IN THE

SUPREME COURT OF THE UNITED STATES

January Term 2019

No._____

DEVI LOREN SMITH,
Petitioner,

v.

NOAH NAGY, et al,
Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Submitted by:

Devi Loren Smith#392953
In Propria-Persona
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

QUESTION PRESENTED

WAS THE PETITIONER DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHERE DEFENSE COUNSEL FAILED TO CALL CRITICAL DEFENSE WITNESSES AND APPELLATE COUNSEL FAILED TO RAISE THIS CLAIM ON DIRECT REVIEW?

PARTIES

The Petitioner is Devi Loren Smith, a prisoner at Lakeland Correctional Facility located at 141 First Street, Coldwater Michigan, 49036. The Respondents are the State Of Michigan and Noah Nagy, the warden at the Lakeland Correctional Facility.

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Decisions Below:

The decision of the United States Court of Appeals for the Sixth Circuit case no# 17-1835 (2018), a copy is attached as Appendix:A to this petition. The order of the United States District Court for the Eastern District of Michigan case no# 14-cv-10969 (2017), a copy is attached as Appendix:B to this petition. The order of the Michigan Supreme Court is case no# 146554, a copy is attached as Appendix:C to this petition. The order of the Michigan Court of Appeals is case no# 306574, a copy is attached as Appendix:D to this petition.

Post-conviction

The order of the Michigan Supreme Court is case no# 152090, a copy is attached as Appendix:E to this petition. The order of the Michigan Court of Appeals is case no# 326534, a copy is attached as Appendix:F to this petition. The trial court order is case no# 10-010956-01-FC, a copy is attached as Appendix:G to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 12, 2018, and a copy of that order is attached as Appendix:A. Jurisdiction is conferred by 28 USC § 2254(A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment 6th to the United States Constitution which provides:

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 in his favor, and to have the assistance of counsel for his defense.

This case also involves the application of 28 USC § 2253(C) which states:

1) unless a circuit Justice or Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from:

A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court.

2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

Introduction

This case involves a conviction for two counts of first degree murder under Michigan law, MCL 750.316, two counts of torture under MCL 750.85, and two counts of felony firearm while committing the felonies, MCL 750.227b. Petitioner Devi Smith was tried and convicted in the circuit court for the county of Wayne, in Detroit, Michigan on August 24, 2011. He was sentenced to life in prison without the possibility for parole as mandated by MCL 750.316, and 23-to-50 years for the torture, and the consecutive term of two years for the firearm convictions.

The facts of the case is that on March 1, 2010, two people were murdered. Monica Botello and Percil Carson were murdered in their home in Detroit. Petitioner Smith was tried twice for these murders. The first trial ended in a hung jury as to Petitioner, the jury convicted the co-defendant Derrick Smith (unrelated to Petitioner Smith), on two counts of first degree murder, torture and felony firearm. The jury was unable to unanimiously agree on a verdict as to Petitioner Smith, which resulted in a hung jury. The case was retried.

During the second trial, evidence was submitted that Devi and Derrick went to the victims home for an alleged drug transaction, as the money for the drugs were being counted, Derrick and Devi drew handguns. Devi Smith, allegedly ordered Botello and her two

young daughters into a bathroom at gunpoint. Botello was later taken out of the bathroom, and the men bound her and Carson's wrists with duct tape.

Carson begged for his life, pleading with the two men that he had family. Derrick and Devi directed Botello and Carson into the basement, where they were laid across a couch and their mouths taped. Carson was shot once in the front of his head, and Botello was shot once in the back of the head. Meanwhile, one of Botello's daughters in the bathroom, eight year old Tayonna heard Carson's pleas, her parents forced into the basement, and gunshots. She called 911 after Derrick and Petitioner left the house. Tayonna described the two perpetrators to the operator and said a man, who she later identified as Petitioner, forced her into the bathroom at gunpoint. The day after the murders, Tayonna again described the perpetrators, and later picked Petitioner at a photographic identification procedure. Petitioner refused to participate in alive line-up. Another witness, Shantell Crankfield also picked Petitioner out of a photographic array as the man who was with Derrick and Carson at the house on the evening of the murders, Crankfield left shortly before the incident occurred.

