No. 19-7175

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Curry Robinson — PETITIONER
(Your Name)

vs.

Barry Smith — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Curry Robinson
(Your Name)

2013 w Atlantic st,
(Address)

Philadelphia, PA 19140
(City, State, Zip Code)

215-765-2431
(Phone Number)

QUESTION(S) PRESENTED

I. WHETHER THE FEDERAL QUESTION OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS TO THE PRESERVED CLAIM OF AN ALIBI WAS VAGUE AND/OR UNEXHAUSTED THEREBY PROCEDURALLY BARRING THE PETITIONER FROM FEDERAL REVIEW?

(a) Whether the Petitioner's 6th and 14th amendment rights were violated when the District court failed to determine whether Petitioner's federal claim of ineffectiveness was properly present and not vague?

(b) The district court abused its discretion when it failed to make a finding of whether the PCRA court based its decision on a unreasonable determination of facts regarding K.M., T.M. and T.T. with respect to Petitioner's county jail stay?

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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 N/A; 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☒ is unpublished.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 Curry Robinson V. Barry Smith 2018 U.S. Dist. LEXIS 90995 Civil Action No. 17-CV-1023; 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[ ] is unpublished.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 C to the petition and is

[ ] reported at 2396 EDA 2014; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the PCRA court appears at Appendix D to the petition and is

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[ ] is unpublished.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was August July 24, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 11, 2019, and a copy of the order denying rehearing appears at Appendix E.

[ ] 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 June 28, 2016. A copy of that decision appears at Appendix C.

[X] A timely petition for rehearing was thereafter denied on the following date: July 28, 2016, 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

Amendment 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 witness in his favor, and have the assistance of counsel for his defence.

Amendment XIV

Section 1: All person born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United State 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 State; nor shall any State deprived any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

LIST OF PARTIES

[X] 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:

TABLE OF AUTHORITY

CASEES **PAGE NUMBER**

STATUES AND RULES

STATEMENT OF THE CASE

The Petitioner was tried and found guilt at a bench trial before the Honorable Defino-Natasti of One (1) count of Rape, Two (2) counts of Agg. Ind. Assault (AIA) Four (4) counts of IDSI, and other related charges, against four minor. Three of whom were the Petitioner's step daughters and one was his non-biological niece. T.M. being thirteen on the witness stand in Jan. 2006, testified to 10 events, four of which she describes some type of sexual contact with the Petitioner. (NT. Jan. 03, 2006 pgs. 29-32, 36-37, 40-43, and 43-44). The four events she describes doesn't involve any sexual contact. (NT. Jan. 03, 2006 pgs. 19-28, 34-36, 39-40, 52-54). The last two events she describes, she allegedly seen Petitioner sexual assaulting L.M. and K.M. her two older sister. (NT. Jan. 03, 2006 pgs. 47-52). T.M. never testified to any age as to the club/tent incident, trial counsel objected to the Commonwealth attempt to lead T.M. answer to being the age of 9 at the time. Next is T.T. who was also thirteen (13) on the witness stand describes two (2) events when she was 10 years old, in the summertime, when school was out. (NT. Jan. 03, 2006, pgs. 112, 119, 122, 130). Next was L.M. who describes seven incidence, five of which there was some type of sexual contact and inappropriate touching that occurred with Petitioner. (NT. Jan. 04, 2006 pgs. 7-8, 8-9, 9-15, 15-17). L.M. was Fifteen on the witnes stand and she describes one incident involves an unrelated choking. (NT. Jan. 04, 2006 pgs. 19 lines 18-25 and pgs. 20-22). Further she also said she saw the Petitioner allegedly sexual assaulting T.T. (NT. Jan. 04, 2006 pgs. 22-24). L.M. also testified to the amount of times she was allegedly sexually assaulted by the Petitioner. (NT. Jan. 04, 2006 pg. 18 lines 24-25 and pg. 19 lines 2-14). Next is K.M. who was fifteen (15) on the stand, testifying to approximately seven events of some type of sexual contact or inappropriate touch with the Petitioner. (NT. Jan. 04, 2006 pgs. 82-96)

