

NOV 17 2017

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

William Scott Fitts
GDC# 312140

— PETITIONER

(Your Name)

vs.

Georgia Department of Corrections
Brian Owens, Commissioner RESPONDENT(S)
~~Barry Goodrich~~
~~Cedric Taylor~~, Warden
ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of Georgia
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Willaim Scott Fitts GDC# 312140

(Your Name)

Baldwin State Prison

(Address)

PO Box 218, Hardwick, GA 31034

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. The constitution requires special consideration in assessing the accused's conduct in guilty pleas especially when parole consequences is a determinate factor. Fitts had a choice between a bump-on-a-log and an absent and mute lawyer. Does the court violate an accused's rights where he is forced to choose among and between the Sixth Amendment and Fourteenth Amendment in deciding whether to plead guilty where normative legal issues are an important factor to be considered?
2. When the lawyer was cut out of the plea negotiations by the prosecutor negotiating directly with the accused's family did this produce an unfair or unreliable proceeding?
3. Is Mr. Fitts being held in violation of his Constitutional right to counsel where he entered a plea pro se to murder in spite of the fact that he had a retained lawyer where the lawyer was present at the plea but did not function as counsel and where the lawyer would have been ineffective had the case proceeded to trial?

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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:

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XXXXXXXXXXXXXXXXXX

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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 appears 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 is unpublished.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 B 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 Ga. State Superior Ct. court appears at Appendix A 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 on 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 rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

For cases from state courts:

The date on which the highest state court decided my case was Aug. 28, 2017.
A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution, which provide respectively that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense" and "nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE.

Fitts failed to show up for trial on June 8, 2004. Fitts entered a plea to murder on August 31, 2004. He was ultimately sentenced on September 20, 2004 to life in prison (Appendix C ST-5). On July 22, 2008, Fitts filed a pro se habeas petition. He amended his petition on November 9, 2008 and again on March 5, 2009. The state habeas court held an evidentiary hearing on May 26, 2010 and ultimately denied habeas relief on June 17, 2010 (Appendix A). A Notice of Appeal from the State judgment was timely filed in the habeas court and a Petition for Certificate of Probable Cause to Appeal was filed in the Supreme Court of Georgia which denied relief on August 28, 2011 (Appendix B).

STATEMENT OF FACTS.

William Scott Fitts had a great deal of faith in the lawyer he hired to defend him for murder. Fitts believed that his family retained for him "the best lawyer in Atlanta" (Appendix C HT-4). But on the day

that Fitts entered a plea to murder and was sentenced to prison for the rest of his life, his lawyer refused to represent him. When compelled to sign the indictment, the lawyer said that he was no longer Fitts's lawyer but was merely present in the courtroom (Appendix C at HT-Exhibit 1). Even at the plea colloquy, the lawyer made it clear that he was not acting as counsel. His first words at the plea were, "I mean, I don't know whether I'm his lawyer. So we're in a position that all this has essentially been negotiated outside my presence, outside my knowledge, outside my participation. So, I'm standing mute at this point (Appendix C PT-5).

Mr. Fitts and his lawyer had a brief conversation on the day of the plea. And it was not very pleasant. Mr. Fitts said that the lawyer, "was mad" and that he told Fitts "I don't plea out of fucking life sentences. He said, I'm a trial lawyer. I go to trial" When Fitts attempted to say that he would proceed to trial on the lawyer's advice, the lawyer responded "you done made this damn deal ... we're going through with this."

However, trial with this lawyer was not a good proposition either. After all, at an earlier hearing, the lawyer stated in his place in open court that he would be ineffective if he went on trial with Fitts: "We'll announce not ready and continue pressing our motion for a continuance. And if we have to go forward, I would State for the Court that Mr. Fitts would be provided with ineffective assistance of counsel'll state that right now" (Appendix CPT-). Fitts, at the point he entered his plea, was faced with the choice between a lawyer who would be ineffective at trial versus entering a plea with the very same lawyer who refused to act as his counsel. The trial court did nothing to assist. And after entering his guilty plea, Fitts sought from the habeas court what his trial lawyer had previously denied him- his day in court.

But there is even more to the story that the unprepared lawyer who decided to stand mute on the day that his client plead guilty to murder. This case also includes the story of an assistant district attorney who decided to cut the lawyer out of the negotiations

and who approached Fitts's family to negotiate a "deal" with them. And this story begins with the very same state prosecutor's decision to wait until the last minute to provide notice of scientific evidence and expert witness testimony.

