No. 23-6128

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV 15 2023
OFFICE OF THE CLERK

JULIA ANN POFF, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Julia Ann Poff, Pro Se
Julia Ann Poff

QUESTIONS PRESENTED FOR REVIEW

1. SHOULD A DEFENDANT'S GUILT OR INNOCENCE BE DETERMINED BY THEIR FINANCES?

   A. BEFORE MAKING A VOLUNTARY AND INFORMED PLEA SHOULD A DEFENDANT HAVE THE RIGHT TO SEE EXCULPATORY EVIDENCE ("BRADY") AND THE ABILITY TO HIRE OR TALK TO A NON-PSYCHIATRIC EXPERT WITNESS ABOUT THEIR INDIVIDUAL CASE, SO THAT THEY CAN ACCURATELY WEIGH THE RISK OF GOING TO TRIAL OR ACCEPTING A PLEA DEAL?

LIST OF PARTIES

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

RELATED CASES

The original judgment of conviction in Case no. 4:17-CR-669 of Petitioner in the United States District Court for the Southern District of Texas.

The original judgment of conviction of Petitioner was appealed to the United States Court of Appeals for the Fifth Circuit which dismissed the appeal sua sponte on November 23, 2020 under United States v. Poff, 2020 U.S. App. LEXIS 37230.

The original judgment of conviction of Petitioner was appealed to the Supreme Court of the United States which was denied on or about June 10, 2021

The original denial of her 28 U.S.C. Section 2255 motion was signed on March 10, 2023 by the Honorable Keith Ellison.

The Court of Appeals denied her request for Certificate of Appealability on August 4, 2023 and denied Petition for Rehearing En Banc on September 7, 2023.

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JURISDICTION

The final judgment denying the Certificate of Appealability from the United States Court of Appeals for the Fifth Circuit was entered on September 7, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

"No person shall be ... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

3. The Fourteenth Amendment of the United States Constitution provides:

"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."

4. The statutes involved and under review are Title 18, United States Code Section 844 (d) which states:

"(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property."

5. The statutes involved and under review are Title 18, United States Code Section 844 (j) which states:

"(j) the term "explosive" means any device or chemical in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof MAY CAUSE AN EXPLOSION.

STATEMENT OF THE CASE

On or about October 3, 2016 someone mailed three (3) potentially explosive devices to: 1) former President Barack Obama; 2) Governor of Texas, Greg Abbott; and 3) Acting Commissioner of Social Security, Carolyn Colvin. These packages were made using trash that linked to William and Julia Poff. Using a fraudulent video tape to show to a Grand Jury, Ms. Poff was indicted on November 9, 2017 and was arrested at her home the same night. Three times she pled, "Not Guilty" to the crimes. She had court appointed attorneys who refused to listen to her or investigate the case. After threats to both her husband and daughters of an unlawful arrest, she was forced to plead guilty. On July 1, 2019, Ms. Poff plead "Guilty" to one count of 18 U.S.C. Section 844(d) - "Transportation of Explosives With the Intent to Kill, Injure, or Intimidate." Learning about the fraudulent video in the Presentence Report, she asked her attorney to withdraw her plea and he refused. On November 18, 2019 she was sentenced to the statutory maximum of 10 years under the illegal cross-reference that only the Fifth Circuit uses of attempted murder. Having completed her unconstitutional sentence, Ms. Poff continues to fight the injustice she has faced and hopes this petition will prevent others from facing the same fate she did.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment of the United States Constitution guarantees to each criminal defendant "the assistance of counsel for his defence." A key headnote in the well known case of Strickland v. Washington, it explains "in representing a criminal defendant, counsel owes the client ,,, a duty to advocate the defendant's cause, a duty to consult with the defendant on important decisions, a duty to keep defendant informed of important developments in the course of the prosecution..." This Court has stated in several rulings, "the defendant does not surrender control entirely to counsel, for the Sixth Amendment grant[ing] to the accused personally, the right to make his defense." This speaks of the "assistance" of counsel, as an assistant, however, expert is still an assistant. The District Court and the Government has continued making sure the defendant had absolutely no control in her defense. Again stated in Strickland, "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defence." She was denied the right to see any discovery or the alleged evidence, the government made sure of it through the use of a Protective Order. The object of our criminal justice system is to render justice, be fair, and impartial, none of which Ms. Poff has been given. If she would have known she had the ability to represent herself then she would have. Not one of her five (5) court appointed attorneys or the district court would listen to her and she wasn't able to make any of her own decisions.

