

No. 18-7312

IN THE
SUPREME COURT OF THE UNITED STATES

DANNY D. TRAN --- PETITIONER

ORIGINAL

Supreme Court, U.S.
FILED

NOV 28 2018

OFFICE OF THE CLERK

VS.

MARTY SAUERS, WARDEN --- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR WRIT OF CERTIORARI

Danny D. Tran #0098510 *pro se.*
Ellsworth Correctional Facility
1607 State St.
PO Box 107
Ellsworth, Kansas 67439-0107

QUESTIONS PRESENTED

- I. MAY THIS COURT'S DECISION IN *STRICKLAND V. WASHINGTON* AS TO WHAT CONSTITUTES THE INEFFECTIVE ASSISTANCE OF COUNSEL?
- II. MAY THIS COURT'S DECISION IN *IN RE GAULT* AS TO WHAT CONSTITUTES A COERCED CONFESSION BY A JUVENILE?
- III. MAY THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR* AS TO WHAT CONSTITUTES A POSTCARD DENIAL?

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Appendix A Order of the Kansas Supreme Court

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the thermometer is to be used. The following table gives the results of a series of experiments made to determine the effect of the temperature of the water on the temperature of the bulb of a thermometer. The thermometer used was a No. 1000, 10 mm. glass bulb thermometer, with a 10 mm. glass tube. The bulb was placed in a glass vessel containing water, and the temperature of the water was raised in 10° C. steps. The temperature of the bulb was then read at each step. The results are given in the following table:

Temperature of water (° C.)	Temperature of bulb (° C.)
10	10.0
20	19.5
30	29.0
40	39.0
50	49.0
60	59.0
70	69.0
80	79.0
90	89.0
100	99.0
110	109.0
120	119.0
130	129.0
140	139.0
150	149.0
160	159.0
170	169.0
180	179.0
190	189.0
200	199.0
210	209.0
220	219.0
230	229.0
240	239.0
250	249.0
260	259.0
270	269.0
280	279.0
290	289.0
300	299.0
310	309.0
320	319.0
330	329.0
340	339.0
350	349.0
360	359.0
370	369.0
380	379.0
390	389.0
400	399.0
410	409.0
420	419.0
430	429.0
440	439.0
450	449.0
460	459.0
470	469.0
480	479.0
490	489.0
500	499.0
510	509.0
520	519.0
530	529.0
540	539.0
550	549.0
560	559.0
570	569.0
580	579.0
590	589.0
600	599.0
610	609.0
620	619.0
630	629.0
640	639.0
650	649.0
660	659.0
670	669.0
680	679.0
690	689.0
700	699.0
710	709.0
720	719.0
730	729.0
740	739.0
750	749.0
760	759.0
770	769.0
780	779.0
790	789.0
800	799.0
810	809.0
820	819.0
830	829.0
840	839.0
850	849.0
860	859.0
870	869.0
880	879.0
890	889.0
900	899.0
910	909.0
920	919.0
930	929.0
940	939.0
950	949.0
960	959.0
970	969.0
980	979.0
990	989.0
1000	999.0

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Kansas Supreme Court to review the merits appears at Appendix _____ to the petition and is without explanation.

The opinion of the Kansas Court of Appeals appears at Appendix _____ to the petition and is unpublished.

The opinion of the Kansas Court of Appeals appears at Appendix _____ to the petition and is unpublished.

JURISDICTIONAL STATEMENT

The decision of the Kansas Supreme Court was entered on August 30, 2018. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 USCS 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, United States Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land, and the judges of every state shall be bound thereby."

The Fifth Amendment, United States Constitution provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself."

The Sixth Amendment, United States Constitution provides:

"In all prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The Fourteenth Amendment Section 1, United States Constitution provides:

" . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law."

The statute under which Petitioner sought post conviction relief was 28 U.S.C. § 1257(a)

State Courts; Certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE SECTION 1257 CASE NOW BEFORE THIS COURT

On July 30, 2009 in a cause pending in the Kansas District Court, Sedgwick County, Juvenile Department, entitled In the Matter of Danny D. Tran, Juvenile no. 09JV555, petitioner waived his male adult prosecution hearing and was transferred to Sedgwick County Adult Detention Facility on the crimes of Aggravated Robbery, Kidnapping, two counts of Aggravated Battery, and Aggravated Burglary.

