No. 19-8251

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Kevin Duane Talkington — PETITIONER
(Your Name)

vs.

Lorie Davis, Director, TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeal for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kevin Talkington
(Your Name)

2661 FM 2054
(Address)

Tennessee, Colony, Tx., 75884
(City, State, Zip Code)

N A
(Phone Number)

QUESTION(S) PRESENTED

Counsel failed to: strike a juror who said he couldn't be fair; investigate and present exculpatory evidence. The court failed to give an oral verbatim reading of it's charge, and omitted from it's written instructions the statutory definitions of the charged offense.

1. Can counsel waive Petitioner's constitutional right to a fair and impartial jury?

2. Is it effective assistance not to strike a juror who states: I can't start him on a level playing field because my wife and pretty much my entire family ... has experiance with sexual abuse; I was sexually abused at 11, so it would be hard to give him a fair trial'?

3. For allegations of juror bias, is the proper remedy a hearing in which the defendant has the opportunity to prove actual bias?

4. When the record is ambiguous, and the parties disagree on the identity of a juror who said he had been sexually abused, so it would be hard to give a fair trial, should the accused juror be questioned about this statement?

5. Is due Process denied when the court fails to give an oral verbatim reading of it's charge to the jury and omitts the statutory definitions of law for the charge offense from the writen instructions ?

6. Was Petitioner prejudiced when counsel failed to: investigate and present exculpatory evidence from eyewitness : recantation evidence ; and medical experts to challenge the lack of physical evidence ?

7. When counsel fails to interview and present Petitioners alibi witness , does this prejudice the defense and deprive him of effective assistance?

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:

RELATED CASES

- The State of Texas v. Kevin D. Talkington, No. 1269829D, In The District Court, Tarrant County, Texas, 213th Judicial District. Judgement entered Feb. 6, 2014.
- The State of Texas v. Kevin D. Talkington, No. 02-14-00064-CR, In The Court of Appeals for the Second District of Texas. Judgement entered Apr. 30, 2015.
- The State of Texas v. Kevin D. Talkington, No. PD-065-15. In The Court of Criminal Appeals, Austin Texas. Judgement entered Sep. 16, 2015.
- Ex Parte Kevin Duane Talkington v. The State of Texas, No. C-213-010817-1269829-A, In The 213th Judicial District Court of Tarrant County, Texas. Judgment entered March 22, 2017. Crt. Crim. App. of Texas
- Ex Parte Kevin Duane Talkington v. The State of Texas, No. C-213-010964-1269829-B, In The 213th Judicial District Court of Tarrant County, Texas. Judgment entered March 22, 2017. Crt. Crim. App. of Texas
- Ex Parte Kevin Duane Talkington v. The State of Texas, No. C-213-011062-1269829-C, In The 213th Judicial District Court of Tarrant County Texas. Judgment entered July 12, 2017. Court of Criminal Appeals of Texas
- Kevin Talkington v. Lorie Davis, Director, TDCJ-CID, No. 4:17-CV-741-O, In The United States District Court for the Northern District of Texas, Ft. Worth Division. Judgment entered Jan. 24, 2019.
- Kevin Talkington v. Lorie Davis, Director, TDCJ-CID, ~~No. 4:17-~~

No. 19-10176. In The United States Court of Appeals for The Fifth Circuit. Judgment entered Nov. 14, 2019

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TABLE OF AUTHORITIES CITED

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

[X] 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.

The opinion of the United States district court appears at Appendix B 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 courts:**

The opinion of the highest state court to review the merits 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 _____ 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

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

The date on which the United States Court of Appeals decided my case was November 14th 2019.

[X] 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).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was ~~March 22, 2017~~.
A copy of that decision appears at Appendix _____.

[ ] 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

Fifth Amendment to the Constitution of the United States of America. see Appendix I

Sixth Amendment to the Constitution of the United States of America. see Appendix J

Fourteenth Amendment to the Constitution of the United States of America. see Appendix K

STATEMENT OF THE CASE

Petitioner entered a plea of not guilty to an indictment alleging in counts one, two, and three aggravated sexual assault of a child and counts four and five indecency with a child by contact. Following his plea of not guilty, the case was tried before a jury. After hearing evidence, the jury returned a verdict of guilty on all five counts of the indictment. Following it's verdict on the issue of guilt, punishment was submitted to the trial court. Petitioner entered a plea of true to an enhancement enhancement allegation setting forth a prior felony conviction. Evidence was presented on the issue of punishment. After hearing evidence, the trial court assessed punishment at forty (40) years confinment in the institutional division of the Texas Department of criminal Justice on counts one, two, and three. The trial court assessed punishment at fifteen (15) years confinment on counts four and five. The court ordered all sentances to run concurrently.

