No. 21-8184

ORIGINAL

IN THE

UNITED STATES SUPREME COURT

Michael Kelly

Petitioner

v.

Jeremy Larson, Warden

Respondent

WRIT OF CERTIOARARI
from the decision of the
The United States Court of Appeals in The Eighth Circuit
(No: 21-2968)

U.S. District Court for the Northern District of Iowa – Eastern
(6:20-cv-020881-LRR)

Michael Kelly 6620379
Newton Correctional Facility
PO BOX 218
Newton, Iowa 50208

QUESTION(S) PRESENTED

1. **WHETHER The United States Court of Appeals in The Eighth Circuit ERR IN NOT FINDING THAT KELLY HAD A RIGHT TO HAVE THE EFFECTIVE ASSISTANCE OF POST- CONVICTION COUNSEL DURING KELLYS INITIAL APPEAL IN VIOLATION OF KELLY'S 5TH, 6TH, AND 14TH AMENDANTS OF THE UNITED STATES CONSTITUTION?**

2. **WHETHER The United States Court of Appeals in the Eighth Circuit ERR IN NOT FINDING THAT KELLY'S MANDATED SENTENCE IS DISPROPORTIONATE TO HIS UNDERLYING OFFENSE OF THIRD DEGREE SEXUAL ABUSE A NON-MANDATED SENTENCE?**

3. **WHETHER The United States Court of Appeals in The Eighth Circuit ERR IN NOT FINDING KELLY'S PLEA COLLOQUY VIOLATED I.R.C. 2.8 AND 2.8(2)(d)?**

4. **WHETHER The United States Court of Appeals in The Eighth Circuit ERR IN NOT FINDING THAT KELLY'S SENTENCE VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND CONSTITUITON OF IOWA, AS HIS CRIME WAS COMMITTED PRIOR TO THE JULY 1, 2005 ENACTMENT OF CODE OF IOWA 903B.1 STATUTE?**

TABLE OF CONTENTS

INDEX TO APPENDICES

JURISDICTION

The Supreme Court will have jurisdiction over this matter because 28 U.S.C. Sec. 1254(1) gives the court jurisdiction over an appeal of final judgement of a United States Court of Appeals.

STATEMENT OF THE CASE

Michael Kelly's Writ of Certiorari stems from the Eighth Circuit denial of his application for certificate of appealability and denial of his motion to proceed in forma pauper as moot.

TABLE OF AUTHORITIES

Statutes

Rules

United States Constitutional Amendments

5th, 6th, 14th

Constitution of Iowa

Article I Section 9 and 10

Other Sources

- Allen L. Bohnert, *Wrestling with Equity*: Identifiable trends as the federal court Grapple with the practical significance of *Martinez v. Ryan & Trevino v. Thaler, 43 Hofstra L. Rev 945, 975 (2015).*
- *Emily Garcia Uhrig, Why Gideon? Martinez v Ryan and the "Equitable" Right to Counsel in Habeas Corpus, 80 Mo. L. Rev. 771, 808 (2015).*
- Ty Alper, *Toward A Right to Litigate Ineffective assistance of Counsel,* 70Wash & Lee L. Rev. 839, 868-80 (2013).

COURSE OF PROCEEDINGS AND DISPOSITION IN TRIAL COURT

Petitioner – Appellant, Michael Kelly, hereinafter referred to as "Kelly" was convicted of sexual abuse in the third degree no injury in violation of Code of Iowa 709.4(4) and sentenced under 902A.2(3). Kelly appealed his conviction and sentence, State v. Kelly, 05-2078 (Iowa Ct. App. 2006).

Kelly filed his initial Post-Conviction Relief Application on October 29, 2007. The district court dismissed the application and the dismissal was affirmed on appeal. Application for Further review was not filed. 789 N.W. 2nd 437 Kelly v. State :: August 25 2010.

Kelly filed a timely request for limited remand in the district court, (Limited Remand January 5, 2010).

Kelly promptly filed his second (Request for Limited Remand and PCR Attached) in MAR of 2010 in the district court of Black Hawk County PCCV103580.

Kelly filed in the district court his second Post-Conviction Relief Application (actually Kelly's third Post-Conviction) on December 22, 2011. 856 N.W.2nd :: Kelly v. State :: August 27, 2014.

Kelly filed in the district court his third Post-Conviction Relief Application (actually Kelly's fourth Post-Conviction) on November 6, 2015. 924 N.W.2nd :: 532 Kelly v. State :: August 1, 2018.

