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No. **21-8264**

United States Court of Appeals for the Third Circuit
C.A. No. 21-1954

United States District Court
For the District of New Jersey,
No. 2:10-cv-6300 (CCC)

IN THE SUPREME COURT OF THE UNITED STATES

Ashley Georges
Petitioner,

vs.

ADMINISTRATOR NEW JERSEY STATE PRISON
ATTORNEY GENERAL NEW JERSEY,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

Presently Confined

Ashley Georges
429230 - 196682C
East Jersey State Prison
1100 Woodbridge Road
Rahway, New Jersey 07065

ORIGINAL

QUESTIONS PRESENTED

The questions presented to this Court is whether the United States Court of Appeals for the Third Circuit improperly applied the AEDPA statute of limitations "is subject to equitable tolling in this particular case where Petitioner has presented external circumstances that were neither addressed or considered by the District Court in this matter.

In addition, whether the United States Court of Appeals for the Third Circuit endorsed the mistaken application of law and insufficient factual determinations surrounding Petitioner's claimed violation of fundamental due process principles requiring the state's disclosure of exculpatory and/or impeachment materials in violation of Brady v. Maryland, 373 U.S. 83 (1963).

LIST OF PROCEEDINGS

State of New Jersey v. Ashley Georges
Superior Court of New Jersey
Essex County, Law Division
No. 00-04-1057

State of New Jersey v. Ashley Georges
Superior Court of New Jersey
Appellate Division
Docket #A-3960-01
certif. denied, 180 N.J. 453, 852 A.2d 189 (2004).

State of New Jersey v. Ashley Georges
Superior Court of New Jersey
Appellate Division
Docket #A-2215-07
certif. denied, 205 N.J. 15, 11 A.3d 374 (2010).

State of New Jersey v. Ashley Georges
Superior Court of New Jersey
Appellate Division
Docket #A-0798-16
certif. denied, 235 N.J. 453, 196 A.3d 964 (2018).

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PROCEEDINGS	ii
TABLE OF CONTENTS	iii
INDEX OF APPENDICES	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
(A) New Jersey State Court Proceedings	3
(B) Federal Court Proceedings	5
STATEMENT OF THE FACTS	8
REASONS FOR GRANTING CERTIORARI REVIEW	15
CONCLUSION	24

INDEX OF APPENDICES

U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Order filed on January 12, 2022

Order filed on March 22, 2022

U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Opinion, filed August 21, 2019

Opinion filed October 21, 2021

Order filed on February 21, 2019

TABLE OF AUTHORITIES

United States Supreme Court

Smith v. Cain, 565 U.S. 73 (2012).
McFarland v. Scott, 512 U.S. 849 (1994).
Holland v. Florida, 560 U.S. 631 (2010).
Maples v. Thomas, 565 U.S. 266 (2012).
Wearry v. Cain, 136 S.Ct. 1002 (2016).
United States v. Agurs, 427 U.S. 97 (1976).
United States v. Bagley, 473 U.S. 667 (1985).
Kyles v. Whitley, 514 U.S. 419 (1995).
Strickler v. Greene, 527 U.S. 263 (1999).

Constitutional and Statutory Provisions

Anti-Terrorism and Effective Death Penalty Act, Pub.L.
No. 104-132, 110 Stat. 1214 (1996)
28 U.S.C. 2244(d)
28 U.S.C. 2254(d)(1)(2)
28 U.S.C. 2254(e)

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT**

Petitioner, Ashley Georges¹, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 22, 2022.

¹ All parties hereto are identified in the caption.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Third Circuit, for which review is sought here, is attached as Appendix A. The Opinion and Order of the United States District Court for the District of New Jersey, attached as Appendix B, were likewise unpublished.

JURISDICTION

This petition follows the appeal by Petitioner to the United States Court of Appeals for the Third Circuit, which affirmed the United States District Court for the District for New Jersey, denying relief sought by his petition under 28 U.S.C. 2254 for writ of habeas corpus. The District Court had jurisdiction over this first federal petition under 28 U.S.C. 2254. The United States Court of Appeals for the Third Circuit had jurisdiction over the appeal under 28 U.S.C. 1291, 2253 and Rule 22 of the Federal Rules of Appellate Procedure. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a dispute of timeliness under 28 U.S. 2244(d)(1)-(2), in addition the affirmative duty of the state, guaranteed to a defendant as a due process right, to disclose exculpatory or impeachment evidence. *Smith v. Cain*, 565 U.S. 73 (2012).

