

No. 18-6845

IN THE
Supreme Court of the United States

EDWARD MITCHELL,

Petitioner,

v.

SUPERINTENDENT DALLAS SCI,
ATTORNEY GENERAL OF PENNSYLVANIA,
DISTRICT ATTORNEY OF DAUPHIN COUNTY,

Respondents

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI*

FRANCIS T. CHARDO
District Attorney of Dauphin County
Counsel of Record
RYAN H. LYSAGHT
Deputy District Attorney
DAUPHIN COUNTY COURT HOUSE
101 Market Street
Harrisburg, Pennsylvania 17101
(717) 780-6767
fchardo@dauphinc.org

Attorneys for Petitioner

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Third Circuit Court of Appeals properly affirmed the denial of Mitchell's habeas corpus petition where Mitchell is not in custody in violation of the Constitution, laws, or treaties of the United States?

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COUNTER-STATEMENT OF THE CASE

On August 10, 2001, a jury convicted Mitchell and his co-defendants, Kariem Eley and Lester Eiland, of second-degree murder, robbery, and conspiracy to commit robbery in connection with the July 2000 homicide and robbery of Angel DeJesus in Harrisburg, Pennsylvania. *Commonwealth v. Mitchell*, No. 782-2014, 2015 WL 7726738, at 1-2 (Pa. Super. 2015) (unpublished memorandum). Mitchell is serving a term of life imprisonment for second-degree murder at SCI Dallas, Pennsylvania.

The evidence presented at trial, construed in favor of the Commonwealth as the verdict winner, established the following facts.

In July 2000, Vivian Martinez was engaged to Angel DeJesus, a taxicab driver. (Doc. 28, Exhibit B, Notes of Testimony of Jury Trial dated August 6-10, 2001,¹ at 140). The couple spent the Fourth of July together at the Kipona festival in Harrisburg, Pennsylvania, where DeJesus spent about half of the over \$400 in his possession. (N.T. 141). They arrived home and went to bed around 2:30 or 2:45 a.m. on July 5, 2000. (N.T. 141-42). Martinez did not wake up when DeJesus left. (N.T. 142).

On July 5, 2000, just before 4:30 a.m., Jennifer McDonald left her house to walk to an all-night store at Evergreen and Derry Streets in the Allison Hill section of Harrisburg. (N.T. 282). After leaving the store, McDonald walked down Hummel

¹ Hereinafter cited as “N.T.”

Street toward Kittatinny Street. *Id.* She encountered the three defendants together near a stop sign at Kittatinny and Hummel. (N.T. 282-84).

From the intersection, McDonald turned and started to walk up Kittatinny Street towards 13th Street. (N.T. 285). She stopped and talked to an acquaintance that lived on that block of Kittatinny Street for two or three minutes, and then continued toward her home. (N.T. 286). While she was talking to the acquaintance on Kittatinny Street, a taxicab passed her going in the opposite direction. (N.T. 287, 302). McDonald crossed 13th Street and opened a gate at the Spanish Speaking Center² on Kittatinny Street. *Id.* She heard a slam and looked back up Kittatinny Street toward the intersection of Hummel Street. (N.T. 286). She thought that it might be a piece of metal that covered road repairs that made such a noise when cars drove over it. (N.T. 286, 306). When McDonald looked back up the street, she saw the cab at the stop sign with the brake lights on. (N.T. 286). There was no one around the cab. (N.T. 287). She walked home and heard police sirens about five or ten minutes later. *Id.*

Guadalupe Fonseca lived at 1238 Kittatinny Street. (N.T. 208). At about 5:00 a.m. on the morning in question, he was standing outside his door, waiting for his ride to work. (N.T. 209-10). From where he was standing, Fonseca could see three African-American men standing by a taxicab. (N.T. 208). One of the men went into the taxicab, and Fonseca heard two gunshots. *Id.* When the man got out

