

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DWAYNE BROWN — PETITIONER
(Your Name)

vs.

JOSEPH CHESNEY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dwayne Brown
(Your Name)

301 Morea Road
(Address)

Frackville, PA 17932
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

It is not fairly debatable among jurists of reason, entitling Petitioner to a Certificate of Appealability under 28 U.S.C. § 2253(c), where he sought Rule 60 relief based on changes in the law regarding treatment of Brady claims rendered by the United States Court of Appeals for the Third Circuit, that was improperly dismissed on the basis of an Order dismissing an unrelated petition.

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:

Petitioner is Dwayne Brown a State Prisoner

Respondent Joseph Chesney is Superintendent with custody

Respondent District Attorney of Philadelphia County Prosecuted Petitioner.

Respondent Attorney General of Pennsylvania is additional

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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 11-16-17, Order of the United States Court of Appeals for the Third Circuit at No. 17-2153 denied Rehearing and appears at Appendix "A".

The October 12, 2017, Order of the United States Court of Appeals for the Third Circuit at No. 17-2153 denied Certificate of Appealability and appears at Appendix "B".

The April 26, 2017, Order of the United States District Court at No. 03-3821 dismissed Rule 60 motion and appears at Appendix "C".

The March 17, 2017, Order of the United States Court of Appeals for the Third Circuit at No. 17-1134 denied Application to file a Successive habeas petition and appears at Appendix "D".

JURISDICTION

Petitioner seeks review of the 11-16-17, Order of the United States Court of Appeals for the Third Circuit.

Jurisdiction of this Court to review the Judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall...deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

On September 12, 1997, following a trial before Common Pleas Judge Jane Cutler Greenspan and a jury, Petitioner, Bernard Bennett and Brian Young were convicted of first degree murder, conspiracy, attempted murder, and possession of an instrument of crime. On November 10, 1997, Petitioner was sentenced to life in prison.

On May 29, 1999, the Superior Court affirmed. *Commonwealth v. Brown*, 739 A.2d 582 (Pa. Super. 1999). On January 14, 2000, the Pennsylvania Supreme Court denied the Petitioner for Allowance of Appeal. *Commonwealth v. Brown*, 749 A.2d 465 (Pa. 2000). On June 12, 2000, the United States Supreme Court denied certiorari. *Brown v. Pennsylvania*, 530 U.S. 1234, 120 S.Ct. 2670 (2000).

On December 5, 2000, Petitioner filed a motion for post conviction collateral relief under the Pennsylvania Post Conviction Relief Act ("PCRA"). On November 30, 2001, the Common Pleas Court Judge denied the motion.

On November 26, 2002, the Superior Court affirmed. *Commonwealth v. Brown*, 816 A.2d 325 (Pa. Super. 2002). On June 3, 2003, the Pennsylvania Supreme Court denied the petition for Allowance of Appeal. *Commonwealth v. Brown*, 825 A.2d 1259 (Pa. 2003).

On June 26, 2003, Petitioner filed a pro se petition for writ of habeas corpus. On September 23, 2003, Petitioner through counsel, filed an amended petition alleging the following:

1. Denial of the right to effective assistance of trial

counsel on the following grounds: (a) failure to get the hard copy of computer records that would have conclusively demonstrated that the testimony of jailhouse informant, Jermaine Brute, was false; (b) failure to object to the prosecution's closing argument directed to the passions and prejudices of the jury; (c) failure to object to the admission of irrelevant evidence and other crimes evidence; (d) failure to object to the prosecution's comments directing the jury's attention to the fact that the Petitioner did not testify; (e) failure to impeach Jermaine Brute with prior inconsistent statements.

2. Constructive denial of the right to effective assistance of appellate counsel on the following grounds: (a) counsel was rendered ineffective by the lack of subpoena power.

3. Denial of due process in connection with the chance to prove that the testimony of Jermaine Brute was totally false, and the prosecution knew or had reason to know it was false.

On March 31, 2004, the district court denied the habeas corpus petition. The Third Circuit Court of Appeals denied an application for Certificate of Appealability on November 1, 2004, and the United States Supreme Court denied certiorari on April 25, 2005.

On April 19, 2006, the Honorable Jane Cutler Greenspan dismissed a pro se second and subsequent PCRA petition, "without prejudice to a properly and timely filed counseled after discovered evidence petition."

On June 13, 2007, Petitioner filed a counseled PCRA petition claiming that evidence newly ascertained taken in combination

with old evidence established that the conviction was obtained by the knowing use of perjured testimony and by the suppression of Brady material.

The newly ascertained evidence consisted of the letter from Richard T. Strohm and Associates to undersigned counsel dated August 14, 2007, described an interview with Rasheed Simpson at SCI Green on August 14, 2007, and an attached summary of the interview. The newly ascertained evidence, combined with the statement from Jermaine Brute, was the foundation for the PCRA petition which presented a Brady claim that was improvidently dismissed without a hearing. The denial of an evidentiary hearing was a denial of procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution.

The Superior Court held that the newly discovered evidence claim had been previously litigated and that Petitioner had failed to establish a Brady violation. *Commonwealth v. Brown*, 900 EDA 2008 (Pa. Super. 2009).

