

No. 19-6427

IN THE SUPREME COURT OF THE UNITED STATES

RAY A. SMITH

Petitioner,

V.

JOHN CHAPDELAIN, Warden, et al.

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO
THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR REHEARING

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REFERENCE

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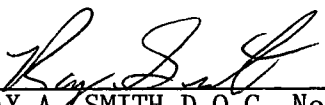
ON PETITION FOR WRIT OF CERTIORARI TO
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GROUND'S FOR PETITION

In accordance to Rule 44 of THE UNITED STATES SUPREME COURT, the GROUND'S for this Petition are as follows:

1. Ineffective assistance of trial counsel
2. Prosecutorial Misconduct
3. Jury Instruction violation - Theory of Defense

I RAY A. SMITH Petitioner, do hereby Certify that the Ground's for this Petition are limited to intervening circumstances of substantial or controlling effect or to other ground's not previously presented.

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PETITION FOR REHEARING AND SUGGESTIONS IN SUPPORT

COMES NOW Petitioner, Ray A. Smith, Pro Se, and prays this Court to grant Rehearing pursuant to Rule 44, and thereafter; grant him a Writ of Certiorari to review the opinion of the Tenth Circuit Court of Appeals. In support of petition, Mr. Smith states the following.

STATEMENT OF FACTS

At trial, Ray A. Smith was convicted by a jury of first degree murder and verbal non-violent witness tampering and sentenced to life without parole and six years.

According to the State's key witness Phillip Patterson, the deceased benefactor who also took in the deceased after finding him drunk and passed out on the sidewalk near his apartment building, he Mr. Crane (the deceased) and Smith were drinking quite heavily on the morning of January 18, 2008 at Patterson's apartment after Smith called Patterson asking for busfare to get home to the suburb of Arvada, Colorado after spending three days in jail for disturbing the peace. When Smith arrived at Patterson's apartment, they were already drinking out of a half gallon jug of Brandy so Smith suffering from a bender and hungover gladly joined them seeking relief from a queasy stomach. After drinking three half gallon jugs of Brandy and some Malt Liquor Patterson testified that he asked Smith to leave after Mr. Crane called him a name because he didn't want fighting(R,CD,TR,04/21/2009pp,12, 13,,16,17,18) Smith complied and left the premises(R,CD,TR,04/21/2009,p144:18)

Patterson testified that after Smith left the apartment,he took his meds and went to bed, this was around 7:00PM (R,CD,TR,04/21/2009,p177:20) Smith; according to Patterson's testimony was not in the apartment when he took his medication or when he went to bed or before he fell asleep after7:00PM.

When I arrived at Patterson's he and Mr. Crane were already drinking on a half gallon jug of Brandy so I naturally joined in. after a lot of drinking I passed out in the recliner and was awakedned by Mr. Crane messing with my belt, I don't know why I didn't have any money, so I yelled at him about what the f*** are you doing? I pushed him back and went to get out of the chair but as I was getting to my feet heswung at me and he had a steak knife and it cut my pinky finger wide open as I was trying to block his swing. He had been eating steak and fries earlier before I got there the night before and the n plate was still on the coffee table. Igrabbed his arm with knife in it and we wrestled around until I finally wretched it away from him and it flew somewhere on the floor. I immediately went to the bathroom to wash the wound but it was bleeding pretty bad so I went to the kitchen to clean it and wrap it with papertowel and when I came out of the kitchen Crane was sitting on the arm of the couch lighting a cigarette and cussing, I wrapped my hand up and I left and Patterson was on the couch passed out through the whole incident, he never moved or said one word. I got home sometime in the afternoon, the sun was still shining, and in late January it gets dark between 5 and 5:30PM so there was no way I could have been in Patterson's apartment when he claims I was.

Failure to Call Witnesses

The coroner confirmed rigor mortis starts within (3) hours of death, and peaks with (6) hours, and the victim was in full rigor mortis when first responders arrived at 11:30PM. According to Detective Castro's Statement of Probable Cause, Detective Larry Moore No. 92001, spoke to Officer Patrick Richards who told Det. Moore he was the first officer on the scene and he recognized Patterson and Mr. Crane from previous calls.

