

No.

18-9045

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN ROBINSON,

PETITIONER,

-VS.-

PAUL H. HENZEIL, esq., et al.,

- RESPONDENT(S).

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

FILED

APR 26 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI

Kevin Robinson, (pro-se petitioner)

I/m #619434/ SBI# 178856D

New Jersey State Prison

P.O. Box 861

Trenton, New Jersey 08625

QUESTION(S) PRESENTED FOR REVIEW

- 1) Are trial attorneys obligated to protect every fundamental right entitled to defendants under the United States Constitutional Amendments? If so, did Kevin's trial attorney denied him any of the United States Constitutional Amendments presented in this petition?
- 2) If this court concludes that counsel did not protect Kevin's fundamental right entitled to him under the United States Constitutional Amendments, shall Kevin's conviction be vacated?
- 3) Does the VI Amendment right to an Impartial Jury allow a juror similar to juror #2, Kathryn Bennett in this case to participate in jury deliberations, although the juror stated on Voir dire that her brother-in-law works at the same Prosecutor's Office that's trying the case at trial?
- 4) If Kathryn Bennett fit the Criteria to be excluded for implied bias according to the doctrine held in 455 US 209 to preserve the VI and XIV Amendment right to an impartial jury, did trial counsel violate Robinson's VI and XIV Amendment right to an impartial jury for not exercising a peremptory challenge to exclude her?
- 5) If this court concludes that the lower courts' decision conflict with 466 US 668; 455 US 209; 145 Led.2d 792; and 511 US 127; regarding trial counsel or the trial court violating Robinson's VI and XIV Amendment right to an impartial jury, shall Robinson's conviction be vacated?
- 6) Does the VI and XIV Amendment right to Due Process allow an attorney to omit material statements from the jury's readback of a state's main witness

testimony, similar to Joseph in this case briefly admitting he don't know if Kevin had a knife during the fight but only guessed he had a knife, when the trial judge granted to give the jury a full readback with regard to their request about Joseph's recollection of Kevin pulling out a knife?

- 7) When trial counsel met with the prosecutor and the court reporter to select Joseph's statement, did trial counsel violate Robinson's VI and XIV Amendment right to Due Process by agreeing to omit Joseph's statement bearing on Kevin's innocence denying the jury's request?
- 8) If this court concludes that the lower courts' decision conflict with 466 US 668, at 694 (citing AGURS); 427 US 97; 373 US 83; 132 S.Ct. 627; 506 US at 540; and 415 US at 317; regarding trial counsel violating Kevin's right to Due Process by denying the jury's request on material evidence, shall his conviction be vacated?
- 9) Does the VI and XIV Amendment right to a fair trial allow the trial judge, like in this case, to instruct the jury not to render a verdict on the lesser-included charges nor answer their questions on the verdict sheet unless they first find that the state has failed to meet its burden to the murder charge, although it conflicts with 508 US 333?
- 10) Did trial counsel violate Robinson's VI and XIV Amendment right to a fair trial by suggesting the sequence of the charges given to the jury for consideration starting with murder, passion/provocation, aggravated manslaughter, and then reckless manslaughter permitting the jury to consider murder first before the lesser-included offenses?

- 11) If this court finds that the lower courts' decision conflict with 508 US 333; 524 US 88; 421 US 684; and 466 US 668; regarding trial counsel violating Kevin's VI and XIV Amendment to a fair trial for allowing the jury to consider an unconstitutional instructions, shall his conviction be vacated?
- 12) Does the V and VI amendment permit trial attorneys to protect their client's right against self-incrimination by filing a 104(c) preliminary motion to challenge a witness statement, similar to Oscar's claiming he allegedly heard Kevin confess to someone else other than himself that he stabbed the victim, and to challenge another witness statement, similar to Joseph's claiming he heard Kevin stating other incriminating statements when their clients deny the allegation?
- 13) Did trial counsel violate Kevin's Fifth Amendment right against self-incrimination for not filing a 104(c) preliminary motion to challenge the allegations that Oscar's and Joseph's made against Kevin although Kevin asserted to counsel before trial that he did not state any of the allegations that he's being accused of stating?
- 14) If this court concludes that the lower courts' decision conflict with 466 US 668; 397 US 759; 404 US 477; 512 US 594; regarding trial counsel violating Robinson's Fifth Amendment right against self incrimination, shall his conviction be vacated?.
- 15) With regard to each claim presented in this petition whether considered cummulatively or individually, did trial counsel deficient performance violate Robinson's Sixth Amendment right to an effective assistance of

counsel as expected in Cronic, 466 US 648; and Strickland, 466 US 668 to being a reasonably competent defense attorney?

