

No. _____

In The
Supreme Court of the United States

VICTOR GATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Did the United States Court of Appeals for the Third Circuit abuse its discretion and commit an error of law in not issuing a Certificate of Appealability and in denying Mr. Gates' Habeas Corpus Petition pursuant to 28 U.S.C.A. 2255 on his criminal conviction, since there was a substantial showing of the denial of his Sixth Amendment right to effective assistance of counsel and his Fifth Amendment right to due process, and there were debatable issues and there was a substantial showing of the denial of his constitutional rights pursuant to 28 U.S.C.A. 2253(c)(ii) as follows:

1) Failure of trial counsel to interview or present any character witnesses and the reason was the lawyer did not believe a crime had been committed and the lawyer did not believe character witness' testimony had any value.

2) Failure to give an opening statement without any good tactical or strategic reason not to and then becomes confused when attempting to give the opening right before the closing speech without any valid reason to delay the opening.

3) Failure to interview, subpoena, or call any factual witness and the failure to have any witness testify who could have refuted the government's case without any good reason not to present such witnesses.

4) Failure to provide the government in advance of trial Mr. Gates' outside work authorization

QUESTIONS PRESENTED – Continued

which could have been used to refute testimony of the government's witness and could have been presented if provided to the government in advance.

PARTIES TO THE PROCEEDING

The Petitioner, Victor Gates, is a 30-year highly decorated retired Philadelphia Police Officer. He was the Defendant in the criminal case in the United States District Court for the Eastern District of Pennsylvania, and the Appellant before the United States Court of Appeals for the Third Circuit. The Respondent is the United States of America, through the United States Attorney's Office for the Eastern District of Pennsylvania.

RELATED CASES

The only related case is the direct appeal of *United States v. Gates*, 803 Fed. Appx. 640 (3d Cir. 2020).

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PETITION FOR A WRIT OF CERTIORARI

Victor Gates has Petitioned for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit denying en banc his request to grant the Habeas Corpus Petition and to issue certificates of appealability by Order dated October 18th, 2022.

OPINIONS BELOW

There is no opinion below by the United States Court of Appeals for the Third Circuit. There is the en banc Order dated October 18th, 2022 denying reargument and a hearing and a certificate of appealability, (App. 1). There is the Order and Judgment of the Third Circuit entering Judgment and denying a certificate of appealability dated September 13th, 2022, (App. 3). There is the Order dated May 26th, 2022 of the Honorable Wendy Beetlestone denying the Habeas Corpus and a Certificate of Appealability, (App. 5). There is the Report and Recommendation of the Honorable Richard Lloret denying the Habeas Corpus Petition and denying a certificate of appealability dated April 27th, 2021, (App. 8).

JURISDICTION

The United States Court of Appeals for the Third Circuit by Order dated October 18th, 2022 denied the request for an en banc hearing to reverse the denial of

the Petition for Writ of Habeas Corpus (28 U.S.C.A. 2255) and the denial of the certificate of appealability. Therefore, this Honorable Court has jurisdiction pursuant to 28 U.S.C.A. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a federal Habeas Corpus Petition pursuant to 28 U.S.C.A. 2255 alleged ineffective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and a violation of the due process clause of the Fifth Amendment of the United States Constitution. This further involved the issuance of a certificate of appealability pursuant to 2253(c)(ii).

INTRODUCTION AND STATEMENT OF THE CASE

This case presents this Honorable Court with a somewhat shocking fact pattern where trial counsel representing Victor Gates (who was a highly decorated and respected Police Officer) did not present any character witnesses and he did not speak to them. He then never gave an opening statement and apparently out of confusion, tried to give one at the beginning of his closing. He did not interview or talk to or present any fact witness who could have refuted key aspects of the government's case. Finally, he failed to turn over the

proof that Mr. Gates, as a police officer, sought permission to have outside work. By not turning this over prior to trial to the government, Mr. Binns was precluded from using the authorization and in fact, had to apologize in front of the jury.

The Third Circuit decision shockingly suggests the trial counsel's conduct is okay when he does not interview witnesses, present witnesses, utilize character witnesses, give opening statements, timely turn over important documents. These failures did not result in the granting of a Habeas Corpus Petition and more importantly, at least in the Third Circuit, does not even require or allow a certificate of appealability. The reason for no character witnesses, according to trial counsel, was that he did not believe there was a crime, and did not believe in the value of character testimony. The failure to issue a certificate of appealability appears to be a gross abuse of discretion and contrary to the existing case law and the constitutional amendments of the Fifth Amendment due process and the Sixth Amendment right to effective assistance of counsel and 28 U.S.C.A. 2253(c)(ii).

The procedural and factual summary is needed. The Petitioner, Victor Gates, was a retired 30-year veteran of the Philadelphia Police Department and had many accommodations for bravery. He was convicted after a trial before a jury where he was represented by attorney James Binns. The trial was held before the Honorable Wendy Beetlestone of the United States District Court for the Eastern District of Pennsylvania on June 4th, 5th, and 6th of 2018. Mr. Gates was

convicted in count one of violation of honest services, mail fraud, and conspiracy (18 U.S.C.A. 1341, 1346, and 1349). He was also convicted on counts two through fifteen of violation of honest services and mail fraud involving mailing checks to Police Officer Pelosi (18 U.S.C.A. 1341 and 1346). In counts sixteen and seventeen he was convicted of providing false information to the FBI (18 U.S.C.A. 1001(a)(ii)).

