

21-6962
No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JAN 19 2022

OFFICE OF THE CLERK

ROBERT EUGENE PLASTER,

Petitioner,

v.

MICHAEL BURGESS, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

and

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT IN SUPPORT

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QUESTIONS PRESENTED

- I. **DID THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER THE DENIAL OF CONSTITUTIONAL RIGHTS WAS SHOWN.**

Petitioner Answers "Yes."

Lower courts answered "No."

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OPINIONS BELOW

United States District Court Judge denied Petitioner's petition for writ of habeas corpus in an unpublished opinion and order on August 7, 2019. The order is attached as Appendix (B). Judge Janet T. Neff went on to deny Petitioner's certificate of Appealability as to the five issues in the petition in an unpublished order dated September 30, 2020. The order is attached as Appendix (A).

The Sixth Circuit Court of Appeals also denied Petitioner's request for a certificate of Appealability in an Order dated November 29, 2021. This Order is attached as Appendix (C).

Petitioner petitions for certiorari to this Court from these orders denying him a certificate of Appealability.

NOTICE

This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1). *Hohn v. United States*, 524 U.S. 236 (1998).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1915(a)(1):

Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefore, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

28 U.S.C. § 2253(c):

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

On 06/15/2012, Petitioner convicted of first-degree criminal sexual conduct (MCL 750.520(1)(c); two counts of child sexually abusive activity, (MCL 750.145c(2); two counts of using a computer to commit a crime, (MCL 752.796); possession of child sexually abusive material, (MCL 750.145c(4)(a); and furnishing alcohol to a miner, (MCL 436.1701). Petitioner was sentenced on October 17, 2012 by Ionia County Circuit Court Judge David A. Hoort to was sentence to concurrent term of seven to twenty years in prison for the two child-sexually-abusive-activity convictions and one of the computer crime counts, four to seven years in prison for second computer crime count, and one to four on the possession count. He was also sentenced to time served and fined for the furnishing-alcohol-to-a-miner conviction. The trial court ordered that these sentences be served consecutive to a fifteen to thirty-five years in prison for the CSC-I conviction.

In a per curiam opinion issued on July 26, 2013 the Michigan Court of Appeals affirmed conviction. Appellant filed a motion for reconsideration and was denied on August 26, 2014. The Michigan Supreme Court denied leave to appeal on May 28, 2015.

Petitioner thereafter timely filed a petition for writ of habeas corpus in the United States District Court for the Western District of Michigan, denying certificate of appealability, and granting leave to appeal in forma pauperis, denied petition writ habeas corpus on September 30, 2020. See Attachment (A)(B) Petitioner then timely filed Notice of Appeal in United States Court of Appeals for the Sixth Circuit, denied November 29, 2021 See. Attachment (C) which is the subject of the instant petition for certiorari. The former petition raised the following five claims:

- I. THERE WAS AN INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ARGUE THE SEARCH WARRANT SHOWING VIOLATIONS UNDER THE DUE PROCESS OF THE 6TH AND 4TH AMENDMENTS, ELIMINATING THE EQUAL PROTECTION UNDER LAW AND FAILING TO FILE PROPER MOTIONS BEFORE AND DURING TRIAL AND AT CRITICAL STAGES OF PROCEEDINGS.
- II. THE PROSECUTORS COMMITTED ACTS OF PROSECUTORIAL MISCONDUCT DURING OPEN AND CLOSING ARGUMENTS IN VIOLATION OF STATE FEDERAL CONSTITUTION. SHOWING BIAS AND PREJUDICE, MISS LEADING JURORS BY PUTTING FRUIT OF THE POISONOUS TREE THROUGHOUT THE TRIAL, WITH ADDITIONAL 3 MISTRIALS.
- III. THERE INSUFFICIENT EVIDENCE FOR CSC 1ST SHOWING SEXUAL PENETRATION IS OCCURRING UNDER CIRCUMSTANCES INVOLVING THE COMMISSION OF ANOTHER FELONY. THAT WAS NOT WHAT WAS PRESENTED AT TRIAL. MORE APPROPRIATE WOULD BE CSC IN THE 3RD. BY OVERCHARGING ME VIOLATED MY EQUAL PROTECTION UNDER THE LAW, AND ENHANCING THE PENALTY UNDER THE LAW SHOWS MORE PREJUDICES.
- IV. THE TRIAL COURT ERRED IN SUBSEQUENT OR CONCURRENT CONVICTIONS WHERE IT WAS NOT PUT IN FRONT OF JURY TO RULE ON ALONG WITH OTHER PRV AND OV'S, THIS IS A VIOLATION OF MY EQUAL PROTECTION UNDER THE 14TH AMENDMENT OF THE US CONSTITUTION.

