Cause No. 18-8976

IN THE

SUPREME COURT OF THE UNITED STATES
1 FIRST STREET N.E.
WASHINGTON, D.C. 20543-0001

ORIGINAL

WILFRED WARREN SHEPPARD,
Petitioner

v.

FILED
APR 10 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF TEXAS
KEN PAXTON, ATTORNEY GENERAL, *Respondent*
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institution Division, *Respondent*

On Petition to the, Fifth Circuit Court of Appeals, Case No. 18-50288, United States District Court, For The Western District of Texas, Case No. W-18-CA-094-RP

PETITIONER'S MOTION FOR WRIT OF CERTIORARI TO REVIEW DENIAL OF CERTIFICATE OF APPEALAILITY FIFTH CIRCUIT COURT OF APPEALS

WILFRED W. SHEPPARD
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Killeen, Texas 76543
Telephone: (254)-681-2983

April 9, 2019

QUESTION PRESENTED

(1.) Whether this Court has the power to issue a Writ of Certiorari to review the action of the Fifth Circuit Court of Appeals in declining to allow an appeal to it, under 262 of the Judicial Code, 28 U.S.C. 377. ***In re 620 Church St. Corp.,*** 299 U.S. 24, 299 U.S. 26, and cases sited; ***Holiday v. Johnston,*** 313 U.S. 342, 313 U.S. 348, note 2; ***Wells v. United States,*** 318 U.S. 257; ***Steffler v. United States,*** 319 U.S. 38.

(2.) If it has, whether it may review the merits of the decision of the Court.

(3.) Whether the Circuit Court erred in not issuing COA to it.

PARTIES TO THE PROCEEDINGS

The sole petitioner here is Wilfred Sheppard

DIRECTOR OF TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTION DIVISION
Lorie Davis
P.O. Box 99
Hunstville, Texas 77342-0099

IDENTITY OF TRIAL COURT JUDGE,

The Honorable John Gauntt
Judge 27th District Court
Bell County Law Enforcement Center
113 W. Central Avenue
Belton, Texas 76513

PARTIES TO THE JUDGMENT APPEALED

Wilfred Warren Sheppard, Appellant

The State of Texas, Appellee

TRIAL COUNSEL

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The Honorable Stacey M. Soule
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JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was MARCH 18, 2019

[ ] 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: APRIL 9, 2019, 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).

MOTION FOR LEAVE TO FILE A PETITION FOR CERTIORARI AND WRIT OF HABEAS CORPUS

I, Wilfred Sheppard, respectfully submit a motion for leave to file a petition for Writ of Certiorari, under 262 of the Judicial Code, 28 U.S.C. 377. ***In re 620 Church St. Corp.,*** 299 U.S. 24, 299 U.S. 26, and cases sited; ***Holiday v. Johnston,*** 313 U.S. 342, 313 U.S. 348, note 2; ***Wells v. United States,*** 318 U.S. 257; ***Steffler v. United States,*** 319 U.S. 38, to review the action of the Fifth Circuit Court of Appeals in declining to allow an appeal to it, Cause No. 18-50288.

OPINION BELOW

The order of the Fifth Circuit Court of Appeals is attached.

JURISDICTION

(i)The Third Court of Appeals, issued its initial decision on May 11, 2017.

(ii)The Texas Court of Criminal Appeals refused my Petition for Discretionary Review on June 28, 2017 and denied my Motion for Rehearing on September 13, 2017. (iii) The District Court Denied Habeas Corpus Petition on April 4, 2018, (vi) Fifth Circuit Court of Appeals Denied Certificate of Appealability on April 9, 2019 (v) This Court has Jurisdiction under 28 U.S.C. 2253and 262 of the Judicial Code, 28 U.S.C. 377

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2 of the United States Constitution provides in relevant part: "The trial of all crimes, except in cases of impeachment, shall

be jury."

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

28 U.S.C.: 1291 provides in relevant part: "The Courts of Appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States...."

STATEMENT OF THE CASE

I was charged and indicted for criminal mischief. The trial court pronounced punishment at 12 months confinement in state jail, predicated on evidence of a conviction of an unrelated offense for which no " jury" found me nor did I enter a plea of guilty. ***Townsend v. Burke,*** 334 U.S. 736

On direct review to the Court of Appeals, I claimed I was prejudiced at trial and taken advantage of by the prosecution due to the ineffective assistance of trial counsel. Furthermore, I presented that the foundation upon which sentence was pronounced was materially false and lacking in due process of law. I was denied my valued right to a "jury trial" to determine the facts when the judge dismissed the jury without my consent ***United States v. Jorn,*** 400 U.S. 470, and arbitrarily held a summary proceeding by judge which I did not elect.