After trial, Mr. Gates terminated the services of attorney Binns and retained present counsel, Samuel C. Stretton, Esquire. Subsequently, Mr. Gates was sentenced by Judge Beetlestone on April 9th, 2019 to 40 months of incarceration on counts one through fifteen to run concurrently. He was then sentenced to two years of supervised release to run consecutively on counts sixteen and seventeen. He was ordered to pay a fine of \$15,000.00. The Judge ordered forfeiture of \$653,319.00.

Mr. Stretton, on behalf of Mr. Gates, filed a direct appeal to the United States Court of Appeals for the Third Circuit. The appeal was denied and the sentence was affirmed in the decision of *United States v. Gates*, 803 Fed. Appx. 640 (3d Cir. 2020), (see App. 42).

Mr. Stretton then filed a federal Habeas Corpus Petition pursuant to 28 U.S.C.A. 2255. A hearing was held before Federal Magistrate Judge Richard Lloret on May 4th, 2021. Judge Lloret allowed the testimony of Mr. Binns but would not allow the testimony of any of the character or fact witnesses. Judge Lloret then

issued his Report and Recommendation recommending denial of the Petition for Writ of Habeas Corpus and recommending there be no certificate of appealability, (see App. 8). Mr. Stretton then, on behalf of Mr. Gates, objected to Judge Lloret's decision and filed objections with Federal Judge Wendy Beetlestone. Judge Beetlestone, without argument or hearing, affirmed Judge Lloret's denial of the Habeas Corpus and also affirmed his denial of certificates of appealability. Judge Beetlestone's Order was dated May 26th, 2022, (see App. 5). Mr. Stretton then filed an appeal to the United States Court of Appeals for the Third Circuit and requested the issuances of certificates of appealability. Unfortunately, without argument or hearing, the United States Court of Appeals for the Third Circuit, in a panel consisting of Judge Ambro, Judge Shwartz, and Judge Bibas, denied the request for certificate of appealability and affirmed the Judgment and denial of the Habeas Corpus, (see App. 3). Mr. Stretton then filed a Petition requesting en banc review and a hearing on the denial by the three Judge panel of the Third Circuit. Unfortunately, without argument or hearing, the United States Court of Appeals for the Third Circuit, en banc on October 18th, 2022, denied the request for reconsideration and the request for appealability, (see App. 1).

This present Petition for Writ of Certiorari is now being filed by Mr. Stretton on behalf of Mr. Gates.

Mr. Gates was released from prison early based on a Petition for compassionate release that Mr. Stretton filed due to a cancerous condition Mr. Gates suffered from and which the prison could not adequately treat.

A brief summary of the government's evidence during the trial is now necessary. Mr. Gates had retired as a Police Officer and was working for Avis rental and other rental companies to recover stolen rental vehicles. The government alleged that from the time of Mr. Gates' retirement, in or around 2005-2006, until 2015, Mr. Gates and Police Detective Pelosi were working together to recover cars that were stolen from Avis rental company. Mr. Pelosi, at times, would find the vehicles. According to the Indictment, Mr. Gates paid Officer Pelosi, who was still an active Police Officer, \$300.00 a month and later \$400.00, to assist him in finding the stolen vehicles. The government then alleged that Mr. Gates illegally had Detective Pelosi remove the vehicles from the NCIC database as stolen.

There was no evidence that the vehicles were not stolen and there was no evidence that the vehicles were not returned. Two FBI agents showed up at Mr. Gates house around 7:30am one morning and asked him whether he had paid checks to Mr. Pelosi. Mr. Gates initially denied he had and a few hours later, Mr. Gates called the FBI agents back and said he did.

The government's case consisted of the testimony of then Inspector Benjamin Naish of the Philadelphia Police Department, (6/4 N.T. 35, 36, 38). Mr. Naish testified that a police officer cannot have outside employment without authorization, (6/4 N.T. 47, 50). Mr. Naish testified for a vehicle to be removed from the NCIC database, an officer would have to come and see the vehicle and only then could it be removed, (6/4 N.T. 57). Investigator Naish agreed that if a stolen vehicle

that was recovered was not removed from the NCIC database then the person driving the car could be stopped and arrested, (6/4 N.T. 63, 64).

There were business records from PNC Bank showing Mr. Gates paying Mr. Pelosi \$300.00 each month and later \$400.00, (6/4 N.T. 69-74).

The government then presented FBI Agent Humphrey's who interviewed Mr. Gates, who had initially told her that he and Mr. Pelosi worked to recover the stolen cars, (6/4 N.T. 77-80). She indicated that Mr. Gates initially denied that he paid Mr. Pelosi by check, (6/4 N.T. 81). Agent Humphrey's confirmed that Mr. Gates called her back and told her later that day that he was paying Mr. Pelosi \$300.00 a month and later \$400.00, (6/4 N.T. 83, 84).

Police Sergeant Chester O'Neill testified and stated that Mr. Pelosi did not seek permission for outside employment and then stated neither did Mr. Gates, (6/4 N.T. 86, 87). Mr. Binns attempted to show Sergeant O'Neill the authorization for outside employment Mr. Gates filed in the 1990s but was prohibited from doing so because he had not turned the document over to the government, (6/4 N.T. 91). Dave Evans, who had worked for Avis, testified that Mr. Gates worked for Avis and was the person who would locate the stolen vehicles, (6/5 N.T. 5, 6). He testified that it was difficult to get cars that were returned to them removed from the stolen NCIC status, (6/5 N.T. 8, 9, 10). He said that Mr. Gates was able to expedite removal of the stolen status when the vehicles were returned, (6/5 N.T.

