

IN THE
SUPREME COURT OF THE UNITED STATES

Phillip Lee Carson - PETITIONER

VS.

David Shinn, Director; et al., - RESPONDENT(S)

ON RULE 15.8 MOTION FOR SUPPLEMENTAL BRIEF

USDC 9 NO. 20-16548

CALLING ATTENTION TO A NEW CIRCUIT COURT CASE

Bracey v. Superintendent Rockview SCI, 986 F.3d 274 (2021)

(NEW ADDRESS, WITHIN THE ARIZONA DEPARTMENT OF CORRECTIONS)

Phillip Lee Carson

Arizona State Prison, #091914, DB 3302, Unit A-44

Florence, AZ 85132

PRO SE, FORMA PAUPERIS

July 21st, 2021,

x Phillip Lee Carson
Phillip Lee Carson

SUPPLEMENTAL BRIEF

1. Petitioner Phillip Lee Carson, Respectfully requests that this most Honorable SUPREME COURT OF THE UNITED STATES:

- 1) Determine between the Ninth Circuits Ruling in Petitioners Case and

- 2) The opposing ruling in the Third Circuits ruling over the same issue as the Petitioners in the Ninth Circuit.

2. The Ninth Circuits ruling in Petitioners case is in TOTAL CONFLICT with the Third Circuits ruling in:

- 1) *Bracey v. Superintendent Reck* 501 F.3d 274 (2021)

RULE 15.8

3. In compliance with Rule 15.8, the Petitioner discovered a New Case from the Third Circuit (above) in a ^{criminal} ~~Prison~~ Legal News magazine (After the Petitioner filed his writ for Certiorari on May 06, 2021).

The Criminal Legal News article was in their April 2021 issue. Petitioner was not a subscriber of the Criminal Legal News, Petitioner was a subscriber to the Prison Legal News which is for Civil Rights case law reviews. Petitioner got the Criminal Legal News after it had been passed down from subscriber and other inmates prior to petitioner.

4. Petitioner received "Bracey" approximately four (4) days after filing his original Writ of Certiorari on May 06, 2021. (See Attach. "A".)

5. The Court of Appeals for the ~~Ninth~~^{Third} Circuit held Contrary to the Ninth Circuits ruling in Petitioners Case, that:

[1] Brady claim was sufficiently debatable to deserve encouragement to proceed further;

[2] Brady claim was timely so long as it was filed within one year of date on which petitioner had reason to believe that prosecution may have violated its duty of disclosure; and

[3] remand to district court was required to determine if extraordinary circumstances existed for relief from judgment based on change in controlling precedent

regarding timeliness of Brady claim,

vacated and remanded.

6. Petitioner's Ninth Circuit ruling in 2021 WL 461562 was in concurrence with the Arizona District Courts ruling in No. 20-16548, D.C. No. 2:19-cv-00827-ROS District of Arizona, Phoenix, Before the Honorable Thomas, Chief Judge, and BRESS, Circuit Judge. As follows:

ORDER

7. "1 The request for a Certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown that a "jurist of reason would find it debatable whether petition states a valid claim of the denial of a Constitutional right and

8. that jurist of reason would find it debatable whether the district court was correct in its procedural ruling," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253 (c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-141 (2012)

Not Reported in Fed. Rptr., 2021 WL 461362.

9. Petitioner has addressed the first part of above denial ruling by using this Courts precedent in *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed 2d 342 (1976), where false testimony is material if there is a reasonable likelihood that [it] could have affected the judgement of the jury.

10. It is the second part of the Ninth Circuits ruling which is in accord with the District Courts ruling where they have determined (unreasonably in Petitioners opinion) that a reasonable jurist would not find it debatable that the district court was correct in its procedural ruling.

11. Petitioner points out the District Courts procedural ruling which is in CONFLICT with Petitioners opinion and *Bracey*!

12. "Petitioner's calculation is incorrect because it is undisputed that Petitioner was aware of the relevant information long ago. Therefore, the statute of limitations did not begin in 2015." (Order D.C. Doc. 77, 08.06.20 at 3/16-18)

13. "And the Statute of Limitations will not begin later if the evidence at trial, or Petitioner's own knowledge, gave ample reason for a reasonable person... to investigate further". Id. at 1236, (id. at 3/25-27)

14. "Petitioner describes witnesses at his trial as offering such testimony but then contradicting that testimony at the later parole hearing. According to Petitioner, this 'perjury' supports claims under ~~Brady~~ as well as claims involving due process, 5th and 14th Const. Amend., in fair trial and prosecutorial misconduct (Doc. 44 at 11),

"While exceptionally difficult to understand, Petitioner appears to be arguing that state prosecutor knew or should have known that his key witnesses were committing perjury on the stand. (Doc. 44 at 13). Allowing that perjury and not disclosing that perjury to Petitioner at the time of trial allegedly resulted in Petitioner being convicted of a crime he did not commit.

The problem for Petitioner is that he knew of the alleged 'perjury' at the time of his trial"

(id. at 4/1-10). [Carson claimed that the state prosecutor knew of impeachable evidence (Notice at 4/14-17).]

At this point Bracey needs to be compared:

15. Based on newly discovered information, Bracey petitioned for relief under Pennsylvania's Post-~~petition for relief~~ Conviction Relief Act,

16. raising claims under *Brady and Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). The Court of Common Pleas dismissed Bracey's petition as time barred, ruling that the factual basis of the claim could have been ascertained [earlier] by exercise of due diligence." (Opinion of the Court in *Bracey* p. 8 I. FACTUAL BACKGROUND 7.9)

17. The District Court Judge determined in Petitioner's case, the same as Bracey's Pennsylvania's Court (incorrectly that):

"For purposes of the provision allowing the statute of limitations to begin only when the 'factual predicate' of the claim is discovered, that provision requires the petitioner have exercised 'due diligence' in trying to discover the claims," (Order 2:19-cv-00827-ROS Doc. 77 at 3/19-21)

18. The Honorable Judge Roslyn O Silvers Court ruling should be vacated and Remanded and ruled on in light of the Third Circuit's correct determination of *Brady* standards. The District Court unreasonable determined Petitioner's *Brady* issue (claim) when the Court got right determines that:

19. "Petitioner is not entitled to start the one-year limitations period in 2015 given that petitioner knew of the alleged new evidence all along." The federal petition must be dismissed as time-barred." (id. at 4/18-20)

The Court ordered a Certificate of Appealability is denied because dismissal of petition is justified by a plain procedural bar and reasonable jurist would not find the procedural ruling debatable. (id. Doc. 77 at 5/11-15).

