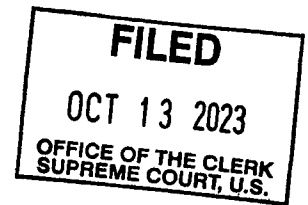


No. 23-5894

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Myron L. Brandon — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Eighth Circuit Court of Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Myron L. Brandon, Reg. No. 19575-030
(Your Name)

Federal Correctional Institution, P.O. Box 7007
(Address)

Marianna, Fl 32447-7007
(City, State, Zip Code)

(850) 526-2313 - Main Prison Number
(Phone Number)

QUESTION(S) PRESENTED

- I. The District Court violated the Defendant's Fifth and Sixth Amendment rights by excluding evidence and Argument under Fed. R. Evid. 412, specifically that one of the alleged victims engaged in prostitution before the alleged crimes in this case and lied during the Investigation.
- II. The District Court erred by denying Defendant's request for Jury instructions concerning the Kidnapping elements of consent before transportation of the alleged victim and withdrawal of consent after initially consenting.
- III. The District Court erred by denying Defendant's request for Jury instructions on the knowledge element to the Counts of Transportation of Minors.
- IV. The District Court erred in allowing the Government to admit certain evidence under Fed. R. Evid. 404(b).
- V. The District Court erred in allowing the Government to admit certain evidence under Fed. R. Evid. 413.
- VI. The District Court erred in denying Defendant's Motion for a new trial.

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 the subject of this petition is as follows:

SEE: Exhibit A

RELATED CASES

Not Applicable - N/A

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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 C to the petition and is

☒ reported at U.S. v. Brandon, Case No. 22-1581; 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 H to the petition and is

☒ reported at U.S. v. Brandon, Case No. 1:20-cr-00013, 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 _____ 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 _____ 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.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 26, 2023. (Mandate Issuance Date)

☒ 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 _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied 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. § 1257(a).

JURISDICTIONAL STATEMENT

The Defendant was charged and tried for two counts of Kidnapping in violation of 18 U.S.C. § 1201(a)(1), 1201(g), and two counts of Transportation of a Minor in violation of 18 U.S.C. § 2423(a). (R. Doc. 124). Because Defendant was charged with an offense against the Laws of the United States, the District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

The Defendant was found guilty of all counts after a jury trial, and judgement on all counts was entered on March 2, 2022. (R. Doc. 171, 215). Pursuant to Rule 3(a)(1) and Rule 4(b)(1)(A)(i) of the Federal Rules of Appellate Procedure, Defendant timely filed a Notice of Appeal to a final order of the District Court on March 15, 2022. (R. Doc. 217). The United States Court of Appeals for the Eighth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

TABLE OF AUTHORITIES CITED

CASES:

Chatwin v. United States, 326 U.S. 455 (1946)
Durns v. United States, 562 F.2d 542 (8th. Cir. 1977)
Faretta v. California, 422 U.S. 806 (1975)
Flores-Figueroa v. United States, 556 U.S. 646 (2009)
Rehaif v. United States, 139 S. Ct. 2191 (2019)
White v. Pence, 961 F.2d 776, 780 (8th. Cir. 1992)
United States v. Arias, 936 F.3d 793 (8th. Cir. 2019)
United States v. Benning, 248 F.3d 772 (8th. Cir. 2001)
United States v. Broeker, 27 F.4th. 1331 (8th. Cir. 2022)
United States v. Buttrick, 432 F.3d 373 (1st. Cir. 2005)
United States v. Campos, 306 F.3d 577 (8th. Cir. 2002)
United States v. Crow Eagle, 705 F.3d 325 (8th. Cir. 2013)
United States v. Foster, 344 F.3d 799 (8th. Cir. 2003)
United States v. Has No Horse, 11 F.3d 104 (8th. Cir. 1993)
United States v. Hernandez-Orozco, 151 F.3d 866 (8th. Cir. 1998)
United States v. Holy Bull, 613 F.3d 871 (8th. Cir. 2010)
United States v. Lacy, 904 F.3d 889 (10th. Cir. 2018)
United States v. McCabe, 812 F.2d 1060 (8th. Cir. 1986)
United States v. Monds, 945 F.3d 1049 (8th. Cir. 2019)
United States v. Never Misses A Shot, 781 F.3d 1017 (8th. Cir. 2015)
United States v. Pumpkin Seed, 572 F.3d 552 (8th. Cir. 2009)
United States v. Riepe, 858 F.3d 552 (8th. Cir. 2017)
United States v. Toledo, 985 F.2d 1462 (10th. Cir. 1993)
United States v. Tyson, 947 F.3d 139 (3d. Cir. 2020)
United States v. Walker, 428 F.3d 1165 (8th. Cir. 2005)
United States v. Warren, 951 F.3d 946 (8th. Cir. 2020)
United States v. White, 557 F.3d 855, 857 (8th. Cir. 2009)
United States v. Williams, 796 F.3d 951 (8th. Cir. 2015)
United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994)
United States v. Young, 613 F.3d 735 (8th. Cir. 2010)
United States v. Zaphier, 989 F.3d 629 (8th. Cir. 2021)

