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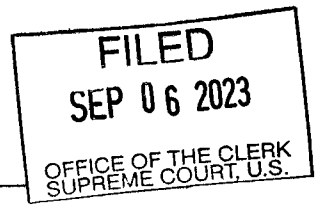

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN M. COOKE, JR.
Petitioner-Appellant,

V.

ALLEN GANG, WARDEN;
MARYLAND ATTORNEY GENERAL
Respondents-Appellees

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN M. COOKE
Petitioner

DOC: #440-788
DOB: March 5, 1971
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I. Questions Presented

1. Was Cooke's Sixth Amendment right to counsel violated when the state introduced at trial Cooke's post-indictment statements and actions that were initiated and recorded by the state's undercover agent?

2. Was Cooke's Fourteenth Amendment right to due process violated when the state introduced at trial Cooke's involuntary statements and actions that resulted from threats and intimidation placed upon Cooke by the state's agent?

3. Was Cooke's Fourteenth Amendment right to due process violated when the state introduced at his trial material evidence that was irreconcilably contradictory to material evidence the state introduced at his co-defendant's trial nine months earlier to convict the co-defendant of the same murder?

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IV. Petition for Writ of Certiorari

Stephen M. Cooke Jr, an inmate currently incarcerated at Jessup Correctional Institution in Jessup, Maryland, proceeding pro se, respectfully petitions this court for a Writ of Certiorari to review the judgment of the Fourth Federal Circuit Court of Appeals.

V. Opinions Below

The decision by the Fourth Federal Circuit Court of Appeals denying Cooke's Petition for Rehearing and Rehearing En Banc is attached as Appendix 1.

VI. Jurisdiction

Cooke's Petition for Rehearing and Rehearing En Banc was denied on June 13, 2023. Cooke invokes this Court's jurisdiction, having timely filed this Petition for Writ of Certiorari within ninety days of the Fourth Federal Circuit's decision.

VII. Constitutional Provisions

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

VIII. STATEMENT OF THE CASE

In 2000, Heidi Bernadzikowski was murdered in her Baltimore County home by Alexander Bennett, a Colorado resident, at the behest of his friend, Grant Lewis, another Colorado resident. Twelve years later Baltimore County investigators arrested Bennett and charged him with murder. Two years after that Bennett made a last minute deal with the state that led to the arrest of Grant Lewis and Stephen Cooke as co-conspirators in the murder.

On March 20, 2014 Cooke was arrested and charged with murder. He was accused of hiring Lewis through the internet to murder Bernadzikowski. Cooke was indicted for the murder eleven days later on March 31, 2014. T. 6/11/18 at 102 (App. F)

About ten weeks after the indictment, on June 9, 2014, Assistant State's Attorney Garrett Glennon and Detective Sergeant Allen Meyer met with James DiVenti, Cooke's cellmate, and asked him to wear a microphone and recorder so that he could initiate and record conversations with Cooke, ostensibly for the purpose of investigating an alleged attempt by Cooke to hire DiVenti to prevent Lewis from testifying against Cooke. T. 6/11/18 at 103 (App. F)

Four days later Sergeant Meyer returned to the jail on June 13, 2014, fitted DiVenti with a recorder, and told DiVenti, "I need you to talk to him about, I need you to ask, I need you to talk to him about names and stuff. That thing is only going to last about two hours. So you need to kind of, you know what I mean, time, get things going. Make it happen. You need to talk to him about what he wants to do with his witness. If you can get him to mention witness names, that's fine too. You know what I mean. Who are you worried about? What witnesses are you worried about? So the deal is you've been in this long enough you know how to make this happen." T. 6/11/18 at 104 (App. F)

When DiVenti returned to the housing unit, he immediately approached Cooke and began a conversation about harming Lewis. Cooke did not respond to anything DiVenti said. DiVenti told Cooke, "Hey Steve, come here...it's already on...I committed myself to do this...now if your mind is changed, you know what it sounds like, it sounds like he's getting set up." T. 6/11/18 at 110- 111 (App.F)

On July 9 Sergeant Meyer returned to fit DiVenti a second time. This time his instructions included, "When you go in there, you gotta bring it up. You can ask him questions." T. 6/11/18 at 106 (App. F)

