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ORIGINAL

IN THE SUPREME COURT OF THE UNITED
STATES

Supreme Court, U.S.
FILED
FEB 05 2020
OFFICE OF THE CLERK

OCTAVIO TORRES ORTEGA - PETITIONER

VS.

ATTORNEY GENERAL, STATE OF FLORIDA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

OCTAVIO TORRES ORTEGA DC #B08162
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SUPREME COURT, U.S.

QUESTIONS PRESENTED

QUESTION ONE

**SHOULD ANY OF THE REVIEWING COURT'S HAVE
REVERSED FOR AN EVIDENTIARY HEARING TO DEVELOP
AN ACCURATE FACTUAL RECORD**

QUESTION TWO

**WAS COUNSEL WAS INEFFECTIVE IN THE TRIAL BY
COMMITTING SEVERAL SUBSTANTIAL REVERSIBLE
ERRORS REQUIRING A NEW TRIAL**

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:

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that this Honorable Court issue a writ of certiorari 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

[X] is unpublished.

[] For cases from state court: N/A

The opinion of the of the highest state court to review the merits is unavailable

[] reported at _____;
or

[] has been designated for publication but is not yet reported; or

[X] is unpublished.

JURISDICTION

[] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was October 3, 2019. A copy of that decision appears at Appendix "A"

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

[X] A timely petition for rehearing was denied by the United States Court of Appeal on the following date: November 15, 2019 and a copy of the order denying rehearing appears at Appendix "A".

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

[] For cases from state court:

The date on which the highest state court decided my case decided my case was N/A. A copy of that decision appears at Appendix.

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

[] 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. _____

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution as well as the Due Process clause of the United States Constitution.

STATEMENT OF THE FACTS

Petitioner was specifically charged with sexual battery by allegedly touching his penis to the vagina of the victim in this case. The State produced no evidence to support this allegation. The State thereby presented questionable testimony and evidence to obtain a conviction.

The State Trial court admitted a video representing the alleged victim and Ms Gaines-Sparks, a C.P.T Representative, when discussing the alleged offense and how and when various things allegedly occurred. The Court found that the child was able to tell fantasy from fiction (*although the alleged victim testified that she had slept with Ms. Gaines-Sparks*) and that she knew truth from a lie. Ms. Sparks admitted that there was suggestibility in the video with the child. The child also alleged that Ms. Sparks was in the bed with her prior, although it was determined that the two of them had never met before the interview. The child changed her answers repeatedly during the interview on small matters and large crucial questions as well. The child could not respond when asked if she knew truth from a lie. The child previously stated that she “hurt” but then changed and said that she was “just sleepy”. The child could not tell if she had told her story to anyone else, or if anyone had told her what to say.

The competency of the child was not determined prior to the video being presented, that she was under oath, or knew the purpose of an oath, or that the defense had a prior opportunity to previously cross examine the witness.

During trial in this case, the State admitted into evidence, expert testimony from Ms. Sparks (child victim advocate), included in her testimony she alleged:

- There was suggestibility to the victim contained in the video (impressing and encouraging on the alleged victim to testify to certain matters certain ways).
- That the alleged victim stated that Ms. Sparks was previously in bed with her (factually impossible due to neither or them meeting each other before the day of the interview).
- Previous interviews with the victim had the Petitioner taking his underwear off, where previously he had not (reflecting the suggestibility and encouragement for the child victim to testify a certain way as a result of the victim being coached on what to say and how to testify).
- That the alleged victim now alleging her “thing” hurt, where before, it did not, nor was there any mention of it (again, reflecting the reasonable

probability of coaching this impressionable victim to say certain things in a certain way before the jury).

Also, the state offered into evidence, testimony from Nurse Susan Sherman who testified that:

- She did not attempt to collect any DNA evidence during her physical examination (thereby eliminating any proof of contact as charged and required to prove the element of sexual contact).
- The hymen of the victim was not broken (proof of no penetration, although not charged, combined with the absence of DNA or medical trauma evidence supports the lack of evidentiary support for a conviction).
- That she would be able to tell if there was any sexual activity within 12 hours of her examination of the victim (again showing no contact penetration).

During trial, the State offered into evidence, hearsay testimony of the alleged victim's mother who:

- was not present in the residence on the night in question
- was not an eyewitness to the event that could testify to any relevant facts
- who offered only hearsay testimony of what her mother (alleged victim's grandmother) told her of the events on the night in question

- illegally identified Mr. Ortega at trial without the benefit of any personal, factual information of the case to prove or disprove any material facts.

REASONS FOR GRANTING THE WRIT

Petitioner avers that the court should grant the writ based upon the major constitutional violations of one who is actually innocent of the crime charged that was based solely upon weak circumstantial evidence.

