No. 19-7039

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Kevin Lee Beam, Petitioner

VS.

Superintendent Albion SCI, et al., Respondent(s)

Supreme Court, U.S.
FILED
DEC 17 2019
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se
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QUESTIONS PRESENTED

I. Does the misguided destruction of exculpatory fetal DNA tissue evidence belonging to the victim by the Respondent constitute a "Brady Violation" where such evidence would have established Petitioner's actual innocence?

II. Does the invalidation of Pennsylvania's Mandatory Minimum Sentencing Statute [based upon this Court's opinions in Alleyne and Montgomery rendering it unconstitutional] have retroactive effect on state post-conviction review as such invalidation constitutes a substantive change in constitutional law which dictated the length of Petitioner's sentence?

III. Does interrogating Petitioner without reading him his "Miranda Rights" violate his constitutional right against self-incrimination where the line questioning was direct to him as a suspect, instead of a witness in order to elicit an incriminating statement?

IV. Does the suppression of "Low IQ Evidence" from the jury deny Petitioner his right to a fair trial and due process of law where he was precluded from challenging the voluntariness of his coerced vague confession?

LIST OF PARTIES

All parties do not appeal 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:

District Attorney's Office
Franklin County, Pennsylvania
157 Lincoln Way East
Chambersburg, PA 17201

LIST OF RELATED CASES

Commonwealth v. Beam, 453 MDA 2012 (Pa. Super. Nov. 8, 2012) - Direct Appeal after trial. Appeal denied November 8, 2012.

Commonwealth v. Beam, 499-2009, Court of Common Pleas, Franklin County, Pennsylvania - Post-Conviction Relief denied July 29, 2014.

Commonwealth v. Beam, 1455 MDA 2014 (Pa. Super. July 28, 2015) - Direct Post-Conviction Appeal. Denied July 28, 2015.

Commonwealth v. Beam, 654 MAL 2015 (Pa. Supreme Dec. 22, 2015) - Direct Post-Conviction Appeal for Allocatur. Denied December 22, 2015.

Beam v. Michael Clark, et al., 1:16-cv-0690 (M.D.Pa. May 9, 2018) - 28 U.S.C. §2254 Habeas Petition partial denial. May 9, 2018. Full denial on July 30, 2018.

Beam v. Superintendent Albion SCI, et al., 18-2946 (3rd Cir. Aug. 20, 2019). Certificate of Appealability denied August 20, 2019.

Beam v. Superintendent Albion SCI, et al., 18-2946 (3rd Cir. Sept. 24, 2019) - Rehearing Denied.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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

FEDERAL COURTS:

The Opinion of the United States Court of Appeals for the Third Circuit appears at **APPENDIX A** to the petition and is reported at Beam v. Supt. Albion SCI et al., CA. No. 18-2946 (3d Cir. 2019).

The Opinion of the United States District Court appears at **APPENDIX B** and **APPENDIX C** to the petition and is reported at Beam v. Michael Clark et al., 1:16-cv-0690 (MD. PA 2018).

STATE COURTS:

The Opinion of the highest state court to review the merits appears at **APPENDIX E** to the petition and is reported at Commonwealth v. Beam, No. 654 MAL 2015 (Pa. 2015).

The Opinion of the Pennsylvania Superior Court appears at **APPENDIX F** and **APPENDIX G** to the petition and is reported at Commonwealth v. Beam, No. 453 MDA 2012 (Pa. Super. 2012) and Commonwealth v. Beam, No. 1455 MDA 2014 (Pa. Super. 2015).

The opinion of the Pennsylvania Court of Common Pleas, Franklin County, appears at **APPENDIX H** to the petition and is reported at Commonwealth v. Beam, No. 499-2009 (Pa.Com.Pls.Ct. 2014).

JURISDICTION

FEDERAL COURTS:

The date on which the United States Court of Appeals for the Third Circuit decided my case was August 20, 2019.

A timely petition for rehearing was denied by the United States Court of Appeals for the Third Circuit on September 24, 2019 and a copy of the order denying rehearing appears at **APPENDIX D.**

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

STATE COURTS:

The date on which the highest state court decided my case was December 22, 2015. A copy of that decision appears at **APPENDIX E.**

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment of the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of 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 subject for the same offence to be twice put in jeopardy of life or limb; 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; nor shall private property be taken for public use, without just compensation.

2. Sixth Amendment of the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and 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 defense.

3. Fourteenth Amendment of the United States Constitution: "**Section 1.** All persons born or naturalized in the United States, and subject 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.

