No.: 21-5535 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY MARCUS MAYBERRY – Petitioner;

v.

STATE OF INDIANA – Respondent;

PETITION FOR WRIT OF CERTIORARI

Timothy Marcus Mayberry
Petitioner in *Pro per*
c/o P.O. Box 1111
Carlisle, In 47838
DOC# 170022

QUESTIONS PRESENTED

Is the Indiana state appellate court's opinion that its trial court did not abuse its discretion when, over multiple objections, it permitted surprise expert testimony in mid-trial and did not provide me an opportunity to depose the expert or a meaningful opportunity to review his test or materials beforehand, a violation of the Compulsory Process Clause under the Fifth, Sixth Amendment and/or the Due Process Clause under the Fourteenth Amendments and/or a constructive denial of counsel under *Cronic*?

PARTIES

Petitioner:

Timothy Marcus Mayberry, Petitioner in *Pro per*

c/o P.O. Box 1111

Carlisle, Indiana 47838

Respondent:

Indiana Attorney General

302 W. Washington St., IGC South, Fifth floor

Indianapolis, IN 46204-2770

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PRIOR OPINIONS AND ORDERS

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Nov. 24, 2020	Direct Appeal, affirmed; Mayberry v. State, 20A-CR-00158.
Jan. 13, 2021	Rehearing denied, filed in *Pro per*; Mayberry v. State, 20A-CR-00158.
Apr. 20, 2021	Transfer denied, filed in *Pro per*; Mayberry v. State, 20A-CR-00158.

BASIS OF JURISDICTION

Seeking U.S. Supreme Court review of an affirmed conviction by the Indiana court of appeals on November 24th, 2020. Rehearing was denied by the Indiana court of appeals on January 13th, 2021, and transfer was denied by the Indiana Supreme Court on April 20th, 2021, which renders it final.

Jurisdiction is conferred on this Court by the U.S. Sup. Ct. Rules 10 (b) and (c), and 13(1). The Indiana state court's conviction was affirmed by its Appellate court, then its Supreme Court denied transfer, amounting to a final adjudication. The process for its conviction conflicts with the Compulsory Process Clause under the Sixth Amendment as read in Taylor v. Illinois, 484 U.S. 400, 415 (1988), and United States v. Khan, 508 F.3d 413, 418 (7th Cir. 2007); and the Due Process Clause under the Fourteenth Amendment as read in Crawford v. Washington, 541 U.S. 36, 61 (2004), Brady v. Maryland, 373 U.S. 83 (1963), and Leka v. Portuondo, 257 F.3d 89, 103 (2nd Cir. 2001); and a constructive denial of counsel as read in United States v. Cronic, 466 U.S. 648, 658-660 (1984).

The Supreme Court has jurisdiction when application of a state law bar "depends on a federal constitution ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." Ake v. Oklahama, 470 U.S. 68, 75, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Constitutional errors are fundamental errors, which may be reviewed by any reviewing court. See id.

CONSTITUTIONAL PROVISIONS AND LOCAL RULE

United States Constitution, Amendments V, VI, and XIV

Indiana State Constitution, Article 1 §§ 12[1] and 13(a)[2]

St. Joseph local criminal rules, LR71-CR00-305.1.1[3] and 305.5(4)[4]

STATEMENT OF THE CASE

I was brought to trial for murder on December 9th, 2019. At the initial hearing on January 3rd, 2019, the trial court issued an automatic order to produce discovery, pursuant to LR71-CR00-305.1.1, in addition to LR71-CR00-305.5(4). Prior to December 9th, 2019 the state did not disclose any intent, evidence, or potential evidence regarding a proximity test.

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[1]"All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial..."

[2]"In all criminal prosecutions, the accused shall have the right to...be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

[3] "...the Court will automatically order the State to disclose and furnish all relevant items and information under this rule to the defendants within fifteen (15) days from the date of the initial hearing..."

[4] "The State shall disclose the following...within its possession or control...(4) Any report or statements of experts...including results of...scientific tests, experiments, or comparisons."

