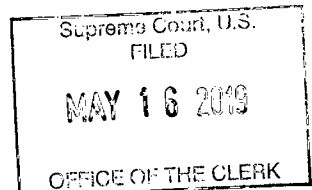


18-9385 ORIGINAL
No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

Cargil Nicholson - PETITIONER

VS.

COMMISSIONER OF CORRECTION- RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

STATE OF CONNECTICUT SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

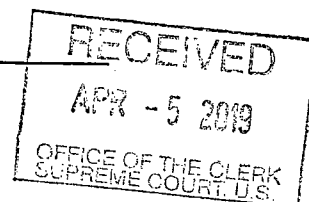
Cargil Nicholson

MACDOUGALL-WALKER, CI

1153 EAST STREET SOUTH

SUFFIELD, CONNECTICUT 06080

860.627.2161



QUESTIONS PRESENTED

- A. WHETHER THE CONNECTICUT SUPREME COURT ERRED BY DENYING THE PETITIONER CERTIFICATION TO APPEAL FROM THE APPELLATE COURT?
- B. WHETHER THE CONNECTICUT APPELLATE COURT ERRED BY AFFIRMING THE HABEAS COURT'S FINDING THAT TRIAL COUNSEL'S PERFORMANCE WAS NOT DEFICIENT?
- C. WHETHER THE CONNECTICUT APPELLATE COURT ERRED BY FINDING THAT THE HABEAS COURT'S DECISION NOT TO REVIEW RELEVANT PORTIONS OF THE TRANSCRIPTS OF THE UNDERLYING CRIMINAL TRIAL WAS NOT AN ABUSE OF DISCRETION?

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TABLE OF CONTENTS

OPINIONS BELOW.....
JURISDICTION.....
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....
STATEMENT OF THE CASE.....
REASON FOR GRANTING THE WRIT.....
CONCLUSION.....

INDEX TO APPENDICES

APPENDIX A Decision of the Connecticut Appellate Court
 Decision of the Connecticut State Trial Court
Appendix B Decision of the Connecticut Supreme Court Denying
 Certification to Appeal

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 state courts:

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

reported at Connecticut Law Journal, CARGIL NICHOLSON v. COMMISSIONER OF CORRECTION, 330 Conn. 961 (2019).

The opinion of the Connecticut Appellate Court appears at Appendix A to the petition and is

reported at Appellate Court, 186 Conn. App. 398 (AC 40101) (2018).

JURISDICTION

For cases from state courts:

The date on which the highest state court decided my case was
January 10, 2019.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Conn. Const., art 1 § 8.....A49

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

Conn. Const., art 1 § 9.....A49

No person shall be arrested, detained or punished, except in cases clearly warranted by law.

U.S. Const., amend. VI.....A49

In all criminal prosecutions, the accused shall enjoy the right to a speedy 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, § 1.....A49

All person 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.

Conn. Gen. Stat. § 53a-54a. Murder.....A35

(a) A person is guilty of murder when, with the intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime.

Conn. Gen. Stat. § 53a-55. Manslaughter in the first degree: Class B felony.....A35

(a) A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or a third person; or (2) with intent to cause the death of another, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.

Conn. Gen. Stat. 52-470. Summary disposal of habeas corpus case. Determination of good cause for trial. Appeal by person convicted of crime.....A47

(g) No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such a person's release may be taken unless the appellant within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