Petitioner was apprehended about six months after the crime. In his statement to police, he admitted to being in the victims house, but he claimed that he did nothing to aid Derrick, who he claims was solely responsible for binding, robbing, and killing the two victims. Petitioner's defense was that Derrick called him

and asked him to come to Carson's house to facilitate a drug deal. When Petitioner saw that Derrick planned to rob Carson, he escorted the children to the bathroom for their own protection and then left the premises. The prosecutor relied on Tayonna's statements and testimony that Petitioner was armed with a gun and forced them into the bathroom to discredit Petitioner's version of events.

Direct Appeal/State Courts

Following Petitioner's conviction and sentence, Petitioner filed a claim in the Michigan Court of Appeals. His appellate brief raised the following claims:

1) Petitioner did not voluntarily, knowingly and intelligently waive his constitutional rights when he did not read the waiver of rights form correctly and the interrogator failed to correct him;

2) The trial court admitted irrelevant and prejudicial evidence in violation of Michigan Rules of Evidence 401 and 403 when it admitted Tayonna Botello's 911 call.

The Michigan Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. People v Smith, No 306574 (November 27, 2012). Petitioner subsequently filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims as in the Michigan Court of Appeals. The Supreme Court denied the application because it was not persuaded by the questions presented. People v Smith, 829 NW2d (Mich 2013).

Habeas Petition

Petitioner submitted his title 28 USC § 2254 habeas petition along with a motion to stay the petition so he could return back to the state trial court to exhaust a claim of ineffective assistance of counsel. The district court granted the motion and Petitioner returned to the state trial court and submitted a motion for relief from judgment pursuant to MCR 6.500 raising the claims of ineffective assistance of both trial and appellate counsel.

Post-conviction motion appeal

On September 16, 2014, the trial court denied the motion for relief on the merits finding that Petitioner's counsel did not perform deficiently, and that Petitioner was not prejudiced by his counsel's performance in light of the strength of the evidence indicating his guilt. See Trial Court opinion at Appendix:G. The court also found that Petitioner failed to demonstrate actual prejudice as required under Michigan Court Rule 6.508(D)(3)(b).

Petitioner filed an application for leave to appeal the trial court s denial to the Michigan Court of Appeals. That court denied relief for failure to establish an entitlement to relief under MCR 6.508(D) and failed to establish a waiver for good cause. See People v. Smith COA No#326534 (2015). Petitioner then filed an application for leave to appeal to the Michigan Supreme Court that was denied under People v. Smith, 878 NW2d 870 (2016).

Petitioner returned back to the federal district court for review on his amended petition for habeas relief and the district court denied the petition but issued a certificate of appealability for Issue (3), habeas issue three encompanced claims on both trial and appellate attorneys.

Appeal to the Sixth Circuit

Petitioner appealed to the Sixth Circuit which was denied on October 12, 2018, Case no# 17-1835, first the sixth circuit in their denial is flawed in several aspects of their opinion and order, where on page 3 of the order, the appeals court states that the:

> "Petitioner could not used their testimony to establish that he was never at the house where the crimes took place because he conceded to the police and at trial that he was there, although he asserted that he left before the murders occurred. Smith contends, however, that their testimony could have supported a theory that he was merely present during the course of events leading up to the murderous events. Presumably because, if he was not with Derrick before or after the crimes, the jury would conclude that he did not participate in the murders". Smith claims are without merit. First, although Funchess did not testify in person at his second trial, her testimony from the first trial was read into the record. "Smith has not explained how he would have benefitted had counsel procured live or additional testimony from Funchess".

Here, this goes to the heart of the Petitioner's claim of ineffective assistance of trial counsel, and any good defense attorney would have first objected to a prosecution witness testimony being read into the record, where this violates the Petitioner's confrontation rights and the Petitioner was granted

a COA by the district court solely on trial counsel's performance, the Sixth Circuit was to judge only the reasonableness of counsel's conduct at the time of the conduct. Strickland v Washington, 466 US at 690. Because this was a critical stage in the proceedings where exculpatory evidence was being suppressed by the prosecution, because a jury cannot weigh the credibility of a transcript or judge a witness demeanor, trial counsel, by not objecting prejudiced the petitioner because where a defendant's guilt hinges largely on the testimony of a prosecution witness, the erroneous exclusion of the evidence critical to assessing the credibility of that witness violates the constitution. Depetris v Kuykendall, 239 F3d 1057 (9th Cir 2001) therefore, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not the outcome of the entire trial, and also trial counsel did not even have the Haugabook testify who also supported the defense theory and both of these people were prosecution witnesses who was given immunity for their testimony.

