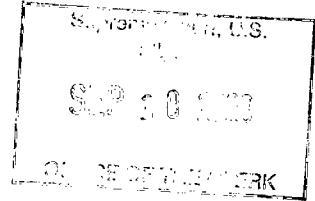


20-6025  
No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES



Steven McManus — PETITIONER  
(Your Name)

vs.

Superintendant Mary Vann — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

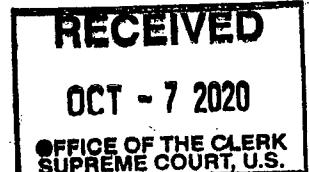
PETITION FOR WRIT OF CERTIORARI

Steven McManus, Dkt# 15A3800  
(Your Name)

Altona Corr. Fac., 555 Devils Den Rd. P.O. Box 3000  
(Address)

Altona, New York 12910  
(City, State, Zip Code)

N/A  
(Phone Number)



## **QUESTION(S) PRESENTED**

Whether the cumulative effect of the prosecutor continually referencing matters not in evidence; her vouching for her witnesses; her acting as an unsworn witness (adding her personal opinions), her attempting to shift the burden of proof to the defendant; her attacking the defense counsel rather than the evidence; and her mischaracterizing the evidence, deprived the petitioner of a fair trial?

Whether the prosecutor, knowing the sensitive nature of the charges presented should have taken special care not to play on the jury's emotions; and whether her incessant use (64 times) of improper comments-prosecutorial misconduct-overwhelmed the jury and deprived the petitioner of a fair trial given the inflammatory nature of the charges in this case?

## **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**

Francis v. Franklin, 471 U.S. 307 91985).

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
U.S.C.A. Const. Amend. XIV Section 1	1
Francis v. Franklin, 471 U.S. 307 91985)	10
People v. Wright 133 A.D. 1097 (3rd Dep't 2015)	11
People v. Lloyd, 115 A.D. 3d 766 (2nd Dep't 2014)	11

## STATUTES AND RULES

## OTHER

(concluding remarks from "About Sleeps Role in Memory" by Rasch and Jan Born, Psychological Reviews, American Psychological Society)

## TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	3
STATEMENT OF THE CASE .....	4-9
REASONS FOR GRANTING THE WRIT .....	10-11
CONCLUSION.....	12

## INDEX TO APPENDICES

APPENDIX A United States Court of Appeals for the Second Circuit  
order denying motion.

APPENDIX B United States District Court Eastern District of New York  
order denying motion

APPENDIX C United States Court of Appeals for the Second Circuit  
order denying motion for reconsideration.

APPENDIX D

APPENDIX E

APPENDIX F

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.

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

### For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 30<sup>th</sup>, 2020.

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: June 22<sup>nd</sup>, 2020, 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 \_\_\_\_\_. 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**

U.S.C.A. Const. Amend. XIV, 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."

## STATEMENT OF THE CASE

By an indictment, filed on or about September 16, 2013, the prosecution accused petitioner of Rape in the First Degree (Penal Law 130.35[1]), Sexual Abuse in the First Degree (Penal Law 121.11[a], [b]),

This case arises from an incident that occurred on August 30, 2013, at about 2:50 to 3:00 a.m. inside the women's bathroom at Jack Duggan's Pub in Floral Park, New York. On that morning, at about 2:30 a.m., after spending the previous five hours playing drinking games with her friends, the complainant entered the bar, Pettitioner was at the bar that evening too.

Upon arriving at the bar, the complainant asked her friend Danny to order her a beer after which she waited outside the woman's bathroom and began texting with a friend on the phone. The complainant stepped inside the bathroom once her friend Svetlana Chirokikh left the bathroom after using it. The bathroom consisted of two rooms, each with its own door. The room nearest the bar was the "sink room" which led into a second separate smaller closet like room that contained the toilet. The video evidence and the testimony of Jack Duggan, the bar owner, demonstrated that behind the bar area was a hallway that led to the kitchen and the rear exit. The left side of this hallway bordered a small dining area, while the right side contained a series of rooms. The first door on the right led to the men's room, while the second door led to the women's bathroom. Meanwhile the third door led to a basement stock room, while the fourth and final door led to a unisex handicapped bathroom, adjacent to the kitchen.

