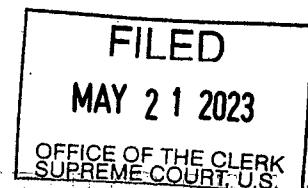


23-5225



IN THE SUPREME COURT OF THE UNITED STATES

Leonard Sapp,
Petitioner,

versus

United States of America,
Respondent.

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

Petition for Writ of Certiorari

Leonard Sapp
Reg. No. 55967-004
FCC Coleman Medium
P.O. Box 1032
Coleman, Florida 33521-1032
Phone Number: N/A

QUESTIONS PRESENTED

Was Leonard Sapp afforded a fair trial when the Government shifted the burden of proof to the Defense during trial?

Does a District Court's decision that a criminal defendant is no longer in imminent danger justify a Brady violation?

**PARTIES TO THE PROCEEDING AND
COMPLIANCE WITH RULE 14(B)**

The Parties concerned are included in the caption of this matter, and there are no corporate parties.

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APPENDIX A U.S. Court of Appeals for the Eleventh Circuit's Judgment

APPENDIX B In Forma Pauperis Affidavit/Declaration

OPINIONS BELOW

The Eleventh Circuit Court of Appeals unpublished decision is attached as [App.A].

JURISDICTION

The Eleventh Circuit Court of Appeal's jurisdiction was invoked from the denial by the United States District Court for the Southern District of Florida, under 28 U.S.C. §1291 and 18 U.S.C. §3742.

The Court of Appeals decision was entered on Feb 2023 [App.A]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(I).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This Case Concerns the failure of the District Court to stop the prosecution from shifting the burden of proof to the criminal Defendant during the closing arguments and other phases of trial. This affected the Defendant's constitutional due process right to a fair trial.

In addition, when the prosecution possess favorable evidence that is material to a Defendants' innocence or guilt, the Government has an obligation to provide that evidence under due process, and there is no justification in withholding said evidence when in the Court's estimation the imminent danger has passed.

STATEMENT OF THE CASE

Mr. Sapp was charged in a one count indictment filed on June 22, 2021, of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1)

A Jury trial began on September 21, 2021. At the conclusion of the four day trial, the Jury returned a verdict of guilty as to the one count indictment.

Sentencing began on December 9, 2021. Mr Sapp was sentenced to a (192) month imprisonment followed by three years of supervised release. Mr. Sapp timely filed a notice of appeal.

The Appellate Court's judgement was entered on February 22, 2023, with the mandate to follow. Sapp requested Counsel to file for rehearing and en banc on March 10, 2023, when he received notice of the final decision by Counsel. Counsel Refused.

The Eleventh Circuit Court of Appeals found that in regard to the Government shifting the burden of proof to the Defendant during trial, it was justified in the context of a justification defense. Where Sapp had to prove imminent harm, and therefore no misconduct was present when Prosecution convinced the Jury that Sapp had subpoena powers, even to information that was not made available until (2) days before.

The Eleventh Circuit further found that even if the belatedly disclosed evidence may have supported Sapp's justification defense, his defense was not since the evidence still would have shown that he possessed the gun after the threat of imminent harm had passed. U.S. v. Leonard Charles Sapp, NO. 21-14394 (11th CIR, 2023).

What follows is a timely petition for a Writ of certiorari.

REASONS FOR GRANTING THE WRIT

Leonard Sapp was not afforded a fair trial when the Government shifted the burden of the production of proof to the Defense during trial.

The Eleventh Circuit employs four factors in determining whether a prosecutor's conduct had a reasonable probability of changing the outcome of a trial. (1) Whether the challenged comments had a tendency to mislead the Jury or prejudice the Defendant; (2) Whether the comments were isolated or extensive; (3) Whether the comments were deliberate or accidental; and (4) The strength of the proof establishing the guilt of the Defendant. When the record contains sufficient independent evidence of guilt, any error is harmless, United States v. Lopez 590 F.3d 1238, 1256 (11th CIR. 2009). In other words, the Eleventh Circuit maintains that if the Court deems there is sufficient indica of guilt, then the prosecution may violate due process by introducing statement to the Jury that swats the Jury in the direction the Court sees fit.

