

No. docket number

IN THE SUPREME COURT OF THE UNITED STATES

TERM OF COURT, 2018

RICHARD LEE CLARK,

Petitioner,

v.

BRYAN MORRISON,

Respondent.

On Petition for Writ of Certiorari to the United States Supreme Court

PETITION FOR WRIT OF CERTIORARI

By: Richard Clark, #697332
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

QUESTION(S) PRESENTED FOR REVIEW

I.

WAS PETITIONER DENIED THE RIGHT TO AN IMPARTIAL JURY?

II.

WAS PETITIONER DEPRIVED OF RIGHTS PROTECTED BY THE CONFRONTATION CLAUSE BECAUSE HE WAS UNABLE TO QUESTION WITNESS CLAIRE NEHRING AT TRIAL?

III.

WAS PETITIONER DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE PROSECUTOR COMMITTED MULTIPLE MISCONDUCTS?

IV.

WAS PETITIONER DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE TRIAL JUDGE ENGAGED IN "INTERFERENCE" AND ABUSED HIS DISCRETION?

V.

DID THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS COMMITTED BY PETITIONER'S LAWYER UNDERMINE THE OUTCOME OF THE TRIAL?

VI.

WAS PETITIONER DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL?

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:

WARDEN BRYAN MORRISON
Lakeland Correctional Facility
141 First street
Coldwater, MI 49036

Mr. Bill Schuette
Michigan Attorney General
P.O. Box 30217
Lansing, Michigan 48909

Laura Moody
Assistant Attorney General
P.O. Box 30217
Lansing, Michigan 48909

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REFERENCE TO 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☒ is unpublished.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 as 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☒ is unpublished.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☐ is unpublished.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 as Appendix ___ to the petition and is

☐ reported at _____; or,

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

☐ is unpublished.

STATEMENT OF JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was
September 1, 2017.

☐ 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: November 28, 2017, 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
[decision date]. 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 PROVISIONS

AMENDMENT V.

No person shall be . . . deprived of life, liberty or property, without due process of law....

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the state and district wherein the crime shall have been committed....

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him....

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense....

STATEMENT OF THE CASE

In 2008, a jury convicted Petitioner of two counts of second-degree criminal sexual conduct involving a person under the age of thirteen, Mich. Comp. Laws §§ 750.520c(1)(a) and 750.520f; four counts of third-degree criminal sexual conduct involving force or coercion, Mich. Comp. Laws §§ 750.520d(1)(b) and 750.520f; three counts of fourth-degree criminal sexual conduct involving a person aged thirteen to sixteen years, to sixteen years, Mich. Comp. Laws § 750.520e(1)(a); and one count of accosting, enticing, or soliciting a minor for immoral purposes, Mich. Comp. Laws § 750.145a. The trial court sentenced Clark as a third habitual offender, Mich. Comp. Laws § 769.11, to an effective term of sixteen years and three months to thirty years in prison. The Michigan Court of Appeals affirmed, *People v. Clark*, No. 287663, 2010 WL 673355 (Mich. Ct. App. Feb. 25, 2010) (per curiam), and the Michigan Supreme Court denied leave to appeal, *People v. Clark*, 784 N.W.2d 806 (Mich, 2010) (mem.).

Petitioner then filed a motion for relief from judgment, which the trial court denied. *People v. Clark*, No. 08-14903-FC (St. Joseph Cty. Cir. Ct. Nov. 16, 2011). The Michigan Court of Appeals and Michigan Supreme Court each denied leave to appeal. *People v. Clark*, No. 309930 (Mich. Ct. App. Aug. 23, 2013); *People v. Clark*, 839 N.W.2d 458 (Mich. 2013) (mem.).

Petitioner then filed a petition for habeas corpus raising six grounds for relief: (1) the jury was tainted; (2) he was denied his right to confront a witness in violation of the Confrontation Clause; (3) the prosecutor committed misconduct; (4) there was a “judicial abuse of discretion/interference”; (5) trial counsel provided ineffective assistance; and (6) appellate counsel provided ineffective assistance. The district court denied the petition and declined to issue a certificate of appealability, reasoning that all claims were reasonably adjudicated by the state courts or otherwise lacked merit. *Clark v. Stoddard*, No. 1:14-cv-80 (W.D. Mich. 1/30/17).

The United States Court of Appeals of the Sixth Circuit denied certificate of appealability on September 1, 2017. *Clark v. Stoddard*, No. 17-1179. The Court denied rehearing November 28, 2017.

ARGUMENT

I.

PETITIONER WAS DENIED THE RIGHT TO AN IMPARTIAL JURY.

