22-5178 **ORIGINAL**

No. ______

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
JUN 16 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Daniel K. Cleary - Petitioner

v.

Illinois - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, THIRD JUDICIAL DISTRICT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

☐ Crime Scene Investigator Michael Oyer's hearsay testimony that the website of the manufacturer of degreasing solvent Oil Eater claimed that the product was "very good" at "getting rid of any evidence of [blood] stains." Over defense counsel's objection the Court permitted the State to continue, wherein Mr. Oyer repeated the claim that Oil Eater was "very good at cleaning up blood and removing the stains and getting rid of any evidence of those stains." The following day, the Court reminded the jury of Mr. Oyer's hearsay testimony about the product, "including the fact that it might be good for cleaning blood", before instructing the jury to disregard that testimony.

I. WHETHER THE TRIAL COURT ERRED IN DENYING THE POST-CONVICTION CLAIM OF INEFFECTIVE ASSISTANCE OF DIRECT APPEAL COUNSEL AFTER AN EVIDENTIARY HEARING, WHERE THE RECORD ESTABLISHES THAT AN ORDER TO DISREGARD CSI MICHAEL OYER'S HEARSAY TESTIMONY ABOUT THE ALLEGED PROPERTIES OF OIL EATER BRAND DEGREASER WOULD NOT HAVE DEPRIVED THE EVIDENCE OF ITS PREJUDICIAL EFFECT, AND THAT IF APPELLATE COUNSEL HAD CHALLENGED THE TRIAL COURT'S FAILURE TO GRANT A MISTRIAL BASED ON THE ADMISSION OF THAT EVIDENCE, A NEW TRIAL WOULD HAVE BEEN GRANTED.

II. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE WAIVER OF THE STATUTORY RIGHT TO POST-CONVICTION COUNSEL FOR AN EVIDENTIARY HEARING WAS KNOWING, WHERE THE RECORD INDICATES THAT PETITIONER WAIVED COUNSEL BECAUSE HE BELIEVED THAT DOING SO WOULD RETROACTIVELY RELIEVE HIM OF RESPONSIBILITY FOR PRIOR ACTIONS, INCLUDING WAIVER OF CLAIMS, TAKEN THROUGH APPOINTED COUNSEL.

Various State witnesses were permitted to offer inadmissible hearsay testimony alleging that the victim told them of threats and/or harm made by the defendant.

III. WHETHER THE DEFENDANTS CONVICTION FOR MURDER SHOULD BE REVERSED, AND THIS CAUSE REMANDED FOR A NEW TRIAL, BECAUSE UNDER CRAWFORD v WASHINGTON, 541 U.S. 36 (2004), THE STATE'S DECISIVE EVIDENCE SHOULD NOT HAVE BEEN ADMITTED SINCE IT CONSISTED OF TESTIMONIAL HEARSAY STATEMENTS ALLEGEDLY MADE BY THE MURDER VICTIM, HIS WIFE, INDICATING THAT THE DEFENDANT HAD THREATENED TO KILL HER IF SHE LEFT HIM.

Daniel Cleary respectfully petitions for a writ of certiorari to review the judgment of the Third Judicial District Appellate Court of Illinois in this case.

Opinions Below

The opinion of the highest state court to review the merits is an unpublished order under Supreme Court Rule 23 (166 Ill. 2d R. 23)(App. 1a-13a) and is docketed as No. 3-19-0344. The order of the circuit court denying post-conviction relief appears at Appendix B (App. 14a).

The findings of facts, conclusions of law, and order of the Third Judicial District Appellate Court of Illinois is published and appears at Appendix D (App. 16a-43a) and is docketed as NO. 3-11-0610.

Jurisdiction

The date on which the highest state court decided my case was January 26, 2022, wherein the state Supreme Court denied a Petition For Leave To Appeal. A copy of that decision appears at Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (a). An extension of time to file a petition for writ of certiorari was granted (Application No. 21A681).

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Constitutional And Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall... be confronted with the witnesses against him... and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, subsection 1, provides, in relevant part: No State shall "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."

The Post-Conviction Hearing Act grants petitioners whose petitions are not summarily dismissed the right to representation by counsel during subsequent proceedings, including a "third stage" evidentiary hearing. 725 ILCS 5/122-4.

