

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 133

MARK GARRETT,

Respondent.

20 Eagle Street
Albany, New York 12207
June 3, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

ANNE E. OH, ADA
SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Appellant
Criminal Courts Building
200 Center Drive
Riverhead, NY 11901

STEVEN A. FELDMAN, ESQ.
FELDMAN AND FELDMAN
Attorneys for Respondent
626 Reckson Plaza
West Tower, 6th Floor
Uniondale, NY 11556

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 133.
2 Counselor, would you like any rebuttal
3 time?

4 MS. OH: One minute, Your Honor.

5 CHIEF JUDGE LIPPMAN: How much?

6 MS. OH: One minute.

7 CHIEF JUDGE LIPPMAN: One minute, sure. Go
8 ahead, counselor.

9 MS. OH: Thank you. May it please the
10 court. My name is Anne E. Oh, and I appear as the
11 appellant in this case, the People of the State of
12 New York.

13 We urge the court to reverse the Appellate
14 Division's decision below, because it erred as a
15 matter of law when it created, essentially, a per se
16 rule that stated where a civil complaint is filed
17 against a testifying police officer, if the
18 prosecution knew about it, then it's Brady.

19 This rule, which has been cited by the
20 Eastern District of New York, and to be held that
21 way, to extend a prisoner's extension to file on his
22 direct appeal in - - - in the state courts, has
23 created a rule in New York State that basically
24 obliterates the last fifty-one years of Brady
25 jurisprudence without that - - - without exception.

1 JUDGE SMITH: Wouldn't it be - - - I mean,
2 you make it sound so disastrous, but in most of these
3 cases, like including this one, you would still have
4 a strong materiality argument. That is, I mean,
5 aren't - - - aren't imputation and materiality
6 separate issues? Even if - - - even if this
7 knowledge is imputed to you, you have a - - - you
8 have a respectable argument that it wasn't material.

9 MS. OH: Your Honor, I absolutely agree
10 with you, and that's why we state - - -

11 JUDGE SMITH: But isn't that true in almost
12 all of these cases that where the - - - where what
13 you have is an officer who might have been accused of
14 doing something bad in his life that only he knows
15 about, it's very rare that that's going to be
16 material, whether it's imputed to the prosecution or
17 not.

18 MS. OH: There is no doubt in my mind that
19 - - - that each member of this bench could come out
20 with a hypothetical where it could be the opposite.
21 The problem with the Appellate Division's decision is
22 it was wrong as to each element.

23 JUDGE SMITH: Well, let me take up that
24 challenge; let's see if I can. You have got a case
25 where it really is material, where the - - - where

1 the guy's record is so bad that it - - - that it
2 would undermine confidence in the verdict. That's
3 the test for materiality, the ultimate test, right?

4 MS. OH: Yes, Your Honor.

5 JUDGE SMITH: Okay. If there's - - - if
6 there's a record that's so bad that it would
7 undermine my confidence in the verdict, why shouldn't
8 I reverse the conviction?

9 MS. OH: There is a difference between a
10 record and an accusation, and if it is - - -

11 JUDGE SMITH: I understand one is much less
12 - - - okay - - - okay, the accusation probably
13 wouldn't undermine my confidence in the verdict, but
14 what if it did? What I'm saying, aren't you, in
15 effect, arguing that you can have something that is
16 material, which means that's it's reasonably probable
17 that it would have produced a different result, and
18 we're just supposed to say tough luck because it's in
19 this category of things you don't impute to the
20 prosecution.

21 MS. OH: No, Your Honor, that's not what
22 we're stating at all. Actually, we agree with you.
23 We're stating that this is, in this case, a mere
24 accusation and the wrong case to make that holding
25 on. If this were a case where this was actually a

1 factual finding, and if this were a case where
2 Detective O'Leary was actually accused of excessive
3 force in taking of the confession, perhaps this would
4 be the case.

5 JUDGE PIGOTT: Where would you draw the
6 line? I realize in this case there's a question of a
7 civil lawsuit, but suppose that you've got an officer
8 who has a history of bad conduct within the
9 department, and it's in his personnel record. In
10 your view, is that something that should be
11 disclosed?

12 MS. OH: Your Honor, I don't think there
13 can be a per se rule with respect to Brady. I think
14 this court has shied away from a per se rule.

