

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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**Nathaniel B. Appleby-El,**

*Petitioner*

v.

**State of Maryland,**

*Respondent*

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**On Petition for Writ of Certiorari to the Court of Appeals of Maryland**

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**Petition for Writ of Certiorari**

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William L. Welch, III  
Counsel of Record  
5305 Village Center Drive, Suite 142  
Columbia, Maryland 21044  
wlw@wwelchattorney.com  
Telephone: (410) 615-7186  
Facsimile: (410) 630-7760  
(Appointed by the Maryland Office of the  
Public Defender)

## **Questions Presented**

1. Whether such extensive reliance on transcripts, denied Mr. Appleby-El's federal right of confrontation, because doing so effectively prevented him from cross-examining witnesses?
2. Whether the Circuit Court erred by admitting an alleged confession obtained by police?

## **Parties and Related Cases**

The names of all parties appear in the caption of the case on the cover page, and there are no related proceedings.

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**Petition for Writ of Certiorari**

Petitioner Nathaniel B. Appleby-El prays for the issuance of a Writ of Certiorari to review the Judgment of the Court of Special Appeals of Maryland.

**Opinions Below**

The Opinion of the Court of Special Appeals of Maryland appears at *Appendix A*. It is unpublished. The Circuit Court rulings appear at *Appendix B*. Likewise, they are unpublished.

**Jurisdiction**

Jurisdiction of the Supreme Court arises pursuant to the United States Code, because the Supreme Court may review final judgments rendered by the highest

court of a State by writ of certiorari, when any right is claimed under the Constitution of the United States. 28 U.S.C. § 1257(a).

On March 19, 2020 the Supreme Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the order denying a timely petition for rehearing. *See Order*, 589 U.S. \_\_\_\_ (Mar. 19, 2020); *see also* Rules 13.1 and 13.3.

On March 1, 2021, the Court of Appeals of Maryland denied certiorari. The Court of Appeals' Order appears at *Appendix C*.

Jurisdiction of the Court of Appeals arises pursuant to Maryland Code, Courts and Judicial Proceedings Article, section 12-201. Jurisdiction in the Court of Special Appeals was based upon Maryland Code, Courts and Judicial Proceedings Article, section 12-301, the final judgment in a criminal case, entered against Mr. Appleby-El on June 12, 2018 in the Circuit Court for Wicomico County. The Circuit Court's Judgment appears at *Appendix D*. Jurisdiction in the Circuit Court was based upon Maryland Code, Courts and Judicial Proceedings Article, Section 1-501, because the State of Maryland prosecuted petitioner for violations of the common law and the Maryland Code.

### **Constitutional Provisions Involved**

The Fifth Amendment to the United States Constitution provides:

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.

The Sixth Amendment to the United States Constitution provides:

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.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and 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**

Petitioner seeks review of the Maryland Court of Special Appeals' decision, finding an adequate opportunity for cross-examination, no proof of ineffective assistance of counsel, and that petitioner's statement was voluntary pursuant to *Miranda v. Arizona*. 384 U.S. 436 (1966).

On February 22, 1978 the State charged petitioner with felonious homicide, robbery and weapons offenses, common law battery, and kidnapping. Md. Code, Art. 27 §§ 410, 488, 36B, 337. See App'x to Md. Cert. Pet'n. at 5.

On May 12, 1978, a jury convicted of felonious homicide, robbery with a deadly weapon, and carrying a handgun; but that same jury found Appleby not guilty of using a handgun in the commission of a felony. *Id.* at 7. The remaining charges, alleging a different incident, were resolved by a plea bargain. *Ibid.*

On August 9, 2013 Appleby-El filed, *pro se*, a motion to reopen his post-conviction proceeding in the Circuit Court and consider his “*Unger* claim.” *See Id.* at 18; *Unger v. State*, 427 Md. 383 (2012).

Although the Circuit Court denied the motion, on November 19, 2015 the Court of Special Appeals ordered a new trial. *See Id.* at 41; App’n for Lv. to App’l, No. 1068 Sep. Term, 2014 (Unreported).

Counsel and Appleby-El filed pretrial Motions *inter alia* to dismiss the charging document and challenging transcripts. *See Id.* at 45, 47, 51, 58, 62; Md. R. 4-252. The Circuit Court denied them. *Id.* at 69.

