

No. _____

IN THE
Supreme Court of the United States

TERRANCE COBB,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the
Fifth District Court of Appeal for the State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2007, Mr. Cobb was convicted of murder and sentenced to life in prison. In 2016, another man confessed to the murder two separate times, first in an affidavit and then in person to Mr. Cobb's defense counsel. Mr. Cobb filed a motion for post-conviction relief based on the confession and argued that he was entitled to a new trial based on the newly discovered evidence. The trial level court denied the motion, and the appellate court affirmed the denial. The question presented is:

Whether, the Florida Courts have violated Mr. Cobb's right to Due Process, under the Fifth and Fourteenth Amendments, in denying him post-conviction relief based on newly discovered evidence that another man had recently confessed to the murder that Mr. Cobb was convicted of in 2007.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to the proceedings.

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PETITION FOR WRIT OF CERTIORARI

Terrance Cobb respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the Fifth District Court of Appeal for the State of Florida, rendered and entered in case number 2006-CF-2560 on August 13, 2019, which affirmed the order denying defendant's motion for postconviction relief of the Circuit Court of the 9th Judicial Circuit in and for Orange County, Florida.

OPINIONS BELOW

A copy of the decision of the Fifth District Court of Appeal for the State of Florida, *Cobb v. State*, 2019 WL 3851663 (Fla. 5th DCA 2019), which affirmed the order denying the Mr. Cobb's motion for postconviction relief, is contained in Appendix A-1. A copy of the order denying the motion for postconviction relief, is contained in Appendix A-2.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the lower court was entered on August 13, 2019. Accordingly, this petition is timely filed pursuant to SUP. CT. R. 13.1. The circuit court had jurisdiction because petitioner was charged with violating Florida state criminal laws. The Fifth District Court of Appeal had jurisdiction pursuant to Rule 9.030(b), Florida Rules of Appellate Procedure, which provide that district courts of appeals shall have jurisdiction for all final decisions of all trial court not directly reviewable by the Florida Supreme Court.

LEGAL PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional provision:

U.S. Const., Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

1. Mr. Cobb was convicted of the murder of Rajon Davis, a drug dealer, who was shot and killed in the early morning hours of February 25, 2006, after having been lured to an ambush by Alexis Nurell. In his dying words, Mr. Davis accused Alexis Nurrell, Daryl White, and a third individual referred to as “T.C.” of his murder. Mr. Cobb maintains that at the time of the murder, he was at a club in Eatonville with his friends. In 2016, Mr. Cobb’s cousin, Timothy Cobb came forward to confess that he was the “T.C.” who helped murder Rajon Davis. Terrance Cobb filed a motion for postconviction relief based on the newly discovered evidence of Timmy Cobb’s confession. Timmy later retracted the confession and the motion was denied. Terrance Cobb submits that the Florida Court’s have denied him his right to Due Process in the denial of his motion for postconviction relief.

FACTUAL BACKGROUND

2. In the early morning hours of February 25, 2006, Vondasa Brown, was awakened by Rajon Davis ringing her doorbell, pounding on her door, and yelling for help. Without opening the door, Ms. Brown stood in the hallway and talked to Mr. Davis, who told her that he had been shot and that the people who shot him left in a green van. He then said that he was going to die and asked Ms. Brown to “tell them who did this.” Mr. Davis waited while Ms. Brown got a pen and pad and had

her write down the names Alexis Nurell and Darryl White. Rajon Davis did not name a third person to Ms. Brown.

3. Law enforcement officers responded to the scene at approximately 3:00 a.m. and found Rajon Davis still lying on Ms. Brown's front porch. Mr. Davis told the officers that he had been shot as payback for being in a sexual relationship with Alexis Nurell. Officer Railey testified that Rajon Davis stated that he was shot by Mr. White and "T. C." Officers Schardine and Harris, however, testified that Rajon Davis stated that he was shot by Mr. White and Terrance Cobb and that they left in a van belonging to Ms. Nurell.

4. Mr. Davis later died from multiple gunshot wounds.

5. The investigation revealed that Alexis Nurell, a former lover of Rajon Davis, who knew he was a drug dealer, and decided to rob him with the help of her then current lover Darryl White.

