

No. _____

In the
Supreme Court of the United States

AUSTIN MCGRAW,
Petitioner,
v.

COMMONWEALTH OF KENTUCKY,
Respondent.

**On Petition for a Writ of Certiorari to the
Kentucky Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a simple Petition. McGraw was clearly deprived of his federally protected constitutional rights under the 4th and 5th Amendments to the U.S. Constitution. He petitions this Court, as guardian of these federally protected rights, to step in to preserve these rights, for him, and those similarly situated.

McGraw was convicted of sodomy (KRS 510.070) and sexual abuse (KRS 510.110). At trial, the prosecutor advised the jury that, during the investigation, McGraw invoked his right against self-incrimination, refused a consensual warrantless search of his home, and refused a consensual warrantless search of his body. These bombshells were dropped on him at trial, without prior disclosure, in violation of the Criminal Rules as well as the Trial Court's own order.

The Kentucky Court of Appeals' unpublished opinion affirming the conviction is rife with erroneous references to trial testimony, misstatements as to who testified to what, and provably false claims regarding McGraw's adherence to the Rules of Appellate procedure. More problematic though – the Kentucky Appellate Courts failed to substantively address his very clear and obvious constitutional claims.

The Question presented is this:

Whether the government can advise a jury that a Defendant invoked his right against self-incrimination, and refused a consensual, warrantless search of both his home and his body; if not, will this Court be the guardian of those constitutional rights?

PARTIES TO THE PROCEEDING

The Petitioner is Austin Channing McGraw.

The Respondent is the Commonwealth of Kentucky.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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OPINIONS BELOW

The decision by the Kentucky Court of Appeals denying Mr. McGraw's direct appeal is an unpublished opinion, reported as *McGraw v. Commonwealth* (Ky. Ct. App. 2021); Nos. 2019-CA-1705-MR, 2020-CA-0719-MR. Appendix A. The Kentucky Court of Appeals denying Mr. McGraw's Petition for Rehearing is reported at *McGraw v. Commonwealth* (Ky. Ct. App. 2021) No. 2019-CA-1705-MR. Appendix B. Mr. McGraw's Motion for Discretionary Review by the Kentucky Supreme Court was denied on February 16, 2022, reported at *McGraw v. Commonwealth* (Ky. 2022), "No. 2021-SC-0482-D". Appendix C.

JURISDICTION

Mr. McGraw invokes this Court's jurisdiction under 28 U.S.C. § 1257. The Kentucky Supreme Court denied Discretionary Review on February 16, 2022. This Petition is filed of record on May 17, 2022, within 90 days of that date. This Court therefore has jurisdiction.

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the U.S. Constitution.

Fourth Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

A. McGRAW'S JURY TRIAL

McGraw was indicted by a Carter County, Kentucky, Grand Jury on May 18, 2018, charging him with Sodomy in the First Degree (KRS 510.070) and

Sexual Abuse in the First Degree (KRS 510.110). The case went to trial in the Carter Circuit Court on July 16, 2019. The case was heard by the Hon. Judge Rebecca Phillips.

The Commonwealth's case consisted of testimony from a Kentucky State Police detective, the alleged victim, and a friend of the alleged victim. An 8-second video, *which did not show any sexual conduct or criminal activity whatsoever*, was played for the jury. No other physical evidence - no DNA, no hairs, fibers, or other forensic evidence was presented. There was no confession. There were no eyewitnesses. There were no controlled phone calls. The case was at best a circumstantial case, but essentially a "*he said- she said*" case. McGraw testified in his own defense.

As discussed more thoroughly below, on appeal McGraw argued that his federally protected constitutional rights were violated when the prosecutor commented on his invocation of his right against self-incrimination. In support of this, McGraw points to three specific statements made by the Commonwealth which violated these rights.

i. STATEMENT NO. 1. At Trial the Commonwealth improperly commented on McGraw's invocation of his right against self-incrimination.

