IN THE

ORIGINAL

SUPREME COURT OF THE UNITED STATES

GEORGE JONES, Petitioner,	)	
VS.	)	CASE NO. 19-7644
CINDY GRIFFITH, Respondent.	)	

PETITION FOR REHEARING

COMES NOW, Petitioner, George Jones, pro se, and in forma pauperis, and pursuant to Rule 44 and respectfully moves this Court to grant rehearing. Petitioner requests of the Court for rehearing of its Judgment of April 6, 2020, and in support states the following:

REASONS MERITING REHEARING

1. The Court's decision is in conflict with United States v. Moore, 599 F.2d 310, 313 (9th Cir. 1979); Colson v. Smith, 438 F.2d 1075, 1079-80 (5th Cir. 1971). Furthermore, the Court's decision was based on an unreasonable determination of facts in light of the evidence presented in the state-court proceeding. 28 U.S.C. § 2254(d)(2). Moreover, the Court overlooked material matters of fact and law, because Petitioner proved he was denied his rights to due process of law and to effective assistance of counsel.

2. The Court's decision is in conflict with Peguero v. United States, 526 U.S. 23 (1999); Rodriquez v. United States, 395 U.S. 327 (1969). Furthermore, the Court overlooked material matters of fact and law, because Petitioner proved he was denied his rights to a direct appeal under § 547.070 R.S.Mo., to due process of law, to access to the courts, to equal protection of the law, and to effective assistance of counsel, in that, the trial court clearly erred and abused its discretion and trial counsel was ineffective in misadvising Petitioner that he could not take a direct appeal from his Alford plea to appeal his conviction and sentence.

GROUND ONE

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE THE CREDIBILITY OF THE DEFENSE'S EXPERT WITNESS HE HAD RETAINED FOR TRIAL, RESULTING IN A GUILTY PLEA THAT WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, AND PETITIONER, JONES WAS DENIED HIS RIGHTS TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT, THE TRIAL COURT'S REFUSAL TO ALLOW JONES TO DISMISS/FIRE HIS ATTORNEY, FORCED JONES TO GO TO TRIAL WITH AN ATTORNEY WHO HAD FAILED TO PROPERLY VET THE ONLY DEFENSE WITNESS, FORENSICS EXPERT, CHRISTOPHER ROBINSON WHO HAD BEEN DISCHARGED FROM THE ATLANTA POLICE DEPARTMENT FOR MISAPPROPRIATION OF FUNDS, AND THEREFORE, MR. ROBINSON WAS ELIMINATED AS A CREDIBLE EXPERT WITNESS FOR THE DEFENSE. THE SUDDEN LOSS OF MR. ROBINSON PREJUDICED JONES, AND THUS, JONES WOULD NOT HAVE PLED GUILTY, BUT FOR HIS ATTORNEY'S FAILURE TO CONDUCT A REASONABLE INVESTIGATION AND HIRE AN EXPERT WITNESS THAT DID NOT HAVE CREDIBILITY ISSUES.

ARGUMENT

In this case, Jones entered an Alford plea that was not knowingly, voluntarily, and intelligently made. Jones would not have pled guilty and insisted on going to trial, but for his attorney's failure to conduct a reasonable investigation

and hire an expert witness that did not have credibility issues. That if Jones' attorney had conducted a reasonable investigation into the expert witness' background, he would have discovered the credibility issues and been able to secure another expert witness without credibility issues who could have provided the same expert testimony.

"[T]o demonstrate a claim of ineffective assistance of counsel for failure to call an expert witness, [Petitioner] must show that: (1) such an expert witness existed at the time of the trial; (2) the expert witness could be located through reasonable investigation; and (3) the expert witness' testimony would have benefitted the defense." Johnson v. State, 388 S.W.3d 159, 165 (Mo. banc 2012).

In this case, it is indisputable that Jones was in the second day of trial, engaged in voir dire proceedings, and selecting a petit jury. It is only due to trial counsel's blunder that Jones felt compelled to enter an Alford plea. This plea does not admit guilt, but simply admits that Jones could not refute the State's case, because trial counsel had botched his only defense.

