

Russell v Borders

***Writ
Of
Habeas Corpus***

Ground 4

***Evidence Insufficient,
False Evidence
and
Expert Witness Funds Denied***

GROUND 4. EVIDENCE INSUFFICIENT,
FALSE EVIDENCE,

&

EXPERT WITNESS FUNDS DENIED

Petitioner contends his conviction on 52 counts of grand theft P.C. §487 subd.(a.) was obtained a.) with insufficient evidence, b.) by introducing false evidence, and c.) because the indigent Petitioner's appointed counsel failed to present expert testimony to the jury at trial presumably for lack of expert witness funds. Petitioner is cognizant these claims of insufficient evidence in view of a 25 day long trial and 78 prosecution witnesses at first sight seems unlikely, incredible and ludicrous.. "Petitioner has to be kidding" some might scoff, but assuredly, Petitioner is not kidding!

A .

EVIDENCE INSUFFICIENT .

The prosecution presented testimony of 53 individual complaining witnesses who established a customer relationship with Petitioner, a California licensed Real Estate Broker via his innovative Rent to Own program. Each paid Petitioner a fee for services ranging from \$2,600 to \$2,900. The contract between Petitioner and each of these individuals promised the fee they paid Petitioner would be refundable to them if they 'changed their mind' and requested a refund. Each of these individuals did 'change their mind' and sought a refund of the fee they paid to Petitioner. Their 'change of mind' came about because Petitioner could not provide all of the services Petitioner had

(Ronald Russell, Habeas Corpus Petition, Ground Four, page 35.)

1 promised them in a timely manner. Petitioner accepted these
2 fees fully intending at the time and subsequently to provide all
3 the benefits and services he promised to provide for the
4 consideration received. Petitioner utilized these fees to cover
5 the "program's business operating expenses" over a 28 month
6 period of time. Petitioner became unable to refund the fee to
7 these complaining witnesses who represented roughly 60% of the
8 Rent To Own customers.

9 Evidence presented also included full financial disclosure
10 of Petitioner's use of the fees collected from customers to
11 cover business operating expenses. These financial disclosures
12 did not reveal use of the funds for illegal or immoral purposes,
13 missing funds or significant financial irregularities despite
14 the co-mingling of Petitioner's personal funds with business
15 funds. Prosecution presented evidence each of these complaining
16 witnesses was a victim of the 2008-2009 real estate market
17 collapse and in danger of losing their home. The complaining
18 witnesses were in these dire straits because of the decisions
19 and mistakes they each made when purchasing their home during
20 the California residential real estate boom and believed they
21 had made another bad financial mistake when paying the fee to
22 Petitioner and now afraid they would never see their money again.

23 This was the sum and substance of the direct evidence
24 provided by the complaining witnesses presented by the
25 prosecution 54 times.

26 Each of the complaining witnesses was made financially
27 whole, receiving a full refund of the fee they paid to

1 Petitioner. Evidence of their recovery was withheld from the
2 jury.

3 The gist of this overwhelming volume of evidence was as
4 follows: We, (the complaining witnesses) paid the defendant and
5 he didn't deliver on either his promise to provide specific
6 services or a refund when we changed our mind ... Petitioner had
7 and offered no general dispute. The dispute arises at the point
8 the prosecution proceeded to spin this overwhelming volume of
9 evidence to infer, imply, and ascribe motive, criminal intent,
10 and knowledge of wrongdoing to the Petitioner but in the absence
11 OF ANY DIRECT EVIDENCE as to Petitioner's motive, criminal
12 intent, knowledge of wrongdoing. There was no direct evidence
13 Petitioner had knowingly and intentionally violated any law
14 whatsoever EITHER IN THE INSTANT CASE or in his entire lifetime.
15 (R.T. pages 321-340), (R.T. pages 359-382), (R.T. pages
16 393-432), (R.T. pages 454-482), (R.T. pages 499-521), (R.T.
17 pages 539-584), (R.T. pages 585-612), (R.T. pages 616-627),
18 (R.T. pages 648-717), (R.T. pages 720-758), (R.T. pages
19 758-797), (R.T. pages 797-825), (R.T. pages 892-907), (R.T.
20 pages 938-973), (R.T. pages 973-1018), (R.T. pages 1026-1045),
21 (R.T. pages 1085-1142), (R.T. pages 1142-1173), (R.T. pages
22 1174-1215), (R.T. pages 1220-1283), (R.T. pages 1284-1316),
23 (R.T. pages 1319-1334), (R.T. pages 1334-1362), (R.T. pages
24 1362-1391), (R.T. pages 1420-1444), (R.T. pages 1446-1479),
25 (R.T. pages 1482-1509), (R.T. pages 1520-1528), (R.T. pages
26 1563-1609), (R.T. pages 1611-1622), (R.T. pages 1657-1661),
27 (R.T. pages 1661-1691), (R.T. pages 1709-1716), (R.T. pages
28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 37.)

