

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. Does A State Appellate Who Did Not Use Any Federal Cases Or Federal Codes In A State Direct Appeal And Did Not Preserve Those Issues For Review That Creates A Un-exhausted And Procedurally Defaulted Claim In A Federal Habeas Corpus § 2254, Does The State Appellate Attorney Have To Had A Specific Need To Make A Separate Federal Argument In The Appellate Brief?

II. Does The State Trial Court Commit Fundamental Error When It Denies A Defendant's Motion For Mistrial When A State Witness Improperly Comments On The Defendant's Request For Public Defender?

LIST OF PARTIES

- ☒ 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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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☒ is unpublished.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☐ is unpublished.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 _____ 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☐ is unpublished.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 _____ 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☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 02, 2018.

☐ 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: June 12, 2018, and a copy of the order denying rehearing appears at Appendix B.

☐ 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 _____.
A copy of that decision appears at Appendix _____.

☐ 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

FLORIDA BAR RULES

RULE: 4-1.3

ONE (1), Preamble: a lawyer's responsibilities

Under Rule 4-1.3, Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a cause or endeavor.

A lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.

FLORIDA RULE OF CRIMINAL PROCEDURE § 3.850 POST-CONVICTION (2018).

§ 3.850 Post-Conviction (2018)

(a) Grounds For Motion: The Following ground may be Claims For relief From Judgment or Release From custody by a person who has been tried and Found guilty or has entered a plea of guilty or nolo contendere before a Court established by the laws of Florida:

(1) The Judgment was entered or Sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida, (2) The Court did not have Jurisdiction to enter the Judgment, (3) The Court did not have Jurisdiction to impose the Sentence, (4) The sentence exceeded the maximum authorized by law, (5) The plea was involuntary, (6) The Judgment or Sentence is otherwise subject to collateral attack.

(b) Time Limitations: A motion to vacate a Sentence that exceeds the limits provided by law may be Filed at any time. No other motion shall be Filed or considered pursuant to this rule if Filed more than 2 (two) years after the Judgment and Sentence become Final.

(c) The motion must be under oath stating that the Defendant has read the motion or that it been read to him or her.

FLORIDA STATUTE ANNOTATED
§ 782.04(2)(2018).

§ 782.04(2)(2018).

(1)(a) The unlawful killing of a human being

1. When perpetrated from a premeditated design to effect the death of the person killed or any human being,

2. When committed by a person engaged in the perpetration, any:

- a. Trafficking offense prohibited by S. 893.135(1),
- b. arson,
- c. Sexual battery,
- d. Robbery,
- e. Burglary,
- f. kidnapping,
- g. escape,
- h. Aggravated child abuse,
- i. Aggravated abuse of an elderly person or disabled adult,
- j. aircraft piracy
- k. unlawful throwing, or discharging of a destructive device or bomb,
- l. carjacking
- m. Home-invasion robbery,

- N. Aggravated Stalking,
- O. Murder of another human being,
- P. Resisting an officer with violence to his or her person,
- Q. Aggravated Fleeing or eluding with serious bodily injury or death,
- R. Felony that is an act of terrorism or is in furtherance of an act of terrorism, including a Felony under S. 775.30, S. 775.32, S. 775.33, S. 775.34, S. 775.35, or S. Human trafficking.

28 U.S.C. § 2254(d)
FEDERAL HABEAS CORPUS

§ 2254(d)

An application For a Writ of habeas Corpus on behalf of a person in custody Pursuant to the Judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceeding unless the adjudication of the claim --

(1) resulted in a decision that was Contrary to, or involved an unreasonable application, of clearly established Federal law, as determined by the Supreme court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or other wise 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 compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein 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 witnesses in his favor, and to have the Assistance of Counsel for his defence.

UNITED STATES CONSTITUTION

FOURTEENTH AMENDMENT

Section 1.

All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are Citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its Jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged by information with second-degree Murder in case number: 07-CF-20409. A jury found Petitioner guilty. In accordance with the verdict, the Judge sentenced Petitioner to life in Prison. Petitioner, through counsel, pursued a direct appeal raising three grounds:

- (1) Whether the trial court abused its discretion when it denied the defense of a separate instruction on heat of Passion Manslaughter;
- (2) Whether the trial court abused its discretion when it denied the defense's request for a curative instruction after the prosecution improperly shifted the self-defense burden to the defense, and
- (3) Whether the trial abused its discretion when it denied the defense's motion for a mistrial when a state's witness improperly commented on Petitioner's request for a public defender.

The state filed an answer brief; upon review, the appellate court per curiam affirmed without a written opinion.

