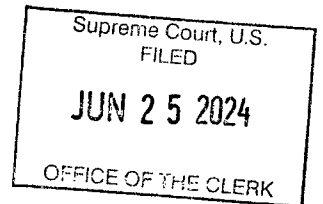


No. 24-5245

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



OTIS PHILLIPS — PETITIONER

VS.

WARDEN, JAMES T. VAUGHN CORRECTIONAL CENTER — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THIRD CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Otis Phillips

James T. Vaughn Correctional Center

Smyrna, Delaware 19977

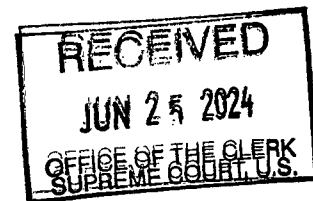
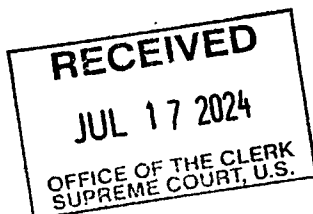


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IN THE
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Opinions Below

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. Specifically, the opinion in the United States Court of Appeals for the Third Circuit, which was decided February 9, 2024 at D. Del. Civ. No: 1:20-CV-01054.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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Questions Presented

Question #1

Did Petitioner indeed meet procedural bar, and did 3rd Circuit decision to deny violate federal law?

Question #2

Did Third Circuit court decision, when it chose to deny Petitioner's claim of prejudice arising from juror's failure to participate, violate 14th Amendment right, and was counsel ineffective in handling of jury's note, violating 6th Amendment, go against clearly established federal law?

Question #3

Did Circuit Court error in denying claim that trial court failed to grant severance?

Question #4

Was District Court's decision an unreasonable determination of the facts of the case, concerning ineffective counsel claim, on failure to investigate, 2008 murder alibi?

1. Procedural Default

“On certiorari to review a Federal Court of Appeals decision upholding a denial of Federal habeas corpus relief to an accused who was determined to have suffered a prior state court procedural bar, the United States Supreme Court will accept the Court of Appeals’ conclusion that the bar was adequate to support the judgment, where the accused did not petition for certiorari on the question.”

“For purposes of Federal habeas corpus review of a Petitioner’s claims, attorney error or ignorance is ordinarily not “cause” to excuse a prior state-court procedural default, because the attorney is the petitioner’s agent when acting or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error, attorney error that constitutes ineffective assistance of counsel is such cause, however, not because the error is so bad that the lawyer ceases to be the petitioner’s agent, but because, in such circumstances, the Federal Constitution’s Sixth Amendment itself requires that responsibility for the default be imputed to the State; in other words, it is not the gravity of the attorney’s error that matters, but the fact that the error constitutes “a violation of the Petitioner’s right to counsel; thus, where a petitioner defaults a claim as a result of a denial of the effective assistance of counsel, it is the state, which is Responsible for the denial as a constitutional matter, which must bear the cost of any resulting default and the harm to State interests that federal habeas corpus review entails.” *Coleman v. Thompson* (1991).

The District Court of Delaware denied Petitioner’s claim because it found claim(s) to be procedurally defaulted, this decision goes against the ruling in *Coleman v. Thompson*, and the ruling in *Martinez v. Ryan* (2012) where, “State prisoner’s failure to raise ineffective-assistance-of-trial-counsel claims in only proceeding-initial-review, and collateral proceeding – in which

State allowed such claims held not to bar federal habeas corpus court from hearing claims, if prisoner had no or ineffective counsel in proceeding.

Petitioner argues counsel was ineffective in failing to raise claims in initial proceeding in District Court, which ultimately lead to barring Petitioner.

2. Jury Instruction

In a habeas corpus proceeding brought in a federal court to test the validity under the Fourteenth Amendment of the Petitioner's conviction and sentence in a State Court, on the ground that he did not receive a fair trial because the jury was prejudiced against him, it is the duty of the Federal Court to evaluate independently the *voir dire* testimony of the impaneled juror.