REASONS FOR GRANTING THE PETITION

1. Ineffective Assistance of counsel: failing to strike or challenge a biased Juror.

Petitioner submits that his counsel failed to strike or challenge Juror No. 36. A. Nygaard after Nygaard said that because his wife and pretty much his entire family but one person had experiance with sexual abuse, he couldn't start Petitioner on a level playing field. Nygaard then said that he had been sexually abuse at age 11, so it would be hard to give Petitioner a fair trial. (2RR 43, 45, 46). The court called Nygaard 'Ma'am' and he repeated that he had been abused and it would be hard to give a fair trial. Nygaard is the only Juror identified by name during this colloquy, and he was not questioned any further. How can the issue of counsel's ineffectiveness be desided without having an evidentiary hearing in which the defendant is given "the opportunity to prove actual bias"? The supreme court has long held such opportunity to be the proper remedy for allegations of juror ~~bias~~

partiality, citing Smith v. Phillips, 102 S.Ct. 940 at 945 (1982); Dennis v. U.S. 70 S.Ct. 523 (1950). A hearing was held by affidavit only, where counsel denied his ineffectiveness, and that Petitioner objected to Nygaard being on the jury. Petitioner asserts that he was not given a full and fair hearing because no provision was made for him to participate therein. Not allowing Petitioner to participate in the hearing was held to be unreasonable by the fifth circuit ~~in~~ citing Richards v. Quarterman, 578 F. Supp 2d 849 (2008). Counsel's affidavit was conclusory with regard to his conduct in representing Patitioner. Nygaard is the only juror whom gave such a detailed answer about why he could not be fair and counsel still did not strike him. Petitioner submits to the court that the state fact-finding was inherently unreliable and the presumption in favor of state fact-finding may be overcome when "the applicant did not recieve a full, fair and adequate hearing in the state court proceeding" or when he was otherwise denied due process of law." Quoting Smith Supra at 957.

Nygaard should have been removed after he said he couldn't be fair to Petitioner. Counsel offered no evidence that any juror was worse than Nygaard. Nygaard's statements suggest that bias should be conclusively presumed, if not implied. Leaving Nygaard on the jury was not strategy. it was ineffectiveness. The fifth circuit held that not removing a biased juror was ineffectiveness by counsel, citing Virgil v. Dretke 446 F.3d 598. (5th Cir. 2006); Hughes v. U.S. 258 F.3d 453 (6th Cir. 2001). Petitioner could not overcome Nygaard bias towards the subject matter due to his personal and family history of abuse. Counsel's deficient performance prejudiced Petitioner's defense and deprived him of an impartial jury and due process. The federal courts denial of relief is contrary to clearly established federal law as determined by the Supreme Court in Strickland v. Washington 104 S Ct 2052 (1984) and the court decisions cited herein. Petitioner was denied his 6th amendment constitutional right to effective assistance of counsel and to an impartial jury. ~~The~~ and his 14th amendment right to due Process by counsel not striking Nygaard from service.

Petitioner could prove actual bias, through an evidentiary hearing, and the resulting harm from Nygaard being on the jury. By not removing Nygaard, counsel aided the prosocution. Petitioner requests a new trial as relief, or at minimum, an evidentiary hearing to question Nygaard in order to protect his right to an impartial jury as held to be the proper remedy by the Supreme court in Smith supra.

Ground Two. Due Process: Omission of elements from the courts charge. - The courts writen instruction to the jury omitted the statutory definitions of law and elements that governed counts two and three. This omission of required elements for said counts denied Petitioner of his fifth and fourteenth constitutional right to due process and to have the jury fully instructed on the "law" as applied to each count. The "law" as given in the writen instruction did not have the required elements for counts two and three. This was harmfull to Petitioner because the ~~jury~~ writen jury instruction gave

specific elements under the "law" that constituted an offense, but then stated the jury could convict Petitioner if they found ~~the~~ under counts two and three, elements that were not included in the definition of "law" that constitutes an offense. (CR 60). The instruction states that "Our law provides that a person commits the offense of aggravated sexual assault of a child if the person intentionally or knowingly causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person...." (CR 60, infacis added). This means that the child's "sexual organ" must "contact or penetrate" another person. However, count two required the penetration of the child by the sexual organ of another person. Count three required causing the mouth of the child to contact the sexual organ of the defendant. Just because the elements of counts two and three are included in the applicable penal code, this does not excuse the court from listing said elements when instructing the jury on the "definition of law that constitutes an

