

United States Court of Appeals,
Tenth Circuit.Clifford Henry BOWEN, Petitioner-Appellee,
v.

Gary D. MAYNARD, Warden, Oklahoma State Penitentiary, Respondent-Appellant.

No. 86-1136.

June 25, 1986.

Defendant, who had been convicted upon information charging him with three counts of first-degree murder, and whose conviction had been affirmed in state court, filed petition for writ of habeas corpus and application for stay of execution. The United States District Court for the Western District of Oklahoma, Thomas R. Brett, J., granted the stay, set aside the convictions, and issued a writ of habeas corpus. State appealed. The Court of Appeals, Seymour, Circuit Judge, held that: (1) finding of oral request by defense for list of other suspects was supported by both federal and state court records; (2) even if no request had been made by defense for list of other suspects, withheld material created reasonable doubt that did not otherwise exist, and therefore met test where general or no request has been made, for purpose of determining whether prosecution violated *Brady* rule; (3) information about other suspect met *Bagley* requirement of reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different; and (4) retrial on charges of first-degree murder was not barred.

Orders of federal district court setting aside convictions, granting writ of habeas corpus, and imposing conditions for release affirmed.

West Headnotes

[1] Criminal Law 🔑627.5(1)

110k627.5(1) Most Cited Cases

Prosecution violates *Brady* rule if, after request by defense, it suppresses evidence which is both favorable to defense and material to guilt or punishment.

[2] Criminal Law 🔑627.8(3)

110k627.8(3) Most Cited Cases

Specific oral request which is not on the record is legally equivalent to formal, written motion for purpose of prosecution's duty to disclose favorable evidence, when parties agree that such request was made.

[3] Criminal Law 🔑627.8(3)

110k627.8(3) Most Cited Cases

Oral request by defense counsel for a list of other suspects would be specific request, for purpose of prosecution's duty to disclose favorable evidence, because it gives prosecutor notice of exactly what defense desired.

[4] District and Prosecuting Attorneys 🔑8

131k8 Most Cited Cases

Criminal prosecutor is ethically bound to charge and try only those he believes, and can prove, are guilty.

(Cite as: 799 F.2d 593)

[5] Habeas Corpus ↪766

197k766 Most Cited Cases

(Formerly 197k90.1)

Federal district court's grant of evidentiary hearing in connection with habeas corpus petition to permit additional evidence not duplicative of that presented in state court was proper, where defendant alleged that he had not received full and fair opportunity to develop certain facts at state hearing.

[6] Habeas Corpus ↪770

197k770 Most Cited Cases

(Formerly 197k85.1(2))

If either state trial court or Court of Criminal Appeals found that no request of any kind had been made for evidence of other suspects, that would have been finding of historical fact entitled to presumption of correctness by federal courts. 28 U.S.C.A. § 2254(d).

[7] Habeas Corpus ↪719

197k719 Most Cited Cases

(Formerly 197k85.5(14))

Finding of oral request by defense for other suspects was supported by both federal and state court records in habeas corpus proceedings and thus was not clearly erroneous, for purpose of determining whether prosecution had violated *Brady* rule by failing to provide list of other suspects.

[8] Habeas Corpus ↪768

197k768 Most Cited Cases

(Formerly 197k85.1(2))

If none of seven conditions specified in statute as exemptions to requirement that federal courts presume correct state court's finding that no request of any kind has been made by defense counsel for evidence favorable to defendant applies, unless habeas court concludes that state court finding was not supported by record, petitioner has burden of establishing by convincing evidence that state court finding is erroneous. 28 U.S.C.A. § 2254(d).

[9] Habeas Corpus ↪719

197k719 Most Cited Cases

(Formerly 197k85.5(14))

To extent state court findings could be construed to imply that defense made no specific, oral request for list of other suspects, State's concession convincingly established error of that determination, so that habeas corpus petitioner met his burden of proving that finding erroneous. 28 U.S.C.A. § 2254(d).

[10] Habeas Corpus ↪799

197k799 Most Cited Cases

(Formerly 197k112)

By concluding that state's concession that defense had made oral request rendered fact question moot, district court adequately complied with requirement that habeas court include in its opinion granting writ reasoning which led it to conclude that one of seven factors specified in statute, as exceptions to general rule that federal courts presume correct state court's finding that no request of any kind has been made by defense for evidence favorable to defense, was applicable.

[11] Criminal Law ↪735

110k735 Most Cited Cases

Question of materiality and possible effect of withheld evidence on verdict is mixed question of fact and law.