The court of appeals has not offered how not calling these two witnesses to testify who support the theory of defense did not prejudice the Petitioner, when their testimony is the heart of his defense, and this cannot be deemed trial strategy, and when trial counsel did not object to the prosecution reading this testimony into the record was not protecting his clients rights because a defendant's right to present his theory is a fundamental right and all of his pertinent evidence should be considered by

the trier of fact, especially in a capital offense. Trial counsel's silence at this stage of the trial proceedings violated the Petitioner's sixth amendment right to confront his accuser.

The Confrontation Clause of the Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him, this is impossible with a transcript, this was a new trial and a new jury. This right that trial counsel neglected to protect is incorporated by the fourteenth amendment and thus must be honored by the states. Pointer v Texas, 380 US 400, 403 (1965). The right includes not only the guarantee of a face to face meeting with witnesses appearing before the trier of fact. Coy v Iowa, 487 US 102, 1016 (1988), but also the right to cross examine those witnesses, Texas supra, 380 US at 406-407, in accord Douglas v Alabama, 380 US 415 (1965). A criminal defendant states a violation of the confrontation clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to expose to the jury the facts from which juries could properly draw inferences relating to the reliability of the witness.

So for the Sixth Circuit to say Petitioner claims has no merit is erroneous on it's face. Also, in reviewing the Sixth Circuit opinion on page 4, they assert that trial counsel's decision not to call Haugabook appears to have been strategic because trial counsel in his opening and closing arguments asserted Haugabook was involved in the robberies and murders and

that Smith was there only to facilitate a drug deal. This would have been supported with evidence by both prosecution witnesses testifying to this theory put forth by the defense attorney. There is no trial strategy that would support a failure to call two exculpatory witnesses endorsed by the prosecution to present to the trier of fact, also here in the Sixth Circuit opinion, they speculate on what they believe a jury would think if they heard the testimony of Haugabook, also this evidence was not cumulative because a jury is instructed that opening and closing arguments is not evidence, only a theory of facts that may be presented in the course of the trial.

The Sixth Circuit indulged in the natural tendency to speculate what was trial strategy instead of assessing trial counsel's performance and in this case there is no justifiable excuse for not calling these witnesses because even if the testimony could not corroborate the Petitioner's defense, it would have been quite useful as it was in the Petitioner's first trial where he had a hung jury, when their testimony helped established his theory of defense, counsel's failure to call these witnesses to testify and not objecting to the reading of prior testimony in a new trial when the witness is available is ineffective. See Matthews v Abramajtys, 319 F3d 780 (6th Cir 2003).

The Sixth Circuit in previous rulings rejected that a Petitioner is not prejudiced by counsel's failure to call witnesses to corroborate his or her defense. See e.g. Stewart v

Wolfenbarger, 468 F3d 338 (6th Cir 2008), Bigelow v Williams, 367 F3d 562 (6th Cir 2004), Clinkscale v Carter, 375 F3d at 443. Even in the Eastern District of Michigan where this case originated from, see Marvin v Woods, 128 F Supp 3d 987 (ED Mich 2015), Freeman v Trombley, 744 F Supp 697 (ED Mich 2010), also see English v Romanowski, 589 F Supp 2d 893 (ED Mich 2008), Kowalak v Scutt, 712 F Supp 2d 657 (ED Mich 2010).

Thus, where the detrimental impact of not calling the witness was exacerbated by counsel's inaction cannot be deemed reasonable and the Sixth Circuit in this case did not focus on the errors of counsel, but on the proofs of the state, this ruling should be reversed by this Honorable Court. Where the Petitioner's Constitutional rights were not protected by trial counsel's deficient performance.

REASONS FOR GRANTING THE WRIT

Here, Petitioner had two trials, the first trial was a hung jury, where the trier of fact could not agree on his guilt or innocence, and upon retrial the same trial attorney showed deficient performance, when he allowed the prosecution to exclude crucial witnesses from testifying that had exculpatory evidence to support the defense theory of what part, if any, Petitioner played in the crime.

