22-7538

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DOMINIC SOUTO DIAZ, PETITIONER

vs.

SUPERINTENDENT FOREST SCI, ET AL

(W.D Pa.Civ.No.1:-cv-00222)

PETITION FOR A WRIT OF CERTIORARI FROM THE DENIAL OF PETITIONER'S REQUEST FOR CERTIFICATE OF APPEALABILITY IN THE UNITED STATES COURT OF APPEALS.

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pro se

QUESTION(S) PRESENTED

(1)Did the Court of Appeals err when it ruled Appellant's gateway claim of innocence was not new evidence? Was PCRA counsel ineffective for not investigating the phone records and not showing proof that it would have been impossible to have committed this crime?
(2). Did the Court of Appeals err when it found Appellant's Brady claim meritless and accorded the State Court deference?
(3). Did the Court of Appeals err when it found Appellant's ineffective assistance of counsel claim in regards to trial counsel failing to object to the commonwealth misrepresenting the phone evidence meritless and not debatable?
(4). Was PCRA counsel ineffective for not developing claim three and developing the claim that trial counsel was ineffective for not objecting to the commonwealth misrepresenting and putting on false evidence in closing arguments?
(5). Was PCRA counsel ineffective for not arguing trial counsel was ineffective for not impeaching Javon Martin with lies and inconsistencies. Was the District Court in error when it ruled that Appellant brought this claim to the state Court's but failed to appeal it to the Superior Court.If not was PCRA counsel error cause for the procedural default?

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JURISDICTION

The date on which the highest state court decided my case was was on July, 21, 2020. A copy of that decision appears at Appendix E.

A timely petition for rehearing was denied on November 15, 2022.

Jurisdiction in this Court is invoked under 28U.S.C. §1257(a).

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On August 23, 2014, Hercules Reiger was shot at an after-hours bar. He was rushed to the hospital where he succumbed to his injuries.

On August 25, 2014, Jamie Bolorin tells the detectives that he witnessed Marzell Stovall strike appellant in the head with a crow bar.

On August 29, 2014, Javon Martin is picked up from the Erie County prison and taken to the police station. Martin alleges he witnessed appellant shoot the victim.

After a six-count criminal complaint was filed, appellant was arrested.

ON September 3, 2014, Jomo Mcadory stated to the detectives that he saw Reiger punch appellant and fifteen minutes later he heard a pop,but he did not see the shooter.

On May 11, 2015, a jury trial was held. All three witnesses testified to the above. Experts in cell-tower triangulation testified that at the time of the crime all calls were placed on the westside of Erie, PA. On May 14, 2015, the jury found appellant guilty of all counts. On July 17, 2015, Appellant was sentenced to life imprisonment on the first-degree murder conviction.

The Appeal.

After filing a post-sentence motion,Appellant appealed to the Pennsylvania Superior Court. That court affirmed Appellant's conviction. On june 12, 2017, Appellant filed a motion for post conviction collateral relief. On june 19, 2017, PCRA counsel was appointed to represent Appellant. Counsel filed a supplemental. On May 11, 2018, an evidentiary hearing was held. On May 16, 2018, the trial court denied three of Appellant's claims and gave 20 day notice to dismiss Appellant's other claims. The trial court has yet to rule on them claims.

Appellant appealed to the Superior Court raising two claims. Did the commonwealth violate Brady, and was trial counsel ineffective for not objecting to the commonwealth misrepresenting the

phone evidence.

On August 20,2020, the Superior Court denied both claims. On July 1, 2020, the Supreme Court of Pennsylvania denied Appellant's petition for allowance of appeal. On August 8,2020, Appellant filed for a petition for a Writ of Habeas Corpus. The Magistrate denied all claims. The Magistrate denied Appellant's Brady and ineffective assistance of trial counsel claims on the merits and found the rest of Appellant's claims procedurally defaulted. Appellant then filed for a C.O.A. which was denied. Appellant filed for re-hearing which was denied. Appellant now files this petition for certiorari.

COGNIZABLE CLAIMS IN FEDERAL HABEAS CORPUS

A state prisoner may seek federal habeas relief only if he is in custody in violation of the United States Constitution or federal law. 28 U.S.C.§2254(a); Smith v. Phillips,455U.S.209(1982). Violation of state law or procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before federal habeas relief may be granted.Engle v. Isaac, 456 U.S.107 (1982). A federal court's scope of review is limited since its role is not to retry state cases de novo, but to examine the proceedings in the state court to determine if there has been a violation of constitutional standards. Barefoot v. Estelle,463 U.S.880(1983); Milton v. Wainwright,407 U.S.371(1972). A habeas petitioner must show the state court's decision was such a gross abuse of discretion that it was unconstitutional;"ordinary" error is outside the scope of review. 28 U.S.C.§2254.

Pursuant to the anti-terrorism and effective death penalty act of 1996,effective April 24,1996, the statute of limitations for filing a petition for Writ of Habeas Corpus is as follows:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of--

(a) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(b) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(c) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(d) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted towards any period of limitation under this subsection.
28 U.S.C.A.§2244(d).

Appellant's judgment of sentence became final on July 25,2016 (see district court's order p.7). On JUne 8, 2017, Appellant filed a PCRA petition. At that point, Appellant had 47 days remaining on the AEDPA clock. Appellant's petition remained pending until July 21, 2020, when the Pennsylvania Supreme Court denied Appellant's petition for allowance of appeal.ON August 1,2020, Appellant filed a petition for federal hebeas relief.Accordingly, Appellant's petition is timely.