SHOULD ANY OF THE REVIEWING COURT'S HAVE REVERSED FOR AN EVIDENTIARY HEARING

The Petitioner has sought review of the case in the State Courts as well as the Federal Courts for an analysis of the case based on the complete lack of evidence to support a conviction.

The United states Supreme Court detailed the requirement for a State to meet the burden of proof necessary to maintain a conviction. See, In re: The Matter of Samuel Winship 90 S. Ct. 1068 (1970) where well established Federal law has found that:

“The disadvantage to a person accused of crime if he could be adjudged guilty and imprisoned on the strength of the same evidence as would suffice in a civil case, amounts to a lack of fundamental fairness. Due process commands that no man shall lose his liberty unless the government has borne the burden of convincing the fact finder of his guilt; to such end, the reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue, and the use of such standard is indispensable to command the respect and

confidence of the community in applications of the criminal law, it being critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned”.

This case does not represent a conviction based upon proof beyond a reasonable doubt, only unreliable, incorrect testimony and questionable evidence that was erroneously presented to the jury that swayed their minds to convict on less than the proof beyond a reasonable doubt required in a criminal court of law.

Petitioner avers that an evidentiary hearing has been required since the first post-conviction motion that alleged trial errors along with ineffective assistance of counsel grounds. The first issue that required a hearing is the unreliable child testimony that was presented to the jury without any degree of certainty. The child witness, (*State's key witness*) was completely incorrect on any of her prior statement stated she had been in bed with the C.P.T (*child protection team*) member who interviewed her; the victim could not tell the difference between the truth and a lie; the victim was unable to discern truth from fantasy.

As for physical evidence, the State presented none; no DNA evidence; no evidence of any physical examination that went to prove or disprove any material fact in issue at trial. The trial hinged on the unreliable testimony of the alleged victim's accusations against the Petitioner's to disprove the allegations. Defense counsel failed to sufficiently challenge the evidence before the jury or present

rebuttal evidence that would have reasonably changed the outcome of the proceedings resulting in a different outcome of the trial.

**WAS COUNSEL WAS INEFFECTIVE IN VIOLATION OF THE
UNITED STATES CONSTITUTION IN TRIAL BY
COMMITTING SEVERAL REVERSIBLE ERRORS**

Defense counsel failed to present an expert witness to test the theory of why the alleged victim stated that it was the Petitioner who had allegedly molested her. Further, the defense expert would have testified to the unreliability of the child's accusations based upon her statement that she had previously slept in bed with the CPT, that she could not tell fact from fantasy; that she originally said that "it hurt" then changed that to being "just sleepy".

Defense counsel could not have determined this fact to be trial tactic or strategy as he did not interview an expert prior to trial for that determination to have been made. A defense expert would have explained to the jury that a child's statement is subject to not only inconsistencies but also other issues that are present:

"(1) losing their objectivity; (2) using anatomical dolls, which studies had shown to be problematic; (3) touching or hugging the child, which could positively "reinforce whatever happened just before" the contact; (4) relying on a "little kid[s]" ability to think abstractly, as "very, very young" children tend to think concretely; (5) failing to audiotape or videotape the forensic evaluation, especially {605 Fed. Appx. 938} in cases of alleged sexual abuse, so that subsequently it can be determined if the evaluator was encouraging certain responses;

and (6) evaluating a child over the course of several sessions, or allowing different people to interview the child, as the child can take on questions and comments as real events".

See, United States v. Manetta 551 F.2d 1352 Cir. 1977) (The burden of proof in a criminal case always remains with the prosecution and is never shifted, on any issue, to the defendant. Thus, in practically all criminal prosecutions, both the burden of proof and the burden of going forward with the evidence is upon the government at the opening of the trial as to all essential elements of the crime). See, also the case of Richey v. Bradshaw 498 F.3d 344 (6th Cir. 2007) (The court there held that counsel for a defendant convicted of arson rendered ineffective assistance because he did not conduct a reasonable investigation or adequately consult experts to test the State's scientific evidence that a fire was caused by the use of accelerants).

A lawyer who fails adequately to investigate, and to introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance. See, Daniel v. Comm'r 822 F. 2d 1248 (11th Cir. 2016).

Likewise here, defense counsel was ineffective by failing to interview or secure a defense expert to rebut the State's key witness and the sole evidence against the Petitioner.

