No. 20-6384

IN THE

SUPREME COURT OF THE UNITED STATES

Owen McCants — PETITIONER
(Your Name)

vs.

Massachusetts — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Massachusetts Appeals Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Owen McCants
(Your Name)

MCI-Norfolk, Box 43,
(Address)

Norfolk, MA 02056
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

#1: WHETHER THE TRIAL COURT, APPEALS COURT, AND SUPREME JUDICIAL COURT ABUSED THEIR DISCRETION?
pp. 8-10

#2: WHETHER THE EXCLUSION OF THE DEFENDANT FROM THE PRETRIAL CONFERENCE VIOLATED FEDERAL LAW?
pp. 10-13

#3: WHETHER THE MUGSHOT PRESENTED TO THE JURY WAS SUGGESTIVE IN VIOLATION OF FEDERAL LAW?
pp. 13-14

#4: WHETHER THE SUFFICIENCY OF THE EVIDENCE SHOULD HAVE RESULTED IN A REQUIRED FINDING OF NOT GUILTY?
pp. 15-18

#5: WHETHER THE PETITIONER'S TRIAL AND APPELLATE COUNSELS WERE INEFFECTIVE AS A MATTER OF LAW?
pp. 19-20

#6: WHETHER THE PROSECUTOR'S OPENING AND CLOSING STATEMENTS PROHIBITED THE PETITIONER FROM RECEIVING A FAIR TRIAL?
pp. 20-22

LIST OF PARTIES

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

[X] 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:

Nelson Alves - Superintendent, MCI-Norfolk
(Formerly Steven Silva, who has retired)

RELATED CASES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED CONT'

TABLE OF AUTHORITIES CITED CONT'

Statutes, Rules & Other

Note: Prisoners at MCI-Norfolk are not allowed copies of statutes, rules, amendments or caselaw, per the order of the Librarian.

TABLE OF CONTENTS

INDEX TO APPENDICES

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[X] is unpublished.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 D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

The opinion of the highest state court to review the merits appears at Appendix E 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 _____ 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 September 14, 2020.

[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 _____. 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. Constitution, Amendment 6

U.S. Constitution, Amendment 14

28 U.S.C. §2253(c)(1)

28 U.S.C. §2254(c)

28 U.S.C. §2254(d)(1)

28 U.S.C. §2254(e)(1)

Mass.R.Crim.P. 25(a)

STATEMENT OF THE CASE

The defendant (hereinafter "petitioner"), was indicted by the Suffolk County Grand Jury on April 3, 1974, charged with rape and armed robbery.

Trial was conducted in Suffolk Superior Court from November 6, 1974 - November 12, 1974. A jury found the petitioner guilty of both charges and he was sentenced to two (2) concurrent terms of 10-20 years at Walpole, to be served from and after any sentence then being served.

On December 29, 1973, between 11:15 p.m. and 11:30 p.m., the complaining witness (CW) returned from her job at the Boston Floating Hospital to her apartment at 103 Gordon Street, Brighton. As she approached the entrance to her apartment building, she observed a person attempting to unlick the inner security door. CW believed the man to be a resident of the building and offered to open the door. The person then followed CW into the stairwell area, which was illuminated by overhead lights.

When CW started up the stairs, the man followed her. That area was also well lit. The man conversed

with CW as he followed her. He asked whether she lived alone and whether her "boyfriend was presently in the apartment?" CW was looking at and talking to the man as she climbed the stairs.

CW became apprehensive because she realized the man was not a resident of the apartment building, so he was questioning her about the rent costs.

At trial, CW testified she looked at his face, his hair, and his jacket. She made a positive identification that the petitioner was her attacker. She again identified the petitioner in court at trial.

CW testified that as she approached her apartment she told the man that her boyfriend was inside and she then attempted to enter the apartment as quickly as possible. The man pushed her back, showed her a knife, and forced his way into her apartment.

CW screamed as a struggle ensued. The man spun her around, held the knife to her throat, telling her to shut up. He then forced her into the bedroom where he placed a bodysuit over her face, and tied it behind her head.