The prosecutor's role in this story began when he served discovery on the defense shortly before trial. At a pre-trial motions hearing, trial counsel withdrew a speedy trial demand and requested a continuance, arguing that "[a] very critical witness has been, I guess, unearthed, by the State, and I believe that was last Thursday or Friday, if I'm not mistaken, who alleges that he purchased a weapon for Mr. Fitts. And now that weapon, the State tells us, has in some way been linked to the offense" (Appendix C PTM-3). Trial counsel needed additional time to investigate the witness, to call the crime lab, and to consult with an independent expert. Counsel also said that "we received an electronic message from a deputy in Canada, Texas, that alleges things different than the report that we had six months ago. (Appendix C PTM-4). The trial court

requested that the client consent to the withdrawal of the speedy trial demand on the record. Only after that did the trial court rule that it would not grant a continuance (Appendix C PTM-6 ln.13).

The district attorney objected to the continuance, reasoning that the defense could have found the witness just as easily as the State did Appendix C at PTM-7). And, had the defense done so, it would have come upon the same ballistics evidence that the State discovered on the eve of trial Appendix C PTM-8). Finally, the State argued that it was keeping a witness in jail on a material witness warrant. And the State did not want to prolong his incarceration Appendix C PTM-9). The State summarized its argument by saying "Well, if the defense had bothered to interview these witnesses, they would know these things." (Appendix C PTM-10)

The defense then argued that the issue with the material witness is "not a reason to allow us to go into a capital felony unprepared when we are getting all this new information the Friday before the Memorial Day holiday with four days to prepare for trial."

(Appendix C PTM-14). After the Court decided that five days was plenty of time to find a ballistics expert and that the continuance would be denied Appendix C PTM-15-16), trial counsel said that he would provide ineffective assistance of counsel if he had to go forward (Appendix C PTM-16). The prosecutor, after objecting to the continuance, used an opportunity that arose from the denial of that continuance to press for a further advantage in the case. And that happened when Fitts, facing the prospect of standing trial for murder with an admittedly unprepared lawyer, fled and failed to show up for that trial. Fitts said, "I got paranoid and left." (Appendix CHT-15). It was at this point that the Prosecutor began negotiating directly with Fitts's family and began cutting trial counsel out of the loop entirely. Fitts's mom "told me [Fitts] she had been talking to David Cooke [the prosecutor] and that if I would plea out to a crime of passion that I wouldn't have to stay that long. . . . he was talking to my uncle and my mom" Appendix C HT-17). The prosecutor told Fitts's uncle "that if I keep listening to Bruce

Harvey [trial counsel], that I'll never get out of prison. And my mama was crying telling me, she'd say, son, you need to do this because, she said, you'll be in prison forever" (Appendix C HT-18). Fitts's mother confirmed that the prosecutor spoke with her about a plea for her son (Appendix C HT -32). And Fitts's uncle also testified to speaking to the prosecutor in person regarding a plea bargain (Appendix C HT-38).

At the plea hearing, after Fitts turned himself in, trial counsel confirmed that the State had negotiated a plea with the family without including the lawyer in those conversations (Appendix CPT-5). This point is not factually in dispute. Mr. Cooke, the prosecutor, confirmed that he had negotiated directly with the family in spite of the fact that trial counsel was still the attorney on record for the murder case. (Appendix C HT-5-6). The trial court appeared to have little concern about the way the lawyer was cut out of plea negotiations. The Court took Fitts's plea even though trial counsel signed the indictment as merely present for the plea.

Essentially, after trial counsel announced he was unprepared to put up an effective defense, Fitts became frightened and failed to show for his trial. At which point, the prosecutor who objected to the continuance, negotiated a plea through Fitts's family rather than through trial counsel. When trial counsel showed up for court, he stated that he was not acting as counsel and signed his name on a court document indicating as such. And the trial court took his plea and ultimately sentenced Mr. Fitts to serve a sentence in prison for the rest of his life. Mr. Fitts entered his plea expecting parole eligibility after seven years. He later learned in prison that he was in for much more time than that. (Appendix C HT-28)

REASONS FOR GRANTING PETITION

The Georgia Supreme Court upheld the trialcourt and violates a Petitioner's right to counsel as guaranteed by the Sixth Amendment of the United States Constitution where the Court allows him to enter a guilty plea with a lawyer who indicates that he is merely present, is unsure that he is still the lawyer, where the prosecutormegotiated a plea directly with the Petitioner's family, and where his lawyer says that he will be ineffective if he had in fact proceeded to trial as was scheduled. The lawyer was unprepared for trial and angry that his client wanted to enter a plea rather than go to trial with an unprepared lawyer. And the state habeas court had found that everything about this situation was perfectly fine from a Constitutional perspective.