4. 42 Pennsylvania Consolidated Statute Annotated, §9718 of the Sentencing Code: "Sentence for Offenses Against Infant Persons;
   (a) Mandatory Sentence -
      (1) A person convicted of the following offenses when the victim is less than 16 years of age shall be sentenced to a mandatory term of imprisonment as follows;
         18 Pa.C.S. §2702(a)(1) and (4) (relating to aggravated assault)-not less than two years.
         18 Pa.C.S. §3121(a)(1),(2),(3),(4), and (5) (relating to rape)-not less than ten years.
         18 Pa.C.S. §3123 (relating to involuntary deviate sexual intercourse)-not less than ten years.
         18 Pa.C.S. §3125(a)(1) through (6) (relating to aggravated indecent assault)-not less than five years.

STATEMENT OF THE CASE

FACTUAL HISTORY: On March 18, 2009, Valarie Deree, her Daughter Melissa Deree (M.D.) and Petitioner went to the Pennsylvania State Police to report that M.D. had been raped. M.D. was fourteen years old and pregnant. Though Valarie and Petitioner lived together, they were not married. M.D. referred to Petitioner as Dad.

The day prior to reporting the rape, Valarie noticed M.D. appeared to be pregnant so she obtained a pregnancy test which was positive. During the time period Valarie obtained the test, Petitioner called her and informed her that M.D. had been raped during a hunting trip several months before. The alleged perpetrators were two unknown male individuals that attacked M.D. while she was going to the bathroom.

While at the Police Barracks, M.D. initially gave a statement which supported this version of events to Trooper Patillo. Trooper Peck and Cahara interviewed Petitioner in a seprate separate room. Beam maintained the allegation of M.D. being raped in the woods by strangers during the hunting trip. Trooper Peck indicated Petitioner answered questions slowly with his head down. Eventually Trooper Peck asked Petitioner directly whether he had sexual contact with M.D. Petitioner responded that he suffered a stroke weeks before and as a result could not remember anything about a sexual encounter with M.D. After hours of repeated questioning, Petitioner incriminated himself by admitting he "made a mistake." At no point did Petitioner ever admit to having sexual intercourse with M.D. It was inferred that he did due to Petitioner's incoherent statements. The Troopers then read Petitioner his Miranda warning after making the incriminating statement and then filled out a Custodial Written Statement, which still did not indicate Petitioner specifically had a sexual intercourse with M.D.

M.D. eventually gave a second and a third version of events which then implicated Petitioner, only after consulting with Police. Petitioner was then arrested for sexually assaulting M.D.

M.D. and Valarie chose to terminate the pregnancy. Trooper Patillo consulted with the clinic regarding the preservation of fetal tissue for DNA testing to preserve paternity. He was mistakenly informed that he would have to personally witness the abortion and transport the fetus to the State Police Crime Laboratory in Harrisburg, Pennsylvania. Because of this misguided belief, Trooper Patillo and the District Attorney made the decision not to preserve any fetal tissue for DNA testing. The abortion occurred on March 21, 2009, three days after Petitioner's arrest on March 18, 2009. It is important to note the Trooper did not have to attend the abortion proceeding in order to establish a chain-of-custody to preserve the fetus. [See District Court Order of May 9, 2018, Pg. 20, **APPENDIX B** hereto]. The Trooper's and Respondent's assertions for not preserving the evidence is factually and legally incorrect.

PROCEDURAL HISTORY: Petitioner was first charged with 17 counts of various sexual offenses on March 18, 2009. A Psychiatric Evaluation was performed on Petitioner which found him incompetent to stand trial and was committed to the Torrance State Hospital. While at Torrance Petitioner's IQ was tested and was at 71. Petitioner's competency was restored and return to Franklin County Jail on April of 2010.

On October 25, 2010 Petitioner plead guilty to aggravated indecent assault and statutory sexual assault while the remaining charges were dismissed, receiving a sentence of 9 to 18 years. Five days after pleading guilty, Petitioner sent a letter to Court Clerk, alleging ineffective assistance of the Public Defender's Office. On December 8, 2010 Petitioner withdrew his guilty plea. New counsel was appointed and the case proceeded to trial.

On July 18, 2011 Petitioner filed a motion to dismiss, alleging the Respondents committed a "Brady Violation" by failing to preserve the DNA from the victim's aborted fetus. The Court held a hearing on the motion on August 1, 2011, the first day of trial, which was dismissed. On July 28, 2011 Respondents filed a motion in limine to preclude evidence of Petitioner's low IQ of 71. Petitioner's stated purpose

of this evidence was to explain the rudimentary nature of his statements to Police and not to assert a mental infirmity defense. The court granted the Respondent's motion and excluded Petitioner's low IQ evidence from being presented to the jury.

After a 2-day trial, Petitioner was found guilty of Rape, Criminal Attempt to Commit Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault, Indecent Assault, and Endangering the Welfare of a Child. The Court determined Petitioner was not a sexually violent predator and sentenced him to an aggregated sentence of 249 to 708 months (20 years and 9 months to 59 years).

On February 1, 2012 Petitioner filed a post-sentence motion for a new trial, that there was insufficient evidence to sustain the verdict, which was denied on February 6, 2012. A direct appeal was taken on February 28, 2012. Trial counsel withdrew from the case and new counsel was appointed. The Superior Court denied the appeal on November 8, 2012 (**APPENDIX F**). Counsel did not seek further review.

