No. 18-6558 ORIGINAL

Supreme Court, U.S.
FILED
OCT 23 2018
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY JAMES MERRICK — PETITIONER
(Your Name)

vs.

STATE OF ARIZONA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ARIZONA STATE SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTHONY JAMES MERRICK - 051614
(Your Name)

ASPC-Y-Cibola, P.O. Box 8909
(Address)

San Luis, Az. 85349
(City, State, Zip Code)

NONE
(Phone Number)

QUESTION(S) PRESENTED

1. Mr. Merrick alleged he was denied his constitutional right to testify in his trial in both the guilt and aggravation phases. In the guilt phase, Mr. Merrick notified his trial counsel that he wanted to testify in his defense and wrote a one page note to the judge to inform the court of his desire. The Judge started to read the letter, then said she would not and told defense counsel he could make a record of the contents but beware of Rule 11, attorney sanctions. Trial counsel made no record and did not call Merrick to testify. Nor did he inform Merrick of his right to testify in the aggravation phase. The State courts held that Mr. Merrick must verbally notify the court prior to the close of the defense of his desire to testify and because he failed there was no error. The case thus presents the following question:

Did the Arizona state courts err in finding Mr. Merrick was not entitled under the constitution to testify at trial even though he attempted to make a record of his desire to testify; the court's denial and threatened sanctions on trial counsel; Trial counsel's knowledge Merrick wanted to testify and counsel refused to call him to testify.

2. Mr. Merrick alleged that communications between himself and his clergy, physician and counselor were privileged under Arizona law and precluded from trial and when the court allowed them it violated Mr. Merrick's due process rights. The case Thus presents the following question:

Did the State court err in finding that Mr. Merrick was not entitled under the constitution to require the state to follow it's rules and laws to prohibit privileged evidence from a trial.

3. Mr. Merrick alleged that his constitutional rights to due process and effective counsel was violated when he demonstrated numerous ineffective assistance of counsel claims and that it was impossible to commit the offenses while he was in a federal Correctional facility and a trial witness testified to stealing Mr. Merrick's identity to commit the crimes himself. The court found there was no colorable claim and the court did not abuse it's discretion. The case Thus presents the following question:

Did the State Courts err in finding that Mr. Merrick's Constitutional rights to Due Process and Effective Counsel was not violated when he demonstrated that he was factually innocent of offenses for which he was convicted.

4. Mr. Merrick alleged that he was denied effective appellate counsel when counsel failed to raise claims that Merrick was denied a fair trial when the prosecution committed numerous acts of misconduct by introducing material testimony they knew or should have known was false. The Arizona Courts found that appellate counsel was not ineffective, Thus, this case presents the Following question:

Did the Arizona courts err in finding that appellate counsel was not ineffective when the prosecution presented materially known false testimony to the jury to obtain a conviction and appellate counsel did not raise the claim on appeal.

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] 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:

Additional Respondent:

Arizona Attorney General:
Mark Brnovich

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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.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A 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 Arizona State Supreme Court court appears at Appendix ~~B~~C 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).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was December 26, 2018
A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: September 18, 2018, and a copy of the order denying rehearing appears at Appendix ~~B~~ C.

[ ] 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

US CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

US CONST. AMEND 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 defence.

U.S. CONST. AMEND I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peacefully to assemble, and to petition the government for a redress of grievances.

U.S. CONST., AMEND XIV

Section 1. 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 laws 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.

28 U.S.C. §2254

(a) The Supreme court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a state court only on the ground that he is in custody in violation of the constitution or laws or treaties of the United states.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the state; or

(B)(i) there is an absence of available state corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant,

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state,

(3) A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgement of a state court, a determination of a factual issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in state court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) The claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(F) If the applicant challenges the sufficiency of the evidence adduced in such state court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the state shall produce such part of the record and the Federal court shall direct the state to do so by order directed to an appropriate State Official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the state court's factual determination.

