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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2017

TYRONE JUSTIN COWAN, Petitioner

v.

DEBBIE ASUNCION, Warden, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TYRONE JUSTIN COWAN  
In Propria Persona  
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Petitioner Tyrone Justin Cowan petitions for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, to review its unpublished order dated March 30, 2018. That order made in case 17-16931 denied petitioner's request for a certificate of appealability from a decision of the United States District Court of Appeals for the Eastern District of California in case 1:16-cv-01826. That case is a 28 U.S.C. 2254 petition that seeks and review of a state criminal conviction. Petitioner is currently serving a term of life without possibility of parole as a result of a conviction in the Superior Court of California, County of Fresno. (Appendix D, p. 1.)

I. QUESTION PRESENTED

Did the Court of Appeals err in denying a certificate of appealability and in evaluating petitioner's claims: 1) that his rights under *Miranda*

*v. Arizona*, 384 U.S. 436 (1966) were violated when police failed to inform petitioner that he had a right to have counsel appointed if he could not afford counsel; and 2) that petitioner was denied his right to the effective assistance of counsel when his trial attorney failed to assert that police failed to give a full and complete *Miranda* admonition?

## II. PARTIES TO THE PROCEEDING

All parties are listed in the caption.

## III. OPINIONS BELOW

On March 30, 2018, the United States Court of Appeals for the Ninth Circuit filed an order denying petitioner's request for a certificate of appealability from the judgment of the District Court. A copy of the order is attached as Exhibit A. Unpublished findings and recommendation regarding the petition for writ of habeas corpus were filed in the United States District Court for the Eastern District of California on June 8, 2017. A copy is attached as Appendix D. On August 24, 2017, by unpublished order, a Judge of the District Court filed an order adopting the findings and recommendation of the magistrate and denying the petition for writ of habeas corpus. A copy of the order is attached as Appendix B. A copy of the District Court judgment, also filed August 24, 2017, is attached as exhibit C.

#### IV. JURISDICTIONAL STATEMENT

The order and judgment of the United States District Court for the Eastern District of California denying the petition for writ of habeas corpus were filed August 24, 2017. (See Exhibits B and C.) The order of the United States Circuit Court of Appeals for the Ninth Circuit denying a certificate of appealability, from which petitioner seeks relief, was filed on March 30, 2018. (Appendix A.) This Court has jurisdiction per 28 U.S.C. § 1254(1).

#### V. CONSTITUTIONAL PROVISIONS

##### **United States Constitution, Amendment VI:**

In all criminal prosecutions, the accused shall enjoy the right to Counsel, and to the right to the effective assistance of Counsel.

Strickland v. Washington, 466 U.S. 668 (1984)

##### **United States Constitution, Amendment XIV:**

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

#### VI. STATEMENT OF THE CASE

##### A. Procedural history

A jury convicted petitioner of one count of first degree murder (count 1), one count of attempted first-degree murder (count 3), and two counts of

second-degree robbery (counts 2 and 4). (Appendix D, p. 1.) He was sentenced to a term of life without the possibility of parole (count 1) and a consecutive indeterminate term of life with the possibility of parole (count 3). Additionally, the trial court imposed two consecutive terms of twenty-five years to life on the enhancements as to counts 1 and 3. (Appendix D, p. 1.) The California Court of Appeal affirmed the judgment and the California Supreme Court denied a petition for review. (Appendix D, p. 2.)

On December 5, 2016, petitioner filed a 28 USC 2254 habeas corpus petition in the United States District Court. He raised the following claims for relief: (1) a deficient *Miranda* admonition, (2) ineffective assistance of counsel, and (3) cumulative trial errors. (Appendix D, p. 2.) The District Court denied relief on the merits on August 24, 2017. (Exhibit B pp. 1-2; Exhibit C.) Petitioner filed a timely notice of appeal and sought a certificate of appealability from the United States Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals denied the request for a certificate of appealability by order dated March 30, 2018. (Exhibit A.)

