No. 21-5438 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

NOE GERARDO MORIN — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN,DIRECTOR,TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

NOE GERARDO MORIN
(Your Name)

2665 PRISON RD 1
(Address)

LOVELADY, TEXAS 75851
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Mr.Morin alleges that the district court erred by mischaracterizing statements from a non-testifying witness, resulting in severe prejudice against him. Mr.Morin was convicted, in large part, as a result of this misclassification. Because of this mischaracterization, Mr.Morin was denied the ability to confront a key witness against him. This error created a distinct slant in the weight of evidence against him. This case thus presents the following question.

Would a reasonable jurist find error in the District Court's assessment that hearsay statement in the case at bar was "non testimonial" according to the standard established in Crawford v. Washington?

Mr.Morin alleges that photos shown to the jury, contrary to the trial and district court determination, were more prejudicial than probative, that they served no legitimate purpose in the proving of guilt. Mr.Morin further alleges that the trial court abused it's discretion by allowing the photos to be shown to the jury, as they served not to establish guilt, but only to excite emotion. This case presents the following question.

Would a reasonable jurist find error in the District Court's determination that photographs shown to the jury were more probative than prejudicial violating Morin's right to fundamental fairness?

Mr.Morin alleges that his trial counsel was ineffective because he failed to investigate potentially exculpatory evidence that may have had a mitigating effect. This error may have had an adverse effect on the trial because it speaks directly to the credibility of the state's key witness. This case thus presents the following question.

Having reviewed the evidence, could reasonable jurists find trial counsel ineffective for not investigating possible exculpatory impeachment evidence included in the State's Brady Disclosure?

LIST OF PARTIES

[x] 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

- State v. Morin, No.1306502 (337th Dist.Court,Harris Co. TX,2013) Judgment entered on September 26, 2013.
- Morin v. State,No.14-13-00889-CR, 2015WL1456184 (Tex.App.-Houston [14th Dist.]) Judgment entered on March 26, 2015.
- Ex parte Morin,No.WR-87,068-02(Tex.Crim.App.2016) Judgment entered June 20, 2018.
- Morin v. Director,No.4:17-CV-2045 (USDC, Southern Dist. TX, Houston Div.) Judgment entered Spetember 13, 2019.
- Morin v. Director,No.19-20715 (USCA 5th Cir. 2019) Judgment entered March 24, 2021.

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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

[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at Morin v. Lumpkin, No.19-20715 (5th Cir.); or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at Morin v. Davis, 4:17-cv-02045; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[x] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at EX PARTE MORIN, WR-87,068-02; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ 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.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was March 24, 2021.

[x] 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 _____.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including August 24,2021 (date) on May 19, 2021 (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 June 20,2021. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

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 Assistanec of Counsel for his defense.

U.S. CONST., AMEND.XIV

Section 1. All persons born or naturalized in the United States, and subject to the jursidiction 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 September 26, 2013 Petitioner Noe Gerardo Morin (Morin) was found guilty of murder and sentenced to life in TDCJ. The State offered no direct evidence that Morin was the person who shot the victim Marlo Thomas (Thomas) nor was there a murder weapon that connected the Pettitioner with the murder.

At trial over a defensive objection the trial court admitted a harmful hearsay statement of an unidentified, non-testifying witness. This inadmissible hearsay statement was bolstered by being offered through the arresting officer in Officer Glover (Ofc.Glover). Officer Glover and the statement all accused Morin of Murder.

The trial court abused her discretion violating Morin's right to fundamental fairness by admitting gruesome photos of Thomas' arm and part of his face (both detached). The photos were erroneously deemed more probative than prejudicial.

Trial Counsel Steve Greenlee had in his possession prior to trial the State's Brady Disclosure. In this disclosure there are statements made by Helen Burkes. Ms.Burkes' statements were beneficial to any defense Morin could muster but were not investigated by Greenlee nor a hired investigator. Greenlee was ineffective for not impeaching nor investigating any witnesses regarding the information contained in the State's Brady Disclosure.

Morin appealed to the Fourteenth Court of Appeals who in turn affirmed the judgment and conviction on March 26, 2015. Morin did not file a PDR on advice from privately retained counsel. Morin filed a state application for writ of habeas corpus on April 18, 2016. On June 20, 2018 the Texas Court of Criminal Appeals (CCA) denied his application without written order on the findings of the trial court (May 24, 2018) without a hearing.

Morin filed a protective federal habeas petition under 28 U.S.C. § 2254 on July 30, 2017. The court stayed the case while Morin exhausted his state remedies. After the stay was lifted, and with leave of the United States District Court (USDC), he filed an amended petition on August 23, 2018. On September 13, 2019 the USDC denied Morin's application § 2254. Morin timely filed notice of appeal to the United States Court of Appeals for the Fifth Cirucit (USCA 5th Cir.) in No.19-20715

that was DENIED on March 24, 2021 with his motion to proceed In Forma Pauperis GRANTED on the same day.

