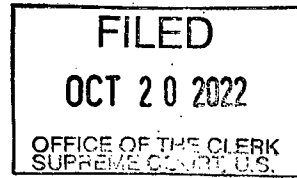


22-5938  
No. \_\_\_\_\_

ORIGINAL



\_\_\_\_\_  
IN THE

SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

CARRINGTON JOSEPH — PETITIONER  
(Your Name)

vs.

SUPT. ROCKVIEW SCI, ET AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Carrington Joseph  
(Your Name)

301 Grey Line Drive  
(Address)

Frackville, PA 17931  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

Whether the Court of Appeals decision to deny Petitioner a Certificate of Appealability conflicts with the standard articulated by this Court and its own where a substantial showing of the denial of a constitutional right was made?

## LIST OF PARTIES

Petitioner is Carrington Joseph, a Pennsylvania State prisoner confined at the State Correctional Institution Mahanoy 301 Grey Line Drive, Frackville, PA 17931 at inmate No. MH-0252

Respondent Superintendent Rockview SCI had custody of Petitioner at the time he filed his habeas petition.

Respondent District Attorney of Lancaster County prosecuted Petitioner.

Respondent Attorney General of Pennsylvania is an additional Respondent.

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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 judgement below.

OPINIONS BELOW

The 8/5/22, Order of the U.S. Court of Appeals denying  
Rehearing appears as Appendix "A"

The 5/3/22, Order of the U.S. Court of Appeals denying  
Certificate of Appealability appears as Appendix "B"

The 8/31/21 Order of the U.S. District Court adopting the  
Magistrate Judges Report and Recommendation appears as Appendix "C"

The 9/27/19 Report and Recommendation of the Magistrate Judge  
appears as Appendix "D"

## JURISDICTION

The Judgement of the United States Court of Appeals for the Third Circuit was entered on August 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: No person shall be compelled in any criminal to be a witness against himself.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with witnesses against him; and to have compulsory process for obtaining witnesses in his favor..."



## STATEMENT OF THE CASE

On November 12, 2015, following a non-jury trial before the Honorable Dennis E. Reinaker, of the Lancaster County Court of Common Pleas. Petitioner was convicted of first-degree murder.

On December 15, 2015, Petitioner was sentenced to life without parole. Petitioner filed a direct appeal and his judgement of sentence was affirmed by the Pennsylvania Superior Court on July 14, 2016.

On September 12, 2016, Petitioner filed a petition pursuant to Pennsylvania's Post Conviction Relief Act. After appointed counsel filed a no merit letter, the PCRA Court issued a notice of Intent to Dismiss the Petition on March 21, 2017. Petitioner filed a pro se response, and the Lancaster County Court dismissed the PCRA petition on May 11, 2017. On that same date, Petitioner filed an appeal of the dismissal. On January 18, 2018 the Pennsylvania Superior Court affirmed the judgement of the PCRA Court.

Petitioner filed a pro se Petition for Writ of Habeas Corpus in the U.S. District Court for the Eastern District of Pennsylvania on May 24, 2018. On September 27, 2019, Magistrate Jacob P. Hart issued a Report and Recommendation that the Petition be denied. By Memorandum Opinion and order dated August 31, 2021 the Honorable Gerald J. Pappert approved and adopted the Magistrate's Report and Recommendation denying and dismissing the petition and his amended petition.

A timely filed appeal to the U.S. Court of Appeals for the

Third Circuit at No. 21-2848, resulted in Certificate of Appealability being denied by order dated May 3, 2022 and a timely filed Petition for Rehearing being denied by order dated August 5, 2022.

This timely filed petition follows.

## REASONS FOR GRANTING THE PETITION

The § 2254 petition in this case was timely filed within one year of the judgment being final, and so is subject to the Certificate of Appealability (COA) provisions of the AEDPA. A COA must issue if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(e)(2). The statute does not define "substantial showing" but the Third Circuit Court of Appeals has recognized that it is the same as that formally applied to Certificate of probable cause.

The standard for appealability is therefore not high: whether the case presents an issue that is at least "debatable among jurists of reason." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983); see *Santana v. United States*, 98 F.3d 752, 757 (3rd Cir. 1996) (§ 2253, as amended in 1996, preserves standard developed for certificate of probable cause under *Barefoot*). As discussed below, Petitioner made a "substantial showing" of denial of his rights on the ineffective issue, evidence insufficient issue, prosecutorial misconduct issue and the Brady violation issue in his § 2254 motion.

