

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Phillip Jerry Powell _____ — PETITIONER
(Your Name)

vs.

State of Michigan _____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Michigan Supreme Court

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Phillip Jerry Powell _____
(Your Name)

2400 S. Sheridan Dr. _____
(Address)

Muskegon, MI 49442 _____
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Was the decision of the State Supreme Court, in conflict with the Supreme Court of the United States decision in Brady v. Maryland, 373 US 83 (1963) ?

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:

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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 judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☒ reported at 907 Mich. 551 NW2d (2018); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 3-5-18.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U S CONST. AMEND. V.:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself nor be deprived of liberty, property, without due process of law; nor shall private property be taken for public use without compensation."

U.S. CONST. AMEND XIV.:

Section 1 "All persons born of naturalized in the United States and subject to 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."

STATEMENT OF THE CASE

Herein this case at bar, Petitioner PHILLIP JERRY POWELL who was convicted and sentenced in Macomb County Circuit Court of Home Invasion first-degree, 10 to 20 yrs.,; 3 counts of first-degree criminal sexual conduct, Life and 1 count of second-degree criminal sexual conduct 10 to 15 yrs. At trial (2001) prosecution introduced (States main witness) Geraldine Sepulveda, who testified as the (victim) of a home invasion and sexual assault (TT. II. PP. 100-149). During direct-examination, Sepulveda testified, the petitioner was the perpetrator (TT. II PP. 120-121). During cross-examination, Sepulveda also testified, petitioner talked like company he was visiting (TT. II. pp. 140 line 9-10).

The prosecution endorse Thomas Kelley (States Informant), who testified, petitioner admitted to the crimes (TT. II. pp. 65-74). Brian Gillan (Defense witness) rebutted Kelly's testimony, and reveal the conspiracy of the Warren Police Department and Thomas Kelley (TT. III. pp. 9-25).

The defense established fingerprints evidence through Geraldine Sepulveda and The Warren Police Department, Detective Jeffery Pieorg testimonies, that a water glass was turn over to police, by Geraldine Sepulveda. Sepulveda testified, she had the perpetrator touch the glass, to get his fingerprints (TT. II. pp. 138). Detective Jeffery Pierog testified the fingerprints did not matched to Geraldine Sepulveda nor Mr. Powell, fingerprints were unidentifiable (TT. II. pp. 186).

After petitioner convictions, Lower Courts denials of leave to appeal, March 14, 2007 resentencing, 6.500 motions, motion for DNA testing pursuant to MCL 770.16 (2002-2011), Writ of Habeas Corpus, request for appealability to the 6th Cir (2013-2015).

Pursuant to MCR 6.502(G)(2); which provides a defendant to file a Successive or Second motion for relief from judgment, based upon newly discovered evidence or retroactive of law, where a defendant is only permitted one motion for relief from judgment pursuant 6.500.

On May 5, 2016, pursuant to MCR 6.502(G)(2), petitioner file to the State Trial Court, a successive motion for relief from judgment based upon newly discovered evidence of Brady claims under Brady v. Maryland, 373 US 83 (1963).

On May 26, 2016, the State Trial Court denied petitioner motion pursuant to MCR 6.502(G).

Petitioner pursuant to MCR 7.205(F) seeks a Delayed Application for Leave to Appeal to the State Court of Appeals dated October 24, 2016.

State Court of Appeals affirmed the Lower Courts decision dated February 23, 2017.

Petitioner seeks leave to appeal to the State Supreme Court dated March 18, 2017.

State Supreme Court affirmed the Lower Courts decision dated March 5, 2018.

Petitioner now submits a petition for a Writ of Certiorari to the Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION

WHY THE SUPREME COURT OF THE UNITED STATES SHOULD GRANT CERTIORARI

The national importance of having the Supreme Court of the United States decide the question involved, is not matter of right, but of judicial discretion. The State Supreme Court's decision was clearly erroneous, in conflict with the Supreme Court of the United States decision in Brady v. Maryland, 373 US. 83 (1963).

HERE'S WHY THE STATE SUPREME COURT WAS WRONG IN REACHING THEIR DECISION!!

In 2011, a different assistant prosecutor was assigned to petitioner's case. Mary Jo Diegel who reveal, at the petitioner's hearing for DNA testing and new trial pursuant to MCL 770.16, "upon the information and belief from the Michigan State Police DNA supervisor Glen Hall stated, the subject DNA samples from Geraldine Sepulveda's Biological material and water glass was returned by the Michigan State Police to the Warren Police Department for destruction pursuant to their evidence retention police on 4-11-07." See Appendix D. [People's answer to DNA motion for DNA testing and request for new trial pursuant to MCL 770.16].

