No. _____

19-5607

IN THE

SUPREME COURT OF THE UNITED STATES





_____

FELIX SUMMERS — PETITIONER
(Your Name)

vs.

SECRETARY PA. D.O.C. — RESPONDENT(S)
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS, THIRD CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

FELIX SUMMERS #GW-9085
(Your Name)
1100 PIKE STREET
(Address)
HUNTINGDON, PA. 16654-1112
(City, State, Zip Code)

(Phone Number)

## QUESTION(S) PRESENTED

DENIAL OF SIXTH AMENDMENT RIGHT OF CONFRONTATION.
THE FEDERAL CONFRONTATION CLAUSE (6TH AMEND.)(was violated).

DENIAL OF SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

## 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:

THE COMMONWEALTH OF PENNSYLVANIA IN THIS INSTANT CASE IS REPRESENTED BY:

The District Attorney of Philadelphia County
Three South Penn Square
Philadelphia, Pa. 19107-3499

THE SECRETARY OF THE PA. D.O.C. IS LOCATED AT:

SECRETARY OF THE PA. D.O.C. (Mr. Wetzel)
PA. DEPT. OF CORRECTIONS
1920 TECHNOLOGY PARKWAY
MECHANICSBURG, PA. 17050

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## INDEX TO APPENDICES

## TABLE OF AUTHORITIES CITED

IN THE

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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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.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,
[x] is unpublished.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[ ] is unpublished.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 June 26, 2019. EXHIBIT/APPENDIX "A"

[X] 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: _____, 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 TO THE UNITED STATES CONSTITUTION
CONFRONTATION CLAUSE

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION
INEFFECTIVE ASSISTANCE OF COUNSEL

## STATEMENT OF THE CASE

PETITIONER IS A JUVENILE LIFER WHO IS CURRENTLY SERVING A SENTENCE OF LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE RELEASE AFTER SERVING TWENTY FIVE YEARS.

PETITIONER WAS CONVICTED FOLLOWING TWO PREVIOUS HUNG JURIES. THE PHILADELPHIA DISTRICT ATTORNEY OFFICE THEN TRIED THE PETITIONER A THIRD TIME. THE THIRD TRIAL RESULTED IN THE PETITIONER BEING CONVICTED OF MURDER IN THE FIRST DEGREE, RETALIATION AGAINST A WITNESS AND POSSESSION OF AN INSTRUMENT OF CRIME.

THE PETITIONER WAS ORIGINALLY SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE ON DECEMBER 14, 2006 BUT WAS RESENTENCED ON OR ABOUT JUNE 27, 2019 TO LIFE IMPRISONMENT WITH THE POSSIBILITY OF PAROLE AFTER SERVING TWENTY FIVE YEARS.

THE PETITIONER ARGUES THAT THE LOWER COUTS COMMITTED FEDERAL CONSTITUTIONAL ERROR WHEN THE STATEMENT OF DIANA MEIRINO, WHO DIED IN 2001, WHICH SUPPORTED THE FACT THAT THE PETITIONER WAS IDENTIFIED AS THE MURDERER, BUT NEVER HAD THE OPPORTUNITY TO CONFRONT MS. MEIRINO. THE STATEMENT BY MEIRINO WAS NOT TESTIMONIAL AND NOT A STATEMENT AGAINST HER INTERESTS OR A DECLARATION AGAINST HER INTERESTS BECAUSE SHE DID NOT ADMIT TO ANY CRIMINAL CONDUCT, AND HER ROLE AS SHE DESCRIBED WAS THAT SHE WAS MERELY PRESENT. CIVILIAN TO CIVILIAN STATEMENTS ARE NOT TESTIMONIAL UNDER THE CONFRONTATION

CLAUSE AS SET FORTH IN CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004); AND DAVIS V. WASHINGTON, 547 U.S. 813 (2006).

