

21-7589 ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

APR - 6 2022

OFFICE OF THE CLERK

Mark A. Brown — PETITIONER  
(Your Name)

vs.

Bernadette Mason — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Third Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark A. Brown

(Your Name)

301 Morea Road

(Address)

Frackville, PA 17932

(City, State, Zip Code)

N/A

(Phone Number)

## QUESTION(S) PRESENTED

Whether the Court of Appeals finding that the state Courts conviction was based on a reasonable determination of the facts in light of the evidence presented deprived Petitioner of his constitutional right to due process of law by eliminating the requirement that the Government prove beyond a reasonable doubt?

## LIST OF PARTIES

[ ] 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:

Petitioner is Mark A. Brown a Pennsylvania State prisoner confined at the State Correctional Institution Mahanoy, 301 Morea Road, Frackville, PA 17932 at No.BJ-5887

Respondent Bernadette Mason is Superintendent at the State Correctional Institution Mahanoy and has custody of Petitioner.

Respondent District Attorney of Philadelphia County prosecuted Petitioner.

Respondent Attorney General of the Commonwealth of Pennsylvania is an additional Respondent.

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4
REASONS FOR GRANTING THE WRIT .....	11
CONCLUSION.....	15

## INDEX TO APPENDICES

APPENDIX A	2/8/22 Order of the Court of Appeals
APPENDIX B	11/23/21 Order of the Court of Appeals
APPENDIX C	5/26/21 Order of the District Court
APPENDIX D	11/30/20 Report and Recommendation of the Magistrate
APPENDIX E	2/20/20 Memorandum of the Pennsylvania Superior Court
APPENDIX F	6/26/17 Memorandum of the Pennsylvania Superior Court
APPENDIX G	9/20/12 Memorandum of the Pennsylvania Superior Court
APPENDIX H	8/17/10 Memorandum of the Pennsylvania Superior Court
APPENDIX I	10/9/08 decision of the District Court
APPENDIX J	4/5/95 Memorandum of the Pennsylvania Superior Court

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Jackson v Virginia, 443 U.S. 307 (1979)	11, 13
Travillion v. Superintendent SCI Rockview, 983 F.3d 896 (3rd Cir. 2020)	13

## STATUTES AND RULES

U.S const. amend. XIV	3
28 U.S.C section 1254(1)	2
18 Pa.C.S. section 911	13

## OTHER

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgements below.

OPINIONS BELOW

The 2/8/22 Order of the United States Court of Appeals denying Rehearing appears as Appendix "A"

The 11/23/21 Order of the United States Court of Appeals for the Third Circuit denying Certificate of Appealability appears as Appendix "B"

The 5/26/21 Order of the United States District Court for the Eastern District of Pennsylvania adopting the Magistrate Judges Report and Recommendation appears as Appendix "C"

The 11/30/20 Report and Recommendation of the Magistrate Judge appears as Appendix "D"

The 2/20/20 Memorandum of the Pennsylvania Superior Court affirming the Judgement appears as Appendix "E"

The 6/26/17 Memorandum pf the Pennsylvania Superior Court affirming the Judgement appears as Appendix "F"

The 9/20/12 Memorandum of the Pennsylvania Superior Court affirming the Judgement appears as Appendix "G"

The 8/17/10 Memorandum of the Pennsylvania Superior Court affirming the Judgement appears as Appendix "H"

The 10/9/08 decision of the United States District Court for the Eastern District of Pennsylvania appears as Appendix "I"

The 4/5/95 Memorandum of the Pennsylvania Superior Court affirming the Judgement appears as Appendix "J"

## JURISDICTION

The Judgement of the United States Court of Appeals for the Third Circuit was entered on February 8, 2022. The Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part; No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its Jurisdiction the equal protection of the laws. U.S. Const amend XIV



## STATEMENT OF THE CASE

### A. PROCEDURAL BACKGROUND OF THE CASE

The facts of this case stem from incidents which occurred in 1988 or earlier. The case involved the prosecution of four person: (Petitioner) Michael McCune ('Shaheen'), Sha Phillip Devon ('Sha') and Romero Green ('Mario'). Each of the other three defendants were found Not Guilty of all charges in the same trial with Petitioner.

