No. 21-8212

In The

Supreme Court of the United States

ANTHONY N. OTT,

Petitioner,

-vs-

STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals of New York

BRIEF IN OPPOSITION

SANDRA DOORLEY
District Attorney of Monroe County
Attorney for Respondent
47 Fitzhugh Street South
Rochester, New York 14614

By: Scott Myles
Assistant District Attorney
Counsel of Record
Telephone: (585) 753-4541
Email: smyles@monroecounty.gov

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether petitioner's cross-examination of a police witness regarding whether the witness spoke to petitioner thereby "opened the door" to testimony that he had refused to speak to investigators.

2. Whether the presumption of vindictiveness applies when petitioner was sentenced by a different judge after re-trial, and received his original sentence after re-trial.

3. Whether petitioner received the effective assistance of counsel, when counsel did not object to the re-direct question regarding petitioner's post-arrest silence, or to petitioner's sentence following re-trial.

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CITATIONS TO THE PROCEEDINGS BELOW

The New York Court of Appeals denied the petitioner's leave to appeal to that Court in a decision reported at 38 N.Y.3d 953, 185 N.E.3d 972. The decision of the Appellate Division, Fourth Department is reported at 200 A.D.3d 1642, 159 N.Y.S.3d 295.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence.

United States Constitution, Amendment Fourteen:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The Crime

Shortly before midnight on Friday, September 16, 2005, petitioner Anthony Ott, who was wearing a bright orange shirt, and his father, co-defendant Edwin Perez, encountered best friends Travis Gray and Hank Hogan, who had been bar hopping for several hours, as they walked through a parking lot near a bar district in the City of Rochester. Words between the strangers erupted into an altercation in which petitioner gutted both men, stabbing Travis Gray eight times.

Eyewitness testimony made clear that while the verbal argument between the two pairs of men may have been mutual, it was petitioner and his co-defendant who were the initial aggressors when the confrontation turned violent; petitioner

immediately eliminated Hank Hogan from the equation, stabbing him twice, before using the knife viciously on Travis Gray.

One witness testified that Travis Gray, "was on his hands and knees with his back section toward me" while petitioner "was over top of him. I could describe it like a wrestling position, [petitioner] was just kind of over him". During this time, the witness observed petitioner moving his arm at a 90 degree stabbing motion "going up and down . . . [a]cross [Travis Gray's] rib cage, underneath". Another eyewitness told the jurors that petitioner and co-defendant were double teaming Travis Gray, and that he observed Gray, "being punched and kicked on the hood of a car by both males". Witnesses watching from a nearby balcony observed Travis Gray in "the fetal position" and "on the ground" while being attacked by petitioner and petitioner's father.

Travis Gray was left with "massive injuries" to his mid-section, with a witness reporting: "It looked like part of his insides were coming out . . . . I don't know if it was intestine or something, something was coming out". Gray was raced to the hospital by ambulance suffering multiple stab wounds, the most severe to his chest and abdomen. The stab wounds to his abdomen appeared to be "four or five inches deep". Despite intense medical intervention, Gray died on September 24, 2005, due to "multiple stab

wounds with complications".

While good Samaritans were helping Travis Gray, Hank Hogan was discovered nearby "between two vehicles". Hogan "had trauma to his abdomen, appeared to be some type of stab wound, and it looked like his intestines or something were protruding out". He too was taken to the hospital where over the course of nearly four hours, surgeons repaired a "very significant laceration to the inferior vena cava, which is one of the main vessels bringing blood back from the lower body in to the abdomen, to the heart" as well as his intestines. Hogan was then sent to the intensive care unit in critical condition.

Directly after the attack, bystander Lisa Owen chased after the assailants as they took a circuitous route to their parked vehicle. When they ran into an alley, the manager of a bar took over the chase of petitioner and co-defendant while Ms. Owen obtained police assistance. Petitioner and co-defendant ended the chase by jumping into their parked car with petitioner in the front passenger seat. When the bar manager caught up to them, he "ran up to the back of the vehicle and . . . smacked on the back of the trunk". He reported: "As soon as I smacked the back of the vehicle their hands went right up". Police were then directed to the vehicle.

