Application No. 10-1729

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ALFRED W. TRENKLER, Petitioner,

v.

UNITED STATES, Respondent.

On application for a second and successive 28 U.S.C. § 2255

PETITION FOR REHEARING OR REHEARING EN BANC

Alfred W. Trenkler

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March, 2011

STATEMENT UNDER RULE 35(b)

The panel denied Alfred W. Trenkler's, "Trenkler", application for leave to file a second or successive petition under 28 U.S.C. § 2255(h), the judgment entered February 7, 2011.

The panel decision conflicts directly with a previous decision granting a 28 U.S.C. § 2255 application filed by Trenkler in July of 2007, No. 07-2112, Judgment entered September 6, 2007, where it was "Less clear [that] the bases for claims that the evidence is newly discovered or that its earlier unavailability reflects any constitutional violation, but it is conceivable that Trenkler might be able to fill in these gaps." This Court had previously granted certification "on a highly incomplete record."

Trenkler's current application, No. 10-1729, filed on June 14, 2010, demonstrates several instances of the discovery of new, material, actual innocence evidence not known to Trenkler, withheld and suppressed in a blatant disregard of discovery rules by the trial prosecution in direct violation of the Constitution, establishing a viable and credible excuse, cause, and the resulting prejudice, for failing to raise these claims at the appropriate time.

It is significant that the evidence that had been withheld was held in an evidence room unknown to Trenkler et al, despite his unwavering diligence, and, with much risk to the "blue wall" surrounding law enforcement, Boston Police Captain Francis Armstrong, Commissioner Edward Davis and Boston

Police Corporate Counsel William Sinnott were instumental in Trenkler's discovery of the evidence, known, possessed, and withheld by Assistant United States Attorneys Paul V. Kelly and Frank A. Libby.

It is a result of government actions of withholding valuable exculpatory, actual innocence, and impeachment evidence, even after representing it would fully abide by discovery rules, and the resulting Constitutional violation that prevented Trenkler from even filing motions beyond general discovery motions to request the evidence now cited in Trenkler's current habeas motion for why this evidence was not discoverable at an earlier date.

This current decision conflicts directly with First Circuit decisions and rulings that apply equitable tolling to claims where defendants were unaware of or could not have discovered evidence, see, for example, Barretto-Barretto v. United States, F.3d 95, 100 (1st Cir 2008), "The doctrine of equitable tolling suspends the running of [a] statute of limitations if a plaintiff, in the excercise of reasonable diligence, could not have discovered information essential to [his claims]", and Gonzales v. United States, 284 F.3d 281, 291 (1st Cir. 2002), same, Ramirez-Carlo v. United States, 469 F.3d 290-291 (1st Cir. 1997) "Equitable tolling applies when the plaintiff is unaware of the facts underlying his cause of action."

Trenkler has shown that no degree of diligence could have revealed the evidence in his current application prior to

trial and provided credible explanations as to why he could not, one, Trenkler never had access to any sworn statement of codefendant Shay Jr, and two, namely, the prosecutor suppressed and withheld the evidence in question while falsely representing it was abiding by discovery rules.

The panel decision also conflicts directly with the Supreme Court's decisions in Brady v. Maryland, 733 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976), Kyles v Whitley, 514 U.S. 419 (1995), United States v. Bagley, 473 U.S. 667 (1985), and Giglio v. United States, 405 U.S. 150 (1972), which allows for defendants such as Trenkler to access evidence withheld by the government.

Trenkler's case relies on well established rules of general application -- the rules enunciated in 1963 in Brady v. Maryland and its progeny. The instant case neither imposes any new obligation on the government nor breaks any new ground.

Because the panel's decision conflicts with the authoritive decisions of the Supreme and Apellate Courts that have addressed similar issues in Trenkler's application, reconsideration by this panel or consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions.

This issue is also of exceptional importance because this is but another instance of prosecutorial misconduct by the withholding of material, actual innocence, exculpatory and impeachment evidence, a pernicious distinction that the First Circuit is saddled with as a result of the few overzelous

prosecutors that continue this practice, affecting the fundamental post-conviction rights of all prisoners that share Trenkler's current predicament.

Further, to bar Trenkler's applcation condones the government's continual practice of suppressing and withholding of evidence, a recurring problem in the First Circuit.

