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No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

STORM N. RIVERA -PETITIONER

VS.

THE PEOPLE OF THE STATE OF NEW YORK-RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

STORM N. RIVERA, # 19A1346

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QUESTIONS PRESENTED

Whether a juror who failed to disclose during jury selection that she was a victim of sexual abuse should have been disqualified after she revealed the information in an emotional outburst during deliberations in a rape prosecution?

Whether County Court's failure to conduct a probing and tactful inquiry to determine if this juror was grossly unqualified constitutes a mode of proceedings error?

Whether defense counsel's ignorance of the proper procedure, and failure to object to the court's insufficient inquiry as to whether the juror was grossly unqualified, constitutes ineffective assistance of counsel?

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 the all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

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 opinion of the United States court of Appeals appears at Appendix _____, to the petition and is

☐ reported at _____, or

☐ has been designated for publication but is not yet reported; or

☐ is unpublished

The opinion of the United States district 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☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☒ reported at _____,

The opinion of the Appellate court appears at Appendix B

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case _____.

☐ 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 February 14, 2023 A copy of that decision appears at Appendix A.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The defendant has the right to the effective assistance of counsel pursuant to the 6th Amendment of the United States Constitution. A defendant also has a right to a fair trial which includes the right to an impartial jury pursuant to the 14th Amendment of the United States Constitution.

STATEMENT OF THE CASE

The defendant relies upon the complete statement of facts as submitted in his Appellate Brief at the Appellate Division Third Department. Specifically relevant to the issues briefed here, at the beginning of the second day of jury deliberations, the foreperson asked to meet with the judge [A249] [A followed by number refers to pages of the trial transcripts]. She revealed that during deliberations the days before, the juror who was in seat six verbally attacked another juror and said that she "had been raped and was a rape victim" [A249]. The foreperson told her that she should not be on the jury and tried to calm the woman down because she was in tears [A249]. Defense counsel asked her if anyone else seemed affected, and the foreperson said she did not know, but that the incident "definitely influenced" her [A251-252].

The court and attorneys discussed how to address the situation, and confirmed that the juror in seat six was Gina Johnson [A254-257]. The court and the attorneys reviewed the information that Johnson had provided on her juror questionnaire [A254-257]. She had not checked the box on the questionnaire to indicate that she had been a victim of a crime, and she did not disclosed that she was a victim when the court had asked the potential juror that question during jury selection [A125, A254-255, A257]. Defense counsel requested that the court specifically ask Johnson about the issue, and the court agreed [A258]. The court then asked each juror whether

anything had happened that would affect his or her ability to assess the evidence impartially [A259-272]. All of the jurors, including Johnson, stated that nothing had happened. Johnson made no mention of the incident that the foreperson had brought to the court's attention [A261-263].

After the court talked to all of the jurors individually, Johnson was brought back in [A271]. The court told her that it had come to their attention that she may have been the victim of a crime at some point in her life [A272]. Johnson responded "[a]s a child" [A272]. The court asked her why she had not indicated that on her juror questionnaire or during jury selection [A272]. Johnson said that "it was my stepdad," and "I wouldn't say it was a crime because nothing was ever proceeded from it" [A272]. Johnson claimed that her experience did not affect her decisions, and explained that she was upset the day before because "so many people...were getting emotionally involved" and making it more personal" [A273]. The court asked her why she did not say anything during jury selection, and she said she did not feel like she was a victim of a crime [A273]. She said that it would not affect her impartiality as a juror [A274]. When the court asked her if she understood why they had to question her, she asked if she could talk to the judge privately [A275]. The court declined, and Johnson said that "[t]he reason this whole thing came

about, and why I spoke of it yesterday, ... I just feel like it's people are taking individual experiences themselves and with their employment, etcetera, etcetera versus - do you know what I mean?" [A275]. The court did not question her further about the outburst, and simply asked her if she could evaluate the proof in an impartial manner. She said that she could [A275-276]. Defense counsel did not pursue the matter further either, stating " I think we're stuck with what her answers are...she hasn't said anything that would make her grossly unqualified to be a juror in this case" [A279]. Later that day the jury found the defendant guilty of rape in the first degree and unlawful imprisonment in the second degree [A280-281].

