No. 13-2037

In The
United States Court of Appeals
for the Tenth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

RICK REESE, TERRI REESE, AND RYIN REESE,
Defendants-Appellees.

Appeal from the United States District Court for the District of New Mexico
District Court No. CR-11-2294
Robert C. Brack, United States District Judge

Petition for Rehearing *En Banc*

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FRAP RULE 35(b)(1) STATEMENT

I. The Panel Decision Applied a Standard of Review of the District Court's Grant of a Motion for New Trial in Conflict with United States v. Robinson, 39 F.3d 1115 (10th Cir. 1994), Requiring Consideration by the Full Court to Secure and Maintain Uniformity of this Court's Decisions.

II. The Panel Decision Applied a Standard of Review of the District Court's Grant of a Motion for New Trial in Conflict with United States v. Torres, 569 F.3d 1277 (10th Cir. 2009), Requiring Consideration by the Full Court to Secure and Maintain Uniformity of this Court's Decisions.

III. The Proceeding Involves an Erroneous Ruling of Exceptional Importance that Must Be Corrected by the Full Court.

STATEMENT OF THE CASE

On August 24, 2012, a 30-count indictment was brought against Rick, Terri, Ryin, and Remington Reese, charging an unlawful conspiracy (a) to make false statements in connection with alleged "straw purchases" of firearms, (b) to smuggle those firearms to Mexico, and (c) to launder the proceeds. I App. at 77-78.[1] The district court dismissed both counts of money laundering, and on August 1, 2012, the jury acquitted the Reeses on all

[1] Citations to "App." refer to the Appellant's Appendix, filed concurrently with its opening brief. *See* Appellant's Opening Brief at 1, n.1.

remaining counts except for one count each against Rick and Terri and two counts against Ryin for aiding and abetting false statements by undercover agents as to their being the "actual buyer" of certain firearms. II App. at 300-310.

On November 21, 2012, almost four months after the jury verdict, the Government trial counsel filed a sealed motion asking the district court to conduct an *in camera* hearing on whether the Government should have disclosed, prior to trial, certain information in its possession that "might reflect negatively ... on the credibility" of one of its key witnesses, Sheriff Deputy Allen Batts. III App. at 467. The district court promptly ordered the Government to furnish the information to defense counsel. II App. at 349-50. Soon thereafter, upon request of defense counsel, the district court ordered an evidentiary hearing to determine whether Deputy Batts had "a motive to temper his testimony to please the government." XIV App. at 3077, ll. 16-17.

On February 1, 2013, following that evidentiary hearing, the district court granted the Reeses' motion for new trial on all four counts of conviction. In a 12-page Memorandum Opinion and Order, the district court made extensive factual findings, including: (i) "the prosecution, **intentionally or negligently** suppressed [exculpatory] evidence" (II App. at 354 (emphasis added)); (ii) "the evidence ... impeached a Government witness[,] put[ting] the

entire investigation in a negative light[,] cast[ing] **doubt on the integrity** of the [Government's undercover] investigation" (*id*. (emphasis added)); and (iii) "**Deputy Batts' credibility was vitally important** at trial ... calling into question Terri Reese's credibility" on her "[k]nowledge of the illegality of the sales ... a central issue at trial," as evidenced by the prosecution "in closing arguments." *Id*. at 356-57 (emphasis added).

"Viewing the significance of the suppressed evidence in relation to the record as a whole," the district court concluded that the evidence impugning Deputy Batts's motive and integrity was "material," undermining its confidence in the jury verdict. II App. at 357.

Nevertheless, in complete disregard of the Circuit's applicable standard limiting appellate review of district court factual findings for "clear error,"[2] and in blatant disregard of the trial judge's factual findings, the panel substituted its own factual findings, concluding that (a) "Deputy Batts was not a critical witness," (b) the numerous acquitted counts were irrelevant to the counts of conviction, and (c) there was "sufficiently strong" evidence on the counts of conviction to allay any concerns about "our confidence in the jury's verdict despite the absence of the impeachment evidence at trial." Slip Opinion ("Slip Op.") at 16 n.6, 24, 27.