A) Trial counsel's ineffectiveness

In the first trial there were two witnesses that were called

by the prosecution that had been granted immunity for their testimony against Derrick Smith, one was Jeffrey Haugabook who assisted Derrick Smith on getting out of town following the murder of Carson and Botello, Transcript of first trial, 3/22/11 at 62-63. On direct examination, Haugabook was presented with several still photographs taken from video footage on the day of the murders. In one of these stills, he identified himself, as well as Derrick Smith and anothor individual who met with Smith at a subway restaurant situated inside of a Walmart. Id at 67-69. Haugabook was queried as follows:

THE PROSECUTOR: Okay. Do you recall what the person (Derrick Smith) met with looked like?

MR. HAUGABOOK: Light-skinned, kind of tall.

Q. I'm going to show you people's Exhibit No#2. Tell me if. . . that appears to you like the person that he met with?

A. Yes.

Q. That's him.

A. It looks like him.

Q. Okay. Was there a conversation between Derrick Smith and the person?

A. I kind of overheard the conversation between Derrick and the person.

Q. Tell us what you overheard Derrick saying to the person?

A. Just that he was going to bust a script.

Q. What's "Bust a script" mean, sir?

A. Cash in a prescription

Q. Did you see anything else occur between the man in the Walmart and Derrick Smith, or hear anything else that you can remember now?

A. No.

Q. After did Derrick Smith and the man split up then?

A. Yes

Q. What did he tell you?

A. He said he was punching in (It means that he was going to rob the guy or cash in prescriptions)

Q. Did he ask you if you wanted in on a robbery, sir?

A. Yes

Q. Do you remember who Derrick Smith was with at the Walmart?

A. He was with Mark.

Q. That's his brother?

A. Correct.

Q. Do you remember if he was with anyone else?

A. I'm not sure, I can't remember.

Q. All right, when you saw him was he alone, or was he with someone else?

A. He was with a young'un

Q. Was he with this young un (PEtitioner) or a different young'un?

A. If I'm not mistaken, it was a different young'un. I don't remember this young'un being there.

Id at 69-75

Haugabook's testimony as noted above provided a boon for the defense in that it proved that (1) Petitioner was not the man that met Derrick Smith at the Walmart where the conspiracy to rob and kill Percil Carson and Monica Botello was spawned and (2) that Petitioner was not the dark skinned person in Derrick Smith's presence in the aftermath of the murders (Id at 75). Nina Funchess was also called by the prosecution, and was Haugabook, she was also granted immunity for her testimony (Id at 91, 93).

She testified that on the date in question, she and her boyfriend "took Derrick Smith to Walmart", where he met with Haugabook. Petitioner was not present at this meeting, Id at 96-97. Derrick Smith asked her to dispose of a bag for him and she complied by placing it in a dumpster located in the parking lot of a K-Mart store, Id at 98. Funchess and her infant son, along with her boyfriend, Derrick Smith and Haugabook, left the state of Michigan together as a group and traveled to Chicago, Illinois, where they remained for less than a day. Id at 99-102, 134. Funchess testimony was useful defense evidence to the extent that, while she was in the presence of Derrick Smith before and after the murders, Petitioner was not with him.

Second Trial

At the second trial, the prosecution did not call Haugabook or Funchess as witnesses even though they were on the prosecution witness list. Here, defense counsel failed to call these witnesses in it's case-in-chief and allowed the prosecution to exclude the very crucial witnesses from testifying that had exculpatory evidence to support the defense theory that he was not part of the plan to rob and kill the victims in this case.

Trial counsel first allowed one witness testimony to be read into the record and the other to be excluded all together, trial counsel's ineffectiveness and prosecutorial suppression of exculpatory evidence violated the Petitioner's rights to a fair trial. United States v Bagley, 473 US 667, 682 (1985). Prejudice

is established if there is a reasonable likelihood that, but for the constitutional violation, the jury would have reached a different outcome and a reasonable likelihood does not require that a different outcome be more probable than not. See Kyles v Whitley, 514 US 419, 434 (1995).

The exculpatory evidence was so compelling that a court can not have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error. Because, inherent in the right of an accused to a fair trial, is the right to have effective counsel. And when a Petitioner asserts ineffective assistance of counsel based on counsel's failure to present to the trier of facts the very exculpatory evidence that demonstrates his actual innocence, canot be viewed as harmless. If the Court look at Michigan Rules of Professional Conduct Rule 1.3:

> "[A] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvience to the lawyer, and make whatever lawful and ethical measures are required to vindicate a client's cause or endeavor".

