

No. 18-5057

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES T. BAGBY - PETITIONER

WILLIAM HYATT / WARDEN, STATE OF INDIANA - RESPONDENT(S)

ON REHEARING OF PETITION FOR A WRIT OF CERTIORARI

REHEARING PETITION FOR WRIT OF CERTIORARI

James T. Bagby
Petitioner/Defendant, *pro se*
D.O.C. # 913111
New Castle Correctional Facility
1000 Van Nuys Rd.
New Castle, IN 47362-1041

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty or property without due process of law..."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defence."

United States Constitution, Amendment XIV, Section 1:

" nor shall any State deprive any person of life, liberty, or property, without due process of law"

STATEMENT OF THE ISSUES

Ground One: Petitioner stated numerous Constitutional violations within his Writ of Certiorari which were disregarded. Petitioner is being held for a charge he did not commit. It took the Prosecutor for the State to withhold evidence to be able to convict the Petitioner. The Prosecutor for the State withheld four things from evidence, (that petitioner knows of), which were essential for the defense of the Petitioners defense counsel to defend the Petitioner from incarceration. One big item was that the Prosecutor did not present all of the DNA evidence which the Indiana State Police DNA laboratory gave to the Prosecutor. Petitioner presented this evidence in the Writ For Certiorari. The Second thing the State withheld were two DVD's that were from witnesses that were interviewed by the Kokomo Police Department. If this evidence would have been disclosed to the Petitioners' trial counsel, Petitioner would have been exonerated and the states key witness impeached. The third was new evidence of Affidavits from the

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Petitioners wife affirming that she and the Petitioner had had sex in the alleged victims bed and that the Prosecutor told her not to tell the defense attorney about that instance. This proves why the Petitioners' DNA was on the bed sheet in alleged victim's bedroom. The sheets were also the Petitioners to begin with. There was another affidavit entered by the Petitioner from the alleged victim's father stating that his daughter informed him that she had made all of the accusations up to implement Mr. Bagby/Petitioner to send him to prison. The fourth was also a 2006 case that the prosecutor had that was not presented to the defense counsel.

Ground Two: The Defense Counsel, upon motion, requested all exculpatory evidence. The prosecutor withheld evidence to assure a conviction which this alone is highly against the Constitutional rights of the Petitioner. If the defense makes specific request for material that is later shown to be exculpatory (called Brady material), reversal is required if exculpatory evidence "might have affected the outcome of the trial." *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, at 104, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976). The omitted evidence, as evaluated in the context of the entire record, must create a reasonable doubt that did not otherwise exist. *United States v. Agurs*, *supra*, 96 S. Ct. At 2401. Also due to fact that the evidence is missing (believed to be missing) and THAT THE STATE TRIED TO KEEP BAGBY FROM OBTAINING IT SHOWS THAT THE EVIDENCE WAS OBVIOUSLY EXCULPATORY. Evidence that may "undermine" a conviction depends upon the facts of any particular case, and nature of the request for information. The key is whether "the prosecutor's response to [defendant's] discovery motion misleadingly induced defense counsel to believe...the evidence did not exist, possibly causing counsel to abandon independent investigation, defenses, or trial strategies..." *Bagley*, 473 U.S. at 683.

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Specific discovery requests would meet this standard best.

Where defendant's request is phrased in general terms, or where there is no request, prosecutor's duty to disclose is determined by whether the evidence in his possession is so obviously exculpatory that the failure to provide the evidence to defendant denies defendant a fair trial. Evidence is material only if there is a reasonable probability that in the event of disclosure the result of the proceeding would have been different.

Prosecution's obligation to disclose Brady material is contingent upon a showing that the prosecution suppressed or withheld evidence that was exculpatory and material. *Moore v. Illinois, U.S. v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985) (regardless of nature of request by defendant, favorable evidence is material, and constitutional error results from suppression by government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"). Brady violation is not subject to harmless error analysis. Prosecution properly bears burden of determining whether evidence, including that in possession of police, is material and must be disclosed to defense. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995) (four aspects of materiality under Bagley: First, reasonable probability of different outcome does not require showing that, more likely than not, defendant would have received different result had evidence been disclosed, but rather that, governmental suppression undermines confidence in the outcome. Second, defendant need not show that, discounting exculpatory evidence in light of suppressed evidence, evidence would not have been sufficient to convict. Third, Brady - Bagley error is not subject to harmless error analysis. Fourth, and finally, effect of suppressed evidence must be considered collectively, not item-by-item).

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Petitioner does not mean to keep repeating what was on or in the Writ of Certiorari, but apparently no one looked at it or he would not be asking for a rehearing. The Supreme Court would have seen the extreme miss-carriage of justice and total disregard for the Petitioners Constitutional Rights. That evidence would have exonerated Mr. Bagby. Prosecutor's failure to disclose "material" evidence may result in reversal of conviction. *United States v. Agurs* (1976), 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed.2d 342. Specific Defense Request - Might Have Affected Outcome if the defense makes specific request for material that is later shown to be exculpatory. Reversal is required if exculpatory evidence "might have affected the outcome of the trial." *Brady v. Maryland*, 373 U.S. 83, 83, S. Ct. 1194, 10 L. E d.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, at 104, 96, S. Ct. 2392, 49 L. Ed.2d 342 (1976).

