

No. 22-7877

IN THE
SUPREME COURT OF THE UNITED STATES

COREY BLAINE COGGINS, Petitioner

Vs.

MURRAY TATUM, Warden, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA, CASE 20H0188

**REPLY BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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STATEMENT

A. Background

The Statement set forth by the Respondent is incorrect and incomplete. A review of the Record during Coggins' trial and in connection with his Petition for Writ of Habeas Corpus in the state court shows that Coggins was a friend of the decedent, Mack Smith, and had no reason or motive to harm him. This was acknowledged by Public Defender Weber. On the night in question, Coggins was partying with Smith, Smith's wife and others. During the evening, Smith learned that a friend, Chris Jarrard, had told others that Smith was a "narc". (TT, p. 195). Smith then went to Jarrard's apartment, called him out, and attacked him and his roommate, Barry Tabor, with a baseball bat. (TT, pp. 199-204). The fight was primarily between Smith, Jarrard and Tabor. Though Coggins was present, there was no motive or reason for Coggins to engage in any physical altercation, nor was there ever any physical evidence connecting Coggins to the stabbing of Smith. There was, however, physical evidence showing that Smith's blood was found on the clothing of both Jarrard and Tabor. (HR135-140).

On the night of the stabbing, Columbia County Sheriff's Deputy Dennis Mack interviewed Tabor and obtained an incriminating statement from him that was never utilized by Coggins' court-appointed attorney, Weber, and was never revealed to the trial court at the time the District Attorney moved to dismiss the case against Tabor.

(HR54). Following Smith's death, Tabor was arrested and charged, as was a Mr. Lopez. Both were charged with manslaughter. Those charges were later dismissed and the case went to a standstill.

After approximately five (5) years, Smith's widow came to national attention following the unrelated murder of a Superior Court Judge in Atlanta, Georgia, the Judge's court reporter, a county official and a federal officer. At that time, the Columbia County investigation was re-opened.

Statements made by Respondent that Coggins' admitted on two (2) occasions to different individuals that he had stabbed and killed Smith are not supported by the record. If Trial Counsel Weber had reviewed the various statements taken by the Columbia County Sheriff's Department in 2001 and had subpoenaed witnesses as requested by Coggins, Respondent's statements would have been shown to be incorrect. The entire Public Defender's file was in the record with all of the statements taken in 2001 and in 2005. (HR61-119). Kenneth Bennings said that Coggins made no statement about the stabbing. (HR 64, 65, 107, 115, 117, 118).

Coggins' pointed this out inconsistency in his brief filed with the habeas trial court. Coggins' court-appointed Appellate Counsel Peter Johnson adopted the State's contention made during the Motion for New Trial proceeding and improperly made an *in judicio* admission which was not correct.

The so-called “jailhouse confessions” that were obtained five (5) years later were disputed and the facts set forth in those letters could have been shown to be nothing but fabrications since it was impossible for two co-defendants to be housed together at the same time. (Appendix H). Timothy Osborne, the jail house informant who received a substantial reduction in his criminal sentence approximately five (5) months after testifying against Coggins, so indicated in his affidavit when he was found in a county jail in 2019. Efforts by Coggins to obtain the Columbia County jail records were unsuccessful in that there was a 10-year retention policy, even though Appellate Counsel Johnson could have obtained those records, which records would have shown that co-defendants were never housed together in the same jail pods in the Columbia County jail.

B. Proceedings Below

Missing from the State’s response is that, without Coggins’ consent, Trial Counsel Weber entered into an informal joint defense agreement with Tabor’s paid counsel. The effect of that informal joint defense agreement was to waive the attorney-client privilege and to share confidential attorney-client information. A review of the Public Defender’s file by Trial Counsel Weber would have shown that there was substantial evidence that co-defendant Tabor had stabbed Smith, which evidence consisted of: 1) a statement made by Tabor the night of the stabbing to Columbia County Deputy Dennis Mack that Tabor had been the one who hurt Smith

and had “put him on the concrete” (HR54); 2) a statement made by Tabor following the stabbing to his then-girlfriend, Whitney Varna, that he had stabbed Smith and that it was in self-defense (HR119, 120-124, 147-148, Appendix E); and 3) physical blood evidence found both on Jarrard and Tabor. With that information, why Trial Counsel Weber would have entered into any joint defense agreement with Tabor has never been explained, nor has that issue ever been addressed. (HR139-140).