This Court is familiar with *Strickland v. Washington*'s two-part test for determining claims of ineffective assistance of counsel. To succeed on a *Strickland* claim a petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish deficient performance, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness.

## RIGHT TO TRIAL BY JURY

Petitioner argued that he was denied his Sixth Amendment right to effective assistance of trial counsel when his counsel failed to prevent him from waiving his right to a trial by a jury of his peers. He alleged that his waiver was entered unknowingly and unintelligently because he was on several heavy sedative psychotropic medications at the time of the waiver.

From the totality of the circumstances, including the facts alleged above Petitioner did not knowingly and intelligently waive his right to a jury trial. ~~Under federal constitutional principles,~~ where the Petitioner has been deprived of his right to a trial by jury, the error is deemed structural and requires automatic reversal of his conviction. *McGerck v. Stenberg*, 163 F.2d 470 (8th Cir. 1998); *Miller v. Dormire*, 310 F.3d 600 (8th Cir 2002).

## COMPETENCY HEARING

Petitioner asserts that he was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel failed to move for the court to conduct a competency hearing. He argues that the court should have conducted a competency hearing to determine if he understood the nature of the charges and whether he could assist counsel in defending his case because he was "on heavy sedative psychotropic medications". Although, Petitioner informed the court during the colloquy that he was taking prescription medication, any further testimony is moot. Therefore, counsel's action in failing to move for a competency hearing was unreasonable. A competency hearing could have revealed diminished capacity defense and could have led the

jury to believe that Petitioner could not have formed the requisite intent to be found guilty of first degree murder which constitute prejudice.

#### IMPERFECT SELF-DEFENSE

Petitioner asserts that his trial counsel was ineffective for failing to pursue the defense of imperfect self-defense in his case. He argues that he stabbed the decedent in the heat of passion in an attempt to protect himself after she threatened to get a knife from the kitchen and stab him and a struggle ensued.

If a criminal defendant subjectively proves, through mental health evidence or otherwise, that he honestly believed he was in danger, but this belief is unreasonable, then he has implicated "imperfect self-defense." Unlike the affirmative defense of self-defense, which is a justification for the crime and, if accepted, results in acquittal, a finding of imperfect self-defense results in conviction of the offense of voluntary manslaughter. Commonwealth v. Busanet, 54 A.3d 35, 44, 618 Pa. 1 (Pa. 2012).

Had counsel conducted a reasonable investigation and provided the results to an appropriate expert, counsel could have presented expert testimony that at the time of the offense, Petitioner was acting in the heat of passion fueled by the cumulative effect of his relationship with the decedent, the statements she made to him, his drugged condition and her action on the night of the offense.

In Commonwealth v. Shaver, 460 A.2d 742 (1983), the Superior Court emphasized the value of psychiatric testimony in support of a heat of passion defense.

In Commonwealth v. Potts, 406 A.2d 1007 (Pa. 1979), trial counsel was found ineffective for failing to present psychiatric evidence at trial and the Pennsylvania Supreme Court reversed a first degree murder conviction. The plurality concluded, "When the only issue is appellant's state of mind, trial counsel's decision not to pursue relevant psychiatric and psychological testimony which may be determinative of the issue can be as damaging to the truthfinding process as the failure in other context to present the testimony of an available eyewitness, alibi witness, or other key witnesses. Id. at 1009. Justice Nix concurred that trial counsel was ineffective for failing to present available psychiatric testimony. Id. at 1011.

#### RIGHT TO TESTIFY

Petitioner argues that he was denied his Sixth Amendment right to the effective assistance of counsel because his trial counsel prevented him from testifying on his own behalf. Petitioner argues that testifying would have brought to the Court's attention the facts leading up to the altercation between him and the decedent and would have demonstrated imperfect self-defense.

It was the clear intent of Petitioner to testify at trial on his own behalf to both deny the allegations and explain to the jury the facts resulting in the offense. Trial counsel prevented Petitioner from testifying. Petitioner's fatal decision to remain silent, notwithstanding his stated desire to testify to counsel was premised upon his belief that there may have been more harm than benefit which was never clarified by counsel. Trial counsel has been deemed to have provided ineffective assistance of counsel pursuant to the PCRA in instances wherein unreasonable advice

prevented the defendant from so testifying. See Commonwealth v. Breisch, 719 A.2d 352 (Pa. Super. 1998).