- 16) With regard to each claim presented in this petition, whether considered cummulatively or individually, did trial counsel deficiency prejudiced Robinson's defense to the extent that it had the potential to change the outcome of the trial in violation of Robinson's VI and XIV Amendment rights to a fair trial?
- 17) If this court concludes that the lower court's decision conflicts 466 US 648; and 466 US 668; regarding trial counsel violating Robinson's VI and XIV Amendment right to an effective assistance of counsel and a fair trial, shall his conviction be vacated?
- 18) With regard to each claim presented in this petition, did any of the claims raise important federal questions in a way that shall be settled by this court with relevant United States Supreme Court cases that's almost similar to the claims presented in this petition?
- 19) With regard to each claim presented in this petition, did Robinson present any compelling reasons that this court ought to grant his petition for a Writ of Certiorari required by Rule 10? If so, shall he be entitled to any relief from this court?

LIST OF PARTIES

All of the parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Solicitor General of the United States

Attorney General of the United States

Gurbir Grewal, (Attorney General of New Jersey)

Paul H. Heinzl, Esq. (Somerset County's prosecutor)

The Administrator of New Jersey State Prison

Kevin Robinson, (Pro-se Petitioner)

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- T6: Trial Proceeding Transcript, August 7, 2008
- T7: Trial Proceeding Transcript, August 11, 2008
- T8: Trial Proceeding Transcript, August 12, 2008
- T9: Trial Proceeding Transcript, October 10, 2008
- T10: P.C.R. Hearing Transcript, December 18, 2012

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

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

OPINIONS BELOW

[x] For cases from **Federal Courts**:

The order and entry of judgment of the United States Court of Appeals for the Third Circuit appears at Appendix A at 1a-6a to the petition and has been designated for publication but is not yet reported.

The decision of the United States Court of Appeals for the Third Circuit denying a timely filed petition for Rehearing appears at Appendix B at 7a-9a to the petition and has been designated for publication but is not yet reported.

The opinion of the United States District Court of New Jersey appears at Appendix C at 10a-46a to the petition and is unpublished.

[x] For cases from **State Courts**:

The opinions of the Supreme Court of New Jersey to review the merits appears at Appendix F at 92a-94a to the petition and they are reported at

State v Kevin Robinson, 116 A.3d 1073 (N.J. 2015); and State v Kevin Robinson, 29 A.3d 742 (N.J. 2011).

The opinions of the Superior Court of New Jersey Appellate Division appears at Appendix D at 47a-69a to the petition and they are not for publication without the approval of the Appellate Division.

The opinions of the Superior Court of New Jersey Somerset County Criminal Law Division appears at Appendix E 70a-91a to the petition and they are unpublished.

JURISDICTION

[X] For cases from **Federal Courts**:

On December 19, 20018, the United States Court of Appeals for the Third Circuit decided my case.

On January 30, 2019, a timely petition for Rehearing was denied.

No Cross-Petition was filed, because petition for a Writ of Certiorari seeking review required by Rule 10 was timely filed required by Rule 13.1, 13.2 and 29.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)(2).

The notifications required by Rule 29.4(b)(c) have been made pursuant to 28 U.S.C. §2403(a)(b) that the constitutionality of an Act was drawn into question.

[X] For cases from **State Courts**:

On October 20, 2011 and on July 10, 2015, the Supreme Court of New Jersey decided my case.

A petition for Rehearing was never filed.

No Cross-Petition was filed, because petition for a Writ of Certiorari seeking review required by Rule 10 was timely filed required by Rule 13.1, 13.2 and 29.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

The notifications required by Rule 29.4(b)(c) have been made pursuant to 28 U.S.C. §2403(a)(b) that the constitutionality of an Act was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As required by Required by Rule 14.1(f) and Rule 14.1(i)(v), Kevin reproduced the provisions involved in this case set out in the Appendix.

The Constitutional Amendments involved in this case are:

United States Constitution: Amendment V (App. G at 96a.)

United States Constitution: Amendment VI (App. G at 96a.)

United States Constitution: Amendment XIV (App. G at 97a.)

The Statutes involved in this case are:

28 U.S.C. § 1254 (App. G at 98a.)

28 U.S.C. § 1257 (App. G at 98a.)

28 U.S.C. § 2253 (App. G at 99a.)

28 U.S.C. § 2254 (App. G at 99a-102a.)

28 U.S.C. § 2403 (App. G at 102a-103a.)

The Federal Rules of Evidence involved in this case are:

Rule 104 (App. G at 104a.)

Rule 801 (App. G at 104a-106a.)

Rule 802 (App. G at 106a.)

Rule 804 (App. G at 106a-109a.)

The Rules of the United States Supreme Court involved in this case are:

Rule 10 (App. G at 110a.)

Rule 13 (App. G at 110a-112a.)

Rule 29 (App. G at 112a-116a.)

STATEMENT OF THE CASE

On October 18, 2007, the grand jury returned indictment No. 07-10-00731-I charging Kevin Robinson with first-degree murder and third-degree possession of a weapon for an unlawful purpose based on witnesses' testimonies given at the police station. Soon after, Kevin received the discovery containing their statements.