On May 19, 2006 the Petitioner was sentenced to a term of 7½ to 15 years followed by five(5) years probation. Post sentencing motion were timely filed but denied on May 31, 2006. On June 26, 2006, Petitioner file a notice of appeal challenging the sufficiency of the evidence which was denied for vagueness on February 21 2008. On April 8, 2008, Petitioner file a PCRA due to ineffective assistance of counsel as to wavier of his claim. In which the Petitioner was granted in part and Petitioner's right to file an appeal was reinstated nunc pro tunc. The Superior court denied Petitioner appeal on January 10, 2011. a timely petition for allowance was file which was denied on July 19 2011. On November 16, 2011, Petitioner filed a pro-se PCRA--(M John P. Cotter was appoint counsel for direct appeal), the court appointed Mr. Matthew J.Wolfe on Petitioner's behalf and he amended the petition. On June 2, 2014, the PCRA court sent the Petitioner a notice of its intent to dismiss his PCRA petition. And on June 19, 2014, Petitioner sent his 907 response in, which was sent to counsel of record pursuant to Com. v. Ellis, 626 A.2d 1137 (Pa. 1993); Com. v. Pursell, 724 A.2d 293 (Pa. 1999) and was docketed until later that year. Petitioner's 907 response was time stamped for the 25th of June by the PCRA court (See SCR No. D21, D23, D25). On July 15, 2014 the PCRA court formally dismissed petition. On August 4, 2014 Petitioner filed for a reconsideration, reiterating his request to pro-se which he set forth in his 907 response, with a request to amend his petitioner once he be allowed to go pro-se. No response from the PCRA court or PCRA counsel. Counsel of record filed a timely notice of appeal in the Superior court. Petitioner motion the Superior court pursuant to Com. v. Grazier, 713 A.2d 81 (Pa. 1998), and was permitted to supplement rule 1925)(b) statement even though, the PCRA did not ask for a 1925(b) statement and Petitioner did know if his counsel put one in. A Grazier hearing was held on April 2, 2015, this is when the Petitioner informed that PCRA court never received Petitioner's 907 notice nor was in docketed. (Grazier Transcripts, pgs. 4-8, 12, 16, 22, 23).

the Superior court affirmed the PCRA court's decision on June 28, 2016 and the Petitioner motioned for reconsideration which was denied on July 28, 2016. On February 1, 2017, Petitioner filed his timely Writ of Habeas Corpus in the Western District which was transferred to the Eastern District (Mem. ECF. No. 1). Petitioner filed all seven issues at the same time in the same envelop and did not motion to supplement the record. On May 30, 2018, the Magistrate recommended that Petitioner's Writ be denied with prejudice. (Magistrate Judge Lynne A. Sitarski). However, before the R&R Petitioner did respond to the respondents answer. On June 20, 2018 the District court docketed the Petitioner's timely file response to the Magistrate Judge R&R. Which was denied by the District court Judge the Honorable Timothy J. Savage. On July 30, 2018 the Petitioner filed a timely motion for a rehearing/en banc, which the denied on August 01, 2018. Petitioner filed a timely notice of appeal with his sixteen (16) page Certificate Of Appealability attached, which was docketed August 22, 2018. On July 24, 2019 Petitioner was denied Certificate of Appealability. Petitioner put in a motion for rehearing/en banc which has denied on October 11, 2019.

REASONS FOR GRANTING PETITION

I. WHETHER THE FEDERAL QUESTION OF INEFFECTIVE ASSISTANCE OF COUNSEL AS TO THE PRESERVED CLAIM OF AN ALIBI WAS VAGUE AND/OR UNEXHAUSTED THEREBY PROCEDURALLY BARRING THE PETITIONER FROM FEDERAL REVIEW?:

STANDARD OF REVIEW

A. Exhaustion and Procedural Default

Before the Superior court can conclude that an appellant's rule 1925(b) statement is waived for failing to identify the legal issue in the concise manner the Superior court must examine the record and any trial court opinion(s) or order to ensure that the basis of the ruling being appeal has been provided. Com. v. Dowling, 778 A.2d 683 (Pa. Super. 2001)[776 A.2d at 686].

