

19-7893

IN THE
SUPREME COURT OF THE UNITED STATES

NICHOLAS IAN ROOS,
Petitioner

v.

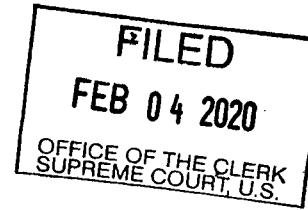
STATE OF ARKANSAS
Respondent

On Petition For A Writ of Certiorari
To The Arkansas Supreme Court

ORIGINAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- 1) Did Arkansas Supreme Court misapply this Court's ruling of *Strickland v. Washington*, by finding it effective for the trial counsel of a capital case to press forward a plea deal without any consultation with a psychological and/or neuropsychological specialist despite numerous red flags and requests made by Roos and Roos' family.
- 2) And, whether the two prongs of Strickland were fulfilled when trial counsel of a capital case chose to forgo a proper investigation of time sensitive evidence wherein a motion to suppress evidence failed to be filed.

PARTIES TO THE PROCEEDING

Petitioner Nicholas Ian Roos is serving a life without parole sentence at the Varner Supermax Unit in Varner, Arkansas.

Respondent is the State of Arkansas, who maintains custody of the Varner Supermax Unit, represented by Assistant Attorney General Adam Jackson and Attorney General Leslie Rutledge with the Arkansas Attorney General's office.

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- ABA, Douglas S. Liebert, Ph.D. and David V. Foster, M.D. The Mental Health Evaluation in Capital Cases 1994. (4.1) 6
- Hall, Professional Responsibility Criminal Defense Practices Post Conviction Remedies § 35:25 3d Ed. (p. 601) 5

PETITION FOR A WRIT OF CERTIORARI

Nicholas Ian Roos respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App. 1) with dissenting opinion of Justice Josephine L. Hart, not yet reported. The trial court's order denying Roos' petition for postconviction relief (App. 19) is not reported.

JURISDICTION

The Arkansas Supreme Court entered its judgment on December 5, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the Sixth Amendment, as applied to the states through the Fourteenth Amendment:

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 accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF CASE

This case has arose from Nicholas Ian Roos' on-going claim that he received ineffective assistance of counsel which led to his acceptance of a plea agreement to a sentence of life without parole for capital murder.

Roos has a history of head trauma, substance abuse, as well as a family history of mental defect. Despite the numerous red flags displayed by Roos' behavior, and the request made by Roos and his family, trial counsel denied any opportunity for a psychological or neuropsychological examination. Ultimately leaving this investigation incomplete before advising Roos to plead guilty to capital murder.

This error is one of many which pertain to the trial counsel's performance. Roos claims another reason for accepting this plea is due to a lack of motions filed to suppress evidence. To support their actions the trial counsel states these motions would have been filed if Roos had not agreed to plea and they were well within the deadline to file motions in preparation for trial. The issues raised by Roos were not investigated by trial counsel.

1. Roos Medical History and Plea Agreement

On November 11th 2015 Roos was arrested without reasonable suspicion. After a brief statement to police, Roos asked for an attorney, invoking his *Miranda rights*. Days later the sheriff, John Montgomery, visits Roos in a isolation cell to promise Roos if he makes another statement his girlfriend/co-defendant Mikayla Mynk will be released, but threatens if no statement is given Mynk will go to prison for murder.

Once Roos made a second statement he attempted suicide. Upon trial counsel's investigation they discover this was not Roos' first attempt at suicide. Six months prior to the

crime Roos was hospitalized and sent to the adult psych unit at White River Medical Center in Batesville, Arkansas, for a similar situation.

While trial counsel *discussed* a possible mental incompetency defense with Roos, they denied his request for mental evaluation because they had had a previous “bad experience.” This request for expert evaluation continued after this *discussion*; by Roos and members of his family.

During this poorly executed investigation trial counsel also discovered Roos had suffered from intense head trauma as a child including multiple concussions, one of which has left a large scar on his forehead.

In addition to these traumas Roos’ drug addiction was brought to trial counsel’s attention. The level of addiction to numerous intoxicants is a reasonable suspect of toxicity to the brain. Roos’ behavior as described by friends and family support a description of a person who has suffered permanent brain damage from a mix of head trauma, emotional trauma, and drug toxicity.

2. Post Conviction Proceedings in State Court

Immediately after the plea, Roos filed a motion to withdraw the plea then a Rule 37 petition on multiple claims of ineffective assistance of counsel.