11). Mr. Evans agreed that all of the vehicles Mr. Gates recovered were accurately removed from the NCIC database and all were recovered that had been stolen, (6/5 N.T. 31, 32, 33).

Patrick Pelosi, the former Police Detective, testified, (6/5 N.T. 40). He confirmed that he was being paid by Mr. Gates each month, (6/5 N.T. 41). He confirmed that at the time he would go out with Mr. Gates to look for cars, (6/5 N.T. 42). Mr. Pelosi indicated that he was going through a difficult divorce at the time, (6/5 N.T. 48). He said that Mr. Gates had been his mentor and friend and Mr. Gates had trained him before Mr. Gates retired, (6/5 N.T. 50, 51). He confirmed there were problems with rental cars not being recovered, (6/5 N.T. 51, 52). On cross-examination, Mr. Pelosi testified that he did not think he was doing anything wrong at the time, (6/5 N.T. 53, 54). He said he was never bribed or received a bribe from Mr. Gates, (6/5 N.T. 85). Mr. Pelosi testified that he had received many calls from Mr. Evans from Avis and had those cars removed from the NCIC stolen list, (6/5 N.T. 86, 87). Mr. Pelosi testified as follows:

“Question: Now is there ever one instance that you can tell these jurors about where Mr. Gates asked you to remove a car from the NCIC and it turned out he was lying to you?

Answer: Never.” (6/5 N.T. 91, 92).

Marla Blume of Avis testified to the monies that were paid Mr. Gates for recovering stolen vehicles, (6/5 N.T. 104, 105). She testified that she did not know there

was anything wrong with paying Mr. Gates, (6/5 N.T. 106). Agent Zenszer testified how she was involved in interviewing Mr. Pelosi at the time of his arrest, (6/5 N.T. 8, 9, 10). She did a tape recording of Mr. Gates but shockingly, allegedly the tape recording was erased by her, (6/5 N.T. 26, 27). The government then rested its case. Mr. Binns chose not to present any evidence whatsoever and he had not made any opening statement.

During the federal Habeas hearing, Judge Lloret allowed Mr. Stretton to subpoena and call attorney James Binns. That hearing was held on May 4th, 2021. Mr. Binns was questioned why he did not present character witnesses. His answer was as follows:

“The testimony of character witnesses is most part ineffective because it has nothing to do with the accusations against the defendant and the most they were going to say was his reputation in the community was one of truth telling and a good citizen,” (5/4 N.T. 7).

This was a somewhat shocking statement since the character testimony would have augmented Mr. Binns’ defense that there was no crime. Mr. Binns testified that was his defense, that there was no criminal activity, (5/4 N.T. 22).

Character testimony would have also negated the very harsh opening statement of the government saying that Mr. Gates had no integrity and violated his police badge. Mr. Binns admitted that Mr. Gates had no prior record, (5/4 N.T. 24). He admitted that Mr.

Gates had a good reputation as a police officer, (5/4 N.T. 25). Yet, when Mr. Binns was asked again why he did not call character witnesses, he said the following:

“ – wanted to focus upon the fact that his alleged co-culprit did not think he was committing a crime and neither did Mr. Gates,” (5/4 N.T. 25).

Mr. Binns then shockingly said if he had to try the case again, he would do the same thing and not call any character witnesses, (5/4 N.T. 26). Mr. Binns agreed that Mr. Gates’ reputation for truthfulness and honesty and peacefulness and law-abidingness would have been allowed to be presented to the jury, (5/4 N.T. 27). Mr. Binns then said his reason for not calling character witnesses was because he did not think they made a difference, (5/4 N.T. 28). He agreed that calling character witnesses would trigger a favorable jury instruction that character testimony by itself could be a basis for an acquittal, (5/4 N.T. 28). Mr. Binns agreed that the character witnesses were available to testify, (5/4 N.T. 29). Mr. Binns gave no good tactical or strategic reason for not calling witnesses. Also of concern was Judge Lloret’s report (see App. 8). On page seven of this report, Judge Lloret focuses on Mr. Binns’ statement that he did not think character witnesses were effective. Judge Lloret, in his Opinion, said he did not think character testimony would have swayed the jury, which is somewhat shocking, (see App. 16-18).

Judge Lloret would not allow Mr. Stretton to present any of the fact witnesses who were available to testify and who could have refuted the government's case. Judge Lloret gave Mr. Stretton the option of having another hearing to call Mr. Gates, but Mr. Stretton chose not to do so. Mr. Binns during the May 4th, 2021 hearing, said he never hired an investigator, (5/4 N.T. 47). Mr. Binns agreed that he never talked to any of the fact or character witnesses, (5/4 N.T. 47). He said that the only person he spoke to was Lou Campione, a Police Captain, (5/4 N.T. 47, 48). Mr. Binns agreed that he was told about many of the other witnesses such as Joyce Fienberg, a criminal investigator, (5/4 N.T. 48). When asked why he did not call her, Mr. Binns said that she had no knowledge of the payments made to Mr. Pelosi, (5/4 N.T. 48, 49). Mr. Stretton pointed out that she had knowledge how vehicles were removed from the NCIC list and would have testified that Mr. Pelosi could not have not of done so, nor could any officer, which would have refuted the government's case, Mr. Binns had no explanation why he did not call her, (5/4 N.T. 49). Mr. Binns then said her testimony had nothing to do with the charges even though he never interviewed her, (5/4 N.T. 51). Judge Lloret then prevented Mr. Stretton from pursuing this issue, (5/4 N.T. 51).