After the man pulled CW into her roommate's bedroom he searched through the bureau drawers for money. He then ordered her to remove her clothes, and to lie down. Then man then raped CW.

The man ransacked the apartment, returned to the bedroom and raped CW again. He removed her wristwatch. The man continued to search the apartment at the same time threatening to injure CW if she did not tell him where the valuables were located.

After CW told the man where the valuables were located he raped her again. As he left, the man told CW to not look at his exit as he left and don't call the police.

CW untied herself, telephoned her parents, who immediately called the police. The police found that $80.00 in cash, a personal check, the wristwatch, and an electric hairdryer were stolen.

CW was taken by the police to the Massachusetts General Hospital where she was examined by a physician, Dr. Willitm T. Thorpe, who created a medical report. At trial, defense counsel stipulated to the report.

Detective Michael Murphy showed eleven (11) photographs to CW, from which she selected a front/side view picture of the defendant, Owen McCants, as the man who raped and robbed her.

At trial, Detective Murphy was shown a photograph of the petitioner by the Assistant District Attorney. Murphy stated, "That's the one."

In showing the photo to the jury, the court ordered the numbers on the police fron/side view photo to be removed. There was no objection by the petitioner's attorney. The court instructed the jury they were to draw no unfavorable inference against the petitioner in that it was the Commonwealth's police who had possession of the photograph.

The petitioner, for his defense, presented four (4) alibi witnesses. Each and every witness testified they were with the petitioner at the time of the assault on the complaining witness, and the robbery.

The petitioner filed a Motion For New Trial with a Memorandum Of Law IN Support Of Motion For New Trial, which appears herein at [Appendix J]

Reasons For Granting The Petition

When the petitioner sought a Certificate Of Appealability pursuant to 28 USC §2253(c)(1), in order to appeal the decision of the Massachusetts District Court, Sorokin, D.J., which ruled the petitioner is procedurally barred from Habeas corpus relief, [Appendix D, pp. 1-6], he was denied by the First Circuit Court of Appeals. [Appendix A, p. 2]

The denial was not on the merits of the issues presented.

In the motion to the First Circuit to provide a COA, the petitioner presented the following issues:

#1: WHETHER THE TRIAL COURT, APPEALS COURT, AND SUPREME JUDICIAL COURT ABUSED THEIR DISCRETION?

The petitioner cited North Carolina v. Rice, 404 U.S. 244, 247 (1971) for the rubric that he has standing to challenge the conviction despite the sentence is already served. [Appendix B, pp. 4-5]

That the AEDPA has caused the statute of limitations to expire, the petitioner overcomes the procedural bar

based on his innocence. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013) [Appendix B, p. 5]

On the District Court level, on habeas corpus, he moved for the appointment of counsel, to no avail. [Appendix C, p. 3]

The petitioner argued below and argues here that the presumption of the State's correctness has been trampled upon, [citing] Miller v. Fenton, 474 U.S. 104, 114 (1995), on mixed questions of fact and law. See, Levasseur v. Pepe, 70 F.3d 187, 191 (CA 1 1995)[Appendix B, p. 7]

An inopportune abrogation by the First Circuit was the failure to allow the development of the facts on the lower levels, encompassing all prior claims and proceedings. The petitioner cited Boumediene v. Bush, 553 U.S. 723, 790-791 (2008)[Appendix B, p. 8]

Based on the State Court lucubration [Appendix E] the Court determination of factual issues were rebutted by clear and convincing evidence. 28 USC §2254(c), Miller-El v. Cockrell, 537 U.S. 322, 341 (2003)(presumption of correctness overcome by petitioner)

The Supreme Court has applied the §2254(e)(1) presumption of correctness to State Courts' factual findings regarding juror exclusion for cause, juror partiality, witness identifications, competency to stand trial, competency to waive post-conviction proceedings, culpability, and the validity of parties' peremptoray challenges. The presumption of correctness does not apply to "questions of law," Miller, 474 U.S. at 114, or "mixed questions of law and fact."