ARGUMENT

In his June, 2010 application to this Court, Trenkler presented all the ingredients for a proper second or successive 28 U.S.C. 2255. The government, prior to Trenkler's trial, had maintained that they were abiding by the First Circuit and Supreme Court rulings as well as local rules of evidence, see, for example, United States v. Bender, 304 F.3d 264 (1st Cir. 2004), "To comply with Brady, the individucal prosecutor has a duty to find any evidence favorable to the defendant that was known to those acting on the government's behalf," Strickler v. Green, 527 U.S. 263, 280, "[S]uch persons include other members of the prosecuting team including police investigators working for the prosecution." Kyles v. Whitley, 514 U.S. 419, "A defendant's right to due process is violated when the prosecution suppresses evidence that is both favorable to the accused and material to guilt or innocence, Brady v Maryland, 373 U.S. 83 (1963), "Evidence is material [] if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Since at least 1984, the Supreme Court has treated the

"materiality" requirement for Brady v. Maryland claims and the "prejudice" requirement for ineffective assistance of counsel claims as synonymous. See Hill v Lockhart, 474 U.S. 52, 57 (1985); Strickland v Washington, 466 U.S. 668, 694 (1984)(stating that "the appropriatee test for prejudice finds its roots in the test for materiality of exculpatory informati on not disclosed to the defense by the prosecution...."). To establish "materiality" or "prejudice" a petitioner must prove a "reasonable probability that...the result of the proceeding would have been different." Id. at 694.

Trenkler included in his June 2010 application to this Court newly discovered reports and investigative and forensic results and videotapes that the government possessed but chose to withhold, all the while maintaining that it was abiding by its obligation under both local discovery rules as well as Supreme Court rulings, such as Brady v. Maryland, 373 U.S. 83, (1963); U.S. v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972), and U.S. v. Bagley, 473 U.S. 667 (1985).

Trenkler also found that the government possessed and withheld impeachment evidence concerning original prime suspect Thomas Leroy Shay, Shay Sr, who had a proven motive and intent to bolster his failing $400,000 dollar lawsuit by "finding" a bomb under the seat of his car, predicting the placement of a bomb from one year to within weeks of the bomb "discovery" in this case at the hands of the defendants in his $400,000 dollar lawsuit. Shay Sr mysteriously morphed from

the "unbelievable", "incredible", prime suspect whose answers given to investigators were not believed, into the chief government witness. "Impeachment evidence may make the difference between conviction and acquittal and thus, must be disclosed." Giglio v. United States, 405 U.S. 150, 154 (1972). See also United States v. Osorio, 929 F.2d 753 (1st Cir. 1991), "[P]rosecutor['s] derived duty ... to search for and produce impeachment evidence that is known to those acting on the government's behalf." Id at 761.

Trenkler had no possible avenue to access the evidence recently discovered if the government was not going to disclose its existence, "[I]n many cases [] exculpatory information in the possession of the prosecutor may be unknown to defense counsel [...] [I]f evidence is so clearly supportive of of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made." United States v. Agurs, 427 U.S. at 107 (1976).

Following Moreno-Morales v. United States, 334 F.3d 140 (1st Cir. 2003), the evidence Trenkler has recently discovered "has shown the three components of a Brady violation: "the evidence at issue [is] favorable to [Trenkler], either because it is exculpatory, or because it is impeaching; that the evidence [was] suppressed by the [government], either willfully or inadvertently; and prejudice [] ensued." Strickler v. Green. 527 U.S. 263, 281-82. (1999).

The newly discovered impeachment evidence this Court is

discounting proves, without a doubt, that the government not only knew of the evidence, it was the one that subpoenaed the very evidence that would have impeached its witness, Shay Sr, and government witness Christopher Shapely.

The newly discovered non-disclosed second fingerprint report and analysis stating that Trenkler's fingerprints were not among the 5 unidentified prints found on the undercarriage of Shay Sr's vehicle, the non-disclosed second report and video tape of a second reenactment proving the bomb could not have been placed on Shay Sr's car to dislodge, proving that Trenkler could not have affixed the bomb to Shay Sr's car, impeaching Shay Sr, at the same time impeaching the govenment's expert witness, Christopher Shapley, on the alleged bomb dislodgment, and finally, the non-disclosed investigative evidence of another viable suspect who admitted working with and having access to explosives, and admitted to the construction of the Roslindale bomb, there is no possible doubt that the results of his trial would have been different.

Further, the affidavit from convicted codefendant, Shay Jr, who refused to testify at Trenkler's trial, was unavailable at trial, and is considered new evidence in the First Circuit, see Del Valle, 566 F.3d 31, 33 (1st Cir. 2009), supra, and would prove that the government put on testimony that it knew to be false. See United States v. Conley, 103 F.Supp. 2d 45, 49 (D.C.Mass. 200?), "Exculpatory evidence withheld from the defense allowed the government purposefully to ask the jury to

infer facts known by the prosecutor not to be true."