In this case, trial counsel's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it. Caldwell v Lewis, 414 Fed Appx 809, 815-816 (Cir 2011), quoting Griffin v Warden, 970 F2d 1355, 1358 (6th Cir 1992). Here the difference between the case that was and the case that should have been is undeniable. Stewart v Wolfenbarger, supra. The prosecution's

case-in-chief at the second trial was identical to that presented at the first trial, with the notable exeception of witnesses Haugabook and Funchess. The fact that the jury at Petitioner's first trial, having heard the testimonies of Haugabook and Funchess, was so significantly divided and thus unable to reach a unanimous verdict underscores the fact that counsel's failure to present these witnesses in the defense case-in-chief was far outside the wide range of professionally competent assistance. Blackburn v Foltz, 828 F2d 1117, 1183 (6th Cir 1987), Vega v Ryan, 735 F3d 1093 (9th Cir 2013).

B) **Appellate Counsel Ineffectiveness**

If this Honorable Court will review Mapes v Tate, 388 F3d 187 (6th Cir 2004) where it found that: "[A] defendant is entitled to the effective assistance of counsel on his first appeal of right, appellate counsel's performance is judged under the same standard for evaluating trial counsel's performance found in Strickland v Washington". In the Sixth Circuit, they consider the following factors in determining whether an attorney on direct appeal performed reasonably competently:

1) were the omitted issues significant and obvious;
2) was there arguably contrary authority on the omitted issue;
3) were the omitted issue clearly stronger than those presented;
4) were the omitted issues objected to at trial;
5) were the trial court's ruling subject to deference on appeal;

6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and if so, were the justification reasonable;

7) What was appellate counsel's level of experience and expertise;

8) Did the Petitioner and appellate counsel meet, and go over possible issues;

9) Is the evidence that counsel reviewed all the facts;

10) Were the omitted issues dealt with in other assignments of error;

11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt.

Here, the Sixth Circuit has set the requirement and in this case you must first look at what procedural steps appellate counsel took and how it affected Petitioner's rights. In the original brief filed by appellate counsel, they filed a motion to remand for ineffective assistance of trial counsel but not on the fact that counsel failed to object to witness testimony being read into the record and counsel's failure to call both exculpatory witnesses to the stand, the obvious omition of these issues and the approach affected Petitioner's substantial appellate rights. Appellate counsel could have resolved all these issues in the trial court before proceeding to the appellate courts by filing a motion for new trial based upon ineffective assistance of trial counsel pursuant to Michigan Court Rules 7.208(B) that states:

(1) no later than 56 days after the commencement of the time for filing the defendant-appellant brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or for resentencing.

By appellate counsel following this procedure would have preserved the issues on the record and gave the trial court time to address the claim properly, instead, appellate counsel filed two pleadings in the Michigan Court of Appeals with respect to Petitioner's appeal of right. The first was the Standard brief on appeal which presented two grounds for appeal. The second was a two page pleading nomenclatured "motion to remand for ineffective assistance of counsel" with an appended one half page pleading styled as an "offer of proof in support of Defendant-Appellant's motion to remand for ineffective assistance of counsel".

The pleadings filed by appellate counsel were completely defective briefs filed in the Michigan Court of Appeals must contain a clear, concise, and separately number list of the questions to be considered on appeal. MCR 7.212(C)(5) issues not placed in the statement of questions presented are waived. See Woods v Booker, 450 Fed Appx 480, 490 (6th Cir 2011). Because the instant issue was not included in the statement of questions presented in the brief on appeal, the Michigan Court of Appeals did not did not address this claim in it's per curiam order affirming Petitioner's conviction. See Appendix:D, People v Devi Loren Smith, No#306574, 11/27/2012.

Appellate counsel's performance in the instant case was pro forma at best. The Supreme Court has observed that this sort of "nominal representation on an appeal as of right does not suffice to render the proceedings constitutionally adequate". Evitts v

Lucey, 469 US 396. Under the Sixth Amendment, counsel's representation was so deficient that it resulted in Petitioner's claim of ineffective assistance of counsel claim being buried on his appeal of right.

