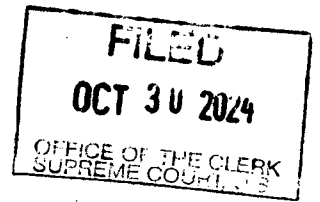


No. 24-5968

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

Brian Adkison (pro se) — PETITIONER
(Your Name)

vs.

Doris Falkenrath Superintendent JCCC — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals For The Eighth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brian Adkison #1288362

(Your Name)

Jefferson City Correctional Center
8200 No More Victims Rd.

(Address)

Jefferson City, Missouri 65101

(City, State, Zip Code)

N/A

(Phone Number)

Question(s) Presented

1. This Court should grant certiorari to clarify that the content prong/proof of prejudice prong of the Strickland V. Washington Standard relative to counsel's deficient performance regarding defendant's right to testify is either met by prejudicial presumption or unconstitutional as the prong violates the right to a trial by jury.
2. This Court should grant certiorari to clarify that plain error is present in this case.
3. This Court should grant certiorari to clarify that Counsels failure to use impeachment testimony, that negates an element of the crime for which the defendant was convicted, constitutes ineffective assistance of counsel.
4. This Court should grant certiorari to clarify that 9-to-3 jury verdicts shall be permitted.
5. This Court should grant certiorari to clarify whether or not a defendant has the right to object in a court proceeding.

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:

RELATED CASES

Brian Adkison,
Petitioner

v.

Doris Falken Rath
Superintendent, JCLC
Respondent

case No 2:21-CV-04056-BCW

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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 A 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☒ is unpublished.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 _____ 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 June 17 2024.

☐ 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: August 06 2024, and a copy of the order denying rehearing appears at Appendix 0.

☐ 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).

Constitutional and Statutory Provisions Involved

U.S. Const., V Amend.

U.S. Const., VI Amend.

U.S. Const., VIII Amend.

U.S. Const., XIV Amend.

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STATEMENT OF THE CASE

I am currently serving a 15 year sentence after conviction at an unfair and unconstitutional trial for rape of my then ex-girlfriend (LC) of 7 years at a trial subsequent to a trial where 9 jurors returned a not guilty verdict on this very case. Counsel claims he mixed up what cross examination had happened in which trial resulting in ineffective assistance of counsel. Specifically counsel was aware of a statement that negated elements of the charge and did not cross witness with said evidence. I made my decision to testify on the fact that counsel did not cross examine the complaining witness with this evidence. Multiple times during the trial I communicated to my attorney both verbally and via a note written to my attorney that I elected to testify in this case prior to the defense resting. In a prior hearing I was reprimanded by the court and informed that I could only communicate/object through my attorney. I made it very clear that I was opposed to resting without testifying in this case to my attorney. At first opportunity I also informed court "I made a written statement that said I wanted to testify, and he obviously didn't give that to you, or I don't know what happened to that. But I wrote on a sheet of paper that said I wished to testify in this case, and I was not allowed to testify. I mean I don't know if that is on my attorney or not. But I made it very clear that I wanted to testify in this case." (Tr. 693-694). My attorney acknowledges he received and read the note before closing without calling me to the stand and at no point did I decide not to testify. The record reflects that I elected to testify and was not allowed to testify. On appeal I intended on testifying at the 29.15 evidentiary hearing as to what my testimony would have been and my attorney on the case was switched just prior to the hearing and the new attorney informed me that I didn't need to testify at the PCR in regard to the substance of my testimony as prejudice was presumed on a right to testify case. I was also informed by new counsel that the substance of my testimony was already set forth in the amended petition eliminating the need for me to testify at the evidentiary hearing. This unfair and unconstitutional trial resulted in a manifest injustice.

Reasons For Granting The Petition

The questions presented are expanded on below:

1. Where a defendant informs defendant's counsel that he elects to testify and counsel does not give defendant the opportunity to testify the content prong of the Strickland v. Washington standard violates the defendants Constitutional rights including, the right to testify, the right to trial by jury, and the right to affective assistance of counsel. When a defendant elects to have a trial by jury and elects to testify in that trial, a Defendant shall be allowed to testify to the jury. Only the jury shall determine the true verdict according to the evidence presented. The Strickland standard provides an avenue where defendants request to testify, are not called to testify by counsel, and then if convicted, the court adjudicates the substance of what the testimony would have been to the jury. This adjudication by the Court violates the right to trial by jury when a defendant elects to testify and is denied that right by deficient performance of an attorney. In addendum the defendants constitutional right to testify and right to due process are also violated. The content prong of the Strickland Standard relative to right to testify is therefore unconstitutional and this court shall deem it so. In the alternative, this court shall clarify that the prejudicial prong is met by presumption on a Right to testify claim where the Court recognizes Counsel's deficient performance in relation to defendant's waiver of right to testify. A violation of defendant's right to testify is a denial of constitutional right of the highest magnitude and prejudice shall be presumed.

The applicable law is as follows:

The right of a criminal defendant to testify in his own defense is "one of the rights that are essential to due process of law in a fair adversary process." Rock v. Arkansas, 483 U.S. 44, 51 (1987). A criminal defendant's right to put on a defense, including the right to testify on one's own behalf, is a fundamental constitutional guarantee that can only be waived by the defendant himself. U.S. Const., VI Amend.; Foster v. Delo, 11 F.3d 1451, 1457 (8th Cir. 1993) rev'd on other grounds en banc, 39 F.3d 873 (8th Cir. 1994). The involuntary denial of a defendant's right to testify is a denial of constitutional right of the highest magnitude and, is therefore presumed prejudicial. Blewett, 853 S.W.2d at 461 (citing Flanagan v. United States, 465 U.S. 259 (1984)).

