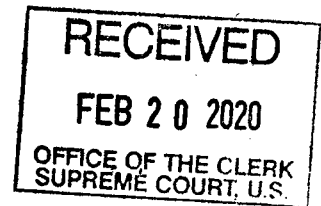


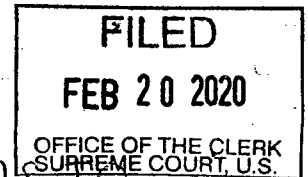
No. 19-8278
IN THE



SUPREME COURT OF THE UNITED STATES

ORIGINAL

IN RE: "LEVAR LEE SPENCE"



ON PETITION FOR A WRIT OF MANDAMUS TO
THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

PETITION FOR WRIT OF MANDAMUS

The party in the above-captioned action, a state inmate, designated "LEVAR LEE SPENCE", confined at the State Correctional Institution at SCI-COAL TOWNSHIP, under Institutional Number System [ML6447], 1 Kelley Drive, Coal Township, Pennsylvania, petitions this Court for a writ of mandamus to the United States Court of Appeals for the Third Circuit.

Also, a Civil Rule 60 is pending in the United States District Court for the Middle District of Pennsylvania, under civil action 0881 of 2017, on or about December 18, 2019.

QUESTION(S) PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly refused review and hearing of a "Fourth, Fifth, Sixth, and Fourteenth Amendment, per se prejudicial, Brady" violation concerning spoliation of a documented item of exculpatory evidentiary value on the premise that the Supreme Court of the United States denied certiorari?

Whether an evidentiary hearing is REQUIRED on this admittedly destroyed State's evidence documented as search [REDACTED] inventory?

Whether the writ of mandamus should be granted?

LIST OF PARTIES

All parties do not appear in the caption of the action on the cover page. A list of all parties to the proceeding in the court whose judgment(s) is the subject of this petition is as follows:

- 1) Chief Judge, SMITH;
- 2) Circuit Judge, Joseph A. GREENAWAY JR.; and, Judges =
- 3) MCKEE
- 4) AMBRO
- 5) CHAGARES
- 6) JORDAN
- 7) HARDIMAN
- 8) SHWARTZ
- 9) KRAUSE
- 10) RESTREPO
- 11) BIBAS
- 12) PORTER
- 13) MATEY and
- 14) NYGAARD, Circuit Judges.
- 15) District Court Judge, John E. JONES III; and,
- 16) Christopher C. CONNER, District Court Chief Judge.

RELATED CASES

- Townsend v. Sain, 372 U.S. 243, 83 S.Ct. 745, 9 L.ed.2d 770 (1963)
- Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.ed.2d 542 (2000)
- Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.ed. 2d 215 (1963)
- Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.ed.2d 705 (1967)

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TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Cone v. Bell, 129 S.ct. 1769, 173 L.ed.2d 701 (2009)	
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Neder v. U.S., 527 U.S. 1, 144 L.ed.2d 35 (1999)	
Wister County v. Allen, 442 U.S. 140, 99 S.ct. 2213 (1979)	
Harrington v. Richter, 131 S.ct. 770, 178 L.ed.2d 624 (2011)	
Garrus v. Sec'y of D.O.C., 694 F.3d 394 (3 rd Cir. 2012)	

STATUTES AND RULES

OTHER

Glassner v. U.S., 315 U.S. 60, 62 S.ct. 457 (1942)	
Cullen v. Pinholster, 133 S.ct. 1388, 179 L.ed.2d 557, 568 U.S. 170 (2011)	
Turner v. U.S., 396 U.S. 398, 24 L.ed.2d 610 (1970)	
Franks v. Delaware, 438 U.S. 154, 98 S.ct. 2674, 57 L.ed.2d 667 (1978)	
Douglas v. Alabama, 380 U.S. 415, 85 S.ct. 1074, 13 L.ed.2d 934 (1965)	
Arizona v. Fulminante, 499 U.S. 279, 111 S.ct. 1246, 113 L.ed.2d 302 (1991)	
Brown v. Colvin, 2013 U.S. Dist. LEXIS 121415 (3 rd Cir. 2013)	
Pierce v. Underwood, 487 U.S. 552, 108 S.ct. 2541, 101 L.ed.2d 490 (1988)	

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF MANDAMUS

Petitioner respectfully prays that a writ of mandamus issue to review the "clearly erroneous" district court judgment, and consistent with Third Circuit Court of Appeals and the Supreme Court of the United States decisions and statutory provisions especially at 28 U.S.C. 2253(c).