The defendant subsequently obtained different counsel, who filed a motion pursuant to CPL 330.30 to set aside the verdict [A35-58]. Counsel argued that the verdict should be set aside because prior counsel failed to provide meaningful representation by not seeking to have juror Johnson disqualified and failing to call certain witnesses who would have corroborated the defendant's version of events [A35-58]. The People opposed the motion [A60-80]. The court denied the motion, explaining that defense counsel had moved to disqualify juror Johnson pursuant to CPL 270.35 [A81-84]. The court stated that it had followed the procedure set forth in People V. Buford to determine whether to disqualify Johnson (69 NY2d 209 [1987]) [A82].

On Appeal the majority opinion affirmed the defendant's conviction finding his arguments that the verdict was against the weight of the evidence, the verdict was not based on legally sufficient evidence, that the juror was grossly unqualified, that the defendant was deprived of the effective assistance of counsel, and that the sentence imposed was harsh and excessive, unpersuasive [App. Div. Decision p 6]. One Justice dissented finding that County Court's inquiry did not meet the probing and tactful standard to ensure that the juror could be impartial and would have taken corrective action in the interest of justice to reverse the judgment and order a new trial [App Div Decision p 12].

So that this court can get a full understanding of the juror issue and ineffective assistance of counsel issue petitioner has incorporated all of the facts in his statement of fact in his Appellate Brief herein and alleges them as fully set forth in that brief.

REASONS FOR GRANTING THE PETITION

A defendant has a constitutional right to a fair trial which includes the right to an impartial jury (NY Const. Art 1 §§2, 6; US Const 6th and 14th Amendments). New York Law includes a mechanism for a juror to be dismissed during proceedings. Pursuant to NY CPL 270.35 "if at any time after the trial jury has been sworn and before the rendition of its verdict a juror is unable to continue to serving...from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case...the court must discharge such juror." If deliberation have begun, the defendant must consent in writing" (CPL §270.35[1]). The standard for disqualifying a sworn juror "is satisfied only when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict (People V. Buford, 69 NY2d 290, 298 [1987], citing People V. West, 92 AD2d 620, 622 [1983]). Stated differently, the Court "must be convinced that the juror's knowledge will prevent her from rendering an impartial verdict" (Buford, 69 NY2d at 299). Further, "[t]he court should conduct a probing and tactful inquiry" into the facts of the situation and, in determining whether the juror's state of mind will bear upon his or her deliberations, should carefully weigh the juror's responses and demeanor" (People V. Harris, 99 NY2d 202, 212-213 [2002], citing People V. Buford, 69 NY2d 290).

Grossly Unqualified

In this case, the defendant submits that juror Johnson was grossly unqualified as, not only was she a victim of the exact crime for which the defendant was accused, but her emotional outburst in the deliberation room indicated she actually had a state of mind that prevented her from rendering an impartial verdict (*People V. Chavez*, 275 AD2d 888 [4th Dept. 2000]; see also, *People V. Parilla*, 27 NY3d 400 [2016]). This was not a situation where the juror merely revealed that she had been a victim of a crime that she forgot to disclose. From the foreperson's description, juror Johnson "blurted out" while "verbally attacking one of the other jurors" that she had been raped and she was a rape victim [A249]. The foreperson described juror Johnson as in tears during this incident and described her as very different when she came in the day after the altercation [A250]. The foreperson admitted that "it definitely influenced me" and that another person was just as upset during the incident [A251-252]. The First, Second and Fourth Departments have held a juror "grossly unqualified" for withholding information during voir dire and found the proper remedy to discharge the juror (*People V. Dotson*, 248 AD2d 1004, [4th Dept. 1998]; *People V. Boston*, 182 AD2d 494, 495 1st Dept. 1992] [the juror withheld material facts pertinent to whether she should be challenged for cause]; *People V.*

Pauley, 281 AD223, 226 [4th Dept. 1953] [finding that the rights of the defendants were prejudiced by the false answer and concealment of facts by a juror during voir dire]; People V. Ahmr, 22 AD3d 593, 595 [2d Dept. 2005] [trial court properly discharged a sworn juror who withheld information about his criminal history, and gave misleading account of his conviction when he did come forward]; but see People V. Ellis, 54 AD2d 1052 [3d Dept. 1976].