When considering prosecutorial misconduct in a closing argument, "the relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed 2 d 144 (1986). "Past decisions of the Supreme Court demonstrate that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the "fairness of the trial, not the culpability of the prosecutor" Smith v. Phillips, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed 2 d 78 (1982). "The Cardinal rule is that a prosecutor cannot make statements calculated to incite the passions and prejudice of the Jurors," Gall v. Parker, 231 F.3d 265, 315 (6th Cir. 2000). When the prosecutor affectively threw his own weight and credibility as a representative of the United States of America behind his own opinion about the burden of proof shifting to Mr. Sapp, then "much weight was given to his personal opinion when it should properly carry none" Berger, 295 U.S. at 88, 55 S.Ct. 629. The opinion of

guilt by the Court should not give leave to the prosecution to commit misconduct, before the Jury even renders a decision. Moreover, the closing arguments by the prosecution presented a falsehood to the Jury, i.e., even though Sapp had subpoena power, much of the material needed for the affirmative defense was not provided until the time of the trial, negating the sheer lack of time to process the needed evidence.

Sapp presented an affirmative defense of justification. To establish a justification defense in the Eleventh Circuit, the Defendant must prove by a preponderance of the evidence there was an unlawful and present, immediate and impending threat of death or serious bodily injury to the Defendant or another.

Second, that the Defendant's own negligent or reckless conduct did not create a situation where the Defendant would be forced to engage in that crime.

Third, that the Defendant had no reasonable, legal alternative for violating the law, and fourth, that avoiding the threatened harm caused the criminal action. A preponderance of the evidence is enough evidence to persuade the Jury that the Defendant's claim is more likely true than not.

The question at hand is not a matter of proving by a preponderance of the evidence of guilt and the burden that carries, but rather the prosecution's statements to the Jury that Sapp could produce evidence, and thereby shift the burden of evidentiary production that lies solely with the Government. Even in the context of an affirmative defense, there lies two separate burdens. Here it seems the District Court is confused. Historically there is the "burden of persuasion", i.e., which party loses if the evidence is closely balanced, and the "burden of production", i.e., which party bears the obligation to come forward with the evidence at different points in the proceedings. OWCP Director v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct 2251, 129 LFD 2D 221 (1994).

The Supreme Court iterates that, "In the two decades after Hill, our opinions consistently distinguished between burden of proof, which we defined as burden of persuasion, and an alternative concept, which we increasingly referred to as the

burden of production or the burden of going forward with the evidence." SEE e.g., Brosnan v. Brosnan, 263 U.S. 345,349, 68 L.Ed. 332,44 S.Ct. 117 (1923) (imposition of burden of proof imposes the burden of persuasion, not simply the burden of establishing a *prima facie* case); Radio Corp of America v. Radio Engineering Laboratories, Inc., 293 U.S. 1, 7-8, 79 L.ed. 163, 54 S.Ct. 752 (1934) (Party who bears the burden of proof "bears a heavy burden of persuasion"); Commercial Molasses Corp v. New York Tank Barge Corp., 314 U.S. 104, 111 86 L.Ed. 89, 62 S.Ct, 156 (1941) (Party with the burden of proof bears the "burden of persuasion", though the opposing party may bear a burden to go forward with evidence"); Webre Steib Co. v. Commissioner,324 U.S. 164, 171, 89 L.Ed. 819, 65 S.Ct. 578 (1945) (The modern authorities are substantially agreed that in its strict primary sense, "burden of proof signifies the duty or obligation of establishing, in the mind of the trier of facts, conviction on the ultimate issue"); J.McKelvey, Evidence 64 (4th ed 1932) ("The proper meaning of burden of proof is 'the duty of the person alleging the case to prove it', rather than 'the duty of the one party or the other to introduce evidence'".)

In the context of an affirmative defense, Sapp indeed has a burden of proving or persuading his justification defense, but the prosecutor bears the burden of producing evidence or introducing evidence. The burden of affirmative defense is one of making a *prima facie* showing, generally to the Jury, "the truth of a proposition which he has affirmatively asserted in the pleadings". W. Richardson, Evidence 143 (6th ed 1944). The affirmative defense is not one of bearing the burden of production. When the prosecution entered into a colloquy with the Jury that Sapp could have produced evidence, tested evidence, collected evidence, and has subpoena powers, in the matter of two days, the Government irrevocably prejudiced the Defendant and deliberately mislead the Jury.