20. The District Court Judge agreed with the Magistrate's Report & Recommendation where the Magistrate unreasonably determined:

"Carson fails to establish an actual innocence claim such that he is entitled to tolling of the statute of limitations. The record and pleadings in this case do not contain evidence of innocence so strong that [the Court] cannot have confidence in the outcome of the proceedings" (R & R doc. 40 at 13/13-16).

21. And the Honorable Reslyn O'Silver agrees at:

Moreover, while there is an 'actual innocence' exception to the one-year statute of limitations, petitioner has not offered sufficient evidence of such innocence.

The Court ruled in her favor at (Doc 77 at 4/25-26)

22. The District Court denied Petitioner an Evidentiary Hearing at (Doc 77 at 5/4-6)

The Magistrate denied Petitioner an Evidentiary Hearing at her R & R at the same time finding that Petitioner's Brady Claim is without merit (Doc. 40 at 20/12-13; 20/21)

23. The Magistrate goes as far to say (and the District Court & Ninth Circuit Courts agreed) that:

"Furthermore, the evidence is not 'suppressed' if the defense is aware of the evidence notwithstanding that the evidence is also available to the prosecution... (holding that, because the defendant's attorney possessed the salient facts to access the alleged Brady evidence [T]here was no suppression of this easily attainable evidence."

24. (Doc. 40 at 18/10-15),

25. Bracey was ruled on correctly (as Petitioner believes) and Bracey is analogous to Carson v. Shinn in virtually the identical claim: Exculpatory Evidence which revealed that the states key witnesses committed perjury and that the prosecution knew during trial and/or should have known and failed to to reveal this information to Defense and Jury,

26. And that in Both Petitioner and Bracey's Case the state claimed they were both procedurally Barred because had they Both used due diligence they could have found and shown the Newly discovered "exculpatory evidence" to jury.

27. In Dennis, 831 F.3d 263, the Commonwealth argued that defendant's failure to seek out exculpatory evidence materials in public domain barred him from bringing a Brady claim. The Bracey Court squarely rejected that argument, holding that defendant has no burden to scavenge for hints of undisclosed Brady material even if the material part could be found in public records.

Rather, the prosecution's duty to disclose under Brady is absolute - it does not depend on defense counsel's actions and the defense is entitled to presume that prosecutors have discharged their official duties. (quoting Barks, 540 U.S. at 696, 124 S.Ct. 1256).

28. Petitioner realizes Bracey had filed a Rule 60 motion in Federal Court, however that was in early 2020, Petitioner has just recently received the April 2021 decision. The Bracey Court found that he must only show that his claim represents "something more than

29. the absence of frivolity or the existence of mere good faith, and that he need not even prove that some jurist would grant the petition.

Petitioners case has proven impeachable/impeachment evidence due to factually recording on a government (Parole Board) CA (hearing) where the states key trial witnesses, at critical moments in Petitioners trial did commit perjury pursuant to prior statements, precedents, Agurs etc. The Petitioner was denied his due process right to even file a full and fair Post Conviction Relief, he was denied at the notice of PCR stage, even though his Notice was 13 pages packed with Federal and Constitutional Claims, references and Case Law which if TRUE would be Colorable Claims no doubt.

30. Question for this Honorable Court

IF Dennis Constituted a change in decisional law material to the dismissal of Braceys Brady Claim on timeliness grounds does this precedent affect Petitioners timeliness grounds? (Petitioner wants to impeach states witness).

31. Dennis arose in the context of proving a Brady claim, it also affects the diligence that §2244(d)(1)(D) expects of a habeas petitioner hoping to assert a Brady Claim, for impeachability.

Dennis's lessons to the principles governing AEDPA's due diligence Requirement (pursuant to the Third Circuit Court) we conclude that a petitioner in Braceys position does not fail to exercise due diligence, 28 U.S.C. §2244(d)(1)(D), by relying on the prosecution's independent and unflagging obligation to disclose material exculpatory evidence in its possession. (especially states knowledge of impeachable perjury).

32. Dennis therefore caused a material change in the relevant law for Bracey, and Petitioner believes, it also does, for his claims.

33. The due diligence requirement under section 2244(d)(1)(D) requires a high fact-and-context-specific analysis which involves as subject matter the "factual predicate" issue. Here the State Superior Court all the way up to the District Court unreasonably determined petitioners predicate factor(s).

The Courts claimed/determined without a full and fair Rule 32 Post Conviction Relief Petition or an Evidentiary hearing (per Notice at 1/29-30) that petitioners predicate factor(s) was "that the victim carried a gun in his vehicle" ... (Dec. 40 R&R at 12/14-15)

34. This is factually incorrect, petitioners actual factual predicate was under "[Specific Evidence] (c) Facts that support the claim and reasons for not raising the claim in the previous petition in a timely manner (However see prior to Dec. 1, 1992 rules): 1) Prosecutor's failure to disclose impeachment evidence violated Brady. State had a constitutional obligation to disclose impeachment evidence, 28 U.S.C. § 2254(d)(1)". (Notice per at 4/10-17).

35. The above is petitioners exact quote in his Notice of PCR as his #1 predicate factor, yes the impeachment is in regards to the states key witnesses perjured testimony regarding the fact that the prosecution knew that his own witnesses were lying about the victim having guns in his vehicle. (See attach "B"). But the Predicate factor is that the state hid impeachable evidence.

36. The States key witnesses were caught and recorded giving ABSOLUTE different statements than what they gave to Petitioner's jury, which convicted petitioner of First degree Murder - Petitioner had a right to due process and a fair trial. Pursuant to Brady the state was obligated to provide this information.