Mr. Stretton asked why Mr. Binns did not call the head of Avis security, Judy Hopson, to confirm this was the practice that had been used for years and Mr. Binns said he did not think her testimony was relevant, (5/4 N.T. 52). When asked why he did not speak to any of the witnesses, he only said that their

testimony was irrelevant, (5/4 N.T. 53). Of course, how would he know that if he did not interview them. Mr. Stretton then asked Mr. Binns why he did not call Ms. Hopson to testify about the long past practice of paying officers to remove rental cars and Judge Lloret would not allow any of these questions, (5/4 N.T. 53, 54). Similarly, Mr. Stretton was not allowed to ask questions about potential witnesses, Helen McCaffery and Jessica Kohoe, (5/4 N.T. 54). They would have refuted Mr. Naish's testimony but Judge Lloret would not allow any questions on it, (5/4 N.T. 54, 55). Mr. Stretton began questioning Mr. Binns about former Police Detective Phil Cochetti, and Judge Lloret cut Mr. Stretton off, (5/4 N.T. 57, 58).

The bottom line why Mr. Binns did not do anything was he said that he was absolutely convinced the government had not proven any criminal activity. Mr. Binns testified that he had effectively impeached, through cross-examination, Mr. Pelosi, (5/4 N.T. 62). Mr. Stretton then asked the following question:

“Question: As a result of that you decided not to present any other evidence or anything else because you were very confident that enough was in the record that the jury would not convict, is that a fair statement?

Answer: Fair statement.

Question: In hindsight, you're telling us you would still do the same thing again and again and not consider any of these other witnesses who might have helped the jury sort this out?

Answer: No I don't think they would have helped the jury sort it out.

Question: But you never even talked to them to discuss it with them did you?

Answer: No," (5/4 N.T. 62, 63).

Judge Lloret, during the hearing, also said that character witnesses were not effective and that when he was a trial lawyer, he did not think much of character testimony, (5/4 N.T. 95).

Mr. Binns was asked why he did not give an opening statement and he indicated that he did not think it was appropriate at the beginning of the case, (5/4 N.T. 38). Then shockingly, Mr. Binns testified that after the government rested, he wanted to give his opening even though he was not calling anymore witnesses, (5/4 N.T. 39). Mr. Stretton tried to ask more questions about that but Judge Lloret would not let Mr. Stretton, (5/4 N.T. 39). When asked why he did not call any witnesses, such as character or some of the fact witnesses, again Mr. Binns said that he did not because "I thought I won the case," (5/4 N.T. 39, 40).

Mr. Binns further agreed that the Assistant US Attorney, Eric Gibson, gave a very tough opening statement raising serious issues as to Mr. Gates' integrity, honesty and conduct, (5/4 N.T. 22, 23). Mr. Binns agreed that Mr. Gibson, in his opening statement, said some very harsh statements about Mr. Gates, (5/4 N.T. 23). Mr. Binns had no good answer as to why he did not give an opening statement to give a different perspective and give his theory of the case, (5/4 N.T. 23, 24). Mr.

Binns agreed that he did not put a subpoena on Captain Lou Campione who could have provided critical testimony as to the practice and procedures and testimony that what Mr. Gates did is what the police had been doing for years. Mr. Binns was aware that by not giving a subpoena, Mr. Campione could not stay at the trial or testify, (5/4 N.T. 32, 33).

Mr. Binns was asked why he did not present to the government, in advance of trial, Mr. Gates' authorization for outside work since the government was criticizing that Mr. Gates never filed one, when he did in 1993, (5/4 N.T. 40, 41). Mr. Binns agreed that he did not give the authorization to the government prior to trial, (5/4 N.T. 41, 42). Mr. Binns agreed that was a mistake on his part, (5/4 N.T. 42). When confronted with the fact that the trial Judge made Mr. Binns apologize in front of the jury when trying to use the document, Mr. Binns said he did not remember that, (5/4 N.T. 44). He was then confronted with the closing speech where he raised the subject and where the Judge made him apologize to the jury, (5/4 N.T. 44, 45).

After that, Mr. Stretton filed a Brief to Judge Lloret and then Judge Lloret ultimately made his decision recommending the Habeas Corpus Petition be dismissed and recommending there were no debatable issues and no certificates of appealability would be issued, (see App. 8). This was affirmed by Judge Betlestone, (see App. 5), and affirmed by the Third Circuit, (see App. 1 and 3).

REASONS FOR GRANTING THE PETITION

The reason for granting this Petition is quite simply that there was a gross injustice by the extreme ineffectiveness of the trial counsel, James Binns. The decision of the trial Court and the Third Circuit makes absolutely no sense to allow no argument or Briefing Schedule on the issues of ineffectiveness nor to even issue a certificate of appealability when Mr. Binns did not call any character witnesses and had no good reason for not doing so. Mr. Binns did not give an opening statement and had no good reason for not doing so. Mr. Binns did not interview or even hire an investigator to interview to speak with any key fact witnesses and refused to call them, and then Mr. Binns did not give the government Mr. Gates' work authorization to refute the government's position that Mr. Gates had never sought authorization for outside employment. Clearly, the above is not acceptable conduct and highly ineffective assistance pursuant to the 6th amendment of the United States Constitution and a due process violation pursuant to the 5th amendment of the United States Constitution. Clearly Mr. Gates made a substantial showing of the denial of his Constitutional rights under 28 U.S.C.A. 2253(c)(ii) and the Courts should of allowed a certificate of appealability on these serious issues.

