

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PETER CAIN BRUTON,
Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

*On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit*

PETITION FOR A WRIT OF CERTIORARI

PETER CAIN BRUTON
PETITIONER
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QUESTION PRESENTED

Before the trial, Petitioner's trial counsel filed a motion in limine, which was granted by the trial court. By adoption, the court ordered that, if the prosecution intended to bring up any extraneous offenses during the guilt-innocence phase of the trial, the prosecution must first approach the bench for a ruling on the introduction of the evidence in question. During closing argument, the prosecution made an improper statement, which violated the motion in limine, concerning extraneous offenses. Petitioner's trial counsel moved for a mistrial, but failed to argue that the improper statement violated the motion in limine.

1. Is an attorney ineffective when he fails to support a motion for mistrial with a violation of Defense's Motion in Limine?

LIST OF PARTIES

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TABLE OF CONTENTS

	Page
Question Presented.....	i
List of Parties.....	ii
Table of Contents.....	iv
Table of Authorities Cited.....	v
Opinions Below.....	1
Jurisdiction.....	2
Constitutional and Statutory Provisions Involved.....	2
Standard of Review: Denial of Certificate of Appealability.....	3
Statement of the Case.....	3
Reasons for Granting the Petition.....	4
Conclusion.....	7

INDEX TO APPENDICES

Appendix A

United States Court of Appeals Reconsideration Denial

Appendix B

United States Court of Appeals COA Denial

Appendix C

United States District Court COA Denial

Appendix D

United States District Court Petition Dismissal

Appendix E

Report and Recommendation of Magistrate Judge

Appendix F

Court of Criminal Appeals of Texas Habeas Corpus Denial

TABLE OF AUTHORITIES CITED

CASES	Page
<i>Anders v. California</i> , 386 U.S. 738, 743 (1967).....	5
<i>Baldasar v. Illinois</i> , 446 U.S. 222, 225 (1980).....	2
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 343 (1980).....	5
<i>McMann v. Richardson</i> , 397 U.S. 759, 771 (1970).....	5
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	3
<i>Padilla v. Kentucky</i> , 130 S.Ct. 1473, 1480-81 (2010).....	5
<i>Slack v. McDaniel</i> , 529 U.S. 473, 484 (2000).....	3
<i>Strickland v. Washington</i> , 446 U.S. 668 (1984).....	4,5,6
<i>U.S. v. Morrison</i> , 449 U.S. 361, 364 (1981).....	5
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 5 (2003).....	5
STATUTES AND RULES	
28 U.S.C. § 1254(1).....	2
28 U.S.C. § 2254.....	3
OTHER	
U.S. CONST. amend. VI.....	2,4
U.S. CONST. amend. XIV.....	4

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner Peter Cain Bruton prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, denying Bruton's Application for Certificate of Appealability.

OPINIONS BELOW

The following opinions and orders below are pertinent here, all of which are unpublished:

1. The order of the United States Court of Appeals for the Fifth Circuit, denying Bruton's motion for reconsideration of a certificate of appealability (March 26, 2018), appears at Appendix A to the petition.

2. The order of the United States Court of Appeals for the Fifth Circuit, denying Bruton's motion for certificate of appealability (February 28, 2018), appears at Appendix B to the petition.

3. The postjudgment order of the United States District Court for the Eastern District of Texas, Sherman Division, denying Bruton's motion for a certificate of appealability (July 27, 2017), appears at Appendix C to the petition.

4. The order of the United States District Court for the Eastern District of Texas, Sherman Division, dismissing Bruton's

Petition for a Writ of Habeas Corpus (April 13, 2017), appears at Appendix D to the petition.

5. The Report and Recommendation of the United States Magistrate Judge of the United States District Court for the Eastern District of Texas, Sherman Division, recommending Bruton's Petition for a Writ of Habeas Corpus should be denied and the case dismissed (February 8, 2017), appears at Appendix E to the petition.

6. The order of the Court of Criminal Appeals of Texas, denying Bruton's Application for a Writ of Habeas Corpus without a written order (May 13, 2015), appears at Appendix F to the petition.

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided Bruton's case was February 28, 2018. An order denying Bruton's motion for reconsideration was entered on March 26, 2018.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The Sixth Amendment right to counsel applies to all federal and state criminal prosecutions in which the defendant is accused of a felony. *See Baldasar v. Illinois*, 446 U.S. 222, 225 (1980).

The right of a state prisoner to seek federal habeas corpus relief is guaranteed by 28 U.S.C. § 2254. The standard for relief under the Antiterrorism and Effective Death Penalty Act of 1996 is set forth in 28 U.S.C. § 2254(d)(1).