Petitioner then Filed a motion For Post-conviction relief under Florida Rule of Criminal Procedure 3-850 raising the Following three claims of ineffectivE assistance of trial counsel:

- (1) Ineffectance assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment of the United States Constitution wherein [sic] counsel Failed to call witness imperative to the defense;
- (2) Ineffectance assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment of the United States constitution where [sic] counsel Failed to call defendant to testify and misadvised the defendant the Jury would learn of the specific nature of his prior convictions, and
- (3) IneFFective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment of the United States Constitution whereon [sic] counsel Failed to object to an incorrect and misleading Jury instruction For the lesser included offense of Manslaughter.

The state Filed a brief in response.

UPon review, of the state's response, The post-conviction court ordered an evidentiary hearing on grounds one and two, denied relief on grounds three, and appointed counsel to represent Petitioner.

On September 14, 2011, the post-conviction court held the evidentiary hearing. Thereafter, the court entered an order denying Petitioner relief on his claims.

Petitioner appealed the Postconviction court's decision.

The appellate court per curiam affirmed the lower court's without decision on March 20, 2013.

Petitioner then initiated the instant Federal habeas Petition on August 16 2013.

In February 2017, A single Judge of ^{The} District court denied Petitioner's Motion For a C.O.A. and denied his For leave to proceed I.F.P. and appointment of counsel as moot.

In June 2017, Petitioner Filed in the district court a motion For relief From the Judgment Pursuant to Fed. R. Civ. P. 60(b), In April 2018 denying the motion For C.O.A.

District court a Motion For relief From the Judgment, Pursuant to Fed. R. Civ. P. 60(b). Petitioner asserted that the District court should reconsider its prior denial of his habeas Petition For two reasons:

- (1) The court Failed to conduct a de novo review of his claims and, instead "Solely relied on the Findings by State Post-conviction court", and
- (2) The court violated his due Process rights when it Failed to have a magistrate Judge prepare a Report and Recommendation ("R&R") to which Petitioner's then could have objected prior to the District court's ruling.

In April 2018, The District court's denial of his pro se Fed. R. Civ. P. 60(b) Motion For relief From Judgment with respect to the District court's denial of his 28 U.S.C. § 2254 Petition For writ of habeas corpus.

In June 2018, denying a Motion For reconsideration, Because Petitioner has not alleged any points of law or Fact that this court overlooked or Misapprehended in denying his motion.

REASONS FOR GRANTING THE PETITION

The importance of this case is dealing with the State direct Appeal process. The appellant attorneys who did not apply Federal law or Federal codes to the litigant direct appeal case; and how that failure waived the litigant's Federal rights to the habeas corpus review, and how it would effect the litigant who is dealing with ineffective assistance of counsel to overcome procedurally defaulted claims in the Federal court who are in similarly situated.

I'm asking this court to review a decision of the Federal court appeals the decision of the appeal court errs in determining facts is even more deferential than under a clearly erroneous standard of review and the court presumes the finding of facts to be correct from the state court.

This court held: "Only when ignored issues are clearly stronger than those presented; will the presumption of effective assistance of counsel be overcome". See, Smith v. Robbins, 120 S. Ct. 746 (2000)

Denial of counsel altogether on a criminal appeal warrants a presumption of prejudice; while mere ineffective assistance of counsel on such an appeal does not. When there has been a complete denial of counsel, prejudice is presumed; various kinds of state interference with counsel's assistance can warrant a presumption of prejudice. . . . I. J. Smith v. Robbins, 120 S. Ct. 746 (2000).

The state appellate attorneys did not properly prepare the petitioner's state direct appeal brief and it is the appellate attorney's responsibility to act with reasonable diligence in representing a client on direct appeal.

A review of the Petitioner's record shows that petitioner's failed to exhaust the federal claims through counsel, pursued a direct appeal raising three grounds:

(1) Whether the trial court abused its discretion when it denied the defense of a separate instruction on heat of passion manslaughter,

(2) Whether the trial court abused its discretion when it denied the defense's request for a curative instruction after the prosecution improperly shifted the self-defense burden to the defense, and

(3) Whether the trial abused its discretion when it denied the defense's motion for a mistrial when a state's witness improperly commented on petitioner's request for a public defender.

Before the state court appeal, The state appellate attorney's did not use any Federal case's or Federal codes as one of a Federal constitutional violation.

Therefore, waived the petitioner's Federal rights and cause procedurally defaulted and there was no Federal case's law was cite to preserve those issues for Federal review.

The state appellate attorney's did not seem to know the severity of the Failure to apply Federal law or Federal codes to the petitioner's State direct appeal and how that Failure waived petitioner's Federal rights to the habeas corpus review.

Florida bar rules, under rule 4-1.3. Diligence

A Lawyer Should Pursue a matter on behalf of a client despite opposition, Obstruction, or Personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a cause or endeavor.

