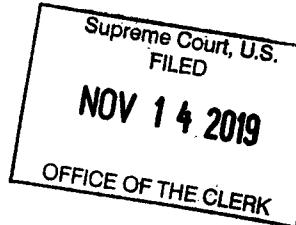


19-6709

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



ADAM ACOSTA — PETITIONER
(Your Name)

vs.

THE PEOPLE OF THE STATE OF COLORADO—
RESPONDENT(S) ON PETITION FOR A WRIT OF
CERTIORARI TO
COURT OF APPEALS, STATE OF COLORADO,
PETITION FOR WRIT OF CERTIORARI

Adam Acosta, # 125041

Fremont Correctional Facility

P.O. Box 999

Canon City, Colorado

81215

QUESTION(S) PRESENTED

Whether the Court of Appeals misconstrued Rule 35(c)(3)(VII), Colorado Rules of Criminal Procedure, in declining to consider a claim of ineffective assistance of counsel raised by the putatively ineffective attorney in Rule 33 motion for new trial and submitted an affidavit in which he swore that he made a mistake in the remedy he requested for a Rule 16 disclosure of prosecution?

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:

RELATED CASES

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[] reported at _____ ; or, [] has been designated for publication but is not yet reported; or, [] is unpublished.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[] reported at _____ ; or, [] has been designated for publication but is not yet reported; or, [] is unpublished.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[] reported at _____ ; or, [] has been designated for publication but is not yet reported; or, [X] is unpublished.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[] reported at _____ ; or, [] has been designated for publication but is not yet reported; or, [] is unpublished.

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 April 18, 2019. A copy of that decision appears at Appendix A.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a)

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STATEMENT OF THE CASE

A. Trial Court Proceedings:

Acosta was convicted of second degree assault, false imprisonment and conspiracy to commit second degree assault arising out of an incident during which A.N., a man who allegedly sexually assaulted a girl, was beaten. [R. Tr., 2/15/17, p 46,pp. 94-96] The incident occurred in the Alamosa County Jail. [. Tr., 2/14/17, pp. 146-147]

Trial on this case started February 14, 2017, and concluded the following day. The prosecution committed several Crim. P. 16 violations prior to and during trial. [R. Court File, pp. 168-169, ¶¶ 3-6, pp. 176-178, ¶¶ 3-18] the third disclosure violation occurred in the middle of trial and involved the non-disclosure of exculpatory evidence. [R. Court File, pp. 168-180: R. Tr., 2/15/17, pp. 4-11] The deputy district attorney acknowledged that a report from Deputy Judy Jackson of the county sheriff's office was not provided to defense counsel until the deputy district attorney was preparing for rebuttal testimony on the night of February 14. [R. Tr., 2/15/17, p. 4] The prosecutor conceded that the report "clearly has exculpatory or corroborative evidence". *Id.*

The prosecutor offered to agree to a continuance. [R. Tr., 2/15/17, pp. 4-5] Defense counsel did not ask for a continuance to make use of the report but instead asked to preclude the Government from introducing this evidence and from calling Jackson in rebuttal. [R. Tr., 2/15/17 pp. 4, 9] Without objection from the prosecution, the court granted the request sanctioned and precluded the Government from calling the deputy as a witness. [R. Tr., 2/15/17, p. 11]

After the jury convicted Acosta, trial counsel filed a motion for a new trial based on his own ineffective assistance in failing to request the appropriate sanction for the eleventh-hour disclosure of the report by Jackson and in failing to investigate the exculpatory evidence in the report which would have supported a choice of evils defense. [R. Court File, pp. 168-173; p. 172, ¶ 18] Defense counsel submitted an affidavit in the support of the Crim. P. 33 motion.[R. Court File, pp. 166-167] The trial court ordered the prosecution to file a written response. [R. Court File, p.174] In its response, the Government argued that: (a) it had conceded that a sanction was appropriate for the late disclosure of Jackson's report, (b) the deputy district attorney suggested a continuance as a proper remedy, and (c) defense counsel disagreed with a continuance and asked for an order excluding Jackson's testimony which the court granted. [R Court file, pp. 176-180, ¶ 17, 18] The prosecutor went on to argue that trial counsel made a strategic choice to ask for a preclusion of the evidence instead of a continuance, and is only seeking a different remedy after his strategic choice "failed to achieve the desired result." [R. Court File, pp. 176-180, ¶ 19, 21] The trial court denied the motion for a new trial. [R. Court File, p. 181] The court then sentenced Acosta to seven and one-half years in prison on the second-degree assault (causing serious bodily injury) charge, a concurrent one year jail sentence on the false imprisonment which the court permitted to be served in prison, and a concurrent seven and one-half year prison sentence on the conspiracy to commit second degree assault. {R. Court File, pp. 192-193}]

