

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Herman Bright — PETITIONER
(Your Name)

vs.

Commissioner, Ga D.O.C. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

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

PETITION FOR WRIT OF CERTIORARI

Herman Bright ^{D.O.C. #1000161242}
(Your Name)

1153 North Liberty St.
(Address)

Nicholls, Ga 31554
(City, State, Zip Code)

(Phone Number)

QUESTIONS

QUESTION 1. Are constructive amendments to criminal indictments, via jury erroneous jury instruction and/or argument, [cured] where the trial judge gives the petit jury the indictment, and instruct them on the state's burden of proof concerning the elements of the charged crime?

ANSWER ``NO." Only a [grand] jury can amend an indictment. Such an error would be of the structural type, and therefore error per se.

QUESTION 2. Can constructive amendments to criminal indictments be subjected to harmless error analysis?

ANSWER ``NO." Because the error is of the structural type. State courts cannot cure structural errors found by the Supreme Court, by using, methods that ignore the Fifth Amendment constitutional right of U.S. citizens.

QUESTION 3. Do Brady v. Maryland violations extend to [informal] agreements between the state and a witness, concerning charges against the witness.

ANSWER ``YES." The Prosecutor should not be given an opportunity to backdoor the jury's right to know, or a defendant's right to prepare his case.

QUESTION 4. If either party in a jury trial for murder, present clear evidence of manslaughter, must the presiding judge instruct the jury on that evidence?

ANSWER ``YES." If there is clear evidence that will reduce the charge of murder to manslaughter, the court must instruct the jury on both offenses.

LIST OF PARTIES

Adams, Hon. Gregory A. -State Trial Judge

Graham, Hon. Kristina Cook -State Habeas Corpus Judge

Herman Bright (pro se)- Petitioner

Commissioner, Ga. D.O.C. - Respondent

King, Hon. Janet F. -United States Magistrate Judge

Matthew B. Crowder -Attorney for Respondent

Totenberg, Hon. Amy -United States District Judge

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

Petitioner certifies that the following are interested persons in the outcome of this appeal:

Adams, Hon. Gregory A. -State Trial Judge

Belk, Lamont -State Prosecutor

Bright, Herman -Petitioner

Commissioner, Ga. D.O.C. -Respondent

Crowder, Matthew B. -Counsel for Respondent

Dillon, Angela Brown -State Appellate Counsel for Petitioned

Fleming, Gwendolyn Keyes, former District Attorney , Stone Mountain Judicial
Circuit -State Prosecutor

Graham, Hon. Kristina Cook -State Habeas Corpus Judge

Jenkins, Jerome -Victim (deceased)

King, Hon. Janet F. -United States Magistrate Judge

Snead, Alden -State Trial Attorney for Petitioner

Totenberg, Hon. Amy -United States District Judge

Wesley, Jamal -Victim

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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 A(2) to the petition and is

Janv. 30, 2018

Do ☒ [] reported at Appeal No. 17-12648-A; or,
not ☒ [] has been designated for publication but is not yet reported; or,
know ☐ [] is unpublished.

The opinion of the United States district court appears at Appendix B(5) to the petition and is

May. 8, 2017

Do ☒ [] reported at Docket No. 1:15-CV-4158-AT-JFK; or,
not ☒ [] has been designated for publication but is not yet reported; or,
know ☐ [] is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C(4) to the petition and is

June. 16, 2015

Do ☒ [] reported at Civil Action No. 2013 CA 39546; or,
not ☒ [] has been designated for publication but is not yet reported; or,
know ☐ [] is unpublished.

Oct. 19, 2015

The opinion of the The Georgia Supreme Court court appears at Appendix C(5) to the petition and is

Do ☒ [] reported at S12A1735 BRIGHT v. State / S15H1667; or,
not ☒ [] has been designated for publication but is not yet reported; or,
know ☐ [] is unpublished.

