ORIGINAL

19-8021

NO:

IN THE

Supreme Court of the United States

Henry L. Jackson
Petitioner

vs

State of Utah
Respondent

On Petition for Writ of Certiorari
To the Tenth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Henry L. Jackson
Pro-Se
P.O. Box 250
Draper, Utah 84020

QUESTIONS PRESENTED FOR REVIEW

Issue 1: DESTRUCTION of EVIDENCE

Whether the state violated petitioner's Fourteenth Amendment right to due process and a fair trial when it released petitioner's vehicle to the lienholder before the defense had the opportunity to investigate it's evidentiary value.

Issue 2: JURY SELECTION

Whether the state violated the equal protection clause of the Fourteenth Amendment when it used a peremptory challenge to remove what appears to be the only minority from the jury panel.

LIST OF PARTIES

PETITIONER, Pro-se

Henry L. Jackson #19377, P.O. Box 250, Draper, Utah 84020

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TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL AMENDMENTS

FEDERAL STATUTES

FEDERAL RULES

STATE STATUTES

STATE RULES

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

[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,
[X] 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[ ] is unpublished.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,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and

[X] reported at State v. Jackson, 243 P.3d 902, 906 (UT. Ct. App. 2010); 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[ ] is unpublished.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[ ] is unpublished.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 August 2, 2019.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10-8-19, and a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

[X] For cases from state courts:

The date on which the highest state court decided my case was May 27, 2010. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The following are determinative: U.S. Const. Amend. XIV, Utah Const. Art. 1 § 7, Utah Code Ann. § § 78-46-3 (1992); 78B-1-103(2) (2008); Utah R. Crim. P. 16 See Appendix E.

STATEMENT OF CASE

Petitioner Henry L. Jackson filed a petition under 28 U.S.C. § 2254 Writ of Habeas Corpus on April 8, 20 15. The respondent filed a response to the petition on July 18, 2016. Petitioner filed a reply on September 14,2016. On September 17,2018, the district court entered a memorandum decision & order denying the habeas corpus petition. On October 15,2018, petitioner filed a motion for relief from judgment. On November 8, 2018, the district court entered an order denying petitioner 's motion for relief from judgment and petitioner's motion for certificate of appealability. On Dec. 21, 2018 petitioner Henry L. Jackson filed a combined application seeking a certificate of appealability and opening brief. SEE Appendix A. On August 2, 2019 the United States Court of Appeals for the Tenth Circuit entered an order denying certificate of appealability. In September, 2019 petitioner filed a petition for review. On October 8, 2019 the United States Court of Appeals entered an order denying the petition for rehearing. SEE Appendix C.

2. Prior Proceedings (State)

Petitioner's appellate counsel filed a direct appeal on March 11,2009. Petitioner's conviction was affirmed by the Utah Court of Appeals. State v. Jackson, 2010 Ut. App. 328, 243 P.3d 902. The Utah Supreme Court denied certiorari review on February 16, 2011.

Post-Conviction Case (State)

Petitioner filed a petition for state post-conviction relief on October 20, 20 11 (case no. 1109186 77). The petition was denied and dismissed with prejudice on September 10, 2013.

Appeal of Post-Conviction Case (State)

The Utah Court of Appeals affirmed the denial of the post-conviction petition. Jackson v. State, 2014 Ut. App. 168,332 P.3d (2014). The Utah Supreme Court denied certiorari review on January 5, 2015. Jackson v. State, 343 P.3d 708 (2015).

REASONS FOR GRANTING THE WRIT

Henry L. Jackson petitioner pro-se hereby petitions the court for review on certiorari pursuant to Supreme Court Rule 10(a).

INTRODUCTION

Denial of a "COA" by the panel of the United States Court of Appeals conflict with the decision of the United States Supreme Court on the same important matter call for an exercise of this court's supervisory power.

Claim One: Destruction of Evidence Claim.

The panel decision on this claim conflicts with decisions of the United States Supreme Court and decisions by other panels in this circuit. The United States Supreme Court held in Brady v. Maryland, 373 U.S. 83, 83 s.ct. 1194, 10 L. Ed. 2d 215 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87, 83 s.ct. at 1196-97; see Kyles v. Whitley, 514 U.S. 419, 432 (1995); United States v. Bagley, 473 U.S. 667, 674, 105 s.ct. 3375, 3379, 87 L. Ed. 2d 481 (1985); United States v. Robinson, 39 F. 3d 1115, 1118 (10th Cir. 1994) (Due Process mandates disclosure."); United States v. Fleming, 513 U.S. 826, 115 s.ct. 93, 130 L. Ed. 2d 44 (1994).

