Nos. 15-1503 & 15-1504

IN THE

Supreme Court of the United States

CHARLES S. TURNER, ET AL., *PETITIONERS,*

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

RUSSELL L. OVERTON, *PETITIONER,*

v.

UNITED STATES OF AMERICA, *RESPONDENT.*

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF OF AMICUS CURIAE WILFREDO LORA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE WILFREDO LORA[1]

This brief is submitted to illustrate to the Court the severity of the problem of federal prosecutors failing to carry out their disclosure obligations under *Brady v. Maryland,* 373 U.S. 83 (1963). It also demonstrate why this Court should clarify and strengthen those obligations in reversing the judgment below under existing *Brady* jurisprudence.

The facts in this brief relating to the conviction of amicus Wilfredo Lora are taken from the petition for a writ of certiorari (No. 15-6826) and petition for a writ of habeas corpus (No. 15-6807) that he filed in October 2015. Lora's affidavit and supporting exhibits were attached as appendices to his habeas corpus petition, and they form the factual basis for his certiorari petition and his motion to certify filed in the Fourth Circuit, in which he sought permission to file a successive motion for a new trial. For convenience, the basis for the factual statements in this brief will cite to the motion to certify that was attached to amicus' certiorari petition ("App __").

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[1] This brief is being filed with the consents of all parties, which are being filed with the Court. No person other than amicus or his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

SUMMARY OF ARGUMENT

Wilfredo Lora is a citizen of the Dominican Republic. After residing in the United States for more than 14 years, he was arrested and eventually convicted in 1999 in the United States District Court for the Eastern District of Virginia of being the ringleader of a massive drug conspiracy and sentenced to 292 months in federal prison. He was granted early release in November 2015. However, solely because of his drug conviction, he was deported to the Dominican Republic in December 2015, where he now lives.

From the moment of his arrest until today, Lora has maintained that he never participated in any drug conspiracy and that his conviction was obtained by the use of the false testimony of the witnesses against him. While in prison, he filed multiple pro se actions seeking release and/or a new trial, but none were successful. Eventually, he obtained copies of the presentence reports of the three key witnesses against him, which had never been provided to him or his counsel for trial, as required by *Brady v. Maryland,* 373 U.S. 83 (1963). As more fully explained below, the presentence reports for the two main witnesses contained evidence that directly contradicted their testimony against Lora, and the report of the third witness contained information regarding his crimes that was completely inconsistent with that witness's trial testimony. Shortly after receiving those pre-sentence reports, Lora obtained the pro bono services of undersigned counsel to represent him in seeking a new trial based on this newly discovered and wrongly withheld evidence.

Because Lora had filed prior motions to set aside his conviction and/or for a new trial, he had to obtain permission from the Court of Appeals for the Fourth Circuit to file a motion for a new trial in the district court in which he was convicted. Counsel filed a motion to certify, seeking that permission, in which he detailed the facts of Lora's *Brady* claims. Without requiring a response from the United States, the Court of Appeals denied the request, with no explanation. Lora then sought review in this Court, by both certiorari and habeas corpus, but again, the United States did not reply, and this Court denied review.

The *Brady* violation that Lora sustained shines an important light on the willingness of prosecutors to circumvent the requirements of *Brady*. First, it confirms that federal prosecutors either do not understand or do not follow the commands of *Brady* in situations where there can be no doubt as to its applicability: prior statements by key witnesses that directly contradict their trial testimony. To bring clarity to the mandate of *Brady,* this Court should require that all documents in the possession or control of the Government that contain information about testifying witnesses, such as the pre-sentence reports in Lora's case, should be automatically provided to defense counsel for use at trial, without filtration by Government counsel on the grounds that the information contained therein is either not exculpatory or not material.