[12] Habeas Corpus ↪770

197k770 Most Cited Cases

(Cite as: 799 F.2d 593)

(Formerly 197k85.1(2))

State court's ultimate conclusion under *Brady* is not entitled to presumption of correctness and is open to review by federal courts in habeas corpus proceedings. 28 U.S.C.A. § 2254(d).

[13] Criminal Law ⚔️700(4)

110k700(4) Most Cited Cases

Suppression of material which could be used to impeach witnesses violates Constitution and deprives defendant of fair trial. U.S.C.A. Const.Amend. 6.

[14] Criminal Law ⚔️700(3)

110k700(3) Most Cited Cases

If defense had known at trial about released suspect in case, who resembled both defendant and description of man seen loitering in concession area at motel shortly before murders, reliability and identification procedures, upon which case against defendant stood or fell, could have been undermined and witnesses impeached, and backbone of state's case might well have been irretrievably broken for purpose of determining *Brady* violation based upon states failure to provide list of other suspects.

[15] Criminal Law ⚔️700(3)

110k700(3) Most Cited Cases

For purpose of determining prosecution's duty under *Brady* to disclose exculpatory information, information concerning early suspect in case created reasonable doubt that defendant committed murders; defendant's only supportable motive to commit murders was money, but it was never proved that defendant had been paid, while early suspect could have been motivated by several factors, in six-year history of litigation, no one had ever sworn to being with suspect on night of murders, while defendant offered 12 alibi witnesses who testified that he was at rodeo 300 miles from crime scene until one hour before murders, and suspect habitually carried same type of gun as murder weapon and used same unusual and expensive ammunition.

[16] Criminal Law ⚔️700(6)

110k700(6) Most Cited Cases

Files.

Testimony which was not known to prosecution at trial was not exculpatory within meaning of *Brady*.

[17] Criminal Law ⚔️627.8(6)

110k627.8(6) Most Cited Cases

Because defense made specific request for list of other suspects, standard of materiality where judging suppressed evidence was whether it might have affected outcome of trial.

[18] Criminal Law ⚔️700(3)

110k700(3) Most Cited Cases

Even if no request had been made by defense for list of other suspects, withheld material created reasonable doubt that did not otherwise exist, and therefore met test where general or no request has been made, for purpose of determining whether prosecution violated *Brady* rule.

[19] Criminal Law ⚔️700(3)

110k700(3) Most Cited Cases

Where identity is an issue, credible alibi defense is presented, and no physical evidence ties defendant to crime, material showing that someone resembling defendant had motive, opportunity, and ability to commit crime is sufficient to undermine confidence in outcome of trial, for purpose of determining prosecution's duty to disclose information.

[20] Criminal Law ⚔️700(3)

(Cite as: 799 F.2d 593)

110k700(3) Most Cited Cases

Information about other suspect met *Bagley* requirement of reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different, given suspect's resemblance to defendant and description of man seen loitering in concession area of motel shortly before murders, and suspect's motive and possible opportunity to commit crime.

[21] Habeas Corpus ⚔️795(1)

197k795(1) Most Cited Cases

(Formerly 197k112)

Generally, district court ruling in petitioner's favor in habeas case provides reasonable time in order to afford state opportunity to re-try defendant or otherwise correct constitutional infirmity.

[22] Habeas Corpus ⚔️795(1)

197k795(1) Most Cited Cases

(Formerly 197k112)

District court did not abuse its discretion in ordering immediate issuance of writ of habeas corpus, where defendant had been incarcerated under three death sentences for over five years, notwithstanding fact that prosecution had violated *Brady* rule at trial, and where conditions were imposed on release to secure defendant's appearance at all future proceedings. 28 U.S.C.A. § 2243; F.R.A.P. Rule 23(c), 28 U.S.C.A.

[23] Habeas Corpus ⚔️892.1

197k892.1 Most Cited Cases

(Formerly 197k892, 197k112)

Effect of judgment granting writ of habeas corpus was to invalidate murder convictions and death sentences for constitutional infirmities.

[24] Double Jeopardy ⚔️119

135Hk119 Most Cited Cases

(Formerly 110k1931/4)

Retrial on charges of first-degree murder was not barred, where information filed in state court charging defendant with three counts of first-degree murder had not been set aside by federal district court's order conditionally granting writ of habeas corpus.