The Third Circuit decision to deny claim of prejudice arising from juror's failure to participate, violates 14th Amendment process, and trial counsel was ineffective in their handling of the notes from the jury.

The first note stated that juror number 10 did not believe "this process" – referring to the jury deliberations – was "facilitating justice." The juror did not expound on that, and both the Court and parties were left to only speculate as to the note's meaning.

The next note, however, put the preceding communication in perspective. Another note was sent to the judge through the foreperson, saying Juror Number 10 had informed the panel that she had taken the preliminary instruction forbidding the formation of an opinion prior to the close of evidence to mean that "she should not be taking in information, putting it in perspective, and apply[ing] deductive reasoning to determine whether the events occurred as the State presents. The note from the foreperson specifically alleged that Juror Number 10 had not "collected any of the evidence presented from day 1."

The Third Circuit decision is contrary to clearly established Federal precedent, put forth in cases such as, *United States v. Bradshaw* (2002), "where a colorable claim of jury taint surfaces during deliberations the trial court has duty to investigate the allegation promptly." The

purpose of that inquiry is twofold; to ascertain whether some taint-producing event actually occurred, and if so, to assess the magnitude of the event and the extent of any resulting prejudice.

If the Court finds both a taint-producing event and a significant potential for prejudice, the Court must then consider the extent to which prophylactic measures (such as the discharge of particular jurors or the pronouncement of curative instructions) will suffice to alleviate that prejudice. In some instances, a likelihood of residual prejudice may remain despite the Court's best efforts. In that event, the Court must grant a timely motion for a mistrial (if one is made). The objective of this painstaking process is to ensure that the parties receive the trial by an unbiased jury to which the Constitution entitles them.

Also, "the primary purpose of jury instructions is to define with substantial particularity the factual issues and clearly to instruct the jury as to the principles of law which they are to apply in deciding the factual issues involved in the cases before them." *Zimmerman v. State*, 565 A.2d 887, 890 (Del. 1989). In Petitioner's case, the trial court and trial counsel recognized that the note from the jury at a minimum suggested that a juror "ha[d] paid no attention to what ha[d] happened for six weeks."

"When a jury is instructed to apply a conducive presumption that permits it to convict a defendant without ever examining the evidence concerning an element of the crimes charged, such an error deprives defendant of constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Conn v. Johnson* (1983).

And, in *Moulder v. Commonwealth* (2023), when there is a reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror should be excused as not qualified.

3. Severance

“Joint defendants address motions for severance to the sound discretion of the trial court. The Court reviews such motions to determine only if, under the specific facts and circumstances of the case before the court, the trial court abused its discretion in denying the motion. Normally, judicial economy dictates that the State should jointly try defendants indicted for the same crime or crimes. But, if the defendants can show a reasonable and not hypothetical probability that substantial prejudice may result from a joint trial, the trial court may grant separate trials.”

The Court has listed the following factors that the trial court should consider when determining whether a motion for severance should be granted: (1) problems involving a co-defendant’s extra-judicial statements; (2) an absence of substantial independent competent evidence of Movant’s guilt; (3) antagonistic defenses as between the co-defendant and the Movant; and (4) difficulty in segregating the State’s evidence as between the co-defendant and the Movant.

“The admission of a non-testifying co-defendant’s statement that tends to incriminate the defendant violates the Confrontation Clause.” *Floudiotis v. State of Delaware* (1989).

The decision of denial of severance by the Third Circuit Court is in conflict with decisions granted in other circuit courts. The Third Circuit decided “reasonable jurists could not debate” Petitioner’s claim. This is an unreasonable determination of the facts of the case.

Trial counsel was ineffective for failing to argue for severance of both murder charges, and for severance of trial from co-defendant who made prejudicial statement against Petitioner. The murder charge of Christopher Palmer should have been severed from the murder charge of Herman Curry. The State’s theory was (Curry) was murdered to prevent him from testifying

concerning the death of (Palmer). This joinder of offenses (murders that happened 4 years apart) greatly prejudiced defendant because a separate consideration of evidence would probability lead a jury to find Petitioner not guilty in the murder of Palmer.