STATEMENT OF THE CASE

This petition seeks relief from the decision of the u.s. Court of Appeals for the Third Circuit affirming the Order of the United States District Court for the District Of New Jersey, which denied petition, brought pursuant to 28 U.S.C. 2254 by a New Jersey prisoner. The petition sought relief from a conviction and sentence in the New Jersey State court on which he remains incarcerated.

(A) New Jersey State Court Proceedings.

(1) Trial Court - Petitioner was charged by Indictment No. 00-04-1057, by Essex County Superior Court, with the following crimes stemming from the shooting death of Kevin Jackson which occurred on December 4, 1999, in

Newark, New Jersey. Petitioner was charged with murder and related weapons offenses.

Petitioner proceeded to trial on November 26, 2001. The jury returned a guilty verdict on all counts, on December 13, 2001.

Sentencing occurred on February 8, 2002. Petitioner subsequently filed an appeal to the Appellate Division, which was affirmed on September 29, 2003. Petitioner petitioned the Supreme Court of New Jersey that was denied on June 4, 2004.

Petitioner was represented by private counsel who abandoned him during his Post-conviction relief (PCR). Petitioner eventually filed a pro se petition for PCR with the Trial court which was received on July 29, 2005. Three Hundred and thirty, (330) days had lapsed on his one-year statute of limitations period.

Petitioner's PCR was denied on the record before the same Superior Court judge who presided over Petitioner's trial on August 28, 2007.

Petitioner requested that the Office of the Public Defender, (OPD) file a Notice of Appeal, (NOA) on his behalf, as instructed by the PCR court on the record. However, due to the OPD filing mechanism and shortage of staff, the NOA was not filed until January 8, 2008.

The Appellate Division affirmed on July 10, 2010. Petitioner filed a Petition for Certification to the Supreme Court of New Jersey that was denied on November 4, 2010. The OPD sent Petitioner a letter dated November 16, 2010, (App) notifying him that his petition was denied and that that concluded his State Court proceedings.

(B) The Federal Court Proceedings

Petitioner filed his habeas petition, December 1, 2010, days after being notified by the OPD, in a letter dated November 16, 2010 that the New Jersey Supreme Court denied his petition for certification, concluding his state collateral review. Because 330 days lapse

from his one-year statute of limitations period due to the abandonment of retained counsel.

The District Court failed to consider Petitioner's due diligence when he immediately filed his habeas petition only days later on December 1, 2010, after the OPD's notification.

After Petitioner filed his petition, he obtained newly discovered evidence that Hakim Kelly was identified as the shooter in a murder that occurred on December 4, 1999, near an intersection of 18th Avenue in the city of Newark.

Based on that information Petitioner applied for a stay, explaining the potential impact of the new evidence to a number of grounds raised in his petition.

The District Court granted Petitioner motion for a stay on February 26, 2016. After Petitioner exhausted the claims in the State courts without an evidentiary hearing preventing any ability to develop a record.

Petitioner filed a motion to Reopen his habeas petition in November 2018. The District Court issued an order on January 8, 2019, to reopen the petition.

Petitioner filed his amended petition on January 14, 2019. In addition, Petitioner filed a Motion for Discovery, Motion to Appoint Counsel, and Motion for an Evidentiary hearing.

The District Court issued an Order pursuant to Rule 4 of the Habeas Rules, ordering the Respondents to file a reply either on timeliness or a full reply.

The Respondents did not file a motion to dismiss on timeliness, instead opted to file a full response on March 26, 2019.

Petitioner filed his traverse to the Respondents' answer on May 3, 2019.

The District Court issued an opinion on August 21, 2019, denying petition. Petitioner filed a timely 59(e) motion on September 16, 2019.