THE PETITIONER ARGUES THAT CRAWFORD CAN BE UTILIZED FOR MAKING A DETERMINATION WHETHER AN OUT OF COURT DECLARATION THAT WAS INTRODUCED AT TRIAL DID VIOLATE THE SIXTH AMENDMENT BECAUSE IT WAS A CIVILIAN TO CIVILIAN CONVERSATION AND IT WAS NOT MADE FOR THE PURPOSE OF ASSISTING IN A PROSECUTION IN THIS CASE. THE PETITIONER HAD NO OPPORTUNITY TO CONFRONT THE INDIVIDUAL MAKING THE STATEMENT.

PETITIONER ALSO RAISES AN INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE. THE CLAIM/ISSUE IS SET FORTH IN THE ARGUMENT OF THIS PETITION.

## REASONS FOR GRANTING THE PETITION

ARGUMENT WHY THE PETITION SHOULD BE GRANTED

THE PETITIONER POINTS OUT THAT HE WAS CONVICTED IN THIS CASE ONLY AFTER TWO HUNG JURIES. IN THIS INSTANT CASE THE PETITIONER OFFERS STRONG REASONS WHY IT SHOULD BE FOUND THAT REASONABLE JURISTS WOULD INDEED DEBATE HIS ENTITLEMENT TO THE WRIT OF HABEAS CORPUS.

THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT UNDER THE CONFRONTATION CLAUSE WHEN THE COMMONWEALTH OF PENNSYLVANIA DID ENTER IN TO THE TRIAL A STATEMENT FROM DIANA MEIRINO, WHO DIED IN 2001.

THE PETITIONER WAS NEVER AFFORDED THE OPPORTUNITY TO CONFRONT MS. MEIRINO, WHOSE STATEMENT IDENTIFIED THE PETITIONER AS THE SHOOTER. SHE WAS NEVER SUBJECTED TO CONFRONTATION BECAUSE OF HER DEATH IN 2001. PETITIONER'S TRIAL TOOK PLACE AFTER MS. DIANA MEIRINO DIED.

IT WAS JANET MEREINO, A REPEAT CONVICTED DRUG DEALER, THAT DID TESTIFY AS TO WHAT DIANA MEREINO TOLD HER, ON MARCH 29, 1999. DIANA MEREINO DIED IN 2001.

JANET MERINO TESTIFIED THAT DIANA MEREINO SAID--> SHE [DIANA] WENT AND KNOCKED ON CHARLOTTE PRESLEY'S DOOR AND ASKED FOR CHARLOTTE. AND THE OLD MAN CAME TO THE DOOR. AND HE SAID WHAT DO YOU WANT CHARLOTTE FOR ? AND DIANA SAID BECAUSE SHE OWES ME SOME MONEY. AND THEN CHARLOTTE CAME TO THE DOOR SAYING WHO DO I OWE MONEY TO ? AND THAT IS WHEN CHARLOTTE WAS SHOT IN THE FACE. THIS VIOLATED THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

SIXTH AMENDMENT/CONFRONTATION CLAUSE

IN CRAWFORD V. WASHINGTON, THE COURT HELD THAT 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 ACCUSATIONS. THE RIGHTS TO **CONFRONT** AND **CROSS EXAMINE WITNESSES** AND TO CALL ONE'S OWN WITNESSES HAVE LONG BEEN RECOGNIZED AS ESSENTIAL TO DUE PROCESS.

IN CRAWFORD V. WASHINGTON, THE CONFRONTATION CLAUSE PROHIBITS THE ADMISSION OF HEARSAY EVIDENCE WHEN THE DEFENDANT LACKS THE OPPORTUNITY TO CROSS-EXAMINE THE OUT-OF-COURT DECLARANT. THE PRINCIPAL EVIL AT WHICH THE CONFRONTATION CLAUSE WAS DIRECTED WAS THE CIVIL-LAW MODE OF OF CRIMINAL PROCEDURE, AND PARTICULARLY ITS USE OF EX PARTE STATEMENTS AND EXAMINATIONS AS EVIDENCE AGAINST THE ACCUSED. IN CRAWFORD IT WAS MADE CLEAR THAT EVEN IF THE SIXTH AMENDMENT IS NOT SOLELY CONCERNED WITH TESTIMONIAL HEARSAY, THAT IS ITS PRIMARY OBJECT.