The reason for this Honorable Court to grant this Petition for Writ of Certiorari is to reverse the Judgment denying the Petition for Writ of Habeas Corpus and to allow and order a certificate of appealability so that the issues can be presented and argued in the Court below. Clearly, the lawyer's conduct in

not presenting character witnesses, not speaking or interviewing witnesses, or not giving an opening statement is totally unacceptable. Having said that, the standard for ineffective assistance of counsel, is set forth in *Strickland v. Washington*, 466 US 668, 104 Sup. Ct. 2052 (1984). Mr. Gates to be successful in his request for a new trial, pursuant to 28 U.S.C.A. 2255, for the allegations of ineffective assistance of counsel, must show that his trial counsel's performance fell below an objective standard of reasonableness and his deficient performance prejudiced Mr. Gates resulting in a unreliable and unfair outcome or verdict. The Court must review the totality of the record in the case, *Id* 2065-2068.

In this case, there was clearly ineffective performance and that performance was objectively deficient. It clearly prejudiced Mr. Gates since the jury never heard his theory, the jury did not know anything about Mr. Gates, there was no opening statement to describe the defense theory of the case, there were no character witnesses to refute the harsh comments of the government against Mr. Gates in their opening statement. There were many defense witnesses present in the courtroom who could have contradicted the government's case and shown that not only did Mr. Gates not do anything wrong but it would have been impossible for Mr. Pelosi and Mr. Gates to remove anything from NCIC since the removal went through another department. Clearly, this would have affected the outcome of the case. Trial counsel presented not one good reason to justify not calling or interviewing fact and character witnesses. Trial counsel, Mr. Binns, had no reason not to talk to any witnesses. He had no reason not to provide the government with the authorization allowing

Mr. Gates to work outside the police department when he was an active officer. He had no reason not to interview witnesses or call character witnesses.

The standard for a certificate of appealability is found at 28 U.S.C.A. 2253(c)(ii). The following is noted:

“The certificate of appealability may issue under paragraph i, only if the Appellant has made a substantial showing of the denial of a constitutional right,” 28 U.S.C.A. 2253(c)(ii).

Mr. Gates contends that he has made this substantial showing of violation of two constitutional rights. First, his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. Second, his right to due process under the Fifth Amendment of the United States Constitution since his counsel presented no evidence, no witnesses, even though it was clear that he should have.

Under the case of *Gonzalez v. Thaler*, 565 US 134, 132 Sup. Ct. 641 (2012), Mr. Gates contends that he met the following standard:

“When in here, the District Court denies relief on procedural grounds a petitioner seeks a certificate of appealability must show both that a jurist of reason would find debatable whether the petition stated a valid claim of a denial of constitutional rights and a jurist of reason would find it debatable whether the District Court was correct in the procedural ruling,” *Id* 648.

In this case, it is not even debatable, the failure was a clear violation of constitutional rights (see Fifth

Amendment and Sixth Amendment) and any jurist with knowledge, reason and experience, should see that or clearly find it debatable and allow these issues to be appealed and briefed. That is what Mr. Gates is requesting.

The standard of review is abuse of discretion on the issue of certificates of appealability and the denial of the Habeas Corpus Petition. A brief review is now necessary of the four areas of ineffectiveness and violation of due process.

- A) Mr. Gates was denied effective assistance of counsel pursuant to the Sixth Amendment and denied fundamental due process pursuant to the Fifth Amendment when his lawyer failed to call any character witnesses and the Courts below erred in not issuing a certificate of appealability after denying the Habeas Corpus Petition.**

The first major error both under the Sixth Amendment and the Fifth Amendment, was trial counsel, James Binns', failure to interview or call any character witnesses during the trial. Mr. Binns admitted during the Habeas Corpus Hearing that Mr. Gates had an excellent reputation, had been cited many times during his 30 years as a Police Officer for bravery, he had numerous character witnesses who were available to testify on his behalf. All of them would have testified as to his excellent reputation in the community as a peaceful and law-abiding person and as a truthful and honest person. This testimony was important

since it would counter the government's arguments that Mr. Gates was dishonest and would trigger a jury instruction that character testimony by itself could be enough to find reasonable doubt and a not guilty verdict.

Mr. Binns, as seen in the earlier section of this Petition, agreed that the government's opening statement was very harsh and attacked the integrity and nature of Mr. Gates. He agreed that the government gave a very strong and harsh opening statement. Mr. Binns had no explanation why he did not give his theory of the case to the jury and no explanation why he did not present character witnesses to refute the suggestions of the government that Mr. Gates was a bad officer and a bad man. Mr. Binns, when asked why he did not present character testimony, had no reasonable, objective, strategic or tactical reason. His only reason was that he did not think there was any crime and second, that he did not believe in character testimony and did not think it was effective. Shockingly, District Magistrate Lloret also agreed that he did not think character testimony was effective. That is shocking because character testimony has been allowed for years and is a very effective tool and is a form of substantive evidence. Mr. Binns, when asked why he did not present character testimony, said as follows:

"The testimony of character witnesses is most part ineffective because it has nothing to do with the accusations against the defendant and the most they were going to say was his reputation in the community was one of truth telling and a good citizen," (5/4 N.T. 7).