Prior to the start of trial, Ray Wolfenbarger ("Wolfenbarger") was listed to testify solely as a *firearm and tool mark expert.* On December 5th, 2019, based on a self-defense voir dire question, the state instructed Wolfenbarger to perform a proximity test for gunshot residue on the jacket Avery Brown ("Brown") was wearing. The proximity test was completed on December 10th, 2019, which is when the state submitted a supplemental notice of discovery identifying Wolfenbarger, only now with ***different*** expert testimony and evidence. The state placed Wolfenbarger on the stand to testify about the new evidence and his findings that same morning. Trial counsel ("counsel") objected several times for several reasons, including the lack of foundation and the inability to prepare for the surprise testimony and technical evidence. (Tr.Vol.3 at113) The trial court only addressed the foundation portion of the objection, sustaining it and allowing the state to establish a proper foundation. Again counsel objected when Wolfenbarger began testifying about the surprise evidence, explaining that "[the evidence] wasn't provided to me until this morning," and "[Wolfenbarger] didn't bring any cotton twill so we could even examine it or see if it's a like-type of substance to this jacket." The court asked counsel how he was prejudiced by surprise testimony and technical evidence in the midst of trial. (Tr.Vol.3 at117-118). Counsel explained that not only was he not prepared, but he had "never even heard of these tests...it's like I can't even take a look and examine what this test is even about or ways to even cross-examine him." (Tr. Vol. 3 at 118). Counsel continued arguing that "I should have an opportunity to have this in advance of trial, not be sprung on me in the middle of

trial in terms of fairness." (Tr. Vol. 3 at 119). The trial court reasoned that "you know things happen. Things happen." (Tr. Vol. 3 at 119), and after counsel could not predict if Wolfenbarger's surprise testimony would be prejudicial or not, the trial court, *also having not heard it*, determined that Wolfenbarger's testimony would not be prejudicial or inconsistent with self-defense and allowed it, but offered to delay only the cross-examination, while still allowing Wolfenbarger to testify, and for trial to continue. (Tr.Vol.3 at 118-120). Counsel argued that a delay of the cross-examination would be "meaningless" considering trial would continue and there was no time to adequately prepare. Having no proper remedy, and being denied an opportunity to depose Wolfenbarger, counsel declined the court's offer to delay cross-examination. (Tr. Vol. 3 at 120).

Wolfenbarger testified that the results showed two proximity distances of sixteen inches in the right side of Brown's jacket, and one proximity distance of thirty-six inches in the back of Brown's jacket. (Tr.Vol. 3 at 123). Wolfenbarger's testimony placed one gunshot at three feet away and two others a foot and a half away, directly contradicting my testimony of a close-proximity struggle over Brown's gun. I was found guilty of murder and sentenced to 75 years in prison, to be served at 75 percent. The Indiana appellate court affirmed the conviction and determined that counsel did not request a continuance and regardless, the trial court's offer to post-pone Wolfenbarger's cross-examination equated to a proper offer of a continuance, which was denied by counsel. (Mayberry v. State, 20A-CR-00158 at 10-11).

ARGUMENT

The Indiana appellate court has determined that trial counsel's statements were not sufficient to request a continuance, which consequently, waived the state's discovery violation. (Mayberry v. State, 20A-CR-00158 at 10-11). Waiver is defined as "the intentional relinquishment or abandonment of a known right." (See United States v. Olano, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)). My counsel's repeated request, and pleas for "*meaningful time*" and a "*fair opportunity*" to prepare for the surprise evidence, are not consistent with the United States Supreme Court's definition of 'waiver'. (Tr. Vol.3 at 118-123). The court's decision not to grant, or offer me a continuance to prepare for Wolfenbarger's surprise testimony is against the logic and effect of the facts and circumstances before the court. No lawyer could have provided adequate representation after being denied the opportunity to depose Wolfenbarger or examine his test or its results before his expert testimony. See United States v. Cronic, 466 U.S. 648, 658-660 (1984); see also Powell v. Alabama, 287 U.S. 45, 57-58 (1932).