On August 7, 2009, upon transfer to the adult court the same cause pending in the Kansas State District Court, Sedgwick County, entitled STATE OF KANSAS V. DANNY D. TRAN, criminal no. 09CR2159, petitioner entered into a guilty plea to the crimes of Aggravated Robbery, Kidnapping, two counts of Aggravated Battery, and Aggravated Burglary, for probation with an underlying sentence of 228 months.

On October 22, 2009, the district court entered judgment and petitioner was sentenced to probation with an underlying term of 228 months of imprisonment on each count to run concurrently.

On October 7, 2010, the district court revoked petitioner's probation and imposed the underlying sentence of 228 months of imprisonment. This judgment was affirmed by the Kansas Supreme Court in a mandate filed on March 13, 2012.

On March 11, 2013, petitioner filed a Motion to Withdraw Guilty Plea alleging manifest injustice. Subsequently, on April 1, 2013, petitioner filed a supplement to the motion to withdraw guilty plea, wherein petitioner asserted reasons demonstrating

excusable neglect for failure to file the motion within the one-year statute of limitations. In addition, petitioner asked the district court to construe his motion to withdraw guilty plea as a K.S.A. 60-1507, and make a finding that he should be allowed to assert his claims outside the one-year statute of limitations to prevent a manifest injustice. The motion was summarily denied without an evidentiary hearing. The Kansas Court of Appeals reversed and remanded the case. See Appendix C.

On remand, the district court entered an order denying the motion after conducting an evidentiary hearing on the merits. Petitioner appealed. This judgment was affirmed. Petition for review denied without opinion. See Appendix A & B.

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION

The relevant facts are contained in petitioner's motion to withdraw guilty plea, which was construed as a K.S.A. 60-1507. Petitioner argued in his motion that manifest injustice exists, as he alleges that the police illegally obtained a confession and that his counsel was ineffective for failing to investigate that allegation and file a motion to suppress his confession.

During the motion to withdraw guilty plea hearing, the district court held that petitioner had failed to show any reason for the untimely filing and denied his motion. In the journal entry of denial, the district court noted that no exceptions excused the untimely filing under either excusable neglect or manifest injustice standards.

On appeal, the Kansas Court of Appeals held that the district court erred in failing to consider all of the factors outlined in Vontress v. State, 299 Kan. 607, 325 P.3d 1114 (2014), specifically whether petitioner's ineffective assistance of counsel claim raised a substantial issue of fact or law. The Kansas Court of Appeals remanded the case to the district court for

an evidentiary hearing to determine whether petitioner's attorney had been ineffective.

On remand, petitioner recounted the facts of his arrest, interrogation, and confession as set out in his motion. The district court reconsidered the Vontress factors and found that: 1) petitioner did not provide a persuasive reason for failure to timely file his motion; 2) petitioner did not claim actual innocence; and 3) petitioner was not credible and counsel was not ineffective. The district court concluded by holding that based on the totality of the circumstances, manifest injustice has not been shown and that the motion be denied. Petitioner appealed.

On appeal of remand, the Kansas Court of Appeals affirmed the decision and held that because the petitioner did not furnish a record which affirmatively shows that prejudicial error occurred in the trial court, the appellate court presumes that the action of the trial court was proper. Substantial competent evidence supports the district court's findings that counsel was not ineffective and that petitioner would not have insisted on going to trial if he had known about the suppression issue.

III. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court of the State of Kansas of Aggravated Robbery, Kidnapping, two counts of Aggravated Battery, and Aggravated Burglary. A K.S.A. 22-3210 construed as a K.S.A. 60-1507 was appropriately made in that Court, and duly appealed to the Kansas Supreme Court.

IV. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE COURT.

This is an ineffective assistance of counsel and coerced juvenile confession case.

"The Sixth Amendment guarantees a defendant the effective assistance of counsel at

'critical stages of a criminal proceeding,' including when [petitioner] enters a guilty plea." Lafler v. Cooper, 566 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

To be valid, a plea must both be voluntary and knowing. Boykin v. Alabama, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969). Petitioner "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the constitutional standards established for effective assistance of counsel." Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235 (1973). In the context of a guilty plea, petitioner "must show that there is a reasonable probability that, but for counsels errors, he would not have pleaded guilty and would have insisted on going to trial." Hill at 58-59.

