

No. 22-5436

IN THE SUPREME COURT OF THE UNITED STATES

Oraine Brown - PETITIONER

VS.

STATE OF NEW JERSEY - RESPONDENT(S)

PETITION FOR REHEARING

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR REHEARING

Oraine Brown

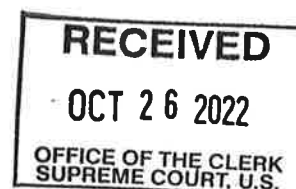
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QUESTIONS PRESENTED

The substantial questions of law and issues that warrants this Court's intervention:

1. Can a trial be postponed at the prosecutor's request, so that the prosecutor can be in compliance with the 30 day prerequisite of N.J.C.R. 3:13-3(b)(1)(I) which mentions nothing about an adjournment? (1T 3-7 to 4-25)

New Jersey Court Rule 3:13-3(b)(1)(I)

names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except as otherwise provided in R. 3:10-3, if this information is not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial.

2. Can the federal due process standard used to dismiss pre-indictment delays be used to dismiss post-indictment delays pursuant to United States v. Gouveia, 467 U.S. 180, 192, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984)?

3. Do the contents of the email sent by juror number twelve display an appropriate utility for conducting a post-conviction voir dire pursuant to State v. Papasavvas, 163 N.J. 565, 617-618, 164, 553 (2000)? (Appendix - H)

4. Does this email display good cause to inquiry into juror number twelve's regret to determine if defendant meets the good cause requirement set by N.J.C.R. 1:16-1 to interview this juror subsequent to trial? (Appendix - H)

New Jersey Court Rule 1:16-1. Interviewing jurors subsequent to trial

Except by leave of court granted on good cause shown, no attorney or party shall directly, or through any investigator or other person acting for the attorney, interview, examine, or question any grand or petit juror with respect to any matter relating to the case.

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APPENDIX J: 2T TRANSCRIPT OF FEBRUARY 19, 2020 (TRIAL); Date when the prosecutor commented during her opening statement that the expert witness would testify how rare it is for fingerprints to be extracted from handguns.

APPENDIX K: 3T TRANSCRIPT OF FEBRUARY 20, 2020 (TRIAL); The date when the expert witness testified that fingerprints are difficult to extract from the handgun involved in this case, and when the defendant was convicted by a jury.

APPENDIX L: 4T TRANSCRIPT OF JULY 31, 2020 (SENTENCING); Date when the trial judge denied defendant's motion for judgment of acquittal, and when defendant got sentenced.

TABLES OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>Barker v. Wingo</u> , 407 U.S. 514, 530 (1972)	8, 9, 13
<u>Romero v. Allstate Ins. Co.</u> , 1 F. Supp. 3d 319, 420 (E.D. Pa. 2014)	12
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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 judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the New Jersey Appellate Division court appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☒ A timely petition for rehearing was thereafter denied on the following date: June 14, 2022, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

1. 6th Amendment; Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. 14TH Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

3. N.J.S.A. 2c:20-7a Receiving Stolen Property

A person is guilty of theft if he knowingly receives (or brings into this State) movable property of another knowing that it has been stolen, or believing that it has probably been stolen.

4. N.J.S.A. 2c:35-10a Possession, use or being under the influence, or failure to make lawful disposition

a. It is unlawful for any person, knowingly or purposely, to obtain, or to possess, actually or constructively, a controlled dangerous substance or controlled substance analog, unless the substance was obtained directly, or pursuant to a valid prescription or order from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by P.L.1970, c.226 (C.24:21-1 et seq.).

5. N.J.S.A. 2c:39-5(b) Unlawful possession of weapons

b. Handguns. (1) Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree. (2) If the handgun is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person it is a crime of the third degree.

