No. 19-5296 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Ozzie Davis — PETITIONER
(Your Name)

vs.

Thomas McGinley, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals, Third Circuit (PA)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ozzie Davis, GL-1424
(Your Name)
SCI- Coal Township
1 Kelley Drive
(Address)

Coal Township, Pa 17866
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

WHETHER THE PENNSYLVANIA SUPERIOR COURT'S DENIAL ON DIRECT REVIEW OF THE CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE IN SUPPORT OF PETITIONER'S CONVICTION FOR THIRD DEGREE MURDER AND CRIMINAL CONSPIRACY RESULTED IN A DECISION THAT IS BASED ON AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED SUPREME COURT PRECEDENT?

WHETHER, IN A STATE TRIAL, THE TRIAL JUDGE'S MISSTATEMENT OF TESTIMONY, AND ITS ADMISSION INTO EVIDENCE VIOLATES JACKSON V. VIRGINIA, 443 U.S. 307, WHERE A JURY BASED ITS VERDICT ON THAT EVIDENCE, AND THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO FIND A PETITIONER GUILTY AS TO EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT?

WHETHER, STATEMENTS FROM THE PROSECUTOR, AND TESTIMONY FROM COMMONWEALTH WITNESSES FROM REDACTED PORTIONS OF A CODEFENDANT'S CONFESSION VIOLATES JACKSON V. VIRGINIA, 443 U.S. 307, WHERE THE ONLY EVIDENCE SUFFICIENT TO CONVICT WAS THE REDACTED PORTIONS, AND WHETHER THIS SAME TESTIMONY VIOLATES BRUTON V. U.S., 391 U.S. 123?

WHETHER THE PROSECUTOR'S STATEMENTS TO THE JURY FROM REDACTED PORTIONS OF A CODEFENDANT'S STATEMENT IS PROSECUTORIAL MISCONDUCT TO A LEVEL THAT IT VIOLATES PETITIONER'S RIGHT TO A FAIR TRIAL?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] 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:

Thomas McGinley, Superintendent
Attorney General for the State of Pennsylvania
John Wetzel, Secretary of the Department of Corrections

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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

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

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2019 U.S. App.LEXIS 6561; 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

[X] reported at 2018 U.S.Dist.LEXIS 125013; 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 C to the petition and is

[X] reported at 932 A.2d 251 (Direct Appeal); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Supreme Court (PA)(Direct Appeal) court appears at Appendix D to the petition and is

[X] reported at 596 Pa 724; 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.

[ ] 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: March 26, 2019, and a copy of the order denying rehearing appears at Appendix E.

[ ] 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).

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

The date on which the highest state court decided my case was 3/16/16. A copy of that decision appears at Appendix F.

[ ] 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

Title 18 PaC.S. §903, See Appendix I
Title 28 U.S.C. §2254, See Appendix I

United States Constitution, Amendment 6, See Appendix J
United States Constitution, Amendment 14, See Appendix J

STATEMENT OF THE CASE

Petitioner, Ozzie Davis is a state prisoner who was convicted in the Philadelphia Court of Common Pleas in 2001 of Third Degree Murder, and Criminal Conspiracy (Docket No. CP-51-CR-1103861-1999). Davis was arrested, along with co-defendant Eric Cacho and charged with murder and criminal conspiracy in response to the August 11, 1999 shooting death of Melvin Lewis. On October 27, 1999, a preliminary hearing was conducted, the Transcript of which have not been provided here, before the honorable Teresa Deni, Judge of the Municipal Court of Philadelphia County, Pennsylvania. On November 17, 1999, Davis was arraigned on bills of information. After several pre-trial conference listings, a motion to sever was heard by the Honorable Renee Caldwell Hughes, on February 20, 2001. After its consideration the Court denied this motion and jury selection began on February 27, 2001. On March 5, 2001, testimony began. On March 13, 2001, the jury found Davis guilty of third degree murder and criminal conspiracy. Davis was sentenced to serve 20 to 40 years of imprisonment on the charge of third degree murder and 10 to 20 years of imprisonment, concurrently on the charge of criminal conspiracy.

The state courts affirmed the judgment of sentence on direct review, Com. v. Davis, 932 A.2d 251 (7/10/07, Com. v. Davis, 596 Pa. 724 (3/14/08); and on collateral review, Com. v. Davis, 2015 Pa.Super.Unpub. LEXIS 3407 (2015), Com. v. Davis, 2016 Pa. LEXIS 464. See Appendices C, D, and F.

