No. 18-9066

IN THE

SUPREME COURT OF THE UNITED STATES

PETER ROJAS
"pro se" PETITIONER

VS.

SCI FAYETTE, SUPERINTENDENT, et.al.
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES THIRD CIRCUIT COURT OF APPEALS

Peter Rojas KB 4917

SCI Forest

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QUESTION(S) PRESENTED

Where the State Court conducted a hearing and the party was "denied due process of law in the proceeding", does 42 U.S.C. § 2254 (e) obviate the need for federal hearing on undeveloped facts?

Does the THIRD CIRCUIT DISTRICT COURT'S decision, not to grant a hearing, conflicts between subsequent decisions of Federal Courts of Appeals and the SUPREME COURT?

PARTIES OF THE PROCEDING

The petitioner in this case is Peter Rojas, pro se.

All of the respondents are Mark Capozza, SCI Fayette's Superintendent and Christine F. Muphy, Esq. for respondent.

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The decision of the UNITED STATES THIRD CIRCUIT COURT OF APPEALS denying "Rehearing" is unpublished, (App. 1a-2a). The decision of the COURT OF APPEALS denying "Certificaye Of Appealability" is unpublished, (App. 3a-4a). The opinion of the UNITED STATES DISTRICT COURT adopting the "Magistrate's Report & Recommendation" is reported at, Peter B. Rojas v. Mark Capozza, 2018 U.S. Dist. Lexis 76429, (App. 5a-7a). The Magitrate's "Report & Recommendation" is reported at, Peter B. Rojas v. Mark Capozza, 2017 U.S. Dist. Lexis 193474, (App. 8a-39a). The opinion of the Pennsylvaia Superior Court affirming the lower court's decision is unpublished, (App. 40a-51a). The opinion of the PCRA Court denying relief is unpublished, (App. 52a-70a).

JURISDICTION

On November 19, 2018, the United States court of Appeals denied a timely petition for rehearing en banc and the petition for rehearing by the panel and a copy of the order appears at (Appendix 1a-2a). On October 15, 2018 the court of Appeals enied the petition for a Certificate Of Appealability and a copy of the order appears at (Appendix B 3a-4a).

An extension of time to file the petition for a writ if certiorari was granted to and including April 18, 2019 on Feb. 22, 2019 in Application No. 18A852.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves United States Constitution Amendment, **V** ; **VI** & **IVX** which provides:

Amendment V: No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.... nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to.... be informed of the nature and cause of the accusation; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.

Amendment IVX: ***Section 1.*** All persons born and naturalized in the United States, and subjected to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5: The congress shall have power to enforce, by appropiate legislation, the provisions of this article...

This case involves Statutory Provision **28 U.S.C. §2254:**

In 1976 and 1977, respectively, the Court and Congress reaffirmed the importance and availability of evidentiary hearings on potentially meritorious federal habeas corpus claims when the former promulgated, and the latter adopted, *Rule 8* of the *Rules Governing Section 2254* cases in the United States District Courts. The advisory Committee notes to *Rule 8* identify *Townsend* as authoritative on the question of when habeas corpus hearings are available and when they are required.

STATEMENT OF THE CASE

This due process violation clause case arose when the procecution improperly suppressed pertinent evidence [Key testimony] during the trial and PCRA hearing stage where petitioner raised a violation of *Miranda v. Arizona, 384 U.S. 436 (1966)* occurred and where trial counsel's performance did not fall under the basis of an objectively reasonable tactical decision under *Strickland v. Washington, 466 U.S. 668 (1986).*

Further due process violation clause occurred when the PCRA judge engaged in misconduct. At the hearing PCRA counsel, Teri B. Himebaugh, attempted to conduct a direct examination of trial counsel's performance. However, this was not permitted by the judge therefore denying petitioner a fair and full hearing. None the less the court then used petitioner's failure to develope evidentiary support to render her determination for denying relief.

