

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 2017 TERM

MARY ELLE DEANE — PETITIONER
(Your Name)

vs.

STATE OF NEW JERSEY — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mary Elle Deane,
(Your Name)

E.M.C.F., P.O. Box 4004
(Address)

Clinton, New Jersey, 08809
(City, State, Zip Code)

(908) 735-7111
(Phone Number)

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QUESTION(S) PRESENTED

- (1) DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT UNDER THE DUE PROCESS CLAUSE TO A FAIR TRIAL WHEN THE COURT FAILED TO INSTRUCT THE JURY PROPERLY ON A KEY ELEMENT OF THE CRIME OF SECOND-DEGREE CHILD ENDANGERMENT?
- (2) DID THE TRIAL COURT VIOLATE PETITIONER'S RIGHT UNDER THE DUE PROCESS CLAUSE BY PERMITTING A WITNESS TO TESTIFY ABOUT INTERVIEWING THE VICTIM REGARDING "OTHER WRONGS" EVIDENCE WITHOUT GIVING A LIMITING INSTRUCTION?

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 proceeding in the court whose judgment is the subject of this petition is as follows:

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

[] For cases from federal courts:

The opinion of the United States court of appeals 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[] is unpublished.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 United States district 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[] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix P1 to the petition and is

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[X] is unpublished.

The opinion of the New Jersey Supreme Court court appears at Appendix P2 to the petition and is

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[X] is unpublished.

JURISDICTION

For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____

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 December 12, 2017
A copy of that decision appears at Appendix P2.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) U.S. Constitution Amendments 5 (due process), 6 (jury trial) and 14
(Due Process) as applied to the States

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STATEMENT OF THE CASE

This case arises from a criminal prosecution in the New Jersey Superior Court, Law Division, Ocean County. Petitioner Mary Elle Deane (referred to in state-court pleadings as "M.E.D.") was indicted on April 27, 2012, charging her with various offenses related to an alleged sexual assault of a minor. There were thirteen counts in the indictment: aggravated sexual assault based on the victim (referred to as "KB" in the State courts) being under 13 years of age (six counts); aggravated sexual assault based on the allegation that petitioner had supervisory or caretaker status over the victim (three counts); and second degree child endangerment (four counts). One of the principal bones of contention (and a subject in this petition) was over the counts charging Ms. Deane with second-degree child endangerment under New Jersey Law when she was not a caretaker as defined in the statute and, by her contention, could not have been found guilty of any higher degree of child endangerment than third degree. See N.J.S.A. 2C:24-4a.

Petitioner was tried on February 11, 2014 on the indictment before Judge James Blaney and a jury. The State's evidence included testimony from the victim ("KB") that she had been induced to commit sexual acts in the presence of petitioner and her co-defendant. KB had related this information to a field worker from the New Jersey Division of Youth & Family Services (DYFS) who had come to KB's school. The DYFS worker also testified and related KB's statement about her safety at home (KB did not reside in the same home as petitioner) and implying that petitioner had helped create an additional unsafe living situation. (This "other wrongs" evidence – possibly hearsay – is also a subject of this petition). She was convicted on all counts on the date of February 12, 2014. Judge Blaney imposed sentence on the date of September 19, 2014. Petitioner received an aggregate sentence of 15 years in State prison, subject to the 85% parole ineligibility stipulation mandated by the NERA statute.

Direct appeal was taken. On the date of July 7, 2017, the Superior Court, Appellate Division, affirmed the convictions but remanded the matter for resentencing. The New Jersey Supreme Court subsequently denied a petition for certification to hear the matter on December 12, 2017. Petitioner was represented by counsel assigned by the New Jersey Public Defender's Office during trial court proceedings and on direct appeal.

REASONS FOR GRANTING THE PETITION

Petitioner advances two reasons for this Court to grant certiorari and hear this cause. **First, petitioner complains that the trial judge gave a deficient jury instruction on the offense of endangering the welfare of a child.** The gist of the argument is as follows: Under N.J.S.A. 2C:24-4a, the state is obliged to prove that a defendant had a legal duty for the care of the child or had assumed responsibility for the child in order to permit a conviction for second-degree child endangerment. In addition, the State must also prove that the defendant engaged in conduct which would impair or debauch the morals of the child. In this case, the trial court instructed the jury as follows:

"The state must prove beyond a reasonable doubt that the defendant had a legal duty for the child, or assumed responsibility for the care of the child. A person having a legal duty for the care of the child, or who has assumed responsibility for the care of the child, includes a natural parent, adoptive parent, foster parent, stepparent, or any other person who has assumed responsibility for the care, custody, or control of the child, or upon whom there is a legal duty for such care. A person who has assumed the responsibility for the care of the child includes any person who assumes a general and ongoing responsibility for the child and who establishes a continuing or regular supervisory or caretaking relationship with the child."

However, the judge failed to explain to the jury what level of supervision did **not** meet the definition of a legal duty of care, nor did the judge explain the factors the jury needed to consider to make that determination. One of the key points of petitioner's defense at trial was that she did not exercise the level of care to bring her under the second-degree child endangerment statute. The victim lived in the same domicile as her grandmother, not in the same household as petitioner, and only visited the petitioner's residence periodically. The trial court also intentionally omitted necessary language from the instruction because the judge found there was evidence of a legal duty and no need for any further elaboration in the instruction.