725 ILCS 5/115-10.2a of the Code of Criminal Procedure of 1963 provides, in pertinent part, allows the admission of a prior statement by an individual protected under the Illinois Domestic Violence Act of

1986 (750 ILCS 60/201 (West 2008)). More specifically, a hearsay statement may not be admitted under section 115-10.2a unless "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." 725 ILCS 5/115-10.2a (a)(2) (West 2008).

Statement

Strickland v Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), is the controlling case regarding claims of ineffective assistance of counsel. To establish such a claim, a defendant must satisfy the Strickland test. The test is composed of two prongs: deficiency and prejudice. A court uses the Strickland analysis also to test the adequacy of appellate counsel.

A defendant who contends that appellate counsel rendered ineffective assistance, e.g., by failing to argue an issue, must show that that failure to raise the issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed. People of the State of Illinois v Whitehead, 169 Ill. 2d 355, 381, 215 Ill. Dec. 164, 662 N.E. 2d 1304; People v Flores, 153 Ill. 2d 264, 283, 180 Ill. Dec. 1, 606 N.E. 2d 1078.

In the case at bar, petitioner contends that he received ineffective assistance of appellate counsel, because reasonable attorneys would recognize and brief strong issues even when there is no "directly applicable authority," so long as competent attorneys "would have recognized the fundamental importance" of the issue in light of extant laws and the record. People v. Mack, 167 Ill. 2d 525 (1995). Reasonable counsel would have recognized the fundamental importance of the mistrial claim in light of the applicable law and the record. That instructing the jury to disregard sufficiently critical evidence does not serve to eliminate its prejudicial effect or cure the initial error in its admission is a well-established principle of law. The trial record showed that Crime Scene Investigator (CSI) Michael Dyer's hearsay testimony was such critical testimony, both serving to paper over the weaknesses in the State's forensic evidence and serve as consciousness of guilt evidence that petitioner's cleaning of the garage was a specific effort to "get rid of any evidence" of the victim's blood. Appellate counsel's performance was deficient for failing to raise the issue.

The inquiry as to prejudice requires this Court to examine the merits of this issue. Initially, the trial court's eventual conclusion that CSI Dyer's testimony about the Oil Eater hearsay was inadmissible hearsay was correct. The content of the website was a statement about the purported capabilities of Oil Eater, and it was offered to prove nothing other than that Oil Eater in fact "get[s] rid of evidence" of blood. People v. Olinger, 176 Ill. 2d 326, 357 (1997) (hearsay rule); In re Jovan A., 2014 IL App (1st) 103835, ¶27 (citing cases) (holding that advertisements are out-of-court statements). It was not relevant to show the mental state of defendant, as there was no evidence that he ever read the website. People v. Bailey, 409 Ill. App 3d 574, 584 (1st Dist. 2011) (absent evidence that defendant knew of statement, statement is not probative as to defendant's state of mind). Neither did Oyer offer any opinion that was dependent upon the statement, or establish that the somewhat generic advertising material would even be appropriate for an expert in his field to rely upon. Wilson v. Clark, 84 Ill. 2d 186, 192-193 (1981) (adopting Fed. R. Evid. 703 as common law).

The issue is whether trial court erred in denying the motion for mistrial instead simply telling the jury to disregard the evidence. A mistrial should be declared "where an error of such gravity has occurred that it has affected the fundamental fairness of the trial." People v. Bishop, 218 Ill. 2d 232, 251 (2006). See also People v. Redd, 135 Ill. 2d 252, 323 (1990) (mistrial should be granted where event "of such character and magnitude" has occurred "that the party seeking it is deprived of his right to a fair trial").

Here, the trial court sought to correct its initial error by ordering the jury to disregard CSI Dyer's testimony about the website. Whether an order to the jury to disregard or limit its consideration of evidence is sufficient to cure the prejudicial effect on the jury and avoid the need for a mistrial depends upon both the nature of the improper evidence and the other evidence admitted at trial. Such an instruction generally serves to eliminate the effect of the evidence on a jury and cure the error. People v. Speight, 153 Ill. 2d 365, 373 (1992). However, it does not always do so, and courts have held instructing a jury to disregard evidence does not remove its prejudicial effect where the evidence is of a critical kind, see, e.g., People v. Hernandez, 121 Ill. 2d 293, 317-18 (1988) (hearsay confession of co-defendant); People v. Lewis, 269 Ill. App. 3d 523, 527 (4th Dist. 1995) (evidence relating to polygraph examination), or where the State's case is structured in a way that repeatedly draws the jury's attention to circumstances connected with the "stricken" evidence, People v. Rivera, 277 Ill. App. 3d 811 (1st Dist. 1996).