When the vehicle was searched, police found a closed, black lock-blade knife underneath the front passenger seat with a "a small red stain" on the blade. The blade of the knife was about three-and-a-quarter inches long. It had a mixture of blood on the blade with DNA profiles consistent with Travis Gray and Hank Hogan. The DNA profile on the knife handle matched petitioner's DNA profile. The orange shirt and jeans petitioner was wearing were also stained with Travis Gray's blood.

B. The Proceedings To Date

Petitioner was originally jointly tried with his father Edwin Perez. Petitioner's original sentence of 22 years to life for second degree murder was, however, vacated due to a discrepancy between the sentencing transcript and the certificate of conviction, and the matter was remitted to the trial court for re-sentencing. However, the original trial judge had retired at the time of remittal and the case was assigned to a different judge.

At the re-sentencing in 2011, the prosecutor explained that he was present in court when petitioner was originally sentenced and stated: "I can tell the Court that Judge Sirkin's sentence on the murder was 22 to life". Despite agreeing that all

evidence other than the sentencing transcript, including the petitioner's own moving papers, indicated that the petitioner was sentenced to a term of 22 years to life, the judge felt bound by the certified transcript and re-sentenced the petitioner to a term of 20 years to life.

The Appellate Division, Fourth Department subsequently granted petitioner's motion for a writ of error coram nobis and vacated its prior orders. See *People v Ott*, 153 AD3d 1135 (4th Dept 2017). On a *de novo* appeal, the Appellate Division found an *O'Rama* issue occurred and reversed judgment. *People v Ott*, 165 AD3d 1601 (4th Dept 2018).

Petitioner was again tried and convicted of intentional murder in the second degree of Travis Gray and intentional assault in the first degree of Hank Hogan. During that trial, a police Investigator testified regarding observing defendant wearing an orange shirt and blue jeans just after the murder and assault stabbing, and his observation of both of the victims in the hospital. On cross-examination, defense counsel strategically asked whether the Investigator interviewed his client, apparently to create the mis-impression to the jurors that the investigation of this homicide and assault stabbing was performed in a slipshod manner. To correct the mis-impression

created by defense counsel, the prosecutor asked why the Investigator was not able to have a discussion with defendant, eliciting only enough testimony to correct this false impression made to the jury by defense counsel. During summation, the prosecutor made a single comment on this evidence, to which an objection was sustained and the jury instructed to disregard the comment.

Following that trial, the trial judge stated it was his intention to sentence the petitioner to the same sentence he received after his first trial, and again sentenced the petitioner to 22 years to life on the murder count and to a concurrent determinate term of incarceration of 20 years with 5 years of post-release supervision on the assault first count.

REASONS FOR DENYING THE WRIT

The State of New York opposes granting the writ. Petitioner is asking this Court to implement a rule that a defendant's post-arrest silence can never be introduced at trial, regardless of the evidence the defendant chooses to introduce at trial. The implementation of such a rule would transform the fifth amendment guarantee against self-incrimination from a shield protecting defendants, to a sword allowing them to mislead juries with impunity.

THE *HEMPHILL* DECISION DOES NOT APPLY TO A CASE WHERE THE CONFRONTATION CLAUSE WAS NOT VIOLATED

Petitioner relies heavily on this Court's decision in *Hemphill v New York*, 142 S.Ct. 681 (2022), however that reliance is misplaced. In *Hemphill*, this Court sought to address a confrontation clause violation. As the Court noted in that case, the confrontation clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Hemphill v New York*, 142 S.Ct. 681, 691 (2022). The Court took issue with the introduction of hearsay statements in that case, further noting that, "The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court." *Hemphill v New York*, 142 S.Ct. 681, 694 (2022).

The Court's concerns regarding the reliability and veracity of statements are not implicated in a case where no statements are introduced. Nevertheless, this Court has found that references to a defendant's post-arrest silence is impermissible. *Doyle v Ohio*, 426 U.S. 610 (1976). However, there are exceptions where this rule does not apply.

In fact, this Court has ruled that prosecutors can comment on the defendant's silence in circumstances very similar to those in this case. In *U.S. v Robinson*, 485 U.S. 25 (1988), this Court stated "It is one thing to hold, as we did in *Griffin*, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would prohibit the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some "cost" to the defendant in having remained silent in each situation, but we decline to expand *Griffin* to preclude a fair response by the prosecutor in situations such as the present one."