STATUTES:

18 U.S.C. § 922(g)
18 U.S.C. § 924(a)
18 U.S.C. § 1201(a)(1)
18 U.S.C. § 1201(g)
18 U.S.C. § 2423(a)
18 U.S.C. § 3231
28 U.S.C. § 1291

RULES:

Fed. R. App. P. 3(a)(1)
Fed. R. App. P. 4(b)(1)(A)(i)
Fed. R. Crim. P. 33(a)
Fed. R. Evid. 403
Fed. R. Evid. 404(b)
Fed. R. Evid. 412
Fed. R. Evid. 413

OTHER AUTHORITIES:

9 Wigmore on Evidence (3d ed.) § 2514
8th. Cir. Model Crim. Jury Inst. 6.18.1201, Committee Comments
U.S. Const. amend. V
U.S. Const. amend. VI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment V

U.S. Constitutional Amendment VI

18 U.S.C. § 922(g)

18 U.S.C. § 924(a)

18 U.S.C. § 1201(a)(1)

18 U.S.C. § 2423(a)

18 U.S.C. § 3231

28 U.S.C. § 1291

STATEMENT OF THE CASE

The charges against the Defendant stem from an allegation by Sharyce Smith and Sara Sevey that they engaged in a non-consensual Sexual encounter with at least one unknown man beginning the evening of June 21, 2003, and carrying over into the early hours of the following day. Ms. Smith was 15 years of age and Ms. Sevey was 14 years of age on these dates. (Tr. 35:3-12).¹

The Government sought to prove their case by calling 24 witnesses and presenting 74 Exhibits. (R. Doc. 167, 175-1 to 175-74). The evidence established that Ms. Smith and Ms. Sevey were picked up on the side of Interstate 29 near Council Bluffs, Iowa in the early morning hours of a June day in 2003. (Tr. 178:10-14, 179:1-9, 192:4-18). Ms. Smith and Ms. Sevey were described as looking distressed and injured. (Tr. 192:20-25, 193:1-21). They were also noted to each have a burn mark on the breast area. (R. Doc. 175-1 at 4, 175-3 at 4). The evidence established that DNA matching the Defendant was recovered from a vaginal swab taken from Ms. Smith during collection of a sex assault kit on June 22, 2003. (Tr. 262:18-24, 448:4-25, 449:1-4). Ms. Sevey told medical personnel on June 22, 2003 that her kidnapper had penetrated her vaginally, orally, and anally, however no DNA evidence tied the Defendant to oral swabs taken from Ms. Sevey. (R. Doc. 175-3 at 10; Tr. 270:18-23). No vaginal swab was taken from Ms. Sevey, despite a sex assault kit being collected and submitted for analysis. (Tr. 173:7-25, 174:1, 270:24-25, 271:1-4).