As Ms. Poff has unfortunately learned once a defendant is incarcerated whether guilty or innocent they lose all their rights, constitutional guarantees, and they are prejudiced and discriminated against by the Government in multiple ways. Basically, their hands are tied and there isn't anything that they can do about it. They are then threatened by the Government in many ways to adhere to the Government's demands or else.

Ms. Poff's first set of CJA counsel wanted her to plead guilty to not one but two crimes within less than two months after her arrest without seeing any discovery. They denied her request to challenge the evidence, talk to any of her witnesses, or even consider hiring their own expert witness. When Ms. Poff refused they went behind her back and filed a sealed motion to withdraw. As a pro se litigant in her 28 U.S.C. § 2255 time period, Ms. Poff filed a motion to see sealed material, the District Court GRANTED her motion but never provided her with a copy or set up a way for the documents to be viewed. However, the Government did get to see them and quoted from it, "... it appears that the defendant is making decisions in her case that are contrary to her best interest..." But aren't those decisions supposed to be hers to make?

There is circuit split on whether a Brady violation, the withholding of exculpatory evidence by the Prosecution prior to entry of a guilty plea violates the U.S. Constitution? What about your own counsel? What about the District Court? Ms. Poff had no intention of ever pleading guilty to the crime she did not commit but since the prosecution and her own counsel withheld exculpatory evidence from an expert witness, which happened to be a report that proved Ms. Roff's factual innocence. But since she wasn't allowed to see any evidence and the District Court (to her knowledge) denied her the right to hire her own expert witnesses, she was left with no choice. Her counsel told her, "the Government is not going to allow you a fair trial, you have to plead guilty." Then the big statement, "you have already done the time so plead guilty so you can go home." That was the biggest lie yet, and yet we believe perjury is supposed to be a felony? Her attorneys never even mentioned the elements of the crime or what the Government would have to prove if they went to trial. The decision to plead was not based on an informed decision nor was it a choice she made, it was made for her. Had she been given the ability to see evidence and had effective counsel then she never would have plead to anything, but without money to control her own defence she was left with no options and became another statistic of an innocent person going to prison.

SHOULD A DEFENDANT'S GUILT OR INNOCENSE BE DETERMINED BY THEIR FINANCES?

As a child of the United States we all learn something called, "The Pledge of Alligance." That national anthem ends with the words "... with liberty and justice for all." But in reality is that a true statement in America? If it was then we wouldn't have organizations like "Black Lives Matter," or people fighting for "LGQBT Rights." Ms. Poff would also not be doing a petition on this topic. Unfortunately this is a huge issue in our Criminal Justice system in regards to our Constitutional rights. As referenced in an article written by an Associate Professor of Law, Kevin H. Smith, entitled "Justice for All? The Supreme Court's Denial of Pro Se Petitions for Certiorari," 63 Alb. L. Rev. 381, 1999, the problem starts in the highest court of the land and trickles all the way down to the District Courts.

> "Many individuals, not only the poor but ordinary citizens as well, are unable to afford an attorney's services or have decided that legal costs (of an attorney's services) far exceed any benefit they would receive from them." (385, footnote 14)

Money makes the world go around, that is true but should innocent people go to prison because they lack it? Our forefathers created ~~in~~ the United States Constitution in hopes that everyone would be treated equally and given certain rights as stated in the Fifth, Sixth, and Fourteenth Amendments. In one of the most famous United States Supreme Court cases, Miranda v. Arizona, 384 U.S. 436 (1966), it held that, "...if you cannot afford an attorney, one will be appointed to you." However, what motive does that appointed attorney have to 1) listen to the defendant, 2) develop a trial strategy, 3) look for evidence to rebuke the prosecutor's theory, and 4) hire expert witnesses to prove the defendant's innocence? That's right absolutely NOTHING! At the end of the day they collect their money and go home to their family while the innocent defendant goes to prison for a crime they didn't commit. Doesn't make for a happy ending, does it?

