2012). Instead, the defendant must show only that the withheld evidence "'undermines confidence in the outcome of the trial.'" *Kyles v Whitley*, 514 U.S. 419, 434 (1995). Accordingly, materiality "must be evaluated in the context of the entire record." *United States v Agurs*, 427 U.S. 97, 96 (1976). Similarly, courts must review suppressed evidence "collectively" rather than discount it "item by item." *Kyles* 514 U.S at 436. Only when the evidence, viewed as a whole – including the undisclosed evidence – is so overwhelming that guilt is undeniable can a court remain confident that the verdict would have been the same if the evidence had been disclosed. See Id. At 450 (finding violation because "the physical evidence remaining unscathed would, ..., hardly have amounted to overwhelming proof").

The point of the rule is to do justice. Fundamental fairness imposes a duty on prosecutors to disclose Brady material even when the defendant does not request it. See *Agurs*, 427 U.S. at 107. For similar reasons, prosecutors have a duty to discover and disclose favorable evidence known to police. See *Kyles*, 514 U.S. at 438.

The heighted standard that the 10th Circuit Court used in this case is contrary to this Court's repeated teachings in *Brady* and its progeny. For years, lower courts have been attempting to raise the threshold for materiality under the *Brady* doctrine, and this Court has repeatedly found it necessary to intervene to ensure that *Brady* remains a meaningful protection against prosecutorial overreach. This case represents yet another attempt to depart from *Brady's* constitutional requirement by ratcheting up the materiality standard. The outcome should be the same as in the many previous cases in which this Court reversed attempts to artificially narrow the *Brady* doctrine.

Central to the reasoning of *Brady* is the notion that an overly high bar for materiality undermines the "truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104. Indeed, in developing the *Brady* materiality rule, this Court has been careful "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Kyles* 514 U.S. at 440. To that end, the Court has routinely rejected a demanding definition of materiality. See, e.g., *Smith*, 565 U.S. at 75-76 ("A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likely hood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'") (citation omitted); *Kyles*, 514 U.S. at 434-35 ("[T]he defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal.").

The heighted materiality standard has implications far beyond the present case. *Brady* violations, by nature, are difficult to detect: Defendants must show that prosecutors withheld material evidence, which by definition requires defendants to discover that which has been concealed from them. Moreover, in light of the absolute immunity enjoyed by prosecutors for

claims brought under 42 USC § 1983, a vigorous application of the *Brady* doctrine is the only meaningful check against the unconstitutional withholding of exculpatory evidence. Especially in borderline cases the Appellate courts heightened materiality standard for evidence of wrong doing by law enforcement may encourage prosecutors to err on the side of withholding such evidence when *Brady* and its progeny would otherwise require full disclosure. In all event, *Brady* seeks more than just outcomes; its primary function is to expose the truth. The Appellate court deviated from that principle, and its decision will make it far more difficult to detect and root out prosecutorial misconduct.

If allowed to stand, the Appellate courts misapplication of *Brady* would also upend the incentive scheme created by that decision. An extensive body of empirical research has found that *Brady* violations occur with alarming regularity. Yet the decision below further opens the door to such violations by making it quite difficult to overturn convictions via Brady. This court should avoid that constitutionally dubious result and reverse the Appellate court's decision.

The District Court stated in its decision's and upheld by the Appellate Court that since I was present during the search of my home, I was aware and "had the opportunity to ascertain the facts and commence his research about the breach of the door within the limitation period." That decision is contrary to the Appellate court's decision in *Fontenot* 4 F.4th at 1066 ("[T]he p*rosecution's obligation under* Brady *to turn over evidence in first instance stands* ***independent of defendant's knowledge****.(quoting* Banks v Reynolds *54 F.3d 1508, 1517 (10th Cir. 1995)")(*emphasis added*)* and this Court's decision in *Strickler v Greene* 527 U.S. 263, 285 (1999).

The elements of the suppression rule are, therefore, materiality of the undisclosed information; actual or constructive knowledge of the prosecution; absence of actual or constructive knowledge of the defense. By analogy to cases in which the constitutional vice is

the admission of evidence, the test of materiality in a suppression case is whether the undisclosed evidence, if revealed, might have affected the outcome of the trial. The court below inverted the correct test, applying a principle that suppressed evidence is immaterial if it might not have affected the result. If the evidence had been disclosed, the defense could have applied for, and should have been granted, a motion to suppress.