1.Background:

On May 29, 2009, Peter Rojas [Petitioner] was charged with Criminal Homicide and Robbery. Prior to being charged, on May 28, 2009 Rojas arrived at the Pennsylvania Allentown Police Department to report that he had been the victim of a robbery and had stabbed the robber in self-defense. The police, who was already investigating a homicide, collected informations from Rojas. Officer Berger who was at the front desk that afternoon notified the homicide detectives of Rojas and together engaged in the eliciting of incriminating statements under the guise of investigating the robbery without affording Rojas the benifits of the *Miranda* warnings. (N.T. 10/27/09 pp 37-44).

After Officer Berger finished gathering facts for his report he then handed Rojas to the detectives for continue interrogation who then brought Rojas to a room. When Detective Collins began reading the *Miranda* warnings, Rojas then interrupted and asked what did that ment. Did it ment he was arrested and he needed to get a lawyer. The detective appeared nervous, stoped the recording and told Rojas that *Miranda* was just a formality. He then errased the interruption by rewounding the tape and recording a second readind of the Miranda over it . (N.T. 10/27/09 pp 25).

After a Pre-liminary hearing the case was bound for trial and on October 27, 2009 a Pre-trial hearing was held where Rojas raised the *Miranda* violation. John Baurkot, Esq. from the Public Defenders Association represented Rojas.

Subsequently counsel filed Omnibus Pre-trial motion and on June 6, 2010 the motion was denied. Rojas then filed a "pro se" "Notarized Affidavit" on September 15, 2010 giving explicit details of the circumstances of the *Miranda* violation in case he would need it for appeal purposes.

On March 1, 2011 counsel filed a Motion In Limine and after a hearing the motion was denied. On March 24, 2011 the jury returned a verdict of guilty and on May 13, 2011 Rojas was sentenced to life imprisonment for second degree murder and 10-20 years for the robbery charge.

Following sentencing a Post-Sentence Motion was filed by court appointed counsel Kimberly F. Makoul, Esq. where the robbery sentence was vacated for merger. A direct appeal was also filed raising claims of sufficiency and weight of the evidence and a Brady violation where the prosecution withheld various videos favorable to the defense. The Superior Court affirmed and the Supreme Court of Pennsylvania denied allocatur.

Rojas then filed a timely prose Motion for Post Conviction DNA Testing and on December 3, 2013 the court denied it. Rojas also filed his initial PCRA Motion where among thirteen claims he raised the *"Miranda violation and counsel's failure to move to suppress the confesion"* and *"counsel's failure to properly argue the motion in limine".* Newly retained PCRA counsel, Teri B. Himebaugh, Esq., filed an amended motion where she raised a *"Pre-Miranda violation claim"* and *"counsel's failure to properly argue the motion in limine".*

After an evidentiary hearing held on March 20, 2015, on August 17, 2015 the court denied relief,(App. 52a-70a). On April 28, 2017 the Superior court of Pennsylvania affirmed,(App. 40a-51a).

On August 3, 2017 Rojas filed a timely pro se Writ of Habeas Corpus Petition with the Eastern District Court of Pennsylvania along with a motion for Discovery. On November 21, 2017 Magistrate Thomas J. Rueter filed a Report & Recommendation denying the writ.(App. 8a-39a), unpublished. Following the filing of an "Objection", the United States District Court adopted the R&R and denied the writ on May 7, 2018.(App. 5a-7a). Reported at: (Rojas v. Capozza, 2018 U.S. Dist. Lexis 76429). A timely application for Certificate Of Appealability was filed followed by a Supplemental and a second Supplemental and on October 15, 2018 Theodore A. Mckee, J. for the United States Court of appeals for the THIRD CIRCUIT denied the application.(App. 3a-4a). Unpublished. On November 19, 2018 the court also denied a Petition for Rehearing.(App. 1a-2a).