1 1719-1741), (R.T. pages 1767-1808), (R.T. pages 1811-1857),
2 (R.T. pages 1859-1882), (R.T. pages 1889-1914), (R.T. pages
3 1925-1948), (R.T. pages 2112-2164), (R.T. pages 2165-2211),
4 (R.T. pages 2254-2299), (R.T. pages 2300-2333), (R.T. pages
5 2334-2363), (R.T. pages 2364-069 - 2364-099), (R.T. pages
6 2364-100 - 2364-124), (R.T. pages 2364-125 - 2364-149), (R.T.
7 pages 2370-2440), (R.T. pages 2440-2466), (R.T. pages
8 2468-2501), (R.T. pages 2502-2533), (R.T. pages 2534-2556),
9 (R.T. pages 2558-2599), (R.T. pages 2615-2618), (R.T. pages
10 2618-2671), (R.T. pages 2672-2714), (R.T. pages 2716-2759),
11 (R.T. pages 2759-2783), (R.T. pages 2784-2854), (R.T. pages
12 3297-3310)

13 The prosecution offered two (2) theories of crime pursuant
14 to theft by deception (P.C. §487 subd.(a.) being that of FRAUD
15 or EMBEZZLEMENT. If granted an evidentiary hearing Petitioner
16 will show the evidence against him was insufficient in that it
17 failed to include any of the "badges of fraud" as the legal term
18 is generally understood and applied; nor any direct evidence of
19 embezzled funds.

20 Petitioner will present direct evidence the jury never heard
21 which went directly to the issues of motive, intent and
22 knowledge of wrongdoing. This evidence includes, but is not
23 limited to the existence of the Broker's Recovery Fund,
24 Petitioner's knowledge of the Fund's existence, purpose,
25 operation and Petitioner's plan to utilize the Broker's Recovery
26 Fund to restore the complaining witnesses to wholeness.
27 Petitioner will prove he offered the complaining witnesses

1 information that allowed them to receive the promised refunds
2 from the Broker's Recovery Fund (R.T. 3456:12-13) and
3 furthermore, prove, upon the conclusion of the trial, each of
4 the complaining witnesses received a full refund of the fee each
5 paid to the Petitioner from the Broker's Recovery Fund.
6 Petitioner will successfully argue had the jury received
7 evidence and testimony regarding the relevant aspects of the
8 Broker's Recovery Fund relating to the underlying factual
9 dispute, they would have come to a different conclusion as to
10 their verdict.

11 Petitioner, a California licensed Real Estate Broker knew
12 the Broker's Recovery Fund existed and the fund's purpose before
13 accepting fees from all Rent To Own customers. Although he
14 considered it unlikely the Rent To Own program would fail or
15 most of the customers would request a refund, the Broker's
16 Recovery Fund, to which he had continued to contribute during
17 his career as a real estate broker was his "insurance" for
18 paying out refunds if the business failed. This knowledge and
19 intent directly contradicts any and all inference as to
20 Petitioner's criminal intent and knowledge of wrong doing.

21 B .

22 F A L S E E V I D E N C E

23 Prosecution presented evidence which they purported was
24 evidence that Petitioner's Rent to Own program was a Ponzi
25 scheme. The Prosecution presented Mr. Edward Hudson as an
26 expert witness to testify Petitioner was operating a Ponzi
27 scheme. The Prosecution repeatedly referred to Petitioner's

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 39.)

