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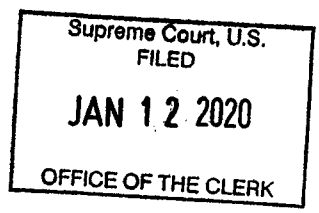


IN THE

SUPREME COURT OF THE UNITED STATES

Thomas Nevius, pro se

VS.

Attorney General of the State of New Jersey

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

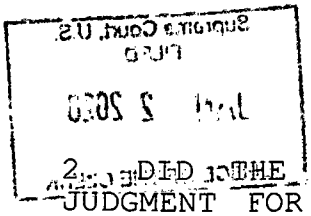
Thomas Nevius #605679/201449E

New Jersey State Prison, P.O. Box 861

Trenton, New Jersey 08625

QUESTIONS PRESENTED

1. DID THE DISTRICT COURT ERR WHEN IT DECIDED THAT CO-DEFENDANT (WILLIAM BOSTON) MINIMIZED HIS INVOLVEMENT IN THE HOMICIDE THEREFORE MAKING HIS CONFESSION TO POLICE UNRELIABLE AND INADMISSIBLE AT PETITIONER'S TRIAL?



2. DID THE DISTRICT COURT ERR WHEN IT SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE EVIDENCE, TO DENY PETITIONER'S BRADY CLAIM?

3. DID THE DISTRICT COURT ERR WHEN IT SUBSTITUTED ITS OWN RECORD FOR THAT OF THE TRIAL RECORD, TO DENY PETITIONER'S CONFRONTATION VIOLATION?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear 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:

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OPINIONS BELOW

The United States District Court of New Jersey denied petitioner's habeas corpus in an opinion on December 11, 2019. **(See Appendix - Ex-1-48).**

The United States Court Of Appeals for the Third Circuit denied petitioner's certificate of appealability on or about June 16, 2020. **(See Appendix - Ex-[redacted]49).**

The United States Court Of Appeals for the Third Circuit filed an order on or around August 18, 2020, denying petitioner's petition for a rehearing en banc. **(See Appendix - Ex-50).**

CONSTITUTIONAL PROVISION INVOLVED

Amendment 6

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.

JURISDICTION

The Third Circuit entered its order denying an application for a certificate of appealability, which served as the court's judgment, on June 16, 2020. Thereafter, on August 18, 2020, the Third Circuit denied a timely petition for rehearing and rehearing en banc. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

STATEMENT OF CASE

Petitioner's habeas corpus consisted of a numerous grounds for relief, however, petitioner's main grounds for relief centered on petitioner being denied compulsory process when the trial court did not allow petitioner's co-defendant to testify on his behalf.

Petitioner's next ground for relief consisted of a Brady violation, where the state did not disclose an expert witness' report.

Petitioner's other primary issue dealt with the trial court's refusal to allow confrontation of two crucial state witnesses.

The District Court denied relief on December 11, 2019.

The United States Court Of Appeals for the Third Circuit denied petitioner's certificate of appealability on or about June 16, 2020.

The United States Court Of Appeals for the Third Circuit filed an order on August 18, 2020, denying petitioner's petition for a rehearing en banc.

This petition follows.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Point I

THE DISTRICT COURT ERRED WHEN IT OPINED THAT CO-DEFENDANT (WILLIAM BOSTON'S) CONFESSION TO POLICE WAS NOT RELIABLE, THEREFORE MAKING IT INADMISSBLE

In order to obtain a certificate of appealability (COA), a petitioner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 478, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

The district court denied the petition for a writ of habeas corpus. Nevius v. The Attorney General of the New Jersey, No. 1:17-04587-(NLH), slip opinion (December 11, 2019).

On July 31, 2002 William Boston (Boston) agreed to go in to police headquarters, where he was questioned by Det. Steven O'Neill. Boston admitted to being involved in the burglary. Boston said that he was with two individuals in the rear of the apartments, but Tyrone Beals (Beals) went to the front and broke into Ms. Walker's apartment.

According to Det. Negron, Boston said that in the early morning hour of July 30, 2002, he had been outside the rear of Ms. Walker's apartment with Tyrone Beals and Damien Stratton.

Beals started to cut a hole in the screen, but Ms. Walker looked out the window and scared him away. That night, Beals jimmied opened the front door of Ms. Walker's apartment and went inside. Boston initially said that he remained outside, but then he admitted that he was inside the bedroom when Beals stabbed the victim and wiped the knife with a rag.

