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No. 18-7635

Supreme Court, U.S.
FILED

APR 10 2019

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IN THE
SUPREME COURT OF THE UNITED STATES

HAROLD HALL — PETITIONER

STATE OF ALABAMA — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR REHEARING
IN ACCORDANCE WITH UNITED STATES
SUPREME COURT RULE 44

HAROLD HALL

200 WALLACE DRIVE

CLIO, ALABAMA 36017

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SUPREME COURT, U.S.

Petition For Rehearing of Order
Denying Petition For Certiorari

HAROLD HALL - PETITIONER

No. 18-7635

STATE OF ALABAMA - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

ALABAMA COURT OF CRIMINAL APPEALS

HAROLD HALL presents this petition for a rehearing of this Court's Order dated March 18, 2019, denying the petition for a Writ of Certiorari to the Alabama Court of Criminal Appeals and in support thereof, respectfully shows:

- (1) Petitioner is a laymen/neophyte, pro-se litigant, that diligently Pursued completing and submitting the initial Petition For Writ of Certiorari in September 2018.
- (2) After Petitioner's Petition For Writ of Certiorari was filed and docketed on January 29, 2019, he informed the Alabama Attorney General's Office, thereby, giving the state of Alabama the opportunity to submit a Brief In Opposition. However, the Attorney General's Office waived submission of a Brief In Opposition.

Petitioner took it upon himself to perfect and submit a Reply Brief in accordance with Rule 15.6 of the Rules of the United States Supreme Court. However, after mailing said Brief Petitioner spoke by phone with Donald Baker at the Clerk's Office of this Honorable Court. Mr. Baker informed Petitioner that there are no Court Rules for a response to a waiver. Mr. Baker also informed Petitioner that he could supplement his Petition in the form of a Supplemental Brief pursuant to Rule 15.8 for content and 33.2(b) for page limit. Baker further informed Mr. Hall that his case was on conference the following day (March 15th), therefore, there would be no time to submit a Supplemental Brief. Baker went on to inform Mr. Hall that if his Petition was denied that he could submit a Petition For Rehearing following Rule 44 for content and 33.2(b) for page limit. Therefore, Mr. Hall submits this Petition For Rehearing with concomitant Brief In Support Thereof with facts, authority, and documentary evidence amplifying petitioner's argument contained in his Petition For Writ of Certiorari, to wit: that he was denied effective assistance of counsel during "critical stages" of the criminal proceeding and that the trial court exceeded its jurisdiction when it sentenced Petitioner in a manner not prescribed by law, contrary to the Alabama Legislature's expressed intent, and in violation of the due process, equal protection, and separation of powers provisions of both the United States Constitution and the Alabama Constitution of 1901.

Additionally, through tireless hours of reading and researching the several constitutional errors committed and sustained throughout Mr. Hall's criminal proceeding, pretrial through sentencing and appeal, Petitioner discovered numerous plain errors that were not presented in the petition for writ of certiorari that will be included in the accompanying Brief In Support of Petition For Rehearing. Petitioner will assign and specify these several egregious constitutional, structural, and prejudicial errors that are clear or obvious, were not intentionally relinquished or abandoned, and affected the Petitioner's substantial rights. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "plain errors or defects affecting substantial rights" may be noticed although they were not brought to the attention of the court. Rule 45(b) of the Alabama Rules of Appellate Procedure (Ala. R. App. P.) was adopted and effectuated on January 1, 1982 and abolished the "search the record" requirement of § 12-22-240. See Ex parte Hoppins, 451 So. 2d 365 (Ala. 1983). The two procedural rules enumerated above allow federal and state appellate courts (respectively) the discretion to remedy a forfeited error provided that three conditions are met. See United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L.Ed. 2d 508 (1993) (emphasis added). Petitioner contends that the plain errors contained in the Brief In Support of this Petition For Rehearing meet the Olano criteria and "seriously affects the fairness, integrity or public reputation of judicial proceedings." Molina-Martinez v United States, 578 U.S. _____, 136 S. Ct. _____, 194 L.Ed. 2d 444, 2016 U.S. LEXIS 2800.