Now look at the case from the stand point of someone with finances. The attorney is being PAID to listen to the defendant / their client, they are PAID to develop a trial strategy, and they are PAID to seek out evidence and talk to witnesses. They also have money readily available to hire experts. Chances are also that the defendant or client is not being ~~able to~~ detained and therefore able to assist. The client is truly in control in this situation because if the attorney fails to act then he gets fired and not paid.

The Sixth Amendment-secured autonomy gives a "Defendant the right to make decisions like: 1) whether to plead guilty, 2) waive the right to a jury trial, 3) testify on one's own behalf, 4) the right to represent one's self, 5) call witnesses in their favor, and 6) forgo an appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983); Rock v. Arkansas, 483 U.S. 44 (1987); and McCoy v. Louisiana, 138 S. Ct. 1500 (2018). These were decisions or choices that Ms. Poff should have made, however when she voiced them her court appointed attorney left the room and filed a sealed "Motion to Withdraw." Even though Ms. Poff is now pro se, filed a motion to view this document, and the District Court granted it, she has still not been given the opportunity to view them. So she quotes Doc. 224 since the Government's attorney DID get to view the sealed material:

"... Moreover, it appears that the defendant is making decisions in her case that are contrary to her best interest ... (Pg. 6 Footnote 3)

Ms. Poff's Federal Public Defenders Ashley Kaper and John Paras wanted her to plead to not one but two crimes that she did not commit, nor would they investigate. When Ms. Poff refused their demand they walked out on her. Brookhart v. Janis, 384 U.S. 1, 5-7 (1966). At that point had Ms. Poff known she could represent herself then she would have because then at least maybe she could have been able to see the "alleged evidence." Faretta v. California, 422 U.S. 806, 819 (1975). At this point the question remains did the CJA attorneys see the expert witness report showing Ms. Poff's factual innocence but yet still try to force her to plead guilty against her wishes, and if so why?

At this point, Ms. Poff reached out to Judge Gilmore and told her what happened, the letter was ignored. In response to the sealed motion, Ms. Poff received a new attorney, Gus Saper. Unfortunately, Ms. Poff's choices fared no better. Mr. Saper said he wouldn't sign a protective order, but he did. He still couldn't get discovery from the Government and the District Court ignored his motions as well. He would come see Ms. Poff and fall asleep while talking to her and didn't listen to her. Another one that would have been fired and not paid, had she had the finances.

It was clear that Ms. Poff was not going to receive effective counsel, the Government refused to produce and show Ms. Poff any discovery, and the District Court was not going to respond to her pleas for help. So she did what she could and filed a Writ of Habeas Corpus, pro se which infuriated the Government who demanded that she "dismiss the action or else." The retaliation and threats against her family was the last straw and against her wishes Ms. Poff was forced to plead guilty to a crime she did not commit. Brookhart, 384 U.S. 1, 5-7 (1966) On July 1, 2019 she pled guilty but at the same time in another part of the case she maintained her innocence as she continues to do today. North Carolina v. Alford, 400 US. 25 (1970) Ms. Poff continued to maintain her innocence at her sentencing and even then the Judge ignored her words.

To reiterate, Strickland v. Washington, 466 U.S. 668, (1984), held that "in representing a criminal defendant, counsel owes the client a duty of loyalty, a duty to advocate the defendant's cause, a duty to consult with the defendant on important decisions, a duty to keep defendant informed of important developments in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." None of these "duties" was shown to Ms. Poff or her case.

With finances and resources the result of this case would have definitely been different, the expert report would have been seen, a second expert hired to confirm facts of the report, case dismissed, no guilty plea, and no prison time. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Schlup v. Delo, 513 U.S. 298 (1995). But with ineffective assistance of counsel and the prejudice of the District Court none of this was done and an innocent person went to prison.

A. BEFORE MAKING A VOLUNTARY AND INFORMED PLEA SHOULD A DEFENDANT HAVE THE RIGHT TO SEE EXCULPATORY EVIDENCE ("BRADY") AND THE ABILITY TO HIRE OR TALK TO A NON-PSYCHIATRIC EXPERT WITNESS ABOUT THEIR INDIVIDUAL CASE, SO THAT THEY CAN ACCURATELY WEIGH THE RISK OF GOING TO TRIAL OR ACCEPTING A PLEA DEAL?