B. Summary of evidence presented at trial:

The complaining witness A.N., did not appear and testify at Acosta's two-day trial. [R. Tr., 2/14/17-2/15/17] The prosecution's case consisted of testimony of an emergency room physician [R. Tr., 2/14/17, pp. 135-139], a deputy sheriff who photographed the cell where the incident took place and observed visible injuries to A.N.'s face [r Tr., 2/14/17, pp. 139-144] and the deputy sheriff who oversaw the entire investigation. [R Tr., 2/14/17, pp 146-161] The government also introduced an SBI report, photographs of the cell where the incident occurred as well as of A.N., and a video recording (without audio). [R. Exh 1, Exh. 2-7, PR Exh. 8]

The deputy sheriff who oversaw the investigation provided most of the evidence as to how A.N. was assaulted. The deputy determined that A.N.- who had already been taken to the hospital when his investigation began – had been assaulted. {R. Tr., 2/14/17, p. 147] The deputy went to see A.N. and watched a video in the jail pod to look for the potential suspects. [R. Tr., 2/14/17, pp. 147-148]

The deputy explained the video to the jury and said that at the start, C221 was visible and inmates Johnathon Dominguez, Jerry Montoya, Brandon Johnson, and Acosta walked out of that cell and over to cell C220 next door. [R. Tr., 2/14/17, p. 148] When the walked into C220, one inmate put a towel over the window, an inmate pulled the door shut but Acosta remained outside the cell.[R. Tr., 2/14/17, p. 149]

The deputy, Keith Stambuagh, interviewed Acosta and most of the suspects.[R. Tr., 2/14/17, p. 150] According to Stambaugh, Acosta said that he agreed to stand outside the door and watch for staff but only for the “13- second rule.” [R. Tr., 2/14/17, p. 150] He counted to “thirteen” but when it was still going in he reached “80”, he realized the incident was getting out of hand. [R.Tr., 2/14/17, p. 150] Acosta then walked down stairs. [R.Tr., 2/14/17, p. 151] Acosta told the deputy that he spoke with someone and told the person that they needed to find a way to stop the assault. [R. Tr., 2/14/17, p. 152]

Stambaugh explained what was depicted on the video: “Brandon Johnson just exited the cell. You can see [A.N.] trying to escape and James McNeil slamming the cell door shut on his wrist.” [R.Tr., 2/14/17, p. 160] McNeil was speaking with Silvas and Acosta few minutes earlier. [R. Tr., 2/14/17, p.160] Jeremy Montoya comes out of the cell followed by Johnathan Dominguez who was hiding his face and the Louis Sanchez who lived in that cell.

[R.Tr.,2/14/17,p.161] Acosta, Johnson and Mascarenas lived in cell C221. [R.Tr.,2/14/17,p.165] However, Mascarenas and Johnson were in cellC220. [R.Tr.,2/14/17,p.165]

The defense called two witnesses: Johnathan Dominguez and Jeremy Montoya. [R.Tr.2/15/17/pp.13-15,pp25-53] Dominguez testified that it was he who assaulted A.N. and that he suggested to Montoya that he be assaulted.

[R.Tr.,2/15/17,pp14-15] Acosta was not a party to this conversation, he was not asked to serve as a “look out” nor was he asked to count to “thirteen.”

[R.Tr.,2/15/17,p.16]

Dominguez was familiar with the “13 second rule” which he explained to the jury and added that the rule only applied between members of the *Surrenos* gang.

[R.Tr.,2/15/17,pp17-18] What happened to A.N. was a “beat down”

[R.Tr.,2/15/17,p18] The attack on A.N. went on for five minutes.

[R.Tr.,2/15/17,pp22-23]

Montoya confirmed that he and Dominguez were A.N. assailants.

[R.Tr.,2/15/17,p26] Montoya said that he was originally going to talk with A.N. but it turned into an assault. [R.Tr.,2/15/17/p.28] He added that Acosta did not involve himself in what was going to happen to A.N. nor did he talk to Dominguez, Mascarenas or Johnson. [R.Tr.,2/15/17,pp. 29-30] Montoya said A.N. was attacked because he raped a girl or a young women.