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[2] *See* United States v. Torres, 569 F.3d 1277, 1281 (10th Cir. 2009).

ARGUMENT

I. The Panel Decision Purported to Settle a Conflict With United States v. Robinson That Only the Court Sitting *En Banc* Has Authority to Settle.

In reliance on United States v. Robinson, 39 F.3d 1115 (10th Cir. 1994), the Reese family defendants urged the panel to review the trial court's decision to grant a new trial for "an abuse of discretion." *Id.* *See* Brief of Appellees ("Reese Br.") at 33-34. In particular, the Reeses relied upon Robinson's emphasis on the need to give "due deference to the district court's evaluation of the salience and credibility of testimony," noting that the court of appeals "will not challenge that evaluation unless it finds no support in the record, deviat[ing] from the appropriate legal standard." *Id.* at 34-35.

The Reese brief demonstrated that the district court had applied the appropriate three-part legal standard governing motions for new trial based upon a violation of the *Brady* rule. *Id.* at 37-70. The Reese brief also established that the district court's vital findings of fact and legal ruling were supported by two post-trial evidentiary hearings. *See id.* at 10-32.

The panel rejected the authority of Robinson, concluding that it "does not accurately reflect the law in this circuit." Slip Op. at 13. Rather, the panel noted, "[i]n a long line of cases, we have held that in the new trial-context we review de novo a district court's ruling on a *Brady* claim, with any

factual findings reviewed for clear error." *Id*. After observing that three of these decisions preceded Robinson, and acting solely pursuant to the Tenth Circuit rule that "when two panel decisions conflict — the earlier decision controls," the panel purported "to settle our standard of review." *Id*.

The panel did not have any such authority. By invoking the first-to-decide-the-issue rule,[3] the panel cannot put to rest the conflict between the competing standards of review in the *Brady* new-trial context. Rather, the first-to-decide-rule means only that the panel was "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *See* In re Smith, 10 F.3d 723, 724 (10th Cir. 1993).

Thus, the panel had no authority to rule that Robinson is an "outlier," purporting thereby to "overrule [it as] circuit precedent." *See* United States v. Spedalieri, 910 F.2d 707, 710 n.3 (10th Cir. 1990). By labeling Robinson an "outlier," the panel usurped the power of the full court, necessitating *en banc* review in order to truly "settle" the critical role the standard of review plays in this Circuit concerning *Brady* claims in a new-trial context.

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[3] *See* Hiller v. Oklahoma *ex rel.* Used Motor Vehicle & Parts Comm'n, 327 F.3d 1247, 1251 (10th Cir. 2003).

II. Contrary to the Standard of Review in United States v. Torres, the Panel Decision Wrongfully Refused to Examine the District Court's Findings of Fact for Clear Error.

Purporting to rely upon "a long line of cases," including United States v. Torres,[4] the panel announced that the Tenth Circuit standard of review that it would employ would be "de novo [of] a district court's ruling on a *Brady* claim, with any **factual findings** reviewed for **clear error**." *Id*. (emphasis added). Instead of faithfully adhering to this stated standard, the panel inexplicably revised it, proclaiming that it would "take this opportunity to **clarify** and **reiterate** that we review **de novo** a district court's ruling on a *Brady* claim asserted in the context of a new-trial motion" (*id*., emphasis added), omitting entirely the "clear error" language, and foreshadowing the flawed approach that the panel would take.

In a 12-page Memorandum Opinion and Order, the district court had made several factual findings upon which it rested its order granting a new trial. *See* II App at 2, 3-10. Yet, not once in its 10-page statement of "Facts" did the panel ever refer to any of those factual findings. Instead, the panel devoted most of its "Fact" statement to its own rehearsal of the evidence at trial. *See* Slip Op. at 2-10. The panel only briefly touched upon the facts as they related to the impact of the evidence withheld by the Government,

[4] Slip Op. at 13 n.5.

making no mention of any of the district court's factual findings on this central point, characterizing them as "Defendants'" contentions, as if the district court had made no factual findings whatsoever. *See id*. at 11-12.

