

THE COURT OF APPEALS FROM THE STATE OF WASHINGTON  
DIVISION ONE

In re Personal Restraint  
Petition of  
  
Raymond D. McCoy  
  
Petitioner.

No. 61853-9-I  
K.C. 06-1-03538-7

AND

No. 61293-0-I  
K.C. 06-1-01623-4

PETITIONER'S REPLY  
TO STATE'S RESPONSE  
TO PETITIONER'S  
PERSONAL RESTRAINT  
PETITIONS, PURSUANT  
TO CAUSE NUMBERS  
61835-9; 61293-0.

A: STATUS OF PETITIONER:

Raymond D. McCoy is presently restrained pursuant to judgment and sentence in King County Superior Court No. 06-1-03538-7 and No. 06-1-01623-4 respectfully.

B: ISSUES REPLIED TO:

Should petitioner be denied the appellate right pursuant to RAP 16.3; RAP 2.5(a)(3); RPA 16.11(b), to present federal claims for relief according to 28 U.S.C. § 2254 (b)(1)(A)?

C: STATEMENT OF FACTS:

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COURT OF APPEALS  
DIVISION ONE  
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DEC 22 2009

On February 9, 2006 petitioner was arrested and booked into custody for allegedly delivering a controlled substance to an undercover Police Officer, incident to the arrest and strip-search the arresting officer founded on petitioner's person what appeared to be a bank robbery note. See PRP 61853-9 and submitted exhibit 1-2.'

February 10, 2006 petitioner was released from custody pursuant to the February 9, 2006 arrest under incident number 06-056860. See PRP 61293-0 and submitted ex.6 3 of 5 at 7-18.

February 15, 2006 a \$50,000.00 outstanding VUCSA warrant for "Dangerous Drugs" was issued from the February 9, 2006 incident # 06-056860, which filing information included reference to the alleged bank robbery note. See PRP 61293-0 and submitted Exs.3,4,6,7.

February 21, 2006 petitioner was arrested on the February 15, 2006 "Dangerous Drugs" warrant. Remaining in custody, petitioner was charged and convicted on May 10, 2007 for three counts of First Degree Robberies.

D: REPLY:

A petitioner fairly and full present a claim to the state court for purposes of satisfying the exhaustion requirement if he present the claim: (1) to the proper forum, see 28 U.S.C. § 2254 (c)

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Through out the remaining of this Reply petitioner will refer to Appendixs and Exhibits submitted in support of Personal Restraint Petitions pursuant to cause numbers 61853-9-I and 61293-0-I.

(2) through the proper vehicle, See Castille V. People, 489 U.S. 346, 3511 (1989), and (3) by providing the proper factual and legal basis for the claim, See Weaver V. Thompson, 197 F.3d 359, 364 (9th Cir 2005). Insyxiengmay V. Morgan, No. 02-36017 (9th Cir 2005).

The State's response undermines petitioner's federal claims for relief, which was not explicitly presented by the appellate counsel or fairly reviewed by the Appellate Court.

The State presents arguments on why petitioner's federal claims should be denied, and fail to address the merit of any one of petitioner's federal claims.

If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. In re Rice 118 Wn.2d 876, 885, 828 P.2d 1006 (1992). See also State's Response at 7.

Petitioner's Personal Restraint Petitions pursuant to cause numbers 61293-0 and 61853-9 both were submitted with supportive evidence not presented during trials.

I. Here the State's argument concerning Mr. Eric Blank's (Video Analysis Expert) letter, see State's Appendix G. is misleading.

First, petitioner never intended to call Mr. Blank as a witness to testify during trial, but only during the admissibility hearing of the, Key Bank's surveillance tape, which the State admits was the key evidence that convicted petitioner.

In addition to establishing that his attorney performed deficient, Jacobs must demonstrate that he was prejudiced by counsel's error. See Strickland, 466 U.S. at 694. The prejudice component requires Jacobs to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694.

Jacob need not show that counsel's deficient performance "more likely than not altered the outcome in the case" -- rather, he must show only "a probability sufficient to undermine confidence in the outcome." Id. at 693-94. This standard is not "a stringent one". Jermyn V. Horn, 266 F.3d 257, 282 (3rd Cir 2001) (quoting Bake V. Barbo, 177 F.3d 149 (3rd Cir 1999)). See Jacob V. Horn, 395 F.3d 100 (3rd Cir 2005).