The question in the case at bar is, and was, what the jury concluded that the State's evidence proved beyond a reasonable doubt. Convincing the jury beyond a reasonable doubt depended on more than the State's circumstantial evidence, and Dyer's testimony about the "evidence" destroying properties of Oil Eater helped provide the State with what it needed. Dyer's testimony served to color the jury's perception of defendant's cleaning of the garage floor. Also, CSI Oyer's testimony suggested to the jury - despite Oyer not specifically opining on the subject using his expertise as a crime scene investigator - that the inconsistent results of forensic testing were explained by the use of Oil Eater.

The split in opinions has profound implications for this case and the use of government-employed "experts" offerring testimony of marketing materials as factual evidence worthy of confidence. Jurors great weight to government-employed witnesses when called to testify for the prosecution. This is true in both state and federal judicial proceedings. And there are no United States Supreme Court rulings that have been made to direct state or federal courts in the matters and circumstances pursued in this petition.

Crawford v Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004), is one of this Court's clearest articulations of the Confrontation Clause as it relates to determining hearsay statement testimony. Whether a statement is testimonial or covered by hearsay exception is a question of law.

In Illinois, an exception to the hearsay rule was added by Pub. Act 93-443 §10 (eff. Aug. 5, 2003), enacted as 115-10.2a (725 ILCS 5/115-10a). The statutory provision, "when enacted by our legislature [in 2003], was tailored to comport with sixth amendment confrontation clause requirements * * * as delineated" under Roberts. In re Rolandis G., 232 Ill. 2d at 23, 327 Ill. Dec. 479, 902 N.E. 2d 600. See also, People v Burnett, 2015 IL App (1st) 133610, (although the court discussed section 115-10 in Rolandis G. and we are concerned here with section 115-10.2a, we are faced with the same issue of whether an exception that was designed to conform to Roberts now complies with Crawford. Footnotes 6, 7).

In its 2004 Crawford decision, the United States Supreme Court rejected the Roberts rule, with its reliance on established hearsay exceptions, and thereby created a sweeping change in sixth amendment jurisprudence. Crawford, 541 U.S. at 60-62, 124 S. Ct. 1354 (the Roberts rule is "not what the Sixth Amendment prescribes"); Clark, 576 U.S. at —, 135 S. Ct. at 2179 (in Crawford, "we adopted a different approach"); Bullcoming v New Mexico, 564 U.S. 2, —, 131 S. Ct. 2705, 2713, 180 L. Ed. 2d 610 (2011) (describing Crawford as "[r]ejecting Roberts"); In re Rolandis G., 232 Ill. 2d at 23, 327 Ill. Dec. 479, 902 N.E. 2d 600 (in Crawford, "the [United States Supreme Court] overturned Roberts and devised a fundamentally new procedure for analyzing confrontation clause claims.").

Defendant claims that Illinois' hearsay exception statute, 725 ILCS 5/115-10.2a, as now applied to him, violates his confrontation clause rights in a post-Roberts world.

In the case at bar, the trial court found that the witness was unavailable for purposes of a hearsay exception, due to her death.

In the case at bar, the trial court admitted hearsay statements into evidence pursuant to section 115-10.2a of the Code (725 ILCS 5/115-10.2a (West 2010)). In order for this exception to apply, the trial court had to find that the statements were "not specifically covered by any other hearsay exception." 725 ILCS 5/115-10.2a (a) (West 2010).

However, satisfying a hearsay exception is no longer enough for admission. Crawford, 541 U.S. at 60-62, 124 S. Ct. 1354 (the Roberts rule is "not what the Sixth Amendment prescribes"); Clark, 576 U.S. at —, 135 S. Ct. at 2179 (in Crawford, "we adopted a different approach"); Bullcoming, 564 U.S. at —, 131 S. Ct. at 2713 (describing Crawford as "[r]ejecting Roberts"). To be properly admitted, an out-of-court statement must satisfy **both** a hearsay exception **and** a defendant's rights under the sixth amendment. Martin, 408 Ill. App 3d at 896, 349 Ill. Dec. 494, 946 N.E. 2d 990. (emphasis added).

