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MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

United States of America ex rel.
Derrick Kelly K84031
(Full name and prison number)
(Include name under which convicted)

PETITIONER

vs.

STEVE BALLARD
(Warden, Superintendent, or authorized person having custody of petitioner)

RESPONDENT, and

(Fill in the following blank only if judgment attacked imposes a sentence to commence in the future)

ATTORNEY GENERAL OF THE STATE OF

(State where judgment entered)

10 C 5595
Judge Joan H. Lefkow
Magistrate Judge Maria Valdez

Case Number of State Court Conviction:
97 CR 27961-02

PETITION FOR WRIT OF HABEAS CORPUS -- PERSON IN STATE CUSTODY

1. Name and location of court where conviction entered: CIRCUIT COURT OF Cook County.

2. Date of judgment of conviction: 12-13-99

3. Offense(s) of which petitioner was convicted (list all counts with indictment numbers, if known)
AGGRAVATED BATTERY OF A CHILD (2 COUNTS)

4. Sentence(s) imposed: 30 YEARS

5. What was your plea? (Check one)
(A) Not guilty (✓)
(B) Guilty ( )
(C) Nolo contendere ( )

If you pleaded guilty to one count or indictment and not guilty to another count or indictment, give details:
N/A

PART I -- TRIAL AND DIRECT REVIEW

1. Kind of trial: (Check one): Jury ( ) Judge only (✓)

2. Did you testify at trial? YES (✓) NO ( )

3. Did you appeal from the conviction or the sentence imposed? YES (✓) NO ( )

(A) If you appealed, give the

(1) Name of court: ILLINOIS APPELLATE COURT 1ST DISTRICT

(2) Result: CONVICTION AFFIRMED

(3) Date of ruling: MAY 22, 2002

(4) Issues raised: WHETHER THE COURT ABUSED DISCRETION BY NOT ALLOWING MITIGATION TESTIMONY OF THE VICTIM.

* THE APPELLATE ATTORNEY CONCEDED TO THE CONVICTION WITHOUT DEFENDANTS APPROVAL.

(B) If you did not appeal, explain briefly why not:

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4. Did you appeal, or seek leave to appeal, to the highest state court? YES (✓) NO ( )

(A) If yes, give the

(1) Result THE COURT REFUSED TO GRANT LEAVE

(2) Date of ruling: 10-2-2002

(3) Issues raised: DID NOT HAVE THE OPPORTUNITY TO RAISE ISSUES BECAUSE DEFENDANT WAS NOT ALLOWING TO PROCEED.

(B) If no, why not: N/A

5. Did you petition the United States Supreme Court for a writ of *certiorari*? Yes ( ) No (✓)

If yes, give (A) date of petition: N/A (B) date *certiorari* was denied: N/A

PART II – COLLATERAL PROCEEDINGS

1. With respect to this conviction or sentence, have you filed a post-conviction petition in state court?

YES (✓) NO ( )

With respect to *each* post-conviction petition give the following information (use additional sheets if necessary):

A. Name of court: CIRCUIT COURT OF COOK COUNTY

B. Date of filing: APRIL 19, 2002

C. Issues raised: ACTUAL INNOCENCE, DUE PROCESS, DENIED THE RIGHT TO PRESENT VIDEO TAPE TESTIMONY OF VICTIM. APPOINTED COUNSEL SUPPLEMENTED THE PETITION WITH INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

D. Did you receive an evidentiary hearing on your petition? YES (✓) NO ( )

E. What was the court's ruling? DISMISSED

F. Date of court's ruling: JUNE 13, 2007

G. Did you appeal from the ruling on your petition? YES (✓) NO ( )

H. (a) If yes, (1) what was the result? AFFIRMED

(2) date of decision: 9-30-09

(b) If no, explain briefly why not: N/A

I. Did you appeal, or seek leave to appeal this decision to the highest state court?

YES (✓) NO ( )