After Boston said that "he wasn't going to go down for it by himself..." Det. O'Neill resumed the questioning. Boston stated that, "it was him and Tyrone" that they knew that Ms. Walker was not home, and that she had approximately $500 on her. He said that Tyrone had used a flat-head screwdriver to get through the two apartment doors. Once inside, they were in the bedroom when they heard keys jingling at the door. Boston hid in the bedroom closet, but Ms. Walker saw Tyrone and started yelling at him in Spanish. There was a struggle; Tyrone got a "chef's knife" from thre kitchen and stabbed Ms. Walker; and then choked her with a white T-shirt. At Beals' direction, Boston then took the T-shirt off the victim's neck and used it to wipe the blood from the knife.

Det. O'Neill then asked Boston to give a taped statement, but Boston only agreed to a written statement. That statement, S-4 and C-6, which is appended was handwritten by Det. O'Neill, although Boston signed every paragraph. In the statement, Boston said that he had gone into Ms. Walker's apartment with Tyrone Beals, who "asked [him] to be the lookout" while Beals was "looking around for something to steal." When the victim drove

up, Boston went outside and greeted her, but once she found Beals inside, Boston used a butter knife to get back into her apartment. Beals got a knife from the kitchen to stab the victim, and then gagged her with a white shirt that was hanging from his belt. Boston stated that it was Beals who "ran off with the knife."

During petitioner's trial, petitioner moved to admit Boston's statement to Det. O'Neill into evidence, citing N.J.R.E. 804(b)(3). Petitioner argued that Boston's statement was trustworthy because the state had used it to convict Boston. He indicated his belief that Boston was unwilling to testify at his trial, and thus would be unavailable as a witness. However, petitioner said that if Boston did not testify, he should still be able to "use his statement as an exception to the hearsay rule, as exculpatory evidence." The court agreed that it had to consider the "[s]tatement against interest" exception of N.J.R.E. 803(c)(25), in making its determination. However, noting that appellant had not attempted to produce Boston, and finding that there had been no showing that he was unavailable to testify, the court denied appellant's application to admit the statement in evidence.

As the trial resumed with the cross-examination of Det. Negron, petitioner asked the witness, "[i]sn't it true that Mr. Boston told you that Tyrone Beals killed Ms. Walker," and began to refer to the "nine-page statement." The prosecutor objected,

and the court instructed the jury to "totally disregard the question."

In reviewing Boston's signed statement to Det. O'Neill, the court acknowledged that it "would have a benefit to [Petitioner]," and that it "contains a certain level of prejudice against the interest of Mr. Boston." On the other hand, the court found that Boston portrayed himself "an unwilling and reluctant participant in a burglary," and that his statement was made to exculpate him from "a capital murder charge." The court also found that Boston's statement to Barrick Wesley would not be admissible under N.J.R.E. 803(c)(25).

Rule N.J.R.E. 803(c)(25) conflicts with petitioner's constitutional sixth amendment compulsory process.

The fundamental right of an accused to present witnesses in his own defense {27 V.I. 358} is an essential attribute of our adversary system of justice. Taylor v. Illinois, 484 U.S. at 408; Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The Compulsory Process clause protects the presentation of the defendant's case from unwarranted interference by the government, be it in the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling by the trial judge. In Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967), the Supreme Court sustained a Compulsory Process clause challenge to a state evidence {956 F.2d 446} rule which prohibited accomplices from testifying on behalf of each

other, but allowed them to testify for the state because the rule arbitrarily denied the defendant the right to present a witness who was both mentally and physically capable of testifying {1992 U.S. App. LEXIS 9} about events that he had personally observed, and whose testimony would have been relevant and material to the defense. 388 U.S. at 22-23.

Point II

THE DISTRICT COURT ERRED WHEN IT SUBSTITUTED ITS OWN VIEWS FOR THAT OF THE EVIDENCE, THEN DENIED PETITIONER'S BRADY CLAIM

The State withheld Edward Ginsburg's (Ginsburg) trace evidence report concerning the T-shirt. The torn T-shirt was used as direct evidence to convict appellant.

On December 18, 2003, Ginsburg was assigned to examine the T-shirt and other evidence in the case, two months and eight days after appellant's arrest. Ginsburg completed his examination on February 23, 2004, four months and 21 days after appellant's arrest.

In the state court, appellant pointed the courts attention to Ginsburg notes, where on page 1 it stated the following:

> "As per meeting with A.P. Ken Paglingh (prosecuting attorney) we are to exam only specimen #7, #8, #10, #14, #15, #17, #18, #19 for foreign hairs. Also we are to look at the control hairs and determine if they are sufficient."

Specimen #10 is the torn T-shirt. The report also contained evidence of Ginsburg's determination of numerous amounts of hair on specimen #10. In fact, so much hair Ginsburg had to break the D.N.A. evidence down into five slides. Portions of the D.N.A. evidence was determined to be comparable to the victim's. Ginsburg also determined that there was two medium brown hairs, which did not compare to any of the submitted controls that were recovered off [#10].