The evidence produced at trial was that there existed several drug houses in the Germantown section in the City of Philadelphia. One of these was located at 5843 Crittenden Street. ... The Commonwealth alleged and the witnesses testified that crack was made from cocaine, which was imported from New York by Petitioner, known as 'Bigger.' Petitioner's girlfriend was Veronica 'Rat' Robinson. She lived in the 5855 address with her mother and grandmother.

At the time of the trial the Commonwealth never produced any evidence of specific sales of narcotics or drugs. There was testimony to the effect that cocaine was imported from New York and sold in batches amounting to \$1,500.00 worth of drugs in each batch. The testimony also indicated that several batches per day were sold at each of the locations. The Commonwealth did not charge any specific crime in violation of the Drug and Narcotic Act. The Commonwealth, however, did proceed to trial on the theory that selling narcotics was one of the predicate acts, which is required before a conviction of the Corrupt Organizations (Act) can be maintained. The Commonwealth submitted three possible areas of predicate acts to the jury: Drug Sales;

Murder; Arson...

The motivation behind the instant killing was the fact that a shortage for the payment of drugs began to occur in the transactions at 5848 Crittenden Street.

About August 7, 1988, Anthony Todd Ford came to Philadelphia from New York and began to work at the drug house. The deceased was also brought from New York to sell drugs. There is no evidence of the true identity of the victim other than that he was named "Pete."

By October 1988, the drug house funds were \$900.00 short. One of the distributors of the drugs blamed 'Sha' for stealing the money. After a confrontation, the suspicion shifted to Anthony Todd Ford. On October 21, 1988, Ford was beaten by four men at the Crittenden crack house over the money shortage. Later, after a confrontation between Petitioner and Anthony Todd Ford, Petitioner took a gun away from Ford. Petitioner, the boss, then permitted Ford to resume managing the house. The focus of responsibility for missing drug funds shifted.

In the early (morning of October 24, 1988) prior to the killing, 'Sha' forced 'Glen' and 'Pete' to strip to find money. They could not find the money.

The suspicion again shifted away from Anthony Todd Ford to 'Pete.' At that point in time, both Anthony Todd Ford and 'Pete' were not too happy about returning back to the drug house.

Tracy Allen was a female courier who carried drugs from Petitioner's brother (Mark Anthony Chase) to Petitioner. Tracy received orders from Petitioner to play up to Pete sexually.

After a brief encounter at a local tavern, where they had a drink, Tracy brought Pete back to 5848 Crittenden Street.

At this point in time, Pete was beaten to death. The Commonwealth attempted to show that the instruments used were a 2" by 4" board and a machete and hammer.

Tracy Allen placed the other three defendants at the scene of the murder on the date of the killing. She described the organization as drug dealers and that Petitioner was in charge. She stated that Petitioner was the one who used the words, 'if he (Pete) did not give you the information, then execute him.' Petitioner was not present at the time Pete was killed...

Some time later, after Tracy left the house, she returned to find that the firemen were there and that the fire inside the house has burned the body of Pete. After that she went to a Park Avenue address where she met with Petitioner, Romero, Sha and Shaheen. She heard Petitioner say, 'this is not the way I wanted it down.' Tracy told him that she did not to be involved in the organization, whereupon Petitioner told her: 'What happened to Pete could happen to you.' After this threat, Tracy did not come forward to the police department until July 11, 1989.

Petitioner, McCune, Devon, and Green were tried jointly for the murder. The jury acquitted Petitioner's co-defendants of all charges, and found Petitioner guilty of first-degree murder, arson, and corrupt organizations. On April 27, 1994, the trial court sentenced Petitioner to life in prison for the first-degree murder, with a consecutive term of forty-three to eighty-six

months imprisonment for corrupt organizations, and no further penalty for the arson conviction. Id.

On April 5, 1995, the Pennsylvania Superior Court affirmed Petitioner's judgment of sentence. See *Commonwealth v. Brown*, No. 1920 PHL 1994 (Pa. Super. Apr. 5, 1995) (unpublished memorandum). Petitioner did not thereafter seek Pennsylvania Supreme Court review. Petitioner filed three PCRA petitions, the last of which was dismissed as untimely on October 27, 2004.

On March 31, 2008, Petitioner filed his first habeas corpus petition in Federal Court. *Brown v. Kerestes*, 2008 WL 4570562, at 2 (E.D. Pa. 2008). In his petition, Petitioner raised eleven claims, including that the evidence was insufficient to support Petitioner's corrupt organizations conviction. On October 9, 2008, the court granted relief on the corrupt organizations claim and remanded Petitioner's case for resentencing. the court dismissed the rest of Petitioner's claims as untimely.