#### SPEEDY TRIAL RIGHTS

Petitioner argues that he was deprived of effective assistance of counsel because his trial counsel failed to file a motion to dismiss his case pursuant to Pennsylvania's Speedy Trial Act. The Complaint was filed on May 2, 2014 and Petitioner's bench trial commenced on November 9, 2015, approximately 18 months later without any discussion regarding continuances with counsel. Balancing the four factors in Barker v. Wingo, 407 U.S. 514 (1997) where this Court found that there was a violation of Petitioner's Sixth Amendment right to a speedy trial, Petitioner has demonstrated that he was prejudiced by the delay in his case.

#### RECUSAL

Petitioner alleges that his trial counsel failed to provide effective assistance of counsel as guaranteed by the Sixth Amendment by failing to file a motion to have the trial judge recuse himself. Petitioner alleges that he was assaulted by Keyon Bertrand Cowan in open court on November 9, 2015. Petitioner claims that the anger and assault upon him by Cowan exhibited to the trial judge the hostility brandished by Cowan, a family member, towards Petitioner which ultimately inflamed the passion of the trial judge. Petitioner argues that because of the inflammatory impact the attack had on the trial judge, his counsel should have immediately filed a motion for recusal.

The Due Process Clause entitles a person to an "impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). This

jealously guarded requirement of neutrality "helps guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or law." *Id.* citing *Matthews v. Eldridge*, 424 U.S. 319, 344 (1976).

Based upon information and belief, it cannot be said that Petitioner received the "impartial and disinterested tribunal" due process requires. A serious risk of actual bias warrants relief

#### SUFFICIENCY OF EVIDENCE

Petitioner alleges that the evidence presented at trial was insufficient to sustain his conviction of first-degree murder. He argues that the evidence was insufficient to establish that Petitioner acted with specific intent to kill the victim. The evidence produced at trial demonstrated that Petitioner engaged in a very heated argument which escalated and decedent scrambled to retrieve a kitchen knife, resulting in a struggle and Petitioner defending himself from decedent.

These facts would support a conviction for voluntary manslaughter. A person is guilty of voluntary manslaughter if, either he acted under a sudden and intense passion resulting from a serious provocation or if he knowingly and intentionally killed the individual under the unreasonable belief that the killing was justified. 18 Pa.C.S. § 2503(a) and (b). A killing that occurs under the mistaken belief that it was justified constitutes voluntary manslaughter. *Commonwealth v. Mehmeti*, 501 Pa. 589, 462 A.2d 657 (1983).

Absent facts from which a specific intent to kill could be inferred, the verdict in this case necessarily rest on conjecture



and surmise. The Commonwealth's case failed to explain what led up to the death. The Commonwealth's evidence further failed to demonstrate a conscious intent to kill on Petitioner's part from either the act itself or the surrounding circumstances. Although first degree murder can be proven by circumstantial evidence, the circumstantial evidence in this case was ineufficient to prove that offense beyond a reasonable doubt.

#### PROSECUTORIAL MISCONDUCT

Petitioner claims that the Commonwealth committed prosecutorial misconduct by withholding and failing to bring to the Court's attention the fact that a Commonwealth witness had a prior arrest record which he claims could have been used for impeachment purposes. He alleges that the prosecution failed to disclose this information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He also alleges that his counsel was ineffective by failing to conduct an investigation to discover the record.

Impeaching evidence must be disclosed if it is favorable to the accused. *Youngblood v. West Virginia*, 547 U.S. 867 (2006). Impeachment evidence has been described as evidence having the potential to alter the jury's assessment of the credibility of a prosecution witness, or as evidence that is offered to discredit a witness, to reduce the effectiveness of the witnesses testimony by bringing forth evidence which explains why the jury should not put faith in the witnesses testimony.

It can not be seriously argued that the prior record of the Commonwealth's witness withheld was not materially favorable to Petitioner. The suppressed prior record of the witness doesn't simply undermine confidence in the outcome of the trial, it is

directly relevant to determining the credibility of the Commonwealth's witness and the guilt or innocence of first degree murder.

At the time of Petitioner's trial the Commonwealth had in its possession its witness' prior arrest record, material evidence that could be used to impeach its witness. The prosecution failed to identify this evidence and turn it over to Petitioner. This is a classic Brady violation and a writ of habeas corpus should have issued as well as a Certificate of Appealability on appeal to the Court of Appeals for the Third Circuit.

This Court should grant certiorari to resolve the conflict between the standard for issuing a certificate of appealability and the standard utilized to deny Petitioner the same. At least, this Court should summarily grant the writ, vacate the judgement of the court of appeals, and remand this case for reconsideration under this Court's standard for a certificate of appealability.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Carrington Kevon Joseph

Date: 10/4/2022