Petitioner then sought habeas corpus review in the federal

courts, which was denied at every stage, Davis v. McGinley, 2018 U.S. Dist. LEXIS 28698 (E.D. 2/21/18)(R&R, copy not provided in appendices/indigence), Davis v. McGinley, 2018 U.S. Dist. LEXIS 125013 (12/25/18), Davis v. Supt. Coal Twnshp., 2019 U.S. App. LEXIS 6561 (1/30/19)(coa denied), Davis v. McGinley, 18-2934 (3/26/19)(Application for rehearing denied). See Appendices A, B, and E.

Petitioner would like to note that all portions of the Notes of Testimony cited herein are contained in Appendix G, arranged in ascending order from Trial volumes 1 - 6, and each Volume's page order ascending.

Latina Sasportas testified at trial that, on August 11, 1999 she was in front of her home at 2349 Nicholas Street, in the city and county of Philadelphia, Pennsylvania when she approached Davis' girlfriend, Aisha Lane, and informed her that she believed Davis to be the father of her young son. Aisha then lift the area located Davis at his home and confronted him with what she had been told by Latina. Davis and Aisha got in her car and drove for about fifteen minutes and stopped at a house where Cacho entered the car. Aisha's preliminary hearing testimony, which was read into the record at trial by an attorney for the Commonwealth, shows that there was no discussion in the car among the three people. When they arrived at 24th Street, Cacho exited the vehicle and Aisha and Davis continued around the corner to the 2300 block of Nicholas Street, where Latina and Melvin Lewis lived together across the street from Aisha. Davis and Aisha did not approach Latina's home right away. They sat on Aisha's front

door step for about five minutes and then Davis knocked on Latina's door. Latina exited her home and stood on the pavement in front of her door. The two talked without any physical confrontation. While they talked, Lewis exited the house and joined the discussion. Davis made no threats and none of the witnesses saw him with a gun at any time. Further, the evidence showed that Davis was not seen making any gestures or signals. While the parties were standing together talking, a man in a black hat, later identifies as Cacho, approached Lewis from behind and shot him. After the victim was shot, Davis and many others on the street scattered from the scene.

Latina Sasportas testified that Mr. Davis told her that Aisha Lane "called him up crying and everything". Vol. 2, N.T. 3/7/01, p. 82, 11.15-16. During the judges instructions, she misquotes that testimony to the jurors, stating that Sasportas testified that Mr. Davis told her he came to her house because the decedent was "disrespectful" to his girlfriend. Vol. 5 N.T. 3/12/01, p. 47. The judge admitted this evidence against Mr. Davis. id. L. 25, p. 48, LL. 1-7. Also see Vol. 5 N.T. 3/12/01, p. 57. Defense counsel objected. id. L. 17-25. The trial judge denied it. Vol. 5 N.T. 3/12/01, p. 60, L. 14.

Detective Reinhold read into evidence Mr. Cacho's original (unredacted) statement. Vol. 3 N.T. 3/8/01, pp. 88-93. See original and redacted statements, 20A, and 20B, Appendix H. Detective Reinhold testified that Mr. Cacho stated "No. I was told you do me a favor and I will do you a favor. id. p. 90, L. 18.

In the prosecutor's closings he stated "He killed him. He did the favor for the favor, but wasn't able to hurt Latina." Vol. 4 N.T. 3/9/01, p. 126, LL. 9-11.

The above testimonies violate both Jackson v. Virginia, 443 U.S. 307 (1979), and Bruton v. United States, 391 U.S. 123 (1968).

REASONS FOR GRANTING THE PETITION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10, Considerations Governing Review on Certiorari. A petition for a writ of certiorari will be granted only for compelling reasons. id. Petitioner here asserts that a state court has decided an important federal question in a way that with relevant decisions of this Court. See Rule 10(c).

The test for §2254(d)(1)'s Uunreasonable application" clause is as follows: "An unreasonable application occurs when a state court identified the correct governing legal principle from the Supreme Court's decision but unreasonable applies that principle to the facts of a petitioner's case." Rompilla v. Beard, 545 U.S. 374, 380 (2005)(quoting Wiggins v. Smith, 539 U.S. 510, 519 (2003)(internal quotations omitted). The test for §2254(d)(2)'s "unreasonable determination of the facts" clause is whether the petitioner has demonstrated by "clear and convincing evidence" that the state court's determination of the facts was unreasonable in light of the record. §2254(e)(1); See also Rice v. Collins, 546 U.S. 333, 338-39 (2006).