DUE DILIGENCE UNDER 28 USC §2244

32. The states key witnesses all gave the same perjured testimony "X" (for non descriptive purposes). The petitioner knew that they were all lying and advised his counsel of this fact. Petitioners Counsel advised petitioner that there is not a shred of proof that the states key witnesses were lying about "X".

Petitioners Counsel also advised Petitioner (in trial) that Counsel was not going to call the "crying, grieving 13 year old son" of the victim (deceased) a liar about "X" on the witness stand, when the rest of the states witnesses were telling the jury the same "X" story.

33. Therefore, Petitioners "reasonable expectations" were beyond bleak, he expected the state to set the record straight as Banks did. The Petitioner could not prove that the State knew that his key witnesses were committing perjury, because Petitioner could not prove states key witnesses were committing perjury.

The Petitioner could not believe that the state knew of his own witnesses perjury, until they gave reason for the petitioner to believe the state knew or should have known of it, and this occurred some 23 years later at petitioners FIRST Parole Board (recorded hearing). (CV20-00827-ROS, Doc. 19)

34. * NINTH CIRCUIT, DISTRICT COURT & STATE COURTS MISSED PREDICATE FACTS!

Petitioners claim is that the Prosecution had withheld Brady material, not that the prosecution had withheld Brady material the defense could not otherwise access. Before May 14, 2015 Petitioner had no reasonable basis to suspect exculpatory evidence that state knew of perjury;

12/15

40. and defenses diligence in seeking out exculpatory material (that the State knew its key witnesses were committing perjury) on its own "plays no role in the Brady analysis," id at 291 (quoting Banks, 540 U.S. at 696, 124 S.Ct. 1256).

41. Petitioner's Counsel assured Petitioner that the state is doing their job and that she is doing hers and that she can not attack the witnesses (for the state) and call them liars, and as far as she determined "I had to start accepting the truth and that I should have taken the plea bargain."

FACTUAL PRECATE & REASONABLE EXPECTATIONS

42. Petitioner knew that there would be no evidence discovered in the states knowing of the perjured testimonies because the witnesses won't admit it; (and they did not).

Petitioner's Counsel advised him that the police in Arizona would never suppress or hide evidence, when sure enough they did - in Petitioner's case, this too was revealed 23 years later at recorded Parole Board hearing 05.14.2015 and which was Petitioner's 2nd factor (Notice at 4/18-26).

43. The District Attorney in Petitioner's recent DNA case (same ^{crime} issue) in the Arizona Superior Court stated: "even if the deceased victims fingerprint DNA was on the guns in Carson's vehicle, it would ^{not} matter because Carson still shot Michael Cartney" ([1])

"This, Petitioner cannot compute, for the only way for the deceased victims prints (DNA) to be on those weapons (that Petitioner alleges that the Police Dept. put them there, by taking them out of victim's truck, to make it look like Petitioner killed an Unarmed man) would

44. be if those guns and weapons were the deceased victims ~~guns~~ and not the Petitioners, however the D.A. Allister Adel does not seem to care about factual Predicates or Reasonable expectations. (see CR#1990-005235, 08.27.2020, p. 1st/12 at Aug. 27, 2020) DWA

45. The District Court failed to consider the full measure of [the] properly presented facts and circumstances attendant to Petitioner Carsons request and the District and Ninth Circuit Courts precluded development of the record concerning those facts and circumstances, thus Petitioner believes this Highest Court in the Land should vacate, overturn, remand and/or set Petitioner free, because he has shown (he prays) "extraordinary circumstances where without such relief, an extreme and ~~un~~ unexpected hardship would occur and thus continue to occur, a miscarriage of Justice.

46. Like Bracey, Petitioner has never been afforded an evidentiary hearing to develop his habeas claim, nor has Petitioner been afforded his due process 5th & 14th Amendments Const., to fully and fairly file a Petition for Post Conviction Relief, Petitioner's pro se pleadings while cogent in their own right, should also be liberally construed.

Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 LEd 2d 108 (2007).

47. PETITIONER prays that this Honorable Court will remand for the District or Ninth Circuit Court to "take the first pass at weighing equitable factors." *Satterfield*, 872 F.3d at 162, with additional briefing and fact finding as necessary, *Cox*, 757 F.3d at 106, including other relevant factors, *DoE*, 810 F.3d at 153. as in *Bracey*.

48. ~~However~~ Petitioner's claim from ^{his} arrest has been the same and the 2015 Parole Board hearing made Petitioner believe ^{that} the state knew of the PERJURY.

49. Unlike Bracey, Petitioner's case has not been closed, because he has met his habeas time frames up to this the Supreme Court. ~~this~~ Dennis and Bracey have been decided whilst Petitioner has been in Court, since his Discovery, that the Prosecution knew of Perjured Testimonies and impeachment evidence thereof.

50. Carson has emphasized that he did know states witnesses were committing perjury under oath, but that he could not prove it and that the state had to know, that his witnesses were lying, but Carson could not prove it. Carson has claimed this since his trial, ^{but} ~~and~~ did not have the proof, to file it in his Original Rule 32 PCR, but attempted the best he could with what evidence he had at that time [1995].

51. Petitioner believes, he has been as diligent as possible, for a man in his unique circumstances; Remember, Petitioner was too psychotic during trial, to ~~even~~ represent himself. He actually had no say so in his case, the Superior Court Judge Robert Hertzberg and Petitioner's Counsel Mara Siegel, made that perfectly clear, prior to and during trial [1992].

52. Carson's Brady rule use, applies equally, to evidence that could have been used, for impeachment purposes.

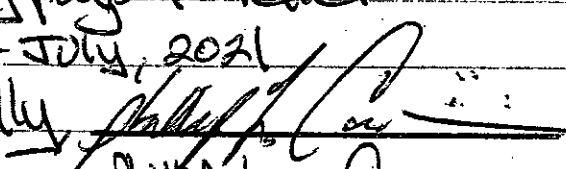
Carson was Denied his COA on procedural grounds, as discussed earlier, whereas Slack v. McDaniel applies, unlike in Bracey, and the States knowledge of impeachment evidence, was not a part of the public record ^{not} until ^{the} Newly Discovered Evidence (05.14.2015). This impeachment evidence, would have made a difference, in the Petitioner's trial, because the Jury would have seen "states witnesses" Lie in

53. Petitioner filed a dozen requests for Brady materials prior to trial to no avail, Petitioner requested an evidentiary hearing at every stage.