(a) If yes, (1) what was the result? DENIED

(2) date of decision: JANUARY 27, 2010

(b) If no, explain briefly why not: N/A

2. With respect to this conviction or sentence, have you filed a petition in a **state court** using any other form of post-conviction procedure, such as *coram nobis* or habeas corpus? YES ( ) NO (✓)

A. If yes, give the following information with respect to each proceeding (use separate sheets if necessary):

1. Nature of proceeding N/A
2. Date petition filed
3. Ruling on the petition
3. Date of ruling
4. If you appealed, what was the ruling on appeal?
5. Date of ruling on appeal
6. If there was a further appeal, what was the ruling ?
7. Date of ruling on appeal

3. With respect to this conviction or sentence, have you filed a previous petition for habeas corpus in **federal court**? YES ( ) NO (✓)

A. If yes, give name of court, case title and case number: N/A

B. Did the court rule on your petition? If so, state

(1) Ruling: N/A

(2) Date:

4. **WITH RESPECT TO THIS CONVICTION OR SENTENCE, ARE THERE LEGAL PROCEEDINGS PENDING IN ANY COURT, OTHER THAN THIS PETITION?**

YES ( ) NO (✓)

If yes, explain: N/A

PART III – PETITIONER'S CLAIMS

1. State briefly every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. You may attach additional pages stating additional grounds and supporting facts. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds later.

BEFORE PROCEEDING IN THE FEDERAL COURT, YOU MUST ORDINARILY FIRST EXHAUST YOUR STATE COURT REMEDIES WITH RESPECT TO EACH GROUND FOR RELIEF ASSERTED.

(A) Ground one ACTUAL INNOCENCE (GROUND #1 ON PRO SE PETITION)
Supporting facts (tell your story briefly without citing cases or law):

I WAS NOT PRESENT WHEN MY WIFE ABUSED MY DAUGHTER. I DO UNDERSTAND THE THEORY of ACCOUNTABILITY AND DUTY OF A PARENT; HOWEVER, I NEVER SAW MY WIFE ABUSE MY DAUGHTER AND MY CHILDREN NEVER TOLD ME THAT JULLIET WAS BEING ABUSED BY THEIR MOTHER. MY DAUGHTER LESLY TESIFIED IN TRIAL THAT HER MOTHER TOLD HER NEVER TO TELL ME, SO I WAS NEVER TOLD. THERE WAS NEVER ANY CLARITY BROUGHT TO ANY ISSUE CONCERNING ME AT TRIAL

(B) Ground two INEFFECTIVE ASSISTANCE of COUNSEL (FAILURE TO CALL VICTIM)
Supporting facts:

TRIAL COUNSEL NEVER ATTEMTED TO INTERVIEW THE VICTIM OR CALL HER AS A WITNESS DESPITE THE FACT THAT SHE TOLD THE STATE THAT I DID NOT HIT HER OR BITE HER. THE STATE AND THE APPELLATE COURT SEEMED TO BELIEVE THAT CALLING THE VICTIM WOULD HAVE MADE THINGS WORST. I WAS GIVEN THE MAXIMUM SENTENCE WITHOUT JULLIET'S TESTMONY SO THEIR RATIONAL IS MIS PLACED. IF THE VICTIM'S TESTIMONY WOULD HAVE MADE THINGS WORST THEN LOGIC SAY'S THAT THE STATE WOULD HAVE HAD HER IN THE COURT. THE TRIAL ATTORNEY SHOULD HAVE INTERVIEWED THE VICTIM BECAUSE HER TESTIMONY COULD HAVE CLARIFIED WHAT THE ALLEGED BITE MARK WAS AND WHETHER HER FATHER KNEW THAT HER MOTHER ABUSED HER. THE VICTIM'S TESTIMONY COULD HAVE ALSO REVEALED IF ANYONE TRIED TO COERCE HER.