Petitioner claims ineffective assistance of defense counsel for failure to call Officer Patrick Richards as a defense witness in order to expose the nature of the calls and the approximate number of times he had responded to Patterson's residence in order to show a prior history of conflict between Patterson and Mr. Crane. The right to compulsory process was violated because Petitioner was arbitrarily denied the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to the defense Washington v. Texas, 388 U.S. 14 (1967). Petitioner also asserts ineffective assistance of defense counsel for failure to call a friend of Patterson who lives down the street in the same block as Patterson who could have testified to the fact that everytime Patterson and Crane got drunk together Patterson would fight Mr. Crane and blame him for the dog getting run over and for stealing money from him and Mr. Crane would go to Mark's apt. and stay with him until Patterson cooled down and sober up. Patterson was very jealous of Mark and Mr. Crane hanging out and drinking together. In fact it was Patterson who let the puppy off the leash and the dog ran out into the busy street and got killed but he blamed Jeff for it and now he's trying to say I blamed Jeff for the dog getting killed when it wasn't even my dog it was Phillip's. Petitioner also has a neighbor that could've possibly verified the time petitioner arrived home because she is elderly and her door and front window is only about six to eight feet from his and she is always sitting in the front window and she could possibly verify when Smith arrived home, but defense never interviewed her or Patterson's friend Mark or called any other witnesses civilian or expert.

REASONS MERITING REHEARING

The Tenth Circuit Court of Appeals decision that Smith could not overcome the presumption that the failure by defense not to interview or investigate or call any witnesses for that matter was trial strategy, was an unreasonable determination of facts in light of the evidence presented and was an unreasonable application of Strickland v. Washington, 466 U.S. 688 (1984) that in determining Strickland prejudice, the Court must examine both the trial testimony and ~~all~~ ~~discovery~~ evidence to determine if the omitted evidence been presented, there is a reasonable probability of a different outcome. Defense counsel's failure to investigate, interview or call any witnesses was not part of a calculated strategy but was the result of indolence and incompetence.

The Tenth Circuit Court of Appeals merely examined the opinions of the Colorado Court of Appeals and the U.S. District Court which stated only the evidence in light of the prosecution's version of events because the defense offered no other evidence to examine which is ineffective assistance of defense counsel. The right to offer testimony of witnesses, and to compel their attendance, is in plain terms the right to present a defense.

Just as an accused has the right to confront the state's witnesses to challenge their testimony, he has the right to present his own witnesses to establish a defense. Defense counsel violated Smith's Fourteenth Amendment right to that fundamental element of due process of law granted him under the United States Constitution when Counsel did not call witnesses that were known to him or conduct any investigation at all. William (Terry) Taylor, 529 U.S. 362 (2000).

As the Court put it in *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994), an attorney must engage in a reasonable amount of pre-trial investigation and at a minimum... interview potential witnesses and... make an independent investigation of the facts and circumstances in the case (“quoting: *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) *Strickland* requires that the Court consider all of the evidence admitted at trial, as well as the evidence that could have been admitted had the defendant had effective assistance of counsel in applying the reasonable probability standard. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000). Because of the failure to consider the entire record, the Colorado Court of Appeals ignored evidence which contradicted the opinion of overwhelming guilt and erroneously denied the appeal.

For example: Detective Knapp and medical responders arrived at Patterson’s apartment around 11:30 on the night of January 18, 2008, pursuant to a dispatch that a party there was D.O.A. (dead on arrival). Firefighter Martinez examined Mr. Crane and determined that he had no pulse, was very cold and rigor mortis had set in. The coroner confirmed that rigor mortis starts within (3) hours of death and peaks within (6) hours, and that Mr. Crane was in full rigor mortis at the scene when the police arrived at 11:30PM. Firefighter Martinez observed Mr. Patterson had blood on his shirt and appeared “intoxicated or not normal.” Detective Knapp collected the bloody shirt and took Patterson to the police station where police photographed but did not test the blood found on Patterson’s hands and underneath his fingernails. Patterson told him that Smith had returned to his apartment before he fell asleep and that he was gone when he woke up around 11:00PM when he went to the bathroom.