Probing and Tactful Inquiry

Further, County Court's inquiry cannot be considered "probing and tactful". In fact, County Court's questioning involved asking different versions of whether the juror believe she could remain impartial and completely deferred to her judgment. It is undisputed that juror Johnson did not check the victim box on the juror questionnaire nor respond in the affirmative to the question about being a victim of a crime during voir dire [A125, A252-255, A257]. While the Court polled each juror generally about their ability to remain impartial, it did not specifically ask a probing inquiry about the incident in the jury room [A259-263, 265-272]. Although juror Johnson stated she could remain impartial, her demeanor and actions indicted otherwise and, at a minimum, necessitated a deeper inquiry [A262]. Juror Johnson's continued denial that she was a victim of a crime, at all

indicates a further inability to assess her own impartiality and it was imperative that County Court step in and make that assessment instead of relying on her self awareness of her bias. It was for County Court to determine from this inquiry whether juror Johnson's state of mind prevented her from rendering an impartial verdict. A juror that could not admit this on her juror questionnaire, during voir dire or under indirect questioning was in no position to assess her own impartiality.

When being questioned by County Court, juror Johnson could not clearly answer the question about being a victim of a crime. She stated "I mean yes and no", "I just feel it was - do you know what I mean?" and concluded that she "didn't feel like [she] was a victim of crime" [A272-276]. County Court also never asked her specifically about being a victim of a rape or a sexual assault, only of a crime in general. Ultimately, County Court's inquiry was not tailed to what was necessary in this case. The court based its decision in part on a good feeling about the juror's body language, instead of probing questions [A279]. Further, the court did not place its reasons on the record as requested by People V. Buford, 69 NY2d at 299. In People V. Dotson, under similar facts the Fourth Department reversed and ordered a new trial when a juror disclosed during deliberations that she "was almost raped once herself and County Court

failed to conduct any inquiry (248 AD2d 1004, [4th Dept. 1998]). Here, although County Court conducted some inquiry, it was not probing and tactful, but merely superficial and based upon speculation.

Appellate Court Decision

The Appellate Division, Third Department majority decision did not address the merits of the defendant's argument as it found that the "defendant failed to object, and in fact consented, to the procedure employed by the court and did not move to discharge the juror" [App Div decision p 6]. This reasoning is belied by the defendant's argument that he received Ineffective assistance of counsel. On the record at the precise point for objection, counsel stated "I think maybe we should take a look at some case law...I don't want to have to do this again. I don't think anybody does" [A265]. If juror Johnson had disclosed that she was a victim of rape on her questionnaire or during voir dire, defense counsel could have sought her removal for cause. It is common practice during jury selection for counsel to ask jurors if they have been convicted of a crime or have been the victim of a crime precisely because of the potential for impartiality. Defense counsel further took a position adverse to his client when he admitted "I think we're stuck with what her answers are. I mean she hasn't said

anything that should make her grossly unqualified to be a juror in this case" [A279]. This was precisely the opposite position counsel should have taken. Since deliberations had commenced, without the defendant's consent, a mistrial would have been the only option (see CPL 270.35). In fact, once he obtained new counsel, the defendant argued precisely this in his post-verdict CPL 330.30 motion to set aside the verdict [A35-58].

Mode of Proceeding Error

"A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law" (People V. Patterson, 39 NY2d 288, 295 [1976]). It is submitted that County Court's failure to conduct a proper inquiry in these circumstances constitutes a "mode of proceedings error" and thus the preservation requirement is inapplicable (see People V. Ahmed, 66 NY2d 307, 310 [1985]). An error falling under this category "need not be preserved, and even if consented to, may still present a question of law" (People V. Ahmed, 66 NY2d at 310). The defendant contends that he is entitled to reversal because he is constitutionally entitled to a fair trial by an impartial jury, which he was denied by County Court's failure to conduct a probing and tactful inquiry into the juror's misrepresentation.

It is petitioner's further position that he writ should be granted, because pursuant to the claim of ineffective assistance of trial counsel based upon his actions of not removing juror Johnson based of the facts and circumstances of the case. Thus, pursuant to counsel's actions the state court decision was an unreasonable determination in view of the facts that were presented in the state court proceedings which violated this court's precedent of Strickland V. Washington, 466 U.S. 668 [1984]. Whereas the state falsely claimed that counsel reasons for not removing juror Johnson was dehors the record, when the record clearly demonstrates that counsel had no idea as what was happening and should have been taking the opposition position to protect petitioner's constitutional right to a fair trial.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully Submitted,

StoMR

STORM N. RIVERA

Date: 4/30/23