Concerning Mr. Blank's availability to come testify during this critical stage of proceedings, Mr Blank stated:

"...In fact, if I had been invited to explain the circumstances to judge Kallas- that is, if I had been notified that there was any issue with respect to the tape- judge Kallas might have ruled differently on admissibility. Then again [she], he might have made the same ruling..." State's Appendix G. P.2(4).

"...In response to your question regarding whether I was available on the morning that I was contacted by the state and asked to return the tape, I was absolutely available. In fact, when I later learned of the turmoil surrounding the state's loss of its records, followed by the discovery of my business card, I was surprised that Mr. McKay did not contact me on the morning I returned the tape..." State's Appendix G. P.3(8).

Concerning the effect this evidence had on the outcome of the verdict, the prejudice to petitioner of not notifying Mr. Blank for the admissibility hearing outweighed any probative value of trial tactics.

Here not only did Mr. McKay abandon his loyalty to petitioner's defense, but help convince the court on behalf of the state that Mr. Blank's possession of the Key Bank's tape was unauthorized.

"I strongly disagree with Mr. McKay's assertion that, "incredibly," I never returned the videotape placed into my custody [by] to the FBI, and that I had to be "tracked down" by Detective Aakervik..." State's Appendix G. P.1(3).

"To summarize the above, I think that Mr. McKay is self-serving and offensive in his comments regarding my role in this matter..." State's Appendix G. P.3(8).

Therefore the State's argument concerning petitioner's effective assistance claim should fail and petitioner's claim review on its merits. See State's Response P.15(5), & 18(7)

## II. RIGHT TO IN-CUSTODY LINE-UP; BIAS PHOTO MONTAGE:

The state argue that there is know due process for a defense discovery order for a line-up. See State's Response P.10.

Here the state relied on the opinion of the Appellate Court See S/R P.9, which petitioner argues is inaccurate and makes statements of conclusions not supported by the trial court's records pursuant to cause number 06-1-03538-7.

Contrary to the State's argument there is no due process for

a defense discovery for a line-up, the United States Supreme Court held in Wardius V. Oregon, 412 U.S. 470, 37 L.Ed.2d 82, 93 S. Ct. 2208 (1973):

In Wardius, the court held that defendants must have the discovery rights reciprocal to those given the state.

...Wardius requires that reciprocal discovery be available to the defendant and the state. CrR 4.7 complies with Wardius by providing equal access to a court ordered line-up. See State V. Boot, 40 Wn.App 215, 697 P.2d 1034 (1985). See also PRP 61853-9 at 8.

In this Circuit, the petitioner must make the federal basis of the claim explicit either by specifying particular provisions of the federal constitution or statutes or by citing federal law. See Lyons V. Crawford, 232 F.3d 666, 668 (9th Cir 2000).

Here petitioner federalize his impermissibly suggestive in-court identification pursuant to the Idicia of Reliability Standard in Simmons V. United States, 390 U.S. 377, 88 S.Ct. 19 L.Ed.2d (1968); due process violation by the denial of an in-court line-up prior to trial pursuant to Wardius V. Oregon 412 U.S. 470, 37 L.Ed.2d 83, 93 S.Ct. 2208 (1973), which would have established an independent origin of the bias Photo Montage use to assist the state's witnesses in-court ID, during the state's case-in-chief, pursuant to United States V. Wade, 388 U.S. 218, 87 S.Ct. (1926).

This montage was used during the state's case-in-chief, not only before trial as stated in the opinion of the Appellate Court. The montage used during petitioner's trial was a six-photograph array with petitioner's booking photo in the fifth position. See PRP 61853-9 and submitted exhibit 15., not from the surveillance cameras from the banks as stated in the opinion of the Appellate Court.<sup>2</sup>

Therefore the state's argument concerning petitioner's in-court ID and line-up should fail and petitioner's claim review on its merits. See State's Response P.9(3).

III. TESTIMONY OF MR. OLSEN:

Did Mr. Olsen's testimony denied petitioner a fair trial and equal protection pursuant to the Sixth and Fourteenth Amendment of the U.S. constitution?

