23-6611

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Morice Ervin - Petitioner;

v.

State of Indiana - Respondent;

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

Morice Ervin, *Pro Se*
DOC# 110724
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

QUESTIONS PRESENTED

1. Whether petitioner's Due process – 14th Amendment of the Federal Constitution was violated by allowing post autopsy?

2. Whether petitioner's Due process of the Federal Constitution violated when evidence so lack of correlating evidence?

3. Whether petitioner's Due process of the Federal Constitution was violated when the state deliberately misquoted the professional expert witness testimony to obtain/ a tainted conviction?

4. Whether petitioner's Due Process constitutional rights violated when the state fail to provide evidence favorable to petitioner?

5. Whether petitioner's Fifth Amendment constitutional rights violated when he was subject to the same offense?

6. Whether petitioner's Federal Constitutional rights violated when state discriminated against petitioner by prejudicial questioning?

7. Whether there is the likelihood that the jury has applied the challenge instruction in a way that violates the Federal Constitution – Due Process Clause - Right to a fair Trial?

8. Were petitioner constitutional rights violated when trial judge showed indifference to ongoing conflict with petitioner and appointed counsel?

9. Whether the counsel's unprofessional errors upset the adversarial balance violates the Federal Constitution – Right to Counsel?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

X - 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:

Petitioner, pro se

Morice Ervin, #110724

For Respondent:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

O9/11/2015 Conviction, Murder, Rape; Marion County, IN 49G01-1406-031398

07/22/2016 Direct Appeal, affirm; Ervin v. State, 59 N.E. 3d 1104 /Transfer denied; Ervin v State, 60 N.E. 3d 1039

01/04/2022 Post-Conviction Relief; denied; Marion County, IN 49D27-1907-PC-026686

04/24/2023 Appeal, demised; 22A-PC-2357

06/29/2023 Petition for Rehearing; denied; 22A-PC0-2357

11/08/2023 Petition for Transfer

JURISDICTION

☐ For cases from **federal courts**: N/A

The date on which the United States court of appeals decided my case was: N/A
A copy of that decision appears at Appendix N/A.

X For cases from **state courts**:

The date on which the highest state court decided my case was November 28, 2023.
A copy of that decision appears at Appendix E.

☐ No petition for rehearing was timely filed in my case.

X A timely petition for rehearing was denied on the following date: June 29 2023, and a copy of the order denying rehearing appears at Appendix.

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

CONSTITUTIONAL PROVISIONS AND STATUTES

Due Process – 14th Amendment of Federal Constitution
United States Constitution, 1:14
U.S.C.S Fourth Amendment
United States Constitution Clause of the Fifth Amendment
U.S.C.S Sixth Amendment
U.S.C.S. Eighth and Fourteenth Amendment
U.S.C.S. Const. Amend – Unreasonable Search and Seizure
U.S.C.S. Statutory and Common LLAWA
288 U.S.C. 2245 (d)(1)
U.S.C.S Fourteenth Amendment - Double-Jeopardy

STATEMENT OF THE CASE

On June 11, 2014, petitioner was convicted of a felony murder and rape. On September 11, 2015, he was found to a habitual offender, sentence to 135 years, the max on all charges.

Trial counsel put forth little to no effort in challenging the charges, his representation fail the pongs set forth by Strickland v. Washington. On appeal, the appellant counsel fails to understand the rudiment of law that surrounded the 14th amendment "the double jeopardy clause", or Doctrine of Amelioration as it relates. The direct appeal was affirming and transfer denied on 07/22/2016. Petitioner pro se, post-conviction petition included I.E.C. violations. An evidentiary hearing was on two occasion beginning 4/13/2021 and concluding 7/06/21. During the hearing, trial counsel admitted to errors which could been avoided, that he made during trial. The court invited both parties to submit "Finding of Fact and Conclusion of Law, petitioner took advantage of the opportunity where the state did not find it necessary.