The video evidence showed petitioner walking to the front of the bar after leaving the men's room sometime after the complainant had entered the women's bathroom. A few minutes later, petitioner returned to the hallway and proceeded to enter the unisex bathroom. Petitioner quickly exited that bathroom, and checked the next door, which led to the downstairs stock room. Petitioner quickly left that room too and opened the door to step inside the women's bathroom, where petitioner remained until the complainant's friend Svetlana entered about eight to ten minutes later.

According to the complainant, petitioner entered the bathroom, and started dancing and making small talk. The complainant claimed that she originally thought that petitioner was drunk and that he had mistaken her for another woman. But, when the complainant tried to redirect petitioner after he kissed her, appellant allegedly covered her mouth, forced her into the toilet room, and with one hand picked her up off the floor by her throat and, with his other hand simultaneously on her shoulder, he allegedly raped her.

The complainant estimated that the entire incident lasted nearly ten minutes. Yet even though the complainant described a frantic struggle, one in which she allegedly screamed for help and kicked the toilet stall door and was "literally going crazy, hitting(petitioner) everywhere" in the mouth, nose, ears and the chest whith an "unbreakable" cast on her arm, none of the

prosecution's witnesses who were at the bar that evening heard the commotion in the bathroom.

Indeed, the video surveillance and the oral testimony established that the following events took place after petitioner had entered the bathroom.

A male patron entered the men's room adjacent to the women's room.

The bartender walked down the hallway, passing the women's bathroom room on her way to the kitchen.

Another male patron entered the men's room, briefly joining the other male patron who had entered a few minutes earlier.

The bartender emerged from the kitchen, and again walked past the women's bathroom after which one of the male patrons left the men's bathroom.

Evan Triantafalis, the bar owner's friend and who was at the bar for about two hours prior to the incident, entered the men's room.

The complainant's friend Svetlana walked to the women's bathroom, and waited outside before returning to the bar.

Duggan walked past the women's room, entered the basement stock room to retrieve a few bottles of liquor, and again walked past the women's room on his way to the bar.

Upon returning to the bar, Svetlana asked Duggan to unlock the women's bathroom. Duggan unlocked the door with a butter knife and returned to the bar.

Thus, not a single one of the individuals who walked past the women's bathroom during the time that this allegedly brutal attack was happening heard anything unusual. In addition, the video surveillance demonstrated that the bar was not crowded. Besides Duggan, his friend Triantafalis, the bartender, and the complainant and her four friends, no more than half-dozen other patrons were there that evening. Further, while the video is muted, it reveals that the music was not loud, as none of the guests appeared to have any difficulty communicating with each other. Indeed, when Svetlana asked Duggan, who was standing behind the bar to unlock the door to the woman's room, she did not lean across the bar to speak with him. Nor did Duggan lean in to hear her speak.

In any event, at Svetlana's request, Duggan unlocked the bathroom and returned to the bar. Svetlana entered the sink area and did not hear any noise or commotion inside the bathroom. Svetlana opened the door to the toilet area, and encountered petitioner, who walked past her while allegedly adjusting his belt or pants zipper. Svetlana did not hear the complainant fall to the floor upon entering the bathroom, and, in fact, she believed that she had inadvertently walked in on a couple.

But, upon entering the toilet area, she purportedly found the complainant crying on the bathroom floor and her dress pulled down. When Svetlana asked what had happened, the complainant reported, "I was sexually assaulted". Svetlana immediately reported this to the complainant's male friends who were outside, all of whom chased after petitioner via the rear entrance of the bar, where they ultimately found him crouching behind a bush, adjusting his belt buckle.

Responding to the 911 call, Floral Park Police Department Officer Michael Saville encountered a group of young men yelling and accusing appellant of attacking a woman. As per his protocol, Officer Saville directed appellant to sit on the curb. Appellant complied. Officer Saville asked petitioner to explain what had happened, and appellant replied that "he tried to get with a girl and she freaked out on him".

While Officer Saville remained with petitioner, his partner, Police Officer Joseph Lauria, went to the women's bathroom where he saw Svetlana comforting the complainant. There, the complainant again stated that she was sexually assaulted, but when Officer Lauria returned to the bathroom several minutes later, she accused petitioner of raping her. With that, petitioner was arrested.

Detective Susan Entenmann of the Nassau County Police Dept. met the complainant at the hospital after being assigned the case. Det. Entenmann spent several hours with her, both at the hospital and later at the precinct. At no time did she notice the complainant to have any apparent injuries. Det. Entenmann also took a photograph of her. This photograph, which clearly depicts her neck, did not reveal any injuries to the complainant either.