Morin now timely presents this Writ of Certiorari to this Honorable United States Supreme Court and will show the following:

REASONS FOR GRANTING THE PETITION

I. WOULD A REASONABLE JURIST FIND THAT THE DISTRICT COURT'S ASSESSMENT OF THE HEARSAY STATMENT BEING "NON TESTIMONIAL" STANDARD IN CRAWFORD v. WASHINGTON?

Morin suggests this Honorable Court find the admission of a hearsay statement testified to by a "credible" Police Officer was "testimonial." Morin believes the trial court abused her discretion by allowing the hearsay statement of an unidentified, non-testifying witness accusing him of a crime. Officer Michael Glover (Ofc.Glover) testifies to the jury on re-direct (4RR 71-71)[2]:

> Q: When this person yelled this information out to you, were they calm or excited? A: Probably a little excited, but they weren't speaking badly. Q: What did this person say? Mr. Greenlee: Again, objection your Honor. The Court: The objection will be overruled. You may proceed. Q: What did the witness say? A: As I remember correctly, he said: That's your man, he is getting away. Q: This was a separate bystander milling with the crowd, correct? A: Yes ma'am. Q: And that led you to further suspicion of the defendant? A: Yes ma'am.

Morin cites Paris v. Rivard,105 F.Supp.3d 701(USDC,Eastern District of Michigan, Southern Division 2015) in relevant part:

> "Where testimonial evidence is at issue...the Sixth Amendment demands[3] what the common required: unavailability and a prior opportunity for cross-examination." Crawford v. Washington,541 U.S. 36(2004). In other words, the Sixth Amendment "contemplates that a witness who makes testimonial statements admitted against a defedant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him." Giles v. California,554 U.S.353,358(2008)(citing Crawford,541 U.S. at 68)... Statements to the police are testimonial when[3] the circumstances objectively indicate that "the primary purpose of the interrogation is to establish or prove past events[3] potentially relevant to later criminal prosecution."

Key words being "past event[3]," Morin continues with McCarley v. Kelly, 759 F.3d 535(6th Cir.2014) in pertinent:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance

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[2] Reporter's Record will be reflected by volume number followed by "RR" followed by page number(s) and lines references if any, e.g., 4RR 71,3-12. Clerk's Record will be referred to as "CR__"

[3] My emphasis throughout memorandum, e.g. hearsay[3]

to meet an ongoing emergency.[3] They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

·Ongoing (Random House College Dictionary): continuing without termination or interruption.

·Emergency (Black's Law Tenth Edition):

1. A sudden and serious event or an unseen change in circumstances that calls of immediate action to avert, control, or remedy harm.

2. An urgent need for relief or help.

While both "ongoing" and "emergency" could be applied to the situation when Ofc.Glover was called to the scene, neither can be applied to the circumstance into which he arrived. The emergency[3] which Ofc.Glover had responded to ended in murder prior to his arrival. He testified that he heard an unidentified individual say, "That's your man, he's getting away." There is no "stranger danger" alert, the streets are crowded with people and Ofc.Glover's weapon is not drawn. These circumstances objectively indicate that the emergency had been terminated. What Ofc.Glover heard, therefore, was indeed testimonial, as its primary purpose was to establish a potentially relevant past event. The predicate, "he's getting away," establishes the subject event in the past. There was[3] an emergency, Ofc.Glover was summoned, Thomas was murdered prior to Glover's arrival at the scene. This is known because, as Glover arrived, he is told, "That's your man, he's getting away[,]" clearly indicating the act of murder was a past event. Had there been an ongoing emergency, for unknown reasons the unidentified individual might have said something like, "There they are, all tangled in a knot." Such a statement as this would have been indicative of an ongoing emergency situation and any such statement then would not have been testimonial. The combination of the verbs "are" and "tangled" places the scene in the present.

Morin keeping with McCarley v. Kelly,759 F.3d 535(6th Cir.2014):

"The Court went on to clarify that the Confrontation Clause applies to informal, as well as formal, prior testimony. Id. @826 ("In any event, we do not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.") The fruits of an interrogation, "whether reduced to a writing signed by the

declarant or embedded in the memory (an perhaps notes) of the interrogating officer [are] testimonial.[3]"Id.

By allowing the inadmissible hearsay statement in through a "credible" witness in Ofc.Glover the statement held more weight and bolstered Glover's testimony that Morin was guilty of murder. The Court abused her discretion violating Morin's 6th and 14th Amendments as cited in Russeau v. State,171 S.W.3d 871(Tex.Crim.App.2005); Pointer v. Texas, 85 S.Ct.1065(1965):

"This procedural guarantee is applicable in both Federal and State prosecutions and bars the admission of testimonial statements of a witness who does not appear at trial."