PRV ISSUE:

THE TRIAL COURT ERRED IN PRV 7 AT 20 POINTS AND WAS IMPROPER AND DISPROPORTIONATE WHEN IT RESULTED IN A MANDATORY SENTENCE.

OV ISSUE A:

THE TRIAL COURT ERRED IN OV4, MCL 777.34 AT 10 POINTS, SERIOUS PSYCHOLOGICAL INJURY. BEING UNCOMFORTABLE DOES NOT SHOW SERIOUS INJURY.

OV ISSUE B:

THE TRIAL COURT ERRED IN OV8, APPROPRIATION OF A VICTIM WAS ASPIRATED TO ANOTHER PLACE OF GREATER DANGER. IT IS NOT KIDNAPPING WHEN A VICTIM MOVES OF THEIR OWN FREE WILL AND IN VIEW BY PUBLIC AND WITH NO INJURY, THIS IS A VIOLATION OF MY 8TH AND 14TH AMENDMENT OF THE US CONSTITUTION.

OV ISSUE C:

THE TRIAL COURT ERRED IN OV 10, PREDATORY CONDUCT, 15 POINTS DOES NOT FIT THE EVIDENCE IN THIS CASE. YOU CANNOT SCORE PREDATORY CONDUCT IN 2 DIFFERENT OV'S AS WAS DONE HERE IN SCORING FOR OV13 AND OV10. YOU SHOULD NOT SCORE IN BOTH OV'S BY THE GUIDELINES. OV 10 WOULD BE 10 POINTS AND OV 13 WOULD BE 0, BY THE GUIDE LINES.

OV ISSUE D:

THE TRIAL COURT ERRED IN OV13, CONTINUING PATTERN OF CRIMINAL ACTIVITY. THERE IS NOT CRIMINAL ACTIVITY INVOLVING 3 OR MORE CRIMES AGAINST A PERSON WITHIN A 5-YEAR PERIOD. HAVING ONE INCIDENT WITH 7 CHARGES DOES NOT CONSTITUTE SCORING THIS.

OV ISSUE E:

THE TRIAL COURT ERRED IN OV19, THE THREAT TO SECURITY OR INTERFERENCE, SUCH AS ASKING FOR HELP IN MY CASE FOR MY DEFENSE DOES NOT MEET THE THRESHOLD OF SCORING OF POINTS IN THIS CASE. THIS TOO IS A FURTHER VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS AND EQUAL PROTECTION UNDER THE LAW.

ISSUE V:

THERE WAS INEFFECTIVE APPELLATE COUNSEL, DUE TO MY DISABILITY WHERE COUNSEL WOULD NOT WORK WITH DEFENDANT ON SUPPLEMENTAL 4 BRIEF, VIOLATING MY DUE PROCESS, AND NOT FILING MY NUMBER ONE ISSUE OF SEARCH WARRANT AND OTHER ISSUES.

Petitioner's petition for writ of habeas corpus is attached as Appendix C. On September 30, 2020, United States District Judge Janet T. Neff, issued an Opinion and Order Denying the Petition, Denying Certificate of Appealability, and granting Leave to Appeal *in Forma Pauperis*. The Order is attached as Appendix A.

