ORIGINAL

18-9732

IN THE
US Supreme Court

BEJAN DAVID ETEMAD

Petitioners,

v.

STATE OF NORTH DAKOTA

Respondents.

On Writ of Certiorari to the United States Court of Appeals for all State Courts of Last Resort

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Can any State Court of last resort or specifically the North Dakota Supreme Court completely abrogate due process to the point that no process existed at all in a criminal jury verdict appeal?

2) Can Federal Certiorari provide relief?

LIST OF PARTIES

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OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix pages 2-4 and is reported at 2018 ND 240919 N.W.2d 192

The opinion of the Grand Forks District Court was a jury verdict of guilty in Appendix pages 6-8 and is unpublished.

JURISDICTION

The date on which the highest state court state case was November 6, 2018. A copy of the decision appears at Appendix page 4.

A timely petition for rehearing was thereafter denied on the following date: December 22, 2019, and a copy

of the order denying rehearing appears at appendix page 5.

An extension of time to file the petition for a writ of certiorari was granted by letter on March 25, 2019 for 60 days per Rule 14.5.

CONSTITUTIONAL PROVISIONS

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Etemad was convicted of terrorizing the Altru Health Systems main hospital campus after a 3-day jury trial. N.D.C.C. § 12.1-17-04

REASONS FOR GRANTING THE PETITION

A person is guilty of terrorizing under N.D.C.C. § 12.1-17-04, if the person "with intent to place another human being in fear for that human being's or another's safety . . . or in reckless disregard of the risk of causing such terror, disruption, or inconvenience, the person . . . [t]hreatens to commit any crime of violence or act dangerous to human life[.]" Etemad does not challenge the constitutionality of N.D.C.C. § 12.1-17-04, but claims the speech his terrorizing conviction was based on was constitutionally protected as a matter of law and the district court erred by failing to dismiss the terrorizing charge.

Such a rule necessitates that counsel either object at the time of admission or receive a stand-ing objection at the time the trial court denies the motion...

The federal and state reporters are filled with cases holding that what appears to be a meritorious argument was not adequately preserved in the trial court.

An offer of proof must satisfy three objectives:

(1) covering each ground of admissibility that will be raised on appeal;

(2) explaining what counsel expects to prove by the excluded evidence; and

(3) giving the trial court contemporaneous knowledge of the proposed evidence.

The four saddest words from the Court of Appeal are these: "Great argument; not pre-served." Alas, even the sharpest legal mind and best honed rhetoric cannot resurrect a ter-rific argument that was not properly preserved for appellate review. Nonetheless, many good appeals have been lost because of counsel's failure to preserve the record.

Legal arguments, like evidence, must be presented in the first instance to the trial court.

Counsel must object at the time the opposing counsel seeks to introduce the evidence. If coun-sel know which witness their opponent will use to introduce the evidence, they should renew the motion before the witness takes the stand. If counsel do not have such knowledge, they will have to be on their toes so that they can object immediately when a witness starts referring to the contested evidence.

If you intend to petition the Supreme Court for review of any issue or material fact that was omitted from or misstated in the opinion of the court of appeal, you must first file a motion for reconsideration by the court of appeal. See Rule 40. The Supreme Court will not normally consider "any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for hearing." In addition, Rule 40 generally provides that the Supreme Court likewise will not ordinarily not review any issue that

could have been, but was not, timely raised in the briefs in the court of appeal.

Although an issue that has not been properly preserved can be raised on appeal, the court of appeals may not review it or review it under a much higher standard.

The court of appeals will review unpreserved issues for plain error. For issues that have been preserved, there are different standards of review that the court of appeals will apply. For example, the court of appeals will review the trial court's evi-dentiary rulings for abuse of discretion. A trial lawyer's fail-ure to properly preserve issues can limit the appellate lawyer's effectiveness on appeal.

Plain error is an error declared by an appellate court to be patently obvious in a lower court decision or action and causes a reversal. When a defendant rais-es an issue on appeal that was not raised before the judge, the court of appeals may review for plain error.

Plain error is an error declared by an appellate court to be patently obvious in a lower court decision or action and causes a reversal. When a defendant raises an issue on appeal that was not raised before the judge, the court of appeals may review for plain error. Federal procedural rules define plain error as a highly prejudicial error affecting substantial rights.