The erroneous admission was a denial of Morin's fundamental fairness and there is a strong probability that the hearsay influenced the jury's verdict. Morin emphasizes what is said in relevant part in United States v. Alvarado-Valdez,521 F.3d 337,341(5th Cir.2008):

"A defendant convicted on the basis of constitutionally inadmissible Confrontation Clause evidence is entitled to a new trial unless it was harmless in that there was [no] reasonable possibility that the evidence complained of might have contributed to the conviction." (quoting Chapman v. California,386 U.S. 18,24(1962)).

What could be better for the State an officer sworn to protect and serve and so happened to be the one that apprehended Morin, to testify what a non-testifying witness said? Implying that Morin was guilty before he was even taken into custody is what Ofc.Glover did in front of the jury for the State. In Ryan v. Miller,303 F.3d 231(2nd Cir.2002):

"A defendant has a right not to have an incriminating, hearsay statement or a non-testifying witness admitted against him. Accusations that have an injurious effect on the jury's verdict is a violation of a defendant's substantial rights."

The unidentified person that supposedly said "That's your man, he's getting away [,]" did not[3] testify at trial. This Honorable Court should find the hearsay statement "testimonial," and not harmless. Morin asks for relief in remand for new trial at least, at best a vacate of judgment.

II. WOULD A REASONABLE JURIST FIND THAT THE DISTRICT COURT'S FINDINGS ERRONEOUS, AND THAT THE PICTURES WERE HIGHLY PREJUDICIAL AND EXTREMELY INFLAMMATORY?

The USDC found no error in the state court's determination that photographs of the victims severed head and arm were more probative than prejudicial. They also deemed if the ruling was in error, Morin did not demonstrate a violation of constitutional magnitude.

The case at bar is not a death-penalty case. The state charged Morin with Murder. The state only needed to prove murder, nothing else. There was absolutely no need to show the jury a picture of "part of his face[,]" (6RR24-25, St."EX 186") to prove murder. Other than to inflame the jury's mind there is no need to show them "part of his arm and then his head." (Id; St."EX 187"). "The trial court found generally that the photos were 'probative [of] the facts before, during, and after, to determine, you know, the mindset of the defendant and what was going on.' " (See M&R @13). Would these photos been "probative" at the punishment phase, more than likely, but not at guilt innocence. How did these photos help the State's case? How did Morin's "mindset" help determine guilt of murder?

A trial is not fair if a panel of juror's base their verdict on an emotional one. Morin avers that these photos have no relevance to the manner, means or cause of death, they only show the gruesomeness of what happened after[3] the murder. The decendant died of a gunshot wound to the head (7RR99) not by his arm or face being cut off and put in a garbage bag.

Rule 404(b) of the Texas Rules of Evidence provides in pertinent part as follows: (1) **Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a persons character[3] in order to show that on a particular occasion the person acted in accordance with the character. (2) **Permitted Uses;**...This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Ary v. State,2020 Tex.App.LEXIS 8668(Tex.App.-Beaumont [9th Dist.]).

The trial court abused her discretion in turn violating Morin's right to fundamental fairness. She violated Morin's right to a fair trial and right to due process. She found "probative [of] the facts before, during, and after, to determine, you know, the mindset of the defendant and what was going on." (D.E.24-21@6-7). This is specifically what Texas Rules of Evidence 404(b)(1) says is inadmissible, and she was in no zone of reasonable legal theory of law.

Morin citing Ary v. State:

"Once a trial court determines that extraneous offense evidence is admissible under Rule 404(b), the trial court must, upon proper objection by the opponent of the evidence, weigh the probative value of the evidence against its potential for unfair prejudcial. When undertaking a Rule 403 analysis, the trial court must balance: 1) the inherent probative force of the proffered item of evidence along with, 2) the proponents need for that evidence against, 3) any tendency of the evidence to suggest decision on improper basis, 4) any tendency of the evidence to confuse or distract the jury from the main issues, 5) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and 6) the likelihood that presentation of the evidence will consume on inordinate amount of time or merely repeat evidence already admitted." Gigliobianco v. State,210 S.W.3d 637,641-42(Tex.Crim.App.2006); See also Erazo v. State,144 S.W.3d 487,489 (Tex.Crim.App.2004).

Morin compares what is required to what happened:

1) There was absolutely no probative force to post these pictures.

2) The State using theatrics only to inflame the jury's emotions and there was no need to present either picture to prove murder.

3) The Court fails here as the jury's decision was determined on an improper basis.

4) Did this evidence distract the jury's attention, 100% YES (they were crying, closing their eyes, and heads were turning away).

5),6) Weren't even considered during the abuse of discretion.

