

No. 17-5804

IN THE
Supreme Court of the United States

QUINTON PETERSON,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the West Virginia Supreme Court of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its brief in opposition, the State for the most part repeats the reasoning of the West Virginia Supreme Court of Appeals. The petition for certiorari and the dissenting opinion below explain why that reasoning is misguided and how it condones a serious injustice in this case. Petitioner offers this short reply to confirm these realities.

I. Reasonable Diligence

1. The State initially casts this case as involving nothing more than a ho-hum application of *Brady's* “reasonable diligence” principle. This characterization misses the mark for two reasons.

First, the prosecution did not disclose the theory that made the witness in question, Ms. Stolze, relevant until the night before trial. *See* Pet. App. B at 11. The State contends that it “beggars belief that reasonable diligence would not have seen the potential relevance of one of the few witnesses present when Petitioner interacted with the victim three days before the murder, especially when Petitioner and the victim were engaged in the same activity—playing dice—as they were immediately before the murder.” Br. in Opp. 22. But this contention ignores the fact that the State itself did not interview Ms. Stolze or Antonio Smith about the first dice game until the day before trial. *Id.* If Ms. Stolze’s relevance was as abundantly clear as the State suggests, surely the State would have spoken with her earlier while investigating and preparing to try a first-degree murder case.

In fact, Ms. Stolze's testimony was not relevant to the murder charge at all until the State decided to introduce a theory centering on a rematch dice game. Thus, until the prosecutor's phone call to the defense the night before trial, the prior dice game was of no concern to the defense. The defense had no reason to seek out Ms. Stolze to see what she had to say about it. *See St. Germain v. United States*, Nos. 03-cv-8006 (CM), 99-cr-339 (CM), 2004 WL 1171403, at *18 (S.D.N.Y. May 11, 2004) ("[D]efense strategies are largely formed prior to trial and the necessary predicate is that the strategies selected were chosen after careful consideration of all constitutionally-compelled disclosure.").

Second, and even more important, when the defense learned on the eve of trial that the State intended to present a new theory regarding the dice game, the defense had no real time to investigate. So it solicited and received an assurance from the prosecution that the State had in fact spoken with Ms. Stolze, and that she possessed no additional exculpatory information. This Court has squarely held in the context of *Brady* that the defense acts reasonably when it relies upon such an assurance from the prosecution. *Banks v. Dretke*, 540 U.S. 668, 692-98 (2004). And yet the State knew here that its assurance was false.

2. No doubt recognizing the dubiousness of its attempt to cast this case as an ordinary dispute over reasonable diligence, the State next maintains that "it is not clear" that the prosecutor's statement that Ms. Stolze possessed no exculpatory

information was false. Br. in Opp. 23. There is no dispute “that the State knew that the police had taken a statement from Ms. Stolze on the day before trial.” Pet. App. B at 15-16. But according to the State, the West Virginia Supreme Court of Appeals overlooked the trial court’s finding that the defense did not “put forth persuasive evidence that there was anything [Ms. Stolze] said to the police in her statement that was substantially different than the other testimony at trial.” Br. in Opp. 23.

This assertion also falls flat. The West Virginia Supreme Court of Appeals specifically highlighted the differences between Ms. Stolze’s suppressed statement and Det. McMillian’s trial testimony. On the one hand, the court recognized the detail Ms. Stolze provided and that “Ms. Stolze’s statement could be favorable to Defendant Peterson as impeachment evidence.” Pet. App. B at 12, 15-16. On the other hand, Det. McMillian testified here that he “could not recall the details of their conversation,” Pet. App. B at 12. And the West Virginia Supreme Court of Appeals has recognized that *Brady* is implicated when the police claim a “failed recollection” with respect to exculpatory evidence. *State v. Youngblood*, 650 S.E.2d 119, 130 (W. Va. 2007). As such, there is no question that the prosecutor’s statement regarding Ms. Stolze’s possession of exculpatory information was false and that the West Virginia Supreme Court of Appeals recognized it as such.

3. Finally, the State asserts that “the reasoning below would be correct even if the prosecution’s statement [that Ms. Stolze did not have exculpatory evidence] had

been inaccurate.” Br. in Opp. 24. In other words, the State maintains that *Brady* allows a prosecutor to lie about whether a witness it has interviewed—and who the defense has not yet contacted—has exculpatory information. “As applied here,” the State maintains, “this rule means that the government’s statement that Stolze did not have exculpatory evidence”—even if false and made in bad faith—“cannot make up for the fact that reasonable diligence before trial would have uncovered that same evidence.” Br. in Opp. 24.

This proposition is as startling as it is wrong. A prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Hence, “[i]t is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Id.*; see also *United States v. Bagley*, 473 U.S. 667, 680 (1985). The prosecution thus violates due process whenever it submits a theory to the jury after lying to the defense about the existence of exculpatory, material evidence—regardless of whether the defense might otherwise have uncovered the evidence with due diligence.