1 business as the Petitioner's "Rent To Own Ponzi scheme" when
2 addressing the jury. In total, he referenced Petitioner's
3 business activities as a ponzi scheme some eighteen (18) or more
4 times.

5 A "Ponzi scheme" however, is a precise term referring to
6 precise characteristics well established case law. The local
7 twelve (12) year old entrepreneur operating a lemonade stand in
8 the front yard and advertises "Free Refills"; who spends the
9 customer's money to buy more sugar and lemons "to keep the
10 business going" (along with a single piece of bubble gum): but
11 can't provide refills to all the customers because the grocery
12 ran out of lemons, the young entrepreneur can't provide refunds
13 to dissatisfied customers who wouldn't wait any longer for a
14 free refill IS NOT OPERATING A PONZI SCHEME.

15 Ponzi Schemes require INVESTORS who are PROMISED ATTRACTIVE
16 RETURNS on their investment far and above what is customary and
17 usual in the specific times and circumstances. The "Ponzi
18 scheme operator" knows from the beginning he or she cannot pay
19 these exceptional returns on the investors' money; does not
20 invest the money with the investor's best interests at heart;
21 AND, when the early investors demand to be paid either or both
22 the return on their investment and their principal the operator
23 pays them from the funds the operator has taken in from new
24 investors. Like the fictional lemonade stand operator,
25 Petitioner wasn't operating a Ponzi scheme because (a.) There
26 were no investors, (b.) There were no funds tendered as
27 "investments", (c.) there was no exceptionally high rate of

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 40.)

1 return promised to investors on their investment, (d.) the early
2 investors were not paid the promised return and or principle
3 with investment funds received from new investors.

4 Like the fictional lemonade stand operator, Petitioner was
5 not operating a Ponzi scheme because a.) There were no
6 investors. b.) Customer didn't tender funds as "investments"
7 c.) The Petitioner did not offer an exceptionally high rate of
8 return on investor's principles. d.) Early investors were not
9 paid the promised exceptional return or their principle with
10 investment funds received from new investors.

11 Petitioner is not arguing a mere matter of semantics here.
12 "False evidence" can be a conjured fact as a falsity in itself,
13 physical evidence moved, removed or "planted" at a crime scene
14 by an entity motivated to create or draw falsified conclusions;
15 or evidence as fact true or untrue in itself, but not evidence
16 of what it is presumed or purports to demonstrate or prove. In
17 the instant case, intent to defraud is presumed in the operation
18 of a Ponzi scheme. Over and over again the prosecution referred
19 to Petitioner's Rent to Own business as a ponzi scheme² and a
20 scam³ recalling such "psuedo facts" (erroneous inferences) like

21 NOTES

22 ² Prosecution references to Petitioner's Rent to Own business as a Ponzi
23 scheme: (R.T. 3340:15-19), (R.T. 3334:9-11) (R.T. 3344:10-11), (R.T.
24 3346:23-25), (R.T. 3348:20-22), (R.T. 3359:1-2), (R.T. 3386:14-15),
25 (R.T. 3390:26-28), (R.T. 3391:7-12), (R.T. 3393:5-10), (R.T. 3395:2-4)
(R.T. 3396:9-11), (R.T. 3396:26-28), (R.T. 3417:7-8), (R.T. 3432:7-10)

26 ³ Prosecution references to Petitioner's Rent to Own business as a scam:
27 (R.T. 252:19-20), (R.T. 259:9-12), (R.T. 263:27-28), (R.T. 269:10-13)
28 (R.T. 275:2-5), (R.T. 275:21-23), (R.T. 3328:10-11), (R.T. 3340:15-16)
(R.T. 3343:10-11), (R.T. 3366:4-5), (R.T. 3367:24-25) (R.T.3386:17-18)

(Ronald Russell, Habeas Corpus Petition, Ground Four, page 41.)

1 'Petitioner never had any intention of buying anyone a house'
2 and absolute fact such as Petitioner paid refunds to some
3 customers from the money he collected from new-comers to the
4 Rent to Own scam. The prosecution's entire theory of
5 embezzlement rested on a showing the Rent to Own program "was a
6 ponzi scheme." And the prosecution said "here are 'the facts'
7 why we know it was a ponzi scheme." By definition under the
8 law, the Rent to Own program was not a ponzi scheme and the
9 evidence presented was intended to deceive the jury and persuade
10 a false conclusion the instant case was all about a ponzi
11 scheme.

