NO.: 19-7625

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT LEE SWINTON JR.

Petitioner,

ORIGINAL

-VS-

THE STATE OF FLORIDA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SECOND DISTRICT COURT OF APPEALS FOR

THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW.

In this case, the petitioner requested an appeal from trial counsel, and counsel failed to file the notice. The petitioner filed his own notice, was granted the direct appeal and appeal counsel withdrew from appeal without informing the petitioner, with the record reflecting an oversentencing issue. Appeals court rendered a decision without any allegation of reviewing the record and corrected some sentencing errors while affirming the sentence, without counsel.

(1) Is it structural error when sentencing errors were corrected by appeals court on direct appeal without defense counsel, and a constitutional denial of counsel on direct appeal when counsel withdrew and the petitioner was not informed by appeal counsel that he was withdrawing from the direct appeal, where the petitioner was oversentenced on the face of the record and has not been afforded any opportunity for review of this issue ?

(2) Would it be a U.S. First Amendment violation, due process violation and a miscarriage of justice if no court addressed the petitioner's Presentencing Investigation Report and Sentencing Guidelines Scoresheet prepared by probation, applied to the petitioner at sentencing to establish his minimum and maximum mandatory guideline sentence, that supports the fact that he was oversentenced and denied all redress ?

(3) Is it an unreasonable application of the U.S. Sixth Amendment, applied to the States by the U.S. Fourteenth Amendment, and U.S. Supreme Court precedent for courts to deny review of all Ineffective Assistance of Appeal Counsel claims of abondonment leading to the forfeiture of all meritous Ineffective Assistance of Trial Counsel claims by a pro se litigant to excuse all procedural bars ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS.

INDEX TO APPENDIX.

APPENDIX A

Page.

APPENDIX B

(Appendix page numbers appear in brackets at the top of pages)

APPENDIX C

APPENDIX D

APPENDIX E

* ALL PAGE NUMBERS ARE BRACKETED AT THE TOP-MIDDLE OF EACH PAGE OF THE APPENDIX.

TABLE OF AUTHORITIES.

* All State citations are from the State of Florida. *

FEDERAL STATUTES

FLORIDA STATUTES ANNOTATED

FLORIDA RULE OF CRIMINAL PROCEDURE.

OPINIONS BELOW.

Swinton v. State, 2D19-2781 (2DCA 2019) (Subject of Petition)

State v. Swinton, CF94-2464-XX (2019)(Subject of Petition)

Swinton v. State, 2D15-1600 (2DCA 2015)

Swinton v. State, 2D14-3492 (2DCA 2014)

State v. Swinton, CF94-2464-XX (2001 VOP) *All Unpublished*

Swinton v. State, 670 So.2d 1128 (2DCA 1996) (Direct Appeal)

State v. Swinton, 1994-CF-2464-A2-XX, in The Tenth Judicial Circuit of Polk County, Florida. Initial case, 1994.

FEDERAL COURT

Swinton v. Sec'y of DOC, Jones, United States Supreme Court, Case No.: 18-6837, 2019 U.S. LEXIS 1187 (Published)

Swinton v. Sec'y of DOC, et al, U.S. Court of Appeals, 11th Cir., Case No.: 18-3238-D, 2018 U.S. App. LEXIS 28236 (Published)

Swinton v. Sec'y of DOC, Atty. Gen., State of Fla., 8:18-CV-447-CEH-MAP (unreported)

JURISDICTION.

The date in which The Second District Court of Appeals for The State of Florida decided this appeal was January 15, 2020, and this petition is timely. No petition for rehearing was filed in this case.

The decision on January 15, 2020 was rendered by a per curiam affirmance, and The Florida Supreme Court lacks discrectionary jurisdiction under The Florida Constitution, Art. V, § 3(b)(3). See Appx. C, 121, Medina v. Inch, 2019 U.S. Dist. LEXIS 38638 at *4 - 5 (March 8, 2019)(citing Wells v. State, 132 So.3d 1110, 1112-13 (Fla. 2014)). The Second District Court of Appeals ("2DCA") was the court of last resort.

