

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TYRON JAMES

Petitioner

v.

JAMES HEIMGARTNER, et al.

Respondent

ON WRIT OF CERTIORARY TO THE SUPREME COURT
OF THE UNITED STATES

Petition For Certiorari

Tyron James #27522

EDCF

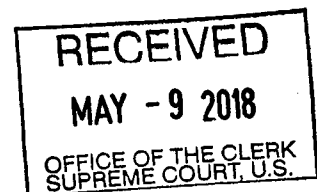
P.O. Box 311

El Dorado, KS. 67042

PETITION FOR CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. May a conviction based on the jury not being notified of a hard 50 sentence being sought be overturned?



2. May this court decision in Apprendi be applied retroactively to set aside the conviction in this case?

3. May this court decision in Strickland as to what constitutes ineffective assistance of counsel be applied retroactively to set aside the conviction in this case?

The caption set out above contains the names of all the parties.

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Order and Judgment of Court Below

1. Judgment of conviction of the Wyandotte County District Court February 27, 2003

2. Judgment of U.S. Court of Appeals 10th Circuit January 11, 2018, Affirming Conviction

3. Order of District Court, March 28, 2017, denying motion under 28 U.S.C. § 2254

4. Judgment of U.S. Court of Appeals, 10th Circuit, January 11, 2018 Affirming denial of 28 U.S.C. § 2254 relief

Other Orders

5. Order and Memorandum opinion of U.S. District Court for the District of Kansas, May 13, 2018 admitting evidence of case

Statutory Material

6. 28 U.S.C. § 2244

7. 28 U.S.C. § 2254

8. Motion in District Court for 28 U.S.C. § 2254 relief was filed on May 11, 2015

9. Notice of Appeal of ruling on 28 U.S.C. § 2254 motion was filed on April 6, 2017

TABLE OF AUTHORITIES CITED

Alleyne v. United States, 133 S.Ct. 2151, 2156

Appendix v. New Jersey, 530 U.S. 466, 476

Blackly v. Washington, 541 U.S. 296, 301

James v. Helmgertner, No. 15-5110

James v. Helmgertner, No. 17-3080

Pepper, 562 U.S. at 506-07

State v. James, 109 P.2d 1171, 1172, (original)

Strickland v. Washington, 466 U.S. 668, 687

United States v. Crooked Arm, 853 F.3d 1065

Constitution, Statutes, Regulations, and Rules

U.S. Const. Amend. V

U.S. Const. Amend. VI

28 U.S.C. § 2254

2013 Bill Text KS-H.B.-2002 A(C)(2)

CITATIONS OF OPINIONS AND ORDER IN CASE

The original conviction of Petitioner in the Wyandotte County District Court for the District of Kansas was not reported, but is set forth at pp. 14 of the Appendix.

The original conviction of Petitioner was appealed to the Kansas Supreme Court, which affirmed the conviction in all respects in an opinion reported at State v. James, 279 Kan. 354, 109 P.3d 1171 (Kan. 2005).

The decision of the United States District Court for the District of Kansas on Petitioner's Section 2254 motion is not reported, but is set forth at pp. 14 of the Appendix.

The opinion of the Court of Appeals below is reported in and is also set forth at pp. of the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the United States of Appeals for the 10th Circuit was entered ~~January 11~~, 2018. Rehearing was sought and that judgment was entered February 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, provides:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the

same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment, United States Constitution provides:

In a criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to the Assistance of counsel for his defence.

3. The Statute under which Petitioner was prosecuted, though nothing turns on its terms, was first degree premeditated murder, which provided:

Premeditation means to have thought the matter over before hand, in other words, to have formed the design or intent to kill before the act.

Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life.

4. The statute under which Petitioner sought post conviction relief was 28 U.S.C. § 2254.

STATEMENT OF THE CASE

Petitioner was charged with First Degree Premeditated Murder on April 16, 2002.

Petitioner appointed counsel did not investigate or requested to have any Independent Experts to testify about blood, ballistics, etc. (see) R.O.A. 2 p. 7.

Counsel just reviewed half of the preliminary hearing tape. (see) R.O.A. 2 p. 6.

At trial counsel did not cross-examine the state's witness, that was investigating the crime. Who stated that a witness told him that they seen a man walking from the scene with a red shirt, black shorts, and blood on him. (See) R.O.A-2 p.13.

