

No. 18-8728

ORIGINAL

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Joseph Christen Thoresen — PETITIONER

vs.

C.J. Lorie Skjerven Gildea - et al. — RESPONDENT(S)

Justice Natalie E. Hudson Justice G. Barry Anderson

Justice Margaret H. Chutich Justice David L. Lillehaug

Justice Anne K. McKeig Justice Paul C. Thissen

ON PETITION FOR A WRIT OF CERTIORARI TO

Minnesota Supreme Court

FOR WRIT OF CERTIORARI

Joseph Cristen Thoresen
OID# 255019
Oak Park Heights Correctional Facility
5329 Osgood Avenue North
Stillwater, MN 55082

QUESTION PRESENTED

As there was no DNA or fingerprints of mine found on any of the physical evidence presented at the trial the prosecution relied heavily on a co-defendant's (who admitted using methamphetamine every day in June) corroborated testimony from: 1) a third party who was an methamphetamine addict that destroyed physical evidence which allegedly tied me to the murder who had intimate relations with the co-defendants sister and close to the co-defendants father during the time frame of murder, 2) a brother of the co-defendant who was an addict, 3) a close friend of the co-defendants brother who grew up in the same foster care home 4) all the previous and other witnesses who were addicted to and using methamphetamine were using liquor and/or marijuana heavily during this time. The trial judge refused to consider relaying the effects of drugs have (especially methamphetamine) on people to the trial jury. During this entire time the press organ released a barrage of "leaked" and highly prejudicial information that the forensic evidence proved to be false. These false prejudicial stories were then presented to the grand jury and then passed on to the district court trial and taken into the deliberation of the trial jury. The question presented is:

Whether the court below erroneously held, in conflict with the decisions of two circuits, that a special jury instruction was not warranted when considering the testimony of addicts using a combination of alcohol, cocaine and methamphetamine and the credibility of their corroborating testimony which was the essence of the States case.

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INTRODUCTION

Toxic Effects of Methamphetamine

Methamphetamine impacts a person's ability to process reality and remember events and not be able to recall events which would distort the general credibility instruction. In Dr. Mary Holley's *How Reversible Is Methamphetamine-Related Brain Damage?*, 82 N.D. L. Rev. 1135, 1136 (2006) states that "Damage to the cells of the self-control tract is immediate upon the first dose of methamphetamine. Where alcohol abuse may require months, or even years of chronic exposure to produce damage to this degree, methamphetamine differs because it can induce significant cell death within hours of exposure to a single high dose. This is the reason so many addicts say, "Man, I used it once and I was hooked." Damage to this tract results in severe cravings and poor impulse control. The addict is unable to resist temptation when offered methamphetamine. He acts on impulse, unable to suppress his craving for another high."¹ Considering the prosecution's case was based entirely on the co-defendant's testimony and corroborating testimony from people addicted to methamphetamine for a great length of time and had been using it consistently for days leading up to the estimated time of the homicide, it is a pivotal factor in the lack of credibility in their testimonies.

Trial by media/social media.

The digital age has ushered in many advances in human interaction which a few decades ago one could only read about in science fiction novels and see at the theatre. What was futuristic then has come to fruition and has since transformed our surroundings into a new hyper speed information world where a tidbit of a humorous pet clip or juicy story can go "viral" receiving thousands if not hundreds of thousands of "hits" within a short period of time on an online video or expounded on a social media venue. Print is being replaced by terabytes of information that are stored in a "cloud"² awaiting someone to "google" some question that the

¹ *How Reversible Is Methamphetamine-Related Brain Damage?*, 82 N.D. L. Rev. 1135, 1136 (2006)

² Estimates are that the sum total of data held by all the big online storage and service companies like Google,

cloud can answer within milliseconds with hundreds of thousands of articles³ with relevant information, opinions made into news along with misinformation and disinformation.

To know the extent of digital saturation all one has to do is visit a public venue and observe the overwhelming amount of folks “googling”, “tweeting”, “friending”, “snap-chatting”, “texting”, etc., with who knows how many people on the other end of the world wide web. Along with all the amazing and wonderful advances the technology age has inundated our society with it has also brought a host of illegal activities i.e. illegal cyber-attacks against countries, cyber bullying, cyber-espionage, cyber-terrorism and “hacking” of personal identities to just name a few. The main stream media TV and their livestream internet counterparts are in direct competition with online “independent” journalism which has increased the amount of content and a greater area effected to be the “most trusted”. One no longer has to wait to buy a paper or wait to catch the latest evening news as it is at our finger tips 24/7 and mostly any place.

