

19-5955

No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

AUG 29 2019

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Dennis R Heilman — PETITIONER  
(Your Name)

vs.

Warden: Randy Blades — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

US District Court, District of Idaho  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dennis R Heilman 83422  
(Your Name)  
Eagle Pass correctional facility (EPCF)  
P.O. Box 849  
(Address)

Eagle Pass, Texas 78853  
(City, State, Zip Code)

N/A  
(Phone Number)

ORIGINAL

## **QUESTIONS PRESENTED**

- 1) Does a variance between the Information charging aggravated assault and rape, and (a) a conviction on non-conforming evidence submitted at trial, and (b) misleading jury instructions, constitute such a fatal variance as would deny petitioner due process of law as demanded of the Fourteenth Amendment to the United States Constitution?
- 2) Did the district court in the last reasoned-decision err by denying habeas relief to petitioner while concomitantly acknowledging perjury on the part of the prosecutrix so as to obviate petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution?
- 3) Was petitioner denied effective assistance under the Sixth Amendment to the Constitution of the United States for trial counsel's for failure to bring an affirmative defense under Idaho Code § 18-6107 which protects the sanctity of a marriage contract in state prosecutions for rape, and, further, not objecting to a jury instruction that permits conviction based solely on lack of consent, thus lessening the burden on the state to prove every element beyond a reasonable doubt?

## 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:

Respondent:

Warden: Randy Blades  
represented by,  
Mark William Olson  
Office of Attorney General  
700 W. State Str. 4th floor  
Boise, Idaho 83720

Petitioner, pro se:

Dennis R Heilman  
83422 / D2-18  
Eagle Pass Correctional Facility  
Eagle Pass, Texas  
78853

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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 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 C 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 E to the petition and is

☒ reported at 158 Idaho 139; 344 P3d 919;; or, (2015

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the Idaho Second District court appears at Appendix F 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 May 23, 2019.

☐ 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: June 6, 2019, and a copy of the order denying rehearing appears at Appendix B.

☐ 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 Jan. 13, 2015.  
A copy of that decision appears at Appendix E.

☐ 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

United States Constitution, VI Amendment

United States Constitution, XIV Amendment

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct 2781 (1979)

U.S. V. George, C.A. Mass., 752 F.2d 749, 753

Cole v. Arkansas 333 U.S. 196 (1948)

Strickland v. Washington, 466 U.S. 668 687-692

Idaho Code 18-6101 (4) Rape Defined.  
Rape is defined as the Penetration, however slight, of the Oral, anal or Vaginal Opening with the Perpetrator's Penis accomplished with a female under any one (1) of the following Circumstances:

(4) Where she resists but her resistance is overcome by force or Violence

Idaho Code 18-6104. Punishment for Rape.  
Rape is Punishable by imprisonment in the State Prison not less than one (1) year, and imprisonment may be extended to life in the discretion of District Judge, who shall Pass Sentence

## Idaho Code 18-6107 Rape of Spouse.

No person shall be convicted of rape for any act or acts with that person's spouse, except under the circumstances cited in Subsection (4) and (5) of Section 18-6101, Idaho Code.

## Idaho Code 18-901 (b) Assault defined.

An assault is: (b) An intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Idaho Code 18-905 (a) Aggravated assault defined. An aggravated assault is an assault: (a) With a deadly weapon or instrument without intent to kill; or

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## STATEMENT OF THE CASE

The case proceeds from a denial of certificate of appealability by the Ninth Circuit Court of Appeals. Petitioner has been granted no relief in the lower federal and state courts.

On December 17, 2005, the petitioner, Dennis R. Heilman, was arrested at his home in Lewiston, Idaho. On June 26, 2006, a jury trial began. On June 30, 2006, Heilman was found guilty of rape, a felony, aggravated assault with a firearm enhancement, a felony, false imprisonment, a misdemeanor, and unlawful entry, a misdemeanor.

On September 28, 2006, the trial court sentenced Heilman to six years fixed in the state penitentiary, with an additional fourteen years of indeterminate time left solely to the discretion of the executive branch. On November 13, 2006, trial counsel filed a late notice of appeal to the Idaho Supreme Court. The district court appointed appellate counsel. On January 4, 2007, petitioner's appeal got dismissed as untimely, the former notice having been filed four days beyond the jurisdictional time constraints. On May 21, 2007, petitioner's original trial counsel filed a motion for a new trial in the district court based upon new information brought forward by a juror. Communication between trial counsel and the lone juror came approximately two weeks after the guilty verdicts were handed down. The female juror expressed to trial counsel a particular irregularity during deliberations that left her uncomfortable.