IN DAVIS V. WASHINGTON, THE COURT CLARIFIED ITSELF AS TO WHAT IS TESTIMONIAL EVIDENCE. A STATEMENT IS TESTIMONIAL WHEN THE STATEMENT WAS GIVEN NOT IN RESPONSE TO AN ONGOING EMERGENCY, BUT RATHER TO PAST EVENTS POTENTIALLY RELEVANT TO CRIMINAL PROCEEDINGS. ALSO SEE ANDERSON V. UNITED STATES, 94 S.CT. 2253 (1974);STATING THAT THE PRIMARY JUSTIFICATION FOR EXCLUSION OF HEARSAY IS THE LACK OF THE OPPORTUNITY FOR AN ADVERSARY TO CROSS-EXAMINE THE ABSENT DECLARANT WHOSE OUT OF COURT STATEMENT IS INTRODUCED INTO EVIDENCE.

IN UNITED STATES V. SUMMERS, 414 F.3D 1287 (10TH CIR. 2005); A STATEMENT IS TESTIMONIAL HEARSAY, BARRED BY THE CONFRONTATION CLAUSE,

IF A REASONABLE PERSON IN THE POSITION OF THE DECLARANT WOULD OBJECTIVELY FORSEE THAT THE STATEMENT MIGHT BE USED IN THE INVESTIGATION OR PROSECUTION OF A CRIME.

THE PETITIONER POINTS OUT TO THIS HONORABLE COURT THE WISDOM AND REASONING MADE BY JUSTICE SCALIA IN DAVIS V. WASHINGTON, 547 U.S. 813 (2006) **AS PER EMPHASIS TO PAGE 828.** JUSTICE SCALIA STATED THAT A DECLARATION MIGHT BE VIEWED AS TESTIMONIAL IN A SITUATION THAT IS INDEED SIMILAR TO THIS INSTANT CASE. IN KING V. BRASIER, 168 ENG. REP. 202 (1779), A YOUNG RAPE VICTIM, IMMEDIATELY ON HER COMING HOME, TOLD ALL THE CIRCUMSTANCES OF THE INJURY TO HER MOTHER. ACCORDING TO JUSTICE SCALIA, SUCH A STATEMENT "WAS AN ACCOUNT OF PAST EVENTS" AND THEREFORE COULD HAVE BEEN TESTIMONIAL, UNLIKE THE SITUATION IN DAVIS V. WASHINGTON WHERE THE SITUATION AND CIRCUMSTANCES WERE DIFFERENT.

THIS COURT SHOULD TAKE NOTICE OF THE FACT THAT IN CRAWFORD, THE SUPREME COURT HELD THAT OUT-OF-COURT STATEMENTS BY WITNESSES THAT COULD BE CONSIDERED TESTIMONIAL ARE BARRED UNDER THE CONFRONTATION CLAUSE UNLESS THE DEFENDANT HAD AN OPPORTUNITY TO CROSS-EXAMINE THE WITNESSES, REGARDLESS OF WHETHER SUCH STATEMENTS ARE DEEMED TO BE RELIABLE BY THE COURT.

THE HEARSAY EXCEPTION AT ISSUE IN THIS CASE, EMBRACES THE WAIVER BY MISCONDUCT RULE, CODIFIED IN FED.R.EVID. 804(b)(6), EFFECTIVE DECEMBER 1997. IT HAS BEEN PREVIOUSLY RECOGNIZED IN REYNOLDS V.U.S., 98 U.S. 145 (8TH OTTO) 145 (1878) AND SNYDER V. MASSACHUSETTS, 54 S. CT. 330 ⟦1934⟧ OVERRULED ON OTHER GROUNDS MALLOY V. HOGAN, 84 S.CT.

1489 (1964). THE RULE WAS APPLIED BY A NUMBER OF CIRCUIT COURTS PRIOR TO THE ADOPTION OF RULE 804. SEE UNITED STATES V. CHERRY, 217 F.3D 811 (10TH CIR. 2000). BY ITS PLAIN TERMS, RULE 804(b)(6) REQUIRES A FINDING THAT THE DEFENDANT ACTED WITH THE INTENTION OF MAKING THE DECLARANT UNAVAILABLE AS A WITNESS. A NUMBER OF CASES DECIDED AFTER RULE 804(b)(6) ALSO READ AN INTENT REQUIREMENT. UNITED STATES V. JOHNSON, 219 F.3D 349 (4TH CIR. 2000); UNITED STATES V. EMERY, 186 F.3D 921 (8TH CIR. 1999); UNITED STATES V. DHINSA, 243 F.3D 635 (2ND CIR. 2001).

