

No. 18-6925

IN THE
SUPREME COURT OF THE UNITED STATES

WARREN TARVER
Petitioner

VS.

ORIGINAL

Supreme Court, U.S.
FILED

SEP 26 2018

OFFICE OF THE CLERK

STATE OF FLORIDA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI
(Corrected)

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QUESTIONS PRESENTED FOR REVIEW

WHETHER IT IS A VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT FOR A PERSON TO BE DETAINED FOR AN OFFENSE THAT IS LEGISLATIVELY DESIGNATED A CAPITAL FELONY THOUGH HELD BY THE UNITED STATES SUPREME COURT TO BE A NON-CAPITAL OFFENSE?

WHETHER DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN A COURT FAILS TO ADDRESS THE MERITS OF A PRO SE CLAIM OF FRAUD UPON THE COURT THAT HAS BEEN ESTABLISHED WITH RECORD ATTACHMENTS?

LIST OF PARTIES

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

TABLE OF CONTENTS

	Page(s)
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	7
CONCLUSION.....	10

INDEX TO APPENDICES

Appendix A – Decision of State Court of Appeals

Appendix B – Decision of State Trial Court

Appendix C – Order of State Court of Appeal/Denial on Rehearing

Appendix D – Information Charging Offenses

Appendix E – Newly Discovered Evidence Motion

Appendix F – Reply to State’s Response

Appendix G – Order Denying Newly Discovered Evidence Motion

Appendix H – Motion for Reconsideration

Appendix I – Motion to Amend

Appendix J – Motion for Relief from Judgment or Order

Appendix K – Post-Conviction Motion (Fraud)

Appendix L – Motion for Leave of Court (Illegal Detention)

Appendix M – Motion to Supplement the Record

Appendix N – Court’s Order to Respond

Appendix O – Motion for Rehearing

Appendix P – Petition for Writ of Certiorari case #4D18-1872 (Redesignated as Appeal)

TABLE OF AUTHORITIES CITED

Cases	Page(s)
FURMAN v. GEORGIA, 408 U.S. 238 (1972).....	7
RAKES v. UNITED STATES, 53 L.Ed. 401, 212 U.S. 55 (1909).....	8
Statutes and Rules	
28 U.S.C. §1251(b)(2).....	1,2,6
28 U.S.C. §1257(a).....	1,2,6
§775.082(1), Florida Statutes (1993).....	2,4,7,8
§794.011(2)(a), Florida Statues (1993).....	3,4,7,8

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

The opinion of the highest state court to review the merits of this case is unpublished but may be viewed in the Appendix at Appendix A.

JURISDICTION

The case now before this Court is concerning the constitutionality of a state statute, and also whether a state court has violated a pro se litigant's constitutional right to due process of law and equal protection. This case was first decided in the Seventeenth Judicial Circuit Court, Broward County, Florida on April 24, 2018, and was affirmed on appeal in the Fourth District Court of Appeal on July 5, 2018. A timely motion for rehearing was submitted on July 12, 2018, and was denied on August 2, 2018.

Wherefore, pursuant to 28 U.S.C. §1251(b)(2) and §1257(a), this Court has jurisdiction to review this pleading as a petition for writ of certiorari, which is timely filed pursuant to Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V.

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 offense 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, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IVX, 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.

FEDERAL STATUTES

28 U.S.C. §1251

- (b) The Supreme Court shall have original but not exclusive jurisdiction of:
 - (2) All controversies between the United States and a State.

28 U.S.C. §1257

- (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATE STATUTES

§775.082(1), Florida Statutes (1993):

A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and:

- (a) If convicted of murder in the first degree or of a capital felony under s. 790.161, shall be ineligible for parole, or

(b) If convicted of any other capital felony, shall be required to serve no less than 25 years before becoming eligible for parole.

§794.011(2)(a), Florida Statutes (1993):

A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injuries the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in §775.082 and §921.141.

