

No. 22A197
22-5920

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Jesse A. Brewer — PETITIONER
(Your Name)

vs.
United States of America RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Jesse A. Brewer
(Your Name)

P.O. Box 3000
(Address)

Pine Knot, Kentucky 40635
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- 1) Whether Petitioner's Sixth Amendment right was violated by Counsel for not exercising my Confrontation Clause of highly persuasive government witness expert testimony by not countering with existing expert defense witness
- 2) Whether Petitioner's Sixth Amendment right was violated by Counsel for not cross-examining the government's expert witness himself
- 3) Whether trial Counsel was ineffective for not requesting the judge to instruct the jury on the "aiding and abetting" Count, in light of the ROSEMONT instruction
- 4) Whether my Fifth Amendment was violated when Petitioner was sentenced as a career offender for an invalid predicate offense that is no longer considered a crime of violence. That being New York State "ATTEMPTED ROBBERY." And now in light of TAYLOR

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:

RELATED CASES

- ~~1) United States v Brewer, NO. 1-13-cr-00013-003, Middle District of Pennsylvania. Judgment entered on 2/24/16~~
- ~~2) Third Circuit Court of Appeals NO. 21-3297 (4/6/18)~~
- ~~3) Third Circuit Court of Appeals NO. 21-3297
Denial of Sup Petition for Rehearing (6/30/22)
of Collateral proceeding from District Court~~
- 1) United States v Brewer, NO. 1-13-cr-13-003, United States District Court for The Middle District of Pennsylvania. Judgment entered Feb. 24, 2016
- 2) Third Circuit Court of Appeals. NO 16-1462. Judgment entered April 6, 2018
- 3) United States v Brewer, NO. 21-3297, U.S. Court of Appeals for the Third Circuit. Judgment entered on June 30, 2022 of Collateral proceeding from District Court

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STATUTES AND RULES

NEW YORK STATE PENAL LAW STATUTE:

Criminal Penal Law § 160.15 — (12)

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 judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals 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.

The opinion of the United States district court appears at Appendix N/A to the petition and is ~~Judicial Act Commitment Order~~

☐ 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 6, 2022.

☐ 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: JUNE 30, 2022, and a copy of the order denying rehearing appears at Appendix A.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including 9/30/2022 (date) on 11/28/2022 (date) in Application No. 22 A 197.

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: _____, 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES IN RELEVANT PART:

"... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor"

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES IN RELEVANT PART:

... Nor be deprived of life or liberty... without due process of law.

STATEMENT OF THE CASE

See ATTACHED
numbered ① thru ⑬

APPEARANCE OF COUNSEL ARGUING CASE, ^{① of ⑬}
JESSE BREWER, PRO HAC VICE

A. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO RETAIN CELL SITE LOCATION EXPERT TO CHALLENGE AND CROSS-EXAMINE THE GOVERNMENT'S EXPERT WITNESS AGENT WILLIAM B. SHUTE.

It is petitioner's position that his Sixth (6th) amendment right of the Constitution was violated by trial attorney William A. Fetterhoff for not hiring a counter cell site expert for the government's expert witness, William B. Shute and his highly persuasive testimony at trial. Agent William B. Shute's testimony had bolstered the government's case against petitioner, but it was never challenged. Trial attorney, William A. Fetterhoff neglected to call a defense expert witness to rebut Shute's testimony. None of the victims identified petitioner, and neither did the Government's DNA or fingerprint evidence implicate petitioner in this crime. Succinctly, the government's case was dependent upon cooperating witness Timothy Forbes, and Agent Shute's highly persuasive testimony.

Therefore, calling an expert witness that^{2 of 3} specialized in cell site technology was crucially important to petitioners' defense. Another expert's version of cell site mapping and cell tower location data would have given the jury a different perspective of the evidence, and could have produced reasonable doubt.

The appropriate question for the Court in this case is not whether a defense cell site expert could have conclusively and definitively establish petitioners' innocence, but whether, in light of the expert's testimony, which could have shown Agent Shute's mapping analysis is misleading, and other rebuttal evidence, a reasonable juror considering the entire mix of evidence would more likely vote to acquit or convict?