54. Petitioner Respectfully prays for relief.

Submitted this 21st day of July, 2021

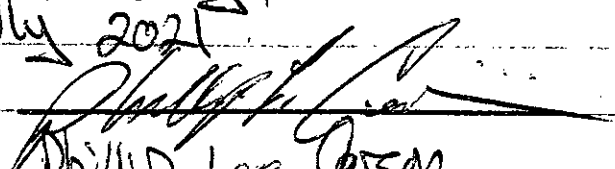
Respectfully,


Phillip Lee Carson
Petitioner, pro se

Declaration

I Phillip Lee Carson, do declare that the aforementioned in the Supplemental Brief is true and correct to the best of my personal knowledge and experience, I declare this under the penalty of perjury, on this the 21st day of July 2021

By:


Phillip Lee Carson
Petitioner, pro se

10/1/1

CERTIFICATE OF COMPLIANCE

No. 20-8425

IN THE
SUPREME COURT OF THE UNITED STATES

Phillip Lee Carson — PETITIONER

VS.

David Shinn, Director; et al., — RESPONDENTS

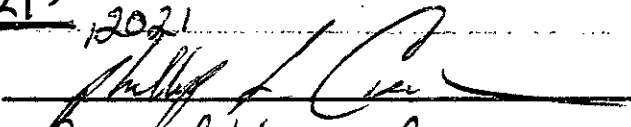
As Required by Supreme Court Rule 33.1 (b) I Certify

that the SUPPLEMENTAL BRIEF contains less than

3,000 words, excluding the parts of the Supplement that
are exempt by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing
is true and correct to the best of my knowledge.

Executed on July 21st, 2021


Phillip Lee Carson, petitioner, pro se

SUPPLEMENTAL BRIEF

ATTACH. "A" NO. 20-8425

- 1) April 2021 edition of Criminal Legal News
received by petitioner on May 10, 2021

2 pages

System Fails Mentally Ill (cont.)

the system understand that Davis was ill and needed help? Maybe, she thinks, it's just that no one cared. She says she talked to the warden at one of the units "no less than 15 times," imploring him to get Davis some help. "After hearing me tell him the whole story, on more than one occasion, and me bawling my head off, he's like, 'Well, sounds like Cameron needs to make better choices.' I'm like, seriously? That's what you just got from all this?" She says it's like they just don't "want to learn, I don't think they want to understand."

In navigating the system, she's realized just how big the problem is. "I didn't know that this was a problem until it happened to my family," she said. "Where was the common sense in this whole thing? Yes, we want law enforcement to have more training in mental health, that would be wonderful. But it didn't take a rocket scientist to put two and two together at the time of Cameron's incident. You know what I'm saying?"

This article by Jordan Smith was originally published by The Intercept (theintercept.com) on November 26, 2020; republished with permission from The Intercept, an award-winning nonprofit news organization dedicated to holding the powerful accountable through fearless, adversarial journalism. Sign up for The Intercept's Newsletter (https://theintercept.com/newsletter). Copyright, First Look Media Works, Inc.

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Prison Legal News
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PO Box 1151
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Third Circuit:
Brady Claims in Habeas Petitions Timely
When Filed Within One Year of Date
Reason to Believe Prosecutor
Violated Duty To Disclose

by Douglas Ankney

THE U.S. COURT OF APPEALS FOR THE Third Circuit determined that *Dennis v. Sec'y*, 834 F.3d 263 (3d Cir. 2016), altered the Circuit's jurisprudence regarding "Brady claims" [*Brady v. Maryland*, 373 U.S. 83 (1963)] such that the claims are timely filed pursuant to 28 U.S.C. § 2244(b)(2)(B)(i) if they are brought within one year of the date on which the petitioner had reason to believe the prosecution may have violated its duty of disclosure irrespective of whether the undisclosed material could have been found earlier.

At William Bracey's Pennsylvania murder trial in 1995, the Commonwealth relied heavily on two witnesses – Thomas Plummer, Jr., and Sylvester Bell. At trial, the Commonwealth elicited testimony from both witnesses that they had received favorable plea agreements on certain charges in exchange for their testimony. Bracey was sentenced to life in prison. His appeal and state habeas petition were unsuccessful.

In 2010, Bracey learned that shortly after he had been convicted, Plummer pleaded guilty to charges that had not been disclosed by the prosecutor. And the Commonwealth also failed to disclose it had withdrawn a second set of charges against Bell.

Based on this newly discovered information, Bracey petitioned for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), arguing that the prosecutor failed to disclose exculpatory evidence as required by *Brady*. The Court of Common Pleas dismissed the PCRA petition as time-barred, ruling that the factual basis of the claim was a matter of public record and could have been ascertained earlier by the exercise of due diligence. The Superior Court affirmed.

Bracey then asserted his *Brady* claims in a federal habeas petition in 2011. The U.S. District Court for the Middle District of Pennsylvania dismissed the petition as untimely under 28 U.S.C. § 2244(d)(1)(D), reasoning that since the undisclosed materials were a matter of public record, Bracey brought his claims more than one year after the factual predicate of

his claims could have been discovered through the exercise of due diligence. Bracey attempted to appeal the denial, but a certificate of appealability ("COA") was denied.

Three years later, the Third Circuit ruled in *Dennis* that a defendant has no burden to "scavenge for hints of undisclosed *Brady* material" even if the material is part of the public record. Bracey moved for reconsideration under Federal Rules of Civil Procedure, Rule 60(b) ("Rule 60(b) motion"). The District Court summarily denied the Rule 60(b) motion without referencing or discussing *Dennis*. The Third Circuit issued a COA to answer, *inter alia*, whether the District Court abused its discretion in denying Bracey's Rule 60(b) motion without considering *Dennis*' effect on its previous decision to dismiss Bracey's habeas petition.

