

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

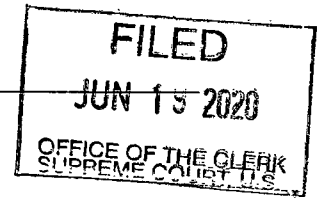
ROOSEVELT JOHNSON,
Petitioner,

20-164

v.

STATE OF FLORIDA,
Respondent.

Case No.



PETITION FOR WRIT OF CERTIORARI

// On Petition for Writ of Certiorari to the First District Court of Appeal of Florida.

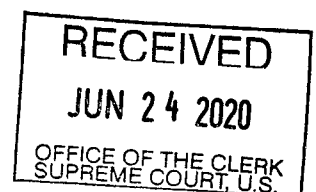
Petitioner:

A handwritten signature in cursive script, appearing to read "Roosevelt Johnson".

Roosevelt Johnson
DC# 390758
Okaloosa Correctional Institution
3189 Colonel Greg Malloy Road
Crestview, Florida 32539-6708

Respondent:

Attorney General, State of florida,
The Capitol Pl-01,
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QUESTIONS PRESENTED

1. Whether a defendant is denied due process and access to the court when appointed postconviction counsel refuses to adopt a meritorious claim and Florida courts render any *pro se* action a nullity, resulting in the forfeiture of the claim.
2. Whether the state court's failure to address a procedurally defaulted claim under the manifest injustice exception before denying it as untimely results in a miscarriage of justice—denying a defendant due process of law.

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STATEMENT OF THE CASE

In 1989, Petitioner Roosevelt Johnson was arrested and subsequently charged by amended information with, Count One: Robbery with a Firearm, Count Two: Kidnapping with a Firearm, and Counts Three-Five, Sexual Battery with a Firearm. Petitioner pled not guilty to all the charged offenses. The case proceeded to trial and Petitioner was found guilty of all the charges, convicted, and sentenced to life in prison.

On appeal, Petitioner argued that the photo lineup was impermissibly suggestive and should not have been allowed to permit the victim's in-court "very certain" identification of Petitioner. The First District Court affirmed based on the lack of prejudice. *See, Johnson v. State*, 571 So.2d 58, 59 (Fla. 1st DCA 1991) (Appendix-D).

Between 1991 and 1998, Petitioner filed a number of postconviction motions, including his original *pro se* 3.850 motion for postconviction relief—alleging:

- (1). I.A.C. for failing to move to suppress or otherwise object to the impermissibly suggestive photo lineup entered into evidence, and
- (2). I.A.C. for failing to call alibi witnesses Keith Mobley and Petitioner's girlfriend who would have testified that Petitioner was with them in a different hotel at the time of the crimes.

On November 7, 1991, the trial court denied Petitioner's photo lineup issue, and ordered the State to show cause whether he was entitled to hearing on ground two or not. Petitioner appealed the partial denial, which was denied by the First District on February 6, 1992. Subsequently, Special Public Defender Tom Copeland was appointed to represent Petitioner. However, Tom Copeland did not make a formal appearance in the case until December 29, 1997, when he filed a motion for "Entry of Order Requiring the Preservation of Evidence" which was denied on May 12, 1998. Thereafter, Petitioner's evidentiary hearing was scheduled and conducted on August 28, 1998.

As soon as Petitioner learned that the hearing was scheduled, he filed a supplemental motion based on Tom Copeland's directive that he would be prepared to argue the claims and present witnesses in support thereof at the evidentiary hearing. However, on April 21, 1999, the postconviction court entered an order denying relief, specifically noting that postconviction counsel, Tom Copeland, was inept for his misadvice and his failure to pursue the execution of the hearing for over five years. The denial was appealed and affirmed by the First District Court of Appeal. *See, Johnson v. State*, 780 So.2d 65 (Fla. 1st DCA 2001) (Appendix-E).

Subject to the current certiorari, on September 5, 2019, Petitioner, through counsel Richard Rosenbaum, filed a Successive Motion for Postconviction Relief Based Upon a Manifest Injustice (See Appendix-F). Therein, counsel argued that the motion should be heard without regard to any procedural bar: (1) because Petitioner's postconviction counsel forfeited any possibility for the claims to be properly presented to the court, and (2) based upon the magnitude of ineffective assistance that Petitioner received (both during the trial and in the postconviction setting), as reflected by the claims raised therein, the well recognized manifest injustice exception was met.

