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21-7016

SUPREME COURT OF THE UNITED STATES

CASE#

TONY GONZALEZ

PETITIONER,

v.

STATE OF RHODE ISLAND

RESPONDENT,

On Petition for a Writ of Certiorari to

The Rhode Island Supreme Court

PETITION FOR A WRIT OF CERTIORARI

TONY GONZALEZ, PRO'SE
#144796
P.O. BOX 8273
CRANSTON, RHODE ISLAND 02920

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I.

QUESTIONS PRESENTED

- i. Did the trial Justice err, when the Jury Venire challenge, had been inappropriately addressed, concerning a proper sixth Amendment challenge? And Trial Justice abused his discretion.
- ii. Did the Trial Justice err, in denying Mr Gonzalez's motion to suppress in full, when Warwick Police violated Gonzalez's Fourth Amendment right by covertly accessing his cellphone prior to obtaining a warrant?
- iii. Did the State commit a Brady violation in supressing the CD/Disc of the "controlled Phone call"?

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IV. PETITION FOR WRIT OF CERTIORARI

Tony Gonzalez, Pro'Se, an Inmate currently incarcerated at the Adult Correctional Institute in Cranston, Rhode Island. Respectfully Petitions this Court for a Writ of Certiorari to review the Judgement of the Rhode Island Supreme Court.

V. OPINIONS BELOW

The second direct Appeal* of the Petitioner is reported as STATE V GONZALEZ, 2021 R.I. LEXIS 89*; 2021WL2760088(See Appendix, Attachment#1). The Rhode Island Supreme Court denied this Petitioner's second direct Appeal on July 2nd, 2021. Then denied his Petition for re-arguement on September 13th, 2021. The decision/Order denying the Petition for re-arguement, See Appendix, Attachment#2.

VI. JURISDICTION

Mr Gonzalez's Petition for re-arguement to the Rhode Island Supreme Court was denied on September 13th, 2021. Mr Gonzalez invokes this Court's Jurisdiction under 28 U.S.C. § 1257, having timely filed this Petition for a Writ of Certiorari within Ninety(90) days of The Rhode Island Supreme Court's Judgement, affirming this Petitioner's conviction.

*1- First direct Appeal is referenced herein as "Gonzalez 1".

UNITED STATES AMENDMENT IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and NO warrants shall issue, but upon probale cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

UNITED STATES AMNEDMENT V: No Person shall be held to answer for a Capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or Naval forces, or in the militia, when in acutal service in the time of war or public danger; Nor shall any Person be subect for the same offense to be put twcie 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.

UNITED STATES AMENDMENT 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 commmited, 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 complusory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

VII. CONSTITUTIONAL PROVISIONS INVOLVED, CONTINUED.

°UNITED STATES AMENDMENT XIV: 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 it's Jurisdiction the equal protection of the Laws.

VIII. STATEMENT OF THE CASE

The United States Constitution contains numerous safeguards for it's citizens, designed to keep this free society in Order, with Order. Here the Petitioner submits that his Constitutional Right's has been violated in a consistant order.

Starting with the Warwick Police Department(WPD) utilizing a Cell-Site Simulator(Pinging Device) Prior to obtaining a search warrant for it's use, a Fourth Amendment violation. The Constitutional provisions set forth, in the Fifth and Fourteenth Amendments, are susceptible to deteriorationand violation, when effective assistance of Counsel(Pursuant to the Sixth Amendment) is not present(ed).

The questions presented within this petition reflect numerous Constitutional violations, that could have been elivated through ethical and proper adjudication at the Trial level, in order to secure the Petitioner's right to a fair Trial. Unfortunatly, as litigation proceeded on this case in chief, the Petitioner's Constitutional rights had become a faint afterthought from the parties involved, in order to cast a veil on the severe ethical misconduct. Tantamounting into a miscarriage of Justice.

1. Early morning hours of the pursuit of Tony Gonzalez

Just past midnight, on January 22nd, 2012, the Warwick Police Department were investigating a shooting that had just been called in. Hours within the investigation, detectives obtained the cell phone number of Gonzalez, through an alledge witness. WPD dispatch logs depicts numerous contacts with Gonzalez's cell phone provider, MetroPCS. Two of the dispatch entries indicate that MetroPCS does not have "pinging" capability (See, Appendix Attachment#3). Shortly after the two entries, WPD's Sergeant Raymond Leblanc requests to "ping" both phones.

