

No. _____

In The
SUPREME COURT of the UNITED STATES

BRIAN D. BAUR,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari
To The Supreme Court of Pennsylvania

PETITION for WRIT of CERTIORARI

Mary Catherine Baur, Esquire
Counsel of Record
U.S. Supreme Court Bar No. 252020
P.O. Box 2561
Philadelphia, PA 19147-0561
(215) 285-9484
mbaur@isp.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the Law of the Case Doctrine is an issue in this case since two Judges have made rulings concerning the Constitutional Rights of the Petitioner.
2. Whether failure to apply the "Castle Doctrine" to the facts of this case is an error of law and a violation of Petitioner's Constitutional Rights essentially denying Petitioner the right to present a defense.
3. Whether preclusion of Petitioner's "use of force" Expert constitutes an abuse of discretion and an error of law denying Petitioner the right to present a defense in violation of his Constitutional Rights.
4. Whether the sentence imposed violated Defendant's Constitutional Rights by ordering medical and psychological treatment for Petitioner based on hearsay reports, obviating Petitioner's ability to cross-examine.
5. Whether the sentence imposed constitutes life imprisonment in violation of the intent of the legislature.
6. Whether the reassignment of the case from Judge Learner to Judge Byrd was justified.

QUESTIONS PRESENTED - Continued

7. Whether the rulings of Judges Learner and Byrd concerning the admission of video evidence violated Defendant's Constitutional Rights where police failed to preserve original evidence, chain of custody was not preserved and evidence was admittedly altered to present it to support the theory of the prosecution.
8. Whether Petitioner's rights were violated by prosecution destruction, deletion and dismissal of evidence that could prove to be exculpatory.
9. Whether the testimony of police that conflicts with reports and prior testimony should have been stricken from the record so that they would not be considered by the Jury.
10. Whether trial counsel was ineffective for not allowing Petitioner to present re-direct testimony to address points raised in cross by the Prosecution.
11. Whether sequestration of Defense co-counsel was an error of law and deprived Petitioner of his 6th Amendment Right to counsel of his choice.
12. Whether Petitioner's right to counsel was violated when he was detained at Police Headquarters (the Roundhouse), without access to his attorneys, for four days prior to arraignment and

QUESTIONS PRESENTED - Continued

prior to Petitioner being read his Constitutional Rights or Mirandized.

13. Whether Petitioner's Constitutional Rights were violated by failing to provide Petitioner copies of exhibits being referred to by the prosecution during his cross-examination.

14. Whether Petitioner's Constitutional Rights were violated by the failure of the Judge to give jury instructions concerning the Castle Doctrine and self-defense and the fact that they could find Defendant not guilty.

15. Whether the Judge's conclusory statements at sentencing, based on hearsay documents, constitute an abuse of discretion and a violation of law.

16. Whether the testimony of the medical examiner should have been stricken in part and whether it demonstrates a further failure of the prosecution to obtain exculpatory evidence by not obtaining a toxicology report.

17. Whether the Judge demonstrated extreme bias for the prosecution in concluding that Petitioner's "warning shot" was "illegal", directing the Prosecution to "find it (the crimes code)"...and develop the argument further". Where the

QUESTIONS PRESENTED - Continued

Prosecution failed to separately charge Petitioner with any crime for the discharge of the weapon, whether Petitioner's right to notice and the opportunity to be heard and present an appropriate defense were violated, and the resulting adverse and confusing charge to the jury prejudiced Petitioner's Constitutional Rights, denying him a fair trial.

18. Whether Petitioner ever made a "confession" is in issue. Whether Petitioner's Constitutional Rights were violated when the Court's decision to remove the involuntary manslaughter charge from the Jury was based on his decision that the Petitioner made a "confession".

19. Whether the rulings of Judges Lerner and Byrd are erroneous with regard to Petitioner's Pre Trial Motions, delineating his objections to his initial detention at the roundhouse where he was denied the assistance of counsel and was not read his Constitutional rights or Mirandized.

20. Whether defense counsel was ineffective, when he stated in his closing argument statements that contradicted the testimony of Defendant, in his presentation to the Jury, and in fact presented the Jury with the Prosecution's version of the evidence.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a non-governmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i, ii, iii, iv
Parties to the Proceeding	v
Rule 29.6 Statement	v
Table of Contents	vi, vii
Table of Authorities	viii
Opinions and Orders Below.....	1, 2
Jurisdiction	2
Constitutional Provisions and Statutes Involved.	3
Statement of the Case	3, 4, 5
Argument for Allowance of Writ	5, 6, 7
Questions Raised in this Case Are Important and Unresolved	8
Conclusion	9

TABLE OF CONTENTS – Continued

Page

APPENDIX

Sentencing Order Court of Common Pleas of
Philadelphia County, Pennsylvania dated April 8,
2016 and signed by Judge Sandy L.V. Byrd .. App. 1

Opinion, Court of Common Pleas of Philadelphia
County, Pennsylvania, signed by Judge Sandy L.V.
Byrd dated December 29, 2016 App. 4