The panel repeated this pattern in the 17-page "Discussion" section of its opinion, devoting six full pages to the evidence that the Government introduced at trial, and not a word about the factual findings made by the district court in its Memorandum Opinion and Order granting a new trial. *See* Slip Op. at 17-23, 27-29.

The panel opinion, then, reads as if the district court made no factual findings, or at least made no relevant factual findings. That is simply not the case. For example, the panel acknowledged that "the sole critical question at trial was whether Defendants ... *knew* the agents were straw purchasers." Slip Op. at 17. Addressing this point, the district court found that:

> At trial, Terri Reese testified and denied any knowledge that guns sold by New Deal went to Mexico. In closing arguments, the **prosecution emphasized** the **discrepancy** between the testimony of **Deputy Batts** and **Terri Reese** to show not only that Terri Reese had lied, but that Defendants found the Defendants knew the transactions were fraudulent and the guns were going to Mexico. The trial record contains no impeachment evidence concerning Deputy Batts. [II App. at 349 (emphasis added).]

Further, in light of the importance of the testimony of Deputy Batts to the Government's argument that the Reeses knew the sales were illegal, the district court found:

> **Deputy Batts credibility was vitally important at trial.** Deputy Batts testified at trial that Terri Reese told him that one of the rifles that New Deal sold ... had been recovered in Mexico. Terri Reese testified at trial that the Defendants did not know the guns went to Mexico. Knowledge of the illegality of the sales was a central issue at trial. The importance of Deputy Batts' testimony is underscored by the fact that at trial **AUSAs referenced his** testimony, and his supposed **lack of motivation to lie**, several times during closing arguments to discredit Terri Reese. [II App. at 356 (emphasis added).]

Instead of reviewing for clear error any of these factual findings made by the trial judge before whom the case was tried, the panel opinion recast them as "Defendants' Arguments," as if first made on appeal, thereby enabling the panel to rule "de novo" that "Deputy Batts's testimony constitutes marginal evidence that Defendants knew about the straw purchasers" (Slip Op. at 24), and that the prosecution's references to Batts in closing argument were irrelevant to "Defendants' knowledge on the straw-purchase counts." Slip Op. at 25.[5]

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[5] The panel's exclusive reliance on some of the evidence — sterile transcripts and confusing surveillance tapes of the firearms transactions — illustrates why appellate courts should defer to a district court judge who actually heard and saw all of the evidence, concluding "the jury did not believe this was a strong case." II App. at 357.

In sum, the Reeses have been prejudiced by the panel's inexcusable disregard of the district court's factual findings, requiring consideration by the full court to ensure and maintain uniformity of review in the Tenth Circuit.

III. The Panel Decision Whitewashed the Government's Deliberate Wrongful Violation of the *Brady* Rule, Presenting a Question of Exceptional Importance.

The panel rejected outright Defendants' argument that district court findings of Government's misconduct are relevant to whether the suppression of *Brady* evidence was material. *See* Slip Op. at 14-15. The panel opinion cited United States v. Buchanan, 891 F.2d 1436, 1442 (10th Cir. 1989), for the proposition that "[t]he good faith or bad faith of the prosecutor has no bearing on the due process inquiry required by *Brady*" (*id.* at 15). But it ignored the fact that Buchanan also stated that "[t]he **standard of materiality** required to set aside a criminal conviction on *Brady* grounds **varies** with the specificity of the defendant's request and the **conduct of the prosecutor**." *Id.*, 891 F.2d at 1444 (emphasis added). *See* Reese Br. at 56.

Instead of attending to both statements in Buchanan, the panel opinion ruled that, unless the Government "knowingly used perjured testimony[,] the general materiality standard applies ... regardless of whether the government intentionally or negligently withheld the Deputy Batts investigation." Slip

Op. at 15. By adopting this all-or-nothing approach, the panel skipped over the first and second elements of the *Brady* claim, focusing exclusively on the issue of materiality.