(G) A copy of the official records of the state court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such factual determination by the state court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the controlled Substances act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or state collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

A.R.S. 13-4062

A person shall not be examined as a witness in the following cases:

3. A clergyman or priest, without consent of the person making the confession, as to any the confession made to the clergyman or priest in his professional character in the course of discipline enjoined by the church to which the clergyman or priest belongs.

4. A physician or surgeon, without consent of the physician's or surgeon's patient, as to any information acquired in attending the patient which was necessary to enable the physician or surgeon to prescribe or act for the patient.

A.R.S. 41-1493.01

A. Free exercise of religion is a fundamental right that applies in this state even if laws, rules or other government actions are facially neutral.

B. Except as provided in subsection C, government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.

C. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is both:

1. In furtherance of a compelling governmental interest.
2. The least restrictive means of furthering that compelling governmental interest.

D. A Person whose religious exercise is burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. A party who prevails in any action to enforce this article against a government shall recover attorney fees and costs,

E. In this section, the term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical or de minimus infractions.

A.R.S. 32-2085

A. The confidential relations and communications between a client or patient and a psychologist licensed pursuant to this chapter, including temporary licenses, are placed on the same bases as those provided by law between an attorney and client.

A.R.S. 32-3283

A. The confidential relationship between a client and a licensee, including a temporary licensee, is the same as between an attorney and a client. Unless a client waives this privilege in writing or in court testimony, a licensee shall not voluntarily or involuntarily divulge information that is received by reason of the confidential nature of the behavioral health professional-client relationship.

A.R.S. 32-3301

STATEMENT OF THE CASE

Mr. Merrick was convicted of one count of fraudulent schemes and artifices, one count of theft and nine counts of obtaining a credit card by fraudulent means, on July 29, 2011. A direct Appeal was timely filed and counsel filed a brief challenging four of the nine counts of obtaining a credit card by fraudulent means.[1] The Court of Appeals vacated the convictions of those four counts. 2012 WL 4955425 (Ariz. App. Div. 1).

On September 19, 2014, Merrick filed a timely state post-Conviction relief petition raising nine issues and twenty-two grounds for relief. Seventy-Six exhibits including Merrick's affidavit was attached to support the twenty-two grounds.

The Grounds included Ineffective Assistance of Trial and Appellate counsel; Defense Counsel Conflict of Interest and fractured relationship; Prosecutorial misconduct; Actual Innocence; Newly-discovered evidence; and Illegal sentencing.

In the trial, Mr. Merrick informed defense counsel that he wanted to testify in his own defense. He prepared a note for the Judge prior to taking the stand, informing the Judge that, "I have expressed my desire to testify in this case to clear up issues..." in addition to stating that he would not testify to his religious communications if asked during the trial. The court started to read the note and said she would not read it further and that if defense counsel thought he

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[1] Mr. Merrick tried to file a prose brief, but the court of Appeals disallowed it. Merrick challenged this twice in the Arizona Supreme Court. Each time the case was reversed to the court of Appeals to decide the matter Consistant with it's decisions. In the end, The court of Appeals did not allow Merrick to file a pro se brief.
2014 WL 4952263 (Ariz. App. Div. 1)

wouldn't be sanctioned under rule 11, he could make a record of the note and Merrick's statements. Defense counsel chose not to make a record of the note and did not call Merrick to the stand. He instead rested the defense against Merrick's desire and this caused visible tension between Merrick and defense counsel. The court then removed the jury.

Later, the Jury was again hearing evidence in the aggravation phase and defense counsel admitted aggravating factors. When the court instructed the jury not to consider whether Merrick testified or not, Merrick was first made aware of this right. Merrick informed the court of this, yet the court merely addressed the visual tension in the courtroom between counsel and Merrick and allowed counsel to withdraw and Merrick to proceed pro se.

During the trial, the prosecution had their witness, Dominick Hurley, testify falsly, including:

A. State's witness, vincent Weiss, a Lowes Inc., representative testified that phone number (480) 614-1359 had activated three fraudulent gift cards and that Merrick was seen at or near a cash register in a Lowes Stores during purchases using these three cards. Dominick Hurley testified on June 1, 2011 that Merrick had activated these three gift cards using his home phone and he witnessed it. The prosecution asked Hurley if his home phone number was (480) 614-1359 and Hurley testified it was.