6. N.J.S.A. 2c:43-6 Sentence of imprisonment for crime; ordinary terms; mandatory terms.

a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:

(1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years;

(2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years;

(3) In the case of a crime of the third degree, for a specific term of years which shall be fixed by the court and shall be between three years and five years;

(4) In the case of a crime of the fourth degree, for a specific term which shall be fixed by the court and shall not exceed 18 months.

STATEMENT OF THE CASE

The defendant, Oraine Brown, was arrested on April 20, 2019, in the township of Irvington, New Jersey, for unlawful possession of a firearm without a permit, in the 2nd degree, N.J.S.A. 2c:39-5(b), receiving stolen property, in the 3rd degree, N.J.S.A. 2c:20-7A, and possession of CDS (Marijuana), disorderly persons, N.J.S.A. 2c:35-10A.

On June 17, 2019, defendant was indicted on two counts; 2nd degree unlawful possession of a handgun, N.J.S.A. 2c:39-5(b), and 3rd degree receiving stolen property, N.J.S.A. 2c:20-7A.

On January 6, 2020, the defendant's trial was supposed to commence but it got postponed to the following month. (1T 3-7 to 5-2). The reason it got postponed was because the prosecutor motioned that she wanted to continue discovery even though all discovery was previously made final during a pre-trial hearing on October 29, 2019. (1T 3-7 to 4-2). This motion was granted by the initial trial judge even though the defendant objected by commenting the prosecutor had several opportunities prior to this date and grand jury to obtain this document, and that discovery was previously made final. (1T 4-5 to 5-2). The additional discovery motioned for was a fingerprint examination report that was produced on April 22, 2019, in the prosecutor's office. (Appendix-G).

Defendant was convicted by a jury on February 20, 2020, for

the sole count of 2nd degree unlawful possession of a firearm without a permit, N.J.S.A. 2c:39-5(b). Within 10 days after the defendant was convicted on February 27, 2020, he filed a motion for a judgment of acquittal pursuant to N.J.C.R. 3:18-2. Within this motion the defendant alleges that the initial trial judge & the prosecutor violated his 6th amendment right to a speedy trial by causing an undue delay in prosecution.

New Jersey Court Rule 3:18-2. Motion after discharge of jury

If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made, even if not earlier made pursuant to R. 3:18-1 or it may be renewed within 10 days after the jury is discharged or within such further time as the court fixes during the 10-day period. The court on such motion may set aside a verdict of guilty and order the entry of a judgment of acquittal and may so order if no verdict has been returned.

On July 22, 2020, juror number 12 from the defendant's trial sent an email to the New Jersey Superior Court stating that he has come to regret his verdict without giving any reason.
(Appendix - H).

On July 31, 2020, the trial judge addressed defendant's motion by commenting the U.S. Supreme Court established four factors for courts to consider in determining whether defendant's rights to a speedy trial has been violated which are the length of delay, the reason for delay, the defendant's assertion of his right and prejudice to the defendant. (4T 9-3 to 12). In regards to the 1st factor the judge commented no undue delay in bringing this matter to trial under typical Essex County trial calendar, as for the 2nd factor that no indication

in the record that the State used adjournments to gain a tactical advantage, regarding the 3rd factor the court said that nowhere in the record did the defendant assert his right to a speedy trial prior to this motion, and lastly that no prejudice was suffered by the defendant because he was free on bail and the discovery was beneficial because it showed no fingerprints where present on the handgun. (4T 9-18 to 10-24). Ultimately the trial judge denied this motion and sentenced defendant to 5 years with 42 months of parole ineligibility pursuant to the graves act, N.J.S.A. 2c:43-6 . (4T 16-23 to 25, Appendix - B)

In regards to the email sent by juror number 12, the trial judge claimed defendant never made a motion pursuant to this email. (4T 17-18 to 18-13, Appendix - H). The trial judge also claimed "change of heart is insufficient for a court to investigate the thought processes which induce a particular to join in a verdict." (4T 18-9 to 12).

