

18-9442 ORIGINAL
IN THE

SUPREME COURT FOR
THE STATE OF LOUISIANA

FILED
APR 24 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. _____

DONALD LOSTON
VERSUS
SANDY MCCAIN, WARDEN

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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SUPREME COURT, U.S.

RESPECTFULLY SUBMITTED:

Donald Loston
DONALD LOSTON #295505
RLCC- Cajun 3, C-1
1630 Prison Road
Cottonport, La. 71327

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether a state trial court denial of counsel of choice is reversible error when no threat against the interest of judicial integrity and efficiency was present?
2. Whether a state trial court's denial of counsel of choice and request for continuance, and presents defendant with the choice of going to trial with court-appointed counsel who defendant has, with legitimate reason, completely lost trust in, create a type of actual conflict, with high potential to constructively deny defendant the effect assistance of counsel?

PARTIES

The petitioner is *Donald Loston*, a prisoner in the Louisiana Department of Public Safety and Corrections, presently housed at Raymond Laborde Correctional Center, located in Cottonport, Louisiana.

The respondents are Camille A. Morvant, II, District Attorney Lafourche Parish, and Joseph S. Soignet, Assistant District Attorney, Bar Roll #21890, P.O. Box 431, 103 Maronge St., Suite A, Thibodeaux, La. 70301

TABLE OF AUTHORITIES

CASES

Adams v. United States ex rel. McCann, 317 US 269, 279, 87 L. Ed. 268, 63 S. Ct. 236 (1943)

Berry v. Lockhart, 873 F. 2d 1168 (8th Cir. 1989)

Childless v. Johnson, 103 F. 3d 1221, 1997 U.S. App. LEXIS 397, No. 95-20865

Cuyler v. Sullivan, 446 US 335, 344-45 (1980)

Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975)

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)

Johnson v. Zerbst, 304 US 458, 467, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)

McMann v. Richardson, 397 US 759, 771, n. 14 (1970)

Padilla v. Ky., 130 S. Ct. 1473, 1480-81 (2010)

Strickland v. Washington, 466 US 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

United States v. Ash, 413 US 300, 308, 37 L. Ed. 2d 619, 93 S. Ct. 2568 (1973)

United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984)

United States v. Davis, 269 F. 3d at 520

United States v. Taylor, 933 F. 3d at 312

Wheat v. U.S., 486 US 153, 159 (1988)

Yarborough v. Gentry, 540 US 1, 5 (2003)

STATUTE

28 U.S.C. § 1254 (1)

28 U.S.C. § 1257

28 U.S.C., Rule of Supreme Court

La. R.S. 14:64

CONSTITUTIONAL PROVISION

United States Constitution Amendment 6

LOUISIANA REVISED STATUTES

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is an unreported dismissal of appeal on January 24, 2019. It is cited in the table at (case no. 18-30988), and a copy of the clerk's letter of Appeal denial is attached as Appendix A this petition (A-1). The order of the United States District Court, for the Eastern District of Louisiana is not reported. A copy is attached as Appendix B to this petition (A. II).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 24, 2019. Jurisdiction is conferred on the Supreme Court by 28 U.S.C., Rules of the Supreme Court Constitutional and Statutory Provisions Involved.

This case involves Amendments VI to the United States Constitution, which provides:

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 obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Amendment is enforced by Amendment 14, Section 1, to the United States constitution, which provides:

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

The petitioner's petition alleged that he was charged in the Parish of Lafourche with Aggravated Second Degree Battery, Armed Robbery, and Cruelty to the Infirm. It further alleged that he was constructively denied counsel of choice; his appointed counsel had a conflict of interest; ineffective assistance of counsel for failing to challenge the jury venire; ineffective assistance of counsel for failing to secure expert testimony; ineffective assistance of counsel by failing to investigate and subject the prosecutions case to meaningful adversarial review; and, insufficient evidence to support his conviction. The state courts denied relief at: 2013-KA-1885, 12-2-13; State v. Loston. 2013-KA-1885, 2014 V&L 1778371 (La. App. 1st Cir. May 2, 2014; State ex rel. Loston v. State, 215 So. 3d 230 (La. 20M), and petitioner thereafter filed the instant Federal habeas application seeking entitled Federal relief.