TABLE OF AUTHORITIES

Bell v. Miller, 500. F.3d 149 (2d Cir. 2007).....	A52
Duperry v. Solnit, 261 Conn. 309, 803 A.2d 287 (2002).....	A49
Evans v. Warden, State Prison, 29 Conn. App. 274, 613 A.2d 327 (1992).....	A62, 63
George M. v. Commissioner of Correction, 290 Conn. 653, 966 A.2d 179 (2009).....	A47, 49
Green v. Ensign-Bickford Co., 595 A.2d 1383, cert denied, 220 Conn. 919, 597 A.2d 341 (1991).....	A60
Johnson v. Commissioner of Correction, 288 Conn. 53, 951 A.2d 520 (2008).....	A47
Lapointe v. Commissioner of Correction, 316 Conn. 225, 112 A.3d 1 (2015).....	A58
Moye v. Commissioner of Correction, 168 Conn. App. 207, 145 A.3d 362, (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017)....	A57, 62, 63
Nieves v. Commissioner of Correction, 51 Conn. App. 615, 724 A.2d 508 (1999).....	A51
Oborski v. New Haven Gas Co., 151 Conn. 274, 197 A.2d 73 (1964)..	A57
Peruccio v. Commissioner of Correction, 107 Conn. App. 66, 943 A. 2d 1143 cert. denied 287 Conn. 920, 951 A.2d 569 (2008)....	A51
Siano v. Warden, State Prison, 31 Conn. App.. 94, 623 A.2d 1035, cert. denied, 226 Conn. 910 (1993).....	A51, 52
Siemon v. Stoughton, 184 Conn. 547, 440 A.2d 210 (1981).....	A51
Simms v. Warden, 230 Conn. 608, 646 A.2d 126 (1994).....	A47
State v. Clark, 297 Conn. 1, 997 A.2d 461 (2010).....	A49
State v. Damon, 214 Conn. 146, 570 A.2d 700, cert. denied sub nom Damon v. Connecticut, 198 U.S. 819 (1990).....	A49
State v. Dejesus, 194 Conn. 376, 481 A.2d 1277 (1984).....	A55
State v. Girolamo, 197 Conn. 201, 496 A.2d 948 (1985).....	A58, 60
State v. Nicholson, 155 Conn. App. 499, 109 A.3d 1010 cert. denied	

denied, 316 Conn. 913, 111 A.3d 884 (2015).....	A35
State v. Onofrio, 179 Conn. 23, 425 A.2d 560 (1979).....	A58
Strickland v. Washington, 466 U.S. 668 (1984).....	A48, 49, 50
Taylor v. Commissioner of Correction, 284 Conn. 433, 936 A.2d 611 (2007).....	A47
Vandever v. Commissioner of Correction, 315 Conn. 231, 106 A.3d 266 (2014).....	A47
Bryant v. Commissioner of Correction, 290 Conn. 502, 518-19 964 A.2d 1186 (2009).....	B7

CONNECTICUT CODE OF EVIDENCE SECTIONS

Connecticut Code of Evidence § 7-1. Opinion Testimony by Lay WitnessesA61

If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

Connecticut Code of Evidence § 7-2. Testimony by Experts....A57

A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.

Connecticut Practice Book § 60-5.....A49

Connecticut Practice Book § 61-10.....A49

Connecticut Practice Book §§ 84-1, 84-2, 84-4, and 84-5.....B1

Statement of Case

I, Cargil Nicholson, the petitioner-appellee (petitioner) respectfully petition for writ of certiorari from the Connecticut Supreme Court's decision in PSC 180283 CARGIL NICHOLSON v. COMMISSIONER OF CORRECTION, cert. denied, (2019). The Connecticut Supreme Court and Appellate Court's decision appears to conflict with other decisions from both courts. Specifically, the Connecticut Appellate Court erred by determining (1) that Attorney Johnathan Demirjian did not render deficient performance, and (2) that the habeas court did not abuse its discretion in declining to review any relevant portions of the transcript of the underlying criminal trial, which had been entered into evidence. As a result of the foregoing, I remain wrongfully incarcerated. Thus, this Honorable Court should grant and hear my argument.

Writ of certiorari is warranted because the Connecticut Supreme Court's decision to uphold the Appellate Court's decision is not in accord with prior decisions of said court. Specifically, both Court's appear to have accepted the habeas court's determination that Attorney Johnathan Demirjian was not deficient based on his testimony that he could not find any helpful expert witness to testify regarding the decedent's toxicology results. The Connecticut Supreme Court upheld the Appellate Court's determination even though the record reflected that trial counsel was aware of an expert who would have given favorable testimony, and despite the fact that the habeas court did not review any of the relevant portions of the underlying criminal transcripts.