Circuit Court appointed counsel (John Craine) at the first of two hearings. The first hearing on the 17th of August, 2016, honorable Judge Webb granted Roos’ request to preserve evidence pertaining to the sheriff coercing a statement from Roos, in violation of his *Miranda* rights. At this time prosecuting attorney replies that this evidence was time sensitive and may not be available (app. 49-50).

At the second hearing on the 28th of March, 2017, many of Roos’ friends and family gave testimony to Roos’ erratic behavior, severity of drug abuse, and mental history.

No expert witness was called upon to support or deny Roos' mental evaluations. At one point prosecuting attorney (Carter) asks Roos to read a specific section of the dismissal form from White River medical unit. This statement is inconclusive and inconsistent with the rest of the report. (App. 51-55).

Prior to this hearing Circuit Court denied Roos' petition, finding Roos to be mentally competent, without expert witness, and that trial counsel provided effective assistance.

3. The Arkansas Supreme Court Opinion

On appeal Roos' petition is affirmed by the Arkansas Supreme Court (App. 1-18). The court agrees with trial counsel's mental evaluation of Roos despite their lack of qualification. This court claims trial counsel's failure to suppress evidence is a new argument, which it is not new, regardless they respond to the claim. The court refers to trial counsel's statement that the motion would have been unsuccessful in light of special agent David Small's statement. Though this statement shows only a complete prejudice for the time sensitive evidence.

The court quotes, "It is not ineffective assistance if counsel fails to file a motion that would not be meritorious, *Rea v. State*, 2016 Ark. 368, 501 S.W. 3d 357.

The majority here failed to apply the ABA guidelines for capital defense to support anyone of their findings.

The dissent recognized this flaw and responded with an inductive argument, "a recommendation by court-appointed counsel that Roos plead guilty in exchange for a recommendation by the prosecutor for life without parole can only be made after counsel has made a full and complete investigation of the facts." (App. 16-17)

In sum the dissent finds the lack of mental-health examination (or filing any other motions) to be inadequate representation, and that the first prong of *Strickland* to be satisfied.

“The Circuit Court should be remanded with instructions to order the forensic examination that Roos should have received before trial.” (App. 16-17)

REASONS FOR GRANTING

Every aspect of Roos’ case fell below any standard of reasonableness; from conduct of law enforcement to courts misapplying case reviews and attorneys failing to maintain standards set by the American Bar Association’s guidelines regarding capital defense.

The two questions presented here represent innumerable cases which have been ignored by the lower courts on a massive scale. If allowed this will continue to decay the statutes that safeguard criminal defendants nationwide.

In this capital case trial counsel failed to complete a single investigation. According to Hall, Professional Responsibility in Criminal Defense Practices,

“Defense counsel has an affirmative duty to consult with the client, to investigate the facts, including facts relating to possible defenses and mitigation of punishment, and to prepare for trial. The duty to investigate even applies to cases where the defendant plans to plead guilty.” P.C.R. § 35:25 3d Ed (p.601)

I. Did Arkansas Supreme Court misapply this court’s ruling in *Strickland v. Washington* by finding it effective for the trial counsel of a capital case to press forward a plea deal without any consultation with a psychological and/or neuropsychological specialist despite numerous red flags and requests made by Roos and Roos’ family.

The Arkansas Supreme Court found that trial counsel were aware of Roos’ mental history including an evaluation from White River Medical Center for one of many suicide attempts, 7 months prior to Roos arrest. The evaluation explains Roos has a condition of “auditory and visual hallucinations, memory disturbance, mania, insomnia, unable to experience pleasure, mood swings, euphoria, manic behavior, and that Roos has no insight into [his own] behaviors.” The report clearly acknowledges “positive psychotic symptoms” and a “known history of

psychosis.” Within it is noted that Roos’ paranoid delusions made him feel trapped at the facility and in regards to Roos’ wish to leave he was released with a final diagnosis of depressive disorder. (App. 51-55)

A defense of mental defect should have been investigated, and even though ABA Guidelines 4.1 and 10.7 support this action, trial counsel admitted to refusing requests made by Roos and Roos’ family; in turn ineffectively advising Roos to accept a plea.

In *Speedy v. Wyrick*, “failure to challenge a defendant’s competence where there was evidence raising doubt about petitioner’s competence to stand trial may constitute ineffective assistance of counsel.”