OPINIONS BELOW

The opinions of the United States court of appeals appear at Appendices A and C pertinent to this petition and is unpublished.

The district court on or about August 2, 2018 know or should have known that a Commonwealth witness, one Detective FENSTERMACHER, admitted at trial that he destroyed search inventory (see Ex. B, item #1), and where there is no adjudication on the merits, denied federal habeas on procedural grounds and grant of a COA.

The United States court of appeals also knew, or should have known, of the same when it refused to grant a COA.

JURISDICTION

The date on which the United States Court of Appeals enter its latest decision on December 23, 2019 denying any action taken in regards "Judge Nygaard's vote" as stipulated in a previous decision (Ex.C).

This petition is brought pursuant to, and in accord with, the Supreme Court Rules specifically at Rule 20.3(a). 28 U.S.C. 1651(a).

STATEMENT OF THE CASE

On or about December 18, 2019 (exactly one year after the district court denied federal habeas and COA on procedural grounds, where there is no adjudication on the merits, improperly), the Third Circuit Court of Appeals was petitioned for rehearing on Judge Nygaard's vote; but, that vote was never disclosed to Your Petitioner. See, Exhibit C.

The said petition for rehearing set forth simply to re-inform the court of appeals, with material evidence thereof, that **documented** search inventory was destroyed by officers; that the physical evidence was destroyed prior judicial examination and was never turned in to the issuing authority with the remaining documented search inventory; what the missing item is; and, that had the seized documented item been present, it would have proven the probable cause and criminal allegations impossible to exist. Basic principles of established Federal law require an evidentiary hearing to prevent furthering miscarriage of justice in such cases.

However, on December 23, 2019, the court of appeals notified the Petitioner that it will take no action (on Judge Nygaard's vote) notwithstanding. The court of appeals indicated that its decision was contingent upon the Supreme Court refusal on certiorari taken as an agreement with the court of appeals. See, Ex. A.

REASONS FOR GRANTING THE PETITION

For the reasons substantially set forth below, in support of the most important three (3) factors the following:

1. Given the current precedent of the Third Circuit Court of Appeals and the Supreme Court of the United States regarding the treatment of parties and pleadings that are without the assistance of an attorney. [See, *Haines v. Kerner*, 404 U.S. 519, 520-21].
2. The significance and substance underlying the undisputed factual Fourth, Fifth, Sixth, Fourteenth Amendment, per se prejudicial, structural defective Brady-spoliation violation claim.
3. A claim that has never been adjudicated on the merits in any court proceeding, indicative that, based on a reasoned and studied [] judgment, the decision to take no action is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and therefore consideration by this Court is necessary to secure and maintain uniformity of decisions in this Court

This Court should therefore mandate that the court of appeals secure and maintain uniformity of decisions, and set a time and date for a prompt evidentiary hearing as to the Brady violation.

The state and federal decisions regarding Your Petitioner's liberty rights, thusly, do not secure and maintain uniformity with the following:

In *Townsend v. Sain*, 372 U.S. 293, 312-13, a case involving the proper standard for determining whether to grant or deny an evidentiary hearing in federal habeas corpus proceedings, the United States Supreme Court announced the rule = "where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." The Court enumerated six specific circumstances in which a federal habeas court must grant an evidentiary hearing:

- "(1.) the merits of the factual dispute were not resolved in the state hearing;
 - (2.) the state factual determination is not fairly supported by the record as a whole;
 - (3.) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
 - (4.) there is a substantial allegation of newly discovered evidence;
 - (5.) the material facts were not adequately developed at the state-court hearing; or
 - (6.) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."
- Id.* at 313. (emphasis added.)

With reference to the respective scenarios, the Supreme Court reasoned that a federal hearing is necessary in this very instance if, for any reason

"not attributable to the inexcusable neglect of petitioner," crucial evidence pertinent to the federal claim was not developed. *Id.* at 317. *Boyd v. Waymart*, 579 F.3d 330 (C.A.3 (Pa.) 2009). In adding further insult to injury, this Court has stated that "[f]ollowing *Townsend* it was generally recognized that district courts had plenary authority to conduct evidentiary hearings in their discretion, constrained only by those six occasions in which a hearing is required". *Id.* *Boyd*, *supra*.