Moreover, the Superior court held just because an issue is extended across more than one page, does not qualify as vague. See Pannsy Supply, Inc. v. Munnna, 921 A.2d 1184 (Pa. Super. 2007)

The Standard of review for the District court pursuant to the 28 U.S.C. § 2254 is whether the State court was given proper notice of the Federal issue. To "fairly present a claim, a petitioner must present its factual and legal substance to the state in a manner that puts them on notice that a federal claim is being asserted." McCandless v. Vaughn, 172 F.3d 255 (3d Cir. 1999) Moreover, a Petitioner may alert the state court to the federal nature of a claim in subtler ways including reliance on state cases employing constitutional analysis in like situation. See Shawnfate Bridges v, Jeffrey Bread, 941 F.Supp. 2d 584; 2013 U.S. Dist. Lexis 57753.

Further, the doctrine of procedural default bars federal habeas relief when a state court relies upon, or would rely upon, "a state law ground that is independent of the federal question and adequate to support the judgment"

forecloses review of the federal claim. Nolan v. Wynder, 363 F.App'x 868 (3d Cir. 2010)

Also, if a state court's decision rest primarily on federal law or the state and federal law are "interwoven" and if the adequacy and independence of any possible state law ground for default, is not clear from the face of the opinion, then we should construe the state court ruling as one applying federal law. See Michigan v. Long, 463 US 1032 (1983). Further this court held that if a state court's reasoning was based upon its conclusion about the federal claim, then the federal court can makes its own assessment of those merit. Coleman v. Thompson, 501 US 722 (1991)[501 US at 729].

(a) Whether the Petitioner's 6th and 14th amendments rights were violated when the District court failed to determine whether Petitioner's federal claim of ineffectiveness was properly present and not vague?

State procedural ground for denial of the petition was not adequate, and was erroneous for the District court's refusing to consider Petitioner's ineffective assistance of appellant counsel claims. See Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999). Further, the procedural bar as to not raising a claim on direct appeal cannot be applied to ineffective assistance of counsel claims. See Jackson v Shanks, 143 F.3d 1313 (10th Cir. 1998); and the holding of comity, do not require deference to the State court decision where procedural bars, that had no foundation in the state law were applied.

In the present case, the Petitioner respectfully contends that the District court abused its discretion when it failed to determine whether the federal question of ineffective assistance of counsel was fairly presented to the state courts. Which was contrary to other circuit court and the U.S. Supreme court.

In the assessment of whether a constitutional claim was fairly

presented, the "Second Circuit" court held that a federal claim is fairly presented when a Petitioner sets forth a citation to Strickland v. Washington in his brief. See Abdurrahman v. Henderson, 897 F.2d 71 (2d Cir. 1990); When a brief mentions the 14th amendment in the heading. See Raid v. Senkowski, 961 F.2d 374 (2d Cir. 1992), and when a Petitioner referred the state court to specific provisions in the Constitution. Also see Shawnfate Bridges Id.

Hence, whether or not the Petitioner federal claim was fairly present to the state court would still be a matter for the federal court to resolve. See. Balentine v. Thaler, 625 F.3d 842 (5th Cir. 2010) Lexis 23699, citing Coleman [501 US at 729].

Moreover, by the District court forgoing its own duties, this sanctioned the Superior court's ruling for vagueness as independent of federal law. However, the reason why it is not, is because the determination of vagueness is predicated upon whether the federal claim was properly presented to the state court which makes it interwoven with federal law. Michigan Id. For example, Petitioner's statement in his 1925(b) was:

> "COUNSEL WAS INEFFECTIVE FOR FAILING TO SYSTEMATICALLY USE APPELLANT'S COUNTY INCARCERATION TIME ALSO WORK HISTORY AS SUCH WOULD ESTABLISH A VIABLE DEFENSE IN THE INTEREST OF APPELLANT, (i.e. PARTIAL OR COMPLETE ALIBI). AND WHERE SUCH OMISSION WAS PREJUDICIAL TO APPELLANT ON SEVERAL GROUNDS (i.e. NEGATING APPELLANT'S AVAILABILITY AND SOAB DETERMINATION)." See (PCRA court's opinion, ECF Doc. 18 pg. 59, issue #3.)