Again DiVenti returned to the housing unit, approached Cooke, and immediately began talking about Lewis. DiVenti began the conversation by saying, "Hey Steve come here. We got a problem. There's two Lewises on that tier. What the f- - - is his first name?" T. 6/11/18 at 106 (App. F)

On August 12 DiVenti and Sergeant Meyer met face to face. At that meeting DiVenti explained that Cooke had a piece of cardboard with a prepaid credit card number written on it. Although DiVenti admitted to Sergeant Meyer that Cooke didn't trust DiVenti and scrambled the numbers on the cardboard because he feared DiVenti would try to steal it, he also claimed that Cooke tried to give it to him as payment for the Lewis matter. T. 6/11/18 at 119 (App.F)

Sergeant Meyer responded that he needed the cardboard and told DiVenti to "take it" from Cooke. DiVenti then informed him that Cooke was no longer in the same housing unit, but that Sergeant Meyer could call the jail and get Cooke returned. Sergeant Meyer said he would and later testified at trial that he did call the jail to get Cooke returned to DiVenti's housing unit. T. 6/11/18 at 119-120 (App. F)

The jail returned Cooke to DiVenti's housing unit the evening of August 12. As soon as Cooke got to his new cell DiVenti approached him, grabbed him by the collar, and told him to give DiVenti the cardboard. T. 6/11/18 at 120 (App. F)

After taking the cardboard from Cooke, DiVenti went to the phone and called Sergeant Meyer. In that recorded audio, DiVenti can be heard explaining that he told Cooke, "Give me some money. Now get in that cell and get me that number!" Before the end of the call, DiVenti asked, "Is there anything else you need? I just know that right now he is scared to death." T. 6/11/18 at 120-121 (App. F)

DiVenti called Sergeant Meyer on the phone on August 12, 14, 20, 25, and 27. The two met face to face on June 9, June 13, July 9, August 12, and September 4. All of their conversations centered around convicting Cooke of murder and of trying to harm Lewis.

In early September, Cooke was charged with assault and other charges related to preventing Lewis from testifying. Shortly after that, the state was successful in getting the murder charges joined with the new assault charges in a single trial by arguing that an attempt to silence a witness represents consciousness of guilt of the original charges.

In October of 2014 the state took Lewis to trial. During their case-in-chief the state introduced Rebecca Love, Lewis's girlfriend at the time of the murder. She testified that Lewis confessed that he met a woman online who hired him for a big job before backing out and refusing to pay. Because the woman refused to pay, Lewis got upset and sent his friend Bennett to Maryland to murder her. T. 3/29/18 at 69-70 (App. I), T. 6/12/18 at 63 (App. G)

In closing arguments, the state told the jury that Ms. Love was the most credible witness in the trial, that it was a credibility battle between Bennett, Lewis, and Ms. Love, that she was the only witness who didn't have something to gain by testifying, and that her testimony could be taken "to the bank." T. 3/29/18 at 69-70 (App. I)

At Cooke's trial, the state put Bennett on the stand to testify that Lewis met Cooke online and was hired by Cooke to murder Bernadzikowski. T. 6/11/15 at 7-8 , 18-19, 25-26 (App. J)

The state then followed up Bennett's testimony with that of DiVenti who testified that Cooke hired him to harm Lewis and prevent him from testifying, that Cooke voluntarily handed over the cardboard as payment for hiring Lewis, and that Cooke made several unrecorded confessions to hiring Lewis and Bennett. T. 6/11/15 at 119-122 (App. K), T. 6/11/18 at 107 (App. F) Also during DiVenti's testimony, the state introduced the recording of July 9 and the piece of cardboard with the prepaid credit card number written on it as physical evidence against Cooke. T. 6/11/18 at 121-122 (App. F)

Cooke testified that he never hired, communicated with, or even met Lewis or Bennett and played no role in his fiancé's murder. He also testified that DiVenti regularly threatened and intimidated him and put him in fear for his life and the lives of his son and ex-wife. Cooke also testified that on August 12 DiVenti grabbed him by the collar and ordered him into the cell to give DiVenti the cardboard. He testified that he never asked DiVenti to harm anyone and did not voluntarily give DiVenti the cardboard, but was robbed of it. T. 6/16/15 at 158-161 (App. H), T. 6/11/18 at 120 (App. F)

