Supreme Court, U.S.
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MAR 12 2019
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No. 18-9605

IN THE

SUPREME COURT OF THE UNITED STATES

DON T. FERGUSON - PETITIONER

vs.

STATE OF FLORIDA - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTION # 1 PRESENTED

Whether A Great Public Importance Exists Of Florida Courts' Denied Pro Se Petitioner's Representing Himself At Jury Trial, Of His (7th) Amendment Constitutional Rights' To A Fair And Impartial Trial When State Trial Judge Tinkler-Mendez Refusal To Give Lesser Included Jury Instructions Of "Simple Battery," When Florida Supreme Court New Law Proves' Petitioner Denied Equal Justice, Compare, Wong Vs. State, 212 So. 3d 351 (Fla. March 2d, 2017)?

QUESTION # 2 PRESENTED

Whether Punishments Mandated By Florida Statute 800.04 Violates Petitioner's 8th Amendment Protections Against Cruel And Unusual Punishments?

LIST OF PARTIES

[ ] Parties appear in the caption of the case on the cover page

[X] 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 subject of this petition is as follows: **Attorney General Ashley Moody**

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari and/or writ of mandamus issue to review the judgment below.

OPINIONS BELOW

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

The opinion of the United States court to appeals 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[ ] is unpublished.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 United States court to appeals appears at Appendix ___ 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[ ] is unpublished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 "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[✓] is unpublished.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 Florida Supreme Court court 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.

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 ___January 16, 2019__. A copy of that decision appears at Appendix "A."

[ ] A timely petition for rehearing was thereafter denied on the following date: _January 12th, 2019_, and a copy of the order denying rehearing appears at Appendix "A".

[ ] 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

Petitioners' has suffered from a "manifest of injustice" to a "miscarriage of justice," when Petitioner made a decision to represent himself (pro se) when paid attorney Robyn Blake was paid $15, 000.00 decided to allow Petitioner's speedy trial rights to expire, Petitioner took the reins and was granted by State Trial judge Tinkler – Mendez to conduct his jury trial for allegations' of lewd and lascivious molestation on a child under 12 years' of age by an adult over 18, see, Florida Statues 800.04 (2009).

During jury trial Petitioner requested the Trial Court to instruct the jury on lesser included jury instruction of "**simple battery**", see, Appendix "C", Jury Trial page 748, 749: ("...I am going to respectfully deny your request for the lesser included battery instruction. However, that issue is reserved should there be any further review").

The instant feature proves' that Petitioner rights to be treated equal to another has been manifested in new law from Florida Supreme Court, see, Wong vs. State, 212 So. 3d 351 (Fla. 2017)("Court remanded for new trial where court refused to give lesser included jury instruction of the permissive act of unnatural and lascivious act **vs.** the higher charge of both lewd or lascivious molestation and lewd or lascivious battery") violated Petitioner's U.S. Constitutional Rights' of the 7th and 14th Amendments Rights' to Due Process, compare, Vickers vs. Ricketts, 798 F.2d 369 (9th Cir. 1986) Cert. Denied 107 S. Ct. 928 (1987)("Reversed the denial of habeas corpus because the state trial court failure to instruct the jury on lesser included 2d second – degree murder violated due process principles").

The instant unique situation presented today, to this Court is very new, even to all the Florida courts; because Petitioner's research failed to uncover any cases' like Wong vs. State, 212 So. 3d 351 (Fla. 2017); Marshall vs. Jerrico, 100 S. Ct. 1610 (1980).

The instant situation requires' this Court to intervene and remand Petitioner's criminal case for a new trial.

STATEMENT OF FACTS OF THE CASE

(1). On November 19th, 2009, the Defendant/Petitioner was charged with one count of lewd or lascivious molestation on a child (Nyasha Gardner) under 12 years of age by an adult over 18. On September 28th, 2010, there was an amended information filed charging different period of time, see, Appendix "B".

(2). Petitioner elected to proceed to trial without counsel and represented himself.

(3). On October 12th, 2010, the court held a hearing regarding the State's intent to reply on child hearsay statements. The court granted the motion and allowed the hearsay testimony to be introduced at trial.

(4). On October 18, 2010 the Defendant's trial began.

(5). The jury returned a verdict of guilty on October 22, 2010.

FACTS OF THE CASE

In October 2007, my then girlfriend, Tangela Fletcher was being evicted from her apartment. I lived and worked as building engineer at the same apartment complex, so out of love and necessity, I invited Tangela and her then 7 year old daughter Nyasha Gardner to come live with me and my best friend Mr. Bryan Person. By December 1st, 2007 we had 3 adults and 1 child living within my 600 to 700 square foot studio apartment. My apartment's main room had 1 Queen – sized bed, and 1 full – sized sofa which abutted the bed. Bryan slept on a pallet in the walk in closet while Tangela, Nyasha and I slept using every possible combination of 2 on the bed and 1 on the sofa.

