

SEP 24 2021

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No. _____

21-5871

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHRET R. HARVEY *PETITIONER*
V.

WARDEN JASON KENT, et al.
RESPONDENT

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE U.S. FIFTH CIRCUIT COURT OF APPEALS**

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED

Was counsel's performance deficient when counsel failed to conduct an independent investigation concerning the time limitations once the institution of prosecution had expired?

Was counsel's performance deficient when counsel failed to file a motion to quash because the time limitations of the institution of prosecution had expired?

Was Petitioner denied a full and fair judicial review in State Court where counsel obstructed the preservation and conservation of the state court record?

Can Petitioner overcome the bar of *Harrington v. Richter* and *Cullen v. Pinholster*, when it is this ineffectiveness of counsel that obstructed the preservation and conservation of the state court record?

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 subject of this petition is as follows:

District Attorney, Leon Cannizzaro
Orleans Criminal District Court
2700 Tulane Avenue
New Orleans, LA 70119

Warden Jason Kent
Dixon Correctional Institute
5568 Hwy 68
Jackson, LA 707748

RELATED CASES

Harvey v. Kent, NO. 20-30318, U. S. Court of Appeals for the Fifth Circuit. Judgment. (July 1, 2021.).

Harvey v. Kent, NO. 12-891 Section "A" (4) (E.D. La., July 22, 2020).

Harvey v. Kent, NO. 12-891 Section "A" (4) (Magistrate Report and Recommendation. (USDC, E.D. La, March 20,2020).

State v. Harvey, NO. 519-505, Orleans Criminal District Court. (La. S. Ct. 2019-KH-0001, Sept. 17, 2019).

State v. Harvey, NO. 519-505, Orleans Criminal District Court. (La. 4th Cir. 2018-K-0925, Nov. 11, 2018).

State v. Harvey, NO. 519-505 Orleans Criminal District Court. (Sept. 18, 2018).

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APPENDIX A: The U.S. Fifth Circuit Court of Appeals denial of Motion for Rehearing is attached as **Appendix “A”**. No. No. 20-30318.

APPENDIX B: The opinion of the U.S. Fourth Circuit Court of Appeals and denial of Certificate of Appealability is attached as **Appendix “B”**. No. No. 20-30318.

APPENDIX C: The Order of the United States Eastern District Court dismissing Petition and denying issuance of Certificate of Appealability is attached hereto as **Appendix “C”**. No. 19-12891 Section "A" (4)

APPENDIX D: The Report and Recommendation by the U. S. Magistrate Judge in the Eastern District of Louisiana is attached as **Appendix “D”**, No. 19-12891 Section "A" (4)

APPENDIX E: Louisiana Supreme Court order denying post-conviction application for relief is attached as **Appendix “E”**. NO. 2019-KH-0001, (La. S. Ct. Sept. 17, 2019).

APPENDIX F: Opinion of the Louisiana Fourth Circuit Court of Appeals denying writ of review of Post-Conviction Application is attached as **Appendix “F”**. NO. 2018-K-0925 (La. 4th Cir., Nov. 11, 2018).

APPENDIX G: Opinion of the Orleans Criminal District Court denying Post-Conviction Relief is not available; *see Appendix “G”*. NO. 519-505. (Sept. 18, 2018).

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<i>Barker v. Wingo</i> , 407 U.S. 514, 530-531, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)	7
<i>Cullen v Pinholster</i> , 563 U.S. 170 (2011)	8
<i>Harrington v Richter</i> , 562 U.S. 86 (2011)	8
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STATUTES AND RULES

18 USC §2252.
28 U. S. C. § 1254(1).
28 U. S. C. § 1257(a).
28 U.S.C. 2254 (a).
U. S. Constitutional Amendment V.
U. S. Constitutional Amendment VI.
U. S. Constitutional Amendment XIV. Sec. 1.
Louisiana Constitution Art. I, § 2.
Louisiana Constitution Art. I, § 13.
Louisiana Constitution Art. I, § 16.
La. Const. Art. 1, 9.
Louisiana Constitution Art. I, § 19.

LA. R.S 14: 42

LA. R.S 14:44.1

La C. Cr. P. art. 578

La C. Cr. P. art. 579

OTHER:

VOLUMES:

ONE: Appendixes.

TWO: State Review.

THREE: § 2254.

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 denial of re-hearing for COA by the United States Court of Appeals appears at **Appendix “A”** to the petition and is,
 not yet published or reported.

The opinion of the United States Court of Appeals denial of COA appears at **Appendix “B”** to the petition and is,
 not yet published or reported.

The opinion of the United States district court appears at **Appendix “C”** to the petition and is

Reported at *Harvey v Kent*, 2020 WL 20-37187, U. S. District Court for the Eastern District of Louisiana. (April 28, 2020).