The District Court denied Petitioner's 59(e) motion in an opinion issued on October 21, 2021.

Petitioner filed a Notice of Appeal to the District Court. The Third Circuit Court of Appeals denied petition on January 12, 2022. Petitioner filed for a rehearing which was denied on March 22, 2022.

STATEMENT OF THE FACTS

On February 21, 2019, the District court issued an Order pursuant to Rule 4 of the Habeas Rules, concluding that it does not "plainly appear from the petition and any attached exhibits that petitioner is not entitled to relief..." The Order further stated the following:

Ordered that where the Petition appears to be untimely under the Antiterrorism and Effective Death Penalty Act of 1996, within forty-five days of the date this Order is filed, Respondents may file a Motion to Dismiss the Petition on timeliness grounds only, provided that the motion: (1) attaches exhibits that evinces all relevant state court filing dates; (2) contains legal arguments discussing pertinent timeliness law; and (3) demonstrates that an Answer to

the merits of the Amended Petition is unnecessary; and it is further Ordered that, if a Motion for Dismiss is filed, Petitioner shall have thirty (30) days to file an opposition brief, in which Petitioner may argue any bases for statutory and/or equitable tolling, and to which Petitioner may attach any relevant exhibits; and it is further Ordered that, if Petitioner files an opposition, Respondents shall have ten (10) days to file a reply brief; and it is further Ordered that, if the Motion to Dismiss is subsequently denied, the Court will then direct Respondents to file a full and complete answer to all claims, and it is further Ordered that if Respondents do not file a Motion to Dismiss the Petition, they shall file a full and complete answer to all claims asserted in the Amended Petition within forty-five (45) days of the entry of this Order..."

The Respondents in this matter did not exercise the option to file a Motion to Dismiss based solely on timeliness grounds only. Because that would have

required that attached exhibits evincing all relevant state court filing dates, contain legal arguments discussing pertinent timelines law.

The Respondents have not presented any exhibits that revealed a late notice of appeal was in fact filed in this matter. In the Appellate Division, the time for extending the time limit to file a notice of appeal must be accompanied by a motion pursuant to Rule 2:4-4(a).

As a result, Petitioner filed a traverse to the answer provided by the Respondents outline in the District Court's Rule 4 Order.

On August 21, 2019, the District court dismissed Petitioner's petition as untimely. Petitioner filed a motion 59(e) requesting an opportunity to present his equitable tolling argument because the District Court's Order issued on February 21, 2019, did not mandate that Petitioner needed to present his statutory or equitable tolling arguments if the Respondents file a full answer to his petition.

On October 21, 2021, the District Court denied Petitioner's 59(e) motion. The District Court unreasonably refused to consider Petitioner's equitable tolling argument. The District Court stated:

"Respondents clearly raised the time-bar issue and placed Petitioner on notice that he should address any basis for avoiding the time-bar in his reply.

Petitioner was thus aware of the issue and should have raised any argument regarding the timeliness of his claims at that time. Petitioner's alleged failure to realize he could argue equitable tolling provides no basis for reconsideration."

The District Court refused to consider Petitioner's equitable tolling argument because the Respondents raised the time-bar issue is not supported by the established precedent by the Supreme Court of the United States.

The District Court unreasonably and erroneously applied United State Supreme Court precedence with allowing a pro se petitioner an opportunity to advance

his equitable tolling position. The ruling also ignored Petitioner's explanation in his 59(e) motion (ECF 58), that his attorney abandoned him, misleading him to believe that he filed a petition for PCR on his behalf for 330 days, when nothing was filed on Petitioner's behalf. No consideration that Petitioner filed his habeas petition days after being informed, by the Office of the Public Defender in a letter dated on November 16, 2010, that the New Jersey Supreme Court denied his petition. Petitioner demonstrated reasonable diligence by promptly filing his petition within days after being notified that his state collateral review was final. Therefore, the abandonment of his attorney hired to file his PCR petition for 330 days; the filing mechanism which tolled an additional 86 days, demonstrate exceptional circumstances that should have warranted equitable tolling in this matter.

BRADY CLAIM

The District Court's ruling on the Brady violation is not in conformity with Supreme Court or the Third Circuit Courts' precedence.

