

Denied 7/24/20

CLD-254

July 16, 2020

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 20-1342

UNITED STATES OF AMERICA

VS.

WILLIAM J. O'BRIEN, III, Appellant

(E.D. Pa. Crim. No. 2-15-cr-00021-001)

Present: JORDAN, KRAUSE, and MATEY, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
- (2) Appellant's document in support of appeal

in the above-captioned case.

Respectfully,

Clerk

ORDER

O'Brien's request for a certificate of appealability is denied because he has not

"made a substantial showing of the denial of a constitutional right." 28 U.S.C.

§ 2253(c)(2). Jurists of reason would agree, without debate, that O'Brien cannot relitigate

the claims he raised on direct appeal in a § 2255 motion, and that his remaining claims

were all either inexcusably procedurally defaulted or meritless, for the same reasons

provided by the District Court in adopting the Magistrate Judge's report and recommendation. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

s/Paul B. Matey
Circuit Judge

Dated: July 21, 2020
Lmr/cc: Mary Beth Leahy
Joseph F. Minni
David E. Troyer
William J. O'Brien, III



A True Copy:

Patricia S. Dodszeit

Patricia S. Dodszeit, Clerk
Certified Order Issued in Lieu of Mandate

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EX BANC
Rehearing
Denied 8/21/20

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1342

UNITED STATES OF AMERICA

v.

WILLIAM J. O'BRIEN, III,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-15-cr-00021-001)
District Judge: Honorable Nitza I. Quiñones Alejandro

SUR PETITION FOR REHEARING

BEFORE: SMITH, *Chief Judge*, and MCKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, MATEY, and PHIPPS, *Circuit Judges*

The petition for rehearing filed by appellant, William J. O'Brien, III, in the above-captioned matter having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified not having

voted for rehearing by the Court en banc, the petition for rehearing by the panel and the Court en banc is DENIED.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: August 21, 2020

CJG/cc: William J. O'Brien, III
David E. Troyer, Esq.
Joseph F. Minni, Esq.
Mary Beth Leahy, Esq.

41 Lie to grand jury

- Guzman v. Secretary, 663 F.3d 1336 (11th Cir. 2011) (testimony by state's key witness and lead investigator about state's deal with witness omitted payment of \$500 reward shortly before witness's grand jury testimony, and prosecutor failed to correct omission).

U.S. v. Adamo, 742 F.2d 927, 940 (6th Cir. 1984) (Agreeing that prosecutors CANNOT KNOWINGLY use perjured testimony AT ANY point in the prosecution of a case...)

Deliberate perjury in the grand jury may also result in dismissal. 54 The defendant must prove that the perjury was material, 55 and may be required to prove that the prosecutor was aware of the perjury. 56 Courts also may dismiss indictments when the prosecutor intentionally or recklessly misled the grand jury. 57 Perjury which is not sponsored by the prosecution is not grounds for dismissal of an indictment. 58

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All we

54 **Deliberate perjury.** United States v. Roth, 777 F.2d 1200 (7th Cir. 1985); United States v. Samango, 607 F.2d 877, 882 (9th Cir. 1979) (dictum).

55 **Materiality requirement.** United States v. Soberon, 929 F.2d 935 (3d Cir.), cert. denied, 502 U.S. 818, 112 S. Ct. 73, 112 S. Ct. 74, 116 L. Ed. 2d 47 (1991) (indictment based on allegedly perjured grand jury testimony does not fall into group of cases of prosecutorial misconduct which allowed for dismissal without showing of prejudice to defendant).

opposite all other!

56 **Proof of prosecutorial knowledge about perjury.** United States v. Roth, 777 F.2d 1200, 1204 (7th Cir. 1985); United States v. Samango, 607 F.2d 877 (9th Cir. 1979) (prosecutor's deliberate use of perjured testimony before grand jury constitutes misconduct invalidating indictment) (dictum).

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57 **Intentional misleading grand jury.** United States v. Exson, 328 F.3d 456 (8th Cir.), cert. denied, 540 U.S. 1011, 124 S. Ct. 549, 157 L. Ed. 2d 421 (2003) (even if prosecutor intentionally misled grand jury, dismissal of indictment appropriate only if defendant showed actual prejudice); United States v. Hogan, 712 F.2d 757 (2d Cir. 1983).

Appendix
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pg 13

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

CRIMINAL ACTION
NO. 15-0021-1

v.

CIVIL ACTION
NO. 19-1810

WILLIAM J. O'BRIEN, III,
Defendant

ORDER

AND NOW, this 27th day of January 2020, upon careful and independent consideration of the *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence filed by Defendant William J. O'Brien, III, (Doc. 866), the Government's response in opposition, (Doc. 869), Defendant's reply, (Doc. 870), the *Report and Recommendation* (the "R&R") issued by the Honorable Lynn A. Sitarski, United States Magistrate Judge ("the Magistrate Judge"), recommending that the motion be denied, (Doc. 876), and Plaintiff's *pro se* objections to the R&R, (Doc. 880), it is hereby **ORDERED** that:

1. The *Report and Recommendation* is **APPROVED** and **ADOPTED**;
2. The objections to the R&R are without merit and are **OVERRULED**;¹

¹ Following a six-week jury trial, during which Defendant chose to represent himself with stand-by counsel, Defendant was found guilty on 135 counts arising primarily out of his distribution of controlled substances for no medical purposes in violation of 21 U.S.C. §§ 841 and 846. Following his sentencing, Defendant filed a counseled appeal of his conviction in which he raised three issues. On June 19, 2018, the United States Court of Appeals for the Third Circuit affirmed Defendant's conviction. Defendant's petitions for an *en banc* hearing and for a writ of certiorari were denied. On April 23, 2019, Defendant, proceeding *pro se*, filed the underlying § 2255 motion, in which he raises twenty-seven claims.

By Order dated August 27, 2019, the undersigned referred this matter to the Magistrate Judge for a Report and Recommendation. On November 7, 2019, the Magistrate Judge issued a thoroughly well-reasoned, thirty-four page R&R in which each of Defendant's claims was addressed and rejected. The Magistrate Judge found that all but one of Defendant's claims were either procedurally defaulted or previously raised and rejected by the Third Circuit on direct appeal.