NO: 21-7943

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY G. WERNSMAN---PETITIONER

VS.

DEAN WILLIAMS, EXEC. DIR OF PRISONS
MARK FAIRBARIN, WARDEN, A.V.C.F.
COLORADO DEPARTMENT OF CORRECTIONS

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ANTHONY G. WERNSMAN
DOC REG NO: 176300
ARKANSAS VALLEY CORR. FACILITY
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ORDWAY, COLORADO 81034

QUESTIONS PRESENTED

1. WHETHER THE COLORADO COURTS WRONGLY CONCLUDED THAT A DENIAL OF CROSS-EXAMINATION ON WITNESSES INTOXICATION DID NOT IMPLICATE PETITIONER'S CONFRONTATION RIGHTS?

2. WHETHER A PARTY CAN REQUIRE A WITNESS TO INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION IN FRONT OF THE JURY ON CROSS-EXAMINATION

3. WHETHER THE COLORADO COURTS WRONGLY CONCLUDED THAT ANY ERROR WAS HARMLESS

LIST OF PARTIES

(X) ALL PARIES 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

Krutsinger v. People, 219 P.3d 1054, 1061 Colo. 2009

Davis v. Alaska, 415 U.S. 308, 316 (1974)

Chambers v. Mississippi, 410 U.S. 284, 294 (1973)

Delaware v. Van Arsdall, 473 U.S. 673, 680 (1986)

United States v. robinson, 583 F.3d 1265, 1275 (10 Cir. 2009)

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JUDGMENT AFFIRMED DIV VI **NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**
ANNOUNCED APRIL 29, 2021

JURISDICTION

The date on which the Colorado Supreme Court decided my case was
(JANUARY 18, 2022) DENIED----Petitioner received NOTICE on Feb. 6, 2022

A COPY OF THAT DECISION APPEARS AT **APPENDIX C**

The jurisdiction of this Court is invoked under **28 U.S.C. 1257(a)**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States and Colorado Constitutions grant the accused the right to confront the witnesses against him. United States Const. amend. VI; Colo. Const. art. II & 16. Due process clauses guarantee the accused the right to present evidence in his own defense. U.S. Const. amends. V, XIV; Colo. Const. art. II, & 25.

UNITED STATES CONSTITUTION

Amendment V.....13,14,16,17,19,21,23,25,37,46,53
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CONSTITUTIONAL & STATUTORY PROVISIONS ARE CITED IN:

APENDIX: A,B, & C

STATEMENT OF THE CASE

Petitioner, at the age of 23 was charged with first degree murder after deliberation, first degree felony murder, and first degree burglary. Petitioner pled not guilty. District Court records will establish and confirm a jury then acquitted Mr. Wernsman of first degree murder after deliberation, but convicted Petitioner of felony murder, second degree murder, and first degree burblary. The convictions merged into a single conviction of felony murder, &nthe Court then sentenced Mr. Wernsman to life in prison without parole.

Mr. Wernsman contends that the trial court violated Petitioner's confrontation rights by barring him from cross-examining the two state witnesses. The only eyewitness and the owner of the house where the shooting occurred as too whether they were under the influence of drugs while testifying in the court.

Petitioner argues that the trial court should have allowed him to present an expert testimony that the brain does not fully develop until the age of 25, and that younger people such as himself lack the decision-making capacity and impulse of older adults. This evidence was highly relevant to Petitioner's defense that he did not act intentionally or knowingly. But rather only recklessly, or in the heat of passion.

Petitioner was cross examined by the prosecution as to whether there was a protection order. Had there been a protection order, it would have been a highly favorable fact for the prosecution, because it would have barred Mr. Wernsman from Zsimovan's house. Therefore, it would have satisfied the unlawful entry of the home. But the protection order **did not, exist.**

Mr. Wernsman contends the trial court committed multiple, cumlative errors in handling of the issue that the protection order (**did**) exist. The Court then **denied a mistrial**, allowed the jury to conclude that the protection order existed and further allowed the jury to consider Petitioner's inadmissible criminal history. As a direct result of these error(s), made Petitioner appear predisposed to violence and criminal behavior. Thus, undermining his credibility as a witness.