If the defense enters a plea because his/her attorney is unprepared for trial, it renders the plea involuntary. United States v. Moore, 599 F.2d 310, 313 (9th Cir. 1979). In the case of Colson v. Smith, 438 F.2d 1075, 1079-80 (5th Cir. 1971), which is strikingly similar to Jones' case, the plea was found to be involuntary because counsel was unprepared on the day of

trial. This last minute breakdown was found to have forced the defendant into entering a guilty plea ...

In this case, any reasonably competent counsel would have asked Christopher Robinson, Forensics Expert about any possible credibility issues as a matter of course. To accentuate the unreasonable nature of counsel's failure to properly vet expert witness, Robinson's information was discovered via LEXIS.com that Mr. Robinson has been discharged from the Atlanta Police Department due to misappropriation of funds. See Daughtie v. State, 297 Ga. 261, 265 (773 S.E.2d 263) (2015).

In this case, expert witness, Robinson was Jones' only defense. He had revealed his anticipated trial testimony during a deposition taken on July 20, 2012 (Deposition of Christopher Robinson). The following is a synopsis of that deposition:

Expert witness, Robinson said that, in researching his facts and conclusion about Jones' case, he relied on photos, reports and notes from the Police Department, reports from the crime lab, and Jones' medical records (Depo.20-21).

According to these reports, Jones was shot in the head and torso while standing at the top of a flight of outside stairs, by two police officers (Depo.46-47). These officers claim that Jones first fired upon them causing them to return fire (Investigative Report #10-18577 pg.6). Four casings and bullets were found at the crime scene. Two were linked to the police and two were linked to Jones' gun (Depo.25). This indicated that Jones fired twice, and Officer Matthew Crosby

fired once, and Lieutenant Lewis fired once (Depo.26) (Photographic Exhibit (P.E.) 3-11).

The police claim that one of the two bullets fired by Jones' gun (bullet 18) struck Officer Crosby in the clavicle (Investigative Report #10-18577 pg.6). That bullet was removed from Officer Crosby during surgery at St. Johns Medical Center (Investigative Report pg.22). Officer Crosby claimed that the second bullet from Jones' gun creased his forehead (Investigative Report pg.21). However, this bullet was never found. Officer Crosby was standing in front of a large glass window when he claims that the bullet creased his forehead (Investigative Report pg.12)(P.E.1). However, none of the Investigative Police Reports indicate evidence of a bullet hole in that window nor in the wall around the window. Jones was shot in the head from the front, and the bullet exited the back of his head (Depo.27). That bullet bounced off the ceiling, hit the wall and landed in front of Apartment #1145 (Investigative Report pg.13)(P.E.3). Jones was also shot in the side of the torso (Investigative Report pg.22). That bullet did not exit Jones in flight, but was removed during surgery at St. Johns Hospital (Investigative Report pg.23). Neither Jones' pants nor shirt had an exit hole where a bullet would have exited through (Investigative Report pg.47-48).

These four shots would account for all four shots at the crime scene. However, there was also a bullet embedded in the door of Apartment #1141 that was not removed and examined by ETU

(Investigative Report pg.13)(P.E.9-11). Expert witness, Robinson contended that the bullet should have been tested because it was likely from Jones' gun (Depo.32).

Because the bullet in the doorframe of Apartment #1141 was shot in the direction away from where the police claimed to have been, this would have impeached the account of the police in two critical ways: (1) there was no shot from Jones that "creased" Officer Crosby's forehead; and (2) Jones was in his own doorway, and not confronting officers on the stairwell when he was shot. It would have also indicated that Jones' gun went off inadvertently after he was shot in the head. To support this theory, expert witness, Robinson also referred to the lack of blood spatter evidence. The following are relevant excerpts from Christopher Robinson's Deposition:

> ROBINSON: What I was about to say, but see, then we have the problem. The police didn't want to take down the door frame because they didn't want to dig in the wall. That's a huge mistake, man. That's a huge mistake. It would have answered the question: Is that George's bullet? Or is there a third shot from the police officer?
>
> ... I want to know: Did the cops fire twice? Because I can account for the cops' two shots. I cannot account for a third bullet.
>
> So that bullet couldn't be the cops' you understand ... So that's George's bullet is all we can say, right? George fired twice; the police fired twice ... It's got to be George's bullet.

(Depo.32).

ROBINSON: George had to be standing in front of his door when he was shot--for that bullet to go ...

(Depo.41)(P.E.2).