The jurisdiction of this Court is invoked under 28 USC § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

I. The U.S. First Amendment "Redress of Grievance" Clause, enforced upon the States by The U.S. Fourteenth Amendment. The State of Florida has not addressed any Ineffective Assistance of Counsel claims on the merits, or any oversentencing and upward departure issues raised. See Tennessee v. Lane, 541 U.S. 509,532 (2004); Griffin v. Illinois, 351 U.S. 12,18 (1956); United States v. Glover, 531 U.S. 198 (2001).

II. The U.S. Sixth Assistance of Counsel Clause. In this case, the petitioner is alleging that his 2014 collateral review counsel, 1996 appellate counsel and 1994 trial counsel were all of ineffective assistance, also enforced upon the States by The Fourteenth Amendment.

III. The U.S. Fourteenth Amendment Due Process of Law and Equal Protection of Laws Clauses. The petitioner alleges that Fla.R.Crim.Proc. §§ 3.702(d)(19), 3.999 and Fla. Stat. Ann. § 921.001(5), was not equally applied to the petitioner in the original sentence of this case on November 3, 1994. The petitioner's sentencing issue has been consistently remanded for resentencing before and after the petitioner's conviction. See (collection of cases) Kepner v. State, 577 So.2d 576,578 (Fla. 1991); State v. Betancourt, 552 So.2d 1107,1108 (Fla. 1989);

Green v. State, 691 So.2d 502 (5DCA 1997); Watson v. State, 690 So.2d 730 (4DCA 1997); Reed v. State, 681 So.2d 913,914 (4DCA 1996); Inclima v. State, 570 So.2d 1034 (5DCA 1990); Hill v. State, 486 So.2d 1372 (1DCA 1986). Florida Sentencing Guidelines were mandatory at that time, and precedents were overwhelming.

The petitioner claims from I and II are hereby re-asserted, along with the abandonment of appellate counsel that resulted in the forfeiture of sentencing challenges, by direct appeal or post-conviction motion pursuant to Fla.R.Crim.Proc. § 3.850. 2014 counsel also failed to make the petitioner's requested challenges, due to his own failure to research current Florida law and U.S. Supreme Court precedent. Trial counsel (1) allowed the petitioner to be oversentenced by an unauthorized upward departure, (2) coersed the petitioner by erroneous advice, into a plea agreement he wanted withdrawn due to the previous conviction of his codefendant of a lesser offense. No effectiveness of these counsels have been ruled upon.

IV. The petitioner alleges that there was an unreasonable application of Martinez v. Ryan, 566 U.S. 1 (2012), Trevino v. Thaler, 569 U.S. 413 (2013) and Fla.R.Crim.Proc. § 3.850 (2005 Supp. Pamphlet)(exempting from general bar any claim based on newly discovered evidence, newly recognized rights or neglect of counsel). See Pace v. DiGulielmo, 544 U.S. 408,425 (2005). The Florida Courts have deemed a challenge pursuant to § 3.850

untimely without any assessment of the general time bar exemption or U.S. Supreme Court precedents.

V. The petitioner alleges a denial of a statutory and Constitutional right to a direct appeal in the State of Florida, and denial of the right to perfect an appeal, by ineffective assistance of counsel. Appeal counsel withdrew with appealable issues on the record and the court never stated that it reviewed the record for error. See Appx. C, 41-42. Trial counsel also refused to file the notice of appeal on behalf of the petitioner. The appeal was initiated pro se and the DCA appointed counsel. See Appx. C, 73. This is an unreasonable application of Douglas v. California, 373 U.S. 353 (1963); Anders v. California, 386 U.S. 738 (1963); Penson v. Ohio, 488 U.S. 75 (1988). These errors are deemed structural by this court and prejudice is presumed.

