United States Court of Appeals

for the Fourth Circuit

No. 18-1160

BRIAN DAVID HILL
Plaintiff-Appellant

v.

Executive Office for United States Attorneys (EOUSA) and United States Department of Justice (U.S. DOJ),
Defendants'-Appellees'

Appeal from the United States District Court for the Western District of Virginia at Danville
The Honorable Jackson L. Kiser
United States District Judge
Civil Case No. 4:17-cv-00027

PETITION FOR REHEARING OR REHREAING EN BANC

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Date: July 31, 2018

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STATEMENT REQUIRED BY FEDERAL RULE OF APPELLATE PROCEDURE 35(b) AND FOURTH CIRCUIT LOCAL RULE 40(b)

Appellant/Plaintiff (Brian David Hill) respectfully requests rehearing and rehearing en banc for the following reasons:

First, rehearing en banc is warranted under FRAP 35(b)(1) because the panel decision conflicts with the decisions of the Supreme Court and with the ethical standards of the American Bar Association ("ABA") requiring that prosecutors disclose discovery material concerning actual innocence. Despite the Appellant/Plaintiff filing a request for the criminal case discovery materials of "United States of America v. Brian David Hill" (Document #2, V.A.W.D, U.S. District Court, Danville Division, case # 4:17-cv-27) through the Freedom of Information Act ("FOIA"), Appellant still contends that he is clearly entitled to a photocopy and/or a copy of all records of his criminal court case discovery materials when it is clearly useful and material to proving the actual innocence of the criminal defendant (*Appellant in this appeal*) that had filed the original FOIA request. Additionally, Judge Kiser's comment that the Constitution does not apply

to the provisions of the FOIA but only the rights entitled under the statute, clearly deprives the Appellant of his Constructional rights that he is entitled to, and deprives him of his rights guaranteed by the U.S. Supreme Court and the ABA Rules of Professional Conduct. The decisions of the Supreme Court that is in conflict in this issue are Brady v. Maryland, 373 U.S.(1963), and Giglio v. United States, 405 U.S. 150 (1972), both cases that were before the Supreme Court.

Second, this case presents exceptionally important issues (FRAP 35(b)(2)) concerning the scope of Supreme Court case law precedent, Constitutional rights, and an American Bar Ethics Rule which affects the final outcome of this civil case if appeal is wrongfully dismissed, which will further create and justify a unconstitutional miscarriage of justice against an innocent man trying to prove his innocence. Not only did the dismissal of Appellant's Appeal create such a miscarriage of justice but it protects the unethical violation of Rule 3.8 of the Model Rules of Professional Conduct, as part of the American Bar Association ("ABA") standards which are supposed to enforce attorney ethical conduct. Indeed the Constitutional issues addressed in the civil action and Appellate brief are of issues that have been in multiple Supreme Court cases which had set case law precedent which shows a conflict between the statute of the Freedom of Information Act ("FOIA") versus the Constitutional discovery rights concerning a defendant of a federal criminal court case. Depriving Appellant of his

constitutional rights, legal rights, privileges, and ABA mandated ethical obligations for Federal Prosecutors (U.S. Attorneys') is threatening the very adversarial nature of our system of justice. It gives the Appellant no other recourse but to push for a "pardon of innocence" from the office of the President of the United States to resolve the miscarriage of justice not being resolved by the panel's decision. If a criminal defendant is deprived of his right or even privilege to prove actual innocence prior to filing a 2255 Motion under Writ of Habeas Corpus, the criminal defendant can be deprived of a successful and effective 2255 Motion which will be doomed to fail by "Motion to Dismiss Petitioner's Motion to vacate, attack, or correct a sentence by a person in federal custody". That criminal defendant is stuck in a perpetual hamster wheel level where the criminal defendant is expected to gather evidence to prove actual innocence to overcome the 1 year statute of limitations procedural hurdles while being deprived access to the very evidence that can prove actual innocence. It sets the precedent where no federal court can offer justice for a wrongfully convicted innocent man and the wrongfully convicted individual has no means to gather the evidence to show factual innocence in a 2255 Motion that is expected to overcome the procedural hurdles. Third, in a sense, the panel's decision sends a message to the Appellant that he has no right to get access to the prosecutor's very own discovery evidence material necessary to prove actual innocence and has no right to remedy. This court has the

opportunity to send a different message. This is a legal jeopardy, a Constitutional crisis that cannot be ignored. The crisis, where procedural bar, and a Federal Prosecutor refusing to cooperate, will create a permanent miscarriage of justice which its only available remedy is to receive clemency or a pardon from the President of the United States. The U.S. Department of Justice controls who receives a pardon through the Office of the Pardon Attorney ("Pardon Attorney"). Essentially this deprives a criminal defendant of his right to prove his actual innocence. Then that same party (the Government) to Appellant's criminal case can also dictate whether Appellant qualifies for a "Presidential Pardon" as a matter of policy. This places the Appellant in a perpetual state of wrongful conviction that has no available remedy and no means to prove that the conviction was wrongful and unconstitutional.

