No. 20-8046

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

***SHAWN BISHOP*, PETITIONER**

vs.

SUPERINTENDENT SMITHFIELD SCI, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mr. Shawn Bishop, #FQ-6133
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QUESTION(S) PRESENTED

1.Does a curative instruction remedy a Confrontation Clause violation where the evidence used to convict is scant and the co-defendant's alleged confession was the only direct evidence of Petitioner's guilt; and was trial counsel derelict in not objecting to instruction as being suffice to cure Confrontation Clause violation?

2. Is a Petitioner's right to due process violated when a prosecutor in closing arguments vouches for the credibility of its witnesses, and trial counsel objects, but fails to request remedial instruction to cure the comments?

3. Can a State evidentiary ruling deny a defendant due process if it prevents him from putting forth evidence that supports the defense theory of the case?

4. Can a defendant be convicted of first-degree murder and sentenced to life without the possibility of parole where he is charged as an accomplice but never knew or participated in the actual crime?

LIST OF PARTIES

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

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

SUPREME COURT CASES *PAGE NUMBER*

FEDERAL APPEAL COURT CASES *PAGE NUMBER*

STATE COURT CASES

STATUTE AND RULES *PAGE NUMBER*

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

The opinion of the United States court of appeals appears at Appendix "A" to the petition is *unpublished.*

The opinion of the United States district court appears at Appendix *"B"* reported at 2020 U.S. Dist. LEXIS 49988 (March 23, 2020).

The opinion of the United States Magistrate Judge appears at Appendix *"C"* reported at 2019 U.S. Dist. LEXIS 95986 (June 5, 2019).

JURISDICTION

The date on which the United States Court of Appeals decided my case was February 18, 2021.

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

CONSTITUTIONAL PROVISIONS INVOLVED

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. ***Amendment 6 Rights of the accused.***

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 21, 2014, Petitioner initiated a habeas corpus petition ("petition") in the United States District Court for the Eastern District of Pennsylvania, 28 U.S.C. § 2254 after exhausting state court remedies. Several of the claims raised in the petition were not raised in the state court, however, Petitioner argued that the procedural default be excused under this Court's precedent in **Martinez v. Ryan**, 566 U.S. 1 (2012).

The United States District Court for the Eastern District of Pennsylvania denied the petition without a hearing. Thereafter, Petitioner sought a Certificate of Appealability in the United States Court of Appeals for the Third Circuit. The request was denied on February 18, 2021.

Petitioner seeks redress in this Court to correct a clear malfunction of the Pennsylvania State Court judicial system in convicting him of first-degree murder despite his rights being violated in contravention of the Sixth and Fourteenth Amendments rights of the United States Constitution.

RELEVANT FACTS

Petitioner was tried with a co-defendant Kamil McFadden (McFadden) for the shooting death of Asmar Davis. The prosecution sought to introduce the confession of Petitioner's co-defendant McFadden by calling Rahjai Black (Black) to testify to the contents of McFadden's confession. Prior to the testimony of Black, the judge and prosecutor admonished Mr. Black not to mention the name of Petitioner Shawn Bishop. On direct examination by the prosecution the following testimony was elicited by the prosecutor:

> Q. Once Mr. McFadden saw the white car, what, if anything, did Mr. McFadden do? What did he tell you he did once he saw the car with Mr. Davis?
>
> **A. He didn't do anything. *Shawn* drove.**

Immediately following this exchange, trial counsel *objected* and a sidebar discussion was held and the following took place:

> ***TRIAL COUNSEL***: I would ask for a *mistrial*, judge. He already said what happened. The guy told him he killed him. Now what did you see when you saw him in a car? There is no reason for him to be asked any questions about that, judge.

> ***THE COURT***: I thought you had cautioned him on that about [Petitioner], Ms. Ruiz?.....
>
> ***THE COURT***: *I will certainly caution the jury at this* point. I will not grant a mistrial because there will be other testimony about that.
>
> ***[SIDEBAR CONCLUDES]***
>
> ***THE COURT:*** *jurors, I want to caution you, what Mr. Black testifies what Mr. McFadden told him about himself, Mr. McFadden, you can take as evidence; however, anything that Mr. Black says that Mr. McFadden told him about anybody else, including [Petitioner], is not evidence in this case....*
>
> N.T. 11/4/03 at 10-11; 172-75.

It merits mention that the prosecutions key witness against Petitioner, Harry Gadson, preliminary hearing testimony was read into the record at trial because he was deemed unavailable. Mr. Gadson's last words read into the record were "Petitioner had nothing to do with the crime as I had nothing to do with the crime." N.T. 11/6/03 at 87-88. Mr. Gadson was never charged with any crime.

During the prosecutions summation, the following occurred:

> Mr. McFadden got people that wouldn't tell. Mr. Bishop [*petitioner*] surely wasn't going to tell, and Mr. Gadson didn't tell anyone, unless maybe he

told his sister because remember what he said at the preliminary hearing, after I left, I went to my sister's house. Bidia Hayman was his sister.[1]

N.T. 11/10/03, at 41-42.

He is willing to sit here and lie to you about what he knows? *Don't think for one minute that, in fact, when he spoke to the feds, or even when he spoke to Detective Pirrone,* ***that some of that stuff is not checked out.***
Do you think that the federal authorities or any authority's just mamby-pamby *believe what he had to say, or* ***do you think that maybe they checked it out?***
TRIAL COUNSEL: *Objection. There is no evidence that the feds—how did they check it out?*
THE COURT: I will sustain that. There is no evidence of that.

N.T. 11/10/03, at 55-56.

Well, Detective Pirrone didn't just stop there. What did he say to you? ***He says I was going to check out what it was that Gadson had to say***. He didn't just as soon as he heard Gadson and what he had to say, that he just went ahead and arrested these two men. ***He went and checked it out.***
TRIAL COUNSEL*: Objection. There is no evidence anybody checking anything out.*
PROSECUTOR: So, he testified to you, ***yes, I checked it out,*** *and I was talking to other people.*

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[1] The trial judge had already instructed the prosecutor about this witness. *THE COURT:* I ruled. **Bidia Hayman, anything he has done with Bidia Hayman is not admissible**. N.T. 11/6/03, at 41; see also 40-45.

> ***TRIAL COUNSEL***: *Objection. What does that mean? Did other people cooperate when it is not true?*
>
> *N.T. 11/10/03, at 56-57.*
>
> **PROSECUTOR***:* He interviewed several people. One of the people that he interviewed was Mr. Gadson's sister. She is not here.
>
> Do you remember when he said I went home to my sister. Is it a coincidence that neither Mr. Gadson nor his sister are here? Do you *think that maybe the sister had some information that would be helpful-*
>
> **TRIAL COUNSEL***: This is way, way out of line. This is the fourth time.*
>
> N.T. 11/10/03 at 57-58.

Petitioner was found guilty as an accomplice and sentenced to a mandatory life without parole to be served in the Pennsylvania Department of Corrections. He comes before the high court of the land seeking to vindicate his rights substantiated by the United States Constitution.

REASONS FOR GRANTING WRIT OF CERTIORARI

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1. *Does a Curative Instruction Remedy a Confrontation Clause Violation Where the Evidence Used to convict is Scant and the Co-Defendant's Allege Confession Was the Only Direct Evidence of Petitioner's Guilt; And Was Trial Counsel Derelict in Not Objecting to Instruction as Being Suffice to Cure Confrontation Clause Violation?*

The Rule of **Bruton v. United States**, 391 U.S. 123 (1968), promulgated by this Court, held that incriminating out-of-court confessions of co-defendant who did not take the witness stand and could not be cross-examined is inadmissible, under confrontation clause of Sixth Amendment, at joint trial when, despite *instructions to contrary*, there is substantial risk that jury will look to out-of-court statement in deciding guilt of other defendant, is applicable to state trial proceedings.

This claim presented to the United States District Court for the Eastern District of Pennsylvania alleging inter alia that trial counsel's performance was deficient for not objecting to curative instruction to remedy a violation of Petitioner's confrontation

clause rights, when Rahjai Black mentioned Petitioner's name while testifying regarding a confession given to him by Petitioner's co-defendant Kamil McFadden in joint trial, was not presented to the Pennsylvania state courts. *See Appendix "C."*

Petitioner presented the claim under this Court standards enunciated in **Martinez v. Ryan**, 566 U.S. 1 (202). **Martinez** recognized a "narrow exception" to the general rule that attorney errors in collateral proceedings do not establish cause to excuse a procedural default, holding, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9.

The district court in a run of the mill opinion claimed that trial counsel did object, therefore, he could not be found ineffective for something that he did do. *See* Report and Recommendation (R&R) at 25; Appendix "C"; *See* Appendix "B" (district court judge adopting R&R). The Third Circuit Court of Appeals denied request for Certificate of Appealability. *See Appendix "C."*

Petitioner respectively disagrees with the district court interpretation of this Court' clearly established federal law in **Bruton**, and avers that he has experienced an extreme malfunction of the State's criminal justice system for which federal habeas relief is the remedy. Reasonable jurist would not debate that the district court unreasonably applied this Court's ruling in **Bruton v. United States**, supra.

A cursory review of the state court record contradicts the findings of the district court which in turn allowed Petitioner's right to confrontation to be infringed and a conviction for first-degree murder accompanied by a life-without parole sentence to stand.

As discussed in the ***Statement of the Case***[2], ***pgs* 4-8**, trial counsel objected to the mention of Petitioner's name, but did not object to the giving of a curative instruction as a remedial measure to cure taint held by this Court as not acceptable and not adequate to substitute for a defendant's constitutional rights of cross-examination. **Bruton**, at 137.

[2] Petitioner refers to Statement of the Case for the sake of redundancy.

A review of the trial record refutes the findings of the district court. Trial counsel agreed that a curative instruction would suffice to a cure a violation of Petitioner's right to confrontation because he failed to object to the instruction. A decision {strategy}that this Court held is insufficient due to the harm it imposes on the jury. Trial counsel's inactions were magnified wherein the inadmissible evidence {co-defendant's confession} was the only damning evidence against Petitioner.

After the testimony of Harry Gadson's preliminary hearing transcripts were read into the record, the court recessed for the morning. Upon returning, trial counsel offered a motion for judgment of acquittal. Counsel argued that there was no evidence that Petitioner knew what McFadden {co-defendant] intended to do. The prosecutor stated, " I am not saying it is the strongest case in the world and, of course, I would have loved to have Mr. Gadson here to testify....it is enough to go to the jury." T.T> 11/6/03, at 89-92. The trial judge allowed the case to go to the jury, but stated, "***It is extremely weak, I agree.***" Id. at 93.

Notably, the trial judge stated to the defense, "I will tell you if the jury should convict him, I would certainly reexamine this issue on post-sentence motions very strenuously..."id. at 94. After Petitioner's conviction, trial counsel failed to file any post-sentence motions.

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2. *Is a Petitioner's Right to Due Process Violated When a Prosecutor in Closing Arguments Vouches for the Credibility of its Witnesses, and Trial Counsel Objects, But Fails to Request Remedial Instruction to Cure the Comments?*

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Over a half-century ago, this Court explained in **Berger v. United States**, 295 U.S. 78 (1935), that the prosecutor has a special obligation to avoid "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should carry none.

Like issue (1), this claim was not presented to the Pennsylvania state court, but argued for the first time in the United States District Court for the Eastern District of Pennsylvania under the standard articulated by this Court in **Martinez v. Ryan**, 566 U.S. 1 (2012).

As discussed in the ***Statement of the Case*** Section pgs. **4-8**, the prosecutor's remarks were highly incendiary and denied Petitioner a fair trial. In **United States v. Young,** 470 U.S. 1 (1985), this Court expressly stated the prosecutor vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: Such comments convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor opinion carries with it the imprimatur of the government and may indue the jury to trust the government's judgment than its own view of the evidence. *See* ABA Standards for Criminal Justice.

Throughout closing arguments, at least four instances the prosecutor repeatedly interjected comments geared to solidify the veracity of the State's witnesses. This type of decorum is prohibited and frowned upon by the courts. *See* **Marshall v. Hendricks**, 307 F.3d 36, 65 (3d Cir.2002)(improper for prosecutor to state that

government witness was telling the truth); **U.S. v. Delgado**, 631 F.3d 685, 700 (5th Cir.2011), on reh'g en banc, 672 F.3d 320 (5th Cir.2012)("It is axiomatic that prosecutor cannot express to the jury their personal opinions concerning the credibility of witnesses or the defendant."); **U.S. v. Cornett**, 232 F.3d 570, 575 (7th Cir.2000)("Improper vouching occurs when a prosecutor expresses her personal opinion about the truthfulness of a witness or when she implies that facts not before the jury lend a witness credibility...").

Here, the prosecutor's actions denied Petitioner a fair trial. Because the remarks were of such nature that they lead the jury to believe that evidence existed that was not presented to them that established Petitioner's guilt, trial counsel's inactions in not requesting at a minimum, a curative instruction, denied Petitioner his rights guaranteed under both the Sixth and Fourteenth Amendments to the United States Constitution.

A review of the closing arguments shows that the prosecutor struck "fouls blows" instead of "fair blows." For instance, the prosecutor was admonished not to mention the sister of the key

witness Harry Gadson, Bidia Hayman, during closing arguments. The prosecutor ignored that admonition from the trial judge and continued her assault on Petitioner's right to a fair trial. T.T. 11/6/03, at 40-45.

The district court opinion which the Third Circuit Court of Appeals adopted unreasonably applied this Court's precedent in determining that the remarks were not improper to the level of denying Petitioner a fair trial.

In **Strickland v. Washington**, 466 U.S. 668, 80 L.ed.2d 674, 104 S.Ct. 2052 (1984), this Court ruled that a defendant alleging ineffective assistance of counsel must demonstrate that: (1) his attorney's performance was deficient, and (2) he was prejudiced by the deficiency. Id. at 687.

In the case at bar, the comments made by the prosecutor were objectionable as shown by trial counsel's actions and the trial court's sustaining of the objection. However, without a curative instruction the comments unfairly denied Petitioner a fair trial and his right to effective assistance of counsel for his defense.

3. *Can a State Evidentiary Ruling Deny a Defendant Due Process if it Prevents Him From Putting Forth Exculpatory Evidence That Supports the Defense Theory of the Case?*

.....

In **Chambers v. Mississippi**, 410 U.S. 284 (1973), this Court ruled that **Chambers** rights were violated by a State rule that a party may not impeach his own witness. This rule applied so as to preclude the accused from cross-examining a witness called by the accused to introduce such witnesses written confession of the crime, the accused having sought to cross-examine the witness as an adverse witness after the witness, on cross-examination by the State, repudiated his written confession and asserted an alibi, and that the States hearsay rule was applied so as to preclude the accused from introducing testimony, critical to the defense of 3 other witnesses as to 3 separate oral confessions allegedly made to them by the first witness shortly after the crime.

Instantly, the Pennsylvania Rules of Evidence 806 in relevant part states the following:

Rule 806. *Attacking and Supporting the Declarant's credibility*

> When a hearsay statement has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

At the trial in the instant matter, Petitioner's co-defendant sought to introduce testimony pursuant to clearly established Pennsylvania Rules of Evidence, specifically Rule 806. The evidence consisted of statements from Rosemary Westbrook and Leroy Drayton the parents of Petitioner's co-defendant. Mrs. Westbrook and Mr. Drayton would have testified that Harry Gadson, the key witness, stated during an encounter after the preliminary hearing that he was forced to testify as he did at the preliminary hearing and apologized to the parents because the police forced him to testify as he did.