Petitioner filed a timely pro se post-conviction petition pursuant to 42 Pa.C.S. §9541 et seq. on June 3, 2013, which was denied on July 29, 2014 (**APPENDIX H**). A pro se appeal was taken and denied on July 28, 2015 (**APPENDIX G**). A pro se petition for allowance of appeal was taken and denied on December 22, 2015 (**APPENDIX E**).

On April 20, 2016 Petitioner filed a pro se habeas petition pursuant to 28 U.S.C. §2254. On May 9, 2018 the District Court dismissed all but one claim (**APPENDIX B**). On July 30, 2018 the District Court denied the remaining claim (**APPENDIX C**). A timely pro se appeal was taken with the United States Court of Appeals for the Third Circuit which denied a Certificate of Appealability on August 20, 2019 (**APPENDIX A**). A timely pro se petition for rehearing was taken which was denied on September 24, 2019 (**APPENDIX D**).

This Petition for a Writ of Certiorari now follows as it was filed within 90 days of the Court of Appeals for the Third Circuit denying rehearing.

REASONS FOR GRANTING THE PETITION

I. The misguided destruction of the exculpatory fetal DNA tissue evidence by the Respondent constitutes a "Brady Violation" as to have denied Petitioner his right to a fair trial and due process of law under the United States Constitution.

The Respondent acknowledged the victim's aborted fetus was exculpatory evidence which is why they inquired into the procedures for retrieving it. This fetal tissue evidence should have been sent for DNA testing to determine who the biological father was which would have established who in fact raped the victim since she stated she only had sexual intercourse with one person, the person who raped and impregnated the her. This is why the preservation and DNA testing of the fetal tissue was of most importance. Yet, the evidence was intentionally destroyed days after the charges were brought against Petitioner. This is especially egregious considering the Respondent and the Police (the sole Parties) made this decision to destroy the exculpatory evidence without ever notifying the Petitioner who was incarcerated and unrepresented by counsel.

Due to the Respondent and the Police destroying this fetal tissue evidence without ever submitting it for DNA testing, Petitioner was deprived the opportunity to present a defense and establish his actual innocence. This fact is apparent in the United States District Court's May 9, 2018 Order, Page 20, **APPENDIX B**:

> "M.D. had an abortion. The fetus was destroyed, and no DNA testing was done to establish paternity. Trooper Patillo, on the advice of the District Attorney's Office, did not do so for several reasons. He strongly believed that Beam was the father of the fetus. He also had a signed, written confession. Finally, he believed [that] he had to personally witness the abortion, per clinic and Pennsylvania Police evidence-collection protocol, and he did not want to re-victimize M.D. by being present. The District Attorney's Office was of the same mind. It believed that any DNA testing would be merely corroborative, as M.D. never had sexual intercourse with anyone else. Admittedly, Trooper Patillo had no experience in the collection [of] evidence from aborted fetuses. He did not discover that M.D. would have been, and indeed was, under general anesthesia during the abortion."

Moreover, the United States District Court further stated:

> "The Superior Court further observed that although **testing the fetus may have been potentially helpful to Beam**, 'Trooper Patillo articulated a good

> faith, but mistaken, belief that [preserving] the fetus would require him to personally witness the abortion and intrude upon the victim's privacy.' . . .'On cross-examination at Appellant's trial, Trooper Peck testified that Appellant confessed after the Trooper described the evidence that could be collected to establish the identity of the individual who impregnated the victim. Given this. . .it is only reasonable to infer that, as of the time the abortion was peformed, and the DNA was discarded, all parties believed that DNA testing would produce inculpatory results. Neither the investigating officers nor the Commonwealth indicated through their conduct, that the lost evidence could form the basis of exonerating Appellant. Thus, there was no evidence of bad faith on the part of the Commonwealth."

If the fetal DNA evidence "could be collected to establish the identity of the individual who impregnated the victim," then surely the same evidence would have established Petitioner's innocence. The basis for withdrawing Petitioner's guilty plea was so that he could obtain DNA testing of the fetal tissue to establish his innocence, which is exactly what he tried to do by requesting DNA testing, only to find out the Respondent had destroyed is without ever informing him such action.[1]

It is clear the Respondent and the Police had "no experience in the collecting of evidence from aborted fetuses." Instead of consulting with Medical Experts and reviewing Police Protocol and Policy, they simply chose to remain ignorant to the fact this DNA evidence was obtainable and exculpatory, which required them to preserve it under the United States Constitution.