THERE ARE SPLIT DECISIONS/OPINIONS ON THIS FEDERAL QUESTION AND IT NEEDS TO BE ANSWERED BY THIS COURT TO HAVE UNIFORMITY.

Under Brady v. Maryland, 373 U.S. 83 (1963), this Court ruled that "a prosecutor has a duty to disclose evidence favorable to a defendant when that evidence is material to either guilt or punishment." But the question remains, "When do they have to?" The prosecutor's duty to disclose material exculpatory information is based on the Due Process Clause of the Fourteenth Amendment, and exists to ensure that the accused receives a fair trial. Mooney v. Holohan, 294 U.S. 103, (1935). But what if there is no trial, what if there is a plea negotiation going on and the prosecution is withholding exculpatory evidence that proves the factual innocence of the person they are about to send to prison, doesn't that violate their Due Process rights, along with being morally unethical? Schlup 513 U.S. 298 (1995). That is exactly what happen in Ms. Poff's case.

The charge that Ms. Poff was forced to plead to was 18 U.S.C. § 844(d), "Transportation of Explosives with the Intent to Kill, Injure, or Intimidate." Ms. Poff's CJA Counsel never even told her the elements of the crime. In Mathis v. United States, this Court ruled that "elements are the constituent parts of a crime's legal definition - the things the prosecution must prove to sustain a conviction. 136 S. Ct. 2243 (2016). So if the prosecutor withheld a report in which proved one of these elements was not there, then how could a defendant be making a voluntary and informed decision concerning a plea? They couldn't because they didn't have all the facts to base a decision on. The elements of 18 U.S.C. § 844 (d) are: 1) transportation or receipt in interstate commerce, 2) any explosive, and 3) with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property. 18 U.S.C. § 844 (d). These three (3) things had to be proven in Ms. Pott's case. "To violate § 844 (d) one must thus at a minimum intend to intimidate by deploying a readied explosive CAPABLE of causing death, injury, or damage to property." United States v. Linehan, 56 F.4th 693 (9th Cir. 2022); United States v. Osorio, 360 F.3d 48 (1st Cir. 2004) ("some possibility of explosion is sufficient under the statute"); United States v. Urenski, 434 F.3d 690, 702 (4th Cir. 2006) ("affirming conviction where evidence established at the very least, that the device was capable of exploding"); and United States v. Langan, 263 F.3d 613, 625 (6th Cir. 2001) ("the only requirement is that the device be capable of exploding").

On November 22, 2016, Government Expert Witness, (Appendix A) Vincent J. Desiderio, Senior Forensic Chemist filed a report that states, "Exhibit 1 represent the remains of a disassembled improvised incendiary device (IID) in the form of a parcel." It goes on to say "it would not have produced an explosion," and "the device would not have functioned as designed." SO IT WAS NOT CAPABLE OF ANYTHING. Therefore it failed to meet the statutory definition and the government would not have been able to prove the element. This report was done one year prior to her arrest and she did not see it until five (5) years after her arrest. This definitely would have changed the outcome of her case and had she known she wouldn't have pled guilty. Hill, 474 U.S. 52, 59 (1985).

When Ms. Poff presented this report attached to her 2255 petition, the District Court ignored it and failed to honor her request for an evidentiary hearing. Schlup, 513 U.S. 298 (1995). So even proving her factual innocence Ms. Poff has still been denied relief. She should have never been put in this position or done any prison time. Murray v. Carrier, 477 U.S. 478 (1986) requires a habeas petitioner to show that a "constitutional" violation has probably resulted in the conviction of one who is actually innocent." So let's analyze the ultimate question, does or should "Brady" extend to a guilty plea when the government withholds exculpatory evidence?