During McGraw's cross-examination the Commonwealth asked McGraw about an interview which McGraw had with law enforcement during the investigation. Specifically referring to a video that had

been obtained by Detectives, the colloquy went as follows:

Q. OK. And you were also asked about this video, and all of the sudden you don't want to answer questions anymore Mr. McGraw, is that accurate?

A. No. I was still...very...I asked all the questions...or answered all the questions.

Q. You were told that the video contradicts your statements at that point in time. Do you recall that?

A. I believe so, yes.

Q. OK. It's at that point in time that you all stopped the conversation. *You didn't want to talk about it anymore you were afraid you were going to incriminate yourself?*¹

McGraw's counsel objected and moved for a mistrial. After a review of the testimony the Court denied the motion for a mistrial, and issued an admonition to the Jury to disregard the testimony.

ii. STATEMENT NO. 2. At Trial the Commonwealth improperly told the Jury that McGraw refused a consensual search of his home.

The Commonwealth introduced evidence that, during the investigation, McGraw *refused a consensual*

¹ McGraw's Corrected Appellant Brief, pp 9-10.

warrantless search of his home. The Detective testified as follows on direct examination...

Q. Did he permit you to search his residence?

A. No.²

McGraw was asked to consent to a search of his home. He was not in custody. There was no evidence of any exigent circumstances. He had a Fourth amendment right to refuse. He declined, invoking his right against self-incrimination. The jury was told about this. McGraw's counsel did not object.

iii. STATEMENT NO. 3. At Trial the Commonwealth improperly told the Jury that McGraw refused a consensual search of his fingernails for DNA.

At trial, the Detective further commented on McGraw's right against self-incrimination during cross-examination. The testimony went as follows;

Q. You didn't try to take swabs of his fingernails?

A. No...nor did he offer to have them swabbed.³

This statement was obviously volunteered by the detective to infer guilt. It was yet another improper comment on McGraw's invocation of his right against

² McGraw's Reply Brief, p. 1.

³ McGraw's Reply Brief, p. 2.

self-incrimination, through his silence. McGraw's counsel did not object.

The Jury returned with verdicts of Guilty on both counts. The Trial Court sentenced McGraw to 18 years in prison on October 22, 2019.

B. PROCEEDINGS IN KENTUCKY APPELLATE COURTS

McGraw appealed the convictions in a timely manner. In his Corrected Brief to the Kentucky Court of Appeals, McGraw argued that he was prejudiced by multiple errors at the jury trial.⁴ While many of his points of contention involved state law issues, he specifically argued that the conviction should be overturned as his federally protected constitutional rights were violated when the prosecutor commented on his invocation of his right against self-incrimination.

In McGraw's Corrected Brief, he referenced Statement 1, *supra*, i.e., the prosecutor asked him in front of the jury...“***You didn't want to talk about it anymore you were afraid you were going to incriminate yourself?***”

In McGraw's Reply Brief he provided two additional citations to the record supporting his original argument that his federally protected constitutional rights were violated – Statement 2 and Statement 3, *supra*.

⁴ McGraw's Original Brief contained errors relating to the number of pages, and thus was ultimately submitted as a “Corrected Brief”.

In affirming the conviction, the Kentucky Court of Appeals claimed that it “closely examined the record”.⁵ As discussed below, this is demonstrably false.

As to McGraw’s claims that his federal constitutional rights were violated, the Kentucky Court of Appeals only addressed his first claim, i.e., Statement No. 1. As discussed below, The Kentucky Court of Appeals based its denial of this claim on an erroneous reading of the trial record, and the demonstrably false conclusion that McGraw did not invoke his right to remain silent.”⁶ The conclusions drawn as to this claim are the result of a failure to adequately review and understand the obvious testimony in trial record.

i. The Kentucky Court of Appeals did not thoroughly review the trial record.

It is obvious from reading the Kentucky Court of Appeals’ opinion, that they did not thoroughly review the trial record. While some of these obvious misstatements of the record are likely immaterial, others are significant. However, they all clearly indicate that a thorough review was not undertaken.

As an example, the Court states that the Appellant “...denied withdrawing \$200 from the A.T.M.” and that “...[Appellant] stated that he did not buy alcohol”.⁷ The

⁵ Appendix A, p.19

⁶ Appendix A, p.10.