The overall cumlative effect of precluding cross-examination of prosecution witnesses on their intoxication, exluding defense expert testimony, allowing the jury to conclude that a non-existent protection order barred Petitioner from the residence of Zsimovan's house, and then exposing the jury to Mr. Wernsman's inadmissible criminal history.

Petitioner contends that these error(s) require **reversal.**

REASONS FOR GRANTING THE WRIT

1. The Court Of Appeals Wrongly Concluded That A Denial Of Cross-Examination On Witnesses Intoxication Did Not Implicate Petitioner's Confrontation Rights

Petitioner argues that the Court Of Appeals incorrectly focused on the fact that confrontation error often stems from a denial of cross-examination on bias, prejudice, or motive for testifying. It then concluded that because a witness's intoxication while testifying **does not** fall into categories, the denial of cross-examination on that topic **did not** rise to the level of constitutional error.

Mr. Wernsman contends that "cross-examination is the principal means by which the believability of a witness and the truth of his/her testimony are tested." See Davis v. Alaska, 415 U.S. 308, 316 (1974); see also U.S. Const. amend. VI; Colo. Const. art II, & 16. In addition, the due process clauses guarantee the accused the right to present evidence in his own defense. U.S. Const. amends. V, XIV; Colo. Const. art. II, & 25; Chambers v. Mississippi, 410 U.S. 284, 294; Krutsinger v. People, 219 P.3d 1054, 1061 (Colo. 2009).

The accused must be allowed to "expose to the jury the facts from in which jurors could appropriately draw inferences related to the availability and reliability of the witness." Kinney v. People, 187 P.3d 548, 559 (Colo. 2008)(quoting Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986); People v. Dunham, 381 P.3d 415, 421 (Colo. App. 2016; United States v. Robinson, 583 F.3d 1265, 1275 (10th Cir. 2009)

Mr. Wernsman asserts that a limitation on cross-examination is a confrontation error if **"a reasonable jury would have had a 'significantly different impression'** of the witness's credibility had the defendant been allowed to pursue the desired cross-examination." Kinney v. People, 187 p.3d 548 (Colo. 2008).

A witness's intoxication while testifying is highly relevant to his/her credibility and reliability. Wilson v. United States, 232 U.S. 563, 568 (1914), (whether a witness was under the influence of morphine while testifying "had a materal bearing upon her reliability as a witness; People v. Alley, 232 P.3d 272, 275 (Colo. App. 2010); ("the jury was fully apprised of a witness's intoxication status, and "it is the jury's role to determine the witness's credibility"); People v. Roberts, 553 P.2d 93, 94 (Colo. App. 1976): United States v. Banks, 520 F.2d 627, 630 (7th Cir. 1975)("Evidence of drug use at the time of trial is clearly relevant to the matter of a witness's credibility as a possible indication of a drug-related impairment in his ability accuragely to recollect and relate factual occurrences while testifying; C.R.E. 401, 402

Thus, the court must allow cross-examination on possible drug intoxication during trial:

> (A) judge may not absolutely foreclose all inquiry into an issue such as the narcotics use during trial of an important eye-witness and central participant in the transaction at issue. Once a proper foundation has been established, the issue is open for inquiry. The jury may not properly be deprived of this relevant evidence of possible inability to recollect and relate

Banks, 520 F.2d at 631; See also Roberts, 553 R.2d at 94 ("defense could cross-examine witnesses on alleged heroin use to show they were under the influence while testifying); Robinson, 583 F.3d at 1272 ("a witness may be impeached on whether she is under the influence of drugs while testifying); Williams v. State, 290 S.E. 2d 551, 552 (GA. Ct. App. 1982)("the defendants state of mind as influenced by consumption of alcohol "before testifying" might be inquired into, as material to the trial procedure"); Pool's v. Heirs v. Pool's Executor, 33 Ala. 145, 147-48 (1858)("even if a witness's testimony is "clear, distinct, and intelligent."