The Third Court of Appeals, rejected my claims raised on direct review and affirmed the judgment of conviction by the trial court on May 11, 2017. I filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was refused on June 28, 2017 and a motion for rehearing which was denied on September 13, 2017. Writ of Certiorari was denied, June 5, 2017, Petition for Writ of Habeas Corpus , in the United States District Court, Western District of Texas, was denied without requiring the State to answer And without giving me an opportunity to prove my allegations, on April 4, 2018, Motion for Certificate of Appealability in the Fifth Circuit, Court of Appeals was denied, April 9, 2019.

I. REASONS FOR GRANTING THIS CLAIM

The Record On Appeal provides evidence of the substantial denial of constitutional rights in this case.

II. ARGUMENT

The order from the Fifth Circuit, Court of Appeals, denying Certificate of Appealability(COA), hereto attached states that a Certificate Of Appealability will issue if I have " made a substantial showing of the denial of a constitutional right." 2253(c) (2) or if it is shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.

- **The Record On Appeal establishes the substantial denial of 2 constitutional rights .**

1. **The Right to a "Jury Trial"** in a criminal prosecution is enforceable against the states through the fourteenth amendment. ***Duncan v. Louisiana,*** 391 U.S. 145, 149 (1968)

   - ROA.18-50288.44: Clerk's Record Certificate of Thumbprint Cause #73471

   - Note that cause no. 72147 (ROA.18-50288.42-43, Clerk's Record) on appeal with this court is distinct and separate from cause no. 73471(ROA.18-50288.44, Clerk's Record), conducted on the same date and time, September 19, 2016 at 10:00am, in the 27th District Court.

   - The Court dismissed the jury without my consent, (RR:VI-4, line#9) and held a separate and distinct trial in cause no. 73471 in which testimony used as evidence (RR:V-31-VI-19) punished me to 12 months imprisonment. A review of ROA.18-50288.34-38,39: Clerk's Record, Charge of Jury, Verdict of Jury, reveals no finding of guilt or instruction in the charge to determine guilt or innocence in cause no. 73471.

   - The conduct of an arbitrary summary proceeding by the court, with no election to have cause no. 73471, heard by the court, deprived me of my right to a "jury trial," showing a substantial denial of a "right" enforceable against the states though the fourteenth amendment, ***Duncan v. Louisiana,*** 391 U.S. 145, 149 (1968).

   - Article 38.33 Texas Code of Criminal Procedure, requires the court to order thumbprint certification for a defendant who is convicted of a felony or misdemeanor offense that is punishable by confinement in jail. In short, I was confined in jail on a decision influenced by what the record appears to show as a conviction obtained without the due process of law in cause no.73471.(see, Judges Docket, ROA.18-50288.56,Clerk's

Record, notes on 9/16/19 coincide with fingerprint certification filed on same date at 11:42am at the disposition of cause no. 73471).

NOTE: The Supreme Court has ruled, where a defendant is convicted and was not adequately represented by counsel and it appears from the record that, while the court was considering sentence to be imposed, the defendant actually was prejudiced either by the prosecutions submission of misinformation regarding his prior criminal record or by the court's careless misreading of that record, he was denied due process of law, and the conviction cannot be sustained. ***Townsend v. Burke,*** 334 U.S. 736 (1948).

Case Authority: ***United States v. Jorn,*** 400 U.S. 470

"The defendant has the option to have his case considered by the first jury, the judge in this case, acting without the defendant's consent, aborted the trial, the defendant was deprived of his "valued right to have his trial completed by a particular tribunal."

"In the absence of the defendant's motion for mistrial, the doctrine of "manifest necessity," ***United States v. Perez,*** 9 Wheat. 579, 22 U.S.580, commands trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion warrants the conclusion that justice would not be served by continuation of the trial."

"A judge must temper the decision whether or not to abort the trial by considering the importance to the defendant of being able finally to conclude his confrontation with society through the verdict of a tribunal that he might believe is favorable to him."

"The trial judge abused his discretion and accordingly appellant's reprosecution would violate the Double Jeopardy Clause."

