

19-5619

No. _____

Supreme Court, U.S.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

LEONARDO R. GERMAN,
PETITIONER,

v.

STATE OF LOUISIANA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
U. S. COURT OF APPEAL, FIFTH CIRCUIT

Respectfully Submitted:


Leonardo R. German #594511
Elayn Hunt Correctional Center
P.O. Box 174
St. Gabriel, La. 70776

(Pro Se Litigant)

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SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW
IN ACCORDANCE WITH RULE 14.1 (A)

Based on Droe v Missouri, Brown v Ohio, Blockburger v United States, Article 36 of the Vienna Convention and Article 35 of the Bilateral Treaty by failing to notify him of his right to Consulate Assistance, Osagiede v United States, and Miranda v Arizona, Mr. German contends that this petition requires an answer to the following precedent-setting questions of EXCEPTIONAL IMPORTANCE:

- 1) Did Mr. German possess a Constitutional right to a SANITY COMMISSION HEARING, after his new lawyer raised issues as to his competency prior to the start of trial, immediately after new counsel enrolled?
- 2) Did the State violate Mr. German's Constitutionally-recognized protection against DOUBLE JEOPARDY by prosecuting him for three crimes, the elements of two being totally encompassed within the third?
- 3) Did Mr. German, a non-Englsih-speaking Cuban National, have a Constitutional right to a CUBAN TRANSLATOR and CONSULATE?

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARDO R. GERMAN

VERSUS

TIM HOOPER, WARDEN

Considering Governing Review
on Certiorari under Rule #10(c)

The Fifth Circuit clearly misapplied the Court's precedents regarding the issuance of a COA. The Court should review this case because the Fifth Circuit Court of Appeals' denial of Mr. German's COA conflicts with relevant decisions of this Court.

PARTIES TO THE PROCEEDING

The petitioner is Leonardo R. German, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leonardo R. German, respectfully petitions for a writ of certiorari to the United States Fifth Circuit Court of Appeals in German v Tim Hooper, No. 18-30518.

CERTIFICATE OF INTEREST

LEONARDO R. GERMAN, PLAINTIFF, PRO SE
ELAYN HUNT CORRECTIONAL CENTER
6925 HWY. 74
ST. GABRIEL, LA 70776

TIMOTHY HOOPER, WARDEN, DEFENDANT
ELAYN HUNT CORRECTIONAL CENTER
6925 HWY. 74
ST. GABRIEL, LA 70776

SARAH ANSARDI TESVICH, LEAD ATTORNEY
PLAQUEMINES PARISH DISTRICT ATTORNEY'S OFFICE
102 AVENUE G
BELLE CHASSE, LA 70037

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German contends that his right against being placed in double jeopardy was violated by allowing him to be prosecuted for three crimes, when the elements of two of the crimes were encompassed within the third crime. <u>Brown v Ohio</u> , 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); <u>Blockburger v U.S.</u> , 284 U.S. 299, 52 S.Ct. 180 (1932).....	10
German contends that, as a Cuban National whose native language is Spanish, he had a right to a Cuban translator and to have access to the Cuban Consulate. He was subjected to interrogation and trial in a language he did not understand, and his <u>Miranda</u> warning was also in English. Thus, he was tricked into waiving rights he had no idea he was waiving, subjected to a trial he could not follow - a thorough violation of his due process right. <u>Osagiede v U.S.</u> , 543 F.3d 399 (2008); <u>Powell v Alabama</u> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); <u>Miranda v Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	12
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IN THE
SUPREME COURT OF THE UNITED STATES

LEONARDO R. GERMAN

VERSUS Petitioner-Appellant No. _____

TIM HOOPER, WARDEN
ELAYN HUNT CORRECTIONAL CENTER

Respondent-Appellee

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Based on Petitioner's understanding of Droe v Missouri, Brown v Ohio, Blockburger v United States, Osagiede v United States, and Miranda v Arizona, German contends that this appeal requires an answer to the following precedent-setting questions of exceptional importance:

- 1) Did German possess a Constitutional right to a sanity commission hearing, after his new lawyer raised issues as to his competency prior to the start of trial, immediately after new counsel enrolled; and
- 2) Did the State violate German's Constitutionally-recognized protection against double jeopardy by prosecuting him for three crimes, the elements of two being totally encompassed within the third; and 3) Did German, a non-English-speaking Cuban National, have a Constitutional right to a Cuban translator and consulate?