[25] Double Jeopardy ⚔️119

135Hk119 Most Cited Cases

(Formerly 110k1931/4)

State was not barred, even after grant of writ of habeas corpus invalidating convictions and death sentences for constitutional infirmities, upon defendant's release under federal district court's order, from retaking custody of defendant under murder charges in information and seeking any protective orders under state procedure to insure defendant's appearance for retrial in accordance with state law.

***595** Robert A. Nance, Asst. Atty. Gen., Deputy Chief, Federal Div. (Michael C. Turpen, Atty. Gen. of Oklahoma, and Robert W. Cole, Asst. Atty. Gen., with him on brief), State of Okl., for respondent-appellant.

Jack B. Zimmermann (Jim E. Lavine of Zimmermann & Lavine, P.C., Houston, Tex., and Patrick A. Williams of Williams, Donovan and Savage, Tulsa, Okl., with him on brief), of Zimmermann & Lavine, P.C., Houston, Tex., for petitioner-appellee.

Before HOLLOWAY, Chief Judge, LOGAN and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

(Cite as: 799 F.2d 593)

Clifford Henry Bowen has been incarcerated in the Oklahoma State Penitentiary under three death sentences for over five years. Convicted of a triple murder, Bowen maintains his innocence and argues that the State of Oklahoma violated his federal constitutional rights when it failed to disclose to the defense certain material concerning an early suspect in the case. Having considered the withheld material, we hold that it casts such grave doubt on the convictions that they cannot be permitted to stand. The prosecution had a federal constitutional duty to reveal the material *596 either with or without a specific request by the defense. We therefore affirm the district court's ruling that the convictions are constitutionally infirm.

I.

BACKGROUND

A. Procedural History

Bowen was arrested on August 28, 1980 and pled not guilty to an information charging him and Harold Behrens with three counts of first degree murder in violation of Okla.Stat. Ann. tit. 21, § 701.7 (West 1983). Behrens was convicted first in a separate trial and sentenced to life imprisonment. His conviction was affirmed by the Oklahoma Court of Criminal Appeals. See *Behrens v. Oklahoma*, 699 P.2d 156 (Okla.Crim.App.1985).

The case against Bowen was tried to a jury before Oklahoma County District Judge Raymond Naifeh. The jury returned three guilty verdicts and recommended death sentences on each count. Bowen filed a motion for new trial and then an amendment to that motion, alleging ineffective assistance of counsel. Judge Naifeh overruled the motion and signed the death warrants.

While his appeal was pending before the Oklahoma Court of Criminal Appeals, Bowen filed in that court a second motion for new trial alleging newly-discovered evidence and the failure to disclose exculpatory material. The Court of Criminal Appeals remanded the matter to the trial court to determine if an evidentiary hearing was appropriate. Judge Naifeh conducted hearings and filed findings of fact and conclusions of law overruling the second motion. The Court of Criminal Appeals affirmed Bowen's convictions. See *Bowen v. Oklahoma*, 715 P.2d 1093 (Okla.Crim.App.1984). The United States Supreme Court denied certiorari, see *Bowen v. Oklahoma*, --- U.S. ---, 105 S.Ct. 3537, 87 L.Ed.2d 660 (1985), and the Court of Criminal Appeals set Bowen's execution for August 12, 1985.

Bowen filed a petition for a writ of habeas corpus and an application for stay of execution in the United States District Court for the Western District of Oklahoma. He alleged denial of due process by the prosecution's withholding of exculpatory evidence and denial of effective assistance of counsel. United States District Judge Thomas R. Brett granted the stay and held an evidentiary hearing intended to supplement evidence taken in the state proceeding.

The federal district court filed an opinion and findings of fact and conclusions of law. The court set aside Bowen's convictions and issued the writ of habeas corpus, although it held that the State may re-try Bowen for the triple murder. The court based its decision on the withheld evidence and declined to reach the claim of ineffective assistance of counsel. The court thereafter denied the State's motion to stay Bowen's release pending appeal. The court provided several conditions for

(Cite as: 799 F.2d 593)

his release, including that Bowen be required to post a \$100,000 appearance bond. The court stayed the effect of its decision pending disposition of a stay motion in this court. This panel heard oral argument on the State's motion to stay and denied the motion but stayed the effect of our order for seven days. Justice White stayed the writ of habeas corpus pending appeal before this court.

On the merits of its appeal, the State contends that (1) the federal district court erred in finding that the defense made a specific oral request for a list of other suspects, and (2) the withheld material is not exculpatory within the meaning of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny.