This statement makes absolutely no sense, particularly since James Binns, who was 82 at the time of the trial, had a long history as an excellent trial lawyer. Clearly, if Mr. Binns' defense was that there was no crime, then character testimony would have enhanced that or augmented that. Mr. Binns testified that his defense was that there was no crime, (5/4 N.T. 22). Character testimony would have negated the very harsh opening statement of the government, saying that Mr. Gates had no integrity and violated his police badge, and at the same time given the jury a different view of Mr. Gates.

Mr. Binns admitted that Mr. Gates had no prior record, (5/4 N.T. 4). He agreed that Mr. Gates had a good reputation as a police officer, (5/4 N.T. 25). Yet Mr. Binns, when asked why he did not call character witnesses, said the following:

“ – wanted to focus upon the fact his alleged co-culprit did not think he was committing a crime and neither did Mr. Gates,” (5/4 N.T. 25).

Mr. Binns then shockingly said that if he had to try the case again, he would do the same thing and not call any character witnesses, (5/4 N.T. 26). Mr. Binns agreed that Mr. Gates reputation for truthfulness, honesty, peacefulness and law-abidingness would have been allowed and was excellent, (5/4 N.T. 27). Mr. Binns said that his reason for not calling character witnesses was because he did not think they made a difference, (5/4 N.T. 28). He agreed that calling character witnesses would trigger a favorable jury instruction that

character testimony could be the basis for an acquittal, (5/4 N.T. 28). He agreed that the character witnesses were available to testify, (5/4 N.T. 29).

Yet, Mr. Binns called no character witnesses. He had no good reason not to and he certainly expressed no good reason. Judge Lloret's report was similarly disappointing. In page seven of his report (see App. 15-16) Judge Lloret agreed with Mr. Binns' statement that he did not think character witnesses were very effective. Judge Lloret then said he himself did not think character testimony was effective and did not think it would sway a jury.

Character testimony is used so frequently in criminal cases, it is rarely discussed on appeal. But a good statement of the purpose of character testimony is found in the decision of the Pennsylvania Supreme Court in the case of *Matter of Sylvester*, 555 A.2d 1202 (Pa., 1989).

"Such evidence may of itself prove sufficient to acquit the accused – or may create a reasonable doubt of the guilt and thus acquit – but to create or clear up doubt is not the only office of good character – it is substantive evidence to be weighed and considered in connection with the other evidence in the case – this kind of proof is allowed to the defendant – because – one accused may be able to produce no evidence except his own oath and proof of good character to exculpate himself upon the charges against him – this proof of her unblemished and outstanding reputation for

truth, honesty, integrity and lack of avariciousness gave valid meaning to the Solomonic that a good name is rather to be chosen than great riches," *Id* 1207, 1208.

This quote shows the importance of character witnesses' testimony and the fact that not only can it be rebuttal testimony, but it is also substantive evidence of innocence. Mr. Binns not only did not present any, he did not interview or talk to any character witnesses.

The failure to present this clearly is an objective failure by Mr. Binns and it clearly had a negative effect on the jury since all they heard was how bad Mr. Gates was and did not have any insight as to the kind of person he was or the kind of officer he was. It also violated due process since Mr. Gates, because of his lawyer, Mr. Binns, was not able to present witnesses in violation of due process.

The failure to interview or call character witnesses is a debatable issue which resulted in prejudice to Mr. Gates. There is prejudice and it is clearly a debatable issue. Mr. Binns was wrong and a new trial ought to be granted. In conclusion, Mr. Gates respectfully request this Honorable Court grant his Petition for Writ of Certiorari on the issue of ineffective assistance of counsel and denial of due process due Mr. Binns' failure to call character testimony. Mr. Gates is requesting this Honorable Court grant a certificate of appealability.

B) Mr. Binns provided ineffective assistance of counsel under the Sixth Amendment and violation of due process under the Fifth Amendment when he failed to give an opening statement. In fact, Mr. Binns was confused about his right to give an opening statement and this severely prejudiced Mr. Gates and further, was a debatable issue and a certificate of appealability should have been issued.

Mr. Binns never presented an opening statement. This was shocking since Mr. Binns' theory, as he testified during the Habeas Hearing, was that there was no crime. He then should have opened by telling the jury that and why the evidence would not show any crime. He never gave an opening statement. He admitted that the government gave a very harsh statement against Mr. Gates. Yet, he never gave an opening statement and never gave a different view of Mr. Gates. If he had presented some character witnesses, he could have referred to Mr. Gates' excellent character on all of traits at issue. That was never done.

Shockingly, Judge Lloret, in his Report and Recommendation, found at Appendix pages 19-21, said there was no problem in not giving an opening statement. He said that he did not find that unreasonable. This makes no sense at all since any experienced trial lawyer or anyone who is trying cases, knows that an opening statement is probably the most important aspect of the case. It sets the tone. It gives the jury issues to look for, it gives the jury another view point besides

just that given by the government but and none was given.

Failure to give an opening statement is clearly a debatable violation of constitutional right, the Sixth Amendment right and the Fifth Amendment due process. This is not a situation where Mr. Binns did not know what the government was going to present. He knew from the discovery and therefore, should have given another version as to why there was no crime.

