

MAR 11 2019

OFFICE OF THE CLERK

18-9094

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARTY HEBERT,

PETITIONER

VS.

STATE OF LOUISIANA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

RESPECTFULLY SUBMITTED

Marty Hebert
MARY HEBERT (PRO SE)
#368170
ASH-1
LOUISIANA STATE PRISON
ANGOLA, LA. 70712

ORIGINAL

QUESTION(S) PRESENTED

The State expert witness Dr. Emile Laga testified before the grand jury concerning his findings of the autopsy of the murder victim and the state secured a second degree murder indictment based upon Dr. Laga's grand jury testimony. After indictment and before trial it was disclosed that Dr. Laga changed or amended his testimony. The State of Louisiana has refused to order production of the Grand Jury Transcript of Dr. Laga. Petitioner contends that Dr. Laga's change in his autopsy finding and grand jury testimony supported the prosecution's theory and aided the prosecution in obtaining a second degree murder conviction against Petitioner.

Has the State of Louisiana committed Constitutional Error in its refusal to Order production of Dr. Laga's grand jury testimony to petitioner ?

LIST OF PARTIES

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE.

ALL PARTIES DO NOT APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE.
A LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT
IS THE SUBJECT OF THIS PETITION IS AS FOLLOWS:

Chester Cedars
Assistant District Attorney
Courthouse Bldg.
St. Martinville, Louisiana 70582

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A	Judgment of the U.S. Court of Appeal, 5th Circuit
APPENDIX B	Judgment of U.S. District Court for the West. District of Louisiana
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix 4 to the petition and is U.S. Court of Appeals, Fifth Circuit

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is Judgment of the U.S. District Court for the Western District of Louisiana

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December 13, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

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

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall...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.

STATEMENT OF THE CASE

Petitioner, Marty Hebert was indicted by the SixteenTeen Judicial District Court for the Parish of St. Mary, State of Louisiana for Second Degree Murder. After trial by jury he was convicted as charged by a nonunanimous jury verdict in 1996, and thereafter sentenced to serve mandatory life imprisonment without benefit of parole, probation or suspension of sentence. The conviction was affirmed by the Louisiana First Circuit Court of Appeal. State v. Hebert, 697 So. 2d 1040 (La. App. 1st Cir. 6/20/1997), and the Louisiana State Supreme Court denied writs. See State v. Hebert, 706 So. 2d 450 (La. 1997).

Petitioner filed an application in the 16th Judicial District Court seeking a portion of the Grand Jury Transcripts in his case. On January 29, 2016, the trial court held a hearing and denied relief. The Louisiana First Circuit Court of Appeal denied writs on May 17, 2016 under docket number 2016-KW-0288. The Louisiana Supreme Court denied writs on August 4, 2017 under docket no: 2016-KH-1104. Petitioner filed an application for Writ of Mandamus in U.S. District Court for the Western District of Louisiana on December 11, 2017. On March 12, 2018 U.S. Magistrate Carol Whitehurst issued a Report and Recommendation in Civil Action No: 6:17-cv-1620 recommending dismissal. On April 5, 2018 U.S. District Court Judge Robert G. James entered judgment adopting the Report and denied relief. On Dec. 13, 2018, the U.S. Court of Appeal for the Fifth Circuit denied writs under docket number 18-30463.

SUMMARY OF THE ARGUMENT

Petitioner contends that the doctor who conducted an autopsy of the decedent gave false and misleading testimony. Petitioner contends that the doctor changed his autopsy findings to fit the prosecution's theory of the case, violating his right to a fair trial, and that his indictment was secured based on the doctor's false and misleading grand jury testimony. Petitioner seeks the doctor's grand jury testimony to attack his conviction. The State trial court's refusal to order that he be provided a copy of the grand jury transcript violates Petitioner's constitutional rights.

