No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Willie Strong Jr. — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

State of New York, Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Willie Strong Jr.
(Your Name)

FCI at: SCHUYLKILL, P.O. BOX 759
(Address)

MINERSVILLE, PA 17954
(City, State, Zip Code)

_____
(Phone Number)

QUESTION(S) PRESENTED

1) When is evidence sufficient to render the "Automobile Presumtion" N.Y. P.L. §265.15 (3)(a) inapplicable?

2) Does the N.Y.P.L. §265.15 (3)(a), violates the due process clause of Fourteenth Amendment where it relieves the state of it's burden of proving the elementsof possession under N.Y.".L.§265.03 (3) beyond a reasonable doubt when the exceptions are omitted from the jury instructions?

LIST OF PARTIES

[X] 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 _____ 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[ ] is unpublished.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 _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] 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,
[X] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Appellate Division, Supreme court appears at Appendix B to the petition and is

[X] reported at People v. Strong, AD3d, 2018 NY Slip Op 6382; or,
[X] 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[ ] is unpublished.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).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was 1/24/2019. A copy of that decision appears at Appendix ___A___.

[ ] 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

1. Fourteenth Amendment of the United States Constitution,

2. Article 1, Section 6 of the New York State Constitution.

STATEMENT OF THE CASE

In this case, on September 2, 2013, Mr. Strong was driving a minivan that police were attempting to stop. during police pursuit, a black shotgun was tossed from the rear passenger side sliding door (T at 284). Shortly thereafter, the minivan slowed and an unidentified passenger exited from the same door and fled (id). Mr. Strong pulled over not long after that, and was taken into custody (T at 336, 439). In addition, at trial the prosecution introduced into evidence a recorded jail phone call. In it, Mr. Strong asserted the following:

> "[I] told that man five times that it's a Sunday night and there's no worries. He said no, I want to protect you, I want to protect you, make sure nothing happens to you. I don't even know this dude.... I'm so upset with myself, I can't believe I got myself back in here behind some dumb shit, like trying to speed off to help somebody out... I'm so upset with myself, I can't even sit with myself—I'm like why did I drive off trying to help him out... I told you four times not to... I should have let him hold it down himself," (Exhibit 5 at 13:20 to 14:30).

As the prosecution told the jury, the jail phone call showed that "[the passenger] had [the shotgun] for Willie Strong's protection... [Mr. Strong] was helping somebody out, somebody that had something, later determined to be a 12-gauge Mossberg pump action shotgun for Willie Strong's protection."(T at 601 [emphasis added]).

Defense counsel specifically objected to the automobile presumption being charged to the jury (T at 568-569). The trial court overruled the objection on the ground that "it's uncontroverted that Mr. Strong was in the vehicle when the weapon was thrown out." (T at 570). On appeal, the Appellate Division rejected the argument that the presumption was improperly charged. Without mentioning the jail phone call, the Appellate Division concluded that there was no evidence indicating who brought the shotgun into the car, and that, at most, the evidence indicated that the passenger handle the shotgun and threw it out of the minivan (People v. Strong,—AD3d—,2018 NY Slip Op 6382 [4th Dept 2018]).

REASONS FOR GRANTING THE PETITION

Pursuant to Question 1:

1. Aside from a brief memorandum decision in People v. Verez, (83 NY2d 921 [1994]), New York courts do not appear to have addressed this issue relating to the Automobile Presumption since there decision in People v. Lemmons, (40 NY2d 505 [1976]) over 40 years ago. Guidance in this area would be of statewide benefit, as appellate courts appear to treat police officer observations as (the only type) of evidence that may render the presumption inapplicable (See e.g. Respondent's brief at 11-12). Demonstrative, and circumstantial evidence prove facts too.

2. The Automobile Presumption, as set forth in Penal law section 265.15 (3), provides that the presence of a firearm in a car "is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon... is found". The presumption does not apply 'if' the weapon is found upon the person of one of the occupants (NYPL section 265.15 [3][a]).

3. The court has held that the exception, by its terms, generally applies to situations where a weapon is found on the person of another, but, it "may also apply where an officer observes a person remove a weapon from his or her person immediately prior to arrest in an attempt to hide it somewhere inside an automobile" (Verez, 83 NY2d 921, 924). "[W]here the evidence is clear-cut and leads to the sole conclusion that the weapon was found upon the person" then the jury should not be instructed on the presumption" (Lemmons at 511).