Importantly, the evidence against which a federal court measures the reasonableness of the state court's factual finding is the record evidence at the time of the state court's adjudication. Cullen v. Pinholster, 131 S.Ct. 1388, 1401-03 (2011); Ruondtree v. Balicki, 640 F.3d 530, 537-38 (3d Cir. 2011). Like the "unreasonable application" prong of paragraph (1), a determination should be adjudged "unreasonable" under paragraph

(2) if a court finds that a rational jurist could not reach the same finding on the basis of the evidence in the record. 28 U.S.C. §2254(d)(2); Porter v. Horn, 276 F.Supp. 2d 278, 296 (E.D. Pa. 2003). See also Torres v. Prunty, 223 F.3d 1103, 1107=08 (9th Cir. 200). When the finding lacks evidentiary support in the state court record or is plainly contraverted by evidence therin, the federal habeas court should overturn a state court's factual determination. Claims on insufficiency of the evidence upon which to base a conviction are cognizable as a due process violation if no rarional trier of fact could havbe found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979)("[T]he relivant question is whethr, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.") Id., at 319. It must be noted here that the State court did not cite to any federal precedent in reaching its conclusion. However, "so long as neither the reasoning nor th eresult of the stat-court decision contradicts" clearly established federal precedent, the AEDPA does not require recitation or even awareness of Supreme Court cases. Early v. Packer, 537 U.S. 3, 8 (2002)(per curiam).

The Pennsylvania Supreme Court has held that "[m]urder is an unlawful killing of another with malice aforethought, expressed or implied." Commonwealth v. Hardcastle, 519 Pa 236, 250 (1988). cert. denied, 493 U.S. 1093 (1990). According to the Crimes Code, third-degree murder is defined as "[all] other kinds of murder" not considered first or second degree murder.

18 Pa.C.S. §2502(c)(copy not supplied in appendices/indigence). The elements of third-degree murder is a killing done with legal malice but without the specific intent to kill, as required in first dgree murder. Commonwealth v. Pitts, 486 212 (1979). Malice is an essential element of the crime of murder. Commonwealth v. Commander, 436 Pa. 532 (1970). A person may be convicted of third degree murder where the murder is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice aforethought. Commonwealth v. Pigg, 391 Pa. Super. 418, 425 (1990), alloc. denied, 525 Pa. 644 (1990). Malice is defined as a "w3ickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured." Commonwealth v. Drum, 58 Pa. 9, 15 (1868); see also Com. v. Young, 494 Pa 224 (1981).

In the case at hand, the Superior Court's opening statement is that Cacho "testified" that Davis called him and told him he had a problem with Lewis. Cacho replied he would prefer to speak with Davis in person rather on the phone. So Davis and Lane picked Cacho upand headed towards Lewis's and Sasportas' house. (Superior Court Decision at 2)(not supplied/indegence). The Court'sfinding that Cacho "testified" to this, resulted in a decision that is based on an unreasonable determination of the facts inlight of the record which clearly shows that Cacho did not testify at all. N.T. 3/9/01, pp. 26-28. 28 U.S.C. §2254(d)(2). The Court further states that after Davis knocked on Latina front door, he confronted her about Lewis' involvement in what

the Court characterizes as an earlier "argument," and that after a while, Lewis came out and stated "arguing"with Davis. As the so-called "argument" progressed, Davis started looking past and away from Lewis who was in front of him. (Superior Court Decision at 2).

The Court further states that Cacho revealed in a statement to the police that "Davis" called him regarding a problem he had with Lewis and he told "Davis" he did not want to talk over the phone. Cacho further stated that "Davis" then picked him up and ordered him to shoot Lewis three times in the back, an dthat Cacho admitted in the statement that he shot Lewis. (Superior Court Decision at 2-3). This inaccurate finding resulted in a decision that is based on an unreasonable determination of the facts in light of Cacho's statement as read into the record at trial by Homicide Detective, Richard Rienhold, which does not mention Davis by name at all. In fact, the jury asked the Court during deliberations if it would have the court recorder read the portion of Detective Reinhold's testimony relativ to Cacho's statement which indicaties how Cacho was transported to the crime scene, specifically who picked him up and dropped him off. During a lengthy discussion concerning this matter, the Court indicated that Cacho's redacted statement, which went out to the jury, "was very narrowly written so that it says that Cacho was picked up, but does not say who picked him up." Vol. 3 N.T. 3/8/01, pp. 88-93.