On April 7,2022,the Magistrate denied all claims. Due to the Court not putting its control number on the envelope, Appellant did not receive the denial until May 18,2022. (see exhibit 1). Immediately upon receiving the denial, Appellant filed a motion for a certificate of appealability in the Court of Appeals for the 3rd circuit. The Court denied Appellant's motion finding Appellant's claims either procedurally defaulted or meritless. (see appendix a).Appellant filed a petition for rehearing that was also denied. Now comes this timely petition for certiorari.

EXHAUSTION

The Antiterrorism and Effective Death Penalty Act of 1996,28 U.S.C. § 2254(b)(1)(a), requires that a state prisoner exhaust his available state court remedies before seeking federal habeas corpus relief. Habeas Courts cannot grant habeas corpus relief under§2254 unless the petitioner has exhausted the remedies available in the state courts.To satisfy the exhaustion requirement, the petitioner must first have fairly presented his constitutional and federal law issuesto the appropriate courts. In PA, a petitioner need not seek review with the Pennsylvania Supreme Court to properly exhaust. Thus, to satisfy § 2254(b)(1), a petitioner must present his claims to the Pennsylvania Superior Court. A petitioner successfully exhausts a claim by bringing it to the Superior Court either on direct appeal or during PCRA proceedings. Leyva v. Williams,504 f.3d 357(3d cir. 2007).

Exhaustion may also be satisfied when a petitioner is barred from raising his claims because pennsylvania courts will no longer entertain them due to waiver or default. However, a claim that has been procedurally defaulted ordinarily will be barred from federal review.Claims that will not be heard in a state court because of a procedural default, will be barred on federal habe. Coleman v. Thompson,501 U.S. 722,731-732(1991). A petitioner can overcome the procedural default if the petitioner can show cause and prejudice or a miscarriage of justice. Coleman,501 U.S. at 750.

In Martinez v. Ryan, 566 U.S.1,(2012), this court articulated when a prisoner may establish cause for a procedural default.

The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding where the claim should have been raised, was ineffective under the standards of strickland v. Washington, 466 U.S. 668, 104 S.CT. 2052 (1984).

Petitioner raises the following claims in this petition for certiorari:

(1) Did the Court of Appeals err when it found Appellant's claim of innocence was not new evidence?

(2) Did the Court err when it found Appellant's Brady claim procedurally defaulted or meritless?

(3) Did the Court err when it found Appellant's ineffective assistance of trial counsel claim procedurally defaulted or meritless?

(4) Was PCRA counsel ineffective for not developing the claim that trial counsel was ineffective for not objecting to the district attorney misrepresenting the phone evidence?

(5) Was PCRA counsel ineffective for not arguing that trial counsel was ineffective for not impeaching Javon Martin with lies?

Appellant raised claims two and three in his PCRA in state court. They were also raised in Appellant's federal habe. See appendix b p.19 and 22.

Claim four was raised in Appellant's initial federal habe. See Appellant's memorandum p.30. However, the District Court and Court of Appeals failed to respond to this claim.

The District Court found claim five procedurally defaulted because it was raised in Appellant's pro se PCRA petition but not appealed to the Superior Court. See appendix b p.16-17. This claim was never presented in the state court. The court's finding is clearly erroneous. The issues were waived in the trial court. See appendix c, 1925 (a) opinion p.7,18-19, where it was held, "Finally, we note that only three issues were raised at the PCRA hearing: (1) the Brady violation; (2) the alibi witnesses, Moore and Valentino; and (3) the issues of conflicting cell phone testimony. **The remaining issues were therefore waived for failure to raise them at the hearing**".

PCRA Counsel failed to comply with pennsylvania rules of appellate procedure 2119(a),(b) and (c). Arguments which are not properly developed are waived, Lackner v. Glosser, 2006 PA Super 14, 892 A.2d 21,29 (Pa. super. 2006). Pa.R.A.P. 302(a),"issues not raised in the lower court are waived and cannot be raised for the first time on appeal".

Claims four and five are thus cognizable for federal review.

Did the Court of Appeals err when it ruled Appellant's gateway claim of innocence was not new evidence? Was PCRA counsel ineffective for not investigating the phone records and not showing proofthat it would have been impossible to have committed this crime?

In order for a habeas court to reach the merits of a barred claim based on actual innocence, a petitioner must show that his conviction was the result of a fundamental miscarriage of justice. Schlup v. Delo, 513 U.S. 298,324,130 L.Ed.2d 808(1995). Must show that a constitutional error has caused the conviction of one that is innocent. Id. at 324. This requires the petitioner to support his allegations of constitutional error with new reliable evidence whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence- that was not presented at trial. Id.

The Supreme Court has ruled that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of the new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. House v. Bell, 547 U.S. 518,518,(2006)(citing Schlup, supra, at 327).

Under Strickland v. Washington,466 U.S. 668,104 S.CT.2502, 2068 80 L.Ed.2d 674(1984), this Court explained that there are two components to a Strickland claim; first, the petitioner must show that counsel's performance was deficient; second, the petitioner must show that he was prejudice by counsel's deficiency.