## B. The underlying facts

The facts underlying petitioner's current convictions have no meaningful bearing on the question presented to this Court. They can be briefly stated as follows. The prosecution presented evidence indicating petitioner shot and killed Efigenia Meza and shot and injured Geremias Leon. The conviction relied in part on a confession given by petitioner. (Appendix D pp. 2-4, 8-9.)

## VI. Reasons for granting the writ.

PETITIONER'S CLAIMS THAT POLICE PROVIDED AN INADEQUATE *MIRANDA* ADMONITION, AND THAT HIS COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO APPROPRIATELY PRESERVE THE ISSUE, MAKES A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT AND JUSTIFIES THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY.

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of a constitutional right." The rules do not require the petitioner to show he would prevail on appeal, having already failed in that endeavor in the district court. *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383 (1983). A certificate of appealability should be granted if the issues presented are not clearly foreclosed by statute, rule or court decision, and present a question of some substance, one that is debatable among jurists, which a court could resolve in a different manner. *Id.* at 893, fn. 4 and 894. The *Barefoot* standard is used to rule on an application for a certificate of

appealability. *Slack v. McDaniel*, 529 U.S. 473, 482, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

Petitioner argued on direct appeal that the *Miranda* admonition he received was defective. The detective who advised petitioner of his *Miranda* rights failed to include in the admonition that if petitioner could not afford an attorney, one would be appointed for him prior to any questioning. All statements made after the defective admonition should have been suppressed.

Once inside an interview room, a detective attempted to inform petitioner of his *Miranda* rights. The advisement was as follows, “[W]e have to, uh, you know, read you your rights before we get started, okay? [Cowan responds affirmatively.] All right. So before we do that I’ll tell you that you have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney and have an attorney present with you while you are being interrogated. Um. You understand each of these rights I have explained to you? [Cowan: “Yes, I do.”].” (Attachment D, p. 8.)

At the outset of trial petitioner’s trial, his counsel filed a motion in which he argued petitioner’s confession was inadmissible. (Attachment D, pp. 8-9.) The motion contained a general summary of the holdings in *Miranda* and related principles, but provided no discussion about the facts of the case or any explanation of how petitioner’s *Miranda* rights were violated. When the motion was heard, the few arguments made by defense counsel were all directed towards petitioner’s pre-interrogation statements. The California trial court ruled that all of petitioner’s pre-

interrogation statements were spontaneous and/or voluntary, unprompted by any attempt by police officers to elicit a response. (Appendix D p. 9.)

On direct appeal, petitioner asserted that the *Miranda* advisement was defective because it failed to explain that petitioner was entitled to legal representation regardless of whether he could afford to retain private counsel. The state argued the issue was forfeited because it was not properly raised in the trial court. Petitioner alleged ineffective assistance of counsel based upon his trial attorney's failure to preserve the issue for appeal. (Appendix D, p. 9.)

The California Court of Appeal found that because the detective who gave the *Miranda* admonition failed to advise petitioner of his right to legal representation at no cost, the prosecutor's reliance upon the statements he made during the interrogation was improper and should not have been allowed. (Appendix D, p. 9.) Nevertheless, the California appellate court found the issue was forfeited because trial counsel failed to make a timely objection that clearly specified the grounds upon which it relied. (Appendix D, pp. 9-10.)

On habeas corpus, the U.S. District Court found the California Court of Appeal rested its decision on a state procedural bar, which is appropriate if the state procedural bar is independent and adequate. (Appendix D, pp. 10-11.) However, the District Court further noted that a petitioner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. Attorney error constituting ineffective assistance provides cause to excuse procedural default. Petitioner presented an independent ineffective assis-

tance claim regarding counsel's failure to argue the *Miranda* admonition was deficient. (Appendix D, p. 11.) Petitioner contends his trial counsel provided ineffective assistance under the Sixth and Fourteenth Amendments to the Federal Constitution as interpreted by the United States Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668, 687-689 by failing to explicitly assert this theory in the trial court.

