

No. 20-5025

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

EDDIE AMOS — PETITIONER
(Your Name)



vs.
TOMMY BOWEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals (11th Circuit)
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Eddie Amos # 888637

(Your Name)

Dodge State Prison

(Address)

Chester, GA 31012-0276

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

(Ground One): Is a criminal defendant, who is also a previously convicted felon, denied a fair trial and the effective assistance of counsel when defense counsel fails to request that the jurors be charged on the affirmative defense of self-defense as it relates to a convicted felon being in temporary possession of a firearm for the purpose of defending himself from imminent peril of great bodily harm and/or death?

(Ground Two): Is a criminal defendant denied a fair trial and the effective assistance of counsel where defense counsel advises and allows said defendant to plead guilty to the unlawful possession of a firearm by a convicted felon prior to that defendant standing trial on a felony murder charge which was predicated on the very same unlawful possession of a firearm by a convicted felon charge that the defendant pled guilty to?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 30, 2020.

No petition for rehearing was timely filed in my case.

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 28 U. S. C. § 1254(1).

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. Amendment 6.

STATEMENT OF THE CASE

Petitioner was indicted by a Cobb County grand jury on November 19, 2009, for malice murder, felony murder based on aggravated assault, aggravated assault, felony murder based on possession of a firearm by a convicted felon, and possession of a firearm by a convicted felon.

Petitioner entered a guilty plea to the charge of possession of a firearm by a convicted felon.

At a jury trial in May 2011,

Petitioner was found guilty of voluntary manslaughter as a lesser included offense of malice murder, felony murder based on aggravated assault, aggravated assault, and felony murder based on possession of a firearm by a convicted felon.

Petitioner was sentenced to life imprisonment for felony

murder based on possession of a firearm by a convicted felon, and the remaining convictions merged into that felony murder conviction.

On direct appeal, Petitioner enumerated as error that the trial court erred in sentencing him to life imprisonment, because the plain language of the statute defining voluntary manslaughter directs that the felony murder counts and other offenses merge into voluntary manslaughter. The Supreme Court of Georgia found that this claim lacked merit and affirmed Petitioner's conviction and sentence on October 5, 2015. *Amos v. State*, 297 Ga. 892, 778 S.E.2d 203 (2015).

Petitioner was represented at trial by attorney Jimmy Berry, and on direct appeal by attorney Mitch Durham.

Petitioner filed a state habeas corpus petition on October 13, 2016, challenging this conviction, and raised two grounds. An evidentiary hearing was held on December 13, 2016; the state habeas court denied relief in a final order entered on June 29, 2017. Petitioner filed an application for a certificate of probable cause to appeal, which the Georgia Supreme Court denied on August 2, 2018.

Petitioner filed this federal petition on September 7, 2018, in which he challenges the same Cobb County conviction.

The United States Magistrate Judge filed a Final Report and Recommendation on June 19, 2019, recommending that Petitioner be denied federal habeas corpus relief. [Appendix C]. Petitioner immediately filed his formal objections to the Magistrate's Report and Recommendation. Thereafter, on August 30, 2019, the U.S. District Court adopted the Magistrate Judge's Report and Recommendation. [Appendix B]. The U.S. District Court declined to grant a certificate of appealability (COA) to the petitioner. Thus, the petitioner timely pursued a COA in the United States Court of Appeals for the Eleventh Circuit. That court, on March 30, 2020, also denied a certificate of appealability to Petitioner. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

Because of the staggering and highly increasing number of convicted felons returning to society from prison, there needs to be some clear legal guidelines set by this Court, outlining the factual circumstances when a convicted felon, who is not allowed a gun, can legally possess a firearm to defend himself.

GROUND ONE: Denial of Effective Assistance of Counsel on Appeal.

SUPPORTING LAW AND FACTS: Petitioner's appellate counsel rendered ineffective assistance to Petitioner by failing to raise on motion for new trial, and on appeal, the ineffectiveness of Petitioner's trial attorney relative to said attorney's failure to request the following jury charge: "When a felon is in imminent peril of great bodily harm or reasonably believes himself to be in such danger, and with preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it continues does not violate the statutory prohibition against possession of a firearm by a convicted felon." Little v. State, 195 Ga. App. 130, 392 S.E.2d 896 (1990).