1. "Tr." refers to the trial transcript at R. Doc. 187, 188, and 190, followed by the page number and line numbers. "R. Doc." refers to the district court docket in case number 1:20-cr-00013, and each reference is followed by the docket entry number and page number of the Cited information.

Testimony during the Trial established that sperm cells (like those identified as containing the Defendant's DNA in this case) can be detected in a vaginal tract up to five days, and that no more precise timeframe could be established in this case based on the physical evidence. (Tr. 271:5-24).

Neither during the investigation nor at trial did Ms. Smith or Ms. Sevey ever identify Defendant as the person who kidnapped and transported them on June 21-22, 2003.

The majority of the Government's remaining case concerning the events of June 21-22, 2003 came from the testimony of Ms. Sevey and Ms. Smith at trial (Tr. 55-116, 116-160), as well transcripts of their interviews with law enforcement on June 22, 2003. (R. Doc. 175-63, 175-64, 175-65). Their interviews to law enforcement on June 22, 2003 dramatically contradicted other statements they made to medical personnel on the same date, and contradicted their testimony at trial.

Ms. Smith first told medical staff on June 22, 2003 that she and Ms. Sevey had been forced into a truck by two men, that one was white with blond hair and blue eyes, the other white with brown hair and brown eyes. (R. Doc. 175-1 at 12-13). Ms. Smith told police later that day that she had willingly gotten into a truck with Ms. Sevey and a single male named Jonathan after Ms. Sevey initiated a conversation with him. (R. Doc. 175-63 at 4-5).

Ms. Sevey first told Medical Staff on June 22, 2003 that she and Ms. Smith willingly got into a male's truck in order to get a ride home. (R. Doc. 175-3 at 10). She later told police that she and Ms. Smith got into the truck of an unknown male after Ms. Smith asked the male for a ride without a particular destination. (R. Doc.

175-64 at 3).

During her interviews with hospital personnel and law enforcement on June 22, 2003, Ms. Smith denied the perpetrator anally penetrated her but stated he vaginally penetrated her. (R. Doc. 175-1 at 12-13, 175-63 at 17). Yet at trial, Ms. Smith testified that she was anally penetrated during the encounter, but denied she was vaginally penetrated. (Tr. 67:11-18).

According to their testimony, Ms. Smith and Ms. Sevey entered a truck in Omaha, Nebraska prior to being kidnapped. (Tr. 73:2-8, 119:6-20). According to Ms. Smith's statement to police on June 22, 2003, after getting into the truck they were transported to Bellevue where they engaged in sexual activity with a man. (R. Doc. 175-3 at 10). She later told police that their assailant transported them to Council Bluffs. (R. Doc. 175-65 at 1). Testimony was given at trial that Bellevue is in Nebraska and Council Bluffs is in Iowa. (Tr. 341:3-25, 342:1-5).

In her conversation with police on June 22, 2003, Ms. Sevey initially denied talking about sex with the male driver or asking for money in exchange for sex with the male driver. (R. Doc. 175-64 at 4). However they later admitted during their statement to police on June 22, 2003 that Ms. Smith and Ms. Sevey got into a vehicle on June 21, 2003 with the expectation of being paid by the male driver for sexual services. (R. Doc. 175-63 at 7-8, 175-64 at 4-5 and 10). Despite these statements to police on June 22, 2003 confirming an agreement of sex for money, both Ms. Smith and Ms. Sevey initially denied such an agreement during their trial testimony. (Tr. 73:16-18, 155:25-156:1-5).

It also became clear that Ms. Sevey had a history of engaging in prostitution, and had told Ms. Smith that this was a way they could get money on the night of June 21, 2003. (R. Doc. 56-5 at 7; redacted at R. Doc. 174-63 at 7). Both Ms. Smith and Ms. Sevey told police in their June 22, 2003 interviews that they received no payment from the man they had sex with. (R. Doc. 174-63 at 8, 174-64 at 9).

