

ORIGINAL

MONTANA SUPREME COURT
SUPREME COURT NO.DA-20-0129

FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

APR 28 2020

Case Number: DA 20-0129

Bowen Greenwood
Clerk of Supreme Court
State of Montana

SHANE PHILLIP NICKERSON

Petitioner and Appellant

v.
STATE OF MONTANA

Respondent and Appellee.

Opening Brief to
Post-conviction-relief
Appeal.

I Shane Phillip Nickerson a pro-se litigant and laman of the law appeal the eleventh judicial districts court of the county of Flatheds, denial of this petition. I ask this honorable court to please give me leeway and lattitude in my arguments to this brief as Iam a pro-se litigant.

My case is a very complex case and there are cumulative errors in regards to this case. My constitutional protection and gurantee of my rights to effective counsel, rights to a fair trial, rights to effective appellate counsel, all ~~sith~~ sixth amendment rights of the U.S. constitution and Montanas constitution was violated.

I have been denied equal protection of the law and several due process violations were done in this case by the state and district court inwhich is in violation of my 14th amendment protection. Double jeopardy violations are cumulated as well to all these convictions in this case, inwhich violates my 5th amendment rights, and Montanas double jeopardy stautes M.C.A 46-11-503 (a), M.C.A 46-11-410. Montana carries a stronger protection against double jeopardy than the U.S. constitution.

My protected 8th amendment rights are violated due to these convictions and sentences, this is why I never filed a timely post-conviction relief which I will explain in this brief. Extroardinary circumstances.

The extraordinary circumstances that I refer to is my mental health and fear of having any of my legal documents due to the publicity to my case. In jail awaiting trial when I was housed with other inmates, my arrest warrant and other legal documents were read when I wasn't on the block by inmates. This led me to get into several altercations while awaiting trial. Also due to the pre-trial publicity jail staff (some) treated me horribly, I ended up getting charged with assaults on officers and this was inflamed with the media as well. So coming to prison I didn't want any of my legal documents because I've been targeted due to the publicity to my case. I've been in several fights due to this conviction, harassed, assaulted, and been severely discriminated on by certain staff here and inmates. Mentally I suffer from PTSD and extreme paranoia, I can't afford private counsel and sharing any information about my crime puts me in danger. I've had inmates say they will say I confessed to my crime to them, officers tell me I will rot in prison and never get out. All of this creates extreme mental health issues, I even attempted suicide several times due to all of this. The paranoia I suffer is severe at times I assumed most my legal mail was being read (out-going) due to comments of word for word sentences in the mail by some officers. I've been told my visits are bugged, vent system etc.. So I started giving all different stories about my case through the mail, phone, even visits. Only to see if it would ever get back to me or ever used against me. These circumstances caused me trouble in trying to file a timely post-conviction relief. I have always maintained my innocence to all of my convictions.

I have never confessed to my crime nor ever would. These unlawful convictions make me feel stuck in which causes severe mental wariness, or mental impairment. This Post-conviction relief is time barred, but as I got most of my legal documents and transcripts I noticed cumulative errors on the records. So I petitioned this court for DNA testing as new evidence to raise the time bar. The appeal of denial for DNA testing is added with this petition. Me being a pro-se litigant and layman of the law I was inaccurate in what was new evidence in regards to the DPHHS records, and I tried presenting a stronger prima facie in my petition for DNA testing appeal.

The DPHHS records isn't new evidence but it was part of the record for appeal and never briefed on my direct appeal along with several cumulative trial errors. I don't know if the district court ruled that those records could not be used in trial in which would be a Brady violation. Those DPHHS records contain evidence of actual innocence in this circumstantial case, and were of impeachment value as witness Mari Hines lied about several incidents within those records, in her video deposition. The state used a cumulative amount of hearsay from witness Mari Hines and this witness told doctors I did something to her son, in which caused probable cause of allegations of sexual abuse by Kalispell regional medical centers Dr. Briles. Mari Hines should have been equally charged as me as there is just as much circumstantial evidence on her verses me. So the DPHHS records aren't new evidence but would constitute a violation of my sixth amendment rights and fourteenth amendment rights.

These DPHHS records would serve as a fundamental miscarriage of justice. These records alone would have gotten me a new trial on all counts, had it been briefed on direct appeal. My appellate counsel Koan Mercer advised me to go to sentence review and as I explained earlier in this brief why I don't want or didn't want any of my legal documents in prison. Koan Mercer made cumulative errors on my direct appeal. There is cumulative trial errors on the record and he failed to brief any of that. Koan Mercer only got the assault on a minor vacated, when had he briefed cumulative trial errors or under the cumulative error doctrine, I would have prevailed on direct appeal. His performance is far below the Strickland v. Washington standard.