The aforesaid supplemental jury charge, which has been in existence and recognized by the appellate courts of this State since 1990, is a correct statement of the law and was adjusted to the evidence in Petitioner's case. Not only was this supplemental jury charge fully applicable to Petitioner's case, but it was absolutely necessary that such a charge be given to Petitioner's jurors. Little v. State, 195 Ga. App. 130, 392 S.E.2d 896 (1990).

Jury instructions are the lamp to guide the jury's feet in its search for a legal verdict of guilty or not guilty with respect to the criminal defendant being tried. Bishop v. State, 271 Ga. 291, 519 S.E.2d 206 (1999). Absent the aforesaid supplemental jury charge being given to Petitioner's jury, the jury had no alternative but to accept that there exists no legal justification for a convicted felon, such as Petitioner, to ever be in possession of a firearm. Said charge should have been given in conjunction with the general charge on justification, which charge was given. (T. vol. III, p. 190) and (T. vol. IV, p. 93). The general charge on justification, standing alone, however, was totally inadequate to protect Petitioner's right to a fair trial, as the legal principle contained in the un-requested supplemental charge was not covered in the court's general charge on justification. Benham v. State, 277 Ga. 516, 591 S.E.2d 824 (2004). The general charge on justification is not a one-size-fits-all justification instruction. The un-requested supplemental charge would have informed Petitioner's jurors that the justification defense would be allowable and lawful under a felony murder charge with the underlying offense of Possession of a Firearm By a Convicted Felon. Little v. State, 195 Ga. App. 130, 392 S.E.2d 896 (1990). The general charge on justification given at Petitioner's trial did not inform the jury that the justification defense would be allowable and lawful under a felony murder charge with the underlying offense of Possession of a Firearm By a Convicted Felon.

As justification was Petitioner's sole defense at trial, it is highly probable that the jury would have reached a different verdict in this case had the jury been charged thusly: "When a felon is in imminent peril of great bodily harm or reasonably believes himself to be in such danger, and with preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it continues does not violate the statutory prohibition against possession of a firearm by a convicted felon." Little v. State, 195 Ga. App. 130, 392 S.E.2d 896 (1990). Only an incompetent trial attorney would fail to request a supplemental jury charge that is absolutely necessary in order for the jury to consider his client's sole defense. State v. Crapp, 317 Ga. App. 744, 732 S.E.2d 806 (2012); Ingram v. State, 317 Ga. App. 606, 732 S.E.2d 456 (2012). As it stands, Petitioner's jury was given only the general charge on justification, a charge which did not inform the jury that the petitioner's justification defense (his sole defense) would be allowable and lawful under a felony murder charge with the underlying offense of Possession of a Firearm By a Convicted Felon. Little v. State, 195 Ga. App. 130, 392 S.E.2d 896 (1990). The petitioner's trial

attorney was, therefore, ineffective in not requesting the aforesaid supplemental jury charge. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

No reasonably effective appellate attorney would have failed to assert the above-described issue of trial counsel's ineffectiveness on motion for new trial and appeal. *Sloan v. Sanders*, 271 Ga. 299, 519 S.E.2d 219 (1999). Had this ineffectiveness issue been so raised, there exists a reasonable probability that the outcome of Petitioner's appeal would have been different. This is so because the evidence adduced against Petitioner at trial was not overwhelming and, also, there was ample evidence presented by both the prosecution and the defense which supported Petitioner's sole defense of justification. But for the absence of the aforesaid supplemental jury charge being given to Petitioner's jury, by virtue of the fact that trial counsel for Petitioner failed to request the charge, it is highly probable that the jury would have acquitted Petitioner of felony murder, as the jury would have been informed that the justification defense is allowable and lawful under a felony murder charge with the underlying offense of Possession of a Firearm By a Convicted Felon. *Little v. State*, 195 Ga. App. 130, 392 S.E.2d 896 (1990). Inexplicably, appellate counsel omitted this significant and obvious ineffectiveness of trial counsel issue while pursuing issues which were clearly and significantly weaker. *Battles v. Chapman*, 269 Ga. 702, 506 S.E.2d 838 (1998).