A certified Sexual Assault Nurse Examiner ('the nurse') examined the complainant. She noticed that the complainant had scrapes on her back and elbow, although they were not bleeding and did not require treatment. She also observed red marks on the complainant's neck, as well as several tears on the complainant's vagina.

Nevertheless, the nurse breached protocol by failing to record the size of these tears. Nor did she have any recollection of their size. Further, she did not conduct an internal examination of the complainant's throat for injuries, even though the complainant claimed that petitioner had lifted her off the floor by her throat and held her there for the duration of the attack which allegedly lasted eight to ten minutes.

The nurse collected a rape kit and obtained a "swab" from the complainant's neck. Even though the complainant claimed that she was menstruating at the time of the alleged attack, DNA analysis did not uncover her DNA on petitioner's clothing. Nor did the DNA expert find any blood or semen on the complainant's dress, even though the complainant, who claimed that her bleeding was "very light" at the time of the alleged attack, admitted seeing blood at the bottom of her tampon when she removed it at the hospital.

The DNA expert detected the presence of petitioner's saliva mixed with the complainant's saliva on her neck, as well as an unknown male's saliva mixed with the complainant's saliva on the opposite side of complainant's neck. He did not detect petitioner's DNA on the complainant's body or clothing, nor did he detect any of the petitioner's DNA inside the complainant.

This totally undermined complainant's testimony that there was no kissing..

Meanwhile, in describing the alleged attack, the complainant stated that, after she rejected petitioner's advances, petitioner "initially got angry and agitated he started grabbing

my neck and the dress came down and he started grabbing my chest" after which he lifted her off the ground and pulled her into the toilet area. On cross examination, the complainant, who ~~had~~ described a frantic, violent struggle, claimed that petitioner touched her breasts both over her clothing and while they were exposed.

Yet, when defense counsel confronted her with her signed statement to the investigating detective, the complainant stated that he just "grabbed my chest". She did not recall whether petitioner had touched them while they were exposed. This was the only evidence bearing on the charge of first-degree sexual abuse. Nevertheless, the jury convicted petitioner of this offense.

The complainant also could not adequately explain how petitioner was able to pull her long dress up and rape her when he had one hand was holding her up in the air by her throat and the other hand on her shoulder. Nor did she explain how he was able to unbuckle his belt while he was using both of his hands to pin her against the wall.

In her summation, the prosecutor repeatedly attacked petitioner's statement to the police, which though ruled admissible after a pretrial suppression hearing, was not in evidence. In that statement, petitioner wrote that he left the bar area for the men's room, but found that it was filthy. Instead, petitioner went to the women's bathroom, but when he entered the toilet area he encountered the complainant sitting on the toilet. Petitioner wrote that when complainant came out of the stall they spoke briefly and started kissing. But, when appellant heard someone trying to enter the bathroom, he left the bathroom and exited the bar through the back door after which several people followed and began cursing at him.

Since the court declared the statement admissible, defense counsel addressed this statement in his opening remarks to the jury, because he did not want the jury to believe that he was hiding anything. But for reasons unknown, the prosecution never moved this written statement into evidence. Nor did petitioner testify and offer this defense at trial. And since the prosecution decided not to move the statement into evidence, defense counsel did not mention it to the jury in his summation.

Nevertheless, the prosecutor continued to attack the credibility of petitioner's statement. When this continued for some time, the defense counsel objected, stating that the prosecutor was not talking about the evidence, what the evidence had shown. The court agreed that "there is no evidence to that effect." and acknowledged that the prosecutor was "referring to something said on opening statements". Thus, the court reminded the jury that "anything said by the attorneys in opening, closing or anything at other times throughout the trial is not evidence in this case".

Although the court sustained defense counsel's objection, the prosecutor again argued that there was no evidence to corroborate petitioner's assertions in the written statement, emphasizing, "And that's my point. There's no evidence of that in this case. There's no evidence of that". Again, defense counsel objected, but the court inexplicably overruled the objection, thereby allowing the prosecutor to argue:

"There's no evidence that's what happened in the bathroom that night. None. And it doesn't even make sense.

This is a girl who came in here and she was embarrassed and uncomfortable. You think she's telling somebody stay in the bathroom with her while she is urinating, some complete stranger? It is absurd."