Just because the Respondent and the Police "strongly believed Petitioner was the father of the fetus" and gave a "confession" does not give them authority to destroy exculpatory evidence favorable to the accused that would establish their actual innocence, especially prior to the accused pleading guilty or proceeding to trial as he is yet to be convicted and to be presumed innocent. If this type of Police Investigation practice was acceptable and constitutional, there would never be a need to preserve any evidence in any investigation as long as the Police

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1. Nowhere in the coerced and vague statement the Petitioner gave to Police does he state he had sexual intercourse with the victim. The statement is vague in its true context and can mean many different things, mainly that he "had multiple discussion with M.D. [victim] about sex." The Respondent has read more into the statement than what it actually says and doesn't say. A confession it is not.

and the District Attorney "strongly believed" the suspect was guilty. Surely once a suspect is arrested the Police and the District Attorney believe he or she is "guilty" which is why that person was arrested in the first place. Such a procedure - as occurred here - would violate every basic principle of due process. The right to be presumed innocent and obtain evidence favorable for a defense.

Furthermore, there is such a thing as false and coerced confessions which is why the preservation of all evidence is paramount in any investigation, especially evidence that can be tested for DNA testing in a Rape case. A fact evidenced by the 1,000's of wrongfully convicted persons who only established their innocence and obtained their freedom through DNA evidence that was properly preserved in their respective cases, cases in which numerous individuals gave "confessions" to the crimes they were wrongfully convicted of.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), this Court held due process requires the prosecution to disclose evidence favorable to an accused when such evidence is material to guilt or punishment pursuant to the 5th and 14th Amendments of the United States Constitution. A "Brady Violation" occurs when evidence that is favorable, exculpatory or impeaching to the accused, was suppressed by the state, either wilfully or inadvertently, and prejudice resulted therefrom.

In United States v. Bagley, 473 U.S. 667, 682 (1985), this Court held the government's duty under Brady arises regardless of whether the defendant makes a request for it. Evidence favorable to an accused is material if there is a reasonable probability that disclosure of the evidence would have changed the outcome of the proceeding. Cone v. Bell, 556 U.S. 449, 469-70 (2008). See also Strickler v. Green, 527 U.S. 263, 281 (1999).

The suppression by the prosecution of evidence favorable to an accused "violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution." Brady, supra at 87. Evidence qualifies as material when there is "any reasonable likelihood" it could

have "affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1972).

To prevail on a "Brady Violation," Petitioner need not show that he "more likely than not" would have been acquitted had the evidence been admitted. He must only show that the evidence is sufficient to "undermine confidence" in the verdict. Smith v. Cain, 545 U.S. 73, ____ (2012).

If the victim did not have any sexual intercourse with anyone else but the person who committed the rape, as she and the Police testified at trial, then any DNA evidence obtained from the fetal tissue not matching Petitioner would have unequivocally established his innocence. The destruction of this exculpatory evidence deprived Petitioner of the sole evidence that would have enabled him to present a defense to establish reasonable doubt which surely would have "undermined confidence in the verdict."

The misguided choices made by the Respondent and the Police in destroying the fetal DNA tissue constitutes a "Brady Violation" so severe it shocks one's conscience that such a violation could have ever occurred. This "Brady Violation" ensured Petitioner would be found guilty before he even proceeded to trial, violating every well settled constitutional principle and a new trial is required as a result.

II. The invalidation of Pennsylvania's Mandatory Minimum Sentencing Statute has a retroactive effect on state post-conviction review as such invalidation constitutes a substantive change in constitutional law that renders Petitioner's sentence illegal and unconstitutional.

Petitioner was sentenced to two Mandatory Minimum Sentences for the convictions of Aggravated Indecent Assault (18 Pa.C.S. §3125) and Rape (18 Pa.C.S. §3121) under Pennsylvania's Mandatory Minimum Sentencing Statute of 18 Pa.C.S. §9718(a)(1), where he received a Mandatory sentence of 60 to 120 months for Aggravated Indecent Assault followed by a consecutive 120 to 240 months for Rape as the victim was under the age of 16. See **APPENDIX I.**

After Petitioner's conviction and sentencing this Court announced the decision in Alleyne v. United States, 133 S.Ct. 2152 (2012), overruling its own prior precedent and established a new constitutional rule of law, grounded on the 6th Amendment. Id. 133 S.Ct. at 2162-63. Alleyne held that any fact by law which increases the penalty for a crime [such as the age of a victim] must be treated as an element of the offense, submitted to the jury rather than a judge and found beyond a reasonable doubt.

The effect of Alleyne's new rules was to invalidate a range of Pennsylvania Sentencing Statutes predicting the application of Mandatory Minimum penalties upon non-elemental facts and requiring such facts to be determined by a preponderance of the evidence at sentencing. See e.g. Commonwealth v. Hopkins, 117 A.3d 247, 262 (Pa. 2015).

On June 20, 2016 the Pennsylvania Supreme Court invalidated the Mandatory Minimum Sentencing Statute of §9718(a)(1) in Commonwealth v. Wolfe, 140 A.3d 651 (Pa. 2016) due to the proof-of-fact requirement of the victim's age which increased the length of punishment if it was under the age of 16. The Wolfe Court found that §9718 is unconstitutional under the 6th Amendment of the United States Constitution and pursuant to this Court's decision in Alleyne.