Oscar Quintana's falsely accused Kevin, claiming he allegedly overheard Kevin giving an incriminating confessions to someone else whom wasn't a witness. His 13 year old brother, Joseph Menjivar, falsely accused claiming Kevin allegedly showed him a knife asking was "it big enough," after allegedly seeing Kevin pulling out a knife and stabbing the victim, Keenan Sanders a couple of times in the side and the chest area. After reading these statements, Kevin brought these issues to his attorney denying the allegations.

Prior to trial, Kevin asked his attorney, Rubin Sinins, to file a 104(c) motion to challenge the incriminating allege confessions and statements. However, counsel never filed the motion. At pretrial, counsel told the judge "there are no dispositive pretrial motions to be heard. There's no statement given by my client." (T1: 12-6 to 8). Then the the trial date was set.

During jury selection, 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 available peremptory challenge to excuse Kathryn as a juror. She participated in jury deliberations.

During trial, witnesses testified, on July 12, 2007, an altercation broke out between the victim, Keenan Sanders, against Kevin's sister, Pamela Robinson, and Pamela's cousin, Shakyia. Before trial, Kevin never knew what exactly happened during the night of the altercation. Kevin was misled to believe that his sister was robbed by a stranger. Kevin didn't know Pamela dated Keenan. Kevin never met Keenan before.

Kevin was hanging out downtown New Brunswick over a friend's house when Pamela called his cell phone crying claiming somebody beat her up and took her belongings. Kevin asked where she was located. Pamela responded, in the apartment complex where their grandmother reside, which is on Livingston Avenue of North Brunswick. Kevin left immediately headed to the location. Once he arrived, he searched the whole area. Pamela was nowhere to be found. He called her phone but no response. She called him back stating she's on her way back. She arrived minutes later in the front passenger seat of Oscar's car, with Joseph and Shakyia in the backseat. They told Kevin to get in. Then Kevin sat in the back seat with Joseph and Shakyia. (T6: 69-16 to 73-4.)

During trial, several testimonies verified the altercation took place elsewhere. Witnesses testified, Keenan and his friend, Jonathan Cancel, mischievously left Pamela and Shakyia at the grocery store with their belongings still in Keenan's van. Pamela called Oscar while they walked across town to Shamara's house. Upon arrival, Keenan and Jonathan was already there while Oscar was waiting in a separate car. Pamela and Keenan began arguing. They started fighting physically. Keenan slammed Pamela and Shakyia on the ground. Jonathan broke it up. When Pamela and Shakyia entered Oscar's car to leave, Keenan reached threw the

window and slapped them both. Then they left. (T4: 124-5 to 158-7.); (T5: 134-20 to 138-12.)

Afterwards, Pamela called Kevin. Once Pamela got off the phone, she told Oscar to get Kevin. Then Oscar receive a call from his mom ordering him to pick up his little brother, Joseph. After picking up Joseph, they went to pick up Kevin. When they met with Kevin, they told Kevin to get in the car. Then they drove straight to Keenan's house. (T4: 160-14 to 169-2.)

They reached Keenan's house less than 3 minutes. (T6: 75-10 to 14.) Upon arrival, everyone in the car stated they didn't see Kevin exited the car with a knife when he approached Keenan and Jonathan in the driveway. A fight broke out immediately. Pamela and Shakyia didn't see the fight. They went across the street over another friend's house. Oscar and Joseph watched the fight. From this point on, several conflicting versions were given.

Overall, most witnesses, including Keenan's friend, testified they didn't see Kevin with a knife. Although Oscar acknowledged he was able to see that Kevin wasn't armed with a knife during the fight, he claimed he allegedly heard Kevin confessed to someone else, other than himself, that he stabbed Keenan. Joseph is the only witness claiming to allegedly have seen Kevin with a knife and stabbing Keenan. However, on cross-examination, Joseph briefly admitted he don't know if Kevin had a knife. Also, Joseph acknowledged his own police statement describing Kevin first stabbing Keenan a couple times in the side and then stabbing Keenan once in the upper chest area which is inconsistent with the medical examiner's description of the victim's stab wound. (App. H 119a-166a)

After trial testimony, a conference was held. The judge agreed to give murder, passion/provocation, aggravated, and reckless manslaughter, including self-defense

instructions to the jury. Counsel suggested the sequence of the instructions and verdict sheet. Counsel also requested the judge to add a sentence explaining just because the order is in a particular way does not mean this is necessarily the order that you must consider. (App. H at 169a-174a.)

The trial judge gave the instruction charges to the jury in the following order: 1) murder; 2) passion/provocation manslaughter; 3) aggravated manslaughter; 4) reckless manslaughter; 5) self-defense; 6th) simple assault; 7) possession of weapon for an unlawful purpose.

However, while giving these instructions, the judge stated:

With regard to giving instruction on these lesser included charges, the law required the court to give those instructions, including the lesser charges, even if they are not contained in the indictment, and just because the Court is giving these instructions concerning these offenses does not mean the Court has any opinion one way or the other whether the defendant committed these or any other offense. Consider these offenses along with the offenses of which the defendant is indicted. However, you are not to render a verdict on these lesser included charges or answer these questions on the verdict sheet unless you first find the State has failed to meet its burden with regard to the charge on the indictment. (T7: 102-6 to 19.)