The State has failed to explain why the District Attorney made the decision to dismiss Tabor as a co-defendant and why the District Attorney did not inform the trial judge that Tabor had made an incriminating statement to Columbia County Deputy Sheriff Dennis Mack on the night of the stabbing. The State failed to mention that Trial Counsel Weber admitted that he should have moved for a mistrial at that time; admitted that he should have focused on Tabor as being the individual who stabbed Smith; and admitted to being ineffective. (HR135-141, Appendix G).

The State fails to mention that Coggins, following the trial, sent a letter to his Trial Counsel Weber requesting that ineffective assistance of counsel be raised in connection with a Motion for New Trial and on appeal and that was never done. The State fails to mention that Appellate Counsel Johnson had represented Osborne when he received a very light sentence for an armed robbery conviction and the State failed to mention that Appellate Counsel Johnson had admitted that he was ineffective in

failing to present the Brady-Giglio claim in connection with Coggins' Motion for New Trial. (HT, p.27-28)

The State has also failed to mention the fact that Coggins filed his *pro se* Petition for *Habeas* relief immediately after his initial appeal was denied. No explanation has been given by the State for the approximately five (5) years from the time of the stabbing in 2001 until Coggins' arrest some four (4) years later as to the delays from the 2006 conviction until the completion of the Motion for New Trial proceedings and initial appeal in 2014; or the delays with the Supreme Court of Georgia in hearing the Application for Discretionary Review of over forty (40) months.

REASONS FOR GRANTING THE PETITION

I. Coggins' joint defense agreement claim merits review.

In dealing with the issue of joint defense agreements, circuits throughout the nation have had different approaches to that issue. A joint defense agreement basically allows a waiver of the attorney-client privilege and creates the same type of situation where a lawyer or group of lawyers are representing co-defendants in a case which should not be permitted under this Court's decision in Holloway v. Arkansas, 445 U.S. 475 (1978), which resulted in a reversal in the Fifth Circuit in the case of U.S. v. Alvarez, 580 F.2d 1251 (5th Cir. 1978). In United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003), the Eleventh Circuit held that when each

party is represented by his own attorney, communications by one co-defendant to the other co-defendant's attorney are not privileged if the co-defendant turns state's evidence, and that the District Court had abused its discretion in precluding one defendant from utilizing communications that the co-defendant made to his attorney during the course of the agreement. The Tenth Circuit in In re Grand Jury Proceedings, 156 F.3d 1038 (10th Cir. 1998), limited the use of a joint defense agreement. In United States v. Schwimmer, 892 F.2d 237 (2nd Cir. 1989), the court remanded the case for an evidentiary hearing to determine whether or not the attorney-client privilege was violated by the Government's use of documents and information furnished by an accountant hired by the attorneys conducting a joint defense.

The facts in this case show that due to the fact that in a joint defense agreement a co-defendant is waiving his attorney-client privilege, the trial court needs to be directed to make an independent inquiry as to whether or not the facts in the case even warrant a joint defense agreement, especially with the fact that in most criminal prosecutions, especially in the federal court system, the cases are concluded with guilty pleas. The great majority of criminal cases in the State of Georgia, just like in the federal system are resolved by plea negotiations or plea bargains. When that occurs, the previous co-defendants become adverse to each other. **That issue needs to be considered when one considers whether or not a**

joint defense agreement could be considered a reasonable trial strategy when one considers the issue of ineffective assistance of counsel, especially when a former co-defendant turns and testifies against the other co-defendant or in a case such as this, a prosecutor dismisses that co-defendant leaving only one possibility for a jury to determine who stabbed Mack Smith. The effect of what occurred was that the jury was left with the impression that it must have been Coggins who stabbed Smith since the District Attorney dismissed Tabor. Trial Counsel Weber so opined in his answers to interrogatories. (Appendix G, Response to Interrogatories 10. HR10, S20H0188, pp.137-138).