The prosecution should be charged with constructive knowledge of the evidence claimed to be suppressed. This is because the failure to acquire such knowledge was the result of their determined avoidance of exposure to information favorable to the accused, in violation of their duty to conduct criminal investigations impartially and with rudimentary diligence.

Defense did not know of any of the evidence claimed to have been suppressed. The court below charged the defense with constructive knowledge of the undisclosed information, but the attributed knowledge is not coextensive with the suppressed evidence. Moreover, defense counsel could not validly be charged with constructive knowledge, because his failure to obtain the information was not caused by lack of diligence. And accused persons cannot be held responsible for a failure of even non-diligent counsel to obtain exculpatory information in the hands of the State. The State only provided one OSBI report that covered the search of my home and that report only contains a four (4) sentence paragraph that had only a general statement that a search warrant was served. Defense had no reason to believe other OSBI reports existed.

The holding of the District Court in my case are contrary to earlier decisions of that court:

- *Fontenot v Allbaugh* 402 F.Supp.3d 1110 (E.D. Okla. 2019) stated that a system where "prosecutor may hide, defendant must seek" is not tenable in a system constitutionally bound to accord defendants due process.

- *Mitchell v Jones* No CIV 06-503-RAW-KEW, 2008 WL 496072 at #4 (E.D. Okla. Feb 20, 2008) (holding that state court was "incorrect in placing the burden of discovery of [*Brady* evidence] on petitioner.")

Those holdings are consistent with the decisions of this Court and holdings of other Appellate courts. The only difference in the above cases and my case is that the petitioners in those cases were represented by an attorney.

The suppressed agent's reports are material as they show two Fourth Amendment and OK ST T. 22 § 1228 violations as they pertain to the search of my residence. If my attorney had the reports prior to my plea a motion to suppress would have been filed under Oklahoma case law (*Brumfield v State* 155 P.3d 826, 831-32 (2007)). The evidence illegally removed from his home would be suppressed under Oklahoma's exclusionary rule for violations of Oklahoma law. As the Oklahoma Court of Criminal Appeals stated in *Brumfield* "The S. Ct. decision in *Hudson* does not control this Court's interpretation of our own state statute, namely, 22 O.S. 2001 § 1228."

The District Court should have at least held a hearing on the materiality of the suppressed OSBI reports. Instead the court ignored the *Brady* violation by claiming I was there and therefore had ample opportunity to determine the actions of the agents before they forced open my front door. When the Appellate Court denied my COA they upheld the Districts holding and made the same wrong determination of the *Brady* standard. The District should have vacated my conviction and remanded my case back to the State.

2. Did the United States District Court for the Eastern District of Oklahoma improperly deny petitioners Rule 60(b) motion as being out-of-time when the court did not take into consideration that petitioner had filed a Rule 59 motion for reconsideration that tolls the time to file a Rule 60 motion. Then did the Appellate Court incorrectly deny me a COA based on a merit decision?

When the District Court denied my Rule 60(b) motion as untimely, the court incorrectly used the date it denied my § 2254 as the date of finality. Instead the court should have used the date when the District Court denied my Rule 59(e) motion. A Rule 59(e) motion is part and parcel of the first habeas proceeding. See *Banister v Davis* 140 S. Ct. 1698, 1702 (2020). The filing of a

Rule 59(e) motion within the 28-day period "suspends the finality of the original judgment". See *FCC v League of Women Voters of Cal,* 468 U.S. 364, 373 n. 10 (1984). When I timely submitted my Rule 59(e) motion, there was no longer a final judgment District Court. See *Osterneck v Ernst & Whinney* 489 U.S. 169, 174 (1989). Only the disposition of a Rule 59(e) motion restores the finality of the original judgment. See *League of Women Voters*, 468 U.S. at 373, n. 10 (internal quotation marks omitted); *Communist Party of Indiana v Whitcomb* 414 U.S. 441, 445 (1974)(Appellees' motion for reconsideration of October 3 suspended the finality of the judgment of September 28 until the District Court's denial of the motion on October 4 restored it.) Cases analyzing the effect of a Rule 59(e) motion on the finality of a judgment generally focus on the effect that such a motion has on the running of the period in which an appeal may be filed. See, e.g., *Stone v INS* 514 U.S. 386 402-403 (1995)(explaining that a Rule 59(e) motion "toll[s] the running of the time for appeal"); *Miltimore Sales, Inc. v Int'l Rectifier, Inc.* 412 F.3d 685, 688 (6th Cir 2005); *Weyant v Okst* 198 F.3d 311, 314-315 (2nd Cir 1999).