Furthermore, the evidence fails to establish that Davis held the requisite mintal state to be convicted of third-degree

murder. The shooting in this case was not perpetrated during the commission of another felony. As a result, the requisite mental state of malice may not be imputed to Davis. Instead, the evidence must independently support all elements of the crime, including malice aforethought. In this case. it dois not. The evidence failed to show that Davis spoke any threatening words to the victim or any of the Commonwealth witnesses. The record does not reflict any actions by Davis that show any aggression towards the victim. Further, there is no evidence of Davis' anger or inflammation while he travelled to Nicholas Street with Aisha and Cacho. Nor was he agitated or angered on the scene. In fact, the evidecne shows that before Cacho shot the victim, Davis did not argu with the victim at all. Accordingly, malice may not be inferrec from Davis' words or actions. Davis was merely present when the shooting occurred. Mere presence at the scene of a crime is not enough to suport a conviction. Com. v. Henderson, 249 Pa. Super. 472 (1977).

The evidence, therfore, is insufficient to support a third-degree murder conviction. It must be noted, however, that the trial court opined that the evidence issufficient to sustain the third-degree murder conviction because Cacho admitted that he did in fact shoot Lewis at close range. According to the trial court's analysis, Davis is a conspirator who is liable for Cacho's actions. (Trial Court Opinion, 8/10/05 at 6-7)(not supplied/indigence). The rial court points out that there was evidence that there was an association between Cacho and Davis, and that Davis drove Cacho to the crime scene. Davis argued on

appeal, however, that although the record shows that he was friends with Cacho and that he was present during the events leading up to Lewis' death, this is insufficient evidence to hold Davis accontable for Cacho's actions. Mere presence at the scene of the crime is not sufficient to hold Davis accountable for anything that Cacho did. Com. v. Lawson, 437 Pa. Super. 521 (1994), appeal denied 540 Pa 596.

In support of this contention, Davis argues that the Pennsylvania Crimes Code states that a person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he" (1) agrees with one or more other persons that one or more of them will engage in conduct which contitutes such crime, or (2) agrees to aid such other persons in the planning, attempting or solicitation to commit such crime. 18 Pa.C.S. §903(a). See Appendix I. Further defined, "the essence of criminal conspiracy is a commmon understanding, no matter how it came into being, that a particular criminal objective be accomplished." Com. v. Keefer, 338 Pa Super. 184, 190 (1985). Thus, a conviction for criminal conspiracy to commit third-degree murder requires that the evidence provide proof that the perpetrators shared any requisite intent. Com. v. Sattazahn, 428 Pa Super. 413 (1993). In addition, Davis argued that in Com. v. Menginie, for example, the Pennsylvania Supreme Court reversed the defendant's conviction for voluntary manslaughter on a conspiracy theory where, although the evidence might warrant the inference that the defendant and his companion expressly or tacitly agreed to taunt

or bully the victim and his family, there was insufficient evidence to support an iference of an unlawful agreement to kill or inflict serious bokily injury and to sustain a conviction on a conspiracy theory. Id. 477 Pa. 156 (1978).

In Minginie, a car driven by the defendatn with two passengers passed a parked car of a drive-in restaurant and tried to squeeze in. When the defendant's car approached the vehicle again and backed up, a passenger form the other car got out. A passenger in the rear seat of the defendant's car then got out and fired a fatal shot at the passenger who had exited the other car. The defendant and his passenger then drove awasy. The Pennsylvania Supreme Court held tha one cannot be held liable for the conduct of another simply gecasue a confrontation was likely to take place and someone wit the defendant usesd a deadly weapon. In this same vein, Davis argued as he does here, that he may have gone willing to and been present at the scene wher an unpleasant confrontation waslikely to take place, but this is not conclusive proof that he agreed to kill Lewis or inflict serious bokily injury. The Superior Court, on the other hand, affirmed the trial court's decision while noting that in Com. v. Lamber, 795 A.2d 1010 (Pa. Super. 2002), it affirmed the defendant's conspiracy conviction because the evidence showed that there was an asociation between defendant and the shooter, defendant was present at the crime scene and defendant facilitated the crime. Id. at 20. The evidence in Lambert shoed that defendnat drove the shooter to the crime scene, positioned his car for a quick getaway, servedas a lok out and finally, drove the shotter form the scene. Id. at 1019. The Lambert Court reasoned that defen-

dant's actoins associated him with the shooter's criminal act and also facilitated the criminal act, Id. at 1020, and, therefore, concluded taht the evidnece was sufficient to establish defendant's prior knwledge of the crime, his shared intent with the shooter to engage in the crime and his paricipation in the crime.

In doing so, the Court found that the evidence in this case is similarly sufficient to sustain the inference that Davis entered into an illicit agreement with Cacho to harm Lewis. The Couert then, again, inaccurately stated that "[t]he evidence established that Davis called Cacho, ordered Cacho to shoot Lewis, drove Cacho to the crime scene, looked away as Cacho sneaked behind Lewis and shot Lewis and Davis then drove Cacho form the scene. Just as in Lambert, it is reasonagle to infer that Davis' actions facilitated the shooting of Lewis. Likewise, this evidence is sufficient to establish Davis' prior knowledge of the crime, a shared intent with Cacho to shoot Lewis and Davis' participation in the crime" (Superior Court Opinion at 6-7).

