
NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

2019-2020 TERM

SHEVAUN E. BROWNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JOFFE LAW, P.A.
Attorney for Petitioner
The 110 Tower Building
110 S.E. 6th Street
17th Floor, Suite 1700
Ft. Lauderdale, Florida 33301
Telephone: (954) 723-0007
Florida Bar No. 0814164

QUESTIONS PRESENTED

I.

WHETHER CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE THIRD CIRCUIT AFFIRMED THE DISTRICT COURT'S RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A CAUTIONARY INSTRUCTION AFTER EVIDENCE OF KEVIN FESSALE'S GUILTY PLEA WAS PRESENTED AT TRIAL.

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**PETITION FOR WRIT OF CERTIORARI
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The Petitioner, SHEVAUN E. BROWNE, (hereinafter “BROWNE”), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue

to review the opinion of the United States Court of Appeals for the Third Circuit entered in the proceedings on April 17, 2019.

OPINION OF THE COURT BELOW

The Court of Appeals for the Third Circuit entered a non-published opinion affirming the District Court's denial of BROWNE'S Motion to Vacate His Conviction Pursuant To 28 U.S.C. §2255 and found that BROWNE'S Trial Counsel was not ineffective on April 17, 2019. *United States of America v. Shevaun E Browne, Appendix 1.*

JURISDICTION

The judgment of the Third Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on April 17, 2019. The Third Circuit Court of Appeals entered its Order Denying BROWNE'S Petition for Rehearing and Petition for Rehearing *En Banc* on June 18, 2019. *Appendix 2.* The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on

a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person ... be deprived of life, liberty, or property, without due process of law....”

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: “In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.”

STATEMENT OF THE CASE

On January 19, 2012, a federal grand jury issued an indictment charging BROWNE, Keven Fessale (“Fessale”) and Kadeem Thomas (“Thomas”) with conspiracy to commit a Hobbs Act in violation of 18 U.S.C. §1951(a) (Count I); and aiding and abetting bank robbery in violation of 18 U.S.C. §2113(a) and 18 U.S.C. §2113(d) (Count II). (DE:1)

BROWNE’S trial lasted three (3) days. (DE:119). On March 28, 2012, the jury found BROWNE guilty of both counts. (DE:68). BROWNE’S sentencing hearing was held on August 6, 2012. (DE:92, 94). BROWNE was sentenced to a term of 165 months of incarceration, followed by three (3) years of supervised

release as to Count I and five (5) years of supervised release on Count II, a special assessment of \$200.00 and ordered to pay restitution in the amount of \$47,529.38. (DE:104, 111, 115).

BROWNE filed his Notice of Appeal on August 8, 2012. (DE:98). BROWNE raised three (3) arguments in his appeal, to wit: (1) that the District Court erred by denying his motion to strike juror #93 for cause; that the District Court erred by not allowing him to withdraw his final preemptory strike so that BROWNE could use it for juror #93; and that the evidence was insufficient to support BROWNE'S conviction for conspiracy to commit a Hobbs act in violation of 18 U.S.C. §1951(a). This Court affirmed his conviction and sentence in an unpublished decision on May 24, 2013. (DE:121) *United States v. Browne*, 525 F. App'x 213 (3rd Cir. 2013). On June 17, 2013 a mandate was issued. (DE:121). BROWNE did not file a Petition for Writ of Certiorari to the United States Supreme Court.

On May 19, 2014, BROWNE filed a timely, *pro Se* Motion to Vacate His Conviction, Pursuant To 28 U.S.C. §2255. (DE:124, 125) BROWNE raised eleven (11) claims; six claims were for ineffective assistance of counsel and five claims were for errors committed by the District Court and the government:

Claim I: Trial Counsel was ineffective for failing to have a proper voir dire and have juror 23 excused for cause;

Claim II: Trial Counsel was ineffective for failing to admit or use phone records which are exculpatory evidence;

Claim III: Trial Counsel was ineffective for failing to investigate and produce witnesses and testimony;

Claim IV: Trial Counsel was ineffective for failing to ask for cautionary instructions for co-conspirator's guilty plea/plea agreement;

Claim V: Trial Counsel was ineffective for failing to ask for limiting instructions for prior inconsistent statements of a witness;

Claim VI: Cumulative effect of Trial Counsel's errors;

Claim VII: District Court's failure to Excuse Juror 23 for cause;

Claim VIII: District Court's failure to give instruction for co-conspirator's guilty plea/plea agreement.

Claim IX: District Court's failure to give proper instructions on prior inconsistent statements.

Claim X: Cumulative effect of District Court's errors; and

Claim XI: Government's failure to correct false testimony. (DE:124;146)

The government filed a response opposing any relief. (DE:137) On December 8, 2015, the Magistrate Judge, recommended that "petitioner's Motion to Vacate, Set Aside or Correct Sentence [DE 124] be DENIED without an evidentiary hearing.