From April 9 – 11, 2018 Appleby-El appeared for trial again in the Circuit Court on Counts One, Two, and Five. *Id.* at 6 – 7. He renewed his objections to introducing transcribed testimony. *Id.* at 85 – 87, 89 – 92, 118 – 124, 135. However, the Circuit Court overruled them. *Id.* at 114 – 117.

Over Appleby-El’s objection, Brian Deale’s testimony was read that when he was sixteen years old, he and his friend Pierre Smith saw a man lying in a Plymouth. Tr. Apr. 9, 2018 p.m. at 48:14 – 52:17. They did not open the door, and he did not touch anything. *Ibid.* They told his cousin Larry Fields, who called the police. *Ibid.*

Larry Fields testified that he drove Deale and Smith back to the Plymouth. Tr. Apr. 9, 2018 p.m. at 56:21 – 71:11. He saw a body slumped over, called the police, and Trooper Pollitt arrived. Ibid. Fields noticed a cab tag, but he could not say whether Deale or Smith had touched anything before he arrived. Ibid. He did not see Appleby-El. Ibid.

Trooper Pollitt testified that he responded, met Fields, and felt for a pulse. Tr. Apr. 9, 2018 p.m. at 71:12 – 84:10. Pollitt told investigator Lee Butler what they had, but he had no idea what had happened before he got there. Ibid.

Harold Lee Butler testified that his duties were to collect physical evidence. Tr. Apr. 9, 2018 p.m. at 84:12 – 129:11. He saw the deceased laying across the front seat of the vehicle, took photos, looked for physical evidence, and collected some. Ibid.

Over Appleby-El's objection, Vaughn Bounds' testimony was read that he owned the taxi that Charles Adkins drove, and Adkins' notepaper indicated that he got his last fare at Trailways, but not where he was going. Tr. Apr. 10, 2018 a.m. at 10:6 – 17:3.

Over Appleby-El's objection, Clarence Hitchens' testimony was read that he identified Adkins' body. Tr. Apr. 10, 2018 a.m. at 17:24 – 19:22.

The parties stipulated that Dr. Dixon's diagnosis was gunshot wound of the head with loose contact entrance in the right temple. Tr. Apr. 10, 2018 a.m. at 19:23 – 23:10.

Over Appleby-El's objection, Lena Adkins' testimony was read about being Charles' widow, seeing his tally sheet, and identifying a watch he wore. Tr. Apr. 10, 2018 a.m. at 25:13 – 34:23.

Over Appleby-El's objection, James Sturgis' testimony was read about giving his mother a wallet, medical card, and license that he found under his camper. Tr. Apr. 10, 2018 a.m. at 35:1 – 52:1. The Applebys lived behind him, but he did not know Nathaniel, and people come through Sturgis' back yard. Ibid.

Over Appleby-El's objection, Sturgis' foster mother Mabel Watkins' testimony was read about calling numbers from the wallet and Reverend Appleby living behind her. Tr. Apr. 10, 2018 a.m. at 52:3 – 59:3.

Over Appleby-El's objection, Trooper Gray's testimony was read about a wallet he received from Watson, the watch he saw when he searched Appelby's pockets, which he said belonged to his brother, and a revolver that he recovered from Nate Bingham. Tr. Apr. 10, 2018 a.m. at 59:5 – 84:10.

Over Appleby-El's objection, Nathaniel Bingham's testimony was read about buying the revolver from Abe Hutley. Tr. Apr. 10, 2018 a.m. at 67:23 – 79:1. Bingham said: "The type of work that I do, sometimes the man has some type of weapon. I might get robbed, so." Ibid. He did not try to get a permit, because he had a conviction. Ibid.

Abe Hutley a/k/a Washington testified that he could confuse Nathaniel Appleby with his brother. Tr. Apr. 10, 2018 a.m. at 80:9 – 103:23. After seeing a revolver in his jacket, Hutley took it to Wright's Market to get some things. Ibid.