Despite his efforts to secure an affidavit from the juror, trial counsel was unsuccessful. She would only orally share with trial counsel that some disruption in deliberations regarding an audio WAV file distressed her enough to reach out to the lawyer. The WAV file at issue involved some recorded conversation between the prosecutrix and a police officer. With no formal inquiry by the trial court into possible confusion of evidentiary issues by at least one juror, and absent an affidavit from that juror, the motion for a new trial was denied on October 15, 2007.

April 28, 2009 Order Vacating and  
reentering Judgment and Conviction

May 27, 2009 Notice of Appeal

July 1, 2009 Motion for reduction of  
Sentence (Rule 35) and Motion to reconsider  
Motion for New Trial

July 2, 2009 Order - denying Motion  
for reduction of sentence (Rule 35)

July 14, 2009 Amended Notice of Appeal  
Direct Appeal # 36554

August 11, 2009 Notice of Appeal  
Post-Conviction # 36858

December 10, 2010 Judgments of  
Conviction and Sentences for aggravated  
assault and rape Affirmed. Docket #  
36554, 2010 Ida. App Unpub. Lexis 447

June 30, 2011 Second Post-Conviction  
filed CV-11-01323

July 1, 2011 Petition for Writ of  
Habeas Corpus filed, 3:11 cv-00304 REB

November 3, 2011 Dismissal of Post-  
Conviction appeal, Docket # 36858, 2011  
Ida. App. Unpub. Lexis 390

November 3, 2011 Motion to Stay  
Federal Habeas Corpus.

May 11, 2012 Order granting Stay

January 13, 2015 Second Post -  
Conviction Denied Docket # 41240

158 Idaho 139; 344 P.3d 919; (2015)

April 24, 2015 Motion to reOpen  
Federal Habeas Corpus, Amended Petition  
for Federal Habeas Corpus

October 19, 2018 Federal Habeas Corpus -  
Denied 3:11-cv-00304 DCN

November 16, 2018 Filed Appeal to  
Ninth Circuit

May 23, 2019 Denied COA from the  
Ninth Circuit

June 6, 2019 Filed Motion for  
reconsideration of COA to Ninth Circuit

June 27, 2019 Denied Motion  
for reconsideration of COA

## REASONS FOR GRANTING THE PETITION

At every stage of his legal proceedings in this criminal case, petitioner has repeatedly tried to press the lower courts to recognize Fourteenth Amendment violations of due process as relate to a fatal variance between the Information and elements presented at trial. Here, he argues again that no rational trier of fact could have found the requisite elements to convict him, as charged, beyond a reasonable doubt.

A fatal variance occurred at trial when the facts proved during the evidentiary process differed substantively from the indictment. As a matter of law, such a fatal variance constitutes grounds for a reversal of a conviction only when it affects the defendant's "substantial rights," that is, when the variance deprives a defendant of sufficiently specific information to prepare a defense and to be protected against surprise at trial, and prevents him from asserting his constitutional protection against double jeopardy. United States v. George, C.A.Mass., 752 F.2d 749, 753. Also, as stated in Cole v. Arkansas, 333 U.S. 196 (1948). "To sustain a conviction on grounds not charged in the information and which the jury had no opportunity to pass upon, deprives the defendant of a fair trial and denies the defendant that due process of law guaranteed by the 14th Amendment to the United States Constitution.

Though acknowledged in the lower courts as having perjured herself, the jury heard in the prosecutrix's own voice that on two separate and distinct occasions petitioner pointed a gun at her and threatened to kill her. As Idaho Code defines aggravated assault, the meaning clearly reads "without intent to kill." I.C. § 18-905(a). The variance amounts to a violation of due process that neither counsel nor the courts have taken up as an offense of petitioner's rights.

The petitioner has made myriad claims of ineffective assistance through the lower state and federal courts. The claims warrant consideration of habeas relief in accord with the Supreme Court of the United States' rule in Strickland v. Washington, 466 U.S. 668, 687-692 (1984).

Taken together, these violative attacks on petitioner's constitutional Sixth and Fourteenth amendment rights, as governed by a long case-history of the Supreme Court, deserve review to preserve due process of law.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dennis R Heilman

Date: August 20, 2019