There is a circuit split on this matter. The First, Third, Fourth, and Fifth Circuits underscore Brady's concern with fairness in the ultimate conviction and reject its application to plea hearings." To constitute a Brady violation, the nondisclosure must do more than impede the defendant's ability to prepare for trial; it must adversely affect the court's ability to reach a just conclusion, to the prejudice of the defendant." United States v. Starusko, 729 F.2d. 256, 262 (3d. Cir. 1984), abrogated on other grounds by Dennis v. Sec'y Pa. Dep't of Corr., 834 F.3d. 263, 289-93 (3d. Cir. 2016) (en banc)." It is, therefore, universally acknowledged that the right memorialized in Brady is a trial right." United States v. Mathur, 624 F.3d. 498, 507 (1st Cir. 2010); see also United States v. Moussaoui, 591 F.3d. 263, 285 (4th Cir. 2010). Rejecting the extension of Brady to pretrial plea negotiations, the First Circuit explained, "courts enforce Brady in order 'to minimize the chance of an innocent person being found guilty.'" Mathur, 624 F.3d. at 507. The Fourth Circuit reasoned similarily: "When a defendant pleads guilty, those concerns [of a fair verdict] are almost completely eliminated because his guilt is admitted." Moussaoui, 591 F.3d. at 285. And the importance of the plea hearing "provides no support for an unprecedented expansion of Brady." Mathur, 624 F.3d. at 507; see also Alvarez v. City of Brownsville, 904 F.3d. 382, 394 (5th Cir. 2018)("In sum, case law from the Supreme Court, [the Fifth Circuit], and other circuits does not affirmatively establish that a constitutional violation occurs when Brady material is not shared during the plea bargaining process.").

But doesn't these rulings go against other rulings like Giglio v. United States, 405 U.S. 150 (1972), which ruled that false statements violate one's rights; Napue v. Illinois, 360 U.S. 264 (1959), which held that the knowing use of false testimony by the Federal Government in gaining a conviction violates the Fifth Amendment? Does a defendant not receive due process rights when they plea? "An officer who intentionally or recklessly makes material misstatements or omissions to or fabricates evidence and puts it before a "neutral and detached magistrate," Johnson v. United States, 333 U.S. 10 (1948), violates the Fourth Amendment." Manuel v. City of Joliet, 137 S. Ct. 918 (2017). A year before Ms. Poff's arrest the prosecutor knew it was not an explosive device and could not have hurt anyone or damage any property but yet he obtained a search warrant on false testimony. The indictment reads "explosive," the plea agreement states, "An FBI Explosives Expert determined it to be a victim-activated, booby trapped, Improvised Explosive Device (IED)" and at sentencing he even waived a picture of an explosion that he knew was a false representation of the material fact, in front of the Judge. Had Ms. Poff ever seen this report the whole outcome would have been different. Hill, 474 U.S 52, 59 (1985). The prejudice of withholding this one report violated Ms. Poff's Fourth, Fifth, Sixth, and Fourteenth Constitutional Rights so this clearly did not allow her to make any kind of informed choice regarding her case.

The Sixth, Eighth, Tenth, and Eleventh Circuits parse the Supreme Court's materiality test - which requires the suppressed evidence to affect the verdict or outcome of trial to limit Brady prejudice to cases in which the criminal defendant is convicted. "A plaintiff cannot establish materiality unless the case goes to trial and the suppression of the exculpatory evidence affects the outcome." Becker v. Kroll, 494 F.3d 904, 924 (10th Cir. 2007); see also Livers v. Schenck, 700 F.3d 340, 359 (8th Cir. 2012) (in qualified immunity context, no Brady violation absent conviction); Flores v. Satz, 137 F.3d 1275, 1278 (11th Cir. 1998).

Likewise, when "the underlying criminal proceeding terminated in appellant's favor, he has not been injured by the wrongful suppression of exculpatory evidence." *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988). The Seventh Circuit has "expressed doubt that an acquitted defendant can ever establish the requisite prejudice for a Brady claim." *Alexander v. McKinney*, 692 F.3d 553, 556 (7th Cir. 2012). Having yet to decide the issue, the Seventh Circuit has allowed *Brady* claims where an "acquitted defendant showed that disclosure of the suppressed evidence would have altered the decision to go trial."

In Ms. Poff's case, it would have definitely altered her decision to go to trial and being incarcerated because of the suppressed exculpatory evidence for 2,170 days has been extremely prejudicial to her.