REASONS FOR GRANTING THE WRIT

The State Court's denied Petitioner a copy of the grand jury testimony of state witness doctor Emile Laga. Petitioner argued that he should be entitled to a copy of doctor Laga's grand jury testimony because he changed his grand jury testimony after the indictment concerning the autopsy of the murder victim to fit the prosecution's theory of the case. The indictment was secured based upon false perjured and misleading testimony by doctor Laga the expert pathologist.

When an error of Constitutional dimension has occurred, the federal court is empowered to correct it. The issue of change was concerning the distance of the shot fired to kill the victim. Petitioner testified that the victim killed himself. Petitioner contends that Dr. Laga's grand jury testimony was false and mis-

leading and the grand jurors made their decision to indict based upon Dr. Laga's grand jury testimony. After the indictment Dr. Laga changed his grand jury testimony just before the trial. At a state court evidentiary hearing the court refused to appoint Plaintiff counsel, the court found a particularized need, but found that it didn't seem to be significant, the court ask for argument, and the state court record will reflect that Plaintiff ask for counsel, the court denied Plaintiff counsel and the record reflects that Plaintiff was unable to adequately argue the issue. The court found that Plaintiff had not adequately stated this ground. That he had not shown the need to pierce the secrecy of the grand jury.

Dr. Laga testified before the grand jury on 8/16/95. On 4/20/94, Dr. Laga did the autopsy on the victim in this case. On April 15, 1996, seven days before the trial Dr. Laga changed his opinion concerning the autopsy concerning the distance of the shot to the left temporal area on page five of the autopsy report was in error and that he had corrected it on page twelve. This correction was crucial because doctor Laga now states that the shot that killed the victim was greater than two feet. See Hebert's testimony where he testified that the victim killed himself by shooting himself in the head, close range and less than two feet. However the change in Dr. Laga's opinion makes it nearly impossible for the victim to have shot himself. However if Dr. Laga told the grand jury that the probable intermediate range was greater than two feet, then the grand jurors made their decision to indict based upon false/misleading expert opinion.

The crux of this conviction rest on the testimony of doctor Laga. The state has adopted a terrible practice which erodes public trust. To hide the very knowledge needed to adequately address the issue of doctor Laga's modification of his expert opinion after testifying before the grand jury is wrong and results in a miscarriage of justice, it impairs the ability of Plaintiff and the public policy makers to have informed conversations about public policy and practice, and it denies defendant's who are wrongfully imprisoned of evidence that could lead to their freedom.

Denying relief the Magistrate failed to consider the factual and legal arguments made by Plaintiff showing a compelling necessity for production of doctor Laga's grand jury testimony.

The failure to consider Plaintiff's arguments resulted in the magistrate failing to find the federal constitutional issues implicated, such as false misleading testimony of doctor Laga which allowed the prosecution to secure the grand jury indictment based upon Dr. Laga's perjury, resulting also in Plaintiff's being denied the right to present a defense. The state's action resulted in a violation of Plaintiff's right to a fair and impartial trial which is guaranteed by the U.S. Constitution. The district court erred in failing to intervene to correct errors of constitutional dimensions.

Federal court intervention in the form of federal mandamus relief is adequate in this case. In *Sanna v. Dipaolo*, 265 F.3d 1 (CA 2001) the court said: "Federal habeas relief cannot be granted merely because a state court errs in its application of state law, but state law or practice that betrays a fundamental principle of justice offends the Due Process Clause. *Cooper v.*

Oklahoma, 517 U.S. 348, 363-65, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996). Thus the state court's error applying state court rule in Plaintiff's case had Constitutional implications. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). That in turn should afford a basis for federal habeas relief.

Dr. Laga's grand jury testimony was not disclosed to the defense prior to trial. However the prosecution did disclose that its witness Dr. Laga had changed his expert opinion testimony he put before the grand jury.

