United States Court of Appeals, Second Circuit, Ceremonial Courtroom, July 8, 2009

Bonjean: May it Please The Court: My name is Jennifer Bonjean, and I represent the Petitioner in this matter, Jesse Friedman.

Judge Pooler: May I just ask you a small jurisdictional question first: Has Mr. Friedman completed his sentence and his supervision period?

Bonjean: He has completed his sentence. He…

Judge Pooler: Is he now in custody for purposes of a *Habeas* action?

Bonjean: Well he is subject to very strenuous reporting, sexual offender reporting…

Judge Pooler: You believe that meets the test of being in custody?

Bonjean: Well he is under the arm of the government, so yes, we would take the position that he is subjected to control of the government and therefore can avail himself of the *habeas* ….

Judge Pooler: Okay. Go ahead.

Bonjean: Your Honors: The question before this Court today is whether to shut off Mr. Friedman's last avenue of hope to demonstrate that he was the victim of false child abuse allegations.

Judge Korman: Are you arguing actual innocence here because there is authority in the Second Circuit for the proposition that statute of limitations might not be a bar if a Defendant-Petitioner is making a claim of actual innocence. I sort of got the impression from reading your brief, particularly in the opening introductory part, that you were suggesting that he was innocent.

Bonjean: He is absolutely. Our position is that he is innocent. However, the claim that is brought is a *Brady* violation which is recognized as a Constitutional claim.

Judge Korman: No, no. I don't think you understand my question. I'm not going to the underlying claim. There is some authority in our case law for the proposition that a statute of limitations… that a claim that might otherwise be barred by the statute of limitations might survive if the Petitioner alleged actual innocence.

Judge Raggi: Even if it wasn't timely.

Judge Korman: Exactly.

Bonjean: I understand. Yes, I am familiar with what Your Honor is referring to. I will respond this way: That is an excellent argument. It's not the argument that was raised by these briefs and was not

addressed in these briefs, and I don't know that I'm in the position to respond to that directly at this moment.

Judge Pooler: It seems significant because as Judge Korman said on the one hand the opening section of the brief seems to assert innocent, but then later in the brief it seems to be clear that's not the grounds your converging on us, and it does, it may very well make a difference to our analysis, so we're trying to figure out, whether if we concluded you're not asserting actual innocence as a ground on this appeal, would we have misread your papers.

Bonjean: Your Honors, I'll answer the question this way, we are alleging a claim of actual innocence. What was address in terms of the brief's focus on the lower court's, the District Court's ruling on the timeliness matter which has to do with how to interpret, of course, the AEDPA timeliness requirement

Judge Korman: But if we rule against you on the ground the that your arguing, presumably, that's the end of the case.

Bonjean: This Court could, on its own, I believe the Court has the authority, the jurisdiction to construe this brief as a claim of actual innocence to forgive any timeliness problem.

Judge Pooler: You don't just get to just say, 'We're claiming actual innocence.' Along with that there is a body of law that talks about what's enough, and since that wasn't briefed it's hard for us… We have to know what is your argument as to how you satisfy our actual innocence jurisprudence. I mean, to spite the factual discussion at the start, we're dealing with a guilty plea here.

Bonjean: Your Honor, I fully understand, and all I can do is, I hate to say that 'I didn't write the briefs', but I can tell you that the briefs that were submitted admittedly did not address that specific issue. Whether or not a claim of actual innocence could forgive any timeliness problem.

Judge Korman: I think there is some authority is the cases that say that it doesn't matter whether you plead guilty or not, you could still…

Bonjean: Absolutely

Judge Pooler: But you still have to convince us that you fall within these cases so are you able to argue that to receive orally now? Because otherwise you're saying to us 'we're claiming actual innocence and you go figure out how.'

Bonjean: Well, Your Honors, the actual innocence claim, I believe by address some of the matters that we address on the *Brady* issue do get to the actual innocence which is, that there is, as this court is fully aware 1980's marked an era of high profile mass sexual abuse cases where you saw many cases that were led to dismissals, acquittals, post-conviction exonerations because precisely what we have here which is that the tactics that were employed to elicit the stories, and Your Honors, they were stories in these cases. They were 100% falsehoods, and that the tactics that were employed in those cases, the McMartin case, the Little Rascals case, and in this case, that investigators would use coercive high pressure, manipulation tactics to highly suggestible children to induce false stories.

Judge Pooler: Let me make sure I understand you and I'm not minimize what you presented to us, but I understand how that argument would suggest that you would have grounds for impeachment, but that's different from showing falsities. So help me out with that.