Indeed, the State’s position here is akin to arguing that the prosecution may allow one of its witnesses to lie on the witness stand simply because the defense

may have access to evidence showing the falsity of the testimony. But, as numerous courts have pointed out, “the government’s duty to correct perjury by its witnesses is *not* discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false.” *United States v. LaPage*, 231 F.3d 488, 492 (9th Cir. 2000) (emphasis added); *accord United States v. Foster*, 874 F.2d 491, 495 (8th Cir. 1988) (“The fact that defense counsel was also aware” of evidence revealing the falsity of a prosecution witness’s testimony “is of no consequence.”); *People v. Smith*, 870 N.W.2d 299, 306 n.8 (Mich. 2015) (While “secreting evidence violates due process, . . . so too does a prosecutor’s exploitation of false testimony by a state witness to gain a conviction, *whether done together with a failure to disclose or not.*” (emphasis added)).

In short, there is no doubt that the prosecution violates *Brady* whenever it falsely represents that a witness it has interviewed has no exculpatory, material evidence. The State’s professed ignorance of that principle just reinforces that this Court should grant review and reverse.

II. Materiality

The State’s defense of the West Virginia Supreme Court of Appeals’ materiality holding fares no better than its “reasonable diligence” argument. Petitioner agrees with the State that Ms. Stolze was immaterial to the case up to the point that the prosecutor introduced its new theory as to what was going on at

Ms. Stolze's house the day before trial. At that point, however, Ms. Stolze's identity and statement to the police became material to this case.

All the reasons why this is so are adequately outlined in Justice Davis's dissent. *See* Pet. App. C. However, it is worth reiterating that it was the prosecution that told the jury in opening and closing remarks that this case started with a dice game where Petitioner left angry wanting his gun, continued with a rematch dice game where Petitioner continued losing, and ended with Petitioner shooting the victim. During the State's closing argument, the State referred to Antonio Smith's testimony about what happened at the first dice game eight separate times and then argued that there was no contrary evidence save Petitioner's testimony. App. C at 9-10 (Davis, J., dissenting). All this, while knowing that Ms. Stolze possessed a complete and contradictory version of events.

"Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (internal quotation marks and citations omitted). And here, Ms. Stolze's statement to the police undermines core aspects of the State's theory of the case. First, it contradicts the notion that Petitioner was the loser of the dice game and left angry. Second, it contradicts the purported motive for the crime. If Petitioner did not leave angry, then he would have had no reason to demand a rematch and to seek revenge against the victim.

The jury's actions during deliberations confirm the materiality of Ms. Stolze's statement to the police. The jury sent out questions during their deliberations concerning Ms. Stolze; they wanted to know why she was not called to testify. The jury would not have cared about Ms. Stolze unless they were focusing on what happened three days before the murder. In sum, the jury was deprived of exculpatory evidence from Ms. Stolze, and even the jury knew it. Pet. App. C. at 10-11 (Davis, J. dissenting).

At a minimum, if Ms. Stolze had testified, her testimony would have negated the intent evidence necessary to establish first-degree murder. None of the "day of the murder" evidence relied upon by the West Virginia Supreme Court of Appeals for finding Ms. Stolze's testimony immaterial provided evidence of premeditation or motive to substantiate a first-degree murder conviction. The majority noted that the evidence established that:

(1) Defendant Peterson was with the victim on the night of the murder in the area where the body was found; (2) an eyewitness [Donovan Wade] saw Defendant Peterson, armed with two guns, entering the alley where the victim was selling drugs, heard a single gunshot shortly thereafter, and then saw Defendant Peterson jogging away from the area; (3) Defendant Peterson made twenty-five phone calls to a Huntington acquaintance in the hour after the murder occurred; (4) Defendant Peterson called his Columbus girlfriend approximately ninety minutes after the murder occurred, requesting that she drive to Huntington to pick him up; (5) Defendant Peterson left Huntington and returned to Columbus on the night of the murder at 11:30 p.m.; and (6) Defendant Peterson fled when a U.S. Marshal attempted to apprehend him in Columbus and offered no reason explaining why he fled upon seeing the Marshal.

Pet. App. B at 24-26.

Under West Virginia law, a defendant “cannot be found guilty of murder where there is no proof of malice except the use of a deadly weapon.” *State v. Jenkins*, 443 S.E.2d 244, 250 (W. Va. 1994) (citation omitted). Thus, even assuming that the prosecution’s evidence persuaded the jury to find Petitioner guilty of shooting the victim, none of the “eyewitness” or “get-away” evidence cited by the majority explains *why* Petitioner did so. Because of this, the State knew it needed more to convict Petitioner of first-degree murder; that is why it sought out additional witnesses the night before trial. In other words, the prosecution needed a story about a loser in a prior dice game and a rematch loss in order to tie everything together. But that is precisely the story that Ms. Stolze’s testimony would have severely undercut.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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