Because Bracey's Rule 60(b) motion sought relief based on an intervening change in the law, the Court first had to determine if the change was material to the basis on which the District Court initially denied habeas relief. *Norris v. Brooks*, 794 F.3d 401 (3d Cir. 2015). The District Court denied relief based on § 2244(d)(1)(D), which allows claims to be filed within one year of "the date on which the factual predicate of the claim[s] ... could have been discovered through the exercise of due diligence." A "factual predicate" of a habeas claim means the facts "out of which a point of law arises." *Fact*, Black's Law Dictionary (11th ed. 2019).

Due diligence is a context-specific inquiry and is the diligence required based on the defendant's knowledge, experience, and circumstances. *Wilson v. Beard*, 426 F.3d 653 (3d Cir. 2004). Due diligence requires a habeas petitioner to investigate only when he has a reasonable basis to expect that an investigation would uncover relevant information. *Id.*

Prior to *Dennis*, the Third Circuit's decisions regarding *Brady* claims related to due diligence were inconsistent and confusing, the Court observed. For example, in *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984), the Third Circuit stated that the Government

bore no obligation under *Brady* "to furnish a defendant with information which [the defendant] already has or, with any reasonable diligence, [could] obtain himself." (The Third Circuit rendered similar rulings in numerous other prior decisions cited in the opinion.) But in *Wilson*, the Third Circuit held that a prosecutor's *Brady* obligations require production of impeachment evidence even when that evidence is publicly available.

The Court explained that *Dennis* corrected and clarified the law by ruling that there is no "affirmative due diligence duty of defense counsel as part of *Brady*" and "no support [for] the notion that defendants must scavenge for hints of undisclosed *Brady* material." Instead, "the duty to disclose under *Brady* is absolute – it does not depend on defense counsel's actions." *Id.* Because the prosecutor's *Brady* obligation to disclose is absolute, the defendant is entitled to presume all materials have been disclosed. *Id.* *Howard*

While *Dennis* didn't directly involve § 2241(d)(1)(D), it materially altered what a petitioner in *Bracey's* position would have reasonably expected about the possibility of undisclosed *Brady* material, thereby shifting the ground on which *Bracey's* petition was

dismissed, the Court explained. Based on the reasoning of *Dennis*, the Court held that a habeas petitioner's *Brady* claim is timely under § 2244(d)(1)(D) so long as it is filed within one year of the date on which the petitioner has reason to believe that the prosecution may have violated its duty of disclosure. However, the Court cautioned: "If there is a reasonable basis [beforehand] for a petitioner to believe additional investigation will yield undisclosed *Brady* material, the petitioner must investigate or risk the statutory consequences [viz., dismissal]."

The Court stated that *Dennis* changed the relevant decisional law in that after *Dennis* the factual predicate is the prosecution's failure to disclose any material – not its failure to disclose material otherwise unavailable. The District Court's denial of *Bracey's* petition due to a failure to exercise due diligence was permissible at the time of the denial but was not permissible post *Dennis* absent the existence of facts showing the defense failed to investigate a reasonable suspicion the prosecution had breached its duty to disclose.

Even though the Court concluded that *Dennis* materially changed the law, "intervening changes in the law rarely justify relief"

without more. *Cox v. Horn*, 757 F.3d 113 (3d Cir. 2014). A defendant's Rule 60(b) motion must show "extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." *Id.* The factors a district court should consider in making such a determination are: (1) the effect of the change in decisional law on a constitutional rule or right for criminal defendants, (2) the merits of the underlying claim[s], (3) principles of finality and comity, (4) movant's diligence in pursuing review, and (5) where appropriate, the imperative of correcting a fundamentally unjust incarceration. *Cox*.

In the instant case, the District Court failed to conduct any analysis at all. Because none of the *Cox* factors was addressed, it was a per se abuse of discretion. *Cox*. And in those instances, *Cox* instructs that remand is necessary unless the court could affirm on some other ground[s], according to the Court. Thus, the Court concluded that the record before it required remand.

Accordingly, the Court vacated and remanded to the District Court for an appropriate consideration of *Bracey's* Rule 60(b) motion. See: *Bracey v. Superintendent Rockview SCI*, 986 F.3d 274 (3d Cir. 2021). ■

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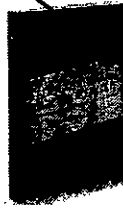
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- ☐ Civil Procedure in a Nutshell

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SUPPLEMENTAL BRIEF

Attach "B" NO. 20-8425

1) May 22, 2015 Notice of Post Conviction
Relief

2. ARIZONA STATE PRISON

(B) 1-13

MICHAEL K JEANES, CLERK
BY *[Signature]* DEF

3. POB 3300, A-44

FILED

4. FLORENCE, AZ 85132
(Pro-se)

15 MAY 22 AM 10:30

6. IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7. IN AND FOR THE COUNTY OF MARICOPA

8. West foot Ct. order 27

9. STATE OF ARIZONA

HON. Hertzberg

10. -vs-

Cr.
CASE NO. 90-05235

11. PHILLIP L. CARSON

R. CRIM. PROC. R. 32

12. Defendant

NOTICE OF POST CONVICTION RELIEF

13. @ Supreme Court of Arizona R.