Bonjean: We would fully disagree that this is mere impeachment. What has been shown through the research, and what has been provided to The Court is that these types of tactics actually produce information that didn't happen. It goes to the heart of the matter.

Judge Pooler: False information.

Bonjean: False information. The perpetrator is not, in fact, a perpetrator. This isn't impeachment. For instance, it's as if the State failed to present, for instance, or I'm sorry, if the State failed to give, during discovery, information that a defendant had confessed because a police officer had put a gun to his head, okay, producing an unreliable confession. That information is not mere impeachment. It goes to the actual heart of the truth of the matter: did it, or did it not happen.

Judge Pooler: That's because the defendant is then saying, 'I confessed but that wasn't true.' Now here, what do you have that's comparable to that that says, 'It's not true?'

Bonjean: We have, and in this case it's witnesses, but it could be the same thing, of course, that somebody put a gun to a witness' head. We would analogize that the tactics that were used by law enforcement in this case.

Judge Pooler: Now have the witness come forward and said, 'It's not true'?

Bonjean: Well the problem is that there's never been an evidentiary hearing held in this matter, but what we do know is that the tactics were used. We know that many, if not most, of the complainants, actually denied that any abuse happened initially.

Judge Raggi: And you were not informed, isn't that part of the claim.

Bonjean: Correct. And that goes back to the *Brady* violation.

Judge Raggi: That's the *Brady* part.

Bonjean: Correct. That the Petitioner was never informed prior to his plea that (a) that there were denials at the outset. And that methods, these coercive tactics, the interrogations, and specifically here, hypnosis, which has been discredited for the last decade.

Judge Raggi: You were not informed at the time of the plea that some of the complaining witness had been hypnotized.

Bonjean: And the extent is still unknown because there's never been an evidentiary hearing in the matter. How many witnesses it was? Was it all of them? Was it a few of them? How did this impact the overall indictment? How many of the counts would have actually been there? This is, again, we're dealing with limited information because the petitioner has been denied the opportunity to explore this

in an evidentiary hearing. Admittedly these are anonymous complainants. People who, to this day, Mr. Friedman does not know the identity of many of them.

Bonjean: I see that my time has expired. I don't know if the Court has specific questions that I'd be happy to address.

Judge Korman: One of the things that is not addressed in your brief, is that the District Attorney's arguments essentially that once he saw this movie, there was enough information to find out the name of the person who, the name of this particular witness, and I believe, forgive me, it was disclosed that he was involved in 35, I think…

Judge Raggi: Thirty-eight

Judge Korman: Thirty-eight counts of the indictment, and there was only one reported victim that was actually named in 38 counts of the indictment and therefore you could have, with due diligence, well before the statute of limitations had run, could have discovered who this person was.

Bonjean: Your Honor, we respectfully disagree that we could have discovered by merely watching him. Even if we could have put together that it might have been this Gregory Doe, which by the way is still an anonymous name…

Judge Raggi: What would have been enough of a name under which to bring a suit?

Bonjean: Our position, Your Honor, is that, and the law is really all over the map on this, is that it is not just being on notice, but being able to access the information. Somebody could come up after a trial and say, 'Hey nanny-nanny poo-poo, I just perjured myself." Okay, you know who it is. The person has just admitted they perjured themselves. But if…

Judge Raggi: The issue thought is not whether you'd be ready to go to trial. As you yourself have explained to us just a moment ago, these kind of tactics have been so seriously criticized that once you knew they were used in your case, the argument that you had a *habeas* that you hadn't been told about them, even just for purposes of impeachment, without going even to the larger argument you have, would certainly have been known to you, and then as part of *habeas* litigation you could have sought more information. The question that we're concerned about is, the claim, that you couldn't have brought the suit once you saw the movie.

Bonjean: Our position, Your Honor, is that we could have, it's our position that we could not have tri.., gone into court with the documentary…

Judge Raggi: Couldn't have gone to trial, as you were about to say. That I recognize. Why couldn't you have known that you had a claim that you had been denied *Brady* material?

Bonjean: I believe there was the potential for a claim, but the ability to access it, and to ultimately be able to prove that up required some development.

Judge Pooler: That's why you bring a lawsuit, so that you get discovery.

