

No. 19-7877

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE ROGERS — PETITIONER
(Your Name)

vs.

JOSIE GASTELO — RESPONDENT(S)

ON PETITION FOR REHEARING TO THE

SUPREME COURT OF THE UNITED STATES
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

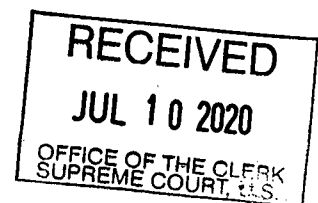
PETITION FOR REHEARING

TYRONE ROGERS
(Your Name)

California Men's Colony, POB 8103
(Address)

San Luis Obispo, CA 93409-8103
(City, State, Zip Code)

(Phone Number)



QUESTION(S) PRESENTED

Did the State use federal law to deny Rogers collateral petition?

Does the AEDPA bar relief once IAC is factually admitted by trial attorney?

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States *Supreme Court* decided my case was May 4, 2020.

☒ A petition for rehearing was timely filed in my case on *May 29, 2020*.

☐ 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 *Rule 44*.

☐ 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 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).

STATEMENT OF THE CASE

Petitioner is in custody pursuant to his 2004 California state case No. SCD176027 of rape by a foreign object of an unconscious victim, California Penal Code 289(D), and attempted rape of an unconscious person California P.C. 261(A)(4), with his live-in exgirlfriend, in the San Diego superior court without a jury. His current case is enhanced by his prior 1994 case No. SCD106382 of two burglaries CA P.C. 459, while intoxicated and high off weed and with nothing taken from both apartments.

On January 9, 2004, during in-limine hearing, current case, he challenged the state courts admission that he was convicted in 1994 of intent to commit sexual assault. On June 26, 2015, Johnson v. United States, No. 13-7120 came out with statute 18 USC 924(e). The Johnson case referred to state cases and one in particular concerning James v. United States, 550 U.S. 192 (2007), in-which showed a violation of due process when elements or factors are extremely disproportionate to create new offenses that require separate punishment. Additionally, in United States v. Osiemi, 980 F.2d 344 (5th Cir. 1993), equally shown is the same violation. On December 20, 1994, Petitioner was convicted of burglary. His public defender orally motioned for a new trial because of her ineffectiveness.

On January 19, 1995, the sentencing court assigned him a conflict counsel at a preappeal motion for a new trial, a critical stage of prosecution, to investigate a motion for new trial; he was not in court (Exhibit A.) Marshall v. Rodgers, 569 U.S. 58 (2013); 2254(d)(1); Williams v. Taylor, 529 U.S. 362, 412 (2000); Knowles v. Mirzayance, 556 U.S. 111, 122(2009.) On February 23, 1995, and April 6, 1995, he received no continuance during the absent of his conflict counsel at a critical stage of

STATEMENT OF THE CASE

prosecution, to investigate why Petitioner's public defender verbally proclaimed herself ineffective (Id). Additionally, on April 6, 1995, the sentencing court sentenced him without hearing why his public defender was ineffective (Id) and (Exhibit A.) See Rosales-Mireles v. United States, 585 US __, [No. 16-9493] (2018), quoting United States v. Olano.

On January 25, 2016, the 2004 sentencing court denied to hear on the merits Petitioner's claims of "structural errors" within his 1994 case when the sentencing court failed to hear a motion for new trial and burglary disproportionate with express and implied sexual elements according to Johnson v. United States, (13-7120) (2015). (Appendix F).

On April 1, 2016, the State appellate court summary denied to hear the merits of his claims stating: untimely, repetitive, successive, and an abuse of the writ (Appendix E.) On May 18, 2016, the California supreme court silently denied his petition. United States v. Davila, 569 U.S. 597 (2013). On August 10, 2018, the U.S. magistrate judge recommended the petition dismissed with prejudice (Appendix D.) See Rosales-Mireles, supra; United States v. Osiem, 980 F.2d 344 (5th Cir. 1993). Questions 1-5 address this Court.