Adopting a prejudice test, the Second Circuit allows *Brady* claims during a plea hearing. *Miller v. Angliker*, 848 F.2d 1312 (2d. Cir. 1988) and *Tate v. Wood*, 963 F.2d 20 (2d Cir. 1992). The Second Circuit's approach in *Miller* and *Tate* links directly to non-disclosure and the Due Process Clause. The *Miller* court adapted this Court's materiality test in order for it to be applicable to the plea context. See 848 F.2d at 1322. Under *Miller's* "objective" test, information is material "if there is a reasonable probability that but for withholding of the information the accused would not have entered counsel's recommended plea but would have insisted on going to full trial." The emphasis in this test is not on the influence the undisclosed information possibly would have had on the fairness of a trial - the focus of Brady's materiality test - but instead on the accused's decision making process. In creating a materiality standard for the nondisclosure of favorable information prior to a guilty plea, the Miller court found it useful to examine this Court's prejudice standard in ineffective assistance of counsel claims at guilty pleas. Miller, 848 F.2d at 1321-22. The Miller court noted that "prejudice" in an ineffective assistance case is the same thing as "materiality" in an withheld evidence case. Id. at 1321; accord Strickland v. Washington, 466 US 668 (1984) ("the appropriate test for prejudice [in ineffective assistance cases] finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution"). Adapting this standard to the disclosure of exculpatory evidence cases, a defendant establishes "materiality" by showing a reasonable probability that but for the failure to disclose the Brady/Giglio evidence, the defendant would have refused to plead and opted for trial. The Miller court's test, in defining "material" information in a manner separated from both trial outcomes and counsel's recommendation creates a due process right where one should exist.

Multiple State courts have also felt this way. State v. Simmons, 112 Idaho 254, 731 P.2d 797 (Idaho Ct. App. 1987) (finding failure to disclose material exculpatory information could render counsel ineffective); Lee v. State, 573 S.W. 2d 131 (Mo. Ct. App. 1978) (holding, based on the absence of contrary law, that failure to disclose material exculpatory information entitled defendant to withdraw his plea); Ex Parte Lewis, 587 S.W. 2d 697 (Tex. Crim

App. 1979) holding that a prosecutor's duty to disclose favorable information extends to defendants pleading guilty).

Looking at a different approach, four circuits have concluded that nondisclosure of Brady/Giglio material may be sufficient to invalidate a guilty plea. Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); White v. United States, 858 F.2d 416, 422 (8th Cir. 1988); Miller, 848 F.2d 1312 (2d Cir. 1988); Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985); United States v. Millan-Colon, 829 F. Supp. 620, 635 (S.D.N.Y. 1993)

"The Fourteenth Amendment Due Process Clause requires that a plea of guilty be knowingly and voluntarily entered because it involves a waiver of a number of the defendant's constitutional rights." Brady v. United States, 397 US 742 (1970) In that case, this court outlined the following standard as to the voluntariness of guilty pleas:

"A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises) or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (eg bribes)."

Accordingly, to set aside a plea as involuntary, a defendant who was fully aware of the direct consequences of the plea must show that 1) some egregiously impermissible conduct (say, threats, blatant misrepresentations, or untoward blandishments by government agents) antedated the entry of his plea and 2) the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice. Brady v. United States, 397 U.S. at 755.

As the above statement indicates, the decision in Brady v. United States was based on the understanding that the defendant and his counsel had the information necessary to evaluate the relevant circumstances, including the strength of the government's case, and the court had the information necessary to evaluate whether the offered admission of guilt was reliable, rather than an effort by an innocent individual to avert the more severe consequences of a potential wrongful conviction.

Where, as in Ms. Pott's case, the government withholds material information that negates guilt, even competent counsel cannot adequately advise a defendant and the court cannot properly conclude that "there is nothing to question the accuracy and reliability of the defendant's admissions." Therefore, the government's misrepresentation undermined the ability of the defendant to plead guilty "intelligently" and the ability of the court to evaluate the truthfulness of her plea.

As the Sixth Circuit held in 1985 "the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent." Campbell 769 F.2d. 314 (6th Cir. 1985). As the Sixth Circuit found, the government's improper failure to disclose exculpatory evidence can undermine the voluntary and intelligent nature of the plea. Id. at 318, 321. In 1985, the Eighth Circuit also agreed. See White, 858 F.2d. at 422.