The District Court ruled the newly discovered evidence Appellant presented to the Court was not new evidence. That the evidence was presented at trial. See appendix b, the Magistrate's order p.28. The court of Appeals agreed. Appendix A p.2.

Appellant argues that this evidence is not only new but shows conclusive innocence. The new evidence demonstrates that the crime could not have happened the way the commonwealth presented it.

At trial, the commonwealth and defense presented cell-tower triangulation experts. The experts testified as to the locations the cell towers signaled, the distance from the cell tower to the crime scene, but he never testified as to how long it will take to get from the cell tower to the crime scene. At trial the commonwealth's expert lays out the address of the cell towers. Under cross-examination from defense counsel(Bruce Sandmeyer) Raymond Mcdonald(cell-tower expert) testified as follows:

Q. I'll come up here and refer to the map that you've been using. All right. Sir, tower one here--just to make it very simple, tower one you have as an address, it would have been of 1431 west 12th street?

A. I believe so, yes.

Q. And then tower three, sir, would have been on west23rd street, right here?

A. Yes, I think so, right.

Q. And finally, tower two, 1001 state street?

A. Yes (TT day 3 p.25-26).

Raymond Mcdonald then testified to the phone locations at the

time of the murder, and he testified as follows:

Q.(Bruce Sandmeyer) Then sir, if we go to the call at 2:35a.m., now, that initiates at tower-- tower 1551 which is tower two, sector three?
A. Yes, that's correct.
Q. And sector three would be?
A. It would be the westside.
Q. So it would be tower two and the call would have come in this arc, 120 degrees on the west side of that tower at 2:35 a.m., correct, sir?
A. That's where the signal would have come on the tower, yes.
Q. And then, sir, the call would have ended at tower three, which is 1552, sector three, which would be the north side, I believe, sir?
A. Sector three, the westside.
Q. Westside. So it would be over here. So that call began west of tower two and ended west of tower three, correct, sir?
A. Yes
Q. So the call was made somewhere west of that tower?
A. Well, that--
Q. It was picked up west?
A. The signal was picked up.
Q. The signal was picked up west of the tower?
A. Yes.
Q. Okay. It was not picked up east of the tower, according to sector?
A. Correct.
Q. And then it ended west of tower three, correct sir?
A. Right.
Q. So we know that the signal was picked up on the westside of the tower?
A. Correct.
Q. All right, sir, get my exercise doing the steps here. next sir, we have call 2:43. That also is -- that call begins at tower one, correct, sir, 1601?
A. Yes.
Q. What is sector two, sir?
A. That is the southern area.

Although the commonwealth's expert testified to where the towers were located, he never covered the time it will take to get from the tower to the crime scene.

Defense's expert likewise failed to cover the time evidence. During direct examination from defense, Louis Cinquanto testified as follows:

" So I went through and measured the distance as the crow flies between the incident and cell tower one, and we have .84 miles. For sector two we have 1.56 miles, and for sector three we have 2.75 miles." (TT day 3 p. 84).

Neither expert testified as to how long it would have taken Appellant to get from where the towers showed he was to the crime scene. Instead of having someone time how long it would have taken to get from A to B, counsel's experts covered the distance as if some one was in a plane.

~~As a consequence of defense counsel failing to investigate the phone records and showing it would have been impossible to get~~

As a consequence of trial counsel failing to investigate the phone evidence and failing to show how it would be impossible for Appellant to get to the crime scene from where he was in that short time gap, The commonwealth was able to argue to the jury that it was possible for Appellant to get to the crime scene. In closing arguments the district attorney stated the following:

"Let's jump ahead a little bit. WE know at approximately 2:35 a.m. we are again targeted here. Approximately 2:35a.m. this phone is picking up here. So 1:47, 1:50, 2:35. So we know, again, that Mr. Diaz's phone is back here. Not disputed. And we know that between 1:35 when this phone call starts to 2:43, or a little before, Mr. Diaz is here. That phone is picking up that tower and then it starts to go back this way, and that's when it picks up the overlapping towers.

So we know for sure, without a doubt, undisputed, because you heard the defense's ownexpert tell us, this phone was used here, at 1:47 and 1:50, and here at 2:35. we know that by 2:47 Mr. Diaz -- or Mr. Rieger was shot and police were dispatched. So we have this, this cell tower two, this puts him at the Bearded Lady tower at that time".

"So what do we have in here? Well, we have a murder. And let's back up. Let's start with Mr. Bolorin, the end of Mr. Bolorin's story. Mr. Bolorin says, I came out, I called the police. So you have him back in the house, coming back out. So we have-- we have a murder occuring somewhere before there, but we know there's time in between the call". (TT Day 3 p.140)

The Magistrate ruled the evidence of how long it would have taken to get to the crime scene was already presented at trial. That is not true. If the time evidence would ~~of~~ have been presented, the district attorney would have never been able to argue that the phone evidence fits the timeline.

The Court of Appeals and the Magistrate failed to assess this evidence with the totality of evidence in this case. For example, with all of the lies Martin told, See argument (5), the discrepancies between Martin and Bolorin as to the clothing Appellant was wearing that night, Appellant's alibi that testified at the evidentiary hearing, the new evidence of the agreement between the commonwealth and Martin.