STATEMENT OF JURISDICTION

The Supreme Court's jurisdiction is invoked under 28 U.S.C. 1254(1). (see . .
Hohn v. United States, 524 U.S. at. 238, 252); & 28 U.S.C. 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT right to exculpatory evidence under Brady v. Maryland

SIXTH AMENDMENT right to effective counsel

EIGHTH AMENDMENT right against cruel and unusual punishment

FOURTEENTH AMENDMENT right to a fair trial

Right to DUE PROCESS

28 U.S.C. 2254(d)(1)

28 U.S.C. 2254(d)(2)

28 U.S.C. 2254(e)(1)

O.C.G.A. 24-9-81 (now repealed)

O.C.G.A. 24-9-83 (now repealed)

STATEMENT OF THE CASE

On November 9, 2009, Petitioner Bright was the defendant on trial for aggravated assault and possession of a firearm during the commission of a felony for the shooting of Jama Wesley, and malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony for the shooting of Jerome Jenkins (deceased). As to the possession charge that supports both aggravated assault charges, the indictment reads, "on or about the 30th of October 2008, (Bright) did unlawfully [have on his person] a firearm during the crime of aggravated assault (Trial Tr. 781-82). Bright pled not guilty as to all counts of the indictment.

On November 11, 2009, Bright was acquitted of all charges related to Jamaal Wesley, and convicted of malice murder, felony murder, aggravated assault, and, possession of a firearm during the commission of a felony for the shooting of Jerome Jenkins (Trial Tr. 811-12).

Bright was appointed counsel by the trial court to represent him on direct appeal, on his issues of ineffective assistance of his court appointed trial counsel. Of which, appellate counsel raised three enumerated errors on direct appeal, one of which was a single issue of ineffectiveness of trial counsel.

Motion for new trial was denied April 3, 2012 (Pet. Appx. C(2)). The Georgia Supreme Court affirmed the conviction on January 7, 2013 (Pet. Appx. C(4)). State habeas court denied Bright's writ of habeas corpus June 16, 2015 (Pet. Appx. C(6)), which raised 26 enumerated errors, 16 of which were issues of ineffective assistance of counsel. The Georgia supreme court denied

Certificate of Probable Cause to appeal on October 19, 2015 (Pet. Appx. C(7)).

The federal district court adopted the recommendation of the of the magistrate judge denying writ of habeas corpus, and denying COA without giving a reason as to why on February 17, 2017 (Pet. Appx. A(4)). The eleventh circuit court if appeals denied application for COA on January 30, 2018, by apparently adopting the district court's merits determination.

The case was tried on the theory that Jamaal Wesley was shot by a stray bullet as a result of the shooting of Jerome Jenkins, during an altercation at the home of Malachi Smith (Trial Tr. 184). Mr. Wesley originally told police that he got hit in a drive-by shooting, and was charged for making a false statement. His charges was dropped as a result of his informal immunity agreement to make a favorable statement for the state, which revealed a BRADY violation (id. 20-21) and 282).

According to the testimony of state's witnesses Aja Harris, and Michael Hatcher, Mr. Jenkins was shown to be armed, drunk, irate, and threatening to kill himself, Bright, and others in the house immediately before he was shot (id. 500-520 and 564-565). According to state's witnesses Brandon Roe and Michael Hatcher, Mr. Jenkins' provocation became physical when he made a "bulk-like action" towards Bright, and Bright got scared and shot Mr. Jenkins (id. 362 and 520).

In a charge conference, trial counsel requested a charge on provocation, and expressly stated that he did not want a charge on manslaughter. The state admitted that there was evidence , arguing that the whole charge should be

given in its entirety, and that Bright, in order to get that charge, he would also have to admit doing the crime. The trial judge said he would not give any charge on justification as long as the defense was alibi. Trial counsel then withdrew his written requested charge on provocation, mutual combat and self defense (id. 684-690).