The appellant has the burden to show plain error, which is error that is clear or obvious and that

materially prejudices the substantial rights of appellant; once appellant has met his burden of persuasion, the burden shifts to the government to show that the error was not prejudicial. To be plain error: (1) there must be an error; (2) the error must be plain (clear or obvious); and (3) the error must materially prejudice the substantial rights of the defendant).

So, with the media and public's demand for greater transparency and accountability through the use of BWCs, and with federal financial support, it seems very likely that the percentage of officers wearing BWCs will increase dramatically over the next few years. However, although this is likely to have generally positive implications for society, there are other implications. One such change will be in the number of criminal cases in which evidence that is in the possession of the police is either lost or destroyed. This may also cause a rethinking of the current state of the law in these cases.

There are a number of BWC manufacturers, but their products all work in similar ways. Officers manually activate BWCs to begin to video. Most departments will require officers to activate them with each citizen encounter. At a later time, either after the shift or perhaps after the encounter, the officer will classify the type of encounter pursuant to the departmental policy. At its most basic level, these classifications will include felonies, misdemeanors, and routine non-arrest interactions. The officer may also include specific information about the interaction, such as the

name of the defendant/subject. Properly classifying these interactions is of very important. Due to the high costs associated with video storage, the departmental policy will establish timelines for the deletion/destruction of videos. For example, a video that was designated as a routine non-arrest interaction may get deleted in as little as ten days, while a felony arrest is likely to be required to be kept for years. So, any errors, whether intentional or unintentional, regarding the classification of videos can lead to those videos being permanently unavailable when they are needed for the courts.

What happens when evidence that is in the possession of the state is lost or destroyed before a criminal defendant's trial? The U.S. Supreme Court issued an opinion that addresses lost or destroyed evidence in *Arizona v. Youngblood*, 488 U.S. 51 (1988). Although the case is more than a quarter-century old, it is a seminal case that is still followed in most states. A young boy was sexually assaulted. Law enforcement collected the boy's clothing for future analysis; however, the clothing was neither refrigerated nor frozen to preserve any biological samples that may have been present. After Mr. Youngblood was arrested, a state criminologist made an unsuccessful attempt to determine the blood type of samples on the clothing in an effort to develop a better case against the defendant. Expert testimony given at trial demonstrated that timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated the defendant, who claimed that the boy

> had mistakenly identified him. Although the state trial court instructed the jury that if they found that the state had destroyed or lost evidence, they might "infer that the true fact is against the State's interest," the jury found the defendant guilty as charged. The U.S. Supreme Court held that unless a criminal defendant can show bad faith on the part of the police, the state's failure to preserve potentially useful evidence does not constitute a violation of the due-process clause of the United States Constitution's Fourteenth Amendment. Although states are free to afford criminal defendants a more flexible standard based on their own constitutions, the vast majority use the *Youngblood* test.

This is a very difficult standard for a criminal defendant to meet. In the context of videos from BWCs, it would probably require that an officer who classified a video testify that he or she intentionally misclassified it so it would be deleted or that an officer with the authority to authorize deletions of videos to do the same. This will rarely, if ever, happen although as unfortunate as it is, there certainly are instances when officers intentionally "lose" evidence. However, due to the enormous volume of video that will be taken as BWCs become more prevalent in the law-enforcement community, lost- or destroyed-evidence issues will appear in more and more cases. Although in the vast majority of these cases the video or other evidence that is missing may have no real evidentiary value and was innocently lost or destroyed, there will certainly be a percentage of this cases in which there is a bona fide issue as to why the evidence is unavailable. State appellate courts will likely be asked to make a modification in existing law in

their states and provide defendants protections that go beyond the "bad-faith" test identified in *Youngblood*. Several states have already developed more flexible tests, which may provide more equitable results in these cases. For a more complete discussion of these issues, **see Body-Worn Cameras and the Courts**, NCSC (2016). Courtroom thriller about a slick, hotshot lawyer who takes the seemingly unwinnable case of a young altar boy accused of murdering an eminent catholic priest.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted on May 24, 2019,

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