Paying absolutely no attention to anything in the record other than the undercover operations related to the straw purchase counts of conviction, the panel "conclude[d] that the Deputy Batts investigation was immaterial because [of its view that] there is not a reasonable probability that the outcome of Defendants' trial would have been different had the government disclosed the investigation." *Id*. at 15-16. Purporting to examine the sufficiency of the evidence with an eye towards "confidence in the verdict," not whether it supported the jury verdict (*id*. at 16, n. 6), the panel expressed no concern about the conduct of the prosecutors in withholding the evidence, or about the post-trial false testimony of Deputy Batts.

In a telling footnote, however, the panel bent over backwards to whitewash both the prosecutorial misconduct and Deputy Batts' corrupt motives, despite the district court's contrary factual findings. "To be fair," the panel wrote, "the two trial prosecutors weren't aware of the Deputy Batts investigation until after trial." *Id*. at 11, n. 3. Quite unfairly, the panel failed to acknowledge that "the lead trial counsel ... was Branch Chief of the Las Cruces United States Attorney's Office from 2005 to 2008, a critical period in

the Batts investigation." *See* II App. at 353 n.3. And if the panel really cared about fairness, it would have at least referenced somewhere in its opinion the district court's finding that:

> [T]here can be no doubt that the information pertaining to Deputy Batts was in a file at the United States Attorney's Office for nearly a decade prior to trial. The **direct supervisor of trial counsel, Mr. Castellano, was informed, and repeatedly reminded**, by a fellow supervising AUSA that his own office possessed *Giglio* information concerning Deputy Batts. As Mr. Castellano was present at the hearing, but did not testify, the Court is left to wonder whether he, appropriately, passed the information on to [the two trial prosecutors] or, inexplicably, sat on it. Regardless of the reason why the **warnings went unheeded** (or, more darkly, were ignored), there is no doubt that the prosecution, intentionally or negligently, suppressed the evidence. [II App. at 353-54 (emphasis added).]

After all, for *Brady* purposes, the "prosecution" is "not only the individual prosecutor handling the case, [but] extends to the prosecutor's entire office." *See* Smith v. Sec'y. of N. M. Dep't. Of Corr., 50 F.3d 801, 824 (10th Cir. 1995). But, in its effort to sanction the prosecutorial conduct in this case, the panel disregarded the district court's finding that "there is no doubt that the prosecution, intentionally or negligently, suppressed the evidence." II App. at 354. Further, by exonerating the two trial prosecutors without mentioning the fault of their supervisors, the panel shirked its duty to evaluate whether the United States Attorney's office had discharged its duty

"as the representative of the sovereign ... to ensure 'not that it shall win a case, but that justice shall be done.'" Smith, 50 F.3d at 823.

While the panel felt it unnecessary to review the prosecution's actions because the Government "concede[d] it didn't disclose the FBI investigation of Deputy Batts," the panel claimed that it assumed that "the investigation was favorable to Defendants" and, therefore, did not need to "concern [itself] with the second element." Slip Op. at 15. Nevertheless, the panel went out of its way to exonerate Deputy Batts, who had been the subject of an FBI investigation, stating, "to be fair to Deputy Batts, no charges have been brought against him." Slip Op. at 11, n. 3.

Had the panel really been concerned about truth and fairness, it would not have neglected the district court's finding that, at the evidentiary hearing on the Reeses' motion for a new trial, Deputy Batts had lied under oath in front of the district judge about a telephone call that he made to an FBI agent in an apparent attempt to curry favor with federal authorities:

> The suppressed documents include an FBI report detailing a May 5, 2008 telephone conversation between Deputy Batts and Agent Brotan.... At the evidentiary hearing, Agent Brotan testified that the phone call occurred. Deputy Batts testified that no such phone call had ever occurred.... Agent Brotan's testimony is corroborated by his contemporaneous report. If Deputy Batts did make the phone call it may be inferred that he knew about the FBI investigation and he had a motive to curry favor with the Government by embellishing his trial testimony. The fact that Deputy Batts testimony **contradicted** the testimony of Agent

> Brotan further **impugned his credibility**. [II App. at 355-56 (emphasis added).]