In 2016, petitioner was finally granted a F.O.I.A. request from a NATHAN MCDANIEL of the Michigan State Police Freedom of Information Unit, who contacted the Michigan State Police DNA laboratory (Northville MI.), of the DNA evidence from the victim's Geraldine Sepulveda's water glass. Their response was; "The DNA or fingerprint information regarding the water glass, the public records do not exist within the Department." See Appendix E. [F.O.I.A. request from the Michigan State Police Freedom of Information Unit].

Here, new evidence discovered by the petitioner is his recent analysis of Brady violations of the exculpatory evidence. The State of Michigan tested the DNA evidence from the victim's water glass at the time of trial, where it was Geraldine

Sepulveda purpose to identify the perpetrator (TT. II. pp. 138), DNA testing results was withheld from the defense, jurors, the State Police reported, that they had stored the water glass, the Warren Police said they destroyed, the water glass (DNA evidence), the State Police reported, that they were unable to find the DNA laboratory reports (water glass), which suggest that it was deliberately destroyed to prevent petitioner from proving his innocence, and supporting his third-party theory, "the perpetrator arrived at the victims home, after he visit (TT. II. pp. 140 line 9-10), committed the crimes, then leaving DNA on the victims water glass."

The State Supreme Court decision, that "petitioner successive motion for relief from judgment is prohibit under MCR 6.502(G)" is erroneous. The Lower Court's decision was in conflict with MCR 6.502(G)(2) and the Court's decision in People v. Swain, 499 Mich. 920 (2016), because the evidence on which petitioner's (2016) motion for relief from judgment was discovered, after his previous (2010) motion for relief from judgment. The Trial State Court's 2016 decision, "Defendant's motion is a successive Motion for relief from judgment and is in essence of matters previous ruled upon by the Court." is clearly erroneous as well. The prior 2010 motion involved claims of prosecutorial misconduct and ineffective assistance of counsel, discrepancies between the prosecutor's remarks (TT. III. pp. 46) and the Michigan State Police original DNA lab reports 8-3-01. The information was based on the DNA analysis of Sepulveda's biological material and left thigh swabbed samples, known and available at that time, not the petitioner's 2016 motion based on Brady evidence, which was discovered 6 years later. See Appendix C. [The State Trial Court's opinion and order dated 2010 and 2016]. As set forth by the Court in Swain, supra, petitioner has "provided a claim of new evidence, that was not discovered, before the first' motion for relief from judgment," and he was entitled to relief under MCR 6.502(G)(2).

See Appendix F. [Swain, supra, 499 Mich. 920].

Petitioner satisfied his burden requirement of MCR 6.502(G)(2), new evidence exception of Brady and substantive legal claims of violation of due process rights under the Fourteenth Amendment of the United States Constitution in Brady, supra 373 US 83, because this new evidence was discovered in 2016, after petitioner previous motion for relief from judgment in 2007 and 2010.

The petitioner didn't have any knowledge or couldn't make any allegations of the suppression of evidence prior to trial, because the State of Michigan suppressed and later destroyed the laboratory reports and DNA evidence from the victims water glass in bad-faith, which violates Brady. See Appendix G. [Brady supra, 373 US 83].

MCL 770.16(12) provides, "the investigating law enforcement agency shall preserved any biological material during the investigation of a crime or crimes for which any person may file a petition for DNA testing under this section. The identified biological material shall be preserved for the period of time that any person is incarcerated in connection with that case " See Appendix H. [Michigan Compiled Laws MCL 770.16(12)].

The State of Michigan was in violation of MCL 770.16(12), because they deliberately failed to preserved and later destroyed, the biological material of DNA evidence from the victims water glass, where petitioner was incarcerated.

The State of Michigan destruction of exculpatory evidence demolished petitioner's chances of proving his innocence, through the Michigan Innocence Project petition for current 2013 DNA testing, which possibly could have exonerated the petitioner as the perpetrator. See Appendix I. [letter to petitioner from the Michigan Innocence Project Donna Mckneelen (Co-Director) dated 12/3/13]. Besides fingerprints any object touch by a person will contained "touch DNA" from that person United States v. Watson, 792 F3d 1177 (9th Cir 2015).

WHAT THE LAW STATES UNDER THE UNITED STATES SUPREME COURT!!

As the law states under the Supreme Court of the United States, in Brady v. Maryland, 373 US 83 (1963), the bad-faith destruction or loss of exculpatory evidence would violate a suspect's due process rights. Brady made it clear that the police or prosecution would not have concluded, he could instead destroy evidence, to avoid disclosing it to the defense. Here, the State of Michigan suppression and later destruction of exculpatory evidence violated petitioner's due process rights.

The Brady violations would make a different results probable on retrial, because the Government and the police suppression failure to preserved and later bad-faith destruction of the DNA evidence and laboratory reports (water glass) cause an incurable suppression of exculpatory evidence, where petitioner, in the present or future could never received a fair trial.