A conviction must be overturned which rests on part upon the knowing use of false testimony if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976)).

The prosecution's argument to the jury capitalizing on the perjured testimony of Officer Harris of the Arvada Police Department, Mr. Phillip Patterson benefactor and landlord of Mr. Jeffery Crane the deceased and the coerced testimony of an angry girlfriend common-law wife of the accused, reinforced the deception brought on by the use of false testimony along with the ineffective assistance of defense counsel in failing to bring to light and object to the Court about the prosecutorial non-disclosure of false testimony that was known to the prosecutor and the defense because the defense counsel was in possession of the discovery which he obtained from the prosecution which contained police and coroner's reports, along with witnesses interviews of testimony to be given, contributed to the deprivation of due process.

The Public Defender's Office representatives Mr. Willie Rios and Mr. Eric Zale, knew about the coroner's report and they also knew about the coroner's confirmation that rigor mortis starts within three (3) hours of death, and peaks meaning the deceased is in full rigor mortis within six (6) hours of death, and that Mr. Crane was in full rigor mortis when Detective Knapp and first responders arrived at the scene at 11:30PM. Mr. Patterson testified he told Smith to leave after Mr. Crane called him a name because he didn't want fighting, Smith complied and left (R,CD,TR,04/21/2009,p144:12-18).

Patterson also testified he never saw or heard Mr. Crane get stabbed, he also testified that Smith was not in the apartment when he took his medication, and Smith was not in the apartment when he went to bed at seven (7) PM at night.

To leave

This was after he told Smith earlier that day and Smith had not returned to the apartment, the obvious conclusion at this point is that Jeffery Crane is still alive after seven o'clock at night. (R,CD,TR,04/21/2009,p145:2-13)

Patterson testified that at "some point" he woke up and heard Mr. Crane Mr. Smith arguing and told them "they were too loud and" to "be quiet". This is proof according to Patterson's testimony that Mr. Crane is still alive well after seven p.m. and possibly after eight p.m. because Patterson has been asleep for a while. (R,CD,TR,04/21/2009,p145:15-25)(R,CD,TR,04/21/2009,p146:1)

Now, after having told Smith to leave earlier because he didn't want fighting, Patterson did not get up to see why Smith would be in his apartment at that time of night and why would Mr. Crane buzz him the building in the first place, instead Patterson testifies he goes back to sleep wakes up later during the night to use the bathroom and he goes into the living room to "check" on Mr. Crane, now the television in the living room has been on the whole time so the living room is not at all dark Mr. Crane can be seen plainly, Patterson sits next to Mr. Crane, Crane puts his arm around him and he "plays with him" and Patterson emphatically denies on the witness stand that he told Detective Castro that he felt cold, in fact he denies seeing any knives, never notices any blood on himself his white t-shirt on his hands or under his fingernails and he never noticed Mr. Crane not breathing, in fact he goes back to bed never seeing any blood at all or anything out of the ordinary. (R,CD,TR,04/21/2009,pp146,147:2-25,1-13). Brenda Thompson testifies she got home from work at nine (9) p.m. and Smith was already at home sleeping, now it is a two (2) hour ride from Patterson's apartment on two different busses and Jan. 18, 2008 was on a Friday and from 6PM to 9PM is prime time so people are out and about.

The Tenth Circuit's decision is clearly in conflict with Strickland v. Washington, 466 U.S. 668 (1984); and Williams (Terry) Taylor, 529 U.S. 362 (2001). The Tenth Circuit's decision that Petitioner/Smith could not overcome the presumption that the decision by trial counsel not to interview or call witnesses was trial strategy resulted in both an unreasonable determination of the facts in light of the evidence presented and an unreasonable application of Strickland v. Washington, because counsel's failure to even interview any witnesses at all expert; Police, Detectives, known civilians told to counsel by the accused met the first prong of Strickland. As in Anderson v. Johnson, 338 F.3d 392 (5th Cir. 2003); "[T]here is no evidence that counsel's decision to forego investigation was reasoned at all, and it is, in my opinion far from reasonable. Counsel's failure to investigate was not 'part of a calculated trial strategy' but is likely the result of either incompetence of payback for petitioner's attempt to replace him for not having my best interest in mind at the start of these proceedings, I then let him convince me that he was sorry but he was now 'in trial mode' and had cleared his case load and he would now be working on my case exclusively. This was whispered to petitioner in court out of earshot of the stenographer when Judge Mansfield asked if I wanted to proceed with my motion to fire Mr. Rios as my attorney, Mr. Rios asked for a minute to confer and told these lies so I would keep him and he did exactly what I accused him of at first nothing! As the court put it in Bryant v. Scott, 28 F.3d 1411,1415 (5th Cir. 1994), "[A]n attorney must engage in a reasonable amount of pre-trial investigation and at a minimum...interview potential witnesses and...make an independent investigation of the facts and circumstances in the case" (quoting Nealy v. Cabana, 764 F.2d 1173,1177 (5th Cir. 1985))