[R.Tr.,2/15/17,pp46,50]

C. Court of Appeals decision:

The Court of Appeals characterized trial counsel’s handling of the discovery violation and his request for the wrong remedy as invited error and declined to take up the issue. [see slip opinion pp.4-5]

The panel also declined to see the motion for a new trial as alleging ineffective assistance of counsel. [see slip opinion, p.6-7] It noted, “But as we read defendant’s Crim. P. 33 motion, and despite this passing comment, the underlying substance of the defendants request for a new trial was based on the prosecution’s discovery violation under Crim. P. 16 – not ineffective assistance of counsel.” [see slip opinion, p. 7] The panel noted that the Crim. P. 33 motion lacked factual details setting forth the two-prong test under *Strickland*.

REASONS FOR GRANTING THE WRIT

First and foremost, Acosta understands and acknowledges that claims of ineffective assistance of counsel generally should be raised in post-conviction proceeding under Rule 35(c). Nevertheless, since trial counsel raised the claim of his own ineffective assistance in a rule 33 motion and since the motion contained allegations that the trial counsel was ineffective, Acosta raised the issue in his direct appeal and requested a remand to the trial court for an evidentiary hearing claim.

Regardless of the form of the motion, the stage in the proceedings when filed, or the caption on the pleading, the substance of what was alleged was the deprivation of the constitutional right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and Article II, §16 of the Colorado Constitution. The Supreme Court has approved of converting civil habeas petitions into Rule 35(c) motions where the allegations were more appropriately raised under Rule 35(c). *Graham v. Gunter*, 855 P.2d 1384, 1385(Colo 1993).

The court of appeals has converted a C.R.C.P. 106 petition into a Rule 35(c) motion, *People v. Ovalle*, 51 P.3d 1073, 1074(Colo.App.2002), and a Rule 35(b) motion into a Rule 35(c) motion, *People v. Lucero*, 410 P.3d 467(Colo.App.2013).⁴

Although captioned as a motion for a new trial under Crim.P.33, the substantive allegations in Acosta's motion were that there were multiple discovery violations by the prosecution the last of which occurred during trial, that Acosta's counsel was "simply wrong" in failing to request the appropriate

sanction when he learned of the Crim.P.16 violation, and counsel failed to investigate the exculpatory evidence. [R.Court File,pp.168-172] the gravamen of the motion was a pre-sentence claim of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.2052, 80 Led.2d 674(1984); *Ardolino v. People*, 69 P.3d 73(Colo.2003).

Most of the published case law in Colorado involving claims of ineffective assistance of counsel claims arise out of post-conviction proceedings under Crim. P. 35(c) because that is when and where they generally should be raised and litigated. Nevertheless, the issue of treating a Rule 33 motion as a Rule 35(c) motion has arisen in a couple of cases.

After being convicted of first degree murder, the defendant filed a motion for a new trial under Crim. P. 33. *People v. Eckert*, 919 P.2d 962(Colo. App. 1996). After filing the motion, the defendant orally supplemented the motion with claims of ineffective assistance on the part of trial counsel and requested a hearing along with the Rule 33 motion. *Id.*

On appeal, *Eckert cited People v. Scheidt*, 187 Colo 20, 528 P.2d 232(1974) in support of his claim that the lower court erred in denying his motion for new trial without a hearing. *Id.* The Court of Appeals distinguished Scheidt from Eckert's case. While both cases involved a 33 motions which were converted into motions for post-conviction relief under Rule 35, Scheidt made more thorough and timelier request for the court to treat the Rule 33 motion as a Rule 35 motion because he raised the issue in a written motion and made the request during a timely hearing which had already been granted.

In contrast in Eckert, a Rule 33 motion alleging general errors in jury instruction, pre-trial motions and the court's ruling addressing physician-patient privilege was filed. The court set the motion over until after sentencing. After sentencing, counsel for Eckert moved to withdraw, new counsel was appointed, and the defendant said orally that he wanted to raise a claim of ineffective assistance by trial counsel. *Id.*

Acosta's case is procedurally more analogous to Scheidt than to Eckert since Acosta's attorney alleged a claim for relief based on ineffective assistance of counsel in a written motion. The claim for ineffective-assistance was not an after-thought orally thrown into a generic motion for a new trial under Rule 33. Acosta's Rule motion contained the essentials for a Rule 35(c) motion alleging ineffective assistance. The Eckert court also stated, "while the trial court tried to accommodate defendant, he did not file any motion setting forth facts in support of his oral allegations based on which the sufficiency of his claims could be measured." Eckert, *supra*, at 968.