STANDARD OF REVIEW:
DENIAL OF CERTIFICATE OF APPEALABILITY

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court clarified the standards for issuance of a Certificate of Appealability:

...A prisoner seeking a COA need only demonstrate a "substantial showing of the denial of a constitutional right." A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further... We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id., 537 U.S. at 327, citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

STATEMENT OF THE CASE

Respondent, Lorie Davis, Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, has unlawful custody of Bruton pursuant to the judgments and sentences from the 211th Judicial District Court of Denton County, Texas, in cause number F-2007-0697-C. Bruton was charged with two counts of aggravated sexual assault and one count of indecency with a child. Bruton pled not guilty and elected the jury decide guilt-innocence and punishment. The jury found Bruton guilty on all charges and assessed punishment at life (X2) and 20 years' con-

finement in the CID-TDCJ.

Bruton presented his ineffective assistance of trial counsel claim to the Court of Criminal Appeals of Texas in an application for a writ of habeas corpus, which was denied without written order.

Bruton further presented said claim to the United States District Court for the Eastern District of Texas, Sherman Division. The court denied relief and a certificate of appealability.

Bruton sought a certificate of appealability from the United States Court of Appeals for the Fifth Circuit. The court denied the motion. Bruton asked for reconsideration, which the court also denied.

Bruton timely filed this Petition for a Writ of Certiorari and these proceedings followed.

REASONS FOR GRANTING THE PETITION

Bruton's trial counsel failed to request a mistrial on the basis that the prosecution's improper jury argument violated Defendant's Motion in Limine. This violated Bruton's right to counsel, as guaranteed by Amendments VI and XIV to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A pretrial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent predispositional effect on jury. The purpose of such a motion is to avoid injection into the trial of matters which are irrelevant, inadmissible and prejudicial and granting of a motion in limine is not a ruling on the evidence and, where properly

drawn, the granting of the motion cannot be error. *See Black's Law Dictionary*, Motion in limine 9th Ed. (2015).

The right to the assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *See Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (*per curiam*). This right to the assistance of counsel has long been understood to include a "right to the effective assistance of counsel." *See McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *see also Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-81 (2010) (6th Amendment right to counsel is right to effective counsel). The integrity of our criminal justice system and the fairness of the adversary criminal process is assured only if an accused is represented by an effective attorney. *See United States v. Morrison*, 449 U.S. 361, 364 (1981). Absent the effective assistance of counsel "a serious risk of injustice infects the trial itself." *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980). Thus, a defendant is constitutionally entitled to have effective counsel acting in the role of an advocate. *See Anders v. California*, 386 U.S. 738, 743 (1967).

This Court in *Strickland v. Washington*, 466 U.S. 668 (1984) established the federal standard for determining whether an attorney rendered reasonably effective assistance of counsel. Pursuant to that test:

...the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

Before trial, Bruton's trial counsel filed a motion in limine, which the trial court granted. The court ordered that, if the prosecution intended to bring up any extraneous offenses during the guilt-innocence phase of the trial, the prosecution must first approach the bench for a ruling on the introduction of the evidence in question. During the closing argument of the guilt-innocence phase, the prosecution made the following improper statement:

THE STATE: And if he's not held accountable, it's going to continue. He's going to feel bulletproof. He's going to know no one is going to believe *these kids*. I can do what I want. *I can continue this, and I can continue to get away with it.* And this is not a *habit* that he can turn off. The way his mind is wired is different than yours...

It just so happened that Bruton had a prior conviction for allegedly sexually assaulting a young child, which the prosecution attempted to capitalize on.

Bruton's counsel objected on the basis that there was no evidence to support the argument, which the trial court sustained. Counsel then requested that the court instruct the jury to disregard, and the court did so. Finally, counsel moved for a mistrial without any further argument - that the improper comment violated Defense's Motion in Limine.

The United States District Court minimized the claim by considering the "entire closing argument." The court admitted that "[t]aken in isolation, the State's reference to 'these kids' during its closing argument could be argued to run afoul of the trial court's order requiring an admissibility ruling before introduc-

tion of instances of misconduct involving other victims."

How much of a reference to the highly prejudicial extraneous offenses is needed before a curative instruction is unable to prevent a predispositional effect on the jury? Bruton contends that the slightest reference is highly prejudicial and cannot be removed from the jurors' minds by the trial court's instruction to disregard the comments. In sum, the jury went into deliberations with the improper comment fresh on their minds - that Bruton may have abused other children.

Bruton's counsel's omission of an argument that the improper comments violated the Defense's Motion in Limine was deficient performance. Prejudice was predetermined by the inclusion of the matter within the motion, which the trial court supported.

CONCLUSION

Reasonable jurists, which includes the trial court judge and the justices of the Eighth Court of Appeals of Texas, could disagree with the district court's resolution of Bruton's constitutional claim and could easily conclude that the issue deserves encouragement to proceed further. The petition for a writ of certiorari should be granted.

Dated: May 1, 2018.

Respectfully submitted,

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