[J-1-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 260 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered on 1/26/99
	:	in the Court of Common Pleas, Cambria
v.	:	County, Criminal Division at No. C-1144-
	:	92
	:	
ERNEST SIMMONS,	:	
	:	
Appellant	:	Submitted: January 5, 2000

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 31, 2001**

As similarly reflected in my dissenting opinion in Commonwealth v. Rivers, ___ Pa. ___, ___ A.2d ___ (Dec. 20, 2001 WL 1645707)(Saylor, J., dissenting), I view the decision to dismiss Appellant's claims as reflected in the opinion announcing the judgment of the Court, and, in particular, those predicated upon Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), as unduly formalistic. Contrary to the lead Justices' conclusion that Appellant's brief fails to contextualize such claims, see Opinion Announcing the Judgment of the Court, slip op. at 4, from my review it appears that the advocacy on the Brady claims is substantial.

In light of the lead's treatment of Appellant's claims, a majority of the Court is able to avoid confronting troubling circumstances that came to light after Appellant's direct review became final. In particular, the Court is presented with multiple instances

of pre-trial suppression by the Commonwealth of exculpatory material in its possession. Two such instances are admitted by the Commonwealth (albeit explained in terms of neglect, poor record keeping, and inadvertence), and the other is, in my view, not meritoriously disputed. The items suppressed by the prosecution include: 1) recordings of post-arrest electronic surveillance of multiple conversations between Appellant and his girlfriend, who acted as a Commonwealth agent in terms of questioning Appellant regarding the case and recording his answers, and ultimately testified as a Commonwealth witness at trial; 2) forensic reports concerning physical samples taken from two crime scenes, the murder scene and the scene of a subsequent sexual assault which, according to the Commonwealth's theory of the case, was perpetrated by the killer; and 3) evidence that the victim of the latter crime was unable to identify Appellant from a mug book shortly after the assault.

A Brady claimant is entitled to relief where there is a reasonable likelihood that, had the suppressed evidence been disclosed to the defense, the result of the proceeding would have been different. See Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 1948 (1999). In this inquiry, we are to consider the potential value of the evidence to the defense, including its value in terms of impeachment. See United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380 (1985). Where the government's failure to disclose relevant evidence undermines a reviewing court's confidence in the verdict's reliability, this standard is met, see Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1558 (1995); Bagley, 473 U.S. at 678, 682, 105 S. Ct. at 3381, 3383, as is the test for prejudice under the PCRA. See Commonwealth v. Kimball, 555 Pa. 299, 312-13, 724 A.2d 326, 333 (1999)(holding that where there is a reasonable probability that the outcome of the trial would have been different, the PCRA's "no reliable adjudication of guilt or innocence" standard for relief is satisfied). In

a case involving multiple Brady violations, while the tendency and force of the undisclosed evidence is evaluated item by item, the overall effect upon trial fairness must be assessed cumulatively. See Kyles, 514 U.S. at 436 n.10, 454, 115 S. Ct. at 1567 n.10, 1575.

I would not conclude that Appellant suffered prejudice if confronted with only one of the Brady violations here presented. Each, however, deprived the defense of a potential advantage either in terms of casting doubt upon Appellant's presence at the crime scenes, or in terms of impeaching the credibility of a key government witness. The electronic surveillance and the associated fact of the status of Appellant's girlfriend and confidant as a Commonwealth agent had potential impeachment value during her testimony as a Commonwealth witness; the forensic reports possessed a degree of exculpatory value;[1] and the assault victim's failure to identify Appellant from a mug

[1] The laboratory analyses of evidence from the crime scenes failed to reveal any physical evidence linking Appellant to either the sexual assault or the murder; in addition, a human hair belonging to neither Appellant nor the rape victim or her husband was found upon the victim's clothing. Although the weight of this evidence may have been modest, it did favor the defense to some degree. Other courts have recognized the effect in similar circumstances as follows:

> Petitioner alleges that his Brady rights were violated by the prosecution's failure to release the results of scientific tests made by the FBI on certain physical evidence until that evidence was introduced late in his trial. The district court correctly characterized the test results as 'neutral' rather than 'exculpatory.' But such a characterization often has little meaning; evidence such as this may, because of its neutrality, tend to be favorable to the accused. While it does not by any means establish his absence from the scene of the crime, it does demonstrate that a number of factors which could link the defendant to the crime do not.

Palter v. Slayton, 503 F.2d 472, 478-79 (4th Cir. 1974); accord People v. Nichols, 349 N.E.2d 40, 43 (Ill. 1976).

book, again, had impeachment worth as against an important Commonwealth witness. None of this information was disclosed to the defense, even after Appellant made a specific pre-trial discovery request for electronic surveillance materials and photographic identifications of Appellant by prosecution witnesses.[2] In my view, the collective effect of all of these omissions on the part of the Commonwealth creates a cloud upon the reliability of the verdict and judgment of sentence. Under these circumstances, I would award a new trial.

Mr. Justice Zappala joins this dissenting opinion.

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[2] In this regard, the Supreme Court has observed:

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued.
>
> We agree that the prosecutor's failure to respond fully to a Brady request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

United States v. Bagley, 473 U.S. 667, 682-83, 105 S. Ct. 3375, 3383-84 (1985). See also United States v. Agurs, 427 U.S. 97, 106, 96 S. Ct. 2392, 2399 ("When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.")