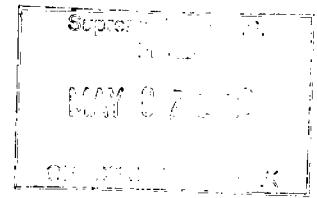


19-8514

No.

APR 20 2020

IN THE  
SUPREME COURT OF THE UNITED STATES



Farid Popai — PETITIONER  
(Your Name)

vs.

State Of New York — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the second circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Farid Popai  
(Your Name)

WENDE Correctional Facility  
(Address)

3622 Wende Rd., PO. Box 1187,  
Alden, New York 14004-1187  
(City, State, Zip Code)

718-937-4000

(Phone Number)

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## QUESTION(S) PRESENTED

WHETHER TWO-WAY VIDEO TESTIMONY VIOLATES A CRIMINAL DEFENDANT'S CONFRONTATION AND RIGHT TO PRESENT A COMPLETE DEFENSE UNDER SIXTH AMENDMENT TO THE U.S. CONSTITUTION?

In this case, it is undisputed fact that the witness who was testifying against the petitioner via SKYPE was taken to a police station not to a U.S. Courthouse surrounded by a team of district attorney and detectives, the lead case detective was whispering into his ear coaching him how to answer questions and make false accusation against the petitioner that were not corroborated by independent proof. However, despite this acknowledgment, the New York Courts are of the opinion that since the U.S. Supreme Court does not provide a mechanism for relief in post conviction proceedings, any misconduct occurred in any post conviction proceedings are not constitutional violation.

The petitioner respectfully disagrees and maintains -- that there is a distinction between constitution not providing relief in a post conviction motion, which must be rooted in issues raised, and the fact that detective completely violated the legal process in the open court by whispering answers into the witness ear during an evidentiary hearing relevant to the post conviction motion which the Court deemed worthy of a hearing in the first place. But witness' false, scripted and unsupported by evidence testimony that was influenced by lead detective whispering and pressuring him to make statements favorable to the prosecution resulted in the denial of said motion. This, the petitioner submits was a constitutional violation worthy of the Court's review.

#### CONCLUSION

Here, the petitioner is not asking the Court to change its holding handed down in Lackawanna City. Dist. Att'y V. Coss, 532 U.S. 394, 402, that did not provide a mechanism for criminal defendants to have a constitutional right to post conviction remedies. But rather, once the state provides a hearing in a post conviction motion, the constitution should protect the required legal proceedings inside the Court room as it does in criminal trials. More specifically, protecting the witness against being coaches and answers whispered into his ear to defeat petitioner's motion.

Without an intervention from this Court, the police and prosecutors across the country will take advantage of the two-way witness testimonies conducted via SKYPE by (1) taking a testifying witness to a police station susceptible to intimidation and coercion; (2) will literally whisper into the ear of a witness, as it happened in this case, and obtain an unfair advantage over a criminal defendant who has obtained new evidence to prove his/innocence in Court. For this reason, this Court should grant the instant write and clarify this very important issue.

## **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:

## **RELATED CASES**

Lackawanna County District Attorney v. Coss, 532 U.S.394

Bordeaux, 400 F.3d at 555

United States v. Gignate, 166 F.3d 75

United States v. Yates, 438 F.3d 1307

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## STATUTES AND RULES

U.S. Constitution, Fifth, Sixth and Fourteenth Amendments

## OTHER

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

The opinion of the Appellate Division 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 \_\_\_\_\_.

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).

For cases from **state courts**:

The date on which the highest state court decided my case was March 11, 2020.  
A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: 1/10, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_. No provision to file

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on 1/10 (date) in Application No. \_\_\_ A \_\_\_\_\_.  
\_\_\_\_\_

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

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

VIOLATION OF DUE PROCESS RIGHTS, U.S.

CONSTITUTION AMENDMENTS 5,6,14.

## STATEMENT OF THE CASE

Subsequent to the denial of petitioner's motion in the lower Courts. Petitioner filed his appeal with the New York Court of Appeals (See Appendix K), which also denied his application on or about March 11, 2020 , See Appendix (A).

For reasons set below and since the issue presented here impacts every criminal defendant in the Country because the law enforcement misused laws and trampled petitioner's constitutional rights, this Court should grant entry and clarify its precedent that is being misapplied by the state and Circuit courts across the country.

### WHETHER THE LEAD CASE DETECTIVE'S LITERAL WHISPERING INTO THE EAR OF THE PROSECUTION WITNESS IN OPEN COURT WHILE TESTIFYING VIA SKYPE VIOLATED DEFENDANT'S DUE PROCESS RIGHTS IN VIOLATION OF THE U.S. CONSTITUTION.