15 JUDGE SMITH: Aren't you asking for a per
16 se rule? Aren't you saying that where it's known
17 only to the offending officer, it's not Brady?

18 MS. OH: No, Your Honor. I am asking that
19 the court not impose a per se rule upon the po - - -
20 upon the prosecution to deem - - -

21 JUDGE SMITH: Well, a per se - - - what is
22 the per se rule you say they did impart?

23 MS. OH: Here they remitted the case back
24 for the prosecution to prove that no one knew that
25 the Detective O'Leary was named in a civil suit.

1 JUDGE SMITH: Well, that's after - - - they
2 did do that, but that's - - - that's after they found
3 it to be material.

4 MS. OH: Yes, Your Honor.

5 JUDGE SMITH: Can we review that finding
6 that it was material?

7 MS. OH: Our position is that their finding
8 was premised so incorrectly on the facts of that case
9 that it was error as a matter of law.

10 JUDGE SMITH: Okay. What about LaFontaine?

11 MS. OH: Could you just remind me of the
12 facts, Your Honor?

13 JUDGE SMITH: Oh, yeah.

14 MS. OH: You stumped me.

15 JUDGE SMITH: You know - - - you know, you
16 don't want to know.

17 MS. OH: Thank you.

18 JUDGE SMITH: Assume there's a rule, and
19 you may have trouble getting your mind around this -
20 - - assume there's a rule that says we can only
21 review - - - that the Appellate Division can only
22 review questions that were actually decided in the
23 trial - - - in the trial-level court. County court
24 here didn't decide materiality, did it?

25 MS. OH: No, it didn't. But the Appellate

1 Division did, based upon the wrong facts. And based
2 upon that, its decision is - - - is wrong.

3 JUDGE SMITH: Well, you say this is
4 immaterial as a matter of law?

5 MS. OH: Yes, Your Honor. And I also - - -
6 there are three prongs. It's suppression, and
7 whether or not the evidence is favorable, and whether
8 or not the evidence is material. Here we argue that
9 the prosecution could not have suppressed the
10 evidence because it's a public document. A civil
11 filing in federal court is not the type of
12 information that the prosecution was obligated to
13 disclose under the concept of fundelment (sic) - - -
14 of fundamental fairness - - -

15 JUDGE PIGOTT: But suppose you knew it.

16 MS. OH: - - - that was embodied - - -

17 JUDGE PIGOTT: I get your point; if you
18 never knew it, I mean, it's hard to blame - - - hard
19 to say you should have produced it. But suppose you
20 know it.

21 MS. OH: Suppose we knew, in this case, and
22 assuming, arguendo, that this was the same Detective
23 O'Leary, because this is the rabbit hole that we are
24 all in right now. Assuming that we knew it, and it
25 was the same Detective O'Leary, the prosecutor in

1 that case would say the defendant testified at this
2 trial; he never claimed that Detective O'Leary harmed
3 him, and in fact, he unequivocally stated Detective
4 O'Leary did not harm me in any way.

5 JUDGE PIGOTT: No, I was - - - I'm farther
6 back. I'm - - - you know - - - you know that there's
7 a civil suit against the - - - the detective who's
8 involved in a case, and it's police brutality, and
9 there's a claim of police brutality here in the
10 confession. Do you have to disclose that fact,
11 regardless of what ultimately is going to happen with
12 it? Because, as Judge Smith indicates, then it comes
13 in front of the court and you've got decisions to be
14 made. But you say, by the way, this - - - this
15 Detective O'Leary, who you - - - your client claims
16 beat you up, he's got a civil suit across the street
17 on the same issue. Do you have to tell them that?

18 MS. OH: Under all three elements of Brady,
19 I would submit, no, in this case. And I think that
20 Brady - - - the courts have shied away from - - -

21 JUDGE PIGOTT: Which one of the three do
22 you think that this doesn't fall under?

23 MS. OH: I would say, A, this is a public
24 document, okay? He has equal amount of access to it
25 as I do. But more importantly, how would this be

1 favorable to the defendant at trial? If he asked the
2 question, Detective O'Leary, isn't it true - - -

3 JUDGE PIGOTT: Well, why do you get to make
4 that decision? In other words, it would seem to me
5 that you - - - that you would say, here's the
6 evidence - - - here's evidence that is - - - that
7 tends to be favorable to your client. We don't think
8 you can get it in, but you know, we have to tell you
9 because we're - - - we're a law enforcement agency
10 that's supposed to be working both sides of the
11 street here, and this is what we've got.

