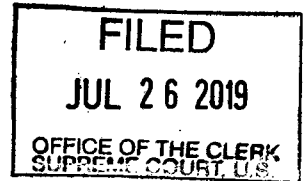


ORIGINAL

19-5879

UNITED STATES SUPREME COURT

TIMOTHY L. JOE,
Petitioner,



v.

Case No.: 18A1294

SECRETARY OF FLORIDA
DEPARTMENT OF CORRECTIONS,
Respondents. /

PROVIDED TO
MARTIN CORRECTIONAL INSTITUTION
ON 8/26/2019
FOR MAILING
T.J.

PETITION FOR WRIT OF CERTIORARI

Court that last ruled on merits of case was the United States
District Court (Middle District).

Timothy L. Joe, DC# 593573
Martin Correctional Institution
1150 SW Allapattah Rd.
Indiantown, FL 34956

PROVIDED TO
MARTIN CORRECTIONAL INSTITUTION
ON 7/26/2019
FOR MAILING
T.J.

QUESTIONS PRESENTED

The State's key witness against the Petitioner in this case, former Detective Robert Carter, was arrested and subsequently terminated for possessing and using illegal prescription narcotics while on duty and during the course of the investigation of this case. The Petitioner alleged that his appellate counsel was ineffective for failing to raise this preserved issue on direct appeal that the trial court abused its discretion for precluding this crucial impeachment evidence. Thus violating the Petitioner's 6th Amendment right to effectively cross-examine the witness. The case thus presents the following question:

Can Florida's evidentiary laws constitutionally preclude impeachment evidence of opioid-addicted police officers?

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Appendix B	Memorandum and Order of the District Court
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Appendix D	Order Denying Rehearing

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☒ is unpublished.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☒ is unpublished.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 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☐ is unpublished.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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of appeals decided my case was April 10, 2018.

☐ 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: March 15, 2019, and a copy of the order denying rehearing appears at Appendix D.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including August 12, 2019 on _____ in Application No. 18A1294.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1554(1).

☐ For cases from **state courts**:

The date on which the United States Court of appeals 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 that order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ on _____ in application no. _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1554(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. Const., Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const., Amend XIV

Section 1. All persons or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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 laws.

28 U.S.C. § 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody

pursuant to the judgment of the State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

QUESTIONS PRESENTED

The State's key witness against the Petitioner in this case, former Detective Robert Carter, was arrested and subsequently terminated for possessing and using illegal prescription narcotics while on duty and during the course of the investigation of this case. The Petitioner alleged that his appellate counsel was ineffective for failing to raise this preserved issue on direct appeal that the trial court abused its discretion for precluding this crucial impeachment evidence. Thus violating the Petitioner's 6th Amendment right to effectively cross-examine the witness. The case thus presents the following question:

Can Florida's evidentiary laws constitutionally preclude impeachment evidence of opioid-addicted police officers?

STATEMENT OF THE CASE

The Petitioner Timothy Joe was convicted of burglary of an occupied dwelling and grand theft over \$20,000.

The victim awoke January 17, 2010 and found her sliding glass door open and missing jewelry. She also found pieces of costume jewelry thrown in the yard. The security alarm technician reviewed the video surveillance and found a person arrive on a bicycle, get off of the bike and walked around the property. The video

didn't show anything incriminating other than trespassing, but a six second clip of the footage was shown on the media. On January 20, 2010, Detective Robert Carter received an anonymous tip that the suspect in the video was Joe and upon further investigation, he went to Joe's residence for questioning. While Joe was being interviewed at police headquarters, Det. Carter went back to the Petitioner's residence, where Joe's nephew, Antoine Wilson advised Carter that Joe's things were in a third bedroom and in the shed. Carter searched on three different occasions but found nothing relevant. Antoine later explained to Carter that Joe kept some things in the shed, specifically stuff that he had found and collected while working on a garbage truck. Inside the shed, Carter found a couch, tools, and a large black garbage bag containing Joe's recently deceased mother's clothing. Det. Carter "claimed" that during the search of the garbage bag he found a zippered calculator pouch that contained several pieces of costume jewelry – a silver necklace with matching earrings. Carter didn't photograph his "discovery"; neither did he tag it into evidence. Six days after he supposedly found this jewelry, he presented it to the victim, who positively identified the items as hers. It was at this time that Carter was able to charge Joe with the burglary.

During the investigation of the case, the State's key witness, Det. Robert Carter, was found to have intimidated his neighbor into providing him with her and her mother's prescription narcotics, namely, Percocet and Loritab. After a five

month investigation conducted by Internal Affairs, it was determined by Captain Kerry Orpinuk of the Criminal Investigation Division that Det. Carter had committed a third-degree felony by possessing these controlled substances in violation of Florida Statute 893.13(6)(a). Captain Orpinuk also found that Det. Carter was under the influence of these drugs while he was on duty. Det. Carter was then arrested and terminated from the department.