EXHIBIT # 1

(C) Ground three INEFFECTIVE ASSISTANCE OF COUNSEL (CONSULT WITH EXPERT)
Supporting facts:

TRIAL COUNSEL TESTIFIED AT THE EVIDENTIARY HEARING THAT HE TOOK THE EVIDENCE IN MY CASE TO HIS BROTHER-IN-LAW'S HOUSE FOR AN EXPERT OPINION. NANCE TESTIFIED THAT HIS BROTHER-IN-LAW NEVER TESTIFIED AS AN EXPERT CONCERNING BITE MARK EVIDENCE. NANCE TESTIFIED THAT HE DID NOT KNOW IF HIS BROTHER-IN-LAW HAD ANY TRAINING IN FORENSIC ODONTOLOGY AND HE DID NOT KNOW IF HE WAS A MEMBER OF THE AMERICAN BOARD OF FORENSIC ODONTOLOGY. HAD NANCE CONSULTED WITH AN EXPERT, HE WOULD HAVE KNOWN THAT BITE MARK EVIDENCE HAS CONTRIBUTED TO MANY WRONGFUL CONVICTIONS. THE WAY THE ATTORNEY HANDLED THE EVIDENCE SHOULD HAVE BEEN ENOUGH FOR THE JUDGE TO FIND HIM INEFFECTIVE BUT THAT WAS NOT THE CASE.

EXHIBIT #2

(D) Ground four DENIED DUE PROCESS + FUNDAMENTAL FAIRNESS
Supporting facts:

THE POST CONVICTION JUDGE GRANTED AN EVIDENTIARY HEARING BUT REFUSED TO ALLOW THE DEFENSE TO PRESENT THE EVIDENCE. THE JUDGE DID ALLOW THE STATE TO CALL A WITNESS BUT DID NOT FEEL HE NEEDED TO HEAR WHAT THE VICTIM HAD TO SAY. THE JUDGE ALSO DIDN'T WANT TO HEAR WHAT OUR EXPERT HAD TO SAY.

TO BE FAIR, THE JUDGE COULD HAVE EASILY DETERMINED WHAT NANCE DID OR DID NOT DO FROM THE RECORD; AFTERALL, NANCE WAS ON THE RECORD FROM PRETRIAL THROUGH TRIAL. THE VICTIM AND EXPERT NEVER TESTIFIED. DURING THE EVIDITIARY HEARING THE VICTIM ASKED TO SPEAK AND THE JUDGE TOLD HER TO BEHAVE AND KEEP HER MOUTH SHUT.

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2 Have all grounds raised in this petition been presented to the highest court having jurisdiction?
YES (✓) NO ( )

EXHIBIT #3
EXHIBIT #4

3. If you answered "NO" to question (16), state briefly what grounds were not so presented and why not:

(E) GROUND FIVE. INEFFECTIVE ASSISTANCE APPELLATE COUNSEL

SUPPORTING FACTS:

APPELLATE COUNSEL FAILED TO RAISE INSUFFICIENCY OF EVIDENCE EVEN THOUGH THE RECORD SHOWS NO EVIDENCE THAT DEFENDANT WAS PRESENT WHEN THE ABUSE WAS TAKING PLACE. INSTEAD OF RAISING VALID ISSUES, THE APPELLATE COUNSEL CONCEDED THE CONVICTION WHICH IS SOMETHING THE DEFENDANT NEVER DID. EVEN AT SENTENCING, THE DEFENDANT TOLD THE JUDGE THAT HE WAS INNOCENT AND ONE DAY THE TRUTH WOULD BE KNOWN.

↑ EXHIBIT # 5

(F) GROUND SIX. DUE PROCESS

SUPPORTING FACTS:

WHILE RENDERING HIS DECISION, THE POST CONVICTION JUDGE RULED THAT WE WERE NOT DEALING WITH "WHO OF THE 6 MILLION PEOPLE IN COOK COUNTY" LEFT THE ALLEGED BITE MARK. THE RECORD HAS NOTHING SAYING HOW MANY PEOPLE HAD ACCESS TO THE VICTIM. THE RECORD DOES SHOW THAT THE DEFENDANT WAS NOT PRESENT FOR TWO MONTHS.