The presumption of correctness does not apply to State Court conclusions regarding the voluntariness of a so-called "waiver." The questions in this petition cannot be afforded that presumption as the State Court does not credit the petitioner's Affidavit. [Appendix H] This was a question of Federal Law. It is not subject to AEDPA, §2254(d) Marshall v. Lonberger, 459 U.S. 422, 431 (1983)

#2: WHETHER THE EXCLUSION OF THE DEFENDANT FROM THE PRETRIAL CONFERENCE VIOLATED FEDERAL LAW?

Snyder v. Massachusetts, 291 U.S. 97, 105-106 (1934) controls this claim. The Pretrial Conference, when Snyder is applied, is a critical stage

of the trial proceedings. [Appendix B, p. 9] The United States Supreme Court held there is no distinction between the trial and the pretrial, pursuant to the Due Process Clause of the Fourteenth Amendment. [Appendix B, p. 9]

The right to assist counsel in his own defense is paramount to a fair criminal proceeding. Kentucky v. Stincer, 482 U.S. 730, 745 (1987)

In Powell v. Alabama, 287 U.S. 45 (1932) the Court held the period from arraignment to trial, "...is perhaps the most critical stage of the proceedings." [Appendix B, p. 11]

In United States v. Wade, 388 U.S. 218, 224 (1967) the Supreme Court held that the Sixth Amendment right to counsel attaches to "critical stages" of pretrial proceedings. The Pretrial Conference must be a critical stage because the petitioner had the right to assist his attorney.

Not being allowed to participate in the Pretrial Conference is a structural defect in the trial process,

the remedy for which is to vacate the conviction. United States v. Gonzalez-Lopez, 548 U.S. 140, 147-148 (2006)

The right to assist counsel for his defense by participating in the Pretrial Conference is a constitutional one. U.S. Const. amend. VI, Gideon v. Wainwright, 372 U.S. 335, 342 (1963)

It was, therefore, a jurisdictional prerequisite to allow the petitioner to be at the Pretrial Conference in order to assist his counsel for various procedures therein; alibi; stipulations; discovery; possible plea deals, etc.

The right to counsel attaches in a criminal prosecution after the very first initiation of the adversarial judicial proceedings. Kirby v. Illinois, 406 U.S. 682, 689 (1972)(Plurality Opinion); Brewer v. Williams, 430 U.S. 387, 404 (1977)(right to counsel does not depend on a request from the defendant)

The petitioner has the unmitigated right under Sixth and Fourteenth Amendments to assist his lawyer,

at the least with the facts of the case at the Pretrial Conference. United States v. Morrison, 153 F.3d 34, 46-47 (CA 2 1998)(defendant was able to assist counsel in his defense), United States v. Leggett, 162 F.3d 237, 242 (CA 3 1998)(same) [citing] Dusky v. United States, 362 U.S. 402 (1960)(Per Curiam)

#3: WHETHER THE MUGSHOT PRESENTED TO THE JURY WAS SUGGESTIVE IN VIOLATION OF FEDERAL LAW?

The First Circuit did not rule on the merits of the claim. The argument, presented in [Appendix B, pp. 12-15] are significant in this case of racial profiling, where an Afro-American male is accused of assaulting a Caucasian woman.

The bias in this case presented to the jury permeated from the First Circuit of Appeals, all the way down to the arrest, the photo array, the mugshot, and that mugshot in the possession of the jurors. The petitioner's mugshot photo looked like a Wanted Poster. [Appendix B, p. 15]

The petitioner challenged unnecessary-suggestive procedures which occurred prior to trial, when the showing to the complaining witness a mugshot photo

array began the process, Kirby v. Illinois, 406 U.S. 682, 690-691 (1972)(Due process standard governs identification procedure, and during the trial, which led to mistaken identification) Neil v. Biggers, 409 U.S. 188, 198 (1972)

Here, showing the jury mugshots was impermissably suggestive, especially where a 5-year-old could see the booking number was "taped over." Bigelow v. Williams, 367 F.3d 562, 576 (CA 6 2004)(In-court identification given under "classically suggestive setting," where big, loud, conversation at sidebar, followed by Clerk cropping photos, etc.)