Ground Three: The Post-Conviction Relief Hearing Court and Prosecutor for the State of Indiana hurried Petitioner's counsel which caused her to make errors. The rushing caused Petitioner's counsel during the Post-Conviction Relief Hearing to not call witness, Kimberly Bagby, who was at the P.C.R.H to testify to the truthfulness of two affidavits that were submitted into evidence. The affidavits were part of the evidence that the state later got thrown out due to the witness not testifying. (Another Constitutional Violation). She did not have to testify. If the state wanted to rebuke the affidavits then they should have called her to testify. The hurrying also caused counsel not to properly litigate the Brady violation caused by the prosecutor at trial.

Ground Four: EQUITABLE TOLLING; As all previously stated Petitioner had hired an attorney or his mother did, to complete a Habeas Corpus. He put his trust in Noel Law Office to do the Habeas and was misled into believing the Habeas was being done. Due to no fault of his own Bagbys' time had run out. Bagby diligently wrote Noel Law Office to

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confirm that they were doing the Habeas and Noel said they were working on it. Then at the last moment Noel sent a letter saying they were not going to do it. It would be a grave miscarriage of justice not to reverse Petitioners case. The timeliness provision in the federal habeas corpus statute is subject to equitable tolling. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.S. 2244(d). (Breyer, J., joined by Roberts, Ch. J., and Stevens, Kennedy, Ginsburg, and Sotomayor, JJ.). A petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. (Breyer, J., joined by Roberts, Ch. J., and Stevens, Kennedy, Ginsburg, and Sotomayor, JJ.) See also *Holland v. Florida*, 560 U.S. 631, 648 (2010).

Additional tolling of the AEDPA limitations period, beyond the provisions set forth by 2244(d)(2), may be available as a matter of equity where the Habeas petitioner "has been pursuing his rights diligently," but has been prevented from timely filing his federal petition by "some extraordinary circumstance [that] stood in his way." *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2562, 177 L. Ed. 2D 130 (2010).

There are "no bright lines in determining whether equitable tolling is warranted in a given case." *Pabon v. Mahanoy*, 654 F.3d 385, 399 (3d Cir. 2011). Rather, equitable tolling is appropriate when "principles of equity would make the rigid application of a limitation period unfair." *Miller v. N.J. State Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998) (alterations omitted); *Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012).

REASONS FOR GRANTING THE PETITION FOR REHEARING

It was not only the U.S Supreme Court that disregarded the Petitioners Constitutional Rights, but it was the Prosecutor of the State of Indiana, The Supreme Court of Appeals, the Post Conviction Relief Court, the Northern District Court, and the

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United States 7th Circuit Court of Appeals. Petitioner was denied relief, how can all these Courts' deny Petitioner the relief sought? It was at no fault what so ever from the Petitioner that the attorney that his mother had hired Noel Law Office to represent him on his Habeas Corpus Relief and they failed to honor their contract. Petitioner was denied a fair trial as guaranteed in the United States Constitution. The Prosecution for the State withheld evidence. If the jury would have heard the withheld evidence he would have been found not guilty. If the Petitioners' defense counsel would have had access to that evidence or had been aware such evidence existed, he would have had a defense.

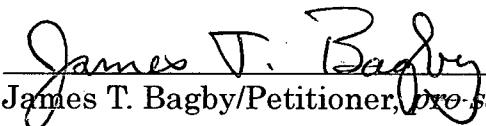
The key is whether "the prosecutor's response to [defendant's] discovery motion misleadingly induced defense counsel to believe...the evidence did not exist, possibly causing counsel to abandon independent investigation, defenses, or trial strategies. If defense counsel would have seen the full DNA file then he would have discovered that: 1) DNA evidence was mis-treated or contaminated 2) because of the contamination there was not enough DNA left to re-test. 3) He could have properly questioned the States DNA annalist and discovered that the DNA evidence in question were Petitioners' DNA and the Alleged victim was a mixture of one to ten, which meant that it was a one in ten chance it was Petitioners' and alleged victims' DNA mixed together.

CONCLUSION

The petition for Writ of Certiorari should be granted. Due to the miscarriage of justice allowed by the Howard County Prosecutor, the Howard County Superior II Court, Northern District Court, and the United States 7th Circuit Court of Appeals. Petitioner is innocent of these allegations and humbly request for the Supreme Court of the United States to please go over this material. Petitioner is sure he missed a lot, but did the best he could. Petitioner could have used a professional attorney to help him go over all these legal issues.

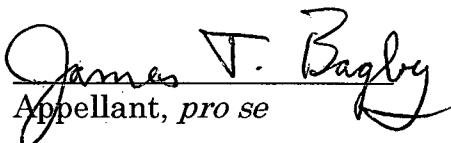
Date: November 2, 2018

Respectfully Submitted,


James T. Bagby/Petitioner, *pro se*

WORD COUNT CERTIFICATE

I verify that this Petition contains no more than 4,200 words, and I verify that this Petition contains 2,531 (actual number) words.


James T. Bagby
Appellant, *pro se*