

JUL 09 2020

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20-5383

No. _____

In the Supreme Court of the United States

DENNIS MARC GRIGSBY,
Petitioner,

v.

DWIGHT NEVEN, WARDEN, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dennis M. Grigsby, #1033640
Pro Se Petitioner
P.O. Box 650 – High Desert State Prison
Indian Springs, NV 89070

ORIGINAL

QUESTIONS PRESENTED

1. Did the state district court failure to certify its grant of motion for reconsideration affect the course of proceedings and factor into the Nevada Supreme Court affirmance of the post-conviction writ prior to the scheduled evidentiary hearing, violate "procedural due process and equal protection of law", as guaranteed by the 5th and 14th Amendments of the U.S. Constitution?
2. Are federal habeas corpus determinations predicated upon a procedural error in state post-conviction proceedings regarding other state court judgments invalidated, where the "highly deferential standard of evaluation which demands that state-court decisions be given the benefit of the doubt", preclude the standard of habeas corpus review within the meaning of 28 U.S.C. § 2254?

LIST OF PARTIES

All parties do not appear in the caption, additional respondents are:

Brian E. Williams Sr., Warden
Aaron Ford, Nevada Attorney General

LIST OF RELATED CASES

Dennis Marc Grigsby v. The State of Nevada, et al., District Court, Clark County Nevada, order denying habeas corpus petition. July 30, 2015, case #08C246709.

Dennis Marc Grigsby v. The State of Nevada, et al., Nevada Supreme Court, order of affirmance. June 17, 2016, #68783.

Dennis Marc Grigsby v. The State of Nevada, Nevada Supreme Court, order denying rehearing. Sept. 22, 2016, #68783.

Dennis Marc Grigsby v. Brian E. Williams Sr., et al., United States District Court for the District of Nevada, order denying habeas corpus petition. October 18, 2019, case #2:16-cv-01886-APG-DJA.

Dennis Marc Grigsby v. Dwight Neven, et al., United States Court of Appeals for the Ninth Circuit, order denying request for a certificate of appealability. April 16, 2020, #19-17248.

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JURISDICTION

Federal Courts:

The date the United States Court of Appeals decided my case was April 16, 2020. Jurisdiction of this Court is under 28 U.S.C. § 1254(1).

State Courts:

The date the highest state court decided my case was June 17, 2016. A copy of that decision appears at Appendix D.

A timely Petition for Rehearing was denied on

the following date: September 22, 2016, and copy of the order denying rehearing appears at Appendix C. Jurisdiction of this Court is under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the U.S. Constitution

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 witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the U.S. Constitution

Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States 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 States; nor shall any State

deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Nevada Constitution, Article 1 Declaration of Rights Section 18. Unreasonable Seizure and search; issuance of warrants.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the persons or persons, and thing or things to be seized.

Nevada Statutes, Title 14. Procedure in Criminal Cases. Chapter 175; Conduct of Trial.

175.161; Instructions.

1. Upon the close of the argument, the judge shall charge the jury. The judge may state the testimony and declare the law, but may not charge the jury in respect to matters of fact. The charge must be reduced to writing before it is given, and no charge or instructions may be given to the jury otherwise than in writing, unless by the mutual consent of

the parties. If either party requests it, the court must settle and give the instructions to the jury before the argument begins, but this does not prevent the giving of further instructions which may become necessary by reason of the argument.

STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder with the use of a deadly weapon and possession of a firearm by an ex-felon. He was sentenced to life without the possibility of parole for the first-degree murder conviction plus a consecutive term of 60 to 240 months for the deadly weapon enhancement. He also was sentenced to 16 to 72 for the possession of a firearm by ex-felon conviction. Petitioner timely appealed, and the Nevada Supreme Court affirmed.

Petitioner filed a pro per superseding state habeas corpus petition, arguing four grounds as to why an evidentiary hearing is necessary. The state district court denied the petition. Petitioner filed a timely motion for reconsideration prior to filing a notice of appeal, because the motion did not toll the time. And moved to stay his appeal at the Nevada Supreme Court pending resolution of the motion for reconsideration at the state district court. The Nevada Supreme Court denied the motion for stay indicating that "a stay of this appeal is not appropriate. If the [state] district court is inclined to grant reconsideration, the [state district] court shall so

certify its intention to [the Nevada Supreme Court]". The state district court granted the motion for reconsideration and set a date for an evidentiary hearing.

In preparation for the evidentiary hearing the state district court clarified the grounds to be addressed asserted by the Petitioner and stated "that it would be beneficial in the overall analysis of this case to have an attorney aiding and assisting in this matter." The evidentiary hearing was rescheduled to July 21, 2016; but before the hearing could be held, the Nevada Supreme Court affirmed the denial of the superseding state habeas corpus petition. Petitioner moved for rehearing and a stay of remittitur at the Nevada Supreme Court stating "that an evidentiary hearing was pending and its order was premature." The state district court vacated the evidentiary hearing, finding that the matter was moot following the Nevada Supreme Court affirmance. The Nevada Supreme Court denied rehearing and issued the remittitur.