Petitioner timely filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. With the Notice of Appeal, Petitioner also filed a motion for certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals denied Petitioner's request for a certificate of appealability, in an Order dated November 29, 2021. This Order is attached as Appendix B.

Petitioner asserts that he is entitled to proceed on appeal to the United States Court of Appeals for the Sixth Circuit with his habeas corpus petition, and he petitions this Court for permission to do so.

ARGUMENTS

I. THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER THE DENIAL OF CONSTITUTIONAL RIGHTS WAS SHOWN.

The issues that Petitioner raised in his petition for a writ of habeas corpus in the district court make a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2).

The federal district court has indicated that the issues that Petitioner intends to raise are substantial. After Petitioner filed his Petition the federal district court ordered the state to file a response. This case was not summarily dismissed. *See Alexander v. Harris*, 595 F.2d 87 (2nd Cir. 1979) (linking standard for issuance of certificate of probable cause to standard for denying summary dismissal).

Prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) a certificate of probable cause was required before an appeal from a federal district court order could be taken in habeas cases. In order to obtain a certificate of probable cause a petitioner was required to make a "substantial showing of the denial of (a) federal right" *Barefoot v. Estelle*, 463 U.S. 880 (1983). All doubts are to be resolved in favor of the petitioner in making this determination. *Barefoot, supra*, 463 U.S. at 893, n. 4. In addition to linkage with the standard for denial of summary dismissal, the probable cause standard in this context has been noted to require "something more than the absence of frivolity." *Barefoot, supra*, 463 U.S. at 893.

Obviously Petitioner is not required to show that he should prevail on the merits as in every case where a certificate of appealability is requested the district court has made a determination against the petitioner on the merits.

This Court has instructed that the certificate should be issued when a petitioner shows that "the issues are debatable among jurists of reason," or "a court could resolve the issues in a different manner," or "the issues are adequate to deserve encouragement," or the issues are not "squarely foreclosed by statute, rule or authoritative court decision or [not] lacking any factual basis in the record." *Barefoot, supra* 463 U.S. at 894.

While *Barefoot, supra*, was obviously issued when the required certificate was one of probable cause, this Court, along with several circuits, has held that there is no real change from the showing required for a certificate of probable cause now that the required certificate is one of appealability under the AEDPA. *Slack v. McDaniel*, 120 S.Ct. 1595 (2000). See also *Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996). The intent of Congress in this respect when passing the AEDPA was to codify the *Barefoot* standard. *Slack v. McDaniel, supra*, 120 S.Ct. at 1603; *Lennox v. Evans*, 87 F.3d 431 (10th Cir. 1996); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997).

A review of the issues that Petitioner raised confirms the conclusion that those issues are substantial. This Court has held that ineffective assistance of counsel can constitute cause to couple with the clear prejudice demonstrated where, as here, ineffective assistance of counsel in relation to the point at issue was independently presented to the state courts. *Edwards v. Carpenter*, U.S. ; 120 S.Ct. 1587 (2000). This issue was not procedurally defaulted and the district court erred in that regard. The denial of a certificate of appealability would effectively preclude appellate review in this case. The requirement of a certificate of appealability is

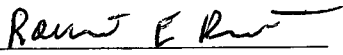
designed to bar frivolous appeals, not to preclude appellate review of cases involving substantial issues. *See Moore's Federal Practice* (2d Ed), § 220.03. Since the federal district court has indicated that the issues involved in Petitioner's petition are not frivolous, it is clear that a certificate of appealability should issue.

SUMMARY AND RELIEF REQUESTED

Petitioner alleges that the 6th circuit claims that his issues are unpreserved are false, petitioner has exerts of issue preservation in transcripts, labeled (Appendix D).

For these reasons Petitioner ask this Honorable Court to grant certiorari in this case and remand this matter to the United States Court of Appeals for the Sixth Circuit for review of the issues raised in his petition for writ of habeas corpus.

Respectfully submitted,


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January 18, 2022