

No. _____

18-9414

IN THE

SUPREME COURT OF THE UNITED STATES

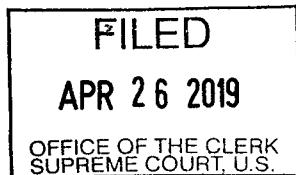
Donald Stewart Royce — PETITIONER

VS.



Mark Inch, Sec. Dep't of Corrections
Ashley Moody, Atty. Gen., State of Florida— RESPONDENT

Florida Second District Court of Appeal



PETITION FOR A WRIT OF CERTIORARI

Donald Stewart Royce
South bay Correctional Rehabilitation Facility
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QUESTION(S) PRESENTED

During the Petitioner's trial one of the two victims was to be questioned by the defense about prior inconsistent statements to law enforcement for impeachment of her trial testimony, however, the trial court refused to allow this cross examination. Defense counsel had planned to rely on the prior out of court remarks to law enforcement, at the scene, to build upon Petitioner's defense and the trial court's ruling on the State's objection unexpectedly derailed an essential portion of his defense.

"Whether a trial court abuses its discretion, within the confines of procedural due process in the U.S. Constitution's 14th Amendment, by limiting cross-examination by the defendant, of the State's witness, about prior out of court statement to law enforcement?"

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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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[] is unpublished.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[] is unpublished.

[X] 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 the Florida Second District Court of Appeal.

[] reported at _____; or,
[X] has been designated for publication but is not yet reported; or.
[] is unpublished.

The opinion of the Third District Appeals 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.

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 of 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 February 1, 2019; with the Mandate issued on March 4, 2019. A copy of that decision appears at Appendix A.

A timely petition of 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 an 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

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and circuit in which the crime shall have been committed, which circuit shall have previously ascertained by law, and to be informed of the nature of the charge and cause of the accusation; to be confronted with the witnesses against and question them fairly; to have the compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of the law; nor deny any person with its jurisdiction the equal protection of the laws.

SECTION 90.608 FLA. STAT.

(1) (b) A witness may be impeached by a prior inconsistent statement, including an omission in a previous out-of-court statement about which the witness testifies at trial, if it is material and would naturally have been mentioned.

SECTION 90.803 (2) FLA. STAT.

(2) Excited utterance. A statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

SECTION 90.803 (8) FLA. STAT.

(8) Public records and reports. Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness.

STATEMENT OF CASE AND FACTS

Petitioner, Donald Stewart Royce, *pro se*, was charged with Aggravated Battery with Discharge of a Firearm and Aggravated Assault with a Firearm. (R. 20-21). A jury convicted him as charged on Count 1 and the lesser offense of Reckless Display of a Firearm, on Count 2. (R. 73-74), (T. 439-440). He proceeded to jury trial on or about June 19, 2017, and after conviction, the trial court sentenced him to a mandatory minimum sentence of 20 years incarceration, as to Count 1 and to “time-served,” as to Count 2, both, on July 31, 2017. (R. 105-112; 134-135). Notice of Appeal was filed on August 22, 2017.

The victim in Count 1 was Petitioner’s wife, Katherine Fivecoat. The victim in Count 2 was a friend who resided with the couple, Deborah Ehrler. The victims were crucial witnesses for the State.

Petitioner was the only defense witness.

Katherine Fivecoat testified as follows:

She and Petitioner were drinking the evening of the event. (T. 179-182). After they ate dinner, Ms. Fivecoat went to bed, by herself and soon fell asleep. (T. 182-184). After some time, Petitioner came into the bedroom and stated, “You wait until tomorrow.” Ms. Fivecoat heard him, but was uncertain of the meaning of his statement. (T. 184-185). Petitioner walked out of the bedroom, came back, and then shot Ms. Fivecoat in the hip as she lay in bed. (T. 185-186). As she was asking him why he shot her, he shot her again, in the back. (T. 186). At that point in time, she testified, she was unable to move. (186). At that moment, Ms Five coat said, she saw

Ms. Ehrler came out of her bedroom. Petitioner pointed the gun at her. (T 189). Ms Fivecoat testified that she had no idea why the Petitioner shot her. (T. 191).