Bonjean: Yes, I realize that, but to go in without a single name, and without the ability to develop it, would have potentially resulted in a summary dismissal of any type of state post-conviction action. At least the name, and the person's significance to the case. It's not just a name is a name, could be any name, but the issue is whether or not to verify if this person was in fact, a complainant; to verify that he was the Gregory Doe or not; to be able to present at least that minimal threshold to the court required, in our estimation, the ability to find out who it was, and to verify that it actually happened, and that did not occur until Mr. Friedman was able to gain the materials from Andrew Jarecki.

Judge Raggi: I'm sorry. At the time of the plea, originally, there were some newspaper articles about investigative techniques. And that goes way back to even before the movie. So we are talking about the amount of diligence required. That wasn't done at all.

Bonjean: Well, yes, Your Honor, and with respect to many of the tactics that we complained of in the *habeas* petition, they are not even at issue here. What was briefed was specifically the hypnosis issue, which was not, which was not part of those original newspaper reports. But that being said, in some ways it's not just the fact that there were these investigative techniques used. The significance of this type, these type of techniques, did not become apparent until well after the 1980's, after all these mass-hysteria sex abuses cases were revealed for being the shams that they were, so in some ways, even if he was on notice that these tactics were being used the significance, or import, of the effects of the reliability of the statements did not become apparent until well after that. But be that as it may certainly Mr. Friedman was not on notice that any therapeutic hypnosis, which is unto itself not only a law enforcement technique, but is done in therapy without law enforcement, but that tactic itself, was not revealed to Mr. Friedman until he watched the movie, and then, only then, did he know there was the potential that at least one complaint, and potentially many of the complainants, had been subjected to this therapeutic hypnosis.

Judge Raggi: You reserved three minutes for rebuttal. We'll here from opposing counsel, Nassau County, I believe.

Sternberg: May it Please the Court, my name is Judith Sternberg. I represent the Respondent.

Judge Korman: Why don't you waive the statue of limitations?

Sternberg: Pardon me?

Judge Korman: Why don't you waive it? {laughter is heard} I'm quite serious.

Sternberg: Why don't we waive?

Judge Korman: These are, you know, this case raises a lot of troublesome issues. One would think you would have an interest in seeing what ultimately happened here.

Sternberg: I'm sorry, Your Honor, we don't waive…

Judge Korman: The District Attorney is not the District Attorney at the time. Why don't you waive the statue of limitations?

Sternberg: We don't waive the statue of limitations because, aside from the fact that we believe very strongly there is no merit whatsoever to any of the defendant's allegations. The People…

Judge Raggi: Well, since you don't think you withheld *Brady* material…

Sternberg: That's correct.

Judge Raggi: You don't think you withheld material you were obliged to disclose if some of your complaining witnesses were hypnotized? You don't think you were obliged to disclose that?

Sternberg: We have denied, since the state 440 Motion was filed, that Gregory Doe was hypnotized. We provided the state court and the federal court with an affidavit…

Judge Raggi: And other witnesses? You didn't turn over that there were other witnesses who denied anything happened. That wasn't turned over.

Sternberg: This defendant didn't go to trial. If this had been addressed…

Judge Korman: He says he didn't go to trial because he was threatened with a million years of consecutive sentences, which is totally, in itself independently improper for a judge to coerce a plea in that way, but he's got an explanation for it.

Sternberg: That's right, Your Honor. We're talking about disclosing *Brady* material to a defendant who pleads guilty.

Judge Raggi: Before he plead…

Sternberg: Before he pleads, yes. The United States Supreme Court in Ruiz says that a defendant is not, a defendant who pleads guilty is not entitled to impeachment…

Judge Raggi: Is it a knowing and voluntary plea if you withhold *Brady* material?

Sternberg: According to Ruiz, you're entitled to *Brady* material as a free trial right pursuant to the Fourteenth Amendment. It is not relevant to entry of a guilty plea when, to the extent that Ruiz addressed, the material is impeachment. They didn't address exculpatory material. In the New York State Courts, in the Appellate Division, Second Department…

Judge Korman: This goes to the creation of false evidence. It strikes me as something more than impeachment. That's what's being alleged here, that the police engaged in conduct that was, produced false evidence, that led somebody under the hysteria of the time to plead guilty.

Sternberg: You're saying it could be exculpatory material?

Judge Korman: Yes.

Sternberg: And in that case, the Second Department of the New York State Appellate Division, the Department where this case arose, has said you're still not entitled to it prior to the entry of the guilty plea. It is evidence that has to be disclosed in time to use at trial, and that has no bearing on the voluntariness of the guilty plea, and need not be provided.

Judge Korman: In your view, you could stand by silently, knowing that a defendant is pleading guilty who may be innocent, and you have no obligations?

