

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN SIMMONS - PETITIONER

vs.

SUPERINTENDENT CAPRA - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS

(NAME OF COURT THAT LAST RULE ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brian Simmons

(Your Name)

354 Hunter Street

(Address)

Ossining, New York 10562

(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

Questions Presented

- 1) Whether, petitioner's justification defense was lost amongst the volume of prosecutors use of false or perjured testimonies that went uncorrected.
- 2) Whether, the redacted Police Narrative Report #3 violated the petitioner's Due Process of Law.
- 3) Whether, counsel's failure to inform the Court of Peoples failure to disclose material evidence, that was the alleged victim excuse for being shot, denied defendants due process right to a fair and impartial trial.
- 4) Whether, counsel's failure to investigate, and correct prejudicial testimony amounted to egregious ineffective assistance of counsel.
- 5) Whether, the Second Circuit failed to conduct the sort of "careful examination" required to establish that prior judicial review was not considerate to pro se litigant arguments briefed.
- 6) Whether, prosecutorial misconduct described violated petitioner's due process of law.
- 7) Whether, clearly exposed solicitations of perjured testimony constitute Fraud on the Court.

LIST OF PARTIES

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:

Brian Simmons,
Petitioner - Appellant,

v.

Superintendent,
Respondent - Appellee,
The People of The State of New York,
Respondent.

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STATUES AND RULES

18 U.S.C. §1622. Subornation of perjury, or disciplinary sanctions, see N.Y. Com. Codes R. & Regs. tit 1200, §33(a)(6) (2000) (DT7-102(a)(6)).

§2870 Fraud on the Court.

28 U.S.C.A. §2106

Fed. Rule 60(b)(d)

Solicited perjury knowingly: Under Fed. Rule Crim. Proc.

585 Grounds- Newly Discovered Evid.-False testimony

OTHER

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RECANTATIONS RECONSIDERED:A NEW FRAMEWORK FOR RIGHTING
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#ILRP15074 10 Cardozo Pub.L.Pol'y and Ethics J. 469(2012),

Guilty Until Proven Innocent:Providing effective Relief to the
actually innocent in N.Y.

#ILRP16393 Wyoming Law Review/15 Wyo.L.Rev. 139*(2015)

Brady Violations:An In-Depth look at"Higher Standard" Sanctions
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#ILRP16390 68 Ark.L.Rev. 1011 (2016)

Brady Misconduct Remedies:Prior Jeopardy and Ethical Discipline
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#ILRP17802 Reporter Case W. Res. 531*(2007)

LITIGATING BRADY v. THE BRADY RULE IN THE MODERN CRIMINAL JUSTICE
SYSTEM: Litigating Brady v. Maryland: Games Prosecutors Play

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTORARI

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 A to the petition and is

reported at NA; 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 B to the petition and is

reported at N.D. 2017 WL 4997735 Slip Copy; 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 C to the petition and is

reported at 22 NY 3d 1203/9 NE 3d 918; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the N.Y.S. 3d A.D. court appears at Appendix D to the petition and is

reported at 111 A.D.3d 975 / 974 NYS 2d 185; 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 05/31/2018.

[] 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: 08/01/2018, and a copy of the order denying rehearing appears at Appendix E.

[] 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. § 1254(1).

[X] For cases from state courts:

The date on which the highest state court decided my case was 04/14/2014. A copy of that decision appears at Appendix G.

[] 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

("AEDPA") Act of 1996. Pub.L. NO. 104-132, 110 Stat. 1214 (1996)

28 U.S.C. § 2254(b)(1)

28 U.S.C. § 2254(d)

28 U.S.C. § 2254(e)(1)

28 U.S.C. § 2253(c)

United States Const. Amends., V, VI, & XIV.

N.Y. Const. Amends. Art. 1, § 5, 6, & 14.

Penal Law § 120.10(1)&(3)

Penal Law § 120.05(4)

CPL § 240.10

CPL § 240.20

CPL § 240.45

CPL § 470.05

Statement of the Case

In the early a.m. of December 9, 2009, this petitioner shot a man who had forced his way into his home, after two days prior had threaten to kill him. Stating that he and his friends had killed people before and nobody was going to find their bodys. His wife was going to call the local police, and this petitioner stopped her and told her to just get her niece out of there home as soon as possible. The nice had moved in to take a job at the local Stewart's corner store. A job that petitioner and his wife had been promised by the store manager. After moving in, the niece Erica Barrett, refused to take the job and 6 weeks after this petitioner told her she had to go she was no longer welcome. Barrett with her Aunt Penny and Grandmother begged for reprieve, which was granted so long as she took a job somewhere. Six weeks later this petitioner approached Barrett and told her she was no longer welcome, and had seven days to figure it out. After this conversation he told his wife what occured, and that the dog went for a run, please do listen for him. At this point in time it was 11:30 p.m. and they were laying in bed. At about 12:30 a.m. Barrett entered the bedroom telling her aunt that Winkler was on his way and she was leaving. Mrs. Simmons told Barrett she had to call her mother before this happened as she felt responsible for her wellbeing. Petitioner and his wife got out of bed. Penny called Barrett's mother to come and get her, intermittently arguing with Barrett about her choice, that this petitioner did'nt care one way or the other how she left, told his wife to just let her go if she wants to leave like this, just get the key. Barrett hearing this slapped her house key in the

