

20-6332

IN THE
SUPREME COURT OF THE UNITED STATES

CECIL WALTER SALYERS, *Pro Se*

PETITIONER

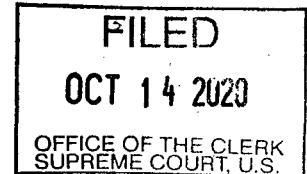
v.

COMMONWEALTH OF KENTUCKY

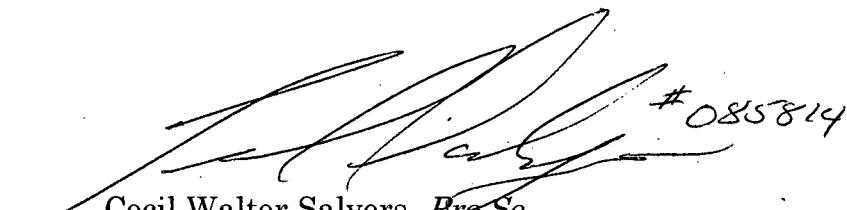
RESPONDENT

ORIGINAL

On Petition For Writ Of Certiorari
To The Kentucky Court Of Appeals



PETITION FOR WRIT OF CERTIORARI



#085814

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QUESTIONS PRESENTED

Did the Kentucky Court of Appeals correctly interpret the Sixth Amendment in holding Petitioner "cannot demonstrate prejudice under *Strickland*", when counsel's ineffectiveness resulted in Petitioner's sentences being ran consecutively when they would have otherwise been concurrent?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Salyers v. Commonwealth, No. 11-CR-249 and 12-CR-111, Hopkins Circuit Court, Judgement Entered March 18, 2014

Salyers v. Commonwealth, No. 2014-SC-186-MR, Kentucky Supreme Court, Opinion Rendered May 14, 2015.

Salyers v. Commonwealth, No. 2017-CA-987-MR, Kentucky Court of Appeals, Opinion Rendered January 10, 2020.

Salyers v. Commonwealth, No. 2020-SC-48-D, Kentucky Supreme Court, Decided July 1, 2020.

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JURISDICTION

The Kentucky Supreme Court Denied Discretionary Review on July 1, 2020.

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

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

This Petition is timely filed pursuant to this Court's Order Entered March 19, 2020, extending the deadline to file a Petition for a Writ of Certiorari from 90 to 150 days.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States 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 United States Constitution, 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

On September 28, 2011, Petitioner was indicted by a Hopkins County, Kentucky Grand Jury in case number 11-CR-249 for three counts of first-degree sexual abuse of a minor less than twelve years old, two counts of first-degree sexual abuse of a minor less than sixteen years old, five counts of using a minor in a sexual performance, one count of indecent exposure, and one count of unlawful transaction with a minor in the third degree. On April 24, 2012 he was indicted in case number 12-CR-111 for first-degree sexual abuse. The two indictments were consolidated and tried together. The first trial resulted in a mistrial. The second trial resulted in Petitioner's conviction for four counts of first-degree sexual abuse, two counts of using a minor in a sexual performance; and third-degree unlawful transaction with a minor.

The jury recommended twenty years under Instruction 6 and fifteen years under Instruction 7, concurrently for a total of twenty years. Ten years each under Instructions 2, 3, & 4, and five years under Instruction 5, consecutively for a total of 35 years. The jury made no recommendation whether the twenty years under Instructions 6 and 7 and the 35 years under Instructions 2, 3, 4 and 5 should run consecutively or concurrently.

Defense counsel raised the issue and a bench conference was held, wherein both attorneys agreed that that the jury should be sent back into deliberation to determine if the sentences should run concurrently or consecutively. The jury reentered deliberation and returned a recommendation that they run consecutively. However, had counsel not raised the issue the sentences would have been presumed concurrent and Petitioner would have been sentenced to twenty years, instead of the forty year sentence he ultimately received.

Petitioner appealed to the Kentucky Supreme Court, which affirmed his conviction. He then filed a motion to vacate his sentence pursuant to Kentucky Rules of Criminal Procedure Rule 11.42, arguing, *inter alia*, that counsel was ineffective in raising the issue and then agreeing to allow the jury to return to deliberations, ultimately resulting in his receiving a 40 year sentence when he otherwise would have received a 20 year sentence. The court denied his motion claiming it found "no reference to any specific instance of deficiency of counsel." (See May 4, 2017 Order and May 10, 2018 Order p. 5, in Appendix).

Petitioner appealed this denial to the Kentucky Court of Appeals, arguing to the court of appeals, that the trial court abused its discretion in denying his motion. However, the court of appeals affirmed the denial of his motion but opined in part,

"The law has been in the Commonwealth that if a judgment is silent as to concurrent or consecutive sentence, the sentence presumed concurrent. Had the jury not been sent out to make a determination as to whether the sentence should be concurrent or consecutive, the sentence would have been presumed concurrent. This would have obviously alleviated any possible error by the prosecutor's comment, but after the comment was made

defense counsel agreed the jury should be returned to deliberate to make a recommendation as to concurrent or consecutive sentences. (Record on Appeal, pp. 531-32). On March 18, 2014, the circuit court entered its judgment and sentence and sentenced Salyers to a total term of imprisonment of forty (40) years from both indictments. We agree with the circuit court that there would no purpose in having an evidentiary hearing. Moreover, Salyers cannot demonstrate prejudice under Strickland. (*Salyers v. Commonwealth*, 2020 Ky. App. Unpub. (Ky. App. 2020) *Id.* at 13). (See Opinion in Appendix).