At the post-conviction hearing Cooke again testified that he was threatened, intimidated, and assaulted by DiVenti and that all of his responses to DiVenti were involuntary. Cooke also

introduced the June 13 recording that defense counsel had failed to introduce at trial. At the end of that recording, DiVenti can be heard telling Cooke that the plan to harm Lewis was "already on" and that if Cooke changed his mind, the hitman would think he was being set up. T. 6/11/18 at 107, 109, 112, 113, 116-117 (App. F) Cooke testified that this remark put Cooke in fear of his life since it was only natural that if the hitman thought Cooke was setting him up, the hitman would kill Cooke. T. 6/11/18 at 111 (App. F)

IX. REASONS FOR GRANTING THE WRIT

Each of the three issues raised in this petition were raised and clearly explained at both the post-conviction court and the district (habeas corpus) court. At both levels, the state and court failed to address the allegations as they were presented.

The state circumvented the allegations by presenting an unnecessary and inaccurate explanation to the court of what Cooke was alleging. The court then accepted the state's version of Cooke's allegation and ruled on that instead of ruling on the allegation as it was actually presented. Since the state's presentation was designed in such a manner as to allow for a defense, the court then went right along with the state's defense. Compounding the problem, the appeals court at each level went with the lower court's version of the allegation. So, as each appeals court refused to review the case because they saw nothing wrong with the lower court's decision, they were analyzing the court's ruling on the state's misrepresentation of the allegations. Consequently, the merits of the allegations presented in this petition have never been ruled upon.

I. Issue 1 - The state violated Cooke's Sixth Amendment right to counsel.

Cooke alleged that the state violated his Sixth Amendment right to counsel afforded him by his murder indictment, by admitting evidence, at a trial of the murder charges, that was obtained after the indictment by an agent of the state outside the presence of Cooke's counsel. Specifically, the state introduced the recorded conversation of July 9, the cardboard obtained on August 12, and Cooke's alleged unrecorded confessions to hiring Lewis and Bennett.

This allegation was denied by the post-conviction court when that court found that because the newer assault charges were different from the original murder charges, carry-over does not apply. Although the court was vague in its opinion, it appears that the court ruled that

the evidence was permissible at trial, although culpatory of the murder charges, because the trial included the newer charges which were not protected by the Sixth Amendment at the time the evidence was obtained. This is a gross misunderstanding of Supreme Court precedent.

Carry-over is not relevant here. Because the trial included the original murder charges which were protected, the state was proscribed by Supreme Court precedent from introducing the evidence mentioned above at that trial. If the state wanted to use the evidence to convict Cooke of the newer assault charges, then the state should have tried Cooke separately for those charges. The fact that the trial was for the murder charges is the controlling factor regardless of any other charges that were joined for the trial.

The federal district court then made several completely unreasonable findings of its own when ruling on Cooke's petition for habeas corpus.

First, the district court erroneously divided all of Cooke's alleged statements into three categories. While there may be justification for dividing statements made by Cooke into two categories of "before" and "after" DiVenti became an agent of the state, it is incorrect to create a third category suggesting that DiVenti's agency ended with the recording of July 9.

Electronic evidence and testimony of state's witnesses introduced at trial and during the post-conviction hearing provided irrefutable evidence that DiVenti and Sergeant Meyer discussed Cooke on at least seven separate occasions after the recording of July 9. Included in the evidence introduced in the post-conviction hearing are five audio recordings of phone calls between DiVenti and Sergeant Meyer on August 12, August 14, August 20, August 25, and August 27, as well as two video recordings of face-to-face meetings between the two on August 12 and September 4.

It was objectively unreasonable for the district court to ignore all of this electronic evidence when determining that DiVenti's agency ended on July 9 simply because Sergeant Meyer was no longer physically present at the jail.

