

IN THE DISTRICT COURT OF THE CHEROKEE NATION

CHEROKEE NATION,)
)
 Plaintiff,)
 vs.)
)
 CHAD RAYLEE DANDERSON,)
)
 Defendant.)

Case No. CF-2022-65

FILED
2024 FEB 21 PM 4:05
CLERK
COURT
CHEROKEE NATION

PROVISIONAL MOTION TO DISMISS UNDER BRADY v. MARYLAND

COMES NOW, Defendant, Chad Raylee Danderson, by and through his attorney of record, Kendra M. Blocker of Palmer Law PLC, and states as follows:

1. This motion is submitted just hours prior to trial relating to discovery of key evidence.

The provisional of this short-notice argument is, in itself, is prejudice to Defendant.

2. *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny are applicable here. See 22 O.S. 2002(D). “The court may specify the time, place and manner of making the discovery and may prescribe such terms and conditions as are just.”

3. The Cherokee Nation did not produce discoverable evidence known and documented to exist. See *United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010).

Nonetheless, our circuit has recognized that dismissal with prejudice may be an appropriate remedy for a *Brady* or *Giglio* violation using a court’s supervisory powers where prejudice to the defendant results and the prosecutorial misconduct is flagrant. We review for an abuse of discretion the district court’s decision whether to dismiss the indictment to cure prejudice resulting from such misconduct.”(citations omitted); *United States v. Miranda*, 526 F.2d 1319, 1325 n.4 (2d Cir. 1975) (sanctions which may be imposed against the Government for failure to disclose material available to the defense include “the exclusion or suppression of other evidence concerning the subject matter of the undisclosed material, the grant of a new trial, or, in exceptional circumstances, dismissal of the indictment or the direction of a judgment of acquittal.”) (citations omitted); *United States v. Chapman*, 524 F.3d 1073, 1086 (9th Cir. 2008) (although the appropriate remedy for a Brady violation will usually be a new trial, “a district court may dismiss the indictment when

the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct.'").
(Emphasis added throughout.)

4. Here, because Defendant has diligently uncovered certain evidence the Cherokee Nation is unable to produce, this Court has the unique opportunity to remedy these *Brady* claims and preempt and prevent error at trial.

5. *Strickler v. Greene, Warden*, 527 US 263 (1999) and *United States v. Bagley*, 473 U.S. 667 (1985) also favor the position of defense.

6. *Strickler* holds there are 3 elements to a true *Brady* violation:

A. The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching.

B. The evidence must have been suppressed by the Cherokee Nation, either willfully or inadvertently.

C. Prejudice must have ensued.

7. Defense hastens to add the Cherokee Nation's suppression was undoubtedly inadvertent. But the impact of an accident, versus a deliberate act, remains the same.

8. *Bagley* held that "Such nondisclosure constitutes constitutional error and requires reversal of the conviction only if the evidence is material in the sense that its suppression might have affected the trial."

9. Defendant filed a discovery motion with wording that included all the missing items which will be described below. (See Defendant's Discovery Motion submitted on March 29, 2023, Defendant's Motion for Discovery)

10. The evidence below is documented to exist. The documentation of its existence is described with each item of evidence.

**EXHIBITS REQUESTED BY DEFENDANT UNDER BRADY v. MARYLAND
BUT NOT PRODUCED TO DATE:**

A. In Defendant's Motion for Discovery filed herein, it states:

DEFENDANT'S MOTION FOR DISCOVERY

COMES NOW Chad Raylee Danderson, Defendant, by and through attorney of record, Alan Taylor of Palmer Law PLC, and states that counsel for Defendant has scoured the Cherokee Nation Code Annotated for criminal discovery rules; however, the search only led him to 22 CNCA § 19 which states that the Federal Rules of Evidence shall be used. Therefore, Defendant respectfully moves this Honorable Court to order the Attorney General's Office to disclose and produce each and every item of evidence and/or information referenced in the Federal Rules of Criminal Procedure Rule 16 and the Oklahoma Criminal Discovery Code, 22 O.S. § 2001 et. seq., including, but not limited to, the following:

17) Any and all physical evidence, whether seized legally or illegally, including but not limited to fingerprints, palm prints, hand prints, footprints, shoe prints, tire tracks, blood, saliva, hair, fibers, clothing, DNA processes or analysis, or any other physical evidence taken from the crime scene or scenes or any other location involved in any way in the investigation of this crime, including any and all property belonging to the Defendant which was or is in the custody of the Cherokee Nation.

29) Any and all evidence that tends to negate the guilt of the Defendant as to the alleged crime, or would tend to reduce punishment therefore, including information that could lead to the discovery of such evidence, which evidence or information is in the possession or control of the prosecuting attorney, or any member of his staff or any representative of any law enforcement official or agency, including any person who has participated in the investigation or evaluation of this case who reports either regularly or in this case particularly; this information should include any evidence that establishes or supports any mitigating evidence or tends to negate or rebut any aggravating circumstances offered by the Cherokee Nation.