Second, *Brady* violations are often discovered many years after a conviction, and in many cases after the defendant has filed

unsuccessful motions to set aside the conviction. When the courts of appeals receive a petition for leave to file a successive motion to set aside a conviction under 28 U.S.C. § 2255 based on alleged *Brady* violations, they should be directed to require a substantive response from the Government, so that there is an evidentiary basis on which the court can decide either to allow or deny the petitioner permission to seek relief in the district court. This procedure is especially important because the prosecutor alone knows why the *Brady* evidence was not produced at trial.

Third, because, as in this case, much *Brady* material is only uncovered long after a trial is concluded, this Court should no longer require defendants to shoulder the heavy burden of proving that the wrongly withheld evidence would have altered the outcome of the trial. Government lawyers already have little enough incentive to turn over *Brady* materials at trial, and if they fail to do so, the Government should be required to explain why that failure did not affect the outcome, instead of imposing that burden on the defendant, as the court below did in this case.

While such bright-line rules are not necessary for the Court to rule in favor of petitioners in this case, these straightforward proposals would do much to fulfill *Brady*'s "overriding concern with the justice of the finding of guilt" and would provide sorely needed guidance to Government counsel and lower courts on the scope and extent of the Government's *Brady* obligations. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

ARGUMENT

THE JUDGMENT BELOW SHOULD BE REVERSED AND THE COURT'S OPINION SHOULD CLARIFY AND RE-ENFORCE THE OBLIGATIONS OF PROSECUTORS UNDER *BRADY*.

A. The Refusal of Government Counsel to Produce Vital *Brady* Material at Lora's Trial Demonstrates the Seriousness of the Problem.

After a two day trial, Lora was convicted of a conspiracy to distribute five kilograms of cocaine and one kilogram of heroin that was alleged to have begun in 1986 and continued until he was arrested in August 1998. The only evidence against him was the testimony of eleven convicted felons, all of whom claimed to have been part of this conspiracy, and all but one of whom was then in federal prison for drug-related offenses. The witnesses all claimed that the hub of the conspiracy was Willie's Auto Body Shop owned and operated by Lora in Northwest Washington DC. Despite the length of this conspiracy, there were no drugs seized or offered in evidence, no documents or other tangible evidence supporting the charge, and no Drug Enforcement Agent who claimed to have witnessed the operation or offered any corroborating evidence.

Lora has maintained his innocence from the time of his arrest to date. His appeal from his conviction was denied, as were his efforts to have his sentence reduced. He subsequently filed numerous motions and appeals attacking his

conviction, all pro se, and all unsuccessful. In the fall of 2014, he finally obtained the presentence reports of two key witnesses in his trial, which, together with another report that he had obtained several years before, provided a very strong basis for Lora's new trial motion.

The most significant of the pre-sentence reports was that of Franklin Cano, who was the Government's first witness and who described the alleged drug conspiracy in greatest detail. App. 6-7. Cano testified that he came to the United States in 1982, started selling drugs illegally with Lora in New York City in 1987, and continued doing that with Lora until he moved to Maryland in 1990. Cano testified that he commuted to Washington, DC, mostly by airplane, to traffic multiple kilograms of cocaine at a time. According to Cano, he would meet Lora at National Airport and bring as much as 25 or 50 kilograms of cocaine at a time to the auto body shop that Lora allegedly owned at that time. Thus, crucial to Cano's accusations is the time—1987 to 1990—that he claimed he was delivering drugs from New York to Lora in Washington.

Cano had been convicted of a federal drug offense. That fact was known to Lora and his defense counsel, but they were never provided Cano's January 1996 presentence report for that offense, to which the U.S. Attorney's office plainly had access at the time of trial. When Lora obtained that report (App. 6-7), it revealed that Cano did not live in New York from 1987 to 1990 as he testified. More importantly, Cano could not have been engaged in the alleged conspiracy as early as 1987

because that report stated that Cano studied and worked in Puerto Rico from the early 1980s until April 1988, when he moved to the United States, coming to Washington, not New York that September. In addition, an application that Cano filed with the INS (App. 7), confirmed that Cano came to Puerto Rico, not New York City, in 1982, where he lived until 1988. In neither of these official documents is there any reference to his living or working in New York. And when Cano came to the Washington area, the presentence report states that, from December 1988 to February 1990, he worked for a cleaning company at Washington National Airport, and that he worked at another cleaning company in Rockville from August 1990 to November 1992. App. 7.