The state informed the court, prior to voir dire of its intent to show that Bright through emissaries, attempted to threaten witnesses. Bright objected that it would be hearsay and improper character evidence. The court said that hearsay is a proper objection, and would allow it [only] if the state could lay the proper foundation, minus any hearsay (id. 27-28). The Georgia law that governed such events in 2008 was former O.C.G.A. 24-9-81 and 24-9-83 (now repealed), which instructed on the foundation for prior statements of a witness, which was not followed in the case.

The state improperly impeached state's witness Malachi Smith, with the testimony of four state's witnesses, that said, after Bright was arrested, Smith allegedly tried to threaten and coerce them into changing their testimony to "get Lou (aka Bright) off." (id. 243-244, 247 273-274 373-374 and 520).

The state failed to show that Bright either authorized or had knowledge of the alleged actions of Mr. Smith, or that he was a party to those alleged actions, rendering that line of testimony inadmissible. Trial counsel did make one objection to hearsay, concerning the testimony of Jamaal Wesley, which the judge sustained, making it clear that the proper foundation was never laid for

that line of testimony, and it was prejudicial to Bright (id. 273-274).

Unfortunately for Bright, it was the only objection to hearsay and improper character evidence that his trial counsel made concerning the alleged actions of Mr. Smith. The state was already on it's second witness, of four, that gave materially indistinguishable testimony, that failed to show Bright's involvement. (id. 243-244, 247 273-274 373-374 and 520).

The prosecutor, sensing the weakness of the state's case (most likely because of the inconsistent testimony of victim Jamal Wesley, and lack of physical evidence), and contrary to evidence and the charges of the grand jury, added a conspiracy theory to his argument in closing, by portraying Mr. Jenkins as not just the victim of Bright, but of everyone in Mr. Smith's house that day. The prosecutor, in closing, mischaracterized the all the state's witnesses testimony, and constructively amended the indictment.

He said, `` They all run in the same circle. Their all in the mix. That's just the way it is." ``If he would have just shot this outsider, Jerome Jenkins, they wouldn't have had to go to the hospital." ``They would have said, I don't know what happened." (id. 771 776-767). There was no objection or curative instruction. These statements from the prosecutor were unfounded, and the only bases for that unsupported constructive possession instruction given by the trial judge, which relieved the state of the burden of proving that Bright actually killed Mr. Jenkins. (id. 794).

The indictment reads, ``on or about the 30th of October 2008, (Bright) did unlawfully have on his [person] a firearm during the crime of aggravated

assault (Trial Tr. 781-782). However, when the trial judge instructed the jury on the possession charge, he said, "The law recognize two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical controls over a thing at a given time, is in actual possession of it. A person who, though not in actual possession, knowingly has both the power and the intention at a given time to exercise authority or control over a thing, is in constructive possession of it. The law also recognize that possession can may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint. [You are authorized to convict if you shall find beyond a reasonable doubt that the defendant had actual or constructive possession, either alone or jointly with others]." (Trial Tr. 794).

Bright's trial counsel never showed up to his motion for new trial or his habeas corpus hearing. Bright raised in both the state and district habeas courts that his appellate counsel was ineffective for failure to raise the ineffectiveness of his trial counsel for the following reasons:

1. for not objecting to state's exhibits 22, 34, 11, 11(b), and 11(c), (Malachi Smith's gun, ammunition clip, ammunition and pictures of the same), from entering the jury room for deliberations.
2. for not objecting to and moving for mistrial concerning a BRADY violation, when state's witness Jamaal Wesley confirmed is informal immunity agreement to have his false statement charge dropped in exchange for a

statement against Bright (Trial Tr. 20-21 282).

3. for not objecting to the prosecutor's improper impeachment of Smith, with inadmissible hearsay testimony from Ms. Stephenson that placed Bright's character in evidence (Trial Tr. 243-244, and 247).