The Sixth Amendment of the United States Constitution guarantee the accused the right to the effective assistance of counsel. And this Court has long noted that the right to counsel guaranteed in the Sixth Amendment, is integral to ensure that defendants enjoy the right to a fair trial, as guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendment of the United States Constitution. See

Powell v. Alabama, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 3345 (1963). This Court deemed what is meant by effective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court in *Strickland* recognized that "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Id.* at 685. And, particularly apt in the facts of this case, the Court in *Strickland* held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."

Did Fitts, with all the facts that came to light in the habeas hearing endure a process that this Court views as reliable and just given the way previous counsel performed in it? If the answer is no, Fitts is entitled to a new trial in which such confidence is possible.

The Georgia Supreme Court decided an important federal question in a way that conflicts with *Hill v. Lockhart*, 474 U.S. 53 (1985) as distinguished by *Lee v. United States*,

137 S.Ct. 1958 (June 23, 2017) when it denied certiorari and affirmed a trial court's determination that Fitts' guilty plea was valid. The review is needed because the lower court must have further guidance to distinguish and clarify what is necessary under the Sixth Amendment and sufficient under the Fourteenth Amendment for the validity of a guilty plea when the prospect at trial was with an admittedly deficient lawyer or plea with an absent and mute one who never negotiated on behalf of Fitts. Fitts' case will help guide lower courts to ensure what necessary factors must be taken to guarantee that the defendant understands normative legal questions when counsel might be constitutional but not adequate under agency law. *McCarthy v. United States*, 394 U.S. 459 (1969).

Consider this: A compulsive gambler approaches the roulette wheel at a casino to place a bet. The pit boss says the mechanic just repaired the wheel but it has not been tested. The gambler asks the mechanic how sure he is that the wheel turns true – the mechanic says "Why are you asking me? You came here to play not me." The gambler turns to his girl who after just receiving a complimentary drink from the casino owner says "the wheel looks good enough to

me." If the boss takes the gambler's bet does he cheat the player no matter the outcome of the spin?

Strickland is a performance-prejudice test. In the performance prong, the question is whether trial counsel has brought "to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. In assessing performance, the Court will defer to strategic choices "made after thorough investigation of law and facts relevant to plausible opinions" *Id.* at 695. But a mere claim of strategy from trial counsel is insufficient. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Though appellate courts defer to counsel's tactical choices, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." *Id.* at 691. The decision not to investigate a claim must be informed and reasonable. See *Rogers v. Zant*, 13 F.3d 384 (11th Cir. 1994).

Under the prejudice prong of *Strickland*, when a petitioner, such as Fitts, demonstrates that he received deficient representation in some way, the next question is

whether, given the error, the trial can be seen as having produced a reliable result *Id.* at 696. In this regard, the cumulative nature of trial counsel's deficiencies throughout trial may be considered as a whole. See *United States v Cronic*, 466 U.S. 648 (1984)(acknowledging that "the Court of Appeals focused on counsel's overall representation of respondent, as opposed to any specific error or omission counsel may have made").

While this case did not go to trial, counsel essentially removed trial as a viable option for his client by being unprepared to go forward. He did not consult with an expert in time to answer the State's new ballistics evidence. The failure to consult with and make appropriate expert witnesses available for trial has been held to be ineffective assistance of counsel. Here, it was ineffective assistance for counsel not to consult with an expert. Beyond that, it was ineffective assistance of counsel not to investigate and find the witness that the State found just before trial.

If there was anything that the State and the defense agreed on before trial, it was that counsel did not adequately investigate the case. Trial counsel said that he

would be ineffective if he had to go forward. And the State noted that trial counsel would have been prepared had it taken some minimal investigative steps rather than waiting for the State to do an investigation and provide statutory discovery - "they could have found this out just as easily as we could" (Appendix C H-6-7). Speaking of another critical witness, the State said "They could have known this information if they had simply bothered to interview the witness" (Appendix C PF10). The lower court had a schedule to keep and denied the request for continuance. Secondly, counsel failed to advise his client about the parole consequences of the plea to a life sentence. Since Fitts turned himself in and came back before the Court, counsel had a responsibility to advise him of the potential parole consequences of his plea. Yet, he signed the indictment indicating that he was merely present for the plea and said at the beginning of the plea hearing that he was standing mute. Yet, the one thing that trial counsel advised was the collateral consequence of the plea given that Fitts had an outstanding Federal matter (Appendix C PT-7-9). Yet, he failed to explain the parole consequences of the plea. When Fitts entered his guilty plea he "thought

that a life sentence carries seven years" (Appendix C HT-28). However, he learned when he was transferred to prison that "I've got to stay fourteen years in prison before I even come up for parole" (Appendix C HT-28). Since trial counsel did not even speak with Mr. Fitts after he announced not ready at the pretrial motions hearing and showed up for the plea unwilling to act as counsel he never advised his client about the parole consequences of a life sentence.