Pursuant to § 2254 (e)(1)("The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). According to the Blacks Law Dic. (6d 1990) "Clear and convincing proof will be shown where the truth of the facts asserted is highly probable."

Petitioner respectfully contend that the "clear and convincing" requirement is unequivocally met through the PCRA court's ability to make a dispositive determination upon the merit on the Petitioner's claim. See (PCRA Court 1925(a), June 2, 2015, issue #3). The PCRA court goes into what it believe was the facts that

disqualifies the alibi claim's merit concerning ineffective assistance of trial counsel.

In addition, the Superior court does not clearly cite any state rule it relied on for defaulting the claim of ineffectiveness as to the alibi. Even though, District court also agrees that the Superior court has not made a clear citing of what rule it relied upon to default the Petitioner's claim, it also failed to make its own assessment according to Michigan Id. and Coleman Id. [501 US at 729]. See (Report and Recommendation, No. 17-cv-1023, date May 30, 2018, pg 16).

The U.S. Supreme court has held that if the adequacy and independence of any possible state law ground for default is not clear from the face of the opinion then the state court ruling should be construed as one applying federal law. Michigan v. Long Supra.

Further, the Superior court cites no relevant cases that approves the overriding of the PCRA court's fact finding in lieu of its own.

Consequently, the rule in Michigan calls for the federal court to make its own determination of federal claim as to ineffective assistance of trial counsel regarding Petitioner's county stay and its effects on the outcome of the trial proceedings.

What should be taken note of is that due to the Superior court preserving the claim of ineffectiveness as to the alibi, there was no need to argue this issue as a layered claim, i.e., Direct appeal counsel would and/or could not be a part of any layered claim regarding the alibi because he could only set forth claims that were preserved at trial. Again, neither, Direct appeal counsel nor PCRA counsel could be brought up under a layered claim once the Superior court preserved the alibi.

However, Petitioner respectfully contends that he could not have known whether the Superior court would preserve these claims before he submitted his appellant brief, due to the confusion regarding his 907 response. Thereby, he had to argue his

claims first as a single, and second as a layered claim to try to cover both outcomes just in case the Superior court ruled that his claims weren't preserved. (See Petitioner's Appellant brief, ECF Doc. 18 pgs. 25-35). Notwithstanding this, because they were preserved, defaulting the alibi claim for failing to properly layer it, would be the wrong standard of review in violation of Petitioner's due process rights of the 6th and 14th amendment.

Additionally, the Superior court's alternative reason for defaulting the alibi claim is in violation of the Strickland standard of review. The Superior court state:

> "Petitioner failed to discuss, let alone satisfy by a preponderance of the evidence, the three prongs of the ineffectiveness test for each of his ineffective claims against each counsel."

First, the legal grounds for the Petitioner to set forth a layered claim as to his alibi became moot once the Superior court preserved the issue.

Second, due to the Superior court determining that the Strickland standard of review requires a "preponderance of evidence as to all three prongs," this is drastically contrary to the holding in Williams v. Taylor, 529 US 362 (2000) @ [529 U.S. at 405-6] Citing Strickland v. Washington, [446 US at 694] as to the "prejudice" prong requiring a reasonable probability, not a "preponderance of all three prongs" which would include the "prejudice prong."

Moreover, the U.S. Supreme Court reviews the prejudice prong de novo. Williams Id.

Therefore, the district court abused its discretion by sanctioning the wrong federal standard of review to be applied to Petitioner's federal claim in the state courts.

relief Sought

Petitioner respectfully request that his case be remanded back to PCRA court to hold

an hearing to have an opportunity to develop his arguments as to his ineffective claims. Or whatever this court deems as reasonable in the interest of justice and public confidence in the legal process.