petitioner's hand, and was returning to the door unlocking it, that allowed Winkler to force his way into dwelling, and attacking Mrs. Simmons causing her 911 connection to be disconnected. Evidence the jury never heard. Winkler called 911, 38 seconds after Simmons call was disconnected. Not 5 min. after as Winkler testified to. In summation the prosecutor made claim that petitioner said it was a long drawn out event, when she knew or should have known it was false.

Winkler's sworn answers to INTERROGATORIES, expose subornation of perjured testimony, that Barrett fabricated an altercation, that counsel's ineffective assistance was egregious, to due process on both issues when Winkler made Claim to being able to see a heated altercation from his car was impossible, and if exposed as to being a fraud on the Court, would have shown that Barrett's and Winkler's credibility was grossly lacking in credibility, and that the prosecutor knew or should have known that she was guilty of fraud on the court.

Dr.Bonville's 2016 testimony exposes the prosecutor knew or should have known that she was soliciting perjured testimony from first responders, Officer Girard and EMT Secko, a protracted injury.

The REDACTED Police Narrative Report is a BRADY violation, entered into evidence as Court Exhibit "A". Document was received late, and not properly, to be effectively used, denied Due Process of Law.

Winkler's claiming that the "Only thing he thought about was defendant had shot somebody again", was totally prejudicial, and caused this petitioner to be denied his Due Process of Law, when it went uncorrected was egregious on all accounts, being Prosecutorial misconduct, and ineffective assistance of counsel.

Reasons for Granting Petition

Prosecutors use of false or perjured testimony. See, Thomas v. City of Troy, 293 F.Supp.3d 282 United States Dist.Court, N.D. N.Y.(2018) Fabrication of evidence constitutes a violation of a right to a fair trial. See, Zahrey v. Coffee, 221 F.3d 342,335(2d Cir.2000). A prosecutor who knowingly uses false evidence at trial to obtain a conviction, acts unconstitutionally. See, Napue v. Illinois, 360 U.S. 264,269,79 S.Ct.1173,3 L.Ed.2d 1217(1959); Pyle v.Kansas, 317 U.S. 213,216,63 S.Ct.1778,87 L.Ed. 214(1942); Mooney v. Holohan, 294 U.S. 103,112, 55 S.Ct. 340,79 L.Ed. 791(1936). Although a prosecutor is protected by absolute immunity for his/her actions in presenting evidence at trial, see, Imbler, 424 U.S. at 431,96 S.Ct. 984, these cases serve to inform every prosecutor that his/her knowing use of false evidence is unconstitutional. In petitioner's case, during jury selection in preperation for trial, prosecutor suggested a prior shooting still being investigated without findings, planted the seed that petitioner had shot someone prior. When Winkler blurt'ed out his fear of petitioner "shooting somebody again" did zealously allow it to prejudice defendant while defense counsel staring out of court room windows did nothing to counter its effect, while presiding Justice and thirteen jurors were focused upon defendant for a reaction, and dismissed by the five appellate Justices who affirmed, contrary to appellants claim, he was "otherwise harmed" by such conduct. That his counsel was ineffective, and defendant was denied due process by his failing to Object! STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984) When an appellant claims that the prosecutor falsified evidence, it is difficult to fathom why securing such a fraudulent determination

of probable cause transmogrifies unprotected conduct into protected conduct. Appellant constitutional right was violated when the prosecutor, in its investigative role, fabricates evidence that resulted in a deprivation of liberty, suborned perjured testimonies that Winkler (could see from his car)(turned in doorway fleeing) arm up (protracted injury) prior to her soliciting a (baseball size) or (fist size hole) in Winklers chest cavity, that the prosecutor's two first responders had sworn to being able to see into the chest, and prosecutor knew or should have known were false claims, and, allowed them to go uncorrected. Now shown to be false through discovery in the lower County Court through testimony. The prosecutor did knowingly violate her duty to tell the truth, and duty not to impede the truth. See, Berger v. United States, 295 U.S. 78,79,88,(1935). (No hole)