VI. The petitioner alleges that by ineffective assistance of trial counsel, (1) trial counsel allowed the petitioner to be oversentenced, in which an upward departure occurred without any written reasoning, (2) coersed the plea agreement of the petitioner by repeatedly telling him that he would receive 25 years if he didn't take the plea. Counsel also used the same tactic to coerse the petitioner to keep the plea, instead of withdrawing the plea when the petitioner learned that his

codefendant had been convicted of a lesser included offense and the petitioner had no weapon at all. See Fla.R.Crim.Proc. § 3.171, Shelton v. State, 739 So.2d 1235,1237 (4DCA 1999) and Thomas v. State, 327 So.2d 63,63-64 (1DCA 1976). The guidelines were mandatory at that time and this was erroneous advice. See Jae Lee v. United States, 137 S.Ct. 1958 (2017). Counsel did not explain the lesser included offense of Toney or move for the withdrawl of the plea. See Boykin v. Alabama, 395 U.S. 238,242-43 (1969) and Hill v. Lockhart, 474 U.S. 52,58-59 (1985). After the petitioner received an unexpected 10 years of probation, he requested that counsel file an appeal in court, and counsel failed to do so. See Roe v. Florez-Ortega, 528 U.S. 470,484 (2000). All prior Florida sentencing information is located at Appx. C, 27 - 42. The petitioner was abandoned and left unknowingly pro se from trial counsel thru decision on appeal. See Maples v. Thomas, 565 U.S. 266, 281-83 (2012) and Holland v. Florida, 130 S.Ct. 2549,2562,560 U.S. 631 (2010).

STATEMENT OF THE CASE.

The petitioner was arrested and charged with armed robbery with a firearm, pursuant to Fla. Stat. § 812.13(2)(a), in The Tenth Judicial Circuit, Polk County, for The State of Florida. The petitioner (from hereon "Swinton") pled guilty to one count of armed robbery with a firearm. Swinton's codefendant, Richard C. Toney (from hereon "Toney") proceeded to trial and was found guilty on November 3, 1994, before the sentencing of Swinton on the same day. See Appx. C, 63, 76-77.

Swinton informed counsel that he wished to withdraw his plea of robbery with a firearm on the grounds that he had no weapon at all and reminded counsel that counsel (Thomas Wilson "Wilson", trial counsel) had told Swinton that he could get 25 years for the crime. Wilson then told Swinton that if he pled to the charges, he would be sentenced by the guidelines instead of getting 25 years at trial. Swinton told counsel that he did not want the open part of the plea, which was "probation up to the court", in the plea agreement. He told me that the court could not exceed the guidelines with probation, and at that time, gave Swinton a copy of the guideline scoresheet prepared by probation for sentencing. See Appx. C, 27-28. Wilson never informed Swinton that he would be sentenced by the guidelines regardless of whether he went to trial or not, and this was coersion to keep the plea agreement. Toney had a lesser included offense.

In court, after this convesation, Swinton pled guilty on the ground that he was facing 25 years instead of 68.9 to 115.5 months. The court accepted the plea agreement for 5 years with probation "up to the court", and imposed 10 years of probation, and adjourned the court immediately after the sentence. Swinton told Wilson that his explaination was that the court couldn't do that and requested that he file an appeal. Wilson did not file the requested appeal notice.

On November 17, 1994, and at the advice of a jailhouse clerk, Swinton filed and mailed in his appeal and application as a poor person, pro se. The court appointed counsel. On March 2, 1995, counsel filed a 'Statement of Judicial Acts to be Reviewed'. Swinton talked to counsel once, told him of the sentencing issue, and wrote a letter in which there was no response to. See Appx. C, 72-73. After no response, Swinton filed a 'Motion to Correct Sentence' on March 13, 1996, which was denied.