Later, Hutley paid Wright money and got a gun back, but could not be certain it was the same gun. *Ibid.* After Hutley traded it to Bingham, two state troopers questioned him, got the gun at Bingham's house, and questioned Hutley some more, but he did not know what Bingham did with the gun. *Ibid.*

Over Appleby-El's objection, Trooper Lewis' testimony was read about interviewing him, "re-advis[ing] him of his rights again after he ... confessed[,]" typing the statement himself without a stenographer, and that the words are verbatim what was said. *Tr. Apr. 10, 2018 a.m. at 103:25 – 146:11.*

Appleby-El moved for judgment of acquittal at the conclusion of the State's case and all evidence, which the Circuit Court denied. *App'x to Md. Cert. Pet'n. at 6, 173 – 188.* The jury convicted. *Id. at 7.*

On June 11, 2018 the Circuit Court sentenced Appleby-El to life plus sixteen years. *Appendix D.*

### **Reasons for Granting the Petition**

#### **I. A State Court Has Decided an Important Federal Question in a Way that Conflicts with Relevant Decisions of this Court.**

Only if the defendant had an adequate opportunity to cross-examine the witness[es] at trial may prior trial testimony be admitted without violating the Confrontation Clause. U.S. Const. amend. VI; *see Crawford v. Washington*, 541 U.S. 36, 57 (2004), *citing, inter alia, Mancusi v. Stubbs*, 408 U.S. 204, 213–216 (1972).

No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308 (1974), because petitioner had been “denied the right of effective cross-examination[.]” *Id.* at 318, *citing Smith v. Illinois*, 390 U.S. 129, 131 (1968), and *Brookhart v. Janis*, 384 U.S. 1, 3 (1966).

#### **A. Standard of Review.**

When the Supreme Court reviews preserved constitutional trial error, the government must prove that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967).

#### **B. Analysis:**

##### **1. The Circuit Court Erred by Allowing Such Extensive Reliance on Transcripts, Because Doing So Denied Appleby-El the Right of Confrontation Again, Considering that his Counsel in his First Trial Failed to Competently Cross-Examine the Witnesses.**

Over objection (See App’x to Md. Cert. Pet’n. at 91), the Circuit Court admitted transcripts of:

Brian Deale’s testimony (*Id.* at 114 – 117; Tr. Apr. 9, 2018 p.m. at 29:20 – 32:8),

Vaughn Bounds’ testimony (Tr. Apr. 10, 2018 a.m. at 10:6 – 17:3),

Clarence Hitchens’ testimony (*Id.* at 17:24 – 19:22),

Lena Adkins’ testimony (*Id.* at 25:13 – 34:23),

James Sturgis’ testimony (*Id.* at 35:1 – 52:1),

Mabel Watkins’ testimony (*Id.* at 52:3 – 59:3),

Trooper Gray's testimony (Id. at 59:5 – 84:10),

Nathaniel Bingham's testimony (Id. at 67:23 – 79:1), and

Trooper Lewis' testimony (Id. at 103:25 – 146:11).

Although defense counsel in 1978 did not ask Deale any questions, defense counsel in 2018 proffered that he would have asked Deale:

- i) to be more specific about the time,
- ii) whether Pierre Smith touched anything,
- iii) how the door was opened,
- iv) whether it was obstructed,
- v) whether at sixteen Deale knew the difference between the truth and a lie.

(See App'x to Md. Cert. Pet'n. at 125);

Vaughn Bounds:

- i) about the procedure for the clipboard;
- ii) how Adkins used the clipboard, specifically whether he would have written down where he was going;
- iii) the proper procedure for recording fares and addresses;
- iv) Bound's knowledge about Adkins' relationship with Lena Adkins, specifically whether they were living together, because they were separated; and
- v) if Bounds recalled Adkins wearing a black digital wristwatch.

(Id. at 159 – 160);

Clarence Hitchens:

- i) about his knowledge of Adkins' relationship with Lena Adkins, specifically whether they were living together, because they were separated; and
- ii) if Hitchens recalled Adkins wearing a black digital wristwatch.

(Id. at 160 – 161).

Prior to the reading of the Transcript of Lena Adkins, defense counsel in the 2018 trial proffered that:

- i) Vaughn Bounds, another deceased witness, would have testified that Lena and Charles Adkins were separated;
- ii) that she would not have been able to identify the watch, because of the separation; and
- iii) that Bounds would have contradicted Lena's statement about seeing her husband on December 24<sup>th</sup>.

*Id.* at 127 – 133.

Defense counsel also proffered that he would have asked:

Lena Adkins:

- i) the status of her marriage and their living situation on the days before and including December 23<sup>rd</sup> and 24<sup>th</sup>, because they were separated;
- ii) specifically whether she saw him the night before he was killed;
- iii) if so, whether she saw him wearing a black Texas Instruments wristwatch;

- iv) when was the last time she would have seen him;
- v) v) how she would know his schedule;
- vi) whether she knew how Bounds and Charles split their money; and
- vii) if so, how?