6. Ms. Nurell's story regarding her accomplices changed several times. Initially, she said that Terrance Cobb and Darryl White had borrowed her van. Later, she told the police that two other friends known as Scooby and Black shot Mr. Davis. After she took a polygraph and entered into a plea agreement with the government in exchange for a ten year sentence of imprisonment, Ms. Nurell changed her story yet again and implicated Terrance Cobb and Darryl White.

PROCEDURAL HISTORY

7. Terrance Cobb was indicted on charges of first degree murder with a firearm and robbery with a firearm. He was tried by jury in the Ninth Judicial Circuit Court in and for Orange County, Florida.

8. Terrance Cobb's put forth an alibi defense at trial. Several witnesses testified that they saw Terrance Cobb at Club Coha at the time of the murder, between 2:00 a.m. and 4:00 a.m. when he was arrested. Shawn Colington saw Mr. Terrance Cobb at Club Coha around 2:00 a.m. Darryl Gamble, the manager of Club Coha, spoke with Mr. Terrance Cobb for approximately ten minutes from approximately 2:05 a.m. to approximately 2:15 a.m. Marquis Hill saw Mr. Terrance Cobb at Club Coha between 2:10 and 2:15 a.m. Henry Lee Coleman saw Mr. Terrance Cobb at Club Coha around 2:30 a.m. Lakeisha Joiner saw Mr. Terrance Cobb at Club Coha around 2:45 a.m. Officer Reginald Mitchell, who was working security at another club across the street, saw Mr. Terrance Cobb around 4:00 a.m. as he was being placed in a police car by Officer Smith.

8. On the last day of the evidence at the trial, at 4:40 p.m., Mr. Terrance Cobb's trial counsel requested a continuance to locate an additional witness, Mr. Arnold. According to trial counsel, Mr. Arnold was under subpoena and was the only witness who saw Mr. Cobb continuously for several hours at the time of the murder. The court gave defense counsel only 15 minutes to find Mr. Arnold, but

defense counsel was not able to locate him. The court then denied a request to continue the trial until the next morning.

9. After deliberations, the jury found Terrance Cobb guilty of First Degree Murder and Petit Theft. Mr. Cobb was sentenced to life imprisonment.

10. On direct appeal, four claims of error were raised: (1) admission of Rajon Davis's dying declaration was a violation of the Sixth Amendment's Confrontation Clause; (2) the verdicts were inconsistent and the evidence was insufficient; (3) denial of motion for continuance to produce an additional witness, namely Willie Arnold, was error; and (4) polygraph evidence was erroneously admitted. The district court of appeal issued a written opinion affirming the conviction and sentence, which addressed only two of the issues raised on appeal. *Cobb v. State*, 16 So. 3d 207 (Fla. 5th DCA 2009). The district court expressly held that any polygraph error was "invited" and that the dying declaration was an exception to the Sixth Amendment's Confrontation Clause. *Id.* at 207-208. His petition to invoke the discretionary jurisdiction of the Florida Supreme Court, was declined. *Cobb v. State*, 37 So. 3d 846 (Fla. 2010).

11. In February 2011, Mr. Cobb filed a pro se amended motion for postconviction relief raising several grounds of ineffective assistance of counsel: (1) trial counsel invited the erroneous admission of the polygraph results; (2) trial counsel failed to object to the State's bolstering of a witness, (3) trial counsel failed

to properly advise Mr. Cobb of his right to testify; (4) trial counsel failed to adequately preserve the record on appeal regarding the anticipated testimony of Willie Arnold; (5) trial counsel failed to file a motion to suppress Mr. Cobb's statement; (6) trial counsel failed to object to the verdict form; and (7) cumulative error. On July 18, 2012, the motion was denied without an evidentiary hearing.

Mr. Cobb filed a pro se appeal of the denial, which the Fifth District Court of Appeal affirmed per curiam. *Cobb v. State*, 109 So. 3d 220 (Fla. 5th DCA 2013).