ROBINSON: I would have to examine, how about blood spatter. If you're shot and the bullet exits you, there's going to be blood spatter, so then I could show where you were standing. Blood spatter wasn't done on the scene either.

(Depo.45).

ROBINSON: I'm saying the possibility is that he was shot--and listen to me, this is why bullet in the door--and if you let me go back to that one more time--if that bullet in the door is George's bullet, which we have to assume, because you told me four shots were fired. Well, if George is trying to shoot the police officers, why did he shoot one six feet away, right? Your measurements that you just gave me are six feet ... Well, why in the world would he shoot straight into that door frame six feet in front of him? And then hits Officer Crosby in the clavicle down below.

You know that sounds like erratic shooting to me? Like erratic shooting. Like someone's been shot. And then George involuntarily is squeezing that trigger after he's shot.

(Depo.46-47)(P.E.2).

PROSECUTOR: Okay. Now you talked about blood spatter analysis that wasn't done. And why is that so important?

ROBINSON: Well, if the bullet passed through George's head, I sure would have liked to have seen some spatter when it exited his skull, for it to be right around his door. They could have tested the door for

blood to see exactly. That would have placed George in his proper location. Or for your account, or the officer's account, that he was standing in front of the stairwell. There would be blood over in that direction. If it passed through his skull, you would have seen the blood blow out of the back of his head. There would be blood somewhere back there. There's no indication. You don't see that. Furthermore--

PROSECUTOR: Your theory is that George Jones was shot standing by his door, correct?

ROBINSON: Yes sir. On this particular shot, that's where he was standing, right there.

PROSECUTOR: And you know that for a fact?

ROBINSON: I can prove it forensically ...

(Depo.52-53)(P.E.5).

Expert witness, Robinson goes on to state that the bullet which struck Jones in the head and bounced off of the ceiling, was shot by police who were standing below Jones. Spatter of Jones' skin and blood, and fabric from Jones' baseball cap were located at the top of the doorway of Apartment #1145 (P.E.5). Whereas, no such evidence was discovered around the doorway of Apartment #1141 (Investigative Report pg.13). This forensic evidence contradicts the police officers' account of what actually occurred at the crime scene. Expert witness, Robinson's testimony paints the picture of a very sloppy handling of the crime scene by police. It also impeached the police officer's account of the incident.

The fact that Jones lost his memory as a result of being shot in the head (LF 27), combined with the fact that Jones reasonably believed that he would be able to rely on expert witness, Robinson's substantial testimony in his defense. Then to suddenly lose this defense during voir dire, is a dramatic ground shift that would have left any defendant feeling as though he suddenly lost his only defense.

Jones alleged that he was informed of the expert's credibility issue in the middle of trial (LF 136), and that he would not have pled guilty but for the fact that his attorney advised him that the expert witness, Christopher Robinson had serious credibility issues, and that it was too late to do anything about it, and that he needed to plead guilty as a result (LF 137).

It is clear that Jones' counsel could have hired an expert who did not have any credibility issues and who would have provided the same useful testimony as Christopher Robinson. PCR counsel, Srikant Chigurupati discussed Jones' case with Forensic Expert, Don Mikko and is convinced that Mr. Mikko would have provided the same useful testimony that Christopher Robinson was going to testify to, and Mr. Mikko would not have had any credibility issues. Jones asserts that if trial counsel had secured a forensic expert, like Don Mikko, who was available and who did not have credibility issues, he would <u>not</u> have pled guilty and would have proceeded with his trial (LF 135-137).

The complete omission on the part of counsel to attempt to conduct a reasonable investigation into the expert witness' background "so undermined the proper functioning of the adversarial process that the [Alford plea] cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). If the defense enters a plea because his/her attorney is unprepared for trial, it renders the plea involuntary. United States v. Moore, supra. Here, counsel's failure to ask Christopher Robinson, Forensics Expert about any possible credibility issues as a matter of course, clearly botched Jones' only defense.

These facts demonstrate prejudice and entitle Jones to relief on the grounds that his pleas were involuntary and the result of the ineffectiveness of his counsel. Furthermore, the facts alleged in support of Jones' claim were not refuted by the record. Where this is the case, a petitioner is entitled to an evidentiary hearing and additionally warrants relief.

