IN THE SUPREME COURT
OF THE UNITED STATES

EDWIN APONTE - **PETITIONER**

VS.

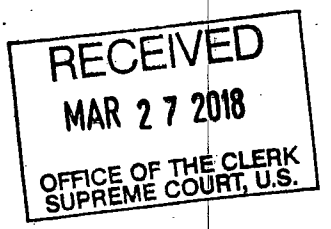
ERIC TICE, SUPERINTENDENT SCI-SMITHFIELD - **RESPONDENTS**

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRITE OF CERTIORARI

Edwin Aponte #HW-5699
P.O. Box 999
1120 Pike Street
Huntingdon, Pa. 16652



QUESTION(S) PRESENTED

A. Was petitioner's prosecutorial misconduct claim procedurally defaulted for failing to present it in state appellate procedure rule when the highest state court ruled on the merits of the claim?

B. Did the District Court error by opining that petitioner could not show prejudice by the Confrontation Clause Violations?

C. Was trial counsel deficient under the Sixth Amendment for failing to argue the prosecution's withholding of evidence claim?

D. Did the denial of self-defense instruction violated Due Process?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

Statutes and Rules **Page Number**

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INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] The opinion of the United States district court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was OCTOBER 19, 2017.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: OCTOBER 19, 2017, and a copy of the order denying rehearing appears at Appendix B.

[X] An extension of time to file the petition for a writ of certiorari was granted to and including MARCH 19, 2018 (date) on MARCH 6, 2018 (date) in Application No. 17 A 931.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

The petitioner having been arrested and charged with murder and related offenses came to be represented by Lee Mandell. The case was assigned to the courtroom of the Honorable Shelley Robbins New of the Philadelphia Court of Common Pleas. Trial commenced on or about October 27, 2008. After hearing the evidence, the jury convicted said Petitioner of Murder in the First Degree and Related Offenses. The Court imposed the mandatory term of Life Imprisonment on the Murder Bill and terms of imprisonment on the related charges and a 2 ½ to 5 for intimidation to run concurrent off a plea of guilty.

On January 12, 2009; Thereafter, said Petitioner filed Post-Sentence Motions which were denied on May 27, 2009. Thereafter, Petitioner filed a timely Notice of Appeal. thereafter, an advocate's brief was filed with the Superior Court of Pennsylvania. The Superior Court affirmed on October 26, 2010. Petitioner's counsel filed for Allowance of Appeal to the Supreme Court of Pennsylvania on November 24, 2010 which was denied April 13, 2011. Following this denial Petitioner filed a timely Pro Se PCRA petition on June 30, 2011 and was denied June 3, 2013 and a timely Notice of Appeal was filed and the Superior Court denied said appeal October 06, 2014. No Allowance to Appeal to the Supreme Court were taken due to the Supreme Court's ruling that one is not required because the Superior Courts ruling is final. Petitioner did file a Timely Petition for Writ of Habeas Corpus of February 02, 2015. Magistrate Judge Lynne A. Sitarski Filed her Report and Recommendation that Petition for Writ of Habeas Corpus be denied without the issuance of a Certificate of Appealabity on June 03, 2016. Petitioner then field his timely Objection to Magistrate Judges Report and Recommendation on September 08, 2016. District Judge Lawrence F. Stengel denied petitioner's Objections on or about February 3, 2017. Petitioner filed a Timely notice Appeal on or about February 28, 2017.

Petitioners request for a certificate of appealability was denied on or about August 30, 2017. In which Petitioner filed for a petition for rehearing En Banc, which was on or about October 19, 2017. this timely Writ of Certiorari to the Supreme Courts of the United States now follows.

FACTUAL HISTORY

On August 17, 2006, Marquis Ward was shot and killed at or near "C" and Ruscomb Street in the city of Philadelphia.