Ms. Ehrler testified as follows:

After dinner and drinks, Ms Five coat went to bed and Ms. Ehrler also retired to her bedroom. (T. 220-224). Sometime later she claimed to hear Petitioner tell Ms. Fivecoat, "Wait until tomorrow," and then a few minutes later she heard two gunshots. (T. 225-226). When she came out of her bedroom, she saw Petitioner standing in Ms. Fivecoat's bedroom, by her bed, holding a gun in his hand. (T. 226). When she asked him what he had done, she testified that he said that he had shot his wife. (T. 227). She claimed that he then turned the gun on Ms. Ehrler, so she ran into her bedroom to call 911. (T. 227). Petitioner ordered her to come out of her bedroom and when she did she saw that he was in Ms. Fivecoat's bedroom, where he stood and pointed the gun at Ms. Fivecoat's face. Petitioner then turned the gun, again, toward Ms. Ehrler. (T. 228-229). Eventually, he let Ms. Ehrler call 911. (T. 229). A recording of the 911 call was played for the jury. In the recording Ms. Ehrler denoted that Ms. Fivecoat had been shot twice. (T. 239).

On cross examination, Petitioner was prevented from establishing that when Ms. Ehrler spoke to law enforcement that night she stated that she did not wish to press any charges against Petitioner. (T. 256-262). The State argued that the evidence was irrelevant, because it was the State who decided who would have charges filed against them. (T. 258). Defense counsel argued this was relevant to Ehrler's credibility. She had claimed that Petitioner's actions had put her in fear for

her life, yet immediately after the event occurred she told law enforcement that she did not wish to press any charges, which is “inconsistent with what she says happened.” (T. 257-258). The trial court sustained the State’s objection, preventing the jury from having knowledge of Ms. Ehrler’s inconsistency. (T. 257, 259, 262).

Deputy Barr testified that when he responded to Petitioner’s residence, Petitioner directed Deputy Barr to where the gun could be found and to where Ms. Fivecoat was located. (T. 269-270). As Barrs escorted Petitioner to his patrol car, Barr testified that Petitioner stated, “He shot her because he was sick of her shit and she bled...his bank accounts dry.” (T 276).

Detective Pannone testified that when he found the gun, it was jammed because the magazine had been installed backwards. Pannone also testified he only found one spent shell casing in the bedroom, although he indicated he searched the entire room. (T. 337). He also only found one bullet hole in the mattress and he was unable to recover the fired bullet. (T. 341). Pannone indicated that, in his post-*Miranda* statement, Petitioner told him, first, that earlier that day Ms. Fivecoat’s son, “a dope pusher in Buffalo, New York,” had called about the fact that his two children had been taken from him and that, “set me (Petitioner) off,” because he was, “frigging sick of” trying to deal with that situation (which had required him to go to Buffalo five times before); second, he was also sick and tired of dealing with Ehrler, who was an alcoholic, who he, “threw out of the house once before”; third, his wife was also an alcoholic and, in the period of four months, the two women had reduced his \$58,000 in savings down to \$1000; fourth, he “aimed over to the side” of

the bed and fired a single shot toward his wife, "to scare her," not trying to hit her or kill her. (T. 330-335).

In his testimony, Petitioner stated, when the two women went to bed, he got the gun from the den and was going to take it to his room to hide, but he got "sidetracked" and carried it into his wife's bedroom. (T. 372-373). When he told Ms. Fivecoat, "We got to talk. We'll talk in the morning," she grabbed at the gun and it went off. (T. 373-374). Petitioner testified that he did not intend to shoot his wife and he denied ever pointing the gun at Ms. Ehrler. (T. 374-375). He explained his statement to Detective Pannone, by saying, "I was a little aggravated with myself for having this happen." (T 375).

And see *McDuffie v. State*, 970 So. 2d 312, 324 (Fla. 2007) ("The right of a criminal defendant to cross-examine adverse witnesses is derived from the Sixth Amendment and the due process right to confront one's accusers. One accused of [a] crime therefore has an absolute right to full and fair cross-examination."). This right to cross-examination may be violated where a witness answers questions from the prosecution but refuses to answer the defense's questions.