12 MS. OH: The decision to - - - at the trial
13 level, the decision to disclose it versus, on appeal,
14 the decision by the court as to whether it's not - -
15 - whether it's Brady, it's not based on whether or
16 not it's arguably favorable alone. What has to
17 occur, in determining whether or not this is Brady
18 evidence is, one, to determine if it in fact would
19 have - - - was favorable, and then more importantly,
20 if the pros - - - defense had this information,
21 whether or not it would have - - -

22 JUDGE PIGOTT: All right. But you're
23 arguing - - - so you want skip the trial and you just
24 want to say in the Appellate Division this would not
25 have been material, and therefore, the conviction

1 should be affirmed, even if we were wrong in - - - in
2 not disclosing it.

3 MS. OH: That's a trick question, and this
4 is why. Whether or not the prosecutor had that
5 document, that - - - at that time of trial, it is up
6 to the prosecution to make that decision.

7 JUDGE PIGOTT: Well, see, remember that - -
8 - I think it's still going on; there's that detective
9 somewhere in New York City who keeps using the same -
10 - - you know, who kept getting confessions, you know,
11 whenever the spirit moved him, with the same
12 witnesses. And that's caused a lot of shadows on - -
13 - on - - - on a lot of cases. Now, if you - - - if
14 you're a prosecutor and - - - and that's your
15 witness, don't you have an obligation to tell the
16 defense, by the way, this is the cop that's - - - you
17 know, that's in all this trouble over fabricating
18 evidence?

19 MS. OH: In a - - - in a - - - you see - -
20 - in this case, no. In other cases, maybe. And I
21 know that's not the answer you want to hear - - -

22 JUDGE SMITH: If you - - -

23 MS. OH: - - - but - - -

24 JUDGE SMITH: If you had a guy like the
25 detective in Longtin, or however you pronounce that

1 case - - -

2 MS. OH: Um-hum.

3 JUDGE SMITH: - - - the guy who - - - who
4 was in the business of fabricating fingerprints, and
5 if you knew he was in the business of fabricating
6 fingerprints, you've got to disclose that, right?

7 MS. OH: But that's different than this
8 case.

9 JUDGE SMITH: But you're not quarreling
10 with that point?

11 MS. OH: No, I'm not disagreeing with if
12 there is a judicial finding - - -

13 JUDGE GRAFFEO: So - - - so what's - - -

14 MS. OH: - - - and that is not the case.

15 JUDGE GRAFFEO: So what's the difference?
16 It sounds like you're making a determination of
17 materiality at the in - - - at the inception instead
18 of - - -

19 MS. OH: The distinction - - -

20 JUDGE GRAFFEO: - - - instead of disclosure
21 and then arguing materiality.

22 MS. OH: The distinction - - - no - - - is
23 - - - is - - - no, Your Honor. The distinction is
24 the quality of evidence presented to the prosecution.
25 Is this just a list of accusations by a complainant

1 on an unrelated case?

2 JUDGE GRAFFEO: So what's the difficulty?
3 Is there an administrative burden here, is that you
4 don't have access to this, or it's too time consuming
5 to find out about every police witness? I mean,
6 what's the real basis for the objection to this being
7 deemed Brady material?

8 MS. OH: Because this is not what Brady
9 requires the prosecution to give. This is not the
10 law under Brady. It is not - - - Brady has never, in
11 this state - - - under Hunter, has never
12 affirmatively obligated the prosecution to find
13 evidence that could possibly be exculpatory or
14 impeaching for their benefit.

15 JUDGE PIGOTT: That's fine, but you do have
16 to disclose those that - - - that favor the defendant
17 or could lead to evidence that could favor the
18 defendant, right?

19 MS. OH: If it were - - - if the quality of
20 the evidence was reliable enough, yes. In this case,
21 it's a list of accusations.

22 JUDGE PIGOTT: Right, but - - - I
23 appreciate your focusing on this particular case, but
24 in terms of this case and future cases, shouldn't we
25 be a little chary about saying, well, it's the DA

1 that decides what is material.