The decision to invalidate §9718 established a new constitutional rule of law

as it substantially affected the length of sentence that Petitioner and similarly situated individuals received for convictions of Aggravated Indecent Assault, Rape, and the other offenses enumerated under §9718's Mandatory Minimum Sentencing scheme. Since §9718 was found unconstitutional from it's inception, any sentence resulting therefrom is illegal and therefore required the state court to resentence Petitioner - and those similarly situated - within the standard range of Pennsylvania Sentencing Guidlines.

On July 16, 2016 the Pennsylvania Supreme Court then announced their conflicting decision of Commonwealth v. Washington, 142 A.3d 810 (Pa. 2016) which held that the decision announced in Wolfe would not be applied retroactively to cases on collateral review. The Washington Panel cited to this Court's opinion in Teague v. Lane, 489 U.S. 288 (1989) when it erroneously determined Alleyne style cases do not apply to cases on collateral review. The Panel futher held that the invalidation of the Mandatory Minimum Sentencing Statute §9718 did not announce a new substantive rule that decriminalized conduct or prohibited punishment against a class of persons.

Like the sentencing issue in Montgomery v. Louisiana, 136 S.Ct. 718 (2016) that dealt with the invalidation of Mandatory Minimum life sentence for juvenile offenders and whether it applied on post-conviction collateral review under Teague, here the invalidation of §9718's Mandatory Sentencing provision has the same affect on the legality of sentence and has created a new substantive rule of constitutional law which controlled the length of sentence based upon a fact determining issue.

The Teague framework created a balance between first, the need for finality in criminal cases, and second, the contrevailing imperative to ensure that criminal punishment is only imposed when authorized by law. The Teague balance does not depend on whether the underlying constitutional guarantee is characterized as a procedural of substantive function; that is, whether it alters only the procedures used to obtain the conviction, or alters instead the range of conduct or classes of persons

that the law punishes. See Welch v. United States, 578 U.S. ____ (2016).

A decision that strikes down a procedural statute; for example, a statute regulating the type of evidence that can be presented at trial, would itself be a procedural decision as it would only affect the manner of determining the defendant's culpability, not the conduct of persons to be punished. A decision of this kind would have no retroactive effect under Teague unless it could be considered a watershed procedural rule. However, the Wolfe Court struck down a criminal sentencing statute that prescribed a mandatory period of punishment upon a class of persons, for a certain class of criminal offenses. Thereby altering the range of conduct or the class of persons that the law punishes. It follows then that Wolfe announced a substantive rule that has retroactive effect on cases on direct appeal as well as on post-conviction collateral review where the Petitioner challenged the illegality of unconstitutional Mandatory Minimum Sentence.

Section 9718 did not "enhance the accuracy of a conviction or sentence" by determining the Petitioner's culpability; §9718 imposed a certain kind of criminal punishment for a certain primary conduct, and most importantly, "a certain category of punishment for a class of defendant's because of their status or offense."

Imposing two different sentences upon two separate defendants for identical convictions of Aggravated Indecent Assault and Rape would create two separate classes of citizens which violates Due Process and Equal Protection of the Law where one defendant - as Petitioner and those 1,000's similarly situated - was convicted prior to the decision in Wolfe and one convicted after.

In Commonwealth v. Justin Secreti, 2016 Pa. Super. 28 (Pa. Super. 2016), the Court held this Court's decision in Montgomery made Miller v. Alabama, ____ U.S. ____ (201__) retroactive on post-conviction collateral review for the purposes of reviweing illegal sentences where a juvenile has been subjected to a Mandatory Life Sentence. The premise of Montgomery is identical to Wolfe as both dealt with the implications of unconstitutional Sentencing Statutes that imposed Mandatory Minimum

Sentences for a certain criminal offenses, by a certain class of offenders. Though Miller dealth with juveniles, the principles and applications of law are identical to Wolfe and the numerous Mandatory Minimum Sentencing Statutes that have been invalidated since Alleyne was announced in Pennsylvania.

If Miller applies retroactively on post-conviction collateral review for juveniles, then most certainly Wolfe does as well. They are one in the same, just a different class of offenders who were originally sentenced to Mandatory Minimum Sentences which were later found unconstitutional after their sentences became final. To give retroactive effect of Miller to juveniles and fail to do the same of Wolfe to those sentenced under §9718 violates the 5th and 14th Amendment of the United States Constitution.

Writing for the Court in United States v. Coin & Currency, 91 S.Ct. 1041 (1971), Justice Harlan made the following point when he declared that "[N]o circumstances call more for the invocation of a rule of complete retroactivity" than when "the conduct being penalized is constitutionally immune from punishment."