On October 2, 2008, Dominick Hurley was arrested and a report was taken. He also gave an interview to the Police. In both, Hurley's home phone number was listed as (480) 474-4592.

This also corroborrated Trial evidence of Merrick's address book and business records, that the prosecutor submitted that showed Dominick Hurley's home phone number was (480)474-4592

B. Dominick Hurley testified that when he initially told Merrick about the fraudulent scheme to steal gift cards from the G.M. Business choice program where Hurley had access, he sat down with Merrick on the home computer and logged into the program to show him how it was done. Yet, the prosecution knew that the computer's forensic records in their possession revealed that the computers operating system was installed on December 18, 2007 which was at least Nine days after the date Hurley testified the conversation occured. Further, the forensic records show that the first time the G.M. Business Choice program had been logged onto was May 9, 2008. Five months after he testified the conversation occured.

C. Dominick Hurley testified Merrick used a fraudulent gift card to buy a Wii system, IPOD TOUCH, and phone, Yet Best Buy records and Merricks U.S. Bureau of Prisons records show that Dominick Hurley actually made these purchases.

D. Dominick Hurley testified that Merrick was involved in the fraudulent scheme as he obtained, activated and used the cards, Yet the U.S. Bureau of Prisons records show that Merrick was in a federal Correctional facility during the theft, activation and use of some cards. Further, Hurley testified he stole Merrick's identity initially.

E. Dominick Hurley stated on a recorded jail phone that the prosecutor had, that he needed to Know what everyone had told the police and prosecutors so when he talked to them his story would be the same and he would be believable and he would say what they wanted to hear.

REASONS FOR GRANTING THE PETITION

I. THE STATE COURTS MISAPPLIED THE STANDARDS OF THE RIGHT TO TESTIFY AND TO HAVE THE EFFECTIVE ASSISTANCE OF CONFLICT FREE COUNSEL

The state courts erred in finding that Merrick's trial counsel was effective and had no conflict of interest in failing to call Merrick to the stand to testify on his own behalf. The state court opinions erred in two important ways. First, the court flagrantly misstated the record. The courts stated that there was no evidence in the trial record to suggest a conflict with counsel or whether Merrick wanted to testify.

Prior to the defense at trial, Merrick informed his trial counsel that he wanted to testify. During the state's case in chief, the court had warned Merrick on June 2, 2011 that if he spoke out during the trial or did anything in the courtroom, there would be no mistrial and he would be put in a cell in the adjoining room for the remaining trial. When the state rested it's case, Merrick asked defense counsel to hand the court a note stating that he was going to testify to all but his religion. Defense counsel handed the court the note, and the court began to read it, then said, "I have read enough" and handed the note back to defense counsel. Merrick then asked defense counsel to make a record of the contents of the letter / note stating Merrick wanted to testify and would, to all except his religion. Defense counsel asked the court if he could make a record of the contents of the letter / note prior to the jury returning to the court. The court said that he could if he believed it was a proper objection and had a basis under rule 11. Defense counsel asked for a moment to confer with Merrick. Merrick told him to make it known that he was going to testify, then call him to the stand. Defense counsel walked away and up to the podium and shaking his head saying, "I'm not going to do that and Im not going to call you." Merrick loudly stated, "you better call me". The jury then entered and Defense counsel stated that the defense rests. This caused Merrick to exclaim, "what the hell", while raising his hands in astonishment. Immediately the courtroom deputies informed Merrick to be silent and not move around or they would tase him. Merrick made no further gestures in front of the jury nor spoke for fear of being removed and tased. Defense counsel then returned to his seat at the prosecutions table where he had been seated since Dominick Hurley testified for the state and caused a near fight in the courtroom between Merrick and defense counsel. [Merrick filed a motion for audio and video recordings of witnesses Eve ford and Dominick Hurley where Merrick and defense counsel had loud verbal disagreements and fights in the courtroom where the deputies had to seperate them]

The record indicates several arguments between defense counsel and Merrick during the trial that shows a fractured relationship and that defense counsel had a conflict of interest. It also shows, and the court has recognized that Merrick sent a note to the judge less than a minute before the defense rested, that stated Merrick's desire is to testify to all but his religion. So, there is evidence in the record to suggest a conflict with counsel and Merrick wanted to testify.