Petitioner contends that barring cross-examination on witnesses intoxication while testifying did not rise to the level of a confronation violation,,**the Court Of Appeals went against consistent authority.**

The weight of authority is undeniable. As a result, Certiorari is warranted here.

2. **Petitioner asserts that his case implicates the issue of whether a party can require a witness to invoke the privilege against self-incrimination in front of the jury on cross-examination.**

Petitioner argues that because the Colorado Court Of Appeals found no confrontation error, it **did not** address the remedy when a witness wants to invoke the privilege against self-incrimination on cross-examination. The Court Of Appeals declined to address whether a trial court should require the witness to invoke the privilege against self-incrimination in front of the jury as a form of impeachment. This particular issue was heavily disputed by both parties on appeal, and on certiorari before the Colorado Supreme Court. Therefore, it should be resolved by this Court to provide the necessary clarity to future litigants in that particular situation.

To be noted, the state prosecution argued cases entitled People v. Dikeman, 555 P.2d 519 (Colo. 1976); and People v. Clark, 370 P.3d 197, 214 (Colo. App. 2015), which preclude a party from ever asking a witness that particular question when the party knows the witness will invoke the privilege against self-incrimination in response.

Neither Dikeman or Clark addresses the situation presented here, as to where the defense sought to cross-examine prosecution witnesses on facts relating to their reliability, and the court precluded those questions on the grounds that the answers would incriminate the witnesses.

Mr. Wernsman asserts that there is significant OUT-OF STATE authority indicating that a witness may be impeached with her invocation of the privilege against self-incrimination. United States v. Hartman, 958 F.2d 774, 789 (7th Cir. 1992)(holding that a witness was properly impeached with his invocation of the Fifth Amendment); United States v. Kaplan, 832 F.2d 676, 684-85 (1st Cir. 1987) ("When a non-party government witness invokes the Fifth Amendment on cross-examination at trial, the court should permit the assertion of the privilege in the presence of the jury. The invocation of the privilege acts as a form of impeachment."); United States v. Seifert, 648 F.2d 557, 560-61 (9th Cir. 1980) (where a witness invoked the privilege on cross-examination, the court should have required the witness to invoke in front of the jury as "a form of impeachment.")

Petitioner contends that the Colorado Courts failed to address whether a witness may be required to invoke the privilege against self-incrimination in front of the jury on cross-examination as a form of impeachment. Because neither Court addressed the particular circumstane. Mr. Wernsman urges this Court to take this opportunity to do so.

3. **Mr. Wernsman argues that the Colorado Courts wrongly concluded that any error was harmless**

Petitioner asserts that the United States Supreme Court should grant this certiorari because the Colorado Courts failed to correctly apply the (harmless) error test. A confrontation error requires reversal unless the prosecution proves that it was harmless beyond a reasonable doubt. People v. Fry. 92 P.3d 970, 980 (Colo. 2004); People v. Durham, 381 P.3d 415, 423 (Colo. App. 2016).

In this instant case, and "assuming that the damaging potential of the cross-examination were fully realized," See Van Arsdall, 475 U.S. at 684, there is a reasonable possibility that barring cross-examination on Zsimovan's & Chamberlain's intoxication while testifying contributed to Mr. Wernsman's convictions.

Court trial records will establish and confirm that Petitioner testified in support of his own defense that he did not commit burglary, and thus felony murder, because he had a standing invitation to go into Zsimovan's residence. As a part of Mr. Wernsman's testimony, he explained that he was furious and shot the victim on the spur of the moment, supporting the theory that he commited only reckless manslaughter or heat-of-passion second degree murder.

However, based on countervailing testimony from Zsimovan and Chamberlain, the jury rejected the lesser offenses and convicted Mr. Wernsman of first degree murder predicated on burglary, and second degree murder without a heat-of-passion mitgator. Zsimovan provided crucial contradictory testimony for the (burglary) charge, and thus for the felony murder charge. She claimed that since she & Mr. Wernsman broke up, Wernsman was not welcome in her home.