Petitioner argues and maintains that the state violated petitioner's Fourteenth Amendment right to due process and a fair trial when it released petitioner's vehicle to the lienholder before the defense had the opportunity to investigate its evidentiary value.

In the instant case the Salt Lake Legal Defender Association (LDA), who represented petitioner, filed a Request for Discovery on November 27, 2006. R. 11-13 It requested:

I. Any evidence which tends to negate or mitigate the degree of the defense that has been

discovered by any member of the agencies involved in the investigation or prosecution of [Jackson's] case. See: Brady v. Maryland, 373 U.S. 83 (1963); and Utah Rules of Criminal Procedure 16.

Petitioner asserts Brady violation occurred when the state released the vehicle to the lienholder before the defense had the opportunity to examine it's evidentiary value. In order to establish a Brady violation, the petitioner bears the burden of establishing:

1. "That the prosecution suppressed evidence.
2. that the evidence was favorable to the accused.
3. and the evidence was material." United States v. Hughes, 33 F. 3d 1248, 1251 (10th Cir. 1994) citing United States v. Deluna, 10 F. 3d 1529, 1534 (10th Cir. 1993) accord Fero v. Kerby, 39 F. 3d 1462, 1472 (10th Cir. 1994).

On September 13, 2007, prior to trial, petitioner filed a supp. motion for discovery specifically requesting access to the vehicle... It was only during oral argument at petitioner's direct appeal that the state conceded that exculpatory evidence was destroyed prior to the defendant's trial. See: e.g., Tr. Oral Argument pg. 12; ln. 6 to ln. 19.

> "...We need to start with a record clarification regarding the destruction of evidence claim. Our argument in the brief was that, if defendant had conducted an appropriate defense investigation, he very well could have discovered this car, very well could have access to this car. We've learned in the last 24 hours that that's not accurate; that the car was released relatively early in the process. And, so, we'd respectfully like to withdraw that portion of our argument, and instead direct the court's attention, very specifically, to the harmlessness aspect of the destruction of evidence issue. As we've indicated in our brief, even if the prosecutor had an obligation under Rule 16 of the Rules of Criminal Procedure to produce this car, there is no reasonable probability that the result of this case wold have been any different."

Id. Oral Argument 09/30/2009.

The vehicle comprised evidence (i.e. blood, animal saliva, and canine hair) critical to preparation of his defense. The vehicle was the alleged weapon in count I of the information. The vehicle contained evidence which would have contradicted key prosecutor witnesses, and bring their credibility and veracity into question, including testimony about the dog's presence inside the vehicle, and corroborate petitioner acting under extreme emotional distress. Thus petitioner was prejudiced by the state's destruction of evidence. See: e.g. United States v. Bagley, 473 U.S. 667, 675, 105 s.ct. 3375, 3380-81, 87 L. Ed 2d 481 (1985) ("The Brady rule is based on the requirement of due process.") (opinion of Blackman, J.); United Sates v. Robinson, 39 F. 3d 1115, 1118 (10th Cir. 1994) ("Due process mandates disclosure."); United States v. Fleming, 513 U.S. 826 115 s.ct 93, 130 L. Ed 2d 44 (1994).

The state withheld exculpatory evidence from the defense and presented evidence at trial that it knew, or should have known, to be false, or at the very least, knew could be contradicted. Under the due process clause of the United States Constitution, the states bears an affirmative duty to disclose exculpatory evidence to the defense. See: e.g. Brady v. Maryland, 373 U.S. 83, 87 (1963). The failure to disclose exculpatory evidence "violates due process where the evidence

is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Kyles v. Whitley, 514 U.S. 419, 432 (1995) (quoting Brady, 373 U.S. at 87). As part of the duty to disclose exculpatory evidence, due process requires that the government disclose "material evidence affecting the credibility of government witnesses." United States v. Kelly, 35 F. 3d 929, 936 (4th Cir. 1994).

Both generally exculpatory evidence and credibility evidence are material to a defendant's case. In Kyles, the court held that "evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Kyles, 115 s.ct. at 1565 (quoting Bagley, 473 U.S. at 682 (opinion of Blackman, J.); Id. at 685 (White, J. concurring in part and concurring in the judgment)).