EVIDENCE is something that tends to prove or disprove the existence of an alleged fact. Appellant believes that the evidence of how long it would take to get to the crime scene is distinct from just showing where the towers are located. Particularly, since it is close enough where one would have to calculate it for thereselves in order to be sure how long it would take to get from point A to point B. It's not sixty miles where the jury can make the inference that it would be impossible to have committed the crime.

Appellant believes that the Court of Appeals finding that the

evidence was not knew is debatable if not wrong. Exhibit six, a copy of google maps, illustrates the impossibility of Appellant being the one who committed the crime. The commonwealth indicated the crime happened between 2:36 a.m. and 2:43 a.m..

Javon Martin, testified he saw Rieger punch Appellant (see exhibit 2), Appellant got back up, left, and came back 4-5 minutes later and shot the victim. (see TT Day 2 p. 87).

The new evidnce shows what Martin was saying can't be true. And the prosecutor's argument that the phone records match the witnesses statements can't be true, and in fact, contradict the witnesses.

Jomo Mcadory testimony was shaky. He refused to go on video. Mcadory had an open case at the time he made a statement and that charge was nolle prosqued one week later. He would not speak to the detectives until he talked to the arresting officer in his case and his public defender. (see exhibits 8 and 9). His testimony was shaky being that he says he was standing right out fron where the victim supposedly got shot at, but he says he did not see the shooting. Under questioning from the commonwealth he testified as follows:

Q.(connelly) where were you when you heard the shot?
A.(mcadory) standing in front of the door.
Q. of the Bearded Lady?
A. yes.
Q. inside or outside?
A. Outside.
Q. How many people are outside?
A. About 60--50.
Q. Did you see who fired the shot?
A. No
Q. Who-- once the shot was fired, what is the next thing you see?
A. After the shot was fired, everybody started running and I seen Hercules-- he like-- after the shot went off, everybody started running and I see him turn the corner and fall.(TT d.3 P. 40). He got to be lying. see exhibit 10. If he was out front, he would have saw the shooting if it happened out front. If not, how do he see the victim turn the corner and fall? First, he can't see around the corner. Second, he would have seen the shooter. Third, he say he did not make a statement to the police because he went to the hospital (TT Day 3 p 44), but the police said they went to the hospital and asked the family if they know anything, and they said no. (TT day 2 p. 171).

Jomo, never came forth initially, only after consulting with his lawyer in his open case. He couldn't testify about how many shot because he did not have that information.

Jamie Bolorin was the third witness who testified. He is the so called unbias witness. He picked Appellant out of a photo-line up they say. However there are flaws to his story. He says he see Marzell Stovall strike Appellant with a crow bar; however, he was mistaken. Appellant believes he was coached for multiple reasons;

One, He called the police at 2:47 a.m.. Initially the commonwealth had the incident time at 2:45a.m., however once the phone

records are examined, Bolorin somehow switch his testimony. See exhibit 11, Bolorin says he was on his porch when the shooting happened.But under direct examination, when the commonwealth was attempting to make the evidence fit the timeline, Bolorin switched his testimony and testified that he was in the house when the shooting occured. (TT Day 2 p.118). Second,the detective say Bolorin did the photo line up on the day of the interview,(TT Day 2 P. 173) (exhibit 12). Third, Bolorin says, after the shot he saw the victim come around the corner and roll on a car, get hit by a car . [redacted] that's not true because the blood trail do not match that. See exhibit 13. Also Casey Bishop is the one who got hit by that car. See exhibit 14). Also, the pathologist testified the victim would not have been on his feet for no more than 10-15 seconds.(See TT DAy 2 P.155).

The commonwealth failed to subpoena the real witnesses. Every witness that was interviewed the night of the crime was kept away from the trial because they all said they never saw Appellant there. Bolorin never saw Martin and vice versa. How does Martin never see the incident Bolorin describes. Martin said Appellant was wearing a blue polo, and Bolorin said Appellant was wearing a white muscle shirt.

Viewed in this context, Appellant believes no reasonable juror would have found Appellant guilty beyond a reasonable doubt with the new evidence. The Court of Appeals order must be vacated. Appellant should atleast be granted an evidentiary hearing.

Appellant believes for the same reasons why he believes the case should be remanded, that Pcra and trial counsel was ineffective and a new trial shall be ordered.

Did the Court of Appeals err when it found Appellant's Brady claim procedurally defaulted or meritless? (see appendix A).When the District Court accorded deference to the state courts.

This claim is timely, and was fully exhausted.(see appendix A) P.19)

A petitioner asserting that the commonwealth violated Brady v. Maryland,373 U.S. 83, 83 S.Ct. 1194 (1963), must demonstrate three elements: (1), the evidence at issue must be favorable to the accused, either because it is exculpatory,or because it is impeaching; (2), that the evidence was supressed; (3), that the petitioner was prejudiced. See Banks v. Dretke, 540 U.S. 668,691, (2004). A petitioner shows prejudice by demonstrating that the undisclosed evidence is material. Favorable evidence is material and constitutional error results from its suppression if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. Kyles v. Whitley, 514 U.S. 419,433,(1995).

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudi-

cated on the merits in State court proceedings unless the adjudication of the claim- (1) 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) 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. Wiggins v. Smith, 539 U.S. 510,520, (2003). In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correction by clear and convincing evidence. 28 U.S.C. §2254 (e)(1).