2. **Ineffective Assistance of Counsel**

I was disadvantaged at trial by the ineffective assistance of counsel's willful and malicious false statement to the court that I had no mitigating evidence to offer in my defense, (ROA.18-50288.460, line #22, "Defense has no evidence, your honor.") despite having knowledge of evidence on file with the court as of December 1, 2014, (ROA.18-50288.62-147) and did not present it. ***Hart v. Gomez,*** 174 F.3d. 1067,1071(9th Cir. 1999) (Holding, that counsel provided constitutionally ineffective assistance of counsel where interalia, having chosen to pursue a particular line of defense, counsel did not introduce readily available evidence that would have corroborated that line of defense, and there was no plausible strategy for his not introducing the evidence.) In the instant case, counsel might have not changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which ineffective assistance of counsel with held from this prisoner. ***Townsend v. Burke,*** 334 U.S. 736 (1948)

3. EXHAUSTION REQUIREMENT

The Court's order states that by filing a Pro Se brief in the Texas Criminal Court of Appeals, I did not present claim #1 stated above in a procedurally proper manner because I was represented by counsel on appeal and lacked authority to file a Pro Se pleading. The Record on Appeal and the Texas Bill of Rights state the contrary.

Appellant's Motion for Review of Reversible Error, ROA.18-50288.77-81 filed May 9, 2018, expressly raises the issue of the deprivation of a " jury trial" for cause no. 73471. This document was received in the Third Court of Appeals on direct review, December 5, 2016, prior to presentation of Petition for Discretionary Review to the TCCA.

Recall, the very substance of my arguments were geared towards the ineffective assistance of counsel. The Texas Bill of Rights expressly states:

Art. 1, Sec. 10: RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS.

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusations against him, and to have a copy thereof. He shall not be compelled to

give evidence against himself, ***and shall have the right of being heard by himself or counsel or both,.....***

The language gives authority to both counsel and the accused the right of being heard in criminal prosecutions. In situations such as mine where conflict exists between counsel and client, and counsel ceases to effectively perform his duties and willfully withholds evidence and filings, the Bill of Rights gives authority to the defendant of being heard by himself.

Not only did my Appellate attorney refuse to raise the additional issues he was made aware of on direct appeal (emails and written correspondence can be provided on request), the contract signed between he and I, did not cover the filing of a Petition for Discretionary Review. I filed the PDR in the Texas Criminal Court of Appeals with the authority of the language used in the Texas Bill of Rights.

Based on the provisions stated above, I contend that I presented the substantial showing of the denial of a constitutional right, in a procedurally proper manner within the purviews of law.

Case Authority: Brown v. Allen, 344 U.S.443

"Where, on direct review of his conviction, a State prisoner's claim of federal constitutional right has been decided adversely to him by the state supreme court

and an application to this Court for certiorari has been denied, he has satisfied the requirement of 28 U.S.C. 2254 that state remedies be exhausted before a federal court may grant an application for habeas corpus.

"It is not necessary in such circumstances that he pursue in the state courts a collateral remedy based on the same evidence and issues."

"Section 2254 is not construed as requiring repetitious applications to state courts for relief.

Repeated efforts made to present the denial of my constitutional rights, to the TCCA were refused and denied on rehearing which made it highly likely that further efforts to present the merits of my claim would be met with the same result. I exhausted my State remedies and sought relief through Writ of Certiorari in the Supreme Court and Habeas Corpus Relief in the Federal Courts, I exercised my "rights" within the purview of law expressed in the Texas Bill of Rights.

II. CONCLUSION

The Record on Appeal provides fact supported by evidence of the substantial denial of constitutional rights stated above. The Texas Bill of Rights provides a statute of law which gives the accused expressed authority to be heard by both counsel and/or himself, proof that I acted within the purview of law in presenting evidence to the Courts, in my defense, when counsel ceased to function effectively.

I have been deprived of my liberty without the due process of law, a substantial

right guaranteed by the constitution, which I was denied in this case.

III. PRAYER

I pray that the Court reviews the facts, supported by evidence filed in the Record on Appeal, and find that I have made a "substantial showing of the denial of a constitutional rights," specifically, the "right" to the effective assistance of counsel, ***Johnson v. Zerbst,*** 304 U.S. 458 and the "right" to a jury trial, ***Duncan v. Louisiana,*** 391 U.S. 145, 149 (1968), enforceable against the States through the fourteenth amendment, and find that they were presented in a procedurally proper manner within the authority of the Texas Bill of Rights, **Art. 1, Sec. 10: Rights of Accused in Criminal Prosecutions.**

Furthermore, I pray the court *GRANTS,* this motion and issue the COA.

Respectfully submitted,

I declare under the penalty of perjury that the forgoing is true and correct.
Executed on: April 9, 2019

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