No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

SHARON BYRD AKA SHARON LEE-PETITIONER

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SECOND DISTRICT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

QUESTION(S) PRESENTED

I. WAS THE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED WHEN THE PETITIONER UNKOWINGLY AND UNINTELLIGENTLY ACCEPTED A PLEA TO A SECOND DEGREE MURDER CHARGE THAT SHE NEVER MET REQUIRED ELEMENTS FOR AND DID A MANIFEST INJUSTICE OCCUR WHEN COUNSEL FAILED TO HAVE AN IQ TEST PERFORMED ON PETITIONER TO TEST HER COMPETENCY?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States Court of Appeals appear at **Appendix**___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States District Court appears at **Appendix** ____to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[X] reported at 2018 Fla. App. Lexis 36022018; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____
appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date of which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date:_____, and a copy of the order denying hearing appears at **Appendix___**

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ on _____ in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[X] For cases from **state courts:**

The date of which the highest state court decided my case was
Second District Court of Appeals.
A copy of the decision appears at Appendix D

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was thereafter denied on the following date: April 10, 2018, and copy of the order denying rehearing at **Appendix E**.

[ ] An extension of time to file the petition for writ of certiorari was granted to and including _____ on _____ in Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION AMENDMENT ONE, FIVE, SIX AND FOURTEEN· THE RIGHT TO TESTIFY, THE RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY, THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND DUE PROCESS OF LAW.

STATEMENT OF THE CASE

On September 25, 2012 the Petitioner was present at her home with her husband (victim) Russell Byrd, Juan McQueen the victim's friend, the Petitioner's daughter and grandchild. The Petitioner, victim, and Mr. McQueen were drinking excessively, having a night at home putting up a Christmas tree with the grandchild. Little tiffs between the Petitioner and the victim began to erupt as a result of the excessive continuous consumption of alcohol, but not significant in volume enough to awaken the Petitioner's daughter sleeping in a room in close proximity to the incident. The daughter eventually awakened to retrieve the child and put the child to bed. The Petitioner became upset when she overheard the victim speaking to who she thought was female, on the phone. It was later determined the victim was speaking to his sister. [T-pg. 9 (lines 7-9)] The victim, in another disagreement, asked the Petitioner for [his] money he saw sticking out of the Petitioner's bra and then he grabbed it. [T-pg. 71 (lines 8-14)]. There was no loud talking or loud outburst; just an underlying aggressiveness associated with the consumption of too much alcohol. The incident escalated and resulted in the Petitioner stabbing the victim one time in the heart and unfortunately affected the death of Mr. Russell Byrd. The Petitioner was charged with Second Degree Murder.

A series of plea offers were presented to the State from the Petitioner's counsel, Frank W. McDermott, for a lesser charge of Manslaughter and a lesser sentence of fifteen (15) years via downward departure. The State would not agree.

The State called Mr. Juan McQueen to testify to the events that had transpired and testified that he did not take the Petitioner serious about her statements to kill the victim. He testified that he thought she was just using that as a slang word, that he plays like that, everything happened so fast and he did not think that the Petitioner knew what she was doing because every person involved was heavily intoxicated. [see T-pgs. 70-74]

Sentencing hearings were held on August 11, 2014, August 12, 2014, September 6, 2013 and a change of plea hearing was conducted on May 14, 2014 where the Petitioner pled guilty to the charge of second degree murder and on August 12, 2014, received a sentence of thirty-three (33) years within the Florida Department of Corrections.

The Petitioner did not file an appeal.

On June 3, 2016, the Petitioner filed a Motion for Post Conviction Relief in the Sixth Judicial Circuit, in and for Pinellas County, Florida.

On June 10, 2016, the Sixth Judicial Circuit entered an order striking the Petitioner's motion because it did not include a proper oath and her substantive claims were facially insufficient. The Petitioner was granted sixty (60) days leave to file an amended motion.

On June 30, 2016, the Petitioner timely filed her amended Motion for Post Conviction Relief with an appropriate oath.

On November 8, 2016, the Sixth Judicial Circuit denied the Petitioner's Motion for Post Conviction Relief. (Appendix "A")

On May 17, 2017, the Petitioner filed an Initial Brief appealing the denial of her post conviction, in the Second District Court of Appeals, case number 2D17-0590.

