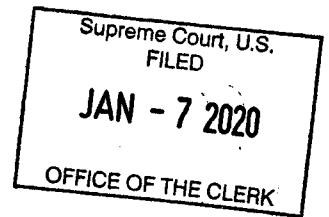


19-7287

No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



JOEY BANKS — PETITIONER

vs.

DARREL VANNOY, WARDEN — RESPONDENT(S)

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

PETITION FOR WRIT OF CERTIORARI

JOEY BANKS

485746, WALNUT—2

LOUISIANA STATE PENITENTIARY

ANGOLA, LA 70712

QUESTION(S) PRESENTED

- (1) Whether Banks was denied his constitutional right to the effective assistance of counsel.
- (2) Whether Banks's trial was adversely affected in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

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:

| | |
|------------------------------|--|
| Joey Banks, 485746 | Hon. John M. Lancaster |
| Louisiana State Penitentiary | Richland Parish District Attorney's Office |
| 17544 Tunica Trace | 305 E Main Street |
| Angola, LA 70712 | Oak Grove, LA 71623-2541 |

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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 issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

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 unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

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 unpublished.

[x] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix F to the petition and is

reported at *State v. Banks, 2014-0671 (La. 12/8/14); 153 So.3d 432*; or,
 has been designated for publication but is not yet reported; or,
 unpublished.

The opinion of the Louisiana Second Circuit Court of Appeal appears at Appendix E to the petition and is

reported at *State v. Banks, 48, 868 (La. App. 2/26/14); 134 So.3d 1235*; 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 October 25, 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: _____, 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 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime....nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law[.]

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right...have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

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.

Louisiana Constitution Article 1, § 2

Due Process of Law. No person shall be deprived of life, liberty, or property, except by due process of law.

Louisiana Constitution Article 1, § 3

Right to individual Dignity. No person shall be denied the equal protection of the laws.

Louisiana Constitution Article 1, § 13

Rights of the Accused.

Louisiana Constitution Article 1, § 16

Right to a Fair Trial.

STATEMENT OF THE CASE

During the late night and early morning hours of February 26, 2012, into February 27, 2012, Shedrick Dorsey (“Dorsey”) was brutally attacked and burned with a clothes iron in Rayville, Louisiana. On April 25, 2012, the State filed a bill of information against Joey Banks (“Banks”); Leonard Banks (“Leonard”); William Johnson (“William”); Robert Banks (“Robert”); Otis Banks (“Otis”); and Anthony Johnson (“Anthony”); charging them with (1) aggravated kidnapping; (2) conspiracy to commit aggravated kidnapping; (3) aggravated second degree battery; and (4) conspiracy to commit aggravated second degree battery.

On May 3, 2013, a final amended bill of information was filed against Banks and Leonard charging them with (1) second degree kidnapping; (2) first degree robbery; and (3) aggravated second degree battery. Jury selection began on May 6, 2013. On May 8, 2013, however, Leonard was allowed to stop jury selection to plead guilty; even so, jury selection for Banks continued. On May 9, 2013, less than one-hour into deliberation, the jury returned a verdict of guilty as charged on all counts.

On June 12, 2013, the trial court sentenced Banks to thirty years on count one, thirty years on count two, and ten years on count three. The court ordered to

sentences to be served consecutively at hard labor without the benefits of probation, parole, or suspension of sentence.

On February 26, 2014, the Court of Appeal, Second Circuit affirmed Banks's conviction and sentence. On October 21, 2915, Banks's application for Post-conviction relief was denied.

Banks filed a timely Petition for a Writ of Habeas Corpus. On October 31, 2018, a Magistrate Judge recommended that Banks's petition be denied and dismissed with prejudice. On January 4, 2019, the District Court Judge adopted the recommendation of the Magistrate and denied Banks's petition. Banks unsuccessfully requested a Certificate of Appealability. This instant petition for writ of certiorari timely follows.

REASONS FOR GRANTING THE PETITION

Under Rule 10, the Louisiana's courts and the United States Court of Appeals for the Fifth Circuit has contrarily decided an important question of federal law that has been settled by this Court and has decided an important federal question in a way that conflicts with relevant decisions of this Court as set forth below:

Banks's counsel rendered ineffective assistance in violation *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). Under *Townsend v. Sain*,

372 U.S. 293, 83 S.Ct. 745, 9, L.Ed.2d 770 (1963). Banks should have been granted an evidentiary hearing by the federal courts because the state courts failed to grant a hearing to resolve the factual disputes presented in his application for post-conviction relief. The legal rulings of the state courts should not have been construed as factual findings by the federal courts.

