

No. 19-6848

ORIGINAL

Supreme Court, U.S.
FILED

NOV 25 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Matthew Wittal — PETITIONER
(Your Name)

vs.

State of Montana; ET AL — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of the State of Montana
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Matthew Wittal DOC: 3020193

(Your Name)

Montana State Prison
700 Conley Lake Road Deer Lodge, MT 59722

(Address)

Deer Lodge, MT 59722

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

The state's key witnesses at a homicide trial were three charged co-defendants. Petitioner's defense rested upon undermining the credibility of the co-defendants' accusations against the petitioner. The state offered a jury instruction on legal principals recognizing the untrustworthiness of the codefendants testimony. When petitioner's counsel--- without research--- objected to the entire instruction, did petitioner receive ineffective assistance of counsel?

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
-- Com. v. Chmiel, 639 A.2d 9 (Pa.1994) -----	
-- Freeman v. Class, 95 F. 3d 639 (8th Cir. 1996)-----	
Hinton v. Alabama, 134 S. Ct. 1081 (2014)-----	
-- Lankford v. Avare, 468 F.3d 578 (9th Cir. 2006)-----	
-- Lawhorn v. Allen, 519 F.3d 1272(11th Cir. 2008)-----	
-- Strickland v. Washington 466 U.S. 688(1984)-----	
-- United States v. Tirouda, 394 F.3d 683(9th Cir. 2005)-	

STATUTES AND RULES

OTHER

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION	

INDEX TO APPENDICES

APPENDIX A : DECISION OF THE SUPREME COURT OF THE STATE
OF MONTANA

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ 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 _____ 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 highest state court to review the merits appears at Appendix A to the petition and is

reported at LexisNexis _____; 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

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

The date on which the United States Court of Appeals decided my case was _____.

[] 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).

XX For cases from **state courts**:

The date on which the highest state court decided my case was 9/03/19. A copy of that decision appears at Appendix A.

[] 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

Bill of Rights -

- Amendment 6:

In all criminal prosecutions, The accused shall enjoy the right to a speedy and public 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.

STATEMENT OF THE CASE

Petitioner Robert Wittal (Rob) was charged in the 11th judicial District, Flathead County, with Deliberate Homicide of Wade Rautio.

The state charged three other individuals with accountability to deliberate homicide-- David Toman, Christopher Hansen, and Melisa Crone. Rob was represented by attorney Steven Scott (Scott).

Rob's case was the first to go to trial. Although David, Chris, and melisa claim they hadn't reached any deals with the state at the time of Rob's trial, they testified for the state. David assumed he had a deal or something like that.(trial at 151.) The jury learned David, Chris, and Melisa had pending charges for accountability to deliberate homicide.(Tr. at 131,183,291) During trial, the state could not dispute that David, Chris, or Melisa were legally accountable.(Tr. at 541)

David and Chris were the only claimed eye-witnesses to Wade's murder.(Tr. at 142-45,192-99) They admitted involvement in the crime. David admitted he drove Wade to the murder scene in Chris's car and grabbed him during the following attack.(Tr. at 139-40,180)

Several weeks after the murder, David led authorities straight to Wade's body, which was exceptionally difficult to see in a creek on a ridge amidst overgrowth.(Tr. at 158,242) Chris admitted he was in his car when David drove wade to the murder scene, and that he punched Wade during the attack.(Tr. at 190,197) Chris admitted his knives were used in Wade's murder, and Chris admitted he washed one of the knives afterwards and hid it at his work, which is where authorities discovered the knife.(Tr. at 193,198, 200-01,287)

Melisa, a drug dealer who was in a relationship with Chris, admitted she had suspected wade of stealing her drugs.(Tr. at 292,295,297-98) She admitted she kicked Wade out of her house one night and later told authorities he'd "fucking ripped her off".(Tr.at 299,322.) Melisa admitted she'd used Wade's foodstamp card that night, helped go through Wade's stuff later and gave some of it away, and used Wade's facebook messenger so it looked like Wade was using it.(Tr.at299,316-17,350). She admitted to knowing about the murder weeks before DRavid went to the authorities. (Tr.at 355-56)

The Defenses theory used David's, Chris's , and Melisa's admitted involvement in Wade's murder. The defense theory challenged the credibility of David, Chris, and Melisa's core accusation that it was Rob, not they, that stabbed and killed Wade.(Tr.at 654-62)

The defense argued David, Chris, and Melisa were minimizing their involvement and framing rob for the murder.(Tr.at655,662-65) The defense argued there was reasonable doubt because the evidence supported that Melisa ordered David and Chris to kill Wade so Melisa would be taken seriously and collect a bounty on Wade, and that David or Chris(with one helping the other), or both of them killed Wade.(Tr.at 655,658,662-65).

The majority of jury instructions were settled after the close of the evidence on the afternoon of the third day of trial.(Tr.at 601-21).

STATEMENT OF THE CASE
(CONTINUED)

After the instructions were settled and the district court went off the record for the day, the state proposed another instruction, State's 24. Defense attorney Scott indicated he was objecting, so the court scheduled a hearing for the following morning.

