

Russell v Borders

***Writ
Of
Habeas Corpus***

Ground 3

***Reasonable Doubt of Each and
Every Element of The
Charged Crime***

***and Elements of The Offense
Omitted***

GROUND 3. REASONABLE DOUBT OF EACH &
EVERY ELEMENT OF THE CHARGED CRIME,
A N D
ELEMENTS OF THE OFFENSE OMITTED.

Petitioner contends the prosecution failed to establish evidence that he was was guilty beyond a reasonable doubt of each and every element of the offense of GRAND THEFT, and whether the theft was by EITHER FRAUD OR EMBEZZLEMENT.

California P.C. §484 subd.(a) defines the elements of theft to include "feloniously" stealing, taking, carrying away the personal property of another, or "fraudulently" appropriates the property of another ENTRUSTED TO HIM, or KNOWINGLY AND DESIGN-EDLY by false or fraudulent representation to defraud any other person of money ... is guilty of theft. The definition identifies a required evil or nefarious intent behind the taking. The definition also establishes a defendant must knowingly and designedly make false representations or false pretenses in an effort to defraud a party. There was no evidence of Petitioner's felonious, nefarious, evil intent introduced at trial, yet there was plenty of evidence of Petitioner's intent to HELP these individuals extricate themselves from the circumstances causing the loss of their homes. Furthermore, there was an abundance of evidence demonstrating Petitioner's good intentions to help these persons was entirely consistent with his life-long ambition of helping others. (R.T. 3177:27-28) (R.T. 3219-20:19-04) Evidence of Petitioner's involvement with Haven of Hope prior to establishment of his Rent to Own program aptly demonstrated his intent and actions to help others. (R.T. 1964:20-27) (R.T. 1965:4-22) (R.T. 1970-71:25-15)

(Ronald Russell, Habeas Corpus Petition, Ground Three, page 24.)

1 The 72 year old Petitioner had absolutely no criminal record
2 and decades of real estate sales experience without any com-
3 plaints (R.T. 1511:16-25); facts from which reasonable persons
4 could easily infer it was pretty late in life for him to adopt
5 felonious intent to engage in a fraudulent real estate scam.
6 The prosecution offered no motive or circumstance to explain any
7 such drastic change in Petitioner. Petitioner wasn't deep in
8 debt, Petitioner didn't bet on the ponies, Petitioner wasn't be-
9 ing blackmailed about a terrible secret and Petitioner wasn't
10 struggling to make alimony or child support payments.

11 The prosecution attempted to prove criminal intent from cir-
12 cumstantial evidence inference (R.T. 3323:25-27) drawn from
13 Petitioner's PRIOR CONDUCT. The prosecution repeatedly said
14 Petitioner's pattern was take their money and run. This is how
15 he is. He promises to pay but never does. To support such a
16 false notion, the prosecution presented these examples:

- 17 i. In 2006, while hospitalized, Petitioner was approached by
18 officers of not-for-profit Haven of Hope to act as the
19 group's broker to purchase properties to house the organ-
20 ization's clientele. (R.T. 2009-10:18-11) After Haven of
21 Hope closed on the sale of two quadplex units, Haven of
22 Hope lost its CARE state funding which would have paid
23 the mortgage payments on the properties and all other re-
24 lated program costs. (R.T. 2009-10:18-11) Petitioner
25 made a large commission on the sale, (R.T. 2058-59:16-
26 16), the properties were lost in foreclosure (R.T.
27 2045:6) and Ms. Margrett Cannon, the Vice President of
28 Haven of Hope; one of the mortgage co-signers wound up
(Ronald Russell, Habeas Corpus Petition, Ground Three, page 25.)

1 filing bankruptcy. (R.T. 2045:14) Petitioner donated his
2 commission to Haven of Hope. (R.T. 2042:6-23) The pro-
3 secution's point was, while the Petitioner enriched him-
4 self, he left Margrett Cannon in financial ruin and Haven
5 of Hope with nothing. (R.T. 2047:3-9), (R.T. 2045:3-14)
6 The Prosecution says "Mr. Russell in whatever situation
7 always does what he perceives is best for Ron Russell re-
8 gardless of the cost to others. He may have some super-
9 ficially plausible explanation, but when you dig deeper,
10 Mr. Russell is making money for himself at the cost of
11 others." (R.T. 3340-41:24-2) Apparently the prosecution
12 believed either Petitioner could have and should have
13 sold the property back to the original owners or could
14 have and should have looked into his crystal ball to
15 foresee the loss of state funding to Haven of Hope caus-
16 ing mortgage foreclosure on the properties the nonprofit
17 purchased, the forcing of the vice president and co-sign-
18 er into bankruptcy; and then with that fore-knowledge of
19 these future circumstances in mind, Petitioner should
20 have blocked the sale of the property to Haven of Hope.
21 The rhetorical question is: What was the Petitioner's
22 nefarious intent evidenced and what should the Petitioner
23 have done differently in these prior 2006-2007 circum-
24 stances and just where is the nefarious intent?