The State's presentation of a sideface, frontface mugshot was prejudicially suggestive. United States v. Fosher, 588 F.2d 207 (CA 1 1978)

The photos were obvious, that they were mugshots taken from the police files, there was an irrebuttable presumption the petitioner had been in trouble with the police prior to the trial. Barnes v. United States, 365 F.2d 509, 510-511 (1966); Gilbert v. California, 388 U.S. 263 (1967)

#4: WHETHER THE SUFFICIENCY OF THE EVIDENCE SHOULD HAVE RESULTED IN A REQUIRED FINDING OF NOT GUILTY?

The First Circuit excused itself from review, eschewing this claim, not on the merits, but because in a cursory manner, the Court invoked a procedural bar, which was an abuse of discretion.

After much hemming and hawing [Appendix B, pp. 16-17] the State Trial Court never ruled on the Required Finding of Not Guilty (RFNG). This violated Supreme Court precedent. Smith v. Massachusetts, 543 U.S. 462, 467 (2005)[Appendix B, pp. 18-20]

This is another structural defect in the trial process. The conviction must be vacated.

Under §2254(e)(1), a State Court's determination of a factual issue is presumed correct and may be rebutted only by "clear and convincing" evidence. Miller-El v. Cockrell, 537 U.S. 322, 341 (2003) (presumption of correctness overcome when district Court "accepted without question the State Court's evaluation of the demeanor of the prosecutors and

jurors in the petitioner's trial); Norton v. Spencer, 351 F.3d 1, 6-8 (CA 1 2003)(presumption of correctness overcome by clear and covincing evidence that State Court failed to consider evaluating defense affidavits, here, the petitioner's affidavit, [Appendix H])

If the petitioner has failed to present a particular claim before State Courts in the manner prescribed by the State's procedural rules, a federal Court will generally refuse to consider that claim on habeas review. Wainwright v. Sykes, 433 U.S. 72 (1977) (failure to make timely objection at trial)

However, where the State has ruled on the merits, [Appendix E], Coleman v. Dretke, 395 F.3d 216, 220 (5th Cir. 2004)(petitioner adequately presented State claims to Appeals Court and Supreme Judicial Court), Accord, Clemons v. Delo, 124 F.3d 944, 953-955 (CA 8 1997)

On the sufficiency of the evidence, the petitioner has demonstrated the actual violations of federal law and the District Court's failure to review the claims has resulted in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991)

The conviction of the innocent petitioner violated federal law because the petitioner had a solid alibi. Murray v. Carrier, 477 U.S. 478, 495 (1986)

The cause to overcome the procedural bar, amongst other issues, was the ineffective assistance of counsel in violation of the Sixth Amendment. Carrier, 477 U.S. at 488.

This is not even a "close call," because on the RFNG the attorney allowed the Court to not rule on the Mass.R.Crim.P. 25(a) motion. Smith, 543 U.S. at 474.

Here, in the last State Court, the Appeals Court, when the federal claims were ignored by that Court, the District Court should have ruled on the petitioner's claims. Ylst v. Nunnemaker, 501 U.S. 797, 801 (1997); Jackson v. Amaral, 729 F.2d 41, 44 (CA 1 1984)

The Commonwealth of Massachusetts was not prejudiced by the delay in filing the original motion, and it did not claim "laches." Dumas v. Kelly, 418 F.3d 164, 167-168 (CA 2 2005)

The standards in Jackson v. Virginia are clear.

> "...Whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

Jackson, 443 U.S. at 319; Brown v. Palmer, 441 F.3d 347, 351 (CA 6 2006)(Due Process violated because facts could only reasonable to establish that, based on a faulty identification, the petitioner had an alibi, and could not have been at the scene of the crime)

The petitioner's alibi, never corroborated by the petitioner's attorney, bringing in the waitstaff from the various nightclubs the two couples attended that night, is clear and convincing evidence of the petitioner's actual innocence. Herrera v. Collins, 506 U.S. 390, 400 (1993); House v. Bell, 547 U.S. 516, 555 (2006)

The standard here is controlled by Carrier, 477 U.S. at 495.