2. Due Process Clause

On may 28, 2009, Rojas arrived at the Allentown Police Depatment to report he had been the victim of a robbery. Micheal Martin accompanied Rojas to the station.

Working at the front desk was Officer Berger who buzzed the door open in order for Rojas to enter the lobby. Once the officer obtained information about the robbery and of the area, he intensified his line of questioning since opon his arrival to the station, he recently learned a homicide was being investigated. (N.T. 10/27/09 pp.38).

The officer did not have sufficient details of the homicide to continue with his line of questionings therefore he decided to communicate with the investigating detectives. (N.T. 10/27/09 pp.39). Officer Berger then returned with a more intense line of quetionings and elicited incriminating statements. As if that was not enough Berger then went back inside, communicate with the detectives, emerged back out into the lobby, further intensified the questions and elicited more incriminating responses. (N.T. 10/27/09 pp.40).

Each time the officer emerged the questionings became more and more aggressive as well as hostile in nature to which this made Rojas nervous. (Supplemental offense Police Report 6/3/09). Mr. Martin, who wrote an affidavit, witnessed Berger interrogate Rojas. (Affidavit 12/16/15). And opon the conclusion of collecting all he needed for his report he then turned Rojas over to the detectives. Miranda warnings was not given. (N.T. 10/27/09 pp 40.).

Tallarico, Collins and Millan were the homicide detectives to whom Rojas was handed over to and from whom Berger obtained details of the homicide and what questions to ask Rojas. (N.T. 10/27/09 pp.20-21). Once inside the interrogation room Detective Collins began reading the Miranda warnings. At a point Rojas interrupted the reading and asked if that ment he was under arrest and needed to get a lawyer. Collins immediately got nervous, stoped the recording and told Rojas the reading was just a formality. (N.T. 10/27/09 pp.25). Rojas then waived his rights when a second reading was being recorded over the initial interruption.

On October 27, 2009 a pre-trial hearing was held. There,detective Tallarico testified to having been the lead detective of the homicide investigation,he also testified as to the *post-miranda* interrogation. (N.T. 10/27/09 pp.20-35). There, the witness was questioned as to Rojas' allegation of a *miranda* violation ever occurred, which he denied it ever happened. Tallarico's testimony was misleading when he answered:

Q: Did anyone have any conversation prior to entering the interview room with the defendant? A: I believe we had a conversation with him, not regarding the incident, just his name, where he lived, if he needed a soda, if he needed to use the bathroom before we sat down and discussed what happened. Q: And once you entered the interview room, did you ask him any questions that were not on tape relevant to the incident? A: Not relative to the incident, no. Q: Did you provide him with any advice regarding Miranda prior to taping - - A: No. (N.T. 10/27/09 pp.21-22).

This is belied by the fact that Officer Berger had interrogated Rojas, prior to the interrogation in the interview room, and that the detectives partook in the *pre-miranda* interrogation.

Tallarico further gave misleading testimony when he testified:

Q: At any time during the course of the interview did he indicate to you that he wanted an attorney? A: No, he didn't. Q: At any time during the course of the interview, did any detective state to him that *Miranda* was merely a formality, that he did not need a lawyer present? A: No. (N.T. 10/27/09 pp.25).

Rojas did not have any evidence with what to rebut the detective's testimony nor with what to prove the violation did occurred. Rojas implored with his counsel to request the original tape recorded be subjected to testings by an audio expert for signs of tampering to no avail.