Fourth, Federal jurisdiction over constitutional rights, American Bar Association standards which applies to all licensed attorneys inside the United States that practice in any federal court within the jurisprudence thereof, that affect the outcome of this civil case. The Constitutional outcomes which are affected by this case are under the Fourteenth Amendment of the United States Constitution, concerning the due process rights of criminal defendants requesting the discovery evidence material necessary to proving actual innocence. Appellant's right to the discovery material of the very criminal case he was such party to when such access

to the discovery material will prove (1) actual innocence, and (2) ineffective assistance of counsel which was the unconstitutional and wrongful cause of a guilty plea entered.

The effects of which the decision entered on July 24, 2018, sends a message to the United States Attorney Office and the United States Department of Justice; that they can violate American Bar ethics rules, act in a way that is contrary to law and contrary to their duties they were supposed to faithfully execute (Title 28 U.S.C. §544, and Title 5 U.S.C. §3331). That means they can do as they please which may entirely and unconstitutionally deprive the Appellant in this case, and create unconstitutional miscarriages of justice.

The outline of ABA Ethics Rule 3.8 are as follows:

Model Rules of Professional Conduct, American Bar Association, RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) (Citation omitted)

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) (Citation omitted)

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) Promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) Promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] (Citation omitted)

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Second reason is that the facts of the case had clearly established that:

(1) The Appellant which was the FOIA Requester in the civil case had appropriately declared under penalty of perjury (under Oath) that he was the criminal defendant of the discovery material records that were sought which are the records concerning the very case that he, the FOIA Requester, was a party to. That the records had concerned himself and were in regards to all matters that effect the liberty and freedom of himself.

(2) The Appellant had specifically made two FOIA Requests to the exact same FAX number for the FOIA (FOI/PA) office of the Executive Office for United States Attorneys, the boss of the United States Attorney's Offices, which held jurisdiction over the United States Attorneys' Offices across the United States. It was served properly by electronic transmission (fax or facsimile) with the United States Attorney Office of the United States Department of Justice.

(3) Facts had shown from multiple sources that records were concealed or covered up which had existed in the United States Attorney's Office for the Middle District of North Carolina concerning Appellant's criminal court case. Such sources includes the leaked Anonymous documentation from archive.org (Document #2-5, V.A.W.D, U.S. District Court, Danville Division, case # 4:17-cv-27) citation from the Federal Court Transcript, Declaration/s and/or Affidavit/s.

Since the beginning of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), United States Courts have the power to strike down laws, statutes, and executive actions that contravene the U.S. Constitution. The FOIA statute does not supersede the United States Constitution including the criminal defendant's right to the criminal court case discovery material when such material may aid in proving the actual innocence of the criminal defendant requesting such records. It should not supersede the Constitutional right of a criminal defendant to file a written request letter to the United States Attorney asking for the specific discovery evidence material from the criminal case for legitimate purposes such as proving actual innocence and proving that the criminal defendant was convicted for a crime that he/she did not commit.

For the panel to make no opinion and neither any findings, regardless of the high amount of evidence Exhibits and contradiction of facts, deprives the Appellant of his procedural due process rights under the Fourteenth Amendment of the United States Constitution. If the panel had no case law authority to make any reversible decision of the lower court's decision, then that would better clarify why the District Court's judgment was affirmed. Instead, there was no published opinion and no case law stating why the Appellant is not entitled to relief other than to be told that there was "no reversible error".

INTRODUCTION

Appellant's/Plaintiff's filed the original Appellate action to challenge the constitutionality of whether a criminal defendant can use the FOIA as a vehicle, under written request, to request access to or a copy of the discovery material from his criminal court case for the main purpose of proving actual-innocence to overcome the procedural hurdle of the one (1) year statute of limitations in over to prove to the court that his criminal conviction was an unconstitutional miscarriage of justice.

The Appellees'/Defendants' not only refused to provide copies of all criminal court case discovery material necessary to prove actual innocence in sheer violation of Attorney Ethics Rule 3.8 ABA standard for Federal prosecutors, but actively denied knowledge of the existence of such records in the answers to Appellant's complaint (Document #9, V.A.W.D, U.S. District Court, Danville Division, case # 4:17-cv-27) which is a total lie. The Appellant had proven the existence of the very records which are being suppressed by the Appellees'/Defendants'. Thus Appellees'/Defendants' have deprived the Appellant of his constitutional right to have access to his original criminal court case discovery evidence material when such records is needed to undo a wrongful conviction in the criminal action he was a victim of.