Petitioner motioned the District Court multiple for Discovery, Evidentiary Hearing, and Appointment of Counsel in

this matter. (ECF 35;44;46,;47). Because the Hakim Kelly certification was the factual predicate that, the Office of the Essex County Prosecutor withheld exculpatory evidence. Based on that factual predicate Petitioner filed a PCR application requesting assignment of counsel with the Trial Court. The Trial Court denied Petitioner's motion on the papers without requiring that the Respondents' to answer.

The Appellate Division affirmed however decided, "Even if this witness was the same witness who later identified [Petitioner],..." The District Court endorsed and recited the same language in its ruling (ECF 57 at p.10). That is in direct conflict with the

United States Supreme Court and this Court's
established precedent, providing the prosecution with a
shield to withhold impeachment evidence in this matter.

REASONS FOR GRANTING CERTIORARI REVIEW

A review of this case on the merits would afford this Court a necessary opportunity to clarify the limitations on federal courts authorization to dismiss summarily any habeas petition that appears insufficient on its face, pursuant to 28 U.S.C. 2254 Habeas Rule 4. *McFarland v. Scott*, 512 U.S. 849 (1994).

Rule 4 provides that the district court, upon receipt of a habeas petition, must promptly examine it, and if upon examination it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.

In this matter, the District Court did not dismiss the petition on its face during the initial screening. In its February 21, 2019 Order, it concluded, "it does not "plainly appear[] from the petition and any attached exhibits that the petitioner is not entitled to relief..." and gave the Respondents an option to

either file a motion to dismiss on timeliness or provide a full answer.

The motion to dismiss on timeliness grounds would have forced Petitioner to argue against the time bar and include any statutory or equitable tolling argument to defend his position. However, the Respondents filed a full answer and added an affirmative defense that the petition was untimely.

Petitioner response argued against the time bar requesting that the Respondents provide the exhibits that would prove that the petition was actually time barred.

The District Court concluded that the petition was time barred. Petitioner filed a 59(e) motion expressing that the District Court consider the equitable tolling argument that Petitioner was not fairly provided an option to present because the Respondents did not file a motion to dismiss the petition on timeliness grounds.

The District Court refused to consider Petitioner's arguments for equitable tolling.

To be entitled to equitable tolling of a statute of limitations, a litigant must establish `` (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.' ' Holland v. Florida, 560 U.S. 631, 649, 130 S. Ct. 2549, 177 L. Ed. 2d 130.

Petitioner filed his petition days after receiving the notice by the Office of the Public Defender, (OPD) on November 16, 2010. Despite, being informed that a habeas petition can be file within one-year of the New Jersey Supreme Court decision that was issued on November 4, 2010.

Primarily, Petitioner's statute of limitations period was tolled 330 days due to his attorney's abandonment. Maples v. Thomas, 565 U.S. 266, 286, n. 8, 132 S. Ct. 912, 925, 181 L. Ed. 2d 807, 824 (2012), a ``significant conflict of interest' ' arises when an attorney's ``interest in avoiding damage to [his] own reputation' ' is at odds with his client's ``strongest argument-i.e., that his attorneys had abandoned him.' '

The District Court refused to consider Petitioner's position for equitable purposes. The District Court concluded that Petitioner should have presented his arguments pertaining to equitable tolling, when the Respondents' answer argued the timeliness of the petition. However, the February 21, 2019, Order indicated that Petitioner should present his arguments supporting statutory and/or equitable tolling if the Respondents file a Motion to Dismiss as untimely. The Respondents filed a full answer therefore, Petitioner complied with the District Court Order and replied to the Respondents answer without including any arguments on equitable tolling which is in accordance with the District Court's Order issued.