ADDITIONALLY, THE POST CONVICTION JUDGE MADE HIS RULEING BASED ON A FLAWED INTERPRETATION OF ACCOUNTABILITY. THE JUDGE STATED "THEY CANNOT VIEW A CHILD WHO IS ABUSED" WHEN SPEAKING OF A PARENT.

→

THE ACCOUNTABILITY OF A PARENT STILL SAYS THAT THERE MUST BE KNOWLEDGE. THERE WAS NO EVIDENCE THAT THE DEFENDANT SAW HIS WIFE ABUSING HIS DAUGHTER, NO EVIDENCE THAT HE WAS TOLD BY HIS CHILDREN, AND NO EVIDENCE THAT HE PERSONALLY ABUSED HER EXCEPT THE ALLEGED BITE MARK EVIDENCE; WHICH THE VICTIM SAID IN AN AFFIDAVIT THAT THE DEFENDANT DID NOT DO.

EXHIBIT # 6

PART IV -- REPRESENTATION

Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(A) At preliminary hearing ZEDRIC BRADEN JR.

(B) At arraignment and plea TIMOTHY P. NANCE

(C) At trial TIMOTHY P. NANCE

(D) At sentencing PRO SE

(E) On appeal MARK PASTERSKI 69 W. WASHINTON CHICAGO

(F) In any post-conviction proceeding MICHAEL DAVIDSON 69 W. WASHINGTON

(G) Other (state): PRAYER FOR LEAVE: MICHAEL DAVIDSON 69 W. WASHINGTON

PART V -- FUTURE SENTENCE

Do you have any future sentence to serve following the sentence imposed by this conviction?

YES ( ) NO (✓)

Name and location of the court which imposed the sentence: N/A

Date and length of sentence to be served in the future N/A

WHEREFORE, petitioner prays that the court grant petitioner all relief to which he may be entitled in this proceeding.

Signed on: 8-23-10
(Date)

Signature of attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct.

Derrick Kelly
(Signature of petitioner)

K84031
(I.D. Number)

100 HILLCREST RD EAST MOLINE, IL 61244
(Address)

EXHIBIT #1

affidavit of Juliet. Juliet, Juliet's affidavit is after the post-conviction case had begun. Juliet's affidavit is from May 26th, 2004, Your Honor.

It is included in the materials that I provided as Exhibit M in the materials that I tendered to Your Honor, and in Juliet's affidavit, which was witnessed by -- the affidavit lists the witnesses, and is signed by the witnesses as well as by Juliet on that date, and that affidavit says,

"I was abused by my mother, Leah Kelly, and I was starved a lot by her.

"My father, Derrick Kelly, was never really home and he didn't do anything to hurt. He is not the one who abused me.

"My mother used to lock me up in closets during the afternoon. And sometimes I would be in there until night time. I wasn't fed well. I was stomped

EXHIBIT #1

on the foot till I bled by her. She would sometimes make my sisters hit me with the end of the belt that snaps the strap. They didn't want to.

"I feel that my father was there a lot and he knew about it, he probably had did something about it."

And it is signed by Juliet and notarized.

Your Honor, this is after trial. Regarding before trial, regarding -- and that is at issue, because it is what Juliet would have said at trial had Mr. Nance tried to get her testimony.

And regarding that fact, one thing that was a part of the pro se post-conviction petition that was filed by Derrick Kelly and attachment to that and included in what I've given Your Honor, as Exhibit N, is a memorandum from Assistant State's Attorney Mary Bucaro,

EXHIBIT #1

who was one of the prosecutors in this case at trial. And this was from April 30th, 1999, or roughly a half year before -- most of the trial occurred towards the end of 1999.

She talked about interviews that occurred at Central Baptist Family Services and regards People versus Derrick Kelly and Leah Kelly. And in this memorandum, besides stating that both Jasmine and Leslie made statements at these interviews consistent with their trial testimony, because at trial, both Leslie and Jasmine said Derrick did not hurt Juliet. It was the mother.