Thus the Appellees'/Defendants' have continued to enforce an unconstitutional and unethical suppression of discovery evidence which they can easily recover (if destroyed) and provide to the Appellant to resolve the FOIA lawsuit and constitutional crisis that they had created. They have deprived him of everything the American Bar Association had done by its rule making governing body politic, to ensure that criminal defendants have a right to prove their actual innocence even after a final conviction and sentence.

The Appellant has been deprived of due process, deprived of equal protection under the laws, that it negatively and unconstitutionally affects the rights pertaining to the Appellant in this civil action which unconstitutionally led to the final judgment in favor of the Government aka the Appellees'/Defendants' in this case, which further creates the miscarriage of justice that a criminal Defendant (Plaintiff-Appellant) does not have a right under the U.S. Constitution, that ethics rules of the ABA does not matter, and the Jencks's Act in regards to the discovery material that was originally used to wrongfully convict the Plaintiff-Appellant.

Even though such wrongful conviction had deprived the Appellant of all Constitutional rights except the right to falsely take the guilty plea under penalty of perjury for a crime that he didn't do. This is a miscarriage of justice, and even MTV's Television show called "Unlocking the Truth" shows that criminal case

discovery evidence is needed to proving the actual innocence of convicted offenders, to prove that they had never offended in the first place.

The U.S. Court of Appeals has the authority to rehear this case, to even hear this case, over the Constitutional protections that are supposed to be afforded to Appellant-Plaintiff as a criminal defendant, and the obligation of the United States Attorney Office to provide access to or a copy of such discovery material that is necessary to reverse the wrongful conviction on the ground of actual innocence. Denial of any right to review the decision of the District Court which ruled erroneously and made the ruling contrary to the law and to the Constitution of the United States, as well as relevant case law and even the American Bar Association standards involving the Constitutional protections afforded to parties in a civil and criminal case, especially involving a criminal Defendant that is not wasting the Court's time but is trying to only prove his factual innocence by getting access to his criminal case discovery material pursuant to Federal Rules of Criminal Procedure 16 and 26.2.

The Panel Decision Will Lead to Wrongful Repercussions Against Appellant

The Appellant has already suffered more miscarriage of justice, legal terrorism, and bullying by the United States Attorney Office for the Middle District of North Carolina, post-judgment from this FOIA civil action.

The United States Attorney Office has pushed for a "Government's Motion for Pre-filing Injunction" against Appellant and used the judgment of the District Court, of this case, as one of the factual basis for determining whether Appellant should be entirely and permanently deprived of due process and access to the Courts (Documents #148 and #149, N.C.M.D, U.S. District Court, Durham Division, case # 1:13-cr-435-1, Civil case # 1:17-CV-1036, "GOVERNMENT'S RESPONSE TO "MOTION AND BRIEF FOR LEAVE TO FILE ADDITIONAL EVIDENCE" AND GOVERNMENT'S MOTION FOR PRE-FILING INJUNCTION"). Assistant United States Attorney Anand Prakash Ramaswamy used case law concerning abusive filers that were given pre-filing injunction over matters of frivolous filings such as over filing over 100 fraudulent financial liens against Government and Judicial officials and filing over 10 frivolous lawsuits. Of course that case law doesn't even remotely apply to Appellant's actions and merit at all. All Appellant has done in this lawsuit was seek justice including his Constitutional rights and rights guaranteed by the ABA standards to compel the Government to let the Appellant prove his innocence. Even Judge Kiser said in the

very Judgment that Appellant appealed that "*If he wishes to pursue his Constitutional rights as a criminal defendant, he is free to do so in a direct or collateral attack on his conviction*." Appellant did exactly what Judge Kiser had addressed him to do, and this FOIA lawsuit is being used as part of the sole basis for their pre-filing injunction motion. Appellant is not a lawyer and shouldn't be punished to the same standards as a licensed attorney. Appellant did file a motion for collateral attack on his conviction and the Judgment of the district court in this appellate case is being used as a vehicle to block Appellant from filing any case anymore, even if there is evidential merits. Not only that, but the United States Attorney Office is pushing to dismiss Appellant's 2255 Motion (Document #141, N.C.M.D, U.S. District Court, Durham Division, case # 1:13-cr-435-1, Civil case # 1:17-CV-1036) after refusing in this civil case to give the Appellant access to all of the discovery evidence material that it useful material in proving Appellant's actual innocence. The Appellees'/Defendants' likely didn't respond to Appellant's appeal brief in this action because the other Assistant United States Attorney Anand Prakash Ramaswamy had planned to file the "Motion for Pre-filing Injunction" to permanently end Appellant's right to prove his actual innocence and push him towards suicide as a permanent false sex offender and was bullied by use of lies and fraud on the court, essentially legal terrorism by the United States Attorney Office. Not only do they want to refuse to give the Appellant access to his very

own criminal case discovery evidence material requested by the FOIA, but pushes for dismissal and pre-filing injunction. To continually and systematically punish the Appellant, over and over again with lies and fraud.