BASIS FOR FEDERAL JURISDICAION

Review on a writ of certiorari is not a matter of right, but judicial discretion. Rule 10, Supreme Court Rules. This case raises a question of interpretation of the denial of the right to

counsel, resulting in the constitutive denial of effective assistance of counsel guaranteed by the Sixth Amendment.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The holding of the courts below that denial of counsel of choice and a continuance, where no threat against the interest of judicial integrity and efficiency were present, did not constructively deny effective assistance of counsel at trial, and was neither contrary nor an unreasonable application of federal law, is directly contrary to the holding in *Strickland v. Washington*, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052, 80 L.Ed 2d 674, (1984); *United States v. Cronic*, 466 U.S. 648, 104 5th Ct. 2039, 80 L. Ed. 2d 657 (1984); and *Childress v. Johnson*, 103 F. 3d 1221, 1997 U.S. App. Lexis 398, No. 95-20865-In addition, the right to counsel provided by the Sixth Amendment, also includes the guarantee to the right to effective assistance of counsel. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (Per curium); *Padilla v. Ky.*, 130S. ct. 1473, 1480-81 (2010); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

IMPORTANCE OF THE QUESTION PRESENTED

This case presents a fundamental question of the right to counsel, and a trial court's constructive denial of the effective assistance of counsel, guaranteed by the U.S. Const. amend. VI, and as suggested by this court in *United States v. Cronic*, 466 U.S. 648, 104 S. ct. 2039, 80 L. Ed. 2d 657 (1984). The question presented is of great public importance because it affects a U.S. citizen's right to retain an attorney of his or her choice, *Wheat v. U.S.*, 486 U.S. 153, 159 (1988), court's refusal to grant continuance to enable defendant's chosen counsel, busy in state court, to try case, and requiring defendant to choose between representation by prior counsel who was herself unprepared or proceed to trial with no counsel at all. In view of the large amount of authority on point, guidance on the question is also of great importance to the judiciary. In addition, the question is of great importance to defendant in this case, because it affects his ability to receive a fair trial that have resulted in fifty years at hard labor without the benefit of sentence of imprisonment.

The importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted "the applicable legal principles mandated under the sixth Amendment, providing that" in all criminal prosecutions, the accused shall enjoy the right...to have assistance of counsel for his defense." Moreover, the Supreme Court has proclaimed that "the guiding hand of counsel "must be made available in criminal trial to those that can not afford to hire an attorney on their

own." United States v. Ash, 413 U.S. 300, 308 37 L.Ed. 2d 619, 93 S. ct. 2568 (1973); Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. ct. 792 (1963). "Compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of this life or liberty." Johnson v. Zerbst, 304 U.S. 458, 467, 82 L.Ed. 1461, 58 S. ct. 1019 (1938).

The Sixth Amendment is unique, however, because it not only guarantees a substantive right-the right to counsel it also guarantees the converse right to proceed without counsel at trial. The constitution does not force a lawyer upon a defendant. "Faretta v. California, 422 U.S. 806, 814-15, 45 L.Ed. 2d 562, 95 S. ct. 2525 (1975), quoting Adams v. United States ex rel., McCann, 317 U.S. 269, 279, 87 L.Ed. 268, 63 S. ct. 236 (1943).

A defendant is entitled to counsel capable of rendering competent, meaningful assistance...No defendant has a right to more. United States v. Davis, 269 F. 3d at 520 (citing United States v. Taylor, 933 F. 2f at 312.

In the instant case, the record does not support a conclusion that retains counsel's oral motion for continuance was motivated by an interest in delaying the trial.

The instant case is more analogous to Berry v. Lockhart, 873 F. 2d 1168 (8th Cir. 1989). (Berry). In Berry, the court affirmed the ground of a habeas petition on the ground that the defendant did not know and intelligently waive his motion for substituted counsel was denied and he was faced with the option of proceeding with unwanted counsel or pro se.

The defendant in this case, was offered the "Hobson's choice of proceeding to trial with unprepared counsel whom defendant had lost all trust or no counsel at all. If the trial court had carefully examined [the defendant's] problems with [his counsel] and found them clearly insubstantial, it might have been justified in forcing [him] to trial with unwanted and counsel whom defendant believed an actual conflict existed.

CONCLUSION

For the foregoing reason, certiorari should be granted in this case.

4-24-19 Date

Respectfully submitted

Donald Loston
Donald Loston 295505