It is further recommended that a certificate of appealability be DENIED". (DE:146:23).

BROWNE filed objections to the Report and Recommendation of the Magistrate Judge. (DE:151). On June 8, 2017, the District Court adopted the Report and Recommendations of the Magistrate Judge, denied BROWNE'S Objections to the Report and Recommendations of the Magistrate Judge and denied all of the claims raised by BROWNE in his Motion to Vacate His Conviction Pursuant To 28 U.S.C. §2255. (DE:169) The District Court denied BROWNE'S motion for a certificate of appealability. (DE:146:23) BROWNE filed a timely Notice of Appeal. (DE:172)

On March 6, 2018, the Third Circuit granted BROWNE'S motion for a certificate of appealability as to the following issue only: "Whether counsel was ineffective for failing to request a cautionary instruction after evidence of Kevin Fessale's guilty plea was presented at trial (ground four of BROWNE'S 28 U.S.C. §2255 Motion)."

On April 17, 2019, the Third Circuit issued its 7-page opinion affirming the District Court's denial of BROWNE'S Motion to Vacate His Conviction Pursuant To 28 U.S.C. §2255 and found that BROWNE'S Trial Counsel was not ineffective. On June 18, 2019, the Third Circuit denied BROWNE'S Petition for Rehearing and Rehearing *En Banc*.

1. Statement of the Facts.

During BROWNE'S trial, BROWNE'S co-conspirator Fessale identified BROWNE and testified as to BROWNE'S involvement in the robbery. During his testimony, Fessale admitted that he had pled guilty to the charge of bank robbery and that he had entered into a cooperation agreement with the government. Fessale also admitted same in his cross examination.

Although Trial Counsel cross examined Fessale regarding his testimony and him entering into the cooperation agreement, Trial Counsel never objected to said testimony given by Fessale as to his guilty plea, nor did Trial Counsel request that the District Court give a curative instruction to the jury regarding the limited evidentiary purpose of Fessale's guilty plea. This Circuit's model jury instruction regarding a witness's guilty plea is as follows:

You must not consider [the witness's] guilty plea as any evidence of [name of defendant]'s guilt. (His)(Her) decision to plead guilty was a personal decision about (his)(her) own guilt. Such evidence is offered only to allow you to assess the credibility of the witness; to eliminate any concern that (the defendant) (any of the defendants) has been singled out for prosecution; and to explain how the witness came to possess detailed first-hand knowledge of the events about which (he)(she) testified. You may consider (name of witness)'s guilty plea only for those purposes.

The instruction given by the District Court was:

You've heard the testimony from a witness who either may receive

benefits from the Government in connection with this case or was involved in the commission of offenses related to the crimes alleged against the defendants.

You may give the testimony of that witness such weight as you feel it deserves. Keeping in mind that such testimony must be considered with greater caution and care than that of an ordinary witness.

In denying BROWNE'S Motion to Vacate, Set Aside and/or Correct Sentence Pursuant to 28 U.S.C. §2255 the Magistrate found that “[a] limiting instruction is justified when evidence – such as the guilty plea of a testifying co-defendant-is admissible for a limited purpose, but might also be considered for a purpose that is impermissible.” (DE:146:16-17).

BROWNE filed objections to the Report and Recommendation of the Magistrate Judge. (DE:151). On June 8, 2017, the District Court adopted the Report and Recommendations of the Magistrate Judge, denied BROWNE'S Objections to the Report and Recommendations of the Magistrate Judge and denied all of the claims raised by BROWNE in his Motion to Vacate His Conviction Pursuant To 28 U.S.C. §2255. (DE:169) The District Court denied BROWNE'S motion for a certificate of appealability. (DE:146:23)

A. BROWNE'S Trial Counsel Was Ineffective for Failing to Request A Cautionary Instruction After Evidence of Kevin Fessale's Guilty Plea Was Presented at Trial.

On appeal from the denial of a motion for post-conviction relief pursuant to 28 U.S.C. §2255, this Court reviews “legal conclusions *de novo* and findings of fact

for clear error". *Mendoza v. United States*, 690 F.3d 157, 159 (3rd Cir. 2012). This Court reviews subject matter jurisdiction *de novo*. *Shaffer v. GTE North, Inc.*, 284 F.3d 500 (3rd Cir. 2002). The District Court was clearly erroneous in its fact findings and erred in its legal conclusion that BROWNE'S Claim Four did not support a finding of ineffective assistance of counsel. As such, the Third Circuit affirming the denial of BROWNE'S Claim 4 by the District Court was a miscarriage of justice and a violation OF BROWNE'S due process rights.

