

19-7883

No. \_\_\_\_\_

*original copy*

Supreme Court, U.S.  
FILED

JAN 13 2020

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

TYROME HARRIS, SR.

PETITIONER

VS.

DEXTER PAYNE, DIRECTOR,  
ARKANSAS DEPT. OF CORRECTION

RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES DISTRICT COURT

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PETITION FOR WRIT OF CERTIORARI

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TYROME HARRIS, SR.  
CUMMINS UNIT #121901  
P.O. BOX 500  
GRADY, ARKANSAS 71644

NO PHONE NUMBER

**ORIGINAL**

### **Questions Presented**

Mr. Harris alleges an obvious conflict between the criminal 16-93-609(b), and the habitual offender statute 5-4-501(d)(2), that prohibits the two from being read in a harmonious way. A reasoned de novo review of the statutes is warranted by this Court.

In finding no prejudice as required by law. This direct conflict shows that the two statutes cannot be read harmoniously. Because the sentence imposed by 16-93-609(b) is prohibited by the plain meaning of the later Ark. Code Ann. 5-4-501(d)(2), the earlier contradictory statute should be deemed superceded.

In finding no prejudice the Federal District Court significantly misstated the version of the facts. This case thus presents the following question:

Did the District Court err in deferring to the lower court's finding, that Mr. Harris was not prejudice during his guilty plea sentencing hearing.

### **List of Parties**

☒ All parties appear in the caption of the cover page.

☐ All parties do not appear in the caption of the cover page. a list of all parties to the proceeding in the court whose judgment is subject of this petition is as follows:

Mr. Tyrome Harris

Mr. Dexter Payne, Director,  
Arkansas Dept. of Correction

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## **Table of Authorities**

### **United States Supreme Court**

Booth v. Kelley, 882 F.3d 759, 762 (8th Cir. 2018)

Strickland v. Washington, 466 U.S. 668, 687 (1984)

Williams v. Taylor, 529 U.S. 362 (2002)

### **Arkansas Supreme Court**

Clark v. State, 271 Ark. 866, 611 S.W.2d 502 (1981)

Johnson v. State, 249 Ark. 208, 458 S.W.2d 409 (1970)

Winkle v. State, 366 Ark. 318, 235 S.W.3d 482 (2006)

### **Statutes**

16-90-103(d)

16-93-609(b); 16-93-609(d)

5-4-501(d)(2)

### **Arkansas Rules of Criminal Procedure**

Ar. R. Crim. Proc. 24.4(d)

Ar. Acts 228.1

Ar. Act 280, 1007

Ar. Act 1805 of 2001

**Petition For Writ of Certiorari To  
The United States District Court**

The Petitioner, Mr. Tyrome Harris, Sr. respectfully prays a writ of certiorari issue to review the judgment and opinion of the U.S. District Court, rendered in these proceedings on February 4, 2019.

**Opinion Below**

The U.S. District Court denied Petitioner's Habeas Corpus in its case no. 5:18-CV-157 DPM.

The opinion is published, and is reprinted in Appendix "A" of this petition.

The order of the District Court is preprinted in Appendix "A" of this petition at page 2A.

**Jurisdiction**

The judgment of denial of the District Court is in Appendix "A" to this petition at page 1A and was entered February 4, 2019. A motion for rehearing was never filed.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## **Statutory And Constitutional Provisions Involved**

The following Statutory and Constitutional provisions are involved in the case.

### **U.S. Const. Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations, to be confronted with witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

### **U.S. Const. Amend XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 law

### **U.S.C. Section 2254.**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

### **Statement of Case**

On February 8, 2016, Mr. Harris entered a conditional plea of guilty to Battery in the First Degree a Class B felony.

His conditional plea was accepted, then sentenced to fifteen (15) years with an additional five (5) years suspended imposition of sentence.

Prior to accepting the State's offer Mr. Harris inquired, regarding the amount of time he would have to serve.

Mr. Harris was told he would only serve one-third or five (5) years of his sentence day-for-day or 100% of the sentence before being eligible for parole.

Mr. Harris now seeks this Court to review the district court's order, so as to advance his claim that an Arkansas statute which lengthens his parole eligibility once sentenced and accepting the plea offer required only to serve one-third or five (5) years made in the plea agreement.



### Reasons For Granting The Writ

The U.S. District Court erroneously found Mr. Harris did not receive ineffective assistance of counsel.

This Court requires in making the familiar two-prong Strickland analysis test to claims of ineffective assistance of counsel. The certiorari review must consider all the evidence in the record, both which was admitted at the plea trial and that which was developed at the post-conviction Rule 37 stage. *Williams v. Taylor*, 529 U.S. 362 (2002) *Strickland*, supra.

Under this test is whether that, Mr. Harris trial counsel was deficient in his performance, and whether that performance prejudiced Mr. Harris, such that it "deprived Mr. Harris of a fair sentencing proceeding." *Booth v. Kelley*, 882 F.3d 759, 762 (8th Cir. 2018) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Under this test, it is appropriate to consider the evidence in light to the plea. It was clear that the U.S. District Court disregarded this principle, by using the *Strickland* standard as it has in several other cases. This Court should began its analysis by setting out the version of facts given by the Arkansas Court of Appeals and the U.S. District Court in both its opinions.