STATEMENT OF THE CASE

On August 8, 1995, Petitioner, Warren Tarver was charged by information with five counts of sexual battery pursuant to Florida Statute §794.011(2)(a), (see Appendix D), which is statutorily designated a capital felony. Tarver pled not guilty to the charges and proceeded to trial on December 4, 1997, where he was found guilty on all five counts by a six-member jury. Upon conviction, Tarver was sentenced to life in prison under a capital felony sentencing scheme as prescribed in §794.011(2)(a) pursuant to §775.082(1), Florida Statutes (1993).

On November 21, 2017, Tarver filed a successive pro se motion for post-conviction relief (see Appendix K) in the Seventeenth Judicial Circuit Court, Broward County, Florida concerning a claim of fraud upon the court. The claimed fraud had been previously brought to the court's attention by Tarver in reply to the state's response (see Appendix F) to his pro se claim of newly discovered evidence (see Appendix E) filed July 21, 2005, his motion to amend (see Appendix I) his pro se motion for reconsideration (see Appendix H) submitted April 15, 2015¹, and his motion for relief from judgment or order (see Appendix J) filed on June 21, 2017.

On February 26, 2018, the Seventeenth Judicial Circuit Court issued an order for the state to respond (see Appendix N) to Tarver's pro se motion for post-conviction relief (see Appendix K) filed on November 21, 2017. Prior to the court's order to respond, Tarver submitted a motion for leave of court (see Appendix L) on December 27, 2017, seeking to raise a claim of illegal detention. In his motion Tarver had expressed that his legal knowledge was limited and that his motion was filed in good faith. On January 10, 2018, Tarver also submitted a pro se motion to

¹ A petition for writ of certiorari was submitted to the Fourth District Court of Appeal on August 14, 2015, and was redesignated by the court as a summary appeal of a 3.850 motion.

supplement the record (see Appendix M) which provided additional argument and authority on his claim of illegal detention. Notwithstanding the filing of those pleadings, the court did not order the state to respond to them in its subsequent order to respond.

On March 30, 2018, the state filed its response to Tarver's pro se motion for post-conviction relief as ordered by the court. In response, the state relied upon a previous ruling on the fraud of which the court did not make a finding on whether a fraud had been committed. In fact, the court denied the claim based on procedural error argued by the state. Also, the state did not respond to Tarver's claim of illegal detention where the court had not ordered it to do so. Subsequently, the court denied Tarver's pro se motion for post-conviction relief.

On May 8, 2018, Tarver filed a timely motion for rehearing (see Appendix O). In his motion, Tarver argued in part that the Court's ruling may result in the denial of equal protection due to Tarver being an indigent pro se litigant who lacked the "procedural knowledge needed to properly introduce" his claims before the Court. However, on May 16, 2018, Tarver's motion for rehearing was denied.

On June 14, 2018, Tarver submitted a pro se petition for writ of certiorari (see Appendix P) in the Fourth District Court of Appeal, State of Florida, arguing that his claim of fraud upon the court should have been addressed by the lower court on the merits but was not, and that his claim of illegal detention was not considered at all. On July 5, 2018, the Fourth District Court of Appeal redesignated Tarver's pro se petition for writ of certiorari as an appeal to a summary denial of a new 3.850 motion and rendered a per curiam affirmed decision on the appeal of the motion (see Appendix A). Tarver then filed a timely motion for rehearing which was denied on August 2, 2018, (see Appendix C) which brought a timely petition before this Honorable Court

on October 9, 2018, pursuant to 28 U.S.C. §1251(b)(2) and §1257(a). Tarver now brings a timely corrected petition seeking certiorari review as directed by the Clerk.

REASONS FOR GRANTING THE WRIT

WHETHER IT IS A VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT FOR A PERSON TO BE DETAINED FOR AN OFFENSE THAT IS LEGISLATIVELY DESIGNATED A CAPITAL FELONY THOUGH HELD BY THE UNITED STATES SUPREME COURT TO BE A NON-CAPITAL OFFENSE?

As a matter of process, legislatures and courts were established to be a means by which to govern by law, in accordance with the United States Constitution.

In this petition, Tarver submits that Florida's legislature and courts have veered away from this process by not fully recognizing this Court's decision held in *Furman v. Georgia*, 408 U.S. 238(1972). In *Furman*, this Court held that it is unconstitutional to impose a sentence of death for a conviction of sexual battery. As a result, "capital" sexual battery (§794.011(2)(a) can no longer be held, by definition, a capital offense. Though the courts in Florida recognize this change of law in some aspects, the Florida Legislature continues to designate sexual battery, pursuant to §794.011(2)(a), a capital felony and prescribes punishment for the offense under a capital felony sentencing scheme.