Issue No. 1: Banks's trial counsel rendered ineffective assistance contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

According to *La. R.S. 14:24*, all persons concerned in the commission of a crime are principals to the offense committed. The Louisiana Supreme Court has explained, more than once, that only those who *knowingly* participates in the *planning and execution of a crime* are principals. See *State v. Pierre*, 93-893 (La. 2/3/94); 631 So. 2d. 427 *State v. Knowles*, 392 So. 2d 651 (La. 1980). The state supreme court has further explained that mere presence at the scene is not enough to accuse someone of a crime. *State v. Schwander*, 345 So.2d 1173 (La. 1977). In fact, the state supreme court also said that an individual may only be convicted as a principal after the prosecution has established the requisite *mens rea* to commit the offense. *State v. Holmes*, 388 So. 2d 722 (La. 1980). Even so, Banks's trial counsel failed to object to the trial court's contrary instruction concerning the law of principals:

Principals: all persons concerned in the commission of a crime are principal and are guilty of the crime charged if, whether present or absent, they directly commit the act constituting the crime, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime.

Cf. *State v. Smith*, 2007-468 (La. App. 3 Cir. 10/31/07); 969 So.2d 694.

The trial court failed to fully instruct the jury concerning the law of principals; and, Banks's trial counsel failed to object to the incomplete and erroneous instruction. Simply said, the trial court failed to explain that a person who knowingly participates in the *planning* or *execution* of a crime *is* a principal to the offense. The trial court further failed to instruct the jury that an individual may only be convicted as a principal of offenses where the prosecution has proved that the alleged offender personally possesses the requisite mental state. *State v. Fernandez*, 2009-1727 (La. App. 4 Cir. 10/6/10); 50 So. 3d 219. Moreover, the trial court did not explain that the "one who aid and abets in the commission of a crime may be charge and convicted with a higher or lower degree of crime depending on the mental element proved at trial." *State v. West*, 568 So.2d 1019 (La. 1990). In *State v. Bridgewater*, 882 So.2d 877 (La. 1/15/02), the Louisiana Supreme Court said: "... as a general rule liability as a principal will not flow merely from a failure to intervene; however, silence in the face of a friend's crime will sometimes suffice when the immediate proximity of the bystander is such that he could be

expected to voice some opposition or surprise if he were not a party to the crime."

In this case, the trial court's instruction to the jury clearly alleviated the State's burden of proof, answering the question concerning the critical state of mind, as announced in *re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In *re Winship*, the Court notably prohibited the State from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. In *re Winship*, *supra*.

Because Banks's trial counsel failed to object to the incomplete and erroneous instruction, Banks was deprived of his Sixth Amendment right to the effective assistance of counsel. Through his deficient performance, Banks's trial counsel deprived Banks of substantive and procedural rights.

The trial court's instruction to the jury was incomplete and improper concerning the law of principals. Accordingly, Banks's convictions and sentences should be reversed.

Issue No. 2: Banks's trial counsel rendered ineffective assistance when he failed to object to, or request, a mistrial when the State failed to give notice of its intent to introduce inculpatory statements Banks allegedly made in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

In the State's opening statement, the prosecutor said: "Ladies and gentleman, we already have a kidnapping, while they're in the expedition driving Joey looks around at Leonard, he says 'take all his stuff.' That ain't exactly how he said it but he said take all his stuff." The State's procedural violation amounted to a constitutional violation because, from that point, Banks's trial was injected with fundamental unfairness. According to *La. C. Cr. P. art. 767*, the State "shall not, in the opening statement, advert in anyway to a confession or inculpatory statement made by the defendant unless the statement has been previously ruled admissible in the case." Cf. *State v. Roberson*, 46, 967 (La. App. 2 Cir. 12/14/11); 281 So. 3d 911. In this case, the State did not provide Banks with sufficient notice, under *La. C. Cr. P. art. 767*, of its intent to introduce or mention an inculpatory statement to the jury; moreover, Banks's trial counsel failed to object. *State v. Lisotta*, 97-407 (La. App. 5th Cir. 2/25/98); 712 So. 2d. 525. See also *State v. Ashley*, 44, 655 (La. App. 2 Cir. 9/23/09); 22 So. 3d 1045. According to jurisprudence, Banks was entitled to a mistrial because the prosecution did not disclose, or give notice of its intent to use, any alleged inculpatory statement. *State v. Brazley*, 96-1657 (La. App. 5 Cir. 11/5/97); 703 So. 2d 87; *State v. Gray*, 262 So. 2d 367 (La. 1972); *State v. Brown*, 480, So. 2d 948 (La. App. 2 Cir. 1985); *Gray v. Lynn*, 6 F.3d 265 (C.A. 5

Since we've started trial and since we've been here the State has proposed they plead guilty to the kidnapping with a twenty year cap, all other charges which they're presently facing will be dismissed. They have rejected that as well. So we need to, at this point going forward, the record needs to be clear that they have rejected all plea offers and I want to know their attorneys have provided those plea offers to them but I wanted the record to be clear.