In United States v. Meehan, 2016 U.S. Dist. LEXIS 125424 (E.D. Pa. 2016), the defense called expert witness Joseph Kennedy for the purpose of showing the lack of reliability of opinions on cell phone locations based only on a review of historical call detail records. Mr. Kennedy reviewed Agent Shute's testimony, then

testified in part that, (1) "mapping exhibits^{3 or 3} can be misleading; (2) mapping basically draws an idealistic circle around the tower in a pie shaped chart..." and you can't really say that the call only - the cell phone only could be covered in that area, because the coverage would actually be in the shape of an oval"; (3) Agent Shute's one-mile radius analysis was incorrect; (4) a cell tower's coverage may be up to twenty-one miles, depending on the height of the tower, existence of surrounding buildings and other factors; (5) cell phones do not always connect to the closest tower; (6) there was no scientific justification for Agent Shute's testimony regarding the defendant's location. The Third Circuit denied Meehan's habeas relief, but based its conclusion upon facts distinguishable from petitioner's case. The Court found in Meehan that his attorney conducted a rigorous cross-examination of Agent Shute, while at petitioner's trial, Shute was never cross-examined. Petitioner's attorney had abandoned cross-examination ~~of~~ completely. In conclusion, the Third Circuit

held in Meehan that "Given Agent Shute's ⁽⁴⁰⁾ ⁽¹³⁾ testimony on direct and cross-examination, defendant's trial counsel made a reasonable strategic decision not to retain an expert on cell site analysis". In petitioners case, trial counsel failed to seek a Daubert hearing regarding Shute's testimony. Had counsel requested the Daubert hearing, he would have been in a better position to decide whether an expert was necessary for petitioners defense, or whether it's a strategic decision not to retain an expert, on cell site analysis. Had petitioners counsel retained an expert, there's a reasonable probability the expert would have likewise provided the jury with facts that could have contradicted Agent Shute's testimony.

Deciding whether to call an expert is "fundamentally a strategic choice-made by an attorney-after a thorough investigation of the relevant law and facts". United States v Caden, 2007 U.S. Dist. LEXIS 91533 (E.D. Pa Dec. 12, 2007). Petitioner's Counsel knew prior to trial that the government would have

introduced cell site evidence through ^(5 of 13) Agent Shute, yet made no attempts to investigate whether another expert cell site witness had in the past discredited Shute's testimony. See United States v

Travillion, 759 F.3d 281, 293, n.23 (3rd Cir. 2006)

("failure to investigate a critical source of potentially exculpatory evidence may present a case of constitutionally defective

representation"). Had Counsel conducted a meaningful investigation on this issue, he would have discovered Joseph Kennedy's testimony that revealed Shute's "mapping analysis" misleading, and possibly could have been misunderstood by the jury.

At this critical phase of petitioners trial, Counsel failed to subject the prosecution's case to meaningful adversarial testing.

United States v Cronin, 466 U.S. 656 (1984), held,

"When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred. But, if the process loses its

Character as a confrontation between ^(6 of 13) adversaries, the Constitutional guarantee is violated." Cronic further noted, "lawyers in criminal cases are 'necessities, not luxuries'. Their presence is essential because they are the means through which the other rights of the person on trial are secured." Id. at 653

Petitioner had a Sixth Amendment right to confront the cell site evidence against him. However, Counsel's failure to retain an expert witness in this field to challenge Shute's mapping analysis prevented the jury from hearing another expert's perspective, namely that mapping exhibits can be misleading; that cell phones do not always connect to the closest tower, and that there was no scientific justification for Agent Shute's testimony regarding petitioner's location. These detailed facts were available when petitioner went to trial. A meaningful investigation would have discovered Joseph Kennedy's cell site analysis, and had he (or another expert) been called as a defense witness, there's a reasonable probability such

testimony could have created reasonable ⁽⁷⁾~~(2)~~⁽¹³⁾ doubt, and even an acquittal.

The text of the Sixth Amendment requires not merely the provision of counsel to the accused but "Assistance", which is to be "for his defense". Thus, "the core purpose of the counsel guarantee was to assure 'assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor". United States v. Ash, 413 U.S. 300, 309 (1973). If no actual "assistance" for the accused's defense is provided, then the Constitutional guarantee has been violated. To hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.

B. TRIAL COUNSEL VIOLATED PETITIONER'S CONFRONTATION RIGHTS BY FAILING TO CROSS-EXAMINE AGENT SHUTE

The Sixth Amendment guarantees a

(8) of (13)

defendant in criminal proceedings the right "to be confronted with the witness against him". U.S. Const. Amend. VI. The Supreme Court has indicated that "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, 415 U.S. 308, 315-316 (1974). The

right to cross-examination is thus constitutionally protected. A criminal defendant can prove a violation of his Sixth Amendment rights by "showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness'." Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986).