2 MS. OH: The problem with permitting a
3 civil complaint, which is, again, merely a list of
4 accusations - - -

5 JUDGE PIGOTT: Get away from that. I mean,
6 look at Sandoval, look at all of the cases that go -
7 - - where you say, if you're going to take the stand,
8 we're going to ask you about prior bad acts, and
9 here's a bunch of them that we have - - - we've been
10 able to ferret out. Now, the defense can't say,
11 Judge, you can't get into that stuff because we
12 didn't tell them that stuff. You go out and do your
13 own investigation. It would seem to me, here, that
14 if you've got stuff that could favor the defendant,
15 you tell them, and then - - - but you say to the
16 judge, by the way, we don't think this - - - this
17 stuff should come in, so let's have a hearing.

18 MS. OH: This stuff, that may favor - - -
19 the Sandoval stuff is convictions.

20 JUDGE PIGOTT: Well, Sandoval - - -

21 MS. OH: And - - -

22 JUDGE PIGOTT: - - - is, but not - - -

23 MS. OH: And - - - but there has to be - -

24 -

25 JUDGE SMITH: Well, you can - - - they're

1 allowed to put in prior bad acts. You don't have to
2 have been convicted to - - - at least they can cross-
3 examine from prior bad acts.

4 MS. OH: But there has to be a good-faith
5 basis. There has to be some - - -

6 JUDGE SMITH: And you say a civil complaint
7 isn't a good-faith basis?

8 MS. OH: There is no burden of proof in
9 filing an accusation.

10 JUDGE PIGOTT: But suppose - - -

11 MS. OH: Any defendant - - -

12 JUDGE PIGOTT: - - - in this particular
13 case, or any subsequent case, you - - - you give them
14 the name of the detective and - - - and say, and by
15 the way, he's getting sued across the street. They
16 go over across the street, talk to the defendant, and
17 he says, yeah, this is one of twelve. And in fact,
18 you know, he's just going to spend the rest of his
19 summer here defending all of these cases. You would
20 have wished you would have disclosed that, I mean,
21 before you would say, well, we only know of one, so
22 we're not going to tell anybody.

23 MS. OH: But that's not - - - no, I
24 disagree.

25 JUDGE PIGOTT: Okay.

1 MS. OH: And I disagree because the - - -
2 that would create, basically, the potential for a
3 trial within a trial. A - - - a witness' prior bad
4 act, in a case where he is not even charged with
5 excessive force - - -

6 JUDGE PIGOTT: But the trial within a trial
7 - - - I apologize; I keep interrupting you. But you
8 want to take on the role of the defense lawyer and
9 say I'm not going to tell this defense lawyer because
10 he would then have evidence that's not material and
11 he'd try to introduce it, so I'm not going to tell
12 him about it and because it might cause a trial
13 within a trial, and the judge is not somebody I can
14 trust to - - - to say that that's not going to happen
15 in my courtroom. I'm not going to tell him because
16 that'll save the judge making that ruling that I
17 think he should make or she should make.

18 MS. OH: But that's not the assessment
19 that's occurring. I mean, that's kind of what I'm
20 saying the court is do - - - should do backwards.

21 JUDGE PIGOTT: Okay.

22 MS. OH: Whether or not the evidence is
23 Brady is - - - it's different. Whether or not a - -
24 - a - - - a prosecutor who has the information should
25 have turned it over, has to rely on the three rules,

1 the three elements that Brady has set forth. In this
2 case - - -

3 JUDGE RIVERA: Counsel, if there had been a
4 verdict against the - - - the defendant in - - - in
5 this civil action - - -

6 MS. OH: Yes.

7 JUDGE RIVERA: - - - would - - - would you
8 have had to turn that information over?

9 MS. OH: If the - - - there was a verdict.

10 JUDGE RIVERA: A verdict.

11 MS. OH: A factual finding regarding the
12 civil complaint that occurred prior to - - -

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 MS. OH: - - - the arrest - - -

15 CHIEF JUDGE LIPPMAN: Counselor, finish it.

16 MS. OH: - - - yes, Your Honor.

17 CHIEF JUDGE LIPPMAN: You'll have your
18 rebuttal time.

19 MS. OH: Thank you.

20 CHIEF JUDGE LIPPMAN: Counselor?

21 MR. FELDMAN: Good afternoon, Your Honors,
22 Steve Feldman for Mr. Garrett.

23 On the same day that we filed our brief,
24 December 10, 2013, Judge Alex Kozinski, the chief
25 judge in the Ninth Circuit, in U.S. v. Leon, cited