The court failed to notify petitioner of the decision of 01/04/22 and allowed petitioner to file several motion: 3/30/2022 "Memorandum for the Opportunity to File a Reply Brief of the Finding of Facts and Conclusion', the court granted the request; 8/10/2022 "Belated Motion to Correct Errors" where the clerk or court had not serve a copy of the court order on "Post-Conviction Relief", which Trial R. 72(e) plainly state, if the (CCS) Chronological Case Summary does not contain evidence that a copy of the courts entry was sent to each party it is appropriate that the court grant an extension of 30 days to file a belated motion to correct error, this was denied 8/25/2022; 8/30/2022 "Motion to Correct Error, along with the 'Affidavit to Motion to Correct Error being denied 9/11/2022.

Petitioner did not receive the order denying post-conviction relief until 8/29/2022, this was 8 months after the decision. The order was contrary to rule of law in that no specifics were address to each issue raised. The court failed to follow Post-Conviction R. 1 § 6 and provide specific

finding of facts and conclusion of law on all issues Penley v. Penley, 145 N.E. 3d. 874. Petitioner diligently, during the eight months put forth every effort in communicating with the court. 7/13/2022, "Motion to Know the Status on the Finding of Fact and Conclusion of Law, he finally received the notice of denial 8/29/2022. 10/03/2022 "Notice of Appeal with request of Transcript and 45 days to prepare a Brief" this was granted on 11/09/2022. The state filed a "Verified Motion to Dismiss" the court granted the motion. 5/24/2023 "Petition for Rehearing" being denied on 6/29/2023 Petition for Transfer was denied on 11\28/2023. Now petitioner seek relief on his "Petition for Writ of Certiorari".

REASONS FOR GRANTING THE WRIT

ARGUMENT

1. Photograph was admitted in contingent upon its potential for displaying more than the state of the victim's body at the time it was discovered, [Tr. Ex. 27, 28, 31,147,151]. Such a display may impute the handiwork of the physician to the accused assailant and thereby render the defendant responsible in the minds of the jurors for the cuts, incisions, and indignity of an autopsy [Spears v. Mullins, 343 F. 3d 1215].
2. Expert witness Dr. Sozio would show that the consent was a possibility, that [Tr. Pp. 256 line 19 – p. 257 line 5; and p. 359 line 1-4]. "That's a possibility" leaving room for doubt, which benefit belongs to the defendant, [Jury Inst. 7, 8, 9, 19 and 23]. According to evidence guilt was lacking, because evidence suggest a third party could have been the actual shooter. If a dangerous weapon (including a firearm) the Government must prove, by a preponderance of the evidence, that petitioner actually possessed the weapon. [Francis v. Franklin, 471 U.S. 307]. Possibility that petitioner was even present at the moment the shots was fire was highly improbable.
3. The question before us is whether the prosecutor's statements during closing argument that the presumption of innocence was now "over" amounted to prosecutorial misconduct in violation of due process under *Darden v. Wainwright*,

477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986). The prosecutor has the responsibility and duty to correct what he knows to be false in this case the statement "Morice Ervin, brutally rape Shannon, he took her to the basement, laid her on the cold cement floor where he terrorized her. He brutally raped her. And so that she could not talk, he blew her off" (Trial Tr. P. 490 line 18 - 23) a statement by the state to contrived a conviction through the pretense of trial which in truth is but used as a means of depriving a petitioner of liberty, a deliberate deception to court and jury by the presentation of testimony know to be perjured. [Mooney v. Holohan, 294 U. S, 103, 112, 555 S.Ct]. The statement was in the extent of being harmful, by misstating a key witness testimony affected petitioner substantial rights [United States v. Carter, 236 F.3d 777]. The issue is clarity of language use with the context of the statement thereof, to have an impact on juror's beings mislead to believe the statement was true. This statement may have been acceptable in the opening statement to let the jurors know what the charges bring brought against petitioner, but it was made in the closing where the statement proves to be harmful and violating his constitutional to due process. [Thompson v. Calderon, 120 F. 3d 1045].