The plain errors that the Petitioner moves this Most Honorable Court to consider are as follows:

- 1) The State failed to disclose material, probative facts that were used during trial to prove ultimate facts in violation of Brady v Maryland and the trial court's discovery order.
- 2) Petitioner was constructively denied the right to counsel at critical stage of the criminal proceeding as counsel was unable to investigate and prepare a defense against the aggravating factors alleged by the prosecuting attorney because the notice failed to name the specific and particular names of the schools and housing project necessary investigate and determine the distances from these structures to the location that the alleged offense occurred. In the case sub judice, the assistance of counsel was indispensable once the prosecuting attorney filed the State's Notice Of Aggravating Factors as counsel's assistance was required to investigate these aggravating factors in order to protect Mr. Hall's most basic right as a criminal defendant - his right to a fair trial at which the witnesses against him might be meaningfully cross-examined. United States v Wade, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926
- 3) Petitioner was denied his constitutional right to be present provided by the Fifth Amendment to the Federal Constitution applicable to the States through the Fourteenth Amendment. This due process violation is also protected by Rule 43 of the Federal Rules of Criminal Procedure, Article 1, Section 6 of the Alabama Constitution of 1901 and by Rule 9.1(a), Alabama Rules of Criminal Procedure.

The denial of Petitioner's right to be present during the critical stages of his trial also violates the Sixth Amendment's Confrontation Clause and right to testify on one's own behalf.

4. Petitioner's trial counsel's performance was deficient for failing to challenge the two statutory aggravating factors being alleged in Hall's indictment in conjunction with the underlying offense as they were clearly omitted. Provisions of Alabama Code 1975, §§ 13A-12-250 and 13A-12-270 imposing stiffer penalty for distribution of a controlled substance, Alabama Code 1975, § 13A-12-211 state an element of a separate offense. The elements of this separate, aggravated crime of the underlying crime had to be alleged in Hall's indictment. See Jones v United States, 526 U.S. 227, 143 L.Ed. 2d 311, 119 S.Ct. 1215 (1999); Hamling v United States, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887; Apprendi v New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435; Blakely v Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403; United States v O'Brien, 560 U.S. 218, 130 S.Ct. 2169, 176 L.Ed. 2d 979; and Alleyne v. United States, 133 S.Ct. 2151; 186 L.Ed. 2d 314. Additionally, trial counsel's performance was deficient and prejudicial to Petitioner when counsel failed to object to the insufficiency of the Notice Of Aggravating Factors submitted by the prosecuting attorney for failing to disclose the specific names of the school(s) and housing project alleged to be within a three mile radius of the situs of the alleged offense charged in the indictment.

5. Petitioner was denied his right to counsel of choice guaranteed by the Sixth Amendment to the Federal Constitution and Rule 6.1(b)

of the Alabama Rules of Criminal Procedure.

6. Petitioner's trial was held in its entirety, opening arguments, presentation of inculcable evidence, the opportunity to cross-examine the State's witnesses, closing arguments, rendering of the verdict, and the pronouncement of judgement without Petitioner being present and with trial counsel physically present, but basically abandoning petitioner's cause by failing to subject the prosecution's case to any meaningful adversarial testing during the guilt phase of petitioner's trial in violation of the Sixth and Fourteenth Amendments of the Federal Constitution, Article I, §6 of the Alabama Constitution, Rule 43 of the Federal Rules of Criminal Procedure, and Rule 9.1(b) of the Alabama Rules of Criminal Procedure. See Also, United States v Cronis, 466 U.S. 648 and Strickland v. Washington, 466 U.S. 668 (1984)
7. The trial court erred and allowed an "abuse of process" by allowing evidence of the alleged aggravating factors to be presented during the "guilt phase" of petitioner's trial instead of during the "trial penalty phase" after petitioner was convicted of the offense charged in the indictment.
8. The trial court showed bias or an appearance of bias towards the Petitioner by allowing the prosecuting attorney to commit prosecutorial misconduct when she made the "highly prejudicial" statement during closing arguments, exhorting the jury, by stating, "that you will find him guilty of distribution of a controlled substance within a three mile radius of a school and within a three mile radius of a housing project. The trial court failed to give any curative instruction to the jury instructing the jury to disregard the prejudicial statement.