The District Court unreasonably and erroneously applied United State Supreme Court precedence with allowing a pro se petitioner an opportunity to advance his equitable tolling position. The ruling also ignored Petitioner's explanation in his 59(e) motion (ECF 58), that his attorney abandoned him, misleading him to

believe that he filed a petition for PCR on his behalf for 330 days, when nothing was filed on Petitioner's behalf. No consideration that Petitioner filed his habeas petition days after being informed, by the Office of the Public Defender in a letter dated on November 16, 2010, that the New Jersey Supreme Court denied his petition. Petitioner demonstrated reasonable diligence by promptly filing his petition within days after being notified that his state collateral review was final. Therefore, the abandonment of his attorney hired to file his PCR petition for 330 days; the filing mechanism which tolled an additional 86 days, demonstrate exceptional circumstances that should have warranted equitable tolling in this matter.

Furthermore, the District Court failed to factor that Petitioner was diligent in pursuing his rights based on the exhibits and attached documents, qualifying him for equitable tolling.

Nevertheless, Petitioner's retained counsel abandoned him and the OPD filing mechanism were

circumstances outside of Petitioner's control that constitute exceptional circumstances which prevented the timely filing of his petition and should have been considered in the District Court's evaluation on Petitioner's position for equitable tolling.

Holland v. Florida, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). To be entitled to equitable tolling, a petitioner need only show "reasonable diligence, not maximum feasible diligence." Holland, 560 U.S. at 653 (citations and internal quotation marks omitted). This requirement "does not demand a showing that the petitioner left no stone unturned."

BRADY VIOLATION

The District Court's ruling on the Brady violation is not in conformity with Supreme Court or the Third Circuit Courts' precedence.

Petitioner motioned the District Court multiple for Discovery, Evidentiary Hearing, and Appointment of Counsel in

this matter. (ECF 35;44;46,;47). Because the Hakim Kelly certification was the factual predicate that the Office of the Essex County Prosecutor withheld exculpatory evidence. Based on that factual predicate Petitioner filed a PCR application requesting assignment of counsel with the Trial Court. The Trial Court denied Petitioner's motion on the papers without requiring that the Respondents' to answer. The Appellate Division affirmed however decided, "Even if this witness was the same witness who later identified [Petitioner],..." The District Court endorsed and recited the same language in its ruling (ECF 57 at p.10). That is in direct conflict with the United States Supreme Court and this Court's established precedent, providing the prosecution with a shield to withhold impeachment evidence in this matter.

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where evidence is either material either to guilt or to punishment, irrespective of the good faith

or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Wearry v. Cain*, 136 S.Ct. 1002, 1006, (2016), the Supreme Court has explained:

We have ... held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, (1985). ... Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." [*Kyles v. Whitley*, 514 U.S. 419, 438 (1995) In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437. *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (citations omitted).

The District Court's ruling failed to address the prosecution's withholding of Reddick's misidentification which violated Petitioner's Due process rights to a fair trial. Thus, the elements of a *Brady* violation has never been addressed. Three essential elements must be considered to determine whether a *Brady* violation has occurred: (1) the evidence at issue must be favorable to the accused.

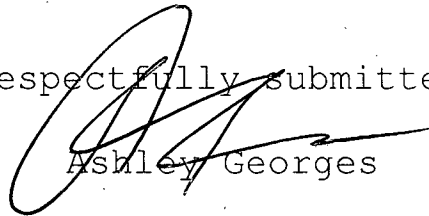
Reddick's misidentification would have been favorable in this matter because Reddick's identification was based on Petitioner's eyebrows. (2) The State must have suppressed the evidence, either purposely or inadvertently. The prosecution has never indicated whether they withheld this evidence because the State and District Courts failed to inquire or compel the prosecution to turn over any evidence. (3) The evidence must be material to the defendant's case. This was a prosecution that relied on one identifying witness, whose testimony was the only circumstantial evidence that placed Petitioner on the scene of the crime. Reddick's testimony was not corroborated by any other physical or testimonial evidence presented at Petitioner's trial. The existence of those three elements evidences the deprivation of a defendant's constitutional right to a fair trial under the due process clause. Brady, 373 U.S. at 87.

CONCLUSION

Petitioner request that this matter be remanded to the District Court to consider the equitable tolling position advanced by Petitioner. Furthermore, the Brady claim requires that the state be compelled to turnover any misidentification made by Reddick that constitute impeachment evidence in its possession.

Dated: 4-27-22

Respectfully submitted



Ashley Georges