

No. 18-8641

Supreme Court, U.S.

FILED

SEP 12 2018

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIE HOUSTON, III — PETITIONER
(Your Name)

vs.

LORIE DAVIS, DIRECTOR, TDCJ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
TEXAS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

WILLIE HOUSTON, III

(Your Name)

~~TELFORD UNIT, 3899 STATE HWY. 98~~
WYNNE UNIT 810 FM 2821

(Address)

~~NEW BOSTON, TX 75570~~

HUNTSVILLE, TX 77349

(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

QUESTION ONE

IN A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL'S MISADVICE THAT PETITIONER WAS ELIGIBLE TO RECEIVE PROBATION WHEN HE WAS NOT, AND BASED ON SUCH MISADVICE PETITIONER ENTERED A PLEA OF GUILTY, IF THE OBJECTIVE RECORD OF TRIAL REFUTE THE CLAIMS AND EXPLANATIONS PROVIDED BY COUNSEL IN AN AFFIDAVIT FILED DURING POSTCONVICTION PROCEEDINGS, ARE THE COURT'S REQUIRED TO GIVE GREATER WEIGHT TO INFORMATION CONTAINED IN THE OBJECTIVE RECORD OF TRIAL?

QUESTION TWO

IF DOCUMENTS FILED DURING THE TRIAL PROCEEDINGS, COMMENTS MADE BY THE PROSECUTOR, AND COMMENTS MADE BY THE TRIAL JUDGE ALL INDICATE THAT PETITIONER WAS ELIGIBLE FOR PROBATION, WHEN IN FACT HE WAS NOT, AND PETITIONER ENTERED A GUILTY PLEA BASED ON THE FALSE SUGGESTIONS THAT HE WAS ELIGIBLE FOR PROBATION, WAS PETITIONER'S GUILTY PLEA BASED ON AN UNINTELLIGENTLY MADE WAIVER OF RIGHTS TO A JURY TRIAL?

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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OTHER

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 A 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[] is unpublished.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 B 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[] is unpublished.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 _____.

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 _____. 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

This case involves Amendment XIV to the United States Constitution, which provides:

"[no] State shall deprive any person of life, liberty, or property, without due process of law[.]", and

"[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner Willie Houston, III, (hereinafter "Houston") was stopped for erratic driving by a Texas Trooper. While the Trooper was awaiting warrant confirmation, Houston fled in his vehicle, and a high speed chase ensued. Houston subsequently crashed into a truck with a trailer attached. The crash severely injured Houston and the operator of the truck. Houston pleaded guilty to evading detention with a vehicle and aggravated assault with a deadly weapon in an "open plea." See Houston v. State, 202 WL 1939796, (Tex.App.-Texarkana 2012). Houston was sentenced to 50 years' imprisonment at the Texas Department of Criminal Justice.

In his state writ of habeas corpus, Houston alleged that his guilty plea was unintelligently made because he had been misled into believing that probation was a sentencing option. (State writ). He also alleged that his trial counsel had rendered ineffective assistance of counsel by misadvising him that probation was an option when in fact it was not. (Id.).

The State habeas court issued findings of fact and conclusions of law stating that Houston's claims should be denied because the record of the trial proceedings was devoid of any evidence that Houston had been led to believe that probation was an option, and therefore trial counsel was not ineffective for misadvising Houston. The State habeas court also found that Houston had been adequately admonished as to the correct range of punishment prior to the Court accepting his guilty plea. (State Habeas Court's Findings of Fact Conclusions of Law).

The Court of Criminal Appeals of Texas adopted the habeas trial court's recommendation that the writ be denied without a hearing based on the findings of the habeas trial court.

In federal habeas proceedings, Houston urged the same claims in regards to the two claims above. (See federal petition for writ of habeas corpus, claims 1,2 and 5). Houston asserted that the State habeas court's resolution of the claims resulted in an unreasonable determination of the facts in light of the evidence presented, as well as an unreasonable application of well established Supreme Court Law. (Id.).