JURISDICTION

Jurisdiction in this proceeding is provided by 28 U.S.C. § 1257(A).

PROCEDURAL STATEMENT

On February 5, 2019, German was denied Certificate of Appealability. The Court determined that german failed to make the required showing under Miller El v. Cockrell (537 U.S. 322 (2003)).

On May 27, 2009, Leonardo German was charged by grand jury indictment with one count each of aggravated rape, a violation of La. R.S. 14:42; simple kidnapping, a violation of La. R.S. 14:45; aggravated battery, a violation of La. R.S. 14:34; and aggravated burglary of an inhabited dwelling, a violation of La. R.S. 14:60.

On July 6, 2009, defendant appeared at arraignment with his court-appointed counsel; he entered pleas of not guilty to all charges. On September 15, 2010, the trial court granted defense counsel's motion to withdraw as counsel of record and ordered the public defender to assign new counsel. On March 15, 2011, the trial court held a hearing on defendant's motion to suppress confession statement. The trial court took the matter under advisement and denied the motion to suppress confession statement on April 19, 2011.

On September 1, 2011, defendant's second court-appointed attorney was allowed to withdraw as counsel, and, on October 14, 2011, a third attorney, Mr. Juan Labadie, was appointed to represent defendant. Mr. Labadie made his first appearance in this matter on November 8, 2011, and motions were set for December 15, 2011. On that date, defense counsel appeared with defendant, and, after all remaining motions were satisfied, the case was set for trial on February 7, 2012.

On February 6, the day before trial, defense counsel filed a motion to appoint a sanity commission; on February 7, he made an oral motion

for continuance. The trial court denied both motions. Defense counsel objected to the trial court's rulings and applied for writ of review with the Court of appeal for the Fourth Circuit of Louisiana on the same day; the appellate court declined to exercise its supervisory jurisdiction and denied German's writ. (State v German, unpub., 2012-0169 (La.App. 4Cir., 2/7/12).)

LAW AND ARGUMENT

German contends his due-process rights were violated when the trial court failed to grant his motion for appointment of a sanity commission and conducted a sub-par hearing regarding his competency to stand trial. German contends that the trial court should have sought the assistance of a psychiatric examiner before holding its impromptu competency hearing. Drope v Missouri, 420 U.S. 162, 172; 95 S.Ct. 896, 904; 43 L.Ed.2d 103 (1975).

The prosecution of a defendant who lacks mental capacity to understand the nature and object of proceedings against him, or to assist in his defense, violates the right of due process of law. Drope v Missouri, 420 U.S. 162, 172; 95 S.Ct. 896, 904; 43 L.Ed.2d 103 (1975). "Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant lacks the capacity to understand the proceedings against him or to assist in his defense." La. C.Cr.P. Art. 641. Determining a defendant's mental competency to proceed depends on "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v United States, 362 U.S. 402; 80 S.Ct. 788, 789; 4 L.Ed.2d 824 (1960).

The issue of mental incapacity to proceed may be raised at any stage of the proceedings; the burden lies with the defendant to establish that he lacks the capacity to understand the proceedings against him and that he is unable to assist with his defense in a meaningful way. State v. Bickham, 404 So.2d 929, 934 (La. 1981). Under La. C.Cr.P. Art. 642, when the question of defendant's mental capacity is raised, "there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed." however, "[t]he fact that the defendant's capacity to proceed is called into question does not, for that reason alone, require the trial court to order a mental examination of the defendant; rather, it must have reasonable grounds to doubt the defendant's capacity." State v. Robinson 92-1057, 655 So.2d 517, 519 (La.App. 1Cir., 5/5/95); La. C.Cr.P. Art. 643; Bickham, supra, 404 So.2d at 935; State ex rel Seals v State, 00-2738, p.5, 831 So.2d 828, 832 (La. 10/25/02).

Defense counsel's motion to appoint a sanity commission cannot rest on mere allegations without supporting evidence to show that a defendant is unable to understand the nature of the proceedings. Bickham, 404 So.2d at 935. The determination of whether there are reasonable grounds to doubt a defendant's mental capacity and to order a mental examination lies within the discretion of the trial court, and the trial court's determination will not be set aside absent a clear abuse of discretion. Id., 404 So.2d at 934; State v. Gauthier, 07-0743, pg. 10, 978 So.2d 1161, 1168 (La. App. 4Cir., 3/12/08).

