

22-5519

No. 21-2849

IN THE
SUPREME COURT OF THE UNITED STATES

FILED

MAY 04 2022

ORIGINAL

KAREEM STANSBURY
PETITIONER-APPELLANT

V.

SUPERINTENDENT CAMP HILL, SCI
RESPONDENT-APPELLEE

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

PRO SE
PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

Respectfully Submitted,



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PRO SE FILING

QUESTIONS PRESENTED

Kareem Stansbury's conviction and habeas corpus proceedings raises pressing issues of national importance: Whether and to what extent the criminal justice system tolerates criminal convictions based off cumulative violations of a pro se defendant's federal constitutional rights.

Specifically, did the United States Court of Appeals for the Third Circuit impose and unduly burdensome certificate of appealability (COA) standard that contravenes this Court's precedent and deepens a split amongst several Circuits when it denied Mr. Stansbury, who was pro se a COA on his habeas petition and to obtain merits review of his claims that;

(a) delaying his trial for over 21 months without valid justification after asserting his right that prejudiced his defense since his only witness became unavailable to testify at his first trial violated his right to a speedy trial under the Sixth Amendment.

(b) the trial judge providing the jury during deliberation written instructions on the crimes charged in his absence without his knowledge and refused to conduct an evidentiary hearing violated his rights to a fair trial by impartial jury, to self-representation and the right to be present at all stages of the criminal trial under the Sixth and Fourteenth Amendments.

(c) whether Stansbury's new evidence that was not presented at trial and undermines his identity as the shooter was sufficient to excuse procedural default and obtain review of the merits.

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PETITION FOR WRIT OF CERTIORARI

Kareem Stansbury, pro se, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The March 25, 2022, Order of the Court of Appeals denying rehearing en banc is attached as Appendix A. The January 26, 2022, panel's order of the Court of Appeals denying Stansbury a COA is attached as Appendix B. The September 16, 2021, Order of the United States District Court for the Eastern District of Pennsylvania denying habeas relief is attached as Appendix C. The August 21, 2021, Magistrate Judge's report and recommendation denying habeas relief and a COA is attached as Appendix D.

JURISDICTION

The Court of Appeals entered its judgment on March 25, 2022. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTES AND OTHER AUTHORITIES

This case involves a pro se defendant's constitutional rights under the Sixth and Fourteenth Amendments. The Sixth Amendment provides in relevant parts:

"In all criminal prosecutions, the accused Shall enjoy the right to a speedy and public trial, by an impartial jury..."

The Fourteenth Amendment provides in relevant parts:

"Nor Shall any State...deny to any person within its jurisdiction the equal protection of the laws.

This case involves the application of 28 U.S.C. § 2253 (c), which states:

- (1) Unless a circuit justices or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
 - (A) The final order in a habeas corpus proceeding in which the detention complained of arises out of the process issued by a State Court;
 - (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a

constitutional right.

STATEMENT OF THE CASE

A. Introduction

By any measure, Kareem Stansbury's Conviction and sentence is constitutional. His trial was delayed for over 21 months without valid justification after being arrested. see Stansbury's Habeas Petition and Memorandum of Law at 8 and 6. (hereafter "Stans Hab Pet"); ECF No.1 at 5 and 22. During jury deliberation the judge provided the jury with written instructions on the crimes charged without notifying Stansbury (who was pro se) in his absence and without conducting an evidentiary hearing on the contact. see ECF No.1 at 10 and 25. Stansbury received new evidence and filed a timely pro se motion and attached the evidence to it. The judge denied the motion without an evidentiary hearing. see ECF No.1 at 10 and 26.

The Magistrate Judge failed to conduct an evidentiary hearing or otherwise inquire into the merits of Stansbury's habeas claims beyond reviewing the trial record. Yet, when the Magistrate Judge was presented with supporting exhibits to support his habeas claims they were ignored. see petitioner's reply brief to respondent's failure to respond to habeas petition and supporting documents at 1, 6, and 7. (hereafter "Pet Reply"); ECF No.7 and 7-1. The Magistrate Judge concluded that "the applicant has not made a substantial showing of the denial of a constitutional right." Appendix D at 41. Yet, when the Third Circuit was presented with these facts declared that Stansbury "has failed to demonstrate that jurists of reasons would debate the district court's decision," Appendix B at 1. As a result, the Third Circuit not only denied relief, it concluded that Stansbury had not made the threshold showing required to grant a COA. This case presents significant questions of constitutional law and questions the integrity of the habeas proceedings.

