

No. 18-8017 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
FEB 05 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JACOBY KINDRED — PETITIONER
(Your Name)

vs.

JEFF TITUS, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

PETITION FOR WRIT OF CERTIORARI

JACOBY KINDRED, PRO SE

(Your Name)

7600 525th Street

(Address)

Rush City, Minnesota 55069

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- I. In cases where a federal district court dismisses a habeas petition based on procedural grounds and is determining whether to issue a certificate of appealability, is there an exception to when district courts can only employ the legal standard announced in Barefoot v. Estelle, 463 U.S. 880 (1983), instead of the two component analysis set out in this Court's Slack v. McDaniel, 529 U.S. 473 (2000) decision?

- II. In cases like Mr. Kindred, is the federal district court and the Eighth Circuit Court of Appeals decision not to grant a certificate of appealability a deviation from the mandates in this Court's Slack decision?

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 A 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 is unpublished.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 B to the petition and is

reported at 2018 U.S. Dist. LEXIS 7434; 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 is unpublished.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 E to the petition and is

reported at 2016 Minn. LEXIS 165; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Minnesota Court of Appeals court appears at Appendix E to the petition and is

reported at 2016 Minn. App. Unpub. LEXIS 3; 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 July 26, 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: November 7, 2018, and a copy of the order denying rehearing appears at Appendix D.

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 Mar. 15, 2016. A copy of that decision appears at Appendix F.

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

The following constitutional statutory provisions are involved in this case.

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 law 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 judgment 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 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 have 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 judgment 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 judgment 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 a 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 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.

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such persons detention pending removal proceedings.

(c)(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 a process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(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.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE¹

The facts underlying Mr. Kindred's conviction are set forth in detail in State v. Kindred, 2016 Minn. App. Unpub. LEXIS 3.² Those facts were further distilled in the United States Magistrate Judge R&R to include those facts related to the habeas corpus proceeding:

On December 11, 2013, Kindred was charged with two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(h)(iii). The charges alleged that Kindred engaged in numerous sexual acts with the daughters of his son's girlfriend. Both girls were minors. From a young age, the victims regularly spent time with Kindred; he would babysit them while their mother was working and they occasionally stayed overnight at his house. Further, the victims referred to Kindred as "Grandpa" even though he was not related to the children by blood, marriage or adoption. At trial, the victims testified regarding the various sexual acts that Kindred had subjected them to over the course of the past decade as well as the circumstances under which the acts took place. The State also played a video for the jurors of an interview of one of the victims conducted by a nurse at the Midwest Children's Resource Center describing in detail the sexual conduct that took place with Kindred. Near the end of the trial and at the jurors' request, the court allowed the State to replay the video of the victim interview. Based on victim testimony, the video of the interview, and other evidence presented at trial, the Ramsey County jury convicted Kindred of both counts of first-degree criminal sexual conduct. The court later sentenced him to a 288 month prison term which he is currently serving at the Rush City Correction Facility where Jeff Titus serves as warden.

Kindred directly appealed and argued, *inter alia*, that the State failed to prove beyond a reasonable doubt that he had a "significant relationship" to the victims, i.e. that he was related to or resided in the same dwelling as them.... a "significant relationship" exists if the accused is related to or "jointly resides intermittently or regularly in the same dwelling" as the victimized child. Minn. Stat. § 609.341, subd. 15. Arguing before the Minnesota Court of Appeals, Kindred asserted the State was unable to show he had a significant relationship to the victims because it failed to prove beyond a reasonable

¹ Because the United States District Judge in its final order adopted the U.S. Magistrate Judge Report and Recommendation (herein after "R&R") without making additional findings, Mr. Kindred will refer to the factual statements rendered in the R&R throughout this petition for certiorari.

² A copy of the Minnesota Court of Appeals opinion is reprinted in Petitioner's Appendix at "Appendix E."

doubt that he resided with them. In particular, Kindred asserted the State was only able to show the victims "sometimes" stayed over at his house which, Kindred argued, was insufficient to show that the victims "reside[d] intermittently or regularly in the same dwelling" as required by the statute. The Minnesota Court of Appeals disagreed and upheld the conviction. In particular, the Minnesota Court of Appeals noted that state court precedent treats discontinuous overnight stays as sufficient to meet the "resided with" requirement for a finding of a significant relationship. Kindred appealed to the Minnesota Supreme Court, and the Court declined to review on March 15, 2016.

By this petition, Kindred seeks federal habeas corpus relief pursuant to 28 U.S.C. § 2254 ... Kindred asserts four grounds for relief. In Grounds One and Two, Kindred argues that his constitutional right to due process was violated because the State failed to show he had a significant relationship with the victims, which is an essential element for conviction under Minn. Stat. § 609.342, subd. 2. In Ground Three, Kindred argues the trial court violated his right to due process when it replayed the video of a victim's interview with the Midwest Children's Resource Center. In Ground Four, Kindred asserts he was denied due process by the inadequate medical examinations of the victims. Lastly, in Ground Five, Kindred asserts his conviction was improper due to various evidentiary shortcomings which, if properly addressed, would have tended to prove his innocence.

Kindred v. Titus, 2017 U.S. Dist. LEXIS 215631³ [citations omitted.] (App. 4c-7c.)

The Magistrate judge ultimately determined that the federal court could not hear Mr. Kindred's habeas petition because all the claims raised in the petition were procedurally defaulted. (App. 10c.) Included in its R&R, the Magistrate judge recommended that Mr. Kindred not be granted a certificate of appealability ("COA") on its assessment that "Kindred has not identified, and the Court cannot independently discern, anything novel, noteworthy, or worrisome about this case that warrants appellate review." (App. 20c.)

³A copy of the R&R is reprinted in Petitioner's Appendix at "Appendix C."

On January 17, 2018, the Hon. Susan Richard Nelson, United States District Judge filed its Order adopting the R&R to dismiss Mr. Kindred Writ of Habeas Corpus and deny his request for COA.⁴ Mr. Kindred then motioned the United States Court of Appeals for the Eighth Circuit for COA following denial of COA request by district court. The three panel judges denied the application for a COA on July 26, 2018.⁵ The Eighth Circuit Court of Appeals filed its Order on November 7, 2018, denying Mr. Kindred petition for rehearing en banc and panel.⁶

⁴A copy of the federal district court's final order is located at "Appendix B" of Petitioner's Appendix.

⁵"Appendix A" contains a copy of the Eighth Circuit Court of Appeals judgment.

⁶A copy of the Eighth Circuit Court of Appeals Order is located in Petitioner's Appendix at "Appendix D."