For example, in *Kelly v. State*, 425 So. 2d 81 (Fla. 2d DCA1982), a witness testified during direct examination that the defendant was at the scene of a drug transaction but, on cross-examination, refused to answer questions about his pending charge of soliciting a bribe. Defense counsel moved to strike the witness's testimony, and the trial court denied the motion. On appeal, the Florida Second District Court of Appeal reasoned that "[t]he right of cross-examination, of course, includes the right to examine a witness as to matters affecting his credibility, including a possible 'motive' for testifying." (emphasis added) *Id.* at 83. Accordingly, the Second District concluded that the "denial of the right to explore, on cross-examination, possible bases for impeaching the credibility of the witness, amounts to a denial of rights under the sixth amendment" and reversed and remanded for a new trial. *Id.* at 84. See also *Hall v. State*, 381 So. 2d 683, 689 (Fla. 1980) ("Where, as here, the codefendant's invocation of his fifth amendment privilege precludes such questioning by the defendant, the principles of *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968),] and *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965),] have been violated.").

Thus, a defendant's right to fully cross-examine an adverse witness to reveal any bias, prejudice, or improper motive...is a fundamental tenant of due process...The right to full cross-examination is especially necessary when the witness being cross-examined is the key witness on whose credibility the State's case relies...The trial court does not have the discretion to exclude questions which touch upon interest, motive, or animus. *Tomengo v. State*, 864 So 2d 525, 530-531 (Fla. 5th DCA 2004) (citation omitted); see also *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusation."); *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("A fundamental aspect of due process of the law is the right to present a defense, the right to present the defendant's version of the facts as well as the prosecutor's to the jury...").

In *State v. Johnson*, 284 So. 2d 198 (Fla. 1973), the Florida Supreme Court noted that an inconsistent statement justifying inquiry into a police report must be upon a crucial point and preferably upon a positive statement in such a report, which the witness at trial flatly refutes. Although noting the preference for a positive statement, *Johnson* actually is an example of the admissibility of a negative one. The trial court there had ruled that a police report could not be used for impeachment, even though the arresting officer had omitted from it a material fact he had included in his trial testimony. The Florida First District Court of Appeals reversed the defendant's conviction, and the Florida Supreme Court agreed, holding that the matter was critical to the defense. The rationale for this hearsay exception

was Ms. Erhler's intent here, but we do know that she made the statement in direct response to a question by a police officer and that although she did accuse the Petitioner of a crime, *she also maintained that she did not wish to press any charges against him.* Ms. Erhler was excited at the time she made the statements, that also has a bearing on her expectation regarding the potential use of her statement in court.

In this situation, the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made. Thus, in accord with these principles the trial court erred in failing to conclude that the statement at issue from the police report was an admissible testimonial statement. While it is true that Ms. Erhler was nervous and speaking rapidly, she surely must have expected that the statement she made to the deputies might be used in court against the Petitioner. She knew that the deputy was a law enforcement officer investigating on the scene, in an official capacity, to investigate a reported crime. It must be accepted then that Ms. Erhler knew that she was making a formal report of the incident and that her report would be used against the Petitioner.

The trial court prevented Petitioner from impeaching an essential State's witness, Ehrler, with the fact that she told deputies that she did not want to press any charges against Petitioner. As defense counsel argued, this was relevant to Ehrler's credibility. Ehrler had testified for the State, in her direct examination, that Petitioner had placed her in fear for her life, yet, that same evening, she told the investigating deputies that she did not wish to press any charges. Her

testimony was "inconsistent with what she says happened." (T. 257-258). Thus, this contradiction testimony would be crucial to the defense, regarding impeachment of the credibility of her direct-exam testimony.

The error in sustaining the State's objection to this testimony's presentation to the jury was unduly harmful to Petitioner, because Ehrler was crucial to the State's case theory and the case was essentially a credibility contest between Petitioner and the two women.

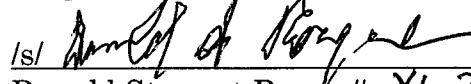
The decision of the state trial court was improper in that the court does not have the discretion to exclude cross-examination questions which touch upon interest, motive, or animus.

Such an error under minds the very foundation of the cause of justice and due process, to such a degree that fairness demands the state trial court be ordered to hold a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,


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