On January 7, 2009, the trial court vacated Petitioner's sentence for corrupt organizations, and reinstated the original sentences for murder and arson. Petitioner appealed, and on August 17, 2010, the Superior Court remanded for resentencing, specifying that Petitioner was to be represented by counsel. *Commonwealth v. Brown*, No. 457 EDA 2009 (Pa. Super. Aug. 17, 2010). On December 6, 2010, Petitioner was sentenced to the mandatory term of life imprisonment for first-degree murder, with no further penalty for the arson conviction.

Petitioner then appealed his 2010 resentencing, arguing

that the corrupt organizations charge was "inextricably intertwined" with the evidence presented against him at trial for the murder and arson charges, and that since the corrupt organizations conviction had been vacated, he should be given a new trial on the remaining charges. Commonwealth v. Brown, No. 34 EDA 2011, at 8 (Pa. Super. Sept. 20, 2012). The Superior Court found the claim to be meritless and outside the scope of appeal, and affirmed the judgment of sentence on September 20, 2012.

On May 3, 2013, Petitioner filed a PCRA petition alleging that: (1) the Commonwealth failed to comply with the Vienna Convention on Consular Relations (Vienna Convention); (2) trial counsel failed to allow Petitioner to testify; (3) trial counsel failed to request a directed verdict based on the co-defendants' acquittals; (4) trial counsel failed to appoint counsel to represent Petitioner at his first resentencing hearing; (5) trial counsel failed to request a mistrial based on juror bias; and (6) prior PCRA counsel failed to raise these claims. (PCRA Pet., at ¶ 19). On September 6, 2016, the PCRA court dismissed the petition, and the Superior Court affirmed the dismissal on June 26, 2017.

On July 6, 2018, Petitioner filed a pro se petition for Writ of Habeas Corpus seeking clarification of his sentence for first-degree murder. (Crim. Docket at 12; Commonwealth v. Brown, 2020 WL 838503, at 2 (Pa. Super. Ct. Feb. 20, 2020)). The Trial Court treated the petition as an untimely PCRA petition and dismissed it on March 5, 2019. The Superior Court agreed with

Petitioner that a habeas corpus petition would be the proper avenue for the claim, but nonetheless affirmed the dismissal on February 20, 2020.

Meanwhile, on May 30, 2013, Petitioner filed the instant habeas petition. In his petition, Petitioner raised seven claims for relief: (1) that Petitioner's conviction for murder and arson were "inextricably intertwined" with the vacated conviction for corrupt organizations; (2) his conviction was obtained on a factual basis different than as charged; (3) a jury instruction improperly shifted the burden of proof; (4) his conviction was based on less than proof beyond a reasonable doubt; (5) his rights to due process were violated by the Commonwealth's failure to comply with the requirements of the Vienna Convention; (6) trial counsel was ineffective for failing to inform defendant of his right to testify; and (7) trial counsel was ineffective for not requesting a directed verdict when Petitioner's co-defendants were found not guilty, and PCRA counsel was ineffective for failing to raise trial counsel's ineffectiveness.

On June 12, 2013, the Honorable Eduardo C. Robreno first referred this matter to me for a Report and Recommendation. On February 26, 2014, Judge Robreno approved this Court's Report and Recommendation to transfer the petition to the Third Circuit as a petition for leave to file a second or successive petition. On January 23, 2015, the Third Circuit denied the petition for leave to file a second or successive petition as "unnecessary," expressing no opinion on the merits of Petitioner's claims.

On March 19, 2015, Judge Robreno approved this Court's Report

and Recommendation recommending that the petition be stayed while Petitioner litigated his pro se habeas claim asking for clarification of his sentence in the state courts. the trial court treated the petition as an untimely PCRA and dismissed it on May 5, 2019, and the Superior Court affirmed the dismissal on February 20, 2020. When the instant habeas matter was removed from Civil suspense on August 13, 2018, Judge Robreno again referred it to me for a Report and Recommendation. On February 28, 2020, the District Court lifted the stay.

On November 30, 2020, Magistrate Judge Lynne A. Sitarski issued a Report and Recommendation to dismiss the petition for Writ of Habeas Corpus. Following timely filed objections, by Order dated May 26, 2021, the Honorable Judge Eduardo C. Robreno adopted the Magistrate's Report and Recommendation.