Petitioner claimed that counsel should have but did not seek to suppress an improperly obtained confession. Premo v. Moore, 562 U.S. 115, 118, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

This Court has recognized that "[a] juvenile's inculpatory statement must be voluntary and free from coercion or suggestion and must not be the product of ignorance of rights or adolescent fantasy, fright, or despair." In re Gault, 387 U.S 1, 55, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967).

As set out in Strickland v Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052, *reh. denied* 467 U.S. 1267, 82 L. Ed. 2d 864, 104 S. Ct. 3562 (1984), the Kansas district court examined the totality of the circumstances to determine whether petitioner was prejudiced by counsels errors. The district court concluded that: 1) petitioner was not credible; 2) counsel was not ineffective for failing to pursue a suppression issue; 3) did not

think that the interrogation provided "such a cut-and-dry case"; 4) even if the confession had been suppressed, the State would still have a strong case; and 5) petitioner would not have insisted on going to trial.

In Fare v. Michael C., 442 U.S. 707, 725, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979), this Court has said, "[t]he totality approach permits -- indeed, it mandates -- inquiry into all the circumstances surrounding the interrogation[,"] of a minor. This is not the case as the district court failed to conduct such an inquiry in assessing the validity and voluntariness of a juvenile confession.

It is also settled that the truth of petitioner's admission of guilt does not remove them from the protection of the privilege against self-incrimination for, "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." Lee v. Mississippi, 332 U.S. 742, 745, 68 S. Ct. 300, 92 L. Ed. 330 (1948).

In reaching its decision to affirm, the court below decided that those principles were not to be applied to the case at bar because: 1) Counsel made a strategic choice not to investigate suppression and pursuing a very favorable plea was reasonable; 2) petitioner's interrogation was not a part of the record on appeal, therefore the district courts findings were proper; 3) Counsel was not ineffective and petitioner would not have insisted on going to trial; and 4) the Kansas Supreme Court issued an order by postcard denial.

Petitioner respectfully urge that all aspects of the decision are erroneous and at variance with this Court's decision as explained in the argument below.

ARGUMENT FOR ALLOWANCE OF WRIT

I. THE KANSAS COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS OF AN UNREASONABLE APPLICATION OF STRICKLAND

The Kansas Court of Appeals affirmed the district court's decision in that counsel for petitioner was not ineffective in failing to suppress. In the Court's decision it stated:

"Here, [counsel] made a strategic choice. Even if [counsel] did not make a full investigation into the suppression issue, reasonable professional judgment would support the limitation on his investigation because [counsel] was working within the time constraints of the plea negotiations. Either [counsel] could investigate and pursue a potentially unsuccessful motion to suppress or he could work out a very favorable plea agreement that would accomplish [petitioner's] goal of avoiding prison. the uncertainty of successfully pursuing a motion to suppress coupled with the time-sensitive nature of the plea negotiations support the district court's conclusion that [counsel] was not ineffective." See Exhibit B

This Court should be disinclined to accept the Kansas Court of Appeals invitation to engage in after-the-fact rationalization of a litigation strategy that almost certainly was never contemplated. It is this Court's holding that "courts should not conjure up tactical decisions [that petitioner's counsel] could have made [to suppress] but plainly did not[,"] Griffin v. Warden Md. Corr. Adj. Ctr., 970 F.2d 1355, 1358 (4th Cir. 1992), regardless of the time-sensitive nature of the plea negotiations.

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 defence." And this right is the right to the effective assistance of counsel. Strickland, 466 U.S. at 687.

In order to make the adversarial process meaningful counsel had a duty to investigate all reasonable lines of defense. Id at 691. In this case, the duty to investigate

exculpatory evidence. Hill, 474 U.S. at 59. If counsel was reasonable competent, then he would have necessarily made a "full investigation into the suppression issue" and learn that both Miranda and Edwards violations were present regarding petitioner's juvenile confession before advising him to plead guilty. United States v. Barnes, 83 F.3d 934, 939 (7th Cir. 1996). (R. IX, 12, 15-16).

The record on appeal will reflect that counsel for petitioner on remand corrected the trial court in that it was not petitioner's "goal [to avoid] prison [,]" rather that the options petitioner had were either prison or probation because he had already confessed. (R. X, 34).