As the lower court assumes the record demonstrates counsel's deficient performance relative to my waiver of right to testify, and the Strickland's Prejudice prong shall be deemed unconstitutional or prejudice shall be presumed on a right to testify claim, I pray that this court grants certiorari. An avenue that circumvents the right to testify is of great national importance and should be corrected.

2. The lower court failed to correct unreasonable determination of fact at "Adkison did not testify at the PCR hearing and has not **otherwise set forth what the substance of his testimony would have been.**" This represents clear factual error as the substance of my testimony is, in fact, stated in the Amended 29.15 motion. See appendix E (wd82263 appeal document number 6 page 13). Paragraph two states, "Had petitioner been given the opportunity to testify at trial, he would have taken the stand and informed the jury that the sexual encounter on May 4 2013 was consensual and that there was no physical force used by him. He would have testified..." Not only is this information located in the 29.15 is also consistent with the information in my (Petitioners) police statement. Therefore it is clear factual error to determine that the substance of what my testimony would have been is not set forth. The presumed testimony set forth negates the element of

forcible compulsion and the element of lack of consent, which would have resulted in an acquittal. The Denial of the constitutional right to testify is clearly prejudicial when the testimony would have resulted in an acquittal. In addendum the prosecutor ended his first closing argument with a long dramatic pause and then stated "And Why isn't he saying the things an innocent person would say? Because he's Guilty" See Appendix F pg 585 trial transcripts lines 4-6. Note the Double indentation indicating the long pause. The prosecutors closing statement was used to draw inference to guilt because I was not afforded the opportunity to testify. The 5th, 6th, and 14th Amendments of the United States Constitution as well as Article 1 Section 10 of the Missouri Constitution shall protect defendants from Incarceration due to Plain Error.

3. This Court should grand certiorari to clarify that Counsel failed to use impeachment testimony, that negates an element of the crime for which the petitioner was convicted, constitutes ineffective assistance of counsel. Notable evidence not used in petitioner's trial consists of a recording ,that I do not have access to as I am currently incarcerated, where LC stated "It's not like he came in and held me down and like took me" and is related to the sexual encounter and on its face value negates the element of forcible compulsion. LC was not crossed on any similar prior statements that would negate the element of forcible compulsion for the alleged crime. However the statement on the recording does negate the element of forcible compulsion associated with the sexual intercourse and had trial counsel crossed her with this statement the jury would have acquitted petitioner of the charge due to the element of forcible compulsion not being met as they acquitted petitioner of the sexual assault charge where LC was crossed on a "similar prior statement" that negated an element of the sexual assault charge. Counsel was clearly aware of this evidence as it was used in the prior trial where the jury returned 9-3 in favor of not guilty. The applicable law is as follows:

it is well-settled that counsel's failure to impeach a witness will not constitute ineffective assistance of counsel unless this action would have provided the defendant with a viable defense or changed the outcome of the trial. Coday v. State, 179 S.W.3d 343, 352(Mo. App. S.D. 2005); see also Payne v. State, 509 S.W.3d 830, 837(Mo. App. W.D. 2016). "Impeachment testimony that negates an element of the crime for which the movant was convicted provides a viable defense." Davidson v. State, 308 S.W.3d 79,82(Mo.App. E.D. 2010) citing Whited v. State, 196 S.W.3d 79, 82 (Mo.App.E.D. 2006)).

At the 29.15 evidence hearing counsel revealed that he "should have" used this statement on cross examination and offered no strategic reason for failing to impeach L.C. with this statement. As the applicable law states counsel's failure to impeach a witness with evidence that provides a viable defense constitutes ineffective assistance of counsel.

4. A Louisiana statue that permitted 9-to-3 jury verdicts Johnson v. Louisiana 406 U.S. 356 1972 was upheld by the Supreme Court. Missouri requires all 12 jurists to return a unanimous decision. This court shall clarify that 75% of the jury on one side or the other shall constitute a fair trial and any trial beyond a 9-to-3 shall be reversible due to the violation of right to be free from double jeopardy as guaranteed by the 5th Amendment. At petitioner's first trial a 9-to-3 jury verdict was returned in favor of not guilty and was subsequently retried as per Missouri's unanimous decision requirement.

5. I was left rather confused in this court proceeding as I was reprimanded by a judge for objecting in open court and not through my attorney and on appeal I was held accountable for not objecting at every turn when I made it clear to my attorney I objected to multiple issues including not being afforded the opportunity to testify. This court shall clarify if a defendant can object in open court or the objection must be made through the attorney. I have found no precedence indicating whether or not a defendant possesses the right to object openly in court or the objection must be made through an attorney. A trial where the defendant is under a false impression that he cannot object in the courtroom is a violation of constitutional rights as guaranteed by the 5th, 6th, 8th, and 14th US Constitutional amendments.

Not only did the content prong of the Strickland case violate my rights, it violates every person's right who elects to testify to a jury and is not afforded the opportunity by counsel. This avenue to avoid allowing a defendant to testify must be corrected. The sentence I am serving for a crime I did not commit is unconstitutional. Had the first trial taken place in Louisiana I would be acquitted of the charge by a 9-to-3 Jury verdict returned in favor of not guilty. This court shall grant certiorari to determine that 9-to-3 verdicts shall be permitted in all states including Missouri. This court shall grant certiorari to correct a manifest injustice. This court shall grant certiorari to clarify whether or not a defendant has the right to object in open court or that objection must be made through an attorney.

CONCLUSION

For all of the foregoing reasons.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Adkison

Date: 10-30-2024