When a prosecutor soliciting false evidence, allows it to go uncorrected when it appears. "Only thing I thought about is he shot somebody again" and trial counsel, prosecutor, and appellate counsel failed to correct fabricated evidence. cf. Napue v. Ill.,360 U.S. 264. In People v. Savvides, 1 N.Y.2d 554,557, a lie is a lie, no matter what its subject, and, if it is in any way relevant to the case the district attorney has the responsibility and a duty to correct what he/she knows to be false and elicit the truth. cf. Drake v. Portuondo, 553 F.3d 230,(2d Cir.2009), (failure to correct false testimony). The prosecutor knew or should have known, that ("Barretts Tr.p.1095-96 asking, SR 292, followed by, a fabricated altercation on the stairs") not corrected caused undue prejudice in lower Courts finding, without any recognition of Barrett's (GJ.PP.72,73) SR 290-291. Which was her honest recollection of occurrences, before prosecutors corruption had

violated constitutional due process to a fair and impartial trial.

Use of perjured testimony was harmful. U.S.C.A. Const. Amend. 14.

Doctor Bonville testified during INQUEST ON DAMAGES, May 6, 2016, that there was no hole in Winkler's chest cavity, or rib cage, that clearly contradicted any testimony that there was a hole in the chest that anyone could see into. Index 2010-2470, see WINKLER v. SIMMONS, supra. He also testified that he documented that there was no powder burns to Winkler's outer bicep and, he did not remove any shots from Winklers chest or torso, which totally contradict what the prosecutor solicited from the two first responders, Officer Girard and EMT Jen Secko, that caused the petitioner undue prejudice and denied his constitutional right to a fair and impartial trial, causing a manifest injustice. See, Tr. pp. 813-14 and 915-16

BRADY VIOLATION

The Supreme Court held in Strickland v. Washington, 466 U.S. 97, (1984) that the prosecutor violates right to effective assistance of counsel when it interfered in certain ways with the ability of counsel to make independent decisions about how to conduct defense. See, redacted narrative police report. If there is a significant chance that the withheld evidence developed by skilled counsel, would have induced a reasonable doubt in enough jurors minds to avoid a conviction, then the judgment of conviction must be set aside. cf. U.S. v. Agrus, 427 U.S. 97. The redacted fabrication, in question, affected how police responded, first and foremost, believing Winkler was the victim, did infect the entire trial process, without ever considering whether the appellant/petitioner was the true victim.

Winkler's fabricated interruption in Oficer Girard's taking of Barrett's statement, was Winkler's successful attempt to derail the facts, and very likely why the prosecutor was able to get Officer Girard and EMT Secko to help her secure a conviction, with their exaggerated discriptions of being able to see into Winkler's chest cavity, to obtain fraudulent fears in the thirteen jurors mind, and to support Winkler's fabrication, that he was turned in the open doorway and fleeing to be shot in his chest, under his raised arm, after 5 minutes inside Simmons' home. 18 U.S.C., §1622. Suborned Perjury

In Brady v Maryland, 373 U.S. 83,(1963), the principal of Mooney v.Holohan, is not punishment of society for misdeeds of a prosecutor but the avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair, our system of the administration of justice suffers when an accused is treated unfairly. id. at The Redacted document was Marked Court Exhibit 'A'. See, Cone v. Bell, 566 U.S. 449,129 S.Ct.1769,173 L.Ed.2d 701, (duty to allow a fair trial), Berger, 295 U.S. at 88, 55 S.Ct. 629. Accordingly, we have held that when the State withholds from a criminal defendant evidence that is material to his innocence or freedom, it violates his right to due process of law in violation of the fourteenth Amendment. See, Brady, 373 U.S. at 87, 83 S.Ct. 1194. In United States v. Bagley, 473 U.S. 667,682, 105 S.Ct. 3375, 87 L.Ed.2d 481(1985)(Opinion of Blackmun,J.), we explained that evidence is "material" of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable

evidence is subject to constitutionally mandated disclosure when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); accord, Banks v. Dretke, 540 U.S. 668, 698-699, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); Strickler v. Green, 527 U.S. 263, 290, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). See, (Tr. pp. 824, 825) U.S. Const. Amends. 5, 6, & 14.

Document unredacted should have been used to show petitioner was innocent of any crime, and if shown to the jury they would more likely than not see through the fraudulent interruption, and no reasonable juror would find petitioner guilty beyond a reasonable doubt. Rivas v. Fisher, 687 F.3d 51 (2012), or remove the doubt negative, that more likely than not any reasonable juror would have reasonable doubt, House v. Bell, 547 U.S. at 538, 126 S.Ct. 2064.

That no hole in side of chest to support his fraudulent claim of fleeing when shot, and a hole being purposely solicited from the first responders to support prosecutor's *prima facia* theory with prejudicial purjured testimonies knowingly. See, (Tr. pp. 814, 915-16)

The Court said it must "consider 'all the evidence' old and new, incriminating and exculpatory, with regard whether it would find any fundamental miscarriage of justice. Is innocence irrelevant? What would properly instructed jurors do." *id.* at 538, 126 S.Ct. 2064.