A "reasonable probability" is one that undermines confidence in the outcome of the trial. Kyles, 115 s.ct at 1565 (quoting Bagley, 473 U.S. at 678). It is not a "sufficiency of the evidence test" or a question of "whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a verdict worthy of confidence." Kyles, 115 s.ct. at 1566. Suppressed evidence is material if, considered in the context of the entire record, it may have created a reasonable doubt. Agurs, 427 U.S. at 112. Importantly, the potential impact of the exculpatory evidence, and thus its materiality, must be judged collectively, not item-by-item. Kyles, 115 s.ct at 1567 (emphasis added).

The Utah Court of Appeals Merit Adjudication reasoned that because other overwhelming evidence exist in this case, that other overwhelming evidence justifies denial of due process. The panel in the U.S. Court of Appeals appears to focus primarily on the Utah Court of Appeals Merits adjudication. However, the panel adopted "...the district court's ultimate resolution on this issue [see Id. below] and thus deny a COA." See: Panel Order Denying COA; pg. 9-11. Appendix A

The panel's decision on this issue is in conflict with: Brady v. Maryland, 373 U.S. 83, 83 s.ct. 1194, 10 L. Ed. 2d 215 (1963); Kyles v. Whitley, 514 U.S. 419, 432 (1995) (same); United States v. Robinson, 39 F. 3d 1115, 1118 (10th Cir. 1994) (same); United States v. Fleming, 513, U.S. 826, 115, s.ct. 93, 130 L. Ed. 2d 44 (1994) (same); Smith v. N.M. Dept. of Corrections, (10th Cir. 1995) (same).

U.S. Dist. Ct. Analysis

U.S. Dist. Ct.: "...the purpose of AEDPA is to ensure that federal habeas relief functions as a 'guard against extreme malfunctions in the state criminal justice systems,' and not as a means of error corrections." Greene v. Fisher, 132 s.ct. 38, 43-44 (2011) (quoting Harrington v. Richter, 131 s.ct 770, 786 (2011) (quoting Jackson v. Virginia, 443 U.S. 307, 332 N. 5 (1979) (Stevens, J. concurring in judgment))). See: U.S. Dist. Ct. Order Appendix B; Pg. 7.

U.S. Dist. Ct. held: The destruction of evidence claim is unexhausted because federal constitutional issues were not raised on direct appeal, where the destruction of evidence was addressed; only violations of the Utah State Constitution and Utah Rules of Criminal Procedure were raised. See: State v. Jackson, 2010

Ut. App. 328, ¶¶ 19-22 (citing State v. Tiedemann, 2007 Ut. 49, ¶¶ 41; 44-45) (analyzing evidentiary matter under Utah Rule of Criminal Procedure 16 and Utah Constitution)); Appellant's Brief, State v. Jackson, No. 20080418-CA, at 46-48. Mar. 11, 2009). See: U.S. Dist. Ct. Order Appendix B; Pg. 1-2.

The Dist. Ct. errs: This claim is exhausted because the Ut. Ct. of App. addressed this claim on the merits and the Utah Supreme Court denied certiorari. See: State v. Jackson, 243 P. 3d 902 (Utah App. 2010), cert denied. 247 P. 3d 774 (2011). Appendix D

The Dist. Ct. further states the destruction of evidence claim is unexhausted because federal constitutional issues were not raised on direct appeal, ...only violations of the Utah State Constitution and Utah Rules of Criminal Procedure were raised. See: (Dist. Ct. Order Appendix B.)

Petitioner asserts the language of the Utah Constitution Art. 1,; Sec. 7 is identical to the language of the due process clause of the Fourteenth Amendment of the United States Constitution. Although short on citation, given that circumstance, presenting the issue under the state constitution encompassed any federal claim of the denial of due process. See: Early v. Packer, 537 U.S. 3, 7, 123 s.ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam).

The right to a fair trial, guaranteed to state criminal defendants by the due process clause of the Fourteenth Amendment, imposes on states certain duties consistent with their sovereign obligation to ensure "that justice shall be done" in all criminal prosecutions. United States v. Agurs, 427 U.S. 97, 111, 96 s.ct. 2392, 49 L. Ed. 2d 342 (1976) (quoting Berger v. United States, 295 U.S. 78, 88, 55 s.ct. 629, 79 L. Ed. 1314 (1935)). In Brady v. Maryland, 373 U.S. 83, s.ct 1194, 10 L. Ed 2d 215 (1963), we held that when a state suppresses evidence favorable to an accused that is material to guilt or to punishment, the state violates the defendant's right to due process, "irrespective of the good faith or bad faith of the prosecution." Id. at 87, 83 s.ct. 1194, 10 L. Ed. 2d 215. Thus, petitioner was denied due process and a fair trial when the state destroyed exculpatory evidence in this case.