After direct questioning by police during the same interview, Ms. Sevey stated that she had a "boyfriend", and identified him as "Pringo." (R. Doc. 174-65 at 4). During trial, retired Detective Shayna Ray testified that pimps in the Omaha area around that time were identified by their prostitutes as "boyfriends", and that prostitutes were both afraid of and dependent on their pimps. (Tr. 313:20-25, 314:1-15).

There was testimony at trial that Ms. Smith and Ms. Sevey, after being picked up by passers-by on the side of Interstate 29, refused the offer to be dropped off at a hospital, and asked to be dropped off at an apparently unoccupied apartment. (Tr. 187:10-20, 188:1-8).

The Defense sought to argue to the jury a theory of the case that Ms. Smith and Ms. Sevey were prostitutes who were not paid by their customer for sexual services performed in Bellevue, Nebraska some time prior to June 22, 2003, and were then assaulted by their pimp and left in Iowa on June 22, 2003 out of retribution. The district court sustained a motion by the Government to prevent the Defense from arguing this theory. (Tr. 465:8 through 471:2).

The Court also denied the request by the Defense to present evidence under Fed. R. Evid. 412 that Ms. Sevey had engaged in sex for money before June 21, 2003. (R. Doc. 137 at 2-12; R. Doc. 56-5 at 7). This evidence was offered in support of the above Defense theory of the case, specifically that Ms. Sevey may have lied to hide the identity of their assailant, who might even have been a "pimp who was angry that [Ms. Sevey] did not obtain money from Mr. Brandon for her prostitution services." (R. Doc. 119-1 at 5-6).

The Defense requested additional jury instructions on consent and the transportation elements regarding the kidnapping counts, which were denied by the Court. (R. Doc. 118 at 16-18, R. Doc. 172; Tr. 473:10 through 475:11).

The Defense requested an addition of a knowledge requirement to the third element of the jury instruction for the Transportation of Minors counts, which was denied by the Court. (R. Doc. 118 at 19-20, R. Doc. 172 at 16-17).

Despite the multiple contradictions of the witnesses and evidence, the district court's failure to instruct the jury about the timing of withdrawal of consent in the kidnapping counts, and the district court's refusal to allow Defendant to argue an alternate theory of the evidence to the jury during closing arguments, the district court denied the Defendant's motion for a new trial. (R. Doc. 207 at 13-20).

The Government presented testimony and evidence at trial that the Defendant was convicted in 2004 for kidnapping a different teenage girl at knifepoint. (Tr. 344:17 through 360:16; 316:23 through 326:1-15). The Government also presented evidence that the

Defendant was seen attempting to kidnap another female in 2003 with a knife, but was not prosecuted for that action. (Tr. 404:23 through 408:9). Both of these incidents were allowed into evidence under Fed. R. Evid. 404(b), over the Defendant's objection (R. Doc. 137 at 19-24 and 34-35).

The government also introduced evidence that the Defendant had been convicted of sexually abusing his teenage niece in 2004. (365:10 through 369:17). The district court allowed this into evidence under Fed. R. Evid. 413, over the Defendant's objection. (R. Doc. 137 at 19-24).

REASONS FOR GRANTING THE PETITION

1. The Eighth Circuit Court of Appeals' Ruling is in Opposition to this Courts' long-standing Jurisprudence in both Holmes v. South Carolina, 547 U.S. 319 (2006) and Crane v. Kentucky, 476 U.S. 683 (1986) and requires this Courts' reaffirming of its prior Rulings.

2. The Eighth Circuit Court of Appeals' Ruling in Affirming the District Courts' Denial of the Defendant's Right under the Confrontation Clause of the Sixth Amendment to Confront and Cross-Examine adverse witnesses is in Opposition to this Courts' long-standing Jurisprudence in United States v. Owens, 484 U.S. 554 (1988) and requires this Courts' reaffirmation of its prior Rulings.

3. The District Court and Eighth Circuit Court of Appeals erred in refusing to grant the Defendant's Motion for a New Trial after the Jury returned a verdict of Guilty on all Counts.