Dr. McDonald opined that the cause of death was multiple gunshot wounds and that the manner of death was homicide (N.T. 10/29/08 pg. 43). Police Officer Yatcilla, of the Crime Scene Unit, arrived at the scene, took photographs, did a sketch and collected ballistics evidence (N.T. 10/29/08 Pg. 66, 68-70). Sheena Geiger, was romantically involved with the deceased and was in his company on August 17, 2006, at about 3:20 p.m. near "C" and Ruscomb Street (N.T. 10/29/08 Pg. 105).

The victim was driving his car with the witness and waved to the Petitioner who was on the street (N.T. 10/29/08 pg. 106). The victim engaged in a conversation with the Petitioner and others (N.T. 10/29/08 pg. 112). Apparently, hostilities then ensued over a debt owed to the victim and fisticuffs the broke out (N.T. 10/29/08 pg. 115-16). The Petitioner was bleeding and beaten badly and a crowd had surrounded the combatants, the witness claimed that the Petitioner pulled out a gun and shot the victim (N.T. 10/29/08 pg. 116-17). Police arrived and the witness eventually spoke to Homicide Detectives. On August 13, 2007, she identified the Petitioner at a line up (N.T. 10/29/08 pg. 129).

Emmanuel Ramos was present at the scene when the victim was shot and killed. He identified the Petitioner as the shooter (N.T. 10/29/08 pg. 193). Mr. Ramos described the

argument, the fistfight and then the moment when the Petitioner alleged pulled out a gun and open fire (N.T. 10/29/08 pg. 198) Elijah Velez, denied being present at the time of the shooting (N.T. 10/29/08 pg. 249). However, he had given an out of court statement and noted that there was a fistfight between the Petitioner and the victim and the fight came to a halt when the Petitioner allegedly pulled out a gun and shot the victim (N.T. 10/2908 pg. 257). The Commonwealth called several Police Officers including those who arrived on the scene and Detectives who participated in the investigation (N.T. 10/30/08 pg. 7 et seq). Officer Stott of the "Firearms Identification Unit" identified the fired cartridge cases as having come from a .40 Smith and Wesson and opined that they were all fired from one firearm (N.T. 10/30/08 pg. 70, 78). The authorities had collected certain blood samples and it was determined that the victim could not be excluded as the source of DNA, but that the Petitioner could be so excluded (N.T. 10/30/08 pg. 157-58).

Further police investigation revealed that certain witness statements had apparently been sent to potential witnesses and the parties stipulated that the Petitioner's fingerprints could be found thereon (N.T. 10/30/08 pg. 177). The Commonwealth produced a letter that the Petitioner allegedly sent which in essence said that the Petitioner did not need the witnesses snitching on him (N.T. 10/30/08 pg. 205-06). After the Commonwealth rested, the defense put on a number of character witness that attested to the Petitioner's good reputation for non-violence (N.T. 11/03/08 pg. 8 et seq.).

the Petitioner took the stand, he conceded that he engaged in a fight with the victim (N.T. 11/03/08 pg. 38). The Petitioner "had enough", [Put up his hands and signaled an end to the fight] (N.T. 11/03/08 pg. 40). At the time, his eye was closed and swollen shut. He turned to walk away, heard "Watch Out" and when he turned around, the victim hit him once again.

He then saw the victim reaching for his waistband area and believed that he was going for a gun (N.T. 11/03/08 pg. 41). The Petitioner grabbed the gun off the victim's waist and shot the victim (N.T. 11/03/08 pg. 42) he also conceded that he wrote to one Jose Rivera and enclosed several witness statements with the letter (N.T. 11/03/08 pg. 45-46). He was upset with the lies that the witnesses were telling (N.T. 11/03/08 pg. 47). He knew that Mr. Rivera was from the same neighborhood as the witnesses and wanted him to speak to the witness in an effort to straighten out "some of the lies that was in the statements". (N.T. 11/03/08 pg. 48). In his opinion, the letter did not reflect any threats to the witnesses and he never told Mr. Rivera, to make any threats (N.T. 11/03/08 pg. 50).