A similar ruling opinion has been reached in numerous jurisdictions:

Smith v. Mahoney, 611 F.3d, 978, 989 (9th Cir. 2010);

Hummel v. Rosemeyer, 564 F.3d 290 (3rd Cir. 2009);

United States v. Kauffman, 109 F.3d 186, 190 (3rd Cir. 1997);

Burt v. Uchtman, 422 F.3d 557 (7th Cir. 2005);

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997);

People v. Shanklin, 814 N.E. 2d 139 (Ill. Ct. App. 2004);

People v. Gutierrez, 648 N.E. 2d 928 (Ill. Ct. App. 1995);

Woods v. State, 994 S.W. 2d 32, 38 (Mo. Ct. App. 1999);

Ex Parte Imoude, 284 S.W. 3d 866 (Tex. Crim. App. 2009)

This claim is in no short supply. A fair ruling from this court would not only be a step toward ending this injustice but aid in the process of future claims on similar circumstance.

Roos was observed to possess a plethora of mental conditions, all of which provided more than enough reason for trial counsel to investigate a defense of mental incompetency.

II. Whether the two prongs of *Strickland v. Washington* (1984) were fulfilled when trial counsel of a capital case chose to forgo a proper investigation of time sensitive evidence wherein a motion to suppress evidence failed to be filed.

Trial counsel made a decision when they decided to ignore Roos' request to obtain evidence. This was not part of a strategy. This request was made months before Roos agreed to accept a plea.

Trial counsel was made aware of the coercion on their first meeting with Roos. As time passed Roos began to realize none of his requests were being carried out or investigated by his defense attorneys.

During the hearing on the 28 of March, 2017, trial counsel admits to knowing their client was coerced into making a second statement after requesting an attorney. Without investigating this they claim if this coerced statement had been suppressed the prosecution's case would not have been affected in a meaningful way. This claim is simply not true; under the fruit of the *poisonous tree doctrine*, the prosecution's case would have unraveled, as the entire case was based off this statement.

Trial counsel admit that the investigation of this evidence would not have hurt Roos' case, if they had obtain the evidence (video and audio surveillance of Roos' cell) they could prove Roos was *coerced* in direct violation of his *Miranda* rights.

The trial court found this to be effective and reasonable; for attorneys to hold off filing motions to suppress until everything about the case is known. And yet trial counsel permitted Roos to accept a plea without that very same knowledge.

Trial counsel chose not to pursue this evidence, and on the 17th of August, 2016, Roos requested this evidence be preserved yet it had already been destroyed. In fact, it had been destroyed before Roos agreed to accept the plea.

The lack of interest displayed by trial counsel influenced Roos to accept the plea. Under ABA Guideline 10.9.1(G) this issue is addressed with absolute clarity, “existence of ongoing negotiations with prosecution does not in any way diminish the obligation of defense counsel respecting litigation.”

ABA Guideline 10.8(A), trial counsel at every stage must “consider all legal claims potentially available” and “thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether [or not] it should be asserted.”

Arkansas Supreme Court has ruled this circumstance to be ineffective in the past; see *Sparkman v. State*, 373 Ark. 45, 281, S.W. 3d 277 (2008); *Sutherland v. State*, 299 Ark. 86, 771 S.W. 2d 264 (1989).

When Roos was promised his girlfriend would be released his statements were rendered involuntary. Cases all across the country share this inconsistency. From law enforcement officers ignoring *Miranda* rights to lawyers failing to investigate the injustice. After reviewing the previous court’s ruling it is evident that with each new court to deliver an “opinion” the facts slip farther from the truth of what actually happened in this case. Every person on one side of the courtroom refuses to accept the possibility of a law enforcement officer, an attorney, or a judge who would embellish the truth to manipulate a certain outcome. To accept such a notion would indicate the system for which these people have given their lives to uphold is a barrel covered in cracks from which the truth often leaks.

For most it is easier to maintain an illusion than to admit the truth.

CONCLUSION

The two prong burden has been demonstrated with a plethora of reasons and circumstance. The trial counsel's actions or lack thereof undermined the functioning of the pre-trial process therefore the outcome produced cannot be relied upon as a just result. Roos was cornered into accepting a plea. This was not a sincere admittance of guilt but the manipulation of a mentally unstable individual.

For the foregoing reasons, the writ should be granted.

Dated, this 14th day of February, 2020

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