The Georgia Supreme Court held in *Alexander v. State*, 297 Ga. 59 (2015)(Appendix D), that the failure to advise a client about the parole consequences of a plea is ineffective assistance of counsel. In that case, counsel's mistake was his failure to explain the parole consequences for recidivist punishment. Counsel owes his client a duty to be effective at a plea hearing and in plea negotiations. *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

Like with *Lee v. United States*, Fitts' advice from his lawyer was negligently at best and deficient at worst and affected Fitts' understanding of his guilty plea consequences. The State prosecutor chose to circumvent the lawyer who had a duty to be effective for his client to

negotiate, instead, with Fitt's mother and uncle, who owed Mr. Fitts no duty under the Sixth Amendment and who were untrained in the law. Yet, when he appeared at the plea hearing, trial counsel refused to advise his client, whom he said was "calling the shots" (Appendix C ¶-9) Here, counsel failed to act as counsel in advising on the plea in general. But the one thing counsel did in the plea hearing was to advise on the collateral consequences of the plea on a then-pending Federal matter. Counsel failed to advise on the other consequence of parole on a life sentence - the time when Mr. Fitts would be eligible for parole. Since Mr. Fitts was left on his own to the extent that he and his family worked out a deal, counsel was ineffective in his failure to discuss parole eligibility with him. In fact, even Fitts admitted that he would not know the legal difference between malice and felony murder other than thinking he was pleading to a crime of passion.

The warden may attempt to distinguish *Alexander/Lafler* from the facts presented in this case. *Alexander* deals with the ineligibility for parole for a man punished as a recidivist. And this case deals with the issue of when a man with a life sentence will become eligible for parole.

Fitts argues that this distinction does not make much difference. Yet, to the extent that the warden might argue that it does, the grant of this Petition will present the Court with the opportunity to further develop the rule of law since its holding in *Lee*. And since the state Court in *Alexander* set new precedent in light of *Padilla v. Kentucky*, 559 U.S. 356 (2010), any case presenting this Court with the opportunity to further develop the precedent and policy that will help guide lower courts in how to apply parole/liberty interests to ineffective assistance of counsel in guilty pleas.

It is clear from the record that Fitts was without counsel during the plea negotiations. Fitts's mother testified that the district attorney called her and spoke with her about a plea for her son to a crime of passion and if he would do that he would get out before he got so old (Appendix C HT 32-33). Mr. Fitts's uncle testified that the district attorney came to his home and indicated that if his nephew would plea to a crime of passion things would be better. The way it was worded is that Mr. Fitts would be able to get out of prison while he was still a young enough man to enjoy life so (Appendix C HT 38-39). Both these

promises were inaccurate or misleading because malice murder is not a crime of passion as represented to Mr. Fitts family and with the life sentence Mr. Fitts may not ever even get out of prison.

It is clear from the plea hearing that Mr. Fitts entered his plea on the advice of his family and the promises they had received from the district attorney (Appendix C PT 3-4). There were many components to the plea bargain. Once was a suitable prison as close to home where could see his family. One was holding him in Pickens County jail. The state prosecutor had to get up with the Pickens County jail and get an okay to hold him there. Only after he got all this worked out and was told that Fitts was turning himself in and accepting this plea did he contact co-counsel (Jennifer Hanson). Fitts admitted at the plea hearing as to not consulting with his attorney on the plea (Appendix C PT 19).

Really this case should come under *Cronic*. The Supreme Court has held that courts may presume that a defendant has suffered unconstitutional prejudice if his "is denied counsel at a critical stage of his trial." 466 US at 659 and in Bell v. Cone, 535 US 685 (2002). We

characterized a "critical stage" as one that held significant consequences for the accused.

The plea negotiations are probably the most critical stage of a guilty plea because it decides what you will plead guilty to and how much time you will receive. With well over 90% of criminal proceedings ending in guilty pleas there needs to be a Supreme Court case the courts and district attorneys can go by on how far the prosecutor can go with their negotiations to secure a plea. It isn't fair to negotiate a plea with a defendant's family. The district attorney should not even be able to speak of a plea with a defendant's family when he has an attorney.

Verification

I declare under Penalty of Perjury that the information in PETITION FOR A WRIT OF CERTITORARI is true and correct except for that information that I rely on from others and as I believe them to be true.

Executed on November 17, 2017 /s/

William Scott Fitts

William Scott Fitts
GDC # 312140

Notary

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William Scott Fitts

William Scott Fitts, GDC # 312140

Date: November 17, 2017

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