SEVERAL CIRCUITS HAVE REQUIRED, BOTH BEFORE AND SINCE RULE 804, THAT THE TRIAL COURT HOLD AN EVIDENTIARY HEARING OUTSIDE THE PRESENCE OF THE JURY IN WHICH THE GOVERNMENT HAS THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT THE DEFENDANT AGAINST WHOM THE OUT-OF-COURT STATEMENT IS OFFERED WAS INVOLVED IN OR RESPONSIBLE FOR PROCURING THE UNAVAILABILITY OF THE DECLARANT THROUGH KNOWLEDGE, COMPLICITY, PLANNING OR IN ANY OTHER WAY. UNITED STATES V. MILLER, 116 F. 3D AT 668. THE BURDEN OF PROOF IS UPON THE STATE PROSECUTOR. SEE UNITED STATES V. EMERY, 186 F.3D 921 (8TH CIR. 1999);-->A FINDING THAT THE DEFENDANT PROCURED THE UNAVAILABILITY OF A WITNESS MUST BE CAREFULLY CRITIQUED BY THE COURT BECAUSE THE ADMISSION OF SUCH EVIDENCE, BASED UPON HEARSAY AND ON ONLY A PREPONDERANCE OF THE EVIDENCE RENDER THE SUPREME COURT DECISION IN CRAWFORD AND THE CONFRONTATION CLAUSE MEANINGLESS. ALSO SEE OHIO V. CLARK, 135 S.CT.

2173 (2015); THE COURT DECLINED TO ADOPT A CATEGORICAL RULE TO THE EFFECT THAT STATEMENTS MADE TO PRIVATE INDIVIDUALS DO NOT RAISE CONFRONTATION CONCERNS. IN PENNSYLVANIA V. RITCHIE, 107 S. CT. 989 (1987) THE UNITED STATES SUPREME COURT HELD THAT THE RIGHT TO CONFRONT AN ADVERSE WITNESS IS A TRIAL RIGHT. ALSO SEE OLDEN V. KENTUCKY, 109 S.CT. 480 (1988); THE CONFRONTATION CLAUSE WAS VIOLATED WHEN THE DEFENDANT WAS NOT PERMITTED TO EXAMINE THE ACCUSER ABOUT HER COHABITATION WITH A BOYFRIEND.

-->THE PETITIONER FELIX SUMMERS, ASKS THIS COURT TO GRANT A C.O.A. AS TO WHETHER STATEMENTS TO PERSONS OTHER THAN LAW ENFORCEMENT OFFICERS ARE SUBJECT TO REVIEW UNDER THE CONFRONTATION CLAUSE FOR ADMISSIBILITY.

THE PETITIONER WAS CONVICTED UPON THE TESTIMONY OF JANET MEREINO, WHO WAS A "REPEATED/CONVICTED DRUG DEALER" AND WHO CLAIMED THAT IN 1999 HER DAUGHTER TOLD HER THAT SHE (her daughter) WAS PRESENT AT THE CRIME SCENE WHEN MS. PRESLEY WAS SHOT - AND THAT SHE WAS INVOLVED IN THE MURDER OF MS. PRESLEY. ACCORDING TO JANET MEREINO, HER DAUGHTER DIANA MEREINO, KNOCKED ON MS. PRESLEY'S DOOR SO THAT MS. PRESLEY WOULD OPEN THE DOOR OF HER APARTMENT. THAT IS WHEN, ACCORDING TO JANET MEREINO, MS. PRESLEY WAS SHOT BY PETITIONER. THIS IS WHAT SHE SAID HER DAUGHTER TOLD HER IN 1999. JANET MEREINO TESTIFIED TO WHAT HER DAUGHTER WAS ALLEGED TO HAVE TOLD HER IN 1999, AT THE TRIAL OF PETITIONER IN NOVEMBER OF 2006. **SOME SEVEN YEARS LATER.**

