No. _____

IN THE
Supreme Court of the United States

CAHLAN CLAY,
Petitioner,
v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a court may dictate the manner by which a defendant presents his case to the jury by forcing defense counsel to rely exclusively on the cross-examination of government witnesses to establish the defense theory.

TABLE OF CONTENTS

INDEX TO APPENDIX

Table of Authorities

Cases

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cahlan Clay respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 5, 2018.

OPINION BELOW

The Eighth Circuit's judgment affirming Mr. Clay's conviction and sentence is reported at *United States v. Clay*, 883 F.3d 1056 (8th Cir. 2018), and is included in Appendix A. A copy of the order denying rehearing is included in Appendix B.

JURISDICTION

On March 5, 2018, the Court of Appeals affirmed Mr. Clay's appeal from his conviction and sentence, and subsequently denied the timely petition for rehearing on April 25, 2018. In accordance with Supreme Court Rule 13.3, this Petition for Writ of Certiorari is filed within ninety days of the date on which the Court of Appeals entered its final order. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254, 28 U.S.C. § 2253 and Sup. Ct. R. 13.3 and 13.5.

CONSTITUTIONAL PROVISION INVOKED

Whether rooted in the Fifth or Sixth Amendments, the United States Constitution guarantees defendants a meaningful opportunity to present a complete defense.

STATEMENT OF THE CASE

District Court Proceedings

The facts are undisputed. At his first federal trial, Detective Anderson testified that Mr. Clay fired four shots from a firearm, and Officer Thomas testified that "the shooter" wore a white t-shirt. *United States v. Clay*, 883 F.3d 1056, 1059 (8th Cir. 2018). Both Anderson and Thomas observed closing argument of that trial where defense counsel argued that such testimony was contradicted by the physical evidence: the recovery of only three (not four) shell casings and Mr. Clay wearing a black (not white) shirt. *Id*. The jury was unable to reach a unanimous verdict based on the testimony of Anderson and Thomas.

At his second trial, Anderson claimed Mr. Clay only fired three shots, and Thomas stated the shooter was wearing a white t-shirt beneath a black shirt. *Id*. Counsel attempted to adduce testimony from defense witnesses that Anderson and Thomas observed the prior trial's closing argument, which highlighted how the physical evidence contradicted their testimony and thereby enabled them to change their testimony from the first trial to match the physical evidence. *Id*. The court excluded such evidence as "more confusing than helpful" and because each witness had given "statements on the record multiple times." *Id*. The jury convicted Mr. Clay.

Appeal to the Eighth Circuit

On appeal before the Eighth Circuit, the court affirmed the exclusion of such evidence on two bases: 1) the witnesses had previously testified, and 2) defense counsel could have elicited the fabrication evidence during the cross-examination of

each witness. The court held as follows:

> . . . we note the considerable amount of committed testimony in this case that could be, and was, used to impeach the officers and call into question the reliability of their testimony. The district court also found that defense counsel could have used cross-examination to show that the officers viewed the physical evidence subsequent to the night of the incident and had a chance to tailor their testimony, without mentioning the prior trial. Although the defense was forbidden to inquire whether the officers were present for closing arguments at a prior trial, nothing prevented defense counsel from asking other questions to establish that the officers learned after their prior testimony about evidence that contradicted their original accounts. Clay thus had an adequate opportunity to lay the foundation for an argument that the officers tailored their testimony to match other evidence. In light of the above, the district court's conclusion that the probative value of the testimony was outweighed by the risk of confusion was not arbitrary, unreasonable, or disproportionate.
> *Id*. at 1060-61.

REASONS FOR GRANTING THE WRIT

The judgment of the Eighth Circuit Court of Appeals decided an important question of federal law in a way that significantly conflicts with this Court's holdings in *Davis v. Alaska*, 415 U.S. 308 (1972), and *Old Chief v. United States*, 519 U.S. 172 (1997). Specifically, the court held that a district court may confine a defendant's right to present evidence of a witness's dishonesty to cross-examination of that particular dishonest witness, and may prohibit a defendant from producing that relevant evidence through other witnesses that do not share an animus toward the defendant.

Essentially, the Court of Appeals opinion creates an evidentiary rule that allows a district court to unconstitutionally dictate the manner by which a defendant is allowed to present impeachment evidence and his theory of defense to the jury. As applied in this case, the court gave Mr. Clay the opportunity to elicit

such impeachment evidence through the police officers, but prohibited the introduction of that evidence through other competent witnesses.

The exclusion of such evidence prohibited Mr. Clay from developing "a record from which to argue" how the fabrication occurred. *See Davis*, 415 U.S. at 318. Absent that evidence, "the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility" of two law enforcement officers. *See id*. In fact, the government urged to jury to do just that by depicting the inconsistencies of Anderson and Thomas as just innocent examples of how human beings remember things differently over time.

The judgment also ignores the obvious – Mr. Clay was convicted only after Anderson and Thomas tailored their testimony to match the physical evidence and to refute the defense theory. Prior to the "new and improved" testimony of Anderson and Thomas provided at the second federal trial, two separate juries from state and federal proceedings had failed to convict Mr. Clay. As the "sole judge of the credibility of a witness," the jury was "entitled to have the benefit of the defense theory" so it "could make an informed judgment as to the weight to place" on such testimony. *Davis*, 415 U.S. at 317. That Mr. Clay was afforded the ability to cross-examine each witness regarding ancillary matters was no substitute for the fabrication evidence excluded by the court. Mr. Clay "should have been permitted to expose to the jury the facts from which jurors, as sole triers of fact and credibility, could appropriately draw inferences relating to the reliability" of each witness. *See id*.

At a minimum, a criminal defendant has "the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). This would logically include impeachment evidence of a witness's veracity. Otherwise, the only means of presenting such evidence convincingly to a jury would be to have the witness being cross-examined to capitulate. That is unlikely in this scenario given that it is the witness' own lack of veracity that Mr. Clay needed to expose to the trier of fact.

The government secured Mr. Clay's conviction only after Anderson and Thomas observed closing argument, and then changed their testimony to conform to the physical evidence and to refute the defense theory. Far from being "marginally relevant" or repetitive, such evidence demonstrated the manner and means of the fabrication of both witnesses, and was a crucial component of Mr. Clay's theory of defense. As this Court has held, "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the officers'] testimony which provided a crucial link in the proof." *Davis*, 415 U.S. at 317.

The judgment also violates the well-established rule that "a party is entitled to prove its case by evidence of its own choice." *Old Chief v. United States*, 519 U.S. 172, 187 (1997). Just as a criminal defendant "may not stipulate or admit his way out of the full evidentiary force" of the Government's case, a court cannot dictate that Mr. Clay rely exclusively on the cross-examination of an adverse witness to demonstrate the means by which that witness fabricated testimony. *See id.* at 186-

87 (citing *Parr v. United States*, 255 F.2d 86 (5th Cir. 1958)). Indeed, the notion that Mr. Clay's due process right to expose the jury to evidence of the dishonesty of a witness was satisfied by the opportunity to question that dishonest witness borders on the absurd.

The rule of *Old Chief* is not limited exclusively to benefit the prosecution, but apply just as equally to a criminal defendant. Mr. Clay was entitled to establish his defense by evidence of his own choice, and the court had no basis to dictate the elicitation of that evidence from the very witnesses that fabricated their testimony.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Mr. Clay respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

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APPENDIX

Appendix A - Judgment of the Eighth Circuit Court of Appeals

Appendix B – Order denying Rehearing.