1 the Garrett case in the Appellate Division. And he
2 said, "There is an epidemic of Brady violations in
3 the land. Only judges can put a stop to it." It's
4 at 737 F.3d 625. In this case, there is classic
5 evidence of Brady. The - - - the lawsuit against the
6 detective, O'Leary, accused him of physically
7 violating the rights of the defendant. And in this
8 trial, with Mr. Garrett, he made allegations of
9 coercion and duress.

10 JUDGE ABDUS-SALAAM: Counsel, could I - - -
11 who was supposed to find this out? This is a lawsuit
12 that's filed in federal district court, and that's a
13 public document, so is it up to the prosecution to
14 find that out and then turn that over to defense, or
15 could the defense do the same thing if it's a - - -
16 if it's a public document?

17 MR. FELDMAN: Your Honor, in Milke v. Ryan,
18 the - - - the Ninth Circuit ruled that even with
19 public information, such as this, the burden rests
20 with the People - - -

21 JUDGE PIGOTT: Well, they didn't say that;
22 they said - - - you're mixing an answer with a quote.
23 I think the question is you could have found this
24 out, too.

25 MR. FELDMAN: The - - -

1 JUDGE PIGOTT: Whatever Milke says, do you
2 think that's true?

3 MR. FELDMAN: Well, what I think is true is
4 that, given the People's enormous resources, compared
5 to the defendant, and the inability of the defense to
6 speak with the police in a murder prosecution like
7 this, the - - - the People absolutely do have a
8 burden, even with - - -

9 JUDGE PIGOTT: Do you see a danger - - -

10 MR. FELDMAN: - - - public information - -
11 -

12 JUDGE PIGOTT: Isn't the danger, in - - -
13 in a situation like this, where you have a conviction
14 and perhaps - - - perhaps you've found out that
15 there's this thing sitting over there, and you know
16 the People haven't disclosed it, and you say, you
17 know, I've got a Get Out of Jail Free card here. All
18 I've got to do is go through this trial. If I get an
19 acquittal, I'm fine. If not, I'm going to raise the
20 fact that they didn't disclose this Brady material to
21 me, and - - - and I get another trial.

22 MR. FELDMAN: I don't see that as a danger
23 in this case, because this entire case, as the Second
24 Department said, basically rested on a confession.
25 And had the defendant - - - had defense counsel had

1 access to - - -

2 JUDGE GRAFFEO: It wasn't entirely on the
3 confession; there was some physical evidence,
4 correct? The - - - the electrical wire - - -

5 MR. FELDMAN: But as - - -

6 JUDGE GRAFFEO: - - - the sheet - - -

7 MR. FELDMAN: - - - the Second Department
8 said - - -

9 JUDGE GRAFFEO: - - - the fact the body was
10 in his mother's back yard.

11 MR. FELDMAN: But anyone would have put the
12 body there. There was no evidence linking my client
13 to that murder outside of the confession. The
14 circumstantial evidence could have never resulted in
15 a conviction in this case.

16 JUDGE PIGOTT: So where - - -

17 MR. FELDMAN: But - - -

18 JUDGE PIGOTT: - - - where would you draw
19 the line? I'm sorry; you wanted to finish your
20 answer.

21 MR. FELDMAN: Well - - - well, no, I just -
22 - - no, I - - - you - - - you can - - - go ahead.

23 JUDGE PIGOTT: I was going to say, where do
24 you draw the line? I mean, this is a civil case in
25 federal court. Obviously, police personnel records I

1 think you get routinely now, don't you? If you
2 demand them, I assume. I mean, what else?