While other evidence was presented to the jury, the case went to the fact finder primarily on the evidence as summarized above.

A. WAS PETITIONER'S PROSECUTORIAL MISCONDUCT CLAIM PROCEDURALLY DEFAULTED FOR FAILING TO PRESENT IT IN STATE APPELLATE PROCEDURE RULE WHEN THE HIGHEST STATE COURT RULED ON THE MERITS OF THE CLAIM.

In denying relief on this claim, the District Court stated the following "Petitioner's objection to Judge Sitarski's recommended with respect to ground four is overruled. The Report and Recommendation thoroughly explained why Petitioner's claim regarding the prosecutor's statement at closing is non-cognizable and that his Constitutional claims regarding his due process and Sixth Amendment rights are procedurally defaulted." District Court order [February 2, 2017] pg. 2; Report and Recommendation (R&R) pg. 31-34.

The magistrate predicated its denial on the premise that Petitioner had failed to include the claim in the 1925(b) Statement, and therefore did not undergo one complete round of State Court review. (R&R pg. 34 Ft. Nt. 9). Prior to coming to this conclusion, the Court conceded that its arguable the Petitioner presented this claim to the Superior Court, but the Court does not have access to Petitioner's appellate brief to the Superior Court. **Id.**

The District Court analysis of this claim is incorrect for two (2) significant reasons : (1) once the Pennsylvania Superior Court reviewed the claim on the merits, the claim is exhausted and subject to 28 U.S.C. § 2254(d)(1) AEDPA deferential standard; (2) the review was inadequate because the District Court did not have a complete record. **Lines V. Larkins, 208 F.3d 153, 159 (3rd. Cir. 2000)** (Exhaustion satisfied when claims presented to each level of state courts).

The Prosecutor arguments that denied Petitioner a fair trial are as follows:

> ...Now, there is a real simple reason for that, because the Law recognizes that from the time someone gives a statement to homicide detectives until they get in that chair, they can be talked to, the witnesses can be intimidated, very

frequently, the statement that they initially told the police is, indeed, the truth and now out of fear, they recant while he is up there on the stand

Mr. Mandell: Your Honor, I am going to object to that

The Court: Ladies and Gentlemen, that objection is sustained

N.T. 11/03/08 Pg. 121

Immediately thereafter, the prosecutor argued as follows:

Again, doesn't make any sense. Doesn't make any sense. what he told you there on the stand makes perfect sense as of the truth of that statement...

Mr. Mandell: Your Honor, I'm going to object, again the comment about the truth of the statement. That is the jury's function.

The Court: Ladies and Gentlemen, you are the fact finders. you may consider counsel's argument, but you are the finders of fact and only you make a determination of whether what a witness said is true as to some, all or none of the evidence.

ID. at 124.

From the above comments by the prosecutor, it is clear that the prosecutor was putting the government's imprimatur on Elijah Velez out of court statement that the statement was the truth and his testimony was false. The prosecutor knew that this type of decorum was outside the realms of professional conduct.

In the Pennsylvania State Courts, that court has required reversal of conviction and ordered a new trial when the prosecutor did what the prosecutor did in this case, express personal

belief either by direct statement or by indirect or as to the veracity of the witness.

Commonwealth V. Bricker, 506 Pa. 571, 487 A.2d 346 (1985).

Our Courts, such as this one share the same legal reasoning as the Pennsylvania State Courts. A prosecutor is not allowed to express his personal opinion as to the truth or falsity of testimony or the guilt of the defendant. **U.S. V. Modica, 663 F.2d 1173 (2nd Cir. 1981)** See Also **U.S. V. Young, 470 U.S. 1, 105 S. ct. 1038, 84 L.Ed. 2d 1 (1985).** (Vouching for credibility of witnesses and expressing personal opinions concerning defendant's guilt pose twin dangers that jury will think there is additional non-record evidence to support charges, and jury's special trust in prosecutor's judgment); ABA Standards for Criminal Justice § 3-5.8 (b) (3rd ed. 1993); ABA Code of Professional Responsibility DR7- 106 (4)(1976) (duty of attorney not to "assert his personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused").