I was the defendant in State of Connecticut v. Cargil Nicholson, CR-12-026360-S, and was represented by Attorney Johnathan Demirjian. Following a trial by jury, I was acquitted of the charge of Murder in violation of Conn. Gen. Stat. § 53a-54a, but convicted on the lesser-included offense of Manslaughter in the First Degree in violation of Conn. Gen. Stat. §53a-55. The trial court, Thim.J., sentenced me to a total effective sentence of twenty (20) years of incarceration. On appeal, both the Connecticut Appellate and Supreme Courts affirmed my conviction, and denied my petition for certification to appeal. See State v. Nicholson, 155 Conn. App. 499, cert. denied, 316 Conn. 913, 111 A.3d 884 (2015), and Appendix B11-12.

I then filed next a pro se petition for writ of habeas corpus, initiating the proceeding below. The habeas court, Fuger, J., denied the petition for writ of habeas corpus, and then subsequently denied the petition for certification to appeal from its judgment. The Connecticut Appellate Court affirmed the judgment of the habeas court and dismissed my appeal, although it did determine that the habeas court had committed harmless error by refusing to qualify Dr. Joel Milzoff, an experienced toxicologist, as an expert witness. The habeas court also openly acknowledged that it had not read any of the transcripts from my underlying criminal trial.

My fiancée, Tracy Wright and I lived in Bridgeport, Connecticut in an apartment complex in the apartment directly above the unit inhabited by James Cleary and his wife Mary Cleary. Throughout our time

as neighbors, the Clearys regularly called the police to complain about the noise (primarily in the form of music) coming from our apartment. When police did respond to these calls, they reported that there sometimes was noise, but that it was not overly loud.

On March 13, 2012, James Cleary came home from his job and, according to Mary Cleary, heard music coming from my apartment. Cleary told his wife that he wasn't going to put up with the situation any more, and proceeded upstairs. Cleary knocked on my door, and then entered (without permission) my apartment. A struggle then ensued between James Cleary and I in the apartment. During the struggle with me, Cleary sustained a fatal wound.

During the trial, Attorney Demirjian tried two different times to present evidence that Cleary had morphine (a byproduct of heroin) as well as Prozac and other prescription drugs in his system at the time of his death. Attorney Demirjian argued that the toxicology report was relevant to my defense because the presence of these drugs in his system was relevant to prove that Cleary was not thinking rationally at the time of the struggle. The trial court refused to permit this evidence because Demirjian failed to present any sort of foundational testimony that would have demonstrated the relevance of the presence of drugs. Demirjian then attempted to introduce the report during his cross-examination of Dr. Wayne Carver, only for the court to prevent him from doing so because it was beyond the scope of the direct.

In the below proceedings, I pursued a claim of ineffective assistance of trial counsel for failing to call an expert to provide foundational testimony regarding Cleary's toxicology report.

The habeas court found counsel had not been ineffective for two reasons. First, it concluded that my trial counsel had not performed deficiently, because trial counsel had consulted with some experts in the field (he could not name them) and they were unwilling to testify favorably about the presence of these particular drugs. Second, the habeas court found that even if deficiency had been proved, I failed to establish prejudice. The habeas court rendered its decision orally immediately following oral argument. It noted that it had not reviewed any transcripts from the underlying criminal trial (which had been submitted into evidence) and also stated that it would not consider Dr. Milzoff's testimony as expert testimony.

The Connecticut Appellate Court affirmed the habeas court's decision. The Appellate Court agreed with the habeas court that Attorney Demirjian had not been deficient because his decision not to present an expert to testify about the decedent's toxicology results was a reasonable strategic decision. The Appellate Court further held that (a) I suffered no prejudice from the habeas court's failure to consider Milzoff's testimony as expert testimony and (b) the habeas court had not abused its discretion in declining

to review the criminal trial transcripts.