Petitioner then sought discretionary review by the Kentucky Supreme Court, calling attention to the fact that all three courts—the Hopkins Circuit Court, the Kentucky Court of Appeals, and the Kentucky Supreme Court—have made conflicting and contrary statements concerning the concurrent/consecutive sentences. Specifically, Petitioner argued “[t]he Kentucky Court of Appeals abused its discretion when, in one sentence it admits ‘had the jury not been sent out to make a determination as to whether the sentence should be concurrent or consecutive, the sentence would have been presumed concurrent’, and in the next sentence it ‘agree[s] with the circuit court that there would no purpose in having an evidentiary hearing. [And claims Petitioner] cannot demonstrate prejudice under Strickland.’” (See *Salyers v. Commonwealth*, 2020 Ky. App. Unpub. (Ky. App. 2020) *Id.* at 13; Opinion in Appendix). Nonetheless, the Kentucky Supreme Court denied discretionary review.

Petitioner now brings this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) this Court held that in order for counsel's inadequate performance to constitute a Sixth Amendment violation, Petitioner must show that counsel's failures prejudiced him. This Court also made clear that to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id* at 694. However, Petitioner need not show that counsel's performance more likely than not altered the outcome. (*Nix v. Whiteside*, 475 U.S. 157 (1986)).

In order to invalidate a sentence, Petitioner must show both deficient performance by counsel and prejudice such that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. (*Crockett v. McCotter*, C.A. 5 (Tex), 796 F. 2d 787 (1986)). This Court has also held that "sentencing is a critical proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128; *Specht v. Patterson*, 386 U.S. 605." (*Gardner v. Florida*, 430 U.S. 349, 358 (1977)). In *Kansas v. Marsh*, 548 U.S. 163 (2006), concurring opinion by Scalia, Justice Scalia wrote,

Our solemn responsibility is not merely to determine whether a state supreme court "ha[s] adequately protected [a defendant's] rights under the Federal Constitution," *Post*, at 200, 165 L. Ed. 2d, 429, 458, 126 S. Ct. 2516 (Stevens, J., dissenting). It is to ensure that when courts speak in the name of the federal constitution, they disregard none of its guarantees- neither those that ensure the rights of criminal defendants.", *Id* at 185.

In *Andrus v. Texas*, 140 S. Ct. 1875 (2020), this Court recently granted certiorari, vacated the judgement, and remanded for further proceedings, although the lower court held that the Petitioner “could not show counsel’s deficient performance prejudiced him.” *Id* at 1881. In *Cox v. State*, 2011 Tex. App. LEXIS 9197 the Court of Appeals of Texas, Second District, Fort Worth remanded for resentencing where counsel was ineffective in misstating the law on stacking sentences. Although, in this case counsel did not misstate the law, he clearly showed a misunderstanding of the law; and his misunderstanding ultimately prejudiced the Petitioner.

In the case at bar, counsel should have known that because the jury remained silent on whether Petitioner’s sentences were concurrent or consecutive, the sentences would have been concurrent. (See *Salyers v. Commonwealth*, 2020 Ky. App. Unpub. (Ky. App. 2020) *Id.* at 13; Opinion in Appendix). (See also *United States v. Smith*, 101 F. Supp. 2d 332 U.S.D.C. W.D. Penn. (2000) (court granted habeas motion where counsel was ineffective at sentencing resulting in consecutive sentences.)) In *Sears v. Upton*, 561 U.S. 945 (2010), this Court vacated and remanded because it was “plain from the face of the state court’s opinion that it failed to apply the correct prejudice inquiry”. *Id* at 946. The state court curtailed a “more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel[]”. *Id* at 953.

The holding in this case by the Kentucky Court of Appeals, that Petitioner "cannot demonstrate prejudice under *Strickland*" is directly contrary to its statement a few sentences prior where it said,

"The law has been in the Commonwealth that if a judgment is silent as to concurrent or consecutive sentence, the sentence presumed concurrent. Had the jury not been sent out to make a determination as to whether the sentence should be concurrent or consecutive, the sentence would have been presumed concurrent."

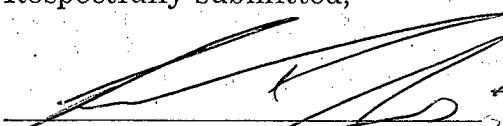
The holding by the Kentucky Court of Appeals is inconsistent with this Court's holding in *Strickland*, as well as other courts across the nation. It also shows the Kentucky Court of Appeals' and the Kentucky Supreme Court's ignorance of and disregard for the Sixth Amendment. Petitioner can clearly demonstrate that his counsel's deficient performance at sentencing prejudiced him and resulted in a harsher sentence than he otherwise would have received.

CONCLUSION

"If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of different judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice. This is the more necessary where the frame of government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts" (Alexander Hamilton, Federalist No. 22, December 14, 1787).

Petitioner respectfully requests this Honorable Court exercise it's duly given authority and Grant this Petition for a Writ of Certiorari. Petitioner strongly urges this Court not to let the Justices of today's courts alter and abolish the principles of liberty and justice which our Founding Father's established as a cornerstone of the American justice system.

Respectfully submitted,


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APPENDIX

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