Counsel did not object to the Prosecutor Cross-examining of the petitioner stating that petitioner's testimony was concocted, and that it was made up. (See) R.O.A-2 p.14. Counsel also did not object to the prosecutor's closing argument misleading the jury on the evidence that was presented at trial. (See) R.O.A-2 p.13, 14. Showing the ineffectiveness and the violation of the Strickland test and the Sixth Amendment.

Once the jury found petitioner guilty. The judge discharged the jury and the prosecutor filed a motion to seek the hard 50 sentence. (See) R.O.A-2 p.11. A sentencing hearing was held and the judge imposed two hard 50 sentences. (See) R.O.A-2 p.11-12. Without the jury having any knowledge of the hard 50 sentence being sought. A violation of the Fifth Amendment and the Apprendi ruling.

I. COURSE OF PROCEEDINGS IN THE SECTION 2254 CASE NOW BEFORE THIS COURT

On April 16, 2002 in a cause then pending in the Wyandotte County District Court for the District of Kansas entitled State v. Tyron James, Criminal No. 02-CH-15 Petitioner was found guilty by a jury on a charge of two Counts of First Degree Murder charging violation of 21-3401, for the years 2002 through 2003. App.14

On February 27, 2003, the District Court entered judgment and Petitioner was sentenced two hard 50's imprisonment to run concurrently, and was not fined on each count. This judgment and sentence was affirmed by the United States Court of Appeals for the 10th circuit, Tyron James v. James Weimgartner, case No. 17-3080. A petition for a writ of certiorari was denied on January 11,

2018. Petitioner was serving this sentence when the motion under Section 2254 was filed in the U.S. District Court of Kansas.

On May 11, 2015, Petitioner filed the motion in the case at bar under 28 U.S.C. § 2254 to vacate and set aside the judgment of conviction (App-14). No answer to the motion was required by the District Court or filed by the ATTORNEY GENERAL OF KANSAS. Briefs in support and opposition were filed by each of the parties, no hearing was held.

On March 28, 2017 the District Court entered its order denying the Motion under 28 U.S.C. § 2254. (App-p. 14). On March 28, 2017 the District Court issued its Memorandum in support of this order. (App-p. 14).

On April 6, 2017, Petitioner filed a Notice For Certificate of Appealability. (App-p. 14).

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION

The relevant facts are contained in Petitioner's Motion under 28 U.S.C. § 2254 (App-p. 14). During Petitioner's criminal trial in the District Court, the State offered as ~~State's~~ exhibit 124, the clothes that witnesses said petitioner had on and police took off of petitioner. That was a different color as to what was seen on the man walking away from the scene with blood on him. (App-p. 14). Petitioner's leg was broke as witness stated, which prevented the petitioner from walking. (App-p. 14).

The petitioner's counsel did not object to the prosecutor misstatement of the law of premeditation nor did counsel object to the submission of the prosecutor wanting to impose the hard 50 sentence. As the judge did impose

the hard 50 sentence. While the jury was not around or aware of the hard 50 sentence being sought. (App-p-14)

The trial lasted one week. The jury deliberated in one day averaging two to three hours. (App-p-14)

III. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the Wyandotte County District Court for the District of Kansas of two counts of First Degree Premeditated Murder, under 21-3401. A Section 2254 motion was appropriately made in the U.S. District of Kansas, and duly appealed to the Tenth Circuit.

IV. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE COURT.

This is a hard 50 case. At the time of Petitioner's criminal trial, this court had previously held "under the Due Process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in a indictment, submitted to a jury and proven beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466 at 476 (2000). As the three-judge panel readily acknowledged, petitioner's direct appeal was not final until 2005. State v. James, 109 P.3d 1171 (2005). In that direct appeal, petitioner's attorney clearly argued that the upward departure sentence that the sentencing judge imposed to a hard 50 life sentence violated the United States Supreme Court's Apprendi decision. The Kansas Supreme court and the 10th Circuit Appeals court erroneously ruled that Apprendi did not apply to hard 40 and hard 50 upward departures. In 2013, the United States Supreme Court

ruled that Apprendi did apply to aggravated sentences on life sentences like petitioner's. *Alleyne v. United States*, — U.S. —, 133 S.Ct. 2151 (2013), which also remanded *Astorga v. Kansas*.