B. Trial Court Proceeding

Stansbury was arrested on March 12, 2014 and charged with two counts

of attempted murder and related offenses in connection with a shooting. Stansbury directed his counsel to pursue a speedy trial by letter. His trial was set for April 15, 2015. On December 31, 2014, Stansbury was granted his right to self-representation. His April 13 trial was continued to August 15, 2016. On May 13, 2015, Stansbury filed a pro se notice with the Court of Common Pleas and the Commonwealth invoking his Sixth Amendment right to a speedy public trial. see Stansbury's Appellate brief Reproduced Record at 6a. His August 15 trial was continued until January 4, 2016.

During Jury deliberation the judge instructed the jury on the elements of the offenses and crimes involved and advised the jury that if they requested the written definitions of the crimes he will provide it to them. see Trial Transcript N.T.5/27/16, 5. Stansbury timely objected to the Court providing any written jury instructions to the jury. see Trial Transcript N.T.5/27/16, 37. The judge reiterated that unless the jury specifically requested the written instruction they will not be sent back. Trial Transcript N.T.5/27/16, 37-38. At Sentencing for the first time the judge and Commonwealth revealed that written jury instructions was provided to the jury at trial. see Sentencing Transcript N.T.10/17/16, 11-12. No evidentiary hearing was conducted on this contact.

On August 1, 2016, Stansbury filed a timely pro se motion for a new trial based on after discovered evidence and attached the new evidence to the motion. see ECF No.7-1 at 3-6. The judge denied the motion without an evidentiary hearing.

C. Direct Appeal

Stansbury timely appealed his conviction and sentence. A 18 month delay occurred from the time he filed his notice of appeal until the trial court transmitted the record to the Superior Court. Stansbury challenged this delay as violating his due process right to reasonable speedy appeal in the state court and under his first habeas petition docket number 18-cv-1066. Shortly after the filing the Superior Court without conducting an evidentiary hearing or other procedure to determine the merits of his

claims affirmed his conviction and sentence by adopting the trial judge's opinion as its own. see Commonwealth v. Stansbury 190 A.ed 719 (Pa. Super 2018).

D. Federal Habeas Proceedings

On April 18, 2018, Stansbury filed a timely pro se habeas petition raising eight separate claims for relief. see Stansbury's Appellate Brief at 6. After a long delay the respondents filed an opposition brief. see ECF No.33. Without conducting an evidentiary hearing the Magistrate Judge recommended his pro se petition be denied and a request for a COA. Appendix D at 42. The District Court adopted the Magistrate Judge's report and recommendation as its own and denied relief. see Appendix C. The District Court ignoring the error raised in Stansbury's amended objection to the Magistrate Judge's report and recommendation. see ECF No.71 at 8, 16, 18 and should have addressed these issues.

E. COA Proceeding

On October 22, 2021, Stansbury filed a timely pro se application for a COA raising three issues. The Third Circuit denied his application by order concluding that "Stansbury, however failed to demonstrate that jurists of reason would debate the district court's decision" and "Stansbury's remaining claims all lack merit, for substantially the reason given the magistrate judge's report." Appendix B at 1. Stansbury sought a timely review en banc of the panel's decision but was denied by Order without an opinion on March 25, 2022.

REASONS FOR GRANTING THE WRIT

A. THE PANEL I PROPERLY SIDESTEPED THE COA PROCESS BY DENYING RELIEF BASED ON ITS VIEW OF THE MERITS

Stansbury argues that the facts and circumstances of this case, the Third Circuit panel "paid lipservice to the principles guiding issuance of a COA." Tennard v. Dretke 542 U.S.274,283 (2004), but actually held him to a far more higher standard. Specifically, the panel sidestepped

the threshold COA process by first deciding the merits of his appeal, and the justified its denial of a COA based on its adjudication of the actual merits, thereby " in essence decided an appeal without jurisdiction." Miller-El v Cockrell 537 U.S. 322,336-337 (2003).

Here, Stansbury claims the Third Circuit panel phrased its determination in proper terms "failed to demonstrate that jurists of reasons would debate the district court's decision." Appendix B, but it reached this conclusion only after deciding the case on the merits. As the Third Circuit put in the fifth sentence of its Order: " remaining claims all lack merits, for substantially the reasons given the magistrate judge's report." Appendix B at 1.

