

**IN THE  
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2018

---

NO.

---

REGINALD LYNCH, Petitioner

v.


HILTON HALL, WARDEN Respondent

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE ELEVENTH CIRCUIT COURT OF APPEALS**

---

**PETITION FOR A WRIT OF CERTIORARI**

  
\_\_\_\_\_  
Rodney Zell  
Counsel for Petitioner  
State Bar No. 784650  
1111 Bull Street  
Savannah, Georgia 31401  
(404) 523-4611

**TABLE OF CONTENTS**

TABLE OF CONTENTS .....	i
QUESTION PRESENTED .....	ii
TABLE OF CITED AUTHORITIES .....	iii
PARTIES TO THE PROCEEDING .....	iv
<b>TABLE OF APPENDICES</b> .....	vi
OPINIONS BELOW .....	1
STATEMENT OF JURISDICTION .....	1
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED .....	2
STATEMENT OF THE CASE .....	3
STATEMENT OF THE FACTS .....	3
REASONS FOR GRANTING THE WRIT .....	4
CONCLUSION .....	9
CERTIFICATE OF SERVICE .....	10

**QUESTION PRESENTED**

DOES PETITIONER RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL  
WHEN TRIAL COUNSEL FAILS TO OBJECT TO TESTIMONY FROM A WITNESS  
REPEATING THE STATEMENTS OF A DYING VICTIM THAT CANNOT BE  
CONFRONTED?

## TABLE OF CITED AUTHORITIES

### CASES

<u>Benham v. State</u> , 277 Ga. 516, 518 (2004) .....	7
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) .....	4, 5, 6
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) .....	6,
<u>Lynch v. State</u> , 291 Ga. 555, 731 S.E.2d 672 (2012) .....	3, 4
<u>Glover v. State</u> , 285 Ga. 461 (2009) .....	5,
<u>Michigan v. Bryant</u> , --- U.S. ----, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011) .....	6,
<u>Ohio v. Roberts</u> , 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)..	4, 5
<u>Sanford v. State</u> , 287 Ga. 351 (2010) .....	5
<u>Walton v. State</u> , 278 Ga. 432 (2004) .....	5
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	7, 8

### STATUTORY PROVISIONS

<u>28 U.S.C. § 2254</u> .....	1, 2, 3
-------------------------------	---------

## **PARTIES TO THE PROCEEDING**

### **1.**

Honorable Judges:

John E. Morse, Jr. - trial judge

David L. Cavender - state habeas judge

G.R. Smith - United States Magistrate Judge

Leigh Martin May - United States District Court Judge

Stanley Marcus - Eleventh Circuit Court of Appeals

### **2.**

Wardens:

Stanley Williams - Respondent-Warden at time of state habeas filing

Hilton Hall - Respondent-Warden during federal litigation

### **3.**

Chatham County District Attorney's Office:

Larry Chisolm - District Attorney

Cecilia Harris - Assistant District Attorney

Reginald Martin - Assistant District Attorney

### **4.**

Office of the State of Georgia Attorney General:

Samuel S. Olens

Paula Smith

Katherine Ruth Thrower

Katherine Parvis

Jason Rea

5.

Petitioner's attorneys:

Christopher Middleton - trial counsel

Steven Sparger - appellate counsel

Rodney Zell - post-appellate counsel

6.

Victim M.G

## TABLE OF APPENDICES

### Appendix

“A”:	The Eleventh Circuit’s decision denying Petitioner’s 28 U.S.C. § 2254 petition .....	1
“B”:	The United States District Court for the Northern District of Georgia’s decision denying Petitioner’s 28 U.S.C. § 2254 petition .....	1
“C”:	The Magistrate’s Report and Recommendation.....	1
“D”:	Supreme Court of Georgia order denying Certificate of Probable Cause .....	1
“E”:	Tattnall County Superior Court Final Order denying state habeas .....	1
“F”	Georgia Supreme Court Direct Appeal decision .....	1

## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals entered on February 27, 2018.

## OPINIONS BELOW

The Eleventh Circuit's decision denying Petitioner's 28 U.S.C. § 2254 petition (Appendix "A") is not published. The United States District Court for the Northern District of Georgia's decision denying Petitioner's 28 U.S.C. § 2254 petition (Appendix "B") is not published. The Magistrate's Report and Recommendation is not published and included herein (Appendix "C"). The Georgia Supreme Court order denying a Certificate of Probable Cause is not published and included herein (Appendix "D"). The Tattnall County Superior Court Final Order denying Petitioner's state habeas corpus is not published and included herein (Appendix "E"). The Georgia Supreme Court's decision denying Petitioner's direct appeal is published and included herein (Appendix "F")

## STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. § 1254, this Court has jurisdiction to review the denial of Petitioner's 28 U.S.C. § 2254 judgment entered by the Georgia Supreme Court, the highest court in the State of Georgia.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. 28 U.S.C. section 1254 (1).