12 Petitioner points to the following as other examples of
13 "false evidence:"

- 14 a.) Evidence Rent To Own was a scam or sham. (R.T.
15 252:19-20) (R.T. 255:14-19) (R.T. 263:27-28)
- 16 b.) Petitioner "had no other income". (R.T. 275:5)
- 17 c.) Petitioner and Earl Neff had opposite interests and
18 intentions.
- 19 d.) The non-existence of HUD Program - no application.
- 20 e.) Conclusions of Petitioner's wrong doing by Real Estate
21 Board pursuant to Real Estate Law.
- 22 f.) Rent to Own contract was illegal or flawed.
- 23 g.) Witness statements regarding Petitioner's lavish
24 lifestyle and spending.

25 ===== NOTES CONTINUED =====

26 ³ Prosecution references to Petitioner's Rent to Own business as a scam:
27 (R.T. 3391:1-3), (R.T. 3396:15-17), (R.T. 3441:4-6) (R.T. 3450:14-16)

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 42.)

1 If granted an evidentiary hearing Petitioner will argue the
2 false evidence presented to and argued before the jury had the
3 exclusive purpose to demonize the Petitioner in such a way
4 that Petitioner's intent COULD ONLY BE nefarious or criminal
5 intent with respect to starting and operating his innovative
6 Rent To Own program. Further, he will demonstrate the
7 prosecution's slight of hand juggling between actual repetitive
8 witness testimony and frequent repetitive false summarization of
9 all of complaining witness testimony was designed and intended
10 to antagonize the jury against the Petitioner; going so far as
11 to character assassination making a mockery of Petitioner's
12 Christian faith. (R.T. 3337:15-21), (R.T. 3438:24-04) (R.T.
13 3465:4-8),(R.T. 3465:21-28) Petitioner will argue; Had it not
14 been for the introduction of false evidence as to Petitioner
15 operating "a Ponzi scheme" or "scam" and false evidence of his
16 nefarious or criminal intent, in all likelihood, the jury in
17 this matter would have reached an opposite conclusion as to
18 Petitioner's guilt and would have acquitted.

19
20 C .

21 **EXPERT WITNESS FUNDS DENIED**

22 The indigent Petitioner was represented by appointed
23 Sacramento County Public Defender Mr. Mark Slaughter at trial.
24 Mr. Slaughter admitted to Petitioner while preparing during
25 preliminary matters that he lacked experience and background in
26 real estate matters as a whole. Early on, this became of major
27 concern to Petitioner who was frustrated in the task of
28 assisting in the preparation of his defense because for the most
(Ronald Russell, Habeas Corpus Petition, Ground Four, page 43.)

1 part, Mr. Slaughter didn't comprehend basic concepts, terms and
2 customary practices in the real estate industry nor how these
3 matters were central to crafting a defense in the instant case.
4 Mr. Slaughter assured and reassured Petitioner several times
5 while preparing for trial that he (Slaughter) would hire a real
6 estate expert. Mr. Slaughter did not however utilize any
7 special expertise of professionals in the real estate industry
8 while preparing for trial nor hire any experts of any kind to
9 offer expert testimony at trial. (Reader should note at this
10 juncture the trial date in this matter was postponed numerous
11 times in the instant case and so it is unlikely the lack of
12 expert testimony can be attributed to scheduling conflicts and
13 equally unlikely attributable to a lack of qualified experts
14 avail- ability in the Sacramento area.)

15 Petitioner must presume he was deprived the benefit of
16 expert witness testimony and the assistance such experts could
17 provide the defense in preparing for trial because funds for
18 expert witnesses were not approved. Petitioner further presumes
19 the defense was denied the funds for expert witnesses because in
20 all likelihood a request for such funds was never presented by
21 defense counsel.