#5: WHETHER THE PETITIONER'S TRIAL AND APPELLATE COUNSELS WERE INEFFECTIVE AS A MATTER OF LAW?

The facts in the case show the petitioner's counsel, a fledgling attorney, flubbed the Trial Rule, Mass.R.Crim.P. 25(a), RFNG.

The attorney failed to present the security staff the waiters and waitresses from the nightclubs attended by the petitioner, his girlfriend and the two other accompanying couple. This was a significant flaw in the representation.

The attorney failed to file a Motion To Suppress the so-called identification by the complaining witness, and he cited Neil v. Biggers, 409 U.S. 188, 198 (1972) [Appendix B, p. 22], and cases cited.

An indigent defendant has the Constitutional right to appointed counsel on appeal, where the appeal is of right. Penson v. Ohio, 488 U.S. 75, 85 (1988)(Court erred in denying indigent defendant representation during appeal as of right after trial counsel withdrew because defendant lacked representation during the decision-making process) Also, the appellate attorney

must be truly effective. Evitts v. Lucey, 469 U.S. 387, 396 (1985); Douglas v. California, 372 U.S. 353, 355-356, 357 (1963)(Same)

The right to (an effective) appeal is solidified by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Martinez v. Court of appeal of Cal, Fourth app. Dist., 528 U.S. 152, 160 (2000)

#6: WHETHER THE PROSECUTOR'S OPENING AND CLOSING STATEMENTS PROHIBITED THE PETITIONER FROM RECEIVING A FAIR TRIAL?

The prosecutor stated the only evidence in the case was from the mouth of his witnesses. [Appendix B, p. 23]

The prosecutor, in his closing, vouched for the credibility of the complaining witness.

His appeal for sympathy from the jury by stating: "I want you to be fair to all those good people out in Suffolk County like yourselves that are walking in and out of doorways." [Appendix B, pp. 24, 25] The jury was all-white. The petitioner cited Berger v. United States, 295 U.S. 78, 88 (1935)

The United States Supreme Court stated in Berger, ante, the prosecutor's duty is to seek justice. Id., 295 U.S. at 88.

The prosecutor should prosecute with "earnestness and vigor," but may not use "improper methods calculated to cause an improper conviction."

The prosecutor's closing argument in the case at bar about "safe to walk the streets at night," in a racially infested Boston, Massachusetts, with an Afro-American defendant and a Caucasian witness-victim is a recipe for disaster. United States v. Wihbey, 75 F.3d 761, 773 (CA 1 1996)

The Abuse of Discretion:

The First Circuit Court of Appeals issued a "Mandate." [Appendix A, p. 1] That Court's mandate is that the District Court should have been allowed to entertain the Application For A Writ of Habeas Corpus because the petitioner's conviction violated the Constitution, laws, or Treaties of the United States.

The First Circuit, Tormella, J., forgot that

relief for violations of federal law by the State will be granted if the State's violation(s) rise to the level of a fundamental defect which resulted in a complete miscarriage of justice, and was inconsistent with fair procedure. Reed v. Farley, 512 U.S. 339, 348 (1994) [quoting] Hill v. United States, 368 U.S. 424, 428 (1962)

The State decision [Appendix E] was contrary to, or involved an unreasonable application of clearly established Federal Law as determined by the United States Supreme Court.

See, 28 U.S.C. §2254(d)(1), Williams v. Taylor, 529 U.S. 362, 405 (2000); Henry v. Poole, 409 F.3d 48, 71 (CA 2 2005)(alibi problems - compromised fair trial)

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted, November 10, 2020

/s/ Owen McCants
Owen McCants, Pro Se
Box 43,
Norfolk, MA 02056