However, if the only value of extraneous offense evidence is to show character conformity, the balancing test requierd by Rule 403 is obviated becaue "rule makers hav[e] deemed that the probativeness of such evidence is so slight as to be 'Substantially outweighed' by the danger of unfair prejudice as a matter of law. United States v. Beechum,582 F.2d 898 (5th Cir.1978).

The USDC states this claim was not cognizable on habeas citing Estelle v. McGuire,502 U.S. 62(1991) but this conflicts and seems misconstrued with what's said in USA v. Plaza,826 Fed.Appx.60 (2nd Cir.2020):

"We review a district court's evidentiary rulings under a deferential abuse of discretion standard, and we will disturb an evidentiary ruling only where the decision to admit or exclude evidence manifestly erroneous." U.S. v. Litvak,889 F.3d 56,67(2nd Cir. 2018)(internal quotation marks omitted). Moreover, even if we find that the District Court abused its discretion, we will not reverse if the error made was harmless." U.S. v. Mercado,573 F.3d 138,141 (2nd Cir. 2009).

The trial court clearly abused her discretion allowing the jury to convict on emotion more than fact. This issue deserves review and should

cause this Honorable Court to remand for a new trial at least, at best vacate sentence and conviction.

III. AFTER REVIEWING THE EVIDENCE, COULD REASONABLE JURISTS FIND TRIAL COUNSEL INEFFECTIVE FOR NOT INVESTIGATING POSSIBLE EXCULPATORY IMPEACHMENT EVIDENCE INCLUDED IN THE STATE'S BRADY DISCLOSURE?

If a reasonable jurist knew that State's witness Helen Burkes revealed to the prosecution before putting Morin on trial for murder that her sister Lucinda Burkes stated the following (M&R @ 8):

- Lucinda and her friend Mae Land Kirkwood, were stealing drugs and money from Morin.
- Morin confronted Lucinda and Kirkwood about the thefts, and they told Morin that Thomas was responsible.
- After telling Morin that Thomas was stealing from him, Morin "transferred his anger to "Thomas" and "wanted to confront" Thomas.
- "They heard the two gunshots sometime later that night."
- Lucinda had given Morin a gun "at some point."

and that State's witness Adrian Bias helped Morin dismember Thomas' body would they believe Greenlee to be ineffective for failing to investigate exculpatory, mitigating and impeaching evidence?

The information came from a State's witness' sister that was not called to the stand to tell the jury the information. This evidence may have been arguably exculpatory clearly mitigating since it directly affected the reliability and credibility of the State's key witnesses. "Brady applies equally to evidence relevant to the credibility of a key witness in the State's case against a defendant." Graves v. Dretke,442 F.3d 334 (5th Cir. 2006); Giglio v. United States,92 S.Ct.763(1972).

The USDC says "[a]t most, fairminded jurists could disagree that those theories are inconsistent with Supreme Court precedent."(See M&R @ 9). The USDC does not cite any[3] Supreme Court precedent to corroborate their conclusions. The USDC failed to liberally construe the entire argument in the fact that the mitigating evidence Greenlee failed to investigate could have lessened Morin's sentence, making the results of the proceeding unreliable.

Morin directs this Court to Tice v. Johnson,647 F.3d 87(4th Cir.2011) "Strickland itself established in no uncertain terms that counsel has a duty[3] to make reasonable investigation." The record is void to any strategy (including FFCL from the State Court) that Greenlee could use to

subtantiate his lack of investigating.

Should Greenlee have impeached Mae Land Kirkwood, Adrian Bias or any of the three Burkes with the info provided by Helen Burkes the jury could have reasonably determined any of the witnesses credibility was invalid. The results of the trial could have been different being there was no murder weapon found, no witnesses seen who shot Thomas, just a weak circumstantial, incredible concotion of placing blame on Morin.

Greenlee obtained funds from the trial court to have an investigator, yet failed to commission a report or call the investigator as a witness as to the information that was uncovered from the State's Brady Disclosure. Citing Wiggins v. Smith,123 S.Ct.2527-2530(2003):

> "Counsel retained funds for an expert but failed to commission a report. This conduct fell short of a reasonable standard. Counsel's failure to investigate stemmed from inattention, not strategic judgment."

Greenlee had a duty to call Helen Burkes and impeach her regarding her statements. Her testimony would have challenged the credibility and reliability of the State's key witness including her own family members. Morin has maintained his innocence of murder from the beginning and only admits to the helping in the attempted disposal of Thomas' body. Greenlee was deficient seven-fold depriving Morin of a fair trial, any viable defenses, effective investigating and advocating.

Should this Honorable Court side with Morin and find Greenlee ineffective, Morin asks for a new trial at least, at best a vacate of judgment and sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Joe Morin

Date: 8-4-21