The treatment of this claim by the Michigan Courts

Because of the failure of appellate counsel as delineated herein, it became incumbent upon Petitioner to present his ineffective assistance of counsel claim be way of a motion for relief fromjudgment filed pursuant to MCR 6.500. The trial court, the only Michigan Court to render a reasoned opinion with respect to this issue, held in relevant part that:

> "Given the evidence at trial placing defendant at the scene of the crime defendant has filed to establish that the testimony of Haugabook and Funchess would have made a difference in the outcome of the trial. The victims' daughter was the key prosecution witness and testified that she observed defendant and another man in the house where she, her sister, her mother, and the other victim, her mother's boy-friend, were located.
>
> At some point, defendant and the other man came into the room where the victims' daughter and her sister were watching T.V. and directed them to get into the bathroom. The victims' daughter saw defendant with a gun. Further, in defendant's statement to police, he admitted to being in the house right before the murder occurred, although he claimed he left after witnessing his co-defendant bind the male victim's hands with duct tape".

Opinion, Third Judicial Circuit Court, Case No# 10-010956-01-FC, 9/16/2014 at 3-4. The trial court overstated the exactitude of Monica Botello's ten year old daughter, Tayonna Botello identification, as demonstrated in the following:

THE PROSECUTOR: When the other guy (Derrick Smith) did that with the duct tape, did you see Devi Smith there, this guy there?

TAYONNA BOSTELLO: I dont remember.

Q. During the part when you were in the bathroom do you remember seeing this man (Devi Smith) at all?

A. I dont remember.

Transcript, 7/27/2011 at 136.

When asked on cross-examination if she could remember the style of hair worn by the perpetrator she stated that he didn't have hair. Id at 173. Shantell Crankfield was called in the prosecution's case-in-chief. Transcript, 7/28/2011 at 11. She had been friends with Monica Botello for like ten years and she saw Petitioner at the residence in question on the day of the murder. She was asked about his appearance on the date in question:

THE PROSECUTOR: Can you remember as you sit there now, if there was anything different today about the appearnce of Petitioner?

MS CRANKFIELD: I just remember him having on dark clothes and had his head down.

Q. Do you remember anything about his hair?

A. I think if I remember, it looked like he had braids at the time.

Transcript, 7/28/2011 at 19.

While ten year old Tayonna described an assailant who did not have any hair, an adult witness specifically recalled that Petitioner wore his hair in a braided fashion. when asked on direct examination if Petitioner wore a hat on date in question,

Tayonna stated that she could not remember. Transcript, 7/27/2011 at 158. however, when interviewed by the police, she told them that the dark complected assailant was wearing a brown baseball hat, Transcript 7/28/2011, at 143. Crankfield, however, indicated that she did not recall Petitioner waering a hat. Transcript, 7/28/2011, at 20, 40.

Contrary to the trial court's claim, Botello's description of the perpetrator was not so beyond reproach as to nullify the effect of defense counsel's failure to call Haugabook and Funchess as witnesses.

PREJUDICE

The performance of Petitioner's attorneys as described supra, were constitutionally deficient and prejudiced Petitioner at trial and on appeal. When evaluating prejudice to a habeas petitioner, a reviewing court **must** take into account the totality of the circumstances, as well as the relative strength of the case proffered by the prosecution. Campbell v Coyle, 260 F3d 531, 551 (6th Cir 2001).

As previously noted. the case against Petitioner hinged upon Tayonna Botello's identification, which in reality left much to be desired. The jurors in the second trial did not hear from Haugabbok and Funchess, and as a result their verdict rested on the narrow ground of Botello's testimony. Foster v Wolfenbarger, 687 F3d 702, 710 (6th Cir 2012). had the jury been presented with

this additional exculpatory evidence, there was a strong likelihood of tipping the scales in the other direction, also see Mahdi v Bagley, 522 F3d 631 (6th Cir 2008), cert denied 129 Sct 1986 (2009) indicates that: "on the first appeal of right, a defendant is entitled to effective assistance of appellate counsel".

The court of appeals for the Sixth Circuit has concluded that a reviewing court should focus on whether counsel's alleged errors have undermined the reliability of and confidence in the result. McQueen v Scroggy, 99 F3d 1302, 1311 (6th Cir 1996). On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the proceeding cannot be relied on as having produced a just result. Id at 1311-12 (quoting Strickland, 466 US 686).