Meanwhile, the prosecutor denigrated defense counsel's cross-examination of the complainant in which he asked the complainant, who claimed that petitioner lifted her up off the ground with one hand, to disclose her body weight. Although her weight was relevant to the credibility of her claim, the prosecutor declared that this line of questioning was "offensive".

Furthermore, the prosecutor mischaracterized the complainant's testimony. The complainant testified that, when she rejected petitioner's advances by screaming, petitioner "took one hand and grabbed me by the neck and covered my mouth with his other hand and started pushing me into the toilet area".

According to the complainant, when she tried to escape, petitioner put her in a "chokehold", pushed her against the wall unbuckled his pants and allegedly raped her. On cross-examination the complainant mentioned, for the first time that petitioner "touched" her breasts, but she was unsure whether they were exposed. She did not claim that petitioner had "groped" her. Nor did she claim that petitioner had tried to pull her dress down.

Yet, on summation, the prosecutor stated that petitioner "grabbed her, groped at her, pulled her dress down, touched her breasts and touched her all over the body". The prosecutor also added that, during this struggle, "she was fighting for her dress", even though there was no evidence that petitioner was trying to rip off her clothing during the encounter.

Then, the prosecutor appealed to the jury's sympathies, noting that she was a longtime Floral Park resident, who was "involved in her community", maintained "a close-knit group of friends". As to these friendship's the prosecutor remarked that the friends who accompanied her to the bar were friends that she has known since high school. In the prosecutor's view, these relationships were important because they "tell you something about who the complainant is and who she surrounds herself with".

Finally, in finishing her presentation to the jury, the prosecutor directed the jury to deliver justice to the victim:

"Tell this defendant with your verdict that what he did to the complainant is not acceptable. Tell this defendant with your verdict that she had a right to say no to him that night. Tell him that women are not his prey to be stalked and for him to do with what he will. Tell him with your verdict that he is not going to get away with what he did to the complainant that night as he told Evan Triantafilis that he would."

After the prosecutor finished her summation, and the court dismissed the jury, defense counsel elaborated on the explained the basis of his objections:

"Judge, the prosecutor-and I don't like to interrupt anybody when doing a summation-but adopted my opening statement and used that as if my client had testified, and attacked that opening statement through a good portion of her summation.

I It finally got to the point I made an objection and you ~~sustain~~ sustained it, but I think the damage was done. I think it is overtly prejudicial to my client. It shifted the burden, actually using my statement which you told the jury at the begining, which I even said at the begining of my closing statement that my opening staement wasn't evidence and I would't discuss anything in that. And it highlighted the fact that my client failed to testify."

Thus for a remedy, defense counsel asked for a mistrial or "at least a curative instruction reminding the jury again if they go into deliberations they-that's not part of their deliberations".

Without eliciting argument from the prosecutor, the court summarily denied defense counsel's application, finding nothing that the prosecutor said had shifted the burden to petitioner. Accordingly, the court decided that it would only "reitterate and emphasize again, as I have throughout the trial, that anything said by counsel on opening statement or summation or in argument to the Cour is not evidence in the case and is not to be cosidered as such."

The jury acquitted petitioner of Rape in the First Degree and one count of Criminal Obstruction of Breathing or Blood Circulation. However, it convicted him of Sexual Abuse in the First Degree and Criminal Obstruction of Breathing or Blood Circulation.

At the sentencing hearing, held on August 31, 2015, petitioner was sentenced to 7 years prison to be followed by 15 years Post Release Supervision, with 1 year running concurrently.

## REASONS FOR GRANTING THE PETITION

There was an adverse impact on the factfinder's application of the reasonable doubt standard because there was unfair prejudice to the petitioner caused by the prosecutor's attack during summation of the petitioner's written statement, which was not in evidence, as well as the prosecutor's numerous mischaracterizations of the evidence and statements of her ~~view~~ opinion, as well as the trial judge's failure to properly address the above. Accordingly, the judgement of conviction should be reversed.

In *Francis v. Franklin*, 471 U.S. 307 (1985), the Supreme Court found potential for a violation of Winship whenever there is a reasonable possibility of an adverse impact on a factfinder's application of the reasonable doubt standard.