Presentence reports are not routine government documents, subject to all the frailties of human reporting. Rather, they are prepared by federal probation officers from information that they are given by the defendant, verified with information from third parties (such as former employers, as happened for Cano), and then used by the Government in suggesting a sentence and by sentencing judges in imposing one. In short, presentence reports are not just any evidence, but are highly reliable and could not be rejected by a jury without some explanation, which could not have happened here because the report was not provided to Lora's lawyer for use at trial. Moreover, Cano's testimony was hardly of peripheral relevance to the case against Lora. As is clear from the prosecutor's closing statement at trial (App. 8), the core of the alleged conspiracy was

that Cano trafficked drugs from New York to Washington, where they were allegedly delivered to Lora's body shop. Thus, the evidence that Cano lied about crucial elements of the charges against Lora was unrebutted, and thereby established the factual basis for his *Brady* claim.

The presentence report that forms the basis of the second *Brady* violation is that of Roberto Rodriguez prepared in connection with his December 1991 sentencing for cocaine distribution. App. 10. Rodriguez was the only Government witness against Lora who was not then incarcerated in a federal facility although, as an alien and a convicted felon, he was under an order of deportation. Rodriguez testified at trial that he worked for Lora from March 1989 to May 1991 at his body shop in Washington DC, where he witnessed the drug conspiracy alleged in the indictment, including delivery of cocaine at National Airport.

Rodriguez's presentence report tells a very different story for that period. App. 10-11. In direct contradiction of his trial testimony that he worked for Lora in 1989-1991, the report states that Rodriguez worked at Falls Church Auto Body Shop from March 1988 to January 1990 and at Craftsman Auto Body Shop in Chantilly, Virginia, from September 1990 to April 1991. The presentence report makes no mention of Rodriguez's employment starting in 1989 at Willie's Auto Body Shop, or at any entity related to Lora, or at any other place in the District of Columbia. Unless Rodriguez was working two jobs,

and told the presentence investigator about only one of them, his testimony at trial is false. [2]

The third significant presentence report is that of Leopoldo Perez, also a convicted drug dealer and labeled a "major supplier" in his presentence report. App. 8. He claims to have participated in Lora's drug conspiracy from 1993 to the time of his arrest in December 1996. App. 8-9. His prior drug conviction was for an offense that took place from the summer of 1994 until late 1996. The details are spelled out in full in his presentence report and in the Statement of Facts to which he and the Government agreed when he pled guilty. Those factual descriptions are most significant for what they do *not* say. Even though Perez's trial testimony was that he was involved with Lora from 1993 until his arrest in November 1996, these two detailed statements of facts against him covering most of the same period never mention Lora or Willie's Auto Body Shop.

This omission is significant for several reasons. The arrest of Perez and his co-conspirators was based on extensive DEA surveillance, yet there is no mention of Lora in either document, even though Perez was supposedly dealing heavily with him during this

[2] There was another serious flaw in the testimony of Rodriguez and Cano. Official government records attached as exhibits to Lora's affidavit confirm that Lora only owned Willie's Auto Body Shop from January 1994 until July 1996, far after the periods in which those witnesses alleged the conspiracy took place. App. 13.

same time period. Indeed, the DEA did not come after Lora until August 1998, which suggests that they were unaware of Perez's alleged dealings with Lora in 1993-1996 or, more likely, that there were no such dealings. In addition, the Perez prosecution was supported by evidence from DEA agents and seized drugs, neither of which were present in Lora's case. Finally, if Perez had evidence about Lora's illegal activities when he was sentenced in 1996, he surely would have come forward with it then in order to obtain a reduction in his sentence, instead of only after Lora was arrested and indicted two years later.