Afterwards, the jury were excused to deliberate. During deliberations, the jury sent a note requesting a readback of Joseph's testimony about his recollection of Kevin pulling out a knife, and clarification of the possession of a weapon charge. The judge re-read the requested instructions. Then the clerk read back the testimonies. However, the clerk didn't read back Joseph briefly admitting he know if Kevin had a knife but only guessed Kevin had a knife. It was omitted because counsel agreed with the prosecutor to omit Joseph's admission. The jury found

Kevin guilty of first-murder and possession of a weapon 33 minutes later. (App. H at 176a-187a.)

After trial, a timely appeal was filed. Several issues were raised on Direct Appeal, but Kevin respectfully request the Court to review the following issues from Direct Appeal:

- 1) THE READBACK THAT THE COURT PROVIDED IN ANSWER TO THE JURY'S INQUIRY OMITTED PERTINENT SECTIONS OF THE RECORD AND THUS WAS POTENTIALLY MISLEADING TO THE JURY AND PREJUDICIAL TO THE DEFENDANT
- 2) 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.

These issues were denied on Direct Appeal and by the Supreme Court of New Jersey. (App. D at 56a-69a; App. F at 94a) Then a timely Petition for Post Conviction Relief ("PCR") was filed. Several issues were raised on PCR, but Kevin respectfully request the Court to review the following issues from PCR:

- 1) 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.
- 2) THE READBACK TRIAL COUNSEL PROVIDED IN AGREEMENT WITH STATE COUNSEL OMITTED SIGNIFICANT SECTIONS THE JURY REQUESTED WHICH WAS MISLEADING AND PREJUDICIAL, THUS CONSTITUTED INEFFECTIVE COUNSELING
- 3) TRIAL COUNSEL'S FAILURE TO CORRECT THE SEQUENCE OF THE LESSER INCLUDED OFFENSES OF

MURDER BY FORECLOSING THE JURY TO CONSIDER
MURDER BY FORECLOSING THE JURY TO ADEQUATELY
CONSIDER THE LESSER INCLUDED OFFENSES UNTIL
AFTER THEY DELIBERATED ON MURDER, VIOLATED
ROBINSON'S 6TH AMEND. RIGHT

- 4) TRIAL COUNSEL'S CUMULATIVE ERRORS AFFECTED THE
JURY DELIBERATION. THUS, ROBINSON'S CONVICTION
SHOULD BE REVERSED BECAUSE HIS 6TH AMEND.
RIGHT WAS VIOLATED.

These issues were denied by the trial court. (App. E at 72-87) A timely appeal was filed. The issues were re-raised in the Appellate Court, but additional issues were also raised as a subtitle. In addition to the previous issues, Kevin respectfully request the Court also review the following issue from PCR appeal:

- 1) TRIAL COUNSEL ERRED BY FAILING TO FILE A
PRELIMINARY MOTION TO CHALLENGE THE
INCRIMINATING OUT OF COURT CONFESSIONS
ROBINSON DENY MAKING WHICH VIOLATED
ROBINSON'S 5TH AND 6TH AMEND. RIGHTS.

These issues were denied by the Appellate Court and the Supreme Court of New Jersey. (App. D at 48a-55a; App. F at 93) A timely Petition for Habeas Corpus was filed pursuant to 28 U.S.C. § 2254. Kevin Raised Fifteen Grounds. The issues mentioned above are the same issues included in those Fifteen Grounds. Kevin still respectfully request the Court to review them. Kevin's petition was denied and a Certificate of Appealability ("COA") was denied. (App. C at 11a-46a.) 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. The Application was denied. (App. A at 2a-6a) A timely petition for Rehearing En Banc was filed. Unfortunately, it was denied. (App. B at 8a-9a).

REASONS FOR GRANTING THE WRIT

I. 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 CONSIDERED BIAS IN VIOLATION OF THE U.S. CONST.

The lower Court's decision on this matter conflicts with the United States Supreme Court precedents. Allowing Juror #2 Kathryn Bennett to participate in jury deliberations conflicts with Smith v Phillips, 455 US 209 (1982), because her brother-in-law, Jack Bennett worked for the Somerset County Prosecutor's Office during the same time the prosecution agency was trying Kevin's case at trial. (T2: 127-6 to 7; T2: 130-9 to 12.) Kathryn Bennett, "should be deemed bias as a matter of law. Specifically, where... employment with the office of the prosecutor, under circumstances highly suggestive of misconduct or conflict of interest, bias should be implied, and... should be automatically disqualified, despite the absence of proof of actual bias." Id. at 231.

