

No. _____

In The
Supreme Court of the United States

GEORGE BRISCOE,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals For The
Sixth District Of Texas At Texarkana**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a defendant receive a fair trial when the plain language of a statute is ignored to allow the government to change the indictment after a jury has been selected?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner George Briscoe respectfully petitions for a writ of certiorari to the Sixth District Court of Appeal in Texarkana in Cause No. 06-17-00061-CR.

CITATION TO OPINIONS BELOW

The decision of the Sixth District Court of Appeals for the State of Texas *Briscoe v. State*, No. 06-17-00061-CR (Tex.App. – Texarkana, delivered February 9, 2018) (pet. ref'd), is attached to this petition as Appendix A. The order denying petitioners request for discretionary review by the Texas Court of Criminal Appeals is attached as Appendix B.

JURISDICTION

The Court of Appeals delivered its opinion affirming Petitioner's conviction on June 13, 2018 in *Briscoe v. State*, No. 06-17-00061-CR (Tex.App. – Texarkana, delivered February 9, 2018) (pet. ref'd). The Court of Appeals ordered that its opinion not be published. On June 13, 2018, Petitioner's petition for discretionary review by the Court of Criminal Appeals was denied. Petitioner filed a timely petition for a writ of certiorari on August 23, 2018. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(a), the Petitioner having

asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part: “No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law. . . .”

The Fourteenth Amendment to the United States Constitution also provides in relevant part: “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”

STATEMENT OF THE CASE

This Court held that when the statutory language is plain, it must be enforced according to its terms. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009).

This petition, *Briscoe v. State*, asks this Court to enforce the well-settled legal principle of following the plain language of the statute in order to ensure due process for the defendant.

In this case, Appellant, George Briscoe, was charged in Hunt County in three different cases all stemming from one overriding set of facts. In Cause

No. 29,065 he was charged with theft of more than \$1,500 and less than \$20,000. In 29,066 he was charged with making a false statement with the intent to obtain credit; and, in 29,067 he was charged with theft of more than \$20,000 but less than \$100,000. All three cases involved different complaining witnesses. (RR V.3 16-18).¹ The Appellant proceeded to trial and was found guilty on all counts and on March 16, 2017, the Appellant was sentenced to one hundred and eighty (180) days in the State jail on one case with a fine of \$6,500; 2 years in the State jail, probated for 5 years and a \$10,000.00 fine with restitution of \$13,000; and, ten years in prison probated for 10 years with a \$10,000 fine and restitution of \$28,862. Appellant filed for and gave timely Notice of Appeal to the Court of Appeals for the Sixth Supreme Judicial District of Texas on March 16, 2017.

In Cause No. 29,067, the Appellant argued the VIN numbers struck from the indictment were not immaterial and their removal and the continuance denial violated due process.

The Court of Appeals delivered its opinion stating the VIN numbers removed were immaterial, thus, their removal after the trial had begun was permissible. It did not address Article 28.10(a), regarding Appellant's argument that allowing an indictment to be changed on the day of trial violated due process and the plain language of the statute. *Briscoe v. State*, No.

¹ CR-Clerks Record; RR-Reporters Record.

06-17-00061-CR (Tex.App. – Texarkana, delivered February 9, 2018)(unpublished).

The Court of Criminal Appeals in Texas denied discretionary review.

REASONS FOR GRANTING THE WRIT

Failure to follow the Plain Language set out in the Texas Code of Criminal Procedure.

This Court should grant certiorari in order to ensure due process. Amendments to a charging instrument are governed by Tex. Crim. Proc. Code Ann. § 28.10 (West).

- (a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time **before the date the trial on the merits commences**. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.
- (b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.
- (c) An indictment or information may not be amended over the defendant's objection

as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

Tex. Crim. Proc. Code Ann. § 28.10 (West)

“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

With any question of statutory interpretation, the analysis begins with the plain language of the statute. When the statutory language is plain, it must be enforced according to its terms. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009). “In analyzing a statute, we begin by examining the text, not by psychoanalyzing those who enacted it.” *Carter v. United States*, 530 U.S. 255, 271 (2000). Thus, applying the Supreme Court’s holdings we must interpret this statute as it is plainly written.

Here, the application of the statute should have been clear and easy to apply because the change was made after the trial on the merits had already begun. However, the trial court failed to do so, and the court of appeals failed to even address the issue.

The objection with the trial court and portion of the brief addressing the issue are recited for the Court below.

Trial court:

Mr. Brooks: Judge, we believe that if they amend or change their indictment, we are entitled to that. We believe we should have at least a ten-day continuance.

The Court: Motion for continuance is denied. (RR V.4, pg. 9-10).

To the court of appeals:

“The State requested that the VIN numbers initially contained in the indictment be struck *after a jury had already been selected*. The trial court allowed them to do so *without granting the Appellant’s continuance request* and submitted a jury charge that did NOT contain the VIN numbers from the original indictment.” (Appellant’s brief at 9-10) (emphasis added).

“Allowing the State to remove the VIN numbers *would deny Appellant due process* as his defense strategy had to entirely change based on the removal of the specific VIN numbers, and *Appellant was forced to make this consequential change in defense strategy after a jury had been selected*.” (Appellant’s brief at 13-14) (emphasis added).

Here, because the amendment was not made “before the date the trial on merits” commenced, as

required by the Texas Code of Criminal Procedure, the court of appeals affirmation of the trial court does not follow the plain language of the statute. The court of appeals failed to even address the issue and petition for discretionary review was denied.

This Court is the Appellant's last hope to ensure he gets due process and a fair proceeding guaranteed by the United States Constitution.



CONCLUSION

For the reasons herein alleged Petitioner prays this Court grant certiorari.

Respectfully submitted,

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