4. for not objecting to the prosecutor's improper impeachment of Smith, with inadmissible hearsay testimony from Michael Hatcher that placed Bright's character evidence (Trial Tr. 520)

5. for not objecting to the prosecutor's improper impeachment of Smith, with inadmissible hearsay testimony from Wesley that placed Bright's character in evidence (Trial Tr. 273-274).

6. for not objecting to the prosecutor's improper impeachment of Smith, with inadmissible hearsay testimony of Brandon Roe that placed Bright's character in evidence (Trial Tr. 373-374).

7. for not objecting to the prosecutor's improper impeachment of defense witness Tasha Jett, with bias a accusation. (Trial Tr. 667)

8. for not objecting to the prosecutor's improper impeachment of Smith, with a bias accusation (Trial Tr. 697)

9. for not objecting to the prosecutor's improper closing argument that Ms .Jett admitted being biased (Trial Tr. 764)

10. for not objecting to the prosecutor's improper closing argument that Smith admitted being biased (Trial Tr. 764 766)

11. for not objecting and moving for mistrial when the prosecutor, in his closing argument introduced extraneous facts not in evidence and

mischaracterized the testimony of the defense witnesses (Trail Tr. 764)

12. for not objecting to the prosecutor's improper closing argument when he vouched for the credibility of four states witnesses (Trial Tr. 766).

13. for not objecting to the prosecutor's improper closing argument on Bright's future dangerousness (Trial Tr. 768-769 772 778)

14. for not objecting to the erroneous jury instruction on constructive possession which was contrary to the indictment (Trial Tr. 781-782 794).

15. for withdrawing a requested charge on provocation at would have reduced the murder charge to manslaughter (Trial Tr. 684-690).

16. for not requesting a charge on self-defense.

17. for not raising a BRADY claim based on newly discovered evidence.

The district court said that any possible error concerning the constructive amendment to Bright's indictment was [cured] because the indictment was given to the jury and they were instructed on the state's burden of proof concerning the elements of the offense, citing *Jarnigan v. State*, 295 Ga. 603, which is a state case that reviews admissibility of variances at trial for harmless error. Bright argued that the indictment was constructively amended, not just that fact that the charge itself was erroneous (Pet. Appx. B(6) and B(1)).

The district court also unreasonably determined that Bright didn't show that Jamaal Wesley was given an immunity deal when the prosecutor told the trial court that his charges were dropped because of his favorable statement for the state, and Wesley's testimony on cross examination acknowledging

that he knew that his charges were dropped because of his subsequent statement against Bright (Trial Tr. 20-21 282) (Pet. Appx. B(1) B(6) and B(7)).

The district court also determined that trial counsel did request a charge on manslaughter pursuant law in Georgia under State v. Alaverado, 260 Ga. 563, 564 396 397 S.E. 2d 550 (1990) ("the Georgia Supreme Court disapproved of the language in SANTONE and said that the correct rule is that a written request to charge a lesser included offense must always be given if there is any evidence the defendant is guilty of the lesser included offense").

However, in the case at bar, trial counsel unprofessionally withdrew every written request instruction on affirmative defense (except self- defense) that the trial court questioned, [before] it was ruled on, saving nothing for appeal (Trial Tr. 684-590).

REASONS FOR GRANTING THE PETITION

There is a great need for this Court to make it clear, if constructive amendments to criminal indictments can be subjected to harmless error review. When state appellate courts use local outdated harmless error analysis of impermissible variances between argument and proof (which does not consider the Supreme Court's precedent) on a petitioner's federal constitutional claims of a constructive amendment to their criminal indictment, some federal appellate courts are reluctant to give habeas relief. They treat the issue as one of only state law, even when the state laws are ambiguous, because the governing laws in both state and federal courts are the same, but were not applied.

If a petitioner complains about the difference between his indictment and the argument at trial, and/or erroneous jury instructions . . . then whether or not the indictment was constructively amended necessarily governs the review. *Stirone v. U.S.* 361 212, 4 L ED 2d 252, 80 S Ct 270 (note 8.) (variances between an indictment and proof is more that between pleading and proof, and cannot be dismissed as harmless error, where the variation destroys the defendant's substantial right to be tried only on changes presented in an indictment returned by a grand jury").