The retroactivity analysis under Teague is not dispositive to the case at hand though, in that, there is also a state based remedy to correct Petitioner's illegal sentence that does not require a finding of retroactivity under Teague. The rule of non-retroactivity was fashioned to achieve goals of federal habeas corpus while minimizing federal intrusion into state criminal proceedings. It was intended to limit the authority to grant relief for violations of new rules of constitutional law when reviewing its own conclusions. See Danforth v. Minnesota, 552 U.S. 264, 280-81 (2008).

Thus, Teague dictates whether a decision must be applied retroactively as a federal constitutional manner. It does not purport to be the last word on whether other remedies exist under Pennsylvania law for the correction of illegal sentences. As Danforth suggests, when Teague does not demand retroactive application of new constitutional rules, Pennsylvania is still free to provide a remedy above and beyond

what is provided by Federal Constitutional Jurisprudence.

A Pennsylvania Court's authority to grant relief on post-conviction collateral review is dictated by the Post-Conviction Relief Act ["PCRA"]. 42 Pa.C.S.A. §9542. The PCRA statute states that it "provides for an action by which persons convicted of crime they did not commit and persons serving illegal sentences may obtain collateral relief." Illegal sentencing claims pertaining to a sentence that exceeds the prescribed law are a cognizable claim for relief. §9543(a)(2)(vii).

Recognizing this change in Mandatory Minimum Constitutional law, Petitioner filed a timely PCRA petition on August 4, 2016, within 60 days of the decision announced in Wolfe, pursuant to 42 Pa.C.S.A. §9545(b)(2), invoking the exceptions of §9545(b)(1)(ii) and (b)(iii), asserting his sentence was unconstitutional. Erroneously the PCRA Court [and those subsequent Courts who reviewed the illegal sentence claim] refused to correct this illegality.

Nevertheless, it is clear by the language in Teague and Montgomery that Wolfe announced a new substantive constitutional rule reviewable on post-conviction collateral review as Wolfe eliminated the State's power to impose a given Mandatory Minimum sentence upon a certain class of offenders convicted of certain offenses under §9718.

There is no doubt that §9718 was unconstitutional when it was applied to Petitioner - and those similarly situated - as it was unconstitutional from it's inception, not merely from the date the Court in Wolfe declared it so. Alleyne did not serve to amend the United States Constitution, Alleyne recognized what had already been previously unrecognized, or what had been previously overlooked, that the 6th Amendment provides a defendant with the right to have any facts that increase the sentence to which he is exposed be determined by a jury beyond a reasonable doubt. Thus, §9718 through it's proof at sentencing provision routinely caused Pennsylvania Courts to violate a defendant's 6th Amendment rights by imposing a Mandatory Minimum Sentence until its unconstitutionality was finally recognized.

Whether illegal when issued or rendered illegal as a result of intervening authorities, it is undisputed Petitioner is currently serving illegal sentence.

The 14th Amendment guarantees that the Government must treat a person or class of persons the same as it treats other persons or classes in like circumstances. In todays constitutional jurisprudence, Equal Protection means that Legislation that discriminates must have a rational basis for doing so. And if the Legislation effects s fundamental right [such as Due Process, Legal Sentencing] and involves a specific classification of persons [such as those sentenced under §9178's Mandatory Minimum provision] it is unconstitutional unless it can withstand strict scrutiny. See Baxstrom v. Herold, 383 U.S. 107 (1966). "As in all Equal Protection cases. . . the crucial question is whether there is an appropriate governmental interest. . . . suitably furthered by the differential treatment." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

Equal Protection principles are exclusively associated with written constitutions and embodies guarantees of equal treatment normally applied to the procedural enforcement of laws but also to the substantive content of their provisions. In other words, the equal protection of the law is unvariably treated as a substantive constitutional principle which demands that laws will only be legitimate if they can be described as just and equal.

Here, there is no rational basis to discriminate against petitioners who challenge their unconstitutional illegal sentence during post-conviction review, especially when it is their first and only opportunity to present such a claim. Placing a procedural bar - where the claim can only be presented in direct appeal proceedings - above the need to correct an unconstitutional illegal sentence does not serve to further any governmental interest, unless that is to say, the government's interest is to deny petitioner's their constitutional rights and imprison them illegally. The only appropriate interest of a government is to ensure a defendant's sentence is constitutional, legal by statute and, just and equal under

the law.

If a Mandatory Minimum Sentencing Statute is found to be unconstitutional after an individual is sentenced, the equal protection principles and guarantees require equal treatment, which is the automatic vacating of said illegal sentence as there is no statutory authorization to further impose the sentence. It comports then that if a challenge to the legality of a sentence can not be waived, and a reviewing court has inherent authority and jurisdiction to correct it, then by law the court must do so.