Court: Okay. Do the attorneys want to say anything with regard to this? Is that we do like I do like to if there is a plea offer due to a recent U.S. Supreme Court case it's good to put it on record.

Defense: I was going to say, Your honor, in response to the recent U.S. Supreme Court case, I will state that I've notified Mr. Banks of—Mr. Joey Banks of all three of those, in fact there was a fourth plea offer, you know, we talked about possibly after 1:30 it went up to twenty-five years.

State: Yes.

Defense: I've let Mr. Banks know of ... those plea offers at the appropriate time and to my knowledge they have all been rejected.

The trial court only addressed Banks's trial counsel instead addressing Banks personally. The court had a duty to find out if Banks's counsel actually communicated the State's plea offers and that Banks's rejection of the offers were knowing and voluntary. In fact, Banks's trial counsel's statement to the court, that to his knowledge all plea offers had been rejected, does not make any sense and further fails to satisfy his constitutional duty. Counsel also made known that there was an additional plea offer the State did not mention to the court. It was counsel's duty to keep Banks informed of the case's developments and any progress. In this case, Banks's trial counsel failed to advise Banks of meaningful options available

to him. See *Bradbury v. Wainwright*, 658 F. 2d 1083, 1087 (C.A. 5 (Fla.) 1981); *Hill v. Lockhart*, 474, U.S. 52, 106 S.Ct. 366 (1985); *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010).

It is important for Banks to point-out that because he said he was actually innocent and did not want to plead guilty; he could have done so under the provisions of *Alford v. North Carolina*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Banks's trust in his trial counsel's assurances that he could beat the charges at trial, along with his poor intelligence and lack of understanding of criminal matters is what led Banks to follow his lawyer's bad advice to reject any, and all, plea offers. Cf. *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376 (2012).

Under the circumstances of this case, Banks's burden is to show the Court that were it not for counsel's unreasonable advice, the trial court would not have only known about the State's plea offer; but more likely than not, he (Banks) would have accepted.

In the interest of fairness, the plea offer should be re-opened because Banks did not receive the effective assistance of counsel required by the Sixth Amendment. See *McMann v. Richard*, 397 U.S. 759, 771, 90 S. Ct. 1441 (1970). Thus the law and facts of this claim establishes that relief is warrant and that Banks's convictions and sentences should be reversed and remanded for the above reasons.

Issue No. 4: The trial court's denial of counsel's motion for continuance violated Banks's right to a fair trial contrary to the Sixth Amendment to the United States Constitution.

On September 18, 2012, the State amended the offenses against Banks and added a first degree robbery and a conspiracy to commit first degree robbery charge. On September 28, 2012, Banks entered not guilty pleas to the offenses. On May 3, 2013, the State amended the bill of information to charge Banks and his brother Leonard with second degree kidnapping, first degree robbery and aggravated second degree battery. Because of the State's many amendments, Banks's trial counsel requested a continuance: "And your Honor, Mr. Banks has expressed similar concerns about the amended bill of information so I would—although it's not—it's not written like Ms. Mims' we would move for a continuance for the same reason regarding the amended bill of information on the robbery we would ask for that continuance as well."

In denying counsel's request for a continuance, the court caused irreparable damage in the preparation of Banks's defense. In other words, Banks suffered prejudice because the trial court hindered his right to present a complete defense. Cf. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed 2d. 297 (1972). Accordingly, Banks's convictions and sentences should be reversed and remanded.

Issue No. 5: Banks's trial counsel rendered ineffective assistance when he failed to object to the trial court's erroneous instruction that lacked the element of criminal intent and violated Banks's rights under the Sixth and Fourteenth Amendment rights of due process and equal protection.

The trial court incorrectly instructed the jury on the second degree kidnapping, first degree robbery, and aggravated second degree battery offenses by failing to include an instruction on criminal intent at the same time. Making matters worse, Banks's trial counsel did not object. According to the Louisiana Supreme Court, prejudice is present when a counsel is derelict in his duty in similar situations. Cf. *State v. Seiss*, 428 So. 2d 444 (La. 1983); *State v. Rubin*, 559 So. 2d 550 (La. App. 2nd Cir. 1990) (failure of defense counsel to object to an erroneous instruction need not be deferred until post conviction relief is obtained on ... constitutional infirmity clearly demonstrated in the appellate record: judicial economy is better served by reversal on appeal ... conviction reversed and remanded); *State v. Ball*, 554 So. 2d 114 (La. App. 2 Cir. 1989).