Based on the forgoing reason Petitioner's Writ of Certiorari should be granted because prosecutor's comments fundamentally denied Petitioner's due process, and his right to a fair trial.

B. DID THE DISTRICT COURT ERROR BY OPINING THAT PETITIONER COULD NOT SHOW PREJUDICE BY THE CONFRONTATION CLAUSE VIOLATIONS.

The sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsels conduct so undermined the proper Functioning of the adversarial process that the trial cannot be relied on as having produced a just result. **Strickland V. Washington, 466 U.S. 668, 669 (1984).**

Petitioner posits that it is debatable the District Court's resolution of this claim being an unreasonable application of clearly established Supreme Court precedent. 28 U.S.C § 2254 (d)(1). For example, the Superior Court focused its analysis on the fact that Petitioner could not establish prejudice. The Superior Court opined as follows:

> The report in question is entitled "Complaint or Incident Report" and is referred to at trial as a "75-48." (N.T. 10/30/08 at 13) Commonwealths Exhibit C-16. It includes general information, including the location of the alleged crime, the date of its occurrence, and a description of the incident - here, the shooting of the victim. Commonwealths Exhibit C-16. It also included a general description of two possible suspects: "#1 6'00", 150 lbs., med. compl. clean shaven, white t-shirt, blue shorts." Id. though Petitioner claims that the description of the potential suspects was prejudicial, the record reflects that Petitioner testified at trial and admitted that he shot the victim, claiming that he did so because he believed he saw the victim reaching for a gun and petitioner grabbed the gun from the victim's waistband and shot him instead. N.T. 11/03/08/ at 41-42. As petitioner admitted that he was the person that shot the victim, Officer DeNofa's testimony regarding a description of the shooter was not prejudicial. (Pa. Super. Ct. Oct. 6, 2014. Slip op. at 6-7).

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides, in relevant part, that "[I]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." **U.S. Const. Amend. VI.** In cases following **Crawford V. Washington, 541 U.S. 36 (2004)**, which held evidence may be inadmissible under the Confrontation Clause where it is (1) hearsay, (2) by an unavailable declarant not previously subject to cross-examination by the defendant, and (3) a "testimonial" statement, the Supreme Court has held scientific reports were testimonial in nature and were inadmissible as substantive evidence against the defendant unless the analyst who prepared the report was confronted. **Melendez-Diaz V. Massachusetts, 557U.S.**

305, 310 (2009).

The evidence that is subject of scrutiny by the Confrontation Clause is Officer DeNofa's testimony about the report in question - a "75-48" preliminary report, which is produced whenever police respond to a crime scene - because, even though Officer DeNofa did not physically prepare the 75-48, he testified that it was filled out in his presence, he was present at the crime scene, and he was involved in gathering the facts contained in the report. (Phila. Cnty. Com. Pl. march 21, 2014 Dec., slip Op. at 6).

"An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." **Strickland** at 694.

Years after **Strickland**, our Supreme Court decided **Lockhart V. Fretwell, 506 U.S.364, 122 L.Ed. 2d 180, 113 S. Ct. 838 (1993)**, "Thus, an analysis focusing solely on mere outcome determination without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him."

Based on the foregoing, Petitioner shows the District court's determination that the Superior Courts decision was not an unreasonable application of **Strickland** because petitioner could show prejudice and Writ should be granted.

C. WAS TRIAL COUNSEL DEFICIENT UNDER THE SIXTH AMENDMENT FOR FAILING TO ARGUE THE PROSECUTIONS WITHHOLDING OF EVIDENCE CLAIM.