Houston argued to the U.S. District Court that the writ should be granted because the objective record of trial refuted the claims made by the state and trial counsel during post conviction proceedings. Nevertheless, the federal district court adopted the state habeas court's resolution of the claims and denied relief. ((See Report and Recommendation)) and (Order of Dismissal)

Houston thereafter sought a certificate of appealability from the U.S. ~~XXXXXXX~~ Court of Appeals for the Fifth Circuit reraising his claims, as alleged in this petition. The Fifth Circuit denied a COA.

REASONS FOR GRANTING PETITION

QUESTION ONE

IN A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON TRIAL COUNSEL'S MISADVICE THAT PETITIONER WAS ELIGIBLE TO RECEIVE PROBATION WHEN HE WAS NOT, AND BASED ON SUCH MISADVICE PETITIONER ENTERED AN OPEN PLEA OF GUILTY, IF THE OBJECTIVE RECORD OF TRIAL REFUTE THE CLAIMS AND EXPLANATIONS PROVIDED BY COUNSEL IN AN AFFIDAVIT FILED DURING POSTCONVICTION PROCEEDINGS, ARE THE COURTS REQUIRED TO GIVE GREATER WEIGHT TO INFORMATION CONTAINED IN THE OBJECTIVE RECORD OF TRIAL?

This petition should be granted because the decision of the district court, sanctioned by the U.S. Court of Appeals for the Fifth Circuit, decided an important question of federal law that is in conflict with this Court's decisions in Hinton v. Alabama, 134 S. Ct. 1081 (2014), Tollett v. Henderson, 411 U.S. 258 (1973) and Anderson v. Bessemer City, 470 U.S. 563 (1985).

Petitioner, Willie Houston, III (hereinafter Houston) claimed in his state and federal writs that his trial counsel misadvised him and persuaded him to plead guilty by incorrectly telling him that he could receive probation from the trial court. In fact, due to the deadly weapon allegation and Houston's plea of true to the deadly weapon allegation, probation was not authorized under Texas statutes. See Ex parte Sanchez, 475 ~~XXXX~~ S.W. 3d 287 (Tex. Crim.App. 2015)(See Houston's federal Traverse, at Pgs. 7-9)(See district court's Order of Dismissal (hereinafter "OD", at 3-4). Houston alleged that, absent trial counsel's misadvice concerning his eligibility for probation, he would have exercised his right to trial by jury.

Trial counsel submitted a post conviction affidavit claiming he correctly advised Houston as to the correct range of punishment. He claimed that he also advised Houston that he was ineligible for probation. (OD, at P.2). Yet Houston presented evidence from

the objective record of trial which diametrically opposed trial counsel's claims and proved that his postconviction affidavit contained nothing more than post hoc rationalizations to conceal the fact that he lacked firm command of controlling law and mistakenly believed that Houston was eligible for probation. Trial counsel is clearly on record discussing probation and evidence submitted to the probation department in support of Houston's pending sentencing hearing. (3 RR 16-17).

In Tollett v. Henderson, 411 U.S. 258, 266-267), this Court held that ineffective assistance of counsel may prevent a defendant from entering a knowing and intelligent plea. In Hinton v. Alabama, 134 S.Ct. 1081 (2014), this Court held that an attorney operating based on a mistaken belief of the law or facts renders deficient performance as a matter of law. Houston even pointed out that even in trial counsel's postconviction affidavit he was misstating relevant law, which the respondent pointed out in her response to Houston's State writ application. (See State Response to 11.07) (Arguing misstatement of law in trial counsel's affidavit)(Id., at P. 6). This Court also held in Missouri v. Frye, 132 S.Ct. 1399,1403 (2012), that ineffective assistance of counsel tests extends to counsel's conduct during plea negotiations.

This petition should also be granted because there exists a split amongst the federal circuit courts regarding whether Courts should give greater weight to the objective record when trial counsel's postconviction affidavit in response to a claim of ineffective assistance of counsel contains explanations contradicted by the objective record.

In U.S. v. Streater, 70 F.3d 1314,1320-1321 (D.C. Cir. 1995), citing this Court's decision in Anderson v. Bessemer, 470 U.S. 563 (1985), the D.C. Circuit stated that when the objective record contradicts what trial counsel claims in a postconviction affidavit, reviewing Courts should give ~~greater~~ greater weight to the objective record of trial. In Houston's case, the Courts below did exactly the opposite, giving greater weight to trial counsel's claims, despite his claims being clearly refuted by his conduct at trial.