EQUITABLE TOLLING

1. WHETHER The United States Court of Appeals in The Eighth Circuit ERR IN NOT FINDING THAT KELLY HAD A RIGHT TO HAVE THE EFFECTIVE ASSISTANCE OF POST- CONVICTION COUNSEL DURING KELLYS INITIAL APPEAL IN VIOLATION OF KELLY'S 5TH, 6TH, AND 14TH AMENDANTS OF THE UNITED STATES CONSTITUTION?

Back Ground: In Kelly's initial post-conviction relief action (October 29, 2007 Case No. FECR129311; PCCV103580) post-conviction counsel David Nadler amended Kelly's Application for Post-Conviction Relief on June 26, 2008. Upon doing so counsel deleted the matters set forth in paragraph III (F) of Kelly's application. State v. Gamble 723 N.W.2nd 443 (Iowa 2006). *See*: Letter to Court in original docket dated 11-7-2007; and to substitute SIXTEEN GROUNDS in their place. The matter came before the court for trial on April 22, 2009. Kelly appeared by telephone and was represented by Attorney David Nadler.

On July 17, 2009, the court entered its decision finding that trial counsel on one occasion committed err but found that applicant was not prejudiced by the err. The court overruled the petition and dismissed the proceedings. Kelly filed a timely handwritten notice of appeal. (NOTICE OF APPEAL FILED AUGUST 17, 2009).

On September 23, 2009, the court appointed Matthew L. Noel to represent Kelly on appeal. After counsel's review of the lower court record, counsel raised six of the sixteen grounds raised by post-conviction trial counsel David Nadler. State v. Gamble 723 N.W.2nd 443 (Iowa 2006).

On August 25, 2010, the Court of Appeals in Iowa affirmed the decision of the district court. 789 N.W. 2nd 437 Kelly v. State::August 25 2010.

In Iowa you have 20 days in order to file an application for further review to the Supreme Court of Iowa in order for that court to review an adverse ruling of the lower court (IRCP 6.1103(1)(a)). In the present case from the affirmed ruling of the Court of Appeals decision. This was Kelly's first appeal of right. When counsel failed to notify his client that he was not filing further review nor send the court of appeals ruling to Kelly counsel denied Kelly the ability to timely file a pro se application for further review. Counsel during this critical stage of Kelly's appeal process provided ineffective assistance and Kelly was prejudiced by counsel's inaction. The Clerk of Supreme Court of Iowa also failed to provide Kelly with a copy of the Court decision. This inaction by both parties prevented Kelly from having his ineffective assistance of trial counsel grounds heard and ruled on by the Supreme Court of Iowa. This inaction further prevented federal habeas recourse proceedings of Kelly' first appeal of right. Kelly admittedly after finding out the court denied his appeal Kelly filed his own application for further review which the court denied citing the 20-day jurisdiction. 789 N.W. 2nd 437 Kelly v. State :: August 25 2010. The Eighth Circuit err in not granting COA and "In Forma Pauperis."

Equal Protection and the Right to Effective Assistance of Counsel

On June 29, 2018 the Supreme Court of Iowa changed direction in its long-standing precedent and holding of Dible, Harrington and Code of Iowa 822.3. *See:* 914 N.W.2nd 866::Allison v. State::June 29, 2018. The court held that Allison who had been previously time barred under Dible, Harrington and Code of Iowa 822.3, was now giving the opportunity to have his statutorily barred ineffective assistance of post-conviction and trial counsel claims reviewed by and in the lower court. 914 N.W.2nd 866::Allison v. State::June 29, 2018. Prior to the Allison court's decision – Code of Iowa 822.3 barred claims of ineffective assistance of post-conviction counsel as grounds for relief to bypass three-year SOL. 898 N.W.2nd 204::Allison v.

State::February 22, 2017, N.W.2nd :: Kelly v. State :: August 27, 2014 and 919 N.W.2d 636::Burnett v. State::May 2, 2018, citing *both* Allison and Kelly together. The Court of Appeals of Iowa opinion – which denied Kelly's third post-conviction relief action, introduced a new *term* "promptly filed" which prior to the court's August 27, 2018 ruling had not existed in the 822.3 statutory language. Kelly was denied his right to the equal protection clause under the 5th, 6th and 14th Amendments of the United States Constitution and Article I. section 9 and 10 of the Iowa Constitution, when *both* the Iowa Court of Appeals and the Supreme Court of Iowa denied him equitable tolling relief when he was "similarly situated" as Allison, "The test is whether a prudent person, looking objectively at the incident, would think them roughly equivalent and protagonists similarly situated …" Johnson v. California, 543 U.S. 499, 509-14 125 S. Ct. 1141 (2005); "(1f) 'We see no reason to afford habeas review to a state prisoner like reed, who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated. *See: Francis v. Henderson,* 425 U.S. 536, 48 L. Ed. 2d 149, 96 S. Ct. 1708 (1976)."'