Furthermore, it is impossible to tell from DiVenti's testimony alone which category Cooke's alleged statements would fall into. Common sense demands that the alleged confessions which DiVenti didn't disclose to the state in their initial meeting on June 9 couldn't have been made before then since no prospective state's agent would fail to disclose a confession by Cooke while simultaneously attempting to convince the state that he can help them get Cooke convicted.

The second error the district court made was that it found that Cooke didn't show that DiVenti solicited the statements.

The recording of July 9 began with DiVenti approaching and questioning Cooke. Because the recorded conversation ended without Cooke ever confessing to murder or expressing desire to harm anyone, the state strongly emphasized to the jury that Cooke responded to DiVenti's questions with interest. The entire conversation consisted of DiVenti questioning Cooke and initiating responses from Cooke after long pauses created when Cooke didn't respond or simply walked away.

The August 12 audio recording revealed DiVenti explicitly telling Sergeant Meyer that DiVenti went to Cooke and ordered him to get in the cell and give DiVenti some money, referring to the cash card number on the cardboard.

The proof that the state's agent initiated the recorded conversations and acquisition of the cardboard is right there in the recordings that were introduced, but ignored by the district court, as well as in the testimony of the state's witnesses at trial and Cooke's testimony at trial and during the post-conviction hearing.

The third error the district court made was in finding that the recording of July 9 didn't pertain to the murder.

It has been well established that a defendant's attempt to prevent a witness from testifying can be used as consciousness of guilt of the original charges. The state recognized that the recording of July 9 was inculpatory of the murder charges when they argued in a pretrial motion for joinder that it constituted consciousness of guilt of the murder charges and again at the end of the trial when they reminded the jury that the judge said that if they found Cooke guilty of trying to prevent Lewis from testifying, they could use that as consciousness of guilt for the murder charges.

In Massiah vs United States, 377 US 201, 12 L Ed 2d 246, 84 SCT 1199 (1964), it was held that the basic protections of the Sixth Amendment are denied when the state uses a defendant's own incriminating words against him at trial if those words were elicited by an agent of the state post-indictment and outside the presence of defense counsel. Through the holdings in Massiah and its progeny it has been clearly established and upheld that the state was constitutionally proscribed from using Cooke's statements and actions, elicited by DiVenti, at Cooke's murder trial.

II. Issue 2 - The state introduced involuntary statements and actions of Cooke.

Cooke alleged that the state violated his right to due process by introducing involuntary actions and statements of Cooke at trial; specifically, all statements made by Cooke after DiVenti threatened him at the end of the June 13 recording, including the July 9 recording and all of the alleged unrecorded murder confessions, as well as the cardboard obtained by DiVenti on August 12.

Like with the previous allegation, the post-conviction court didn't address the merits of this allegation, but instead, denied that Cooke was forced to hire DiVenti. Confusing the issue even more, the court never clarified the point at which it felt DiVenti was hired.

Cooke never claimed he was forced to hire DiVenti, but instead, has adamantly denied ever hiring DiVenti at all. Cooke, however, realized that was an issue for the jury to decide and didn't raise it at the post-conviction hearing. The allegation has always been that the evidence introduced was involuntary.

Through the entire recorded interrogation of Cooke by DiVenti on June 13, Cooke refused to participate and wasn't recorded saying anything. At the end of that recording, while DiVenti was acting as an agent of the state, the last thing he said to Cooke was that if Cooke's mind had changed, the hitman in the jail would think Cooke is setting him up. Any reasonable man in Cooke's shoes would have understood that to mean that if Cooke doesn't cooperate with DiVenti, the hitman would come after Cooke.

At the start of the July 9 recording, the first thing DiVenti told Cooke was, "We got a problem," before proceeding to ask Cooke what the target's name is, what Cooke wants done,

how Cooke proposes to pay, and what will happen to the target if Cooke moves forward. It's obvious that DiVenti was asking questions to guide the conversation that were not at all responsive to anything Cooke said. Therefore, his questions, like his June 13 statement, "if your mind has changed" cannot be considered indicative of prior statements or actions of Cooke.

"A finding of coercion does not depend upon actual violence by a government agent; a credible threat is sufficient ... coercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition." Arizona v Fulminante, 499 U.S. 279, 316 (1991).