The court's erroneous instructions, in this case, caused the jury to convict Banks without proof beyond a reasonable doubt—especially where the State did not meet its burden of proving the essential elements of the offenses charged beyond a reasonable doubt. The court told the jury:

Specific criminal intent is that state of mind which exists when the circumstances indicate that the defendant actively desired the prescribed

criminal consequences to follow his act of failure to act. General criminal intent is present when the circumstances indicate that the defendant must have averted to the prescribed criminal consequences to reasonably certain as reasonably certain to result from his act or his failure to act. General intent is always present where there is specific intent. Whether criminal intent is present must be determine in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances, you may infer, or presume the defendant intended the nature and probable consequences of his acts.

In this case, the Court is tasked with determining if it was reasonably likely that the jury did not fully understand the challenged instruction and therefore misapplied the law in this case. Banks understands that a conviction will not be reversed on grounds of an erroneous jury charge unless the disputed portion, when considered in connection with the remainder of the charge, is erroneous and prejudicial. Accordingly, Banks has shown that the trial court gave the jury erroneous instruction on the offenses of second degree kidnapping, first degree robbery, and aggravated second degree battery. Moreover, Banks was denied his due process and equal protection rights to a fair trial because his trial counsel failed to object to the erroneous instruction. Banks's conviction and sentence should be set aside.

Issue No. 6: Banks's trial counsel rendered ineffective assistance when he failed to object to the trial court's contravention of Banks's right to an instruction concerning circumstantial evidence in violation of the Fourteenth Amendment to the United States Constitution.

The trial court failed to instruct the jury on circumstantial evidence in the jury charge jury. Making matters worse, Banks's trial counsel did not object to the lack of instruction. The court had a duty to give an instruction concerning the differences between direct and circumstantial evidence.

The trial court's charge to the jury implied that the standard for determining the sufficiency of the evidence presented was not altered by the inclusion of any circumstantial evidence in the State's case. Moreover, the trial court's jury charge did nothing to explain the State's burden of proof for a case involving circumstantial evidence. The Louisiana Supreme Court has pointed out that *La. R.S. 15:438*, rather than creating a different burden of proof, suggests a way of analyzing circumstantial evidence that should serve as a guide to jury deliberation. *State v. Camp*, 446 So. 2d 1207 (La. 1984); *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L.Ed. 150 (La. 1954), and *State v. Chism*, 436 So. 2d 464 (La. 1983).

The trial court should have instructed the jury that even where circumstantial evidence is involved, in whole or in part, the State bears the burden of proving the existence of all of the elements of a crime beyond a reasonable doubt. Again, the trial court erred in not properly charging the jury concerning circumstantial evidence. Accordingly, Banks has demonstrated sufficient prejudice to undermine confidence in the outcome of his trial.

Issue No. 7: Banks's trial counsel rendered ineffective assistance in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Banks's trial counsel's deficient performance caused Banks prejudice as he has argued above. To reduce redundancy, Banks will briefly highlight counsel's errors and the ensuing prejudice as they relate to each claim:

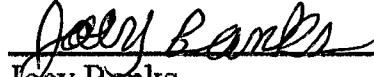
- (1) Defense counsel was ineffective for failure to object to the Trial Judge's erroneous instruction on the law of principals;
- (2) Trial counsel was ineffective for failure to request a mistrial or object to the State not giving notice to introduce an inculpatory statement that was allegedly made by Petitioner;
- (3) Banks's trial counsel rendered ineffective assistance when he advised him not to accept the State's plea offer in violation of Sixth Amendment to the United States Constitution.
- (4) Banks's trial counsel rendered ineffective assistance when he failed to object to the trial court's erroneous instruction that lacked the element of criminal intent and violated Banks's rights under the Sixth and Fourteenth Amendment rights of due process and equal protection.
- (5) Banks's trial counsel rendered ineffective assistance when he failed to object to the trial court's contravention of Banks's right to an instruction concerning circumstantial evidence in violation of the Fourteenth Amendment to the United States Constitution.

Banks was deprived of his Sixth Amendment right to effective assistance of counsel. Counsel's egregious errors deprived Banks of substantive and procedural rights.

CONCLUSION

For the foregoing reasons Banks's petition for a writ of certiorari should be granted.

Respectfully submitted,


Joey Banks
Joey Banks

Date: January 6, 2020