² The Spanish Speaking Center is a school. (N.T. 333).

of the taxicab, Fonseca heard a third shot. (N.T. 209). The three men left and went up Hummel Street. *Id.*

On the night leading into incident in question, Rufus Hudson and Amanda Weikel had been together in Hudson's car, riding around the area of Allison Hill. (N.T. 332).³ At some point, Hudson saw Angel DeJesus at a store at 13th and Kittatinny Streets. *Id.* Weikel got out of the car and briefly spoke with DeJesus, who had pulled over in his taxicab. (N.T. 332-33). Hudson was across the street from the store, in front of the Spanish Speaking Center. (N.T. 333). Hudson thought that it was about 4:00 a.m. when they saw DeJesus at the store. (N.T. 334).

While driving around, Hudson and Weikel went by the intersection at Kittatinny and Hummel Streets. (N.T. 333). There, Hudson saw the defendants. (N.T. 334-35). He first saw them at about 3:00 a.m. standing near a big tree at the intersection. (N.T. 336). Hudson remembered seeing DeJesus' taxicab three times. (N.T. 365). About 25 minutes after Hudson saw the cab at the store, he saw the taxicab parked on Hummel Street and the defendants standing at the intersection of Kittatinny and Hummel Streets. (N.T. 373). Hudson drove around again and came back to the intersection when he saw the defendants running. (N.T. 374). The defendants were running fast towards an apartment building. (N.T. 337-38).

³ McDonald saw Weikel with Hudson just before midnight, July 4-5, 2000, when she arrived home earlier in the night. (N.T. 313-14).

The taxicab still was parked on the corner of Kittatinny and Hummel Streets. (N.T. 338).

At 5:21 a.m. on July 5, 2000, Officer William Vernouski of the Harrisburg Bureau of Police received a call from the Dispatch Center about a man with a gun near a taxicab at Kittatinny and Crescent Streets. (N.T. 59-60). Officer Vernouski arrived at the scene about a minute later but saw no taxicab or any persons at the intersection of Kittatinny and Crescent Streets. (N.T. 60-61). He proceeded to the intersection of Kittatinny and Hummel Streets where an unidentified, white male told him that there was someone inside the taxicab. (N.T. 61). Officer Vernouski proceeded to the taxicab and found someone inside with what appeared to be a head injury. *Id.*

The taxicab was resting against a red car that was in front of it. (N.T. 62). The man in the car was sitting in the driver's seat, slumped over with his head toward the middle of the front passenger seat. *Id.* Officer Vernouski could hear groaning sounds. *Id.* He called for an ambulance. *Id.* Emergency medical personnel went into the taxicab from the passenger side because the driver's side door was locked and removed the driver through the driver's side door. (N.T. 63). Officer Vernouski noticed two spent shell casings on the driver's side floor of the taxicab. *Id.*

Officer James Hawkins also responded to the call and saw Officer Vernouski walking towards the taxicab when he arrived. (N.T. 89). Once the driver was removed from the taxicab, Officer Hawkins accompanied the emergency medical

personnel to Hershey Medical Center. *Id.* Officer Hawkins gave evidence (clothing, shoes, and a watch) that was gathered to Corporal Cindy Baldwin of the Forensics Unit. (N.T. 91-92). The victim was in an operating room for about ten or fifteen minutes, taken for a CAT scan, and then taken back to the operating room. (N.T. 91).

When Corporal Baldwin arrived at the scene, she collected some evidence and photographed the taxicab. (N.T. 178). She then called a towing service which removed the taxicab to be secured in a garage. *Id.* Law enforcement did not find money, a wallet, or a purse in the taxicab where DeJesus was known to keep it. (N.T. 179-80). Corporal Baldwin went to the Hershey Medical Center and took custody of the evidence that Officer Hawkins gathered. (N.T. 178). There was no money among that evidence. (N.T. 180).