The Pennsylvania Supreme Court's decision to invalidate the Mandatory Minimum Sentencing Statute of §9718 created a substantive change in constitutional rule of law that must be applied retroactively on post-conviction collateral review. §9718 implemented a mandatory penalty on specific criminal offenses and specific persons which has now been barred by the constitution, resulting in a conviction and sentence that is unlawful and unenforceable.

The Pennsylvania Supreme Court's, as well as that of the below Federal Court's application and understanding of this Court's opinion in Teague, Alleyne and Montgomery has been misapplied and misunderstood when these Courts refused to retroactively apply the relief announced in Wolfe to those petitioners who were previously sentenced under §9178.

It has been well established that Pennsylvania and the below Federal Courts have decided an important question and application of Federal Law that should be settled by this Court to ensure that Equal Protection and Due Process of the Law is afforded to Petitioner and those similarly situated persons in the form of resentencing them.

Moreover, though more specific to a sub-illegal sentence question of law, Petitioner's consecutive sentences in which he received 20 years and 9 months to 59 years is an illegal sentence due to each charge stemming from one singular act.

Petitioner's convictions of Rape, Criminal Attempt to Commit Involuntary Deviate

Sexual Intercourse [Inchoate], Aggravated Indecent Assault [Lesser-Included to Rape], Indecent Assault [Lesser-Included to Rape], and Endangering the Welfare of a Child [Lesser-Included to Rape] should have all merged together for sentencing purposes under the conviction of Rape as the Inchoate and Lesser-Included Offenses were designed to culminate in the commission of the same crime, Rape.

Petitioner's consecutive sentences run against the principles of Double Jeopardy as announced in Blockburger v. United States, 284 U.S. 299, 301 (1932). The failure of the Sentencing Court, as well as the below Federal Courts to recognize this clear and patent error violated Petitioner's right to a fair proceeding and a legal legal sentence pursuant to the 5th, 6th and 14th Amendments of the United States Constitution.

III. Interrogating Petitioner without reading him his "Miranda Rights" violated his constitutional right against self-incrimination where the line of questioning was directed to him as a suspect instead of as a witness in order to elicit an incriminating statement.

In Miranda v. Arizona, 382 U.S. 436 (1966), this Court held that inculpatory statements made in response to interrogation by a defendant in police custody are admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to the questioning by the police and that the defendant not only understand these rights, but voluntarily waived them.

Miranda further held that custodial interrogations have the potential to undermine the 5th Amendment right against self-incrimination by possibly exposing a suspect to physical or psychological coercion. To guard against such coercion, this Court established a prophylactic procedural mechanism that requires a suspect to receive a warning before custodial interrogation begins. Miranda, 384 U.S. at 444. Also see J.O.B. v. North Carolina, 131 S.Ct. 2394, 2401 (2011).

In Rhode Island v. Innis, 466 U.S. 291, 300-01 (1980), this Court defined interrogation as the express questioning or its equivalent. The functional equivalent of interrogation consists of words or actions on the part of the police, that the police should know are reasonably likely to elicit an incriminating response from the suspect. Innis, 466 U.S. at 301.

Here, the location of Petitioner's interrogation and questioning was at a police station in a small room where the police initiated the line of questioning at Petitioner as a suspect without reading him his "Miranda Rights". During the course of the interrogation Petitioner requested to leave the room and speak to his family but was denied from doing so which reasonably led him to believe he was in custody.

The failure to read Petitioner his "Miranda Rights" was an intentional tactic by the Police designed to elicit an incriminating statement as evidenced by Trooper Peck's line of questioning used to scare him into confessing to a crime he didn't

commit. Petitioner was eventually read his "Miranda Rights" but only after he made incriminating statements to police. As stated by the United States District Court, "Trooper Peck testified that [petitioner] 'confessed' after Trooper Peck described the evidence that could be used to establish the identity of the individual who impregnated the victim." This intentional description of evidence was used to elicit an incriminating response. More so, this factual statement is also most relevant to the preservation and testing of the fetal DNA tissue as presented in **CLAIM I.** to establish the true perpetrator who raped and impregnated the victim.

Nevertheless, Trooper Peck made this statement to Petitioner prior to him being read his "Miranda Rights" as a suspect in the Rape of the victim. If Petitioner was only being questioned as a "witness" - which he clearly was not - there was no reasons for the Trooper to take this line of questioning as it had nothing to do with being a witness.

The incriminating statements made by Petitioner in the written "confession" should have been objected to by Trial Counsel as the "confession" was a by-product of an unconstitutional interrogation. Other than the victim's inconsistent statements of who committed the Rape, Petitioner's coerced "confession" was the only evidence linking him to the crimes convicted of, making the failure of trial counsel to object to the police's failure to read him his "Miranda Rights" most prejudicial. Absent counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 687, 688 (1984).

The failure to read Petitioner his "Miranda Rights" prior to being interrogated as a suspect denied him his constitutional right against self-incrimination and the assistance of counsel, violating the 5th, 6th and 14th Amendment of the United States Constitutional.