As this Court stressed in Miller-El, the threshold nature of a COA inquiry " would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail." Miller-El at 337. In this case, Stansbury argues that the panel impermissibly sidestepped the COA inquiry in this manner by denying relief because in its view:

(1) Stansbury's remaining claims all lack merit, for substantially the reasons given the magistrate judge's report;

(2) Stansbury's new evidence whether offered to excuse a procedural default or instead to advance a freestanding claim of actual innocence fails to support an innocence theory by way of alibi." Appendix B at 1-2.

These statements reflects the panel's (proudly wrong) assessment of the merits of his habeas petition and a complete departure from the proper COA analysis. The panel's inquiry should have been limited to whether a reasonable jurists could debate the District Court's disposition of his habeas petition because reasonable jurists could argue that the Pennsylvania Superior Court's decision contravened or unreasonably applied clearly established federal law. Stansbury's habeas petition stated a valid claim of the denial of constitutional rights. see ECF No.1 at 22,25,26. The panel failed to correctly apply the proper COA standard

in this case and its decision conflicts with this Court's precedent. Miller-El at 327; Buck v Davis 137 S Ct. 759 (2017). This Court should not allow this error to go uncorrected. A certiorari should be granted to address this error.

B. COA SHOULD HAVE ISSUED

This Court's precedent is clear: " that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the Court of Appeals should limit its examination to a threshold inquiry into the underlying merit of his claim." Miller-El at 327. "A prisoner seeking a COA need only demonstrate a substantial showing of the denial of a constitutional right." Id. " A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id.

Here, Stansbury argues that since his State appellate brief, see ECF NO.57-1 and his habeas petition, see ECF NO.1 were filed pro se his pleadings should have been liberally construed in light of this Court's decision in Haines v Kerner 404 U.S. 519,520 (1972). Applying Miller-EL and Haines principles to his petition a reasonable jurist could disagree with the district court's conclusion that his first petition under No.18-cv-1066, raised a speedy trial claim because his first petition raised a due process right to a reasonable speedy appeal that attacked the a separate 18 month delay after filing his notice of appeal and before the Superior Court's decision resolving his appeal. see Stansbury v District Attorney of Philadelphia 2019 US Dist LEXIS 163192019 (E.D. PA 2019).

The Third Circuit denying a COA on this issue is inconsistent with this Court's precedent and the Third Circuit own precedent. see betterman v Montana 136 S Ct. 1609 (2016); Burkett v Cunningham 44 f.3d 1160,1169 (3d cir 1995). The Betterman Court held that " after conviction a

defendant's due process right to liberty, while diminished, is still present." *Betterman* at 136 S Ct. 1618. This proves that his challenge to the delay after conviction was properly raised as a due process claim. In *Burkett*, the Third Circuit recognized the "due process clause guarantees a reasonably speedy appeal if the state has chosen to give defendants the right to appeal." *Burkett* at 1169. This proves that since Stansbury's delay occurred during his appeal process the Third Circuit recognized a due process right to a reasonably speedy appeal. This illustrates the fact that the panel's decision conflicts with this Court's and its own precedent. Certiorari should be issued to correct this error.

A reasonable jurist could conclude his speedy trial is adequate to deserve encouragement to proceed further because his first trial commenced 21 months after being arrested without valid justification after asserting his right prejudiced his defense since his only witness became unavailable. The 21 month delay in commencing his trial triggered a presumption of prejudice and application of the factors articulated in *Barker v Wingo* 407 U.S. 514, 530 (1972).

The Third Circuit denying a COA on this issue is inconsistent with this Court's precedent, and deepens a circuit split between the Third and Ninth Circuits concerning the proper application for a COA on a speedy trial claim. *Barker* at 530; *Hernandez v Lyou* 817 Fed Appx 498 (2020). In *Barker* this Court stated "when determining whether a defendant has been deprived of the right to a speedy trial, a court should consider: the length of the delay, the reason for the delay, whether the defendant asserted the right, and any prejudice. *Id.* at 530. Here, since the district court failed to review and apply these factors to the delay between his arrest and conviction the panel's decision was contrary to *Barker*. In *Lyou*, the Ninth Circuit Court of Appeals granted *Hernandez* a COA on the same issue "whether *Hernandez* was denied his Sixth Amendment right to a speedy trial." *Id.* Stansbury raised this exact same claim in his habeas petition. see ECF No.1 at 5 and 22. This illustrates the fact that the Third Circuit is out of step with this Court's precedent and other Circuits. Certiorari should be issued to resolve this split.