The United States magistrate judge on April 1, 2016, failed to mention that Petitioner had, in 2005, filed a direct appeal in the California appellate court concerning two 5 year enhancements. When the case was remanded (People v. Rogers, D044637, 9/9/05) the trial court failed to strike a strike due to California spirit of the law. People v. Superior Court (Romero) (1996) 13 Cal.4th 497, 528. There are many structural errors associated in his 1994 case in which to have his trial attorney admit on record that she was ineffective as she motion for a new trial. United States v. Marcus,

STATEMENT OF THE CASE

560 U.S. 258 (2010). The U.S. magistrate judge also failed to mention that the 1994 case is so disturbed with errors, the government has tampered with the sentencing transcript to illegally show that Petitioner's conflict counsel was present on April 6, 1995, (Exhibit A) though the minute orders clearly demonstrates him as absent. 28 USCS 2254 (d)(1); Fourteenth Amendment; Fifth Amendment; Sixth Amendment. Gathers v. United States, No. 09-CO-422 (D.C. Ct App. 2014).

On September 19, 2018, (Appendix C) the United States district court dismissed Petitioner's petition with prejudice and denied certificate of appealability. On July 19, 2019, (Appended A) the U.S. district court denied the petition. On September 27, 2019, (Appendix B) the United States appellate court denied motion for consideration en banc and denied appointment of counsel, 18 U.S.C.S. 3553(a); 28 USCA 404; FRCP. 52(b).

REASONS FOR GRANTING THE REHEARING

The State rejected Rogers' collateral petition finding that he is not in actual or constructive custody for the 1995 convictions and his claims were untimely, successive, and an abuse of the writ. The State used the federal case *Lackawanna Cnty Dist. Atty v. Coss*, 532 U.S. 394 (2001) as its standard of review.

A) Rehearing On Lackawanna

There are three exceptions to the Lackawanna rule of preclusion so Rogers need only one of the three as an exception. The State does not inform the Court that on January 19, 1995, Rogers' trial attorney declared herself ineffective. (Exhibit A). The trial wrote her oral statement, "... motion for new trial for ineffective of counsel.". Rogers fairly related to his trial attorney's ineffectiveness within his lower district court brief, 3:16-cv-01943-mma, ground three.

Rogers should meet the Lackawanna rule of preclusion from his 1994 trial attorney on admission violating Rogers' Fifth, Sixth, and Fourteenth Amendments. The reasons for her verbal admission stems from: 1) siding with the language of, "specific offense must be stated with the intent to commit rape, whatever; sodomy, oral copulation," when Rogers was indicted with burglary. (Exhibit B, p. 168:6-11); 2) allowed the jury to hear intent read above (Exhibit B, p. 178-179:25-13); 3) conspired with prosecutor during his closing argument with the same sexual elements concerning an indictment of burglarly (Exhibit B, pp. 185-186:22-7); when the correct way for the jury to receive instruction about burglary is shown in the State's file (Exhibit B, pp 1-2); 4) conspired with prosecution allowing hand written forgery of officer Reyes'

REASONS FOR GRANTING THE REHEARING cont.

police report, the photo lineup on 8-26-94 & 8-31-94, and the security guard report. So Rogers was represented with an ineffective counsel from preliminary to trial, plus the allege forgery, and his conflict attorney who failed to attend court, minute order, on Jan 19, Feb 23, and April 6, of 1995 (Exhibit A). Ineffective assistance of counsel claim is contrary to clearly established federal law, AEDPA presents no bar to relief. *Lafler v. Cooper*, 566 U.S. ____ (2012), No. 10-209. The Sixth Amendment requires effective assistance at critical stages of a criminal proceeding, including pretrial stages. *Rosales-Mirales* quoting *U.S. v. Olano*.

B) Petition Not Untimely, Successive, And Abuse of The Writ

1) State Procedure Rule Not Adequate To Bar Federal Law

The State used U.S. Supreme Court cases *Maleng v. Cook*, 490 U.S. 488 (1989), *Daniels v. U.S.*, 532 U.S. 374 (2001), and *Lackawanna Cnty Dist Atty v. Coss*, 532 U.S. 394 (2001) to deny Rogers' collateral claim (Exhibit D). *La Crosse v. Kernan*, 244 F.3d 702, 706-07 (9th Cir. 2001) (holding that the state's "untimeliness" rule did not constitute "independent" state ground because at the time the petitioner defaulted his claim, the rule had a "fundamental constitutional error exception" that involved a ruling on federal law).

These facts combined with the other facts already presented in the rehearing establish "clear and convincing evidence that but for the constitutional error no juror would have found Rogers guilty of burglary charges. 28 U.S.C. § 2244(b)(3)(D) (2012) & 28 U.S.C. § 2254(e)(A)-(ii) (2012).

CONCLUSION

The petition for a *rehearing* should be granted.

Respectfully submitted,

Tyrone Rogers

Date: *July 1, 2020*