Petitioner's right to cross-examination of Agent Shute and to introduce alternative cell site and cell tower analysis evidence, was relevant to impeach or disprove Shute. Such would have allowed the jury to evaluate

the credibility and scientific validation of Shute's testimony. Discrediting the accuracy and reliability of Shute's testimony could have shown a tendency to exaggerate or overstate, if not outright fabricate. See Davis, 415 U.S. at 315-16. (9)(3)

After the Government conducted its direct examination of Agent Shute, the Court inquired of Petitioner's attorney regarding cross-examination. Counsel refused to cross-examine Shute, and in doing so he failed to protect petitioner's confrontation rights.

A showing of Constitutional error under the Sixth Amendment as what transpired here, only merits grant of the petition for habeas Corpus if the error was not harmless, that is, if it had a "substantial and injurious effect or influence in determining the jury's verdict". Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). This error is not harmless, even under Strickland, because it had a "substantial and injurious effect" or influence on the jury's determination of guilt in this case. The prosecution's case depended upon the jury believing Shute, as the prosecution conceded during closing argument. Because Shute's

Accuracy and truthfulness were key ^(10 of 13) elements of the government's case, the jury might have received a "significant different impression" of his credibility had petitioners Counsel engaged meaningful and rigorous cross-examination. Put simply, Counsel's failure to retain a cell site expert and cross examine Shute, had a "substantial and injurious effect or influence on the jury's verdict."

C. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST THE JURY TO BE INSTRUCTED ON THE AIDING AND ABETTING COUNT

Trial attorney William A. Petherhoff testified at petitioner's Evidentiary Hearing that Sentencing Judge William Caldwell did not instruct the jury on aiding and abetting liability, only on principle liability? When in fact, petitioner was charged as both,

As a principle and also aiding and abetting Jamel Smallwood and Timothy Forbes. Attorney Fetterhoff did not request any instruction on aiding and abetting, including the Rosemond instruction, indicating at petitioner's Evidentiary Hearing... "Well, I didn't give it a lot of thought, to be honest"?? ^{11 of 13}

D. NEW YORK STATE "ATTEMPTED ROBBERY" CONVICTION WAS / IS NOT A VALID PREDICATE OFFENSE FOR A CAREER OFFENDER DETERMINATION AND NOW IN LIGHT OF TAYLOR

It is petitioners position that his career offender enhancement should be voided and that he be resentenced

In light of Taylor for the fact that ^{(2) of (3)}
New York State "attempted robbery" can
also be accomplished without the use
of violent force or even physical
force and that it also extends to
property. See N.Y.S. CPL § 160.15

Being that Hobbs Act robbery criminalizes
conduct involving threats to "property",
it should not qualify as a crime of
violence under Taylor or under the
United States Sentencing Guidelines. See Scott
id. therefore petitioner is not a career
offender and must be resentenced. And
because Hobbs Act Robbery and New York
State "Attempted Robbery" can be accomplished
without the use of physical force, then
its elements are too broad to match
up with the appropriate "Crime of Violence"
in the U.S.S.G 4B1.1 or Taylor and as
explained in SCOTT, 2021 U.S. App. LEXIS
28697 (9/22/21) (3rd Cir 2021), see also, United
States v Edling, 895 F3d 1153, 1157-58 (9th Cir
2018) (reaching the same conclusion when
analyzing a state statute identical to Hobbs

Act robbery In all relevant respects),
And also see United States v McCants, 952
F3d 416, 501-02 (3d Cir. 2020)

In light of Taylor, and all of the
facts in the aforementioned, it is

Petitioner's position that this Court can
and should order and instruct the
district Court to Grant petitioner a new
trial or at the very least resentencing him
but as not a career offender

REASONS FOR GRANTING THE PETITION

With respect to the Sixth Amendment of the United States Constitution, Petitioner had a clearly established right to confront the government's expert witness and that right was violated twice by his trial attorney's deficient performance to not only present a defense expert witness to counter the government's but also to confront said witness himself

AND NOW, in light of the Justice Eugene Taylor Case, Petitioner was enhanced, illegally, at sentencing for an invalid predicate offense, that being New York State "ATTEMPTED ROBBERY" - which is no longer considered a crime of violence

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jesse A. Brewer

Date: October 17th, 2022