Petitioner has herein made out a Sixth Amendment ineffectiveness of appellate counsel claim against attorney Mitch Durham for his failure to raise on motion for new trial, and on appeal, the ineffectiveness of the petitioner's trial counsel relative to trial counsel's failure to request that Petitioner's jury be charged thusly: "When a felon is in imminent peril of great bodily harm or reasonably believes himself to be in such danger, and with preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it continues does not violate the statutory prohibition against possession of a firearm by a convicted felon." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

GROUND TWO: Denial of Effective Assistance of Counsel on Appeal.

SUPPORTING LAW AND FACTS: Petitioner's appellate counsel rendered ineffective assistance to Petitioner by failing to raise on motion for new trial, and on appeal, the ineffectiveness of Petitioner's trial attorney relative to said attorney's advising and allowing Petitioner to plead guilty to unlawful possession of a firearm by a convicted felon prior to Petitioner standing trial on the charge of felony murder--a charge which was predicated on the very same unlawful possession of a firearm by a convicted felon (count 5).

Petitioner stood trial for the offense of felony murder, and was subsequently found guilty by a jury of same. The felony murder count (count 4) was predicated on the underlying felony of unlawful possession of a firearm by a convicted felon (count 5). Before trial, however, Petitioner's trial attorney advised and allowed Petitioner to plead guilty to unlawful possession of a firearm by a convicted felon (count 5). Petitioner was deprived of his entire defense of justification when he pled guilty to count 5 of his indictment, unlawful possession of a firearm by a convicted felon. Said trial attorney should have known that by pleading guilty to count 5 of the indictment, Petitioner was waiving any and all defenses, known and unknown, to the offense of unlawful possession of a firearm by a convicted felon (count 5). *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602 (1973). Wherefore, the jury in its consideration of Petitioner's felony murder count (count 4), they had no alternative but to accept that Petitioner was in UNLAWFUL possession of a firearm by a convicted felon (count 5). Conversely, had the petitioner not pled guilty to count 5, the jury in its consideration of Petitioner's felony murder count (count 4), they would have had the option of finding that Petitioner was in LAWFUL possession of a firearm by a convicted felon (count 5); thus, authorizing and mandating Petitioner's acquittal on the felony murder count (count 4).

No reasonably effective appellate attorney would have failed to assert the above issue of trial counsel's ineffectiveness on motion for new trial and appeal. *Sloan v. Sanders*, 271 Ga. 299, 519 S.E.2d 219 (1999). Had this ineffectiveness issue been so raised, there exists a reasonable probability that the outcome of Petitioner's appeal would have been different. This is so because, but for trial counsel's ineffectiveness in advising and allowing Petitioner to plead guilty to count 5 of his indictment, Petitioner would have pleaded not guilty and insisted on having a jury trial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985). In summation, trial counsel advised and allowed Petitioner to plead guilty to count 5 of the indictment absent ever informing Petitioner that by so pleading, Petitioner would be fully relieving

the State of its burden of proof with respect to count 4 of the indictment, felony murder. In this regard, trial counsel ceased serving in the capacity of defense counsel for the petitioner and began, instead, serving in the capacity of the prosecution. *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). Inexplicably, appellate counsel omitted this significant and obvious ineffectiveness of trial counsel issue while pursuing issues which were clearly and significantly weaker. *Battles v. Chapman*, 269 Ga. 702, 506 S.E.2d 838 (1998).

Petitioner has herein made out a Sixth Amendment ineffectiveness of appellate counsel claim against attorney Mitch Durham for his failure to raise on motion for new trial, and on appeal, the ineffectiveness of Petitioner's trial counsel relative to trial counsel's advising and allowing Petitioner to plead guilty to unlawful possession of a firearm by a convicted felon prior to the petitioner standing trial on the charge of felony murder--a charge which was predicated on the very same unlawful possession of a firearm by a convicted felon (count 5). *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eddie Amos

Date: June 24, 2020