AMERICAN CONSTITUTIONALISM

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

The Contemporary Era—Criminal Justice/Due Process and Habeas Corpus

**Wearry v. Cain, \_\_ U.S. \_\_** (2016)

*Michael Wearry was sentenced to death for the murder of Eric Walber. After his conviction became final, Wearry’s attorneys learned that state prosecutors had failed to disclose much exculpatory evidence. Prosecutors were aware, but did not disclose, testimony by several inmates that that cast doubt on the veracity of Sam Scott, the main prosecution witness at Wearry’s trial, that, contrary to the prosecutor’s assertions at trial, prosecutors were aware that another witness, Eric Brown, attempted to make a deal in exchange for his testimony and medical evidence that cast on whether, Randy Hutchinson, who Scott also implicated, could have acted consistent with Scott’s testimony. Wearry brought a habeas corpus action against Burl Cain, warden of the Louisiana State Penitentiary, claiming that this failure to disclose violated the due process clause of the Fifth Amendment as incorporated by the due process clause of the Fourteenth Amendment. The Louisiana courts denied his claim. Wearry appealed to the Supreme Court of the United States.*

*The Supreme Court by a 6-2 vote ruled that Wearry’s constitutional rights had been violated. The per curiam opinion held that prosecutors had an obligation to disclose the evidence in question because a reasonable likelihood existed that a jury would have decided differently had they been aware of the withhold evidence. Do the per curiam and Justice Alito’s dissent dispute the law or whether additional hearings are appropriate? To what extent do you think the majority was influenced by the apparent egregiousness of the rights violation or was this an appropriate case for a summary judgment? How did Wearry’s being under a sentence of death influence the opinion? Does Wearry suggest that the judicial majority was not willing to take the chance that a possibly innocent person might be executed?*

PER CURIAM.

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“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland* (1963). Evidence qualifies as material when there is “‘any reasonable likelihood’” it could have “‘affected the judgment of the jury.’”  To prevail on his *Brady* claim, Wearry need not show that he “more likely than not” would have been acquitted had the new evidence been admitted.  He must show only that the new evidence is sufficient to “undermine confidence” in the verdict.

Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi. . . . Louisiana . . . charged Wearry with capital murder, and the only evidence directly tying him to that crime was Scott's dubious testimony, corroborated by the similarly suspect testimony of Brown. . . . . Scott's credibility, already impugned by his many inconsistent stories, would have been further diminished had the jury learned that Hutchinson may have been physically incapable of performing the role Scott ascribed to him, that Scott had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated Wearry to settle a personal score. Moreover, any juror who found Scott more credible in light of Brown's testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister's relationship with the victim's sister—as the prosecution had insisted in its closing argument—but by the possibility of a reduced sentence on an existing conviction. Even if the jury—armed with all of this new evidence—could have voted to convict Wearry, we have “no confidence that it would have done so.”

Reaching the opposite conclusion, the state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively, emphasized reasons a juror might disregard new evidence while ignoring reasons she might not, and failed even to mention the statements of the two inmates impeaching Scott.

In addition to defending the judgment of the Louisiana courts, the dissent criticizes the Court for deciding this “intensely factual question ... without full briefing and argument.”  But the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law. . . . . Summarily deciding a capital case, when circumstances so warrant, is hardly unprecedented. Perhaps anticipating the possibility of summary reversal, the State devoted the bulk of its 30–page brief in opposition to a point-by-point rebuttal of Wearry's claims. Given this brief, as well as the State's lower court filings similarly concentrating on evidence supporting its position, the chances that further briefing or argument would change the outcome are vanishingly slim. . . . The alternative to granting review, after all, is forcing Wearry to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed.

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Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I56bb7c97e46711e5b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I56bb7c97e46711e5b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins, dissenting.

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The Court argues that the information in question here could have affected the jury's verdict and that petitioner's conviction must therefore be reversed. The Court ably makes the case for reversal, but there is a reasonable contrary argument that petitioner's conviction should stand because the undisclosed information would not have affected the jury's verdict. . . . For good reason, we generally do not decide cases without allowing the parties to file briefs and present argument. Questions that seem quite simple at first glance sometimes look very different after both sides are given a chance to make their case. Of course, this process means extra work for the Court. But it leads to better results, and it gives the losing side the satisfaction of knowing that at least its arguments have been fully heard. There is no justification for departing from our usual procedures in this case.