A "Brady Claim" as it is commonly referred to occurs when the government fails to disclose evidence materially favorable to the accused, including both impeachment evidence and exculpatory evidence. **United States V. Bagley, 473 U.S. 667, 676 (1985)**. There are three (3) components of a Brady Violation: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or it had impeachment value; (2) the prosecution suppressed the evidence, wither willfully or inadvertently; and (3) the evidence was material. **Strickler V. Greene, 527 U.S. 263, 281-282 (1999). Lambert V. Beard, 387 F.3d at 252** (citing **Banks V. Dretke, 540 U.S. 668 (2004)**). A defendant demonstrates the materiality of suppressed by showing a "reasonable probability of a different result." **Kyles V. Whitley, 514 U.S. 419, 434 (1995).** In turn, "A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." Id.

The State Court record reveals that the Commonwealth failed to correct false testimony. When the Commonwealth called Ramos to testify, the first question the prosecutor ask him surrounded his incarceration in Montgomery County for pending criminal charges and the Commonwealth's offer to make his cooperation in the case at bar known to the judge hearing his pending case. (N.T. 10/29/08 at 192-193.).

However, when Ramos testified he agreed that no deals or promises were made in return for his testimony. Id. at 193. Ramos testimony regarding no deals or promises was in stark contrast to what the Commonwealth had already brought out and should have been corrected. In **United States V. Bagley, 473 U.S. 667, 679, 87 L. Ed. 2d 481, 492, 105 S. Ct. 3375 (1985)**, the Supreme Court distinguished three (3) situations involving the discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the

defense. The first situation was the prosecutor's knowing use of perjured testimony, or equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

Here, the prosecution knew that Ramos testimony that no deals were made in exchange for his testimony was false. The prosecution had a duty to correct that testimony. Conviction obtained through use of false testimony, known to be such by representatives of the State, is a denial of due process, and there is also a denial of due process, when the State, though not soliciting false evidence, allows it to go uncorrected when it appears. **Napue V. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).**

The State Court's adjudication that Petitioner could not establish prejudice was unreasonable application of **Strickland V. Washington, 466 U.S. 668 (1984).** Petitioner shows that the underlying Brady claim was prejudicial, as the Commonwealth presented false testimony and based on this foregoing claim Writ should be granted.

D. DID THE DENIAL OF SELF-DEFENSE INSTRUCTION VIOLATED DUE PROCESS

As a preliminary matter, the District Court did not have a complete record. See pg. 24 Ft. Nt. 7 (R&R). That court further erred by concluding "Even if Petitioner presented a due process argument elsewhere in his briefing to the Superior Court, See McCandless, 172 F.3d at 261 (explaining that claim can be fairly presented, inter alia, by citation to pertinent federal case law), the claim would not be exhausted since it was not initially raised in Petitioner's 1925(b) Statement to the trial court." Id.

The District Court stated that, "Petitioner did not present the factual and legal substance of a federal due process claim related to the denial of the self-defense instruction to the State Courts in a manner that put them on a notice of such a claim; rather, he exclusively argued that issue as one of trial court error. Accordingly, any claim that the exclusion of the self-defense instruction violated Petitioner's due process rights is unexhausted." (R&R at 24)

Petitioner contends, whether or not the claim was prejudiced in Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal is of no moment. Once the highest court to have to hear the case - order 218 - has heard the merits, the claim is exhausted and ripe for Federal review. Here the Pennsylvania Superior Court addressed the claim on the merits.

Moreover, without the actual brief that Petitioner submitted to the Superior Court, the District Court was not in position to effectively review this claim. Petitioner submits that he presented his Federal Due Process claim to the Superior Court.

Furthermore, when a Petitioner properly presents federal claim to a State Court, but the State Court does not consider the merits of the federal claim, the deferential standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is inapplicable. See **Cone V. Bell, 129 S. Ct. 1769, 1784, 173 L. Ed. 2d 701 (2009)** (Holding that "[b]ecause the Tennessee court did not reach the merits of [the] claim, Federal Habeas review is not subject to the deferential standard that applies under AEDPA").

CONCLUSION

For the reason asserted herein, Petitioner respectfully request the petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Edwin Aponte

Edwin Aponte

Date: March 16, 2018