Non-Precedential Decision – See Superior Court
I.O.P. 65.37, Superior Court of Pennsylvania,
Affirming Judgment of Sentence based on the trial
court opinion, signed by Joseph D. Seletyn, Esquire,
Prothonotary, dated December 22, 2017..... App. 80

Order Denying Allowance of Appeal, Pennsylvania
Supreme Court, dated July 18, 2018 App. 100

Order Denying Reconsideration of the Allowance of
Appeal, Pennsylvania Supreme Court, dated August
24, 2018App. 101

TABLE OF AUTHORITIES

	Page
<u>Furman v. Georgia</u> , 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).	4
<u>McCoy v. Louisiana</u> , No. 16-8255, 138 S. Ct. 1500, 200 L.Ed.2d 821 (2018).	2, 6
<u>Williams v. Commonwealth of Pennsylvania</u> , 579 U.S. ___, 136 S. Ct. 1899, 195 L.Ed.2d 132 (2016).	3, 5, 7
 <u>Constitution, Statutes, Regulations, and Rules</u>	
U.S. Const. amend. II	3
U.S. Const. amend. IV.	i, iii, iv, 3
U.S. Const. amend. V.	3, 8
U.S. Const. amend. VI.	3
U.S. Const. amend XIV.	3
18 Pa.C.S.A. Section 505.	i, iii, 3
42 Pa.R.A.P. 1925	1, 3, 4, 5, 7
28 U.S. C. Section 1257	2

Brian D. Baur respectfully petitions for a writ of certiorari to review the judgment of the Pennsylvania Supreme Court.

OPINIONS AND ORDERS BELOW

The original conviction of Petitioner in the Court of Common Pleas in Philadelphia County was a jury verdict entered on January 29, 2016. Petitioner was not sentenced until April 8, 2016, and is found at App. 1.

Petitioner appealed to the Superior Court of Pennsylvania from the Sentencing Order of April 8, 2016 on April 21, 2016. App. 1 Petitioner's attorney, who had been sequestered by Judge Byrd during trial, did not receive the transcript until April 22, 2016. (Post trial motions would have had to have been filed 10 days after the Sentencing Order of April 8, 2016). On April 25, 2016 Judge Sandy L.V. Byrd issued an Order for Appellant to file a Statement of Matters Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). On December 29, 2016 Judge Byrd filed his Opinion in response to Appellant's Statement of Matters Complained of on Appeal. App. 4. The Superior Court of Pennsylvania affirmed the conviction in all

respects in an unpublished opinion issued on December 22, 2017 relying on the Opinion of Judge Byrd issued on December 29, 2016, and is found at App. 80.

The Pennsylvania Supreme Court issued an Order on July 18, 2018 denying Petitioner's Petition for Allowance of Appeal, and is found at App. 100. On May 14, 2018 this court issued a decision in McCoy v. Louisiana, No. 16-8255, 138 S. Ct. 1500, 200 L.Ed.2d 821 (2018) where this court held that a 6th Amendment violation was a structural error requiring a new trial. Petitioner filed an Application for Reconsideration so that the Pennsylvania Supreme Court could review the present case in light of the holding. On August 24, 2018 the Pennsylvania Supreme Court issued an Order denying Petitioner's Petition for Reconsideration of the Petition for Allowance of Appeal, and is found at App. 101.

JURISDICTION

The Order of the Pennsylvania Supreme Court was entered on July 18, 2018, found at App. 100. Reconsideration was requested and denied on August 24, 2018, found at App. 101. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The arrest and conviction of Petitioner raise grave Constitutional questions concerning the 2nd, 4th, 5th, 6th and 14th Amendments to the Constitution of the United States. Whether the jury's right to decide whether the prosecution has overcome the Defendant's presumption under the Castle Doctrine of Pennsylvania before deciding whether the Defendant is guilty of any crime was denied. Whether the mechanism of Pa.R.A.P. 1925 makes it impossible for Petitioner to appeal all issues as the Judge continues to rule on Petitioner's case even though Petitioner has appealed as of right to the Pennsylvania Superior Court under Williams v. Commonwealth of Pennsylvania, 579 U.S. ___, 136 S. Ct. 1899, 195 L.Ed.2d 132 (2016).