(Id. at 161 – 162);

James Sturgis: to clarify whether Nathaniel Appleby-El lived next door, because Sturgis said that the Applebys lived down the road and their properties abutted. Specifically, Sturgis referred to Reverend Appleby living there, but not Nathaniel (Id. at 162);

Mabel Watson:

- i) what specifically was in the wallet;
- ii) what number she tried to call;
- iii) how she got the wallet; and
- iv) how she would have known whether anything had been removed.

(Id. at 163);

Harold Gray:

- i) whether the watch was in the lining of the jacket or just in the pocket;
- ii) whether the watch was placed in an evidence bag and photographed;
- iii) whether he had taken it to Lena Adkins to identify;
- iv) if so, specifically what procedures he followed to preserve it as found;
- v) whether it was working;
- vi) whether he learned that it was missing from Adkins;

- vii) when it was placed in an evidence bag; and
- viii) whether Trooper Gray had a particular interest in the watch when it was seized.

(Id. at 163 – 165);

Daniel Bingham:

- i) whether he knew the make, the model, or the serial number for the gun;
- ii) whether he fired it; and
- iii) whether it worked.

(Id. at 165 – 166);

Trooper Lewis:

- i) about inconsistencies in the alleged statement he obtained;
- ii) his continuous reference to it as a confession;
- iii) about Appleby going to the bus station to meet his sister;
- iv) that Appleby asked Gerald Curtis: “Hey, man, do you think that’s a cool thing to do?”;
- v) that Appleby said that he begged Curtis until he said he would not kill the driver;
- vi) about how Curtis was involved in the investigation, because he was charged;
- vii) to clarify that Appleby was holding Curtis, not Adkins, when the gun fired; and

viii) when Appleby tried to get the gun back from Curtis in relation to firing.

Id. at 166 – 168.

There is a reasonable probability that, but for the failure of trial counsel in 1978 to competently cross-examine these witnesses, the outcome would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984).

**2. The Circuit Court Erred by Admitting the Alleged Confession Obtained by Police.**

**a) There is a Reasonable Probability That, But for the Failure of Trial Counsel in 1978 to Competently Cross-Examine Trooper Lewis, the Outcome Would Have Been Different.**

*See* I.B.1., *supra* at 12 – 13.

**b) Lewis' Testimony Included Allegations Which Seem Highly Questionable in Light of Common Experience and Knowledge, and He Behaved in a Way at Odds with the Way in Which People Would Normally Expect a Similarly Situated Person to Behave.**

Lewis claimed that although there was no stenographer, the statement was verbatim. Tr. Apr. 10, 2018 a.m. 139:5 – 140:15.

The statement does not read like Appleby-El speaks. App'x to Md. Cert. Pet'n. at 136 – 146; 147 – 149. According to a 1978 Maryland Division of Corrections admissions summary investigation, Appleby dropped out of James M.

Bennett high school in the twelfth grade. PSR at 7. School records noted that Appleby had behavioral and academic problems. *Ibid.*

It is inherently incredible that the statement is in fact a verbatim statement of Appleby's words. *Consider, In re A.H.B.*, 491 A.2d 490, 496 n. 8 (D.C., 1985); *Jackson v. United States*, 353 F.2d 862, 867 (1965); *see also Coleman v. United States*, 515 A.2d 439, 444 (D.C., 1986).

Without the ability to ask Lewis to clarify that Appleby was holding Curtis, not Adkins, when the gun went off; the jury might have wrongly believed that he was holding Adkins.

### **Conclusion**

The Court should grant a writ of certiorari.

### **Counsel of Record and Other Counsel**

Brian E. Frosh  
Attorney General of Maryland

Carrie J. Williams  
Assistant Attorney General  
Office of the Attorney General  
Criminal Appeals Division  
200 Saint Paul Place, 17<sup>th</sup> Floor  
Baltimore, Maryland 21202  
(410) 576-7837  
cwilliams@oag.state.md.us

*1/s/ William L. Welch, III*

---

William L. Welch, III  
5305 Village Center Drive, Suite 142  
Columbia, Maryland 21044  
wlw@wwelchattorney.com  
Telephone: (410) 615-7186  
Facsimile: (410) 630-7760  
Counsel for Petitioner Nathaniel B.  
Appleby-El  
(Appointed by the Maryland Office of the  
Public Defender)