IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-5578
(Summary Calendar)

EUGENE SPENCER, JR.,

Petitioner-Appellant

versus

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas
(SA-82-CA-473)

(December 22, 1992)

BEFORE KING, DAVIS, and WIENER, Circuit Judges

PER CURIAM:[*]

In this petition for federal habeas relief, Petitioner-Appellant Eugene Spencer once again seeks an evidentiary hearing on his claim that the government knowingly used perjured testimony to obtain his conviction. Spencer argues that this court's decision in Spencer v. Lynaugh,[1] requires that the district court grant him

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] No. 87-5602 (5th Cir. 1989) (unpublished).

an evidentiary hearing on his claim. As we agree with Spencer's reading of Spencer v. Lynaugh, we reverse the district court's decision and remand for proceedings consistent with this opinion.

I

FACTS AND PROCEEDINGS

A. STATE COURT PROCEEDINGS

This case dates back to 1972 when Spencer and an accomplice, Edwin Bates, robbed a San Antonio gas station at gunpoint. According to the station attendant, the man occupying the passenger seat of the car, dressed in black and blue, pointed a sawed-off shotgun at the attendant and demanded money. As the two men fled the scene, they were pulled over by a policeman. The passenger shot and killed the policeman with a shotgun blast. The driver drove the car a short distance before ramming into a concrete pillar. Spencer and Bates ran from the car, in different directions.

The police apprehended Bates approximately eight blocks from the scene of the crime. Spencer was taken into custody later, after being sighted by neighborhood residents. While leading the police on a brief chase over three fences, Spencer ripped his pants on one of the fences, leaving behind blue fibers. When cornered by the police, Spencer surrendered, stating "I give up. My name is Spencer. I think you are looking for me." The police discovered the shotgun across the street from the scene of the murder, covered by a black sweater.

Physical evidence admitted at trial included the shotgun and

blue and black clothing fibers found in a barbecue pit near the scene of the crime and near the shotgun. An expert witness testified that the blue fibers on the fence matched those found in a barbecue pit near the scene of the crime and those blue fibers found near the shotgun. In addition, black fibers found in the pit matched fibers from the black sweater.

In addition to the witnesses who testified at trial about physical evidence, the state presented two witnessesSQBates and Samuel Walker, a friend of Spencer'sSQwho testified about Spencer's acquaintances, statements, and whereabouts around the time of the slaying. Bates testified that Spencer was the passenger in the car and was responsible for the policeman's death. Walker testified that he had seen Spencer and Bates together the day before the murder; that they had discussed committing a robbery; and that Spencer showed him the shotgun and stated that he was not afraid to use the weapon. This testimony conflicted with Walker's original statement to the police, given shortly after the murder, in which he (1) failed to state that he saw the two men together; (2) stated that he had seen Spencer three or four days prior to the murder; and (3) made no allegations that Spencer had made any incriminating statements. Walker's trial testimony was consistent, however, with a detailed statement he had given five months after the murder while he was in the county prison.

Based on this evidence Spencer was convicted of murder. He was sentenced to 10,000 years in prison, a sentence which was later reduced to 1,000 years. Spencer exhausted his state remedies,

including state habeas relief. The state court dismissed his petition without a written opinion.

B. FEDERAL COURT PROCEEDINGS

For the past ten yearsSQsince 1982SQSpencer has been seeking federal review of his allegation that the government knowingly used perjured testimony to secure his conviction for the murder of the San Antonio policeman. Twice before, Spencer's claims have come before us, and twice before we have remanded to the district court with instructions.

In our first opinion on this matter,[2] we affirmed the district court's dismissal of Spencer's other claims, but remanded for an evidentiary hearing on his allegations concerning the government's knowing use of perjury. The district court conducted an evidentiary hearing, at which Walker testified that his trial testimony had been fabricated by the government and, in fact, that he had never seen Spencer with a shotgun and had never seen Spencer and Bates together. Bates's testimony supported Walker's, as Bates claimed that he had never met Walker. The policeman involved denied the claim.

The magistrate judge made two conclusions based on the hearing testimony: (1) there had been no perjury because the statements were not inconsistent and (2) "there [was] no evidence to support a conclusion that the state knowingly or deliberately used such perjured testimony." The district court adopted the magistrate

[2] Spencer v. McCotter, No. 84-1813 (5th Cir. 1986) (unpublished).

judge's conclusions and dismissed Spencer's habeas petition. We reviewed this decision[3] and reversed both findings as clearly erroneous. We again remanded for an evidentiary hearing, noting that the magistrate judge had made no findings regarding the materiality of the perjured evidence or on the credibility of the witnesses.

On remand, however, the magistrate judge declined to grant an evidentiary hearing, finding that the allegedly perjured testimony was immaterial. Reasoning that Spencer could not prevail on his claim unless the testimony was material, the magistrate judge recommended that no evidentiary hearing was required. The district court agreed, stating that:

> In light of the standard which Petitioner must satisfy to prevail on his claim, this Court believes that the Magistrate reasonably read the Fifth Circuit's order of February 22, 1989 as authorizing him to bypass the issues of the falsity of Walker's testimony and the knowledge of the prosecution and to proceed to determine the ultimate issue of the materiality of Walker's testimony.