On April 19, 1996, The Second District Court of Appeals for The State of Florida struck various fines, fees and probationary clauses, yet affirmed the conviction. Appellate counsel was dismissed in 1995 and no new counsel was appointed when the court discovered that there was error in the sentencing. See Penson v. Ohio, supra. In the court's opinion, it did not allege that the record was reviewed, in Swinton v. State, 670 So.2d 1128 (2DCA 1996), to determine if Anders

protocol was sound, and no other errors existed from a cursory review of the record. Counsel presented two errors, and the court only addressed one error without placing the substance of the other alleged error on the record. See Appx. C, 41-42. Throughout this entire process, Swinton was not provided with the 'Statement of Judicial Acts to be Reviewed', nor any other notification that counsel had withdrawn from the appeal. Swinton received his decision directly from the court, without an opinion. The 'Motion to Correct Sentence' filed by Swinton also pertained to the oversentencing issue allowed by trial counsel, and to this day, sentencing has never been reviewed.

Swinton knew of no other remedies at that time, and appeal counsel had the obligation to pursue the sentencing error by direct appeal or Fla.R.Crim.Proc. § 3.850. See Appx. C, Grubbs v. Singletary, 900 F.Supp. 425,426,428 (M.D.Fla. 1995)(Secretary motion for rehearing denied from Penson remand to The Second District Court of Appeals, 892 F.Supp. 1484, with U.S. Dist. Court opinion), Appx. p. 106-107. On habeas corpus remand to the State court, this was held as ineffective assistance of counsel and remanded for appeal of right or dismissal of the case.

Swinton violated probation and was returned by extradition on December 10, 2001, after his October 31, 1997 release. Swinton was violated in 1998 and extradited after serving a sentence in the State of New York.

On January 24, 2002, Swinton was sentenced to 72 months of incarceration for violation of probation. Swinton told his counsel about the oversentencing issue that was never brought up to the courts. Pastorin (revokation counsel) told me that he did not know my case well enough to argue that issue. Again, Swinton asked that Pastorin file an appeal, and was not able to tell the court this problem on the grounds that he was again, just as in 1994 sentencing, denied the right to allocate before being sentenced. The appeal notice was not filed.

The Florida Sentencing Guidelines were similar to the U.S.S.G., and enforced by Florida Statutes Annotated, § 921.001(5) and Fla.R.Crim.Proc. §§ 3.702(d)(19) and 3.999. Pursuant to the Scoresheet at Appx. C, 27-28, Swinton could only be sentenced to a maximum of state prison months of 115.5, or any combination of prison and probation thereof. Swinton had served a prior sentence of 60 months and had just been sentenced to 72 months, for a total of 132 months, exceeding the mandatory guidelines of 115.5 months. In 1994 sentencing, the trial court imposed a 180 month sentence, without any explaination, and 2DCA affirmed the conviction with this sentencing showing on the record in 1996. Swinton could not file a notice of appeal at a prison facility, as was done in 1994, on the grounds that he was immediately released by Florida DOCS and transfered back to New York for service of the rest of his parole there, which was successfully completed in 2006, due to State sentencing error.

Swinton was arrested on October 16, 2012, for federal offenses, and was alleged by the AUSDA to be a career offender. Swinton only has two adult convictions, which formed the basis of this assessment by the USA Office, during the Office of William Hochol. Magistrate Judge Payson appointed Patrick M. Megaro, to contest the Florida conviction on the grounds of past counsel, in which Megaro aborted over Swinton's objections to him, and filed a § 3.850 and 3.800 motion in The Tenth Judicial Circuit of Florida. See Appx. D, 122. I wrote Megaro and told him that I did not want that motion filed and his motion should have included my requested challenge, in which Swinton also informed the Magistrate and submitted the challenge he wanted by his version of the motion. See Appendix E, 130. By the time I received any answer from Megaro, he informed me that not only had he filed the motion, he had appealed to the 2DCA and would not file a brief. See Appx. C, 25-26. I told my criminal counsel that Megaro can no longer represent me and go forward with my criminal case, in which Donald Thompson ("Thompson") requested a detention hearing and after making this request, Swinton was indicted before this hearing. All letters to the court of Megaro's ineffectiveness are located at United States v. Swinton, 15-CR-6055-EAW-MWP (W.D.N.Y.), docket no. 265, all subsections thereof. Swinton proceeded to trial pro se, after the 30 month loss of time on this challenge and another 27 months in motion practice, and sentenced to 270 months.