On November 17, 2009, Petitioner filed a Rule 60 motion which sought to bring attention to the Brady claims. The district court denied the motion as untimely on December 9, 2009, and the Third Circuit denied a Certificate of Appealability.

On October 20, 2016, Petitioner filed a true Rule 60 motion in the District Court claiming procedural deficiencies in the way his habeas corpus petition was handled. He later on January 9, 2017, filed a pro se application for leave to file a second petition for habeas corpus based on *Miller v. Alabama*, 132 S.Ct. 2455 (2012). On March 17, 2017, the Court of Appeals denied

the application. CTA3 No. 17-1134 because Petitioner was 22 years old at the time of the shooting incident that led to the death of Officer Porter. On April 26, 2017, the district court dismissed the Rule 60 motion as "moot" based on the third Circuit's order.

A timely filed appeal to the United States Court of Appeals for the Third Circuit at No. 17-2153 resulted in Certificate of Appealability being denied by Order dated October 12, 2017, and Application for Rehearing denied by order dated 11-16-17.

REASONS FOR GRANTING THE PETITION

A Certificate of Appealability must issue if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The statute does not define "substantial showing" but this Court has recognized that it is the same as that formerly applied to certificates of probable cause.

The standard for a 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 certificates of probable cause under *Barefoot*). As discussed below, Petitioner made a "substantial showing" of a procedural defect in the way his habeas petition was handled in his Rule 60 motions.

This Court should grant certiorari in this case because the Circuit Court has failed to properly enforce this Court's rulings in *Barefoot v. Estelle*, *supra.*, as well as the decisions of the Circuit Court in *Santana v. United States*, *supra.*

There is no dispute in this case that Petitioner's habeas petition and Rule 60 motions were mishandled.

On October 20, 2016, Petitioner filed a true Rule 60 motion in the District Court claiming procedural deficiencies in the way his habeas corpus petition was handled. He later on January 9, 2017, filed a pro se application for leave to file a second petition for habeas corpus based on *Miller v. Alabama*,

132 S.Ct. 2455 (2012). On March 17, 2017, the Court of Appeals denied the application. CTA3 No. 17-1134 because Petitioner was 22 years old at the time of the shooting incident that led to the death of Officer Porter. On April 26, 2017, the district court dismissed the Rule 60 motion as "moot" based on the third Circuit's order. The pro se Petitioner confused things by filing the application for leave, but the district court plainly erred when it denied the Rule 60 motion without reading it. If the district court had read the Rule 60 motion and the CTA3 order, it would have been clear that the Rule 60 motion and the pro se application presented different claims and issues.

The district court committed a procedural error when it dismissed as "untimely" a roughly similar Rule 60 motion filed back in 2009 for there is no diligence or timeliness requirement that applies to a Brady claim, and no due diligence or timeliness requirement for a claim of actual innocence.

Presently, the case law indicates that the State is not free to decorate Brady with due diligence or other requirements beyond the three mentioned in the *Dennis v. Secretary, PA Department of Corrections*, 834 F.3d 263 (3rd Cir. 2016) opinion.

Petitioner alleged the prosecution obtained the conviction. It took years but Petitioner was able to get credible statements from Jermaine Brute and Rasheed Simpson which collectively establish that Jermaine Brute's testimony against Petitioner was false, and the State knew it was false. The State knew or should have known that Rasheed Simpson was not even in the same institution with Petitioner and Jermaine Brute at the time

Petitioner supposedly made the statements attributed to him by Jermaine Brute. The State knew from prison records that Petitioner and Brute were not in the same cell. In short, it put a jailhouse informant on the stand to give perjured testimony.

Contrary to opinions of the state system and the federal court system, the evidence of guilt was far from overwhelming. First, Petitioner has no motive to shoot at Officer Bay or Officer Porter. Second, contrary to the Superior Court's statement of facts, the record clearly indicated that Petitioner, was in a separate part of the bar having a conversation with his friend, Police Officer Ernest Brown. (N.T. 9/12/97 at pages 80-81, 83, 95-96, 99, 101). Third, Bernard Bennett and Brian Young were sitting at the table with two women when they had the argument with the officers.

Motive is not an element of first degree murder but it is always extremely relevant to a criminal prosecution because people rarely act without a motive. *House v. Bell*, 547 U.S. 518, 540-41, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006).

There was no evidence of specific intent to kill and no evidence of malice on the part of Petitioner except, of course, for the false testimony of Jermaine Brute. *Smith v. Cain*, 565 U.S. 73, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012)(impeachment evidence material where the conviction hinge on testimony of one person).

Clearly, there is a reasonable probability that prosecutors literally framed Petitioner for this crime, and the federal courts should take some action to correct the conviction of an innocent

person.

The district court committed a procedural error when it dismissed a roughly similar Rule 60 motion filed back in 2009 as "untimely" for there is no due diligence or timeliness requirement that applies to a Brady claim, and no due diligence or timeliness requirement for a claim of actual innocence.

In these circumstances, Petitioner respectfully submits that the rule of Barefoot and Santana applies and that the Circuit Court of Appeals has failed to properly give effect to this Court's decision in Barefoot v. Estelle, supra., and the Circuit Court's decision in Santana v. United States, supra.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew Brown

Date: 12/16/17