14. NO ISSUE WHICH HAS ALREADY BEEN RAISED AND DECIDED ON

15. APPEAL OR IN A PREVIOUS PETITION MAY BE USED AS A BASIS

16. FOR A SUCCESSIVE PETITION.

17. 1. Defendants name: Phillip Lee Carson

18. Defendants prison #: 091914

19. 2. Defendants address: ARIZONA STATE PRISON, POB 3300,

20. A-44, Florence, AZ, ~~85003~~ 85132

21. 3. (A) Defendant was convicted of the following crimes:

22. 1st degree Murder ARS 13-

23. (B) Defendant was sentenced on ^{June 12th} ~~May 3rd~~, 1992, to a term of

24. 25-Life, commencing on ~~May 3rd~~, 1992 for the crime

25. of 1st degree Murder (Note: The convictions for; all other

26. charges except Theft have been served. The sentence for

27. theft is 5.00 years), following a:

28. [X] Trial by jury (of 12 peers 11 women/1 man)

29. Per Earp v. Dranski, 431 F.3d 1158, 1167 (9th Cir 2005)

30. Evidentiary Hearing requested ARS R. 32.8(a, b, c, d).

2. 4. Defendant has taken the following actions to secure relief
3. from his convictions or sentences

4. (A) Direct Appeal ☐ No ☒ Yes

5. (B) Previous Rule 32 Proceedings ☐ No ☒ Yes

6. 5. Defendant was represented by the following lawyers at:

7. Trial/Sentencing: Mara T. Siegel Public Defenders Office

8. Appeal: Sandra Appointed Private Counsel (Advocate)

9. Previous Rule 32 proceedings: yes, however?

10. 6. Is the defendant raising a claim of ineffective assistance
11. of counsel? ☐ Yes ☒ No (as Counsel was unaware)

12. 7. Defendant is presently represented by a lawyer ☐ Yes ☒ No

13. 8. If you are not currently represented by a lawyer, do you want
14. the court to appoint a lawyer for this proceeding? ☒ Yes ☐ No

15. Timely Notice under R. 32.:

16. (A); (B) and (C) ☐ Yes ☒ No (☐ NA)

17.

18. 9. Defendant was sentenced prior to December 1,

19. 1992 ☒ Yes; Defendant has filed a previous Rule 32

20. petition in this case ☒ Yes ☐ No; This is an untimely

21. Notice ☐ Yes ☐ No (☒ NA)

22. (Prior to December 1, 1992)

23. (A) A claim pursuant to Rule 32.1(c) Newly discovered
24. material facts exist, which the court, after considering

25. (1) The probability that such facts, if introduced would

26. have changed the verdict, finding or sentence, (3) The

27. promptness with which the petitioner has commenced

28. a proceeding after discovery of such facts, may require

29. that the conviction or sentence be vacated, is being

1. raised in this petition (Form #24.6) after 12-1-92)
2. (B) [X] Newly discovered material facts exist which
3. probably would have changed the verdict or sentence.
4. (1) The newly discovered ~~facts~~ material facts
5. ~~exist~~ were discovered after the trial. (3) The
6. newly discovered material facts are not merely
7. cumulative or used solely for impeachment, unless
8. the impeachment evidence substantially undermines
9. **testimony** which was of "critical significance" at trial
10. such that the evidence probably would have changed
11. the verdict or sentence.

12. Rule 32.4 Commencement of Proceedings

13. Prior to December 1, 1992

14. a. Form, Filing and service of petition. A proceeding is
15. commenced by timely filing a Petition with the clerk of
16. the court in which the conviction occurred. A petition
17. **may be filed at any time after entry of judgment**
18. **and sentence,**

19. d. The Court shall order those portions of the record
20. prepared that it deems necessary to resolve the issues
21. to be raised in the petition. The preparation shall be at
22. county expense if the defendant is **indigent**

23. Rule 32.5 Contents of Petition

24. Prior to December 1, 1992

25. a. Contents, the petitioner shall provide all inform-
26. ation required by the form. The petitioner shall incl-
27. ude every ground known to him for vacating, reducing,
28. correcting, or otherwise changing all judgments or
29. sentences imposed upon him, and verify under **oath**

1. that he has done so.

B-11

2. c. Discretionary appointment of counsel, If the petit-
3. ioner desires appointment^{ed} of counsel on a subsequent
4. petition and if the court is satisfied that he or
5. she is indigent, the court may appoint counsel,
6. who may file an amended petition within thirty
7. (30) days of appointment. If court declines to
8. appoint counsel the reason for such appointment
9. shall be set forth in writing.

10. [Specific Evidence]

11. (C) Facts that support the claim and reasons for not
12. raising the claim in the previous petition in a timely
13. manner (However see Prior to Dec. 1, 1992 rules):

14. 1) Prosecutor's failure to disclose impeachment
15. evidence violated *Brady*. State has a constitutional
16. obligation to disclose impeachment evidence. 28 U.S.-
17. C. A. § 2254 (d) (1). [Inflammatory lies added at 5-14-15 hearing]

18. State Prosecutor along with lead Investigating
19. & detective failed to produce evidence in a **Murder**
20. trial that was favorable to the defense. The
21. prosecutor "Noel Levi" and lead Detective "Hutchens"
22. suppressed evidence that would have proved "Michael
23. Coatney" the murder victim had a 22 ~~revolver~~
24. caliber under his driver seat and/or kept the
25. 22 caliber under his driver seat in his white
26. truck he drove to work.

27. This evidence was revealed by "Michael
28. Coatneys" son "Mike Coatney" at the Defendants
29. Parole Board hearing on May 14, 2015.

1. Detective Hutchens had this information
 2. back in 1990-1992 during the Defendants Murder
 3. trial and Rept it to him and prosecutors self;
 4. and/or self.

5. "Howard Coatney" murder victims brother
 6. Stated he gave Michael Coatney a "shotgun",
 7. specifically a "sawed off" that Michael Coatney
 8. would keep behind his seat in his white work
 9. truck (the truck he was in day of murder).

10. Howard Coatney stated this at Defendants
 11. Parole Board hearing. The state was aware of
 12. this fact and did not produce this evidence
 13. to defense, either willfully or inadvertently,
 14. this produced prejudice for the following
 15. reasons:

16. 1) Defendant pulled his gun out from under
 17. "his" drivers seat due to the fact "he" knew
 18. Michael Coatney had weapons in his vehicle;
 19. Specifically his white work truck, and that
 20. Michael most likely will have a gun when he
 21. approaches Defendant on side of road; due
 22. to defendant running him off the road because
 23. Michael had Defendants wife in white truck
 24. with him in embrace.