Simultaniously to this part of the pursuit of Gonzalez, the WPD had located Juan Garcia(Gonzalez's brother), and brought him to Headquarters to conduct a [recored]"controlled phone call". It is this controlled phone call, that WPD asserts is the manner in which Gonzalez is located and not the pinging of his phone.

2. TRIAL

(a) Prior to Trial, the Petitioner had requested his Counsel(Dimitri) to pursue a change of Venue. After said motion was denied, he requested his Counsel to raise a fair cross section challenge to the Jury Venire. AFTER Voir Dire/ Jury selection concluded, Dimitri had discreetly(via sidebar)"renewed" the same motion for a change of Venue. The Petitioner sensed something was off(after the "motion" was denied) and addressed the Trial Justice on the following day. The Justice of the Court, in excercising his discretion, had mis-construed the Petitioner's concern(without stating a Jury Venire challenge), and then proceeded to display dishonesty, in referencing a case that he(Justice) had presided over(See, Appendix, Attachment#4). The lie was/is a deliberate act of impropriety, and in violation of the Judicial Conduct Canons.

(b) The Opening Statement by Dimitri, mentions the "controlled phone call", made by Juan Garcia to Gonzalez. Dimitri then brouches a "lack of flight" defense theory, when referencing the controlled phone call, but completely abandons the lack of flight defense*. The subject of this controlled phone call(recording), is something the Petitioner asserts as the Brady violation by the Rhode Island attorney Generals office, on Direct Appeal. Nonetheless, the Petitioner loses Trial, and files a timely notice of Appeal.

#2 Immediately after the opening statement by Dimitri, a long sidebar off the record commences. The Petitioner does speculate what could have been discussed during sidebar, within his Brief. Yet the dots don't seem too far to connect, accountability to Brady material ia at stake here.

3.

DIRECT APPEAL

Gonzalez was appointed Lara Montecalvo, from the Rhode Island Public Defender's office. Montecalvo was very familiar with Gonzalez's case, being the same Attorney from the first direct Appeal. After a series of peculiar communication between the Petitioner, Montecalvo, and Montecalvo's supervisor, the attorney/client relationship had come to an end. The Petitioner was Ordered to proceed Pro'Se*, and filed his Brief on time.

On April 1st,2021, Petitioner argued four Issues on the record*, and did his best to stay within the scope of what was briefed on paper, but also expand and refine the Issues argued orally. As cordial as possible, the Petitioner had advised the Rhode Island Supreme Court Justices of the Trial COurt's violation of the Judicial Canon's and cite the exact part of the Trial transcript in support thereof. On July 2nd,2021, The Rhode Island Supreme Court Affirmed the Petitiioner's conviction, addressing three of the four Issues. After reading the decision, the Petitioner noted both a flagrant oversight(as to Issue I of the Brief), and other queationable substance..With limited resources..The Petitioner timely filed a handwritten Petition for re-argueument. On September 13th,2021, the Rhode Island Supreme Court denied the Petition for re-argueument.

#3 Montecalvo's motion to discharge from case, also included a request to appoint Counsel for Gonzalez.

#4 Direct Appeal transcripts.See Appendix, Attachment#5.

A. A motion to change Venue and a Jury Venire challenge must not be ambiguous. To avoid erroneous deprivations of the right to a fair Trial, this Court must assert the importance and purpose of the Judicial Conduct Canons, whn addressing sucionct matters of FACT and LAW.

"The Sixth Amendment to the United States Constitution ensures that a Jury represents a cross section of the community." STATE V LAWLESS, 996 A.2d 166,168(R.I. 2010) ,See, TAYLOR V. LOUISIANA.

The Petitioner asserts that the Entire Jury Venire did not represent a fair cross section of the community(of Kent County, Rhode Island), before the start of Jury selection. This caused concern from Petitioner when Dimitri did not commence the actual challenge Prior to Voir Dire. It is noted that a statement of sworn facts in support thereof is needed, when adequately challenging a Jury Venire, and Petitioner's Trail Counsel failed to do so.