Ultimately, Angel DeJesus died on July 6, 2000. (N.T. 142-43). The cause of death was multiple gunshot wounds to the head. (N.T. 108).

Before the autopsy, Corporal Baldwin found two casings inside the taxicab on the driver's side floor. (N.T. 185). However, when the autopsy revealed that there were three wounds, she and Investigator Leroy Lucas reexamined the inside of the taxicab. (N.T. 186). They found a third casing inside an air conditioning or heating vent. (N.T. 189).

Doctor Wayne K. Ross, an expert in forensic pathology, performed an autopsy of the body of Angel DeJesus on July 7, 2000. (N.T. 99-100). He found three gunshot wounds in the head and neck area. (N.T. 101). One was to the side of the

right eye, in the orbit. (N.T. 102). That wound had stippling, indicating that the gun was no further than “a foot or so” away when it was fired. *Id.* The bullet proceeded back to front into the victim’s nose. *Id.* Dr. Ross removed the bullet from the nose. (N.T. 105).

A second shot⁴ passed through the skin and soft tissue of the neck, again traveling right to left and back to front. *Id.* There was no stippling of the second wound. (N.T. 105-06).

The third wound was on the left top of the victim’s head, and the bullet traveled back to front and left to right. (N.T. 106). However, the bullet traveled downward at an acute angle. *Id.* The bullet lodged in the base of the skull after passing through the brain. (N.T. 106-07). There was no stippling of the third wound. (N.T. 107).

Finally, Matthew LeVan testified about statements he heard on multiple occasions while incarcerated at the Dauphin County Prison. LeVan testified that he recalled an incident during which Eiland was jumping up and down and shouting, “That was me, that was me,” when a story about the murder appeared on the evening news. (N.T. 420). LeVan also testified to admissions made by Eiland while Eiland and LeVan played cards in his jail cell. (N.T. 422-24). These admissions

⁴ Although the reference is to the “second shot” or “second wound,” the reference is for numerical purposes only. Dr. Ross indicated that he could not put the shots in chronological order. (N.T. 109). The same applies to the “third wound” described below.

included Eiland telling LeVan that he shot the victim and hid in a nearby house afterwards. *Id.* Additionally, LeVan testified that, while waiting in the “pill line,” he overheard a conversation between two inmates discussing the shooting. (N.T. 450-57). However, LeVan was unable to identify either of the speakers. *Id.* Despite being unable to identify either of the speakers, LeVan, in a statement to the police taken in October 2000, gave a description of one of the speakers; a description which fit Mitchell.⁵ *Id.*

Mitchell filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on December 28, 2009 (Doc. No. 1), and an amended petition on October 19, 2010 (Doc. No. 19). In his amended § 2254 petition, Mitchell claimed, *inter alia*, that the prosecution “improperly introduced a prejudicial statement of a non-testifying co-defendant” in violation of the Sixth Amendment’s Confrontation Clause. (Doc. No. 19 at 8-10). On December 12, 2016, Chief Magistrate Judge Schwab issued a Report and Recommendation recommending that the amended petition be denied. (Doc. No. 94). Mitchell filed objections on January 10, 2017. (Doc. No. 99). Mitchell filed a brief in support of his objections on January 10, 2017 (Doc. No. 100), and a motion to supplement the record on January 31, 2017. (Doc. No. 101). The United States District Court for the Middle District of Pennsylvania

⁵ Since Mitchell’s appearance had changed somewhat by the time of trial, the Commonwealth introduced a photograph for the purpose of showing more closely how Mitchell looked at the time of the “pill line” conversation.

adopted the Report and Recommendation in its entirety on August 29, 2017.