Petitioner's jury was tainted during voir dire by comments made by a prospective juror. Specifically, when defense counsel asked the prospective juror, Juror Number 260, if he would follow instructions advising that Clark is innocent, Juror Number 260 replied that "[i]mmediately, as it's presented right now . . . with the number of complaints against [petitioner] . . . I'm leaning with the gentleman being guilty." The trial court judge then asked Juror Number 260 if he could "set that feeling aside" and follow the instructions that Clark is presumed innocent until the prosecutor proves that in view of all the evidence, he is guilty beyond a reasonable doubt. Juror Number 260 replied that he "would listen, obviously to all the information that's presented, but [he's] not going to sit [t]here and tell [the court that he doesn't] have a strong opinion going in."

The law protecting criminal defendants from partial juries is firmly established. Criminal defendants are entitled to be tried by an impartial jury. U.S. Const. Amend. VI; *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). In assessing a juror's alleged impartiality, "the relevant question is 'did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.'" *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

It is clear from the record Juror Number 260 was not impartial. Juror Number 260 did not even pretend to be impartial. Yet, Juror Number 260 was not excused for cause. The trial court rendered defense counsel ineffective by forcing counsel to strike Juror Number 260 with a peremptory challenge. Further, it was ineffective assistance of counsel to fail to object to Juror

Number 260 not being excused for cause.

Petitioner was denied effective assistance of appellate counsel when counsel failed to charge trial counsel with incompetence regarding this issue.

II.

PETITIONER WAS DEPRIVED OF RIGHTS PROTECTED BY THE CONFRONTATION CLAUSE BECAUSE HE WAS UNABLE TO QUESTION WITNESS CLAIRE NEHRING AT TRIAL.

The prosecution was unable to locate their witness, Claire Nehring, who was a YWCA sexual assault counselor. Nehring transported victims to the police station. Nehring was present when an officer interviewed at least one of the complainants. The prosecutor advised the court twelve days before trial that Nehring moved out of state and left no forwarding address. She could not be located.

After a “due diligence” evidentiary hearing the trial court concluded that the prosecution had exercised due diligence in attempting to locate Nehring and, accordingly, permitted the prosecutor to remove her from its witness list.

The Confrontation Clause prevents the admission of testimonial statements, made out-of-court by a declarant, that are offered for their truth. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). In review of this issue, the state courts held none of Nehring’s out-of-court statements—testimonial or otherwise—were offered at trial. The habeas review deferred to the state court holding.

This reasoning was misplaced. There were between 10 and 20 statements made by prosecution witnesses in reference to Claire Nehring; what Nehring did and said. See TT, pages 250, 251, 253, 259, 260, 264, 265, 267, 272, 307, 357, 359.

The defense theory was that Claire Nehring coached the alleged victims to make

complaints against petitioner. The theory included the position that Nehring had done this before and charges were abandoned. The trial court opined that the victims reported the sexual assaults to their school counselor, Jason Luke, before reporting to Claire Nehring.

The prosecutor did not call Jason Luke as a witness. Nevertheless, there were many statements made by prosecution witnesses in reference to Jason Luke; what Luke did and said. Defense counsel abandoned the defense. When petitioner argued with defense counsel about his abandoning the defense, his lawyer said without Claire Nehring there was nothing he could do.

The Confrontation Clause protects against the admission of testimonial statements, made out-of-court by a declarant, that are offered for their truth, as stated. In the instant case, the culmination of the statements made about Claire Nehring was prejudicial to petitioner. It was tantamount to vouching for the veracity of the alleged victims.

III.

PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE PROSECUTOR COMMITTED MULTIPLE MISCONDUCTS.

Petitioner charged his prosecutor with three instances of misconduct in his appeal. First, the prosecutor badgered perspective jurors about committing themselves to a guilty verdict if the prosecution has proven its case beyond a reasonable doubt. Second, the prosecutor solicited testimony from a law enforcement officer that Nehring was a “trained sexual assault counselor.” Third, during closing arguments, the prosecutor referred to petitioner as a “predator.”

The culmination of multiple misconducts, when any single misconduct by itself would not undermine confidence in the trial’s outcome, could require a different outcome. In the instant case, the misconducts committed by the prosecution were reviewed individually rather than cumulatively. Further, at least one of the misconducts was a close call.

The testimony about Nehring being a “trained sexual assault counselor” was material.

There is no question about Nehring being at the epicenter of this case. At the due diligence hearing the prosecutor claimed Nehring was not at the epicenter of this case, school counselor Jason Luke was the first counselor to take reports from the alleged victims. Nevertheless, Jason Luke did not testify at trial. The prosecutor maneuvered the epicenter of this case in the fashion of a three card Monte dealer.