IV. The Suppression of "Low IQ Evidence " from the jury denied Petitioner his right to a fair trial and due process of law.

In the Trial Court's 1925(a) opinion of direct appeal, the Court stated Petitioner's Low IQ of 71 Evidence was only relevant to a defense of mental insanity or diminished capacity, or to avoid the death sentence, none of which are applicable to Petitioner's cause and reasoning for wanting to introduce such evidence to the jury. The Court also found that because Petitioner had not challenged the voluntariness of his confession [due to trial counsel ineffectiveness] his Low IQ Evidence could not be used for such purposes at trial.

However, Petitioner's intention was to introduce his Low IQ Evidence to the jury to explain the rudimentary nature of his written "confession". Petitioner's statement is ambiguous because it can mean more than one thing. The text of the confession is as follows:

> "She confided in me and was asking sexual questions and it happened three times. I'm so sorry [M.D.'s nickname], you are one of my [non-grammatical marking] baby [non-grammatical marking]. I love you and I'm sorry Val. I love you and I'm sorry. It means sex. K.L.B."

According to Trooper Peck and his interview of Petitioner, "it" in the first sentence meant the act of sexual intercourse. However, "it" meant the discussions were about sex and these discussions happened three times. Therefore the jury would have benefited from knowing that the individual who wrote the alleged "confession" was of low intelligence and would have provided the true context in what Petitioner meant when he stated "it happened three times." The Low IQ Evidence was a potential tool of reasonable doubt and therefore, a valuable asset to Petitioner's defense.

Surely denying Petitioner the ability to present evidence of his Low IQ to the jury in order to explain the true context of his written words in his "confession" was an abuse of the trial court's discretion as it denied him a fair trial, violating his due process rights. This is especially egregious in this matter as there was insufficient evidence to have sustained a proper conviction. See Fiore v. White, 121 S.Ct. 712 (2001).

Here, there is more than merely contradictory evidence. Contradictory evidence would be Petitioner telling one story while the victim tells another. However, in this case Petitioner provided to the police a version of events where the victim was raped in the woods by strangers while on a hunting trip. This version of events was corroborated by the victim in a written statement that was very descriptive in terms of time of day, order of events leading up to the attack, an explanation of why she was alone and exposed in the woods, how the assailants held her down while they raped her, and a detailed description of how the rape occurred.

It was only upon the urging of police did the victim provide another statement wherein she implicated Petitioner for the first time. In contrast to the first statement, the second statement was very vague and would not have provided enough evidence to support the charges against Petitioner. It was precisely due to the vagueness of the second statement that the police again urged the victim to provide a third statement which further implicated Petitioner. The victim also gave two interviews at the Children's Resource Center, both of which she described the alleged sexual contact between her and the Petitioner. These additional statements are even more detailed than the statements given to police but were derived from the use of an anatomical drawing.

These differences in the victim's statements weight heavily against her testimony in Court. It also diminishes the testimony of Trooper Patillo as to his interviews with the victim as he encouraged her to change her statements twice. It was only when the victim was asked to give a second and third statement does she implicate Petitioner in any wrongdoing, two statements that give no detail, stating both times that her memory wasn't great concerning the events.

These differences in the victim's statements also diminish Petitioner's "confession" as it demonstrates his vague statement was a by-product of coercion by the police, which is why the Low IQ Evidence was relevant and material to his defense. This evidence would have explained that his statement was given by a

individual of low intelligence, and therefore, the true meaning of "it happened three times" referred to the Petitioner and the victim having discussions about sex, not that any sexual intercourse ever occurred. Evidence of Petitioner's Low IQ would have also established that he was more likely to be influenced by coercion and intimidation interrogation tactics than that of a person of a higher IQ.

Based on the totality of the evidence - and lack thereof - a new trial should have been granted by the below reviewing Courts as Petitioner was denied due process of law, a fair trial and the right to present a defense pursuant to the 5th, 6th and 14th Amendments of the United States Constitution.

CONCLUSION

Petitioner respectfully presents the below Courts abused their discretion in denying relief where relief is clearly warranted in the form of vacating Petitioner's conviction and remanding the matter for a new trial, or in the very least, resentencing as he is currently imprisoned under an unconstitutional and illegal sentence.

Addressing these issues and/or questions of constitutional law will not only benefit Petitioner, but thousands of similarly situated persons who have been forced to remain imprisoned under unconstitutional and illegal Mandatory Minimum Sentences because they have been unlawfully denied the ability to challenge them on post-conviction collateral review due to Pennsylvania's refusal to apply the correct application of law of this Honorable Court. More so, the type of "Miranda Rights" and "Brady" violations that occurred in this matter is the kind of issue that occurs more often than not due to the "punch first, ask questions later" tactics of investigating police officers who ignore precedent and law because they believe a suspect if "guilty" and therefore does not need to be read their rights or preserve any exculpatory evidence that would establish their innocence.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Date

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