States 24 was patterned from Model Criminal Jury Instruction (MCJI) 1-112 and would have told the jury:

Testimony has been presented that the witnesses David Toman, Christopher Hansen, and Melisa Crone may be legally accountable for the offense charged in this case. In this respect you are to be guided by the following rules of law:

1. A person is legally accountable for another when: Either before or during the commission of the offense of deliberate homicide, with the purpose to promote or facilitate the commission, the person solicits, aids, or attempts to aid the other person in the planning or commission of that offense.

2. It is a question of fact for the jury to determine from the evidence and from the law as given you by me whether or not in this particular case the witnesses David Toman, Christopher Hansen, and Melisa Crone is or is not legally accountable for within the meaning of the law.

3. The testimony of one legally accountable ought to be viewed with distrust.

4. A conviction cannot be had on the testimony of one legally accountable unless the testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one legally accountable for the same offense tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

At the hearing, the state explained that the instruction was important since "we do have co-defendants who we have charged with accountability to the homicide of Wade Rautio, a charge that defendant is facing." The state conceded the instruction was important because it " tells the jurors how to view this evidence," namely, "with distrust", which was "one of the most important parts of that instruction." The state also explained the instruction told the jury "that the testimony of persons legally accountable isn't sufficient for a conviction" and that "there also needs to be corroborating evidence that tends to connect the defendant to the crime". Those two parts of the instruction were "imperative" on "what the state's burden is" and how to view the evidence "when you have testimony from people who are also charged legally accountable for this offense."

Although the district court had scheduled the hearing the day before and both the state and the court aptly cited cases at the hearing, Scott asserted: "I'll admit I haven't researched this issue", I haven't had this issue come up before."

STATEMENT OF THE CASE
(Continued)

"I didnt even know to even go look for this."

The district court decided to leave it up to Scott whether he wanted the instruction offered. After Scott said he didn't, the state asked for the record to reflect whether Rob agreed:

[The State]: Can we make it clear that Mr. Wittal is on board, you've discussed it with him and everything?

[Mr. Scott]: No, we're having a discussion right now. Rob, you onboard?

[Mr. Wittal]: You're the proffessional, you've done well so far, so-

[The State]: I just wanted to have a record.

The district court refused the instruction due to Scott's objection.

After deliberations the jury returned a guilty verdict.(Tr.at 689-90) Rob was sentenced to 100 years in Montana State Prison, followed by a consecutive 10-year sentence for a weapons enhancement. (1/17/17 Tr.at 65). Rob timely appealed to the Supreme court for the state of Montana.

REASONS FOR GRANTING THE PETITION

The decision that Petitioner is requesting review is erroneous in that it is in direct contradiction of not just one or two federal citations but of seven separate cases. All of which maintained extremely similar circumstances involving co-defendants and/or persons legally accountable to the same crime. in each of those cases that i cited the court ruled in favor of the accomplice instruction in one way or another.

Other courts have found counsel deficient for failing to advocate for similar accomplice instructions. E.g., Lankford v. Avare, 468 F.3d 578, 583-8542(9th Cir. 2006); Freeman v. Glass, 95 F.3d 639, 641-42(8th Cir. 1996); Com v. Chmiel, 639 A.2d 9,13-14(Pa.1994).

Counsel's duties include "making reasonable investigations". Strickland, 466 U.S. at 691. "Strategic choices made after thorough investigation of laws and facts relevant to plausible options are virtually unchallengeable," but, "Strategic choices made after a less thancomplete investigation" are reasonable only to the extent it was reasonable to limit counsel's investigation. Strickland, 466 U.S. at 690-691.

"An attorney's ignorance of a point of lawthat is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under STRICKLAND". Hinton v. Alabama, 134 S.Ct. 1081, 1089(2014); see also, Lawhorn v. Allen, 519 F.3d 1272,1295(11th Cir. 2008) ("' One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior' to a legal proceeding." (citation omitted)). The Strickland inquiry determines whether counsel's conduct, " regardless of its characterization as 'strategic' or 'tactical', proved reasonable under the circumstances." Rosling v. State, 2012 MT 179; see also, Wiggins v. Smith, 539 U.S. 510,521,534(2003) (ruling counsel deficient although counsel justified their limited investigation as a tactical judgement). United States v. Tirouda, 394 F.3d 683, 687(9th Cir. 2005) (explaining as "well settled law" the appropriateness of an accomplice witness instruction "where an accomplice testifies for the prosecution").

There is one thing that ALL of these cases have in common, and that is they all agree about the accomplice instruction. if this court denies to review this case for whatever reason, they will be sending a message to each and every state in the country. A message that declares that the states are allowed to individually ignore decades of court rulings and legal precedent, precedent that is established so that the rights of the accused are protected, so that the liberties of the accused are trampled. This isn't a review for just another single cases but a request for a review to send a message to the rest of the country that in the pursuit of justice every citizen has rights that are to be protected and preserved. Therefor , with the utmost respect the petitioner requests and prays that this court review the lower courts decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Wiffal 

Date: 11-22-19