Trial court's denial of defense counsel's motion
to appoint sanity commission

The trial court determined that, in defense counsel's motion to appoint a sanity commission, filed on February 6, 2012, defense counsel did not allege any specific facts in support of the motion. In arguments before the trial court, defense counsel stated that, in discussing a possible plea deal with defendant, he became concerned about defendant's ability to understand his sentencing exposure, if convicted of the charged offenses or lesser responsive offenses. Defense counsel spoke with defendant, within ten to fourteen days prior to trial, about the possibility of accepting a plea deal. Defense counsel represented to the court that he spoke to defendant for approximately an hour or an hour and a half, and he found that defendant had no problem discussing the facts of the case. However, defense counsel also found that defendant was focused on the fact that the State had no gun in evidence and thought he could not be found guilty of any charges involving a gun. Defense counsel stated that he tried to explain to defendant about lesser responsive verdicts that the jury might return, and that any of the convictions could result in a considerable sentence of imprisonment, even assuming he was not convicted of aggravated rape, the most serious offense charge that carries a mandatory life sentence. Defense counsel represented to the trial court that defendant became quiet, and defense counsel perceived this to mean that defendant did not understand the issue of lesser included offenses and the possibility of considerable sentences if found guilty on those charges.

After speaking with defendant, defense counsel contacted the State

and inquired whether any of defendant's previous attorneys had raised the issue of defendant's mental capacity to proceed. The State advised defense counsel that neither of defendant's two previous attorneys had raised the issue. At that point, defense counsel decided to file a motion to appoint a sanity commission.

Defense counsel represented to the trial court that he believed filing a motion to appoint a sanity commission pursuant to La. C.Cr.P. Art. 642 mandated a halt to the prosecution of the case until the issue of sanity is addressed, a mental examination of defendant is conducted, and defendant's competence to proceed is determined. Defense counsel further represented to the court that, prior to being informed by the State that morning, he did not know that the trial court, within its discretion, may deny a motion for sanity commission if it is not satisfied that there are sufficient and reasonable grounds for such procedure. Defense counsel argued, however, that he had presented sufficient and reasonable grounds for granting the motion to appoint a sanity commission to determine defendant's mental capacity to proceed.

The Droe court determined that a state's statutory procedure for determining an accused's mental capacity to stand trial is constitutionally adequate to protect a defendant's due process right not to be tried while legally incompetent, where the state's statutes (1) provide that a judge or magistrate shall, upon his own motion or upon motion filed by the state or the accused, order a psychiatric examination whenever he has reasonable cause to believe that the accused has a mental disease excluding fitness to proceed, (2) prescribe the contents of

a psychiatric examination, (3) require the court to hold a hearing if the opinion as to fitness to proceed is contested, and (4) authorize the trial court to conduct a hearing on its own motion. *Id.*, at 420 U.S. 162.

German contends that the conjunctive word "and" requires that each of the four criteria set forth in *Drope* be fulfilled, if his liberty interests to a psychiatric examination are to be met. Where each of these measures were not furnished by the trial court, German was denied the due process rights prescribed to assure that he would not be tried while legally incompetent. Particularly, where the trial court failed to order a psychiatric examination, when defense counsel had a reason to believe German has a mental disease that legally excluded him from the trial process, pending a psychiatric examination. Here, German was taken to trial in lieu of the trial court's denial, over defense counsel's motion, with no report based on the contents of a psychiatric examiner's report. Here, German's right to due process was denied.

In reviewing state court criminal proceedings involving a claim that the defendant's due process right to a fair trial had been denied by the trial court's refusal to order a psychiatric examination to determine the defendant's competency to stand trial, it is incumbent upon the United States Supreme Court to analyze the facts in order that the appropriate enforcement of the federal right may be assured, where there is no dispute as to the evidence possibly relevant to the defendant's mental condition that was before the trial court, and where the dispute instead concerns the inferences that are to be drawn from the

undisputed evidence and whether the trial court's failure to make inquiry into the defendant's competence to stand trial denied him a fair trial.

The irrational acts of German leading to his arrest speak volumes towards the likelihood of mental instability that calls for psychiatric treatment. The acts leading to German's arrest should preclude any independent determination of German's competency by the trial court alone without first having a sanity commission in place to assist the court in making its final determination. Particularly, where the court knew that German came to America, not by choice, but with castigated prisoners and those committed to Cuban insane asylums by Fidel Castro. The caveat here was given by defense counsel, who initiated the sanity inquiry: a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, may not be subjected to a trial; such prohibition is fundamental to an adversary system of justice.