Secondly, under Rock v. Arkansas. 483 U.S. 44, 107 S.Ct. 2704 (1987), this court held that a criminal defendant has a right to testify in his own behalf under the Due Process Clause of the fourteenth amendment, the Compulsory clause of the sixth Amendment and the fifth Amendments privilege against self incrimination. The Rock court held these rights may only be restricted by a state if the rules are not arbitrary or disproportionate to the purposes they are designed to serve.

Here, the State held that because Merrick did not complain prior to the defense resting that he wanted to testify and defense counsel wouldn't call him, the right was waived. However, in addition to the state court's misstated evidence on the record, they ignored the fact that the court and deputies threatened Merrick not to speak out; gesture; or move around while the jury was present or he would be tased and removed from the courtroom. So Merrick's silence was not by his choice, but by threats.

The Arizona State court rules that require a defendant to notify the court prior to the defense resting of the desire to testify and counsel's refusal to honor this request to overcome a defendant's right to testify. See State v. Prince, 226 Ariz. 516, ¶146, 250 P.3d 1145, 1160 (2011); State v. Allie, 147 Ariz. 320, 328, 710 P.2d 430, 438 (1985). Yet the above evidence shows that, at minimum, the decision to deny him the right to testify was arbitrarily and disproportionatly applied in this case. The court used a rule that required Merrick to be physically injured and in great pain as well as being excluded from his trial if he did speak up when the jury was in the courtroom. This doesn't satisfy the ROCK RULE.

Then under Cuyler v. Sullivan, 446 U.S. 335, 348, 349 (1980) the court held that in order to establish a violation of the sixth Amendment, a defendant who doesn't object at trial must demonstrate that an actual conflict of interest adversely affected his lawyers performance. As shown above, the record here does show evidence of a conflict of interest and no official objection on record during the trial. It also shows that the person that did actually commit the offenses [Dominick Hurley] testified that he committed the schemes and thefts with Merrick. Merrick provided Hurley with the addresses to mail the fraudulent cards, he received them for Hurley, activated them and spent them with Hurley. The Rule 32 record shows that Hurley said he stole Merrick's identity while Merrick was in a federal correctional facility and used his identity to steal gift cards which he received, then activated and used. It simply wasn't possible for Merrick to have committed these offenses while confined in a penal institution. The Rule 32 record shows that trial counsel never presented these facts to the jury and wouldn't allow Merrick to testify at trial, so he could tell the jury. This evidence establishes with near certainty that Merrick would have been aquitted. Thus the conflict of interest did prevent trial counsel from presenting this evidence, ie., it affected his performance.

Lastly, this court requires, in making an analysis under Strickland v. Washington, 466 U.S. 668 (1984) that the reviewing court consider all the evidence in the record, both that which was admitted at the trial and that which is developed at the post conviction stage. Strickland v. Washington, 466 U.S. 668, 687-688 (1984); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams (Terry) v. Taylor, 529 U.S. 362 (2000). Under this test, it is inappropriate to consider the evidence in the light most favorable to the verdict. It is clear that the Arizona courts here disregarded this principle. As it has in several other cases, the court began it's analysis by setting out the version of the facts they think might have happened, instead of facts clearly on the record. The court ignored conflicting evidence that was presented at trial and the Rule 32 petition but not recited by the Arizona courts.