On Friday, May 23, 2008, Bryan was away house sitting, so only Tangela, Nyasha and I were the residence. Tangela slept on the sofa, while Nyasha and I shared the bed.

On Saturday, May 24, 2008, I awoke around 9am; while my family still slept I quietly saw to the morning ablutions and headed to our local Blockbuster Video Store to rent movies for our evening. Upon returning I immediately noticed that Tangela's countenance was extremely distressed. Alarmed, I asked her what happened. Tangela told me shortly after they awoke, Nyasha told her I had touched her on her privates the previous night. Nyasha told Tangela that she awoke during the night with my hand upon her groin area and pajamas. It is important to note that whenever Nyasha and I shared the bed we were always clothed in pajamas.

Knowing I had not consciously committed this allegation of inexcusable activity, I immediately asked Tangela if Nyasha was hurt, and shouldn't we take [her] to the hospital. Tangela told me she had examined Nyasha herself and saw no scratches, redness or swelling, and Nyasha herself said she was not hurt, so no hospital trip was necessary. I now wish I had insisted we go to the hospital. Needless to say, we didn't watch any movies that evening and Tangela was

seriously considering ending our relationship. We decided then, to prevent any possible future occurrences, that Nyasha and I would never again sleep in the same bed together. I had zero objections to agreeing with what seemed perfectly logical, as I fully concur that any inappropriate touching of any child is abhorrent and entirely unacceptable!

We did continue on living together and our relationship grew stronger to where I proposed marriage and she accepted/consented to become my wife.

In August 2008 Bryan moved out. In April 2009 Tangela and I finally managed to move into a two (2) bedroom, 2 bath apartment. This address change required us to enroll Nyasha in a school closer to our new residence in August 2009. On October 29, 2009, I had to escort Nyasha directly into her classroom, as Tangela and I had purchased several 2 liter bottles of soda for Nyasha's class Halloween party. After I set the soda on the table, I went to give Nyasha a goodbye hug, which she rebuffed. Unbeknownst to me her teacher (Ms. Wallen) interpreted that rebuff as a sign of trouble. So after I left, Ms. Wallen asked Nyasha why she had reacted that way to which Nyasha supposedly told her I touch her privates and hurt her, sometimes so badly it's hard for her to walk. The police was then contacted, and after having her examined and questioned further, later that evening I was asked to come to the police station, which I did willingly not knowing how drastically different Nyasha version of events had changed from what she had told her mother about 18 months earlier. My Miranda Rights were read at the station and willing I gave a full statement of what had occurred May 23 and 24th, 2008. By about 10pm, October 29, 2009, I was placed under arrest for the charge of Capitol Sexual Battery. At my arraignment, November 19, 2009, I was told my charge was amended to lewd or lascivious molestation by an adult on a child under 12 years old. It wasn't until I was finally able to get my Public Defender to provide me a copy of the State's Discovery in January 2010, that I learned how radically different Nyaha's

version of alleged events were: in May of 2008 she wasn't hurt [then] on October 29th, 2009 she hurt so bad it was difficult to walk; my hand was longer on her pajamas but now my fingers were penetrating her vagina. Also different (in this newer version) was that this was an event that happened more than once.

On November 3rd, 2009, Nyasha was interviewed by a forensic investigator to whom Nyasha's story now reverted back to more closely resembling what she had told her mother on May 24, 2008. Nyasha was back to saying my hand was atop her pajamas, she wasn't hurt, I was asleep and she was adamant it was a onetime event. (So I knew why they [State] had amended my charge on November 19, 2009, even though Dr. Lambert's Oct. 29th, 2009 examination caused him to report there was indications of a sexual battery.

On June 7th, 2010 the alleged victim was deposed by my attorney Ms. Robin Blake. This deposition was transcribed and video recorded to a DVD. My attorney Ms. Blake told me via a phone call later that day that when I asked about [Nyasha] account given on October 29th, 2009, Nyasha replied "her teacher told her what to say". Now I understood why her version of events had changed so much. It is also important to note that on May 7th, 2010, I had an Arthur hearing to attempt to gain a bond at that time trial was set for June 21, 2010.