The law concerning constructive amendments in Georgia and the federal courts are identical: ("An indictment can't be materially amended after the grand jury has returned the indictment into court, any subsequent amendment by the trial court or prosecutor that materially affects the

indictment is void and cannot serve as the basis of conviction." *Driggers v. State*, 295 Ga. App. 711, 717-718 (4) (b) 673 S.E. 2d 95 (2009) ("An amendment can be actual or constructive, a constructive amendment occurs when the essential elements of the {310 Ga. App. 129} offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment as the result of an erroneous jury instruction or a prosecutor's statements to the jury." *United States v. Castro*, 89 F.3d 1443, 1352-1453 (111) (11th Cir. 1996).

However, Due Process and Equal Protection are violated where appellate courts only pay lip service to the Supreme Court's precedent, when they use cases like *Jarnigan v. State*, 295 Ga. 603, (which says, "any potential harm is [cured] where the indictment is given to the jury, and they are instructed on the state's burden to prove the elements of the charged offense"), local case law that only describe harmless error of impermissible variances at trial, which do not address an appellant's constitutional claims of constructive amendments to his criminal indictment, and thereby, subvert United States Supreme Court precedent found in *Stirone v. U.S.*, 361 US 212, 4 L ED 2d 252, 80 S Ct 270 note. 9 ("the purpose of the requirement of the Fifth Amendment that a man be indicted by a grand jury is to limit his jeopardy to offenses charged only by a group of his fellow citizens acting independently of either prosecutor or judge, this purpose is defeated by a device or method which subjects the defendant to persecution for an act which the grand jury did not charge").

Even if constructive amendments to criminal indictments are subject to some kind of harmless error analysis, is Jarnigan a adequate form of review? Jarnigan was a case where the trial judge sustained an objection of the prosecutor, that object that trial counsel's argument was improper because certain evidence was not shown.

In the case at bar, the same evidence was used to prove the charges of both victims. The jury acquitted Bright on the charges of shooting Wesley, proving that they believed someone else shot Mr. Jenkins, and the jury applied the instruction on constructive possession unconstitutionally, because the state was relieved of the burden of proving that Bright actually killed Jenkins, which was outside the scope of the indictment and evidence at trial (Trial Tr. 781-782 and 794).

Bright is complaining that he has been unconstitutionally tried for the alleged actions of another person, party to a crime or conspiracy, when the grand jury and evidence in trial only brought charges on his alleged actions. The improper argument of the prosecutor concerning Smith's alleged threats and coercion, minus a showing of Bright's involvement, plus his improper statement that "Their all in the mix," constructively amended the indictment, and that constructive possession charge was double prejudice.

The alleged action of Mr. Smith was shown to be his alone. State's witness Hatcher testified that right after Bright [left], Smith allegedly coerced him into coming up with a plan to "get Lou off." (Trail Tr. 520).

Another Due Process and Equal Protection issue here is whether or not, under federal law, do BRADY violations extend also to informal agreements between a prosecutor and a witness concerning criminal charges? Because it does in Georgia. (see Walker v. State, 126 Ga. App. 302 (1) 190 S.E. 2d 807 (1972))("the prosecuting attorney is under a duty to reveal any understanding or agreement with a witness concerning criminal charges pending against that witness. This duty extends to even informal agreements regardless of how non-promising the agreement was in terms of respect for the witness.") The district court determined that trial counsel made a request to charge on manslaughter, but the trial court was not required to give a manslaughter charge in Georgia because the defense was alibi.

However, In State v. Alvarado, 260 Ga. 563, 564 397 S.E. 2d 550 (1990)(the Georgia Supreme Court disapproved the language in Santone, and said that the correct rule is that a written request to charge a lesser included offense must always be given if there is any evidence that the defendant is guilty of the lesser included offense).