The defendant's appellate attorney submitted briefs on September 28, 2021, to dismiss the conviction or grant a new trial. This appeal concerned whether a 6th amendment speedy trial violation occurred when the discovery was erroneously continued to benefit the State at trial causing an undue delay in prosecution and should a post-conviction voir dire be conducted in regards to the email sent by juror number 12 expressing an unspecified regret for his verdict in this case prior to

defendant's sentencing. On October 12, 2021, this appeal was denied by the Appellate Division which affirmed the conviction and the sentence. (Appendix - A)

The Appellate Division analyzed the speedy trial violation utilizing the four Barker factors. First stating that a 34 day trial postponement was not undue delay where the State sought the adjournment to provide defendant new discovery. Also stating no prejudice in the short delay, as defendant "was not subject to pre-trial incarceration, and was free to handle his personal affairs". Finally, the judges noted that the new discovery contained evidence beneficial to defendant, as it showed no fingerprints were recovered on the handgun. (The Appellate Division affirmed that the defendant asserted his right to a speedy trial.) (Appendix - A pages 4-5)

Response: This was not new discovery because this report was produced on April 22, 2019, within the prosecutor's office two days after the defendant was arrested. (Appendix - G). Even though the delay was only 34 days both the Court and the prosecutor knew that would be sufficient enough time to permit an expert witness to testify on behalf of the State and make this expert report permissible for trial. (1T 3-7 to 4-19). According to N.J.C.R. 3:13-3(b)(1)(I) the name and report of any expert witness whom the prosecutor expects to call as an expert witness should be furnished 30 days in advance of trial which both the prosecutor and the Court knew. (1T 3-7 to 4-19). Defendant was free on bail to handle his personal affairs but that isn't the only

interest under this factor. When evaluating prejudice, the fourth factor, courts should consider three main interests: preventing oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. Barker, 407 U.S. at 532. On January 6, 2020, the initial trial date, defendant was fully ready to resolve this case but this unwarranted delay sent defendant's anxiety to a peak which was reflected on the record when he questioned the Court about any more possible delays. (1T 5-25 to 6-8). Although defendant's fingerprints were not present on the weapon at hand, the expert witness was able to testify that fingerprints are difficult to extract from handguns and the particular handgun involved in this case which impaired the defense. (3T 22-14 to 24-23)

As to the second issue, whether a post-conviction voir dire should be conducted in regards to the email sent by juror number 12, the Appellate Division stated; The email, at best, represents an unspecified expression of regret, assuming the author of the email is actually juror number twelve. Its contents allege no "event or occurrence injected into the deliberation in which the capacity for prejudice inheres."

(Appendix - A page 6)

Response: Although the email sent by juror number 12 did not state or allege any jury misconduct or introduction of extraneous factors into the jury's deliberations the unknown reason may have lead to an unjust result in this case. (Appendix - H). The defendant's fate should not be left to sheer luck

that the reason for the regret might somehow come to light.

The thrust of the New Jersey and federal cases on mid-trial allegations of jury misconduct is that the trial judge must make a probing inquiry into the possible prejudice caused by any jury irregularity, relying on his or her own objective evaluation of the potential for prejudice rather than on the juror's subjective evaluation of their own impartiality. See State v. Weiler, 211 N.J. Super. 602, 609-12, 512 A. 2d 130 (1986). Although the trial judge has discretion in the way to investigate allegations of jury misconduct, an adequate inquiry on the record is necessary for the purposes of appellate review. State v. Scherzer, 301 N.J. Super. 363. The trial judge never investigated into juror number 12's regret even though the alleged cause could be due to jury misconduct.

Defendant filed a pro-se motion for reconsideration on October 25, 2021, in regards to the Appellate Division's denial of his direct appeal pursuant to N.J.C.R. 2:11-6. On November 24, 2021, defendant's motion for reconsideration was denied by the Appellate Division without stating its reason therefore.