In Arizona v. Youngblood, 488 US 51, 57-58 109 S.Ct. 337; 102 LE2d (1988), the Governments states "Government agencies failure to preserved material exculpatory evidence violates a suspect's due process." The State of Michigan violated petitioner's due process, by failure to preserved material exculpatory evidence of the DNA evidence and the laboratory reports (water glass). As the United States Supreme Court stated in Kyles v. Whitley, 514 US 419, 433-434, 115 S.Ct. 1555, 131 L Ed2d 490 (1995), first, "favorable evidence is material, and constitutional error results from its suppression by the Government, if there is a reasonable probability that had the evidence been disclose to the defense, the results of the proceeding would have been different."

A determination of materiality does not require that the defendant demonstrates "by a preponderance" that the disclose of the evidence would had resulted in his acquittal. Rather, the defendant must merely show that there is a "reasonable probability" of a different result "and the adjective is important."

The second aspect of materially bearing emphasis here is that it is not a sufficiency of the evidence test, a defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a violation by demonstrating that some of the inculpatory evidences should have been excluded, but by, the showing, that the favorable evidence could reasonable be taken to put the whole case in a different light as to undermine confidence in the verdict.

Third, if there is a finding of constitutional error, it cannot be consider harmless.

Fourth, the suppressed evidence must be considered collectively, not item by item.

The State Supreme Court mixed up the facts and were wrong in reaching their decision, where it was an "Unreasonable Application" contrary to the United States Supreme Court precedent of Brady v. Maryland, 373 US 83 (1963); Arizona v. Youngblood, 488 US 51, 57-58, 109 S.Ct. 333; 102 LEd2d 281 (1988); Kyles v. Whitley, 514 US 419, 433-434, 115 S.Ct. 1555, 131 LEd2d 404 (1995).

In summary, the national importance of the Supreme Court of the United States, to decide the question involved, within it's judicial discretion, that the decision of the State Supreme Court that decided petitioner's case is in conflict with the decision of the Supreme Court of the United States decision in Brady v. Maryland, 373 US 83 (1963); the importance of this case not only to the petitioner, but others similarly situated; and the ways, the decision of the lower courts, in this case was clearly erroneous.

Petitioner was severely prejudiced by the State of Michigan failure to turn over exculpatory laboratory reports (water glass), denied petitioner a fair trial, there is a "reasonable probability" of a different result" and the adjective is important." If the State of Michigan would had disclose the laboratory reports to the defense, this favorable evidence could reasonable be taken to put the whole case in such a different light as to undermine confidence in the verdict. Here, this constitutional error violated petitioner's due process, one cannot possibly say with confidence that such a defect in trial was harmless. The suppressed evidence must be considered collectively.

The undisclosed evidence had probative value, because the victim recovered the water glass, which contained both fingerprints and later discovered DNA evidence, for the identification of the perpetrator, that the State of Michigan had knowledge of the existence of the laboratory reports. See Appendices D and J [People of the State of Michigan Answer to petitioner motion for DNA testing and new trial pg 5, Geraldine Sepulveda and Detective Jeffery Pierog testimonies TT. II. pp. 138, 186]

In Addition, the Michigan Innocence Project investigated and request for all laboratory reports, the State of Michigan, further concealed exculpatory DNA laboratory reports (water glass) in 2013. See Appendix I. [letter to petitioner for Innocence Project dated 12/3/13].

The State of Michigan wrong doings cause an incurable suppression of exculpatory evidence, where petitioner, in the present or future could never received a fair trial.

The victim Geraldine Sepulveda identification is Questionable!! First, Sepulveda testified "I had him get the glass to get his fingerprints" (later discovered DNA evidence) for the purpose to identify the perpetrator (TT. II. pp. 138).

Second, Sepulveda testified "petitioner was the perpetrator" (TT. II. pp. 120) and finally, Sepulveda testified "petitioner talked liked company, he was visiting" (TT. II. pp. 140 line 9-10). DNA evidence would had told the whole story.

Petitioner conviction was unconstitutional, by the State of Michigan unconstitutional failure to disclose potentially exculpatory DNA laboratory reports, that consumed the last DNA sample taken from the Geraldine Sepulveda water glass, that could have proven petitioner's innocence and pointed to the true perpetrator. The prosecution of the petitioner was the State of Michigan pursuit of an innocent man that let the real perpetrator go free.

Here is clear and convincing evidence, that the State of Michigan decision was clearly erroneous, in conflict with the Supreme Court of the United States decision in Brady v. Maryland, 373 US 83 (1963) and wrong doings causing a miscarriage of justice, in violation of petitioner's due process rights under the Fifth and Fourteenth Amendment of the United States Constitution.

Petitioner Phillip Jerry Powell presents to the Supreme Court of the United States, this issue of importance beyond the particular facts of both parties, which involves one party decision was clearly erroneous, suppressing and later destroying exculpatory evidence, it was require by law to disclose and preserved, causing the other party a problem that threatens the integrity of the entire judicial system.

28.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Phillip J. Powell

Date: May 4, 2018