

No. 18-9045

IN THE SUPREME COURT OF THE UNITED STATES

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KEVIN ROBINSON,

- PETITIONER,

-VS.-

PAUL HENZEIL, Esq., et al.,

- RESPONDENT(S).

\*\*\*\*\*

ON PETITION FOR WRIT OF CERTIORARI TO  
THE THIRD CIRCUIT COURT OF APPEALS

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PETITION FOR REHEARING

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Kevin Robinson, (pro-se petitioner)

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### PETITION FOR REHEARING

COMES NOW Petitioner, Kevin Robinson, Pro Se, proceeding in forma pauperis and prays to this Court for a response to grant Rehearing pursuant to Rule 44, and thereafter, and grant him a Writ of Certiorari to review the opinion of the New Jersey Supreme Court and the Third Circuit Court of Appeals. In Support of petition, Robinson states the following:

### REASONS GROUND MERITING REHEARING

The court of appeal's and the New Jersey Supreme Court's decisions conflicts with 455 US 209; 528 US 304; and 466 US 668; Trial counsel violated Robinson's Sixth Amendment right to an effective assistance of counsel for not exercising a peremptory challenge to exclude juror #2 whom is considered biased in violation of the U.S. Constitution to an impartial jury because it's considered to be highly suggestive of misconduct or conflict of interest based on her brother-in-law working for the same prosecuting agency whom investigated and tried this case at trial.

### STATEMENT OF FACTS

In 2008, this case was tried at trial by the Somerset County Prosecutor's Office. While selecting the jury, juror #2, Kathryn Bennett, mentioned her "Brother-in-law, Jack Bennett, works at the Somerset County Prosecutor's office." (T2: 127-6

to 7.) At sidebar, the prosecutor told counsel that "Jack Bennett is a retired Captain of detectives and has been a civilian employed with the office for a couple of years now as a director of communications." (T2: 130-9 to 12.) Counsel did not exercise any of the available peremptory challenges to excuse Kathryn as a juror. She participated in jury deliberations.

After trial, an appeal was timely filed. On Direct Appeal, Robinson raised the following ground in his Pro Se Brief:

**TRIAL JUDGE ABUSED HIS DISCRETION IN FAILING TO STRIKE JUROR FOR CAUSE, WHICH DEPRIVED MR. ROBINSON OF HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY.**

In Robinson's pro se brief, he argued juror #2, Kathryn Bennett should've been excused from the jury panel because her brother-in-law works for the Somerset County Prosecutor's office. Robinson cited United States v Lecco, 2009 U.S. Dist. Lexis 38368 (S.D. W. Va., 2009) stating, "private communication, possibly prejudicial, between jurors and third persons are absolutely forbidden, and invalidate the verdict." Robinson also cited Dyer v Calderon, 151 F.3d 970, 983 (9th Cir. 1998) quoting Clark v United States, 289 US 1, at 20 (1933) stating, "his relation to the Court and the parties is tainted in its origin." Robinson cited Lecco again which quoted Phillips, 455 US 209 at 222 (1982) stating, "there are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting

agency... whether or not the state proceedings result in a finding of no bias, the Sixth amendment right to an impartial jury should not allow a verdict to stand under such circumstances."

The Direct Appeal Court ruled, the challenged jurors indicated they would be fair and impartial and further stated the trial judge did not abuse his discretion in failing to sua sponte excuse the jurors because defendant exercised only 4 of the 20 peremptory challenges. This ground was denied on Direct Appeal, and by the Supreme Court of New Jersey.

A petition for Post Conviction Relief ("PCR") was timely filed. Robinson raised the following ground in his petition:

**DURING VOIR DIRE, TRIAL ATTORNEY FAILED TO EXERCISE THE REST OF THE PEREMPTORY CHALLENGES TO EXCUSE SEVERAL JURORS WHO SHOULD HAVE BEEN EXCUSED FOR CAUSE WHEN 16 PEREMPTORIES HAVE NOT BEEN EXERCISED. THUS, VIOLATED THE PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.**

On PCR, Robinson's PCR counsel recited the ground in his brief on Robinson's behalf citing Strickland, 466 US 668, but didn't argue the claim. However, the prosecutor still responded to the claim. Robinson then submitted a pro se reply brief. In his reply brief, he argued trial counsel was ineffective for failing to utilize the 16 peremptory challenges that were available to excuse juror

#2, Kathryn Bennett. Again, Robinson cited Lecco quoting Phillips in support of his argument.