All though^{12/11} appellate counsel doesn't have to brief all frivolous issues there was; ~~blatant~~ blatant constitutional violations within the record. Jury instructions in which subjected me to double jeopardy, lack of evidence analyzed 7 of 32 items, Mari Hines testifying under the influence of drugs both the state and trial counsel acknowledge this in closing arguments on the record, the state used hearsay from Mari Hines in closing arguments, DPHHS records never briefed, several impeachment exculpatory witnesses that never testified, pre-trial publicity, cumulative errors and trial errors. My sexual assault conviction is in violation of several constitutional protections, the state's theory was sexual contact by committing sexual intercourse without consent, this was inflamed through the media, beginning of trial, middle trial, and even the end. (as to the penile injuries) The state's theory was they were bite marks or a suck which is sexual intercourse without consent. The state added the pinching element at the later stage of trial in closing arguments in which violated my due process of ~~the~~ the law.

The change of theory or added essential element of the crime was fundamentally unfair. Had the Judge knew of the pinching element to the penis he would have granted the middemeanor sexual assault instruction requested by my defense counsel. This sexual assault charge had a dead-lock, had the state not ~~ehza~~ changed their theory or analized all items swabed off me and the diaper never# analized , This charge would have been acquitted. To prove the state maliciously charged me they amended information and charged me with assault on a minor. This is because the state knew there theory of the case was'nt as strong. So it makes no sense for the judge to allow the state to amend and grant a lesser charge but not grant any ~~mide~~ misdemeanor instruction or any lesser offense instruction. That is fundamentally unfair and the judges instructions alone could amount a reversable error. This allowed the state to get merged offenses and a included offense with another in violation of M.C.A 46-11-410 criminal endangerment and assault on a minor are merged offenses with my aggravated assault charge. Criminal endangerment alone could be a lesser offense to aggravated assault as the states theory was all out of the same transaction. This is another error by appellate counsel Koan Mercer, even though there is no Montana case, my case would have been the first. Koan Mercer has even briefed several cases in violation of M.C.A 46-11-410.

The state violated the federal muliple charges statute and these convictions violate that. My sexual assault conviction if DNA testing is denied by this court to prove actual innocence. Due to Prosecutorial misconduct changing their theory inwhich is a misdemeanor offense, also using illegal hearsay in closing arguments=and to prove motive to commit sexual assault, and lack of DNA testing

These constitutional violations amount to constitutional trial errors. My case should be given retro active jurisdiction to the Deck v. Jenkins, 814 F.3d 954 and this conviction of sexual assault should be vacated in light of Deck v. Jenkins. If this court doesn't allow the Petition for DNA testing. Or if this court will grant me a new direct appeal under cumulative errors by appellate counsel Koan Mercer.

Had all DNA evidence been properly analyzed and the use of DPHHS records and all the impeachment witnesses called to testify. This would have allowed me to testify and explain why I wasn't honest to the detective and those records have incidents that corroborate actual innocence and at worst I would have been found not guilty to aggravated assault or any of these offenses. At worst criminal endangerment, if those records were used and I testified. It makes any trial fundamentally unfair, my testimony would have explained much of more negligent endangerment, not these heinous offenses. I just don't want to incriminate myself on this brief. This is why I wanted counsel and a hearing on this issue, I also believe in my trial several jury influences occurred in which is a miscarriage of justice. My brother Roger Nickerson was handcuffed and detained by jailor Mallory in front of jurors and my counsel, this puts a bad light on my family and even myself to jurors and should have been a mistrial. My trial counsel should have declared a mistrial on several grounds. His performance fell far below the Strickland v. Washington standard. There was no justifiable reason for all the errors performed by my trial counsel and appellate counsel, my sixth amendment guarantee protection has been violated. I please ask this court to lift the time bar under the miscarriage of justice standard and please grant my petition for DNA testing.