As previously aserted, the finding taht Davis called Cacho, ordered Cacho to shoot Lewis, and looked away as Cacho sneaked behind Lewis and shot him, and tha tDavis then drove Cacho from the crime scene, "resulted in a decision that is based on an unreasonable determination of the facts in light of Cacho's redacted statement as read into the record by Homicide Detective , Reinhold, which, as Judge Hughts explained to the jury, not only "does not indicate who picked [Cacho] up or dropped him off,

N.T. 3/13/01, p. 11, it also cannot be used in any way against Davis, N.T. 3/12/01, p. 27, as well as the testimony provided by Commonwealth witness, Pamela Wood, who testified that she saw the victim, Melvin Lewis, speaking to another person whom she could not identify, when another person whom she could not identify, came up from gehind, at which time she heard shots. The two unidentified men then ran down 24th Street and got into a car, but she could not see the car, nor coud she remember which side of the car these two unidentified men got into, the driver's seat or the passenger's seat. N.T. 3/9/01, pp. 12,14, and 16. 28 U.S.C. §2254(d)(2).

While further distinguishing Minginie as being factually distinct from this case, the Superior Court explained that in Minginie, it found "the prosecutionhad simply failed to produce any evidnece of an unlawful agreement," id. at 873, because the defendant did not know any member of the other party, there was no prior encounter between any of the opposing party members that might have provided the impetus for the crime and the defendant did not participate in the crime. Id. at 872. The Court, then, Stated tha tunlike in Minginie, "Davis and Lewis knew each other, there had been a prior confrontation between them and the prior confrontation appears to have been the motive for shooting Lewis." (Superior Court Decision at 8).

Davis arguable asserts that this inaccurate finding resulted in a decision taht is based on an unreasonable derermination of the facts in light of the entire record below shich is devoid of any evidence whatsoever that Davis and Lewis "knew

each other." 28 U.S.C. §2254(d)(2). The Court's interrelated and inaccurate findings, in context, that there had been a prior confrontation between Davis and Lewis and the prior confrontationappears to bave been the motive for shooting Lewis, also resulted in a decision that is based on an unreasonable determination of the facts inlight of the clear and convincing testimony provided by Latina which established that there was "never" any bad blood between Davis and Lewis, N.T. 3/7/01, p. 106, and that the so-called "confrontation" which occirred prior to the shooting consisted of a conversation between Latina and Aisha. N.T. 3/7/01, p. 43. Moreover, the t4ial court's finding that Davis "distracted" Lewis before the shooting, is an unwarranted assumption that is also unsupported by any record evedence.

Here, Davis argues that, although resonabel inferences must be drawn in the Commonwealth's favor, the inferences must flow from the facts and circumstances proven in the record an must be of such volume and quantity as to overcome the presumption of innocence and satisfy the fact finder of Davis' guilt beyond a reaonable doubt. Com v. Scott, 409 Pa. Super. 313, 315 (1991) (quoting Com. v. Clintori, 391 Pa 212, 219 (1958). The evidence in this case failed to show any conversation between Davis and Cacho that revealed a plan to shood and kill Melvin Lewis. Davis did not threatin Lewis in any wasy or exhibit any behaior t to indicat that he was angry with Lewis. The record simply shows tha Davis was merely present when Cacho shot Lewis for no apparent reason, and left the area after the gunshot was heard along with everyone else in the vicinity after he heard the shot.

Even if Davis was seen running down 24th Street with Cacho, this is not competent evidence to support his conviction for criminal conspiracy. Without proof of a common understanding between Davis and Cacho to kill Lewis, the convicion for third-degree murder on a conspiracy theory may not stand.

The trial judge instructed the jury that Latina Sasportas testified that Mr. Davis told her he came to milvin Lewis' the victims' house becase Mr. Lewis dad "disrespected" Mr. Davis' Girlfriend, Aisha Lane. Vol. 5 N.T. 3/12/01, p. 47. That's inaccurate. The judge then admitted this mistatement into evidence to be used against Mr. Davis. id., p. 47-48. Later, over vigorous objection, and its denial, the court disagreed that the use of the word, and whether Mr. Davis said that to Sasportas. Vol 5, N.T. 3/12/01, pp. 57-60. Ms. Sasportas said nothing of the sort. In fact, she testified that Mr. Davis did not appear hostile. Vol. 2, N.T. 3/7/01, pp. 97-98. When asked does she "think Mr. Davis was angry or sad or happy", she replied "He wasn't happy and he wasn't sad." Vol. 2 N.T. 3/7/01, p. 45. Even in her later testimony she never used any words tha would allow a jury to infer malice or motiv. "A: Yeah. He said sh she [Aisha] called him down there saying that Melvin said all this stuff to her and she called him up crying and everythin." Vol. 2 N.T. 3/7/01, p. 82, LL. 14-16.