By denying Trenkler's application this Court is granting government prosecutors permission to conceal evidence if it is detrimental to its case, a practice recognized in Bracy v. Gramely, 520 U.S. at 899, 909, urging "in effect, that 'the [former] prosecutor can lie and conceal and [Trenkler] still has the burden to [...] discover the evidence', so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected."

Trenkler was further disadvantaged by the fact that the government made false representations that it was abiding by discovery rules when, if fact, it was withholding verdict altering evidence. "Our decision lends no support to the notion that defendant's must scavenge for hints of undisclosed material when the prosecution represents that all such material has been disclosed." Banks v. Dretke, 543 U.S. 695.

This evidence, had it been in the hands of the jury at Trenkler's trial, would have most difinitely had a different result in the outcome of the proceeding.

The case against Trenkler was entirely circumstantial, had Trenkler had access to the forensic, witness, and impeachment evidence possessed and withheld by the government along with never before available sworn testimony of Trenkler's codefendant, Thomas Arthur Shay, "Shay Jr" there is no doubt that the results of Trenkler's trial "would have been different."

CONCLUSION

Rehearing by the original panel or en banc review is of critical importance not only because the panel decison conflicts with other decicisions in the Supreme Court, the First Circuit and other Circuits, but also because in the district of Massachusetts government prosecutors have had an enduring difficulty in discharging their duty to disclose material exculpatory and impeachment information to defendants in a timely manner, if at all.

For example, in 1991, in a case of "astounding negligence," the First Circuit described "the recurring problem of belated government compliance with its duty to provide timely disclosure of exculpatory evidence." United States v. Osorio, 929 F.2d 753, 755 (1st Cir. 1991). The First Circuit had addressed before the "'sloppy practice' in the prosecutor's office with respect to disclosure" and found that in Osorio "[t]he negligence fit[] that pattern of practice." Id. at 760 (quoting United States v. Ingraldi, 793 F.2d 408, 413 (1st Cir. 1986). Despite the First Circuit's admonitions in Osorio, inadvertent and deliberate violations of the government's duty to disclose material exculpatory information continued to occur. . . . Seven or eight [] discovery violations concerned the failure to disclose exculpatory information in Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006). In 2003 it was discovered that AUSA Jeffery Auerhahn had withheld powerful exculpatory information that directly negated the guilt of

Barone and his co-defendant, Vincent Ferrara. See Ferrara, 456 F.3d at 293. As a result, both men were released from prison. Id. at 280-281.

Local Rule 116.2, was enacted in response to federal prosecutors' indifference to pre-trial discovery obligations. However, the District of Massachusetts revised Local Rules have not proved to be fully effective in preventing the inadvertent errors by prosecutors that have been discovered in some cases. e.g. United States v. Diabate, 90 F.Supp.2d 140 (D. Mass. 2000), mistrial, government failed to disclose documents; United States v Castillo, CR No. 01-10206-MLW (2002), mistrial because of government's failure to disclose important impeachment evidence; United States v Henderson, CR No. 01-10264-MLW (2002), mistrial, belated disclosure of exculpatory information that the government was required to provide; United States v. Baskin, CR No. 01-10319 (2002) Government failed to obey an order to provide defendant with exculpatory evidence before hearing; United States v. Diaz, Cr. No. 05-30042-MLW (2006) mistrial, government's failure to disclose impeachment material.

These cases expose a systematic disregard of defendant's basic rights, yet, as it now stands, the panel decision acts as both a shield and sword, excusing the government for its past offenses, and encouraging it to continue to possess and withhold material, actual innocence, exculpatory and impeachment evidence in direct violation of defendant's due process rights afforded by the Constitution, Federal and

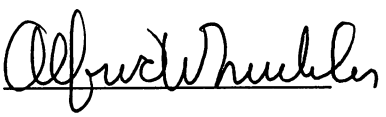
rules of evidence and decisions of the First Circuit as well as other Circuits and District Courts.

For all these reasons, Mr. Trenkler respectfully urges this panel to reconsider, or the full court to consider, the February 7th, 2011 judgment denying Trenkler's June, 2010 28 U.S.C. § 2255 application under 28 U.S.C. § 2244 in order to allow Trenkler to proceed with his §2255 in the District Court, keeping in mind that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." Brady v. Maryland, 373 U.S. 83, 87 (1963).

Dated: March 23, 2011

Respectfully submitted,

Alfred W. Trenkler



Petitioner pro se

CERTIFICATE OF SERVICE

I, Alfred W. Trenkler, do hereby certify that I have forwarded a true and exact copy of the foregoing pleading to the United States Attorney's office, Suite 9200, One Courthouse Way, Boston, Massachusetts 02210, by placing same in the USPS, postage pre-paid, on this 23rd day of March, 2011.

Alfred W. Trenkler
Petitioner, pro se