At trial the commonwealth denied they had any(d)eals with their witness. After, Appellant received information that the commonwealth's denial was categorically false.

At trial, the commonwealth solicited the following testimony from Javon Martin:

Q.(attorney connely) and at some point you actually meet me at the police station that evening correct?
A.(Javon Martin) yeah, after everything;after i made my statement.
Q. After you've given your statement?
A. Yeah.
Q. And do I make you any promises about what i can do to help you out?
A. no.
Q. After that, you go back into court dor your revocation?
A. Yes.
Q. alright. And i asked the judge to let you out of jail right?
A. Yes.
Q. Did you know I was going to do that?
A. No

(TT Day 2 p. 71). In closing argument the commonwealth made it known to the jury there was no deal:

And what does he do? He gives a video taped statement to the police saying this is what happened, this is what I saw. And you know what, because he did that, I did go to the court. He didn't know i was going to. I showed up at his probation hearing and I said, let him out, he's doing the right thing, let him out. He didn't know I was going to do that. Hdidn't know how long he was sitting there. He didn't even know I was coming to his hearing. And we let him out.(TT Day 3 p.132).

After trial Appellant obtained a copy of Martin revocation hearing where that same prosecutor told the judge,I told him that I would come to bat for him in court here today. I guess I would be taking a risk here going to bat for Mr. Martin,but I would ask that he be paroled for the remaining ten months of his sentence, that he continue to work, and that he be made to continue his cooperation with the commonwealth as part of his probationary sentence. See exhibit 15.

Appellant argued to the Magistrate that the state Court should not be entitled to deference as a result of the Court clearly erroneous factual determinations and for adding a requirement to Brady. The Magistrate found since Appellant pointed out an error by the trialCourt , Appellant was mistaken in his argument. The Magistrate found: "The Superior Court noted three important facts in support of its conclusion. First, the court observed that prior to trial, the prosecutor 'fully disclosed her promise to help Martin at his revocation hearing.' Id. Second, the state Court noted that Martin's deal with the prosecution was divulged to the jury. Id. And third, the Superior Court pointed to the fact that the prosecutor did not promise Martin any assistance until after Martin made his statement to the police identifying Diaz as the shooter.".

In arguing that the State Court's factual determination was unreasonable, Diaz points to the decisions of the PCRA Court. His argument is misplaced because it seeks relief based on an error purportedly made by the Erie County Court of Common Pleas.

Appellant believes the Court erred because if the Superior Court adopted the PCRA Court opinion, and Appellant, pro se, argued that the reasoning was flawed, the Magistrate should not have reviewed the Brady claim with deference. Regardless if Appellant misstated the Courts, the Courts' factual determinations was clearly erroneous and was not entitled to deference. The Superior Court order that the commonwealth fully disclosed her promise to help Martin at his revocation hearing, and that Martin's deal with the prosecution was disclosed to the jury, was not only wrong but clearly rebutted by exhibit 15.

When the Court denied Diaz claim and found the claim is denied because Martin was not offered anything until after he made his statement, have the effect of attaching a new rule.

The Superior Court and PCRA Court failed to consider this evidence with the evidence presented at trial. The fact that Martin was the only witness to say he saw the shooting; this Brady violation should result in a new trial.

Appellant believes he met the requisite for C.O.A. and now for Certiorari. The commonwealth not only lied about their deal with Martin , but it was a condition of Martin's probation to testify on Appellant. That question was never answered. Certiorari should be granted because the courts answered the question of when did the defense knew Martin received help.(superior court order p. 17).

(3).Did the Court of Appeals err when it found Appellant"s ineffective assistance of counsel claim in regards to trial counsel failing to object to the commonwealth missrepresenting the phone evidence meritless and not debatable?

This claim was brought pursuant to the mandates of AEDPA 28 U.S.C. §2254.

Under Strickland v. Washington,466U.S. 668(1984), there is a two-pronge inquiry(1) must show trial counsel's performance was deficient; and (2) that the deficient performance prejudiced the defandant.

In closing arguments the commonwealth told the jury that the phone Appellant had shows he was on the eastside of Erie PA. In closing the commonwealth said:

"so we back up to here. Here, ironically enough, is goung to put us between that 2:35 and 2:43 number before Diaz starts coming back this way. So we know that around the time the shot was fired, he's there. His phone is there. His,,phone is picking up that tower. See Magistrate's order P.22-23.

The above statement was false The phone experts placed Appellant on the westside of Erie, Pa. The commonwealth's expert testified to the following:

Q. Then sir if we go to the call at 2:35 a.m. now that initiate at tower--1551 which is tower two, sector three?

A. Yes. That's correct.

Q. And sector three would be?

A. The westside. (TT Day 3 p. 30-31-32).

The Magistrate order that he believes the above was not an inaccurate reflection of the record is clearly erroneous. So the commonwealth gets to frame Appellant on record and the Courts just minimize it. This is clearly debatable. Appellant was prejudiced .

(4).Was PCRA counsel ineffective for not developing claim three and developing the claim that trial counsel was ineffective for not objecting to the commonwealth misrepresenting and putting on false evidence in closing arguments?

At trial, cell-phone experts testified that all calls made from Appellant's phone shows Appellant made the calls from the westside of Erie Pa. Eventhough the crime happened on the east-side of Erie, Pa, the commonwealth argued to the jury that both experts Placed the calls Appellant made on the eastside in the area of the crime. Appellant argued this claim in his initial PCRA however, due to ineffective PCRA counsel the claim was not developed.