⁷ Appendix A, p. 4.

testimony in the record is unequivocal. During his testimony McGraw specifically admitted withdrawing \$200 from an ATM and he admitted buying alcohol.⁸

The very first point made by the Court of Appeals in its analysis is that McGraw did not comply with CR 76.12 (4)(c)(v), e.g., he did not state where and how he believed the issue was preserved.⁹ Yet, in a footnote to this very finding, the Court notes that... “*Appellant contends that this issue is preserved by the trial court’s discovery order.*”¹⁰ Thus, it is clear that the Appellant *did abide* by the rule. How can the Appellant both violate the rule by *not* stating how an alleged error was preserved, and at the same time state how the error was preserved? With all due respect to the Kentucky Court of Appeals, this simply defies logic and is an astonishing example of the Court of Appeal’s questionable review of the record.

While these obvious misstatements of the record arguably may be immaterial, others are not so inconsequential. The Court very clearly misread the record, and ignored other parts of the record, regarding the deprivation of McGraw’s constitutional rights, as to Statement No. 1.

On appeal McGraw alleged that the prosecutor, while cross examining McGraw, made an unconstitutional comment on the invocation of his

⁸ McGraw’s Petition for Rehearing, pp. 8,9.

⁹ Appendix A, p. 7.

¹⁰ *Id.* footnote 5.

constitutional right against self-incrimination. While this testimony was brought forth during the Commonwealth's cross examination of McGraw, inexplicably, the Kentucky Court of Appeals seems to believe that this occurred *during the Detective's testimony*.¹¹ It did not. The Kentucky Court of Appeals concluded that *a video of the Detective's interview with Appellant was played to the Jury*.¹² That never happened. The Kentucky Court of Appeals seems to believe that the claimed error was the Detective stating to Appellant on a video recording that "*You didn't want to talk about it anymore you were afraid you were going to incriminate yourself*".¹³ That was not the argument. The argument, as well stated in the brief, was that the *prosecutor* made this comment to the Defendant in front of the jury, specifically commenting on McGraw's right against self-incrimination.

In another glaring misstatement of the record, the Kentucky Court of Appeals specifically held that Appellant did *not* invoke his right to remain silent.¹⁴ This is not true. The detective had asked McGraw how many times he went into a room. McGraw refused to give a number (i.e., invoking the right) stating that... "*If I give a number and that's wrong, it just incriminates me.*" That is invoking the right to remain

¹¹ *Id.* pp 9, 10.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* p.10.

silent.¹⁵ The jury heard this. The Kentucky Court of Appeals again mis-stated the actual record. The Court based its conclusion on what is demonstrably a misstatement of the trial record. Simply stated, the Kentucky Court of Appeals clearly did not thoroughly review the record.

ii. The Kentucky Court of Appeals' erroneous reading of the record led to an erroneous conclusion, as to Statement No. 1.

The rationale of the Kentucky Court of Appeals for finding no error here was that “[the detective] did not state that the Appellant was afraid he was going to incriminate himself”.¹⁶ Ironically, while the detective did not state this- that is exactly what the prosecutor did while cross examining the defendant. Applying the Court of Appeal’s own logic to the actual record, as opposed to its misstatement of the record, leads to only one conclusion - that this constitutionally defective and was reversible error.

¹⁵ While the defendant did answer some questions, during the investigation, he specifically refused to answer this question from the detective. In his brief, the appellant cited the doctrine of “selective silence” as being applicable. *Barley v. Commonwealth*, 445 S.W. 3d 1, 6 (Ky. 2014). The Court of Appeals never even addressed this issue.

¹⁶ Appendix A, p. 10

iii. The Kentucky Court of Appeals simply ignored McGraw's other claimed violations of his federally protected constitutional rights, as to Statements 2 and 3.