For example, the Arizona court opinion states that at no time did defendant tell the court that he and his attorney were in disagreement and defendant wanted to testify but his attorney would not let him. The opinion ignores, however, that the court first warned the defendant not to notify the court during the trial unless he wanted to be removed and the trial proceed without him. It also ignores defendants statement under the penalty of perjury that the Deputy threatened him not to speak out or gesture to the court in any way unless he wanted to be tased then removed from his trial. It also ignores the evidence of a visual conflict of interest in the courtroom where there was argument between counsel and the defendant and counsel thereafter sat at the prosecutors table. It also ignores evidence of not only motions to the court of conflict, and statements to the court in the aggravation phase of the trial that there was a conflict, the court also recognized the "tension" between defendant and counsel and after the trial, relented and allowed defendant to proceed pro-se. Perhaps the most obvious evidence in the rule 32 petition was when trial counsel rested the defense, it caused defendant to exclaim. "What the hell" while raising his hands in astonishment and all in the courtroom noticed, while defense counsel went to sit at the prosecutors table. In light of this evidence, it is clear that the defendant did want to testify and counsel refused to call him. It also shows that Merrick would have immediately spoke-up, but due to threats from the court and the courtroom deputies, he did not, at that time.

Under Strickland, trial counsel's failure to call Merrick to testify and cross-examine Dominick Hurley properly, was deficient performance. The strong evidence obtained therefrom, as shown above, would have revealed Merrick's Factual innocence, which was prejudice. Thus, Both prongs of strickland were met.

The factual issues are clear. What merits review by this court is the practice of the Arizona state courts and other circuit courts[1] in denying a defendant his right to testify in his defense because of a rule that was implemented, then not only was evidence showing Merrick tried to follow the rule ignored, the state actively prevented Merrick from following the rule.

Because the Arizona Courts have truncated the scope of ROCK V. ARKANSAS, supra; CUYLER V. SULLIVAN, supra; and STRICKLAND V. WASHINGTON, supra, this court must grant certiorari.

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[1] see U.S. v. Edwards, 897 F.2d 445 (9th cir. 1990)(silence in the face of an attorney's decision not to have a defendant testify is a waiver); U.S. v. Taylor, 128 F.3d 1105, 1109 (7th cir. 1997)(No ineffective assistance when counsel and client disagree about testifying); Dows v. Woods, 211 F.3d 480 (9th cir. 2000), (Trial counsel not ineffective when defendant claimed he was denied the right to testify, but never complained about such during the trial).

II. THE STATE COURTS MISAPPLICATION OF CLEMONS V. MISS., 494 U.S. 738 (1990) STANDARDS WARRANTS THIS COURTS ATTENTION

The state courts created a liberty interest when they implemented Arizona Revised Statutes 13-4062 (3) and (4); 41-1493.01; 32-2085; 32-3301; 32-3283. These statutes mandate that all communications to or from a cleric, religious counselor or psychologist in their official capacity are 100% privileged and cannot be used, heard by, relied upon, or quoted by the courts. Under Clemons v. Miss., 494 U.S. 738 (1990) This court held that a state created a liberty interest under the due process clause of the fourteenth amendment when the state created laws or rules that requires them to follow those laws and rules.

Here, the Arizona Courts analyzed Merrick's claim of religious privilege by setting out a version of facts given by the Arizona Court of Appeals in a seperate case [memorandum decision, May 2, 2014, 1CA-CR 11-0834]. The Court went on to hold based upon this recitation of factual errors that Merricks clergy, was not clergy according to the state's interpretation of what a cleric is. This analysis ignores conflicting evidence presented to the court in the petition for post conviction relief and petitions for review, which included affidavits of beliefs of Merrick's religious faith and who clerics are in his faith. It also ignores the law, which was also not recited by the Arizona Courts.