25
26 ii. Petitioner's sales agent Earl Neff was an independent
27 contractor. (R.T. 2364-10:3-10) Prosecution's evidence
28 of felonious intent was: while Petitioner was raking in
(Ronald Russell, Habeas Corpus Petition, Ground Three, page 26.)

1 all the money for himself, the sales agent sleeping in
2 the office or his truck because he was destitute; getting
3 nothing in return for his efforts. (R.T. 2364-31:2-16)
4 The prosecutions point? "Mr. Russell is the one running
5 the program. All the money goes to him. Mr. Neff gets,
6 what, \$1,000 a month?" (R.T. 3463:15-17) "[B]ecause he
7 made so little money from Mr. Russell, Mr. Neff slept in
8 his car or at his girlfriend's or sometimes at the off-
9 ice." (R.T. 3379:11-13) Conveniently, the prosecution
10 failed to mention Mr. Neff's employment terms as a sales
11 agent were customary in the real estate industry. (R.T.
12 2364-[29-30]:24-15) The customary terms of employment
13 for real estate agents is their compensa- tion is based
14 entirely on a percentage of the sales commissions on the
15 agent's property sales after the sales close. Sales may
16 not all close, even at the very last minute for numerous
17 reasons. (R.T. 2364-[60-62]:16-1)

18
19 iii. Petitioner leased office space for his real estate busi-
20 ness where he met with his Rent to Own clients. (R.T.
21 2601:16-21) After Petitioner learned officially in a
22 written letter HUD did not approve the application to a
23 special program providing lists of substantially discoun-
24 ted foreclosed homes; which in turn, caused the private
25 investor Best Realty (Hermie Bacus) who committed 5 mil-
26 lion dollars (R.T. 3191:4-23) to withdraw his commitment;
27 Petitioner shut down Rent to Own business operations,
28 (R.T. 3191:15-23), closed the office, gave Notice to the
(Ronald Russell, Habeas Corpus Petition, Ground Three, page 27.)

1 landlord, Timothy Cahill, and vacated the premises. Pe-
2 titioner was paying refunds to dissatisfied customers but
3 stopped paying office rent when he stopped collecting
4 fees from new Rent to Own customers. The prosecution's
5 point: Petitioner had TAKEN IN ALL THAT MONEY and left
6 his landlord Timothy Cahill without paying for the unex-
7 pired term of the lease. The prosecution said 'that's
8 how the Defendant is; he promises to pay and never does.
9 "I submit to you ... [t]hat is his viewpoint with regard
10 to promises to pay. He doesn't have to." (R.T.
11 3342:15-17) The inherent irony was of course, the major
12 tenets of the prosecution's case were: a.) Peti- tioner
13 was never entitled to use the fees he collected from
14 customers for business operating expenses because he had-
15 n't informed them and didn't have their permission to do
16 so; (R.T. 3249:25-26), b.) The promised refunds Peti-
17 tioner paid to dissatisfied customers were paid with fees
18 he took in from new customers; (R.T. 3250:7-10), and c.)
19 Petitioner did not have the funds to pay the promised
20 refunds to the remain- ing dissatisfied customers (R.T.
21 3206 :11-27). The pregnant question is what would the
22 prosecution have to say if Petitioner had paid the
23 landlord the rent due on the remainder of the lease, but
24 to the exclusion of paying the promised refunds to
25 dissatisfied customers?
26

27 iv. Petitioner engaged in a series of business transactions
28 with a business associate-friend Patrick McLafferty.

(Ronald Russell, Habeas Corpus Petition, Ground Three, page 28.)

1 (R.T. 3155:24-27) One transaction involved Petitioner
2 receiving consideration in the form of an old car with
3 expired tags that didn't run. (R.T. 3167:6-10)
4 Petitioner went ahead and paid the expenses of repairing
5 the car and the fees in arrears for licensing the
6 vehicle, then gave the vehicle as a gift to his grandson
7 who was going off to college and needed a vehicle. (R.T.
8 3216-17:16-3) Subsequently, the business associate's
9 deal arranged by the Petitioner fell apart through no
10 fault of the Petitioner. (R.T. 3152:14-27) The
11 prosecution's point: Petitioner took the business
12 associate-friend's car promised to pay him. He should
13 have returned it to him or paid the business
14 associate-friend for the car after the deal fell through,
15 but didn't. (R.T. 3158:5-8) Again the prosecution said:
16 That's how the defendant is. He promises to pay but
17 because he has done something with it, he decides he
18 doesn't have to. (R.T. 3342:1-17) But the prosecution
19 failed to present evidence of any of the subsequent,
20 ongoing successful business transactions and business
21 relationship between Petitioner and his business
22 associate-friend, nor any evidence the business
23 associate-friend believed he was entitled to either
24 return of the vehicle (which under the circumstances was
25 then impossible) or compensation for the vehicle, nor any
26 evidence the business associate-friend demanded return of
27 the vehicle or compensation for the vehicle from the
28 Petitioner. In fact, the business associate-friend