Further, due process is self-executing in the state of Utah. As such, when Art. 1; Sec. 7 of the Utah Constitution was cited on direct appeal, it encompassed the due process clause of the Fourteenth Amendment of the United States Constitution. See: Spackman ex rel. Spackman v. Board of Ed. Box Elder, 467 Utah Adv. Rep. 19, 2000 Ut. 87.

Moreover, the district court failed to fulfill petitioner's request under Rule 5 of the Rules Governing Section 2254 Cases In United States District Courts. Petitioner specifically requested: transcript of oral argument - Direct Appeal; and the initial opinion issued by the Utah Court of Appeals and the petition to remove/alter footnote 16 in the re-issued opinion. The records were not provided.

Petitioner asserts the absence of these records led the panel in the U.S. Court of Appeals to an unreliable decision due to an incomplete record.

Petitioner was denied favorable evidence by the state's destruction of evidence. See: Scott v. Mullin, 303 F. 3d 1222, 1228-30 (10th Cir. 2002) (petitioner demonstrated "cause" based on state's failure to disclose exculpatory evidence, resulting in appellate counsel not being able to [adequately brief] the Brady claim during direct appeal). Appellate counsel requested rebriefing on this claim based on the state's concession. Motion denied. Id. Thus the state's brief on

record contains false and inaccurate information which leads any future court into unreliable conclusions. As is in the U.S. Ct. of Appeals' denial of a COA on this claim.

Claim Two: The State's Peremptory Challenge Violated the Equal Protection Clause.

Although a "party may exercise peremptory strikes to remove jurors during jury selection for "virtually any reason, or for no reason at all", the Fourteenth Amendment prevents it from "strik[ing] prospective jurors solely on the basis of race or gender." See: J.E.B. v. Alabama, 511 U.S. 127, 141-42 (1994); Batson v. Kentucky, 476 U.S. 79, 84-85 (1986); Utah Code Ann. § 78-46-3(2) (1992). (A citizen shall not be excluded or exempt from jury service on account of race, color, religion, sex, national origin, age, occupation, disability, or economic status.) This court should grant certiorari because the state's peremptory challenge of the only racial minority on the venire violated equal protection.

To determine whether a peremptory strike violates equal protection, Utah courts apply a three-part test. First, "the opponent of a peremptory challenge "must make out a prima facie case of racial discrimination"; Second, "the burden of production shifts to the proponent of the strike to come forward" with a race-neutral explanation. Third, "if a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination." In this case, the court of appeals correctly held step one was met, see: id at ¶ 18, but erred when it affirmed under steps two and three.

First, step one is moot because the state did not challenge Jackson's prima facie case; instead, it assumed that Jackson had established a prima facie case and explained its reasoning. R. 214:17; See Hernandez v. New York, 500 U.S. 352,359 (1991); State v. Chatwin, 2002 UT App 363, ¶ 9, 58 P.3d 867. Besides, Jackson established a prima facie case when he noted that the state struck the only racial minority. See Batson, 476 U.S. at 96-97; State v. Alvarez, 872 P.2d 450,457 (Utah 1994).

Second, this court should reverse because the state failed to provide a race-neutral explanation. See Chatwin, 2002 UT App 363 at ¶ 20. The state claimed that it struck Mr. Curry because "he was deaf in his right ear." R. 214:17. This explanation, however, was not clear and reasonably specific, and it did not appear to be legitimate because Mr. Curry said he had "been able to hear" the proceedings. R. 243:33 See, e.g., Ex parte Travis, 776 S. 2d 874,881 (Ala. 2000) ("[T]he state's failure to engage in any meaningful voir dire [***218] examination on a subject the state alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination"). The state also claimed that it struck Mr. Curry because he was "to[o] young." R.214:17. But this explanation was not clear and reasonably specific, and did not appear to be related to the case or legitimate because Mr. Curry was old enough to serve on a jury, had graduated from high school, and was employed. R. 243:33. His age, in fact, was very similar to that of venire persons Greg Mortensen, Betty Kurilich, Clinton Fowler, Zach Davis, and Timothy Baker[1] 2 R.243:16-32.