By affirmation of the District Court's decision, may mean more suffering and miscarriage of justice against Appellant until Appellant commits suicide or is forced to dial hundreds of phone numbers of The White House offices in Washington, DC, to find a staffer for the Appellant to literally beg that person or beg each staffer of the President of the United States for a full pardon outside of the Parton Attorney working for the U.S. Department of Justice/InJustice. Appellant feels he may get the wrongful "pre-filing injunction" which will allow the Government to break as many laws and rules as they wish as lawbreakers that are bullying Appellant into possibly suicide.

REASONS FOR GRANTING REHEARING EN BANC

I. The Panel's Decision Conflicts with Binding Precedent of the Supreme Court

A. The Supreme Court had recognized that that criminal defendants have a right to get access to the discovery material of the criminal court case, as well as to inspect and make photocopies, when such evidence pertains to the guilt or innocence of such defendant. Brady v. Maryland, 373 U.S.(1963), and Giglio v. United States, 405 U.S. 150 (1972)

B. The Panel's Decision Conflicts with ABA Rule 3.8

CONCLUSION

For all the reasons stated above, Appellant respectfully requests that the Court give the Appellees'/Defendants' an opportunity to respond to this Petition, grant this petition for rehearing or rehearing en banc if the Court finds it appropriate, reverse the Panel's decision dismissing Appellant's appeal, and proceed to give an opinion and to order a remand of the lower court's decision with instructions as outlined in the Appellate brief. Thank You!

Dated:	Respectfully submitted,

July 31, 2018	Brian D. Hill Signed Signed Brian D. Hill (Pro Se) 310 Forest Street, Apartment 2 Martinsville, VA 24112 Phone #: (276) 790-3505 U.S.W.G.O.

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32, 35-4, OR 40-1

Appellant hereby certifies that this "PETITION FOR REHEARING OR REHREAING EN BANC" complies with the type-volume limitation of Fed. Rules. App. P. 25(b)(2)(A) because this petition does not exceed 3,900 words, that the text is proportionately spaced and has a typeface of 14 points or more, and that the font is Time New Roman.

Dated:	Respectfully submitted,
July 31, 2018	Brian D. Hill Signed Signed Brian D. Hill (Pro Se) 310 Forest Street, Apartment 2 Martinsville, VA 24112 Phone #: (276) 790-3505 U.S.W.G.O.

REQUEST FOR RESPONSE FROM APPELLEES

Appellant hereby requests that in compliance with F.R.A.P. Rule 40(a)(3), that Appellees'/Defendants' provide an answer in response to this Petition for Rehearing

CERTIFICATE OF SERVICE

Appellant hereby certifies that on July 31, 2018, service was made by mailing the original of the foregoing

"PETITION FOR REHEARING OR REHREAING EN BANC"

by deposit in the United States Mail, Priority Mail, Postage prepaid under certified mail tracking no. 7017-1450-0000-9411-2921, on July 31, 2018 addressed to the Clerk of the Court in the U.S. Court of Appeals for the Fourth Circuit. Then Appellant requests that the Clerk of the Court shall have electronically filed the foregoing PETITION FOR REHEARING OR REHREAING EN BANC using the CM/ECF system which will send notification of such filing to the following parties:

Cheryl Thornton Sloan

U.S. Attorney Office

Civil Case # 4:17-cv-00027, Appeal Case # 17-1866

101 South Edgeworth Street, 4th Floor, Greensboro, NC 27401

cheryl.sloan@usdoj.gov

This is pursuant to Appellant's "In forma Pauperis" ("IFP") status, 28 U.S.C. §1915(d) that "The officers of the court shall issue and serve all process, and perform all duties in such cases..."the Clerk shall serve process via CM/ECF to serve process with all parties.

Date of signing:	Respectfully submitted,
July 31, 2018	Brian D. Hill Signed Signed Brian D. Hill (Pro Se) 310 Forest Street, Apartment 2 Martinsville, VA 24112 Phone #: (276) 790-3505 U.S.W.G.O.

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