3 MR. FELDMAN: Where you draw the line, in a
4 case like this, is very simple. When the defendant
5 is making a point of the fact that it's a
6 circumstantial case, and the confession is the key to
7 the People's case, every single juror would be
8 desperate to know is the modus operandi of the police
9 in this case - - -

10 JUDGE ABDUS-SALAAM: So are you ask - - -

11 MR. FELDMAN: - - - to extract a confession
12 - - -

13 JUDGE ABDUS-SALAAM: Are you asking us to
14 rule that the - - - the prosecution has to survey the
15 federal district courts to find out whether - - -

16 MR. FELDMAN: No, Judge.

17 JUDGE ABDUS-SALAAM: - - - there are any
18 1983 actions - - -

19 MR. FELDMAN: No.

20 JUDGE ABDUS-SALAAM: - - - pending?

21 MR. FELDMAN: No, Your Honor. What I'm
22 asking this court to do is affirm the Second
23 Department ruling, for a very, very common sense
24 reason. Every single prosecutor in New York State,
25 and indeed the country, is going to ask their star

1 witness, who is saying the defendant confessed, when
2 there's very little circumstantial evidence, have you
3 ever been charged in a civil action or in any act of
4 - - -

5 JUDGE SMITH: Suppose he - - -

6 MR. FELDMAN: - - - misconduct.

7 JUDGE SMITH: Suppose he falsely says no;
8 is the prosecution - - - is the prosecution's Brady
9 obligation discharged?

10 MR. FELDMAN: Not at all, and - - - and the
11 reason - - -

12 JUDGE SMITH: You say his knowledge is - -
13 -

14 JUDGE GRAFFEO: What do they do - - -

15 JUDGE SMITH: You say his knowledge - - -

16 JUDGE GRAFFEO: What do they do next?

17 JUDGE SMITH: - - - is imputed to the
18 People?

19 MR. FELDMAN: All the People needed to do
20 in this case was to do a fifteen-second PACER search.

21 JUDGE SMITH: Okay. In this - - - oh, so -
22 - - so you say you not - - - you not only have to ask
23 your witness; you've got to do some research?

24 MR. FELDMAN: I can't hear you.

25 JUDGE SMITH: You say you not only have to

1 ask your witness; you've got to do this fifteen
2 seconds of - - - of research?

3 MR. FELDMAN: Well, what I'm saying is - -
4 -

5 JUDGE GRAFFEO: What if they worked in - -
6 -

7 MR. FELDMAN: - - - that the prosecutor
8 should - - -

9 JUDGE GRAFFEO: What if they worked in
10 another state before they came to this police
11 department? Do you have to check nationally whether
12 they have any claims pending against them?

13 MR. FELDMAN: There should be an absolute
14 minimum under Brady that the prosecutor should do
15 about - - -

16 JUDGE GRAFFEO: Can you answer - - -

17 MR. FELDMAN: - - - a detective - - -

18 JUDGE GRAFFEO: - - - my ques - - - can you
19 answer - - - answer my question? I mean, we're
20 trying to ask - - - I don't understand the rule
21 you're proposing. So they've got to research
22 nationally to find out whether there's any civil - -
23 -

24 MR. FELDMAN: They don't - - -

25 JUDGE GRAFFEO: - - - lawsuits pending

1 against - - -

2 MR. FELDMAN: They don't have to - - -

3 JUDGE GRAFFEO: - - - any witness - - -

4 MR. FELDMAN: Your Honor - - -

5 JUDGE GRAFFEO: - - - any law enforcement
6 witnesses?

7 MR. FELDMAN: No, they don't have to do the
8 research. In this case, they didn't even ask the
9 detective - - -

10 JUDGE ABDUS-SALAAM: So - - -

11 JUDGE GRAFFEO: Well, how do they know that
12 the answer they get from a police officer is - - - is
13 truthful? They ask the question of a potential
14 police witness, and he says - - - she says no, I
15 don't have any civil cases. You're saying even if
16 that's not correct information, they still have to go
17 and do the research. So they're going to have to
18 research every witness.

19 MR. FELDMAN: But the - - - the issue is,
20 Your Honor, that the amount of work that the People
21 and the prosecutor have to put in, in a murder
22 prosecution, to find out about the detective who took
23 the confession is so minimal; it is so easy - - -

24 JUDGE ABDUS-SALAAM: What do they have to
25 do?

1 JUDGE GRAFFEO: Well - - -

2 JUDGE ABDUS-SALAAM: What do they have to
3 do? What - - -

4 JUDGE GRAFFEO: We're not really getting an
5 answer.

6 MR. FELDMAN: In the state - - -

7 JUDGE GRAFFEO: Maybe you could tell us
8 what's the rule you want us - - - what's the rule you
9 want us to announce in this case?