12. On August 24, 2010, Mr. Cobb filed a pro se petition alleging ineffective assistance of appellate counsel, based on counsel's failure to argue that the jury's verdict, finding him only to be in possession of a firearm, as opposed to discharging a firearm, was inconsistent with a verdict of murder. On September 3, 2010, the petition was denied.

13. Mr. Cobb then filed two pro se motions to correct an illegal sentence which were denied in one order. Subsequently, he filed a pro se initial brief appealing the denial of his motions to correct an illegal sentence, which was denied. *Cobb v. State*, 135 So. 3d 294 (Fla. 5th DCA 2014).

14. In January 2014, Mr. Cobb filed federal habeas corpus petition raising five grounds, which is currently stayed pending the resolution of the state claims raised in this petition.

15. On October 1, 2015, Mr. Cobb filed his Second or Successive Motion for Postconviction Relief in the circuit court. Therein he raised three claims: (1) he received ineffective assistance of counsel where his trial counsel failed to subpoena the only witness who could completely verify Mr. Cobb's alibi that he was at a local club at the time of the murder; (2) he received ineffective assistance of trial counsel where trial counsel failed to object to the manslaughter jury instruction, which was found to be erroneous in *Montgomery v. State*, 39 So. 3d 252 (Fla. 2010); and (3) there was newly discovered evidence that another man has confessed to a third party (Timmy Cobb confessed to a friend, Terrance Clayton) that he had committed the murder of Rajon Davis. The court denied the motion on October 13, 2015.

16. Finally, Timmy Cobb publically confessed to the murder of Rajon Davis, by writing an affidavit confessing to the crime. On January 20, 2017, Mr. Cobb filed his Third Motion for Postconviction Relief raising the claim that this affidavit constituted newly discovered evidence of innocence. Within his confession, Timmy Cobb details how he and Darryl White a/k/a "Doc" robbed and murdered Rajon Davis as follows:

On February 25, 2006 me and Darryl White did kill rajohn davis. I Timmy Cobb was on Calhoun Street in Eatonville Fl, when darryl white was let out a green van that white girl lex (Alexis Nurrell) was driving. darryl white ask me if I wanted to make some money by robbing someone later on that night. I agreed to robbing rajohn and was told by darryl white to meet him at neats. I was there about 30

minutes before darryl came up there we snorted powder in the cut on the side of neats then white girl Lex pulled up and doc went to the van and called me over. Doc got in the back seat and I got in the front we jump on the highway and went to some house where doc and white girl got out and went inside I stayed in the van. They came back 5 minutes later with doc holding a shotgun once in the van doc asked if I had my gun I showed him my 38 revolver. We went back to eatonville to neats for awhile then we left and went to the back of eatonville Thompson st where we waited. Soon after we waited a car pulled on the other side of the road and rajohn got out and walked towards the van. Once he got close me an doc jumped out and doc shot the shotgun off rip So I started shooting to at rajohn. rajohn started running and we chased him to some yard where we continued to shot him and I went in rajohn pockets and took his money and we went back to the van and got on the highway For a minuet then turned around and went back to Eatonville where I was let out at the hotel. Darryl whit keep my gun I used and I went home after the murder.

17. On June 20, 2018, 18 months after his confession, Timmy Cobb sent a letter to the trial court recanting his confession. An evidentiary hearing was held on the Third Motion for Postconviction Relief on October 22, 2018. At the hearing, the trial court excluded testimony from Todd Doss, Terrance Cobb's federal defense counsel. Mr. Doss had met with Timmy Cobb on two occasions. During the first meeting, Timmy Cobb made statements consistent with the affidavit. His statements were not consistent with the affidavit during the second meeting. Terrance Cobb argued, under *Chambers v. Mississippi*, 410 U.S. 284, 300-301 (1973), that it would violate his right to Due Process if Mr. Doss's hearsay testimony was not admitted.

18. On November 16, 2018, the trial court issued an order denying the Third Motion for Postconviction Relief. The trial court ruled, as a matter of first impression, that *Chambers* applies to postconviction proceedings. The trial court then excluded Mr. Doss's hearsay testimony finding that it failed to meet the four factor test set forth in *Chambers*. Specifically, the trial court found that Mr. Doss's testimony was polished, intelligent, and professional – and yet – was somehow unreliable. The trial court then denied the motion finding that Timmy Cobb's recanted confession was not credible and, thus, would not probably produce an acquittal on retrial.