But at the very end of this, there's also the part in State's Attorney Mary Bucaro's memorandum that says the following.

"On April 30th, 1999, Juliet Weaters was reinterviewed as a witness in the above captioned matter.

"During the interview --

present during the interview were Assistant State's Attorney Annette Millville, Assistant State's Attorney Mary Bucaro. EXHIBIT #1

"Juliet reaffirmed previously made statements contained in police, medical, and DCFS reports relating to her mother, Leah Kelly.

"Juliet stated that her father, Derrick Kelly, did not hit her and did not bite her."

And this is Juliet's statements to State's Attorney a half a year before trial began, but at trial, Timothy Nance did not even try to get her to testify and that failure hurt Derrick Kelly at trial, because here we have -- I have here that Derrick Kelly first of all was not the principle perpetrator of any harm whatsoever against Juliet. And this was a critical testimony that should have been presented. And Timothy Nance blew it off. He did not do the job.

Q. When generally did you say it might have been that you spoke to -- went to Dr. Nicorata?

A. It would have been after I received the pictures.

Q. And trial began in December of -- of -- excuse me. Strike that.

When you took these photographs -- well, let me ask you this.

Did you know Dr. Nicorata? And I'm sorry I'm butchering his name.

Did you know Dr. Nicorata before you went to him regarding this case?

A. Yes.

Q. How do you know him?

A. He's my brother-in-law.

Q. He's your brother-in-law.

And to the best of your knowledge -- to the best of your knowledge, has Dr. Nicorata ever testified as an expert in bite mark evidence in court?

A. I don't believe he has.

Q. To the best of your knowledge, has Dr. Nicorata -- what training has Dr. Nicorata had in the area of forensic ondontology or forensic

EXHIBIT #2

dentistry?

A. I'm sorry. Could you rephrase that?

Q. To the best of your knowledge, what training has Dr. Nicorata had in the area of forensic ondontology or forensic dentistry?

A. That I don't know.

Q. To the best of your knowledge, is Dr. Nicorata a member or diplomate of the American Board of Forensic Ondontology?

A. That I don't know.

Q. When you brought the photographs to Dr. Nicorata -- and it was the photographs you brought. That was the evidence. Did you bring also the reports -- any report or documents from Dr. Smith, also, to Dr. Nicorata, or was it the photographs?

A. It was just the photographs.

Q. Okay. And these were photographs of a wound or what was like a bite mark and also photographs of the mouth, of the teeth and the mouth; is that correct?

A. That's correct.

Q. And when you gave these photographs to Dr. Nicorata, what -- were you with him when he

EXHIBIT # 2

examined them?

A. Yes. What happened was I called him up, I explained the situation to him, I asked him if he would mind taking a look at these photos, I told him what the purpose was.

And he invited me to his house. I went to his house. I walked into his kitchen, and when I was maybe from me to you, which is about 10, 12 feet, he could see the pictures in my hand, and he immediately said, oh, absolutely, that dental impression, that individual's mouth matches that injury. And then he looked at it further for a period of time.

Q. But he gave you that opinion after you gave him photos of the bite mark and and a teeth photograph, he looked at those photos in your presence and he said basically that he believed that these matched essentially?

A. I believe what he said was, oh, my God, that's an exact match.

Q. Okay. And that's what Dr. Nicorata told you?

A. That's correct.

Q. Okay. Mr. Nance, there was some other

EXHIBIT #3

THE CLERK: Derrick Kelly.

THE COURT: Okay. This matter is Derrick Kelly and it's set today for post-trial motions, motion for new trial and sentencing.

Mr. Kelly, are you ready on your motion for new trial?

MR. KELLY: Well, I spoke to you on the 2nd of August concerning a video-taped interview. Now, that evening after court I talked to the investigator and I also talked to the social worker, the case worker of my daughter Juliet. And they said it would have been no problem, but by her being a juvenile under the consent of DCFS and Central Baptist Family Services that I would have to have an order from you.