A timely filed Appeal to this Court resulted in Certificate of Appealability being denied by Order dated November 23, 2021. This timely filed Petition for Rehearing follows.

## REASONS FOR GRANTING THE PETITION

- A. THE COURT OF APPEALS FINDING THAT THE STATE COURTS CONVICTION WAS BASED ON A REASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW BY ELIMINATING THE REQUIREMENT THAT THE GOVERNMENT PROVE BEYOND A REASONABLE DOUBT.

Although the panel characterizes its decision as finding a reasonable application by the state courts of federal law set forth in Jackson v. Virginia, 443 U.S. 307 (1979), close analysis reveals that the decision -- which is based on a finding that the state courts properly relied on valid factual inferences -- constitutes a finding that the state courts decision was based on a reasonable determination of the facts in light of the evidence presented.

The evidence at trial greatly focused on the Corrupt Organization aspect of the charges. The Commonwealth produced evidence tending to establish that the headquarters of the drug distribution ring known as "Grandma's" was located specifically at 5855 Crittenden Street in Philadelphia. The Commonwealth then intended to establish that crack was made from powder cocaine which was imported from New York to Petitioner.

There was further testimony which may have established that cocaine was imported from New York and sold in batches amounting to \$1,500.00 worth of drugs in each particular batch. Furthermore, the testimony revealed that several batches per day were sold at each of the drug locations. While the Commonwealth did not charge any drug offenses against Petitioner, the very fact that they did not probably makes Petitioner's case herein, stronger. The



Commonwealth was able to introduce much evidence of Petitioner's alleged drug activities without ever charging him with a specific drug offense and only because he was charged with Corrupt Organization and we now know that he never should have been charged with that to begin with. Further exacerbating the evidentiary problems is that the Commonwealth attempted to prove that the motive behind the killing in question was that a shortage existed for a payment of drugs at 5848 Crittenden Street. That evidence specifically comes into trial because of the Corrupt Organization Act charged.

The record went on, page after page, with regard to evidence tending to establish that drug activities of Petitioner and all where he was never charged with a drug activity but where the evidence came in under the umbrella of the Corrupt Organization Act.

Later in the trial, the prosecutor made closing argument and again, the argument surrounding Corrupt Organization together with Murder and Arson were inextricably intertwined. The same must be said for the charge that the Court gave to the jury. However, this is not to say that counsel is blaming the prosecutor or the trial judge; they did what they had to under the circumstances and Corrupt Organizations charges was, in fact, set aside, it cannot be disputed that Petitioner's trial was infected by testimony from all ports which washed away any chance of Petitioner receiving a fundamentally fair trial.

On October 7, 2008, the Honorable John P. Fullam, of the United States District Court for the Eastern District of Pennsylvania, granted Petitioner's Petition for a Writ of Habeas

Corpus, "to the extent that the conviction for violating the Pennsylvania Corrupt Organization Act, 18 Pa.C.S. section 911, is VACATED and the matter is REMANDED to the Court of Common Pleas of Philadelphia County for re-sentencing on the remaining charges in the bills of Information".

Petitioner was resentenced on December 6, 2019 before the Honorable Carolyn Engel Timin and the mandatory term of Life Imprisonment on the Murder of the First Degree conviction was reimposed.

In Jackson, the specific question addressed by the Court was, under the federal habeas review, "not whether there was any evidence to support a state court conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." 443 U.S. at 313.

Based on the Court of Appeals decision in Travillion v. Superintendent SCI Rockview, 982 F.3d 896 (3rd Cir. 2020), decided December 15, 2020, clarifying application of clearly established Federal Law announced by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1979), regarding the standard of review for challenges to the sufficiency of evidence, the evidence presented in this case, absent the Corrupt Organization evidence, did not reach a subjective state of near certitude of the guilt of Petitioner required by Jackson, therefore, the state court unreasonably applied it.

In this case, it certainly can be said that there is clear and convincing evidence that contradicts the state courts determination that Petitioner had an intent to kill and collude with co-defendants, who were acquitted of all charges in the

murder. Petitioner alleges this and the Court of Appeals panel did not find this. For this reason, the Court of Appeals denial of Certificate of Appealability is affirm.

Respectfully, Petitioner requests that a writ of Certiorari be issued to the United States Court of Appeals for the Third Circuit.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark A. Berman

Date: April 4, 2022