When I informed my judge I wanted to self – represent myself at trial on May 17th, 2010 she stated and I quote -- "I will not allow you to represent yourself against such a serious charge." With that statement my Trial Judge had violated my Constitutional Rights. Had I been allowed to provide my own defense, then or shortly thereafter as I should have, and my trial had began near that already set trial date of June 21, 2010, it's entirely reasonable to believe that alleged victim would've easily repeated to my jury what she had just testified to at her June 7th, 2010 deposition: ("Her teacher told her what to say"). My trial judge would again violate my Constitutional Right

to represent myself in a[n] August 27th, 2010 appearance and in effect my right to speedy trial when she again denied me my right to proceed to trial pro se.

I then wrote letters to my trial judge, and the Chief Judge in Miami – Dade demanding to be allowed to proceed pro se. But it wasn't until a 9/27/1010 "Faretta" Hearing that my trial judge finally relented and allowed me to self – represent.

On October 12, 2010, the State conducted a motion to allow hearsay testimony, and for the alleged victim to testify via closed circuit TV. Both of which were approved by my biased trial judge. My trial began on October 18, 2010, less than prescribed by statute 10 days removed from hearsay motion. Prior to my case being given to my jury, on October 21, 2010 I asked my trial judge to allow my jury to consider the category 2 lesser included offense of Battery. Unsurprisingly my trial judge errantly denied this request committing per se reversible error.

On October 22, 2010, my jury returned an errant verdict of guilty. The State committed a Brady/discovery violation by never informing me of the fact the video with Nyasha providing all the reasonable doubt I would ever require, "Her teacher told her what to say," was inoperable (no video or sound). They told this to my standby counsel Ms. Robin Blake on about 10/15/2010 and Ms. Blake told me [this] when I called her from county jail that evening.

Of the many unintentional ineffective counsel acts I committed I failed to state in open court this discovery violation by the prosecution. I failed to file an expiration of speedy trial motion seeking a dismissal as well. Unfortunately, in my impatience to obtain my acquittal, I grievously erred in hoping the alleged victim would simply repeat her deposition testimony statement that "her teacher told her what to say" at my trial.

If a seasoned attorney is obligated to cite themselves for ineffective assistance of counsel after a loss, surely a per se defendant such as myself, who proceeded pro se to not make a mockery

of the judicial system but because I genuinely believed that I presented my best opportunity to gain an acquittal, I too should be allowed to cite my errors of ineffectiveness also.

Even should you doubt my previous factual accounting of events which has led to my current wrongful conviction and believe me to be guilty, the Honorable Court must agree my sentence is in violation of my 8th Amendment protection from cruel and unusual punishment. The Florida legislature [Fla. Stat. 795.082(3)(A)(4)(A)(II)] has circumvented my 8th Amendment Right by creating legislation that mandates either a life sentence or a split sentence of a minimum of 25 year prison term followed by lifetime probation. This statute, Fla. 800.04, prevented my trial judge from being able to sentence me to any more moderate and case appropriate term of imprisonment. I had never before been accused, much less convicted of any sexual crime against anyone, much less a child. I also fail to qualify for any State's definition of a habitual criminal. Yet, for my alleged conduct I now must serve a 25 year prison sentence followed by probation for the rest of my natural life!

As a first time sexual offender (if I were indeed guilty) I must also register as a sexual predator, wear an ankle tracking monitor, and pay probation fees, fines and costs for the rest of my life. I am also subject to the State's Jimmy Rice Statute that can possibly extend my incarceration time indefinitely. The punishment I am now currently facing for inadvertently and unknowingly rolling over while asleep easily exceeds any reasonable person's definition of unusual and excessive cruelty. At the least the 800.04 statute must be repealed to allow leeway in sentencing regarding some violations of this unconstitutional statue. The Court's decision to allow the alleged victim to testify via closed circuit T.V. [also] violated my Constitutional Right to confront my accuser. Florida statue defines battery as any touching against the victim's will. When the alleged victim testified [on video] at my trial [that] she allegedly yelled "Stop daddy stop," that made any

alleged touching against her will and therefore an offense of Battery were I actually guilty of such an act. I am innocent of this allegation and I wish DNA evidence was used to irrefutably proclaim my innocence.