After Omnibus Pre-trial Motion was denied. On September 15, 2010 Rojas filed a "Notarized 'Pro Se' Affidavit" narrating every detail and actions given by the detectives when they violated the *miranda* rights. Rojas described the following details:

(2) At about 2:55PM defendant was being read the miranda warnings when defendant abroptly interrupted the reading, by Detective Collins, making an ambiguous statement and asking a question. The statement was: "Wait [does] this means that i'm under arrest? Do I have to get a lawyer?" Immediately detective Collins became some what disarrayed and nerveous then he proceeded to give the defendant a degradating definition of the miranda. Detective Collins' definition was: "This is just a procedure, I have to read this, then you have to sign consenting that I read it to you in order for us to be able to talk to you". Detective collins then stoped the tape recording [rewound] the tape then started recording over what he first recorded therefore concealing defendant's questions and his degradating definition of the miranda with the reading of the miranda for a second time. The defendant then fully trusted the detective thertefore waving his rights based on the definition that detective Collins gave him. Therefore realizing, later after investigating, that defendant had unknowingly and involuntarily waived his rights. (Afft. 9/15/10 pp.2-3).

Rojas, feeling being in a helpless position made an attempt to preserve the claim (to the best of his ability) and its integrity by filing the affidavit with the court:

(12) Please accept this affidavit as a document to refer to if needed be to support defendant's defense when and if defendant's attorney or trial judge prevents him from raising <u>all issues</u> mentioned (but not limitted) to in pre-trial, trial stage or appeal. (Afft. 9/15/10 pp.7) ("Notarial Seal" at pp.8).

Attorney Baurkot did not conduct any investigation on the matter. Discovery materials were then produced by District Attorney Tonya Tharp where the only evidence pertaining to the interrogation was a copy of the recorded tape. On March 1, 2011, before trial, counsel filed a Motion In Limine. The motion requesting the defense be permitted to introduce: (1) record from the Department of Public Welfare Records and (2) questionaire from the Allentown Rescue Mission of the victim (Mark Holdren) who answered the questions. (N.T. 3/3/11 pp. 31-32).

However counsel was entirely unprepared to present meaningful argument. The evidence shows the victim had a history of drug abuse, untreated psychiatric issues and suicidal tendancies. However, counsel opted to argue the evidence was "relevant" because the victim had no money. (N.T. 3/3/11 pp. 32-35). None the less the motion was denied.

On March 20, 2015 a PCRA Hearing was held. Various claims were raised. Among the raised claims was: (1) counsel failed to effectively cross-examine witness [Officer Berger] and argue the pre-trial motion to suppress; and (2) counsel failed to properly prepare for and effectively argue the victim's Access Welfare Record and Rescue Mission Records were admissible.

At the hearing counsel admitted that he likely had officer Berger's 6/3/09 "Supplemental Offense Report" prior to the arguement for suppression. ((P1) (N.T. 3/20/15 pp.23)). However, counsel was under the mistaken belief that his only focus in a suppression hearing challenging an officer's failure to *Mirandize* a suspect was the defendant's state of mind - whether he thought he was free to leave or not. (N.T. 3/20/15 pp.29).

Mr. Baurkot testified he knew, at the time to argue the suppression motion, that it was Officer Berger telling the homicide detectives about the admissions he elicited from Rojas which directly led the detectives to place Rojas in an interview room, *mirandize* and interrogate him as a suspect. (N.T. 3/20/15 pp.32). That Rojas was not allow to leave. (N.T. 3/20/15 pp 27).

After the above was placed on the record, demonstrating counsel's performance fell bellow the reasonable tactical decision required under *Strickland v. Washington, 466 US 688 (1986),* the court in its opinion gave the following to justify denyle of relief:

> Upon review of the totality of the circumstances surrounding the petitioner's interaction with Officer Berger, we do not believe that the officer was required to issue *Miranda* warnings. The Petitioner, of his own accord, appeared at the police station to report that he was the victim of a robbery. Officer Berger initially dealt with the Petitioner as a victim and allowed the Petitioner to tell him his version of the events in question. When Officer Berger eventually came to suspect that the Petitioner knew more about the homicide on Jute street, he confirmed the information he had been given and contacted detectives to further the homicide investigation. As the officer's actions did not form the basis of a successful suppression motion, and further cross-examination of Officer Berger would not have yielded a different outcome, we do not find that trial counsel's failure to file a suppression motion "prejudiced the outcome of the case." Therefore, trial counsel did not render ineffective assistance of counsel. Opinion 8/17/15 pp14. (Appx. "F" 65a).