(Appendix - F)

New Jersey Court Rule 2:11-6. Motion for reconsideration

(a) Service; Filing; Contents; Argument. Within ten days after entry of judgment or order, unless such time is enlarged by court order, a party may apply for reconsideration by serving two copies of a motion on counsel for each of the opposing parties and filing nine copies thereof with the Supreme Court, or five copies thereof with the Appellate Division, as appropriate. One filed copy shall be signed by counsel. The motion shall not exceed 25 pages and shall contain a brief statement and argument of the ground relied upon and a certificate of counsel that it is submitted in good faith and not for purposes of delay. The motion shall have annexed thereto a copy of the opinion or order that is the subject thereof. An answer shall be filed only if requested by the court, and within ten days after such request or within such other time as the court fixes therein. The motion will not be argued orally.

On December 10th, 2021, defendant filed a notice of petition for certification with the New Jersey Supreme Court. On March 22, 2022, this petition for certification was denied by the Supreme Court of New Jersey without stating its reason therefore. (Appendix - D)

On April 8th, 2022, defendant filed a reconsideration petition for certification with the New Jersey Supreme Court pursuant to N.J.C.R. 2:11-6. On June 14, 2022, this reconsideration petition for certification was denied by the New Jersey Supreme Court without stating its reason therefore. (Appendix - E).

On August 18, 2022, defendant filed a pro-se petition for a writ of certiorari with the Supreme Court of the United States. This petition was urging this court's intervention to determine how to properly continue or prohibit discovery in a criminal action, what is considered new discovery after discovery is made final, can a trial judge grant a postponement of trial at the prosecutor's motion to admit additional discovery which was long known by the prosecutor, and is an unspecified regret by a juror about the verdict he rendered a valid reason to conduct a post-conviction voir dire. On October 3, 2022, this petition for a writ of certiorari was denied by the Supreme Court of the United States. (Appendix - C).

REASONS FOR GRANTING THIS RECONSIDERATION MOTION

WHEN THE TRIAL JUDGE RULED TO POSEPONE DEFENDANT'S TRIAL ON IT'S COMMENCEMENT DATE THIS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BECAUSE IT WAS GRANTED IN ORDER TO HAMPER THE DEFENSE AND WAS MOTIVED SO THAT THE STATE COULD GAIN AN UNFAIR ADVANTAGE. WHILE POSTPONING DEFENDANT'S TRIAL THE COURT MISAPPLIED N.J.C.R. 3:13-3(b) (1) (I) WHICH WARRANTS AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. (1T 3-7 TO 4-25). THE IMPORTANT QUESTION AS TO WHETHER AN UNSPECIFIED REGRET BY A JUROR ABOUT HIS OR HER VERDICT GOOD CAUSE TO CONDUCT A POST-CONVICTION VOIR DIRE, HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. (APPENDIX - H)

A court may reconsider a prior ruling if the moving party shows (1) an intervening change in the controlling law, (2) the availability of new evidence that was not available when the court issued its order, or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. See *Romero v. Allstate Ins. Co.*, 1 F. Supp.3d 319, 420 (E.D. Pa. 2014).

This Court overlooked that when defendant's initial trial judge granted the prosecutor's motion for additional discovery and for a postponement of trial it violated the federal due process standard. (1t 3-7 TO 4-25). The federal due process standard requires defendant to prove that the delay was caused by the State's motive to gain an advantage and that defendant was actually prejudiced in his ability to maintain a defense. *United States v. Gouveia*, 467 U.S. 180, 192, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984).

When the prosecutor was seeking this postponement of trial she commented that she would be calling the author of this report as an expert witness and would proceed to introduce this report as evidence at trial. (1T 3-24 to 4-4, Appendix - G). Deliberate attempt to delay trial in order to hamper the defense

should be weighed heavily against the government in determining whether defendant's right to speedy trial has been denied.