Further, reviewing the trial record shows that Mr. Binns was seemingly confused. At the end of the case, after the government rested, Mr. Binns said he was not presenting any witnesses but then demanded to make an opening statement right before his closing statements. Mr. Gates respectfully requests this Honorable Court order that a certificate of appealability be issued and that his Habeas Corpus Petition be granted since there was a violation under the Sixth Amendment right to effective counsel and Fifth Amendment due process by his lawyer's failure to give an opening statement.

C) Mr. Binns failed to call any factual witnesses and failed to even interview or talk to any factual witnesses. He failed to even hire an investigator to speak to them. All of which violated the Sixth Amendment of the United States Constitution for effective assistance of counsel and the Fifth Amendment for due process violation.

Mr. Gates now contends that his trial counsel, Mr. Binns, was very ineffective for not calling fact witnesses. What is particularly egregious is that Mr. Binns not only did not call fact witnesses but he did not even interview them. He had no idea what they were going to say. These witnesses were in the courtroom and Mr. Binns refused to call them. In fact, he would not have even known what they were going to say because he was so ineffective by not even talking to them. Unfortunately, Judge Lloret would not let Mr. Stretton question Mr. Binns in any detail on these witnesses that he did not call and Judge Lloret would not let Mr. Stretton call the witnesses. There were affidavits and summaries of their testimony provided in the Writ of Habeas Corpus that was filed.

The failure to interview or speak or hire an investigator, clearly, would be a debatable constitutional violation by any experienced lawyer. To go to trial without talking to even one factual witness, is clear evidence of serious ineffectiveness. As noted, Mr. Binns said he did not even hire an investigator, (5/4 N.T. 47). Mr. Binns almost bragged that he never talked to any potential factual witness, (5/4 N.T. 47). He said he

never spoke to anyone other than Police Captain Lou Campione, who would have been a key defense witness, (5/4 N.T. 47, 48). But Mr. Binns said that Mr. Campione did not know anything about the case, (5/4 N.T. 48). That statement of Mr. Binns was absolutely wrong as seen by the statement provided by Captain Campione, which is attached in the Habeas Petition. Mr. Binns agreed that he was told about Joyce Fienberg, who worked as criminal analyst, who could have testified how the stolen cars were removed from the NCIC list. She would have testified that could not have been done by Mr. Pelosi or any police officer but was done by a different department, (5/4 N.T. 48, 49). Mr. Binns had no reason for not calling her or even talking to her, since her testimony refuted the essence of the government's case that Mr. Gates bribed Mr. Pelosi to remove the stolen cars from the NCIC list. It could not have been done.

Mr. Binns had no explanation why he did not call Judy Hopson, the former head of security for Avis, who was alive at the time of trial, (5/4 N.T. 51, 52). Mr. Binns' only answer was that he had no recollection of talking to her and did not think it was relevant, (5/4 N.T. 52). Mr. Binns said that he did not speak to any of the witnesses because their testimony was irrelevant, (5/4 N.T. 53).

Those statements of Mr. Binns clearly show his ineffectiveness in not properly preparing or presenting the case. Mr. Stretton asked Mr. Binns, during the Habeas hearing, why Ms. Hopson would not have been an important witness since she worked with the

Philadelphia Police Department through her job with Avis for 40 years and would testify as to the established practice to recover stolen rental cars, including paying police officers, which was done regularly, (5/4 N.T. 53).

Mr. Binns agreed that former Police Detective Phil Cochetti was available to testify but he said he would not call him, (5/4 N.T. 55, 56). Mr. Cochetti was important since he originally held the position that Mr. Gates held and then Mr. Pelosi held in the police department. He would testify that he started the practice that was put in place where officers were being paid to help recover stolen cars and that was approved by the department, (5/4 N.T. 55, 56, 57). All of this was set forth in Mr. Cochetti's affidavit, which is attached to the Habeas Petition.

Joyce Fienberg worked as a criminal investigator research analyst with the police and would have explained how stolen vehicles were removed from the NCIC list and explained that Detective Pelosi could not do so.

Mr. Binns did not call Police Captain Lou Campione. He would testify, as seen by his statement, that he had personal knowledge of how cars were taken. He would have said that the detectives and officers rarely looked for stolen cars because there were too many of them. He said that unless the car was involved with guns or drugs, they did not look or do anything to recover the cars. This would have refuted Inspector Naish's testimony that the officers had to touch the car

before the stolen status could be removed. Captain Campione would have testified that that was not the practice.

Helen McCaffery, who gave a statement that is attached to the Habeas Petition, was with the Human Relations Department of the Philadelphia Police Department and would have refuted Mr. O'Neill's testimony he could not find outside records of employment by Mr. Gates. She would have explained that the records were only maintained for six or seven years.

Jessica Kohoe, from the Personnel Department of the Philadelphia Police Department, was not called. She would have also confirmed the seven-year period of maintaining police records of outside employment. Again, Mr. Binns did not interview or speak to any of these witnesses.

Richard Livingston, the Corporate Security Manager for Hertz Rental Car, was not called. He could have confirmed how Mr. Gates handled all of their cases and how everything was done appropriately. His statement is attached to the Habeas Petition.

Frank Maffie was not called. He gave a statement. He worked for Avis and Budget rental companies during the time that Mr. Gates worked for Avis. He would explain that Mr. Gates found the cars and returned them. He would have explained how Mr. Evans, who was an important government witness from Avis, was not present most of the time and would have also confirmed that Mr. Evans had many cars on his own removed from the NCIC list by talking to Mr. Pelosi and

others. That would have clearly refuted Mr. Evans' testimony.