From the above we can see that the court chose to overlook at counsel's testimony and make their determination based on an analysis used to determine Police failure to administer *Miranda* warnings. Of course, this analysis is applicable, however the inquiry was whether counsel's performance fell below the reasonableness standard under *Strickland* and without a full and complete inquiry of counsel's examination Petitioner is prevented from developing the record.

From the opinion above, we can clearly concluded that the court favored aiding counsel's rationales which he failed and refused to testify to with conviniently not remembering. Evidently the court had already made their mind-up in not rendering a full and fair hearing to Petitioner nor an impartial determination. (N.T. 3/20/15 pp. 25-30).

Further, when Ms. Himebaugh began the examination of Mr. Baurkot's tactical and stratigical reasons for his failure to make the proper argument to have the motion in limine granted, counsel was found on the record, to have had the incorrect beliefs.

Baurkot believed that in order for the documents to be admitted into evidence it was sufficient for him to only assert that the documents were relevant. (N.T. 3/20/15 pp.34-35).

As PCRA counsel attempted to examing Baurkot's Knowledge of the Pennsylvania Rules of Evidence ("rules that any attorney with so many years of practice as Mr. Baurkot should be very familiar with") and his understanding of the Rules, the court abruptly stoped the proceeding. Violated Petitioner's Right to due process under the U.S. Constitution and the Pennsylvania Constitution when they did not permitted Ms. Himebaugh to fully question Baurkot. The court took offense at the questionings and interrupted in the following manner:

> THE COURT: You know, Ms. Himebaugh, I have to say -- I guess I can't say what I really want to say , but just because something is a business record does not mean it gets in. And it's nice to yank Mr. Baurkot's chain about whether or not he knows the specific Rules of Evidence by number. .... But, I mean, when he says, you know, he would have attempted to do it because it was relevant, that's probably the better answer.... And rather than sort of make a fool of him by pulling these numbers out, could we get back to the matter at hand? Ms. HIMEBAUGH: That was never my intention, Your Honor, to try to make a fool of him . I appologize for-- THE COURT: I'm telling you I'm sitting up here squirming. Thank you. Ms. HIMEBAUGH: I'm sorry. I had no intention to do that. I'm simply trying to make sure that I represent my client zealously. (N.T. 3/20/15 pp.35-36).

The court went on to now question Ms. Himebaugh, in a retaliative manner, in order to offend her:

> THE COURT: Go ahead. Well, I just have to ask, Ms. Himebaugh, are you-- you're private counsel. Ms. HIMEBAUGH: Appellate. THE COURT: Have you ever tried a homicide case? Ms. HIMEBAUGH: If I tried homicide cases, I couldn't do the appellate work, Your Honor. One can't call one self ineffective. One can't appeal one's own failure to-- THE COURT: No. I just mean-- Ms. HIMEBAUGH: So no. It's pretty much precluded. It's either one or the other. Ms. GALLAGER: Well, objection, Your Honor. I mean, because I am appellate counsel and-- THE COURT: No. In your career you could have tried cases and then gone on to be appellate counsel, so I'm just trying to establish your point of view. (N.T. 3/20/15 pp.36-37).

The court clearly expressed not being impartial. It deprived Rojas of a meaningful, fair and full hearing. None the less, despite the above, the Federal Courts deferred to the State Court's findings and denied Rojas request for relief.