While in Lackawanna Cnty. Dist. Att'y v. Coss, 532 U.S. 394,402, this Court recognized, the Constitution does not compel states to provide post-coviction proceedings for relief. This ruling did not undermine post conviction remedies all together, nor it provided license for police to literally whisper into the ear of a witness in open Court to pressure him provide scripted testimony to defeat a criminal defendant's meritorious post conviction motion. Here, the New York Courts are relying on Lackawanna supra, to justify or ignore this violation. For this reason, this Court should step in and clarify that ruling and provide constitutional protection for in Court proceedings relating to a post conviction motion, which as evidenced by the denial of this and petitioner's

other related appeals grounded on this violation is deemed permissible by the New York Courts.

In the case at bar, STEVEN BROWN, the lead detective in petitioner's criminal case. Took the chief witness who recanted his trial testimony in 2017, to a police station and literally whispered into his ears to provide scripted testimonies while he testified for the prosecution in open court via SKYPE.

Among other misconduct that includes but were not limited to fabricating information, intimidating petitioner's witnesses to keep them from testifying on petitioner's behalf to defeat defendant's CPL 440.10 motion.

The lead case detective Steven Brown took the 70 years old wheel chair bound witness to a police station in Florida while proceedings were being held in New York while he testified via SKYPE. Steven Brown positioned himself at a blind spot of the camera and continuously whispered into the witness ear coaching him to accuse the defendant, his brother and his attorney of bribing him for his original recantation. Albeit, a false accusation there were proven to be false by documentary proof that further proved it was the lead detective and an associate of his who forged documents to blame the defendant and his associates when Brown himself was involved.

Furthermore, since police's bald allegations accusing the defendant of misconduct fell flat on their face and remained unsubstantiated. The prosecution witness was used to fill the

evidentiary gap by means of detective Brown whispering into his ears.

The followings took place in open Court:

Mr. George: Objection, Judge. I'd like to point out the witness keeps turning to someone else in the room. and looking for something and I just would like --

The Court: I know he is not looking for his lawyer because his lawyer is sitting right in front of the both of us.

The Court: do you know who is in the room there?

The prosecutor: Sergeant Brown, from Queens district attorney's office, detective Al Schwartz from dis, Queens district attorney's office, and I think Tommy lockwood, from the Queens district attorney's office.

The Court: Mr. Miata, who's sitting to your left?

Witness: Steve Brown

The Court: Mr. Miata just answer the questions, look at the camera, you don't need help from detectives to answer questions, all right.

(Evidentiary hearing minutes of 2018, pages 170,171<sup>2</sup>)

See Appendix (D)

*Page 185, 186*

Certainly, the evidentiary hearing records in this case clearly establishes that the witness who was recanting his recantation and was testifying for the prosecution was taken to a police station to testify via SKYPE as opposed to a U.S. Courthouse. Only so that he can be tampered with and give testimony in favor of the prosecution's allegations.

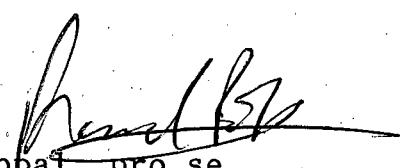
The honorable justice of said proceeding was no saving grace because despite witnessing and admonishing the witness for getting help from the lead detective to answer questions, he still allowed the proceedings to commence and subsequently relied upon the same scripted testimony he himself witnessed and denied the motion.

The question of law for this Court is this: if in each post conviction evidentiary hearings the detectives are given the right to whisper into the ear of witnesses testifying for the prosecution, how can a defendant win any motion and what would be the use of having a post conviction proceedings in New York State? And, whether the misconduct occurred in this case by the lead detective violated defendant's rights to cross examine, present a complete defense, and right to unbiased judicial intervention?

Wherefore, for the reasons above, this Court should grant certiorari and set precedent to protect the integrity of a post conviction proceedings in New York state and hold the misconduct occurred in this case-a violation of a criminal defendant's due process rights because while police detective was whispering into the ear of the witness, said witness was simply repeating what the detective was whispering to him thereby petitioner's right to cross examine and confront as well as his right to present a complete were all denied, such misconduct should never happen anywhere especially

in the open court and for such other and further relief as this court deems just and proper.

cc; Queens District Attorney's office

  
Farid Popal, pro se  
06A2870  
WENDE Correctional  
Facility, 3622 Wende  
Rd II PO. Box 1187  
Alden, NY. 14004-1187.

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A

### REASONS FOR GRANTING

With the continuing advancement of face-to-face video technology in our society, it is inevitable that the Supreme Court is going to address this technology's clash with our Constitutional rights. The clash of this technology with our constitutional rights have been more evident in this case when, without any guidance from the Supreme Court directing the method and designating a place (i.e. a place where the witness is not pressured to testify in favor of the prosecutor or police), where a face-to-face video conference can commence, the police and the prosecution's office are using this windfall and taking witness to police stations, surround him with a team of detectives and literally whispering answers into the ear of witness to defeat a criminal defendant's motion.