PCRA counsel was admonished in multiple cases for not developing claims or certifying the records. See commonwealth v. Williamson, 222A.3d 795,No. 116WDA2019,No. 118 WDA 2019. "Appellant's argument on the issue fails to include citations to legal authority and record citation". In commonwealth v. Shields, 224 A.3d 773, No. 143 Wda 2019. William Hathaway failed to file a notice of Appeal, then, filed a defective brief. In commonwealth v Burrell, 242 A.3d 444, No. 423 WDA 2020,(2020), William Hathaway does it again.

Due to Pennsylvania Appointing counsel that does not even follow the court rules, Appellant was prohibited from developing this claim.

Appellant brought this claim up ground 8 in his memorandum p. 30, but no courts responded.

The misrepresenting of the phone records started in opening arguments. The commonwealth says Appellant tried to smash his phone then she says:

"That's important for two reasons. That's going to be important because it puts him in the area of the location of the shooting as our witnesses say, but its also important because Mr. Diaz then says to the police I wasn't even on the eastside of town that night. I was on the westside of town, I never went on the eastside of town. They said well where were you that night. I have an alibi. And he sits there for 20 minutes you'll hear-- you'll see, can't say where he was all he can tell the police is I wasn't on the eastside of town, despite the fact that the phone that's in his posession is pinging for lack of a better word, to the towers where the homicide occured at the times at 2, at 4:40 a.m., around the same time it occured. (TT Day 2 P.26)

Again, the commonwealth continued to misrepresent the phone evidence to make it appear as the phone locations support the commonwealth's theory of events:

"So we know somewhere around 1:47 and 1:50 that white cell-phone thatMr. Diaz has was here (pointing to the crime scene) here at the tower that connects to the Bearded Lady, the tower closest to the Bearded Lady. We know he was in this location. Not disputed by their expert, our guy told you, no dispute about that." (TT Day 3 P.137-138)

In closing arguments she continued:

" Let's jump ahead a little bit we know at approximately 2:35 we are again targeted here. Approximately 2:35a.m. this phone is picking up here. So 1:47, 1:50, 2:35. So we know again not disputed and we know that between 1:35[sic] when this phone call starts to 2:43 or a little before, Mr. Diaz is here. That phone is picking up that tower and then it starts to go back this way and that's when it picks up the overlapping tower.

So we know for sure, without a doubt undisputed, because you heard the defense's own exper„tell us, this phone was used here, at 1:47, and at 1:50 and 2:35.(TT Day 3 P. 138-139).

Everything the prosecutor said is a bold face lie. The expert never said Appellant's phone was on the eastside. In fact, both expert's placed Appellant's phone on the westside at all times.

At trial, the commonwealth's expert testified every call was signaled west except one call at 1:47 a.m. and that call still wasn't east. Raymond Mcdonald (phone expert) testified during cross examination [redacted] by Bruce Sandmeyer(defense's counsel) to the following:

Q. I'll come up here and refer to the map that you've been using. All right. Sir , tower one here-- just to make it very simple,tower one you have as an address, it would have been of 1431 west 12th street?

A. I believe so, Yes.

Q. And then tower three, sir, would have been on west23rd street, right here?
A. Yes, I think so, right.
Q. And finally, tower two, 1001 state street?
A. yes.
(TT Day 3 P.25-26) See exhibit for relation to the crime scene. Exhibit 15. Then Mr. Mcdonald testified as to what tower the phone was hitting at the time of the murder:

Q.(Bruce Sandmeyer) Then sir, if we go to the call at 2:35a.m. now, that initiates at tower-- tower 1551 which is tower two, sector three?
A. Yes. That's correct.
Q. And sector three would be?
A. It would be the west side.
Q. So it would be tower two and the call would have come in this arc, 120 degrees on the west side of that tower at 2:35 a.m. correct, sir?
A. That's where the signal would have come on the tower, yes.
Q. And then, sir, the call would have ended at tower three, which is 1552,sector three, which would be the north side, I believe sir?
A. Sector three, the westside.
Then a little later he says:
Q. All right sir, get my exercise doing the steps here. Next sir, we have call 2:43. That also is-- that call begins at tower one, correct, sir, 1601?
A. Yes.
Q. What is sector two, sir?
A. That is the southern area.

The commonwealth testified that Appellant's phone was west of tower two(see exhibit 16) The phone signaled west of tower two at 2:35 a.m., the crime is east of tower two. It takes five minutes in a car to get from tower two to the crime scene. But Appellant's phone hit west of tower two and ended west of tower three 36 seconds later at 2:36. Then at 2:43 the phone hit south of tower one . So for the commonwealth to say the experts said my phone was hitting at the crime scene and the phone records match the witnesses testimony is false. Especially when Javon Martin said Appellant got into a fight with the witness and came back 4-5 minutes later then shot the victim. The phone records contradict that theory. For trial counsel to sit there and let the commonwealth lie is ineffective counsel and a failure to advocate for his client. The performance was deficient and Appellant was denied his alibi(phone records), therefore causing prejudice.

Appellant requests a new trial or atleast a remand to the District Court to fully develop this claim.

