

No. _____

IN THE

Supreme Court of the United States

MANUEL GARDNER,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

On Petition for a Writ of Certiorari
to the New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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May 30, 2018

Question Presented

1. Is it a violation of *Brady v. Maryland*, 373 U.S. 83 (1963) for the prosecution to fail to disclose jail records demonstrating that the jailhouse snitch who claimed to hear Mr. Gardner confess to murder was not in jail with Mr. Gardner at that time?

List of Parties

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

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Opinions Below

The decision of the New Mexico Supreme court, App. A, is unreported.

The New Mexico district court's denial of the motion for new trial, App. B, is unreported.

Jurisdiction

The New Mexico Supreme Court issued its decision on March 8, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Constitutional Provision Involved

The Fourteenth Amendment to the United States Constitution provides,

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Introduction

The State's case hinged on inmate-snitch testimony that Mr. Gardner confessed to the inmate-snitch in October while they were housed together in Polk County Jail. There was just one problem with the testimony – it was factually impossible. But the prosecution failed to disclose jail records that proved their inmate-snitch witness was lying. This witness and Mr. Gardner were not in county jail together when the witness claimed to have heard the confession. The New Mexico Supreme Court held Mr. Gardner failed to explain how inmate-snitch testimony of an alleged confession was vital to the State's case, ignoring this Court's precedent on the effect confession evidence has on juries and instead holding that the jurors likely did not find the witness credible anyway. In addition to ignoring long-standing precedent on the impact of confession evidence, the New Mexico Supreme Court Decision ignores this Court's requirement that the prosecution turn over impeachment evidence, and turns *Brady's* test of materiality on its head.

Statement of the Case

Manuel Gardner was convicted of first-degree murder for the killing of a store clerk. The murder was captured on video-surveillance, but the suspect wore a red bandana over his face and a hooded sweatshirt, obscuring his identity.

Except for the inmate-snitch testimony, the evidence at trial was entirely circumstantial. The State did not present any physical evidence at all—no finger prints, no DNA, no recovered property, no gun. The State instead asked the jury to rely on a series of inferences and speculation in convicting Mr. Gardner—he had a

car similar to the one seen in the area at the time of the murder, he had been to the store previously, he had a faded red or pink bandana in his car, he owned shorts and shoes similar to the ones worn by the suspect in the grainy surveillance video.

The State's most direct evidence of Mr. Gardner's involvement came from the jailhouse snitch testimony of two inmates who claimed they heard Mr. Gardner confess to the murder. One of them, Inmate Villegas, got practically every detail of the crime incorrect. The other, Inmate Thomas, claimed he heard Mr. Gardner confess to the murder when they were both housed at the Polk County Jail in Texas in October, due to overcrowding at the local jail in New Mexico. Records later demonstrated that Mr. Gardner was not at the Polk County jail in October. The State never gave these jail records to the defense. Nor did the State bother to verify whether the two men were housed together. On appeal, the State conceded that for purposes of appeal, this inmate gave perjured testimony.

The defense filed a motion for new trial once it obtained the jail records that showed Mr. Gardner and Inmate Thomas were not housed together and so he could not have heard Mr. Gardner confess. The district court denied the motion.

The New Mexico Supreme Court held that "[e]ven assuming Thomas committed perjury, we are not convinced his testimony had such a persuasive and prejudicial effect on the jury's verdict that Defendant was deprived of a fair trial." Decision, ¶ 32. The Court went on to recognize the impeachment value of the jail records, yet paradoxically held that the failure to disclose them was not a *Brady* violation. *See id.* ¶ 34. ("If the defense had the record at trial, it could have produced

the record to impeach Thomas; but the jurors likely did not find Thomas credible anyway, given the lack of any real substance to his testimony and his criminal record.”)

Reasons for granting the writ.

1. **THE STATE FAILED TO DISCLOSE JAIL RECORDS SHOWING INMATE THOMAS AND MANUEL GARDNER WERE NEVER IN POLK COUNTY JAIL TOGETHER RESULTING IN A *BRADY/GIGLIO* VIOLATION.**

A. Introduction

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the government is obligated to disclose evidence materially favorable to the accused. Such a duty extends to impeachment evidence as well as exculpatory evidence, *see United States v. Bagley*, 473 U.S. 667, 676 (1985), and includes evidence that is directly known by the prosecutor as well as evidence “known to the others acting on the government’s behalf.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). A prosecutor’s ethical obligations extend beyond *Brady* such that a claim of misconduct may lie even where a *Brady* claim does not. *See Kyles*, 514 U.S. at 437.

The defense brought this issue to the district court’s attention by filing a Motion for New Trial. However, the defense did not specifically raise the failure to disclose the jail records as a *Brady* violation. Mr. Gardner asserts the prosecutor’s failure resulted in plain error. *See United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002) (“If, however, the defendant did not precisely articulate a *Brady*

violation in his or her motion for new trial, this court need only conduct a plain error review.”) (internal quotation and citation omitted.)