Mitchell appealed to the Third Circuit Court of Appeals, which affirmed the denial of Mitchell's habeas petition in a published opinion on August 23, 2018. ***Mitchell v. Superintendent Dallas SCI***, 902 F.3c 156 (C.A.3 (Pa.), 2018). Mitchell filed a petition for writ of *certiorari* on November 21, 2018. On December 10, 2018, Respondents waived their right to file a response. On December 18, 2018, Mitchell filed a supplemental brief in support of his petition. On January 2, 2019, this Honorable Court requested that Respondents file a response to Mitchell's petition. Respondents therefore file this response to Mitchell's petition for writ of *habeas corpus*.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD NOT GRANT REVIEW WHERE MITCHELL IS NOT IN CUSTODY IN VIOLATION OF THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES.

As the Third Circuit Court of Appeals noted in its August 23, 2018, precedential opinion affirming the denial of Mitchell's petition for writ of habeas corpus, Mitchell argues that the District Court erred by applying *Crawford v. Washington*, 541 U.S. 36 (2004) because the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires assessment of whether a state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), and this Honorable Court decided *Crawford* on March 8, 2004, after Mitchell's trial and after the Pennsylvania Superior Court affirmed his conviction on direct appeal on September 22, 2003, in the last state court proceeding dealing with the Sixth Amendment issue. Mitchell argues that the *Crawford* principles were not "clearly established" at the time the state courts were considering the Sixth Amendment issue.

In *Crawford*, this Honorable Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). "[T]he Confrontation Clause . . . applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Id.*, 541 U.S., at 51. Only "testimonial statements" cause a declarant to be a witness. *Davis v. Washington*, 547 U.S. 813, 814 (2006).

The Court is unaware of any early American case invoking the Confrontation Clause or the common-law right to confrontation that did not involve testimony as thus defined. Well into the 20th century, this Court's jurisprudence was carefully applied only in the testimonial context, and its later cases never in practice dispensed with the Confrontation Clause requirements of unavailability and prior cross-examination in cases involving testimonial hearsay.

Id., 547 U.S., at 814.

Statements made unwittingly to a Government informant are not testimonial, *Davis v. Washington*, 547 U.S. 813, 825 (2006) (citing *Bourjaily v. United States*, 483 U.S. 171, 181-84 (1987)), and statements from one prisoner to another are not testimonial. *Davis*, 547 U.S., at 825 (citing *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970) (plurality opinion)).

Based on the aforementioned, clearly established law of this Honorable Court at the time of Mitchell's trial only invoked the Confrontation Clause in the context of testimonial statements. Mitchell does not challenge the characterization of Eiland's statements to LeVan as "non-testimonial" as defined by *Crawford*. Here, Eiland made the challenged, out-of-court statement to LeVan, a fellow inmate, while they were playing cards in the jail cell. LeVan also testified that while LeVan and Eiland were incarcerated at Dauphin County Prison, LeVan witnessed Eiland jumping up and down in reaction to a local six o'clock newscast, admitting that he was involved in the cabdriver being shot. (Doc. No. 28-2 at 57). LeVan testified that he struck up a conversation about playing cards "on the second tier" while the two of them "were at the phones." (Doc. No. 28-2 at 58; Tr. At 422: 2-11). According to LeVan's testimony at trial, while Eiland and LeVan were playing cards in the jail

cell and talking about their cases, Eiland discussed the “cabbie situation” and made the challenged, out-of-court statement to LeVan. (Id. at 58, 60, 63; Tr. At 422:25; 423: 1-6, 22-25; 430: 4-9; 422: 20-24). Even accepting Mitchell’s characterization of LeVan as “a jailhouse informant” (Doc. No. 20 at 18), Eiland’s casual statements to LeVan while playing cards do not qualify as testimonial for purposes of the Confrontation Clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should not be granted.

Respectfully submitted,

Francis T. Chardo

District Attorney

Counsel of Record

Ryan H. Lysaght

Deputy District Attorney

Dauphin County Courthouse

101 Market Street

Harrisburg, Pennsylvania 17101

(717) 780-6767

fchardo@dauphinc.org

Attorneys for Respondents