4. The state brought into evidence pictures of green sheets that was found in the laundry area but fail to process this evidence, which could prove to be favorable to the petitioner violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. According to Ms. Kleeman report to Det. Flack in his report [DP14 -32-147, p. 4 of 21; p. 178 line 17-5] "that is seemed strange that Shannon wanted to change the green sheet." So it is reasonable that the question is to why Shannon wanted to change the bedding, the possibility of shame and covering up of what would been unapproved. It would be reason to any jury to believe Ms. Kleeman knew her

Step daughter who she raised as her own as any parent would know when the child is hiding something. So the question to why she wanted to change the green sheet must be answered. This would prove to align with the victim Fetal Alcohol Syndrome (F.A.S.), being that the defects of the disorder would include, but not limited to: inappropriate behavior; lying; remorsefulness, aggressive fullness and facial impairment of some kind. The state fail to process the green sheet for properties that may been in favor of petitioner. By not processing the green bedding that was in the laundry area which Ms. Jenny Kleeman, the victim stepmother's statement to Det. Flack [DP14-32147 of p. 4 of 21] violated petitioner Due Process (Brady v. Maryland, 373 U.S. 83).

5. The same injury cause by the operation of a weapon, violated petitioner Due Process. [Holloway v State, 773]. The court violated his due process right to fair trial by erroneously admitting "other act evidence" of an un-adjudicated murder and rape, because the state made an unreasonable determination of facts in linking the two crimes, and apparently failed to consider the entire record, and the admission of the evidence deprived petitioner of fundamentally fair trial in violation of his due process rights and prejudice him. [Kipp v. Davis, 971 F.3d 939]. Ms. Robinson claim that the murder and rape was interrelated to show the closeness of the shot, as being the murder was in commission of rape. [Tr. 227 line 2-7], this would be a felony murder, not just murder which he been convicted. The lack of correlating evidence of murder alleged that the petitioner murder while engage in perpetration of a felony. Which violates Ind. Const. art 1, Subsection 14. [Summit v. Blackburn, 795 F.2d 1237]. The Supreme Court mandated, the charges of murder and rape with S.B.I., enhanced and elevated by the same injuries conduct and /or same set of operative circumstances is inconsistent with case-law and averse to decision made by the

Indiana Supreme Court – must be resentence. [United States Constitution, Art 1:14 – Statutory Construction and Common LLAWA], and [288 U.S.C. Subsection 2245 (d)(1)] "contrary to clause" to the Sixth Amendments in which the court would require to vacated the murder, Statutory Construction error [Whalen v. United State 455]. Because the State did not properly submit to the jury or prove beyond reasonable doubt the fact that petitioner actually possessed a deadly weapon as describe in Francis v. Franklin, 471 U.S. 307, 316, 85 L.Ed. 2d 344, 105 S.Ct 1965; Cage v. Louisiana, 498 US 39– as evidence, by the jury finding guilt base on the principal theory, knowing where a weapon is kept or loading a weapon in past fall short of the present event at hand. Petitioner sentence was contrary to establish constitution law, as set forth in Apprendi and subsequent cases, and violated petitioner constitutional rights under the Fifth and Sixth Amendment.

6. The prosecution asked the petitioner age to show the significance in the difference how inappropriate the difference of ages being that petitioner was 51 and the victim 21, this perjured the jury. [Hall v. United States, 419 F.2d 585-86].

7. The jury instruction was unconstitutional, because of reasonable likelihood that the jury understood the instruction to allow conviction without proof of reasonable doubt. There was reasonable possibility that the same evidence used by the jury to establish the element of rape was also included among the same element of the murder. [Hines v. State, 30 N.E.3d 1216] in violation of Ind. Const. art. 1, Subsection 14. Showed a reasonable possibility that the jury used acts of murder occurring in the basement as the used the sexual activity in the bedroom as there was the victim bra found on the floor. [Miske v. State, 142 N.E.3d 439]. There is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard "which requires