Counsel presented the following claims in support:

- (1) I.A.C. for permitting off the record trial conferences, with and without the jury present to be conducted regarding evidentiary and testimonial issues material to the defense's case.
- (2) Denial of due process when the sexual assault kit relied on by the prosecutor to support a guilty finding was lost or destroyed prior to trial.
- (3) I.A.C. for failing to object to prosecutor's vouching for law enforcement and labeling the Petitioner a liar and the defense, a lie.
- (4) Denial of due process and I.A.C. for failing to voir dire witness regarding a roll of dimes that she blindly indicated came from the hotel cash drawer that was robbed; the dime coin roll actually had a different hotel's name on it.
- (5) Denial of due process and I.A.C. for failing to object to the prosecutor's argument that shifted the burden of proof.
- (6) Denial of due process and I.A.C. based on the cumulative effect of prosecutor's

closing argument.

(7) That the trial court still retained jurisdiction to review the merits of Petitioner's pro se claim that were rejected for postconviction counsel, Tom Copeland's, failure to properly present them.

(8) Denial of due process, a fair trial, and I.A.C. for failing to properly address the purely circumstantial nature of the evidence relied on to secure the convictions.

(9) I.A.C. for failing to investigate and demand production of the sexual assault kit.

(10) I.A.C. for failing to properly relay the plea offer.

(11) Denied due process based upon the cumulative effect of the errors to date.

(Appendix-F). In denying relief, the trial court simply stated that the motion was procedurally barred as untimely (See, Appendix-C). Petitioner appealed the decision and argued that the trial court's failure to view the merits of the claims before denying habeas relief because of their untimeliness, denied him due process of law, constituting reversible error (Appendix-G). However, the First District Court of Appeal affirmed without opinion (See, Appendix-A).

Petitioner now seeks a writ of certiorari from this Court on the two important questions presented in this case.

REASON FOR GRANTING THE PETITION

1. A defendant who is *appointed ineffective* postconviction counsel is denied due process and access to the court when counsel fails to present or adopt viable claims for relief in the postconviction setting, because any claim the defendant attempts to present *pro se* constitutes a nullity.

SUPPORTING FACTS

Florida law generally only permits ineffective assistance of trial counsel claims to be presented in a Rule 3.850 postconviction motion. Florida courts have also adopted a rule that once postconviction counsel is appointed, a defendant has no control or authority over any subsequent filing in his case. Further, he has no recourse against postconviction counsel for any ineffective assistance. *See, Logan v.*

State, 846 So. 2d 472, 476-78 (Fla. 2003); *Davis v. State*, 789 So. 2d 978, 981 (Fla. 2001)(both holding that once an appearance of counsel has occurred, any *pro se* filing is a nullity). Consequently, even when postconviction counsel provides ineffective assistance in failing to file a meritorious I.A.T.C. claim, a defendant has no available remedy to correct the error and is thereafter procedurally barred from presenting the claim thereafter. *See, Lambrix v. State*, 698 So.2d 247, 247 (Fla.1996)(“[C]laims of ineffective assistance of postconviction counsel do not present a valid basis for relief”).

In Petitioner's case, he requested appointed Public Defender Tom Copeland to amend/supplement his postconviction claims with a few more viable claims for relief and present them to the court. Tom Copeland instructed Petitioner to file the claims himself and he would be prepared to present evidence and argument to support them at the evidentiary hearing. However, such was not permitted by the postconviction court; (1) Because Tom Copeland did not pursue scheduling the hearing for five years, and (2) Florida law prevented Petitioner from filing anything in the court because he had been appointed counsel. Ultimately, because of postconviction counsel's misadvice and his laziness, Petitioner has never had the opportunity to present his claims to a court for review on the merits, denying him due process and access to the courts.

This Court has repeatedly held that a defendant has no constitutional right to counsel when mounting a collateral attack. However, under Florida law, if the only setting a defendant can attack trial counsel's performance is in the postconviction setting, and any claim he files against trial counsel *pro se* constitutes a nullity when he is appointed postconviction counsel—then the defendant is denied his First and Fourteenth Amendment Rights to due process and access to the court when his postconviction counsel renders ineffective assistance by failing to pursue viable claims for relief.

Moreover, although Petitioner has viable claims for relief against his trial counsel, because he

was appointed an ineffective postconviction counsel, under Florida's adopted nullity *pro se* rule, his claims will forever remain unheard. This is reflected by the denial of the motion which provoked the current petition (Appendix-C). Although Petitioner raised meritorious claims for relief against trial counsel, and pointed out that he was seeking relief based on a manifest injustice to excuse the procedural bars, the state court refused to address the merits of the motion and attached the procedural bar without regard to the availability of habeas corpus relief. When Petitioner appealed to the first District Court, he asserted that he was being denied his rights to due process and access to the courts (Appendix-G at 12-24).

