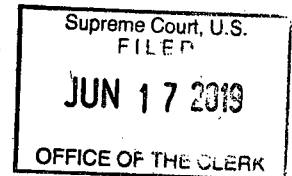


No. 18-9795

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



GREGORY A. BARTO — PETITIONER
(Your Name)

vs.

MARK GARMON, ET AL., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE THIRD CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gregory A Barto

(Your Name)

Box A

(Address)

Bellefonte, PA 16823

(City, State, Zip Code)

NA

(Phone Number)

QUESTION(S) PRESENTED

WHETHER THE COURT OF APPEALS DECISION TO DENY A COA CONCLUDING THAT PETITIONER SUFFICEINCY OF EVIDENCE CLAIM WAS PROCEDURALLY DEFAULTED BASED ON STATE COURT'S ERRONEOUS FACTS WAS CORRECT?

WHETHER PETITIONER WAS DENIED HIS RIGHT TO EFFECTIVE CROSS-EXAMINATION UNDER THE SIXTH AMENDMENT WHEN THE STATE FAILED TO DISCLOSE THAT AN ARRESTING STATE TROOPER WAS BEING INVESTIGATED FOR SEXUAL ACTS CONDUCTED ON A COMPUTER DURING PETITIONER'S TRIAL, WHICH AFTER THE STATE TROOPERS ARREST TAMPERED EVIDENCE FROM PETITIONER'S CASE WAS FOUND IN THE STATE TROOPER'S RESIDENCE?

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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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 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☒ is unpublished.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 United States district court appears at Appendix B 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☐ is unpublished.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 _____ 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☐ is unpublished.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 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 March 1, 2019.

☐ 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: April 2, 2019, 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 _____.
A copy of that decision appears at Appendix _____.

☐ 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

Sixth Amendment

Fourteenth Amendment

STATEMENT OF THE CASE

In May 2010, Petitioner and his wife proceeded to a jury trial in connection with numerous alleged sex offenses and drug offenses. The Commonwealth proceeded on 5 different criminal actions that was filed by the Pennsylvania State Police via former Trooper Douglas Sversko. Petitioner was subsequently found guilty of all counts in each information.

On September 30, 2010, Petitioner was sentenced to an aggregated sentence of thirty-five (35) years to seventy (70) years in prison. Petitioner filed a timely notice of appeal but direct appeal counsel made no challenge to the sufficiency of evidence.

Petitioner filed a timely PCRA petition and the PCRA court appointed counsel, with directions to file an amended petition. Throughout, the entire proceeding Petitioner did not have any communication with PCRA counsel.

The PCRA court sent a dismissal notice and Petitioner complained that PCRA counsel was not communicating with Petitioner and counsel did not challenge the sufficiency of evidence via direct appeal counsel's ineffectiveness.

The Pennsylvania Superior Court denied relief and Petitioner sought relief in a 2254 petition in the United States Middle District Court in Pennsylvania docketed at No. 16-1799. Petitioner raised that the evidence was insufficient to find him guilty of the drug offenses and direct appeal counsel was ineffective for failure to raise the claim. On May 21, 2018, the district dismissed the petition concluding that Petitioner did not adequately present the sufficiency of evidence claim in state court, thus, ruling the claim procedurally defaulted.

Petitioner filed for a Certificate of Appealability with the Third Circuit Court of Appeals and on March 1, 2019 that court denied the request adopting the district court ruling that the claims are procedurally defaulted.

Petitioner filed for reargument which was denied on April 2, 2019 and the instant petition followed.

REASONS FOR GRANTING THE PETITION

In **Buck v. Davis, 137 S.Ct. 759, 773 (2017)** this Court explained that at the COA stage review of the district court's ruling based solely for debatability. The COA is not coextensive with merits analysis.