B. The Failure To Disclose Jail Records Resulted In A *Brady/Giglio* Violation.

A meritorious *Brady* claim contains three essential components: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeachment evidence; (2) the government must have withheld the evidence, either intentionally or inadvertently; and (3) the evidence must be material to guilt or punishment, i.e., “prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Evidence is material if “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006). The “touchstone of materiality is a ‘reasonable probability’ of a different result.” *Kyles*, 514 U.S. at 434.

The related rule of *Giglio* applies where “the undisclosed evidence demonstrates that the prosecution’s case includes perjured testimony and that the prosecution knew, or should have known, of the perjury.” *United States v. Agurs*, 427 U.S. 97, 103 (1976) *holding modified by Bagley*; *Giglio v. United States*, 405 U.S. 150, 154 (1972). In order to establish a *Giglio* violation, “a defendant must show the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material.” *United States v. McNair*, 605 F.3d 1152, 1208 (11th Cir. 2010). The materiality

element is met if there is “a reasonable likelihood the false testimony could have affected the judgment of the jury.” *Id.* On appeal, the State admitted that Inmate Thomas gave perjured testimony.

The State failed to disclose records showing that Mr. Gardner was not at Polk County jail when Inmate Thomas claimed he heard Mr. Gardner confess. Of course, “the individual prosecutor has a duty to learn[,]” that is, “any favorable evidence known to the others acting on the government's behalf in the case, including the police.” *Kyles*, 514 U.S. at 437. The State knew where both Mr. Gardner and Inmate Thomas were incarcerated and when they arrived at each jail location. This fulfills the first *Brady* factor as the State suppressed this evidence by failing to disclose it to defense counsel prior to trial. This also satisfies the inquiry under *Giglio*, because the prosecutor should have known, given that both men were in the State’s custody at the time. *See United States v. Agurs*, 427 U.S. 97, 103 (1976) (noting that “when the undisclosed evidence demonstrates that the prosecution’s case includes perjured testimony and that the prosecution knew, *or should have known*, of the perjury” . . . the conviction is fundamentally unfair “and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”) (emphasis added).

As to the second factor, this evidence proved that Inmate Thomas could not have overheard Mr. Gardner confess while in jail in Texas as he claimed. It shows conclusively that Inmate Thomas’ testimony was a lie. As such, it was favorable to Mr. Gardner. As to the third factor, this evidence was material to the defense. It

served as both impeachment evidence, which the Supreme Court has recognized must be disclosed under *Brady*, and also substantively proved that Inmate Thomas' claim he heard Mr. Gardner confess was impossible. *Cf. Bagley*, 473 U.S. at 676 (rejecting any "distinction between impeachment evidence and exculpatory evidence" in the *Brady* context).

Studies have shown that snitch testimony are one of the leading causes of wrongful convictions in this country. One study of 350 erroneous convictions in potentially capital cases found "[p]erjury by prosecution witness[es]" to be a cause in 117 cases--the single largest categorical cause. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 56 (1987). This Court recognized this risk and cautioned, "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." *Lee v. United States*, 343 U.S. 747, 757 (1952). The Ninth Circuit held: "By definition, criminal informants are cut from untrustworthy cloth Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *United States v. Bernal-Obeso*, 989 F.2d 331, 333-34 (9th Cir. 1993).

The use of snitch testimony in this case came in as evidence of the most damaging sort: that of a confession. This Court has recognized the "profound impact that the confession has upon the jury[.]" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The jailhouse snitch testimony in this case was exceptionally unreliable, yet

highly damaging. Had the defense been able to prove Inmate Thomas' testimony was a lie there is a "reasonable probability of a different result." *Kyles*, 514 U.S. at 434. Under *Giglio*, because the testimony was evidence of a confession by Mr. Gardner, there is "a reasonable likelihood the false testimony could have affected the judgment of the jury." *McNair*, 605 F.3d at 1208.

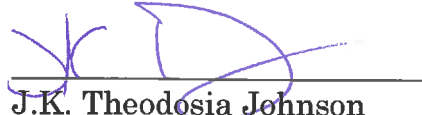
Although defense counsel did try and bring this up during his cross-examination of Inmate Thomas, he did not have the necessary proof to show that he was lying. He did not have this proof because the State never turned over the jail records, despite their impeachment and exculpatory value. Instead, defense counsel was only able to ask whether "it would surprise" Thomas to learn that Mr. Gardner was not in Texas at that time. This evidence was material as it would have challenged Inmate Thomas' claim of a confession. The State's other evidence of Mr. Gardner's involvement was almost entirely coincidental and circumstantial. Inmate Thomas' testimony that Mr. Gardner confessed to this crime was the lynchpin of the State's case. The prosecution suppressed evidence that demonstrated Inmate Thomas was lying. Mr. Gardner's defense was undermined by its absence and reversal is necessary.

Conclusion

Inmate Thomas committed perjury when he testified that he heard Mr. Gardner confess in jail in Texas. Allowing a conviction to stand when it is undoubtedly achieved through perjured testimony is a miscarriage of justice and a violation of due process. The New Mexico Supreme Court should have reversed Mr. Gardner's conviction, as material evidence was suppressed before trial and the

State presented perjured testimony to obtain the conviction in this case.

Respectfully submitted,



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