"When the circumstances were such that bias could be implied... exclusion of a prospective juror for implied bias is appropriate when it is shown that he is of kin to either party." 455 US at 232. "Most jurisdictions have statutes that set forth conduct or 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." Id. at 333; See 455 US at 234 ("Juror whose

relative is a member of the prosecutor's staff should be disqualified." Id. at fn. 13); "Whether or not the state proceedings resulted in a finding of no bias, the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." Id. at 222.

"It is important for the Court to retain the doctrine of implied bias to preserve the Sixth Amendment rights." 455 US at 224. "The right to trial by an impartial jury lies at the very heart of due process." ibid.; "That purpose simply cannot be achieved if the jury's deliberation are tainted by bias or prejudice." Id. at 225; "The right to a trial by an impartial jury is too important, and the threat to that right too great to justify." Id. at 231-232; "It was unrealistic to expect a juror in this situation to act with an even hand toward both parties." Id. at 234; See 455 US at 238 ("The law cautiously incapacitates him from serving on the jury because it supposes prejudice" Id. at fn. 19.)

"This Court has recognized... the Sixth Amendment right to counsel exists, and is needed in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial largely through several provisions of the Sixth Amendment, including the Counsel Clause... and public trial, by an impartial jury." Strickland v Washington, 466 US 688, at 684-685 (1984)

Thus, counsel's duty was to exercise the available peremptory challenge to remove Kathryn Bennett immediately from being a prospective juror when he learnt on voir dire of her brother-in-law's "employment with their office" at the Somerset County's prosecution agency. Kathryn Bennett "could have been replaced, and" Kevin "would have received an opportunity to be tried by an impartial jury."

455 US at 244; It was "necessary to ensure that the trial is fair" by an impartial jury. 466 US at 685.

"Voir dire provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently." J.E.B. v Alabama, 511 US 127 (1994); "By enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminating extreme of partiality on both sides, thereby ensuring the selection of a qualified and unbiased jury." Id. at 147; "The peremptory challenge plays an important role in reinforcing a defendant's constitutional right to trial by an impartial jury." United State v Martinez-Salazar, 145 L.ed.2d 792, 796 (2000)

"The loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." 145 L.Ed.2d at 801. "So long as the jury that sits is impartial, does not mean the Sixth Amendment was violated." Ibid. "The seating of any juror who should have been dismissed for cause, as we have recognized, that circumstance would require reversal." Id. at 804; "If due process really does mean a full and fair opportunity to be tried by an unbiased jury... then in this case, due process has been denied." 455 US at 244. Therefore, trial counsel violated Robinson's Sixth Amendment right to an Impartial Jury, Due Process, and an effective assistance of counsel.

II. COURT OF APPEALS' DECISION CONFLICTS WITH
466 US 668, at 694 (citing AGURS); 427 US 97; 373 US
83; 132 S.Ct. 627; 506 US at 540; AND 415 US at 317;
TRIAL COUNSEL VIOLATED ROBINSON'S VI AND
XIV AMEND. RIGHTS TO DUE PROCESS BY
DENYING THE JURY'S REQUEST OMITTING
JOSEPH MENJIVAR'S MATERIAL STATEMENTS
FROM JURY'S READBACK BECAUSE IT COULD'VE
CHANGED THE OUTCOME OF TRIAL.

The lower Court's decision on this matter conflicts with the United States Supreme Court precedents. In this case, the jury specifically asked for a readback of Joseph's recollection about Kevin pulling out a knife literally right before giving their verdict. The trial judge granted their request and ordered that all portions pertaining to their request be included in the readback. However, when counsel agreed with the prosecutor and the court reporter to excluded Joseph's admission from the readback admitting he don't know if Kevin had a knife but only guessed he did, (App. H 176a-181a and 186a-187a.); "it involve a corruption of the truth-seeking function of the trial process." 427 US 97, at 104.

"If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the" attorney. "If the evidence is so clearly supportive of a claim of innocence... it gives... a duty to produce." 427 US at 107. "Illustrated by the Brady case itself... This court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was material." 427 US 97, at 104.

"Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 373 US at 90; "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence, a fair trial does not include the right to exclude relevant and competent evidence." Zafiro v US 506 US 534, 540 (1993); Similarly, Brady "hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material." Brady v Maryland, 373 US 83, at 87 (1963).

"When the specified attorney error results in the omission of certain evidence... the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense." 466 US 668 at 694 (citing United States v. Agurs, 427 US at 104, 112-113); "For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies where the evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's error resulted in actual and substantial disadvantage to the course of his defense" 466 US at 682; "A fair assessment of attorney performance requires that every effort be made to... evaluate the conduct from counsel's perspective at the time." Id at 689.

"The sole question before us is thus whether" Joseph's "statements" omitted from the readback "were material to the determination of" Kevin's "guilt" having potential to change the outcome of trial. "We have explained that 'evidence is material within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" Smith v Cain, 132 S.Ct. 627, at 630 (2012) (citing Cone v Bell, 556 US 449, 469-470 (2009)); "A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 US 668 at 694; "A reasonable

probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial." 132 S.Ct. at 630.