When joined, prejudice arises where “the confusion of the jury ... resulting from presentation of joined offenses.” The joinder of both murders, overwhelmingly prejudiced Petitioner’s trial, being that it was portrayed that the State’s theory was true, ultimately finding Petitioner guilty of the murder of “Palmer” before trial concerning “Curry’s” death was even concluded.

Also, trial counsel was aware of evidence that Jeffery Phillips allegedly made a statement that defendant to kill Herman Curry because Curry was trying to take this defendant down for Christopher Palmer’s murder.

Failure to ask for severance from co-defendant who possibly put forth evidence through 3rd party hearsay is already highly scrutinable when no other evidence existed to link 2008 (Palmer) murder to (2012) “Curry” murder.

Trial counsel opted to ask for severance only on gang participation charges, the least impactful charge, rendering them ineffective in their strategic decision-making. In *People v. Casica* (2014), the California, Fifth District, ruled that “a classic case for joint trial is presented when defendants are charged with common crimes involving common events and victims.”

“Though severance is the sound discretion of the trial court, severance should generally be granted, in the face of an incriminating confession [by a co-defendant], prejudicial association with co-defendants, likely confusion resulting from evidence on multiple counts.”

Also, in *People v. Letner and Tobin* (2010), “prejudicial association justifying severance will involve circumstances in which the evidence regarding one defendant might make it likely the jury would convict that defendant of the charges and, further, more likely find a co-defendant guilty based upon the relationship between the two rather than upon the evidence separately implicating the defendant.”

Failure to grant severance by lower court prejudiced Petitioner and violated the Confrontation Clause, similar as in *Bruton v. United States* (1968), where, “An accused’s right of cross-examination secured by the Confrontation Clause of the Sixth Amendment is violated at his joint trial with a co-defendant who does not testify by the admission of the co-defendant’s confession inculcating the accused, notwithstanding jury instructions that the co-defendant’s confession must be disregarded in determining the accused’s guilt or innocence.

Also, “where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial, not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. *Bruton v. United States* (1968).

4. Failure to Investigate Alibi

Petitioner argued to all lower courts that counsel violated 6th Amendment, under the ruling precedent in “*Chronic*” by failing to investigate into 2008 murder alibi.

The 3rd Circuit decision is an unreasonable determination of the facts, based on the following argument.

“Question of whether state court decision involved unreasonable application of federal law to inmate’s ineffective assistance claim so as to warrant habeas relief under 28 U.S.C. 5(d)(1) was not fairly included in questions presented under Sup. Ct. R. 14.1(a); questions presented for review concerned whether state court made unreasonable factual determination under 2254(d)(2) regarding ineffective assistance claim, which was different question from whether law was unreasonably applied.” *Wood v. Allen*, LEXIS 2372 (2010).

Trial counsel was ineffective in failing to investigate into alibi defense. A proper investigation would have shown Otis Phillips was stopped Jan. 26, 2008, in Brooklyn, New York, and cited a ticket for drinking in public. Phillips also suggested counsel seek affidavit from his girlfriend and people and places he came into contact with during the time the State alleged he was actually around to commit the 2008 murder.

Trial counsel also failed to investigate a “third party” for the 2008 Christopher Palmer murder, being that, (DNA) found at scene was not Otis Phillips’, and belonged to another individual who was wanted for “murder” in upstate New York.

This case is similar to *Wearry v. Cain* (2016) in which, “During state postconviction proceedings, Wearry also maintained that his trial attorney had failed to uncover exonerating evidence. Wearry’s trial attorney admitted at the state collateral-review hearing that he had

conducted no independent investigation into Wearry's innocence and had relied solely on evidence the State and Wearry had provided. For example, despite Wearry's alibi, his attorney undertook no effort to locate independent witnesses from among the dozens of guests who had attended the wedding reception."

The 3rd Circuit decision goes against the ruling in "Wearry" and in other cases, such as "Chronic" where, "defendant's constitutional right to the effective assistance of counsel had been violated. The Court based this inference on five criteria: (1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel. *United States v. Chronic* (1984).

"When a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *Holloway v. Arkansas* (1977).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Otis Phillips", is written over a horizontal line.

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