The Kansas Supreme Court, U.S. District of Kansas, and 10th Circuit Appeals court was absolutely wrong, Apprendi did apply to hard 40 and hard 50 cases, and petitioner's hard 50 sentence, that was imposed by the sentencing judge upon a finding of aggravating factors is unconstitutional. The federal courts have unanimously held that an Apprendi error constitutes manifest injustice that must be corrected by the courts. *Gibson v. United States*, 271 F.3d 247; *United States v. Crooked Arm*, 853 F.3d 1065 citing *Pepper*, 562 U.S. at 506-07.

Petitioner properly argued his Apprendi issue in the state and federal courts and fully exhausted it. Petitioner diligently filed two post conviction actions in the state court raising numerous valid constitutional challenges to his conviction and sentence. Petitioner then filed his federal 2254 petition as quickly as petitioner could upon the conclusion of the second post conviction appeal. Petitioner sentence constitutes clear manifest injustice and petitioner should be granted equitable tolling to permit petitioner to litigate the unconstitutional sentence with relief here in the federal court.

In reaching its decision to affirm, the court below decided that these settled principles were not to be applied to the case at bar because:

1. The petitioner filed the petition untimely (App. p. 17-20);
2. The Apprendi decision do not apply to the petitioner's case (App. p. 21-22);
3. The Apprendi issue does not satisfy the manifest injustice standard (App. p. 24-25).

Petitioner respectfully urge that all aspects of this decision are erroneous and at variance with this Court's decisions as explained in the argument below.

ARGUMENT FOR ALLOWANCE OF WRIT

I. The Court of Appeals Erred in Affirming by Determining not to give this Court's Decisions Retrospective Effect of Apprendi

We there noted that "under the Due Process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in a indictment, submitted to a jury and proven beyond a reasonable doubt." (See) *Apprendi v. New Jersey*, 530 U.S. 466 at p. 476.

If "a statute prescribes a particular punishment to be inflicted on those who commit under special circumstances which it mentions, or with particular aggravations," then those special circumstances must be specified in the indictment. (See) *Alleyne v. United States*, — U.S. —, 133 S. Ct. 2151 at p. 2156. Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. (See) *Blackley v. Washington*, 542 U.S. 296 at p. 301.

In the case at hand the Tenth Circuit Appeals Court three-judge panel denied the certificate by finding that the petition was out of time and that equitable tolling was not justified. The three judge panel's wrongly determined that petitioner's certificate of appealability did not present a justified equitable tolling.

The Apprendi issue satisfies the "manifest injustice" standard a would

warrant the application of equitable tolling. As the sister court of United States v. Crooked Arm, 853 F.3d 1065, ruling will agree. Quoting Pepper, 562 U.S. at 506-07 to support the argument. "As eyes too clear Apprendi error is a manifest injustice, unlike a misdemeanor a felon must carry through life".

"Under the Due Process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior convictions) that increases the maximum penalty for a crime must be charged in a indictment, submitted to a jury a proven beyond a reasonable doubt." (See Apprendi v. New Jersey, supra. As previously stated and shown by the record the jury was discharged after the finding of guilt. The District Attorney then submitted a notice to seek and impose the hard 50 life sentence. where the judge then sentence petitioner two hard 50 life sentences. (See) R.O.A. 2 p. 5, 11

In which the petitioner strongly argued this fact to the 10th Circuit Appeals Court. who denied the petitioner the relief sought, not agreeing with the sister courts of Apprendi v. New Jersey, supra, Alleyne v. United States, supra, Blackly v. Washington, supra, and the Kansas State House Bill 2002 A(c)(2). As the petitioners case was after the Apprendi ruling THEREFORE petitioner pray that this Honorable Court will grant the relief that is sought.

II. The 10th Circuit Appeals Court Erred in Affirming the conviction not applying the Strickland Decision on Counsels Performance

A convicted defendants claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant

by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel error were so serious as to deprive the defendant of a fair trial. (See) *Strickland v. Washington*, 466 U.S. 668 at p. 687.

In the present case the petitioner pointed out to the Appeals court how the trial counselor did not investigate the fourth person talked about by the states witness that was at the scene, not objecting to the prosecutor's misconduct on cross-examination calling petitioner's testimony concocted and made up and in closing argument misleading the jury. Counsel not interviewing the state witnesses, all prejudice petitioner of a fair trial.