In Drope, the sentencing judge and the Missouri Court of Appeals concluded that the psychiatric evaluation of petitioner attached to his pretrial motion for a continuance did not contain sufficient indicia of incompetence to stand trial to require further inquiry. Both courts mentioned aspects of the report suggesting competence, such as the impressions that petitioner did not have "any delusions, illusions, hallucinations . . .," was "well oriented in all spheres," and "was able, without trouble, to answer questions testing judgment," but neither

Court mentioned the contrary data. The report also showed that petitioner, although cooperative in the examination, "had difficulty in participating well," "had a difficult time relating," and that he "was markedly circumstantial and irrelevant in his speech." In addition, neither court felt that petitioner's episodic irrational acts described in the report or the psychiatrist's diagnoses of "borderline mental deficiency" and "chronic anxiety reaction with depression" created a sufficient doubt of competence to require further inquiry. *Id.*, 420 U.S. 176.

In the case at bar, the trial court and appellate court similarly concluded that the motion submitted by German's counsel failed to contain sufficient indicia of incompetence to stand trial to require further inquiry. And like Drope, both courts mentioned aspects of German's pretrial manner to conclude his competency: the silence of two previous defense lawyers as it relates to competency; German's pro se motions; and his §1983 suit against the Sheriff's Department; but neither court mentioned the data indicative of incompetency: the warning flag raised by a licensed member of the Louisiana Bar Association, who felt strongly enough about German's mental capacity to motion for a sanity commission and immediate writs to the appellate court in hopes of procuring a competency determination from one more qualified than himself or the trial court; German's erratic behavior prior to his arrest, i.e., covering himself in a white sheet to walk down a rural street in the dark of night to evade police; time that German likely spent in a Cuban institution.

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The Droepe Court determined that it is nevertheless true that judges must depend to some extent on counsel to bring issues into focus. Here, the trial court was not impressed by defense counsel's somewhat inartfully drawn, last-ditch, motion for a continuance, which probably fell short of appropriate assistance to the trial court in that regard. *Id.*, 420 U.S. 177. The Court continued: we are constrained to disagree with the sentencing judge that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial," did not raise the issue of petitioner's competence to stand trial. This statement also may have tended to blur the aspect of petitioner's mental condition which would bear on his criminal responsibility and that which would bear on his competence to stand trial. However, at that stage, and with the obvious advantage of hindsight, it seems to us that it would have been, at the very least, the better practice to order an immediate examination under Mo. Rev. Code 552.020(2)(1969). *Id.*, at 178.

German contends that his right against being placed in double jeopardy was violated by allowing him to be prosecuted for three crimes, when the elements of two of the crimes were encompassed within the third crime. Brown v Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); Blockburger v U.S., 284 U.S. 299, 52 S.Ct. 180 (1932).

Both the State and Federal Constitutions provide that no person shall twice be put in jeopardy of life or liberty for the same offense. Fifth Amendment, U.S. Constitution; La. Constitution Art. I, § 15; La. C.Cr.P. Art. 591.

In the case before bar, on the strength of the same evidence

adduced at trial, German was convicted of attempted aggravated rape, aggravated burglary, and aggravated battery, the enumerated felonies. to uphold the conviction of aggravated burglary and aggravated battery would subject him to double punishments for the same offense. "Where multiple punishment has been erroneously imposed, the proper appellate procedure is to eliminate the effect of the less severely punishable offense." State v Doughty, 379 So.2d 1088, 1089 (La., 1981). The concept of double jeopardy, under both the Federal and State Constitutions, embodies the dual purpose of preventing multiple punishments and multiple convictions for a single criminal wrong. See Brown v Ohio, 432 U.S. 161; 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); State v Doughty, 397 So.2d 1088 (La. 1981).

With respect to the Blockburger test, as the Fifth Circuit explained, "Two statutory offenses need not be identical to constitute the same offense for Double Jeopardy purposes." Blockburger v U.S., 284 U.S. 299, 52 S.Ct. 180 (1932).

Thus, the trial court relying upon the same "evidence element" pertinently to the aggravated rape, aggravated burglary, and aggravated battery arriving out of a single criminal conduct related to one victim is grounded on the same incident and, for that purpose, the aggravated burglary and aggravated battery offenses, where their elements were totally encompassed within the aggravated element of the attempted aggravated rape, is barred under Double Jeopardy. Brown v Ohio, 432 U.S. 161, 97 S.Ct. 161, 53 L.Ed.2d 187 (1977); State v Steele, 387 So.2d 1175 (La. 1980). In State v Miller (571 So.2d 603 (La. 1990)), the Supreme Court stated, "It has principally relied upon the same-evidence

test in evaluating Double Jeopardy claims."