10 MR. FELDMAN: Well, what I want you to do
11 is just affirm what the Second Department did,
12 regardless - - -

13 JUDGE GRAFFEO: Well, we don't just say
14 affirmed on the opinion below.

15 MR. FELDMAN: Right.

16 JUDGE GRAFFEO: We write an opinion.

17 MR. FELDMAN: But - - -

18 JUDGE GRAFFEO: So what's the - - - what's
19 the rule you want us to announce?

20 MR. FELDMAN: That when there is a murder
21 prosecution which rests on a confession, the People
22 have a duty to do a minimal investigation of its key
23 detective to find out if he's engaged in the similar
24 misconduct that the defense is alleging - - -

25 JUDGE RIVERA: Okay. So - - -

1 MR. FELDMAN: - - - he's engaged in.

2 JUDGE RIVERA: - - - I'm with - - - I
3 understand your point about one would prep a witness
4 anyway; you'd ask this question. Why - - - why then
5 can't the prosecutor depend on what seems to be the
6 obvious incentive to a police officer to tell the
7 truth, which is they're ly - - - they would be lying
8 through an ADA, and they may go and perjure
9 themselves on the stand. Why - - - why can't the DA
10 - - - the ADA just rely on that and just ask that one
11 question? Because it sounded to me like you were
12 saying, and then they've got to do a bunch of other
13 stuff.

14 MR. FELDMAN: Well, it was only in response
15 to Your Honor's question about what if the - - - the
16 detective lies about whether he has a pending civil
17 lawsuit, like this detective who has been charged
18 with so many acts of misconduct.

19 JUDGE RIVERA: Right, but I'm just - - -
20 I'm just saying under the circumstance you just have
21 a witness; you don't have any other information to
22 suggest that the witness has a history and that they
23 would be lying, why - - - why couldn't the ADA just
24 depend on what strikes me as - - -

25 MR. FELDMAN: Because - - -

1 JUDGE RIVERA: - - - the normal incentive -
2 - -

3 MR. FELDMAN: Because there's - - -

4 JUDGE RIVERA: - - - here to be truthful.

5 MR. FELDMAN: Because there's no prosecutor
6 who wants to jeopardize their case by having a
7 detective commit perjury and open it up to a 440
8 action. There - - -

9 JUDGE READ: Well, you seem to be saying -
10 - -

11 JUDGE SMITH: Let me - - - let me - - -

12 JUDGE READ: - - - there's some kind of an
13 independent duty, right? Is that what you're saying;
14 there's some - - -

15 MR. FELDMAN: I'm not - - -

16 JUDGE READ: - - - there's an independent
17 duty on the part of the prosecutor to - - - to check
18 - - -

19 MR. FELDMAN: Not an independent duty; it's
20 just under Brady that the People should have said,
21 before the suppression hearing, when the defendant
22 was saying I confessed to a crime I - - - it was not
23 true; I confessed because I was beat up. At that
24 point, it - - - or before that, it was up to the - -
25 - the prosecutor to say our detective would - - -

1 JUDGE RIVERA: Well, the prosecutor - - -

2 MR. FELDMAN: - - - would - - -

3 JUDGE RIVERA: - - - may have done that,
4 because he didn't lie; it's a different person.

5 MR. FELDMAN: But Your Honor, that fact - -
6 - I'm absolutely delighted you brought that up.

7 JUDGE RIVERA: Okay.

8 MR. FELDMAN: This is a fact that Mr.
9 Garrett has never been able to litigate, and it is
10 absolutely dehors the record.

11 JUDGE SMITH: I - - -

12 MR. FELDMAN: And the People - - -

13 JUDGE SMITH: I think we actually know
14 you're right about that, but let me - - -

15 MR. FELDMAN: But - - -

16 JUDGE SMITH: Let me ask you - - - we have
17 to - - - your adversary concedes we've got to assume
18 it's the same O'Leary.

19 MR. FELDMAN: Yeah.

20 JUDGE SMITH: But let me ask you a
21 different - - - don't you have a different argument,
22 a different argument from the one you're making?
23 Under - - - under Kyles v. Whitley, the knowledge - -
24 - it doesn't matter what the prosecutor knows; the
25 knowledge of the police is the knowledge of the

1 state. Why isn't the fact that O'Leary knew it
2 enough? Why do you have to go all through all of
3 this, why they had a duty - - - a duty to
4 investigate, they had to ask questions.