The judge in instructing the jury that the word "disrespect" could be used as evidence against Mr. Davis supplied a motive to the incedent where there was none. Motive is an element of intent, or mens rea, ill will, or the malice required to

be proved beyond a reasonable doubt. Motive is the cause for the intent. The word disrespect denotes mistreatment. One can cerainly infer from the context the judge used it that because Mr. Davis' girlfriend was disrespected, he then was moved to commit an act equivalent to the mistreatment his girlfriend received from the decedent. "Crying and everything" alone does not create motive. If there was no motive to create an intent in Mr. Davis' mind, then there is no casue for Mr. Davis to agree with Mr. Cacho(co-defendant) to act in the manner that Mr. Cacho acted-killing Melvin Lewis. Absent this, one can only conclude that Mr. Cacho acted alone. In admitting this mistated testimony, the judge allowed the jury to use it to convict Mr. Davis on incriminating evidence not in the record. This is an improper bases on which to convict a defendant. With out it there was insufficient evidence on which to convict Mr. Davis. In Quercia v. U.S., 289 U.S 466, 469-71 (1933), the Court stated:

> "This privilege of the judge to comment on the facts has inherent limitations.... In commenting upon testimony he may not assume the role of a witness.... He may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or limitation is received with deference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as to not be on-sided"; that deduction and theories not warranted by the evidence should be studiously avoided." He may not charge the jury "upon a suppose or conjectural state of facts, which no evidence has been offered. See United States ex rel Harding v. Marks, 403 F.Supp. 946 (1975)."

The jury gave great weight to the evidence the judge admitted because of the deference it afforded the judge. The judges

instructions controlled. Because of it, the jury convicted Mr. Davis on deductions and theories not warranted by the evidence. For this reason, Mr. Davis' conviction is in violation of Jackson v. Virginia, 443 U.S. 307 (1979).

In conjunction to the above, the Commonwealth marked Mr. Cacho's original and redacted statements 20A, and 20B, respectively. Vol. 3 N.T. 3/8/01, P. 22. Later, Detective Reinhold read into evidence Mr. Cacho's original (unredacted) statement. Vol. 3 N.T. 3/8/01, pp. 88-93. Thereby, allowing the jury to hear the redacted highly prejudicial, and identifying evidence in the statement. See Appendix H, (unredacted 20A, and Redacted 20B Statements). Detective Reinhold testified that Mr. Cacho stated "No. I was told you do me a favor and I will do you a favor. id. p. 90, L. 18. This is directly from the redacted statement. See Appendix G, 20B, p. 3. Also see Vol. 4 N.T. 3/9/01, p. 122,, L. 15-16. In the prosecutor's closings he states "He killed him. He did the favor for the favor, but wasn't able to hurt Latina." Vol. 4 N.T. 3/9/01, p. 126, LL. 9-11. By saying to the jury that Mr. Cacho wasn't able to hurt Latina, the deceased girlfriend, suggests that they came to not only kill, Mr. Lewis, but his girlfriend too. There aren't any statements, testimony, or any other evidence suggesting that. This is improper and highly prejudicial. This allowed the jury to draw an inference from the suggestion that there was an agreement to kill Mr. Lewis girlfriend, Lantina Sasportas, too. As a result the jury based its verdict on conclusions unsupported by any evidence. And without which there is insufficient evidence to support a verdict

of guilty beyond a reasonable doubt in violation of Jackson v. Virginia, 443 Us. 307 (1979). And, for that reason certiorari should be granted. In addition, the prosecutor stated in his opening that "...you will hear that this defendant [Mr. Davis] came with a girl named Aisha which was the current girlfriend and codefendant Eric Cacho." Vol. 1 N.T. 3/5/01, p. 52, L. 16. This is but another instance where statements from the redacted portion of Mr. Cacho's statement were used as evidence to convict Mr. Davis. Yet again, defeating the purpose the redactions were intended to serve. Further allowing the jury to base its verdict on prejudicial evidence that was ruled out. For the forgoing reasons, the Superior Court's denial of this claim for relief resulted in a decision that is based on an unreasonable application of Jackson v. Virginia, 443 U.S. 307 (1979).