It is clear that Trial Counsel's failure to request a cautionary instruction after evidence of Fessale's guilty plea was presented at trial was clearly deficient and his failure to request said cautionary instruction prejudiced BROWNE. Therefore, the District Court's denial of BROWNE'S Claim 4 and the Third Circuit affirming the denial of BROWNE'S Claim 4 by the District Court violated his due process rights.

REASONS FOR GRANTING THE PETITION

I.

**CERTIORARI REVIEW SHOULD BE GRANTED WHERE
THE THIRD CIRCUIT AFFIRMED THE DISTRICT COURT'S
RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE
FOR FAILING TO REQUEST A CAUTIONARY
INSTRUCTION AFTER EVIDENCE OF KEVIN FESSALE'S
GUILTY PLEA WAS PRESENTED AT TRIAL.**

A claim for ineffective assistance of counsel presents mixed questions of law and fact. *See Berryman v. Morton*, 100 F.3d 1089, 1095 (3rd Cir.1996); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3rd Cir.1993). “An effectiveness claim require[s] the application of a legal standard to the historical-fact determinations, and thus the ultimate question whether counsel was effective is a uniquely legal conclusion subject to *de novo* review”. *Townsend v. Sain*, 372 U.S. 293, 310 n. 6, 83 S.Ct. 745 (1963); *United States v. Cleary*, 46 F.3d 307, 309–10 (3rd Cir.), *cert. denied*, 516 U.S. 890, 116 S.Ct. 237 (1995).

We review a claim of ineffective assistance of counsel under the two-pronged test announced in *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2064 (1984). Under that standard, the defendant must first show that his counsel's performance was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms. *Strickland v. Washington* 466 U.S. at 688. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland v. Washington* 466 U.S. at 687. In evaluating counsel's performance, we are “highly deferential” and “indulge a strong presumption” that, under the circumstances, counsel's challenged actions “might be considered sound ... strategy.” *Strickland v. Washington* 466 U.S. at 689; *see also Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3rd Cir.1996).

In affirming the District Court’s denial of BROWNE’S Motion To Vacate His Conviction, Pursuant To 28 U.S.C. §2255 and finding that BROWNE’S Trial Counsel was not ineffective, the Third Circuit found that “[w]hile the instruction the Court provided was indeed deficient, counsel’s failure to object or request a proper instruction did not undermine confidence in the trial’s outcome.” However, the Third Circuit was incorrect in its analysis and therefore BROWNE’S Petition for Writ of Certiorari must be granted.

In reviewing the Third Circuit’s opinion, the Third Circuit is correct in its finding that the instruction given by the District Court “failed to inform the jury that Fessale’s plea could not serve as proof of Browne’s guilt, and for this reason, the instruction was legally deficient.” However, the Third Circuit finding that said deficient instruction did not “undermine confidence in the trial’s outcome” is incorrect and because that finding is incorrect the finding that Trial Counsel was not ineffective for failing to request a cautionary instruction is also incorrect.

The Third Circuit found “[i]t is undisputed that Fessale’s plea was not introduced to establish Browne’s guilt at trial”. In support of its finding, the Third Circuit confirms that the government “argued that Fessale confessed his role in the robbery prior to pleading guilty . . .” and therefore, it was not introduced as proof of anyone’s guilt. Said logic is unfounded. If Fessale pled guilty to the robbery and then entered into an agreement to “testify truthfully” and then admits that BROWNE

was involved in the robbery, wouldn't a reasonable man then be swayed to find that BROWNE is guilty because of Fessale being guilty? Therefore, the failure of the District Court not to instruct the jury that Fessale's plea of guilt could not be used to determine BROWNE'S guilt, was error and BROWNE'S Trial Counsel's failure to object and/or ask for the correct instruction clearly supports a finding of ineffective counsel. Because Trial Counsel did not request the required cautionary instruction, BROWNE'S due process was violated. The jury was allowed to hear testimony about Fessale's guilt without instructions as to how to use said testimony. *Attorney General v. Bisaccia*, 623 F.2d 307 (3rd Cir. 1980). Accordingly, BROWNE'S Trial Counsel's failure to request a cautionary instruction after evidence of Fessale's guilty plea was presented at trial was clearly a violation of BROWNE'S due process rights under the Sixth Amendment and therefore, BROWNE proved that Trial Counsel was ineffective. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

BROWNE'S Trial Counsel's failure to object to the jury instruction given and/or failing to request the correct jury instruction be given did prejudice BROWNE. The Prejudice analysis not only focuses on outcome determination, but on "the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair". *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838 (1993). "The benchmark for judging any claim of

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. at 686. Hence, all BROWNE needs to establish is that “counsel’s performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy”. *Strickland v. Washington*, 466 U.S. at 686. It is clear that case law requires that the District Court instruct the jury with the standard jury instruction. This clearly did not happen and therefore, based on this alone, the fact that Trial Counsel did not object or seek a cautionary instruction clearly prejudiced BROWNE in his presentation of his defense. Accordingly, prejudice was established.