Barker v. Wingo, 407 U.S. 514, 573 (1972): During the prosecutor's opening statement on February 19, 2020, the prosecutor claimed that this expert witness whom completed the fingerprint examination would testify how rare it is for fingerprints to be extracted from firearms. (2T 37-12 to 16, Appendix - G). The next day when this expert witness testified she claimed that fingerprints are difficult to extract from the handgun involved in this case which without a doubt proves that this deliberate delay was caused by the State's motive to gain an advantage and impair defendant's ability to maintain a defense. (3T 22-14 to 24-23).

Even if this court finds that the initial trial judge was correct to permit the discovery of the fingerprint examination report not previously disclosed pursuant to N.J.C.R. 3:13-3(b)(f) there is no way that this disclosure justified the postponement of defendant's trial. (1T 3-7 to 4-25). According to N.J.C.R. 3:13-3(b)(1)(I) the name and report of any expert witness whom the prosecutor expects to call as an expert witness should be furnished 30 days in advance of trial, if not the expert witness may be barred from testifying at trial upon application by the defendant. This rule doesn't state that trial can be postponed for 30 days to be in compliance with this rule.

On January 6, 2020, the prosecutor misrepresented this rule by asking the court "to carry this for 30 days" which the court did by adjourning trial till February 10, 2020. (1T 3-20 to 4-4 & 4-15 to 4-25). There is no precedent yet set to allow an adjournment of trial to permit the State to be in compliance with the thirty day prerequisite of N.J.C.R. 3:13-3(b)(1)(I). (Appendix - G).

New Jersey Court Rule 3:13-3(b)(1)(I)

names and addresses of each person whom the prosecutor expects to call to trial as an expert witness, the expert's qualifications, the subject matter on which the expert is expected to testify, a copy of the report, if any, of such expert witness, or if no report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Except as otherwise provided in R. 3:10-3, if this information is not furnished 30 days in advance of trial, the expert witness may, upon application by the defendant, be barred from testifying at trial.

According to State v. Papasavvas, the utility of an appropriate post-conviction voir dire is to dispel the possibility of taint as well as to demonstrate it. State v. Papasavvas, 163 N.J. 565, 617-618, 164, 553 (2000).

In this case juror number twelve sent an email expressing an unspecified regret for the verdict he rendered against the defendant prior to his sentencing date. This email would demonstrate that the conviction is possibly tainted which could only be dispelled with a post-conviction voir dire. (Appendix - H)

New Jersey Court Rule 1:16-1. Interviewing jurors subsequent to trial


Except by leave of court granted on good cause shown, no attorney or party shall directly, or through any investigator or other person acting for the attorney, interview, examine, or question any grand or petit juror with respect to any matter relating to the case.

Good cause intended by the rule is not impropriety or defect in the motives or methods or thought processes by which the jurors reached their verdict but rather some event or occurrence injected into the deliberations in which the capacity for prejudice inheres. State v. Kociolek, 20 N.J. 92, 100 (1955).

Based on this email defendant has good cause to inquiry into juror number twelve's regret to determine if he meets the good cause requirement set by N.J.C.R. 1:16-1. (Appendix - H). Without this interrogation there is no way possible to determine that the defendant has or has not meet this requirement.

CONCLUSION

The initial trial judge was clearly erroneous when postponing defendant's trial on its commencement date at the prosecutor's request because N.J.C.R. 3:13-3(b)(1)(I) claims that an expert report can be furnished at trial which is the usual and accepted course of judicial proceedings, and defendant demonstrated pursuant to State v. Papasavvas, that this email sent by juror number twelve displayed the appropriate utility to conduct a post-conviction voir dire which should but has not been settled by this court and that this email also meet the good cause requirement set by N.J.C.R. 1:16 1 to interview juror number twelve subsequent to trial. So for the foregoing points stated defendant's petition for rehearing should be granted.



Date: 10/19/2022

**Additional material
from this filing is
available in the
Clerk's Office.**