In *THE MEDIA'S IMPACT ON THE RIGHT TO A FAIR TRIAL: A CONTENT ANALYSIS OF PRETRIAL PUBLICITY IN CAPITAL CASES* authors Shirin Bakhshay and Craig Haney examine “whether and how the right to a fair and impartial jury may be compromised by prejudicial news media coverage of death penalty cases.”⁴

“ The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to “an impartial jury.” This fundamental guarantee is part of a criminal defendant's basic right to a fair trial, which encompasses the right to be judged by a jury of his or her peers and on the basis of evidence presented at trial. Information that jurors obtained before or outside of the trial itself and any pre-existing, case-related biases they may hold are not supposed to influence their decision-making. In practice, the Sixth Amendment right to an impartial jury has come to mean that jurors cannot have formed opinions about key aspects of the case--and certainly not the defendant's guilt--before trial (Newcomb v. State, 1990). Combined with the “presumption of innocence” that attaches to all criminal defendants at the start of trial, the Sixth Amendment requires jurors to be indifferent, unbiased, and open to the evidence presented at trial. However, in an increasingly media-saturated society, defendants in

Amazon, Microsoft and Facebook is at least **1,200 petabytes** between them. A petabyte is 1,000 terabytes.

³ It is estimated that there is 10 terabytes of data in the Library of Congress.

<https://blogs.loc.gov/loc/2009/02/how-big-is-the-library-of-congress/>

⁴ 24 Psychol. Pub. Pol'y & L. 326

high profile cases may be tried--and essentially found guilty-- by the news media before they reach a courthouse. Depending on the nature and amount of the media coverage that surrounds a particular case, potential jurors may be profoundly affected by what the press reports. As a consequence, criminal defendants may be deprived of basic Sixth Amendment protections.”

The murder of David A. Haiman received an overwhelming amount of media and social media attention in a sparsely populated Itasca County in Northern Minnesota⁵. Many erroneous “facts” that implicated me as the machete wielding murderer were relayed to the public statewide⁶, nationally⁷, as well as internationally⁸ within hours of being arrested and as the crime scene investigation revealed, were proven to be false, but was not recanted. With that being said, the chances of a juror not having been exposed to my case and formed an opinion due to the prejudicial nature of the press, is unlikely. A grand jury was convened of which 11 jurors confirmed that they had followed the case.

⁵ Itasca County ranks 22nd in population density of 16.92 persons per sq. km. (0.81% of the population)

⁶ Minneapolis <http://www.startribune.com/paul-walsh/10646171/>;

⁷ <https://people.com/crime/minnesota-man-allegedly-decapitates-man-he-believed-raped-his-girlfriend/>

⁸ <https://www.dailymail.co.uk/news/article-3670542/Minnesota-woman-charged-accomplice-boyfriend-allegedly-murdered-man-claimed-raped-her.html>

IN THE
SUPREME COURT OF THE UNITED
STATES PETITION FOR WRIT OF
CERTIORARI

I Joseph Cristen Thoresen respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Minnesota Supreme Court , rendered in these proceedings on January 2, 2019.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court to review the merits appears in Appendix A to the petition and is reported at A17-1854. The opinion of the district court is unpublished but a trial transcript is available at Itasca-31-CR-16-182.

JURISDICTION

On direct appeal to the Minnesota Supreme Court which entered its judgement on January 2, 2019 affirming the lower court's decision. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and Constitutional provisions are involved in the case.

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST., AMEND. XIV Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minnesota Constitution Article I Sec. 7.**Due process; prosecutions; double jeopardy; self-incrimination; bail; habeas corpus.**

No person shall be held to answer for a criminal offense without due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

Minn. Stat. §634.04 UNCORROBORATED EVIDENCE OF AN ACCOMPLICE

A conviction cannot be had upon the testimony of an accomplice, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

STATEMENT OF THE CASE

.State v. Thoresen A17-1854 in part:

“We first address Thoresen’s request for a jury instruction about the credibility of witnesses who were using or addicted to drugs. Thoresen requested that the district court give the following instruction:

Evidence was introduced during the trial that (name of witness/witnesses) were (using drugs)(addicted to drugs)(abusing drugs) when these events took place. There is nothing improper about calling such a witness to testify about events within his or her personal knowledge.

On the other hand, this testimony must be considered with care and caution. The testimony of a witness who (*describe circumstances*) may be less believable because of the effect the drugs may have on his or her ability to perceive, remember, or relate the events in question.