(quoting) Gray v. Green, 800 F.2d 644, 646 (7th cir. 1986) see, Also Burger v. Kemp, 107 S.Ct. 3114 (1987) (Finding no ineffective assistance of counsel when the Failure to raise a particular issue had ("A sound strategic basis"). A petitioner satisfies the prejudice prong upon showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

COURT Appeal held: In Gray v. Greer, 800 F.2d. 644, 646 (7th Cir. 1986). Had appellate Counsel Failed to raise a significant and obvious issue, The Failure could be viewed as deficient performance. IF an issue which was not raised may have resulted in a reversal of the conviction, or an order For a new trial, The Failure was prejudicial.

When a claim of ineffective assistance of counsel is based on Failure to raise viable issues....

Procedural default precludes the court's review of a constitutional issue only if petitioner can not show cause for the default and prejudice resulting from the default.

Florida bar Rules, under rule 4-1.3. Diligence

A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

This court held: In Burger v. Kemp, 107 S. Ct. 3114 (1987). In case involving the question whether a criminal has received effective assistance of counsel are required by the Sixth Amendment, Judicial scrutiny of counsel's performance must be highly deferential; A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

In considering claims of ineffective assistance of counsel, the court address not what is prudent or appropriate, but only what is constitutionally compelled under the Sixth Amendment. Id., Burger v. Kemp, 107 S. Ct. 3114 (1987).

and, This court held: In order for an error involving the denial of a Federal constitutional right to be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Id., Chapman v. California, 87 S. Ct. 824 (1967).

Argument's of The Fifth AmendMend

The deFendant's FiFth amendmend right to remain silent and his right to Counsel was deprived When the crime Scene investigator commented on the deFendant's request For a public deFender by the deFense attorney asking of Whether deFendant was cooperative; and it was highly prejudicial as it clearly suggested that the deFendant must be guilty because he kept asking For a public deFender.

Any COMMENT on deFendant's Constitutional right to Counsel or right to Silence Vitates the entire trial.

I'm asking this court to review that the appellants attorney was deFicient in performance and was prejudiced Because, The appellant's attorney never raised the claims on my direct appeal as a Federal constitutional Violation, There-fore denied the deFendant his Fourteenth Amendment due process and equal protection rights.

When the crime scene investigator testified for the state, on cross-examination by the defendant's attorney, the crime scene investigator commented during her testimony that the defendant asked for a public defender. The crime scene investigator commented on the defendant's right to remain silent.

The trial court abused its discretion when the trial court refused to grant defendant's motion for a mistrial. The defense attorney renewed his motion for mistrial at the close of the state's case. The court inquired as to what prejudice the defendant suffered from the witness' statement. The defense attorney responded that the prejudice suggested to the jury that defendant had something to hide. The court denied the motion. The defense attorney renewed the motion for the final time at the end of the defense's case.

The court did not rule on the motion for mistrial.

The trial judge failed to recognize the prejudicial effect that such a comment did substantially influence the jury's verdict of guilty.

In Burns v. Sec'y, Fla. Dept. of Corr., 720 F3d. 1296, (2013). When a Criminal Defendant's Constitutional right is Violated, the Violation may require reversal without any inquiry into harmlessness. There are two basic Forms of Constitutional error: in part: Trial error, by contrast, does not taint the entire trial proceeding. This is error which occurred during the presentation of the case to the jury and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. Also see:

Mansfield v. Sec'y, Fla. Dept. of Corr. 679 F3d. 1301, (2012). To show prejudice under Brecht, there must be more than a reasonable possibility that the error contributed to the conviction or sentence. Although harmless error review is necessarily fact-specific and must be performed on a case-by-case basis, the erroneous admission of evidence is likely to be harmless

Under the Brecht standard where there other evidence of guilt is overwhelming. Also see: Chapman v. California, 87 S.Ct. 824 (1967).

The Florida Supreme Court held:
... Statements obtained from a defendant in violation of the right against self-incrimination, also known as a "privilege", can not be used against the defendant at trial. The state bears the burden of proving by a preponderance of the evidence that a confession is voluntary and thus admissible. See: Cuervo v. State, 967 So 2d, 155 (2007) Fla. and also see:

State v. DiGuilio, 491 So 2d, 1129 (Fla. 1986). Any comment, direct or indirect, by anyone at trial on the right of the defendant not to testify or to remain silent is constitutional error and should be avoided.

This court held: In order for an error involving the denial of a Federal constitutional right to be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the

Defendant's conviction.

There are some constitutional rights so basic to a Fair trial that their infraction can never be treated as harmless error. See: Chapman v. California, 387 S. Ct. 824 (1967).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William Foley Miller

Date: August 16, 2018.