On June 29, 2017, the Second District Court of Appeals dismissed the Petitioner's appeal for lack of jurisdiction because the notice of appeal was filed more than 30 days after rendition of the order being appealed and was therefore considered untimely. (Appendix "B")

On July 31, 2017, the Petitioner filed a pro se Motion for Post Conviction Relief with the Sixth Judicial Circuit, in and for Pinellas County, Florida.

On September 14, 2017, the Sixth Judicial Circuit denied the Petitioner's pro se Motion for Post Conviction Relief citing that it was not raised in a timely, facially sufficient manner. (Appendix "C")

The Petitioner appealed the decision of the Sixth Judicial Circuit to the Second District Court of Appeals case number 2D17-4014.

On March 14, 2017, the Second District Court of Appeals per curiam affirmed the Petitioner's appeal. (see Appendix "D")

The Petitioner filed a timely Motion for Rehearing and Request for Written Opinion.

On April 10, 2017, the Second District Court of Appeals entered an order denying the Petitioner's Motion for Rehearing and Request for Written Opinion. (see Appendix "E")

This Petition for Writ of Certiorari follows:

REASON FOR GRANTING THE PETITION

The Petitioner was denied her right to fair proceedings, effective assistance of counsel and Due Process of Law when counsel allowed her constitutional rights to be violated by unknowingly and unintelligently accepting a plea that was not in her best interest and to accept a plea without the benefit of IQ testing to determine her competency to accept such plea or take part in any proceedings at bar. **Strickland v. Washington,** 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674. The State courts have failed to grant relief. This Honorable Court should issue a Writ of Certiorari where her question concerns matters in which the District Courts are in conflict and which are violations of the U.S. Constitution especially where the conviction and sentence were administered to someone who was actually innocent. The questions are asserted as follows:

I. **WAS THE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED WHEN THE PETITIONER UNKNOWLINGLY AND UNINTELLIGENTLY ACCEPTED A PLEA TO A SECOND DEGREE MURDER CHAGE THAT SHE NEVER MET THE REQUIRED ELEMENTS FOR AND DID A MANIFEST INJUSTICE OCCUR WHEN COUNSEL FAILED TO HAVE AN IQ TEST PERFORMED ON PETITIONER TO TEST HER COMPENTENCY?**

Florida Statute Section 782.04(2) defines second degree murder as the unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to affect the death of any particular individual.

The Florida Supreme Court has defined an "act imminently dangerous to anther and evincing a depraved mind" as an act or series of acts that: (1) a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another and (2) is done from ill will, hatred, spite, or an evil intent, and (3) is of such a nature that the act itself indicates an indifference to human life.

The Petitioner was charged with second degree murder for fatally stabbing her husband, one time, in the heart. This was after an evening spent drinking an excessive amount of vodka; the Petitioner, the victim, Russell Byrd and the victim's friend, Juan McQueen.

The more alcohol that was consumed, the more argumentive the environment became. The Petitioner overheard the victim speaking to a female on the phone and accused him of cheating however the Petitioner did not realize that he was speaking to his sister. [T-pg. 69 (line 23)] The second argument was over drinking money and the victim snatched money that was protruding out of the Petitioner's bra. This money was spent to obtain more alcohol to drink on this night. [T-pg. 71 (lines 8-14)] Mr. McQueen testified that the Petitioner said on two or three occasions throughout the course of the night that she would kill the victim however he stated in his testimony:

[T-pg. 70 (lines 15-20)]

"A:...I didn't think she meant it, because we uses [sic] phrases like that as a slang, you know? We don't really...we don't really mean it when -- you know, when we

doing to say we're going to kill you, we don't kill you. So I think she was just using that as a -- as a slang-- a slang word." (Emphasis added)

Mr. McQueen alluded by using the word "we" that it is common to jokingly say, "I'm going to kill you" and recklessly go through the motions but not actually commit the act.