The further problem with any joint defense agreement which is present in this case is the fact that in a joint defense agreement the attorney-client privilege, which can only be waived by the defendant, not by his attorney, was in fact waived. Coggins does not know exactly what agreement was worked out between the District Attorney and Tabor, but he does know that Tabor was in fact released; the case against Tabor was dismissed; and Coggins was left to stand trial alone, even though the trial judge who approved the dismissal had not been advised of the fact that Tabor had made an admission to Deputy Sheriff Mack on the night of the stabbing and that the State had physical evidence that tied Tabor to the stabbing. If joint defense agreements are going to be utilized in both state and federal courts then the procedure suggested by the district court in United States v. Stepney, 246 F.Supp.2d 1069

(N.D. Cal. 2003) needs to be employed. That procedure requires that a trial court determine that a defendant, especially an indigent defendant like Coggins, be made aware of the fact that confidential communications between himself and his lawyers would be subject to being disclosed as part of a joint defense agreement and whether or not a joint defense agreement could be considered “reasonable trial strategy”. This is especially so in this case where there was substantial evidence that Coggins’ co-defendant, Tabor, had in fact stabbed Smith.

On page 4 of its brief, the State cites the case of Bangiyev v. United States, 2017 Westlaw 3599640 (E.D. Va. 2017) n. 4, in support of its argument that the joint defense agreement was a “strategic decision”. The State fails to review the entire history of that case. Eduard Bangiyev and his brother, Arkadiy Bangiyev, both pled guilty to participating in a RICO conspiracy and were leaders and participants in a counterfeiting scheme that manufactured \$70 million in counterfeit over a nearly 10-year period. Arkadiy Bangiyev knew of at least \$20 million in counterfeit currency that he was involved in. The court found that Eduard Bangiyev was the leader and knew that between \$77 million and \$20 million was generated by the conspiracy. *See, United States v. Bangiyev*, 359 F.Supp.3d. 435 (E.D. Va. 2019). Both of these individuals, unlike Coggins, entered guilty pleas which, under Boykin v. Alabama, 395 U.S. 238 (1969), they were advised of their rights and gave up those rights in Criminal Action No. 1:14-CR-206. In the case at hand, the decision that Trial

Counsel Weber made without Coggins' approval could be considered as a reasonable trial strategy.

The Public Defender's file shows that Trial Counsel Weber met with Coggins on two (2) occasions. This was supported by Coggins' testimony at the habeas hearing. The various circuits have not yet defined what is "reasonable trial strategy". Lower courts, like the habeas courts, have justified the deficiencies of trial counsel as "reasonable trial strategy" with few exceptions, such as the failure to investigate and call witnesses, which has been classified as not a "reasonable trial strategy". Berryman v. Morton, 100 F.3d 1089 (3rd Circuit, 1996); Blackburn v. Foltz, 828 F.2d 1177 (6th Cir. 1987). This Court needs to define what conduct is outside the wide range of professionally competent assistance as to constitute ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984), when counsel enters into a joint defense agreement without the consent of the client and fails to prepare the defense for his client. This should meet both prongs of the Strickland test.