The District Court misinterpreted the burden or proof in the context of an affirmative defense to mean production. The Government violated Sapp's due process and a new trial should ensue.

A DISTRICT COURT'S DECISION THAT A CRIMINAL DEFENDANT IS NO LONGER IN IMMINENT DANGER DOES NOT JUSTIFY A BRADY VIOLATION.

Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed.R.Crim.P. 33(a). In order to obtain a new trial based on a violation of Brady v. Maryland, 373 U.S. 83 (1963), the defendant must show that: "(1) the government possessed favorable evidence to the defendant; (2) the defendant does not possess the evidence and could not obtain the evidence with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defendant, there is a reasonable probability that the outcome would have been different." United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Wearry v. Cain, 577 U.S. 385, 392 (2016) citing Brady v. Maryland, 373 U.S. 83, 87 (1963). See also Giglio v. United States, 405 U.S. 150, 153-54 (1972) clarifying that the rule stated in Brady, *Id.*, applies to evidence undermining witness credibility. "Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" Wearry, *Id.*, quoting Giglio, at 154, quoting Napue v. Illinois, 360 U.S. 264, 271 (1959) (emphasis added). "To prevail on his Brady claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted ... [h]e must show only that the new evidence is sufficient to "undermine confidence" in the verdict. *Id.*, citing Smith v. Cain, 565 U.S. 73, 132 S. Ct. 627, 629 (2012).

Brady applies to exculpatory and impeachment information that is in the possession of the "prosecution team," which includes investigators and the police. Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555 (1995) (rejecting state's argument that evidence known only to police but not prosecutor should escape Brady's disclosure requirements); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989) ("Brady and its progeny apply to evidence possessed by a district's 'prosecution team,' which includes both investigative and prosecutorial personnel.")

(citations omitted); Moon v. Head, 285 F.3d 1301, 1309 (11th Cir. 2002) (defining "prosecution team" as "the prosecutor or anyone over whom he has authority"); see also United States v. Reyeros, 537 F.3d 270, 281 (3rd Cir. 2008) (explaining that Brady requires disclosure of evidence known to prosecutor as well as "others acting on the government's behalf in the case" (citing Kyles), including evidence known to state police officers investigating the case).

On the eve of trial, the government provided two reports from expert witnesses, Clate and Bello, containing previously undisclosed information to the defense. The reports were prepared on September 16, 2021, and not disclosed until September 17, 2021, which was the Friday before trial was scheduled to start on that next Monday. (DE 96:148-150). Despite the late disclosure, the evidence discussed in the reports had been collected on or about May 16, 2021, and was in the possession of law enforcement continuously since that point. Specifically, the defense learned for the first time that DNA blood swabs had been taken at the scene, that two .40 caliber cartridges were retrieved from the windshield of Perkins's Cadillac, which were a different caliber than previously revealed, that Mr. Sapp's clothes from the scene had been preserved, that a latent fingerprint of value had been retrieved from Mr. Sapp's car, that there was information regarding the location of cartridges and the direction of travel of some of the bullets, that an unidentified cell phone and unidentified keys had been retrieved along the blood trail, that an expert report existed comparing cartridges, and that there was a slight possibility of a third firearm involved in the shooting based on the two cartridges that could not be matched to the recovered firearm. (DE 54).

Approximately a week earlier on September 9, 2021, the defense was provided crime scene photos taken on May 16, 2021, was advised that Mr. Sapp had made an exculpatory statement to Probation Officer Kus, was given body camera footage from various officers on the scene containing previously undisclosed body camera interviews with neighbors and witnesses, and received Mr. Sapp's hospital records for the gunshot wound showing he had been shot at close range. (DE 54). During the trial testimony, the defense learned for the first time that blood swabs had been submitted for testing two weeks earlier and that the blood collected was possibly of two people. Also during trial through Agent Schade, defense counsel learned that Detective Knapp had checked every hospital in the county and no other gunshot wounds had been treated on or about that date. (DE 97:188; DE 98:24, 43-44).