Indiana's appellate court has determined that even if I was entitled to a continuance, counsel declined the trial court's offer of one. Wherein affirming this conviction Indiana's appellate court opined that the trial court's offer to post-pone Wolfenbarger's cross-examination, while still permitting his unknown testimony about a test I could not meaningfully investigate, equates to a continuance and a proper remedy. (Mayberry v. State, 20A-CR-00158 at 11). Aside from not having adequate time to prepare, had counsel accepted the trial court's offer, he still would

not have known the substance or truth of Wolfenbarger's testimony, or what to object to. The trial court's statement, "if you feel you need overnight to prepare, I understand that", (Tr. Vol. 3 at 118), and its offer to post-pone merely the cross-examination, was not only inadequate, but unconstitutional and impossible since it required counsel to:

- Continue with the remainder of trial for the day;
- Postpone the trial preparation he had planned for the following day;
- Locate and depose Wolfenbarger;
- Analyze Wolfenbarger's deposition for inconsistencies to his in-trial testimony;
- Obtain on short notice a rebuttal jury-ready expert;
- Have the rebuttal expert review Wolfenbarger's findings, and testimony;
- Obtain and examine the jacket from evidence;
- Obtain and examine the gun, and cloth that Wolfenbarger used;
- Have the rebuttal expert conduct a similar test with Wolfenbarger's gun and cloth;
- Compare both findings to the material of the jacket;
- Depose the rebuttal expert about his/her findings; then
- Prepare the rebuttal expert to testify, all by 9:00 a.m. the following morning;

Which directly contradicts the *Johnson* court's holding, where the Indiana appellate court held that "an evening to depose the State's surprise expert witness

was grossly inadequate for...defense counsel to review and analyze the expert's testimony and to obtain on short notice an expert of his own for rebuttal. This lack of opportunity to prepare...created a prejudice that could not be overcome..." Johnson v. State (1979), 179 Ind. App. 28, 36; see also United States v. Lanoue, 71 F.3d 966, 973 (1st Cir. 1995). More conflicting is that counsel was not afforded the opportunity to conduct even an overnight deposition.

The Indiana appellate and Supreme Court have repeatedly held that a defendant *must* have adequate time to depose and prepare for surprise witnesses, especially newly discovered expert witnesses. See Brewer v. State, 363 N.E.2d 1175, 1177 (Ind. 1977); Flowers v. State, 654 N.E.2d 1124, 1125 (Ind. 1995); Johnson v. State, 384 N.E.2d 1035, 1040 (Ind. Ct. App. 1979); Thorne v. State, 429 N.E.2d 644, 647 (Ind.1981); Johns v. State, 251 Ind. 172, 180 (Ind.1968); Butler v. State, 372 N.E. 2d 190, 194 (Ind. 1978); Murphy v. State, 352 N.E.2d 479, 482 (Ind. 1976); Davis v. State, 487 N.E.2d 817, 820 (Ind.1986).

Countless cases reaffirming that the denial of the opportunity to depose a surprise witness is comparable to a pre-trial denial of a motion to depose. See Johnson v. State, 179 Ind. App.28, 35 (1979); see also Brewer v. State, 363 N.E.2d 1175 (Ind. 1977). And regarding experts, the Indiana Supreme Court has held that, "the only opportunity the defendant has to protect his presumption of innocence is to offer an equally prominent expert who might be able to explain some of the limitations, nuances, complications, and inadequacies of the testing." Flowers v.

State, 654 N.E.2d 1124, 1125 (Ind.1995). I was not afforded this opportunity or even a chance to depose Wolfenbarger or review his test beforehand.

Counsel should have either been offered a continuance or had his request for "meaningful time" granted, to effectively confront the newly discovered expert evidence. Since the trial court issued the automatic discovery order at the initial hearing it should have provided a proper remedy when that order was violated. This reasoning was explained in *Butler*, wherein the Indiana Supreme Court held that "when a trial court undertakes such a practice, [issuing discovery orders] it also assumes the responsibility of compelling compliance", and "that a sufficient remedy be provided when there is a failure to comply", and that "it is well-settled that a trial court must grant a continuance in order for counsel to have adequate time for preparation and investigation." Butler v. State, 372 N.E. 2d 190, 194 (1978). Instead of following *Butler* and providing a "sufficient remedy" the trial court stated "You Know things happen. Things happen", and permitted the newly discovered surprise expert testimony, after an offer to delay cross-examination. (Tr. Vol.3 at 119).