Petitioner dispatched his pro se federal petition for a writ of habeas corpus on August 8, 2016 and supplemental reporter's transcripts and exhibits in support of the petition on January 11, 2017. The petition asserts that federal constitutional rights were violated due to the following grounds:

1. The state district court erred in not accommodating a full hearing for him to air additional reasons for his motion to dismiss

counsel.

2. The state district court erred in admitting evidence of the arson of his car.
3. The State committed prosecutorial misconduct when it elicited answers that bore upon his invocation of the right to remain silent.
4. The state district court erred in allowing demonstrative evidence of a gun when no gun was recovered.
5. The state district court erred in rejecting his proposed jury instructions.
6. His trial counsel was ineffective in failing to timely move to suppress evidence recovered subsequent to an invalid warrantless search of his domicile.
7. His appellate counsel was ineffective in failing to raise a preserved claim of prosecutorial misconduct in his direct appeal.
8. His appellate counsel was ineffective in failing to raise issue of state district court error to properly instruct the jury.
9. Petitioner was denied "procedural due process and equal protection of law", where the Nevada Supreme Court overlooked a decision directly controlling a dispositive issue in the case.

10. There were cumulative errors.

The Respondents filed a motion to dismiss on April 24, 2017. Petitioner opposed the motion, and moved for the appointment of counsel, for expansion of the record, and for an evidentiary hearing. The federal district court granted the Respondent's motion to dismiss in part, and denied Petitioner's motions for appointment of counsel, expansion of the record, and an evidentiary hearing. Specifically, the federal district court dismissed Grounds 1, 2, 4, and 5 without prejudice at Petitioner's direction and Ground 9 without prejudice as non-cognizable.

On May 10, 2018, the Respondents filed an answer to the remaining grounds in Petitioner's petition. Petitioner filed a traverse to the answer on June 18, 2018. And the Respondents filed an opposition to Petitioner's traverse on June 29, 2018.

On October 18, 2019, the federal district court denied both the petition for a writ of habeas corpus and certificate of appealability. Petitioner timely filed notice of appeal on November 1, 2019 and motion for certificate of appealability in the federal Court of Appeals for the Ninth Circuit on November 12, 2019. Request for a certificate of appealability was denied on April 16, 2020.

REASONS FOR GRANTING THE PETITION

The Questions Presented have a notable profile of national importance. As other federal courts may experience federal habeas determinations made upon

state post-conviction procedural error that denies the practice to which substantive law is administered. This Court can set new precedent that may affect future federal habeas review.

Specifically, the federal court's denial of habeas relief sanctions a state-court decision which departs from the accepted and usual course of judicial proceedings.

The federal district court was placed in a precarious position because the state district court said there should be an evidentiary hearing on the merits of the superseding petition. Yet, through an arbitrary outcome of the state district court not communicating to the Nevada Supreme Court that there were still proceedings taking place at the state district court. The Nevada Supreme Court affirmed the denial of the state habeas corpus petition before the evidentiary hearing could be held.

Seeing that a federal district court does not exercise appellate or supervisory jurisdiction over the state courts. The following grounds are presented due to the aforementioned questions for certiorari review:

A. Ground 3

In Ground 3, the Petitioner contends that his federal constitutional rights were violated when the prosecution committed misconduct by improperly eliciting testimony of his post-arrest silence.

Although the prosecution did not directly comment on Petitioner's post-arrest silence, it did so indirectly. The federal district court determination conflicts with *Doyle v. Ohio*, 426, U.S. 610, 618 (1976) stating, "it does not comport with due process to permit the prosecution during the trial to call attention to [a defendant's] silence at the time of arrest ... an unfavorable inference might be drawn". The Fifth Amendment right to remain silent assures citizens "that silence will carry no penalty." *Id.*

B. Ground 6

In Ground 6, the Petitioner contends that his federal constitutional rights were violated by trial counsel's failure to timely move to suppress evidence recovered subsequent an invalid warrantless search of his domicile.

This Ground indicates the third party did not in any way intimate she had mutual use and joint access to or shared control over the Petitioner's apartment. And that the affidavit in support of the search; the search warrant informs that the Petitioner's apartment was entered upon invalid consent and searched by officers well before the process of obtaining a warrant had begun.

Because the state court decision acknowledged only "actual authority and assumption of risk" and the federal court decision of "joint access or control for most purposes" relies upon state court error. Both the federal and state court determinations conflict with

circuit court standards for determining a third party's actual authority to consent to a search.

For example, the Seventh Circuit, in *United States v. Chaidez*, 919 F.2d 1193, 1201 (7th Cir. 1991), has rejected the "assumption of the risk" approach, since "renting a place 'for' someone else may create a sublease. A landlord does not have authority to permit a search of his tenant's leasehold, and the same holds true for a tenant and his sub-tenant. Use of and access to the property are the touchstones of authority." *United States v. Cotnam*, 88 F.3d 487, 496 (7th Cir. 1996) (citing *Nix v. Williams*, 467 U.S. 431 444, 81 L.Ed.3d 377, 104 S.Ct. 2501 (1984)).