Trial counsel claimed in his affidavit that he specifically advised Houston that he was not eligible for probation, but during the trial proceedings he's on record discussing probation matters with the prosecutor and the trial judge. (3 RR 16-17). What more evidence could Houston produce to prove he was persuaded to enter an open plea of guilty through misadvice from counsel that he was eligible to receive probation than trial counsel referring his case to the probation department?

Based on the facts contained in the objective record, Houston respectfully request that this petition be granted.

QUESTION TWO

IF DOCUMENTS FILED DURING THE TRIAL PROCEEDINGS, COMMENTS MADE BY THE PROSECUTOR, AND COMMENTS MADE BY THE TRIAL JUDGE, ALL INDICATE THAT PETITIONER WAS ELIGIBLE FOR PROBATION, WHEN IN FACT HE WAS NOT, AND PETITIONER ENTERED A GUILTY PLEA BASED ON THE FALSE SUGGESTIONS THAT HE WAS ELIGIBLE FOR PROBATION, WAS PETITIONER'S GUILTY PLEA BASED ON AN UNINTELLIGENTLY MADE WAIVER OF RIGHTS TO A JURY TRIAL?

In order to prove that his open plea of guilty was unintelligently made and that he was deceived into pleading guilty through actions by trial counsel, the prosecutor, and the trial judge all suggesting that he could possibly receive probation as a sentencing option when he was, by law, ineligible, Houston presented the following evidence:

- a) A "consent form" signed by Houston containing the language "if probation is granted" on the document. (See Exhibit attached to State's Response to Houston's 11.07);
- b) Following Houston's guilty plea, the trial judge ordered a presentence investigation (PSI).

Under Texas law, if a defendant is not eligible for probation, then a presentence report serves absolutely no purpose. (Article 42.12(9)(g)(3), Texas Code of Criminal Procedure. See also

McGhee v. State, 747 S.W. 2d 446,450 (Tex.Crim.App. 1988);

c) During Houston's sentencing hearing, the Court, during its admonishment of Houston stated to Houston:

"Under our law whatever sentence you would receive, if you were to receive a prison sentence in the aggravated assault case, any sentence you receive you would have to serve half that time[.]" (3 RR 13).

The deadly weapon allegation itself made Houston ineligible for probation. See Ex parte Sanchez, 475 S.W. 3d 287 (Tex.Crim.App. 2015)(deadly weapon allegation makes probation not a sentencing option). If in fact Houston was not being led to believe that probation was a sentencing option, why would the trial judge make the statement "if you were to receive a prison sentence?" The only alternative to receiving a prison sentence is probation.

d) During the prosecutor's cross-examination of Houston's defense witness during the sentencing hearing, the prosecutor asked his witness:

"...and you think the judge should do something positive for him. Maybe put him on probation[.]" (3 RR 40-41).

Despite all of this evidence in the objective record to the contrary, the State and federal habeas courts decided that there was no ~~new~~ evidence in the record that Houston was misled into believing he could receive probation as a sentencing option, and therefore his guilty plea was intelligently made. (See district court's Order of Dismissal, Appendix B, at P.2-8).

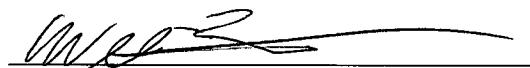
This petition should be granted because the U.S. Court of Appeals in denying Houston's petition for a certificate of appealability has decided an important question of federal law in a way that is in conflict with this Court's decision in Anderson v. Bessemer, 470 U.S. 563 (1985) because the Court has accepted a decision that gives greater weight to claims made in postconviction pleadings than facts contained in the objective record of trial.

Review should also be granted because the U.S. Court of Appeals for the Fifth Circuit has sanctioned the lower federal and State courts far departure from the accepted and usual course of judicial proceedings by allowing such courts to completely disregard the facts contained in the objective record in favor of contradictory statements made in postconviction pleadings, calling for this Court's supervisory powers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael S. Feldman".

Date: 9-11-18