The court had not yet denied Kelly's claims prior to ruling on Allison. 924 N.W.2nd :: 532 Kelly v. State :: August 1, 2018. When counsel failed to advanced Kelly's six ineffective-assistance-of- trial-counsel claims on further review after counsel had done his initial review of those claims which counsel obviously felt those grounds had merit and warrant review by the Court of Appeals in Iowa. Counsel cannot in good faith claim nor state a reason for failing to file further review. Counsel must be aware of the dire consequences that would befall his client if he failed to do so *or* fail to notify his client that he need file the application himself which would preserve his claims for review. Kelly had previously shown his diligence in appealing any adverse ruling, (NOTICE OF APPEAL FILED AUGUST 17, 2009); State v. Kelly, 05-052078

(Iowa Ct. App. 2006); 789 N.W. 2nd 437 Kelly v. State :: August 25 2010; 856 N.W.2nd :: Kelly v. State :: August 27, 2014; 924 N.W.2nd :: 532 Kelly v. State :: August 1, 2018; *See*: Bourrage v. State of Iowa Case No. 13-0840, court tolled 30day time to appeal; Holland v. Florida 130 S. Ct 2549, 2560 (2010). *Martinez* 566 U.S. at 16, 132 S. Ct. at 1319. See, e.g., Ty Alper, *Toward A Right to Litigate Ineffective assistance of Counsel,* 70Wash & Lee L. Rev. 839, 868-80 (2013); Allen L. Bohnert, *Wrestling with Equity*: Identifiable trends as the federal court Grapple with the practical significance of *Martinez v. Ryan & Trevino v. Thaler, 43 Hofstra L. Rev 945, 975 (2015); Emily Garcia Uhrig, Why Gideon? Martinez v. Ryan and the "Equitable" Right to Counsel in Habeas Corpus, 80 Mo. L. Rev. 771, 808 (2015).* The Eighth Circuit err in not granting COA and "In Forma Pauperis."

Whether Kelly had Viable Grounds for Review?

Intoxication Defense: Appellate Attorney Mathew L. Noel committed err which was ineffective and prejudicial to his client when counsel failed to present this ground to the Supreme Court of Iowa on further review. Counsel also committed err when he failed to support the intoxication defense claim with evidence to the Iowa Court of Appeals. In violation of Kelly's right to the 5th, 6th, and 14 Amendment of the United States Constitution and Article I. Section 9 and 10 of the Constitution of Iowa. The matter came before the court for trial on April 27, 2009. (Case No. FECR129311; PCCV103580.) The following exchange took place during Kelly's first post-conviction relief trial hearing:

Nadler Q. Do you recall whether Mr. Kelly also became very intoxicated that evening?

Court stops to address the State—counsel re-reads the question

Nadler Q. Do you recall whether Mr. Kelly also became very intoxicated that evening?

Hawbaker A. I don't believe that there was any evidence to support that, and I can – at least in my conversations with Mr. Kelly, I don't recall that ever being a position that he was – he himself, was so intoxicated that he would not have known what was happening such that it would have been available at – for a defense.

Nadler Q. Do you recall whether he was participating in the game where the beer was chugged?

Hawbaker A. I'm sorry, at this time I don't and its – I don't think that it's just beer. I think other things were drunk.

Nadler Q. Okay.

DEFENDANT: Your Honor, may I speak with my attorney?

MR. NADLER: No, this isn't the proper time.

DEFENDANT: Oh, I'm sorry, okay.

Nadler Q. Did you contemplate at all raising an intoxication defense?

Hawbaker A. No.

Nadler Q. Is it your feeling that you didn't have any evidence to support that?

Hawbaker A. Right.

The following was submitted as exhibits and evidence during. (Case No. FECR129311; PCCV128544). Unfortunately, during the Motion to Dismiss hearing the court denied Kelly the right to present evidence at his post-conviction hearing. The Court of Appeals and the Supreme Court of Iowa has remained silent on the evidence although it was presented to the lower courts.

If Kelly's evidence had been allowed in the court would have found that the outcome of Kelly's jury trial would have been different. Kelly had informed trial counsel Aaron Hawbaker that he had been drinking all night at the bar—prior to heading to Katie's afterhours party. Counsel had a duty to investigate the police reports for evidence and then raise the intoxication

defense. Counsel had an essential duty to perform once Kelly informed him of his drinking all night at the bar and at the party contrary to counsel's testimony. Counsel should have taking the steps similar to Officer A. Frana. The police reports should have been one of the first thing counsel should have reviewed when preparing for trial, especially since these individuals were docketed as states witnesses.