On appeal the prosecution argued Petitioner did not prove that the testimony was false, or that the prosecutor knew it was false. *Giglio v. United States*, 405 U.S. 150, 154 (1972). Petitioner cannot prove the testimony was false because his rights under the Confrontation Clause were decimated.

IV.

PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE TRIAL JUDGE ENGAGED IN "INTERFERENCE" AND ABUSED HIS DISCRETION.

Petitioner charged that his judge: failed to declare a mistrial due to the biased statements that tainted prospective jurors; failed to declare a mistrial after a prosecution witness falsely testified that Nehring was a trained sexual assault counselor; and failed to advise Petitioner that the trial judge wrote the defense lawyer a letter in which he chastised counsel for missing two arraignment hearings.

On appellate review it was held that these allegations neither establish that the judge held an actual bias against petitioner nor evince a predisposition so extreme as to display clear inability to render fair judgment. *Liteky v. United States*, 510 U.S. 540 551 (1994). It was pointed out that the tainted jury issue was found without merit, and that Petitioner failed to show that the testimony that Nehring was a trained sexual assault counselor was false. Further, it was held that the record showed Petitioner received a fair trial in a fair tribunal before a judge

with no actual bias against him. *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997).

The record reflects circular reasoning for denying Petitioner relief. The appellate reasoning is specious. Petitioner was denied his right to confrontation with the “trained sexual assault counselor” and the lower courts have concluded petitioner cannot prove any aspect of the “trained sexual assault counselor’s” testimony.

The standard of proof Petitioner is being held to is paradoxical. Nehring, the “trained sexual assault counselor” was at the epicenter of this case. The prosecutor committed a fraud on the court at the “due diligence” hearing when telling the court that Nehring was a secondary link in the chain of testimonial evidence.

V.

THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS COMMITTED BY PETITIONER’S LAWYER UNDERMINED THE OUTCOME OF THE TRIAL.

Petitioner’s lawyer failed to appear at two scheduled arraignments. It took a terse letter from the judge chastising the lawyer before the lawyer appeared for Petitioner’s arraignment. Consequently, every pre-trial motion filed by Petitioner was denied, and every pre-trial motion filed by the prosecution was granted.

While picking the jury, Petitioner’s lawyer failed to object to the biased and prejudicial statements made by a potential juror, failed to request that the prospective jurors be sequestered during the voir dire process and failed to request that the juror who made the biased and prejudicial statements be dismissed for cause. See Issue I.

Petitioner’s lawyer failed to make any effort at presenting an alibi defense. Petitioner was accused of crimes by six different complainants; all at different times. Petitioner had time stamped receipts, airline tickets, and alibi witnesses for the general time periods of several of

the accusations. Petitioner's lawyer abandoned the effort because (i) the state did not have to provide a date and time for the allegations; and (ii) petitioner had total air-tight alibis for some victims and only a general alibi for one allegation.

Petitioner's lawyer failed to move for a dismissal of charges because Nehring the "trained sexual abuse counselor" was not located for trial. Although the judge ruled, at the "due diligence" hearing that Nehring would be of limited importance, it became clear at trial by the sheer number of references made about Nehring that she was at the epicenter of the case. In other words, if you looked up *res gestae witness* in the dictionary there would be a picture of Nehring the "trained sexual abuse counselor."

Petitioner's lawyer stipulated that DNA test results, which were negative toward Petitioner, did not have to be presented by the prosecutor. This stipulation made by the defense lawyer falls below the reasonable competence of defense tactics. Counsel failed to exploit the only shred of exculpatory evidence petitioner had going for him. Why would Petitioner's lawyer do the prosecutor's job?

Petitioner was denied effective assistance of counsel guaranteed by the U.S. Const. Amend. VI; *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

VI.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

The U.S. Constitution does not guarantee a convicted defendant the right to appeal. However, when a state guarantees a convicted defendant the right to appeal, this Court says that the defendant is entitled to effective assistance of counsel on appeal. U.S. Const. Amend. VI; *Evitts v. Lucey*, 469 US 387, 395-97 (1985). Michigan guarantees the right to appeal. Mich. Const. 1963, Art. 1, § 20.

Appellate counsel for Petitioner raised none of the issues raised herein. Petitioner brought these issues through his one and only motion for relief from judgment. *M.C.R. 6.500 et. seq.* Accordingly, Petitioner prays for relief from this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Richard Lee Clark #697332
Lakeland Correctional Facility
141 First Street
Coldwater, Michigan 49036

Date: February 8, 2018