Sternberg: Your Honor, I'm not going to say that there could be extreme cases, but I'm saying that the law in New York, in the Second Department is that there is no *Brady* material until trial. That material, that *Brady* material, in accord with the Supreme Court of the United States, is required to be turned over as part of the defendant's fair trial.

Judge Raggi: What Judge Korman is asking about fabricated evidence which is different than *Brady* material.

Sternberg: Well this is…

Judge Raggi: He's saying if you were... If there was fabricated evidence does the District Attorney…

Sternberg: There was no showing…

Judge Raggi: just let me finish the question.

Sternberg: I'm sorry

Judge Raggi: If there was fabricated evidence, did the District Attorney have a duty to turn it over before taking a plea?

Sternberg: Well the District Attorney certainly would not have knowing been using fabricated evidence, and if the…

Judge Korman: Well, let's assume. We're in a hypothetical now. Let's assume that that what was going on.

Sternberg: … that it was the District Attorney's intention to use fabricated evidence at trial?

Judge Korman: That the evidence that was inducing this plea was fabricated, and the judge believing it was true, had threatened in effect, that she would give consecutive sentences that would encompass his life, you could just stand by and say nothing?

Sternberg: I don't find myself in that circumstance. I don't believe there was fabricated evidence. The movie talked about…

Judge Korman: That remains to be determined. That's why I asked you why don't you just waive the statue of limitations and let it all come out, let everything come out about what went on here, instead of trying to stifle it with a defense of the statue?

Sternberg: Judge, it is the People's believe that if we're not successful here, and the case is remanded, that Judge Seybert will have to deny relief because when a defendant pleads guilty he's not entitled to *Brady* material. His entire claim…

Judge Raggi: I'm not sure that's not quite right. There are different categories of *Brady* material. And certainly with respect to what we'll call Jiglio, impeachment material, you may be right, but I'm not sure that the hypothetical Judge Korman gave you, of knowing that the defendant is innocent, or having fabricated the evidence of his guilt, is covered by Ruiz. Ruiz deals with your witness has died, and you don't tell the defendant that, but you believe he is guilty, or that you have some impeachment which will not be material until a witnesses takes the stand, but that's different from withholding evidence that might indicate that the defendant is innocent; the true, or classic *Brady* material.

Sternberg: The people had no such evidence. There is no such evidence in the District Attorney's files, or the police department's files, to the extent that I asked for them and received them, and looked through them. But, to the extent, I feel that, I apologize if I'm repeating myself. The Supreme Court has never addressed the failure to turn over exculpatory *Brady* material. The Second Department of New York State has. For Judge Seybert to overrule, to vacate the judgment, for the District Court to decide that the State unreasonably applied Federal Law, there has to be a Supreme Court decision addressing that law. There is no Supreme Court decision…

Judge Korman: I think you're confusing two things. In order for it to be contrary to Supreme Court law, there has to be a Supreme Court holding that's squarely in point, in order to be an unreasonable application of Supreme Court law you don't need an all force Supreme Court decision, you need a Constitutional principle, and you make a determination of whether it's has been unreasonably applied to the facts of the case.

Sternberg: Thank you, I mis-spoke, yes. But the Supreme Court has not addressed the issue of whether… it clearly in Ruiz consistently spoke of impeachment material. It has not addressed exculpatory *Brady* in a plea situation. Judge Seybert, or whatever Eastern District judge who would review this case, would have to make new law, and Teak prevents that. The state law provides, in the Second Department, that the defendant is entitled to no *Brady* material prior to trial.

Judge Raggi: Of course, we could agree with the Plaintiff that he didn't really have enough information until July 2003, instead of January and then the action would be timely.

Sternberg: It would be timely, Your Honor. And you could agree, but that agreement with his …

Judge Raggi: It's a straight face argument. That they didn't have a name, and didn't put everything together, that after seeing the movie that started the due diligence, and they didn't complete it until July.

Sternberg: But, that clearly is their argument. Had they completed it in July, and they filed their 440 Motion in January of 2004.

Judge Raggi: It would be timely. If we agree with the July 2003 date for knowing the facts that would give rise to this action, this action would then be timely.