22 Petitioner also contends in aside: Had he been released from
23 custody pending trial, not only would he have fully assisted his
24 counsel preparing a defense, he would have identified appro-
25 priate expert witnesses relative to specific defense problems
26 and himself investigated and initiated whatever process and
27 procedures were involved to secure funds for expert witnesses.

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 44.)

1 Petitioner was totally unaware the Prosecution intended to
2 call a series of expert witnesses at trial until these
3 prosecution witnesses actually testified. Hence, Petitioner was
4 at a severe disadvantage to provide his appointed counsel with
5 even impeachment material to counter the prosecution's expert
6 witness testimony, much less call his own expert witnesses.

7 As the trial proceeded, it became increasingly evident to
8 Petitioner that his counsel could have and should have called
9 expert witnesses for the defense as to the following topical
10 areas:

- 11 1. Residential real estate market in California,
12 2002-2005, 2006-2012 (facts re: bubble / facts re:
13 market collapse)
- 14 2. Real estate sales profession and marketing (market
15 cycles, market trends, market segments, property
16 values)
- 17 3. California contract law (nature of contracts,
18 consideration given, specific non-performance,
19 refunds, recourse)
- 20 4. Real Estate Financing, Private investment /
21 (mortgages types of mortgages, sources of funds,
22 PPM's, legalities, restrictions)
- 23 5. Small Business Forensic accounting / taxes
24 (Defendant's accounting records, allowable business
25 expenses, special accounts)
- 26 6. HUD programs (Variety, purpose & availability,
27 application procedures)

28 (Ronald Russell, Habeas Corpus Petition, Ground Four, page 45.)

1 If granted an evidentiary hearing Petitioner will demon-
2 strate the Prosecution's case against him relied heavily on the
3 Prosecution's use of expert witness testimony which received
4 undue weight by the jury because the defense offered no
5 impeachment testimony nor any expert testimony which would
6 reveal either an alternative viewpoint or contrary view point.
7 Petitioner will argue the point the lack of expert witness
8 testimony for the defense seriously diminished Petitioner's
9 credibility, particularly whereafter the Prosecution pointed out
10 to the jury the defense failed to present any expert witnesses
11 who stated the prosecution's experts were wrong, and proceeded
12 to infer the reason for this being the prosecution's expert's
13 weren't wrong! Petitioner will demonstrate the prosecution
14 spent in excess of \$13,000 in just the forensic analysis of
15 Petitioner's bank accounts.

16 Petitioner will argue at an evidentiary the prosecution's
17 case against him largely rested on the expert opinion of "cherry
18 picked" experts and had expert witness funds been available to
19 the defense; or, if such were available and actually utilized by
20 the defense such that the jury heard expert witness testimony
21 presented by the defense, the jury's verdict in this case would
22 likely been completely different and Petitioner would have stood
23 acquitted on all charges.

24 APPLICABLE CASE LAW:

25
26 Jackson v. Virginia, 443 U.S. 307 (1979) (Insufficient Evid-
27 ence) The petitioner's conviction was obtained as the result
28 of evidence that is insufficient to persuade a properly instruc-
(Ronald Russell, Habeas Corpus Petition, Ground Four, page 46.)

1 ted, reasonable jury of his guilt beyond a reasonable doubt
2 violating petitioner's Fifth Amendment right to due process.

3 Miller v. Pate, 386 U.S. 1 (1967) Petitioner's conviction
4 was based on evidence to be false violating petitioner's Fifth
5 Amendment right to a fair trial.

6 Ake v. Oklahoma, 470 U.S. 68 (1985) (Expert Witness Funds)
7 The high court held where the Petitioner was indigent was denied
8 funds to be used to rebut experts consulted and called by the
9 prosecution petitioner's Fifth Amendment right to due process
10 and Sixth Amendment right to counsel were violated. "The
11 Fourteenth Amendment due process guarantee of fundamental
12 'fairness' requires that the basic tools of an adequate defense
13 ... be provided to those defendants who cannot afford to pay
14 for them."

15 Holmes v. South Carolina, 126 S.Ct. 1727 (2006) The defendant's
16 right to defend was impaired because state rules of evidence
17 were applied in a way which denied Petitioner the right to
18 pre- sent a complete defense violating petitioner's Fifth
19 Amendment right to a fair trial.