The PCR Court ruled, "before the Appellate Division defendant-petitioner argued that the trial judge abused his discretion in failing to sue sponte excuse these jurors for cause during jury selection. The appellate court denied this claim because a trial judge is not required to sua sponte excuse a juror who should have been excused for cause if trial counsel failed to exercise all of his peremptory challenges. Here, defendant-petitioner submits that his trial counsel's performance in selecting the jury was so deficient so as to prejudice the result of his trial... A defendant who does not affirmatively request the right to participate in voir dire sidebars should be considered to have waived the right... Therefore, this defendant-petitioner waived the right to participate therein. This issue was denied by the PCR Court.

A PCR Appeal was timely filed. Robinson raised the following ground in his pro se brief:

**TRIAL COUNSEL FAILED TO UTILIZE THE REMAINING 16 PEREMPTORY CHALLENGES AVAILABLE TO EXCUSE SEVERAL JURORS THAT SHOULD HAVE BEEN REMOVED, VIOLATED ROBINSON'S 6TH AMEND. RIGHT.**

In connection to this ground, Robinson raised the following subtitle heading:

**TRIAL COUNSEL SHOULD HAVE EXCUSED JUROR #2, BECAUSE HER BROTHER-IN-LAW WORK FOR THE SAME EXACT PROSECUTION**

OFFICE THAT INVESTIGATED ROBINSON'S CASE. COUNSEL  
VIOLATED ROBINSON'S SIXTH AMEND. RIGHT.

In Robinson's pro se brief, he cited Harris v Housewright, 697 F.2d 202 at 207-208 (1982) stating, "Several jurors revealed they had relationship with members of the sheriff's department or the police department, both of which were involved in the investigation of the crime... In related context, we have emphasized the danger of a conviction-prone jury when jurors have been associated with. Although each juror stated that he or she would not be affected by such relationships, we are not persuaded by these responses." Also, Robinson once again cited Lecco quoting Phillips.

On PCR Appeal, the court ruled the first prong of the Strickland/Fritz test, defendant bears the burden of proving trial counsel's performance not using peremptory challenges to excuse the five jurors, was constitutionally deficient and not a sound strategic decision. As a general rule, strategic miscalculations trial mistakes are insufficient to warrant reversal except in those rare instances where they are of such magnitude as to thwart the fundamental guarantee of a fair trial. It is near impossible to second guess an attorney's decision not to exercise a challenge, absent a juror's clearly disqualifying trait. In this case, as we noted on direct appeal, all of the disputed jurors indicated they would be impartial and fair. Defendant did not present a prima facie case of IAC on this issue. This issue was denied by the Appellate Court, and the New Jersey Supreme Court.

A Petition for Habeas Corpus was timely filed pursuant to 28 U.S.C. § 2254. In Habeas Corpus Robinson raised the following ground in his pro se Memorandum of Law in support of his traverse:

**TRIAL JUDGE ABUSED HIS DISCRETION IN FAILING TO STRIKE JUROR FOR CAUSE, WHICH DEPRIVED MR. ROBINSON OF HIS RIGHT TO TRIAL BY AN IMPARTIAL JURY.**

In his pro se memorandum, he cited Phillips 455 US at 217 stating, "The right to trial by an impartial jury lies at the very heart of due process... Due process means a jury capable and willing to decide the case solely on the evidence before it and a trial judge so ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen."

He then cited Phillips 455 US at 231 stating, "Bias or prejudice is such a elusive condition of the mind that it is most difficult to always recognize it's existence. It might exist in the mind of one (on the account of his relations with one of the parties) who was quite positive that he had no bias and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence... In cases like this one, where the probability of bias is very high... the juror should be deemed bias as a matter of law. Specifically where a juror's" relative is in "employment with the office of the prosecutor. Under circumstances highly suggestive of misconduct or conflict of interest, bias should be implied and he should be automatically disqualified, despite the absence of proof of actual bias." He

further cited Phillips id at 234 fn. 13 stating a "juror whose relative is a member of the prosecutor's staff should be disqualified."

Robinson further cited Phillips at 236-237 referencing Dennis 339 US 162 at 168; Frazier, 335 US 497 at 511; and Wood, 299 US 123 at 150; specifically pointing out "Decisions in Dennis, Frazier, and Wood do not hold that implied bias would never be appropriate. In all three decisions, the court stressed that trial judges would retain power to safeguard the interest of the defendant where circumstances suggest a real danger of bias." Robinson also cited Frazier, 335 US at 510 fn. 19 stating, "actual bias... might be thought to be implicitly to arise in view of the nature or view of the nature or circumstances of his employment, or of the relation of the particular activity to the matters involved in the prosecution."