(b) The district court abused its discretion when it failed to make a finding of whether the PCRA court based it decision on a unreasonable determination of facts regarding K.M., T.M. and T.T. with respect to Petitioner's county jail stay.

Pursuant to § 2254, the Third Cir. court interpreted the statutory provision to have a three step inquiry when a federal claim is adjudicated upon its merit. Looking first to the Contrary Clause; second, to the Unreasonable Application clause, and third to the Unreasonable determination of facts clause. See Blston v. Horn, 664 F.3d 397, 417 (Third Cir. 2011).

The Third Cir. court requires an evidentiary hearing in order to settle the dispute in the facts. See Rolan v. Vaughn, 445 F.3d 671 (3d Cir. 2005) @ [445 F.3d 681].

In the present case, Petitioner respectfully contend that the district court failed to set forth the unreasonable determination of fact clause even though the PCRA court adjudicated Petitioner's ineffectiveness of trial counsel claim as to the alibi upon its merit.

The PCRA court's justification for the Petitioner's alibi, not having substantial merit was that the:

"Alibi defense for multiple sexual assaults testified to by each of the complainants that occurred prior to June 2002. Nor would it render it impossible for the sexual assaults testified to by TT and LM to have happened in the summertime."

Although, this statement facially sounds like a reasonable explanation, however, this broad conclusory statement interpolated the scope of the evidence educed at trial and discovery for K.M., T.M. and T.T. Once the record is scrutinized under the unreasonable determination clause, it would revel an obvious subterfuge to

avoid federal review.

In addition, the clear and convincing standard required by § 2254 (e)(1) is demonstrated further by what the PCRA court did not set forth, e.g., the first fact that was not checked is whether or not K.M., T.M. or T.T. testified to any alleged incident taking place in 1996 or before June 2002 as the PCRA court contends?

Moreover, did anyone of the aforesaid girls testify to being as young as Two, Three, or Five, years old when they were allegedly sexual assaulted to demonstrate the 1996 date?

Further, was there any testimony from the Mother or Aunt that will affirm the 1996 date for those specific girls? And was there any discovery in support of the PCRA court's fact finding regarding K.M., T.M. and T.T. being sexually assaulted starting in 1996-2002.

These are the facts that the PCRA court should have made a finding of and pointed out to support its conclusion of facts. See Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004). Also, the factual findings are unreasonable when the court made a finding without holding an evidentiary hearing. See Nunes v. Mueller, 350 F.3d 1045 (9th Cir. 2003).

Consequently, when the PCRA court facts are not supported by the record, the federal court gives no presumption of correctness when the court's fact finding were only conclusions. See Mask v. McGinnis, 233 F.3d 132 (2d Cir. 2000).

Despite there being no evidentiary hearing to ascertain trial counsel's reason for not using the county stay record, trial counsel did leave on the record his impression of the evidence regarding the time frame for K.M., T.M. and T.T., when he made it unequivocally clear that L.M. was the only one alleging the 1996 time frame. (NT. Jan. 04, 2006 pg. 112 lines 2-17). Of note, he did not say L.M. and T.M. or T.T., and the Respondents also affirms that the trial judge had already understood that the 1996-2002 time frame did not apply to all four girls. (See ECF Doc. 16, pg. 14).

Relief Sought

1. Petitioner pray this court to remand his case back to the relevant court either in the state or federal court in order to have an evidentiary hearing as to the facts that are in dispute with respect to the aforesaid girls, the alibi and trial counsel ineffectiveness for failing to use the evidence.

2. Petitioner respectfully ask for a remand because since the Superior court ruled that Petitioner's 907 response was not untimely, the PCRA court did not have the opportunity to address PCRA counsel's ineffectiveness regarding the character witness properly being verified, and the forgoing raising direct appeal counsel to ineffectiveness for not correcting the Trial court's finding of fact as to K.M., T.M. and T.T. and for stopping Petitioner's request to go pro-se before he gave the PCRA court a notice to appeal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Curtis Robinson

Date: Jan. 2, 2020