Under the circumstances here, the State had the burden to show a strategy supporting the failure to interview witnesses for the defense, because the State failed to do so, Petitioner/Smith has clearly met the "performance prong" of the Strickland v. Washington, 466 U.S. 668,687-88 (1984) test. The question for this Court to answer is whether the Petitioner was prejudiced by Counsel's ineffectiveness. The Tenth Circuit Court of Appeals held that this Petitioner had not demonstrated prejudice from defense counsel's failure to interview or call any witnesses and suggested that the evidence against Smith was "overwhelming" and therefore calling witnesses would have been futile. By doing so the Tenth Circuit exercised an unreasonable interpretation of Strickland and it's progeny. Williams (Terry) Taylor, 529 U.S. 362 (2000), emphasizes that in determining Strickland prejudice, the court must examine both the trial testimony and the post-conviction evidence to determine whether, had the omitted evidence been presented, there is a reasonable probability of a different outcome. Namely, Officer Patrick Richards who was the first officer on the scene who recognized Patterson and Mr. Crane from previous calls who could've attested to the nature of the police calls, why there was so many, enough for him to be able to recognize both parties on the spot. Also, Patterson's associate Mark who lived down the street and who used to take Mr. Crane in when Patterson would assault him and put him out of his apartment for falsely letting his dog get run over when it was Patterson who took the puppy off the leash in the first place. Petitioner/Smith's neighbor who could have possibly verified the approximate time the Petitioner got home on the day in question. More importantly experts who could confirm the time of death, dispute State witness on how the cut on Smith's finger was inflicted, although State witness did testify that the cut could have been the result of the Petitioner blocking the blade of the knife being swung at him. Defense could have contacted the RTD bus service to

see if the video could be obtained to verify the time Petitioner caught the first bus in front of Patterson's apartment building and transferred to the second bus downtown to get home, or at the least he could have verified the time it takes to get from Patterson's address to Smith's address on the bus routes number 10 west to downtown from 1140 Colorado Boulevard (Patterson's address) to 7714 Robinson Way in Arvada, CO by transferring to the number 52 bus downtown leaving Patterson's address between 7 & 8 PM what time would Petitioner arrive at his destination, compare that to the time of death and the time Patterson claims he heard Mr. Crane and Smith in the living room and there's your defense, Petitioner/Smith could not have possibly been in two places at the same time, Mr. Crane could not have been alive between seven and eight to eight thirty PM and be in full rigor mortis at eleven thirty PM when first responders arrived (coroner confirmed it takes 3 hrs. for rigor mortis to start after death and 6 hrs. for it to peak to full rigor mortis.

Petitioner testified that he and Mr. Crane did have an altercation and they wrestled over the knife, moved furniture and tussled around but when the knife was no longer involved, Smith left the residence and Patterson was on the couch passed out and Mr. Crane was on the couch also and he was very much alive.

Given Patterson's excessive alcohol use that day along with the ingestion of ten (10) different kinds of pills, and his self-interest in shifting blame for the murder away from himself onto this Petitioner, the jury should have disbelieved Patterson's account because his testimony makes no sense, but for the prosecution's blatant misconduct in closing arguments calling Petitioner/Smith a liar and saying "he made up his testimony from hearing all of the evidence presented during the trial and now he is lying to cover his own behind, he killed that boy and now he is lying to cover it up" with no objection from defense and no reprimand from the Judge.