25. However in trial state and lead Detective
 26. suppressed the evidence that Michael Coatney
 27. carried or had weapons in his vehicle. State
 28. portrayed Defendant as one who pulled a gun
 29. on a man who was known to be defenseless and

1. was not customary to carry guns; which was
 2. not the **truth**. To find **prejudice** under
 3. **Brady and Giglio**, it is not necessary to find
 4. that the jury of "Carson" the defendant
 5. would have come out differently; it
 6. suffices that there be a reasonable probab-
 7. ility of a different result as to either guilt
 8. or penalty.

9. And where "Carson" does not have enough
 10. information to find **Brady** material with reas-
 11. onable diligence, the states failure to produce
 12. the evidence is considered suppression.

13. If the lead detective "Hutchens" has a
 14. duty to disclose exculpatory "evidence" such as
 15. Michael Coatney having and carrying a handgun
 16. and sawed off shot gun in his vehicle; when
 17. in trial State presented a case to the very
 18. **Contrary to the jury**; It is then a duty
 19. even applicable to disclose even where there has
 20. been **no** request by the the accused. see: *Strickler-*
 21. *v. Greene*, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed. 2d
 22. 286 (1999); *United States v. Agurs*, 427 U.S. 97, 107, 96
 23. S.Ct. 2392, 49 L.Ed. 2d 342 (1976).

24.

25. Impeachment issue

26. 1) prior statements of Lead Detective Hutchens
 27. Varied materially from his testimony at trial, i.e.
 28. A) In trial Detective Hutchens swore under
 29. oath as a Police Detective that Michael Coatney

1. was shot leaning forward per forensics.
2. The victim was shot with the bullets (357 rand)
3. trajectory travelling from the top of the
4. heart area towards the bottom. This was
5. Confirmed by State Prosecutor "Noel Levi"
6. who in his closing argument stated to the
7. Jury that "Michael Coatney" was leaning
8. forward with hands to his downward
9. motion; when he was shot.

10. However Detective "Hutchens" changed
11. his testimony at Defendants Parole Board
12. hearing 5-14-15; stating Michael Coatney
13. was standing straight up, with his hands
14. in the air walking backwards. This ~~material~~
15. ~~is~~ testimony (or statement while representing
16. his testimony as a lead Detective) is materially diff-
17. erent from trial, and was a leading cause for
18. defendants denial of Parole.

19. Linda Coatney **the** key witness in this case
20. gave a testimony (Proof of evidence) that was
21. materially different than her testimony (or
22. oath) in trial.

23. At the Defendants Parole hearing Linda Coatney
24. testified that Defendant did not tell her she could
25. leave at mountain side and that she did not swear
26. under oath that she went with defendant because
27. She thought he was testing her and that he would
28. shoot her in the back of the head if she walked
29. away from him. She stated at Parole hearing

1. That defendant grabbed her by her hair and drug
 2. her up the mountainside; with no conversation
 3. about; she could leave, or she went with defendant
 4. seemingly voluntarily [due to her belief he would
 5. shoot her in back of her head if she walked away].
 6. This is materially different from her testimony
 7. from trial as material witness that helped to
 8. convict defendant. [Specific information above].

9. From Howard Coatney; Linda Coatney
 10. (defendant Phillip Carsons wife at the time of
 11. the murder); Michael Coatney and Detective
 12. Hutchens, had specific information about
 13. Michael Coatneys known reputation of carrying
 14. a handgun and sawed off shotgun, yet they
 15. suppressed these facts at trial and actually
 16. perjured themselves on witness stand and/or
 17. did not take stand due to suppression of their
 18. role in knowledge of evidence by state.

19. In the broad sweep of 6/9/10, it was the
 20. prosecutors' duty to learn of any favorable
 21. evidence known to the others [listed above
 22. and who knows who else?] acting on the
 23. government's behalf in this case including
 24. the **police**. *Kyles v. Whitley*, 514 U.S. 419, ~~437~~ 38, 115 S.Ct.
 25. 1555, 131 L.Ed.2d 490 (1995) this was required of state.

26. The state has suppressed the fact that
 27. their actors on the government's part knew about
 28. the victim: Michael Coatneys possession of guns for
 29. the past 25 years; and has suppressed it from defense.

1. Surely if jury in defendants case; if the
 2. jury had known that Michael Coatney "did" have
 3. a handgun handi (under his truck drivers seat)
 4. and a sawed off shotgun behind his truck seat,
 5. they would have surely cast doubt on Linda
 6. Coatneys and other government actors who
 7. claimed Michael Coatney did not have guns
 8. with him or on him or that he did not have
 9. the wherewith all to brandish a handgun on
 10. defendant,

11. Defendant surely was prejudiced by this
 12. in his trial.

13. Linda Coatney and Detective Hutchens
 14. specific instances mentioned above of prior conduct
 15. describing their materially different testimony
 16. from Parole board (Recorded) testimony from
 17. Defendants trial testimony (transcribed) shows
 18. they both had lied on the witness stand or the
 19. Parole Board stand - EITHER WAY THEY LIED. SEE
 20. *Fouk v. Kotz*, 138 ARIZ. 159, 673 P.2d 799, 801-02 (?)
 21. (ARIZ. CT. APP. 1983)

22. Defendant requests all of states and
 23. Detective Hutchens notes, reports, files in
 24. regards to "Carsons" case and any type of
 25. reprimand concerning Detective Hutchens
 26. and Noel Levi for their personnel records for
 27. impeachment purposes; And any reliable evidence of their
 28. misconduct in unrelated cases for credibility. *United States*
 29. *v. Kiszewski*, 877 F.2d 210, 216 (2nd [sic] Cir 1989)