This Court went on to hold that a prisoner's claim of ineffective assistance of counsel must be established by the preponderance of the evidence, that the result of the criminal proceeding would have been different. That decision would be diametrically different opposed to this Court's clearly established precedent because in *Strickland*, the prisoner need only demonstrate a "reasonable probability that the results of the proceeding would have been different." *Williams v. Taylor*, supra.

Both the Circuit Court and the U.S. District Court relied upon *Strickland v. Washington* by holding that the presumption of trial counsel's was not ineffective.

In the instant case, Mr. Harris accepted a plea deal rather than opting to go to trial. Prior to accepting the State's offer, Mr. Harris inquired of counsel regarding the amount of time he would have to serve before being eligible for parole. During a hearing on February 8, 2016, Mr. Harris entered a negotiated guilty plea to the offense of first-degree battery in case no. CR-2014-3398, and in exchange, the child-enhancement and habitual-offender allegations were dropped in case CR-2014-3398 and case CR-2014-2754 was nolle processed.

The plea statement on February 8, 2016, included a provision that explained he "could" receive a total sentence from five (5) to twenty (20) years in the State penitentiary and/or a fine of up to \$15,000.

On March 7, 2016, Mr. Harris was sentenced to fifteen (15) years, with an additional five (5) years suspended imposition of sentence. But during the plea hearing Mr. Harris entered a plea of guilty to battery first degree with the "habitual" dropped along with the allegations. In a specific (quid pro quo) exchange during the plea hearing, the prosecutor and Mr. Harris both agreed. During the hearing Mr. Harris stated he fully understood the punishment range available should the matter have gone to trial on the "battery" charge.

However, the issue of parole eligibility was never discussed as required under Arkansas Rules of Criminal Procedure 24.4(d), advice by the court as a condition of the plea agreement. See Clark v. State, 271 Ark. 866, 611 S.W.2d 502 (1981). Mr. Harris was led to believe he would only be required to serve 1/3 or five (5) years day-for-day of the sentence imposed.

Mr. Harris was never informed of all direct consequences of his plea agreement, nor any effect on the sentencing range by the sentencing Judge under Rule 24.4.

The main point Mr. Harris wants to make is if he was sentenced with 16-93-609(b) and if 16-93-609(b) refer to 5-4-501(d)(2), the habitual statute, then Mr. Harris is not having his plea agreement honored. Why didn't the court nor counsel bring up 16-93-609(b) at the plea agreement hearing held on March 7, 2016.

Here, the statutes are in irreconcilable conflict. In Act 1805 of 2001, the General Assembly declared this act to be known as the "Arkansas Criminal Code." Ark. Code Ann. 5-4-501 (2011). The code governs the prosecution of any offense defined by the code committed after January 1, 1976, Ark. Code Ann. 5-4-501.

No defendant convicted of an offense shall be sentenced to an extended term otherwise than in accordance with title five chapter four, Ark. Code Ann. 5-4-501(a).

The enhancement statute was created in Act 1805 of 2001 and is codified at Ark. Code Ann. 16-93-609. It is a separate enhancement statute. It requires findings of fact. Johnson v. State, 249 Ark. 208, 458 S.W.2d 409 (1970), and it has its own sentencing procedure, Ark. Code Ann. 16-93-609 and in fact contradicted the statute with Ark. Code Ann. 5-4-501(a), when presented with the challenge of construing criminal statutes that were enacted at different times, this should presume "that when the Arkansas General Assembly passed the later act, it was well aware of the prior act." A companion doctrine to the second or subsequent violent offense statute is the habitual offender statute found in Ark. Code Ann. 16-93-609 (2011) (originally enacted in 1953 Ark. Acts 228.1).

In 1975 the Arkansas legislature incorporated the Habitual Offender statute into Ark. Criminal Code beginning at Ark. Code Ann. 5-4-501 (1975 Ark. Acts 280 § 1001). Because the two statutes are in conflict, this should deem the other enhancement statute superceded

and direct the Arkansas General Assembly to correct the problem by amending the Arkansas Criminal Code.

Mr. Harris contends that the trial court moved to nolle prosequere the child-enhancement including the habitual offender allegations pursuant to Ark. Code Ann. 16-90-103(d). It was the understanding that Mr. Harris would receive no enhancements when the guilty plea was rendered nor discussed by the trial judge under Ark. Rules Crim. Procedure 24.4 Advice by Court.

Finally, Mr. Harris was prejudiced and would not have pleaded guilty had he had known of the mandatory community placement of Act 1805 of 2001 enhancement. Mr. Harris was led to believe he was being sentenced to five (5) years day-for-day of what was on his sentence order. Failure to inform Mr. Harris of cumulative punishment for the same conduct violates a double jeopardy challenge and should be reviewed de novo, with no deference.

Winkle v. State, 366 Ark. 318, 235 S.W.3d 482 (2006).

#### **Conclusion**

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States District Court.

Respectfully submitted,

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