28 U.S.C.A. § 2254 (d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

On February 4, 2009, Petitioner was indicted, Ind. No. CR09-0204-MO, in the Chatham County Superior Court for murder (count 1), possession of a firearm during a felony (count 2), felony murder (count 3), aggravated assault (count 4), and possession of a firearm during a felony (count 5). His first trial from August 2, 2010–August 4, 2010 ended in a mistrial when the jury could not reach a unanimous verdict. He was re-tried from January 24, 2011 until January 26, 2011 at which time the jury convicted Petitioner of all counts. He

was sentenced to life in prison on the count 1 murder plus 5 years consecutive on the count 2 firearms charge, but all other counts merged.

Petitioner's direct appeal was affirmed on September 10, 2012. Lynch v. State, 291 Ga. 555, 731 S.E.2d 672 (2012). On May 20, 2013, Petitioner filed a habeas corpus in the Tattnall County Superior Court. His habeas was heard on March 26, 2014 and denied on March 16, 2015. On April 15, 2015, Petitioner filed a Certificate of Probable Cause to appeal the denial of his state habeas. The Certificate was denied on September 8, 2015.

On March 25, 2016, Petitioner filed an action under 28 U.S.C.A. § 2254. The federal petition was denied on July 28, 2017. He filed a Notice of Appeal on August 25, 2017, and on February 27, 2017, the 11th Circuit denied the Certificate of Appealability.

### **STATEMENT OF THE FACTS**

The Georgia Supreme Court found the following facts in Petitioner's direct appeal (Lynch at 555–556):

Viewed in the light most favorable to the verdict, the record shows that, on the night of October 22, 2008, police found Marcus Givens (the victim) in an alley suffering from multiple gunshot wounds. At the scene, Detective Dantzler asked the victim for his name. The victim responded, "Reggie Lynch." Detective Dantzler initially thought that "Reggie Lynch" was the victim's name, but the victim corrected, "Reggie Lynch, shot me." The victim repeated this statement at least three times. Star Corporal Angela Grant was with Detective Dantzler when she heard Givens say, "Reggie Lynch." At first, she could not determine whether it was "Reggie Leck," but she knew the last name given started with an "L." Both officers testified that the victim appeared to be in serious pain and his voice sounded gurgled. The victim later died from his injuries. The day

before the murder, on October 21, 2008, Lynch argued with the victim and called him derogatory names. Tiffany Davis, who is related to both Lynch and the victim, was present during this altercation, and she testified that, afterwards, Lynch told her that he was going to kill the victim. Leisha Givens testified that the victim, who was her cousin, told her at the scene that Reggie Lynch shot him. She also testified that she saw Lynch driving away from the scene in a white truck.

### **REASONS FOR GRANTING THE WRIT**

#### **DOES PETITIONER RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILS TO OBJECT TO TESTIMONY FROM A WITNESS REPEATING THE STATEMENTS OF A DYING VICTIM THAT CANNOT BE CONFRONTED?**

Appellate counsel did not raise on appeal that the trial court erred in allowing the victim's testimonial statement to police to be admitted. As the Georgia Supreme Court noted in its factual recitation (Lynch):

At the scene, Detective Dantzler asked the victim for his name. The victim responded, "Reggie Lynch." Detective Dantzler initially thought that "Reggie Lynch" was the victim's name, but the victim corrected, "Reggie Lynch, shot me." The victim repeated this statement at least three times. Star Corporal Angela Grant was with Detective Dantzler when she heard Givens say, "Reggie Lynch." At first, she could not determine whether it was "Reggie Leck," but she knew the last name given started with an "L."

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), abrogating Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), this Court held that confrontation is satisfied if the hearsay statement bears an adequate indicia of reliability. Reliability is satisfied if the

evidence falls under a firmly rooted hearsay exception or bears a particularized guarantee of trustworthiness. Roberts. Crawford held that the only indicia of reliability are confrontation.

Contrary to the state habeas court's ruling, the statements made by the decedent had nothing to do with an ongoing emergency. The habeas court cited Glover v. State, 285 Ga. 461 (2009) in support of its ruling. Petitioner agrees with the habeas court that there was an ongoing emergency in Glover. The hearsay admitted in Glover involved two 911 calls reporting the shooting, as the incident transpired. There was no ongoing emergency in Petitioner's case. The incident was over, and the police were tending to the victim. There was no testimony at the trial that the police began searching for a shooter or put out a call regarding a possible suspect.