The suspect in Fulminante was approached by a government informant while he was serving a prison sentence. The informant made an indirect threat of violence by saying that he would not protect Fulminante from other prisoners unless he confessed to his involvement in a crime different from the one resulting in his prison sentence. Fulminante stipulated that he never indicated that he was in fear of other inmates nor did he ever seek the informant's protection. Despite that stipulation, the Supreme Court held that Fulminante's confession was involuntary based on the informant's indirect threat and evidence that Fulminante was susceptible to the threat.

The circumstances confronting Fulminante pale in comparison to those confronting Cooke. DiVenti threatened Cooke with gang violence unless he cooperated in the interrogations and the plan to harm Lewis. Thus, the threat to Cooke was more direct than the threat leading to an involuntary confession in Fulminante. Nor does the record support the conclusion that Cooke was impervious to DiVenti's threats. Unlike Fulminante, Cooke never stipulated a lack of expressed fear. Rather, he gave undisputed testimony that he was scared that DiVenti and the gang members would physically harm or kill him.

In addition, the record contains no evidence that Cooke's personal characteristics would render him impervious to such a direct threat of physical violence. He had no criminal record. He thought he was being threatened by someone capable of following through with the threats. Cooke provided uncontested testimony that he was actually afraid of DiVenti's threats of violence. Thus, the totality of circumstances present a situation far more coercive to Cooke than the one found unconstitutional in Fulminante. Cooke's fear of the threats undermines the reliability of all incriminating remarks and actions he may have made. Voluntariness must be viewed in the totality of the circumstances. Schneckloth vs. Bustamonte, 412 US 218, 226, 36 L Ed 854, 93 SCT 2041.

When this is done, the only possible conclusion is that Cooke's will was overborne no later than June 13, well before the July 9 recording, all of the alleged unrecorded murder confessions, and DiVenti's robbery of Cooke on August 12.

Because the state never made an attempt to deny Cooke's allegation, the record is overflowing with undisputed evidence of involuntariness including Cooke's trial testimony, Cooke's post-conviction testimony, and the audio recordings of DiVenti's own words as he admitted to Sergeant Meyer that he ordered Cooke to hand over the cardboard and that Cooke was scared to death.

The Court's finding that Cooke wasn't forced to hire DiVenti does nothing to address Cooke's allegation that Cooke wasn't acting voluntarily when being recorded and when handing over the cardboard. Once it is properly determined that Cooke's verbal responses to DiVenti and his action of handing over the cardboard were all involuntary, the harmless error rule must be

applied to determine if the improperly admitted evidence was harmless. Arizona vs. Fulminante, 499 US 279, 113 L Ed 2d 302, 111 SCT 1246.

Until DiVenti testified at trial about Cooke's alleged confessions and about the cardboard, the only evidence the jury saw was the testimony of the actual killer, Bennet, that his friend Lewis told him that Cooke hired Lewis and that he, Bennett, was testifying in exchange for leniency at his own sentencing. There was no physical evidence or any corroborating witness testimony.

It is undeniable that DiVenti's claims of confessions and the cardboard were harmful to Cooke's defense. That is why ASA Glennon testified at the post-conviction hearing that the evidence was harmful and why the state never argued it wasn't.

III. Issue 3 - The state introduced material evidence at Cooke's trial that was irreconcilably contradictory to material evidence they introduced at Lewis's trial.

In this third issue Cooke alleged that the state violated his right to due process by introducing material evidence at his trial that was irreconcilably contradictory to material evidence they introduced at the trial of Cooke's codefendant nine months earlier.

At Grant Lewis's trial, the state introduced his confession through the testimony of his ex-girlfriend Rebecca Love. During the state's case-in-chief at Lewis's trial, the state called Ms. Love to the stand to testify that Lewis previously confessed to her that he met an out-of-state woman online who hired him for a big job before she backed out and refused to pay Lewis. According to Lewis's confession, he then became angry and sent his friend Bennett to murder the woman.

During the post-conviction hearing, Glennon testified that as the lead prosecutor at Lewis's trial, it was his decision to call her to the stand, that her testimony was what he expected it to be, that he made no attempt impeach anything she said, and that he made several statements during closing arguments to support her credibility. When asked if it was currently the state's position that Lewis's confession was false, he testified, "No."