Tarver contends here that the continued enactment and enforcement of §794.011(2)(a) as a capital offense is a violation of due process and that any person in Florida who is charged, convicted, or sentenced under this statute is done so illegally.

For one, as prescribed in §794.011(2)(a), the offense is technically punishable by death.

§794.011(2)(a) – a person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age **commits a capital felony, punishable as provided** in ss. 775.082(1) and 921.141;

§775.082(1) – a person who has been convicted of a capital felony shall be **punished by death** if the **procedure** set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment; Florida Statutes (1993).

Nonetheless, because sexual battery is held by this Court not to be punishable by death, the required determination of sentence proceeding set forth in §921.141 is not applicable to §794.011(2)(a) leaving the court to impose, without subject matter jurisdiction, the **alternative sentence to death** which is life imprisonment. As such, sentencing for this offense is improperly imposed by the State of Florida under a capital felony sentencing scheme.

But more important, sexual battery, as designated in §794.011(2)(a), is a non-existent capital offense where it does not meet the standard of “capital” felony. See *Rakes v. United States*, 53 L. Ed. 401, 212 U.S. 55, 57 (1909) (the test is not the punishment which is imposed but that which may be imposed under the statute). As a non-existent capital offense, it is illegal to detain a person under the authority of §794.011(2)(a).

Wherefore, Tarver avers that his detention is illegal and that this is an issue of great public concern which this Court should address by setting a precedent that will deter other states from enacting and enforcing laws which do not coincide with the constitutional standards recognized by this Court.

WHETHER DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN A COURT FAILS TO ADDRESS THE MERITS OF A PRO SE CLAIM OF FRAUD UPON THE COURT THAT HAS BEEN ESTABLISHED WITH RECORD ATTACHMENTS?

Judicial fairness is the most essential thread woven into the fabric of our judicial system.

Tarver submits here that he was denied equal protection and a fair opportunity to be heard as an indigent pro se litigant based upon his inability to hire a bar certified attorney and his lack of knowledge concerning court procedure. In any event, judicial fairness should dictate that a court be held to a standard that would require it to look beyond an indigent pro se litigant's inability to practice law and discern whether a gross miscarriage of justice has occurred that warrants a review by the court on the merits.

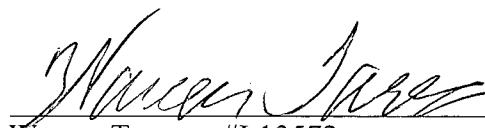
As a matter of record, Tarver had shown the lower court, with exhibits of record (see Appendix H), that Assistant State Attorney Joel Silvershein, had given the court a false statement concerning evidence in response to his claim of newly discovered evidence which went to the heart of the court's decision to deny his claim. Tarver had also provided the court with a record showing that Mr. Silvershein had knowledge that the statement he had given was false (see Appendix J). Notwithstanding, the court evaded the issue by rendering summary denials without addressing the merits of the claim based on Tarver's non-compliance with procedure, which should not have been of any consequence considering the nature of the claim. Compounding this miscarriage of justice, the appellate court blindly upheld the lower court's denials by rendering PCA decisions on appeal which impeded Tarver's ability to seek review in the Florida Supreme Court.

In this particular matter, certain Florida courts have sent the message to indigent pro se litigants that it is appropriate for a court official to commit a known fraud upon the court without consequence when it is brought to the court's attention by an unskilled indigent pro se litigant. The court's summary denial of Tarver's claim and the appellate court's PCA decision is a testament to this atrocity. As such, Tarver vehemently exerts that this is a message this Court should not allow to be sent because it puts the integrity of all courts on a slippery slope towards injustice.

CONCLUSION

Wherefore, Tarver submits that he has given adequate reason for this Court to grant his petition for writ of certiorari.

Respectfully Submitted,



Warren Tarver - #L13572
Pro se

November 19, 2018