Noting that the *Miranda* warning in this case was deficient, the U.S. District Court focused only on whether counsel's deficient performance had a substantial and injurious effect or influence in determining the jury's verdict, citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993). (Appendix D, p. 12.) After reviewing the evidence, the District Court found counsel's error did not prejudice the outcome. (Appendix D, p. 17.)

The District Court's evaluation of this question is flawed and deserves review in the Circuit Court. The error in admitting evidence of statements petitioner made during the interrogation clearly contributed to verdicts finding him guilty. During summation to the jury, the prosecutor relied heavily on statements petitioner made during the post-*Miranda* interrogation to support his argument that petitioner acted with the intent required to make him guilty of murder, attempted murder and robbery. The prosecutor predicated his argument on a theory that the primary factual question for the jury to determine was the intent with which petitioner acted, because there was no serious question that petitioner committed the charged acts. (9 R.T. pp. 2450-2452.) The prosecutor seemed concerned the jury

would not believe petitioner acted without the requisite criminal intent, because of his history of mental health problems. (*Ibid*; and see Petition Exhibit B pp. B-4, 5.)

To support his theory that petitioner acted with the intent required to commit murder, attempted murder and robbery, the prosecutor argued that his actions after the shooting exhibited goal-directed behavior designed to avoid being apprehended. (9 R.T. pp. 2459-2461.) The prosecutor argued the statements petitioner made during the interrogation revealed his thought process, saying,

Let me show you what I mean by that. During the interview at one point Detective Villalvazo specifically makes the statement to the defendant that he's street smart, that he knows what to tell the detective, and what not to tell the detective. That, ladies and gentlemen, is thought process.

(9 R.T. p. 2462.) The prosecutor explained that petitioner never admitted during the interrogation that he committed murder. Petitioner admitted he killed someone, but did not admit murder and did not admit committing robbery. The prosecutor asserted, "That's pretty sophisticated," and opined, "That's thought process. That's thinking it through." (*Ibid*.) The prosecutor argued that, during the interrogation, petitioner tried to,

[C]reate a story that will cover what the police know, but he won't be guilty of a crime. He claims he accidentally shot himself, he claims he accidentally shot the victims, and he never robbed anybody.

(9 R.T. p. 2465.) The prosecutor added,

And when the detectives don't believe his lies, he admits he's lying, and offers to trade the truth for a deal. And I believe it was even Dr. Howsepian [Cowan's forensic psychiatrist] that said if a person – on a hypothetical, if a person can recognize they're in that situation and offer to make a deal, that's the thought process. That's proof of the ability to think through and plan a course of action.

(9 R.T. p. 2466.) The prosecutor argued that when the detectives caught petitioner in lies, he adjusted them. (9 R.T. p. 2468.)

The prosecutor used evidence from the interrogation to attack the testimony of Dr. Howsepian, the forensic psychiatrist who testified for the defense. (8 R.T. pp. 2122-2123; 9 R.T. p. 2491.) The prosecutor argued that Dr. Howsepian failed to consider significant evidence in making his diagnosis. (9 R.T. pp. 2491-2493.)

The prosecutor asserted that the doctor should have focused on petitioner's state of mind at the time of the offense, then argued,

And what's the most relevant piece of evidence that he have at all in this regard? [Petitioner's] recorded statement where he's sitting here talking to detectives and we can hear exactly what he sounds like, we can hear exactly his thought process as he answers questions, we can hear him shift gears and change when he's caught in one lie and switches to another gear.

(9 R.T. pp. 2493-2494.) Thus, the prosecutor used the recording of the interrogation to impeach the testimony of Dr. Howsepian. That testimony formed the backbone of petitioner's defense to the charges he faced. The prosecutor's reliance on the recorded interrogation to undercut petitioner's defense demonstrates why the judgment must be reversed. The error that permitted the jury to hear evidence of petitioner's confession had a substantial and injurious effect or influence in determining the jury's verdict. (*Brecht v. Abrahamson*, 507 U.S. 619 (1993).)

A certificate of appealability should issue so the Court of Appeals can consider this significant legal question.

DATED: June 5, 2018

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