Over fifty years later, the Supreme Court partially overruled *Townsend*, albeit not on this issue pertaining to evidentiary hearings. "That basic rule has not changed". [*Shriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.ed. 2d 836 (2007).]

This Court should mandate a prompt evidentiary hearing.

Next, the right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on State's certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions. *Cone v. Bell*, 129 S.Ct. 1769, 1772, 173 L.ed. 2d 701 (2009) (internal quotations and citations omitted).

In *Brady* [*v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.ed. 2d 215 (1963)], the Supreme Court of the United States held that when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant's rights to due process, "irrespective of the good faith or bad faith of the prosecution". *Id.* at 87, 10 L.ed. 2d 215; see *Cone*, 129 S.Ct. at 1772. Although the State is obligated to "prosecute with earnestness and vigor", it "is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one". Quoting *Berger v. United States*, 295 U.S. 78, 88, 53 S.Ct. 629 (brackets provided in *Cone*, 129 S.Ct. at 1782).

Accordingly, the Supreme Court of the United States have held that when

the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment. See *Brady*, 373 U.S., at 87, 83 S.Ct. 1194; see *Cone*, 129 S.Ct., at 1782-83. In *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.ed.2d 481 (1985) (opinion of Blackmun, J.), the Supreme Court of the United States explained that evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it "could reasonably be taken to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.ed.2d 490 (1995); accord, *Banks v. Dretke*, 540 U.S. 668, 698-99, 124 S.Ct. 1256, 157 L.ed.2d 1166 (2004); *Strickler v. Greene*, 527 U.S. 263, 290, 119 S.Ct. 1936, 144 L.ed.2d 286 (1999); see also *Cone*, 129 S.Ct., at 1783.

Furthermore, in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.ed.2d 215 (1963), the Supreme Court set out the Rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment..." *Id.* at 87, 83 S.Ct. 1194; see *Simmons v. Beard*, 590 F.3d 223, 228 (C.A. 3 (Pa.) 2009). "To establish a *Brady* violation, it must be shown that (1) evidence was suppressed; (2) the evidence was favorable to the defense; and (3) the evidence was material to guilt or punishment." *United States v. Risha*, 445 F.3d 298, 303 (3rd Cir. 2006); see also, *Simmons v. Beard*, 590 F.3d 223, 233 (3rd Cir. 2009).

Evidence is "material", according to this Court, where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable

probability 'is a probability sufficient to undermine confidence in the outcome.'" *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.ed. 2d 481 (1985); see also, *Simmons v. Beard*, 590 F.3d 223, 234 (3rd Cir. 2009).

In the present matter at hand, on April 15, 2015, during a facially valid search of a hotel room for a controlled substance specifically and particularly possessed with an intent to deliver. The officers retrieved a small amount of marijuana, and heroine. However, the heroine was discovered in an inaccessible sealed box. That sealed box would have proven that its contents was not readily accessible for apportionment. That same sealed box was documented as search inventory item # 1, see Appx. B, but all of its contents was not listed. There were multiple items in the hotel room that would have unequivocally proven non-conforming use. Consequently, the sealed box was destroyed by an officer executing the search warrant. Official spoliation is illegal.

The Issuing Authority never reported the missing search inventory. The District Attorney never reported the missing search inventory. The trial court judge never reported the missing search inventory, and has heard testimony admitting its overt destruction. These officials have (1) suppressed illicit spoliation of documented exculpatory evidence, (2) favorable to Your Petitioner here, (3) that was "material to guilt or punishment." *Risha*, supra, at 303. Also, this claim(s) had somehow evaded adjudication for (5) FIVE YEARS requiring a mandatory evidentiary hearing. This Court will also be correct in its inference that the proceedings were unfair and appeal frustrated - but, it must be remembered that direct appeal is the primary avenue for review of a conviction or sentence. *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.ed.2d 1090 (1983); superceded by statute on other grounds as organized in *Slack v. McDaniel*, 529 U.S. 473, 480-81, 120 S.Ct. 1595, 146 L.ed.2d 542 (2000).

This Court should mandate an evidentiary hearing.