The Kansas Court of Appeals claims that there is uncertainty in whether the motion to suppress would have been granted or not. And even if the motion to suppress was granted, the state had built a case against the petitioner. True, that the state may have built a case against the petitioner, but with a confession that incriminates the petitioner suppressed, counsel would then have a duty, at the minimum, to hold the state "to its heavy burden to prove guilt beyond a reasonable doubt." United States v. Cronic, 466 U.S. 548, 657 n.19, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984).

A motion to suppress would have rendered petitioner to not waive his male adult prosecution, be tried as a juvenile, and insisted on going to trial. Petitioner's decision about going to trial runs on his prospects of success and those were affected by counsel's errors in that counsel should have but did not seek to suppress an improperly obtained confession. Premo, 562 U.S. at 118. Counsel's failure to suppress was the decisive factor in the petitioner's decision to plead guilty. Barnes, 83 F. 3d at 940. This isolated error is sufficiently egregious and prejudicial enough to support petitioner's claim of ineffective

assistance. Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

This case at bar will show that the Kansas Court of Appeals unreasonable applied Strickland and erred in affirming the district court because, for the above-mentioned reasons, "[t]here is a reasonable probability that, but for [counsel's] errors, [petitioner] would have insisted on going to trial." Hill, 474 U.S. 59.

II. THE KANSAS COURT OF APPEALS ERRED IN AFFIRMING THE CONVICTION ON THE BASIS THAT THE JUVENILE CONFESSION WAS TRUE AND UNCOERCED

The district judge, after examining the interrogation, concluded that it was not so "cut-and-dry[.]" The judge also found that after petitioner learned that he might be charged with attempted murder, petitioner chose to confess. However, because "[n]either the emails nor the interrogation are part of the record on appeal, [the Kansas Court of Appeals] must presume that the district court's findings were proper. See Exhibit B.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Further, the Fifth Amendment, which applies to the States by virtue of the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

"This Court has held that the totality of the circumstances approach used to determine the voluntariness of adult's confession is adequate for evaluating juvenile confessions. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973). "[A] juvenile confession is not inadmissible merely because the person making it is a juvenile; however, a juvenile's confession requires courts to use the 'greatest care' in

assessing the validity of the confession." In re Gault, 387 U.S. at 55.

This Court typically looks at the following nonexclusive factors when determining whether a defendant's statement to the police was voluntary: (1) the accused's mental condition; (2) the manner and duration of the interview; (3) the accused's ability to communicate with the outside world; (4) the accused's age, intellect, and background; (5) the officer's fairness in conducting the interview; and (6) the accused's fluency with the English language." Id at 54.

Specifically, when evaluating the voluntariness of a juvenile's statement, this Court considers "[t]he age of the juvenile, the length of questioning, the juvenile's education, the juvenile's prior experience with police, and the juvenile's mental[.]" Id at 55.

Petitioner did not choose to confess merely because he might be charged with attempted murder. The record on appeal will reflect that petitioner changed his mind because, through his perspective, he was threatened as opposed to just changing his mind. (R. XI, 21).

The Kansas Court of Appeals misstated the record in making this finding, a finding that proves petitioner's Fifth Amendment rights were violated. A violation that is central to his claim of ineffective assistance of counsel. This misstatement "factually undermine[d] the fact-finding process, rendering the resulting factual findings unreasonable." Byrd v. Workman, 645 F.3d 1159, 1171-72 (10th Cir. 2011).

Although the emails and interrogation were not a part of the record on appeal, the transcripts were and the analytical framework is clear: petitioner, a juvenile, "indicate[d] . . . prior to questioning, that he wishe[d] to remain silent," Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and "request[ed for] an attorney[.]" Maryland v.

Shatzer, 599 U.S. 98, 104, 130 S. Ct. 1213, 1219 (2010); quoting Edwards v. Arizona, 451 U.S. 477, 488, 101 S. Ct. 1880, 68 L. Ed. 378, but the Wichita Police Department failed to scrupulously honor petitioner's request. Michigan v. Mosley, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

Further, the Kansas Court of Appeals disregarded the factors pointed out by remand counsel, not the district court, that petitioner: 1) was handcuffed to a table for four hours; 2) had no contact with the outside world; 3) was refused a bathroom break at least once; 4) had no new reading of Miranda; 5) had no interval of time pass; and 6) was interrogated about the same matter. (R. X, 77).