In the case at bar, trial counsel unprofessionally withdrew every requested affirmative defense instruction that the court questioned [before] the court ruled on them (except self-defense), even the ones that counsel gave argument for, saving nothing for appeal. (Trial Tr. 684-690).

This was not professional counsel. If an instruction is required by law to be requested by counsel, if it is withdrawn by counsel before it is ruled on, then it wasn't requested at all. An appellate court can't say that the required

requested charge was made if it was withdrawn before it was ruled on. The decision of the district court in this case was a unreasonable determination in light of the evidence under 2254(d)(2).

The district court decision cited *Reed v. State*, 204 Ga. App. 273, adopted from the magistrate judge, which states, "Reed relied exclusively on an alibi defense. Defenses such as self-defense, or accident, which would have called into question the issue of intent were not present in this case. Since any charge of defense was so far removed from the theory upon which the case was tried, even if incorrect, it would have been harmless.)

However, in the case at bar, state's witness Aja Harris testified that Mr. Jenkins was armed, and threatening to kill himself and his assailant immediately before he himself was shot. (Trial Tr. 564-565). State's witness Brandon Roe testified saying, "he was provoking him." The state asked, provoking Lou (aka Bright). "And there was a Bulk-like action (from Jenkins), then he (Bright) got scared and started shooting. (Trial Tr. 362).

(In deciding if a state court's failure to give a jury instruction on a particular defense violated the defendant's federal due process right, a habeas court must first determine whether the petitioner was erroneously deprived of a jury instruction to which he was entitled under state law, if the court makes that finding, it must then ask whether the failure to give the requested charge was so harmful as to make the conviction unfair.)(*Graham v. Lape*, 476 F.Supp. 2d 399.)

In Georgia, the rule remains that " in assessing whether counsel was

ineffective for failing to request an instruction on voluntary manslaughter in a murder prosecution, the question is whether there was a reasonable probability that the jury would have returned a verdict for the lesser included offense.) Wadley v. State, 258 Ga. 465, 369 S.E. 2d 734.

Trial counsel's performance during the defense charge conference was unprofessional, because every time the judge questioned a charge, instead of preserving petitioner's right for appeal, he simply withdrew the request for all the charges that the judge refused to give . . . even ones that counsel really wanted and fought for. (Trial Tr. 684-690). That was not professional counsel. see . . . Lattimore v. Dudios, 152 F. Supp. 2d. 67 July 13, 2001)(counsel was ineffective for not requesting a manslaughter charge, but declined to find that trial court abused it's discretion for not so charging, stating .`the Beck court specifically declined to decide whether it's holding and rational extends to non-death penalty cases.) (The Circuits have split on the issue: only the Third Circuit has extended Beck to non-capital cases. see Vujosevic v. Rafferty, 884 F. 2d 1023, 1027-28 (3rd Cir. 1988)).

CONCLUTION

When state court use the wrong form of review, and unreasonably apply the facts in a petitioner's case, some federal courts are reluctant to give habeas relief because there is little guidance from this Court on how to apply the deference given to state court decisions under 28 U.S.C. 2254(e)(1) in light of an unreasonable determination of the fact in light of the evidence under 28 U.S.C. 2254(d)(2).

Bright also asks this Honorable Court to consider the mental and civil death that comes with a life sentence in murder cases, that at worst, actually only showed manslaughter, and to extend that olive branch found in Beck v. Alabama, to cases of provocation and passion.

PRAYER

If this Honorable Court will touch just one of these questions presented here in this petition, not only will it correct a fundamental miscarriage of justice in the present case, it would give more guidance and more fairness and uniformity to state prosecutions and federal appeals where petitioners are procedurally barred (most often because of ineffectiveness of counsel) from justice.

Respectfully Submitted
/s/ Herman Bright
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Nicolls, Ga. 31554