A trial judge may certainly insist on an explanation for a party's failure to comply with a court order to identify his or her witnesses in advance of trial. If that explanation reveals or is later exposed that the omission was willful or motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause of the Sixth

Amendment of the Unites States Constitution to exclude the witness' testimony. See Taylor v. Illinois, 484 U.S. 400, 415 (1988).

The denial of an opportunity to review Wolfenbarger's testimony before it was presented was a denial of discovery under *Brady*, a violation of the Due Process Clause, a constructive deprivation of effective assistance of counsel, and fundamental error. See California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); United States v. Cronic, 466 U. S. 648, 659 (1984); Davis v. State, 487 N.E.2d 817, 820 (Ind.1986); see also Thorne v. State, 429 N.E.2d 644, 647 (Ind.1981) (Explaining that "a willful or deliberate violation of disclosure requirements may not only impair the lawyer's ability to prepare properly for trial but, may also substantially impair his ability to counsel his client properly and thus be regarded as a violation of the accused's right to counsel.") (See also Leka v. Portuondo, 257 F.3d 89, 103 (2nd Cir. 2001) citing Brady v. Maryland, 373 U.S. 83 (1963)) (Explaining that evidence that is not "disclos[ed] in sufficient time to afford the defense an opportunity for use" may be deemed suppressed within the meaning of the *Brady* doctrine).

In regards to what constitutes a continuance, the Indiana appellate court has held that, "we consider the mid-trial deposition to have been of no discovery value...we reverse the trial court on that basis enunciated in Brewer v. State (1977), 173 Ind. App. 161, 363 N.E.2d 117...a continuance would have terminated the trial proceeding and at least provided counsel...with one workday to prepare to depose the expert...on the technical subject matter..." and that "trial courts must provide

to the surprised party a remedy sufficient to guarantee that the purpose of discovery is fulfilled, lest the idea of a criminal trial as a sport or game be revived." Johnson v. State, 179 Ind. App. 28, 35, 37 (1979). The Indiana appellate court's opinion that the trial court's offer to post-pone cross-examination was a continuance is contrary to Indiana state law and the law of the United States of America.

The trial court violated the Fifth, Sixth and Fourteenth Amendments when it abused its discretion and admitted surprise evidence and expert testimony, over objection, then limited my ability to "subject [Wolfenbarger's] testimony to the crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004); see also King v. State, 296 N.E.2d 113, 115 (Ind. 1973) (Explaining that "an abuse of discretion is demonstrated if the record reveals that the defendant was prejudiced by the failure of the trial court to grant the continuance). The *Khan* court held that "this court first examines whether the limit foreclosed an opportunity to expose biased or false testimony, thereby affecting the "core functions" of the confrontation clause." United States v. Khan, 508 f.3d 413, 418 (7th Cir. 2007).

The state admitted that it ordered the proximity test on December 5th, 2019, meaning that the state knew of the test's expected existence and the legal obligation[5] under *Brady* and the local court rules[6] to disclose the test results

[5] "2.4 Material held by other governmental personnel...information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel..." ABA Standards, Discovery, and Procedure before Trial § 2.4 (Approved Draft, 1970).

[6] *See* LR71-CR00-305.1.1. and 305.5(4)

whether inculpatory, exculpatory, or inconclusive. The state instead held this information for five (5) days and waited until mid-trial to reveal the test's existence to the court and counsel. The state's suppression of material evidence until the eleventh-hour minimized counsel's ability to effectively cross-examine Wolfenbarger and/or obtain a rebuttal expert. See Thorne v. State, 429 N.E.2d 644, 647 (Ind. 1981).

The state had no legitimate reason, or paramount interest, to justify concealing the test, or the results. The question then becomes, if the results were discoverable, why did the state withhold, not only the existence of the test being performed, but also the results, until mid-trial?