the government to prove every element of a charged offense beyond a reasonable doubt, *Winship*, 397 U.S. at 364. The Jury was instructed "if the evidence lends itself to two reasonable interpretations, you must choose the interpretation consistent with the defendant's innocence". The evidence must overcome any reasonable doubt concerning the defendant guilt. The state failed short of overcoming all burden as instruction deem to be necessary. The evidence presented was insufficient of guilt beyond responsible doubt due to the possibility of third person, and blood DNA shows signs of another [Lab14 01771 item 004.001 and Tr. P. 339 line 29 – p. 340 line 8]. The jury lost their way, they should had a reasonable doubt as to whether petitioner possessed the missing, unprocessed firearm [Francis v. Franklin, 471 U.S. 307, 316, 85 L.Ed. 2d 344, 105 S.Ct 196 see also, Cage v. Louisiana, 498 US 39]. The Due Process Clause of the U.S. Const. amend XIV require that a jury on the basis of proof beyond reasonable doubt make a factual determination [Apprendi v. New Jersey, 530 US 466]. The evidence on the part of the state did not prove every element of the crime charged against the defendant beyond a reasonable doubt, the evidence on the part of the defendant was sufficient to raise a reasonable doubt of the establishment of any essential element of the crime, the defendant should be acquitted. Fritz v. State, 178 Ind. 463, 99 N.E. 727, 1912 Ind. LEXIS 111 (Ind. 1912);

8. In the beginning of trial, the trial court asked was there any preliminary issues. (Tr. 6 line 14-17). Jaffe answered "no" even though the petitioner made him aware that through motion to "sever of charges" through a motion sent to the Honorable Judge Eisgruber, which he received a copy, but never communicated with petitioner, to allow petitioner to have input in his own defense or asked for a lessor included offense instruction, his action affected the verdict. Petition requested through letters to the Honorable Judge Eisgruber

to substitute counsel due to lack of communication, the breakdown in communication were irreversible differences did exist. [Tr. 4 line 4 line 14 through 5 line 2], but of no avail denying petitioner request to substitute counsel without making the requisite inquiry as in [Harrison v. Anderson, 300 F. Supp 2d 690]. Court abused its discretion and deprived petitioner of his Sixth amendment right to counsel see also [United States v. Nguyen, 262 F.3d 998].

9. The State filed the "Intent to File the habitual" as well as the actual "Habitual" on the same day of January 21, 2015, at 155 days after the omnibus date, after the allowed 10-day period without good cause govern by [Subsection 35-34-1-5(c); Subsection 35-34-1-5(e). which was law at time of charges filed on June 11, 2014, which was in affect and all proceedings was to by. Jaffe did not challenge the habitual, but allowed the state to file the habitual 155 days post the omnibus date without "good cause. Jaffe at the evidential hearing just said it would have read as just sort of formality. That basically putting us on notice. It's sort of -- half the time it's not even done by the actual prosecutor, it's just someone that's prosecuting the case, it's just someone coming in looking at the paperwork and notice you're habitual eligible, filing it mean – I mean it's not a significant move when it's happens". [Evid Hr. Tr. P. 36 line 6 - line 1 -7] which the rule tells us differently, if the state failed to file the habitual within the 10 days without good cause they forfeit their opportunity to do so latter, this is a matter of law. Counsel negate the central issue in petitioner case a misunderstanding which could be corrected with minimal effort. [Smith v. Dretka, 417 F.3d 438]; failure to investigate the existence compliance deprived petitioner of effective counsel. By not objecting to the prosecution misleading the jurors by giving false unsworn statement. Jaffe did not object to the misleading statement of the state who