During Trial, the Court had deceitfully treated the Petitioner's concern as a change of venue, in an ambiguous manner, and then implemented an untruthful fact of matter, referencing a case he he had presided over. On Direct Appeal, the State latched on to this "change of Venue" apparatus, and tried to slight the topic of the Trial Court's dishonesty. The use of a "renewed" motion to change venue, as a vehicle to challenge the Jury Venire, is wrong in this instant matter for two reasons; 1. For the sake of Judicial Economy, the time spent on Voir Dire for Jury selection would have been wasted, had the Venue motion been granted.and seemlessly;2. Change of Venue does equal change(not Challenge) of Venire, but even the new Jury Venue/Venire could have required a fair cross section challenge.

The State is forcing a Red Herring on the Issue, just because the Petitioner acknowledged(during Oral) that he did not make a Prima Facie demostration. The focal point is not the failure of demonstrating a Prima Facie showing. It is the Due Process violation, by the Trial Court's errors in adjudicating the matter, which have become the accessories to the violation of the Petitioner's Constitutional Rights. BALANCE, A Court arbittrator must be nuetral at all phases of the proceedings. The Petitioner submits, his right to a fair Trial had been compromised, as soon as the balance scale tipped in the direction of such a Due Process violation.

It is unconcievable to accept such Judicial Conduct was/is condoned by the Rhode Island Supreme Court. Within their Opinion they continue to address the Issue as a failure to make a Prima Facie demostration, and deliberately overlook the topic of the Trial Court's dishonesty, by quoting the wrong part of the colloquy*between the Petitioner and Trial Justice, See Appendix, Attachment#6.

*5- The Petitioner's direct Appeal brief contained the majority of the colloquy between himself and the Trial Justice on the Issue, but does not overlook the specific matter of the Court's dishonesty. During Oral arguement the Petitioner reiterates by specifically citing the Trial record page and line number, See Appendix, Attachment #5 Page45, lines 1-12.

B. This Court has ruled in *Jones V United States**, that the use of a Cell Site Simulator, is a search within scope of the Fourth Amendment. Requiring Law Enforcement to obtain a warrant, prior to it's use. The use of such nefarious device is still secretive, and this Court's ruling in JONES must not be overlooked.

The Petitioner had advised Trial Counsel of the use of the Cell Site Simulator on numerous occasion, to no avail. Dimitri lacked the Due Diligence of a competent attorney, to cross reference police dispatch logs, with developing case law, and articles on the use of what is referenced to as the "Stingray" or "Kingfish" device. The Trial record may not contain the distinct wording of "Stingray" or Cell Site Simulator, yet the Petitioner still tried to raise the Issue on direct Appeal.

On direct Appeal, the State tactfully address the Petitioner's assertion of the use of the device, by simply claiming the "raise or waive" rule. Indicating that the Issue was not properly raised below at the Trial level is understandable, but there has been exceptions to the "raise or waive" rule, See *STATE V MCGEHEARTY*, 121 R.I. 55*; 394 A.2d 1348** (1978). The Petitioner felt compelled to raise it on direct Appeal, with supporting documents to his claim. what may seem like speculation by the Petitioner on this matter, becomes substantiated in itself when WPD dispatch logs, and narrative reports correlate the use of a "Pinging" device.

*6- *JONES V UNITED STATES*, 168 A.3d 703*; 2017 D.C. App LEXIS 277**

Also within the "Gonzalez1" Opinion, Justice Goldberg states".... in the early morning hours Detectives were sent [(Without Jurisdictional clearance)] to the Silverlake area of Providence, home of Gonzalez's sister abedon(Abdona) Garcia, when it was thought he made a call from her house(1st Trail-Pre Trial Transcript Pg170-172)..Sometime after 4am., Detectives Grant and DeGregorion left for Providence to pursue a lead based on a telephone call placed from defendant's telephone [Traced] to the Silverlake neighborhood"....