I was not granted meaningful time to adequately confront, and expose Wolfenbarger, or an opportunity to obtain a rebuttal expert witness. (See Johnson v. State, 384 N.E.2d 1035, 1040 (Ind. 1979) (Explaining that "it is incongruous to allow the state to inject surprise expert testimony at trial without allowing the defendant an opportunity to investigate and prepare for technical evidence which concerns his defense."). The mere hours offered by the court deprived me of the ability to "show that [Wolfenbarger was] biased, or that the testimony [was] exaggerated or unbelievable." United States v. Khan, 508 F.3d 413, 418 (7th Cir. 2007). (See also Tr. Vol. 3 at 125 wherein Wolfenbarger testified that he used 36" as a distance because it is more than 12" even though his report reflected 12", and Tr. Vol. 3 at 123 wherein Wolfenbarger testified that he obtained a 16" proximity ***entrance*** distance from an ***exit hole***.) I was first denied meaningful access to material evidence by the

state; then denied adequate time to review the discoverable evidence or an opportunity to perform depositions by the court.

The record reflects that the trial court acknowledges, and attempts to cure the prejudice of the discovery violation, by offering to set aside the cross-examination of Wolfenbarger. The trial court's offer to delay cross-examination is evidence that the court agreed that there was a discovery violation—and—understood that counsel was requesting and needed additional time to prepare. The trial court did not grant a continuance, or offer any other sufficient remedy that would have cured the prejudice of the surprise testimony. "Denial of a motion for continuance amounts to reversible error and abuse of discretion when it results in prejudice." Beverly v. State, 543 N.E.2d 1111, 1113 (Ind.1989).

The trial court's order to produce, gave me the impression that I had been afforded discovery rights, "it is fundamentally a denial of due process of law guaranteed by the Fifth, and Fourteenth Amendments of the United States Constitution to lead a defendant to believe that he has been afforded the right of discovery and then permit the State of Indiana, in violation of an order of court, to present, during its case in chief, surprise witnesses whose testimony substantially added to the weight of the State's case." Johns v. State, 251 Ind. 172, 180 (Ind.1968).

I was denied due process by the inability to meaningfully confront Wolfenbarger's expert testimony and the ability to provide a rebuttal expert in my defense. The state's deliberate act of withholding evidence of an ongoing expert test

in the midst of trial prevented counsel's ability to perform an adequate cross-examination, constructively and fundamentally depriving me of effective assistance of counsel. See Taylor v. Illinois, 484 U.S. 400, 415 (1988); United States v. Cronic, 466 U. S. 648, 659 (1984). The state's suppression of the proximity test also violated the Compulsory Process Clause and the "core functions" of the Confrontation Clause. See United States v. Khan, 508 F.3d 413, 418 (7th Cir. 2007).

I respectfully request this Court grant my petition for Writ of Certiorari.

Respectfully Submitted,

by: Mayson-El

Timothy-Marcus:Mayberry, Petitioner
c/o P.O. Box 1111
Carlisle, IN 47838-1111
DOC# 170022

WORD COUNT

I, Timothy Marcus Mayberry, verify that this 'Petition for Writ of Certiorari' contains 2727 words.

By: Mayson-El
Timothy-Marcus:Mayberry

CERTIFICATE OF SERVICE

I, Timothy Marcus Mayberry, hereby certify that on July 8th, 2021, I placed this 'Petition for Writ of Certiorari' in the I.D.O.C. prison mail system to be delivered by the United States Postal Service first-class pre-paid postage to:

United States Supreme Court Clerk
One 1st Street NE
Washington, D.C. 20543

Office of the Attorney General of
Indiana Indiana Government Center
South 5th floor Indianapolis, IN 46204

July 8, 2021
Date

By: Mayson-El
Timothy-Marcus:Mayberry

AFFIRMATION

Subscribed and sworn to before me, a Notary Public for the State of Indiana, this 8th day of July 2021.

03/04/2023
My Commission Expires

Seal

Sullivan
County of Residence

Heather L Mills
Notary Public

Heather L Mills
Name Printed

No.:_____

IN THE

UNITED STATES SUPREME COURT

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STATE OF INDIANA – Respondent;

PETITIONER'S APPENDIX
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