offense." For example, this is like telling the jury that a person commits assault if they stab another person with a knife, but then instruct the jury in one of the counts that if the jury finds from the evidence that the defendant hit a person with a bat, they must convict him of assault. Petitioner submits to the court that it was plain error for the judge to fail to fully instruct the jury on each "definition of law that constitutes an offense" for each count of the indictment, thus seriously affecting the fairness of the proceedings. Petitioner was further harmed by the courts failure to read verbatim and ALOUD the court's charge to the jury. (4RR 28). The record is silent regarding whether any juror read the instructions submitted to them, citing Guam v. Marquez 963 F.2d 1311 (9th Cir. 1992). Petitioner submits that since there is no record of a (verbatim oral reading) of the court's charge to the jury, it did not happen, and thus is a structural defect in the constitution of the trial mechanism, which defies harmless error analysis and compels automatic reversal, citing Arizona v. Fulmanante, 111 S. Ct. 1246 (1991); citing Marquez supra.

Petitioner was harmed by the court's failure to give an oral verbatim reading of it's charge to the jury because it was the only way to ensure that the jury was fully instructed on the applicable law of the case since the writen charge was missing the definitions of law for counts two and three . Petitioner submits to the court that since there is no record evidence of a verbatim reading of the court's charge, and because the record is silent about if the jury read the writen instructions, it's impossible for him to demonstrate the resulting harm due to the omission of elements (definitions of law) for counts two and three ; and due to the court not giving an oral verbatim reading thereof. Petitioner requests a reversal and new trial as relief on this ground.

Ground Three. Ineffective Assistance of Counsel: Failure to Investigate. Trial Counsel failed to: Investigate the facts of the case; Interview availible witnesses; Obtain the medical records of complaintant; Interview the state's experts; consult with experts for the defense; Present exculpatory evidence, such as recantation evidence, and

eyewitness testimony. Counsel provided a billing statement that documents everything he did during his representation of Petitioner, (invoice No. 292). It shows no investigation of any kind. Counsel claims that he did investigate but doesn't like to keep track of the details, so he didn't document any witness interviews. (Johnston aff. pg). There is no record of counsel obtaining the medical records of the complaintant that were made available by the state. Counsel is not an expert on the subject of sexual assault, yet he chose not to consult with any medical expert or even present an expert to rebut the medical evidence, or lack of medical evidence. M. Morris shared a room with complaintant N.S. during a period of the alledged abuse, M. Morris stated in an affidavit that since she was present in the room with N.S., the abuse couldn't have happened as alledged without her seeing it. (Morris affidavit, exhibit E on state habeas corpus writ). N.S. spoke with Casey Talkington about the abuse she alledged. When Casey asked N.S. if the aligations were true, N.S. replied, 'No, it never happend'. (see C. Talkington aff.)

Morris and C. Talkington were both available to testify and to be interviewed but ~~the~~ counsel never spoke to them about what they knew, yet counsel says they were liars to excuse not talking to them. There was no physical evidence linking Petitioner to the crime alledged. Counsel has a duty to investigate all leads relevant to the merits of the case, citing Strickland v. Washington, 104 S.Ct. 2052, (1984). Counsel relied on the state's file for his investigation, in place of actually interviewing defense witnesses. Without speaking to Morris and casey Talkington, counsel was ill-equipped to assess their credibility or persuasiveness as witnesses, citing Anderson v. Johnson, 338 F.3d 382, 392, (5th Cir. 2003). The state's expert said that because there was no physical evidence, it ment the abuse had happened. Petitioner needed a medical expert to rebut this theory, and tell the jury that it was also possible that the reason there was no ~~evidence~~ physical evidence is because the abuse never happened. Counsel made no effort to present this theory to the jury or in any way challenge the lack of physical evidence. Counsel knew about N.S.'s

recantation to Casey Talkington one year before trial, yet he admits that he didn't interview Casey, stating that she was not credible because of her age. (see Johnston aff. pg 2,). Counsel expressed doubt about Petitioner's innocence in closing arguments, telling the he doesn't like to call a little girl a liar, but he doesn't know the truth. (4RR 34). Petitioner submits to the court that he was denied his 6th amendment right to effective assistance of counsel because counsel didn't interview any defense witness before trial and failed to present the ava.ilbe exculpatory evidence of M. Morris' testimony; the recantation evidence through Casey Talkington, thus denying petitioner his right to present witnesses in his defease. Petitioner submits that counsel's performance was deficient for not presenting a medical expert to rebut the state's expert testimony, and his decision not to do so was unreasonable because it was not based on a consultation with such an expert, citing Gersten v. SenKowski, 426 F3d 588, 611 (2nd Cir. 2005), preiudicing Petitioner because the state's case rested on credability.