The district court dismissed Spencer's claim without an evidentiary hearing, and Spencer appeals, claiming that the district court impermissibly disregarded the instructions of this court on remand. In addition, Spencer insists that the magistrate erred in the standard applied in determining the materiality of the allegedly perjured testimony.

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[3] Spencer v. Lynaugh, No. 87-5602 (5th Cir. 1989) (unpublished).

II

SUBSTANTIVE LAW

Spencer's habeas petition presents what is referred to as a "Giglio claim," named after the Supreme Court decision[4] that reaffirmed the "long-settled rule . . . that the knowing use by the prosecution of false evidence or perjured testimony which is material to the issues in a criminal trial is a denial of due process."[5] To prevail on a Giglio claim, the criminal defendant must show that the evidence was perjured, that the government knew it was perjured, and that the perjured testimony was material. The knowing use of perjured testimony so offends our notions of fundamental fairness that it will not be allowed to stand "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[6]

III

EVIDENTIARY HEARING

Resolution of Spencer's first allegationsQthat he is entitled to an evidentiary hearing on his claimsQrequires us to examine our last opinion in this matter[7] to determine if it could be read to authorize the district court to dispense with an evidentiary hearing. We do not read that opinion in a vacuum, however, but

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[4] Giglio v. United States, 405 U.S. 150 (1972).

[5] United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978).

[6] United States v. Agurs, 427 U.S. 97, 103 (1976).

[7] Spencer v. Lynaugh, No. 87-5602 (5th Cir. 1989) (unpublished).

consider it in light of the prior proceedings and what appears to be a persistent reluctance of the district court to grant Spencer an adequate evidentiary hearing. When we do that we conclude that the district court misread our instruction on remand, so we return this case to that court with the clear instruction to allow Spencer an evidentiary hearing at which he may attempt to prove all three elements of his Giglio claim.

In reaching our decision we see no need to repeat and explain our language in Spencer v. Lynaugh. It is clear in that case that we were concerned with the seriousness of Spencer's allegations and the evidence he offered to support them. An evidentiary hearing wasSQand still issQnecessary to develop and evaluate his evidence. The conclusions below, based solely on a review of the record, that the perjured testimony was immaterial did nothing to resolve the truth of the allegations and thus failed to address the concerns of this court.

III

MATERIALITY

Having determined that Spencer remains entitled to an evidentiary hearing, we now address his claim that the magistrate judge and district court erred in the standard used to determine the materiality of the allegedly perjured testimony. We do so in an effort to avoid any further misunderstandings or remands.

The magistrate judge and the district court relied on our decision in United States v. Anderson,[8] in which we discussed

[8] 574 F.2d at 1347.

the four different types of claims falling under the rubric of "Brady" claims.[9] In that discussion we recognized that each of these different types of claims requires a different analysis and a distinct test for materiality. An allegation that a prosecutor knowingly used perjured testimony qualifies as the most serious of these claims and, consequently, "the defendant's burden of showing the materiality of the suppressed evidence, a showing which requires reversal, is the least onerous of the four type situations."[10]

We agree with the district court that Anderson presents the applicable standard for materiality. In that decision we explicitly stated:

> Materiality must be evaluated in light of all the evidence. . . . The reviewing court must focus on the impact of the jury. A new trial is necessary when there is any reasonable likelihood that disclosure of the truth would have affected the judgment of the jury, that is, when there is a reasonable likelihood its verdict might have been different. We must assess both the weight of the independent evidence of guilt and the importance of the witness' testimony, which credibility affects.[11]

We conclude, however, that the magistrate judge and district court

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[9] Brady v. Maryland, 373 U.S. 83 (1963). These four types of claims are (1) the prosecutor has not disclosed information despite a specific defense request; (2) the prosecutor has not disclosed information despite a general defense request for exculpatory information or without any defense request at all; (3) the prosecutor knows or should know that the conviction is based on false evidence and (4) the prosecutor fails to disclose purely impeaching evidence not concerning a substantive issue, in the absence of a specific defense request. Anderson, 574 F.2d at 1353.

[10] Anderson, 574 F.2d at 1355.

[11] Id. at 1356 (citations omitted).

erred in believing that this test could be administered without conducting an evidentiary hearing, merely by reference to the record. Evaluation of materiality in light of all the evidence requires some determination whether and to what extent there has been perjury. In the instant case, such an evaluation is impossible absent an evidentiary hearing.

IV.

CONCLUSION

In 1982 Spencer filed his first federal habeas petition seeking relief on his Giglio claim; ten years and three appeals later, Spencer has yet to receive a full and adequate evidentiary hearing. As we have stated previously, he is entitled to one to have a real opportunity to establish the elements of his claim. On remand, the court is to conduct an evidentiary hearing and is then to answer three questions: was there perjury;[12] if so, did the government know of it; and, if it did, was the perjury material under the standard articulated above.

For the foregoing reasons, the decision of the district court is VACATED and the case is once again REMANDED, this time for proceedings that comply with the directions of this opinion.

[12] As previously noted, we held in Spencer v. Lynaugh that the magistrate judge and district court erred in determining that there was no perjury on the grounds that there were no inconsistencies.