While they may not have been the product of a formal interrogation, the statements by the decedent were made while two police officers were responding to the decedent's shooting. There was no evidence presented at trial that there were any steps taken that indicate the police believed there was an ongoing emergency.

The federal district court relied on Sanford v. State, 287 Ga. 351 (2010). Sanford based its holding on Walton v. State, 278 Ga. 432 (2004) that Crawford did not apply to dying declarations. This is an incorrect statement of Crawford's holding. The Walton court cited Crawford, 124 S.Ct. at 1367 for this

proposition. However, this cite only holds that a deceased witness' testimony is admissible where there was a prior opportunity to cross-examine the witness.

After Crawford, this Court decided Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) and Michigan v. Bryant, --- U.S. ----, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). In Davis, this Court held that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Id. at 822, 126 S.Ct. 2266.

In Bryant, over the strong dissent of Justice Scalia, the Supreme Court further loosened Crawford by adopting a "primary purpose" test and additional factors to determine whether the statement involved an ongoing emergency, the nature of the emergency, the formality of the exchange, and the probable intent of the parties judged by an objective observer.

The federal court also ruled that Bryant is consistent with the state habeas court's decision. As discussed, Bryant deals with an ongoing emergency. On the contrary, there was never any evidence presented that there was an ongoing emergency in Petitioner's trial, and any suggestion that there was would be an unreasonable determination of the facts.

Petitioner's trial counsel could definitely not confront and cross-examine the decedent. The decedent's statements to the police were therefore testimonial and should not have been admitted. Certainly, there can be no strategy for failing to object to testimony that directly inculpatates a defendant. See generally Benham v. State, 277 Ga. 516, 518 (2004), in which the Georgia Supreme Court held that "invoking the words 'tactics' and 'strategy' does not automatically immunize trial counsel against a claim that a tactical decision or strategic maneuver was an unreasonable one no competent attorney would have made under the same circumstances." Therefore, the failure by trial counsel to object to these statements was deficient, and appellate counsel is likewise deficient for not presenting this issue on appeal.

Next, Petitioner turns to Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and second prong regarding prejudice. This is a fairly simple under the facts of this case, as there were two trials. Appellate counsel testified that he was familiar with Petitioner's first trial because he actually consulted with the trial counsel (H. 10). The jury could not reach a verdict in the first trial, which shows that the evidence was certainly not overwhelming. Appellate counsel testified that Givens changed her testimony in the second trial and stated she heard the dying declaration (H. 11-12). In fact, during the second trial, Givens admitted that in the first trial, she previously testified that not only that she did not see Petitioner, but that she testified that she actually did not see him at the scene (H. 201-204). Givens

inconsistent and possibly perjured testimony from the first to the second trial cannot be considered sufficient to overcome the impermissible testimony of the officers testimony regarding the dying declaration.

Especially under the circumstances of the statements at issue here, the dying declarations supposedly identifying Petitioner were especially crucial. There was great dispute regarding the actual name given by the decedent. There was confusion among the witnesses regarding the last name given by the decedent. The inability to confront the decedent with these inconsistencies severely prejudiced his defense. Without the dying declarations, the State is left relying on the testimony of Givens. Her change in testimony from the first to the second trial, and the hung jury from the first trial clearly show that the admission of the inadmissible dying declarations demonstrates the probability of a different result under Strickland. Appellate counsel's failure to raise this issue on appeal is ineffective assistance of counsel requiring the grant of Petitioner's habeas corpus.

Finding counsel's decision was strategic is an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Further, the state court's decision that Petitioner was not prejudiced and that trial counsel's failure to object was strategic was 'contrary to, or involved an unreasonable application of Strickland.

**CONCLUSION**

For the foregoing reasons, the petition for writ of certiorari should be granted for the purpose of clarifying under what circumstance a dying declaration is admissible against a defendant who cannot cross-examine the declarant.

Respectfully Submitted,

A handwritten signature in blue ink, reading "Rodney Zell", is written over a horizontal line.

Rodney Zell  
Counsel for Petitioner  
State Bar No. 784650  
Zell & Zell, P.C.  
1111 Bull Street  
Savannah, Georgia 31401  
(404) 523-4611

**CERTIFICATE OF SERVICE**

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari to the Respondent's attorney, the Honorable Paula Smith, Senior Assistant Attorney General, 40 Capitol Square, Atlanta, GA 30334-1300.

This 28th day of September, 2018.

  
\_\_\_\_\_  
Rodney Zell