These undisputed facts are living proof of the conclusion drawn by then-Chief Judge Alex Kozinski, dissenting from the denial of rehearing en banc in *United States v. Olsen,* 737 F.3d 625, 626 (9th Cir. 2013): "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it." The documents withheld – pre-sentence reports of three key witnesses – are plainly relevant in any criminal trial, especially when there was no evidence beyond the trial testimony of the prosecution's witnesses. Because the witnesses were all convicted of federal drug felonies, the Office of the U.S. Attorney surely knew how important presentence reports are and either had the reports (to defend against cross-examination by Lora's trial counsel) or could easily obtain them. Defendants are not required to make a specific request for *Brady* material, and this Court has held that *Brady* applies to impeachment as well as direct exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Thus,

there can be no doubt that the presentence reports in Lora's case were *Brady* material that should have been turned over for trial, and little doubt that had they been available to defense counsel, the trial and almost certainly the verdict would have been very different.

Lora's facts are also important because they demonstrate the need for the Court to spell out in detail the kinds of evidence that clearly comes within the *Brady* mandate. These would include presentence reports, prior statements of testifying witnesses, statements of other fact witnesses not called for trial, results of forensic testing (whether used or not), and any other evidence (admissible or not) that *might* be useful to the defense. Years after a trial, when *Brady* materials eventually surface, the trial judge is asked to decide "whether in its absence [defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). That necessarily artificial and hypothetical inquiry would be avoided if prosecutors carried out their *Brady* duties properly, because the jury would have had the evidence in making its determination of guilt or innocence, instead of asking courts to speculate on the significance of the withheld evidence years later. As the Court has previously instructed, the message that prosecutors should receive is that all doubts should be resolved in favor of disclosure to the defense. *See Kyles*, 514 U.S. at 439; *Agurs*, 427 U.S. at 108. Yet, as in Lora's case, prosecutors often follow the contrary presumption, confirming the need for further guidance from this Court.

B. When a Prima Facie *Brady* Claim is Presented, Prosecutors Should Be Directed to Respond Substantively in All Cases.

In this case, the petitioners were fortunate in one respect: they had not made previous post-conviction motions to set aside their convictions before they obtained the exculpatory evidence that *Brady* required be made available at trial. Lora faced an additional hurdle, frequently arising in cases like his. Because Lora, acting pro se, had filed previous motions to vacate his conviction, he was barred by 28 U.S.C. § 2255(h) from filing a successive motion without first obtaining permission from the Fourth Circuit via a motion to certify. His recently-obtained counsel filed that motion on September 24, 2015, accompanied by Lora's affidavit, exhibits, and a proposed memorandum in support of the motion to vacate his conviction based on the Government's failure to provide him with these exculpatory pre-sentence reports

The Fourth Circuit did not ask the United States to respond, and so it was undisputed that the evidence that Lora submitted was (a) newly discovered under 28 U.S.C. § 2255(h)(1), and (b) filed within the one year discovery limitation under 28 U.S.C. § 2255(f)(4). App. 4. Accordingly, the only legitimate basis on which the Court of Appeals could have denied the motion was that, "in light of the evidence as a whole, [the facts] would [not] be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the movant

guilty of the underlying offense." 28 U.S.C. § 2244(b)(1)(B)(ii). Given the factual record presented on Lora's *Brady* claims, it is impossible to understand the basis on which the Court of Appeals reached a contrary conclusion in its six word order denying Lora's motion.

In contrast to Lora, the petitioners here did not have to obtain permission to file a motion for a new trial. They simply filed their motion, and the United States had to respond on the merits. At that point, the trial and appellate courts had a record on which to decide whether there was a *Brady* violation and if so, whether petitioners were entitled to a new trial. As this Court observed in *Kyles,* 514 U.S. at 521, the answer to that question "turns on the cumulative effect of all such evidence suppressed by the government." And while the suppressed evidence must be material, that does not "require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Id.* at 434.