Accordingly, Petitioner prays this Honorable Court will grant certiorari to consider his ability to address the court in the postconviction setting while appointed counsel, to determine whether he was denied due process and access to the court when the state court refused to hear his I.A.T.C. claims, despite its finding that postconviction counsel rendered effective assistance of counsel. Ultimately, Petitioner seeks the ability to have his meritorious I.A.T.C. claims considered on the merits.

2. The Court should grant certiorari to decide whether a state court should address the merits of a motion requesting habeas relief before finding that a procedural bar applies.

SUPPORTING FACTS

It has long been held that “‘in appropriate cases,’ the principles of comity and finality that inform the concepts of cause and prejudice ‘must yield to the imperative of correcting a fundamentally unjust incarceration,’” *See Murray v. Carrier*, 477 U.S. 478, 495, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)(quoting *Engle v. Isaac*, 456 U.S. 107, 135, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)). Further, the law of the case doctrine “does not apply if the court is ‘convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.’” *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382,

75 L. Ed. 2d 318 (1983). Florida courts have consistently held to this concept, even recognizing that ineffective assistance of counsel can result in a manifest injustice requiring the application of habeas relief. *See, Hutchinson v. State*, 29 So. 3d 1228, 1230 (Fla. 3d DCA 2010)(“Although the two year time limitation for filing a motion pursuant to rule 3.850 has long passed, the defendant may not be without remedy as our decision is without prejudice to the defendant's right to seek habeas corpus relief if he can establish a manifest injustice); *Deras v. State*, 54 So.3d 1023, 1024 (Fla. 3rd DCA 2011) (holding that Deras was entitled to an evidentiary hearing on an *untimely* rule 3.850 motion because his assertion that the facts were insufficient to support his conviction indicated that he received ineffective assistance of counsel in the plea proceeding, requiring the application of the manifest injustice exception to excuse any procedural bar); *also see, Baker v. State*, 878 So.2d 1236, 1246 (Fla. 2004), and *State v. McBride*, 848 So.2d 287, 291-292 (Fla.2003)(both recognizing a court's duty to grant relief despite procedural bars when a manifest injustice may otherwise occur).

In the motion that provoked the current petition filed in the lower court, Petitioner presented a claim alleging that his counsel never relayed a 12-year plea deal that was offered by the State, and asserted that he would have taken it had he been properly advised (Ground 10); a claim pointing out the denial of effective assistance from postconviction counsel, Tom Copeland, and the court's ability to rule on the claims Petitioner attempted to present while represented by Mr. Copeland (Ground 7); a claim reflecting that a sexual assault kit favorable to the defense was not presented, and even unavailable at the time trial (lost or destroyed)(Ground 2); several claims showing gross misconduct by the prosecutor without objection (Ground 3, 4, 5, and 6). Most importantly, Petitioner argued that trial counsel's ineffectiveness allowed for a conviction based on purely circumstantial evidence, when proper investigation and presentation of *any* of the available contradictory and favorable evidence would have

resulted in an acquittal (Ground 8) (Appendix-F).

However, the state court entered an order denying relief without regard to the possibility of habeas relief (Appendix-C). Actually, the court boldly found that habeas corpus relief could not be applied to the motion filed by Petitioner simply because it was untimely (Appendix-C at 1-2), and that finding was upheld by the First District Court of Appeal (Appendix-A). Although Petitioner appealed to the First District and asserted that the due process demanded that the claims be addressed before being simply dismissed as untimely, the Court merely affirmed the lower court's denial. Petitioner submits that the state court's refusal to look to the merits of the underlying claims before applying a procedural bar results in a denial of due process and is contrary to this Court's long-held precedent.

Accordingly, Petitioner prays this Court will grant certiorari to address the necessity to review the body of the claim before finding that the claim is forever barred without regard to the resulting miscarriage of justice. As it stands, the court that reviewed the underlying petition determined there was no need to determine whether their denial would result in a manifest injustice.

CONCLUSION

For the foregoing reasons, this Court should grant the Writ of Certiorari in this case, appoint counsel for Petitioner to represent him, and order full briefing.

Respectfully submitted,


Roosevelt Johnson