5 MR. FELDMAN: You're right under Kyles and
6 the whole imputation doctrine. The - - - the
7 district attorney is imputed to know impeachment
8 material that is so vital under Brady. This entire
9 case turned on a confession. And there is not just a
10 reasonable possibility; there is an absolute almost
11 certainty that had the jury known this was
12 detective's MO and he's been sued in federal court -
13 - - there was a settlement in federal court - - -
14 that jury would have looked at that confession
15 differently, because it is common sense that that's
16 how people think.

17 JUDGE GRAFFEO: If that's the basis for why
18 it's Brady, then let me ask you why did you say in
19 murder cases? Why wouldn't this rule equally apply
20 for kidnapping or arson or - - -

21 MR. FELDMAN: It does.

22 JUDGE GRAFFEO: - - - or any - - - well - -
23 -

24 MR. FELDMAN: It's not limited to - - -

25 JUDGE GRAFFEO: Well, when we asked you

1 what the rule was you wanted us to adopt, you started
2 by saying "in murder cases".

3 MR. FELDMAN: Well, just because this is a
4 murder case. But it - - - it would - - - this is not
5 - - - we're not calling for any per se rules like the
6 - - - like the People are arguing. All Garrett is
7 saying is that the People were imputed to know about
8 the other detective and the civil lawsuit, which
9 settled in federal district court, literally across
10 the street from the state court, and they had a duty
11 to tell the defense. And that's the only holding
12 we're asking this court to make, not to extend Brady,
13 not to reinterpret Brady - - -

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MR. FELDMAN: - - - but - - -

16 CHIEF JUDGE LIPPMAN: Thank you.

17 MR. FELDMAN: Thank you very much, Your
18 Honors.

19 CHIEF JUDGE LIPPMAN: Rebuttal, counselor?

20 MS. OH: Thank you, Your Honor. Just for
21 the record, the settlement in this case occurred in
22 March of 2001, and the trial occurred in 2000. So
23 for the jury to have known about a settlement in the
24 future, which of course is not dispositive of the
25 fact finding within the case, is now presuming upon

1 the prosecution that every allegation made in a civil
2 complaint is right. Then - - - then if you file a
3 1983 claim, the prosecution has to assume that all of
4 those allegations are right and, therefore, it's
5 dispositive for Brady.

6 The Appellate Division's decision was wrong
7 on many levels. And I argue in my brief, because as
8 to each prong of Brady, it's - - - it wasn't - - - it
9 wasn't favorable because of the impeachment value, it
10 wouldn't have led to the police officer's personnel
11 files, it was not within the custody of the - - - the
12 state.

13 Also - - - but I think the most important
14 factor is the Appellate Division did no prediction as
15 to the impact of this evidence, this civil complaint,
16 onto the impact of this trial.

17 JUDGE SMITH: Well, they - - - they found a
18 reasonable probability, didn't they?

19 MS. OH: Your Honor, it was a conclusive
20 statement, where they stated that because the
21 evidence of this crime was weak, where they just
22 based - - - stated that the evidence was - - -

23 JUDGE SMITH: You're saying they were
24 wrong.

25 MS. OH: Yes.

1 JUDGE SMITH: And maybe they were. You can
2 - - - by the way, is that a mixed question, or is
3 that a question of law and materiality?

4 MS. OH: When the - - - regarding - - - it
5 is - - - the conclusion was so summary, without an
6 actual finding of fact, that we argue - - -

7 JUDGE SMITH: I'm asking you what our scope
8 of review is. Do we review it for error of law, or
9 is it a mixed question which we're bound if there's
10 record support?

11 MS. OH: There - - - I - - - my position is
12 it's an - - - it's an error of law because it's based
13 on incorrect facts and incorrect law.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.

15 MS. OH: Thank you, Your Honor.

16 CHIEF JUDGE LIPPMAN: Thanks. Thank you
17 both.

18 MR. FELDMAN: Thank you very much.

19 (Court is adjourned)

20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Mark Garrett, No. 133, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

AAERT Certified Electronic Transcriber (CET**D-492)

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: June 11, 2014