Also, petitioner, a seventeen year old during the interrogation, through testimony provided that he had initialed "no" where the Miranda form stated whether he wished to waive his right to remain silent. (R. X, 7-8). This invocation is sufficient to invoke the Fifth Amendment. Tice v. Johnson, 647 F.3d 87, 107 (4th Cir. 2011); Weeks v. Commonwealth, 248 Va. 460, 450 S. E. 2d 379, 385-86 (Va. 1994).

It is true that the totality of the circumstances was conducted, but for the determination of the ineffectiveness of counsel. The totality of the circumstances surrounding the voluntariness of petitioner's confession, a juvenile one, was absent. This determination is of a different one than for ineffectiveness. Schneckloth, 412 U.S. at 226. This Court mandates courts inquire into all the circumstances surrounding the interrogation of a minor. Fare, 442 U.S. at 725.

Through the transcripts, the totality of the circumstances, was pointed out by remand counsel, surrounding petitioner's juvenile confession, which was obtained through coercive conduct of officers, after petitioner unequivocally invoked his right to remain

silent, would render it inadmissible in a court of law under the holdings in this Court in interpretation of the Fifth Amendment, as Article VI of the Constitution of the United States provides in part as follows:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the Land; and the Judges of every State shall be bound thereby."

"In passing it should be noted that under this constitutional mandate the interpretation placed on the decisions of the Supreme Court of the United States is controlling upon state courts and must be followed. This we may add true regardless of views of state courts even though such decisions are inconsistent with their prior decision."

Krouse v. Lowden, 153 Kan. 181, 109 P.2d 138, *cert. denied* 314 U.S. 633, 86 L. Ed. 508, 62 S. Ct. 67, *reh. denied* 314 U.S. 7-10, 86 L. Ed. 566, 62 S. Ct. 174.

The U.S. Supreme Court cases of Miranda, Mosley, and Edwards are dispositive of these issues.

The Kansas Court of Appeals passes on the confession issue because the emails and interrogation were not a part of the record on appeal and ignores the rest of the remand transcripts that proves violations of Fare, Miranda, Mosley, and Edwards.

This Court has ruled that whenever a state court identifies the correct legal principle and then refuses to extend that principle to a context, in this case the juvenile confession issue, is considered unreasonable, Williams v. Taylor, 529 U.S. 362, 407, 120 S. Ct. 1495 (2000), and contrary to the ruling in Goudy v. Basinger, 604 F.3d 394, 399, (10th Cir. 2010).

III. THE KANSAS SUPREME COURT ERRED IN AFFIRMING THE CONVICTION ON THE BASIS OF A POSTCARD DENIAL

On August, 30, 2018, the Kansas Supreme Court failed to explain their denial of petitioner's claims. The Kansas Court of Appeals cited case law and offered little rationale and the Kansas Supreme Court simply denied petitioner's petition for review without citation. This terse denial constitutes adjudication on the merits. Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992).

Petitioner submits that the Kansas Court of Appeals acknowledged that a Miranda violation was claimed but did not review the claim. Further, the mandate in Fare was not applied in petitioner's case during review by the Kansas Court of Appeals. The Strickland standard set by this Court was unreasonably applied as petitioner has mentioned above in this writ. Williams, 529 U.S. at 407-408. The absence of applying clearly established federal law, as determined by this Court, to the facts of the case at bar is objectively unreasonable.

Petitioner's merits and reasons as to his claims constitutes that there was no reasonable basis for the state court to deny relief. Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 784, 178 L. Ed. 2d 264 (2011).

CONCLUSION

The judgment below is a unique departure from decisions of this Court that requires the effective assistance for his defence in suppressing an involuntary juvenile confession. This Court further requires that convictions based on involuntary statements be set aside at any time after conviction. As such, it represents a breach in the wall erected by the Fifth amendment to the Constitution and the decisions of this Court that were designed to protect a citizen from being convicted by the Government through the use of statements involuntarily wrung from the citizen.

This Petition for Writ of Certiorari shoud, therefore, be granted.

Respectfully Submitted,



Danny Tran #98510, *pro se*
Ellsworth Correctional Facility
1607 State St.
PO Box 107
Ellsworth, Kansas 67439-0107