The outcome would have been different were the two lesser charges not have been allowed to proceed because of their being encompassed in the greater charge altogether. Those convictions should be vacated on the ground s of double jeopardy.

German contends that, as a Cuban National whose native language is Spanish, he had a right to a Cuban translator and to have access to the Cuban Consulate. He was subjected to interrogation and trial in a language he did not understand, and his Miranda warning also was in English. Thus, he was tricked into waiving rights he had no idea he was waiving, subjected to a trial he could not follow - a thorough violation of his due process right. Osagiede v U.S., 543 F.3d 399 (2008); Powell v Alabama 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Miranda v Arizona 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

German was subjected to self-incrimination after his arrest by police misconduct by not allowing him access to a Spanish interpreter before questioning. This violates his "Miranda rights" warning, because German is of Cuban nationality: Spanish is his native language, not English. The interrogation denied him the Constitutional protection of access to an Spanish interpreter. German was told by Detective Harvey and Detective Kick that he didn't need an interpreter because they were going to ask him "just a few questions". German speaks and understands Spanish; his understanding of English is extremely limited. The detectives did not speak or understand Spanish. Therefore, a Spanish interpreter should have been allowed to be present during his interrogation.

In this regard, the Seventh Circuit has offered significant guidance on what types of assistance is supposed to be made available to suspects who are not American citizens: Osagiede v United States,

543 F.3d 399, 403-404. German should have been allowed to contact the Cuban consulate and receive consular assistance from them. For instance, the Consulate can help a defendant understand difference between the receiving State's legal system and that of the sending State, thus reducing the risk of cultural misunderstandings leading to legal mistakes. Id., at 403. As the Supreme Court states in Powell v Alabama (287 U.S. 45, 68-69; 53 S.Ct. 55; 77 L.Ed. 158 (1932)):

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

The Court has also recognized the right to counsel at the investigatory stage of criminal proceedings, based on the Fifth Amendment's protection against compelled self-incrimination. See Miranda v Arizona, (384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)), which notes that the presence of counsel during interrogation can "mitigate dangers of untrustworthiness" and "help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial".

The authorities violated German's rights under Article 36 of the Vienna Convention and Article 35 of the Bilateral Treaty by failing to notify him of his right to consular assistance. The rights conferred to German by Article 36 and Article 35 are fundamental protections that

were denied to him, thus making any statements he made to the detective's illegally obtained. Denial of his right to consular notification and consultation woefully prejudiced German at every stage of the proceedings, thoroughly violating his due process right.

CONCLUSION

The burden lies with German to establish that he lacks the capacity to understand the proceedings against him and that he is unable to assist with his defense in a meaningful way. Bickham, 404 So.2d at 934. Such a determination could not be satisfied without a professional psychiatric examination. There is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to stand trial denied him a fair trial.

The proceedings were further tainted by denying petitioner access to his consulate - or even an interpreter during his interrogation. As a native of a non-English-speaking nation, he could not understand the questions asked of him, the rights explained to him, or the proceedings going on around him, regardless of his competency or incompetency to stand trial. By treaty he has a right to consular assistance, a right denied to him at every stage of the proceedings.

Finally, the proceedings were further corrupted by prosecuting petitioner for multiple crimes using the same evidence, thus placing him in double jeopardy. Petitioner should never have been charged with

three crimes when the elements of one perfectly match the elements of the other two.

German's various rights have been violated throughout all the proceedings, making due process a travesty. It now rests upon this Court to finally grant him justice.

Respectfully Submitted,

Leonardo German
Leonardo R. German #594511
Elayn Hunt Correctional Center
P.O. Box 174
St. Gabriel, LA 70776

PROOF OF SERVICE

The foregoing petition has been mailed, postage prepaid, from Elayn Hunt Correctional Center to the Supreme Court of The United States, Hon. Clerk Scott S. Harris, 1 1st St. NE, Washington, DC 20543-0001; and to Sarah Ansardi Tesvich, Plaquemines Parish District Attorney's Office, 102 Avenue G, Belle Chasse, LA 70037; on this day of 7/2, 2019.

Leonardo German
Leonardo R. German, #594511