In regards to Petitioner's claim under GROUND ONE that appellate counsel was ineffective for failure to raise the sufficiency of evidence pertaining to the conviction regarding N.B. the district court concluded that this claim was procedurally defaulted because the state court concluded that petitioner did not set forth and meaningfully discuss the legal principals pertaining to the underlying sufficiency claim. (district court memorandum @ 9)

However, the district court did not review Petitioner's brief to Superior Court where on pages 9-10 Petitioner clearly explained why the evidence was insufficient. Specifically, Petitioner explained that the Commonwealth charged between the dates of May 2006 and December 2006 and there was no testimony presented that supported intent to deliver cocaine on those dates in regards to N.B.

Clearly, Petitioner presented what was required for Superior Court to resolve the sufficiency of evidence test, with meaningful review.

The district court also concluded relying on the state court that Appellant did not discuss the prongs applicable for ineffective counsel. Likewise, the district court failed to consider that in regards to sufficiency of evidence any **Strickland** prongs are not applicable. In other words, if the evidence is insufficient then counsel would automatically be ineffective under **Cronic** which Petitioner cited in his brief. See **Appel v. Horn, 250 F.3d 203, 212-213 (3d. Cir. 2001)**

Courts have found constructive denial of the right to counsel under **Cronic** where counsel offered no assistance to defendant at plea proceeding, see **Turker v. Day, 969 F.2d 155, 159 (5th Circuit)** (failed to object to direct verdict against the defendant. . .

The same applies here in the instant matter where appellate counsel failed to relieve his client of an unjust conviction and request discharge for a conviction that was not sustained

by sufficient evidence.

2254(d)(2) provides for relief where a state court has based its decision on an unreasonable determination of the facts in light of the evidence presented.

Here the Petitioner did provide meaningful review of the sufficiency of evidence and did use **Cronic** because **Strickland** prongs did not apply.

Clearly reasonable jurist would debate whether the district court was correct in its ruling and the Court of Appeals used the wrong standard of review inconsistent with this Court's decision in **Buck v. Davis**.

In regards to GROUND TWO pertaining to Petitioner's **Brady** claim the district court concluded that Trooper Sversko's arrest after Petitioner trial for soliciting sexual acts with a minor on a web cam was minimal for potential exculpatory effect to establish a reasonable probability to a different outcome. (district court memorandum @13-14)

The district court concluded that the former trooper had minimal involvement in Petitioner's case.

However, this is incorrect because it was established at trial that he was the lead investigating officer who filed the charges. (N.T. 5/4/10 @101)

During Petitioner's trial the former trooper claimed he received an anonymous letter that led him to other alleged victims. (N.T. 5/4/10 @ 105-108). Notably no letter was ever produced and his arrest after trial of similar conduct that Petitioner was charged with has the potential of credibility issues as to whether the former trooper made this story up about the letter, for his own gratification.

There were other questions presented to the former such as the following:

Q. Well was she more embarrassed about what actually happened or **that you were looking at what happened?**

A. I can't answer her state of mind. (N.T. 5/4/10 @123)

Certainly, had trial counsel been aware that this former trooper was conducting similar acts upon young women it would have allowed for more questioning in this area, as to why this trooper filed charges to obtain and gratify himself from the photos and imagines.

This Court should also consider that his conduct occurred on March 3, 2010, which an undercover agent was aware of his conduct but allowed this former trooper to testify in Petitioner's trial knowing very well he was caught on tape committing offenses against a minor, which now he is appearing for trial to testify against a defendant charged with allegedly committing similar conduct.

This was a calculated decision to allow this former Trooper to continue to work in his capacity for 11 months without an arrest but they waited until he testified at Petitioner's trial then made the arrest.

Based on this scenario it is irrelevant whether the former trooper was aware he was being investigated to testify favorably for the Commonwealth. It is the fact that petitioner was denied the right to effectively cross-examine this former trooper regarding his own sexual misconducts with minors and the reasons for bringing these charges was to gather all of these photographs for his own personal gratification.

If this former trooper who was in the capacity to be trusted because of his position but betrayed his position by his sexual acts against minors, one might question whether he is capable of planting drugs and creating positive drug results.

This Court should conclude that the Court of Appeals erred by not granting a COA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gregory Bando

Date: 6.17.2019