A reasonable jurist could conclude that Stansbury's jury tampering claim is adequate to deserve encouragement to proceed further because the trial judge provided the jury written instructions on the crimes charged in Stansbury's absence (Stansbury was pro se) and did not conduct an evidentiary hearing when the allegations was made. This contact and denial of an evidentiary hearing was presumptively prejudicial and deprived him of the presumption of justice he was entitled to under Remmer v United States 347 U.S. 227,229-230 (1954). Since the State Court and District Court both failed to conduct a Remmer hearing this issue should be remanded for one.

The Third Circuit denying a COA or remanding this issue back for a Remmer hearing conflict with this Court's precedent in Remmer and creates a split amongst the Third and the First, and Fourth Circuit concerning a trial judge duty to conduct a Remmer hearing. see Voutour v Vitale 761 F.2d 812 (1st cir 1985); United States v Vega 285 F.3d 256,266 (3d cir 2002); Barnes v Joyner 751 F.3d 229,240 (4th cir 2014). This Court and the First and Fourth Circuits recognize a Remmer hearing must be held with respect to jury impartiality when there is evidence of extraneous influences on the jury. This proves that the The District Court and Third Circuit abused its discretion by not conducting or remanding for a Remmer hearing. Certiorari should be granted and this issue remanded back for a Remmer hearing.

A reasonable jurist could conclude that Stansbury's actual innocence claim is adequate to deserve encouragement to proceed further because the District Court failed to determine whether the Sunoco document he submitted was new reliable evidence...not presented at trial and consider the Sunoco evidence with all the evidence presented at trial and assess the likely impact of all the evidence on a reasonable juror was sufficient to proceed under Schlup v Delo 513 U.S. 298,324,327 (1995). Since the District Court did not correctly apply the Schlup standard to the facts of this case remand is necessary.

The Third Circuit denial of a COA on his actual innocence claim conflicts with this Court's decision in Schlup and deepens a split between the Second and Third Circuit on the proper application for a COA on an actual

innocence claim. This Court held in Schlup, that in order to pass through the actual innocence gateway as Schlup did, a petitioner must support his claim of innocence with new reliable evidence, not presented at trial. Schlup at 324. Since the District Court did not consider the new evidence or assess the new evidence with "all the evidence" presented at trial, the District Court's decision conflicts with this Court's decision. Schlup at 328. In *Rives v Fischer* 294 F.Appx 667,679 (2d cir 2008), the Second Circuit granted Rives a COA on the same issue "whether appellant demonstrated that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* This illustrates that the District Court and Third Circuit decision's was contrary to Schlup and other Circuits.

Under § 2253 (c) requires an overview of the claims in the habeas petition and a general assessment of their merits. *Miller-El* at 336. Applying this principle to Stansbury's pro se petition, ECF No.1 at 5,10,22,25,26, a COA should have been issued because reasonable jurists could find it debatable that his pro se petition stated a valid claim of the denial of a constitutional right and that jurist of reason could conclude the issues presented deserve encouragement to proceed further. *Slack v McDaniel* 529 U.S. 473,484 (2000). Certiorari should be granted to correct this error.

C. HABEAS RELIEF SHOULD BE GRANTED

Under the AEDPA, a federal court may grant a petition for habeas relief only if: (1) the state court's adjudication of the claim, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States"; or (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254 (d)(1)-(2); see *Parker v Matthews* 567 U.S. 37,42-45 (2012).

Here, Stansbury argues that the state court's decision was contrary to *Barker v Wingo* 407 U.S. 514, 530 (1972), because the state court did not consider or mention any of the four Barker factors. see ECF No.31-2 at 20 & n.10. Instead the state court assess his speedy trial claim by the number of days. Id. Nowhere in the trial judge's opinion does he assess or determine the third and fourth Barker factor. Id. This proves that the state court's decision was contrary to Barker. A remand for an evidentiary hearing is necessary because the Commonwealth failed its burden of explaining the delay and the trial judge's reasons were made without an evidentiary hearing. Also, since there was no determination made on the third and fourth Barker factor it is necessary for an evidentiary hearing to be held.