Robinson also raised the following ground in his pro se Memorandum of Law in support of his traverse on Habeas Corpus:

TRIAL COUNSEL FAILED TO UTILIZE THE REMAINING 16 PEREMPTORY CHALLENGES AVAILABLE TO EXCUSE SEVERAL JURORS THAT SHOULD HAVE BEEN REMOVED, VIOLATED ROBINSON'S SIXTH AMEND. RIGHT.

Again, Robinson argued trial counsel was ineffective for not excluding juror #2, Kathryn Bennett because of her relation to her brother-in-law. Again, Robinson cited Phillips to support his argument. Then he cited Strickland 466 US at 670 stating, "The ultimate focus must be on the fundamental fairness of the proceedings whose result is being challenged." He then cited Strickland at 711 stating,

"constitutional rights are so basic to a fair trial that their violation can never be treated as harmless error. Among these rights is the right to the assistance of counsel at trial." He further cited Strickland at 684 stating, "the 6th amendment right to counsel is needed in order to protect the fundamental right to a fair trial." Robinson also cited Hughes, 258 F.3d 453 at 464 (2001) quoting Strickland at 687 stating, "When the court has failed to respond to a bias juror on voir dire, counsel who fails to respond in turn is no longer 'functioning as (counsel) guaranteed by the sixth amendment.'"

Robinson then cited Martinez-Salazar 528 US 304 at 316 stating, "A principal reason for peremptories is to help secure the constitutional guarantee of a trial by an impartial jury... The seating of any juror who should have been dismissed for cause, as we have recognized, would require reversal." He also cited Ross, 487 US 81 at 82 stating "the constitution renders, a denial or impairment of the right to exercise such challenges is reversible error without a showing of prejudice."

The Habeas Court ruled there is nothing to indicate the state court erred in failing to sua sponte dismiss the jurors and the particular jurors all affirmed that they could be impartial. The court also ruled there is no basis to find that counsel's decision not to exclude the jurors fell below an objective standard or reasonableness. Robinson's Habeas petition and a Certificate of Appealability ("COA") was denied.

A timely appeal was filed. It was granted by the district court. An Application for COA was filed, pursuant to 28 U.S.C. §2253(c)(1) in the Court of Appeals. Robinson asked the Court, can a jurist of reason debate that Robinson was

prejudiced by his trial counsel when he did not remove juror #2 whom is considered to be bias by federal law and if Phillips raise questions to this issue that's adequate to encourage the court to proceed further regarding Robinson's Sixth Amendment right.

The Third Circuit Court of Appeals ruled that reasonable jurist also would not act unreasonably by not arguing that juror #2 was implicitly biased in favor of the prosecution. and then cited Phillips 455 US at 697-88. The Court then denied the application.

A petition for Rehearing En Banc was timely filed. In that petition, Robinson argued the panel's decision conflicts with the rulings of this court by quoting several guidelines set forth in Phillips, and Strickland. Unfortunately, no judge who concurred in the decision having asked for rehearing and a majority of the judges of the circuit in regular service didn't vote for rehearing. The court denied the Rehearing En Banc.

A petition For Writ of Certiorari was timely filed in this Court. Robinson raised the following ground in his petition:

COURT OF APPEALS DECISION CONFLICTS WITH 455 US 209; 145 L.ED.2D 792; 511 US 127; AND 466 US 668; TRIAL COUNSEL VIOLATED ROBINSON'S VI AMEND. RIGHT TO AN IMPARTIAL JURY FOR NOT EXERCISING PEREMPTORY CHALLENGE TO EXCLUDE JUROR #2, WHOM IS CONSIDERED BIAS IN VIOLATION OF THE U.S. CONST.

In that petition Robinson cited Phillips id. at 233 stating, "most jurisdiction have statues that set forth conduct and status that will automatically disqualify prospective jurors, without regard to whether that person is actually biased. These statutes frequently exclude persons related to the prosecution." He further cited Phillips id. at 234 stating, "it was unrealistic to expect a juror in this situation to act with an even hand toward both parties." he also cited Phillips id. at 224 stating, "it is important for the court to retain the doctrine of implied bias to preserve the Sixth Amendment Right."

Unfortunately, this court denied Robinson's Petition Writ of Certiorari. Now Robinson respectfully request this court to grant this petition for rehearing because it concerns a grave matter regarding his and a number of other people Sixth amendment right to an Effective assistance of Counsel and an Impartial jury.

### CONCLUSION

For the stated reasons, Robinson prays that this Court respond to this petition and grant Rehearing of it's judgment entered October 7, 2019 and issue a Writ of Certiorari to decide an important question of federal law that should be settled by this Court and to hold the State Court or the Third Circuit Court of Appeals accountable for deciding an important federal question in away that conflicts with relevant decisions of this Court and grant Mr. Robinson relief.

Respectfully submitted,



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