The first item of information discussed by the Court is a police report that recounts statements made about Sam Scott, a key witness for the prosecution, by a fellow inmate. According to this report, Scott told the inmate: “I'm gonna make sure Mike [i.e., petitioner] gets the needle cause he jacked over me.” . . . The Court reads the report to suggest that Scott implicated petitioner in the murder “to settle a personal score.”  But if petitioner's counsel had actually attempted to use this evidence at trial, the net effect might well have been harmful, not helpful, to the defense. The undisclosed police report on which the Court relies may be read to mean that Scott blamed petitioner for putting him in the position of having to admit his own role in the events surrounding the murder and thereby expose himself to the 10–year sentence and lose an opportunity to secure early release from prison on the drug charges. If defense counsel had attempted to impeach Scott with this police report, the effort could have backfired by allowing the prosecution to return the jury's focus to a point the State emphasized often during trial, namely, that Scott's accusations were credible precisely because Scott had no motive to tell a story that was contrary to his own interests.

The Court next turns to an allegation that Scott had coached another prisoner to make up lies against petitioner. This prisoner never testified at trial, and there is a basis for arguing that this information would not have made a difference to the jury, which was well aware that Scott did not have an exemplary record of veracity. . . . Given that the jury convicted even with . . . quite serious strikes against Scott's credibility, there is reason to question whether the jury would have seriously considered a different verdict because of an accusation from someone who never took the stand.

Third, the Court observes that the prosecution failed to turn over evidence that another witness, Eric Brown, had asked for favorable treatment from the district attorney in exchange for testifying against petitioner. It is true—and troubling—that the prosecutor claimed in her opening statement that Brown had not sought favorable treatment. But even so, it is far from clear that disclosing the contradictory information had real potential to affect the trial's outcome. For one thing, there is no evidence that Brown (unlike Scott) actually received any deal, despite defense counsel's efforts in cross-examination to establish that Brown's testimony might have earned him leniency from the State. Moreover, Brown admitted during the exchange that he had manipulated his initial story to the police to avoid implicating himself in criminal activity. We know, then, that the jury harbored no illusions about the purity of Brown's motives, notwithstanding the prosecutor's opening misstatement.

Finally, the Court says that the medical records of Randy Hutchinson would have cast doubt on Scott's trial testimony that Hutchinson repeatedly dragged the victim into and out of a car and bludgeoned him with a stick.. . .  Given that these particular details about Hutchinson's actions were a relatively minor part of Scott's account of the crime and the State's case against petitioner, the significance of the undisclosed medical records is subject to reasonable dispute.

While the Court highlights the exculpatory quality of the withheld information, the Court downplays the considerable evidence of petitioner's guilt. Aside from Scott's and Brown's testimony, three witnesses told the jury that they saw petitioner and others driving around shortly after the murder in the victim's red car, which according to one of these witnesses had blood on its exterior. Petitioner offered to sell an Albany High School class ring to one of these witnesses and a set of new speakers to another. The third witness said he saw petitioner throw away a bottle of Tommy Hilfiger cologne. . . . In addition, three jailers testified that petitioner called his father after his eventual arrest and stated that “he didn't know what he was doing in jail because he didn't do anything [and] was just an innocent bystander.”

Whether disclosing the information at issue realistically could have changed the trial's outcome is indisputably an intensely factual question. . . . At this stage, all that we have from the State is its brief in opposition to the petition for certiorari. And the State had ample reason to believe when it submitted that brief that the question on the table was whether the Court should hear the case, not whether petitioner's conviction should be reversed. . . .

One consequence of waiting until the claim was raised in a federal habeas proceeding is that our review would then be governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under AEDPA, relief could be granted only if it could be said that the state court's rejection of the claim represented an “unreasonable application” of *Brady*.  By intervening now before AEDPA comes into play, the Court avoids the application of that standard and is able to exercise plenary review. But if the *Brady* claim is as open-and-shut as the Court maintains, AEDPA would not present an obstacle to the granting of habeas relief. On the other hand, if reasonable jurists could disagree about the application of Brady to the facts of this case, there is no good reason to dispose of this case summarily. The State should be given the opportunity to make its full case.