REASONS FOR GRANTING THE PETITION

(1). Petitioner has suffered a "manifest of justice" to a "miscarriage of justice," when the Florida Supreme Court released a new law exposing the reality that Petitioner has been defrauded and denied equal justice of the laws' and amenities' by the State Trial Judge Tinkler – Mendez failure to allow Petitioner who represented himself the opportunity to provide the jury with a permissive lesser included jury instruction of "simple battery," that's' connected to the primary charged crime of lewd and lascivious molestation on a child ("victim Nyasha Gardner") under 12 years of age by an adult over 18, when new Florida law exposes' thru the only legal case that Petitioner is entitled to a lesser included jury instruction, see, Wong vs. State, 212 So. 3d 351 (Fla. 2017)("Court remanded for new trial where court refused to give lesser included jury instruction of the permissive act of unnatural and lascivious act") violated Petitioner's 5th, 7th, 8th and 14th Amendments United States Constitutional guaranteed rights, compare, Vickers vs. Ricketts, 798 F.2d 369 (9th Cir. 1986) Cert. Denied 107 S. Ct. 928 (1987)("Reversed the denial of habeas corpus because the state trial court failure to instruct the jury on lesser included 2d second – degree murder violated due process principles"); Cole vs. Young, 817 F.2d 412 (7th Cir. 1986); Yujosevic vs. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988)("Refusal to instruct the jury to the lesser included offense of aggravated assault in appellant's murder trial was prejudicial constitutional error which deprived appellant of his [primary defense] that he committed a crime but did not cause the victim's death"); Nichlous vs. Gagnon, 710 F.2d 1267, 1272 (7th Cir. 1983) Cert. Denied 104 S. Ct. 1918 (1984); Byrd vs. Lewis, 566 F.3d 856, 866 (9th Cir. 2009); Beck vs. Alabama, 100 S. Ct. 2382 (1980), see, Appendix "B", Criminal Information/Indictment charging Florida Statute 800.04 (2009).

(2). Petitioner further asserts that due to the victim's age, the court manifestly denied Petitioner his 7th Amendment Right to present evidence to keep the jury from being mislead, was done intentionally to punish Petitioner and retaliate against Petitioner for proceeding to jury trial as my own lawyer, when Petitioner had a gut feeling that appointed counsel, State, and trial judge were in a scheme to defraud Petitioner any reviewing court's the merits' of my grievance that Petitioner requested during jury trial "simple battery jury instructions, see Appendix "C", Trial page 748, 749: (**"The Court: Let me just review something here. All right, I've reviewed the language of 800.04 (phonetic) and my recollection of the testimony during the course of trial, I'm going to respectfully deny your request for the lesser included battery instruction. However, that issue is [preserved should there be any further review]. I've reviewed the statue under 800.04 subsection (5), defining the alleged crime and reviewed the felony battery statue. I do not find, do not recall there being any evidence of a felony battery. But that is preserved as well.**

The next question I have for everyone was the following. It's so late. I know counsel wishes to make arguments. Do you [wish] to make the closing arguments? Here is my proposal frankly since they have had such a long day.

It would take men and I get from the jury instructions, I don't see, and I don't know if anyone had any particular objections other than what w have already discussed. My thought would be you make your closings and they will come back tomorrow morning for the instructions and be sent back to commence deliberations; when U.S. vs. Williams, 197 F.3d 1091 (11th Cir. Ga. 1999)("citing U.S. vs. Eades, 633 F.2d 1075, 1077 (4th Cir. 1980)("The great majority of the offenses proscribed by Maryland's sexual offense statues may be said to encompass [simple assault as a lesser included offense]").

The State's trial court's baseless blunder has lead to serious violations' when the trial record is devoid of evidence from the trial judge which a reasonable court could debate that State court synopsis lacks "proof" that Petitioner's conduct did not fit within simple assault permissible lesser included jury instructions' was a classic case of abuse of discretion by State trial judge, see, U.S. Sec. Inc., 731 F.3d 952, 956 (9th Cir. 2013)("**An error of law is per se abuse of discretion**"); Cooter and Gell vs. Hartmarx Corp. , 110 S. Ct. 2447 (1990); Yokoyama vs. Midland Nat. Life Ins. Co., 594 F.3d 1087, 1091 (9th Cir. 2010)("A district court abuses it's discretion when it makes an error of law").

(3). The above and below of the instant filed petition's show Florida courts' and Florida attorney's have abridged Petitioner's Constitutional Rights of the 5th, 6th, 7th, 8th, and 14th U.S. Amendments' and this Court must admonish the lack of uniformity in allowing permissible lesser included jury instructions; lower courts' lack of professionalism, and lack of applying the laws' on a equal basis, see, Berger vs. U.S., 55 S. Ct. 625 (1935); Wong vs. State, 221 So. 3d 351 (Fla. 2017); Marshall vs. Jerrico, 100 S. Ct. 1610 (1980); by ordering that Petitioner should be awarded a new trial which should include "simple battery" jury instructions.

ONCLUSION

(1). The petition for writ of certiorari should be granted.

(2). Grant for new trial.

Respectfully submitted,

/s/ Don Ferguson
Don T. Ferguson, M75435

Date: May 23, 2019

OATH

UNDER THE PENALTIES' OF PERJURY I swear that the facts' and circumstances' are true and correct, see, Kafo vs. U.S., F.3d 1063, 1068 (7th Cir. 2006).

/s/ Don Ferguson
Don T. Ferguson, M75435