STATEMENT OF THE CASE

On January 29, 2016 Petitioner was convicted by a jury of one count of Murder of the Third Degree. The Jury found Petitioner Not Guilty of Possession of an Instrument of Crime. Petitioner had been charged with Murder in the First Degree and Possession of an Instrument of Crime. Pennsylvania

does not allow bail for those charged with First Degree Murder. Petitioner called police on August 21, 2014 and was immediately placed in custody upon the arrival of police at Petitioner's residence, which is also his place of work. Petitioner was held for four days at police headquarters before being arraigned. Petitioner was denied access to his attorney during those four days and was appointed a public defender at arraignment on August 24, 2014. Petitioner has been continuously incarcerated since August 21, 2014 to the present, but was never given credit for any time served. The sentence imposed on April 8, 2016, found at App. 1, was already the maximum and differed from most sentences as Petitioner was charged the \$25,000 for his jury trial. The denial of crediting his time served is in excess of a maximum sentence. Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

On April 8, 2016 Petitioner was sentenced, found at App. 1. Notice of Appeal was filed with the Superior Court of Pennsylvania on April 21, 2016. On April 25, 2016 the Common Pleas Court Judge issued an Order under Pa.R.A.P. 1925(b). Petitioner was required to file a Statement of Matters Complained of on Appeal which was filed by Petitioner on May 16, 2016. On December 28, 2016 Judge Byrd issued an Opinion in response to Petitioner's Statement of Matters Complained of on

Appeal, found at App. 4. The Superior Court of Pennsylvania issued an unpublished Memorandum Opinion affirming the Opinion of Judge Byrd on December 22, 2017, found at App. 80.

A Petition for Allowance of Appeal was filed with the Pennsylvania Supreme Court and was denied on July 18, 2018, found at App. 100. Reconsideration of the Denial was requested and the Pennsylvania Supreme Court denied reconsideration on August 24, 2018, found at App. 101.

ARGUMENT FOR ALLOWANCE OF WRIT

Although all of Petitioner's issues on appeal from the trial court are Constitutional claims, not one United States Supreme Court case was cited by the trial judge or the Pennsylvania Superior Court.

The trial Judge's opinion essentially is the Judge defending his own decision. This is able to occur through the mechanism of Pa. R.A.P. 1925, an appellate court rule. Petitioner argues the rule creates a conflict of interest which is governed by Williams v. Commonwealth of Pennsylvania, 579 U.S. ___, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016).

This case demonstrates that there is a Constitutional flaw in Pa. R.A.P. 1925 consistent

with this court's ruling in Williams, supra. It allows the judge to re-gain control of a case after jurisdiction has switched to the appellate court, assuming a Notice of Appeal is timely filed. The jury has long since been dismissed. It allows the trial court judge to essentially rule on the appeal of a jury verdict. The judge writes the facts to defend against Petitioner's issues on appeal. He does this by writing an Opinion to support the verdict rendered by jury and his personal reasoning as to why the facts presented by the Judge are correct. The Judge was not in the jury room so any presumptions are self-serving. The result is to essentially nullify any jury error, and any error on the part of the judge, that occurred at trial. The Pennsylvania Superior Court then issues a decision affirming the lower court judge essentially eliminating Petitioner's right to appeal to an independent tribunal and ensuring the judge's decision and sentence are preserved.

The Pennsylvania Supreme Court review is discretionary. On his Application for Reconsideration Petitioner pled a recent United States Supreme Court case because 6th Amendment ineffective assistance of counsel issues were raised in Petitioner's Statement of Matters Complained of on Appeal, McCoy v. Louisiana, No. 16-8255, 138 S. Ct. 1500, 200 L.Ed. 2d 821 (2018). The Pennsylvania Supreme Court still denied review. The

Pennsylvania Supreme Court does have a duty to enforce the laws of this nation and to enforce the decisions of the United States Supreme Court but in this case chose not to do so even though the issues were squarely before the court.

Petitioner has presented all of his original issues presented to the Pennsylvania Superior Court in his Statement of Matters Complained of on Appeal which was filed in compliance with the Order of Judge Byrd under Pa. R. A. P. 1925. This is because Petitioner has not yet had an independent tribunal review his Constitutional claims from the time of his arrest to the time of sentencing, due to the new Constitutional claim of a conflict of interest under Williams, supra. created by Pennsylvania Rule of Appellate Procedure 1925.

Petitioner requests review by this Court due to the numerous Constitutional violations, the inordinate delay at each step of the litigation, the preclusion of counsel from the time of initial custody until after arraignment, the sequestration of co-counsel at trial, the ineffectiveness of both hired counsel; and the abuses of power by police, the prosecutor and the Judge.

QUESTIONS RAISED IN THIS WRIT ARE IMPORTANT AND UNRESOLVED

Pennsylvania has a very high incarceration rate. The issues presented by this Petitioner may shed light on how this is achieved.

None of Petitioner's issues have been addressed. He is still serving an illegal sentence. He has still not been afforded review by an independent tribunal.

CONCLUSION

The judgment below is a unique departure from decisions of this Court that require that convictions based on coerced statements be set aside at any time after conviction. As such, it represents a breach in the wall erected by the Fifth Amendment to the Constitution and the decisions of this Court that were designed to protect a citizen from being convicted by the Government through the use of statements involuntarily wrung from the citizen.

This petition for writ of certiorari should,
therefore, be granted.

Dated: April 5, 2019

Respectfully submitted,

Mary Catherine Baur, Esquire

Mary Catherine Baur, Esquire
United States Supreme Court
Bar No. 252020

P.O. Box 2561
Philadelphia, PA 19147
mbaur@isp.com
(215) 285-9484
Attorney for Petitioner