Stansbury also argues that the District Court erred in refusing to review this claim because it held this claim was previously litigated in his first habeas petition, see Appendix D at 10, is incorrect because his first petition No.18-cv-1066 raised a due process right to a reasonable speedy appeal, see *Stansbury v District Attorney of Philadelphia* 2019 US Dist LEXIS 634872020 (E.D. PA 2020). This proves that the District Court mischaracterize his first petition claim and misapplied the law and facts. Moreover, since his speedy trial claim was unripe when he filed his first petition he could not have raised the speedy trial claim in his first petition.

In this case, Stansbury argues that the state court's decision regarding his jury tampering claim was contrary to *Remmer v United States* 347 U.S. 227, 229-230 (1954), because the trial judge admitted he provided written jury instructions to the jury and the trial and sentencing transcripts shows the issue was brought to the Court's attention and no Remmer hearing was held.

This Court held in *Remmer* that " in a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror about matters pending before the jury is deemed presumptively prejudicial, if not made in pursuance of known rules of the court and

instructions and directions of the court made during the trial, with full knowledge of the parties." 347 U.S. at 229-230.

Here, the state court determined that under state law it was proper for the court to provide the jury the written instructions. see ECF No.31-2 at 32 & n.11. Stansbury argues that the state court is wrong and ignored the fact that the written instructions were provided to the jury not in court open but during jury deliberation, in his absence and without his knowledge. And when the issue was raised about this contact the court did not conduct a evidentiary hearing pursuant to Remmer.

The trial judge's opinion, see ECF No.31-2 at 32 & n.11, and the sentencing transcript, see N.T.10/17/16,9-12, proves that there was conduct between the judge and jury and written instructions were provided to the jury. These documents also proves that the written instructions were given in his absence and without his knowledge and no Remmer hearing was held. Under Remmer the contact between the judge and jury and the providing of written instructions in his absence was presumptively prejudicial and the failure to conduct a Remmer hearing deprived him of the presumption of prejudice which he was entitled to under Remmer. The state court's decision was contrary to Remmer and Smith v Phillips 455 U.S. 209,215 (1986).

Stansbury also argues that this Court should excuse the procedural default regarding his Sixth Amendment right to self-representation and Due Process right to be present at all stages of the criminal trial because the trial judge's actions prevent him from fully developing and fairly presenting the claims in the state court.

This Court held in Edwards v Carpenter 529 U.S. 446 (2000) that " where a petitioner has procedurally defaulted on his claim, his avenue of relief are constricted. He may show either " cause " for the procedural default and " actual prejudice" as a result of the supposed violation of federal law, or "demonstrate a sufficient probability that our failure to to review his federal claim will result in a fundamental miscarriage of justice." Id at 451. This Court held that " demonstrating cause requires

that an objective factor external to the defense impeded a petitioner's ability to raise his claims in state court. see *Murray v Carrier* 477 U.S. 478,488 (1986). Should a petitioner fail to establish the " cause " prong, a court need not move to the prejudice prong before denying the claim. see *Smith v Murray* 477 U.S. 527,533 (1986).

In this case, Stansbury argues that the contact between the judge and jury where written instructions were provided. Was done in his absence without his knowledge. And when the issue was raised the trial judge refused to conduct a Remmer hearing at which he could have discovered his right to self-representation and to be present was also violated. This Court should find that the trial judge impeded his ability to fully develop and fairly present these claims in the state court. The trial judge actions also constituted government interference.

Stansbury argues that this Court failure to review these claims will result in a miscarriage of justice because the trial judge can not engage in unconstitutional and unethical behavior and then in an attempt to cover up his conduct by not affording him a hearing which he was entitled to under Remmer. The trial judge disregarded the fact-finding purpose of the Remmer hearing. Denying him his complete right to self-representation and to be present not only violated his federal rights but also made his trial unfair and unconstitutional. Because without knowing what transpired during this contact between the judge and jury (which was held off the record) at this critical stage of his trial (which his right to self-representation under *Faretta v California* 422 U.S. 806 (1975), and right to be present under *Kentucky v Stincer* 482 U.S. 730 (1987) were violated) calls into question the integrity of the verdict. This Court should excuse default and review the claims on their merits.

