

No.: _____

IN THE SUPREME COURT OF THE UNITED STATES

Charles Richard Lamar, Jr., *Petitioner*,

v.

Donnie Ames, Superintendent, Mount Olive Correctional Complex, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the failure of trial counsel to request a limiting instruction related to unindicted collateral acts evidence constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), when the collateral acts evidence satisfies the elements of a lesser-included offense which the jury is instructed to consider?

PARTIES TO THE PROCEEDINGS BELOW

1. Charles Richard Lamar, Jr.
 - a. Mr. Lamar is the Petitioner in a post-conviction habeas corpus proceeding brought in the Circuit Court of Preston County, West Virginia.
 - b. Mr. Lamar is the Petitioner in the appeal of the denial of his state habeas petition to the Supreme Court of Appeals of West Virginia, in *Charles L. v. Donnie Ames*, Docket No. 17-0824, (W. Va., March 6, 2019).
2. Donnie Ames, Superintendent, Mount Olive Correctional Complex.
 - a. Mr. Ames' predecessor as Warden (now superintendent) of Mount Olive Correctional Complex, David Ballard, is the Respondent in a post-conviction habeas corpus proceeding brought in the Circuit Court of Preston County, West Virginia.
 - b. Mr. Ames is the Respondent in the Petitioner's appeal of the denial of his state habeas petition to the Supreme Court of Appeals of West Virginia, in *Charles L. v. Donnie Ames*, Docket No. 17-0824, (W. Va., March 6, 2019). Mr. Lamar has since been transferred to another prison, Northern Correctional Facility, the Superintendent of which is Karen Pszczolkowski, who would now be the party in interest as habeas respondent.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles Richard Lamar, Jr., respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Appeals of West Virginia, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

Charles L. v. Donnie Ames, Docket No. 17-0824, (W. Va., March 6, 2019). Memorandum Decision of the Supreme Court of Appeals of West Virginia (included in the Appendix to this Petition at p. 1).

STATEMENT OF JURISDICTION

The denial of the Petitioner's state post-conviction habeas action was affirmed on appeal by Memorandum Decision issued by the Supreme Court of Appeals of West Virginia on March 6, 2019. This Honorable Court has jurisdiction over final judgments of the highest court of a state pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

U.S. 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. XIV, sec. 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.

STATEMENT OF THE CASE

On March 2, 2010, the Petitioner, Charles Richard Lamar, Jr., was indicted by the Preston County Grand Jury for four felonies corresponding to two separate transactions. For each transaction, he was indicted for one count of First Degree Sexual Assault, pursuant to W. Va. Code §61-8B-3, as well as one count of Sexual Abuse by a Parent, Guardian, or Custodian, pursuant to W. Va. Code §61-8D-5.

The Petitioner was represented from arraignment until prior to sentencing by Claire Niehaus, Assistant Public Defender at the 18th Judicial Circuit Public Defender Corporation. The Petitioner's case went to trial by jury on January 18th and 19th, 2010. During trial, the jury heard testimony describing the alleged act of sexual penetration that the State claimed the Petitioner committed against the juvenile alleged victim. In addition to the testimony of the alleged victim, the State put on the testimony of psychologist Abigail Leslie, and of her therapist Rebecca Feist, both of whom described the disclosures that the alleged victim made to them. The jury also heard the Petitioner's own testimony concerning "horseplay" with the alleged victim, at which time he stated it was possible that his hand came into contact with the alleged victim's genital area over her clothing.

Over the objection of Petitioner's trial counsel, the Circuit Court gave a lesser-included offense instruction to the jury, which would permit a verdict of guilt on first degree sexual

abuse for each of the sexual assault charges. The Petitioner was found guilty of two charges at trial, and acquitted of two others. Specifically, the Petitioner was found Guilty of First Degree Sexual Abuse (W. Va. Code §61-8B-7), a lesser-included offense of First Degree Sexual Assault as contained in Count One of the Indictment, and was found Guilty of Sexual Abuse by a Parent, Guardian, or Custodian as contained in Count Three of the indictment, both of which corresponded to the first alleged transaction. He was acquitted on Counts Two and Four, both of which corresponded to the second alleged transaction. The Petitioner filed post-trial motions, which were denied at a hearing held February 16, 2011.