After years of being wrongfully convicted for a fabricated gun crime, and conviction laced with inappropriate sexual harassment, being perpetrated through blatant fraud upon the Court.

The Court's function is not to make an independant factual determination about what likely occured, but rather to access the likely impact of the evidence on reasonable jurors. See,(GJ.p.107)

See, Fraud on the Court.§2870. A federal court inherent power to investigate whether a judgment was obtained by fraud. Universal Oil Products Co., v. Root Refining Co.,328 U.S. 575 (1946). The redacted police report, raises questions as to why the prosecutor during Grand Jury testimony, instructed Officer Girard to avoid the document content, and is a reasonable probability as to why Girard and EMT Secko lied, and defense counsel balked at the site of the redaction, and only entered document into evidence as Court Exhibit "A". The content was withheld from the grand jury (p.107), and what effect this had on the trial as a whole is deserving of a hearing, to evaluate whether petitioner was justified in his shooting an unwanted intruder 1:00 a.m. December 8,2009.

Petitioner's claims of fraud on the court are deserving of and require a full hearing to address any and all evidence which it now has, new or otherwise, concerning charges of suborned perjury, fraud and immunity. U.S. v. Shotwell Mfg. Co.,355 U.S. 233, 78 S.Ct. 245, 2 L.Ed.2d 234 (1957). 28 U.S.C.A. §2106.

The redaction also calls into question the accuracy of the determination of petitioner's guilt, and its being a miscarriage of justice. See, Murray v. Carrier, 477 U.S. 478,(1986), the trial courts analysis was severly flawed, and petitioner denied "fundamental fairness at trial, and resulted in a conviction of one who is actually innocent, and justified in his shooting Winkler.

Petitioner's claim he has made a "credible and compelling" showing of actual innocence, based on Dr.Bonville's (2016)-Testimony that is also supporting his prosecutorial misconduct claim, see, Com. of Northern Mariana Islands v. Bowie, 236 F.3d 1083(2001). His claim here is based on new information not presented to the jury that dramatically undermines the central forensic evidence linking him to the crime of which he was convicted. There was no hole in Winkler's side or ribs cage to support his fleeing when shot by this petitioner, in protecting his wife and dwelling from an unwanted intruder, (30 seconds) after his forceful entry. That now reveal the lower Court's determinations were erroneous in denial of several harmful constitutional errors, that renders his current confinement unlawful. See, Rivas v. Fisher, 687 F.3d 514,(2012), and first responder Girard (Tr.pp.814,824-825) & EMT (915-916).

Deliberate deception of a court and jurors by presentation of known false evidence is incompatible with rudimentary demands of justice. Giglio v. U.S., 405 U.S. 150,92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Winkler's sworn submissions to INTERROGATORIES exposes the deliberate deception of his being able to see heated altercation from his car, was impossible, *id.* at answers 4 & 27. His answer to question 11 expose Barrett's fabricated altercation on the stairs, followed by calling Winkler after seeing his car pull away from the Simmons' home (Tr.p.1095) asking, was also a concocted fabrication to deceive the court and jurors, that the lower Court's finding no prosecutorial conduct, is a erroneous determination to discredit petitioner's finding that the prosecutor knew or should have known

were lies to prejudice his defense, and that the jury should have found petitioner's, and his wife testimony more credible, than Winkler and Barrett, but they were unknowingly deceived.

See, Simmons v. Superintendent, 2017 WL 4997735

In the instant case of People v. Simmons, 974 N.Y.S.2d at 981, was a erroneous finding where the lower Courts have found Winkler's deliberately placed fabrication with out objection did not cause this petitioner undue prejudice, was incorrect. It violated his Due Process under the, U.S.C.A. Const. Amends. 5,6 and 14. Where it caused Justice Hoye to lean forward onto her elbows, and for the prosecutor to place her hands on her hips and with a disgusting gleam, turn and stare at jurors, and then turnabout and stare at the defendant, with all (13) jurors following in that order, glaring too for a reaction from this petitioner, while his counsel stayed staring outside, and Winkler placed a smirk toward his family. id. Trial Tr. at p. 864.

Thus, the Appellate Division 'did not' accurately describe Winkler's testimony where it stated that "immediately after this shooting he thought, incorrectly, that the defendant had also shot one of the others and fled with Barrett." Ineffective counsel claim was meritable.

Petitioner, prays for and beg for the Courts indulgence in the interest of justice, and set aside or reverse this conviction.

Respectfully submitted,

DATE: 10/29/2018



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Simmons

Date: 10 / 29 / 2018