Joseph is the only person placing a knife in Kevin's possession. On direct examination, he claimed he saw Kevin pull out a knife and stab Keenan once in the throat. But on cross-examination, he contradicted his statement claiming he saw Kevin stab Keenan a couple of times in the side and then once in the chest. However, he admitted in his omitted statement he don't know if Kevin had a knife during the fight but only guessed Kevin had a knife. Joseph's omitted "statements directly contradicted his testimony" but it's consistent with other witnesses' stating they didn't see Kevin with a knife while watching the fight. The omitted "statements were plainly material." The jury requested a readback to rehear Joseph's recollection of Kevin pulling out a knife because they needed clarification determining the verdict. Since the jury came back with a verdict 33 minutes after the readback, "that merely leaves us to speculate about which of" Joseph's "contradictory declarations the jury would have believed." 132 S.Ct. at 630.

"Counsel made errors so serious that counsel was not functioning as the counsel guaranteed... by the Sixth Amendment," because "counsel's deficient performance prejudiced the defense." 466 US at 687;. "The jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on" Joseph's "testimony which provided a crucial link in the proof of petitioner's act... The accuracy and truthfulness of" Joseph's "testimony were key elements in the State's case against" Kevin. Davis v Alaska, 415 US 308, 317 (1974); "If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." US v Agurs, 427 US 97, 112 (1976).

III. COURT OF APPEALS' DECISION CONFLICTS WITH
508 US 333; 524 US 88; 421 US 684; AND 466 US 668;
TRIAL COUNSEL VIOLATED ROBINSON'S VI AND
XIV AMEND. RIGHTS TO A FAIR TRIAL BY
ALLOWING TRIAL JUDGE TO INSTRUCT THE JURY
NOT TO CONSIDER THE LESSER-INCLUDED
OFFENSES OF MURDER NOR ANSWER THEM ON
VERDICT SHEET UNTIL AFTER THEY FIRST FIND
THE STATE FAILED TO MEET ITS BURDEN TO
MURDER.

The lower Court's decision on this matter conflicts with the United States Supreme Court precedents. In this case, Trial counsel suggested the judge to give the murder charge and the lesser-included charges of murder in the following order:

- 1) murder;
- 2) passion/provocation manslaughter;
- 3) aggravated manslaughter;
- 4) reckless manslaughter.

(App. H 170a-174a)

Counsel allowing the judge to instruct the jury not to render a verdict on the lesser included charges of murder or answer their questions on the verdict sheet unless they first find the State has failed to meet its burden with regard to the murder charge conflicts with Gilmore v Taylor, 508 US 333 (1993), because the order of the charges they was instructed to consider were unconstitutional.

Similarly, in Taylor "the jurors signed neither the guilty nor the not-guilty verdict forms regarding voluntary manslaughter, This is almost certainly because the instructions for murder preceded the instruction for manslaughter, the verdict

forms for murder preceded the verdict forms for manslaughter, and the jurors understood that once they had found Taylor guilty of murder, they could not, consistent with the judge's instructions, find him guilty of manslaughter. There was no need, under the instructions they received, to consider manslaughter and provocation. Taylor's jury never knew that provocation made out a complete defense to murder... the instructions violated state law by permitting the jury to find Taylor guilty of murder without considering his affirmative defense." 508 US at 356-357.

Since the Judge agreed on giving the passion/provocation manslaughter, reckless manslaughter, and aggravated manslaughter instructions to the jury for consideration, the jury should have been able to consider these lesser-included charges first before considering the murder charge. The "jury instructions" given to the jury "were unconstitutional because they allowed the jury to return a murder verdict without considering whether" Kevin "possessed the mental state that would support a... manslaughter verdict instead." 508 US at 335. "The instructions violated state law by permitting the jury to find" Kevin "guilty of murder without considering his affirmative defense." id. at 357.

"The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter differ significantly." Mullaney v Wilbur, 421 US 684, at 698 (1975); Mullaney "divides the single generic offense of... homicide into three distinct punishment categories-murder, voluntary manslaughter, and involuntary manslaughter. Only two of these categories require that the homicidal act either be intentional or the result of criminally reckless conduct." id. at 698-699.; "It is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter." id. at 703-704.; "A state may not erect a... artificial barrier to the provisions of instructions on offenses that actually are lesser-included offenses under state law." Hopkins v Reeves, 524 US 88, at 97-98 (1998)

"Through his instructions," which counsel suggested, "the trial judge in this case applied an ex post facto murder law... and thereby mislead the jury." Trial counsel and "the trial judge also violated" Kevin's "constitutional rights. When the judge prevented" Kevin's "jurors from considering his... defense, the judge" and counsel "deprived" Kevin "of his Sixth Amendment and Fourteenth Amendment right to a fair trial." 508 US at 362; In this case, "there had been a distortion of the factfinding process because his jury had been forced into an all or nothing choice between... murder and innocence." 524 US at 98.