The State response that, "...but asserted that Olsen had held himself out to be his (McCoy's) attorney and that his [Olsen's] testimony was therefore improper...", see S/R P.11(4).

This is clearly a misleading and misinterpretation of petitioner's

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Other than petitioner's STATEMENT OF ADDITIONAL GROUNDS pursuant to cause number KC 06-03538-7, appellate counsel Mr. Andrew P. Zinner WSBA No. 18631 only addressed the sufficiency of the evidence pursuant to State V. Collinsworth, 90 wn.App 546, and a Batson challenge pursuant to cause#KC 06-1-01623-4. Appellate counsel never **argued** or presented any of petitioner's claims presented for review pursuant to Personal Restraint Petitions 61293-0;61853-9.

citing of State V. Granack, 90 Wn.App 598, which states in relevant parts:

"...for that reason, the court held that where the state intrudes on a defendant's right to effective representation by intercepting privileged communication between an attorney and client, the only remedy is dismissal.."

Here petitioner cites the Granack's court in analysis, in that of the defendant/attorney ~~function~~ dual function of a Pro-se defendant.

Never did petitioner refered to Mr. Olsen as his [petitioner] attorney.

Here petitioner federalized and explicitly asserts his federal claims for relief pursuant to Massiah V. United States, United States V. Henry, and Spano V. New York, See also PRP 61853-9 Pages: 22,23, 25, and 33.

The State's assertion that petitioner failed to satesfy his burden of establishing prejudicial error, is contrary to federal law and should fail, and petitioner's claim review on its merits. See S/R P.11(4).

#### VI. SUFFICIENCY OF THE EVIDENCE:

Finally, the State argues that petitioner's sufficiency claim is, "...grad bag of arguments, including corpus delicti,..."

To prevail on an insufficiency of evidence claim, a habeas petitioner must show that "upon the record evidence adduced at trial [,] no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson V. Virginia, 443 U.S. 307, (1979).

An additional layer of deference is added to this standard by 28 U.S.C. § 2254(d), which obliges Briceno to demonstrate that the state court's adjudication entailed an unreasonable application of the quoted Jackson's standard. See Juan H. V. Allen, 408 F.3d 1262, 1274 (9th Cir 2005). See Briceno V. Scribner, No. 07-55665 (9th Cir 2009).

CHIEF EVIDENCE PRESENTED:

- (a) alleged bank demand-note
- (b) alleged palm print
- (c) in-court identification
- (d) testimony of jail house informant

Petitioner explicitly argued and demonstrated that the alleged note incident to the February 9, 2006 VUCSA arrest was the state's corpus delicti.<sup>3</sup> This evidence was the result of an unlawful arrest which constitute the fruit of the piosonous tree. See PRP 61853-9 P.28(4).

Here the state's obvious disregard of petitioner's federal claims for relief and the Appellate Court's denial of a fair review

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<sup>3</sup> Petitioner was denied a MOTION TO CONSOLIDATE Personal Restraint Petitions, 61293-0 and 61853-9 to establish that the Febraury 15,2006 warrant was secured in bad faith, and was pretextual on its face which resulted in a miscarriage of justice, to-wit, three counts of first degree robberies.

of the federal claims presented, is sufficient to conclude there is no state remedy available.

A petitioner can satisfy exhaustion by either: ...(2) showing that there is no state remedy available. See Johnson V. Zenon, 88 F.3d 828, 829 (9th Cir 1996).

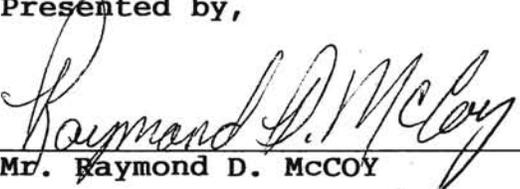
Petitioner federal claims for relief pursuant to cause numbers 61293-0 and 61853-9 had been explicitly and fairly presented to the state courts for review. Therefore, petitioner now must seek relief through 28 U.S.C. § 2254.

E. CONCLUSION:

For the reasons stated in this Reply, petitioner await this court decision, which would allow petitioner to proceed to the Federal Western District of Washington pursuant to U.S.C. § 2254.

Submitted this 16 day of December 2009

Presented by,

  
Mr. Raymond D. McCOY