Here, the Supreme Court's failure to address issues related to the use of two-way video has created an unjust and unconstitutional windfall for the state prosecutors and police to violate our Confrontation Clause rights, our right to present a complete defense and the right to have witness provide testimony without being coached by the law enforcement.

Petitioner's case presents a novel issue worthy of this Court's review because the Supreme Court must provide guidance establishing (a) whether two-way video conference in legal proceedings must be commenced from a designated place rendering the testimony impervious to police coercion and coaching the witness; (b) whether the documented whispering into the ear of testifying witness who was actively giving testimony in Court via SKYPE violated petitioner's constitutional rights; (c) whether police

whispering into the ear of testifying witness compelling him to literally repeat what the case detective whispered into his ear were violations of petitioner's right to present a complete defense; right to cross examine; and right to due process when witness provided scripted testimony in open court.

The Supreme Court has stated the literal meaning of the Sixth Amendment guarantees defendant "a right to meet face to face [witness against them]." The Court has yet to determine whether live two-way video conferencing testimony conducted from a police station and witness literally repeating what case detective was whispering into his ear violates a criminal defendant's constitutional rights.

Currently, as detailed in the case history, despite the fact that the presiding Judge admonished the witness not to seek help from the police when answering questions and just look at the camera not at the detective and knew that the witness was testifying from a police station not a U.S. Courthouse. The Court did not see a violation and used witness' scripted testimony to deny petitioner's meritorious motion. See pages 170,171,185,186 of petitioner's evidentiary hearing transcripts annexed here as Appendix (D)

#### CIRCUIT SPLIT

The Eighth Circuit, in comparing one-way video testimony and the use of two-way testimony, held that two-way video testimony violated the defendant's confrontation rights under the Sixth Amendment. See Bordeaux, 400 F.3d at 555.

The Eleventh Circuit held that the Two-way video teleconference violates the Sixth Amendment. See United States v. Yates, 438 F.3d 1307 (2006) (en banc).

The Second Circuit Fashioned the "Exceptional Circumstances" Test. For its part, the Second Circuit considered the use of two-way television testimony and held that it did not violate the Sixth Amendment of the Constitution. See United States v. Gignat, 166 F.3d. 75, 78.

Consequently, since the United States Supreme Court never addressed this very important and essential technology now commonly being used in Court rooms across the Country. The Court should address this issue and provide constitutional protection and close the loop holes being used by the prosecution's office to violate a criminal defendant's rights. Certainly, if it is not allowed and unconstitutional for a detective to sit next to a testifying witness in open Court to whisper answers into his/her ears to win cases; it should also be unconstitutional when the prosecution misused the two-way technology, hid a detective at a blind side of the SKYPE camera to enable him whisper answers in witness' ear to defeat petitioner's motion. This conduct should be held unconstitutional and a violation of criminal defendant's due process rights.

#### CONCLUSION

Here, the petitioner is not asking the Court to change its holding handed down in Lackawanna City. Dist. Att'y V. Coss, 532 U.S. 394, 402, that did not provide a mechanism for criminal defendants to have a constitutional right to post conviction remedies. But rather, once the state provides a hearing in a post conviction motion, the constitution should protect the required legal proceedings inside the Court room as it does in criminal trials. More specifically, protecting the witness against being

coaches and answers whispered into his ear to defeat petitioner's motion.

Certainly, while the petitioner argued this case many times in New York State, the lack of his ability and not having an attorney impeded him to persuade a Judge to see the significance of this issue as it relates to every criminal defendant in the United States.

Wherefore, the defendant-petitioner is praying that this Court see the merits of the issue presented and if more elaboration is needed to appoint counsel so that the petitioner can provide more evidence establishing that this District Attorney's office and the lead detective in this case, as relevant to the instant motion, literally fabricated evidence to defeat petitioner's motion that was based on newly-discovered evidence.

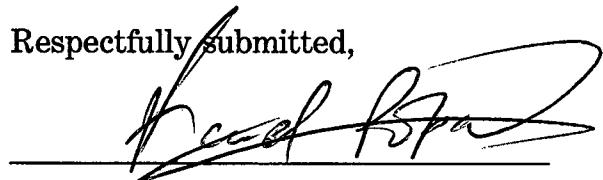
More specifically, in this murder case that offered no body, DNA, confession, weapon and the entire case was built upon drawing inference from another inference without solid factual foundation. In 2017, the prosecution's lead witness recanted alleging he was mislead to falsely testify against the petitioner.

Of course, this fact did not set well with the lead detective and the district attorney's office and subsequent to the evidentiary hearing when witness' material trial testimonies were all fully corroborated by independent government agency generated information. He was intimidated and taken to a police station to recant his recantion via SKYPE while being surrounded by police. Please see, Case History

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kendall R. Brown". The signature is fluid and cursive, with "Kendall" and "Brown" being the most distinct parts.

Date: May 7, 2020