No. 19-5195

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CLEO HINES — PETITIONER
(Your Name)

vs.

CINDY GRIFFITH — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Cleo Hines #1021930
(Your Name)

Potosi Correctional Center
11593 State Highway O
(Address)

Mineral Point, MO 63660
(City, State, Zip Code)

573-438-6000
(Phone Number)

QUESTION(S) PRESENTED

The Equal Protection Clause of the 14th Amendment to the United States Constitution requires the law to treat identically situated persons in the same way. The 14th Amendment forbids a state to "deny any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. The 5th Amendment requires the federal government to obey the same equal protection standards as the states.

Question: Does the Equal Protection Clause require the law to treat identically situated persons in the same way, as required by the 14th Amendment, or only when an issue is established in federal case law by the same Circuit Court of Appeal with the claim in question being presented before it?

LIST OF PARTIES

[X] 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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CONSTITUTIONAL PROVISIONS

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 & B to the petition and is

[X] reported at No. 18-3069; 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[ ] is unpublished.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 C to the petition and is

[X] reported at No. 4:15-CV-01376-DDN; 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[ ] is unpublished.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[ ] is unpublished.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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 30, 2019. Appendix **A.**

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 9, 2019, and a copy of the order denying rehearing appears at Appendix B.

[ ] 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

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall ... 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 law."

STATEMENT OF THE CASE

Inconsistent Theories of Prosecution

Petitioner, Hines was denied his right to persist in his plea of not guilty, right to due process of law, right against self-incrimination, and right to jury trial, in violation of the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, §§ 10, 18(a), 19, and 22(a) of the Missouri Constitution, in that, the theory the prosecution chose to convict Hines at his plea hearing on August 24, 2012 was inconsistent with the theory the prosecution chose to convict Hines' codefendant, Paul White, at White's previous jury trial.

Specifically, as a basis for Hines' conviction after the guilty plea, the prosecutor selectively chose to use Hines' statements to police that Paul White had committed the robbery and shooting inside the insurance office while Hines had remained outside in the car in the office parking lot (Plea Tr. 20-23). In reciting the factual basis for Hines' plea, the prosecutor stated:

> You admitted that the Ford Focus car was one you had access to and that on the day of the crime you had driven the defendant to the victim's insurance agency. You also told the police that White had first gone to the Walmart store with a gun and that he was planning on robbing people who were cashing checks at Walmart;

that's also consistent with what White had told the police.

You indicated to police that the robbery at Walmart didn't take place and that instead White asked you to drive him to his insurance agent's office and that you did that.

You initially tried to tell the police that White told you he was just going to pay his insurance, which you later conceded to the police that at the time of the-- or at the time he was going there supposedly to pay his insurance he had a Glock nine millimeter in his hand, that he was waving it around and telling you that he was going to do what he was going to do.

You also told the police you knew he couldn't be going to pay his insurance because he had no money and that through all these circumstances it was apparent that a robbery was going to take place given the fact that you all had just attempted one at the Walmart store.

So our evidence of aiding and assisting would be that you drove him to Mr. Eidman's office under circumstances where any reasonable person would have known that he was going to perpetrate an armed robbery there.

You told the police that you remained in the car while White went in and that White did all the shooting. Of course White says that you're the one who did all the

shooting so both of you seem to be pointing the finger at the other one.

You also described the gunshot wounds fairly accurately. You claimed you got the information from White that the first shot missed, which would be consistent with a grazing wound, and that one shot was to the neck and the other shot was to the head. Again, that's consistent--basically consistent with [what] the evidence shows.

In any event, our evidence will clearly show that you and White had gone to Walmart to commit a crime and then you had gone to the insurance agency knowing that there was going to be a robbery taking place. We believe that the jury, if presented this evidence, would clearly believe that you knew the robbery was taking place.

And frankly, we believe that the jury might conclude that you had deliberated this killing, although that's not what we've alleged in this charge, because you knew that you were taking him to rob his insurance agent. So it's not clear how you all would have gotten away with it unless the only eye witness were killed.

But again, for the murder in the second degree we're not required to prove that. The only thing we're required to prove is that you aided or assisted in the commission of a robbery in the first degree. And your

admission that you took White to Mr. Eidman's office knowing he was going--knowing he had a gun, knowing he had no money, and after he had just attempted to rob someone at Walmart, there would be no other conclusion but that you were helping to commit the robbery.

In your statement to the police you claimed that he had forced you to do this at gun point, but in the interview the police indicate that you had no explanation for why you didn't drive away either at the Walmart store when he went into the Walmart store or at Mr. Eidman's office, and we believe a jury would conclude that that is basically a lie, that your intent all along was to aid him in the commission of this crime.

You also admitted that the gloves he wore, the cloth gloves he wore, were obtained from your place of employment, and while those cloth gloves were effective from preventing fingerprints from being left behind they were very ineffective in preventing Mr. White from leaving his DNA on Mr. Eidman's pocket.