B. The Guest House Murders

A notorious triple murder occurred in Oklahoma City on July 6, 1980 at approximately 2:00 a.m. Ray Peters, Lawrence Evans, and Marvin Nowlin were fatally shot as they sat around a poolside table at the Guest House Inn motel. Although the murder weapon was not found, bullets and *597 shell casings recovered at the scene revealed that a .45 caliber automatic weapon with silver-tipped, hollow point bullets had been used. Several witnesses related that an unfamiliar man had been seen in the pool concession area before the shooting and that, after gunshots were heard, he ran and fled in a waiting vehicle.

Other information pointed in the direction of Harold Dean Behrens. Formerly a detective with the Oklahoma City Police Department, Behrens made his living selling drugs at the time of the crime. Ray Peters, alleged by the State to be the primary victim, worked for Behrens as a drug dealer. The month before his death, Peters had been arrested in Pauls Valley, Oklahoma on drunk driving and drug charges. Behrens had gotten Peters out of jail and was allegedly concerned about the excessive use of whiskey and Dilaudid by Peters, the loss of profits due to Peters' consumption of the goods, and the possibility that Peters would inform on him to the authorities. A short time before the shooting, Behrens and his lover Herman Borden had been sitting at the poolside table with Peters and various other people including the identification witnesses. Upon leaving the table and in full view of the stranger lurking in the concession area, Behrens put his hand on Peters' shoulder and said he would see him tomorrow. Jack Zumwalt, Behrens' former lover, testified at trial that it was not Behrens' custom to make physical contact with people upon parting company. The State argued that Behrens' gesture "fingered" Peters for the hit man.

Based on descriptions of the man seen in the pool area before the shooting, provided primarily by Mary Lee Chilton and Carrie Pitchford, a police flyer was circulated containing a composite sketch and bearing the following caption:

"SUSPECT WANTED FOR THE TRIPLE HOMICIDE OCCURRING AT THE GUEST HOUSE MOTEL AT 5200 N. CLASSEN AT 2:00 A.M. ON 7/06/80.

"SUSPECT: WM/50, 6' 1"', 210-250 #, POT BELLIED, SALT AND PEPPER HAIR BEING MEDIUM LENGTH, WEARING A RED BASEBALL CAP, LONG SLEEVED BLUE SHIRT, FADED BLUE JEANS, BROWN WORK BOOTS LACED UP, HAVING A WEEK'S GROWTH BEARD.

"WEAPON USED: .45 CAL COLT AUTOMATIC

"AMMUNITION: WINCHESTER-WESTERN HOLLOW POINTS

"IF SUSPECT IS LOCATED, PLACE IN JAIL ON ABOVE CHARGE AND CONTACT DET. BOB HORN IN HOMICIDE DETAIL."

(Cite as: 799 F.2d 593)

Def. trial ex. 1.

Upon hearing the description of the alleged assailant and the connection with Behrens, Detective Sergeant David McBride of the Oklahoma City Police Department thought of Clifford Henry Bowen. In 1975, McBride had headed the department's organized crime detail. Behrens was a detective under his supervision and brought information to the detail regarding a man named Jerry Ray James. Bowen was seen with James and became an object of surveillance. Toward the latter stages of the investigation, Behrens left the police department; shortly thereafter, James and Bowen were no longer seen in Oklahoma City. No charges against James or Bowen arose out of the investigation, although at trial the State relied on the investigation to buttress its theory that Behrens had retained Bowen as a professional hit man.

McBride recalled this investigation five years past and found the description of the suspect reminiscent of Bowen: "The salt and pepper hair. The big jaws, the pot belly. *The horn-rimmed glasses.* Several things that sounded exactly like him as I remembered him." Rec., vol. V, trial trans., vol. II, at 386-87 (emphasis added). McBride pulled a picture of Bowen from police records and brought the information to homicide detectives, who presented the picture to Chilton and Pitchford in a photo array consisting of two groups of five photos each. Group No. 1 featured Bowen without his customary horn-rimmed eyeglasses. *598 None of the men in the first group had mustaches. In Group No. 2, three of the five men, including the suspect Lee Crowe, see *infra* Part I(D), had mustaches. Both witnesses identified Bowen in the array and subsequently in a live lineup, although it is disputed whether Chilton also had positively identified a man named William Wayne Simmons from a photo array, and a police detective in a lineup. Chilton underwent hypnosis in an attempt to sharpen her memory of the events, but the fact that she had been hypnotized was never presented to the jury, see rec., vol. III, trial trans., vol. I, at 287-327, and it first appears in the record in the first motion for new trial, see *id.* vol. III, trial, trans., vol. III, at 913-15.