Coggins' claims that the prosecutor's prosecutorial misconduct does warrant review. When a prosecutor takes certain actions, such as eliciting information about any plea agreement or the reason for a co-defendant's being dismissed, or even implying such or even improperly vouching for a witnesses' credibility, those types of cases have been set aside in the federal courts for prosecutorial misconduct. *See*,

United States v. Francis, 170 F.3d 546 (6th Cir. 1999). *See also*, a case where the prosecutor vouched for the credibility of a key prosecution witness, United States v. Kerr, 981 F.2d 1050 (9th Cir. 1992); *see also*, United States v. Sanchez, 176 F.3d 1214 (9th Cir. 1999). There have been a substantial number of cases where a court has given curative instruction rather than having a mistrial and those convictions have been affirmed. *See*, United States v. Harlow, 444 F.3d 1255 (10th Cir. 2006); United States v. Beard, 318 Fed. Appx. 323 (6th Cir. 2008). In this case, Trial Counsel Weber entered into an informal joint defense agreement without his client's consent, failed to show that the co-defendant had stabbed Smith, and in essence had his hands tied. When the Prosecutor dismissed Tabor and implied that Coggins was guilty, Trial Counsel Weber should have informed the trial judge of all of the facts against Tabor and objected to his dismissal since someone in fact did stab Smith, rather than consent to the prosecutor's not telling the trial judge about the evidence connecting Tabor to the stabbing. Here, Trial Counsel Weber consented to the dismissal, did not tell the trial court what the facts were when the District Attorney failed to do so, and these combined actions have resulted in the wrongful conviction of Coggins.

Prosecutors, just like lawyers have a duty to tell the whole and entire truth. In this case, the trial judge was not apprised of all of the facts by the Prosecutor or Trial Counsel Weber.

II. The Brady-Giglio claims warrant reversal.

This is an unusual factual situation. Appellate Counsel Johnson represented Osborne, the jail house informant. Appellate Counsel Johnson knew of the fact that Osborne had given favorable testimony against Coggins in his trial and pointed that fact out to Osborne's trial judge, that being the same judge who tried Coggins. Osborne received favorable treatment. That has been acknowledged by Appellate Counsel Johnson and he has acknowledged in his testimony before the Habeas Court that he provided ineffective assistance to Coggins.

While Appellate Counsel Johnson was handling Coggins' Motion for New Trial, he was informed by his former client, Osborne, that he had lied in Coggins' trial! Rather than withdraw as Coggins' attorney at that time and become a witness for Coggins, Appellate Counsel Johnson continued to represent Coggins on his appeal. Appellate Counsel Johnson has acknowledged the fact that he was substantially deficient in handling the appeal, which deficiencies include but are not limited to the failure to raise the Brady-Giglio defense of which he was well aware.

III. The time delays in this case warrant reversal.

In this case, Coggins filed a pro se Petition for *Habeas* relief shortly after his conviction in August of 2006. His court-appointed trial lawyer waited more than a year to withdraw after Coggins had asked him to withdraw and raise ineffective assistance of counsel in August of 2006. Coggins' appellate lawyer failed to raise

ineffective assistance of counsel, even though he has acknowledged that Weber was ineffective and there was a letter from Coggins in the Public Defender's file requesting that he do so. Furthermore, the record in this case shows that the Columbia County jail records were only kept for ten (10) years. At the time Appellate Counsel Johnson became Coggins' lawyer on the Motion for New Trial and his appellate lawyer on appeal, those records could easily have been obtained and would have shown the number of times that Weber had actually met with Coggins in preparation for trial. (Twice, as indicated in the Public Defender's file.) Those records would have verified the fact that Tabor and Coggins were never housed in the same jail pod. This would have placed substantial doubt on the jail house confession written by Osborne.

CONCLUSION

For the reasons set forth in the original Petition and in this Reply Brief, Coggins respectfully requests that the Court grant this Petition and, that the Court, pursuant to the Criminal Justice Act, appointed a well-seasoned, experienced lawyer who has handled appeals before the United States Supreme Court to represent him in his Appeal and that his conviction be reversed.

This 11th day of Sept, 2023.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Coggins', written in a cursive style.

COREY BLAINE COGGINS