Mr. Binns did not call Police Officer Whitefield, who worked for neighborhood services. He knew Mr. Gates and would have confirmed the work that Mr. Gates did by recovering and getting abandoned vehicles off of the streets. Mr. Binns gave no reason for not interviewing or calling these witnesses. His failure to call critical witnesses, who could have refuted the government's theory and witnesses, is clearly a debatable issue that should have resulted in certificates of appealability. Mr. Gates respectfully contends that Mr. Binns' gross failure to interview witnesses or present any witnesses should have resulted in his Petition for Writ of Habeas Corpus being granted and it clearly was a debatable issue of constitutional violations, was objective in nature, and clearly, a certificate of appealability should have been issued. He is respectfully requesting this Honorable Court reverse the decision denying his Habeas and order certificates of appealability be issued.

D) Mr. Binns provided ineffective assistance of counsel by not providing, in advance of trial, to the prosecution Mr. Gates' request to the Philadelphia Police Department in 1993 to do outside work, which he was allowed to do. As a result, the introduction of this fact was barred from being presented and Mr. Gates was not able to refute the testimony of Police Officer O'Neill that Mr. Gates never filed such a request.

A serious issue of ineffectiveness involving Mr. Binns was his failure to give advance proof to the government that Mr. Gates, in 1993, had sought permission that had been granted to do some outside work when he was a Police Officer. This was an important issue raised by the government witnesses at trial.

The government presented Police Sergeant O'Neill, (6/4 N.T. 85). Sergeant O'Neill testified that he was employed by Internal Affairs. He was asked whether Mr. Pelosi had sought permission to do outside work and he indicated that there was no such permission requested, (6/4 N.T. 87). Sergeant O'Neill was then asked about Mr. Gates:

“Question: Did you also similarly determine whether Mr. Gates had made the request for outside employment while he was a Philadelphia Police Officer prior to his retirement?

Answer: Prior to his retirement?

Question: Yes sir.

Answer: No I did not but after he retired I did.

Question: Ok. And what were the results of your checking?

Answer: It was negative," (6/4 N.T. 86, 87).

Further, Inspector Naish also testified that outside employment was prohibited by the Police Department, particularly if it involved towing cars, (6/5 N.T. 45). This was incorrect testimony since Mr. Gates, while a Police Officer, had been given permission by the Police Department for this outside employment. Yet, this evidence could not be presented to the jury because Mr. Binns did not give the authorization to the government in advance of trial. During Mr. Binns' cross-examination of Sergeant O'Neill, he presented the previously filed authorization, (6/4 N.T. 89, 90). The government then objected, (6/4 N.T. 89, 90). The government indicated they had asked Mr. Binns repeatedly for reciprocal discovery and he never gave it, (6/4 N.T. 91, 92). The Court then ruled that this could not be used. Mr. Binns then, during his closing speech, referenced this document, (6/6 N.T. 84, 85). Mr. Binns was then criticized in front of the jury for trying to use this since it had been barred. Mr. Binns in front of the jury had to withdraw the document and had to apologize to the jury. Obviously, that would have been reflected adversely on Mr. Gates. The government tried to suggest this was irrelevant but the government raised the issue. This was an important issue in this case and Mr. Binns' failure to turn over the document in advance of

trial, prevented Mr. Gates from refuting the government's evidence.

Mr. Binns, during the Habeas hearing, was questioned why he did not present this employment authorization in advance. Mr. Binns had to agree that this was a mistake on his part, particularly since he had to apologize, (5/4 N.T. 42, 43). Mr. Binns accepted responsibility for that.

Judge Lloret, in Appendix pages 29 and 31, suggested the document would not have been admissible. But clearly it would have been admissible to impeach the government's witnesses to refute what they had said.

This is yet another example of ineffective assistance of counsel, which has prejudiced Mr. Gates and further, this is an example of a debatable issue on the substantial failure where a certificate of appealability should have been issued.

In viewing the four examples of serious ineffectiveness, each one by itself should result in a new trial and collectively these failures resulted in severe prejudice to Mr. Gates who as a result, did not receive a fair trial.

This Petition is unlike many before this Honorable Court in that, factual failures of trial counsel clearly speak for themselves. Mr. Binns had no good reason for these failures. That is why the failure to issue certificates of appealability was so surprising. It is also surprising why this Habeas Corpus was not granted.

Collectively and individually, these failures by Mr. Binns caused severe prejudice to Mr. Gates in his trial and effected the outcome. These are substantial issues of effective assistance of counsel under the Sixth Amendment and due process under the Fifth Amendment and these failures created a taint and prejudice to Mr. Gates that could not be wiped from the record.

This is not a case of a Circuit split. This is a case of just downright ineffective assistance of counsel and a case where trial counsel could provide no justification for his gross failures. Mr. Binns' poor performance and lack of preparation stands out. These failures clearly met the standards for debatable issues of ineffectiveness and a certificate of appealability should be issued.

Mr. Gates respectfully requests this Honorable Court therefore grant his Petition for Writ of Certiorari and order a certificate of appealability in order to correct this injustice and in order to reverse the decision which affirmed the right not to present witnesses, call witnesses, interview witnesses, prepare the case, but still be considered effective assistance of counsel.

CONCLUSION

The Petitioner, Victor Gates, by his counsel, Samuel C. Stretton Esquire, respectfully requests this Honorable Court grant his Petition for Writ of Certiorari and order the issuance of certificates of appealability.

Respectfully submitted,

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