9. Trial Counsel's performance was deficient when she failed to object to the prosecuting attorney's prejudicial statement and for not asking the trial court for a curative instruction. This deficient performance prejudiced Mr. Hall in a concrete way as this allowed the jury's decision making process to be skewed and allowed the jury to convict Mr. Hall of an offense that was not alleged in his indictment and that was a "greater offense" of the offense charged in the indictment. This prejudicial statement by the prosecuting attorney constructively amended petitioner's indictment. This violated Mr. Hall's substantial rights protected by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article 1, § 6, Article 1, § 9 of the Alabama Constitution of 1901 and Ala. R. of Crim. P., Rule 13
10. Petitioner was denied his right to trial by jury for the two aggravating factors alleged by the prosecution. This right is guaranteed by the Sixth Amendment to the Federal Constitution, Article 1, § 11 of the Alabama Constitution of 1901, by statute 12-25-34.2, Ala. Code 1975 (as amended) and by Rule 18.1 of the Alabama Rules of Criminal Procedure.
11. The trial court erred when it allowed the prosecuting attorney(s) to use statutory sentencing enhancements as aggravating factors used to depart from the recommended sentencing range pursuant to the Alabama Presumptive Sentencing Standards (2013) and thereby, illegally sentence Petitioner to "Life Imprisonment pursuant to the Alabama Habitual Felony Offender Act (HFOA), another statutory sentencing enhancement (Ala. Code 1975, § 13A-5-9 et al) that the Alabama Legislature expressly proscribed from being used in departure procedures pursuant to the Presumptive Sentencing Standards, codified at 12-25-34.2, Ala. Code 1975 (as amended) as all three of the above enumerated statutory sentencing enhancements are included in

calculation of the recommended sentencing range for distribution of a controlled substance, the offense of conviction in the instant matter. The trial court misinterpreted and misapplied the departure procedures contained in Ala. Code 1975 (as amended), §12-25-34.2, contrary to the intent of the Alabama Legislature and in violation of the due process, equal protection, and separation of powers provisions of both the United States Constitution and the Alabama Constitution of 1901.

12. Alabama Code 1975 (as amended), §12-25-34.2 is unconstitutional "as applied" to the Petitioner and the particular facts of the case sub judice.

13. The trial court illegally sentenced petitioner to ten (10) years beyond the unlawfully imposed Life sentence by using the same statutory sentencing enhancement provisions used previously as aggravating factors. This violates the double jeopardy Clause (cumulative punishment) of the Fifth Amendment to the Federal Constitution applicable to the states through the Fourteenth Amendment, Article I, §9 of the Alabama Constitution of 1901, the Due Process and Equal Protection provisions of both listed Constitutions, as well as, the notice and confrontation clauses of the Sixth Amendment of the U.S. Constitution and Article I §6 of the Alabama Constitution of 1901. See Also, Apprendi v New Jersey, 530 U.S. 466.

14. Petitioner's indictment failed to inform Petitioner of the nature and cause of the accusation against him as it failed to include the necessary element of mens rea. See §13A-2-4(b), Ala. Code 1975; Ex parte Edwards 816 So. 2d 98, 101 (Ala. 2001) ("A statute

Creating a criminal offense, with the exception of a strict-liability statute, requires a culpable mental state"). Petitioner's indictment tracked the language of the statute for distribution of a controlled substance, §13A-12-211(a), Ala. Code 1975, but failed to list the particular facts, acts, and/or omissions necessary to sufficiently apprise the Petitioner of what he must be prepared to meet. This violates U.S. Constitutional Amendments Six and Fourteen as well as Alabama Constitution Article I, §§ 5, 6, and 7. Furthermore, due process pursuant to the Fourteenth Amendment to the Federal Constitution and Article I, §6 of the Alabama Constitution is violated when an essential element of a crime is not charged in an indictment and proved beyond a reasonable doubt.

15. Petitioner was denied effective assistance of counsel because his appellate counsel failed to raise three issues on direct appeal that counsel had raised in Petitioner's Motion For New Trial. Petitioner's Motion For New Trial was denied by "operation of law" after pending in the trial court beyond sixty (60) days pursuant to Rule 24.1, Alabama Rules of Criminal Procedure. Mr. Hall's Motion For New Trial contained five issues, to wit; (1) The trial court should not have tried Mr. Hall without his presence, "; (2) Mr. Hall's trial counsel was constitutionally ineffective at trial, "; (3) The trial court should have ordered the recusal of District Attorney, Honorable Charlotte Tesmer, and Assistant District Attorney, Steven Townes, " (4) the trial court should order a new trial on the ground that it should have granted trial counsel's