This Court has held many times that courts may not interprete religious beliefs, doctrines and practices including who may be a cleric, as this belongs exclusively to the religious believer and bodies. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976) (courts may not interprete religious doctrine or practices. This belongs exclusively to religious bodies); LEE v. WEISMANN, 505 U.S. 577 (1992)(A state may not engage in interpreting religious beliefs and practices); U.S. v. Seeger, 380 U.S. 163 (1965)(courts are not free to reject beliefs because they consider them incomprehensible. Their only task is to decide whether beliefs proffessed by a registrant are sincerely held and whether they are, in his own scheme of things, religious); Torcaso v. Watkins, 367 U.S. 488, 492-93; Hernandez v. Comm., 490 U.S. 680, 699 (1989)(The first and fourteenth Amendments prohibit the government from making a rule, law or interpretation of religious beliefs and practices); Wallace v. Jaffree, 372 U.S. 38, 112 (1985)(The first Amendment prohibits the courts from interfering with the individuals freedom to believe and practice his beliefs and express himself in accordance with the dictates of his own conscience); U.S. v. Ballard, 322 U.S. 78 (1944) (With mans relations to his maker and the obligations he may think they impose and in the manner in which expression shall be made by him of his belief on those subjects, no interference can be permitted). This court has clarified a very clear ecclesiastical abstention rule. So the Arizona courts had no authority to define cleric and who could be one.

That factual issue is not disputed and what needs the attention of this court is the emerging practice of the Arizona courts not following the laws that they have made. This was precisely the type of review that this court condemned in Clemons v. Miss., supra.

Because the Arizona courts have essentially truncated the scope of Clemons v. Miss., 494 U.S. 738 (1990), requirement that the state must follow it's own laws as a defendant has a due process right under the fourteenth Amendment, this court most grant certiorari.

III. THE STATE COURTS MISAPPLICATION OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) WARRANTS THIS COURTS ATTENTION

The State courts opinions misapplied the Strickland v. Washington, 466 U.S. 668 (1984) two prong test in at least two important ways. First, the court flagrantly mistated the record. It stated that Merrick provided no evidence to support an ineffective assistance of counsel claim.

In the Rule 32 post conviction relief petition, Merrick showed that he was convicted of and ordered to pay 1,500 restitution [$500.00 each] for three gift cards [No's. 3615, 3623, 4293] and Dominick Hurley testified that he stole these gift cards by himself. Merrick presented evidence that these three gift cards were stolen, received, activated and used prior to Merrick's release from a U.S. Bureau of Prisons facility on December 12, 2007 (ie., Merrick was incarcerated when these crimes occurred and it was impossible for him to have committed them).

Merrick presented this claim under ineffective assistance of trial and appellate counsel. It was clear that neither lawyer presented the evidence to the court or jury and it's fact that Merrick could not have committed the offenses, so aquittal was evident. Prejudice was clear, which included $1,500 restitution and several prison sentences of thirty-five years.

Merrick also showed in the Rule 32 petition that he was convicted of and ordered to pay $500 restitution for gift card 6368. Merrick provided evidence that Dominick Hurley ordered this card under his girlfriend's brother's name, a Robbie Watson, the gift card was activated by his daughter, Jordy Weaver and the gift card was fully used by Hurley and Heather Gebert. Merrick was not involved with this card in any way whatsoever. His factual innocence was proven and was apparent. This claim was also presented under ineffective assistance of trial and appellate counsel. Neither lawyer presented the evidence of innocence to a court or jury and it's fact Merrick did not commit the offense.

Merrick also showed in the rule 32 petition he was convicted of and ordered to pay $1,000 restitution for gift cards 4171 and 5502. Merrick provided evidence that Rick Salazar had made a deal with Hurley for two gift cards. Salazar received these cards in the mail from Hurley, and he activated them and spent them. This claim was also presented under ineffective trial and appellate counsel and was clear that neither counsel presented this evidence to the court or jury. It's also fact Merrick was innocent of these gift cards and an aquittal was likely had the jury or court had notice. Secondly,

This court has held that ineffective assistance of counsel requires proof that counsel's performance was deficient under prevailing professional norms, and as a result of such deficient performance, the defendant was prejudiced. Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052 (1984). As shown above, Merrick is factually innocent of offenses for which he was convicted and both trial and appellate counsel failed to raise the issue and show the proof to any court or jury. Due to counsels errors Merrick was convicted and remains imprisoned, when it's certain that the evidence establishes innocence beyond a reasonable doubt. Aquittal was certain. Therefore Both prongs of strickland were satisfied.