THE PETITIONER WAS CONVICTED BY NOTHING OTHER THAN HEARSAY TESTIMONY BY JANET MEREINO AND THIS VIOLATED CRAWFORD AND DAVIS. THE LOWER COURTS ERRED IN NOT GRANTING THE PETITIONER'S HABEAS CORPUS PETITION AND THE THIRD CIRCUIT ERRED IN NOT GRANTING THE C.O.A. APPLICATION CONCERNING THE CONFRONTATION ISSUE.

SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

THE ISSUE HERE FOR WHICH A C.O.A. SHOULD BE ISSUED IS THAT THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT **TRIAL** AS A RESULT OF TRIAL COUNSEL'S FAILURE TO REQUEST THAT THE TRIAL JUDGE PROVIDE—CAUTIONARY INSTRUCTIONS—WHERE THE JURY HEARD MULTIPLE REFERENCES TO THE PETITIONER HAVING ALLEGEDLY BEEN INVOLVED IN PRIOR ACTS OF CRIMINAL VIOLENCE, INCLUDING HOMICIDE.

THIS CLAIM IS BEING APPLIED AS PER THE PRINCIPLES SET FORTH IN STRICKLAND V. WASHINGTON, 104 S.CT. 2054 (1984).

IN THE HABEAS CORPUS PETITION FILED BY THE PETITIONER SET FORTH THE FOLLOWING DISCUSSION.

"THE RECORD OF THIS CASE SHOWS THAT MULTIPLE REFERENCES WERE MADE AT TRIAL TO PRIOR CRIMINAL CONDUCT WHICH ATTRIBUTED TO THE PETITIONER BOTH BY THE PROSECUTOR AND BY HIS WITNESSES. DURING THE COMMONWEALTH'S **OPENING STATEMENT,** JOHN NILES, THE MAN WHOSE MURDER MS. PRESLEY ALLEGEDLY WITNESSED, WAS REFERRED TO NO LESS THAN FIVE

TIMES. AT TRIAL, TWO POLICE OFFICERS WERE CALLED TO TESTIFY ABOUT THE CIRCUMSTANCES REGARDING THE NILES HOMICIDE. FURTHERMORE, IN HIS CLOSING STATEMENT, THE PROSECUTOR REPEATEDLY MENTIONED MR. NILES BY NAME AND REFERENCED THE FACT THAT MR. NILES WAS SHOT IN COLD BLOOD AND IN BROAD DAYLIGHT BY SOMEONE WHO IS THAT TOUGH. WHO DOESN'T CARE WHO'S OUT THERE. THE PROSECUTOR ALSO REMINDED THE JURY THAT THE PETITIONER HAD PHYSICALLY ABUSED A KEY WITNESS FOR THE PROSECUTION, SHERRIE HEWITT. BY MAKING THESE COMMENTS, THE PROSECUTOR EXPLOITED THE REFERENCES TO THE DEATH OF JOHN NILES AND THE PETITIONER'S ALLEGED INVOLVEMENT IN OTHER ACTS OF VIOLENCE/CRIMES. FURTHERMORE, BY REITERATING THE FACT THAT MR. NILES WAS KILLED IN COLD BLOOD AND IN BROAD DAYLIGHT, THE PROSECUTOR PORTRAYED THE PETITIONER AS A VICIOUS AND COLD-BLOODED KILLER WITH A PROPENSITY TOWARDS UNLAWFUL BEHAVIOR."

IT IS EXTREMELY DANGEROUS FOR THE DEFENDANT WHEN THE STATE PROSECUTOR DELIBERATELY REFERENCES PRIOR CRIMINAL CONDUCT. THERE IS A HIGH LEVEL OF POTENTIAL THAT THE JURY MAY BE CONFUSED AND STRAY FROM ITS DUTY OF EVALUATING THE EVIDENCE FAIRLY. THE LAW REQUIRES A CAUTIONARY INSTRUCTION WHEN THE PROSECUTOR PRESENTS THIS TYPE OF EVIDENCE. COMMONWEALTH OF PA. V. BILLA, 555 A.2D 835, 841 (PA. 1989); ALBRECHT V. HORN, 485 F.3D 103, 126-127 (3RD CIR. 2007).