Whether analyzing the confrontation clause or hearsay exception, the United States Supreme Court's definition of unavailability is equally applicable.

As observed above, the U.S. Supreme Court "overturned Roberts and devised a fundamentally new procedure for analyzing confrontation claims." In re Rolandis G., 232 Ill. 2d at 24, 327 Ill. Dec. 479, 902 NE 2d 600. This exception has not been amended substantively since Crawford was decided. (The exception was amended by Pub. Act 97-1150 § 635 (eff. Jan. 25, 2013) only to change the reference to the Criminal Code of 1963 to the Criminal Code of 2012. Thus, this is the same section in substance which the legislature enacted to conform to Roberts.)

Further review is therefore imperative. These questions appear frequently and is critically important in each case in which it arises. And this case presents a clean and fully-developed vehicle for addressing the question. The petition accordingly should be granted.

Proceedings Below

In 2008, Melisa Cleary, wife of Petitioner, was murdered. The case remained unsolved until 2010, when the police investigation focused on Daniel Cleary. The State charged him with five counts of first degree murder (720 ILCS 5/9-1(a), (a)(2) (West 2010). On February 28, 2011, the matter proceeded to a jury trial. During the trial, the State admitted hearsay statements made by the victim pursuant to Section 115-10.2a of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.2a (West 2010)). Following said jury trial, Cleary was convicted of murder and sentenced to 60 years' imprisonment.

On appeal, Cleary contended that pursuant to Crawford v. Washington, 541 U.S. 36 (2004), admitting those statements violated his rights under the confrontation clause of the sixth amendment to the United States Constitution; Arguing that section 115-10.2a was unconstitutional as applied to him because it allowed testimonial hearsay statements to be admitted against him when he had no prior opportunity to cross-examine the declarant. Applyin the test set out in People v. Stechly, 225 Ill. 2d 246 (2007) the Third Judicial District Appellate Court of Illinois concluded that the hearsay statements at issue were not testimonial. Accordingly, the confrontation clause did not bar the admission of those statements against defendant; Therefore, confirming conviction.

On February 20, 2015, Cleary initiated postconviction proceedings when he filed a petition for relief in the trial court pursuant to 725 ILCS 5/122-1 et seq. (West 2014), alleging, inter alia, that his due process rights were violated when the State presented hearsay testimony regarding the uses of Oil Eater brand degreaser, and that appellate counsel was ineffective for failing to raise the claim. The circuit court advanced defendant's petition to the second stage and appointed counsel.

On June 13, 2017, counsel filed a supplemental petition alleging that appellate counsel was ineffective for failing to claim that the trial court erred in denying defendant's motion for a mistrial due to CSI Oyer's hearsay testimony regarding the Oil Eater website.

On Aug. 16, 2018 and Sept 19, 2018, defendant filed motions requesting leave to file supplemental postconviction petitions presenting new claims of ineffective assistance. The court granted defendant leave to file both, and on Dec. 20, 2018, the matter proceeded to an evidentiary hearing, wherein defendant introduced documents produced by the Illinois State Police, including, crime scene investigation reports and excerpts from the agencies' forensic training manual. The court made a directed finding for the State and denied defendants petition.

An appeal was sought in the Third Judicial Appellate Court of Illinois, wherein defendant argued that the circuit court erred by denying defendant's postconviction allegations of ineffective assistance of appellate counsel. Specifically, that appellate counsel was ineffective for failing to allege that the court abused its discretion by denying trial counsel's motion for mistrial due to improperly admitted hearsay statements. The court, relying on People v. Biggs, 294 Ill. App. 3d 1046, 1051 (1998), and People v. Scott, 401 Ill. App. 3d 585, 601 (2010), opined that any prejudicial impact caused by the erroneous admission of the Oil Eater hearsay testimony was eliminated by the court's jury instruction. Thereby affirming defendant's conviction.