"Under the standard fashioned in Boyde, the relevant inquiry is 'whether this is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" 508 US at 342 (citing 494 US at 380); "Since the Eight Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence, this evidence was plainly constitutionally relevant." *id.* at 342.; "But in a noncapital case such as this, there is no counterpart to the Eighth Amendment's doctrine of constitutionally relevant evidence in capital cases." *ibid.*

Nevertheless, we have held that other constitutional amendments create constitutionally relevant evidence that the jury must be able to consider." 508 US at 349; Taylor referred to the "discussion of Sandstrom as establishing the due process principle that instructions are unconstitutional if they let the jury to ignore exculpatory evidence in finding the defendant guilty of murder beyond a reasonable doubt." *Id.* at 343; "The most that can be said of the instructions given... is that they created a risk that the jury would fail to consider evidence that related to an affirmative defense." *ibid.* "The jury instructions given at his trial interfered with his fundamental right to present a defense. We have previously stated that 'the Constitution guarantees criminal defendant's a meaningful opportunity to present a complete defense.'" *id.* at 343 (quoting Crane v Kentucky, 476 US 683, 690 (1986)).

"Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the constitution." Strickland 466 US at 692; "The right to an affirmative-defense instruction that jurors can understand when there is evidence to support an affirmative defense is as significant to the fairness and accuracy of a criminal proceeding as is the right to counsel." 508 US at 364; However, counsel suggested the sequence of the "erroneous instructions thereby vitiated" Kevin's "right to a fair trial, guaranteed him by the Sixth Amendment." ibid.

"Because the murder instructions preceded the... manslaughter instructions, but did not expressly direct the jury that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state, it was possible for a jury to find that a defendant was guilty of murder without even considering whether he was entitled to a... manslaughter conviction instead. Explicit misdirection on this scale, the Seventh Circuit held, violates the constitutional guarantee of due process." 508 US at 339; Therefore, counsel's deficiency "actually had an adverse effect on the defense." 466 US at 693.

IV. COURT OF APPEALS' DECISION CONFLICTS WITH
466 US 668; 397 US 759; 404 US 477; 512 US 594;
TRIAL COUNSEL VIOLATED ROBINSON'S V
AMEND. RIGHT AGAINST SELF-INCRIMINATION
BY FAILING TO FILE A 104(C) PRELIMINARY
MOTION TO CHALLENGE THE ALLEGE
INCRIMINATING CONFESSIONS AND STATEMENTS
THAT ROBINSON DENY STATING.

The lower Court's decision on this matter conflicts with the United States Supreme Court precedents. In this case, Trial counsel failed to file a 104(c) before trial or during trial to challenge Oscar's, and Joseph's testimony implicating Kevin of giving incriminating statements outside the presence of the jury. (App. H 139a-142a, 153a-155a.) At trial, Kevin denied Oscar's allegation by asserting he did not confess to stabbing Keenan and Oscar did not pick up any of his friends. Kevin also denied Joseph's allegations about showing him a knife asking was it big enough and denying stabbing the victim saying this is what you get. "When the prosecution, state or federal, seeks to put in evidence an allegedly... confession, its admissibility is determined by the command of the Fifth Amendment that no person... shall be compelled in any criminal case to be a witness against himself." Lego v Twomey, 404 US 477, at 490 (1972).

"The most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements." Williamson v United States, 512 US 594, at 600 (1994); "This is especially true when the statement implicates someone else." id. at 601; "To decide whether" the allege "confession is made admissible by Rule 804(b)(3), we must first determine what the rule means by statement, which Federal Rules of Evidence 801(a)(1) defines as an oral or written assertion." id. at

599; "The hearsay rule, Fed. Rule Evid. 802, is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying." id. at 598.

"The Court recognizes the untrustworthiness of statements implicating another person." id. at 607; "The accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." id. at 608; "A ruling on the admissibility of evidence under Rule 804(b)(3) is a preliminary question to be determined by the district judge under Rule 104." Therefore, Rule 104(c)(1) allowed Kevin's attorney to file a 104(c) motion to conduct a hearing regarding the alleged confessions.

"The court must conduct any hearing on a preliminary question so that the jury cannot hear it if the hearing involves the admissibility of a confession." See Rule 104(c)(1); "It is a common practice, for example, to hold pretrial hearings or devise other procedures for the purpose of permitting defendants an opportunity to challenge the admissibility of allegedly confessions." McMann v Richardson, 397 US 759, at 781 (1970); "If it is assumed that these procedures provide a constitutionally adequate means to attack the validity of the confession, then it must be expected that... it does not follow from this that a defendant assisted by counsel can never demonstrate that this failure to invoke the appropriate procedures was justified." id. at 781-782.

"The Sixth Amendment imposes on counsel a duty to investigate... based on professional decisions and informed legal choices." 466 US at 680; "The purpose is simply to ensure that the criminal defendants receive a fair trial." id. at 689; "We acknowledged that certain constitutional rights are so basic to a fair trial that their infractions can never be treated as harmless error." id. at 711; Counsel's "performance... departed from constitutionally prescribed standards." id. at 712.