THERE IS NO QUESTION THAT THE PETITIONER WAS PREJUDICED BY

TRIAL COUNSEL'S FAILURE TO REQUEST A CAUTIONARY INSTRUCTION. THE FAILURE BY TRIAL COUNSEL TO REQUEST THE CAUTIONARY INSTRUCTION CAUSED TRIAL COUNSEL'S PERFORMANCE TO BE CONSTITUTIONALLY DEFICIENT. STRICKLAND V. WASHINGTON, 104 S.CT. 2054 (1984).

SOCIETY VIEWS THE CONVICTION OF AN INNOCENT DEFENDANT AS THE MOST GRIEVOUS MISTAKE OUR JUDICIAL SYSTEM CAN COMMIT. HERE, THE PETITIONER'S TRIAL COUNSEL'S FAILURE TO REQUEST THE CAUTIONARY INSTRUCTION RESULTED IN THE PETITIONER BEING DENIED A FAIR TRIAL. THE PROSECUTOR DELIVERED HIS CLOSING-CONSISTING OF FALSE STATEMENTS, AND ALLEGATIONS-AIMED AT THE PETITIONER FOR THE SOLE PURPOSE OF TAINTING THE PETITIONER BEFORE THE JURY. HOWEVER THESE FALSE AND UNTRUE ALLEGATIONS, WERE NOT FACTUAL, AND WERE NOT EVIDENCE THAT WAS BASED ON SOME PREVIOUS VERDICT. A PROSECUTOR MAY NOT PORTRAY AS FACT-MATTERS THAT ARE NOT IN EVIDENCE,-AND ARE NOT IN THE RECORD. PROSECUTORS GENERALLY ARE FORBIDDEN FROM MENTIONING A DEFENDANT'S REPUTATION IN THE COMMUNITY OR PORTRAY THE DEFENDANT AS A MEAN AND DANGEROUS INDIVIDUAL BASED SOLELY ON OPINION OR CONJECTURE.

A PROSECUTOR'S COMMENTS ARE IMPROPER IF THEY ARE LIKELY TO INFLAME BIAS IN THE JURY AND TO RESULT IN A VERDICT BASED ON SOMETHING OTHER THAN EVIDENCE IN THE RECORD. SIMPLY PUT, A PROSECUTOR'S COMMENTS AND ARGUMENT IN HIS CLOSING, CANNOT ROAM BEYOND THE SAID EVIDENCE THAT WAS ACTUALLY PRESENTED AT TRIL.

OUR SISTER CIRCUITS HAVE SPOKEN ON THIS ISSUE. U.S. V. AUSTIN, 786 F.2D 986(10TH CIR. 1986); U.S. V. BECKMAN, 222 F.3D 512 (8TH CIR.

2000); U.S. V. AUSTIN, 786 F2D 986 (10TH CIR. 1986); U.S. V. MACHUCA-BARRERA, 261 F.3D 425 (5TH CIR. 2001); U.S. V. HERMANEK, 289 F.3D 1076 (9TH CIR. 2002); U.S. V. OLLIVIERRE, 378 F.3D 412 (4TH CIR. 2004); U.S. V. WEATHERSPOON, 410 F.3D 1142 (9TH CIR. 2005); UNITED STATES V. CRAWFORD, 523 F.3D 858 (8TH CIR. 2008); U.S. V. SANTOS-RIVERA, 726 F.3D 17 (1ST CIR. 2013); U.S. V. ANAYA, 727 F.3D 1043 (10TH CIR. 2013); U.S. V. ANDERSON, 755 F.3D 782 (5TH CIR. 2014); U.S. V. MADSEN, 809 F.3D 712 (1ST CIR. 2016).

**JUST HOW SERIOUS ARE THESE REFERENCES MADE BY THE PROSECUTOR ?**

TRIAL COUNSEL'S FAILURE TO REQUEST A CAUTIONARY INSTRUCTION IN THIS CASE DOES MEET BOTH PRONGS OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984); MILLER-EL V. COCKRELL, 537 U.S. 322, 327 (2003).