Kelly submits to this court *Exhibits A, B and C* which are the police reports statements of Katie Seiler, Denise Christensen, Bobby Shultz and Jake Warner. Please *note* that these individuals gave testimony on behalf of the State. Caution should be given to the testimony of Shultz and Warner as they were drunk during the events of that night and their recollection of my actions may be blurred. The same can be said of Ms. Seiler with the exception of the period when I was at the bar while she was working. The only person who stated they had not been drinking that night would be Ms. Christensen who stated that Mike was, "naked" and that "she never knew anyone who would just get naked if they were not intoxicated". She also stated that Kelly was playing the drinking game "hi-low" and that "Mike" and others were "drunk." For all the above reasons Kelly was denied his right to have the effective assistance of counsel by appellate post-conviction counsel, post-conviction trial counsel and trial counsel in violation of the 5th, 6th and 14th Amendments of the United States Constitution and Article I. Section 9 and 10 of the Constitution of Iowa. Kelly request this court remand him back for new trial. The Eighth Circuit err in not granting COA and "In Forma Pauperis."

2. WHETHER The United States Court of Appeals in the Eighth Circuit ERR IN NOT FINDING THAT KELLY'S MANDATED SENTENCE IS DISPROPORTIONATE TO HIS UNDERLYING OFFENSE OF THIRD DEGREE SEXUAL ABUSE A NON-MANDATED SENTENCE?

> Kelly recognize that the, *"Legislature determination of punishment are entitled to great deference. In order to establish a claim for cruel and unusual punishment, a sentence must be 'grossly disproportionate' to the underlying offense." Id. At 872-73 (citing Rummel v. Estelle, 445 U.S. 263, 271 (1980).*

Summary of Facts: NB after a night of consuming alcohol while playing a game of hi-low alleged that she was unable to consent to a sex act with Kelly during the early morning hours of December 5, 2004. Kelly has maintained his innocence throughout these proceedings. Instead of counsel challenging the DNA evidence, trial attorney Aaron Hawbaker presented the consent defense to the jury. The record established that NB and Kelly were involved prior the incident on December 5, 2004, and that their involvement continued after the incident. NB was found to have made inconsistent statements during trail (Case No. FECR129311; Sentencing p.22 l. 6-8) and the court found further inconsistences during Kelly's initial post-conviction trial. The court stated in its decision that NB's "willing to have contact with applicant after the incident … can be argued is inconsistent with a nonconsensual sex act occurring shortly before that.) (Case No. PCCV103580; **DECISION** 12, 13, 14, 15).

Question: was NB able to consent to sex act? First and foremost, there was not any sex act. Trial counsel was ineffective for submitting such an argument to the Jury when the DNA was contaminated, no DNA was found on or in NB vaginal area. NB wrapped herself in a bed sheet, she went to the bathroom—where Lynn the state witness had performed oral sex on Kelly while standing next to the toilet. The police report from officer A. Frana, *Exhibit D* of Katie Seiler, "I saw Lynn stand up quickly and Mike had his pants down". The state had to prove two elements,

whether Kelly and NB had sex, and whether NB was incapacitated. Counsel committed err by stating the sex act was consensual giving the state the first prong. NB by her testimony shortly after the alleged act said she went to the "bathroom" by herself in the dark apartment, she walked around the apartment in the dark, she seen "Rob" in the dark, she did not wake "Rob", she did not lay on other available couches, chairs to sleep—avoiding Kelly, she realized that Katie and others were gone; yet she did go back to lay next to Kelly who was unclothed in the bedroom, she went back to "sleep" the key word "sleep!" Although NB stated that she was in a fog and not able to consent to sex act, she was able to describe the alleged event in detail to the Sexual Assault Nurse Examiner SARS, Emily Huisman. (Case No. FECR129311; Trial - Day 2, Testimony of Emily Huisman, p.221, li.2 thru p.226, li.16.)

Kelly claims his sentence is disproportionate to the facts of his underlying offense of Third Degree Sexual Abuse a 10yr non-mandated sentence. Kelly has served over 16 years. Kelly has discharged four 10yr Third Degree Sexual Abuse Offenses with one left to go for a total of five, that's five-hundred percent which would be in line with the Supreme Court of Iowa *Brugger* ruling for disproportionality. The Eighth Circuit err in not granting COA and "In Forma Pauperis."

3. WHETHER The United States Court of Appeals in The Eighth Circuit ERR IN NOT FINDING KELLY'S PLEA COLLOQUY VIOLATED I.R.C. 2.8 AND 2.8(2)(d)?