Stansbury argues that the state court and district court's decisions regarding his actual innocence claims was contrary to *Schlup v Delo* 513 U.S. 298,324,327 (1995), because the state court and district court both ignored the new evidence he filed, see Petitioner's Reply Brief to Respondent's failure to Responded to Habeas Petition and Supporting Documents at 3-6; ECF No.7-1 at 3-6., and assess the new evidence with all the evidence presented at trial.

This Court held in *Schlup v Delo* 513 U.S. 298 (1995), in order to pass through the actual innocence gateway as Schlup did, a petitioner must support his claim of innocence with "new reliable evidence- whether it be exculpatory scientific evidence, trustworthy eyewitnesses accounts, or critical physical evidence- that was not presented at trial. Id at 324,327. Though the Schlup standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt. Id at 329.

In this case, Stansbury argues that the state court and magistrate judge (since the district judge did not specifically address the issue), ignored and did not consider the new evidence he submitted. The state judge reasoned that " Appellant merely states that he received notification that the previously unavailable material was now available. He did not present the Court with any information or advise the Court about what information the material contained" ECF No.31-2 at 39. The Magistrate judge concluded that " All without supplying me with a copy of the Sunoco document on which Mr. Stansbury relies, and after not supplying the trial judge with the Sunoco document either." Appendix D at 40-41.

Stansbury claims that both of these conclusion are incorrect because a simply review of ECF No.7-1 at 3-6, is a copy of the motion for a new trial and new evidence filed in the state court on August 1, 2016 and filed with the district court on July 19,2018. This proves that both the state court and district court was provided a copy of the new evidence. The only explanation for this profoundly wrong conclusion is either both court just ignored the evidence he filed or both courts did not review the documents he filed. The latter suggest that this what happened because the magistrate judge echoed the same false statement made by the state judge and Commonwealth that Stansbury did not provide the state court with a copy of the Sunoco document. see Appendix D at 40-41 and ECF No.31 at 19 and ECF No.31-2 at 39. This proves that his new evidence was ignored and his documents were not reviewed and recieved full and fair consideration by the Courts.

Stansbury also argues that the state court and district court both failed to correctly apply Schlup's predictive standard regarding whether jurors would have reasonable doubt because his new evidence was ignored and not considered prevented the state and district court from determining the impact the new evidence would have against all the evidence that was presented at trial. Instead, the both the state and district courts engaged in speculative and selective fact-finding. For Example:

The Magistrate Judge determined that " Mr. Stansbury would have me believe that, with the Sunoco document before them, a jury would have accepted his alibi, even in the face of contemporaneous eyewitness identification of Mr. Stansbury as the shooter by Mr. Stansbury's half-brother, one of the intended victims, an identification made in the presence of lay witnesses at the scene of the shooting, caught on tape on a 911 call, and then repeated by Mr. Stansbury's half-brother again during a formal police interview. All without supplying me a copy of the Sunoco document on which Mr. Stansbury relies, and after not supplying the trial judge with the Sunoco document either. Together, this is unconvincing, to put it charitably. A jury would not have brought it." Appendix D at 40-41.

Stansbury claims the magistrate judge determination was selective because the magistrate judge only cited or mention the Commonwealth evidence that they presented at trial and did not cite or even mention the evidence Stansbury presented at trial such as. For Example:

Defense witness Jabbar Scott testified that Abdul Scott got punched by someone else because Stansbury was not present when the hit occur. see Trial Transcript. N.T.5/26/16,173-175.

Stansbury testified in his own defense and claimed he was at Sunoco where he used his bank card and purchased a bottle of water (which the Sunoco document supports), see Trial Transcript. N.T.5/26/16,182.

During closing the Commonwealth suggested Stansbury's alibi was fabricated because his bank record did not support his alibi. see Trial

This proves that Stansbury presented evidence at trial that the magistrate judge failed to cite or mention. Therefore, the state and district courts failed to consider "all the evidence" presented at trial. Schlup at 328. This Court should not rely on the state court or magistrate judge's determinations since the basis for their conclusions were based on selective and speculative fact-finding as stated above. This Court should remand for an evidentiary hearing.

CONCLUSION

For all of the foregoing reasons, Mr. Stansbury's case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a COA must issue. This Court's review is warranted not only to resolve the split amongst the circuits, but to maintain public confidence that courts will not permit a conviction based on violating a pro se defendant's federal constitutional rights to stand or deny him adequate and effective appellate review to review his conviction.

Respectfully Submitted,



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