While this finding does not prove that the prosecution "knowingly [used] perjured testimony" at the trial, as condemned in United States v. Agurs, 427 U.S. 97 (1976), it does bespeak "a corruption of the truth-seeking function"[6] of the post-trial process made necessary by the prosecution's having called to the stand a witness who, before trial, the supervisor of the Government's trial counsel had reason to believe was tainted.[7] *See* II App. at 351-52.

Having provided cover for the government's wrongdoing and ignored Deputy Batts's post-trial lie, the panel freed itself from the overall record in order to focus on a single question: Whether the evidence gathered by the undercover operations was sufficient to prove the four counts of conviction, even if defense counsel had been provided the withheld information on the FBI investigation of Deputy Batts. On all four counts, the panel found more than sufficient evidence to support the Reeses' convictions, no matter how

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[6] *Id*. at 104.

[7] The judiciary has an obligation to supervise the manner in which federal prosecutors carry out their solemn responsibilities, and the prosecution's behavior in the Reese case is certainly not unique. *See* Project on Government Oversight, Report: "Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards" (Mar. 12, 2014).

"withering," "thorough," "destroying," or "devastating" the cross-examination would have been of Deputy Batts. *See* Slip Op. at 17-23. Thus, the panel concluded that "the Deputy Batts investigation was not material within the meaning of *Brady* because the government's evidence on the counts of conviction was **sufficiently strong** to sustain our confidence in the jury's verdict." *Id*. at 23 (emphasis added).

Concerned that its conclusion was based upon a "sufficiency-of-the evidence-test" forbidden by the Supreme Court in Kyles v. United States, 514 U.S. 419, 434-35 (1995), and condemned by Tenth Circuit Judge Gorsuch in dissent in United States v. Ford, 550 F.3d 975, 998 (10th Cir. 2008), the panel coined an entirely new "sufficiently-strong-evidence" test. *See* Slip Op. at 16, n. 6. By rhetorical flourishes, the panel transformed "strong evidence" that "suggests" guilty knowledge of a "straw purchase" into "damning evidence" that the Reeses knew that they were aiding and abetting a "straw purchase." *See* Slip Op. at 17-23. The only difference, then, between a sufficiency-of-the-evidence test and the panel's "sufficiently-strong" test was the insertion of an adjective that enabled the panel to view the Government's evidence in the best possible light.

In doing so, the panel committed precisely the same error that Judge Gorsuch identified in Ford:

> My concern is ... what [the court] does with th[e] record — namely, outline facts and draw inferences in the light most favorable to the government. This is our mode of operation in a sufficiency review, not a *Brady* challenge. [*Id.*, 550 F.3d at 998, n.5 (Gorsuch, J., dissenting).]

As Judge Gorsuch also pointed out in Ford, the Supreme Court established in Kyles that "while the jury could well still have found the defendant guilty in light of the considerable evidence amassed by the government, this fact simply was not dispositive of the question before it." Ford, 550 F.3d at 998.

Thus, under the panel's novel "sufficiently-strong-evidence test," the panel did exactly what the Supreme Court ruled must not be done:

> This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed. [Kyles, 514 U.S. at 435, n.8.]

The petition should be granted to correct the panel's egregious departure from this Supreme Court rule.

CONCLUSION

For all of the reasons stated, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I HEREBY CERTIFY that the foregoing Petition for Rehearing *En Banc* was filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the CM/ECF system on this 2nd day of April, 2014. I ALSO CERTIFY that Laura Fashing, attorney for the United States, and Robert Gorence, attorney for Rick Reese, and Jason Bowles, attorney for Ryin Reese, are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system. I ALSO CERTIFY that any required privacy redactions have been made, and that the hard copies being submitted to the clerk's office are exact copies of the electronic version. I FURTHER CERTIFY that the digital submission of this document has been scanned for viruses with scanning program Symantec Endpoint Protection, version 11.0.7400.1398, most recently updated on April 2, 2014, and according to the program, the file is free from viruses.

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