motion to withdraw to allow for Mr. Hall's newly retained attorney to enter the case," and (5) "This Court should vacate Mr. Hall's sentence under the Habitual Felony Offender Act and resentence him pursuant to the presumptive sentencing guidelines." However, after said motion was denied by "operation of law" and timely appealing Hall's conviction and sentence, appellate counsel submitted an appellate brief that only raised two issues, to wit; that "Mr. Hall was denied effective assistance of counsel as required by the Sixth Amendment" and that "trial court impermissibly departed from the presumptive sentencing guidelines in sentencing Mr. Hall." The remaining three issues raised in the Motion For New Trial were ripe for appeal, but were not presented to the Court of Criminal Appeals in Petitioner's appellate brief. Although issues (1), (3), and (4) were not included in Petitioner's appellate brief they were raised in Petitioner's Motion For New Trial that was submitted to the Appeals Court as part of the Clerk's Record. It is self evident that the judges of the Alabama Court of Criminal Appeals searched the record, including Hall's Motion For New Trial because the presiding judge of said court, Mary Becker Windom ordered that Hall's case be returned to the trial court for an evidentiary hearing on Hall's ineffective assistance of counsel claim. However, under the plain-error doctrine, Rule 52(b), Federal Rules of Criminal Procedure and Rule 45B, Alabama Rules of Appellate Procedure the proper relief was granting Petitioner a new trial rather than an evidentiary hearing. The decision of the

Alabama Court of Criminal Appeals is contrary to decisions and precedence established by the United States Supreme Court.

Furthermore, a fortiori, three issues raised in Petitioner's Motion For New Trial were never adjudicated on the merits by the Butler County, Alabama Circuit Court nor by the Alabama Court of Criminal Appeals although both Courts were put on notice of the alleged errors and given an opportunity to correct these errors. The three errors: that the trial court should not have tried Mr. Hall without his presence, that the trial court should have ordered the recusal of the District Attorney Charlotte Tesmer and Assistant District Attorney Steven Townes and that the trial court should order a new trial on the ground that it should have granted trial counsel's motion to withdraw and allow Mr. Hall's retained counsel to enter the case. These three allegations, if found to be true, require reversal of Mr. Hall's conviction and sentence as they are either structural errors or due process violations that affect the integrity, fairness, and outcome of the proceedings. This also implicates Petitioner's Fourteenth Amendment right to equal protection and his Sixth Amendment right to counsel on first appeal.

Additionally, Rule 24.4, Ala. R. Crim. P. is unconstitutional as applied to the particular facts and circumstances of Mr. Hall's case because without an adverse ruling from the trial court on the above listed issues, not only is Mr. Hall foreclosed from raising these issues on direct appeal, but also forecloses postconviction petitions, including the privilege of the writ of habeas corpus as proscribed by Article I, § 9

of the Federal Constitution and Article 1 § 17 of the Alabama Constitution.

16. The prosecuting attorneys in this instant matter violated Mr. Hall's fundamental, substantial rights guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as Article 1 § 9 and Articles 1, 2 and 3 throughout the entire criminal proceeding, from pretrial to the guilt phase of the trial to the trial penalty phase through the sentencing hearing. These same rights are also protected by Article 1, §§ 1, 6, 7 and 17 of the Alabama Constitution. The trial court failed to perform its affirmative duty to step in and protect petitioner's fundamental and substantial rights guaranteed by the Constitution of the United States that would have allowed petitioner a "fair trial" in all aspects.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue to the Alabama Court of Criminal Appeals.

April 10, 2019

Harold Hall #209369

Harold Hall # 209369

Pro-Se

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CERTIFICATE OF ACKNOWLEDGMENT

I, Harold Hall #209369, pro-se, hereby certifies under the penalty of perjury that the foregoing "petition for rehearing" and accompanying "brief in support thereof" state grounds that are limited to intervening circumstances of substantial or controlling effect and to other substantial grounds not previously presented.

Additionally, I certify under the penalty of perjury that the foregoing petition for rehearing and concomitant brief in support of said petition for rehearing is presented in good faith and not for dilatory reasons.

April 30, 2019
Executed on

Respectfully Submitted,
Harold Hall #209369
Harold Hall #209369