Ginsburg also found several medium to light brown caucasian head hairs, and head fragments that were recovered from various pieces of evidence. In particular, specimen #10 torn T-shirt, that was used to convict appellant, which was excluded from this trace evidence. The date of the findings were February 23, 2004. The state was were aware of these findings. However, appellant did not receive this evidence until August of 2013.

To obtain relief from a Brady violation an appellant need to show that: (1) the prosecution suppressed evidence (2) the evidence is material (3) with the last prong dealing with the reasonable probability test of materiality. See also United States v. Bagley, 473 U.S. 667, 681, 87 L. Ed. 2d 481 , 105 S. Ct. 3375 (1985). In Bagley, the Court further refined the materiality definition by noting that, "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682. {1992 U.S. App. LEXIS 11}.

Had appellant possessed this D.N.A. trace report during trial, it would have undermined the state's D.N.A. evidence, and showed the jury whatever hair that was on specimen #10. Specimen #10 actually carried the killer's D.N.A.

There was other relevant evidence that was not turned over by the state, such as: Curriculum vitae, and case notes of Laura Hutchins of the F.B.I.

There is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding

would have been different-necessarily entails the conclusion that the standard of harmful error generally to be applied in federal habeas corpus cases has been satisfied, that is, that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict.

Petitioner maintains his conviction was obtained in violation of Brady v Maryland, 373 US 83, 87, 10 L Ed 2d 215, 83 S Ct 1194, which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment.

In United States v Bagley, 473 US 667, 87 L Ed 2d 481, 105 S Ct 3375, the Bagley materiality is not a sufficiency of evidence test. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. In this case the undisclosed evidence affected this trial.

Point III

THE DISTRICT COURT ERRED WHEN IT SUBSTITUTED ITS OWN RECORD FOR THAT OF THE TRIAL RECORD, THEN DENIED PETITIONER'S CONFRONTATION VIOLATION

Petitioner's right to confront was violated by the state's presentation of Officer Vai's (Vai) testimony concerning how Automated Fingerprint Identification System (A.F.I.S.) classified the suspected prints he collected.

Vai's testimony was offered directly for the truth, and to undermine the defense of there being only one print found in general, with that print being classified as insufficient for comparison purposes. According to Det. Harris' Grand Jury testimony, Vai gave a detailed account of what (A.F.I.S.) is comprised of, its general use, why he took steps before hand concerning this supposed evidence, and why A.F.I.S. was not able to read these prints. Those statements were used as testimonial statements to help convict appellant, and to show the jury the print on the closet door, not the night stand.

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1369 (2204), the Supreme Court held: "that the confrontation bar the admission of testimonial statements of witnesses from trial" except "where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine."

The Supreme Court detailed the "core class of testimonial statements" as: Affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or pretrial statements that declarants would reasonably expect to be

used prosecutorial; extrajudicial statements... contained in formalized testimonial material, such as affidavits, depositions, prior testimony of confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

The state took advantage of the not having a representative testify about A.F.I.S. The second print that came supposedly came from the closet door, allowed the state to infer to the jury that it was this second print that was "insufficient", not the print that came from the night-stand. The so-called second print destroyed appellant's defense.

The state presented Leslie Wanko, (Wanko) a supposed laboratory supervisor for testimony of a test performed by a trainee specialist. In Melendez-Diaz v. Massachusetts, U.S. 120 S.Ct. 2027, 174 L.Ed.2d 314 (2009), the court was faced with the question whether a state laboratory certificate indicating that the substance seized from defendant was cocaine was testimonial, and thus subject to confrontation under the sixth amendment.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." 541 U.S. at 53-54 (emphasis added).

The Confrontation Clause of the Sixth Amendment protects a criminal defendant "only against the introduction of testimonial hearsay statements, and [the] admissibility of nontestimonial hearsay is governed solely by the rules of evidence." United States v. Berrios, 676 F.3d 118, 126, 56 V.I. 932 (3d Cir. 2012); see also Davis v. Washington, 547 U.S. 813, 823, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) (concluding that the Confrontation Clause applies only to testimonial hearsay). "[W]here nontestimonial hearsay is concerned, the Confrontation Clause has no role to play in determining the admissibility of a declarant's statement." Berrios, 676 F.3d at 126. The Confrontation Clause inquiry is therefore a two-step process: courts must first determine whether a given out of court statement is testimonial in nature, and then apply the appropriate safeguard. Id. at 127. Thus, if a statement is non-testimonial, the inquiry is limited solely to whether the statement was properly admitted under the appropriate rules of evidence. Id.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

Dated: 12-22-20

Thomas Nevius

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear 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: