No. _____

In The
Supreme Court of the United States

JASON WAYNE CARLILE,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals, Second Appellate District Of Texas

PETITION FOR WRIT OF CERTIORARI

LEONARD THOMAS BRADT
14090 Southwest Freeway, Suite 300
Sugar Land, Texas 77478
(281) 201-0700
Fax: (281) 201-1202
ltbradt@flash.net

Counsel of Record for Jason Wayne Carlile

TRACY D. CLUCK #00787254
12600 Hill Country Blvd., Suite R-275
Austin, Texas 78738
(512) 329-2615
Fax: (512) 329-2604
tracy@tracyclucklawyer.com
Of Counsel

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. May a defense attorney completely fail to subject the State's case to adversarial testing during a trial, without thereby depriving a criminal defendant of the effective assistance of counsel guaranteed by the Sixth Amendment and a fair trial guaranteed by the Fourteenth Amendment? (*Implicating Amend. V, VI and XIV, U.S. Constitution*)

2. Does it deny a Defendant Due Process of law when the Court of Appeals goes outside of the record on appeal to find that there was an intentional strategy engaged in with the approval of the Defendant, for defense counsel to not ask any questions during trial? (*Implicating Amend. V and XIV, U.S. Constitution*)

PARTIES TO THE PROCEEDING

Jason Wayne Carlile – Petitioner

State of Texas – Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

RELATED CASES

In re Jason Wayne Carlile, No. 02-19-00445-CV, in the Second Court of Appeals at Fort Worth, Texas. Memorandum Opinion issued December 6, 2019.

In re Jason Wayne Carlile, WR-90,715-01, in the Texas Court of Criminal Appeals. Leave to file denied without written order on December 9, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioner, Jason Wayne Carlile, respectfully petitions for a writ of certiorari to review the judgment of the Second Court of Appeals at Fort Worth, Texas.

OPINIONS BELOW

The Texas Court of Criminal Appeals refused a Petition for Discretionary Review without written opinion. One Justice would have granted on Issue Three. The notice of that refusal is reproduced at App. 26. Petitioner did not move for rehearing of that refusal. The judgment and opinion of the Second Court of Appeals at Fort Worth, Texas in Docket No. 02-19-00468-CR, affirming Petitioner's conviction, is unpublished and is reproduced at App. 1. There was no Motion for Rehearing.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals' refusal of the petition for discretionary review of the opinion of the Fourteenth Court of Appeals was issued on March 2, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). App. 26. This petition is timely filed.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides as follows:

> 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. U.S. Const. Amend. V

The Sixth Amendment to the United States Constitution provides as follows:

> 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 defence. U.S. Const. Amend. VI

The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows:

> . . . 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. U.S. Const. Amend. XIV

RELEVANT STATUTORY PROVISIONS

Article 39.14(a), Texas Code of Criminal Procedure, provides:

> Subject to the restrictions provided by Section 264.408, Family Code, and Article 39.15 of this code, as soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. The state may provide to the

> defendant electronic duplicates of any documents or other information described by this article. The rights granted to the defendant under this article do not extend to written communications between the state and an agent, representative, or employee of the state. This article does not authorize the removal of the documents, items, or information from the possession of the state, and any inspection shall be in the presence of a representative of the state.

STATEMENT OF THE CASE

Introduction

There is no reciprocal discovery in a criminal case in Texas. Only Article 39.14(a), TEX. CODE CRIM. PRO. and *Brady*[1] impose a duty on the State to produce evidence to the defense. Article 39.14(a) imposes a duty on the State to produce responsive evidence "as soon as practicable."

The State's belated production of hundreds of pages of documents in the two weeks before trial, was the production of Article 39.14(a), TEX. CODE CRIM. PRO. material, or it was the production of *Brady*/*Bagley* material, or both.

The question arises under *Brady* and *Bagley*[2] whether the production of exculpatory evidence must

---

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *United States v. Bagley*, 473 U.S. 667 (1985).

be at a time that affords a defendant sufficient time to properly and fully investigate the evidence that is ultimately produced.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On July 30, 2018, Jason Wayne Carlile was charged by two Indictments with Aggravated Sexual Assault of a Child, Cause Numbers 60829-B*1-2 and 60817-B. One of the Indictments alleges that the complaining witness was under 14 years of age, while the other alleges the complaining witness was under 6 years of age. On May 15, 2019, Cause Number 60829-B*1-2 was dismissed and re-indicted as Cause Number 61562-B*1-9. In Cause Number 61562-B*1-9, Jason Wayne Carlile was charged by Indictment with four counts of Aggravated Sexual Assault of a Child, and five counts of Sexual Assault of a Child.

On November 8, 2019, the indictment was amended.[3]

The case was set for trial on Tuesday, December 3, 2019—the week after Thanksgiving. Two weeks before trial, the State produced hundreds of pages of records—records which the State had previously denied existed, records which required an expert to review and records that disclosed the possible existence of exculpatory/impeachment evidence that would have

[3] C.R. pp. 358–359.

to be investigated. None of which could be done before trial.

The Wednesday before Thanksgiving, the State produced hundreds of pages of records—records which the State had previously sworn did not exist, records which required an expert to review and records that disclosed the possible existence of exculpatory/impeachment evidence that would have to be investigated. None of which could be accomplished before trial.

On December 3, 2019, Petitioner sought to continue the trial. The State opposed the continuance and the motion was denied.[4]

Voir began December 4, 2019.[5] On December 4, 2019, Petitioner sought mandamus from the Second Court of Appeals in Fort Worth, which denied relief. The Texas Court of Criminal Appeals also denied any relief.

On December 11, 2019, the jury convicted on all counts.[6] The jury assessed punishment at confinement for life and a $10,000 fine on Counts 1 and 2; the jury assessed punishment at confinement for twenty years and a $10,000 fine on each of Counts 3–8.[7] A judgment

[4] Had the continuance not been opposed and denied, defense counsel could have properly investigated the leads disclosed in the hundreds of pages of document and not been forced to stand mute by the State's actions.

[5] R.R. Vol. 11.

[6] C.R. pp. 496–514.

[7] C.R. pp. 520–524.

was entered on that verdict.[8] The court certified defendant's right to appeal.[9] A timely notice of appeal was filed.[10]

Petitioner appealed to the Second Court of Appeals in Fort Worth. Appellant raised and briefed the following points of error (phrased another way): Did the State violate its duty to promptly provide the defense with Art. 39.14 (*Brady*) material; Did the prosecutor violate Petitioner's due process rights and his duty to see that justice is done by waiting until near the trial date to turn over *Brady* and Art. 39.14 material to the defense; Did the trial court deprive Petitioner his fundamental right to a fair trial and the effective assistance of counsel by denying his motion for continuance; and, Was Petitioner denied his Sixth Amendment right to effective assistance of counsel and his Fifth and Fourteenth Amendment right to a fair trial when his attorneys failed to present a defense or otherwise participate in his trial? In an unpublished memorandum opinion, the Second Court of Appeals discussed and overruled Petitioner's four points of error. The Texas Court of Criminal Appeals denied discretionary review, with one Justice saying he would grant as to the third issue.

This timely petition for writ of certiorari follows.

[8] C.R. pp. 525–548.

[9] C.R. p. 549.

[10] C.R. pp. 550–551.

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is *de novo*.[11]

REASONS FOR GRANTING THE WRIT

Because of the position that she was placed in by the belated dump of *Brady/Bagley* material, Petitioner's attorney conducted no voir dire, exercised no strikes, made no opening statement, examined no witnesses, made no objections, presented no defense, made no closing argument and presented nothing on punishment. This denied Petitioner his Sixth Amendment guaranteed assistance of counsel and Fourteenth Amendment right to due process and a fair trial.

"The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense."[12] It is this Court's responsibility under the Constitution to ensure that no criminal defendant, whether a citizen or not, is left to

[11] *See Salve Regina College v. Russell*, 499 U.S. 225, 231–232 (1991).

[12] *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003).

the mercies of incompetent counsel.[13] Especially in light of this Court's holding that,

> " . . . 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 presumptively unreliable."[14]

Although a defendant generally bears the risk of attorney error that results in a procedural default, such error **cannot** be attributed to the defendant when counsel's performance is constitutionally ineffective.[15] When defense counsel does not even "fog a mirror", is that performance constitutionally ineffective and can that conduct ever be attributed to the defendant?

This Court has held that a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to

---

[13] *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

[14] *United States v. Cronic*, 466 U.S. 648, 659 (1984).

[15] *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

> deprive the defendant of a fair trial, a trial whose result is reliable.[16]

The State's belated dump of many hundreds of pages of records—records that required expert review and further investigation,[17] put Petitioner's trial counsel in a box. That box was, ask any questions and have everything determined to be trial strategy, or not participate in the trial to preserve the error for appellate review.[18] Stated another way, unless defense counsel **entirely** fails to subject the State's case to meaningful adversarial testing, the defendant loses the *Cronic* presumption of prejudice.[19]

Faced with this dilemma, Petitioner's attorney conducted no voir dire, exercised no strikes, made no opening statement, examined no witnesses, made no objections, presented no defense, made no closing argument and presented nothing on punishment.[20]

And, predictably, Petitioner was convicted on all counts, with the jury assessing the maximum punishments on all counts.

---

[16] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[17] C.R. pp. 433–438.

[18] *Rubio v. State*, 596 S.W.3d 410, 428 (Tex.App. Dallas 2020), citing *United States v. Cronic*, 466 U.S. 648 (1984), rev'd on other grounds, 638 S.W.3d 693 (Tex.Crim.App. 2022).

[19] *Rubio v. State*, 596 S.W.3d 410, 428 (Tex.App. Dallas 2020), citing *United States v. Cronic*, 466 U.S. 648 (1984), rev'd on other grounds, 638 S.W.3d 693 (Tex.Crim.App. 2022).

[20] Entire R.R..

The Fort Worth Second Court of Appeals affirmed, holding, *inter alia*, that counsel's failure to participate in the trial was "trial strategy" that Petitioner acquiesced in and was, therefore, "invited error."[21] The Fort Worth Second Court of Appeals did not hold that Petitioner was denied his constitutionally guaranteed effective assistance of counsel.

This "invited error" holding misapplies the concept of "invited error" as observed by this Court. As this Court noted, "[the] Courts of Appeals have stated more broadly under the 'invited error' doctrine 'that a party may not complain on appeal of errors that he himself invited or provoked the [district] court . . . to commit.' "[22]

Trial counsel's refusal to participate in the trial was not something that the trial court committed. It was something that trial counsel did after being put into the box of the State's creation.

IMPORTANCE OF CASE:

This Court has never delimited when the State must produce *Brady/Bagley* material. The facts of this case show that this Court's guidance in that area is sorely needed. Further, this case presents the question of whether a defendant may ever agree to his attorney not subjecting the State's case to meaningful

---

[21] App. 17–25.

[22] *United States v. Wells*, 519 U.S. 482, 487–488 (1997).

adversarial testing—unless that agreement affirmatively appears on the record.

It denies a Defendant Due Process of law when the Court of Appeals goes outside of the record on appeal to find that there was an intentional strategy engaged in, by defense counsel, with the acquiescence of the Defendant, for defense counsel to not ask any questions during trial.

It cannot be gainsaid that defense counsel's strategy to not subject the State's case to any adversarial testing was intentional, for the reasons set forth above.

This Court has never decided whether a defendant, who is represented by counsel, may agree to counsel's strategy to not subject the State's case to meaningful (any) adversarial testing. The Court's guidance in this area is needed.

Assuming, *arguendo*, that a defendant may agree to counsel's strategy to not subject the State's case to any adversarial testing, must that agreement be found in the record, or may the appellate court infer acquiescence from a silent record without violating the defendant's Fifth and Fourteenth Amendment Due Process rights?[23]

While the trial court sent Petitioner and his counsel out to discuss her strategy, as that "strategy" was stated in the record by the District Attorney, the record is silent as to any colloquy between the court and

[23] App. 17–25.

Petitioner, or his counsel, as to whether he did or did not agree with his attorney's strategy to not subject the State's case to any adversarial testing, much less what was discussed between Petitioner and his attorney.[24]

To infer anything from a criminal defendant's silence is to violate that defendant's Fifth Amendment right to remain silent. It also ignores the conventional wisdom that defendants remain silent in court, unless and until they are questioned by the trial court or are called by their counsel to testify.

IMPORTANCE OF CASE:

This Court has never decided whether a defendant may (or must) agree to his counsel's decision to not subject the State's case to any adversarial testing. Should this Court decide that a defendant must agree to his counsel's decision to not subject the State's case to any adversarial testing, this Court should announce how that agreement must be reflected in the record on appeal.

CONCLUSION AND PRAYER

Petitioner prays that this Honorable Court grant certiorari to determine whether, when defense counsel conducts no voir dire, exercises no strikes, makes no opening statement, examines no witnesses, makes no objections, presents no defense, makes no closing argument and presents nothing on punishment, is that

[24] Entire R.R..

attorney constitutionally ineffective under the Sixth Amendment? Related thereto, Petitioner prays that this Honorable Court grant certiorari to determine when the State must produce *Brady*/*Bagley* material so as to not deprive a defendant of Due Process and the right to a fair trial.

Petitioner also prays that this Honorable Court grant certiorari to determine both whether a defendant may agree with trial counsel's strategy to not subject the State's case to meaningful adversarial testing; and, if so, how must that agreement be reflected in the record?

Petitioner prays for general relief.

Respectfully submitted,

LEONARD THOMAS BRADT
14090 Southwest Freeway,
Suite 300
Sugar Land, Texas 77478
(281) 201-0700
Fax: (281) 201-1202
ltbradt@flash.net

Counsel of Record for
Jason Wayne Carlile

TRACY D. CLUCK #00787254
12600 Hill Country Blvd.,
Suite R-275
Austin, Texas 78738
(512) 329-2615
Fax: (512) 329-2604
tracy@tracyclucklawyer.com
Of Counsel