As a result of Zsimovan's testimony, this was the main evidence establishing a key element of burglary. Which, indicated that Petitioner knowingly entered the house unlawfully. Merritt v. People, 842 P.2d 162, 169 (Colo. 1992) (considering whether there was other "evidence on the material points of the witness testimony. Court records will also establish that Chamberlain, was the sole eyewitness to the shooting. He testified that Petitioner barged into the house, made an aggressivesstatement, and then immedediately shot the victim before the victim could say anything. Chamberlain's testimony thus supported a finding of a knowing unlawful entry. Thus supporting the burglary and felony murder charges, and second degree murder.

Mr. Wernsman argues that if the defense had been allowed to impeach both Zsimovan and Chamberlain on the fact that they were potentially under the influence of drugs while testifying. The jury most likely would have viewed their testimony more skeptically and credited Petitioner's account over theirs. See Van Arsdall, 475 U.S. at 684. In that case, there was a reasonable probability that the jury would have acquitted Mr. Wernsman of felony murder and convicted him of heat-of-passion second degree murder or reckless manslaughter.

Petitioner asserts that because the Colorado Court Of Appeals, and the Supreme Court concluded that because there was other impeachment evidence for Zsimovan and Chamberlain in the form of felony convictions, potential bias, and intoxication on the night of the shooting, prohibiting cross-examination on their intoxication while testifying was not a constitutional error, & was therefore harmless. Mr. Wernsman contends that was a misapplication of the law.

("Merely because other impeachment evidence was presented does not necessarily mean that additional impeachment evidence was cumulative.) See United States v. Cooper, 654 F.3d 1104, 1120 (10th Cir. 2011).

Cross-examination on Zsimovan and Chamberlain's intoxication while they were testifying was an entirely whole different category of impeachment from the other forms of impeachment the defense was allowed to pursue. Their potential intoxication during trial---which affected their ability to accurately relate facts to the jury---had significant additional probative value. There is no doubt it would have further eroded their credibility, and thus may have changed the outcome of Mr. Wernsman's case.

The Colorado Courts assumed that the jury could have recognized symptoms of drug intoxication without cross-examination on this topic and considered this in assessing the witnesses credibility. But an ordinary juror likely would not have recognized symptoms of methamphetamine intoxication. People v. Douglas, 412 P.3d 785, 793 (Colo. App. 2015)("average citizens would not be expected to know which part of the marijuana plant is used to make edibles"); People v. Pollard, 307 P.3d 1124 (Colo. App. 2013); (ordinary people would not know the street price of crack cocaine and paraphernalia associated with use of crack cocaine): People v. Veren, 140 P.3d 131, 139 (Colo. App. 2005)(ordinary people would not know how methamphetamine is manufactured).

In support of this argument, Mr. Wernsman demonstrates that the symptoms the defense described see in Zsimovan---hysteria, seeming to cry without tears, sniffing, clenching and wiggling her jaw---might well be interpreted by lay jurors as shows of emotion, rather than as signs of drug intoxication.

Petitioner asserts that a defendant should not have to hope that lay jurors recognize these symptoms of drug intoxication, and the Colorado Courts erred by assuming that they would have. Instead, Mr. Wernsman argues that he was entitled to cross-examine both of them on whether they were intoxicated while testifying. Roberts at 553, P.2d 94; Banks, 520 F.2d at 631; Robinson 583 F.3d at 1272. These cases bolster Petitioner's arguments.

Cross-examination could have significantly eroded Zsimovan's and Chamberlain's credibility. Due to the fact that their testimonies provided (key) testimony relating to the Petitioner's mental state and whether he knowingly unlawfully entered the house, cross-examination on their state of intoxication could have made a difference between a conviction on felony murder, and conviction solely on lesser charges.

However, as a direct result of this error, the Colorado Courts was wrong to conclude that prohibiting cross-examination on the witnesses intoxication was harmless, and this United States Supreme Court should grant certiorari review on this issues and others argued in this petition.

CONCLUSION

WHEREFORE, ANTHONY GERALD WERNSMAN, requests that the United States Supreme Court grant this Petition For Writ Of Certiorari.

ANTHONY G. WERNSMAN