The jury sent out a note during its deliberations asking for the definition of a legal duty of care, and defense counsel repeated a request that the jury be instructed that

temporary supervision was not sufficient. The judge refused to modify the instruction already given and merely repeated that instruction to the jury.

In addition, the court also failed to instruct the jury on **how** the victim's sexual history could negate petitioner's mental state; the court merely told the jury that the victim's prior sexual conduct could be used as evidence to consider whether petitioner knowingly engaged in sexual conduct in violation of the child endangerment statute. The jury had no guidance as to how to use this information as it pertained to the charge of debauching the orals of a minor.

Petitioner concedes that this Court has made clear that "It is well established that the instruction "may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record." *Cupp v Naughten*, 414 U.S. 141,147, 94 S Ct 396 (1973). In addition, in reviewing an ambiguous instruction "we inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution." *Boyde v California*, 494 US 370, 380, 110 S Ct 1190 (1990). Moreover, challenges to erroneous jury instructions are subject to a harmless error analysis in most cases. *Neder v. United States*, 527 U.S. 1,9-10, 119 S.Ct. 1827 (1999). The exception is for errors in defining reasonable doubt, which can never be harmless. *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078 (1993).

Nonetheless, there have been cases where this Court has found erroneous instructions requiring reversal under federal constitutional law. In *Cool v. United States*, 409 U.S. 100, 93 S.Ct. 354 (1972), the Court considered a challenge to a jury instruction which effectively ordered the jury to disregard a co-defendant's exculpatory testimony unless it was "convinced it is true beyond a reasonable doubt. 409 U.S. at 102. This Court held that the instruction was erroneous, requiring reversal of the conviction, since the instruction, *inter alia*, impermissibly restricted the defendant's Sixth Amendment right to present to the jury exculpatory testimony of an accomplice by totally excluding relevant evidence unless the jury made a preliminary determination that it was extremely reliable; substantially reduced the government's burden of proving guilt beyond a reasonable doubt by creating an artificial barrier to the consideration of relevant defense testimony; and in effect, required the defendant to establish his innocence beyond a reasonable doubt,

contrary to the constitutionally rooted presumption of innocence. In petitioner's trial, the judge's failure to properly instruct the jury had the effect of diluting the State's burden of proof, usurped the jury's factfinding function and violated her right to due process and a fair trial. Hence, this Court should grant certiorari to hear this matter and assign counsel to represent petitioner.

Second, the trial court violated petitioner's due process rights under the U.S. Constitution by permitting the DYFS worker to testify that she had interviewed the victim about the victim's safety and the court failed to give a limiting instruction to the jury. At trial, a worker from the New Jersey Division of Youth & Family Services* (DYFS) testified that she had questioned the victim about the victim's safety at home (where the victim resided, not where Ms. Deane resided). This questioning had nothing to do with any allegations made against petitioner and should have been excluded by the judge. The testimony conveyed a message that the victim was unsafe at home for reasons other than the crimes for which petitioner was charged and also implied that petitioner was involved in creating an additional unsafe living situation or in making the victim's home life unsafe beyond the allegations for which petitioner was on trial. The trial court permitted this "other wrongs" evidence and failed to give a limiting instruction to the jury.

New Jersey Rule of Evidence (NJRE) 404(b) states in relevant part:

"...Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute."

New Jersey Rule of Evidence 404(b) is largely identical to Federal Rule of Evidence 404(b), making this Court's rulings on case law under Fed.R.Evid. 404 pertinent. Federal Rule of Evidence 404(b)-which applies in both civil and criminal cases-generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's

* That agency is named Division of Child Protection & Permanency as of 2012

character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. *Huddleston v. United States*, 485 U.S. 681, 685, 108 S.Ct. 1496 (1988).

The instant case is analogous to *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644 (1997), where this Court held that trial court held to have abused discretion in allowing evidence of name and nature of prior assault offense, where accused offered to stipulate to prior conviction. The Court acknowledged that "Although 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged - or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment - creates a prejudicial effect that outweighs ordinary relevance." 519 US at 181. Similarly, in this case the risk was that the jury would convict petitioner partly because they believed that she had a history of creating an unsafe living situation for KD in the past - a propensity for unlawful conduct.

In addition, the unrelated allegations were also hearsay since they were the result of what one witness heard from another person and did not qualify for one of the exceptions to the hearsay rule. The statements also raise serious questions about Sixth Amendment Confrontation Clause issues. This implicates the doctrine discussed in *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139 (1990), where this Court held that, in a case where a 2 1/2-year-old child's out-of-court statements made to a pediatrician concerning alleged sexual abuse for which the child's mother was being tried were being introduced by the prosecutor, the admission of a child's hearsay statements violated the defendant's Confrontation Clause rights.

As in *Wright*, petitioner's Confrontation Clause rights and due process rights were violated because of the introduction of this evidence. The problem was compounded because the trial judge failed to give an instruction to the jury on the proper use of this evidence. For these reasons, this Court should grant *certiorari* and assign counsel to represent petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

X9 Maryland Deer

Date: X 2-6-18