taking on the role of the "fact-finder, by saying the petitioner 'Morice Ervin, brutally rape ... and blew her head off". Mr. Jaffe did not object to either to bring light the misconduct of the prosecution but went along with the state allowing the jurors to retire with the state view. The misleading the jury affected petitioner's substantial rights. [United States v. Carter, 236 F.3d 777]. The Statement must be true itself, the fact that blood sample with the victim's and an unknown female assailant places doubt, because evidence lends itself to another possibility also see Hall v. United States, Supra 419 F.2d 587. He did not object to the prosecution asking the petitioner age to show the significance in the difference how inappropriate the difference of ages being that petitioner was 51 and the victim 21, this perjured the jury. Jaffe, failure to object to the improper and prejudicial questioning which was inflammatory, because it focusses undue attention on age difference between the petitioner and victim. [Hall v. United States, Supra 419 F.2d 587]. The prosecution claims to have to priors, there were discrepancies in the paper work. Even though, Mr. Jaffe had the resources to secure expert to affirm or denied the identity of the fingerprints used to convict petitioner of the habitual he failed to do so (Evid. Hr. Tr. P. 18 line 21 – page 29 line1). The prosecution order of additional prints on the same date of filing the habitual. There was discrepancies' in the priors' information. The finger prints were order on January 21, but was not taken until eight months later, the night before habitual hearing. Jaffe did not question the syllogistic reasoning behind the delay, or did he secure an expert to view the prints at time of filing eight months earlier. A red flag was required in violation of petitioner rights' to be secure in person violating his fourth amendment [U.S.C.S. Const. Amend – Unreasonable Search and Seizure. The order of fingerprint was improper, since the prosecution already allegedly had what was required. Mr. Jaffe challenged the photos

of the crime scene with no effort, objecting with no cause to why these photo should not be permitted, just saying they were gory no other defense, no case-law recited, no rules of court to show a good defense which he admitted during the evidentiary hearing there are many case laws. [Tr. 223 line 19-25; 225 line 5-9; 2228 line 5-8]. Jaffe discussed the photos with the prosecuting attorney prior to trial and had time to research a defense, but decided not to do so. At the evidentiary hearing, the appellant counsel testified that the petition could only use the merit of abuse of discretion, because of the gory photographs, because the trial could did not challenge any other charges count I or count II, the only thing was challenge was the gory photographs of the crime scene. Jaffe did not prepare a proper defense, even though he discusses the photograph with the state prior to trial. No research on why the photos should be inadmissible. At the evidentiary hearing the reason he gave was there a lot of case-law indicating his laziness to research them, put the petitioner in danger of an unfair prejudice of trial due to the photos outweighed the probative evidence which deprived the petitioner of a fundamentally sentencing as granted by the Eighth and Fourteenth Amendment [Spears V. Mullins, U.S. 343 F. 3d 1215] also see Rule of Evid. 403, 603. Petitioner ask why he did not cite case-law, statutes or rule for the post-autopsy photographs and ask why, he gave the explanation 'unless they show that body was altered they would not be admissible, but actually in this case the face was sewn together being altered, the incision, cuts altered the appearance. [Evid. Tr. P. 35 line 16-24; Tr. 223 line 1925; p. 225 line 5-9 and p. 228 line 5-8]. On cross-examination defense counsel, Jaffe proves to be prejudice against petitioner when he declines in questioning Mrs. Ervin, [Smith v. Dretke, 417 F. 3d 438] [Tr.p. 217 line 17- 22 Trial Tr. P. 217 line 17 – 22], even though the discovery would have showed she could be used as an alibi witness,

she told Det. Flack petitioner was home sleep at time of disturbance [DP14-32147], [Tr. 217 line 17-19]. When petitioner question Jaffe during the evidentiary hearing why he did not cross-examine Mary Ervin to show that the possibility he was not present at the time of the murder, because the discovery which he was so well-adverse knowing showed that she could have testified to petitioner whereabouts. Jaffe agreed that it could been an alibi defense [Evd. Tr. Hr. P. 34 line 1 – 24;] even, though being well-adverse about the discovery, this important and viable factor eluded as well as the "third party theory". The failure to call alibi witness, was unreasonable that no competent attorney would have made it. [Smith v. Dretke, 417 F.3d 438; Jaynes v. Grace] violation under the fourteenth amendment. Petitioner asks Jaffe during the evidentiary hearing why he did not use the third party theory when he know it was a good defense [Evid. Hr. Tr. P. 39 line 8 – p. 40 line 24], that it would open doors and possibilities, Jaffe decide not to use the third party defense [Evid. Hr. Tr. P. 28 line 15-19]. Jaffe did not prepare a strategy, or even asked for jury instruction on a lesser offense as the jurors seen it was necessary for one to be included one [TR. 6 line 14-17; Freeman v. Class, 95 F.3d 639]. Failure to research the victim mental capacity as it pertains to F.A.S. where he could of challenge some degree of Count II (rape) such failure was highly prejudicial to the petitioner to the extent that the fundamental fairness of the proceeding and the conviction was undermined and that had the jury been properly instructed, there was strong probability that the result of the trial would have been different. In the beginning of trial, the trial court asked was there any preliminary issues. [Tr. 6 line 14-17; p. 4 line 14; 6 line 1- 8]. Jaffe answered "no" even though the petitioner made him aware that through motion to "sever of charges" through a motion sent to the Honorable Judge Eisgruber, which he received a copy, but never