The Appeals court erred in not agreeing with it's sister court in *Strickland*.

Ruling that petitioner did receive a fair trial and the petitioner's Sixth Amendment was not violated. As the *Strickland* test states. The right to counsel is the right to the effective assistance of counsel. Government violate the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. Counsel, however can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance. (See) *Strickland v. Washington*, 466 U.S. 668 at p. 686.

Also in *Strickland* at p. 691 criminal defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffective assistance of counsel case, a particular decision not to investigate must be directly assess for reasonableness in all the circumstances, applying a heavy measure of deference to counsel judgments.

The *Strickland* court set out the ground work for ineffective assistance of counsel where the sister courts can follow. But the 10th Circuit Appeals

Court do not coincide with their ruling - To CONCLUDE petitioner pray that this Honorable Court will grant a new trial.

III. THE QUESTIONS RAISED IN THIS ARE IMPORTANT AND UNRESOLVED

The Circuit has decided important questions of federal law that have not been, but should be, settled by this Court and are a firm basis for granting certiorari in this case:

1. The circuit made a highly questionable ruling on the retrospective application of Apprendi and Strickland. The question of retrospective application has been answered directly by the Supreme Court and the Kansas House Bill 2002 A(c)(2).
2. This petition presents to this court a more fundamental question for review may a conviction that is unlawfully upheld (where no jury had any knowledge of being sought) be allowed to stand. This Court has always held in the negative, and the decision of circuit is sufficiently unusual that it is important that this Court reiterate this principle by making Apprendi and Strickland retroactive in this case.

CONCLUSION

IN SHORT the judgment below is a unique departure from decision of this court that require that convictions based on the jury not being notified, and a counsel not being effective be set aside at any time after conviction. As such, it represents a breach in the wall erected by the Fifth and Sixth Amendment to the Constitution and the decision of this court that were designed to protect a citizen from being convicted by the Government through the use of illegal sentencing

and not have effective counsel wrong from the citizen.

This petition for Writ of Certiorari should, therefore, be granted.

Date:

Respectfully Submitted

Tyron James #77522

EOCP

P.O. Box 211

El Dorado, KS 67042

ProSe

APPENDIX

On April 16, 2002 petitioner was apprehended and charged with two counts of First Degree Murder because two men were dead. The Death Penalty term was on the case then later withdrew. A counsel was appointed, petitioner seen that counsel was not doing anything. So petitioner filed a Motion to Dismiss counsel. At the hearing the judge told Petitioner he will not appoint another counsel once that counsel withdrew, counsel did so. Trial counsel was appointed and did not prepare for trial that was less than 60 days away. At trial counsel committed cumulative errors rendering the trial unfair for petitioner. Once the jury returned a guilty verdict counsel did not poll the jury or object to the judge not inquiring about the verdict that was ready before discharging the jury a violation of K.S.A. 22-3421. As the State filed a Motion to impose the hard 50 sentence without the jury knowledge.

Petitioner's direct appeal counsel argued the hard 50 life sentence in the Supreme Court of Kansas. That court denied petitioner relief. Petitioner then filed his 60-1507, arguing Ineffective assistance of trial counsel, direct appeal counsel, and retain 60-1507 counsel. Once the Kansas Supreme Court denied that petition for review. Petitioner then filed a second 60-1507, which the District court denied that motion as untimely. Petitioner then filed the 2254 in the U.S. District Court of Kansas. Petitioner's 2254 motion was denied as untimely. Petitioner filed the notice for certificate of appealability. The 10th Circuit Appeals Court denied that. So the petitioner sought for a rehearing, which that was denied and this writ of Certiorary follows.

CERTIFICATE OF SERVICE

I hereby certify that a true and original with two copies of the foregoing Writ of Certiorary was placed in the prison U.S. mailbox postage pre paid sent to the United States Supreme Court address 1 First St. N.E., Washington, D.C. 20543 on this 9th day of April 2018, and one copy deposited in the U.S. Postal Service postage prepaid, delivery to the office of Kansas Attorney General, Deputy Solicitor General Kristofer R. Ailslieger addressed 120 S.W. Ave., Topeka, Ks. 66612 on this 18th day of June 2018.

Respectfully

T. James #27521
Tyron James #27521