THEORY OF DEFENSE NOT INCLUDED IN JURY INSTRUCTIONS

Petitioner asserts the Colorado Court of Appeals and the United States District Court misapprehended both matter of material fact and law when it held that Petitioner had not demonstrated prejudice and miscarriage of justice in its ruling that the District Court of the State of Colorado did not prejudice then defendant Smith, by not including his Theory of Defense in the instructions to the jury. In criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in supporting the defense is his own. Crane v. Ky., 476 U.S. 319 - (vacated and remanded); Holmes v. South Carolina, 547 U.S. 319 - (vacated and remanded); Anderson v. Bessemer City, 470 U.S. 564 - (reversed); United States v. Lofton, 776 F.2d 918 - (reversed). Though the District Court used the pattern instructions, the failure to include the defendant's theory of defense, presented plain error. Bird v. United States, 180 U.S. 356, 45 L.Ed 570, 215 S.Ct. 403 (1901)

The very essence of a manslaughter instruction is that a killing must be preceded by a serious and highly provocative injury inflicted on the person defending him/her self from the imminent threat of severe bodily harm. In the case of People v. Baird, 66 P.3d 183, 194 (Colo. App. 2002), the defendant testified that he did not realize until after the fight, that he had taken his knife out, and that he did not recall having stabbed either brother. Because this testimony created a dispute about whether he intended to produce death by his use of force, he was entitled to have the jury resolve that issue and apply appropriate self-defense principles.

To the extent that inferior Federal Courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness...of the State Court's treatment of the contested issue.

Copeland v. Washington, 237 F.3d 969,974 (8th Cir. 2000). Smith refers this Honorable Court to Stanley v. Bertley, 465 F.3d 810 (7th Cir. 2006), as was the case in Stanley, the issue is not whether Smith is innocent, but whether if he had had competent lawyer, would he have had a reasonable chance of being acquitted; given that guilt must be proven beyond a reasonable doubt,

This Petitioner did not make any admissions to police, and the statements he made to show his innocence mysteriously disappeared due to a "malfunction" a whole hour of his statement to detectives vanished as did Smith's wife's her statement about Mr. Crane stabbing Smith first and Smith telling her that he and Jeff "got into it and he hoped Jeff was alright" mysteriously vanished.


Petitioner/Smith was totally cooperative with police and Detectives at the time of his questioning, however detectives were deceiving him the whole time.. just to make a case when they let the real killer go. Although Smith left the building via the rear exit the only way back into the building is through the lobby because the rear door automatically locks when it closes, Smith would have been on camera if he had indeed returned to the building. If defense counsel would have conducted an investigation, he would have found that there is no way for Smith to be in Denver after seven PM and make it to Arvada before nine PM.

Had defense counsel performed his job the way he was dutifully sworn to and conducted pre-trial investigations and interviewed witnesses and consulted experts, read discovery and made a reasonable effort on behalf of his client, there would have definitely been a different outcome to the trial.

CONCLUSION

For the reasons stated, this Petitioner prays this Honorable Court MUST Grant Rehearing of its judgment entered on January 13, 2020, and issue a WRIT OF CERTIORARI to hold the Tenth Circuit Court of Appeals accountable for failing to properly apply the law of this Honorable Court and Grant this humble Petitioner relief. A trial that only allows the jury to hear the evidence against the ~~accused~~ ~~without any~~ rebuttal, is not a fair trial, and a defense attorney that fails to provide any kind of defense what-so-ever for his client is clearly ineffective.

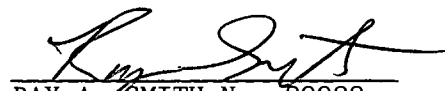
Respectfully submitted,


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CERTIFICATE OF SERVICE

I RAY A. SMITH, declare under penalty of perjury, that placed in the legal mail system of the Arkansas Valley correctional Facility, a true and correct copy of a PETITION FOR REHEARING in the United States Mail postage pre-paid and addressed to the following; on February 2nd, 2020.

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF COLORADO
Office of the Clerk
1300 Broadway, 10th floor
Denver, CO 80203


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