The Petitioner was sentenced to 5-25 years of incarceration on Count One, the lesser-included offense of First Degree Sexual Abuse, and was sentenced to 10-20 years of incarceration on Count Three, Sexual Abuse by Parent, Guardian, or Custodian. (A.R.1., 40-50). On direct appeal, the Petitioner raised three issues: insufficiency of the evidence; a prejudicial bolstering of the alleged victim's testimony based upon the way she was seated in the courtroom; and an error in jury selection relating to the use of a preemptory strike when a motion to strike for cause had not been granted. The Petitioner's convictions were affirmed via unanimous memorandum decision by the Supreme Court of Appeals of West Virginia, in *State v. Charles Richard Lamar, Jr.*, Docket No.: 11-1416 (W. Va., April 12, 2013).

The Petitioner filed a pro se Petition for Post-Conviction Habeas Corpus on or about September 19, 2016. The Petitioner filed an Amended Petition with assistance of counsel on or about April 17, 2017. The Respondent filed an Answer to the Amended Petition on May 1, 2017, asserting an affirmative defense that all matters other than Ineffective Assistance of Counsel are barred as *res judicata*, and that relief should be denied on the basis of Ineffective Assistance of Counsel because the Petitioner's counsel was effective.

The Petitioner raised the following grounds in his Amended Petition: Denial of Right to

Speedy Trial; Consecutive sentences for same transaction; Suppression of helpful evidence by prosecutor; State's knowing use of perjured testimony; Information in pre-sentence report erroneous; Ineffective assistance of counsel; Non-disclosure of Grand Jury minutes; Claims concerning use of informers to convict; Constitutional errors in evidentiary rulings; Jury instructions; Claims of prejudicial statements by trial judges; Claims of prejudicial statements by prosecutor; Sufficiency of evidence; Severer sentence than expected; and Excessive sentence.

An Omnibus Evidentiary Hearing was held on June 27, 2017, at which time Claire Niehaus, Samantha Lamar, and the Petitioner testified on behalf of the Petitioner. Ms. Niehaus testified concerning various aspects of her representation, admitting to some errors and denying or having no recollection of other events. No witnesses were offered on behalf of the Respondent. Following the Omnibus Evidentiary Hearing, the parties prepared and filed proposed findings of fact and conclusions of law with the Circuit Court. The Circuit Court entered an "Opinion Order Denying Petition for Writ of Habeas Corpus" on September 8, 2017, denying all of the Petitioner's claims.

The Petitioner appealed that order to the Supreme Court of Appeals of West Virginia, raising six assignments of error: the denial of habeas relief on the basis of prejudicial jury instructions, which resulted in the Petitioner's conviction for conduct separate from that which was charged in the indictment; the denial of habeas relief on the basis of prejudicial statements by the prosecutor; the denial of habeas relief based upon a failure to disclose exculpatory evidence; the denial of habeas relief on the basis of ineffective assistance of trial counsel; the lower court's failure to permit the Petitioner to inspect certain documents; and cumulative error.

The Supreme Court of Appeals of West Virginia set the matter for oral argument, which

was delayed as a result of certain instability whereby a majority of that court ultimately resigned. The reconstituted West Virginia Supreme Court that ultimately heard arguments affirmed the lower court's denial of habeas relief. The Petitioner now raises a single subpart of one of those assignments of error in this Petition for Writ of Certiorari: whether the conduct of Petitioner's trial counsel in failing to request a limiting instruction relating to collateral acts evidence (i.e., the "horseplay" evidence) was ineffective assistance of counsel when the jury was instructed to consider a lesser-included offense that encompassed the wrongdoing alleged in the collateral acts evidence. The Petitioner asserts the right to effective assistance of counsel as guaranteed by the 6th and 14th Amendments to the United States Constitution, as described by *Strickland*, which is the specific issue addressed in the decisions of the lower courts at pages 4-5 and 32-38 of the Appendix.

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

Charles Richard Lamar, Jr., the Petitioner, urges that this Court grant Certiorari to review the judgment below because of the error first committed by the Circuit Court of Preston County, West Virginia, which was explicitly adopted by the Supreme Court of Appeals of West Virginia. Neither court found that the Petitioner's trial counsel had been ineffective as a result of a failure to request a limiting instruction on certain collateral acts evidence, which did not satisfy the elements of the indicted charge, but which did satisfy the elements of a lesser-included offense that the jury was instructed to consider. This error by the lower court constitutes a circumstance in which a state court of last resort has decided an important federal question in a way that conflicts with the decision of other state courts of last resort.