The Report and Recommendation by the U. S. Magistrate Judge in the Eastern District of Louisiana appears as **Appendix “D”**, to the petition and is,

Reported at *Harvey v Kent*, 2020 U.S Dist. LEXIS 75843, U. S. District Court for the Eastern District of Louisiana. (March 20, 2020).

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 *State v Harvey*, 278 So. 3d 958 (La. 2019).

The opinion of the Louisiana Fourth Circuit Court of Appeals appears at **Appendix “F”** to the petition and is,
 Unpublished.

The opinion of the Orleans Criminal District Court appears at **Appendix “G”** to the petition and is,
 Unpublished.

JURISDICTION

The date on which the United States Fifth Circuit Court of Appeals decided the case was and the jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The date on which the Louisiana Supreme Court decided the case was September 17, 2019, and the jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U. S. Constitutional Amendment VI. Rights of the accused.

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 defence.

U. S. Constitutional Amendment XIV. Sec. 1. [Citizens of the United States.]

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.

Louisiana Constitution Art. I, § 2, Due Process of Law

No person shall be deprived of life, liberty, or property, except by due process of law.

Louisiana Constitution Art. I, § 13. Rights of the Accused.

When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.

Louisiana Constitution Art. I, § 16. Right to a Fair Trial

Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf. However, nothing in this Section or any other section of this constitution shall prohibit the legislature from enacting a law to require a trial court to instruct a jury

in a criminal trial that the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, that the governor in exercising such authority may commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence which includes the possibility of parole, may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole, or may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon.

Louisiana Constitution Art. I, § 19. Right to Judicial Review

No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

28 U.S.C. 2254: (a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF PROCEEDINGS

Petitioner entered a guilty plea on January 22, 2018, to an amended indictment of forcible rape and second degree kidnapping and on January 23, 2018 he was sentenced to forty (40) years on each count to run concurrently. No appeal was sought and the conviction became final on February 22, 2018. On April 2, 2018 Petitioner submitted an application for post-conviction relief claiming (1) Ineffective Assistance of Counsel and, (2) he was subjected to jeopardy. He filed a supplemental brief in July, 2018.¹ On September 18, 2018, the trial court denied the application but, Petitioner did not receive a copy of the ruling and was granted an extension to file writ.² A timely writ was filed and on November 11, 2018,³ the Louisiana Fourth Circuit of Appeals denied the writ.⁴ Petitioner sought writ of review⁵ and the Louisiana Supreme Court denied relief on September 17, 2019⁶ holding he had failed to show ineffective assistance of counsel.

On September 27, 2019 filed petition for federal habeas corpus relief asserting ineffective assistance of counsel and that the court lacked jurisdiction because his right to a speedy trial was violated.⁷ The State filed its answer citing legitimate delays. On March 20, 2020, the Magistrate submitted her Report and Recommendation.⁸ Petitioner filed an Objection to the Report and Recommendation.⁹

¹ Exhibit 1: Original PCR, Memorandum & Supplemental Brief. *See Volume Two.*

² Exhibit 2: Appendix G: Denial from District Court. *See Volume One.*

³ Exhibit 3: Supervisory Writ. *See Volume Two.*

⁴ Exhibit 4: Appendix F: Denial of Writ. *See Volume One.*

⁵ Exhibit 5: Remedial Writ of Review. *See Volume Two.*

⁶ Exhibit 6: Appendix E Denial of Remedial Writ. *See Volume One.*

⁷ Exhibit 7: Federal §2254 Petitioner and Memorandum. *See Volume Three.*

⁸ Exhibit 8: Appendix D: Report and Recommendation. *See Volume One.*

⁹ Exhibit 9: Objection to the Report and Recommendation. *See Volume Three.*

On April 28, 2020, the United States District Court for the Eastern District of Louisiana adopted the Report and Recommendation and denied relief.¹⁰ Petitioner sought a Certificate of Appealability from the United States Fifth Circuit Court of Appeals.¹¹ The Fifth Circuit denied his application on June 2, 2021.¹² Petitioner filed for re-hearing¹³ and was denied on July 1, 2021.¹⁴

He now comes before this Honorable Court seeking Certiorari.

STATEMENT OF THE CASE

On March 13, 2014, Petitioner was indicted by an Orleans Parish Grand Jury for a November 21, 2000 aggravated rape and aggravated kidnapping and a June 13, 2003 aggravated rape and aggravated kidnapping. At the time of indictment, Petitioner was serving sentences for unrelated convictions.

Petitioner originally entered a not guilty plea on May 16, 2014. On January 22, 2018, he entered a guilty plea to an amended indictment of forcible rape and second degree kidnapping and on January 23, 2018 he was sentenced to forty (40) years on each count to run concurrently.

REASONS FOR GRANTING THE WRIT

- (a) The State of Louisiana has departed from the usual course of judicial proceedings *and* the United States Fifth Circuit Court of Appeals has accepted and sanctioned such a departure by the lower court, as to call for an exercise of this Courts supervisory power.
- (b) The State Court and the United States Fifth Circuit Court of Appeals has misapplied federal law and this Honorable Court should intervene.