(5).Was PCRA counsel ineffective for not arguing trial counsel was ineffective for not impeaching Javon Martin with lies and inconsistencies. Was the District Court in error when it rule that Appellant brought this claim to the state court but failed to appeal it to the Superior Court. If not,,was PCRA counsel error cause for the procedural default?

The District Court ruled that appellant raised this claim to the Pcra court but failed to appeal it to the Superior Court therefore, the waiver was attributed to Appellant. (See Magistrate order p. 16-17, Appendix B). The Magistrate relies on Appellant's pro se PCRA petition where he argued, "failing to impeach key witness with multiple lies he told". See Magistrate's order p.14.

But that claim is completely different at that time Appellant was talkin about Jamie Bolorin and assumed Martin was a chief witness. If the court finds Appellant previously argued this claim, Appellant now argues that the waiver is attributed to PCRA counsel.

See Appendix C, 1925(a) opinion p. 7. The PCRA court found all claims except(1) the Brady claim,(2) the alibi claim, and (3) the cell phone evidence waived for failure to raise them at the evidentiary hearing. Then on page 18 of the Pcra Court 1925 (a), the court found all but the three claims waived for being undeveloped.See appendix c.

In Pennsylvania, an appellate court cannot reverse a trial court judgment on a basis that was not properly raised and preserved by the parties. Steiner v. Markel, 600 Pa. 515, 968 A.2d 1253, 1256)Pa. 2009).

This Court announced in Martinez V. Ryan, 132S.Ct. 1309, 1311,182 L.Ed.2d 272 (2012), that an unexhausted claim that was procedurally defaulted can be excused if Appellant show (1) the procedural default was caused by either the lack of counsel or ineffective counselon post conviction review; (2) that this lack of effectiveness was in the first collateral proceeding when the claim could of been heard; and that the claim is substantial, Id. at 14.

In Strickland v. Washington the Supreme Court established a two part test to evaluate ineffective assistance of counsel claims. First, that counsel was deficient. Second, that you was prejudiced by counsel's actions or lack of actions.

Trial counsel failed to impeach Javon Martin with lies and inconsistencies he told between the preliminary hearing and the

trial. At the preliminary hearing Martin testified that his baby-mother was working at the club on the night of the shooting and that after the shooting she came outside, but at trial he said that she never came out. At the preliminary hearing Martin testified as follows:

Q. Okay. Now. What about the people you were with on the porch sir, what did they do after the shots were fired?
A. took off.
Q. But you didn't take off sir?
A. No, my babymom was inside.
Q. Okay, did she come out of the club sir?
A. Yeah, after they--after everybody was coming outside she came out. (preliminary hearing transcripts p. 39).

At trial Martin said she never came out:

Q. What did you do when you see that occur?
A. I called--texted my baby momma, told her to come out.
Q. You told her to what?
A. to either come out or leave.
Q. Did she?
A. No she had to stay with her sister and work.(TT Day2p.64)

At trial, Martin said he left the scene prior to the police arrival because he had a warrant, but at the preliminary hearing he said stovall was out there when the ambulance arrived. and the victim was talking until the ambulance came. That is inconsistent with Martin saying he left before the police arrived because the ambulance arrived after the police arrived(see exhibit 5, and TT Day 2 P. 44)(the patrolman testified we were securing the scene until the medical professionals arrived.). If Martin left before the police arrived he can not know what happened when the ambulance arrived. At the prelim under questioning Martin testified as follows:

QC Alright, what about Mr. Stovall did he go over and help Mr, Reiger?

A. He was out there when the ambulance came out,(prelim p.38-39).

A little later when talking about the victim Martin said:

Q. Okay. When he(victim) fell down were you able to what were you able to observe about him at that point?

A. He was talking to I don't know who, who exactly was right there, but he was,like verbal, till the ambulance came, came there. (preliminary hearing transcripts p. 18).

But at trial Martin said he left before the police arrived because he knew the cops:

Q. Okay and you were-- sowhy did you leave the scene?
A. Cause I-- I know some cops that work third shift and they know me.

Martin, then said, after the victim punched Appellant, Appellant

left and came back when Appellant came back a little bit was said then Appellant shot the victim. However, a little later Martin said when Appellant came back nothing was said:

Q. Then what did you see happen next? Where was Herc when they left and walked toward Reed Street?
A. He was on the corner by the stop sign.
Q. Still outside the Bearded Lady?
A. Yeah.
Q. Okay what happens next?
A. When they came back it was about-- a little bit, a little bit was said, then he pulled out the pistol.
Q. Who pulled out the pistol?
A. Dominic.
Q. All right, and what did he do?
A. He shot him.]