Reasons For Granting This Petition

After April 24, 1996, federal habeas corpus petitions filed in federal courts are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Woodford v. Garceau, 538 US 202, 207, 123 S. Ct. 1398, 155 L. Ed. 2d 363 (2003). Under AEDPA, a federal habeas corpus petitioner is not entitled to relief unless he demonstrates that the state court's adjudication of his federal claim was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. 28 USCA § 2254(d)(1). Supreme Court precedent is "clearly established" only if it squarely addresses an issue in the state case. See, e.g., Wright v. VanPatten, 552 U.S. 120, 125, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008)(per curiam)(Supreme Court precedent must "squarely address[ ]" the question at issue); Carey v. Musladin, 549 U.S. 70, 77, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)(Supreme Court precedent must "require" the state court to reach a conclusion); see also Panetti v Quarterman, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007)(Supreme Court precedent must enunciate a principle that applies in an analogous case). There can be no Supreme Court precedent on point or the Court has declined to decide the issue. Virsnieks v Smith, 521 F. 3d 707, 716 (7th Cir. 2008) quoting Lockhart v. Chandler, 446 F. 3d 721, 724 (7th Cir. 2006); accord Simpson v Battaglia, 458 F. 3d 585, 597 (7th Cir. 2006).

Post-AEDPA, direct collateral review by the United States Supreme Court is petitioners only available action. There is no established U.S. Supreme Court law addressing petitioners issues regarding the admissibility of degrees of hearsay evidence that may be testified to, nor whether state forensic experts may testify to marketing materials of a products website without greatly prejudicing the jury, beyond a reasonable doubt.

As to the degrees of hearsay statement evidence, Illinois' legislature has not substantively amended 725 ILCS 5/115-10.2a since Crawford was decided, overturning Roberts. The statutory provision, "when enacted by our legislature [in 2003], was tailored*** as delineated" under Roberts, In re Rolandis G., 232 Ill. 2d at 23, 327 Ill. Dec. 479, 902 N.E. 2d 600. (Although the court discussed section 115-10 in Rolandis G. and we are concerned with section 115-10.2a, we are faced with the same issue of whether an exception that was designed to conform to Roberts now complies with Crawford. People v. Burnett, 2015 IL App (1st) 133610 (2015) footnote 6).

The United States Supreme Court has refused to make any pronouncements about whether statements to nongovernmental actors can be testimonial. See Davis v. Washington, 547 U.S. at 823 n.2 (the Court finds it "unnecessary to consider whether and when statements made to someone other than law enforcement personnel are "testimonial."); Michigan v Bryant, 562 U.S. at — n.3, 131 S.Ct. at 1155 n.3. Bryant - which the Richter court did not address - continued to treat this as an open issue, and its focus on whether the statement's primary purpose was to establish or prove past events potentially relevant to later criminal prosecution does not preclude the possibility that testimonial statements may be made to nongovernmental actors. See Bryant, 562 U.S. at —, 131 S.Ct. at 1165. Because the Illinois courts have adopted the Stechly plurality approach in Rolandis G. and Sutton, "it may have implicitly adopted Stechly's determination that a testimonial statement does not need to be given to government personnel." People v Cleary, 2013 IL App (3d) 110610 ¶¶65.

Illinois State Police Crime Scene Investigator Michael Oyer testified as to claims made by a product manufacturers' website for its Oil Eater brand degreaser, alleging that the product is "very good at cleaning bloodstains up." Oyer repeated the point and added "it's very good at cleaning up blood and removing the stains and getting rid of any evidence of those [blood] stains." The following day, the trial court revisited defense counsel's objection of Oyer's testimony. The court admitted its error and in its instruction to the jury that Oyer had testified and made reference to a website of the manufacturer of Oil Eater and its claims, including "the fact that it might be good for cleaning blood." The court's instruction reminding the jurors of what was testified to further compounded the court's initial error and that error was unreconcilably prejudicial.

In order to evolve the body of constitutional law, this case is perfect vehicle for addressing the questions presented.

"It is impossible to unring a bell." Maness v Meyers, 419 U.S. 449, 460, 42 L. Ed 2d 574, 584, 95 S. Ct. 584, 592 (1972).

There is no established United States Supreme Court law. Therefore, the federal courts cannot review a writ without U.S. Supreme Court decisions from which to base review decisions upon. The Sixth Amendment right to counsel means nothing if it can be circumvented so easily. For all the above reasons, further review of petitioners claims is manifestly warranted.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully Submitted,
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16 June 2022