In all criminal prosecutions, state as well as federal, the accused has a right guaranteed by the sixth and fourteenth amendments to the United States Constitution, "to be confronted with winesses against him". U.S. Const. Amdt. 6; Pointer v. Texas, 380 U.S. 400,.

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to a rigorous testing in the context of an adversary proceeding before the trier of fact. See Mryland v. Craig, 497 U.S. 836. Also see Bruton v. U.S., 391 U.S. 1620.

Petitioner asserts that the use of the following testimony violates Bruton, cited above. Petitioner draws this Courts attention to Ms. lanes testimony N.T 3/7/01, pp. 173, 174, 175, whic

which Ms. Patricia DeMaio read into the record Ms. Lane's Preliminary hearing testimony because Ms. Lane was not in court to testify:

A: I talked to Ozzie, Me and Ozzie--I confront him about having the baby. He denied it. Then me and Ozzie got in the car and me and Ozie got in the car and me and Ozzie went to--I don't know the name of the lot. I can't tell you what vicinity it's in." And he picked up Eric. P. 173.

A: "I can't tell you what vicinity it's in and we picked up Eric." L. 18, id.

Q: "Eric Cacho. His house or house or on the street?"; L. 23

A: "at a house." L. 25

Q: "who was driving this car?"
A: "Ozzie"
Q: "You were siting where?"
A: "In the passenger side."
Q: "In the front and this defndatn, Cacho, was where?"
A: "In the back."
Q: "Where did the three of you go ?"
"Where did the three of you go, MKa'am?"
A: "To Nicholas Street."
Q: "And when you got there where, was the car parked?"
A: "On 24th Street."
Q: "Did anybody get out of the car at 24th street?"
A: "On 24 Street, yes."
Q: "who?"
A: "Eric"
P. 174

Page 175:
"A: Uh-huh."
Q: And where did you and Ozzie go in the car?
A: We was on 24th Street.
Q: All three of you got out at the same time?
A: No.
Q: You parked on 24th street, Eric got out? You have to answer, ma'am, yes or no?
A: Yes.
Q: Then what happened?
A: We parked the car. Me and Ozzie got out.
Q: This was on Nicholas?
A: On 24th Street
Q: Go ahead. By the way, where did Eric get out on 24th Street?

After Ms. Lane's Preliminary hearing testimony was read into the record, Mr. Eric Cacho's statement confession was read into the record, Mr. Eric Cacho's statement/confession was read into the

the record by Detective Reinhold, see N.T. 3/8/01. It was read as follows:

> P. 89, LL. 8-15:
> "A: I was called on the phone and told about a problem with this guy. I did not want to speak on the phone. I was picked up. I was picked up on Monmouth Street and instructed to shoot this guy. I was told to shoot him three times in the back. I was driven to around 24th and Cecil B. Moore when I got out of the car.
>
> P. 90, L. 4:
> Q: was anyone else with you when you were picked up on Monmouth Street before the shooting happen?
> A: Yes, Aisha."

It was very clear by the introduction of these two pieces of testimony by the Commonwealth of these two unavailable declarents, that the sole purpose was for the Commonwealth to coroborate one's testimony with the other without allowing you r petitoner his constitutional rights to confrontation.

It can not be any clearer that even a blind jury could put two and two together and come to the conclusion that it was your petitioner that was being implicated in this crime as the driver.

Petitioner avers that the admissions of that the admissions of Cacho's statement/confession, provided to police and Lane's Preliminary hearing testimony was prdjudicial to petitoner and should not have been admitted. In addtiition, if this Court were to rule that they could have been admitted, petitioner would argue that the effects of the redactions were nullified when the prosecutor in opening arguments and closing argument mentioned the names of all co-defendants that were supposed to have been redacted from Cacho's statement/confession and Lane's testimony.

In Bruton v. U.S., 391 U.S. 123 (1968), the United States Supreme Court held that a defendant's Sixth Amendment Rights to Confrontation is violated when a statement of a non-testifying co-defendant that clearly implicates the defendant is entered into evidence. Our Supreme Court has stated that "when it is not clear that a confession can be redacted without prejudice to the defendant, the confession should be excluded." See Com. v. Johnson, 474 Pa. 410, 378 A.2d 859,861 (1977).

Also, in Lilly v. Virginia, 119 S.Ct. 1887 (1999), the United States Supreme Court has stated that "Despite frequent disagreement over matters such as the adequacy of the trial judge's instructions or the sufficiency of the redactions of ambiguous references to the declarant's accomplice, we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person."