Then, but clearly not limited to, in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. ed. 2d 705 (1967), the Supreme Court of the United States set forth the test for determining whether a constitutional error is harmless. That test, this Court said, is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict detailed". *Id.* at 24, 87 S. Ct. 824; see *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. ed. 2d 674 (1986) ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"). Cited from *Neder v. United States*, 527 U.S. 1, 15-16, 119 S. Ct. 1827, 144 L. ed. 2d 35, 51 (1999).

Petitioner asserts that the said spoliation require this Court to issue a writ of mandamus upon the lower court to hold a prompt evidentiary hearing on the noted Fourth, Fifth, Sixth, and Fourteenth Amendment Brady violation which admits also a "structural defect" requiring automatic reversal. Indeed, "a state prisoner must show that the state court's ruling... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Quoting *Harrington v. Richter*, 131 S. Ct. 770, 786-87, 178 L. ed. 2d 624 (2011); accord, *Garrus v. Sec'y of the Dep't of Corr.*, 694 F.3d 394, 415 (3rd Cir. 2012). Especially, if the evidence is not overwhelming as claimed by the Petitioner, the smallest error should favor a reversal. See *Glassner v. United States*, 315 U.S. 60, 67, 62 S. Ct. 457, 86 L. ed. 2d 680 (1942) ("... error, under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swing the scales toward guilt").

The Supreme Court of the United States held that the evidence against which a federal court measures the reasonableness of the state court's factual findings is the record evidence at the time of the state court's adjudication, *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401, 179 L. ed. 2d 557 (2011), and have also held that if there is no adjudication on the merits the district courts cannot deny habeas relief on procedural grounds as it had done to Your

Petitioner on December 18, 2018 (M.D. Pa. Docket Number 17-CV-0881, SPENCE v. McGinley, et al.).

Thus, if the decisions of the Supreme Court or the United States Court of Appeals are to remain secure and uniform, neither court should tolerate nor continue to ignore the unjust allegations set forth herein. The Supreme Court of the United States further established the uniform ruling/decision that "Evidentiary inferences violate due process unless the inferred fact is 'more likely than not to flow from the proven fact on which it is made to depend'." *Turner v. United States*, 396 U.S. 398, 405, 90 S. Ct. 642, 646, 24 L. ed. 2d 610 (1970) [*Commonwealth v. Williams*, 2006 Pa. Super. 320, 911 A.2d 548, 552 (2006); *Kamiensky v. Hendricks*, 332 Fed. Appx. 740, 749-50 (3rd Cir. 2009)].

At some point, the criminal process, if it is to function at all, must turn its attention from where a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. *Franks v. Delaware*, 438 U.S. 154, 182 (dissenting opinion).

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. *Id.* at 170. The Supreme Court of the United States, in *Slack v. McDaniel*, *supra*, held that when the district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim(s), a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right or that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Cf. Seiler v. Superintendent*, 2013 U.S. Dist. LEXIS 40717 (E.D. Pa.). Quoting the United States Supreme Court in *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S. Ct. 1074, 13 L. ed. 2d 934, 939 (1965):

"

In determining the sufficiency of objections we have applied the

general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here." Your Petitioner had done this five years ago, but there is neither review nor adjudication on the merits of valid constitution claim set forth here.

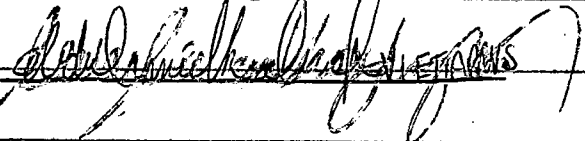
However, the common denominator of a structural defect(s) is that such errors infect "the entire conduct of the trial from the beginning to end", quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. ed. 2d 302 (1991), and the claim raised here incorporates the same results. As is established in this very Supreme Court of the United States, United States Court of Appeals for the Third Circuit, and the United States District Court, "substantial evidence... does not mean a large or significant amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" requiring automatic reversal, evidentiary hearing, MANDAMUS to the lower courts with instructions, grant of habeas relief, or prompt review and adjudication on the merits of the whole record on certiorari.

CONCLUSION

The petition for a writ of mandamus should be granted

Respectfully.

"LEVAR LEE SPENCE"

BY: 

Date: 4th January 2020