Before the start of trial, the State filed a motion in limine to preclude the defense from eliciting impeachment testimony from Carter. The State's position was that the internal affairs investigation was unrelated to the Petitioner's case. Defense counsel argued that because it was determined that Det. Carter had committed a felony and the State could prosecute because of the five year statute of limitations, that Det. Carter was obviously biased and in a position to curry favor from the State. The court granted the State's motion in limine. Because the court's ruling was clearly contrary to the pertinent legal standard and to clearly established state and federal law, its ruling was an abuse of discretion and it effectively deprived the Petitioner of a fair trial.

REASONS FOR GRANTING THE PETITION

The State's key witness against the Petitioner, lead Detective Robert Carter, was arrested and later terminated from the police department for possessing and using illegal prescription narcotics. Captain Kerry Orpinuk of the Criminal

Investigations Division determined that Det. Carter was actively using these drugs while he was on duty. During the investigation, Carter was ordered to take a urinalysis test. That test revealed that "Drug 44" was detected. However, "page 2" of this two-page document was intentionally withheld, which would have specifically disclosed what caused the positive result. Regardless, after it was confirmed that Carter was using these drugs, he admitted that he was "addicted."

The Petitioner's substantive due process rights to a fair trial have clearly been abridged. The District Court employed reasoning that is clearly contrary to the pertinent legal standard and to the rules established to guard fundamental constitutional protections. The accuracy and truthfulness of Carter's testimony were key elements in the State's case against Petitioner. The claim of bias which the defense sought to develop, was admissible to afford a basis for an inference of undue pressure because of Carter's recent arrest, investigation, and firing.

I. CONFRONTATION CLAUSE VIOLATION

The confrontation clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." This includes the right to cross-examination. See *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965).

The opportunity for cross-examination, protected by the confrontation clause, is crucial for ensuring the integrity of the fact-finding process. Cross-

examination is “the principle means by which the believability of a witness and the truth of the testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1970). It is especially in a case where a witness may have substantial reason to cooperate with the government that a defendant be permitted to search for an agreement between the government and the witness. *United States v. Crumley*, 565 F.2d 945, 949 (5th Cir. 1928). Whether or not a deal existed is not crucial. *United States v. Mayer*, 556 F.2d 245, 249 (5th Cir. 1977) what counts is whether the witness may be shading his testimony in an effort to please the prosecution. “A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such subtle desire to assist the State nevertheless may cloud perception.” *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980).

Where the witness the accused seeks to cross-examine is the “star” government witness, providing a crucial link in the prosecution’s case, the importance of full cross-examination to disclose possible bias is necessarily increased. *United States v. Summers*, 598 F.2d 450, 460.

Det. Carter was a crucial witness for the prosecution because it was his alleged “discovery” of some costume jewelry that caused the Petitioner to be charged. Ironically, Carter did not present this evidence to the victim until six days after he supposedly found it. He also couldn’t remember where in the shed he found anything else. Carter never photographed where in the shed he discovered

this costume jewelry, neither did he tag it into evidence or follow any other chain-of-custody protocol. Therefore, knowledge of Carter's investigation, arrest, and firing for the illegal possession of prescription narcotics, would have given the jury a concrete reason to believe that Carter's testimony was fabricated or embellished in order to avoid prosecution or to minimize the adverse consequences of prosecution.

It would be fundamentally unfair for this Court to conclude that the jury, had it been given a specific reason to discredit the testimony of this key State witness, would have still found that the State's case and the Petitioner's guilt had been established beyond a reasonable doubt.

II. APPELLATE COUNSEL'S DEFICIENT PERFORMANCE

At the hearing for the State's motion in limine, defense counsel objected and requested that he be able to make a proffer of the proposed impeachment testimony. He later formally proffered that Det. Carter was "terminated for committing felonies, either state or federal, while a police officer."

Also, it was determined that Carter was actively using drugs at or about the time of the incident, the issue came up at the motion hearing, and was memorialized in the internal affairs report, which was part of the record. Therefore, appellate counsel's performance was clearly deficient for failing to raise these crucial issues in the Petitioner's direct appeal because under Fla. Statute §

90.608(4) which allows a party to impeach a witnesses credibility by showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified. The Petitioner had an absolute and constitutional right to bring the jury's attention that Carter was actively using drugs during the investigation of the case. Appellate counsel was grossly ineffective for failing to raise these crucial issues.

A Petitioner may establish that counsel was "constitutionally ineffective" if he shows that counsel omitted significant and obvious issues, while pursuing significantly weaker ones. *Mayo v. Henderson*, 13 F.3d 528. Similarly, in *Carter v. Straub*, 349 F.3d 340 (6th Cir. 2003) the court ruled that appellate counsel was ineffective in failing to present claim that "was much stronger than the issues" counsel did raise. See also *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987) ineffective assistance of counsel when appellate counsel ignored "a substantial, meritorious Fifth Amendment issue," raising instead a weak issue.

Similar to the above cited cases, Petitioner's appellate counsel was ineffective for failing to raise a well-established, straightforward and obvious Sixth Amendment violation, that was magnified by the fact that it was specifically preserved by Petitioner's trial attorney.