The reasonable doubt standard was influenced by the prosecutor's attack during summation of the defendant's written statement, which defense attorney referenced in his opening statement, but which was not admitted into evidence, and by the judge initially sustaining the defense counsel's objection to this, and then subsequently overruling the defense's objection to the same as the prosecutor continued to attack the defendant's statement which was not in evidence, thereby reinforcing to the jury that there was no impropriety. The prosecutor repeatedly attacked the credibility of petitioner's written statement that was not in evidence. A cursory review of these remarks reveals this (T. 1554-55, 1159-61, 1164-65, 1189, 1190).

The jury was clearly impacted and confused by the improper attack of the defendant's statement that was not in evidence, which consequently, impacted that factfinder's application of the reasonable doubt standard and resulted in an inconsistency in the jury's verdict.

The jury clearly had reasonable doubt regarding the credibility of the complainant and therefore acquitted ~~petitioner~~ of one count of rape in the first degree and one count of criminal obstruction of breathing or blood circulation. There is no logical basis by which the jury could acquit the petitioner of rape based on reasonable doubt, yet convict him of other charges premised on the notion that a violent attack had occurred unless the jury's application of reasonable doubt to all counts defendant was charged with was unduly influenced by ~~and~~ prejudiced by the prosecutor's attack of the defendant's statement that was not in evidence and by the judge's overruling of defense's objection to this.

ADA Burke's summation lasted approximately 2 hours. At approximately 4:25 pm, the court advised ADA Burke that she had 5 minutes left as the time approached 4:30 pm when the court must stop all proceedings to release the court officers to avoid any overtime. ADA Burke then finished, and the judge quickly excused the jury without giving the defense attorney the opportunity to create a record concerning ADA Burke's improper remarks during her summation. The defense attorney asked the court if he could make a record and the court said it could be addressed the following morning before he would charge the jury.

(Trial record, p. 791, lines 13-24)

When the trial resumed the following day, the defense attorney asked for a mistrial based on the prosecutor's repeated commenting on the petitioner's statement that was not in evidence. The motion was denied. The court's instructions to the jury before and after summation that comments made during opening and ~~summation~~ summation are not evidence for the jury to consider did not alleviate the prejudice to petitioner (T. 1092-96, 1214-15). Such a generic instruction, issued the day after the prosecution's summation and which failed to reference to the specific ~~remarks~~ that the jury may not consider, utterly failed to cure the ~~prejudice~~ prejudice to petitioner. See People v. Wright 133 A.D. 1097 (3rd Dep't 2015) (reversing conviction on account of the prosecution's improper remarks on summation, even where the County Court Repeatedly instructed the jury to disregard parts of the prosecutor's summation).

Most disturbing is the court's overruling of the defense attorney's objection and allowing the prosecution to continue to attack the defendant's statement, which was not in evidence and then allowing the jury to "sleep on it" under the assumption that there was no impropriety because the judge overruled the defense's objection to the attack of the defendant's statement which was ~~no~~ not in evidence. As the Court announced in People v. Lloyd, 115 A.D. 3d 766 (2d Dep't 2014), "when as here, the court overrules the defendant's objections, and gives standing to the statement of the prosecutor as legitimate argument, the possibility of prejudice is greatly enhanced by leading the jury to believe "that there was no impropriety."

So what happens when a jury is allowed to "sleep on it?" "The active system consolidation process assumed to take place during sleep leads to a transformation and a qualitative reorganization of the memory representation, whereby the "gist" is extracted from the newly encoded memory information and integrated into the long-term knowledge networks" (concluding remarks from "About Sleep's Role in Memory" by Rasth and Jan Born, *Physiological Reviews*, American Physiological Society).

The prosecutor's improper remarks during summation and subsequent overruling of the defense's objection undoubtedly confused the jury and impacted the jury's deliberations by causing the jury to consider matters not in evidence. By arguing well outside the four corners of the evidentiary record, the prosecutor failed to give petitioner "the full measure of fairness" to which he is entitled. The judgement of conviction should be reversed and immediate release from custody is warranted.

As shown above petitioner did not receive a fair trial by a jury of his peers and there was an adverse impact on the factfinders application of the reasonable doubt standard because there was unfair prejudice to the petitioner caused by the prosecutor's attack during summation of the defendant's written statement, which was not in evidence, as well as the prosecutor's numerous mischaracterizations of the evidence and statements of the above. Accordingly, the judgement of conviction should be reversed and immediate release from custody granted.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven J. MacLean".

Date: September 19<sup>th</sup>, 2020