On page 33 when asked Martin said nothing was said:

Q. All right. Did you hear anything verbal that passed between the two, sir?
A. No.

The next lie was probably the most important. Initially Martin said he was on a porch when the shooting happened,then, he switched and said he was on the street. Appellant considers this to be of significant import since you can't even see the front of the building from the porch. See exhibits 17,18. Under cross examination from defense counsel Martin testified as follows:

Q. Okay, when you saw this occur, how far apart were Mr. Diaz and Mr. Reiger? Again sir I'd say we're about seven feet away?
A. A little further back.
Q. A little further back?
A. Yeah
Q. Would it be--
A. About right there.
Q. Would you agree, sir, that maybe I'm stabding about 10,11,12 feet from you?
A. Yeah, somewhere in that.
Q. All right. Did you hear anything verbal that passed between the two?
A. No
Q. And you were as you said, sitting on the front porch?
A. I was yeah.
Q. Okay. Now, you're on the front porch. Were you sitting down, standing up sir?
A. Standing up. (preliminary hearing transcripts P.33-34)

At trial Martin says he was in the street:

Q. And after the altercation is done and they walk away, you

head back towards the porch?
A. yeah.
Q. And what draws your attention back to that location then?
A. Then when they started walking-- when they came, came back towards the Bearded Lady.
Q. Did you ever make it all the way back over to the porch?
A. No. I made it to-- before the porch right there is like a little-- a little like a step. Well, not step, the ground rises up some. I made it to there, and then they came back and they started walking toward the Bearded Lady. (TT Day2 p.62-63).

Martin then told conflicting stories about if people was on the porch with him when the shooting started. He also testified he was on the porch with friends and later said he did not know them. At the prelim Martin testified as follows:

Q.(Bruce Sandmeyer) Now, you sit down for a while, sir. Now you're outside, you're on the porch of chelsey's house. are you moving around or are you just sitting down there just by yourself?
A. No; it was me and a couple other people.
Q. There were a couple people there?
A. yeah.
Q. And who were those people, sir?
A. What?
Q. Who were those people, sir?
A. People I know from the street.
Q. Do you know there names, sir?
A. No, I dont know there names.
Q. Do you know there street names, sir?
A. (No response.).
The Court: You've got to respond.
The witness: Yeah.
By Mr. Sandmeyer:
Q. What are their street nicknames, sir?
A. Uhh--.
Q. There must be a way that you communicate with them in a verbal sense, sir. What are their street names?
A. Nagle.
Q. What, sir?
A. Nagle.
Q. Nagle?
A. Yeah.
Q. You just knew Nagle?
A. Yeah.
Q. Okay. And did you tell the police about these individuals?
A. I was never asked about them.
Q. All right. Going to just jump ahead, sir. Were these people present when the shooting took place involving Mr. Reiger?
A. I have no idea. I wasn't -- I went into the street when the altercation started to make sure my baby mom was still at the club?

Martin testified that he did not know if the people he was with on the porch was present when the shooting occured. later on in the questioning he testified that they ran when the shooting occured. See the following excerpt.

Q. All right. Now, when the gunshots that you allege were fired, what did the rest of the crowd do at that point when the shots were fired, sir?

A. Took off. He had a gun.

Q. All right. Did anybody remain to help Mr. Reiger at that point in time?

A. There was couple people who came out from inside.

Q. All right, what about Mr. Stovall, did he go over and help out Mr. Reiger?

A. He was out there when the ambulance came out.

Q. Okay. Now, what about the people you were with on the porch? sir, what did they do after the shots were fired?

A. Took off. (prelim. P. 38-39).

~~Martin continued to contradict his own testimony, at the preliminary hearing, Martin contradicted himself about who he was on the porch with.~~

~~Q. Now, you sit down for a while~~

At the preliminary, Martin alleged a story that contradicted the undisputed fact that the police officers arrived before the ambulance. Or excuse me, Martin told a story that is contradicted by the facts. Martin mentioned The victim was verbal until the ambulance arrived, but we know Martin said he left before the police arrived. So, he wouldn't even know what was happening. The victim was shot in the heart and could not communicate. The first responding officers testified the victim was unresponsive when he arrived. Testimony from the prelim went as follows:

Q. Okay. And when he fell down were you able-- what were you able to observe about him at that point?

A. He was talking to I don't know who, who exactly was right there, but he was, like, verbal till the ambulance come, came there.)preliminary transcripts p. 18).

Counsel failure to impeach Martin denied Appellant the right to A fair trial. Martin was the only witness to say he saw Appellant shoot the victim. The only avenue at trial was to try to show that Martin was lying. The case was about credibility. Counsel had an ammo to shoot down Martin credibility, and he chose not to. Appellant was on trial, for counsel to miss something of this magnitude on a first degree murder case, was a lack of advocacy. Impeachment evidence is enough to argue a successful Brady claim and should be here.

Appellant demonstrated the previous courts erred in concluding that this claim was waived because of Appellant. Appellant believes he demonstrated prejudice under Martinez and Strickland.This case

should be remanded for an evidentiary hearing so counsel can answer why he failed to impeach Martin.

REASONS FOR GRANTING THE PETITION

Appellant believes he presented a valid claim of innoncence where the court will have a chance to expound on what is considered new evidence.

In regards to the brady claim, the Courts failed to answer the question that was presented. Appellant argued the commonwealth violated Brady by hiding and denying the fact that they had a quid pro quo. The superior Court adopted the trial court order where the question the trial court answered was whether Martin had fore-knowledge of that assistance. (Appendix C p. 10). An important question arises in this claim. The Courts denied the Brady claim and pointed to the fact that Martin did not receive any help until after he made his statement.(Appendix B P.21).

CONCLUSION

Appellant ask this Court to grant this petition and remand this case back to the District Court for an evidentiary Hearing so trial counsel can answer why he failed to impeach Martin with the lies and inconsistencies he told. Appellant also ask that Appellant's conviction be vacated as Appellant presented a claim of innocence that is so strong, it would be a miscarriage of justice otherwise.

Respectfully submitted,

Dominic Dean