4. It is respectfully submitted that when, as in this case, the prosecutor affirmatively introduces proof that shows that another person possessed the weapon, the automobile presumption is inappropriate. Here, the recorded jail phone call, plus the observations of police of the shotgun being tossed from the rear passenger side door of a minivan that Mr. Strong was driving, constituted clear-cut evidence that the passenger possessed the shotgun.

REASONS FOR GRANTING THE PETITION

5. Under similar circumstances, but involving only observations of police, the Fourth Depatment held that the automobile presumption was inapplicable (People v. Willingham, 158 AD3d 1158 [4th Dept 2018]). In Willingham, police saw a co-defendant carrying a long gun (id. at 1158). The co-defenadnt entered the left rear door of a car, and the defendant entered the right raer door, (id). Police pursued the car but then lost sight of it (id.). They eventually stopped the car, removed four occupants, but found nothing in it (id.). They found the long gun in another location, along with defendant's cell phone and a handgun (id. at 1158-1159). The Fourth Department found that "the weapon was not found in the vehicle, and the co-defendant was holding it while he was observed entering the vehicle consequently, 'the evidence is clear-cut and leads to the sole conclusion that the weapon was... upon the person' of the co-defendant" (id. at 1159, quoting Lemmons at 511).

6. The jail phone call evidence in this case should not be treated any differently then the direct observations of police, particularly when it is the prosecution that chooses to introduce such evidence in its case-in-chief. Indeed, disregarding the jail phone call in effect allows the prosecutor to use it as proof that someone else possessed the gun and that Mr. Strong acted in concert with that person, but prohibits Mr. Strong to use it for that same purpose in order to defeat the automobile presumption instruction. That result should not stand, since the jail phone call, plus the observations of police is evidence just as clear-cut as the police officer's claim in Willingham that he observed the passenger with the shotgun when he entered the car.

7. The New York Supreme court used the incorrect standard in concluding that it was proper for the lower court to give the jury the Automobile Presumption charge. In this regard, in the court's opinion, the court stated: "Here, there was no evidence indicating whether it was the defendant or the passenger who brought the shotgun into the van." See Appendex B, i.d. at p.2.

REASONS FOR GRANTING THE PETITION

Petitioner agrees totally with the NYS Supreme court's redition of the facts, and evidence, specifically relating to "who handled, and desposed of the shotgun" -Vs- "while Mr. Strong, the defendant, was driving the van." The fact that only two persons were in the van, and from the court's own words, "someone 'other than defendant handled the shotgun and disposed of it, 'while defendant was driving the van', is clear-cut evidence at least circumstantial, that the other occupant possessed the firearm, and that N.Y.S.P.L. 265.15 [3][a], would thus apply, and that the Jury should have been instructed on the "exception (a)" of the Automobile Presumption...

It should be noted, not only did the court give the automobile instruction when the facts, and circumstances of the case did not require such an instruction...

Additionally, the trial court inadequately gave the automobile presumption instruction because it failed to inform the jury about the instructions "Exception (a)"...

Thus, taking the statutory exception from the jury's consideration... Mr. Strong, was clearly prejudiced by the court's error because the exception (a) was critical to the prosecution's case, and had the jury received the proper instruction or had the not received the automobile presumption instruction at all, Mr. Strong would not have been found guilty of possession of a weapon, and would not have received a prison sentence which affected his liberties...

The automobile presumption: NYS Penal law section 265.15 [3][a]: states in pertinant part: if specific evidence is present in an automobile it is presumptive evidence of its possession by all occupying such automobile at the time such weapon is found, "except under the following circumstances:"

(a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein;

8. The evidence at trial established that the other occupant possessed the shotgun to protect Mr. Strong. The prosecution introduced the tape of the phone conversation from jail. See (T. at 601[emphasis added]).

In People v. Williams, 146 A.D.2d 659, 537 N.Y.S.2d 39 (2d Dept.1989) (the court improperly charged the statutory gun presumption under PL section 265.15 (3) since the evidence showed that the gun was at all times when it was seen, in the exclusive possession of the co-defendant)...