V. COURT OF APPEALS' DECISION CONFLICT WITH
466 US 668 AND 466 US 648; THE CUMULATIVE
EFFECT OF TRIAL COUNSEL'S DEFICIENT
PERFORMANCE PREJUDICED ROBINSON'S
DEFENSE VIOLATING ROBINSON'S SIXTH
AMENDMENT RIGHT TO AN EFFECTIVE
ASSISTANCE OF COUNSEL.

The lower Court's decision on this matter conflicts with the United States Supreme Court precedents. "This court has recognized repeatedly, of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." United States v Cronic, 466 US 648 at 654 (1984); "The text of the Sixth Amendment itself suggests as much. The Amendment requires not only the provision of counsel to the accused, but assistance, which is to be for his defence. Thus, the core purpose of counsel guarantee was to assure assistance at trial when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." id. at 655.

"Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." Strickland 466 US at 692; With regard to each claim presented in this petition, Robinson did "make out a claim of ineffective assistance of counsel only by pointing to specific errors made by trial counsel" violating his other constitutional rights. Cronic, 466 US at 649, and 666 (1984).

Counsel's deficient performance deprived Robinson of an impartial jury by allowing Kathryn Bennett to participate in jury deliberations. When she stated her brother-in-law work at the same prosecuting office, trial counsel was supposed to

had removed her from the panel, because Kathryn is considered to be bias in violation of the Sixth Amendment to an Impartial Jury according to Phillips v Smith, 455 US 209 (1982). Thus, counsel was ineffective for violating Kevin's right to an impartial jury.

Counsel's deficient performance deprived Robinson of his defense against Joseph claiming he allegedly seen Kevin pull out a knife during the fight and stabbed the victim. When the judge granted the jury's request to readback all the portions pertaining to Joseph's recollection of Kevin pulling out a knife, trial counsel shouldn't have omitted from the readback Joseph admitting he don't know if Kevin had a knife but only guessed he had a knife. The statement was essential to the jury's request. It denied the jury to have clarification determining the verdict during deliberation. The deliberation process is a critical stage during trial. Counsel's performance conflicts with Strickland 466 US at 694 (citing Agurs 427 US at 104). On the same page of Agurs, it cites the Brady case stating, "This court held that the suppression of one of Boblit's statements deprived Brady of due process, noting specifically that the statement had been requested and that it was material." 427 US at 104. Thus, counsel was ineffective for violating Kevin's Fourteenth Amendment right to Due Process.

Counsel's deficient performance deprived Kevin of a fair trial by suggesting the sequence of the charges should start with murder first on the verdict sheet. Although Kevin maintain his innocence, the jury still found him guilty. In this case, the state presented evidence that supports a lesser-included charge which the judge agreed to give the jury. However, since counsel suggested the sequence of the charges given to the jury, counsel's deficient assistance conflicts with Gilmore v Taylor, 508 US 333 (1993). The sequence of the charges denied the jury the opportunity to consider the lesser-included offenses of Robinson's defense to murder making the jury instructions unconstitutional violating Kevin's right to a fair trial.

Thus, Counsel was ineffective for violating Kevin's Sixth Amendment right to a fair trial.

Counsel's deficient performance denied Kevin's right against self-incrimination by not filing a motion to conduct a 104(c) preliminary hearing to challenge the allege statements and confessions that Kevin deny stating. A 104(c) motion allow counsel to conduct a hearing challenging the admissibility of the allege statements and confessions outside the presence of the jury. (see App. G at 104a) "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... confession without regard for the truth or falsity of the confession." Twomey, 404 US at 477; "When the prosecution, state or federal, seeks to put in evidence an allegedly ... confession, its admissibility is determined by the command of the Fifth Amendment that no person... shall be compelled in any criminal case to be a witness against himself." id. at 490. Therefore, counsel was ineffective for violating Kevin's Fifth Amendment right against self-incrimination.

"Among the factors relevant to deciding whether particular strategic choices are reasonable are... the potential for prejudice from taking an unpursued line of defense." 466 US at 681; "Both the performance and prejudice components of the ineffective inquiry are mixed questions of law and fact." id. at 698; "The account of trial counsel's actions and decisions given above reflects the combined findings on the legal issue of ineffectiveness." id. at 678; "For these reasons... the constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." id. 684; "Counsel's errors resulted in actual and substantial disadvantage to the course of his defense." id. at 682; Counsel's deficiencies prejudicing Kevin's defense, "conjoined with the unreasonableness of counsel's" deficient performance, "are more than sufficient to establish a violation of the Sixth Amendment" right to effective assistance. id. at 719.

CONCLUSION

The petition for a writ of Certiorari should be granted.

Respectfully submitted,

Kevin Robinson

Kevin Robinson (Pro-se Petitioner).

Dated: April 26, 2019.

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