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[1]Greg Mortensen was "a senior in college", was "engaged" to be married, and did not have children. R.243:16. Betty Kurilich was a "high school graduate", was employed "as a dental technician", and was married with a 17-month child. R.243:17. Clinton Fowler had completed "some college", was employed, and was married, but had no children. R.243:23. Zach Davis was "in [his] first year of college", was employed, was not married, and had no children. R.243:31. And Timothy Baker "graduated high school", was employed, was not married, and had no children. R.243:32.

But the state did not strike these individuals and Mortensen, Kurilich, and Fowler ultimately served on the jury. R.149-50; "If a prosecutor's proffered reason for striking a black panelist applies just as well to a white panelist allowed to serve, that is evidence tending to prove purposeful discrimination." Miller-EL v. Cockrell, 537 U.S. 322,154 L.Ed. 2d 931 , 123 S.ct. 1029. Finally, the state claimed that its peremptory strike did not matter because Mr. Curry "would not have made it into the jury" anyway. R.214: 17. This reasoning was not legitimate, however, because excluding a juror "for impermissible reasons", even if the juror ultimately would not have served, "harms that juror and undermines public confidence in the fairness of the system." J.E.B. v. Alabama, 511 U.S. 127, 142 N. 13 (1994).

Third, this court should reverse because the trial court, and the UT Ct. App, clearly erred by deciding Jackson [petitioner] had not proved purposeful discrimination. See Colwell, 2000 UT 8 ¶20. "To show clear error, the appellant must marshal all of the evidence, in support of the trial court's findings and then demonstrate that the evidence, including all reasonable inferences drawn there from, is insufficient to support the finding." Id. (quotations and citations omitted). The marshaled evidence is: Mr. Curry graduated from high school and worked as "a diesel mechanic at CMR Lube." R.243:33. He had no spouse or children. R.243:33. He subscribed to "Car and Driver" magazine. R.243:33. And he was deaf in his right ear. R.214:17. The state struck him because "he was deaf in his right ear," "he struck me as to[o] young," and he "would not have made it into the jury pool either way because of his listing as No. 46." R.214:17.

As explained above, the state's claim that it struck Mr. Curry because "he was deaf in his right ear," R.214:17, was not clear, reasonably specific, or legitimate because Mr. Curry had "been able to hear" the proceedings. R.243:33. If the state harbored concern, it should have questioned him further. See: J.E.B., 511 U.S. at 143-44; also see Ex parte Travis, 776 So. 2d 774, 881. Likewise, the state 's claim that it struck Mr. Curry because he was "to[o] young", R.214:17, was not clear, reasonably specific, or legitimate because Mr. Curry's age was similar to that of other venire persons whom the state did not strike see: supra at n.1. Also, see Miller-EL v. Cockrell, 537 U.S., at 339, 154 L.Ed. Finally, the state's claim that its peremptory strike did not matter because Mr. Curry "would not have made it into the jury" anyway, R.214:17, was not legitimate because striking a juror for impermissible reasons "harms that juror and undermines public confidence in the fairness of the system", regardless of whether the juror ultimately would have served. J.E.B., 511 U.S. at 142 n.13.

Petitioner asserts two of the three reasons (age & disability) provided by the state under step 2 of the Batson analysis are prohibited by law in the state of Utah. The Utah Court of Appeals acknowledged this fact in it's initial opinion issued in the instant case on May 27, 2010. In that opinion the court noted:

> As discussed in ¶ 31-33, infra, case law supports that these reasons were racially neutral and that the trial court properly determined the reasons were not a pretext under step 3. However, based on a recent statutory amendment that became effective after defendant's trial, see: Utah Code Ann. 78B-1-103 (2) amendment notes (2008), striking a juror based on age or disability will no longer be legal, see id 78B-1-103 (2) ("A qualified citizen may not be excluded from jury service on account of race, color, religion, sex, national origin, age, occupation, disability, or economic status. (emphasis added)

Jackson, 2010 Ut App. 136 at ¶ N. 16. Footnote 16 is evidence to demonstrate that the state's explanation for it's peremptory challenge was a pretext to disguise a racial motive. Batson, 476 U.S. at 79. SEE: Original Opinion w/FN 16 Appendix D.

The Utah Court of Appeals held: "Peremptory strike of prospective juror who was young and had hearing impairment did not violate Batson.

This court should grant certiorari because the state court's decision resulted in:

> A decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or
>
> resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

28 U.S.C. § 2254 (d)(1)-(2); and see: Batson v. Kentucky, 476 U.S. 79, 84-85 (1986).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Henry L. Jackson

Date: Feb. 13th 2020