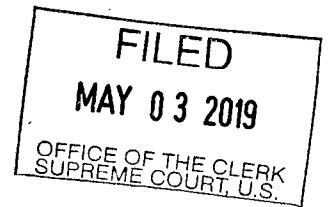


No. 18-9310

ORIGINAL



IN THE

SUPREME COURT OF THE UNITED STATES

Roberto Nieto Cruz — PETITIONER
(Your Name)

vs.

State of Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Third Court of Appeals State of Texas
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Roberto Nieto Cruz
(Your Name)

1012 Burkett Street
(Address)

Taylor, Texas 76574
(City, State, Zip Code)

512-679-7861
(Phone Number)

QUESTION(S) PRESENTED

- I. The Court of Appeals erred by misapplying the first prong, and failing to consider the second prong, of the *Strickland* standard, with respect to the Appellant's trial counsel's failure to properly object to extraneous offense testimony. The Court of Appeals has decided an important question of Federal law in a way that conflicts with applicable decisions of other Courts of Appeals, or the Supreme Court of the United States.
- II. The Texas Court of Appeals has misconstrued a rule or statute in such a way as to deprive Petitioner of his 14th Amendment due process right to confront and cross-examine witnesses in the Crawford case.
- III. The Texas court of Appeals has misconstrued a rule or statute, and unfairly decided a question of law, in such a way as to deprive Petitioner of the right to effective assistance of counsel under the 6th Amendment, and to deprive Petitioner of his due process right to a fair trial under the 14th Amendment.

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All 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:

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Cases

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

Crawford v. Washington, 541 U.S. 813 (2004)

STATUTES AND RULES

OTHER

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

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Court of Criminal Appeals of Texas court appears at Appendix C to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Feb. 6, 2019.
A copy of that decision appears at Appendix C.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 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 defense.

United States Constitution, Amendment XIV:

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.

STATEMENT OF THE CASE

The trial court, following a jury trial, found Petitioner guilty and imposed sentence on June 23, 2016. The case was transferred to the Eighth Court of Appeals on August 9, 2016. Briefs were completed on August 14, 2017. On April 16, 2018, the case was transferred back to the Third Court of Appeals. The Third Court of Appeals issued its opinion on August 28, 2018. A Motion for Rehearing was timely filed (with extension) on September 17, 2018, and subsequently denied on November 20, 2018. A Petition for Discretionary Review was filed December 10, 2018 and the Petition for Discretionary Review was denied February 6, 2019.

REASONS FOR GRANTING THE PETITION

Ground 1: The Court of Appeals erred by misapplying the first prong, and failing to consider the second prong, of the *Strickland* standard, with respect to the Appellant's trial counsel's failure to properly object to extraneous offense testimony.

Ground 2: The Texas Court of Appeals has misconstrued a rule or statute in such a way as to deprive Petitioner of his 14th Amendment due process right to confront and cross-examine witnesses in the *Crawford* Case.

Ground 3: The Texas Court of Appeals has misconstrued a rule or statute, and unfairly decided a question of federal law, in such a way as to deprive Petitioner of the right to effective assistance of counsel under the 6th Amendment, and to deprive petitioner of his due process right to a fair trial under the 14th Amendment.

The appellate supports a finding of ineffective assistance of counsel based upon trial counsel's numerous failures to raise timely and appropriate objections to testimonial hearsay on the basis of the Confrontation Clause and hearsay rule.

Throughout trial, several witnesses related testimonial hearsay statements conveying that Appellant and his brother's had assaulted the complainant, used a weapon, and that the statements of uncalled witnesses were consistent and corroborated the complainant's and his wife's statements. While the appellate

record does not reflect trial counsel's reasons for not objecting to the testimonial hearsay, there could be no hypothetically objectively reasonable strategic basis for failing to object to the testimony because it could only have been harmful to the defense by corroborating the complainant's allegations. Given the equivocal nature of the State's case, there is reasonable probability that in the absence of the testimonial hearsay, one or more jurors might have disbelieved the complainant's version of events and returned a different verdict.

2. In addition to the preceding claim, the appellate record supports a finding that trial counsel rendered ineffective assistance of counsel by failing to object to opinion testimony by the investigating police officers which labeled Appellant as the *perpetrator* of an assault, and which discounted Appellant's defensive theory of mutual combat. The failure to object to the officer's opinion testimony lacked any conceivable objectively reasonable basis because the opinions could only have been prejudicial to the defense. The admission of the officers' opinion testimony raised a reasonable probability of a different verdict because in the absence of the opinions, given the high degree of deference traditionally accorded to law enforcement, one or more jurors would have harbored doubts about the complainant's assertions.

3. The trial court abused its discretion in admitting testimony by the complainant's wife that Appellant was violent and a bully around the apartment

complex because the State failed to articulate a specific applicable basis for admission, and because the record does not support the admission of such testimony. Evidence of Appellant's violent character and bullying was general bad character evidence and did not serve to logically rebut the State's case apart from as general character propensity evidence. The introduction of Appellant's bad character/conduct had a substantial and injurious effect on the verdict because the evidence was directly, yet improperly, probative on the very issue before the jury-whether Appellant unprovokedly assaulted the complainant.

4. In the event that the Court concludes that Appellant did not timely and appropriately object to the introduction of bad character evidence, then the record would support a claim of ineffective assistance of counsel. If counsel failed to preserve error, then such failure could not have been the result of objectively reasonable strategy; counsel are charged with having an adequate knowledge of the law and the facts and counsel could not have had a reasonable strategy by failing to object to inadmissible bad character/bad conduct evidence which was directly probative toward the key issue at trial. For the same reasons that the improper admission had a substantial influence on the verdict, the failure to object to this evidence raises a reasonable probability that the verdict would have been different had trial counsel preserved error.

5. The trial court erred in permitting the prosecutor to argue in closing argument that the state had been precluded from bringing additional supporting witnesses due to intimidation by Appellant's mother. It is error to permit the prosecutor to argue facts outside the record. In the present case, there was no evidence that Appellant's mother, even though she was the apartment manager, had influenced or intimidated any witnesses to not appear on the State's behalf. The inferences which the prosecutor sought to draw were unreasonable because they were not supported by the evidence. The improper argument had a substantial and injurious effect on the verdict because the prosecutor's argument was flagrantly unsupported by the record and went to a key weakness in the State's case, the court gave the argument the imprimatur of approval, and the State's case was strongly contested and not overwhelming.

So when you consider the trial errors all together, we have a jury that heard improper "other offence evidence", heard that police spoke to absent witnesses who allegedly agreed with the victim, and those witnesses did not testify because they were afraid. Due to the fact that the jury heard improper offence evidence, "The Texas Court of Appeals has misconstrued a rule or statute in such a way as to deprive Petitioner of his due process right to confront and cross examine witnesses in the Crawford v. Washington 541 U.S. 36 (2004). Therefore, The Texas Court of Appeals has deprived Petitioner of the right to effective assistance of counsel under

the 6th Amendment, and to deprive Petitioner of his due process right to a fair trial under the 14th Amendment. The Court of Appeals has decided the case in such a way that conflicts with the Supreme Court's decisions in *Crawford*, *Strickland*, and due process. The Court of Appeals decision conflicts with opinions from other courts, that are consistent with the Supreme Court's decision in *Crawford* and *Strickland*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Roberto N. Cruz.

Date: May 3, 2019