The above referenced, is cited within the Petitioner's full Brief. Within the 2021 Gonzalez Opinion, there is absolutely no reference of the Cell Site Simulators use, not even to the mere extent of the Issue of the device not raised at Trial. Therefore the Rhode Island Supreme Court's reluctance of a "use-mention error", secures them from addressing and/or proving the Petitioner (was) wrong about the Cell Site Simulator.

C. In Brady V. Maryland, this Court held that Due Process requires the Prosecution to disclose, upon request, evidence favorable to an accused person when such evidence is material to guilt or punishment.

On January 31st, 2013, The Rhode Island Attorney Generals Office had submitted a "Supplemental Discovery"(See Appendix, Attachment#7) entry to the Kent County Superior Court, for this case. The file contained "One CD/Disc" of the Controlled phone call between Juan Garcia and Gonzalez, with correlating Police narrative. On March 29th, 2016 Gonzalez's first direct Appeal was Sustained and case remanded for re-Trial. On June 16th, 2016, Gonzalez's Trial Counsel filed for Discovery. Apparently the discovery file that Dimitri had obtained, did not contain the above referenced CD/Disc of the controlled phone call(See Appendix Attachment#8).

In United States V Bagley,"this Court held that the Government's duty under Brady arises regardless of whether the Defendant makes a request for the evidence; 473 U.S. 667, 682 (1985) (Plurality Opinion) (Prosecutor's duty to disclose favorable evidence governed by materiality standard and not limited to situations where defendants request favorable evidence); See also KYLES V WHITLEY, 514 U.S. 419, 433 (1995) ([R]egardless of request, favorable evidence is material..' (Bagley, 473, U.S. at 682)

The materiality of the recording plays a substantial role. This case in chief has a lingering timeline, starting from 2012 till present day. Which means, numerous instances of sworn testimony was given, that surrounded this subject matter. The impeachment value in total is vast, and it's use would definitely substantiate the lack of flight defense. From start to end, is as follows. State's supplemental response to Discovery containing Cd/Disc in 2013, Dimitri's request for Discovery in 2016, Dimitri's opening statement in reference of. Then poof, accountability vanishes.

"Government's bad faith attempt to suppress evidence considered 'common sense' indication of materiality, when materiality had not been conclusively determined". U.S. V JACKSON, 780 F.2d 1305, 1311 n4 (7th Cir 1986)

On direct Appeal the State initially claim within Appellee Brief that "The State undertook efforts to locate a copy of the recording, but was not able to locate one". (See Appendix, Attachment #9). Only to relinquish a copy of the disc, after the Petitioner questions the veracity of the Disc's chain of custody documentation. The 11th hour attempt to save face, is proof in itself that the State's accountability of the Disc is beyond questionable. The mis-appropriation of said piece of evidence was deliberate, and in violation of the Petitioner's Constitutional Right's.

This present case contains a unique set of circumstances. The Petitioner believes, that the Rhode Island Supreme Court figured, the Order to have the Petitioner proceed Pro'se, would be too overwhelming and the Petitioner would crash and burn. Then the Petitioner's Brief is submitted, containing novel Issues, and a steadfast Oral argument in support thereof.

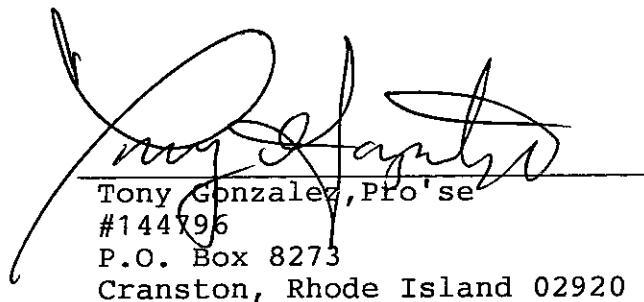
X.

CONCLUSION

For the foregoing reasons, Mr Gonzalez respectfully request that this Court Issue a Writ of Certiorari to review the Judgment of The Rhode Island Supreme Court.

Dated this 30TH day of NOVEMBER, 2021.

-Respectfully submitted,



Tony Gonzalez, Pro'se
#144796
P.O. Box 8273
Cranston, Rhode Island 02920

CC:File

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