1 DID NOT either expect return of the vehicle or
2 compensation for the vehicle, or compensation for the
3 vehicle, nor did the business associate-friend ever make
4 demand for return of the vehicle or compensation for the
5 vehicle from the Petitioner. (R.T. 3158:1-8)

6 If granted an evidentiary hearing Petitioner will present
7 irrefutable evidence and testimony there was absolutely no
8 nefarious intent on his part in the examples above that were
9 cited by the prosecution. Petitioner will argue the logical and
10 legal impossibility of inferring Petitioner's criminal intent in
11 the instant matter from past situations where there was no evil
12 or mal-intent.

13 The prosecution failed to prove beyond a reasonable doubt
14 Petitioner KNEW what he was doing was wrong. Knowledge element
15 required the Petitioner to a.) know what he was about to do, or
16 was doing was wrong, and b.) then **decidedly** go forward to do it
17 and c.) by false or fraudulent representation and do it anyway.
18 The evidence showed Petitioner DID NOT know the law required him
19 to place the fees collected from customers in a trust account,
20 and he relied on bonafide legal advice to the contrary. In
21 fact, the entire trust account issue is a question of law as to
22 whether or not Petitioner would be principal in the future
23 transaction. Petitioner made no express or implied
24 representations to anyone about how the fees would be utilized
25 UP UNTIL THE TIME that the fee would either be applied toward a
26 rental deposit or the cus- tomer asked for a refund. Petitioner
27 had no knowledge of any such requirement and as a matter of law,
28 it appears there is no such requirement. With respect to the
(Ronald Russell, Habeas Corpus Petition, Ground Three, page 30.)

1 issues of private investors and receiving HUD application
2 approval his knowledge and belief was both were imminent based
3 on positive information provided to him by third parties.
4 Similarly, the representations Petitioner made about private
5 investor funds and HUD's program of providing lists of discount
6 priced homes were neither fraudulent or made recklessly because
7 when Petitioner made them they appeared to be imminent. And did
8 Petitioner go head anyway? Of course he did based on the
9 confidence he had in the best information he had in hand at the
10 time. No evidence was presented by the prosecution showing the
11 Petitioner continued to promote, accept fees etc. for his Rent
12 To Own program after he officially learned from HUD the
13 application was denied, further resulting in the loss of his 5
14 million dollar investor.

15 If granted an evidentiary hearing, Petitioner will present
16 irrefutable evidence as to what he knew, why he knew it, and
17 when he knew it about the HUD application, investor funds and
18 the last date he accepted fees from new customers. Petitioner
19 will also argue the logic behind his business as he executed it.
20 Petitioner will further argue executing the business plan in a
21 different order: (i.e. Find investors, Obtain HUD's approval to
22 receive the lists, Get customers) or (i.e. Obtain HUD's
23 approval, Line up investors then Recruit customers) was not
24 feasible. Finally, Petitioner will argue the order by which he
25 executed his business plan did not infer his nefarious intent
26 nor made his Rent To Own business venture a scam.

1 And with particular attention to the charge of embezzlement,
2 the definition establishes fraudulently appropriates the
3 property of another ENTRUSTED TO HIM as elements. In the
4 instant case Petitioner did not fraudulently appropriate the
5 "alleged victims" property. Testimony from each individual
6 established they paid a fee to the Petitioner. This fee was not
7 entrusted to the Petitioner beyond the point that the
8 individuals had a reasonable expectation the Petitioner would
9 accurately record the amount of the fee to their credit which
10 Petitioner did. Petitioner made no express representations he
11 would invest the fees or simply "hold on to" the fees or that he
12 would not utilize the fees in the operation of his Rent To Own
13 program. Petitioner promised the individuals when the time
14 came, PETITIONER WOULD apply the fee received toward the future
15 rental deposit or down payment OR refund the fee if the
16 individual changed their mind. Individuals rightfully trusted
17 in the promise made by Petitioner, which as it turned out was
18 not a promise Petitioner was able to immediately fulfill.
19 California law recognizes that not every promise made is a
20 promise fulfilled and the crux of the matter is whether the one
21 who made the promise had no intention of fulfilling the promise
22 when the promise was made.