Swinton filed his own "Writ of Error Coram Nobis" in The 2DCA, and it was dismissed 'Quo Warranto' on June 8, 2015. Swinton was not notified of this decision until December 5, 2017, and the court was informed by Swinton of all relocations immediately upon arrival at a new institution each time. See Appx. D, 93-94 for more specifics. Being that the petition was decided and the time to file a Certiorari to The U.S. Supreme Court had lapsed, the petitioner filed a Petition for An Extraordinary Writ, pursuant to 28 USC § 1331(a), in The U.S. Middle District of Florida. The Writ was denied, Swinton appealed to The Court of Appeals for The Eleventh Circuit, which was also denied, and then appealed to this court. See Appx. D, 94-95.

Swinton began the process anew in The Tenth Judicial Circuit, Polk County, Florida, with a petition to Correct Sentence, pursuant to Fla.R.Crim.Proc. §§ 3.850, 3.800(a) and (b), in which this petition was denied on July 1, 2019. See Appx. C, 12-23. The court construed the allegations in the motion to mean that Swinton was challenging the fact that Swinton's codefendant received a lesser sentence, which is misconstrued from the plain language of the motion. The page relied upon by the court is only case history, and this was only to show ineffectiveness of counsel, not a stand alone ground for relief. Please see Appx. B, 1-2. No ineffectiveness of counsel that was raised or exemtions for the procedural bar addressed.

REASONS FOR GRANTING THE WRIT.

The reasons for granting this writ is detrimental to the right to assistance of counsel, beginning with Gideon v. Wainwright, 372 U.S. 335 (1963) as it applies to first appeals of right, if appeals are provided by a State. See Douglas, Id. This is one of the most basic principles and rights of a criminal defendant, that would be eroded if this writ is not granted, and possibly used to deny relief pursuant to Martinez v. Ryan and Trevino v. Thaler, Id. As stated previously, no ineffective assistance of trial counsel was ever addressed, along with the issue that would require a resentencing or withdrawl of the plea agreement of conviction.

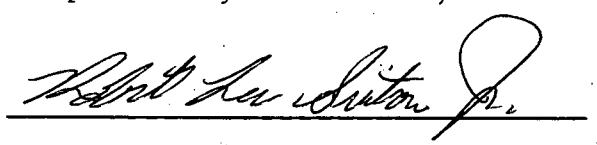
Due process will be loss if the criminal defendant is not allowed to redress the government of grievances, and have all laws apply to his case equally, as shown by this petition. No court has answered any claims stated by Swinton pertaining to his conviction in 1994. Even the 2DCA allowed an illegal sentence without addressing the only thing that could possibly be addressed on appeal aside from blatant ineffectiveness; the sentence of the appellant, which would still be ineffectiveness of counsel. The U.S. Fourteenth Amendment would be eviscerated if the writ would not issue to The Second District Court of Appeals, in The State of Florida.

CONCLUSION.

The petitioner humbly and respectfully request that The U.S. Supreme Court grant this Writ, and the petitioner pleads with this Court to protect my Constitutional rights in this case and not allow these rights that this Court has bestowed through precedent to be eroded by the State courts.

Under penalty of perjury, all herein is true and correct.

Respectfully Submitted,



Robert Lee Swinton Jr.

Fed.Reg.No.: 22008-055

On This Day of:

January 30, 2020