After considering this testimony in light of all the evidence in this case, you may give it whatever weight, if any, you find it deserves.

The district court denied Thoresen’s request and gave the following instruction before the jury deliberated:

You are the sole judges of whether a witness is to be believed and of the weight to be given a witness’s testimony. There are no hard and fast rules to guide you

in this respect. In determining believability and weight of testimony *you may take into consideration the witness's interest or lack of interest in the outcome of the case, relationship to the parties, ability and opportunity to know, remember, and relate the facts, manner, age and experience, frankness and sincerity or lack thereof, reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case, evidence of a statement by or conduct of the witness on some prior occasion that is inconsistent with present testimony.*

(Emphasis added.) Before testimony began, the district court gave a similar instruction, advising that the jury should consider all factors that weigh on believability.

We previously considered the question of a substance-abuse-related jury instruction in *State v. Daniels*, 361 N.W.2d 819, 832 (Minn. 1985). Like here, the district court in *Daniels* instructed the jurors before and after testimony to use their own judgment and common sense and to consider whether other factors—including the ability of witnesses to know, remember, and relate the facts—affected the witnesses' credibility. *Id.* We also noted in *Daniels* that the defendant's attorney discussed the witnesses' drug use when addressing the jury. We held that the district court did not abuse its discretion because the jury received "ample instruction on credibility." *Id.*

Thoresen argues that *Daniels* is distinguishable from this case because here nearly every lay witness was using drugs during the events they described to the jury. In contrast, multiple witnesses in the *Daniels* trial, including eyewitnesses, were not under the influence of drugs. 361 N.W.2d at 823–26. This is not a legally meaningful difference. In fact, the impact of the witnesses' drug use on their ability to observe and understand Thoresen's actions was more fully developed in this case, not only through the district court's credibility instruction but also on cross-examination by defense counsel and in closing arguments by both the state and the defense.

Ultimately, the district court did not abuse its discretion in rejecting Thoresen's proposed jury instruction on addict or drug user testimony because the substance of the requested instruction was included in the jury instructions given to the jury. *State v. Swanson*, 707 N.W.2d 645, 653 (Minn. 2006). The district court included the directive to consider the witnesses' "ability and opportunity to know, remember, and relate the facts."

Because the jury heard testimony that witnesses had used mind-altering substances, it was able to consider the effect of these substances on the reliability of the witnesses' testimony³

[In a footnote the court stated:]

"³Thoresen urges us to adopt an Eighth Circuit rule that a jury instruction on drug or alcohol use may be appropriate when considering the testimony of addicts. *United States v. Hoppe*, 645 F.2d 630, 633 (8th Cir. 1981); *see also United State v. Johnson*, 848 F.2d 904, 906 (8th Cir. 1988). Under the Eighth Circuit rule, courts should consider whether any of the following factors are present: "a dispute as to whether the informant is actually an addict; cross-examination concerning the informant's addiction; an instruction alerting the jury that an informant's testimony should be viewed with care; and corroboration of the informant's testimony." *Hoppe*, 645 F.2d at 633 (citations omitted). We need not and do not decide whether to adopt this rule because in this case it was not an abuse of discretion for the district court to deny Thoresen's requested jury instructions. Further, *Hoppe* considered the testimony of *informants* who had addictions, but here no witnesses were informants. Moreover, application of the Eighth Circuit's rule here would not have changed the outcome because the factors from the rule would have weighed against giving the instruction."

REASONS FOR GRANTING THE PETITION

“Damage to the cells of the self-control tract is immediate upon the first dose of methamphetamine. Where alcohol abuse may require months, or even years of chronic exposure to produce damage to this degree, methamphetamine differs because it can induce significant cell death within hours of exposure to a single high dose. This is the reason so many addicts say, “Man, I used it once and I was hooked.” Damage to this tract results in severe cravings and poor impulse control.²¹ The addict is unable to resist temptation when offered methamphetamine. He acts on impulse, unable to suppress his craving for another high.”⁹

In *State v. Daniels*, this Court considered a defendant's argument that the district court had erred in refusing a requested jury instruction on testimony of drug addicts. *State v. Daniels*, 361 N.W.2d 819, 832 (Minn. 1985). Noting that the jury was given general instructions on judging the credibility of witnesses, this Court concluded, in a single sentence, that the defendant's counsel “talked to the jury about ... the fact that [two witnesses] are heavy drug users.” *Id.* at 832.