The Third Circuit misconstrued the law when it comes to proving prejudice in order to prove ineffective assistance of counsel. Case law is clear that there are instances where prejudice does not have to be proven. In *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984), the Supreme Court carved out a narrow exception to *Strickland*’s general rule that a defendant must demonstrate prejudice: a showing of prejudice is not necessary if there are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Circumstances which would warrant a presumption of prejudice from counsel’s ineffectiveness are those where “the adversary process itself is [rendered]

presumptively unreliable [by the circumstances]". *United States v. Cronic*, 466 U.S. at 659.

In the case at hand, Trial Counsel's failure to require said cautionary instruction clearly prejudiced BROWNE. Although a co-defendant's guilty plea may be admissible on the issue of credibility, however, when this occurs, the District Court must instruct the jury regarding the limited purpose for which that evidence may be used. *United States v. Restaino*, 369 F.2d 544 (3rd Cir.1966). An instruction is necessary because admission of a co-defendant's guilty plea can be extremely prejudicial to the defendant, given the natural human tendency to assume that if an aider and abettor is guilty, the principal must also be guilty. The instruction to the jury must deal precisely with the issue of how the guilty plea evidence can and cannot be used. *See United States v. Newman*, 490 F.2d 139, 144 (3rd Cir.1974) (generalized instruction to disregard co-defendant's guilty plea when determining the defendant's guilt was inadequate); *United States v. Gullo*, 502 F.2d 759, 762 n. 4 (3rd Cir.1974). Case law is clear that the instruction given to the jury must "deal precisely with the issue of how the guilty plea evidence can and cannot be used." *Government of the Virgin Islands v. Mujahid*, 990 F.2d. 111, 116 (3rd Cir 1993). At the very least, the District Court should have instructed the jury that Fessale's guilty plea is not proof of BROWNE'S guilt and should not be considered when deciding their verdict as to BROWNE. Again, this did not occur. The jury instruction that

was given by the District Court did not “deal precisely with the issue” as is required by law and clearly did not, “at the very least” instruct the jury not to consider Fessale’s guilty plea when deciding whether BROWNE was guilty or not. Because the jury instruction was improper, BROWNE’S Trial Counsel should have objected and should have requested said specific jury instruction. Because Trial Counsel did not request said required cautionary instruction, the Third Circuit should have found that BROWNE’S Trial Counsel’s representation was ineffective and that said ineffective assistance did in fact prejudice BROWNE. However, because the Third Circuit affirmed the District Court’s rulings, BROWNE’S Petition for Writ of Certiorari must be granted.

Furthermore, the Third Circuit failed to even consider BROWNE’S argument that Trial Counsel’s failure to request said cautionary instruction regarding Fessale’s guilty plea/plea agreement, deprived the jury of properly considering BROWNE’S theory of defense, to wit: that he was not guilty of conspiracy or of aiding and abetting in a bank robbery. *See generally, Breakiron v. Horn*, 642 F.3d 126 (3rd Cir. 2010). It has been long recognized that evidence of another party’s guilty plea is not admissible to prove the defendant’s guilt. *See, e.g., United States v. Gambino*, 926 F.2d 1355, 1363 (3rd Cir.1991); *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307 (3rd Cir.), *cert. denied*, 449 U.S. 1042, 101 S.Ct. 622 (1980); *United States v. Toner*, 173 F.2d 140 (3rd Cir. 1949). In the case at hand, because there was no

cautionary jury instruction, the jury was allowed to consider the testimony, to wit: Fessale's guilty plea in deciding whether BROWNE was guilty or not. As a result of this, BROWNE'S due process rights were clearly violated. In affirming the District Court's denial of BROWNE'S Motion to Vacate, Set Aside and/or Correct Sentence Pursuant to 28 U.S.C. §2255 and finding that Trial Counsel was not ineffective clearly violated BROWNE'S due process rights and his constitutional right to effective assistance of counsel. Therefore, BROWNE'S Petition for Writ of Certiorari must be granted.

CONCLUSION

This Court should explicitly adopt BROWNE'S position based upon law and equity. The Third Circuit affirming the denial of BROWNE'S Claim 4 by the District Court seriously affects the fairness, integrity and public reputation of the judicial proceedings. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, SHEVAUN E. BROWNE, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,

JOFFE LAW, P.A.
Attorney for Petitioner
The 110 Tower Building
110 S.E. 6th Street
17th Floor, Suite 1700
Ft. Lauderdale, Florida 33301
Telephone: (954) 723-0007
Facsimile: (954) 723-0033
davidjoffe@aol.com

By /s/ David J. Joffe
DAVID J. JOFFE, ESQUIRE
Florida Bar No. 0814164

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 10th day of July, 2019, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By /s/ David J. Joffe
DAVID J. JOFFE, ESQUIRE