That said, the Advisory Committee notes to Rule 59 state that a motion brought under that rule "affect[s] the finality of the judgment." FED.R.CIV.P.59 Advisory Comm. Notes. The Advisory Committee Notes, however, do not state that a Rule 59 motion only affects the finality of a judgment for purposes of filing an appeal. Additionally, some cases that discuss the effect of a Rule 59(e) motion on the finality of a judgment do not limit that discussion to the implications of such a motion on the appellate timeline. See, e.g., *Derrington-Bey v D.C. Dep't of Corr.,* 39 F.3d 1224, 1225 (D.C. Cir. 1995) (stating that the time limit for filing a Rule 59(e) motion "is to be kept short presumably because a timely Rule 59(e) motion deprives the judgment of finality"); Weyant, 198 F.3d at 315 (stating that the 14-day period established by Rule 54(d)(2)(B) for the filing of a motion for attorneys' fees begins to run after resolution of a Rule 59 motion); *National*

Passenger R.R. Corp v Maylie 910 F.2d 1181,1183 (3rd Cir. 1990) ("We find the motion was timely because the correct date upon which the one-year time limitation for a Rule 60(b) motion began to run was when the motion for reconsideration was denied on June 8, 1983"); 12 FED. PRAC. 3d § 59.12 (a "timely motion under rule 59 destroys the finality of the judgment.") In other words, the suspension of finality on the basis of a timely-filed Rule 59(e) motion is not only applicable to an appeal. Accordingly, courts conclude that a timely filed Rule 59(e) motion suspends the finality of a judgment not just at the appellate level, but at the district court level as well. See *International Center for Technology Assessment v Leavitt* 468 F.Supp.2d 200 (D.C. Cir 2007). The Tenth Circuit Court of Appeals in an unpublished opinion stated that with a timely filed Rule 59 motion, the time-period for a Rule 60(b)'s one-year limitation begins to run when the Rule 59 motion is denied. *Hartzell v Honda Motor Co. Ltd.*, No-90-4016, 1991 WL 50540 n. 1 (10th Cir 1991) (unpublished). See also *Rashid v Drug Enforcement Admin.* 1999 WL 506652 (D.C. Cir. 1999) (Unpublished); *Gethers v PNC Bank* 2019 WL 221117 (W.D. Pa May 22, 2019) (Unpublished); *Bethel v McAllister Bros., Inc.* 1994 WL 328350, at *3 (E.D. Pa July 11, 1994) (unpublished).

Therefore, when Mr. Carter filed his Rule 60(b)(1) motion it was within the one-year limitation for filing Rule 60(b) motions and the District Court was incorrect in denying my Rule 60 motion for that ground.

In the Appellate Court's decision to deny my COA it stated "But even if the district court's Rule 60(b) timeliness analysis is debatable, as Carter suggests, its ultimate decision to deny his Rule 60(b)(1) motion is not." (App 3 pg 4). The court also suggest that I didn't mention any mistake, inadvertence or excusable neglect to support my Rule 60 motion. The entire Rule 60

motion was about the district court mistake or excusable neglect on ignoring the Brady violation which it has never ruled upon.

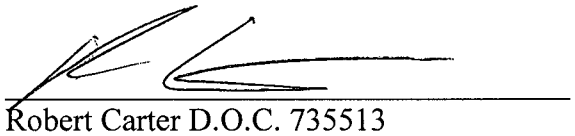
In a world that a presumptive supreme court nominee can be investigated on how they handled certain cases by the United States Senate, makes it difficult to believe that lower court justices will not turn a blind eye to those same cases when the petitioners are filing post-conviction motions, that if they were shown to be agreeing with, might cost them in the political arena or a posting in a higher court.

CONCLUSION

The writ of certiorari should be granted.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Respectfully submitted on this 24th day of January, 2023.



Robert Carter D.O.C. 735513