Finally, even if the introduction of the petitioner's silence was error, that error was harmless. In a case where petitioner was seen committing the crime by multiple eyewitnesses, chased from the scene of the murder by those eyewitnesses, cornered in a car, and immediately apprehended by police who found him still in possession of the murder weapon and covered in the victim's blood, the single comment by the prosecutor regarding the petitioner's silence was harmless beyond a reasonable doubt. *Chapman v California*, 386 U.S. 18 (1967); *U.S. v Hasting*, 461 U.S. 499 (1983).

THE PETITIONER'S SENTENCE FOLLOWING RE-TRIAL WAS NOT VINDICTIVE

As noted in the statement of the case, petitioner was originally sentenced to 22 years to life. However, due to a discrepancy between the sentencing transcript and the certificate of conviction, the matter was remitted to the trial court for re-sentencing.

The re-sentencing in 2011 took place before a different judge than the original sentencing. At that proceeding, the prosecutor explained that he was present in court when petitioner was originally sentenced and stated: "I can tell the Court that Judge Sirkin's sentence on the murder was 22 to life". Despite agreeing that all evidence other than the sentencing transcript, including the petitioner's own moving papers, indicated that the petitioner was sentenced to a term of 22 years to life, the judge felt bound by the certified transcript and re-sentenced the petitioner to a term of 20 years to life.

The trial judge at petitioner's re-trial was a different judge than at the original trial, or the re-sentencing. At sentencing following the re-trial, the judge stated "I'm going to sentence you to the same thing that Judge Sirkin sentenced you to, which is 22 years to life".

As a preliminary matter, this issue is not properly before this Court. This Court "adhere[s] to the rule in reviewing state court judgments under 28 U.S.C. §1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review." *Adams v Robertson*, 520 U.S. 83, 86 (1997)(*per curiam*); *see Illinois v Gates*, 462 U.S. 213, 218 (1983). Petitioner now asks this Court to review the decision of the New York Appellate Division, Fourth Department, but he cannot meet his burden of proving he presented this issue to that Court, as Petitioner's arguments on this issue before the New York state appellate courts concerned only issues of state law.

Should this Court find that this issue is appropriately before it, it should nevertheless find that the issue does not merit granting the writ of certiorari.

While the imposition of a greater sentence after a re-trial is permissible, vindictiveness in sentencing is not. *Alabama v Smith*, 490 U.S. 794 (1989). There is a presumption of vindictiveness in circumstances in which there is a "reasonable likelihood," that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. *U.S. v Goodwin*, 457 U.S. 368 (1982). However,

the presumption of vindictiveness does not operate in cases, such as this one, where the second sentence is imposed by a different sentencer than the original sentence. *Texas v McCullough*, 475 U.S. 134, 140 (1986). Where there is no presumption, the burden remains upon the defendant to prove actual vindictiveness. *Alabama v Smith*, 490 U.S. 794, 799 (1989). Petitioner has failed to meet that burden. In fact, it appears that petitioner relies entirely on the presumption of vindictiveness, and does not attempt to show actual vindictiveness. It would be difficult to imagine how defendant would meet such a burden in a case where the sentencing judge affirmatively states that it is his intention to re-sentence the defendant to his original sentence.

THE PETITIONER RECEIVED MEANINGFUL REPRESENTATION

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the

deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland v Washington*, 466 U.S. 668 (1984). Petitioner has failed to make either of the required showings in this case.

Petitioner claims his counsel was ineffective for failing to object to the re-direct question regarding his post-arrest silence, and for failing to object to the sentence petitioner received. As noted in the above discussion, the re-direct question was appropriate given the cross-examination of that witness, and any objection would have been unsuccessful. Even if such an objection could have succeeded, petitioner was not prejudiced by the failure to object when the proof against him was so overwhelming that the objection could not have affected the outcome of the trial.

Petitioner also argues that his counsel was ineffective for not objecting during sentencing. As noted above, there is no presumption of vindictiveness when the defendant is sentenced by a different judge than originally imposed sentence. *Texas v McCullough*, 475 U.S. 134, 140 (1986). Since there is also no evidence of actual

vindictiveness, it is unclear what basis petitioner's counsel would have had to object, or that such an objection would have been successful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SANDRA DOORLEY
District Attorney of Monroe County

SCOTT MYLES
Assistant District Attorney
Counsel of Record
Ebenezer Watts Building, Suite 832
Rochester, NY 14614
(585) 753-4541
smyles@monroecounty.gov