Contrary to federal district court opinion stating, "[the Petitioner] does not allege any deficiency regarding the search warrant, there was nothing to suppress", the Petitioner contends that the consent to search card relied upon was flawed and the search warrant is invalid. And *United States v. Brown*, 328 F.3d 352, 358 n.5 (7th Cir. 2003), supports claim of the habeas corpus petition, where "[defendant] asserts that the affidavit supporting the warrant application should have apprised the magistrate of the invalid consent search ... any search warrant flowing from such an affidavit would have been tainted by the illegal search, and any evidence obtained pursuant to such a warrant would have been fruit of the poisonous tree."

Reexamination of federal district court determination upon the state court's decision involving

State v. Taylor, 114 Nev. 1071, 968 P.2d 315 321 (Nev. 1998) (a defendant generally assumes the risk when he cedes control of his property to another); will reveal, instead Mildred ceded total control of the apartment to the Petitioner as he paid the rent and utilities. They did not cohabit, "share", or possess "equal control over" the apartment. See *Lastine v. State*, 134 Nev.Adv.Rep. 66, 429 P.3d 942 (Nev. 2018).

In several cases, the Ninth Circuit explains that "we have rarely applied the 'assumption of risk' analysis ... and the few cases in which we have done so have involved situations where the person whose property was searched clearly ceded authority over the property, either partially or totally, to the consenting third party. See, *United States v. Davis*, 332 F.3d 1163, 1170 n.4 (9th Cir. 2003). Moreover, "as between the resident and a lessor with a narrowly proscribed right of access, there be no doubt that the resident has a greater right of 'access or control for most purposes'". See *United States v. Impink*, 728 F.2d 1228, 1233 (9th Cir. 1984) (citing *United States v. Matlock*, 415 U.S. at 171 n.7). The determination should be based on actual expectations of privacy rather than common law definitions of property rights.

C. Grounds 7 and 8

In Grounds 7 and 8, the Petitioner contends that his federal constitutional rights were violated by direct appeal counsel's failure to raise preserved issue of prosecutorial misconduct and state district error to properly instruct the jury.

These two claims evolve from the same statutory violation, a trial procedure error involving jury instruction. Nevada Revised Statute § 175.161, Instruction.

Appellate counsel was ineffective for not raising the prosecution's oral instruction/charge of the jury during closing arguments affecting the jury's deliberation and verdict, a procedural error.

The State argued the following:

The next instruction talks about theories of first degree murder. If you go back and deliberate and, say, six of you believe that he's guilty under the theory of lying in wait. And six of you say to yourselves: You know what, I think he's guilty, but I think it's premeditation and deliberation. As long as you all agree on a theory of first degree murder, then he can be guilty of first degree murder.

Federal district court opinion stating, "the State's oversight in not offering the alternate theory instruction and the state district court's failure to supplement the instructions benefitted [the Petitioner]", conflicts with *Smith v. Phillips*, 455 U.S. 209, 219 (1982), "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Importantly, the trial court did not instruct the jury that it did not have to unanimously

agree upon a theory of murder. Furthermore, "arguments of counsel cannot substitute for instructions by the court," *Taylor v. Kentucky*, 436 U.S. 478, 488-89 (1978), and because Nevada Revised Statute § 175.161(1) in pertinent part provides:

The charge must be reduced to writing before it is given, and no charge or instructions may be given to the jury otherwise than in writing unless by the mutual consent of the parties". See *Harvey v. State*, 78 Nev. 417, 375 P.2d 225 (Nev. 1962).

Specifically, the unfairness of the trial was compounded by the state's use of "PowerPoint" to provide the improper oral charge/instruction visually. In the context of "PowerPoint" used during a trial, "a PowerPoint may not be used to make an argument visually that would be improper if made orally". See *Watters v. State*, 129 Nev.Adv.Op. 94, 313 P.3d 243, 247 (Nev. 2013).

Moreover, appellate counsel did not obtain copy of the February 4, 2009 guilt phase transcript in order to see that trial counsel properly preserved these claims for direct appeal. Appellate counsel was ineffective and permitted the Nevada Supreme Court to affirm the conviction upon an incomplete trial record months before the transcript was filed. As a matter of due process, an appellant is entitled to a "record of sufficient completeness", so that he can demonstrate that prejudicial "negligence per se" occurred during trial.

Because "prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The federal district court determination without providing the Petitioner a "full and fair" hearing to litigate these claims, ratified the prosecutorial misconduct and judicial error which violated the Federal Rules of Criminal Procedure.

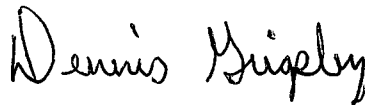
D. Ground 10

In Ground 10, the Petitioner contends that his federal constitutional rights were violated by cumulative error of the aforementioned grounds and federal court determinations.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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Date: July 7th, 2020