23 If granted an evidentiary hearing, Petitioner will
24 conclusively demonstrate he had every intent in the world to
25 fulfill his promise to the Rent To Own customers when he made
26 them a promise when the time came, PETITIONER WOULD apply the
27 fee he received toward the future rental deposit or down payment
28 or refund the fee if the individual changed their mind.

1 Petitioner will further demonstrate he had every intention in
2 the world to fulfill his promise to the Rent To Own customers
3 who wanted a refund even after it was clear his business venture
4 could not and would not succeed and as the business owner, he
5 was unable and could not personally and immediately make each
6 individual financially whole. He will present the evidence the
7 jury never heard or saw: Rent to Own customers were to be made
8 whole through the Broker's Recovery Fund and as a condition of
9 drawing upon this fund to pay refunds due Rent to Own customers,
10 Petitioner's Real Estate Brokers License would be suspended
11 until such time Petitioner reimbursed the fund the total amount
12 the fund disbursed to these customers as the promised refunds.
13 Petitioner will demonstrate this was precisely the manner and
14 means by which each of the testifying "alleged victims" was made
15 financially whole. Petitioner will demonstrate how, when and
16 why the jury was not presented any evidence about the existence
17 and purpose of the Broker's Recovery Fund. And Petitioner will
18 convincingly argue in light of the fund's existence and purpose,
19 Petitioner's plan directing customers to the fund and the fact
20 the customers did obtain their refunds from the fund, there is
21 NO EVIDENCE Petitioner had nefarious intent, knowledge of wrong
22 doing and designedly to illegally take funds or embezzle funds
23 from anyone.

24 **APPLICABLE CASE LAW:**

25 Arthur Anderson LLP v. U.S., 544 U.S. 696 (2005) The knowledge
26 requirement - consciousness of wrongdoing was omitted violated
27 petitioner's Fifth Amendment right to due process.

1 In re Winship, 397 U.S. 358 (1970) The U.S. Supreme Court
2 held the petitioner's conviction was based on less than proof
3 beyond a reasonable doubt of each and every element of the
4 charged crime violating petitioner's Fifth Amendment right
5 to due process.

6 Russell v. U.S., 369 U.S. 749 (1962) (Variance) Petitioner
7 was convicted on the basis of facts different than those facts
8 on which the charges were based violating petitioner's Fifth
9 Amend- ment right to due process.

10 Osborne v. Ohio, 495 U.S. 103 (1990) The court held petitioner's
11 conviction resulted from a jury instruction which omitted an
12 sential element of the charged offense violating
13 petitioner's Fifth Amendment right to a fair trial and violating
14 petitioner's Sixth Amendment right to jury trial.

15 U.S. v. Gaudin, 515 U.S. 506 (1995) The U.S. Supreme Court
16 held the jury verdict was rendered in the absence of proper
17 instructions on every element of the offense in violation
18 of petitioner's Fifth Amendment right to due process.

1 reimbursement of their \$2,900 from the fund.

2 Mr. Russell was arrested on September 20, 2012 and the ac-
3 tual trial began in April 2014. Defendant Russell repeatedly
4 moved for the Court to set bond in the case. Each time the
5 prosecution strenuously objected. Defendant Russell repeatedly
6 attempted to assert his constitutional right to a speedy trial
7 to no avail. Each time the matter of setting a trial date came
8 up, his appointed defense counsel, a public defender, would
9 explain to the court at each pre-trial hearing; the prosecution
10 had just handed him another stack of discovery materials, he had
11 twenty-two or more cases and was nowhere near ready to go to
12 trial. Meanwhile, however, defense counsel was not and did not
13 actively investigate the facts of the case. Further extensive
14 detailed discussion of these matters continues in Ground Five in
15 the instant Habeas Corpus petition.

16 POST CONVICTION PROCEEDINGS

17 Petitioner's direct appeal was decided 12-10-15 but Peti-
18 tioner was not notified of the decision nor did he receive the
19 trial transcripts from Appellate Counsel until August 2016.
20 Direct Appeal languished in the Court for 27 months because of
21 appellate counsel's personal problems. Rather than present any
22 one of the grounds in the instant petition which could likely
23 have led to either a reversal or new trial, counsel only focused
24 on the one issue she knew she would prevail. That single issue
25 was that the Trial Court had mis-calculated Petitioner's pre-
26 sentencing jail credits. This problem, explored further in
27 Ground 8 of the instant petition is the credit mis-calculation
28 was corrected almost immediately after Petitioner was
(Donald Russell, Habeas Corpus Petition, General Case Overview, page 13a.)