Petitioner recognized that it was theoretically possible for such staements to possess "particularized guarantees of trustworthiness" that would justify its admissibility, but this Court should refuse to allow the prosecutor to "bootstrap on" the trustworthiness of other evidence. To be admissible under the Confrontation Clause, the "hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.

In the present case, the petitoner argues that by the pros-

ecutor's own words in opening arguments, the redacted testimony statements and closing arguments, the prosecutor nullified any and all recactrions by clearly telling the jury exactly who the parties were that each redaction was meant to exclude.

In opening arguments the prosecutor told the jury the following:

Se N.T. Vol. 1, 3/5/01, p. 52, L. 15.

> Line 15:
> "As they're talking on the porch you will hear that this defendant came with a girl named Aisha which was the current girlfriend and codefendant Mr. Eric Cacho."

Later on in which the prosecutor presented Ms. Lane's Preliminary hearing testimony which was supposed to be redacted, thru Ms. DeMaio, Ms. Lane's testimony , was read to the jury.

See Vol. 2, 3/7/01, pp. 173,174 and 175:

> Line 1-8:
>
> "A: I talked to Ozzie. Me and Ozzie - I confronted him agout having the baby. He denied it. Then me and Ozzie got in the car and me and Ozzie went to- I don't know the name of the lot. I can't tell you what vicinity it's in. And he picked up Eric.
> Q: Eric Cacho. His house or house or on the Street
>
> LL. 18-25:
> A: I can't tell you what vicinity it's in. And we picked up Eric.
> The Court: Not and we
> The Witness: and we
> The Court: Okay keep going.
> Q: Eric Cacho. His house or house or on the street:
> A; At a house.
>
> P.174, LL. 1-25.
> Q: Who was driving the car?
> A: Ozzie.
> Q: You were sitting where?
> A: In the passenger side.
> Q: In the front and this defendant, Cacho, was where?
> A: In the back.
> Q: Where did the three of you go? Where did the three of you go, Ma'am?
> A: To Nicholas Street.
> Q: And when you got there where, was the car parked?

A: On 24th street.
Q: Did anybody get out of the car at 24th Street?
A: On 24th Street, yes.
Q: Who?
A: Eric.
Q: He got out on 24th Street?

P. 175, LL. 1-22.
A: Uh-huh.
Q: And where did you and Ozzie go in the car?
A: We was on 24th Street,
Q: All three of you got out at the same time.
A: No.
Q: You parked on 24th Street, Eric got out? You have to answer ma'am yes or no?
A: Yes.
Q: Then what happen?
A: We parked the car. Me and Ozzie got out.
Q: This was on Nicholas?
A: On 24th Street.
Q: Go ahead/. By the way, where did Eric get out on 24th Street?
A: I don't know.

Nest the prosecutor presented Eric Cacho's suposedly redacted statement/confession, which was read to the jury by Detective Reinhold . See N.T. Vol. 3, 3/8/01, p. 89, LL. 8-15.

"A: I was called on the phone and told about a problem with this guy. I did not want to speak on the phone. I was picked up, I was told to shoot him three times in the back. I was driven to around 24th and Cecil B Moore when I got out of the car."

Then finally in the prosecutor's closing arguments, he tells the jury that Aisha Lane and Ozzie Davis picked up Eric. See Vol. 4, 3/9/01, P. 114, Lines 10 and 11.

Again, later in the prosecutor's closing arguments, he stated that Ozzie picked up Eric. See N.T. Vol. 4, 3/9/01, P. 116, LL. 13-18:

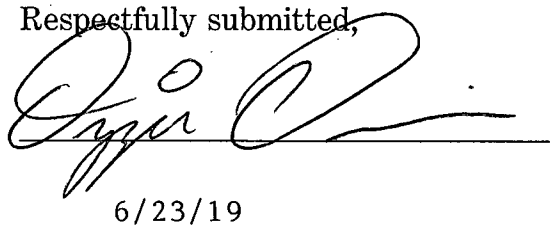
Where the prosecutor state the following:
"Rather than driving there and solving a problem, he picked up Eric. Why did he pick up Eric? Did Eric have to go shopping. Well, did he pick him up saying that guy's six foot tall and I need some backup."

Petitioner could continue with the rest of the prosecutor's closing arguments in which the prosecutor refers to Ozzie and Eric as codefendants. Based on the deliberate attempts by the prosecutor to closely link the petitioner with his codefendant's statement/confession and by name, any and all redactions are nullified in violation of Bruton and in violation of petitioner's right to confrontation. For the above mentioned reasons, petitioner is entitled to Certiorari,

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 6/23/19