III. DISTRICT COURT'S DENIAL

The District Court erred in denying Petitioner's habeas corpus writ because the State appellate court's decision was in direct conflict with the reasoning and the holdings of the Supreme Court precedent. Its rejection of this claim was contrary to clearly established federal law. "A State court decision will also be contrary to this Court's clearly established precedent if the State court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams v. Taylor*, 529 U.S. at 406. The phrase "unreasonable application of federal law," also encompasses an unreasonable failure to extend the holding or legal principle of a Supreme Court decision to a situation in which it should have controlled. 28 U.S.C. § 2254(d)(ii).

The issue that was presented to the State appellate court and the federal district court has been identified and articulated in a wealth of Supreme Court cases, and the Court has consistently and cogently held that the Sixth Amendment right of confrontation of witnesses requires that defendants in criminal cases be allowed to impeach the credibility of a prosecution witness by cross-examination directed at the witnesses possible bias. See *Davis v. Alaska*, 415 U.S. 308, 318 (1974).

The Supreme Court has also held that this bedrock procedural guarantee applies to both federal and State prosecutions. *Pointer v. Texas*, 308 U.S. 400

(1965). The Court later explained that, "the right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the Constitutional right of confrontation, and helps assure the accuracy of the truth-determining process. *Dutton v. Evans*, 400 U.S. 74, 89, 91 (1970).

The State's central witness against the Petitioner, (fmr.) Detective Robert Carter was investigated, arrested, and subsequently fired for using and possessing illegal prescription narcotics. So ironically, this officer was committing crimes, while simultaneously charging the Petitioner with crimes. Because Carter was the only witness to have claimed to have found incriminating evidence at the Petitioner's residence, thus providing "a crucial link in the proof...of petitioner's act." *Douglas v. Alabama*, 380 U.S. at 419. Carter was the impetus of the State's case. Therefore, the importance of impeaching his testimony was vital to the Petitioner's defense.

Clearly, defense counsel should have been permitted to expose to the jury that the evidence against Petitioner came from a witness whose credibility was suspect because the witness committed a crime, and he himself could have been subjected to criminal charges if he failed to testify in the exact framework of the prosecution's case. Therefore, the jury as the sole trier of fact and credibility could have appropriately drawn inferences relating to the reliability of the witness.

There is no provision in the Constitution or any Supreme Court precedent, that justifies the preclusion of impeachment evidence in this type of situation. Therefore, there was no reasonable basis for the State appellate court of the District Court to deny relief.

IV. PREJUDICE TO PETITIONER

In determining whether prejudice has ensued, this Court must analyze the impeachment value of the undisclosed evidence. Carter's testimony and credibility were of significant consequence. Even more so, when the Court considers that no other physical evidence was produced linking the Petitioner to the crime other than the evidence "mysteriously produced"¹ by Det. Carter. He alone of all the witnesses for the State, testified that after several days of unsuccessful searches, he went back to do "follow-up" when he discovered a black calculator pouch that contained several pieces of costume jewelry. He never made any inquiry concerning this discovery to any of the other members of the Petitioner's household. He never photographed where he found this evidence and he never tagged this discovery into evidence. Carter presented his supposed findings to the victim only after having a hunch, six days later. It was only after Carter made this questionable discovery, that the police had enough probable cause to charge the

¹ It has always been the defense's theory that Carter procured this costume jewelry out of the victim's yard, where she reported that the burglar had discarded the inexpensive jewelry.

Petitioner. So therefore, Carter's testimony concerning this supposed discovery was the linchpin of the State's case. Thus, the significance of impeaching carter was critical, and the exclusion of the impeachment testimony had a substantial and injurious effect on the Petitioner's defense, effectively depriving him of his Constitutional rights under the confrontation clause. This point was articulated in *Delaware v. Van Arsdall*, 474 U.S. 673, 679 (1986). In *Van Arsdall*, defense counsel was precluded by the trial court from questioning a witness about the State's dismissal of a public drunkenness charge against him. The Court concluded: "By thus cutting off all questioning about an event...that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony" the trial court's ruling violated the defendant's rights under the confrontation clause. *Id.* at 679.

Based on the case law cited, the arguments and illustrations, the Petitioner has demonstrated his appellate counsel was indeed ineffective and the Petitioner was clearly prejudiced, because according to the principles of *stare decisis*, the Petitioner would have won his appeal on a significant and obvious question of State and federal law that appellate counsel failed to pursue. Consequently, Petitioner's appeal was not fundamentally fair, and the resulting affirmance of his conviction was not reliable.

The Petitioner has been denied his right of effective cross-examination, "which is Constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 [16 L.Ed.2d 314, 86 S.Ct.].

Petitioner's trial was infected with Constitutional errors – violations of his Sixth Amendment right to effectively cross-examine the State's key witness against him was the most deliberate and egregious, this undermined the legitimacy of his conviction. Thus, certiorari should be granted to correct this error.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

/s/ Timothy L. Joe
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