See, also *Wiggins v Smith* 539 U.S. at 527, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (stating that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision"); *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995) (holding that even where defense counsel elicited a concession from the state's expert that whether a particular blood type was on a knife was entirely speculative, defense counsel was defective for having failed to take measures "to understand the laboratory {2007 U.S. App. LEXIS 55}tests performed and the inferences that one could logically draw from the results"); *Dugas v. Coplan*, 428 F.3d 317, 328 (1st Cir. 2005) (holding that where defense counsel visually inspected the fire scene himself, talked with the state's experts, did some limited reading, and talked with other defense attorneys, he nonetheless failed to adequately investigate an available "no arson" defense).

Defense counsel in the instant case failed to pursue a defense of why children testify to accusations that may not be true; or that there was no medical evidence to support the allegations. Defense counsel failed to pursue testimony from an expert that children may be coerced to testify a certain way and the reasons for doing so. The testimony of an expert with the above listed cross-examination would have severely undermined the outcome of the proceedings by casting doubt into the validity of the child accusations. Counsel's duty is to

reasonably investigate or make a reasonable decision that no further investigation is necessary. See Strickland, 466 U.S. at 691.

Here, defense counsel failed to determine without conducting any investigation at all to determine if an expert was necessary to rebut and/or discredit the State's key witness. Had counsel obtained an expert, there is a reasonable probability that the outcome of the proceedings would have been different. The expert witness would have undermined the weak circumstantial evidence case by rebutting the only evidence the State presented; that of the victim stating that Petitioner did various things to her and then changed her accusations, along with the other far-fetched statements made to the C.P.T, that were far from the truth and borderline on fantasy. The statements made by the child victim alone were insufficient to support a conviction in this case.

COUNSEL'S FAILURE TO OBJECT TO A CONSTITUTIONAL SPEEDY TRIAL VIOLATION

On December 9, 2006, after being arrested on October 27, 2006, Petitioner appeared in Court with counsel for a case management conference. On October 19, 2007, counsel Miguel Montalvo, filed a motion to withdraw as counsel.

On October 23, 2007, the Court granted the motion to withdraw as counsel, on December 5, 2007, the State served an amended information, meanwhile, petitioner spent 386 days in the County Jail with no action taken by the State nor

the Court, nor being taken to trial as required by law and the constitution.

On January 25, 2008, conflict counsel filed for a court date of February 1, 2008. On February 28, 2008, without petitioner's presence and permission, waived petitioner's speedy trial rights.

As of that date, 466 days had lapsed without going to trial in this case.

On July 29, 2009, defense counsel[s] (Terry L. McCreary and L. Kremenchucker) filed a motion to withdraw, stating "petitioner needed a Spanish speaking attorney".

Thereafter, Adam Oosterbaan was appointed to represent Mr. Ortega on August 12, 2009; on August 13, 2009 a written plea of not guilty was entered and on October 5, 2009, a Spanish interpreter was appointed to assist with the defense.

On January 21, 2010, petitioner finally went to trial in this case; this is in violation of Fla. R. Crim. P. 3.191 (a) and the Due Process Clause of the United States Constitution:

"except as otherwise provided by this rule... every person charged with a crime shall be brought to trial within 90 days of arrest if the crime is a misdemeanor, or within 175 days of arrest if the crime is a felony."

See *United States v. Ramirez*, 973 F.2d 36 (1st. Cir. 1992) (furthermore, we conclude in the circumstances of this case, that a delay of 31 days is just as serious as a delay of 46 days. *United States v. Russo*, 741 F.2d 1264, 1267 (11th Cir.

1984) (delays of several months sufficient to bar re-prosecution even though crime serious), *cited with approval in United States v. Hastings*, 847 F.2d 920, 929 (1st Cir.), *cert. denied*, 488 U.S. 925, 102 L. Ed. 2d 327, 109 S. Ct. 308 (1988); but cf. *United States v. Brown*, 770 F.2d 241, 244 (1st Cir. 1985) (delay of 35 days not exorbitant when due to failure to anticipate a ruling by court of appeals on legal issue not previously free from doubt as opposed to administrative neglect), *cert. denied*, 474 U.S. 1064, 88 L. Ed. 2d 789, 106 S. Ct. 816 (1986).

The Petitioner proceeded to trial where he was convicted and sentenced to a term of life imprisonment. Petitioner has been diligent in pursuing the issues in an attempt to persuade a Court of the unjust conviction and the multiple errors in the trial that are substantial in nature in this case and is therefore alerting this Honorable Court of the same.

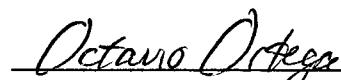
CONCLUSION

The petition for a writ of certiorari should be granted in light of the constitutional violations relied upon to obtain a conviction in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1 day of January, 2020.

Respectfully Submitted,


Octavio Torres Ortega #B08162