The Appellate Court held that my trial counsel, Attorney Johnathan Demirjian had not rendered deficient performance because he made a reasonable strategic decision not present the testimony of an expert witness in support of his attempts to enter the toxicology report of the decedent into evidence. The only evidence that Demirjian had consulted with experts who provided unfavorable information was Demirjian's testimony at my habeas trial.

The Appellate Court's analysis (upheld by the State Supreme Court) is wrong on two levels. First, the Appellate Court opinion, which states that Demirjian believed that the decedent's toxicology report held no value, ignores the fact that Attorney Demirjian twice attempted to introduce the toxicology report at my underlying criminal trial, only to be rebuffed in his attempts by the Court for failing to lay a foundation to prove the relevance of the toxicology report.

Second, The Appellate Court's analysis ignores the fact that, regardless of who else he consulted with, Attorney Demirjian was clearly aware of Dr. Milzoff, who did provide favorable testimony regarding the relevance of the toxicology report. This case is not properly analyzed as one in which the claim is that trial counsel was deficient for failing to consult with and present the testimony of an expert. In my briefs, I presented the issue as one in which

as one in which an attorney's investigation has revealed a favorable witness, and that witness is then not presented. See *Siano v. Warden*, 31 Conn. App. 94, 623.A.2d 1035, cert. denied, 226 Conn. 910 (1993). Appendix A51-52.

Attorney Demirjian testified that he consulted with experts and could not find one that would testify favorably regarding Cleary's toxicology report. If that had been all of the evidence presented, an analysis as to whether it was reasonable for trial counsel to make efforts to find a favorable expert would have been sufficient. However, the transcript of the underlying criminal trial reveals that this is incorrect. The underlying criminal transcript reveals that the prosecution had been given Dr. Milzoff's name as a potential expert that might be called by myself and Attorney Demirjian. I then presented the testimony of Dr. Milzoff at the habeas trial, and he testified favorably regarding Cleary's toxicology report. A review of his testimony shows that he would have been able to provide the foundational testimony necessary in order to demonstrate the relevance of the toxicology report and get it admitted into evidence at my criminal trial. Thus, taken in combination, the transcripts of the underlying criminal trial and Dr. Milzoff's testimony at the habeas trial reveal that Attorney Demirjian had the name of an expert, at the time of the criminal trial who would have presented favorable foundational testimony regarding Cleary's toxicology report.

Put it differently, the Appellate Court (upheld by State Supreme

Court later) concluded that Attorney Demirjian had not acted deficiently when he failed to call an expert witness in support of his attempts to introduce Cleary's toxicology report. In so concluding, it did so on the basis that the habeas court had credited Demirjian's testimony that he consulted with several potential experts, none of whom were willing to provide favorable testimony. On the basis, the Appellate Court and Supreme Court of Connecticut ultimately concluded that Demirjiian had performed adequately.

A more opposite comparison to the present situation, however, is thus *Siano v. Warden*. In *Siano*, this Court determined that trial counsel had rendered ineffective assistance of counsel for failing to subpoena the petitioner's orthopedic surgeon to the trial . See *id.* at 100-105. The habeas court ruled that this failure to call the surgeon, who would have been able to testify that I was physically incapable of committing the crime with which I had been charged because I was recovering from surgery, was not a "strategic or tactical decision" because it left me without a defense and without a critical witness in my favor. See *id.* at 103-105. The admission of Cleary's toxicology report was especially critical in this case: the criminal defense and the prosecution presented conflicting versions of events, and the admission of a document demonstrating Cleary had morphine and Prozac in his system at the time of the altercation would have provided independent support for my justification defense. See *Bryant v. Commissioner of Correction*, 290 Conn. 502, 518-19, 964 A.2d 1186 (2009) (Noting importance of neutral, dispassionate evidence in cases that largely involve credibility contests).