At Cooke's trial, the state put Bennett on the stand to testify that Lewis met Cooke online and was hired by Cooke to kill the victim.

These two sets of facts are irreconcilably contradictory. If the client who met Lewis online and was later murdered was a woman, it is impossible that the client was Cooke, a man who is still alive. When all of the state's distractions are set aside, this one irreconcilable contradiction remains. The evidence the state submitted to Cooke's jury to convict him of murder is physically irreconcilable with the evidence the state submitted to Lewis's jury to convict him for the same murder.

Cooke asked the post-conviction court, "If Lewis and Cooke had been tried together, would the prosecutor have been within the bounds of due process if he asked the jury to believe Rebecca Love for the purposes of convicting Lewis, but reject her testimony for the purposes of convicting Cooke?"

The state defended against this allegation by persuading the post-conviction court that Cooke alleged his right to due process was violated because the state didn't put Ms. Love on the stand at his trial. Of course the state also reminded the court that they aren't required to use the same witnesses at separate trials.

The court, instead of clarifying the issue for the state, effectively just signed off on the state's version of Cooke's allegation, and then agreed with the state's defense.

Both the state and the court even went so far as to explain that Ms. Love's testimony would have been hearsay, as if to suggest that had her testimony not been hearsay, the state would have introduced her at Cooke's trial to testify that Lewis confessed to working for the woman he sent Bennett to murder. The whole explanation given by the court is illogical and unsupported by the evidence.

The post-conviction court also ruled that theories remained consistent between both trials. The transcript of Lewis's trial was not introduced into evidence and no witnesses from that trial testified at Cooke's post-conviction hearing. So, the only support for such a finding would have been ASA Glennon's argument at the end of the hearing, an argument that was completely undermined by his own testimony.

The district court, continuing to misunderstand the merits of the issues, ruled that Ms. Love's testimony at Cooke's trial was not inconsistent with the evidence at Lewis's trial. As explained above, Ms. Love never testified at Cooke's trial.

When all of the distractions are set aside, the state told Lewis's jury that Lewis was working for the woman he later sent Bennett to murder, no matter what they argued at Cooke's post-conviction hearing.

The allegation that a due process violation occurs when the state selectively uses evidence to establish inconsistent factual contentions in separate criminal prosecutions for the same crime has been found in multiple federal and state courts of appeal, but has not yet been

determined by The Supreme Court. See Smith v. Groose, 205 F. 3d 1045 (8th Cir. 2000), Thompson v. Calderon, 120 F. 3d 1045 (Cir. 1997), Sifrit v. State, 383 MD 77, 857 A. 2d 65 (2004).

As a reason for its denial of this issue, the federal district court found that a precedent from a federal circuit court does not constitute clearly established Supreme Court precedent, and therefore, cannot form the basis for habeas relief.

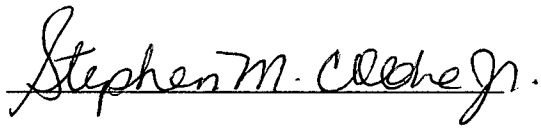
X. CONCLUSION

At every step in the process Cooke, an innocent man, obeyed the law, followed the correct procedure, and presented the undisputed evidence that clearly and overwhelmingly proved true his allegations of constitutional violations.

At every step in the process the state circumvented the allegations by misrepresenting Cooke's claims to make them easier to critique. Then, in what appears to be a penalty of some sort for Cooke proceeding pro se, the courts completely ignored Cooke's articulated claims and arguments and accepted the state's misrepresentations as accurate before proceeding to effectively sign off on the state's refutation of those claims.

Cooke has been unconstitutionally convicted of crimes he didn't commit and is currently sentenced to spend the rest of his life in prison while prosecutors around the country will no doubt commit the same constitutional violations against future defendants if Cooke's convictions are allowed to stand, thereby resulting in the complete evisceration of a defendant's Sixth and Fourteenth Amendment rights.

Cooke respectfully requests that this Honorable Supreme Court grant his Petition for Writ of Certiorari.



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