Petitioner submits that counsel did not subject the prosecutions case to meaningful advasarial testing because he didn't present any of the availible exculpatory evidence stated herein, nor challenge the state's evidence, or lack thereof, citing United States v. Cronic, 104 S.Ct. 2039 (1984); this prejudiced Petitioner's defense because counsel denied him every chance to present evidence of his innocense.

For these reasons, Petitioner request certiorari be granted and he recieve a new trial as relief, or at minimum, an evidentiary hearing.

Ground Four. Ineffective Assistance of Counsel. Failure to present Alibi witness.

Petitioner had an alibi against the charges. At the time of the alledged offense, petitioner was in another room with N.S.'s mother, Cristal Sparks. Counsel never interviewed her about this fact as proved in her affidavit, (exhibit F). He failed to present this eyewitness alibi evidence at trial. Counsel calls Mrs. Sparks a liar about not interviewing her about Petitioner's alibi, but offers

no evidence to show his alledged interview with her, stating that he "doesn't like to keep track of the details". (Johnston aff. p.4). The proof of any case, on guilt or innocence, is in the details. Mrs. Sparks found the allegations, "extremely hard to believe". (3 RR 186, 187). Her alibi testimony would have shown that Petitioner was with her in another room at the time of the alleged crime. (C. C. Sparks aff. exhibit F), demonstrating Petitioner's factual innocence, or raised sufficient doubt about his guilt. Petitioner had a right to present evidence in support of his defense. Without counsel's help, petitioner had no way to present his alibi to the jury. The state's case rested on the credibility of N.S., therefore it was prejudical to the defense for counsel not to present the most critical evidence, Mrs. Sparks' alibi testimony, availible to establish the defense's theory of the case. The alibi evidence could have undermined the prosecutions case, but counsel chose not to believe Petitioner's alibi and present this evidence to the jury which undermined the defense. Petitioner's trier of fact could have chosen to believe or reject Mrs. Sparks's alibi testimony, but they never had the

chance to do so. citing Raygoza v. Hulick, 474 F.3d 958, 965. (7th Cir 2007). At trial, counsel stated: "I'm not saying that cristal Sparks is a good person. I'm not saying she's a great mother." (4RR 33). It's reasonable to infer from these statements that counsel was expressing a dislike for her, because she did not believe N.S., and is the likely reason he did not present the alibi evidence. A reasonably competent attorney would present all availible facts to the jury which tend to support his client's innocence, therefore it was unreasonable for counsel not to do so here. Petitioner submits to the court that: There is a reasonable probability that the jury would have reached a different verdict if counsel had introduce the alibi testimony of Cristal Sparks; he did not recieve the assistance of counsel guarnteed by the 6th Amend. of the constitution because counsel denied him the chance to present evidence in support of his innocence. Petitioner further submits that counsel's ~~performance~~ representation fell below an objective standard of resonableness, and that his deficient performance prejudiced the defense so as to deprive petitioner of a fair trial, citing Strickland v. Washington

104 S.Ct. 2052 (1984). For these reasons Petitioner requests certiorari be granted and that he recieves a new trial and/or an evidentiary hearing.

CONCLUSION

Presently, the United States Court of Appeals for the Fifth Circuit has entered a decision that is in conflict with the decisions of other appellate courts, and decisions of the United States Supreme court on the same important matters presented in grounds one through four. It is important for this court to exercise it's supervisory powers to secure and maintain uniformity of the court's decisions with the sister courts cited in grounds one through four, not only to protect Petitioner's Constitutional rights, but other people's constitutional rights across the nation who are similary situated. Because other appellate courts have ruled in favor of petitioners with the same type of errors presented herein, and because the Supreme Court holds that an evidentiary hearing is the proper remedy to resolve alligations of juror bias, a writ of

certiorari should be granted.

Respectfully Submitted.

Kevin Duane Talkington

Date: March 26th, 2020