The Appellate and Supreme Court of Connecticut rejected this argument because, at the habeas trial, Attorney Demirjian testified that he could not recall whether he had ever consulted with Dr. Milzoff. The Both Courts therefore concluded that the habeas court did not err in rejecting my claim that Demirjian had acted deficiently when he failed to call an expert such as Dr. Milzoff to provide necessary foundational testimony. However, The Appellate Court ignored my argument that, given that the Dr. Milzoff's name was disclosed to the prosecution, it is clear that (a) Attorney Demirjian was aware of Milzoff and (b) Milzoff would have provided helpful testimony. Under these circumstances, the case is more properly evaluated as a claim that the attorney was deficient for failing to present a favorable witness pursuant to Siano. As a result, the Connecticut Appellate and Supreme Court should have granted my petition for certification to appeal in order to review whether, once an expert who will testify favorably to me is known to trial counsel, counsel will be deemed to act deficiently if such a witness is not subsequently presented where there is no accompanying strategic basis not to do so.

The Connecticut Appellate and Supreme Court concluded that the habeas court did not err in failing to consider relevant portions of the underlying criminal transcript because those transcripts were irrelevant to the habeas court's evaluation of my claim that Attorney Demirjian was deficient. However, in this case, certain relevant portions of the transcripts were critical to the proper evaluation of my claims, as envisioned by the Connecticut Appellate Court in *Evans v. Warden*, 29 Conn. App. 274, 276-77, 613 A.2d 327

(1992) and Moya v. Commissioner of Correction, 168 Conn. App. 207, 229-30, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017). The sole claim I raised in my amended petition for a writ of habeas corpus was the trial counsel had been ineffective for failing to lay the appropriate groundwork necessary to allow the jury to hear of the drugs in the decedent's system and to consider their potential individual or cumulative effects on the decedent's mental status at the time of his death.

The habeas court concluded that Attorney Demirjian was not deficient because he testified that he had consulted with experts regarding Cleary's toxicology result and they gave him unfavorable information. He testified that, on that basis, he did not attempt to use the toxicology report. However, the transcript reveals two different things: (1) Attorney Demirjian must have been aware of Dr. Milzoff and (2) Attorney Demirjian tried, twice over the course of the trial to introduce the toxicology report and argued in his favor of its relevance. Because it did not review relevant portions of the underlying criminal trial transcript, the habeas court did not understand and evaluate Attorney Demirjian's habeas trial testimony in proper context.

The Connecticut Appellate and Supreme Court concluded that the habeas court did not err in reviewing the relevant portions of the transcripts because they either were cumulative of Demirjian's habeas trial testimony or irrelevant to the question of deficient performance. However, the transcript reveals that Demirjian was aware of Milzoff at

the time of trial, a crucial fact for the question of deficient performance. Given Milzoff's habeas trial testimony, there has been no explanation for Demirjian's failure to call him as an expert at the criminal trial.

The habeas court concluded that Attorney Demirjian had not performed deficiently based on Demirjian's habeas testimony, it decided to credit this testimony, along with his testimony that he could not recall whether he had consulted with Dr. Milzoff. The habeas court credited this testimony, however, without reviewing the portions of the transcript where (a) Demirjian attempted to introduce the toxicology report and described its relevance, and (b) the prosecution describes being given Dr. Milzoff's name as a potential expert. The habeas court,,essentially, made its credibility determination while ignoring evidence that cast doubt on Attorney Demirjian's recollection of events. Under these circumstances, the habeas court, Appellate and Supreme Court failed to meaningfully consider all of the evidence before it.

For all of the foregoing reasons, I request that this Honorable Supreme Court of the land should review these courts holding that the portions of transcript I identified were not relevant to their determination regarding my claim of ineffective assistance under Strickland v. Washington and please grant me writ of certiorari to the State of Connecticut Supreme Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Cory A. Richardson

Date: 3/28/2019