Now, as far as his hiring and so forth, all of that had been taken care of, but I wasn't able to do it because I didn't have written consent from you allowing me to conduct the interview.

THE COURT: Well, I told you I wasn't going to allow you to call Juliet to testify. I said if you had a tape I would view it.

A

EXHIBIT #3

So, I don't see where that tape would do anything, might do something in sentencing, but not on a new trial. So as to motion for new trial we are ready to proceed. I will not give you a continuance.

MR. KELLY: Well, also, sir --

THE COURT: You can make an offer of proof of what the tape says. Do you have the tape already?

MR. KELLY: No, I don't have the tape. The original would be made.

THE COURT: It has not been made yet? Proceed. Proceed with your motion for new trial.

MR. KELLY: Well, before I proceed, sir, since 6-29 I have been asking this Court for discovery, as you know. I am, you know, defending myself and right now I'm a defendant with, you know I'm a lawyer for myself without discovery.

Now let me see, I think it was on 7-28 they tendered me about twelve sheets of supplementary reports. But I mean, I asked for indictments and everything. I asked for the full discovery. I haven't had a chance to look over

B

EXHIBIT #4

beyond a reasonable doubt a child who was abused constantly over a period of time.

And my understanding of the law and the law does not allow the parent who knows that to stand idly by and do absolutely nothing.

I listened to the evidence in this case and I found beyond a reasonable doubt that Derrick Kelly knew it. That he stood by and did nothing and also found that the teeth marks were his also beyond a reasonable doubt.

As to the Appellate Court counsels, I'm raising it. I also feel they were not incompetent. That a review of the totality of the evidence and my findings on that would not I agree with the State that your --

A WOMAN: Can I say something?

THE COURT: If you can't behave and keep your mouth shut, you can leave the courtroom.

No. She is okay now. She does not have to leave now, but if she

EXHIBIT #4

cannot --

A WOMAN: You are asking me to --

THE COURT: She can stay if she can behave otherwise she has to leave.

A WOMAN: She never had a chance to say a word.

THE COURT: Nor is she going to get a chance. She filed her affidavit.

A WOMAN: She has no rights?

THE COURT: In this particular hearing she does not. She is not a witness in this.

A WOMAN: She was a witness to everything that happened.

THE COURT: I'm making my findings here. I'm making my findings.

That lady will leave now. She will be escorted out of the courtroom.

Anybody else? This is a courtroom. Anyone else who cannot refrain from making comments can leave now. Okay. I'm making my findings.

EXHIBIT #5

that we have encountered in our lifetime that has not made a mistake or error. A mistake is unintended departure from what's true. An error is a departure from what we know is right.

I would like to turn to the transcripts and at this time I passed several errors just in this courtroom alone during the trial; people calling Lesly Juliet, someone calling me Derrick Smith. Those are harmless errors. But the errors that Dr. Smith has made is a serious error and an error that can scar a man's life for a long time.

As crazy as it seems you know that the defendant maintains that he had nothing to do with this, these crimes and it is definitely true. One day it will be known, I know it will. But at this time I thank you for your patience throughout this whole thing because I know it had become a thorn in your side.

The only thing now is that I pray that, you know, that they are asking for extended term. The defendant came in front of you on a bench trial. The defendant -- the main issue is accountability in this case. The defendant, as

EXHIBIT #6

expert witness. He pointed out that Mr. Nance testified that he did not go to an expert witness, but went to a dentist and showed that person the evidence.

That upon seeing the bite marks and the photographs, he told Mr. Nance he says that's the guy. He said well, I have to do a little more before I can say that, but he was confident that was the person.

And in this case, we are not dealing with a bite mark that's left was left in say who in the world did this? Or who of the 280 million people in the United States left this bite mark? Who of the 6 million people in Cook County?

We are talking about a bite mark put on a girl. There are limited people with access to Juliet. It was not the whole world like a fingerprint or DNA. It was a question of it being consistent with him.

It could have been Leah, it