The instant issue was clear on the face of the record and when appellate counsel failed to preserve this issue in the trial court pursuant to MCR 7.208(B), it severly prejudiced Petitioner's appellate rights, the Sixth Circuit is clear on this aspect as stated in Beasley v US, 491 F2d 687, 696 (6th Cir 1974) "holding that it is a violation of the Sixth Amendment for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence". See Bigelow v Haviland, 576 F3d 284, where trial counsel failed to take minimal steps, was objectively unreasonable. Ramonez v Berghuis, 490 F3d

482 (6th Cir 2007), Martinez v Ryan, 132 Sct 1309 (2012).

Importance of the question presented

It has long been recognized that the right to counsel is the right to the effective assistance of counsel. McMann v Richardson, 397 US 759, 771 N. 14 (1970). Indeed, over fifty years ago, the Supreme Court held that the Sixth Amendment right to the effective assistance of counsel is "so fundamental and essential to a fair trial, and due process of law, that it is made obligatory upon the states by the fourteenth amendment. Gideon v Wainwright, 372 US 335 (1963), Betts v Brady, 316 US 455, 465 (1942).

In this case, Petitioner who had a second trial, and during a critical stage in these proceedings defense counsel silence shows deficient performance by not objecting to the reading of an exculpatory witness previous testimony in a new trial that had violated the right to compulsory process because a defendant in a state criminal trial is denied his constitutional right to have compulsory process for obtaining witnesses in his favor. When a trial lawyer has arbitrarily denied the defendant an opportunity to put on the stand a witness who was physically and mentally capable of testifying to events that he or she had personally observed, and whose testimony would have been relevant and material to the defense. Washington v Texas, 388 US 14.

Here was truly a critical stage of the proceedings to introduce exculpatory evidence by the way of the prosecution own

witnesses and whether a proceeding is a critical stage depends on whether there was a reasonable probability that the defendant's case would suffer significant consequences from his total denial of counsel at the stage, the overarching legal question of whether a particular proceeding is a critical stage of the case should focus not only on the specific case but the general question of whether such a stage is critical. Van v Jones, 475 F3d 292, 313-14 (6th Cir 2007), see also US v Hillsman, 480 F3d 333 (2007), and Coleman v Alabama, 399 US 1, 90 Sct 1999 (1970).

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense. it is also well established that the accused is entitled to the assistance of counsel not only at the trial itself, but at all critical stages of his prosecution. If counsel for the accused is totally absent during a critical stage, then there is a presumption of prejudice under Cronic, 466 US at 659, and reversal is automatice.

This Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding. Geders v United Sates, 425 US 80, 96 Sct 1330, 47 Led 2d 592 (1976), Herring v New York, 422 US 853 (1975), Brooks v Tennessee, 406 US 605 (9172), Hamilton v Alabama, 368 US 52 (1961), White v Maryland, 373 US 59 (1963).

In order to asses if a given portion of a criminal proceeding is a critical stage, you must ask how likely it is that significant consequences might have resulted from the absence of counsel at that stage of the criminal proceeding. See Cronic, 466 US 659, look at (1) a critical stage presents a moment when available defenses maybe irretrievably lost, if not then and there asserted. Hamilton, 368 US at 53; (2) a critical stage is one where rights are presented or lost, White, 373 US at 60; (3) counsel's assistance is guaranteed whenever necessary to mount a meaningful defense, Wade, 388 US at 225; (4) determination as to whether a hearing is a critical stage requiring provision of counsel depends upon an analysis whether potential substantial prejudice defendant's rights inhere's in the confrontation and the ability of counsel to help avoid prejudice, Coleman, 399 US at 9; and (5) a critical stage holds significant consequences for the accused. Bell, 535 US at 696.

If you look at Patterson v Illinois, 487 US 285 (1988), where a preceeding is adversarial, counsel is needed to render assistance in counter balancing any overreaching by the prosecution. Id at 314.

CONCLUSION

A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It

is deemed as an "obvious truth" the idea that any person haled into court, has a right to effective counsel that is the core foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. Powell v Alabama, 287 US 45 (1932). [The defendant] requires the guiding hand of counsel at every step in the proceedings against him, without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. Effective counsel preseves claims to be considered on appeal. See e.g. Fed Rule Crim. Proc. 52(b) and in federal habeas proceedings, Edwards v Carpenter, 529 US 446 (2000).

WHEREFORE, for the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,

1/3/2019
Dated

Devi Loren Smith