In 1988, the Miller court wrote, "it is now [in 1988] well established that a person accused of a crime has a due process right to require the prosecution to turn over to him any material exculpatory evidence in its possession," and cited Brady, 373 U.S. at 87. Id. at 1319. The court then explained that:

"In the absence of special circumstances, the validity of a plea of guilty is determined by reference to whether it was intelligent and voluntary. Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238, (1969). As a general matter, a plea is determined "intelligent" if the accused had the advice of counsel and understood the consequences of his plea, even if only in a fairly rudimentary way; it is deemed "voluntary" if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally. The Brady v. United States Court made clear, however, that this test suffices only in the "absence of misrepresentation or other impermissible conduct by state agents." Id. at 757. Since a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case, id at 756, and of information that may be available to cast doubt on the fact or degree of his culpability, we conclude that even a guilty plea that was "knowing" and "intelligent" may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." Id. at 1320.

Ms. Poff's Brady Claim:

In the filing of her 28 U.S.C. § 2255 motion to vacate her sentence, Ms. Poff reiterated the fact that she is filing pro se and not an attorney. Erickson v. Pardus, 551 U.S. 89 (2007). However, the Judge failed to acknowledge her claim of actual innocence. The Judge states on Pg. 21:

"To the extent defendant claims actual innocence as a gateway claim to surmount any procedurally defaulted claims, her conclusory assertions of actual innocence and disagreements with the credibility of the Government's evidence fail to satisfy her burden of proof. As explained, by the Supreme Court, "tenable-actual-innocence gateway pleas are rare: A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) (cleaned up); Schlup v. Delo, 513 U.S. 298, 324, 329 (1995) (holding that a claim of actual innocence "requires petitioner to support his allegations of Constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial") Defendant does not satisfy this burden of proof."

Ms. Poff DID present new evidence, did he not see her Exhibits C and F? Mr. Desiderio's report is exculpatory scientific evidence that clearly states "it was not an explosive." This report has never been presented to the Court because it was withheld by the government. Brady, 373 U.S. 83 (1963). This was factual proof of her innocence, Schlup, 513 U.S. 298 (1995), but yet she was denied an evidentiary hearing? Sawyer v. Whitley, 505 U.S. 333 (1992) This one report would have altered the whole case in the following way:

With money or effective counsel who performed their duties and allowed Ms. Poff to be in "control" of her case, once she saw this report once she was arrested, she would have immediately challenged probable cause. Next would have been the indictment using the words "improvised explosive device." She would have requested the Grand Jury transcripts to examine the wording used within it because there is no doubt in her mind that Napue, 360 U.S. 264 (1959) was violated. After seeing this she would have removed for a dismissal. If that didn't work then she would have challenged the statutory language. The controlling definition is found under the statute at 18 U.S.C. § 844 (j). "For purposes of § 844 (d), the term "explosive" means any device or chemical in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof MAY CAUSE AN EXPLOSION." As the last sentence of § 844 (j) confirms, the device must be readily capable of explosion..." Lineberry, 56 F.4th 683 (9th Cir. 2022). As previously referenced by the 1st, 4th, and 6th circuit "some possibility of explosion" is required. There was no possibility of explosion so the case should of ended there and she would have never been forced to plead guilty to anything.

The above scenario only references the second element of the statute. However, had she been told the elements, then this report would have also negated the third element. "With the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property." It has been determined by several courts that 18 U.S.C. § 844 (d) contains a mens rea requirement. "18 U.S.C. § 844 (d) does not require mere knowledge of some bare facts, nor does it criminalize the mere knowing transportation or receipt of an explosive. Instead it requires someone to transport or receive in commerce a readied explosive with the knowledge or intent that it will be used to kill, injure, or intimidate a person or damage property." Lineban, (9th Cir. 2022)

The Compulsory Process Clause of the Sixth Amendment which grants a defendant the right to call "witnesses in his favor." Rock, 483 U.S. 44 (1987). Moreover, in Faretta v. California, 422 U.S. 819 (1975), the court recognized that the Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and the cause of accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" The District Court denied Ms. Poff the funds to hire her own expert witnesses which denied her the right to a fair trial and violated her compulsory process clause rights.

Had she been allowed to hire her own expert witness, a similar defense strategy as shown in United States v. Wisdom, 534 F.2d 1306 (8th Cir. 1976), would have been used to negate the third element. "A jury would have had the right to consider that if a person is charged with having mailed a bomb that for some reason did not explode, that an obvious defense would be that it was never intended to explode." Id. As referenced by the government's explosive expert in that case, Michael L. Beckman testified, "that a device prepared as a hoax bomb and not intended to explode will ordinarily have lacking a component part of a real bomb." Id. From Mr. Desiderio's report there were two (2) things that showed the device was designed specifically NOT to explode: 1) There was NOT a significant source of confinement and 2) There was NO ignition mechanism. They were intentionally made with safety matches and will NOT strike against sandpaper. This would have eliminated the "intent" element so with 2 out of 3 required elements, Mathis, 136 S.Ct. 2243 (2016), missing there is no way the government could have sustained a conviction against Ms. Poff.