Plaintiff contends that Dr. Laga's grand jury testimony contains evidence favorable to his defense. He contends that federal constitutional issues are implicated and that the federal court can intervene to correct errors of constitutional dimensions. See *Smith v. Phillips*, 455 U.S. 209, 221, 102 S.Ct. 940, 948, 71 L.Ed.2d 78 (1982). See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The Court has acknowledged that because of the U.S. Supreme Court jurisprudence, a defendant is constitutionally entitled to receive exculpatory information in the possession of the government, including significant impeachment material, as the rule of grand jury secrecy must give way if the testimony contains impeachment material which an accused is entitled to have.

The use of false testimony to obtain tainted convictions goes against any concept of ordered liberty. See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959). The U.S. Supreme Court in *Basurto* concluded on Constitutional grounds, that reversal of a conviction is required:

When the government allows a defendant to stand trial on an indictment which it knows to be based in part upon perjured testimony, the consequences to the defendant of perjured testimony given before the grand jury are no less severe than those of perjured testimony at trial, and in fact may be more severe. The defendant has no effective means of cross examination or rebutting perjured testimony given before the grand jury, as he might in Court.

In fact, the Ninth Circuit has said that "deliberate introduction of perjured testimony is perhaps the most "flagrant example of misconduct" causing usurpation of the functions of the grand jury. The United States Supreme Court and other federal courts have been concerned on occasion with possible usurpation of the function of the grand jury by the prosecution. The fear is that a grand jury sufficiently controlled by the government thus becomes a kind of "rubber stamp" for the wishes of the prosecutor. The Fifth Amendment Due Process Clause of the Constitution guarantees citizens who are to be charged with serious crimes in the federal courts the right to have their cases screened by a grand jury of their fellow citizens before being put on trial. If the presentation to the grand jury is done unfairly, and essential information is withheld or incorrect, the grand jury is thus unable to make a decision based on a fair assessment of the evidence. Then the indictment in fact becomes the decision of the prosecutor and not the grand jury thereby causing fundamental unfairness and a violation of a defendant's Constitutional rights.

The Court's attention is directed to *Miller v. Wainwright*, 798 F.2d 426 (11th Cir. 1986), which is a case similar to Plaintiff's. In *Miller*, the court vacated a denial of habeas relief and remanded for reconsideration of three issues under the correct legal standard as well as all other claims in light of new information being developed in the case. In particular, the court ordered the district court

to review the grand jury testimony of the three testifying eye-witnesses to determine if the defendant's established the particularized need sufficient to overcome the need for maintaining the secrecy of the grand jury testimony.

The Court said:

"If the grand jury testimony is the same as that at trial, it would obviously be of no use to the defendants. If it is the same as the deposition testimony, contrary to that at trial, it might or might not be useful, since the deposition was used at trial. If it were a third version, unlike either the trial or deposition, it strikes us that it would probably be useful to a jury in trying to sort out what is true and what is not..."

At the state court hearing, the trial court concluded that Plaintiff had shown a particularized need, but that it didn't seem significant, the Court ask for argument and because Plaintiff was denied his request for appointment of counsel and because being unlearned in the law he was unable to adequately argue the issue. Thus, the state court concluded that Plaintiff had not adequately stated grounds, that he had not shown the need to pierce the secrecy of the grand jury.

The high court has consistently held that " the statutory rule of secrecy of grand jury testimony must yield to Constitutional Rights. The party seeking disclosure of grand jury material has the burden of proving "that the need for disclosure outweighs the continuing need for secrecy. The secrecy of grand jury proceedings is not absolute, in some situations, justice will demand that discrete portions of transcripts be made available for use in subsequent proceedings, and it is argued that the present case is one of them situations.

Louisiana Court's have consistently adhered to federal jurisprudence in interpreting state grand jury secrecy laws. See *In re Grand Jury*, 737 So.2d 1, 5

(La 4/13/99), State v. Trosclair, 443 So.2d 1098, 1102 (La. 1983), cert. dismissed, 468 U.S. 1205, 104 S. Ct. 3593, 82 L.Ed. 2d 889 (1984).

Petitioner has demonstrated compelling need for production of the grand jury testimony of state witness Dr. Laga.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully Submitted,

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