REASONS FOR GRANTING THE WRIT

In *Townsend v. Sain, 372 US 293 (1963)* the Supreme Court reversed the District Court's dismissal of a habeas corpus petition because the lower court improperly had refused to hold an evidentiary hearing on the petition. Chief Justice Warren's opinion for the court identified a strong federal policy favoring hearings, or at least equally sufficient fact-development and fact-resolution procedures, because "detention... obtained [in violation of the constitution] is intolerable" and

because "the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed". *id at 312, 322(citing Frank v. Mangum, 237 U.S. at 345-50 (Holmes, J... dissenting).*

Then, in 1976 and 1977, respectively, the Court and Congress reaffirmed the importance and availability of evidentiary hearings on pontentially meritorious federal habeas corpus claims when the former promulgated, and the latter adopted, *Rule 8* of the Rules Governing Section *2254* Cases in the United States District Courts. *see Rule 8(a)* of the Rules Governing Section *2254* Cases in the United States District Courts *(2005)* (" if the petition is not dismissed, the judge must review the answer, any transcripts and records of the state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted").

In 1992 and 1996, however, the Court and the Congress tempered somewhat their emphatic endorsement of habeas corpus hearings. In its closely divided 1992 decision in *Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992),* the court limited mandatory (but not discretionary) hearings to facts that were not previously the subject of a "full and fair" hearing in the state courts for reasons beyond the control of the habeas corpus petitioner or his attorney.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). AEDPA altered hebeas corpus proceedings by narrowing yet further the right to an evidentiary hearing in the situation the court previously had addressed in *Tamayo-Reyes*. Under AEDPA, a petitioner who is to blame for failing to develop the facts in state court may not do so by evidentiary hearing in federal court unless the petitioner satisfies the statute's stringent "cause and innocence" standards. In other respects, however, the pre existing standards remain in effect. Even after AEDPA, that is, *Townsend's* mandatory -hearing standards- and its delegation to district courts of broad discretion to hold evidentiary hearings that are not mandated- continues to govern all situations save those in which the petitioner's procedural default accounts for the states court's failure to develop the material facts.

Under the statutes, rules and caselaws discussed above, federal habeas corpus hearings are required if three conditions are met-(1) the petition alleges facts that, if proved, entittled the petitioner to relief; (2)the fact-based claims survive summary dismissal because their factual allegations are not "'palpably incredible' [or] 'patently frivolous or false'" - the standard for

summary dismissal in habeas corpus proceedings, and (3) for reasons beyond the control of the petitioner and his lawyer, the factual claims were not previously the subject of a "full and fair" hearing in the state court factfindings that resolve all the controlling factual issues in the case. see, e.g. *Davis v, Lambert, 388 F.3d at 1066;* Bryan v. Mullin, 335 F.3d at 1215 (.... Although th[e] record contains much information relevant to the question whether Freeman's failure to utilize mental health evidence during both the guilt and penalty phases of Bryan's trial was constitutionally ineffective, it is missing key testimony from Freeman regarding what he knew and understood about Bryan's mental health history and, most importantly, why he decided not to utilize that evidence. It is exactly this information Bryan sought to develop in state court when he requested an evidentiary hearing before the [state courts].).

Similarly, to Bryan, Rojas sought to develop Baurkot's key testimony regarding what he knew and understoond about the Pennsylvania Rules of Evidence, why he chose to make a vague arguement and most importantly if he even properly informed and prepaired himself at the time he submitted the motion in limine. However the court prevented Rojas from developing these facts. With out knowledge and understanding of a Rule one can never make a proper and effective argument.

Even if the state court porported to conduct a hearing, (as it is in this case), that hearing will not suffice to avoid federal hearing unless it was "full and fair". The state court proceedings is inadequate if:

> (1) Although a state court conducted a hearing, the party relies upon substantial newly discovered evidence that "bear[s] upon the constitutionality of the applicant's detention" and that "could not reasonably have been presented to the state trier of facts".
>
> (2) Whether or not the state court conducted a hearing, "the material facts were not adequately developed" in the state court for a reason not attributable to the inexcusable neglect of petitioner".
>
> (5) Although a state court conducted a hearing, the party was "denied due process of law in the state court proceeding." *see 28 U.S.C § 2254 (d)(7)(1994) (superseded).*
>
> (6) Although a state court conducted a hearing, "the factfinding procedure employed by the state court was not adequate to afford [the party] a full and fair hearing" or was an "unreasonable" method for "determin[ing] the facts".

