



National Police Accountability Project

A Project of the National Lawyers Guild

September 21, 2011

Hon. Judges, Ninth Circuit Court of Appeals
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Walker v. Moody and Pulido*, Ninth Cir. Nos. 10-55692,
10-55970

Your Honors:

Pursuant to F.R.App.P. 29 and this Circuit's advisory committee note to Rule 29-1, the National Police Accountability Project and the Human Rights Defense Center file this letter in support of the positions taken by plaintiff-appellee Michael Walker.

INTERESTS OF AMICI CURIAE

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law enforcement and corrections officers through coordinating and assisting civil rights lawyers. The project presently has more than four hundred attorney members throughout the United States. NPAP provides

training and support for attorneys and other legal workers, public education and information on issues related to misconduct and accountability, and resources for non-profit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability, and appears as amicus curiae in cases, such as this one, which present issues of particular importance for the clients of its lawyers, who are sometimes incarcerated and prosecuted as a result of the suppression of exculpatory evidence by police officers or detectives.

The Human Rights Defense Center (HRDC) is a Washington State non-profit, charitable corporation based in Vermont that publishes a nationally distributed monthly journal called Prison Legal News (PLN). Since 1990, PLN has reported on news, recent court decisions, and other developments relating to the civil and human rights of prisoners in the United States and abroad. PLN has the most comprehensive coverage of detention facility litigation of any publication. In addition to reporting on the human and civil rights of prisoners, PLN also reports on the rights of crime victims, prison and jail employees, and prison and jail visitors. PLN has approximately 7,000 subscribers in all fifty states and abroad and eight times as many readers.

Approximately sixty-five percent of PLN subscribers are state and federal prisoners. The remainder are attorneys, judges, advocates, journalists, academics and concerned citizens. PLN's website, www.prisonlegalnews.org, receives approximately 100,000 visitors per month. HRDC is concerned with the incarceration and prosecution of pretrial detainees based on police officers and detectives suppressing or failing to disclose exculpatory information to the prosecuting authorities.

ARGUMENT

The essence of the argument of plaintiff-appellee Walker is that a criminal defendant's right to receive exculpatory evidence is grounded in the right to procedural due process, which protects against *any deprivation of liberty* without due process of law. The Supreme Court has given the liberty interests protected by Fourteenth Amendment procedural due process clause a generous definition:

While this court has not attempted to define with exactness the liberty . . . guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (citations omitted).

Thus, although courts may refer colloquially to a right to a "fair trial," it is clear that procedural due process protects against more than conviction in an unfair trial. The reference in *Roth* to "freedom from bodily restraint" demonstrates that due process safeguards not merely freedom from unwarranted conviction, but freedom from any deprivation of physical freedom without adequate process, and more. The argument that procedural due process protects one from the burdens and restraints of prosecution in the face of undisclosed exculpatory evidence, or from pretrial confinement or excessive bail in the face of

undisclosed exculpatory evidence, is a straightforward application of these principles. The Court has applied the guarantee of procedural due process at several stages of criminal or other proceedings that result in deprivations of liberty, other than conviction at a criminal trial. See, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (detention of enemy combatants); *United States v. Salerno*, 481 U.S. 739, 751 (1987) (finding pretrial detention under Bail Reform Act constitutional because of adequacy of procedural due process); *Schall v. Martin*, 467 U.S. 253 (1984) (finding procedural safeguards in New York Family Court Act sufficient to justify pretrial detention of juveniles); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of a mentally ill person requires procedural due process). The Court cited *Mathews v. Eldridge*, 424 U.S. 319 (1976), as the test for the adequacy of procedural due process in each of these cases.

The applicability of the procedural due process analysis to the failure to disclose exculpatory evidence is confirmed by the Supreme Court's opinion in *United States v. Ruiz*, 536 U.S. 622 (2002). If there were no pretrial right to exculpatory evidence, as the appellants argue in the instant case, the Court would have decided the case on that basis. Instead, the Court conducted an analysis that balanced the risk of an erroneous deprivation of liberty against the burden on the government of providing impeachment evidence before a criminal defendant pleads guilty. That is the test for determining what process is due under *Mathews v. Eldridge*, which is what plaintiff-appellee requests be used in this case. Under that analysis, it is clear that the risk of erroneously depriving a suspect of his liberty by prosecuting him for a crime without disclosing exculpatory evidence outweighs any burden it would impose on the police to furnish such evidence to the prosecutor.

Plaintiff-appellee's additional argument that the defendants violated his rights by filing false reports that failed to disclose

Hon. Judges, Ninth Circuit Court of Appeals
September 21, 2011
Page 5 of 5

exculpatory evidence is supported by a decision from the First Circuit Court of Appeals that was issued following the filing of his brief. In *Haley v. City of Boston*, --- F.3d ---, 2011 U.S. App. LEXIS 19223, 2011 WL 4347027 (1st Cir. Sept. 19, 2011), the Court held that police officers violated a criminal defendant's due process rights by bringing a prosecution based on "deliberate deception." As in the instant case, the officers in *Haley* "purposely failed to tell either the prosecutor or defense counsel about [exculpatory evidence]." *Id.* at *8. The court held that this violated the defendant's due process rights under *Mooney v. Holohan*, 294 U.S. 103 (1935) and its progeny, independent from his rights under *Brady*.

Respectfully submitted,

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