In his Reply Brief, McGraw elaborated on his argument that the Commonwealth improperly commented on his invocation of his constitutional right against self-incrimination, referencing Statements 2 and 3, *supra*. As argued in his Reply Brief, a citizen's right against self-incrimination springs from the Fifth Amendment to the United States Constitution. However, the Fourth Amendment also provides protection from self-incrimination.¹⁷ Refusing to submit to a consensual search is obviously an invocation of one's constitutionally protected right against self-incrimination – and allowing this to be presented to the jury is a violation of one's *rights under the Fourth Amendment and Section 10 of the Constitution*.¹⁸ The Commonwealth clearly commented on McGraw's refusal to agree to a consensual search – of his home and his body.

McGraw supplemented this reference to the record in his Reply Brief, in support of his original argument that the Commonwealth improperly commented on his invocation of his constitutional right against self-incrimination. (NOTE: This was not a new argument,

¹⁷ *Deno v. Commonwealth*, 177 S.W.3d 753 (Ky. 2005), citing 4th Amendment to the U.S. Const.

¹⁸ *Id.*, at 762

rather a citation to the record in support of an argument advance in his original Appellate Brief.)

The Kentucky Court of Appeals *completely ignored* these violations of McGraw's federally protected constitutional rights.

McGraw's Motion for Discretionary Review by the Kentucky Supreme Court was denied on February 16, 2022

REASONS FOR GRANTING THE WRIT

This Court is the ultimate guardian of the constitutional rights of every citizen. Humans are fallible. Courts make mistakes. What then is the remedy for a citizen who is denied his constitutional rights at the state level, as a result of an over aggressive prosecutor, and an appellate process that is less than ideal? Can the constitutional rights of any United States citizen be simply cast aside where an appellate court errs and demonstrably fails to review a trial record, and otherwise ignores the alleged constitutional violations? The answer to this obviously should be a resounding - NO. For this reason, this Court, as guardian of these rights, should grant the writ and hear this case.

McGraw's 4th and 5th amendment rights under the U.S. Constitution were clearly violated at trial. The fact that the Court of Appeals did not provide any rationale for completely ignoring these arguments does not make it any less true. The claimed constitutional errors fall into two categories.

McGraw's first claim is that the prosecutor violated his rights under the Fifth Amendment when she commented on his invocation of his right to remain silent at trial.¹⁹ While the Court did at least examine this argument, the record is clear they completely misconstrued the record not only as to who made the offending statements, but also what those statements were. McGraw's constitutional rights under *Griffin* and its progeny should not be violated simply because a clerk or even a judge failed to thoroughly review the record.

McGraw's second claim relates to his rights under the 4th Amendment. Law enforcement asked him if they could search his home. They had no warrant. They also asked if they could, without a warrant, take DNA samples from his fingernails. McGraw had every right to refuse of these searches.²⁰ The prosecution had no right to tell the Jury McGraw refused.²¹

This was not a case where there was overwhelming evidence of guilt. There was no DNA. No hairs. No fibers. No witnesses to any sexual act. There was no confession. The only real evidence of any compelling nature was that McGraw chose to remain silent and refused a search of his home and refused a search of his body. Basing a conviction on these is obviously contrary to any constitutionally sound system of justice.

¹⁹ *Griffin v. California*, 380 U.S. 609 (1965).

²⁰ *North Dakota v. Birchfield*, 136 S.Ct. 2160 (2016).

²¹ 177 S.W.3d, 762.

McGraw should at least be able to expect that if his constitutional claims are denied by the courts – he is entitled at least to an analysis of these claims. It is fundamentally unfair to him, as well as other litigants, and even members of the bar, for a Court to just simply ignore these arguments without any explanation whatsoever and summarily dismiss them.

CONCLUSION

McGraw was clearly deprived of his federally protected constitutional rights under the 4th and 5th Amendments to the U.S. Constitution. It is unknown why the appellate courts performed such a demonstrably questionable review of the record. It is equally unclear as to why they misconstrued and ignored these arguments. One thing is clear, however McGraw is entitled to these rights and they were obviously violated at his trial. He petitions this Court, as guardian of these federally protected rights, to step in to preserve these rights, for him, and those similarly situated.

DATED this 17th Day of May 2022.

Respectfully submitted,

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