THE PROSECUTOR MADE REPEATED MENTION REGARDING THE JOHN NILES HOMICIDE DURING HIS CLOSING STATEMENT TO THE JURY. (Petitioner was not on trial for the John Niles homicide). THE PROSECUTOR TOLD THE JURY THAT JOHN NILES WAS KILLED IN COLD BLOOD AND IN BROAD DAYLIGHT. THE PROSECUTOR'S CLOSING ARGUMENT TO THE JURY PAINTED THE PETITIONER OUT TO BE A COLD BLOODED KILLER, A TOUGH GUY-WHO DOESN'T CARE WHO IS OUT THERE-WHEN HE DECIDED TO KILL JOHN NILES. THE PROSECUTOR ALSO INSINUATED THAT PETITIONER HAD SOME INVOLVEMENT IN OTHER ACTS OF VIOLENCE AND COMMITTED OTHER VIOLENT CRIMES. THE STORY TOLD HERE BY THE PROSECUTOR OF THE PETITIONER IN HIS CLOSING WAS THAT THE PETITIONER WAS A TOUGH, VICIOUS, COLD BLOODED KILLER. ‖EMPHASIS‖

IN **U.S. V. HOLMES,** 413 F.3D 770 (8TH CIR. 2005), THE COURT HELD WHEN THE PROSECUTOR MADE IMPROPER REMARKS TO A JURY, THE COURT MUST MAKE A CAREFUL REVIEW WHETHER THE REMARKS MADE BY THE SAID PROSECUTOR DEPRIVED THE DEFENDANT OF A FAIR TRIAL. SEE PAGES 774, AND 775. HERE THE REMARKS WERE CUMULATIVE AND HAD A CUMULATIVE EFFECT AND IMPACT UPON THE JURY. ALSO THE CURATIVE ACTIONS TAKEN BY THE TRIAL COURT MUST BE REVIEWED. HERNANDEZ, 779 F.3D 456, 460 (8TH CIR. 1985). [U.S. V. HERNANDEZ] --> **A NEW TRIAL WAS ORDERED.**

IN **HODGE V. HURLEY,** 426 F.3D 368 (6TH CIR. 2005), -->>THE COURT HELD THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO ANY ASPECT OF THE PROSECUTOR'S EGREGIOUSLY IMPROPER CLOSING ARGUMENT WAS OBJECTIVELY UNREASONABLE. SEE STRICKLAND, 466 U.S. AT 687-88. THE FAILURE BY TRIAL COUNSEL TO OBJECT TO COMMENTS THAT WERE DEROGATORY AND MADE BY THE PROSECUTOR AGAINST THE DEFENDANT IS MUCH LESS SUSCEPTIBLE TO THE ARGUMENT THAT IT SHOULD BE CONSIDERED REASONABLE TRIAL STRATEGY. SEE PAGES 386-387.

THE COURT CONCLUDED THAT HODGE [was prejudiced] BY TRIAL COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCONDUCT COMMITTED DURING IMPROPER CLOSING ARGUMENT.

THE SUPREME COURT OF THE UNITED STATES MADE IT CLEAR THAT A DEFENDANT NEED NOT ESTABLISH THAT TRIAL COUNSEL'S DEFICIENT PERFORMANCE MORE LIKELY THAN NOT ALTERED THE OUTCOME IN ORDER TO ESTABLISH PREJUDICE UNDER STRICKLAND AND THE REASONABLE PROBABILITY

STANDARD IS NOT A SUFFICIENCY OF EVIDENCE TEST. **KYLES V. WHITLEY,** 115 S.CT. 1555, 1566 (1995). RATHER A REASONABLE PROBABILITY IS A PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME. STRICKLAND, 466 U.S. AT 694. HERE IN THIS INSTANT CASE, THE I.A.C. PERTAINING TO THE FAILURE TO REQUEST A CAUTIONARY INSTRUCTION DOES MEET BOTH PRONGS OF THE STRICKLAND V. WASHINGTON, TEST.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: August 4 2019