On October 6, 2005, the district court excused the jury and the court performed the following Plea Colloquy. Kelly was represented by counsel. Kelly claims that the court failed to comply with the Iowa Rules of Court for Pleas during the enhancement phase of his sentence. The court failed to outline each of elements contained in I.R.C. 2.8 but more importantly the court failed to properly advise Kelly of his right to file a motion in arrest of judgement, the time to file such

motion and the right to file an appeal before excepting the plea I.R.C. 2.8(2)(d). The following exchange took place during Kelly's plea:

THE COURT: All right. Sentencing will be set in approximately three weeks. I will order the presentence investigation. You will be held without bond, because this is a nonbondable offense, so you have to be in custody of the sheriff's department until you are sentenced. Do you have any questions, sir?

KELLY: No.

THE COURT: All right. Any post-trial motions should be filed in conformity with the rules. Anything else? Mr. Hawbaker?

Mr. Hawbaker: No. your honor.

THE COURT: Mr. Katcher?

Mr. Katcher: No. your honor.

THE COURT: All right. If there is anything further, we are adjourned until sentencing. Thank you.

It is clear from the I.R.C. 2.8(2)(d) the sentencing court violated the plea enhancement phase of Kelly sentencing. Kelly was represented by counsel, counsel should have informed the court that this was not sufficient to inform Kelly of his right to file a motion in arrest of judgement and his right to appeal. The district court in Iowa has been placed on notice by the Supreme Court of Iowa. 924 N.W.2nd 846::State v. Smith::March 8, 2019. Kelly claims that because of this err made by the court his sentence is an illegal sentence and request this court remand him back for resentencing. The Eighth Circuit err in not granting COA and "In Forma Pauperis."

4. WHETHER The United States Court of Appeals in The Eighth Circuit ERR IN NOT FINDING THAT KELLY'S SENTENCE VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND CONSTITUITON OF IOWA, AS HIS CRIME WAS COMMITTED PRIOR TO THE JULY 1, 2005 ENACTMENT OF CODE OF IOWA 903B.1 STATUTE?

Kelly would like to clear up his reason for claiming his sentence is illegal under the ex post facto clause. The court sentenced Kelly under Code of Iowa 903B.1. The court stated that Kelly would have to register, yet it did not state how long Kelly would have to register. *See: Transcript of Sentencing, December 12th 2005 Case No. FECR129311.*

However, for criminal defendants whose crimes were committed prior the enactment date of July 01, 2005, Code of Iowa 903B.1. The Supreme Court of Iowa found it violated the ex post facto clause. The Supreme Court review of: "*A. Is Section 903B.1 Criminal or Penal Law?*". That court found: "In examining pertinent indicators of legislative intent, we conclude the statute imposing lifetime parole was intended to be punitive in nature"; "Based on these factors … this statute is subject to the restrictions imposed by the constitutional prohibition against ex post fact laws"; "*See, State v. Simnick, 279 Neb. 499, 779 N.W.2nd 335, 340-42 (Neb 2010)* (holding statute authorizing lifetime supervision was impermissible by the ex post facto law as applied to defendant whose crime was committed before the effective date of the statute). "We vacate this part of the defendant's sentence". *See:* State v. Lathrop, N.W.2nd 288 (Iowa 2010. The record will show that on February 8, 2005, IN THE DISTRICT COURT IN AND FOR BLACKHAWK COUNTY; CRIMINAL NO. FECR129311 TRIAL INFORMATION W04-116243 was filed. It stated on or about the 5th day of December, 2004, in Black Hawk County, Iowa did: … [Michael Kelly].

Kelly's alleged criminal act was committed on December 5, 2004, prior to the enactment of the July 1, 2005, Code of Iowa 903B.1 special sentence statute, and therefore cannot be applied to Kelly sentence, it's an ex post facto violation. Kelly ask this court to make the record clear concerning Kelly's sentence. The Iowa District Courts have upheld *Lathrop*. In a resent Motion to Correct Illegal Sentence on reconsideration, a case filed by Timothy Ohm (Criminal No. FECR007940, Motion for Reconsideration dated July 26, 2021, 903B.1 Lifetime Special.) The court reversed its decision and removed the 903B.1 Special Sentence as it violated the ex post facto clause. (Citing, State v. Lathrop, N.W.2nd 288 (Iowa 2010.) The Eighth Circuit err in not granting COA and "In Forma Pauperis."

CONCLUSION

Kelly respectfully prays the reviewing Supreme Court panel grant this request for Writ of Certiorari.

WORD COUNT

Writ of Certiorari word count 4,177.