communicated with petitioner, to allow petitioner to have input in his own defense or asked for a lessor included offense instruction. Jaffe claim he did not recall the motion to severe charges, but goes to say "that it was a stupid motion and would not have filed it [Evid. Tr. P. 24 line 2 – 13] his action affected the verdict, and denied petitioner his entitlement of I.C. Subsection 35-34-1-11(a). The deficient performance of counsel performance affected the verdict [Thompson v. Calderon, 120 F.3d 1045; Strickland v Washington, 466 U.S. at 699]. The conviction for murder committed in the course of rape would not been possible without proving the element of rape. Jaffe admits not challenging the constitutionality of count II [Evid. Tr. 29 line 24 – P. 30 line 9]. He claims he do not recall if jury asked if it was possible for a lessor include offense instruction [Evid. Tr. P. 30 line 10 – P. 31 line 20], but remember that he admits also then remember the case [Evid. Tr. P. 27 line 6 – 7; P. 18 line 13 – 20]. Jurors had asked if they could bring a lessor conviction, [TR. 6 line 14-17] which showed they had doubt in the charges presented in count II, being rape. Jaffe did not research the victim F.AS. (Evid. Hr. Tr. P. 25 line 3-9; p. 26 line 7-12), because he believed it would not have an impact on anything, this would be to be a show of incompetency on his part, due to the characteristics of the F.A.S. A focus on what the jury did not know establishes the substantial likelihood of a different outcome at a trial. During the Evidentiary Hearing, Jaffe testifies that he did not remember the DNA of the victim and another female infused, but went on to claim it was the petitioner DNA that was found inside of the victim and the vagina was ripped to pieces (Evid. Hr. tr. P. 28 line 5-11), this would be inconsistent with what we would find in the trial transcript where Dr. Sozio would show that the possibility of consent was a possibility [Tr. 359 line 1-4;] and in tacked. "Collectively, counsel's error "have had a pervasive

effect on the inferences to the drawn from the evidence, altering the entire evidentiary picture as in "Strickland, 466 U.S. at 698 -699".

CONCLUSION

Wherefore, petitioner respectively request that court find Mr. Jaffe ineffective due to performance fail below the prongs of Washington v. Strickland, and reverse count I murder with prejudice, vacate the habitual and remand count II resentencing to reflect consensual instead of forcible rape. The rape must be reducing and the murder be reversed and habitual vacated for it constitute to be vindictive in sentencing, due to petitioner was given the maximum on all charges, a sentence for a term of years beyond defendant's life expectancy which violates the "Statutory Scheme" [United State v. Grimes, 142 F. 3d 1342 N. 12].

WORD COUNT

"I verify that this brief (or Petition) contains no more than (4200) words," and "I verify that this brief (or Petition) contains (4186) words", as ascertained by the Word Count feature of Microsoft Word 2013.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the Petition for Writ of Certiorari has been served upon the Attorney General of Indiana, I.G.C.S., Fifth Floor, 402 W. Washington Street, Indianapolis, Indiana 46204-2770, by United States Mail, First Class, this 10th day of January, 2024.

Appellant

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