1. The State violated defendant Carson's Due Process
2. rights - Because Due process imposes an "inescapable"
3. duty on the prosecutor "to disclose known, favorable evi-
4. dence rising to a material level of importance." *Kyles*,
5. Favorable evidence includes both exculpatory and impeach-
6. ment material that is relevant ~~that~~ either to guilt
7. or punishment. *Bagley*, The prosecutor is charged
8. with knowledge of any *Brady v Maryland*, 373 U.S. 83, 87,
9. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*,
10. 405 U.S. 150, 153 - 1, S.Ct. 763, 31 L.Ed.2d 104 (1972)
11. material of which the prosecutor's office or the
12. investigating police agency is aware i.e. Michael
13. Coatney's guns and now as of 5-14-15 Linda
14. Coatney and Detective Hutchens have proved
15. to lie about certain "key" events in case that
16. may have made it a 1st degree rather than
17. a lower ~~charge~~ conviction of 2nd degree or
18. manslaughter; Their lies influenced the jury.
19. In trial Linda Coatney and detective
20. Hutchens suppressed "Key" evidence under the
21. direction of the State concerning the guns
22. of Michael Coatney and "who" knows what
23. else. Linda Coatney lied at Parole Hearing
24. on certain issues to inflame Board members
25. and she lied on specific issues in trial to
26. inflame jury; same as Detective Hutchens.
27. See *Youngblood v. West Virginia*, 547 U.S. 867, 869-70, 126
28. S.Ct. 218, 165 L.Ed.2d 269 (2006) (per Curiam). The State
29. violated R. 42.12, R. Prof. Conduct R. 3.8 as well.

1. The state suppressed the fact's revealed
2. at defendant's Parole Board Hearing (25 years^{B-11}
3. after trial) i.e. that murder victim carried
4. handgun and sawed off shotgun on a regular
5. basis. This fact would have been able to give
6. the jury a different understanding as to
7. what was really in defendant's state of mind.

8. This evidence of specific acts of carrying
9. guns by deceased would have been relevant as
10. to bearing-on defendant's state of mind and
11. reasonableness of his belief that deadly force
12. was necessary when used; defendant claimed self-
13. defense defendant was entitled to elicit evidence
14. of victims character of carrying weapons [as
15. defendant claimed in his interrogation] [and via
16. counsel's defense questions in trial that were lied
17. about them some 25 yrs. ago. see: State v. Dalrymple,
18. 131 AZ. 133, 639 p2d 323 (1982); State v. Williams
19. app. AZ. 141, 127, 685 p2d 764 (1984).
20.

21. On 5-14-15 Detective Hitchens also stated that
22. there was a sudden ~~quarrel~~ quarrel between defendant
23. and deceased due to deceased being with defendant's
24. wife (at time) Bartram v. State 33 md app 115, 364 p2d.
25. 1119 (1976); State v. Ramirez, AZ 116, 259 569 p2d 201 (1977).

26. The state held facts in violation of R. 3.8
27. (R. 42) from defense; And therefore the jury was
28. not allowed to judge full picture. (Re-sentenced^{manslaughter})

29. Therefore defendant requests a new trial for
the murder charge or absolute discharge.

Respectfully.

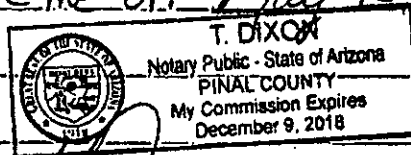
Phyllis J. [Signature]

5-15-15

1. Defendant respectfully requests counsel in
2. this R. 32 request. However defendant stat (B-12)
3. proceed forward in propria-persona and in
4. trial as well (if applicable). Defendant requests Counsel.
5. I am requesting post-conviction relief under
6. pre December 1, 1992 rules as well due to the
7. Commission of Crime was April 25, 1990. I
8. declare under penalty of perjury that the inform-
9. ation contained in this petition is true to the
10. best of my knowledge or belief and that a request
11. for Parole Board Hearing of 5-14-15 has been ordered.
12. Via my Counselor Co3 Smith on 5-18-15. I also
13. understand that failure to raise any known ground
14. for relief in my petition will prohibit me from
15. raising it in any future date (relevant to Dec,
16. 1, 1992 prior law).
17. Respectfully *Phillip Carson*
18. Date signed 5-18-15

19. AFFIDAVIT OF INDIGENCY

20. I have requested the appointment of a lawyer to
21. represent me in post-conviction proceedings. I swear
22. under oath and penalty of perjury that I am
23. indigent and because of my poverty I am financially unable
24. to pay for the cost of a lawyer to represent me, without incur-
25. ring substantial hardship to myself or my family. *Phillip Carson* 5-18-15
26. Subscribed and sworn before before me on May 18 2015 by
27. *Phillip Carson*



28. 12-9-2018

T. Dixon
Notary Public

30. my Commission expires

Certificate of Service

B-13

I, Phillip Carson, declare under penalty of perjury that a true and correct copy of "Notice of Post Conviction Relief" was mailed to below listed parties via ADOC legal mail in stamped and sealed envelope on this 19th day of may 2015;

& Attachment A-1 Parole Board hearing request

1) Maricopa County Superior Court
Clerk of the Court Michael K. Jeanes

201 W. Jefferson

Phoenix, AZ. 85003

(1) orig (1) copy, confirmed w/ S.A.S.E & postage

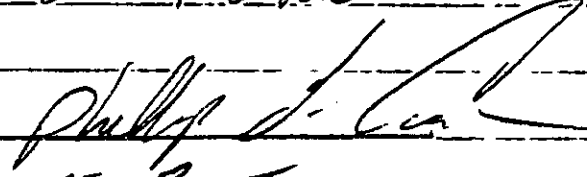
2) Mara Siegel Attorney of record
Maricopa County Public Defender

Criminal Appellate Div. suite #6

132 S. Central

Phoenix, AZ. 85004-2406

Respectfully,



Date signed: 5-18-15

No. 20 - 8425

IN THE

SUPREME COURT OF THE UNITED STATES

Phillip Lee Carson - PETITIONER

VS.

David Shinn, Director; et al - RESPONDENT(S)

PROOF OF SERVICE

I, Phillip Lee Carson, do swear or declare that on this date July, 21st, 2021 as required by Supreme Court Rule 29 I have served the enclosed Supplemental Brief on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents with ADCRR staff member for legal-mail-out (mail Box Rule) addressed to each party with postage prepaid envelope for delivery within 3 calendar days.

The name and address of party served is: Attorney General's office, state of Arizona, Mark Brnovich, Attorney General, Eric Knobloch, Assist. A.G., 2005 N. Central Ave., Phoenix, AZ 85004-1580, Counsel for David Shinn, et al.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 21st 2021 at Phoenix, Arizona.