The Standard of Review for a District Court's Denial of a Motion for a New Trial is an abuse of discretion. United States v. Broeker, 27 F. 4th 1331, 1335 (8th. Cir. 2022). The District Court mat Order a New Trial "If the Interest of Justice so requires." Fed. R. Crim. P. 33(a). The District Court may "weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict." United States v. Campos, 306 F.3d 577, 579 (8th. Cir. 2002)(quoting White v. Pence, 961 F.2d 776, 780 (8th. Cir. 1992)).

REASONS FOR GRANTING THE PETITION

The Defendant timely moved the District Court under Fed. R. Crim. P. 33(a) for a new trial in this case. (R. Doc. 185, 185-1). The Defendant asked the District Court to review the evidence, as well as the District Court's Denial of the Defendant's request for an instruction on consent for the kidnapping offense (discussed supra at 21-28), and the District Court's ruling precluding the Defendant from arguing a theory of the case at closing argument concerning a pimp as an alternate explanation for who caused the injuries to the victims in this case (discussed supra at 15-16, 20).

In his Rule 33 Motion, the Defendant pointed out the incongruities between the statements of Ms. Smith and Ms. Sevey with one another and with their statements given at the time. Ms. Smith initially told medical personnel that two people had kidnapped her and Ms. Sevey by forcing them into a car. (Doc. No. 175-1 at 12-13). Ms. Smith even provided a description of the two men as being white, one with blonde hair blue eyes and the other with brown hair and brown eyes. (Id). Ms. Smith told Police later that day that she had willingly gotten into a truck with Ms. Sevey and a single male named Jonathan after Ms. Sevey initiated a conversation with him. (R. Doc. 175-63 at 4-5).

During her interviews with hospital personnel and law enforcement on June 22, 2003, Ms. Smith denied the perpetrator anally penetrated her but stated he vaginally penetrated her. (R. Doc. 175-1 at 12-13, 175-63 at 17). Yet at trial, Ms. Smith testified that she was anally penetrated during the encounter, but denied she

REASONS FOR GRANTING THE PETITION

was vaginally penetrated. (Tr. 67:11-18).

In her conversation with police on June 22, 2003, Ms. Sevey initially denied talking about sex with the male driver or asking for money in exchange for sex with the male driver. (R. Doc. 175-64 at 4). However, what became clear during their interviews with Police on June 22, 2003, is that Ms. Smith and Ms. Sevey got into a vehicle around June 21, 2003 with the expectation of being paid by the male driver for sexual services. (R. Doc. 175-63 at 7-8, 175-64 at 4-5 and 10). Despite these statements to police on June 22, 2003 confirming an agreement of sex for money, both Ms. Smith and Ms. Sevey initially denied such an agreement during their Trial Testimony. (Tr. 73:16-18, 155:25-156:1-5).

Ms. Sevey's June 22, 2003 statements to police and medical personnel included no mention of using a knife to escape bonds that the perpetrator allegedly tied her with. (SEE: R. Doc. 175-3, 175-64, 175-65). Ms. Sevey admitted she didn't say anything about the knife to anyone in 2003. (152:13-17).

The District Court dismissed the incongruities in the testimony of Ms. Smith and Ms. Sevey with each other and the other evidence at trial, stating that none of those matters are "material to the elements of the offenses for which the Jury convicted Defendant." (R. Doc. 207 at 15). Even if that is true, that statement shows the District Court did not take into account Ms. Sevey and Ms. Smith's inconsistencies with an eye toward whether or not they had implicated the correct person.

REASONS FOR GRANTING THE PETITION

Of course. the Defendant could not argue the alternate explanation which would posit a reason for the fabrication of Ms. Smith and Ms. Sevey because of the District Court's Ruling precluding the Defendant from arguing that reason to the Jury. The District Court also failed to weigh whether and to what extent those inconsistencies may have impacted Ms. Smith and Ms. Sevey's veracity when discussing at what points in time they consented to go with the man in the black truck, as they alleged.

The Defendant requests this Court find that the District Court abused its discretion in failing to grant the Defendant's Motion for a New Trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Mym Branda

Date: October 13, 2023