Because the Arizona Court's misapplied Strickland and is allowing an innocent man to be imprisoned this warrants this court attention and this court should grant certiorari.

IV. THE STATE COURTS MISAPPLIED THE STANDARDS OF STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984): AND NAPUE V. ILLINOIS, 360 U.S. 264 (1959) AND FAILED TO APPLY THE PROPER TEST

The state courts erred in finding that appellate counsel was not ineffective when the prosecution presented materially known false testimony to the jury to obtain a conviction and appellate counsel did not raise the claim on appeal, therefore it was precluded.

During the trial, states witness Dominick Hurley, testified that his home phone number was (480) 614-1359 (Prosecution asked him to confirm this as his home phone number - which he said it was). This testimony followed testimony by Hurley that both he and Merrick activated gift cards 3615, 3623 and 4293 using the home phone. This testimony followed that of a lowes inc., representative who testified that phone number (480) 614-1359 had activated these cards. However Hurley's testimony was known to be false by the state. When Hurley was arrested and gave a police interview he listed his home phone as (480) 474-4592. Furthermore, the state introduced Merrick's address book and recorded business records in the trial prior to Hurley's testimony that showed Hurley's home phone was (480) 474-4592. This was material to connect the fraudulent gift cards to Merrick.

During the trial, Dominick Hurley also testified that when he initially told Merrick about the fraudulent scheme to steal gift cards from his work that he was already doing, he sat down with Merrick on the home computer and logged into the G.M. Business choice program to show him how it was done. Yet, the prosecution had completed a forensic examination of the home computer and knew that the operating system was installed on December 18, 2007, which was nine days after the conversation was previously testified to have taken place [testimony was it occurred before December 9, 2007]. Further, the forensic examination revealed that the first time the G.M. Business choice program had been logged into was five months later on May 9, 2008. The prosecution Knew Hurley was lying about this material event to show Merrick's Knowledge, and participation.

Dominick Hurley also testified that Merrick used a fraudulent gift card to purchase a Wii gaming system, IPOD touch, and phone. Yet, the prosecution had the records of Best Buy which showed Hurley purchased the Wii gaming system using his own name with a fraudulent gift card, and the prosecution had Merrick's Bureau of prisons records that showed Merrick was in a prison facility on December 9, 2007 when the IPOD touch and other items were purchased using Merrick's name. The prosecution Knew Hurley was lying

Dominick Hurley also stated on a recorded jail call that he was going to lie to the prosecution and jury to implicate Merrick, so that he would get a lesser sentence. During the trial, Hurley testified that he had stole three or four gift cards before involving Merrick. Yet, the prosecution Knew that these gift cards were numbers 3615, 3623, 4293. They also Knew that these stolen gift cards were obtained using Merrick's name, which was clear evidence that Hurley testified to stealing Merrick's identity to commit the schemes and thefts.

The State Courts ignored this court's three prong test in Napue v. Illinois, 360 U.S. 264 (1959) where a petitioner must show 1) The testimony (evidence) was actually false, 2) The prosecution Knew or should have Known the testimony was actually false, and 3) the testimony was material. Napue, 360 U.S. at 269-271

Instead the court precluded the claim stating that he did or could have raised the issue on appeal. However, the claim was presented to the court under ineffective assistance of appellate counsel, and therefore was not waived. Under the two pronged test in Strickland v. Washington, 466 U.S. 668 (1984), Counsel was deficient by not raising clearly meritorious claims of prosecutorial Misconduct/denial of due process in a fair trial as stated above. Because of appellate counsel's failure, the court could not overturn the conviction based on Napue v. Illinois, supra. Which, as shown above, was clear from the record that the convictions should be overturned.

CONCLUSION

Based upon the reasons set forth above, including petitioner's factual innocence

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: 10/23/2018