Sternberg: Yes, it would be Your Honor, but it would ignore the fact that in the 440 they made a very strong argument about the hypnosis. And they supported it with the film from the movie, and they supported it with all the published articles they had found, and when the 440 was unsuccessful they filed a *Habeas* petition and they supported the hypnosis claim with what was in the movie and the published articles, and it was not until it appeared likely that the hypnosis claim was going to be dismissed as untimely that suddenly the name of the name of complainant became the fact with which no other facts could be found, the facts with which no investigation could be conducted, but the real fact is that the argument was made, that the name adds nothing to it, if you inserted the name into these papers, the argument wouldn't change. There's nothing to suggest that they did anything with the name.

Judge Korman: Did you argue in opposition to the 440, aside from Ruiz, that it didn't have sworn statements; it should be dismissed because it just, is just procedurally defective?

Sternberg: My recollection, Your Honor, is that we did not argue that, and it was supported by many sworn… oh, you're talking about this particular argument. No, what we argued was that the complainant's psychiatrist denied that she ever hypnotized him, and she gave us an affidavit with the complainant's permission, and that the prosecutor at the time, in 1988, was unaware of any hypnosis of this complainant. That was what we argued there. If there are no other questions.

Judge Pooler: Thank you counsel.

Judge Pooler: You've retained three minutes for rebuttal.

Bonjean: Yes, Your Honor. Briefly, I'd like to clarify the state of the law in New York. While the respondent refers to a Second Department case, it should be noted that there is a First Department case, Ortiz, which relies on a Court of Appeals decision which does not make any distinction between impeachment evidence or factual innocence evidence, and says that *Brady* obligations survive a guilty plea. So the state of the law isn't quite as clear as the respondent would have us believe. There is actually a First Department case and a Second Department case that seem to be in some conflict with each and the Court of Appeals has never decided the issue. But more importantly, looking back at Ruiz: Ruiz actually supports the Petitioner's position, and this is why: although Ruiz talks about impeachment evidence, and obviously our position that this was not mere impeachment evidence, but aside from that, the Ruiz court strongly indicated that a plea agreement that required pre-plea-production of *Brady* material would be enforceable after that plea, and that's this case. This is exactly the scenario. In this specific case the prosecution and the defense stipulated that the prosecution would deliver to the defendant all evidence favorable to him under *Brady*. So in this case specifically there was an agreement that all *Brady*...

Judge Raggi: Do you have that in the record?

Bonjean: Well what we have to support it was an affidavit from Mr. Friedman's attorney, Panaro, that was never objected to, and that the State never argued was in some any inaccurate. This was the practice in this jurisdiction, in Nassau county, that there was open discovery to expedite litigation. This not only was the practice, but was according to the affidavit, which has gone uncontested at this point, was that there was a stipulation between the parties that all *Brady* material, no distinction between impeachment or any other type of *Brady* material, would in fact be tendered prior to, as part of the plea agreement.

Judge Raggi: So this was a deviation from the policy that Nassau County followed in other cases, not to turn over everything, even before the plea?

Bonjean: Correct.

Judge Pooler: See our Court has drawn a distinction between exculpatory information and impeachment information. What would be the basis for our concluding that an agreement to turn over favorable evidence would include this? I mean, I understand when you're talk about having witnesses hypnotized you are arguing that this is not simply impeachment, but if, you've just argued to us now that there was an obligation to turn over impeachment evidence, and I'm not sure I see that.

Bonjean: Well, the obligation was to turn over *Brady* material, which we know under Jiglio that this would include impeachment. There was no distinction…

Judge Raggi: That's a debatable point, whether what *Brady* is talking about includes impeachment, thirty-five hundred, *Jenksat*, whatever, *Rosario* material, whatever label you want to put under it, there's a debate about that. At least in this Circuit we don't require prosecutors to turn over impeachment material before trial.

Bonjean: Well putting aside whether you want to call it impeachment or not, we're talking about evidence that would have gone to refute the stories in their entirety; that they would, evidence which would have shown that this was false statements, that these, that it didn't happen. This isn't just impeachment in terms of well, 'He said it happened in the living room and it actually happened in the bedroom.' That's impeachment. That's classic impeachment. This is, the evidence that should have been turned over, with arguably, with a proper investigation, and perhaps an expert and everything else, the defense could have felt confident to go to trial to show these children were forced, for lack of a better word, to make the statements that they did. And, in fact, many of these statements, as we're learning, many of these witnesses denied that it happened in the first instance. Which, again, you could call that impeachment, but in combination with how the actual statements came to be, go far beyond impeachment and ,in fact, to whether it happened or didn't happen, we're talking about eliciting false statements, like a false confession, like a false statement. It didn't happen. And that is well beyond impeachment.

Judge Pooler: Thanks you counsel. That you both. We'll reserve decision.