Since Eckert, the Court of Appeals also addressed the issue of a claim of ineffective assistance raised in a Crim.33 motion in *People v. Esquivel-Alaniz*, 985 P.2d 22(Colo. App. 1999). Esquivel-Alaniz claimed error in the trial court's failure to appoint counsel and to set a hearing on his claim of ineffective assistance by trial counsel in his distribution of a controlled substance case. The Court of Appeals found no discretion in denying an evidentiary hearing because:

"Here, defendant, in his motion, asserted that 'the complete and total absence of a defense to prosecution allegations' was ineffective assistance of counsel. However, in asserting such, defendant does not allege any acts

or omissions of defense counsel that deprived him of a defense. In the absence of particularized facts supporting defendant's assertion of ineffective assistance, the trial court was not required to hold a hearing on his motion.”

Esquivel-Alaniz, *supra*, at 25.

Esquivel-Alaniz did nothing more than make a bare, conclusory statement that his trial attorney did not present a defense. He was not entitled to a hearing because of the lack of particularized facts.

In contrast, the written motion in the case at bar is rich in details as to counsel's deficient performance and prejudice. Counsel gallantly threw himself on his own sword in admitting that he was “simply wrong” to request the wrong relief which caused him to breach his duty to investigate potential defenses.. [R.Court File,p.172, ¶ 18] Counsel also attached an affidavit which he executed to the motion. [R. Court File,pp.166-167]

Trial counsel also outlined how Acosta was prejudiced by his deficient performance. The deputy district attorney conceded that the Jackson report clearly contained exculpatory evidence. The jury never heard this exculpatory evidence. Given the paucity of evidence against Acosta – the only real evidence was the interview which was a video recorded but not audio recorded and during which he purported made damaging admissions – the failure to investigate the Jackson report undermines confidence in the outcome of Acosta's trial.

Paragraph 18 of the motion for new trial alleges that trial counsel erred in requesting the wrong remedy. [R. Court File, p.172, ¶ 18] More significantly, counsel also stated that he failed to fulfill his duty to investigate the exculpatory evidence in

Deputy Jackson's report. *Id.* In response to these allegations, the prosecution stated that counsel's actions were reasonable strategy. [R. Court File,p.178,¶ 19,21,22] This created a classic factual dispute which required the court to hear the evidence and make findings of fact.

Similarly, Acosta's Rule 33 motion and affidavit alleged prejudice resulting from counsel's ineffective assistance. The Jackson report reflected that Acosta had been assaulted by individuals in jail, was told that if he did not do what he was told to do, it would happen again, and requested to be placed in protective custody as a result. [R. Court File,166,¶ 5] The evidence in Jackson's report would have supported the affirmative defense of a choice of evils. [R. Court File,p.171,¶ 14]

As noted above, the evidence against Acosta, to put it charitably, was thin. The alleged victim never testified. The only real evidence implicating Acosta was the interview which was video recorded but had no audio. While Deputy Stambaugh testified to the admissions made by Acosta regarding the "13 second rule" [R.Tr,2/14/17,p.150], the jury never heard from Deputy Jackson that Acosta was only doing so under threat of reprisals from other inmates.

The trial court must make findings of fact and conclusions of law in resolving all appropriate issues raised in a post-conviction relief motion. *People v. Coit*, 50 P.3d 936(Colo.App.2002). The failure to make findings of fact and conclusions of law may be harmless if the motion may be denied as a matter of law. *People v. Mayes*, 981 P.2d 11106(Colo.App.1999).

In this case, however, the motion alleging ineffective assistance of counsel could not be denied as a matter of law. There were sufficient allegations to warrant

appointment of post-conviction counsel, an evidentiary hearing followed by finding of fact and conclusion of law. The District Court and the Court of Appeals erred in ignoring the requirement that factual finding and legal conclusions be made before ruling on a claim of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the United States Supreme Court should grant the writ and review the decision of the Colorado Court of Appeals in this matter.

Respectfully submitted,

Dated this 31st day of October, 2019

/s/ Adam Acosta

Adam Acosta
D.O.C 125041
Fremont Correctional Facility
P.O Box 999
Canon City, Colorado