We believe that once all of this evidence is presented to the jury there is no question they would convict you of robbery in the first degree and felony murder. Also you indicated to the police that the wallet was in fact taken, that there was money in it, that the money was later gambled away at the casino and that you or White

burned the wallet in a barbeque grill to destroy the evidence as well as the white gloves. So based upon all that evidence we believe that a jury would convict you of both these charges.

(Plea Tr.20-23) [emphasis added].

However, at Paul White's trial, the prosecutor argued Mr. White's statement to the police as the basis for a finding of guilt, and Mr. White's statements to police differed materially from Hines' statements to police. In Mr. White's statements to police, Mr. White identified Hines as not only an active participant in the robbery and killing committed in Mr. Eidman's insurance office, but also as the shooter. Mr. White in his statements to police admitted the robbery of Mr. Eidman, but claimed the killing was an unplanned move committed by Hines without his foreknowledge.

In closing argument at Mr. White's trial, the prosecutor argued that both Petitioner, Hines and Paul White had gone inside the insurance office and executed Robert Eidman (Codef. Tr. 2, 7-10, 13). The prosecutor argued scenarios consistent with Mr. White's statement, placing the gun in Hines' hand. The prosecutor argued that Mr. White provided the gun, that he "saw what was being done with that gun," that he didn't tell "Cleo stop, stop," and that he never "demanded the gun back from Cleo" (Codef. Tr. 11, 20; see also Codef. Tr. 43 (stating "they are playing Cleo's songs")).

Petitioner, Hines alleges a violation of his constitutional rights because the theory the prosecution chose to convict Hines at his plea on August 24, 2012 was inconsistent with the theory the prosecution chose to convict Hines' codefendant, Paul White, at White's previous jury trial.

The Due Process Clause of the United States Constitution guarantees every defendant the right to trial that comports with the basic tenets of fundamental fairness. Lassiter v. Department of Soc. Servs., 452 U.S. 18, 25-26 (1981); see also turner v. Louisiana, 379 U.S. 466, 471-472 (1965); In re Murchison, 349 U.S. 133, 136 (1955).

"It is a much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." Berger v. United States, 295 U.S. 78, 88 (1935), overruled on other grounds by Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

"While prosecutors are not required to present precisely the same evidence and theories in trial for different defendants involved in the same crimes, the use of theories that are factually contradictory to secure convictions against two or more defendants in prosecutions for the same offenses arising out of the same event violates the principles of due process." Bankhead v. State, 182 S.W.3d 253, 258 (Mo.App.E.D. 2006); see also Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000); United States v. Higgs, 353 F.3d 281, 326 (4th Cir.

2003); Drake v. Kemp, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark, J., concurring).

When no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants in separate prosecutions, offer inconsistent theories and facts regarding the same crime. Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997)(en banc), reversed on other grounds, 523 U.S. 538 (1998); see also United States v. Bakshinian, 65 F.Supp.2d 1104, 1110-1111 (D. Cal. 1999)(citing Thompson, 120 F.3d at 1058)); see also United States v. GAF, 928 F.2d 1253, 1260 (2nd Cir. 1991)(stating "[c]onfidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts").

"To violate due process, an inconsistency must exist at the core of the prosecutor's cases against the two defendants for the same crime, and the State's error must have 'rendered unreliable' the habeas petitioner's conviction." Clay v. Bowersox, 367 F.3d 993, 1004 (8th Cir. 2004)(citing Smith v. Groose, 205 F.3d at 1052)). Here, an inconsistency exists at the core of the prosecutor's case against the defendants for the same crime. See Smith v. Groose, 205 F.3d at 1052. Here, at Mr. White's trial and Petitioner, Hines' plea, the prosecutor used inconsistent theories about the degree of affirmative participation that Hines allegedly exercised in the commission

of the offenses of robbery and murder. Specifically, at Petitioner, Hines' plea, the State's evidence of accomplice liability was that Hines drove "[Mr. White] to Mr. Eidman's office under circumstances where any reasonable person would have known that he was going to perpetrate an armed robbery" and that Mr. Eidman was killed in the perpetration of that robbery (Plea Tr.18, 21-22). However, at Mr. White's trial, the State portrayed Hines as a more active participant who was present in the insurance office when Mr. Eidman was robbed and killed, and who possibly pulled the trigger with the intention of shooting Mr. Eidman dead (Codef. Tr.2, 7-10, 13, 43).

First, the prosecution's use of inconsistent theories prejudiced Petitioner, Hines. The prosecution's use of inconsistent theories resulted in an unreliable conviction; Hines' unknowing, unintelligent, and involuntary plea, and sentence to a term of life.

Second, plea counsel should have objected to the prosecution's use of inconsistent theories at Hines' plea, because the objection would have proven meritorious. No reasonable strategy justified plea counsel's failure. Consequently, plea counsel's ineffectiveness prejudiced Petitioner.