In this case, the Petitioner was subjected to two sets of evidence that involved allegations that he touched the alleged victim on her genitals. First, the alleged victim's own disclosures indicated that the Petitioner touched the alleged victim on her genitals under her

clothing. Second, the Petitioner's own account to law enforcement, and his own testimony, suggested that he may have tickled the alleged victim and come into contact with her genital area over her clothing in that manner: the "horseplay" evidence. The indicted charge, First Degree Sexual Assault, requires penetration, and could not have possibly been satisfied by the "horseplay" evidence. However, the lesser-included offense of First Degree Sexual Abuse can be sustained on evidence of touching of the genital area over the clothing. Therefore, prior to the granting of a lesser-included offense instruction, there was no risk that the jury would convict the Petitioner on either First Degree Sexual Assault count based on the hearing the collateral "horseplay" evidence. However, once that lesser-included instruction was given, the Petitioner's trial counsel was under an obligation to seek a limiting instruction so that the Petitioner's alleged "horseplay" conduct, which was clearly outside the scope of the conduct contemplated by the indictment, could not be substituted in as proof of the lesser-included offense by the jury.

The situation is analogous to an Indiana case which usefully encapsulates the issue. In *Young v. State*, 30 N.E.3d 719 (Ind., 2015), two co-defendants were charged with murder and conspiracy to commit murder. The victim was shot to death by a third person. After a bench trial, the trial court in that case found that there was insufficient evidence to support convictions for murder or conspiracy to commit murder; however, the trial court ultimately convicted the co-defendants of attempted aggravated battery based on the fact that they were beating the decedent at the time that the third person shot him. The Supreme Court of Indiana held that while it was indisputable that attempted aggravated battery was a lesser-included offense of murder (Id., at 724), that fact on its own was not sufficient to satisfy due process: "attempted aggravated battery by beating was not just a lesser offense than the charged murder by shooting—it was a completely different offense, based on a completely different 'means

used' than alleged in the charging informations. This deprived Defendants of fair notice to extend their defense to that very different lesser charge and constituted fundamental error." Id., at 719.

There are a number of cases of state courts of last resort which are at odds with the result in the instant case, in which a failure to request a critical limiting instruction was not deemed ineffective assistance below. In *State v. Rocha*, 836 N.W.2d 774 (Neb. 2013), trial counsel was held to be ineffective as a result of a failure to seek a severance of child sexual abuse charges from child physical abuse charges, or in the absence of a severance, a limiting instruction to prevent improper utilization of evidence by the jury.

In *Garcia v. State*, 308 S.W.3d 62 (Tex. Crim. App. 2009), trial counsel was held ineffective for failing to request a limiting instruction on collateral acts evidence, a portion of which was invited by trial counsel, in addition to improper sentencing advice and a failure to object to damaging hearsay evidence. This case is highly analogous to the instant case because of the fact that in both cases, trial counsel elicited a portion of the evidence for which no limiting instruction was requested. That same court, in an earlier case, *Walker v. State*, 195 S.W.3d 250 (Tex. Crim. App. 2006), found trial counsel ineffective for a litany of mistakes, which included failure to request a limiting instruction related to collateral acts evidence.

In *Humphrey v. State*, 73 N.E.3d 677 (Ind. 2017), trial counsel was held ineffective for a failure to obtain a limiting instruction related to the manner in which the jury could consider a prior unsworn statement of the defendant. Much like the instant case, the defendant's own statements were able to be considered for an improper purpose due to trial counsel's omission to request that the jury be properly instructed for the permissible uses of the evidence in question.

Based upon these contrary precedents, the Petitioner respectfully requests that this

Court grant certiorari to effectuate a determination of the scope of the duty of effective counsel to obtain limiting instructions, and to define what sort of omissions to request such instructions constitute ineffective assistance of counsel under *Strickland*. Wherefore, the Petitioner respectfully requests that this Court grant the relief requested herein, or any other relief the Court deems just and proper.

Respectfully Submitted,

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by counsel,



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