

No. 23-6788

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

TERRANCE FOWLER-PETITIONER

vs.

COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA  
ATTORNEY GENERAL; ERIE COUNTY DISTRICT ATTORNEY'S  
OFFICE-RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Mr. Terrance Fowler, #KF-4317  
SCI-Albion  
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Albion, PA 16475-0001

**QUESTION PRESENTED**

Can a State deny a defendant due process of law by convicting and sentencing him to the maximum penalty for a crime that he was not charged with, nor was the jury instructed on the elements of the crime for which he was convicted and sentenced?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE  
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the Pennsylvania Superior Court appears at Appendix "A" to the petition and is unpublished.

The Opinion of the Pennsylvania Supreme Court the highest state court to which an appeal was taken appears at Appendix "B" to the petition and is unpublished.

**JURISDICTION**

The date on which the highest state court decided my case was December 13, 2023. A copy of that decision appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a); 28 U.S.C. §1251.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

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

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. XIV amendment

## STATEMENT OF THE CASE

Appellant was charged and convicted of Attempted Murder, Aggravated Assault, Conspiracy to Commit Robbery and Possessing Instrument of Crime. He was sentenced to an aggregate term of 27 ½ to 55 years imprisonment.

Appellant exhausted state court remedies without success. See Commonwealth v. Fowler, 53 A.3d 923 (Pa.Super.2012)(unpublished memorandum)(direct appeal); Commonwealth v. Fowler, 100 A.3d 294 (Pa.Super.2014)(unpublished memorandum)(denial of PCRA).

Appellant sought relief in the United States District Court for the Western District of Pennsylvania without success. He was granted a Certificate of Appealability in the Third Circuit Court of Appeals that was denied. See Fowler v. Superintendent Smithfield SCI, et al., 702 Fed. Appx. 44 (3<sup>rd</sup> Cir.2017). Petition for Certiorari was denied by the United States Supreme Court.

On July 5, 2022, Appellant initiated the instant post-conviction relief act (PCRA) petition which is the focus of the instant appeal. The Commonwealth responded and the court issued a Notice of Intent to Dismiss on August 4, 2022. The court dismissed the petition on August 31, 2022.

The Pennsylvania Superior Court affirmed the Lower Court decision on May 18, 2023. Commonwealth v. Fowler, No. 1155 WDA 2022 (unpublished).

The Pennsylvania Supreme Court denied petition for allowance of appeal to review the claim on December 13, 2023. Commonwealth v. Fowler, No. 144 WAL 2023.

## STATEMENT OF THE FACTS

The Primary evidence implicating Appellant to the instant crime was provided by Commonwealth witness Bruce Wagner, who lived around the corner from the jewelry store. Wagner testified that he saw two African American men park a small green car outside his house on the morning of July 7, 2010. He observed the men walk away from the car, one wearing a black T-shirt and the other wearing a white T-shirt.

After about ten minutes, the men returned to the car and drove away and about five minutes later, they returned to the same spot outside Wagner's house, parked and walked away again. Becoming suspicious, Wagner wrote down the car's license plate number. The men returned to the car and drove off. About ten minutes later, Wagner turned on his police scanner, heard about the nearby jewelry store robbery, and went outside to flag down passing police officer. The officer, Officer Velez, inspected the area where the Green car had been parked and allegedly found a silver certificate.

In the course of the robbery, the perpetrators shot jewelry store owner, Aleksandr Cheremnykh, in the chest. Notably, Mr. Wagner never witnessed the men enter or exit the Jewelry store, he lived a distance away.

When instructing the jury with final instructions, the trial court instructed the jury as follows in regards to criminal attempt at murder and aggravated assault:

*Now, the defendant is charged with a number of crimes which I will define for you now. The first is criminal attempt at murder. In order to find the defendant guilty of this offense, you must be satisfied that the following elements have been proven beyond a reasonable doubt:*

*First, that the defendant did a certain act, in this case, shot Alex Cher in the chest. Second, that the defendant did the act with the intent to*

*commit the crime murder. And third, that the act constituted a substantial step toward the commission of the crime.*

*Now, for purposes of this charge, the definition of murder, that is the crime that the Commonwealth alleges the defendant attempted, for a murder, the victim must have been killed and the defendant must have done so with the specific intent to kill him. Now here, obviously, it's an attempt. So, the defendant, in attempting to kill the victim, Mr. Cher, must have had the specific intent to do that. In other words, that at the time he shot him, it was his conscious object or purpose specifically to kill Mr. Cher. If you find that the Commonwealth has proven those elements beyond a reasonable doubt, you should find the defendant guilty of criminal intent at murder. Otherwise you must find him not guilty.*

*Relative thereto, the defendant is also charged with the crime of aggravated assault, and again, this is for shooting Mr. Cher. In order to find the defendant guilty of this offense, you must be satisfied that the Commonwealth has proven the following beyond a reasonable doubt. First, that the defendant caused serious bodily injury to Alerks Cher. And second, that the defendant acted intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.*

N.T. Jury Trial Day 2- 7/15/11, at 97-98.