The trial court did not allow this testimony notwithstanding the fact that this evidence fell squarely within the parameters of Pa.R.E. 806. Moreover, the trial court's ruling denied Petitioner his Sixth Amendment right to compulsory process. *See* ***Government of Virgin Islands v. Mills****, 956 F.2d 443, 445-46 (3d* Cir. 1992)(discussing the right of the accuse to offer testimony of favorable witnesses and "to have compulsory process for obtaining witnesses in his favor.").

As a result of the arbitrary state court ruling, an innocent man remains behind bars serving a sentence of first-degree murder without the possibility of parole where the only evidence that somewhat implicates him could not be challenge denying him due process of law.

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4. *Can a Defendant Be Convicted of First-Degree Murder and Sentenced to Life Without the Possibility of Parole Where He is Charged as an Accomplice But never Knew or Participated in the Actual Crime?*

.....

It is well established, however, that a defendant, who was not a principal actor in committing the crime, may nevertheless be

liable for the crime if he was an accomplice of a principle actor. See 18 Pa.C.S. §306; see also **Commonwealth v. Bradley**, 392 A.2d 688, 690 (Pa.1978)(the actor and his accomplice share equal responsibility for commission of a criminal act). A person is deemed an accomplice of a principle if "with the intent of prompting or facilitating the commission of the offense, he: (i) solicit the principle to commit it; or (ii) aided or agreed or attempted to aid such other person in planning or committing it." 18 Pa.C.S. §306; **Commonwealth v. Spotz**, 716 A.2d 580, 585 (Pa.1998). Accordingly, two prongs must be satisfied for a defendant to be found guilty as an accomplice." See **Commonwealth v. Woodward**, 614 A.2d 239, 242 (Pa.Super.1992). First, there must be evidence that the defendant intended to aid or promote the underlying offense. Id.

Second, there must be evidence that the defendant actively participated in the crime by soliciting, aiding, or agreeing to aid the principle. Id. While these two requirements may be established by circumstantial evidence, a defendant cannot be an *accomplice simply based on evidence that he knew about the crime or was*

present at the crime scene. **Commonwealth v. Wagman**, 627 A.2d 735, 740 (Pa.Super.1993). There must be additional evidence that the defendant intended to aid in the commission of the underlying crime, and then aid or attempted to do so. Id. With regard to the amount of aid, it need not be substantial so long as it was offered to the principal to assist him in committing or attempting to commit the crime. See **Commonwealth v. Cox**, 686 A.2d 1279, 1286 (Pa.1997).

The clearly established federal law governing this claim is **Jackson v. Virginia**, 443 U.S. 307 (1979). Under **Jackson**, "the relevant question is whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. 443 U.S. at 319 **citing Johnson v. Louisiana**, 406 U.S. 356, 362 (1972).

At the close of the prosecution's case, trial counsel requested a motion for acquittal based upon insufficient evidence. After a brief discussion between all parties, the trial court stated the following: Mr. Santiguida [trial counsel] it is extremely weak, I agree, but I

have to look at every inference in favor of the Commonwealth....*I will tell you if the jury should convict him, I would certainly reexamine this issue on post-sentence motions very strenuously with case law hopefully, but at this point I will leave him in the case."* Id. T.T. 11/6/03, 93-94.

The State court record is clear that the case against Petitioner was extremely weak as stated by the trial judge. It violates due process where a conviction is secured when the elements of the crimes were not established or presented by the Commonwealth. That is exactly the case here.

Harry Gadson testified that "he had nothing to do with the crime as Petitioner had nothing to do with the crime." Mr. Gadson and Petitioner was in the car joy riding prior to the co-defendant entering the car. There was no evidence that these men conspired to meet up. There encounter was by happenstance.

As the result of Petitioner's conviction, an extreme malfunction of the state court process occurred.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Shawn Bishop

Date: May 7, 2021