Daniels' brief analysis did not hold that a special instruction on drug abuse was never required; rather, it simply found no abuse of discretion in that case. *Daniels* is very different than this case, and should not control the result here. In *Daniels*, for example, there were multiple other witnesses, including eyewitnesses to the shooting, who were not under the functions; the two witnesses for whom the instruction influence of drugs that impaired brain was requested were more ancillary, and one witness testified the drug he

⁹ Dr. Mary Holley, *How Reversible Is Methamphetamine-Related Brain Damage?*, 82 N.D. L. Rev. 1135, 1136 (2006)

was on did not affect perception or memory. *Id.* at 823-26. Here, in contrast, nearly every key lay witness was under the influence of drugs, and they were drugs that unquestionably affected the ability to perceive and remember events. Unlike *Daniels*, this was a case where a specific instruction to guide the jury in its evaluation of the credibility of the testimony of the many witnesses who were drug addicts at the time of the offense was necessary.

The Eighth Circuit recognizes that a special jury instruction may be appropriate when considering the testimony of addicts. *E.g., United States v. Hoppe*, 645 F.2d 630, 633 (8th Cir. 1981) (setting out factors to be considered when determining need for a special jury instruction on addict-informants); *United States v. Johnson*, 848 F.2d 904 (8th Cir. 1988) (applying *Hoppe* factors when addict is not an informant). Numerous other federal circuits do the same. *E.g., Virgin Islands v. Hendricks*, 476 F.2d 776, 779 (3rd Cir. 1973). Factors that should be considered in assessing the need for an instruction include whether there is any dispute that the witness is an addict, whether there was cross-examination on the witness's addiction, whether there was an instruction that the witness's testimony should be viewed with care, and whether there was corroboration of the witness's testimony on material facts. *Hoppe*, 645 F.2d at 633. *Hendricks* explains the rationale for a special instruction in the context of an addict/informant:

Similar scrutiny must be used in weighing the testimony of a present or former addict who recognizes, or may recognize, the possibility of being rewarded by the Government. Examples of possible rewards are

the dropping of charges presently pending against the witness and the recommending of a lighter sentence for a crime of which the witness has already been convicted. An instruction would be appropriate

whether or not it is shown that the Government intends to reward the witness. It would be especially useful when the testimony of such a witness is uncorroborated as to a material fact.

Hendricks, 476 F.2d at 779-80. The Minnesota Supreme Court should follow the lead of the federal courts, and rule that a special instruction may be appropriate in certain cases. *See generally* IA Fed. Jury Prac. & Instr. § 15.05 (6th ed.) (setting out a specific credibility instruction in criminal cases that advises, "The testimony of a drug or alcohol abuser must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs or alcohol").

There is no question that an extraordinary number of key witnesses were under the influence of methamphetamine and other drugs at the time of the events in question, and that Corwin's destruction of evidence placed me in legal jeopardy. The sheer number of witnesses in this case whose testimony raised special credibility concerns because of being under the influence of a highly addictive drug that impacts perception and memory use heightened the need for the jury to be given guidance. Further, witnesses such as Greniger, her bother, Corwin, and Dewey were not tangential or unimportant witnesses; their testimony formed the heart of the State's case. It was therefore essential that the jury should have been fully instructed on how to evaluate their credibility.

Moreover, the credibility of these witnesses was critically important. With no forensic evidence tying me to the murder, and the requirement that Greniger's accomplice testimony

be corroborated, determining my criminal liability turned on evaluating the believability of witnesses like Jeffrey Greniger, Dewey, and Corwin. For example, Jodee Dewey provided some of the key testimony on the kidnapping predicate. Corwin was highly relevant to corroborating Greniger's testimony. Under these circumstances, failure to advise the jury was not harmless.

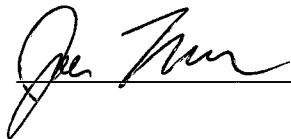
It is no answer that the extent of the drug use and its impact on memory was argued by counsel. (*E.g.*, T 1773) (prosecutor noting that people were using "meth, drugs, alcohol" and that impacts the ability to remember). Lawyers can argue that an accomplice is untrustworthy or that an eyewitness identification is unreliable, but those arguments do not obviate the need for a jury instruction. If anything, the centrality of the drug use issue in this case underscores the need for proper instructions that could have guided the jury in evaluating particular aspects of credibility not encompassed by the general instruction.

It cannot be said that the failure to give the specific instructions required by me had no significant impact on the verdict and thus denying due process afforded by the United States Constitution. So the question is how low will the evidence bar be lowered for the next defendant?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: March 27 2019