On July 20, 2011, the Appellant appeared before the Honorable Shad Connnelly for sentencing, and the following exchange took place:

*The Court under all of these circumstances will order the following sentences, which will be from the standard range of the Pennsylvania sentencing guidelines. The defendant on the charge of attempted murder will be ordered to pay the costs of prosecution. The defendant will be ordered to make restitution.....And the defendant will be ordered incarcerated a minimum period of which shall be 240 months. A maximum, which shall be 480 months.*

N.T. Sentencing, 9/20/11, at 20-21

## REASONS FOR GRANTING THE PETITION

The Pennsylvania Constitution states in relevant part the following: Article I, §11.

*Courts to be open;* suits against the Commonwealth: All courts shall be open; and every man for injury done him his lands, goods, person or reputation shall have remedy by due course of law, and right and just administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the legislature may by law direct.

In the matter sub judice, Appellant's sentence was enhanced based upon elements of a crime that he was neither charged with, or that the jury was instructed for.

The State was well aware that the complaint/information did not contain Attempted Murder as it relates to *serious bodily injury*, an element that allows the Commonwealth to seek the maximum, and for the trial court to impose the maximum.

A case that is illustrative on this point is Commonwealth v. Barnes, 167 A.3d 110, 117 (Pa.Super. 2017), where the Pennsylvania Superior Court held that the Commonwealth must give defendant notice that it seeks to prove *serious bodily injury* in order for the 40-year maximum sentence for attempted murder to apply. 18 Pa.C.S. § 2301.

Instantly, this was not done. Appellant was not put on notice that the Commonwealth intended to seek a maximum sentence as he was not charged with attempted murder as it relates to serious bodily injury. The Commonwealth very well knew this, but yet and still, remained mute as the trial court imposed an illegal sentence.

In conjunction with the aforementioned infractions by the Commonwealth and trial court,

the jury has the sole responsibility to find beyond a reasonable doubt whether serious bodily injury resulted from attempted murder. See Commonwealth v. Johnson, 910 A.2d 60 (Pa.Super.2006), appeal denied, 923 A.2d 1173 (2007)(stating the jury has sole responsibility to find beyond reasonable doubt whether serious bodily injury resulted from attempted murder offense).

The due process clause of the Federal Constitution's Fourteenth Amendment requires that any fact that increases the penalty for a state crime beyond the prescribed statutory maximum-other than the fact of a prior conviction-must be submitted to a jury and proven beyond a reasonable doubt; this rule insures that a state is obliged to make its choices concerning the substantive content of the state's criminal laws with full awareness of the consequence, unable to mask substantive policy choices of exposing all who are convicted to the maximum sentence it provides. Apprendi v. New Jersey, 530 US 466 (2000).

As it stands currently, unless this Court graciously intervenes, Petitioner's conviction and sentence will remain in direct contravention of the United States Constitution, and this Court will be sanctioning the States knowing disregard for the United States Constitution and the Framer's intent.

Notably, the Pennsylvania State Court Post-Conviction procedures sanctions the incarceration of innocent citizens. For example, no matter how compelling a defendant's assertion of innocence may be, if s/he does not meet the State procedural rules then the State will not consider the claim.

Simply put, if years go by and evidence surfaces that the defendant is actually

innocent of the crime, but the evidence that he presents that demonstrates unequivocally that he is innocent of the crime, could have been discovered earlier through due diligence and somehow presented at trial, the Pennsylvania State Courts will not entertain the claim because under the present construction of the statutes for post-conviction relief this evidence could have been obtained earlier, and therefore, the claim cannot be entertained. 42 Pa.C.S.A. §9545(b)(1)(i)-(iii); Commonwealth v. Williams, 105 A.3d 1234, 1239 (Pa.2014)(petitioner's burden to plead and prove, that the information could not have been obtained earlier).

Under this theory, in essence, Pennsylvania sanctions that innocent citizens, no matter how compelling the evidence of innocence may be, can remain in jail if they don't follow state procedural rules even if the failure to comply is not their fault.

The federal constitution in relevant part states that even if a claim is procedurally default, a strong showing of actual innocence can overcome that barrier. See McQuiggin v. Perkins, 569 US 383 (2013); Schlup v. Delo, 513 US 298 (1995).

Petitioner is actually innocent of Attempted Murder as it relates to serious bodily injury, as he was not charged with that crime, nor was the jury instructed as to the elements of that crime for trial court to enhance his sentence and give him the maximum sentence.

Petitioner prays this Honorable High Court of the Land will remand this matter back to the State courts to correct this clear violation of his Sixth and Fourteenth Amendment rights under the United States Constitution.

## CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Terrance Fowler  
Terrance Fowler

Date: February 10, 2024