Following the identification of Bowen by Chilton and Pitchford, police obtained an arrest warrant on August 27. That same day an information was filed charging Harold Dean Behrens and John Doe with the murders. On August 29, Bowen was interrogated by Oklahoma City detectives with counsel present and was taken into custody. Bowen's name was substituted for John Doe on the information.

C. The Trial

The case against Bowen rested upon the testimony of the two witnesses who had seen the man in the pool area. No fingerprint, ballistic, or other physical evidence tied him to the crime.

Mary Chilton worked at the Guest House as night office clerk. She testified that sometime after 12:15 a.m. she first observed a man standing in the pool concession area whom she did not recognize as a registered guest. He was at least six feet tall, weighed 200 to 250 pounds, and had salt and pepper hair, a medium-sized beer belly, and a slight growth of beard. He wore a red baseball cap, medium blue long-sleeved work shirt, blue jeans, and work boots. He was not wearing eyeglasses. His forehead was covered with the cap. The single most outstanding characteristic was that his face was pale, "a whitish gray color like he had not

(Cite as: 799 F.2d 593)

been out in the sun." Rec., vol. III, trial trans., vol. I, at 317. She had observed the man at various moments between midnight and 2:00 a.m. and had walked within three feet of him in a well-lighted area.

Carrie Pitchford, a motel guest, testified that she had been sitting at the poolside table with Peters, Nowlin, Behrens, and others for much of the day and that she returned to her room between 1:15 and 1:30 a.m. She looked out the window, over a distance of eighty-five feet, and saw a "very large man" who was at least six feet tall and wore no glasses. Rec., vol. V, trial trans., vol. II, at 334, 356. His face appeared "very large" and "[v]ery, very white." *Id.* at 355. He wore a white T-shirt, jeans, and a bright red cap. His light-colored hair stuck out from under the cap, but she did not see any facial hair. The man had looked straight up at her, and she looked at him full in the face. The lighting "was similar to the stage in a grammar school.... The lighting was very good." *Id.* at 339; see also *id.* at 349. When she identified Bowen in court, Pitchford described him as he sat at counsel table as wearing glasses, and having gray hair and "a very light skin." *Id.* at 334-35.

Several other witnesses were presented to the jury in the State's case in chief. The manager of the Guest House, Promud Govind, testified that sometime after midnight he saw a man wearing a red ball cap standing in the concession area. When he heard gunshots, he saw from the motel office, 100 to 150 feet away, a man wearing a red cap with his hand raised and shooting.

Jack Zumwalt testified to his close business and personal relation with Behrens. He also related that the day after the murders he called Behrens, told him he had read about the killings in the newspaper, and asked him about it. Behrens said he did not have anything to do with it, although he had been there with Herman Borden. Behrens further stated that they had walked by the alleged assailant and that they too could have been shot. Several days later Zumwalt asked Behrens why it was Ray Peters and not Jim Powell, another drug dealer working for Behrens. *599 Behrens replied that "it was because he needed Jim." *Id.* at 425. On cross examination Zumwalt acknowledged that he had never heard Behrens mention Bowen. [FN1]

FN1. Behrens did not testify at trial and has never testified in these proceedings except in an offer of proof at the first motion for new trial. At that hearing, Behrens stated that he did not know Bowen and had never seen him before that proceeding. He further testified that prosecutors had offered him a 10-year sentence in the federal penitentiary for his own three murder charges in exchange for his testimony that he knew Bowen. Behrens related his response to the offer: "I would gladly testify but I don't know the dude, you know. I would have testified but I don't know Clifton Bowen." Rec., vol. III, trial trans., vol. III, at 880.

Alibi was Bowen's defense. He produced a parade of twelve witnesses who stated that Bowen had been at a rodeo in Tyler, Texas, some 300 miles from Oklahoma City, until approximately midnight on July 5. Bowen's wife and stepdaughter testified, as did four members of the Wheeler family, who owned the rodeo, and six other witnesses unrelated to Bowen or to the Wheelers. Dennis Wayne Blan, a bull rider, stated that he first met Bowen a month before July 5 and that he had ridden Hook 'em Henry, a bull named for Bowen, in the July 5 rodeo. Dennis' mother, Jerry, first met Bowen at the July 5 rodeo. Dennis' stepfather, David, had previously seen Bowen