Ineffective assistance of counsel violating Ms. Poff's Sixth Amendment rights continued at sentencing when Brady material had still not been revealed. First, the Judge allowed a cross-reference of attempted murder to give Ms. Poff the maximum sentence, of 10 years. But as referenced on Pg. 6, Ms. Poff's attorneys' told her, "you have already done the time so plead so you can go home." This was based on the guidelines range of 24-31 months, what Ms. Poff was told to expect. Second, Ms. Poff's attorney was silent when the word "restitution" came up. Both of her CJA attorneys told her, "there will be no fine or restitution in this case," and Ms. Poff unfortunately believed them. On page 31 of the sentencing transcript the only thing said by Ms. Poff's counsel concerning restitution is:

"Government asked that she be ordered to pay some amount of restitution, I'm not sure that the Court has the authority to order restitution, unless there's a count of conviction for that."

The Court responded: "I have a restitution on here of $9700.00"

The Probation Officer responded: "Pursuant to the plea agreement, Your Honor, she' agreed to pay restitution with regard to the count of conviction."

Ms. Poff's counsel then apologizes and the issue is dropped. There was no defense presented, nor was there any breakdown of where $9700.00 came from. So how can a defendant be made to pay restitution on a dismissed charge that the Government never even proved she owed? Ms. Poff's CJA counsel was unprepared and failed in his duty to advocate for Ms. Poff. Strickland, 466 U.S. 668 (1984).

Looking at her Presentence Investigation Report, Pg. 14 ¶ 28 it states: "The defendant failed to disclose that she shared a residence with her spouse, failed to disclose a bank account, denied owning a vehicle, failed to disclose income from operating a fireworks stand, and failure to disclose William Poff's income of $5,333." Had Ms. Poff had effective counsel he would have been able to prove periods of separation between Mr. & Mrs. Poff by witnesses. He would have been able to show that the Netspend accounts were listed solely in Mr. Poff's name. He also would have been able to show that Ms. Poff does NOT own any vehicle, that both of them are registered to her husband. He would have also pointed out to the court that fireworks income is only in January and July, so an application done any other time would not have that income. But mainly he would have been able to show that the true and accurate amount of restitution was $1500 and was not by false statements but by slow mail. However, her attorney never said a word. Ms. Poff herself was in shock over the ordeal and not prepared to say anything either. Her attorney should have requested a separate restitution hearing and made the Government present proof of all their alleged allegations but he never did anything. This has been extremely prejudical to Ms. Poff and is the ONLY reason she remains incarcerated, today.

CONCLUSION

"The truth shall set you free." (John 8:32). Ms. Poff has been saying this the whole time. For 2,170+ days she has been incarcerated for a crime she did not do. She was denied her constitutional rights by the government, the courts, and her own counsel. One report withheld by the Government lead to her wrongful conviction. As she has shown if that report would have been seen by her in 2017 and not 2022 then the outcome of this case would have been different and this petition would not be filed from a prison cell today. But even when she took her case over pro se, the District Court continued to fight against her. Multiple times she requested the transcripts and they were denied. Why, because lack of funds? She even filed motions to view documents and even though the Court "granted" them she still has never seen them. She couldn't even get her CJA counsel to send her the case file. This whole case has been fundamentally unfair from day one, but yet she has continued to fight. Unfortunately, her sentence is over with and she never got the justice she wanted. But hopefully the topic discussed within will have garnered enough attention to help others so they don't have to live through the injustice that she has.

"Justice delayed is always justice denied." Teague v. Mayo, 553 F.3d 1068 (7th Cir. 2009)

WHEREFORE, Ms. Poff prays this Honorable Court will grant certiorari and vacate her conviction and sentence. Remand to the District Court to effect the vacation of the conviction and order her indictments to be dismissed with prejudice.

Respectfully Submitted,
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