This mandatory-hearing caterogory "is intentionally open-ended", and its definition is "the province of the district judges". Exercising their broad authority under this *Townsend* category, the federal courts have ordered hearings, for example, because:

> **(a)** The state factfindings procedure violates the constitution and is inadequate for the ascertainment of the truth.
> **(b)** The state procedure, even if it "does not violate the constitution... appears to be seriously inadequate for the ascertainment of the truth".
> **(c)**The state court hearing was "not a meaningfull one".
> **(d)** "[T]he state trial judge... made serious procedural errors... in such things as the burden of proof. *Townsend at 316. see Conner v. Wingo, 409 F.2d at 22; United States ex rel. Jefferson v. Follette, 369 F.2d 862, 865 (2d Cir. 1968) (trial court denied petitioner opportunity to develop case adequately through testimony of witness).*
> **(e)** The state judge who conducted the state hearing and found the facts was not an impartial decisionmaker, either because the judge's own conduct was at issue or for some other reason.
> **(f)** The prosecutor withheld or misrepresented, or the trial judge excluded, critical facts at the state court hearing. *see William v. Whitley, 940 F.2d 132, 133-34 (5th Cir. 1991) (district court erred in denying evidentiary hearing on claim of prosecutorial suppression of evidence, which concerned "recently disclosed police report [that] has never been the subject of an evidentiary hearing"); Smith v. Wainwright, 741 F.2d 1248, 1256 (11th cir. 1984) (prosecution withheld evidence); Bibby v. Tard, 741 F.2d 26, 31 (3d Cir. 1984) (judge excluded information); Lockett v. Blackburn, 571 F.2d 309, 313 (5th cir.), cert. denied, 439 U.S. 873 (1978) (state hearing unfair because state concealed witness).*
> **(g)** The state court hearing did not consider the full scope of the party's factual claims. *28 U.S.C. § 2254(d)(1) (1994) (superseded) ("merits of the factual dispute were not resolved in the State court hearing").*
> **(h)**The state presented false, misleading, or incomplete testimony at the state court hearing. *Lahay v. Armontrout, 923 F.2d 578, 578-79 (8th Cir. 1991) (state postconviction court's findings that trial counsel had valid tactical reasons for questionable conduct at trial did not obviate need for hearing, given evidence that trial counsel...).*

The prosecutor, trial counsel, and the judge behave in the manner to avert key testimony from being fully developed on the record which would have rendered counsel ineffective. (N.T 3/20/15 pp. 25-30). Even in the court's opinion the court refused to refer to counsel's own testimony where he admitted he knew Rojas would not had been free to leave at the time Rojas was being interrogated by Officer Berger. (N.T. 3/20/15 pp. 27). In all the court denied Rojas the opportunity of a full and fair hearing.

CONCLUSION

Rojas was denied due process in the State Court and the Courts of Appeals determination of denyimg COA as well as deferring to the state court' findings stands in conflict with decisions held in the Supreme Court.

AEDPA left entirely intact the portion of *Townsend* that *Tamayo-Reyes* also previously had left intact - governing evidentiary hearings on facts that the state or the state courts are responsible for not having developed in state court (e.g. because the state suppressed evidence or the state court did not permit the develoment of the factual record).

WHEREFORE, for the reasons set forth Rojas prays the "writ of certiorari" should be granted in order to maintain uniformity and the integrity of U.S. Supreme Court presedents as well prevent the spread of and continuous conflicting decisions that culminates in the Miscarriage of Justice and Unconstitutional Imprisonments.

Date: 4/13/19

Respectfully Submitted

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