9. Furthemore, see New York Supreme court's memorandum and order, id at p.2,[See Appendex B.], in rejecting defendant's contention that it was error to give the "automobile presumption"to the jury, the court stated:

"[T]he presence of a firearm in a automobile is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found upon the person of one of the occupants therein'" (People v. Lemmons, 40 NY2d 505, 509 [1976], quoting Penal law section 265.15 [3]). and continued:

Here there was no evidence indicating whether it was defendant or his passenger who brought the shotgun into the van...

10. As an initial matter. The automobile presumption does not require any indication as to "who" brought a weapon into an automobile... Additionally, the court further stated:

"The evidence established at most, that "someone", "other than defendant", handled the shotgun and disposed of it "while defendant was driving the van"...

11. It should be noted that the above evidence, as indicated by the court, is in fact the exact evidence adduced at trial by the prosecution in it's case, and chief and based upon the phone call conversation, and also the circumstances surrounding the automobile stop, and search... also, and most critical is the fact that this evidence, which mirror the automobile presumption's exception PL section 265.15 [3][a] was erroniously ommitted from the trial court's jury instruction. See appendex D, id at p(s) 641-43.

12. The fact of the matter is that "there was sufficient 'clear-cut' circumstantial evidence at trial that the shotgun was found in the possession of a specified passenger in the vehicle other than defendant....

13. In UNITED STATES v. White, 692 F.3d 239)(the court stated: The excluded evidence spoke directly to a critical element of the government's case and its exclusion prevented White from presenting a complete defense.

Mr. Strong, respectfully, submits that this court should grant this writ of certiorari so that it can provide guidance to defeat a request to charge the Automobile instructions...

REASONS FOR GRANTING THE PETITION

Pursuant to Question 2:

1. Petitioner was charge with violating N.Y.S. Penal law section 265.03[3], Possession of a Weapon in the Second Degree.

2. Petitioner contends that specifically in his case, the trial court's jury instruction as to the automobile presumption, violates the Fourteenth Amendment of the UNITED STATES Constitution's requirement that the State prove every element of a criminal offense beyond a reasonable doubt...

3. Specifically, when, as in the instant case. The evidence adduced at trial by the prosecution was that based on a phone conversation between the defendant and his automobile passenger, the actions of the two while in automobile, and evidence that it was the passenger who had possession of the shotgun, which he had to protect the defendant, and also it was determined that the passenger threw a long black object out the rear car window of which he thereafter exited...

4. The trial court gave the jury an erronious instruction, which was obhectively unreasonable because it failed to inform the jury about the "exceptions" to the automobile presumption... See Lockyer v. Andrade, 538 U.S. 63 (2003). Therefore, as a direct result thereof, the jury was unable to consider those exceptions when determining defendant's guilt or innocense... See In re Winship, 397 U.S. 358, 1068, 51 Ohio op.2d 323 (1970), See also Sanstrom v. Montana, 442 U.S. 510, 520-24, 61 1.ed. 2d 39 s. ct. 2450 (1970)...

5. In Ulster County v. Allen, the trial judge instructed the jury that, on the basis of a New York statute providing, "WITH CERTAIN EXCEPTION", that the presense of a firearm in an automobile is rpesumptive of its illegal possession by all persons then occupying the vehicle. See Ulster County Court v. Allen, 60 L.ed 2d 777, 442 U.S. 140 (1979), I.d. at (SUMMARY)... As indicated above. It is clear that the court instructed the jury that there were "certain exceptions" to the automobile rpesumption. See N.Y.S. Penal law section 265.15 [3][a]... when the 'exceptions' are ommitted from the court's instructions....

6. In the case at bar. The trial court failed to instruct the jury as to the 'EXCEPTIONS' to the automobile presumption. As such, the instructions were erronious. The evidence, and facts of the case clearly applied to the 'EXCEPTION (a)', as the shotgun had been in, and ahd been found to be in possession of one of the occupants of the automobile other than the defendant.

Had the jury been properly instructed as to the 'Exception (a)', they would not have found the defendant guilty of the charge of possession. See appendex D, I.d. at p (s). 641-43,)Trial Transcripts, July 31,2014 jury instructions)... As noted above. the ommission in the instruction, given by the court misstated the law...

Mr. Strong, respectfully submits that this court should grant this Writ of Certiorari so that it can provide guidance on whether N.Y.S. Penal alw section 265.15 (3) violates the due process clause of the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Willie Strong

Date: March 28th 2019