19. Mr. Cobb appealed the denial of the motion to the Fifth District Court of appeal. The trial court's decision was affirmed on August 13, 2019, *Cobb v. State*, 2019 WL 3851663 (Fla. 5th DCA 2019).

REASONS FOR GRANTING THE PETITION

Under U.S. Supreme Court Rule 10, this petition for a writ of certiorari should be granted for the compelling reason that the state courts of Florida have decided an important question of federal law in a way that conflicts with relevant decisions of this Court. In that the Florida Courts have not only decided that the *Chambers* four factor test is applicable to the postconviction context (a matter of first impression), but also that the first factor in the *Chambers* test necessarily precludes the admission of evidence of recent confessions as newly discovered

evidence. This erroneous interpretation *Chambers* has denied Terrance Cobb of his right to Due Process. Thus an innocent man to serve life in prison for a murder he did not commit. Therefore, Mr. Cobb respectfully requests that this Court grant this petition.

This Court has long held that the Fifth Amendment right to Due Process guarantees a defendant the right to “a fair opportunity to defend against the State's accusations” which includes the right to the admission of hearsay regarding a third party’s confession. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

In *Chambers*, this Court held that the exclusion of hearsay regarding a third party's confessions to a crime violated the defendant's constitutional right to due process—the state's rules of evidence notwithstanding. Chambers was convicted of the murder of a police officer. *Chambers*, 410 U.S. at 285. During his trial, he sought to introduce evidence that another individual had confessed three separate times and also offered a sworn, although later recanted, confession. *Id.* at 289. However, Mississippi law would not allow the defense to impeach its own witness, so Chambers was precluded from introducing evidence relating to the alleged confessions. *Id.* at 289, 294. Chambers argued that his right to due process was violated because he was unable to introduce evidence relating to another person's confessions to the crime for which he was convicted. *Id.* at 298. This Court evaluated Chambers’ argument in light of four factors intended to evaluate the

admissibility of an out-of court statement: “(1) the confession or statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the confession or statement is corroborated by some other evidence in the case; (3) the confession or statement was self-incriminatory and unquestionably against interest; and (4) if there is any question about the truthfulness of the out-of court confession or statement, the declarant must be available for cross-examination.” *Id.* at 300–01. The proper focus for the *Chambers* analysis is the reliability of the hearsay statements themselves, because any concerns as to credibility can be addressed by the government on cross-examination.

Here the trial court properly decided that *Chambers* rationale applied to postconviction proceedings, but, unfortunately, it improperly applied the four factor test. The trial court held that Mr. Cobb could not meet the first factor because the confession to Mr. Doss was made many years after the crime occurred. The trial court held that the “first *Chambers* factor is so lacking as to doom the rest of the analysis.” Rather than guarantee a defendant’s right to Due Process, the trial court’s position weaponizes *Chambers* to deny it.

Mr. Cobb sought to overturn his conviction based on a confession, which came to light almost a decade after the murder. In Florida, in order for a conviction to be set aside on the basis of newly discovered evidence, the evidence must be, first newly discovered, and second it must be of such nature that it would

probably produce an acquittal on retrial. *Smith v. State*, 213 So.3d 722, 736 (Fla., 2017). But Mr. Cobb was denied the opportunity to present evidence of that confession at the evidentiary hearing on his motion for postconviction relief, precisely for the fact that the confession for an old crime.

In other words, the length of time from the crime to the confession came into play in two opposite ways in this case. It both met a ground for overturning the conviction in that it was a basis for finding that the evidence was *newly* discovered and served as a reason to exclude testimony regarding the confession. Such a rigid application of the *Chambers* test is the antithesis of the holding of *Chambers* and served to deny Mr. Cobb his right to Due Process. Should this erroneous application of *Chambers* remain uncorrected many more defendants will be unable to prove their innocence. Therefore, Mr. Cobb respectfully asks this Court to grant this petition.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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