GROUND TWO

THE TRIAL COURT ABUSED ITS DISCRETION AND TRIAL COUNSEL WAS INEFFECTIVE IN ERRONEOUSLY MISADVISING PETITIONER, JONES THAT HE COULD NOT TAKE A DIRECT APPEAL FROM HIS ALFORD PLEA TO APPEAL HIS CONVICTION AND SENTENCE, AND JONES WAS DENIED HIS RIGHTS TO A DIRECT APPEAL UNDER § 547.070 R.S.Mo., TO DUE PROCESS OF LAW, TO ACCESS TO THE COURTS, TO EQUAL PROTECTION OF THE LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE 1ST, 5TH, 6TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 2, 10, 14, AND 18(a) OF THE MISSOURI CONSTITUTION, IN THAT, THE TRIAL COURT AND TRIAL COUNSEL MISADVISED JONES THAT HE COULD NOT APPEAL FROM HIS ALFORD PLEA. THE MISADVICE FROM THE TRIAL COURT AND TRIAL COUNSEL PREJUDICED JONES, AND THUS, THIS MISADVICE CAUSED JONES TO UNKNOWINGLY AND INVOLUNTARILY FOREGO HIS RIGHT TO DIRECT APPEAL. FURTHERMORE, JONES MOVED TO WITHDRAW HIS ALFORD PLEA BY WRITTEN MOTION FILED ON SEPTEMBER 11, 2012, PRIOR TO SENTENCING AND AGAIN BY ORAL MOTION ON THE DAY OF SENTENCING. HOWEVER, THE TRIAL COURT REFUSED TO ALLOW JONES TO WITHDRAW HIS GUILTY PLEA.

ARGUMENT

The Supreme Court has held that due process is offended when a defendant is kept completely ignorant of his right to seek direct appellate review of his conviction and sentence. See Peguero v. United States, 526 U.S. 23 (1999). Here, Jones

clearly asserts that he was misadvised by the trial court and trial counsel, that he could not take a direct appeal from his Alford plea to appeal his conviction and sentence. Furthermore, Jones asserts the trial court nor counsel informed him of his right to appeal the denial of the motion he filed prior to sentencing, in which he sought to withdraw his Alford plea.

On September 11, 2012, Jones filed a motion to withdraw his Alford plea, in that, the plea was induced by false promises of the plea Judge, conveyed to Jones, by and through counsel (LF 9). On September 24, 2015, during the sentencing hearing, Jones tried to withdraw his Alford plea stating: "I want my day in court with a competent lawyer" (Sent.Tr.46) (LF 36). On July 31, 2012, during the plea hearing, the following colloquy occurred between the plea Judge and Jones:

> Q: You understand that there will be no further trial on these charges; do you understand that?
>
> A: Yes, ma'am.
>
> Q: And do you understand that there will be no appeal?
>
> A: Yes, ma'am.

(Plea Tr.5)(LF 26).

On September 24, 2012, during the sentencing hearing, the following colloquy occurred between the sentencing court, Jones, and counsel:

> THE COURT: Okay. That being the case, then following the examination of the Defendant under oath pursuant to Rule 29.07(b)(4) four, the court finds that the Defendant has been advised of his

rights to proceed under Supreme Court Rule 24.035 and that he understands those rights. The Court finds that there is no probable cause to believe that the Defendant received ineffective assistance of counsel.

THE DEFENDANT: So does that mean that I can't file an appeal?

MR. BARNHART: You can file a Form 14 [Sic].

(Sent.Tr.58)(LF 39).

Section 547.070 R.S.Mo. provides: "In all cases of final judgment rendered upon any indictment or information, an appeal to the proper appellate court shall be allowed to the defendant, provided, defendant or his attorney of record shall during the term at which the judgment is rendered file his written application for such appeal."

Because Jones was obviously entitled to appeal the trial court's denial of his motion to withdraw the Alford plea, it was wholly improper for the trial court and counsel to tell Jones that he could not appeal. Therefore, Jones is entitled to resentencing and appeal. He is not required to prove any further prejudice than that he was denied the right to direct appeal. See Rodriquez v. United States, 395 U.S. 327 (1969).

CONCLUSION

WHEREFORE, for the foregoing reasons, Jones prays this Court grant rehearing, because he has made a substantial showing of his claims of trial court error and abuse of discretion, ineffective assistance of counsel, and the denial of his constitutional rights. He further prays for any other and further relief as this Court may deem just and proper.

Respectfully submitted,

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