This petition is time-barred, but post-conviction DNA testing is new evidence. In Golden v. State, 2014 MT his post-conviction relief was viewed as untimely, which can be construed as time barred. This court reversed the district courts ruling in Golden and his ineffective assistance of appellate counsels claim granted. In Golden 2014 MT he had inadmissible hearsay and petitioned for DNA testing on a sexual assault conviction. He was denied his petition due to a eye witness account to his sexual assault conviction. Where in my case the state violated my due process not fully analyzing all swabs taken from me, and proceeding through trial with false evidence in violation of Napue v. Illinois. There was a dead-lock to the sexual assault conviction, so had all DNA evidence been fully analyzed it's more probable that I would have been acquitted of sexual assault as well. The state used inadmissible hearsay in closing arguments to prove motive to commit sexual assault. Saying I told Mari Hines I was sexually abused as a child, and this was the night before the abuse of the victim happened. Witness Mari Hines testified under the influence of drugs, no testimony is admissible under ~~§5~~ intoxicants, this is fraud upon the court and a fundamental miscarriage of justice. These statements were never objected to by my trial counsel. This hearsay was used to convict how is it fundamentally fair to use any of this witnesses hearsay, and proceed through trial with a intoxicated witnesses testimony and also not fully analyze exculpatory evidence. In Hagen v. State, 1999 MT 8 his ineffective assistance of appellate counsel claim was granted, and in Price v. State, 2007 MT 307 his petition was granted as appellate counsel was ineffective. In my case there was cumulative ~~tr~~ trial errors and constitutional errors, Appellate counsel made cumulative errors.

In Deck v. Jenkins, 814 F.3d 954 Prosecutors misstatements and prosecutorial misconduct amounted to constitutional trial errors. The state in my case advanced in a different element of pinching the penis, when throughout trial and arrest the penile injuries was that caused by mouth. This new theory is a misdemeanor allegation and was never proven by the state. My case should be given retroactive consideration as there is far more violations to my sixth amendment rights, and fourteenth amendment rights. The state in my case violated several trial errors and Deck v. Jenkins, 814 F.3d 954 should be given effect to my case as it was done after mine. In Robbins v. Smith 152 F.3d 1062 his appellate counsel failed to brief cumulative constitutional trial errors and was granted relief. My case is far worse to cumulative errors than State v. Cunningham, 2018 MT 56. The DPHHS records alone would of got me a new trial as they were part of the record for appeal. These records are similar to State v. Weisbarth, 2016 MT 214 but have far more exculpatory value than this Weisbarth case. This made my trial fundamentally unfair without the use of impeachment exculpatory evidence, with these DPHHS records. The witness lied about the events in these records in her video deposition (Mari Hines). These records could have been used to impeach any of the hearsay used by Mari Hines. I only told her that I was molested by my baby sitter weeks before she lived with me. Mari Hines twisted this hearsay to help prove motive for the state by saying I said this the night before my arrest. She lied several times and even testified under the influence of drugs to my counsel and her testimony caused probable reasoning for the conviction to my sexual assault charge, and other charges I assumed she was a co-defendant at first and tried to keep her out of trouble, I refused to give a sexual

ssault kit because I assumed Mari Hines was accusing me of raping her to get out of trouble. I had no idea that I was being accused of something sexual to an infant. This is disgusting offensive and unexplainable, and I am not responsible for any of the victim's bruises on his body or head. The victim's mother knew what happened and told the nurse the victim got his head stuck between the netting of the crib, She says in her video deposition she said that because she was scared, but contradicts herself by later saying it looked to her that the abrasions were caused by the netting of the crib. She only ~~start~~ started to blame me because she was being asked questions (Mari Hines). The DPHHS records contain corroborating evidence to what I would have testified to, and helped me in this circumstantial case and at worst I'd been guilty of criminal endangerment, as I am guilty of negligent endangerment, not these offenses I am currently convicted of.

In Bradford v. Davis, 923 F.3d 599 he established cause to overcome procedural default as he was timebarred=~~but~~ habeas relief, he was able to establish prejudice and a constitutional violation that occurred to his convictions.

This case should give retroactive consideration to my case and I request this court to grant me a new trial under the cumulative error doctrine, or grant me a new direct appeal due to appellate counsel's cumulative errors, and constitutional violations within this conviction or convictions.

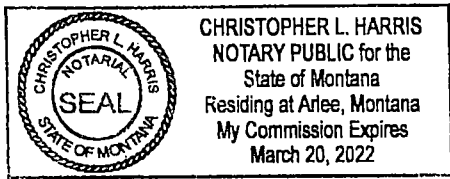
CERTIFICATE OF SERVICE

All of which I have briefed in this petition is all to the best of my knowledge and sworn under the penalty of perjury. The following parties have received a copy of this petition and the certificate of service.

Petitioner Name Print Shane Nickerson Date 4-2-20

Sign Shane Nickerson Date 4-2-20

Notary stamp



CHRISTOPHER HARRIS

Sign Chris L Harris

Date 4-2-2020

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