¹⁰ Exhibit 10: Appendix C: Denial and Judgment of Petition. *See Volume One.*

¹¹ Exhibit 11: Application for Certificate of Appealability. *See Volume Three.*

¹² Exhibit 12: Appendix B: Denial of COA. *See Volume One.*

¹³ Exhibit 13: Motion for Rehearing. *See Volume Three.*

¹⁴ Exhibit 14: Appendix A: Denial of Rehearing. *See Volume One.*

OVERTURE

Respectfully, I Stephret R. Harvey, Petitioner, am a layman of law and do not proclaim to be a peer of this Honorable Court, nor do I come before this Honorable Court presumptuously. It is with great humility I pray you will consider the subsequent claims and persuasions.

CLAIMS

The conviction was obtained in violation of the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. The right to effective assistance of counsel and due process of law were violated and Petitioner was prejudiced through counsel's deficient representation.

PERSUASIONS

Both State and Federal Courts opined that Mr. Harvey had failed to make "a substantial showing of the denial of a constitutional right."

In *State v. Napoleon*, 119 So. 3d 238; 2013 La. App. LEXIS 979 May 16, 2013, Decided (La. 5th Cir.) the reviewing court found trial counsel was ineffective for failing to advance his right to a speedy trial. 119 So. 3d 238 at 240, *Id.*

The constitutional right to a speedy trial attaches when an individual becomes an accused, either by formal indictment or bill of information, or by arrest and actual restraint. *State v. Pleasant*, 489 So.2d 1005, 1009 (La. App. 1 Cir. 1986), writ denied, 493 So.2d 1218 (La. 1986). Claims for speedy trial violations are evaluated under the four-factor test set forth in *Barker v. Wingo*, 407 U.S. 514, 530-531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972).

In the Report and Recommendation, the Magistrate misapplied the *Barker* factors in reaching her conclusion, that is, Petitioner did not support the long delays by defense counsel or the State. Indeed, how could he acquiesce to the continuances when counsel had been replaced and then failed to keep Mr. Harvey abreast of the proceedings.

Many times Petitioner didn't know he was scheduled for a hearing until the day of the proceedings. Being newly appointed, counsel had a duty to learn the specifics concerning his client and failed this duty when he failed to investigate the limitations in which the court had to bring his client to trial. Competent counsel would know that a continuance would be of no benefit to his client.

The Magistrate said a plea offer remained open until October 31, 2016, and afterward the trial court scheduled several pretrial conferences at which either Mr. Harvey or his attorney failed to appear. The "doubly deferential" standard of review in *Harrington v Richter*, 562 U.S. 86 (2011), and *Cullen v Pinholster*, 563 U.S. 170 (2011) is held to review of the State court record at the time. In this case, the State court record is void of the date or cause for these pretrial conferences. The Magistrate doesn't state the reasons for the conferences or their delay. The record offers no evidence that Petitioner or his attorney were advised of the hearings.

Respectfully, Mr. Harvey cannot be faulted for failure to appear when he is incarcerated and available and he cannot be held accountable for counsel's failure to appear or inform the court.

If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not "within the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson*, 397 U. S. 759, 771, n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). It is obvious that counsel was not acting within this range when he failed to file a motion to quash and allowed Petitioner to plead guilty to the offenses when the statute of limitations had expired.

Petitioner was prejudiced by the delay in prosecution. The court reset the proscriptive period of one year in which to bring Mr. Harvey to trial in proceedings where neither he nor his attorney were present. This maneuver violated Petitioner's right to due process and indicates an intent to injure Mr. Harvey by use of an *ex parte* process of the court.

The District Attorney used his authority to create an advantage by *nolle prosequi*, the indictment numerous times, then re-instatting. After such an extended period, witnesses and evidence in his behalf could not be found and Petitioner would never be able to prepare a viable defense. Petitioner is subject to the relevant law and rules of court, including the Rules of Procedure and due process is violated when the State is not held answerable to the same laws and rules of court.

The limitations on the institution of prosecution had expired under La C.Cr.P. art. 578. The Court set hearings which Petitioner was not advised. It is the responsibility of the court to subpoena and Petitioner's failure to appear was not his fault. Mr. Harvey could not flee because he was incarcerated and available to appear. Here, the interruptions of La C.Cr.P. art. 579, created by the State, are not applicable.

CONCLUSION

Petitioner, Stephret R. Harvey, prays this Honorable Court will agree that the nexus of his conviction and the incomplete state court record for review are due to ineffective assistance of counsel and appellate counsel and that these issues are debatable among reasonable jurists. He further asserts he has shown exceptional circumstances justifying relief and prays that this Honorable Court will grant Writ of Certiorari and remand this to the district court for an evidentiary hearing to expand the record to allow Petitioner a full and fair judicial review.



Stephret R. Harvey