The briefs of petitioners amply demonstrate that the Court's existing materiality standard has been met in this case. However, there is an additional point to be made that applies to the very many cases where newly-discovered *Brady* material is the basis of the motion and permission must be sought to file a motion for a new trial. In Lora's case, the court of appeals (and subsequently this Court) did not ask for a response from the United States, but rejected Lora's motion and provided no reason for doing so. Where, as in Lora's case, a prima facie *Brady* claim is made, the

Government typically responds that the new *Brady* evidence would not have had the required impact had it been available at trial. However, for an appellate court, which must answer this question as part of its "gatekeeping" function, *Felker v. Turpin,* 518 U.S. 651, 657 (1996), it must have the legal and factual positions of both sides. When there are *Brady* claims, a court cannot make a reasoned determination to *deny* the motion to allow the district court to decide the new trial motion on the merits without *some* explanation from the Government as to why the failure to disclose was not significant. Yet that is just what the Fourth Circuit did to Lora, saying only that it "denies" his motion.

The court's lack of justification for the denial or Lora's motion to certify is itself problematic, but the best cure for that is to be sure that the gatekeeper courts have the information that they need to make a supportable ruling. That means instructing those courts to demand a prompt response from the Government in every *Brady* case in order to meet the thirty day decision requirement in 28 U.S.C. § 2244(b)(3)(D). And to assure that the courts of appeals perform their gatekeeper function properly, they should be require to explain the basis for any denial of a motion to certify. That explanation is particularly important because the following subparagraph, 28 U.S.C. § 2244(b)(3)(E), precludes a defendant from seeking rehearing of a denial and also precludes any appeal or petition for certiorari.

C. The Burden of Obtaining a New Trial When a *Brady* Violation Has Been Established Should Be Minimal.

The lower courts in this case imposed a heavy burden on petitioners to establish their entitlement to a new trial. That was error, mainly for the reasons given by petitioners in their briefs. But it was also error because that kind of burden also increases the incentive for prosecutors *not* to turn over *Brady* material at trial, when it would be most useful to the defense. Thus, in any case in which there is a doubt as to whether there is *Brady* material that must be disclosed, if prosecutors know that they will be able to retain an undeserved conviction because the defendant will be unable to show that the unavailable evidence would have mattered to the verdict, they will be tempted to withhold the evidence.

Once prosecutors become convinced of a defendant's guilt, it is natural for them to do nothing that might prevent a conviction, which includes turning over any evidence that might be exculpatory — unless *Brady* commands them to do otherwise. *Brady* already imposes an affirmative disclosure obligation on prosecutors, and yet, as Judge Kozinski observed, *supra,* the epidemic of *Brady* violations continues. A major reason for that is that, even if a *Brady* violation is discovered, and the defendant is permitted to file a motion for a new trial, the prosecutors are likely to succeed in persuading the lower courts, as they did here, that the new evidence would not have mattered.

The simplest way to decrease the incentives for withholding exculpatory and impeachment material from the defense counsel is to place the burden of proving that a new trial is not warranted on the party that withheld that material in the first place — the Government. Of course, even in that situation, prosecutors may be able to justify the withholding, and if they cannot, they can still re-try the defendant. Nevertheless, placing the burden on the prosecution to explain why a new trial is not warranted when exculpatory and impeachment material has been withheld would strengthen the incentives for prosecutors to make upfront disclosures of information favorable to the defense, which is the goal of *Brady* in the first instance.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below under its current *Brady* standard. Furthermore, the Court's opinion should spell out in detail the obligations of all prosecutors under *Brady* so that the evidence favorable to the defense is turned over for trial and not many years later, when the courts are left the very difficult task of determining what impact that evidence would have had if it been timely produced.

Respectfully submitted,

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