[T-pg. 71 (lines 16-21)]

> **"A: ...And so she went in the kitchen and got this knife, and I didn't think she was going to, you know, stab him, you know? Because she went-- the motion she did -- because I done play with people where I'm acting like I'm going to stab you and I flip it, you know, and just be playing But I guess she didn't know what she was doing."**

The Petitioner was too inebriated to know what she was doing. Moreover, the small arguments that transpired, so small as to not even be audible enough to wake up the Petitioner's daughter sleeping in the next room, were amplified by both the Petitioner and the victim due to the excessive amount of alcohol that had been consumed. The Petitioner did not meet the first element of second degree murder as she was too intoxicated to act with ordinary judgment and did not reasonably know she would certainly kill the victim or do him serious bodily harm.

The second element of second degree murder was not met as it could not be affirmatively established that this act was done from ill will, hatred, spite, or an evil intent. There had been no previous disturbances to establish a history of evil intent and the witness, Mr. McQueen testified himself that the Petitioner did not know what she was doing.

Every element of second degree murder had not been satisfied, and therefore, the Petitioner should have been dissuaded by counsel from accepting a plea to second degree murder.

Counsel presented, on two (2) occasions, pleas to the State, to a charge of Manslaughter in which both pleas were rejected by the State. The State did not even want to agree to a sentence cap in the Petitioner's cause.

[T-pg. 5 (lines 5-24)-Sentencing Hearing-August 12, 2014]

> **"Mr. Nate: I can, Judge. This is just a ball park, obviously, but the defense believes this is a Manslaughter case, that's what the facts of this case indicate, it is a manslaughter case. We were asking for a 15 year sentence; that was rejected by the State Attorney's Office. We'd -- what we're talking about now, judge, with Ms. Lee (Byrd) is ...I'm asking your Honor to cap her at 23 years and we'd come in for a departure hearing and ask for the 15.**
>
> **The Court: Okay, so we're talking about a -- where does she fall on the bottom, Mr. Murray?**
>
> **Mr. Murray: She scores 22.925 years, so pretty much 23.**
>
> **The Court: So it's essentially a cap at the bottom?**
>
> **Mr. Nate: Yes, Judge.**
>
> **The Court: Okay, and you're obviously not agreeing to that.**
>
> **Mr. Murray: No, your Honor."**

It was clear that the defense felt as though the Petitioner's cause was one of Manslaughter because she had not met all the elements of second degree murder.

Under Florida Law, Florida Statute 782.07(1), the elements of Manslaughter are outlined as: (1) the victim is dead, (2) the death was caused by the act,

procurement or culpable negligence of the defendant, and (3) the killing was not justified or excusable homicide.

Every element of Manslaughter had been satisfied however the defense and the State went back and forth in plea negotiations and the State refused. At the end, the Defense attempted to get the State to agree to a 40 year cap. The State relented. The lowest permissible sentence the Petitioner could receive was twenty-three (23) years in prison and the maximum sentence was life. In essence, the State was still guaranteed a life sentence, even a de facto life sentence, and counsel allowed the Petitioner to accept a plea to a charge of second degree murder that she never met their required elements for. Counsel's deficient performance severely prejudiced the Petitioner and had she really understood that she was entering a de facto life sentence plea of thirty-three (33) years, that she would be released from prison when she is eighty-one (81) years old, she would not have taken a plea but proceeded to trial. The defense felt strongly that the Petitioner's cause met the required elements of Manslaughter and since the State did not want to agree to a plausible plea, counsel should have explained to Petitioner that she was accepting a de facto life sentence if she took the plea; that it would have been in her best interest to proceed to trial. This would have given the jury the opportunity to determine intent and the state of mind of the Petitioner, that in most cases cannot be ascertained by direct evidence. **Rozelle v. Sec'y of Fla. Dept. of Corrections**, 672 F.3d 1000 (11th Cir. 2012); **United States v. Garcia-Perez**, 779 F.3d 278 (5th Cir. 2015)

Moreover, counsel for the Petitioner admitted when the court asked if she understood all of her rights, that it was difficult for her:

[T-pg. 32 (lines 19-25) pg. 33 (lines 1-5)-Change of Plea Hearing]