The withholding of the evidence above satisfies all of the Brady prongs: the government possessed all of the evidence noted in the reports and testified about during trial; the evidence was favorable to Mr. Sapp's affirmative defense; there was no way for Mr. Sapp to obtain the information other than from the prosecutor; the prosecution suppressed the information and did not disclose it to the defense, even upon request; and there is a probability sufficient to undermine confidence in the outcome.

The government was in possession of all of the evidence retrieved on or about the day of the incident, May 16, 2021, and shortly thereafter. Blood swabs, firearm cartridges, crime scene photographs, Mr. Sapp's clothing, body camera footage from various officers containing interviews of witnesses that corroborated a second shooter, an unidentified cell phone found along the blood trail, unidentified keys to a Hyundai found along the blood trail, a latent fingerprint from Mr. Sapp's Cadillac that did not belong to Mr. Sapp, 9mm cartridges and .40 caliber cartridges, information regarding the direction of travel of some of the bullet holes, the number, type, and location of shell casings revealing where certain firearms were discharged, where bullets had struck, the number of times the firearm had been discharged, the number of items struck, hospital records for Mr. Sapp's gunshot wound, an exculpatory statement Mr. Sapp made to his probation officer a short time after the incident, blood trail information indicating where Mr. Sapp was wounded and indicating that the blood was from possibly two different people, were all items of evidence in the government's possession, unbeknownst to the defense. (DE 97:178-222).

These various pieces of evidence were favorable to Mr. Sapp because they all served to support his affirmative defense of justification. Clate's report revealed that: (1) the two shell casings on Perkins's car were of a different caliber than all the other shell casings recovered. This was the first time the defense learned that the shells were .40 caliber which demonstrated evidence of a second shooter. This evidence also corroborated a shooter near the location described by Tavares Jacobs in this statement to the police; (2) DNA blood swabs had been recovered from the scene and held by the crime scene investigatory and that the blood splatter started by the driver's side of Mr. Sapp's car. The defense did not learn until trial testimony that Clate had determined that the blood trail may have resulted from more than one person; (3) an unknown phone and keys seen in the crime scene photos had been held for possible testing. This was the first indication that the

keys seen in the photos were not Mr. Sapp's keys to his Cadillac but keys from a Hyundai; (4) CSI Clate had established the direction of travel of some of the bullet holes in Mr. Sapp's car; (5) ammunition from the location of the sidewalk was a different make from the ammunition by the car itself; (6) Mr. Sapp's clothing had been kept by the police; and that (7) all items were available for testing if ATF decided to order it.

Bello's report, also disclosed on September 17, 2021, established that the firearm recovered from Mr. Sapp at the time of his arrest was used at two separate locations. Linking that information with the medical reports of a "close range injury," along with the number of bullet holes versus the number of casings recovered, made it clear that the firearm in Mr. Sapp's possession had to have been the same firearm that shot his car and his finger. This information was consistent with Mr. Sapp's justification defense.

Before the reports from Clate and Bello, the defense did not have knowledge of any of the above exculpatory information. The only reasonably diligent step that the defense could take to get the information was to continue to ask government and law enforcement for information. The government not only failed to provide this information in a timely manner, as required by Brady, but also suppressed this evidence when the defense affirmatively reached out to Clate to ask if there were any reports and Clate never replied.

There is a reasonable probability that the outcome of the trial would have been different if the Brady information was provided to the defense in advance of trial and prior to the eve of trial; that is, a probability sufficient to undermine confidence in the outcome. The Supreme Court rejected a standard that would require the defense to demonstrate that the evidence if disclosed properly would have resulted in an acquittal. United States v. Agurs, 427 U.S. 97, 110 (1976); Bagley, 473 at 681. In this case, if the defense had known about all of the pieces of evidence supporting Mr. Sapp's justification defense prior to the eve of trial, Mr. Sapp would have tested the various pieces of evidence and called his own expert(s) to testify about the findings which would have given his affirmative defense increased credibility with the jury.