Third, had the prosecution not pursued inconsistent theories, there is a reasonable probability that Hines would not have pleaded guilty, that the plea court would not have found factual basis for Hines' plea, and that Hines would have

received a shorter term of imprisonment.

Petitioner, Hines maintains that he did not exit the car, nor enter the insurance office, nor shoot Mr. Eidman, or otherwise, assist or encourage Mr. White in Mr. White's commission of the charged robbery and murder. But for the prosecution's use of an inconsistent theory of guilt at his plea, Hines would have presented evidence at a trial of his mere presence outside in the car on the parking lot when the offenses occurred.

Mere presence at the commission of a felony, considered alone or in combination with a refusal to interfere, is an insufficient basis upon which to find accomplice liability. State v. Washington, 901 S.W.2d 276, 280 (Mo.App.E.D. 1995); State v. Castaldi, 386 S.W.2d 392, 395 (Mo. 1965); State v. Martin, 428 S.W.2d 489, 491 (Mo. 1968).

Petitioner, Hines attests that at the time of his plea, he believed he had evidence establishing his mere presence and refusal to interfere. Furthermore, had the State based his accomplice liability for the charged offenses on the theory used at Mr. White's trial, i.e., that he actively participated in the commission of the offenses by entering the insurance office with Mr. White and possibly even shooting Mr. Eidman, he would not have pleaded guilty, but would have refuted this theory at trial with his evidence. Consequently, the State's fundamental interest in criminal prosecution should be "not that it shall win a case, but that justice will be done."

Berger, supra, overruled on other grounds by Stirone, supra.

EQUAL PROTECTION OF THE LAWS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires the law to treat identically situated persons in the same way. The Fourteenth Amendment forbids a state to "deny any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. This means "that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985). The Fifth Amendment requires the federal government to obey the same equal protection standards as the states. Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975).

In this case, Petitioner's right to equal protection of the law was violated when the U.S. Eighth Circuit Court of Appeals refused to grant him the same relief that was previously granted to identically situated litigants, and therefore, the Panel's Judgment violated Petitioner's right to equal protection of the law, and is contrary to established state and federal case law in Bankhead v. State, 182 S.W.3d 253 (Mo.App.E.D. 2006); and Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000), in that, the legal and factual issues in Bankhead and Smith are identical to Petitioner's case.

COURTS' OPINIONS

The Missouri Court of Appeals found that Petitioner waived this claim, because it was known to him at the time he pleaded guilty, and he knowingly and voluntarily entered a guilty plea anyway. That court held that "[by] entering a knowing and voluntary guilty plea, a defendant waives all nonjurisdictional defects including statutory and constitutional guarantees." However, Petitioner, Hines' plea was not knowingly and volunarily entered, but was in fact made at the misadvice of plea counsel. Plea counsel was ineffective in failing to investigate and research the prosecutor's use on inconsistent theories of prosecution, and thus, Petitioner was prejudiced by counsel's failure.

The U.S. District Court found that neither the prosecution, nor the Court of Appeals acted contrary to federal law. The motion court did not believe that the State used inconsistent theories in prosecuting Petitioner and his codefendant. However, the record clearly reflects that the prosecutor in fact used inconsistent theories in the prosecution of Cleo Hines (Petitioner) versus Paul White (codefendant).

The U.S. 8th Circuit Court of Appeals' Panel opinion is contrary to clearly established state and federal case law, and the Panel overlooked material matters of fact and law, because Petitioner proved he was denied his constitutional

right to persist in his plea of not guilty, right to due process of law, right against self-incrimination, and right to jury trial, in violation of the 5th, 6th, and 14th Amendments to the United States Constitution and Article I, §§ 10, 18(a), 19, and 22(a) of the Missouri Constitution.

REASONS FOR GRANTING THE PETITION

The U.S. District Court and the 8th Circuit's denial of relief is contrary to established state and federal case law in Bankhead v. State, supra and Smith v. Groose, supra. The law is also established in U.S. v. Higgs, supra and Drake v. kemp, supra regarding the use of inconsistent theories of prosecution. Here, specifically, no reasonable strategy justified plea counsel's failure to object to the prosecution's use of inconsistent theories at Petitioner's plea hearing. had plea counsel made such objection, the plea court would not have found factual basis for Petitioner's plea. Furthermore, had the prosecution not pursued inconsistent theories, there is a reasonable probability that Petitioner would not have pleaded guilty and would have instead insisted on a trial. Finally, the prosecution's use of inconsistent theories prejudiced Petitioner and resulted in an unreliable conviction; Petitioner's unknowing, unintelligent, involuntary plea, and sentence to a term of life. In this rare and exceptional circumstance, a manifest injustice would result in the absence of a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cleo Hines

Date: 5/31/2019