

20-685
Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Mr. LaVon Oden
Prisoner ID #715-906
P.O.Box 1812
Marion, OH 43302

Supreme Court, U.S.

FILED

MAR 05 2021

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Re: LaVon Oden
v. Neil Turner, Warden
No. 20-6856

Now comes, LaVon Oden respectfully moves this court pursuant to USCS Supreme Ct R. 44, for petition for rehearing of writ of certiorari in the above and titled case which was denied February 22, 2021 and received this day of March 1st 2021. This petitioner reasserts his arguments for this petition for rehearing.

Respectfully Submitted,

LaVon Oden

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GROUND TWO- Pursuant to the manifest necessity doctrine, Perez prescribes a case by case approach, taking into account all the facts and circumstances to determine whether there was i.e., a high degree of necessity for the mistrial declaration. Sound discretion exists where the trial judge acts responsibly and deliberately rather than irrationally or irresponsibly.

In this case, Petitioner made a motion for mistrial after hearing testimony from Boston that he spoke to witness Darryl Craig, while in lock up. Boston testified Craig helped him remember some facts about the case.

It is unclear how Boston's testimony was influenced, because when the petitioners trial counsel attempted to question Boston about what was discussed, the prosecution objected and the trial court sustained the objection.

When the trial court sustained the objection preventing counsels inquiry into this issue; trial counsel was denied adversarial testing to determine if and how Craig influenced Boston's testimony. Since counsel was prevented from performing the necessary adversarial testing to determine the possible prejudice; prejudice should be, must be, presumed pursuant to United States v. Cronic, 466 U.S. 648, at 659 (May 14th 1984).

Since, the petitioners convictions were based solely on the testimony of these witnesses; The trial court clearly did not act responsibly. The trial court therefore abused its discretion by; Overruling the motion; and preventing counsels inquiry into Craig and Boston's conversation. See Ground two in habeas petition for further support.

GROUND THREE- U.S. Supreme Court explained a defendant must show counsels representation fell below an objective standard of reasonableness. The reviewing court must evaluate the reasonableness of counsels performance within the context of the circumstances at the time of the alleged error.

The appellate court already determined this evidence is inadmissible in their opinion and journal entry. See State v. Oden, 2016 Ohio App. Lexis 3817. Therefore, the first prong requiring: the petitioner to show that counsels representation fell below a reasonable standard has already been determined and this court can proceed directly to the prejudice prong.

To satisfy the prejudice prong of the Strickland test, a defendant must show that there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. A habeas petitioner is not entitled to a presumption of prejudice unless it can be said that his counsel failed meaningfully to oppose the prosecutions case.

Prejudice can be demonstrated under Strickland standard because the hearsay evidence that was introduced influenced the jury in drawing the conclusion of guilt.

Counsels failure to object to the evidence was unreasonable

considering, the context of the circumstances at the time of the alleged errors. Counsel's failure to object allowed the state to introduce a third eyewitness, to the jury, that was never subject to cross examination.

Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself unreliable. No specific showing of prejudice was required because the petitioner had been denied effective cross examination which would be a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. United States v. Cronic, 466 U.S. 648, at 659.

If prejudice is to be presumed in a situation denying the petition to meaningful adversarial testing, as demonstrated above, then prejudice must be presumed in this case.

As described above, pursuant to Strickland, a habeas petitioner is not entitled to a presumption of prejudice unless it can be said that his counsel failed meaningfully to oppose the prosecution's case. The AEDPA standard, demonstrates an incorporation of Cronic into the Strickland standard. If prejudice is to be presumed then the appellate court's application of the Strickland standard in requiring the outcome of the trial to be different was in error. The appellate court clearly did not review the case taking into consideration the Cronic exceptions.

In conclusion, the lack of the adversarial testing of the hearsay evidence by trial counsel rendered the trial proceedings fundamentally unfair. When trial proceedings are fundamentally unfair prejudice has been demonstrated pursuant to Lockhart, Cronic and Strickland. See Ground Three in Habeas petition for further support.

2) Counsel was Ineffective for failing to renew the motion for mistrial;

Had counsel renewed the motion for mistrial at the conclusion of trial; the court may have conducted the necessary inquiries into this issue to determine the actual effect on the proceedings. This issue could have been better addressed by the court once all of the relevant facts were presented; therefore, counsel should have renewed the issue at the conclusion of proceedings.

~~GROUND FOUR~~ This court has held the position that a concession of guilt does not amount to ineffective assistance of counsel, *per se*. The Court stated, a complete concession of guilt is a serious strategic decision that must only be made after consulting with the client and after receiving the client's consent or acquiescence. This court placed the burden on the petitioner to show that he was not consulted and that he did not agree to or acquiesce in the concession strategy.

There are two separate instances in which trial counsel conceded to the guilt of the petitioner.

First, during the questioning of Boston counsel stated, I'm agreeing that Lavon was the shooter. This statement, without

a jury instruction; or limitation to questioning was inappropriate. Trial counsels failure to phrase this statement clearly, as to the context, was highly improper, amounting to ineffective assistance of counsel. Counsels negligent actions directly influenced the jury to draw an assumption of guilt. Therefore counsels negligent actions prevented a fair trial from being possible and counsels statement fell below an objective standard of reasonable attorney representation. Counsel failed to get permission for the use of this tactic. See Ground Four in habeas petition for further support.

GROUND FIVE- This court uses a two-step analysis when considering whether a pretrial identification procedure raises a very substantial likelihood of irreparable misidentification. First determining whether the identification procedure was impermissibly suggestive, and if it was, then looking to the totality of the circumstances to decide whether the identification was still reliable.

At the first step, Petitioner claims the photo array (or photo line up) was impermissibly suggestive because four of six photos did not resemble defendant.

The second step, is the totality-of-the-circumstances analysis, the Supreme Court enumerated the five factors for consideration; 1) the opportunity of the witness to view the criminal at the time of the crime. In this case, the crime occurred at night and it was dark. Further the crime occurred quickly. Mr. Johnson was in the front drivers seat; and allegedly the shooter was on the outside of the car, on the right back passenger side so his ability to see the shooter clearly is doubtful. Mr. Johnson could not have seen who fired the shot either because the shot was fired after he drove off.

2) the witness degree of attention to the crime. In this case In Johnsons February 5th statement in 2013 he stated, I dont remember seeing Boston this clearly demonstrates that Johnson was not paying attention to the perpetrators as they approached the vehicle.

3) the accuracy of the witness prior description of the defendant. In this case, in Johnsons initial description he said I have no idea. He was a black guy. When asked is there anything that stood out to you, like if you look at a group of people? Johnson replied No sir. No sir. When asked do believe that if you saw a picture of him again you would recognize him? Johnson replied Maybe. I dont.

4) the level of certainty demonstrated by the witness at the confrontation. In this case, at the february 5th interview Johnson stated Somedays I feel like I will know if I see a picture, but I dont, I dont know.

5) the length of time between the crime and confrontation. In this case, Mr. Johnson admitted to the ~~negative~~

CERTIFICATE AND AFFIDAVIT OF
LaVon Oden

I LaVon Oden, state that these grounds presented for petition for rehearing are limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented.

LaVon Oden further states and certify that the petition for rehearing is presented in good faith and not for delay, due to covid 19 and other legal disadvantages and restrictions to the prison library.

Respectfully Submitted



Sworn to and subscribed in my presence on this day of march, 24
2021.

Notary Public



SARAH A COLEGROVE
Notary Public
In and for the State of Ohio
My Commission Expires
November 15, 2021