35) The Defendant further moves this Court to order the Attorney General's Office to comply with the disclosure and production of the requested information within thirty (30) days from the date of this hearing, to provide copies of requested material, and to honor their continuing duty to promptly disclose any information within the realm of this request or any material exculpatory to the Defendant with due diligence upon learning of same, even during the course of any hearing or trial concerned herein.

36) The Defendant moves this Court to direct the Attorney General's Office, to notify each and every law enforcement officer and any other person involved in the investigation of the crime alleged herein, including, but not limited to any experts, crime lab personnel, or any person involved in the investigation of the crime alleged herein, to file any notes, memorandum, comments, pictures, diagrams, names of persons interviewed and not interviewed, any other suspects or person consulted or otherwise contacted in connection with the investigation of the alleged crime herein with the Attorney General's Office and that such material delivered to the Attorney General's Office will be delivered to the defense if exculpatory or if falling within any request of this discovery motion.

WHEREFORE, Defendant prays for relief as set forth herein, and for such other and further relief that the Court finds fair and equitable.

11. Regarding an incident report presented by the Claremore Police Department dated "05/04/22," following an alleged incident regarding the dissemination of nude photos of the alleged victim on a social media platform, Officer Rice states "I seized Danderson's cellphone, a black phone with a black Otterbox phone case. Danderson provided the passcode to the phone. The phone was placed into evidence. . . My body cam and dash cam were operational during the incident and the footage will be attached to this report."

12. The missing phone data, all by itself, would be sufficient to disprove the allegations of the Cherokee Nation regarding Defendant's location at the time of the alleged incidents and dissemination of the unauthenticated screen recording of a TikTok video. Even if the Cherokee Nation will argue the phone data was never "dumped" during a search, defense still had a right to obtain the data from a phone that was definitely seized.

13. Luckily, at this point in time there has been no verdict. Both knowledge of the missing exhibits and remedies are possible.

14. Though most times *Brady* is argued after conviction, here the court has the opportunity to prevent a miscarriage of justice from occurring during a trial which is not yet concluded. Alternative

forms of relief are listed, below, in the prayer for relief.

ARGUMENT

15. The missing phone data, all by itself, could disprove the allegations as charged against defendant.

16. It must be noted that both *Greene* and *Bagley* are cases that look backward in time, where “hindsight is 20/20,” and the impact of any piece of evidence discovered post-conviction can be weighed, examined, argued. However, Mr. Bu’s trial (as of the date of this filing) is in the present, and if there is a verdict, such verdict is in the future.

17. Therefore, per *Bagley*, every piece of suppressed evidence might affect the outcome of the trial. We do not yet know the outcome of the trial. Without 20/20 hindsight, how can we know what evidence might affect the outcome of the trial? How can so much missing evidence of such great importance not affect the outcome of the trial?

18. Now applying the *Strickler* elements:

A. The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching. All the missing evidence, and the evidence which appeared during the alleged incident is exculpatory or impeaching.

B. The evidence must have been suppressed by the Cherokee Nation, either willfully or inadvertently. Defense gives the Cherokee Nation the benefit of the doubt and will assume “inadvertently.”

C. Prejudice must have ensued. Clearly, “prejudice must have ensued” is a factor that mostly looks backward in time, post-conviction, but defendant is prejudiced in the present, with defense turning up discovering missing data, thus missing photos, text messages, app data etc.

19. Defendant meets all the elements of *Bagley* and *Strickler*. The case of *Harris*, though holding Brady claims “typically do not arise until some time after trial,” by its careful wording does anticipate there are some atypical *Brady* situations that arise before or during trial.

PRAYER FOR RELIEF

20. “The most appropriate remedy is dismissal of the indictment with prejudice or the direction of a judgment of acquittal.” *Harris, supra*.

21. Defendant pleads for dismissal because of the costs defendant has already been forced to endure and the emotional turmoil. Defendant has not been allowed to return to his home since September of 2022.

22. Alternatively, and falling far short of what is just, the trial could be continued for defendant to examine the evidence as the Cherokee Nation attempts to produce the evidence. Defendant requests 60 days to examine the evidence past the date the last piece of evidence is produced by the Cherokee Nation to defense.

Respectfully submitted,

Kendra Blocker

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PALMER LAW

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on the 18th day of February, 2024, I delivered a true and correct copy of the above and foregoing instrument, to the following named person, via and by means of:

- First-Class US Mail, with postage prepaid thereon and affixed thereto
- Certified US mail, return receipt requested and delivery restricted to the addressee
- Private process server
- Electronic mail
- Hand delivery

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Kendra Blocker

Kendra Blocker, CNBA #999