> "Mr. McDermott: **She did. It was a little difficult for her to read it and I actually read it to her. I showed it to her and -- and pointed my finger while we went through it in the back there. (unintelligible)**
>
> The Court: **All right. And you spent some time doing that, correct?**
>
> Mr. McDermott: **Yes, sir. And we had talked previously about, generally, the things she'd have to give up if she were entering a guilty plea as well. I believe she understands what -- what's going on here today."**

The court went on to question the Petitioner about the fact that she was giving up her right to a jury trial where the State has the burden of proving her case beyond a reasonable doubt, the court explained the jury selection process, the State's burden of proof, the defense's ability to call witnesses in her defense and how the court would instruct the jury after closing argument of the law. [see T-pg. 33 (lines 12-25); pg. 34 (lines 1-19)] The Petitioner agreed she understood however when the court asked her if she was current under the influence of alcohol or drugs or any kind of medication, the Petitioner said, **"No."** [see T-pg. 34 (lines 24-25); pg. 35 (lines 1-2)], but an unidentified speaker spoke up and said: **"She's on medication for (unintelligible)."** Counsel for the Petitioner confirmed that she was. [T-pg. 35 (lines 13-15) It was evident that the Petitioner did not know how to correctly respond to the questions asked of her of the court.

The Petitioner only has an eleventh grade education, was considered to have a slow learning disability since the first grade, was a truant and then a drop out, held very few jobs, chronically abused alcohol, was chronically depressed but had no documented mental health issues and counsel, knowing all this failed to have her IQ tested to determine is she was indeed competent to understand the proceedings at bar. This information was obtained by Dr. Richard Carpenter, a licensed psychologist in forensics via a confidential forensic evaluation, who subjectively judged her level of intelligence of low average, "**...Maybe high borderline. So that would be somewhere 78 to 84, somewhere in there.**" [T-pg. 11 (lines 14-16) Dr. Carpenter advised that he did not perform an IQ, "**...because at the end of the day I didn't think that that was going to shed a whole -- a whole -- you know, an awful lot of light on this event.**" [T-pg. 11 (lines 14-23)]

The fact that Dr. Carpenter stated that this incident was "really distorted by alcohol" by the Petitioner and victim being extremely drunk sheds light on the relevancy of his statement [T-pg. 10 (line 2)] because it supports the fact that she did not act with ordinary judgment, thus, once again, not meeting the required elements of second degree murder but the doctor's failure to conduct an IQ test and counsel's failure to further request an IQ test be conducted of the Petitioner, goes to support the fact that it is highly probable the Petitioner did not clearly understand the parameters of her plea agreement and the rights she was giving up as a result of entering a guilty plea, which deemed her plea unknowingly and unintelligently

made. **Antoine v. State**, 138 So.3d 1064, 1073 (Fla. 4th DCA 2014); **Dorsey v. State**, 74 So.3d 521, 524 (Fla 4th DCA 2011).

Counsel failed at his constitutional duty to ensure that the Petitioner's constitutional rights were not violated. Counsel did not operated as the counsel guaranteed by the Sixth Amendment of the United States Constitution and his performance fell below a reasonable objective standard. Counsel, in protecting the Petitioner's right and in knowing that the Petitioner did not meet the requirements of second degree murder, should have explained to her that the outcome of these proceedings would have been different had she gone to trial; resulting in a lesser charge/conviction of manslaughter based upon the obvious evidence and a lesser sentence; at the most, the Petitioner could have received thirty (30) years in prison; a possible downward departure of fifteen (15) years which would have caused the Petitioner to be released from prison at sixty-three (63) years of age; still able to work and be a productive citizen in society and not a burden. Had the Petitioner truly understood that, she would not have accepted the plea but proceeded to trial. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674

The Petitioner's learning disability and the fact that she was on medication while making this crucial life decision and no IQ test was performed to determine her competency, rendered her plea unknowing and unintelligently made, counsel's performance prejudiced the Petitioner and robbed her of an outcome that was reliable.

The Petitioner has demonstrated a valid claim of a denial of her Fifth, Sixth and Fourteenth Amendment rights to fair proceedings, effective assistance of counsel and Due Process of law has occurred and a manifest injustice has occurred.

This Honorable Court should issue a writ of certiorari for the compelling reasons listed herein where the Second District Court of Appeals had entered a decision in conflict with decisions made in its court and other courts of appeals on the same important matters.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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