The Appellate court when considering Sapp's arguments on appeal noted that the Eleventh Circuit may vacate a judgment and grant a new trial if the interest so requires. Fed.R.Crim.P. 33(a), but that in the Eleventh Circuit, motions for new trials are disfavored. Scrushy, 721 F.3d at 1304. The Appellate court rightly listed that in regard to a Brady violation that warrants a new trial, the defendant must show that: (1) the government possessed evidence favorable to him; (2) he did not possess the evidence and could not obtain it with reasonable diligence; (3) the government suppressed the evidence; and (4) if it had been disclosed, there is a reasonable probability that it would have changed the trial's outcome. Vallejo, 297 F.3d at 1164. "The burden in the Eleventh Circuit to show a Brady violation lies with the defendant, not the government." Stein, 846 F.3d at 1145.

As to the first prong, evidence is favorable to the defendant if it is exculpatory or impeaching. Id. As for the second prong, the government is not required to give a defendant information that he could obtain himself with reasonable diligence, like public record. Id. As for the third prong, delayed disclosure may qualify as a Brady violation "but only if the defendant can show prejudice, e.g., the material came so late that it could not be effectively used." United States v. Beale, 921 F.2d 1412, 1426 (11th Cir. 1991). And as for the fourth prong, a reasonable probability is one that undermines confidence in the outcome. United States v. Scheer, 168 F.3d 445, 451-52 (11th Cir. 1999). In the Eleventh Circuit, a defendant does not need to show that the disclosure of suppressed evidence would have resulted in acquittal or that there was insufficient evidence to convict in light of the suppressed evidence. Id.

With this backdrop, the Appellate court analyzed Sapp's Brady claims under each prong and ultimately came to the decision that he could not establish a reasonable probability that earlier disclosure of any belated materials could affect a Brady claim because he possessed the firearm he was shot with, eight (8) minutes after he was robbed and shot, and thus, the imminent danger had passed. Essentially, in the court's consideration, the Government was justified in violating Brady, because Sapp still had in his possession the weapon he was shot with.

In the context of a justification defense, when a defendant has been robbed and then shot when he attempts to protect himself, the court considers eight minutes passage of time a period long enough where imminent harm has passed. It should be noted that if a public official is merely threatened harm, protocol demands measures

to avert any imminent danger even providing no incident has occurred, and the potential for danger is unlimited.

In this case, Mr. Sapp was sitting near a friend's home. He was approached by individuals whose purpose was to rob him. When they pulled a gun, Mr. Sapp immediately reacted by grabbing the gun. He was shot for his attempt. Once Sapp was shot, he obtained possession of the weapon. Short minutes later, dazed and confused from the traumatic experience and fearful of further harm, Sapp left the scene.

The Appellate court offered multiple scenarios to overcome the Brady prong of reasonable probability that would have changed the outcome of the proceedings, and more importantly convinced the Appellate court that the withheld Brady material did affect the imminent danger justification. The court offers, he could have gotten rid of the gun ... perhaps on a street corner where children could have access to it. Or the court offers, he could have stayed at the scene where he was just shot and in fear for his life. But none of these "would be" scenarios should give license to the Government to withhold Brady material, and possessing the firearm eight minutes after he was shot with it, does not remove Sapp from imminent harm in one of the nation's most notorious gangland neighborhoods in the United States.

The court asserts the minimal passage of eight minutes negates the affirmative defense of necessity, and thereby supports the government's belatedly disclosed evidence which could have supported Sapp's justification defense. Sapp asserts as a matter of law that when the government withholds Brady material it had for months until hours before trial, the court cannot justify the government's lack of disclosure when no court has ever established a definitive running of the clock for imminent harm.

CONCLUSION

Sapp asserts that during trial, prosecution engaged in misconduct by misleading the jury into believing Sapp bore the burden of proof in persuasion and in production of evidence.

In addition, the Government's Brady violations cannot be justified by an unestablished imminent harm clock. Imminent harm is not only in the immediate but

also in the temporal immediate, surrounding a traumatic life-threatening experience.

Sapp asks this Honorable Court to vacate/remand to the lower court for further proceedings.

Respectfully,



Leonard Sapp #55967-004

FCC Coleman Medium

P.O. Box 1032

Coleman, Florida 33521-1032

Corrected Date

Date: 7/13/2023