No. 20-5898

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ROY USSERY — PETITIONER
(Your Name)

vs.

Richard Hightower, et. al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Court of Appeals-First District of Texas
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Roy Ussery
(Your Name)

9601 Spur 591
(Address)

Amarillo Texas 79107
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1) When giving weight to the prejudice factor in a 'Barker' test & the complained of prejudice is the death of a DEFENSIVE witness, but the Court erroneously considers the witness to be a witness for the State (yet by the State's own admission and by the record it is shown the witness WAS a witness for the defense) was a fair ruling reached based on the factors of Barker vs. Wingo when the most important fact to be considered (if the deceased was a witness for the defense or prosecution) concerning the prejudice factor was actually contrary to the facts presented in the case?

2) Where Appellate Counsel is shown to be ineffective and likely the cause of the Court to consider the deceased as a witness for the State (because she proffered as fact, in error, that the witness was a witness for the State) and the record shows this to be in error, should a COA be granted Appellant so that he may FAIRLY litigate this issue by way of a new Direct Appeal if the Court does not wish to re-perform the Barker test?

3) Should the State be given ANY favorable consideration in the prejudice factor because they chose to abandon extraneous offense evidence related to this deceased witness when the State did not express its intent to use the extraneous offense evidence until AFTER THE DEATH OF THE WITNESS and more than 3 years after charging appellant witht the instant offense AND when appellant presented the witness and notarized statement concerning her potential testimony prior to even being formally charged?

4) Where the record will show that the absence of the deceased witness directly affected appellant's ab lity to testify, is definitive prejudice shown which would affect the prejudice factor in a Barker test?

5) Where Grand Jury Packet originally submitted by 1st Defense Counsel Joe Ray Rodriguez contained a defensive theory which shows the deceased witnesses testimony was necessary to present this theory, is prejudice not shown on the death of that witness and the inability of appellant to present a defensive theory?

6) Where the assertion of one's right to a speedy trial is at issue and Appellant filed 13 pro se motions for speedy trial, 2 writ of habeas corpus concerning speedy trial, one writ of mandamus seeking a higher court to force the lower court to trial, and several letters to the Judge concerning speedy trial; but the weight given this factor by the Court in its review is downplayed considerably due to the failure of TRIAL COUNSEL to assert the claim, would this finding be contrary to the Federal Court's determination of one's assertion of this right? considering appellant himself asserted this right time and again? and is this contrary to the progeny of Barker?

7) Where previous question(s) stand to reason that the prejudice factor or any other factor of the Barker test should be re-considered in this case, and no one factor of the Barker test should be considered singularly nor be given the weight of the test all its own without due consideration of the other factors because the weight in one factor can affect any of the other three.would it not be necessary for the Court to perform the Barker test all over again anew?

LIST OF PARTIES

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

[xx] 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:

Justice Richard Hightower, Court of Appeals-First District of Texas

Justice Kelly. Court of Appeals-First District of Texas

Justice Countiss, Court of Appeals-First District of Texas

RELATED CASES

The State of Texas vs. Roy Ussery, 338th District Court Harris County, TX
Judgement entered June 15, 2018 Case No. 1459846

Roy Eugene Usery vs. The State of Texas, In the Court of Appeals for the First District of Texas. Judgement entered November 26, 2019
Case No. 01-18-00540-CR

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TABLE OF AUTHORITIES CITED

CASES

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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 _____ 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 _____ to the petition and is

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

x[x] 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,
[x] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Court of Appeals-First District of Texas court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[x] 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 _____.

[ ] 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).

[XX] For cases from **state courts:**

The date on which the highest state court decided my case was 03-25-2020. A copy of that decision appears at Appendix B.

[XX] A timely petition for rehearing was thereafter denied on the following date: 4-07-2020 / 6-24-2020, and a copy of the order denying rehearing appears at Appendix C/D (reference included statements).

[XX] An extension of time to file the petition for a writ of certiorari was granted to and including 09-20-2020 (date) on 06-12-2020??? (date) in Application No. ___A_____. not assigned(applicant unsure)

Please reference letter pleading with Court for filing delays due to the covid pandemic and related issues at unit of confinement.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amendment 6

Tex. Const. Art. 1 §§10

Tex. Code of Crim. Proc. Ann. Art. 1.05

STATEMENT OF THE CASE

Appellant plead not guilty to Super Aggravated Sexual Assault of a Child Under 6 years of Age, maintaining his innocence throughout the trial.

Immediately after being charged and prior to indictment Appellant employed Joe Ray Rodriguez, attorney, who obtained a written, notarized statement from a witness who was the alleged victim (whom recanted) in a prior adjudication of the appellant as a juvenile. The statement and a defensive theory proffered by original counseln(intended for the grand jury) described how this witness' testimony was necessary to rebuff the accusation in the instant case, and the statement highlighted how that particular witness' testimony would allow the then defendant to testify with impunity. However, it would be 3-1/2yrs before the defendant was brought to trial. The witness in question died less than 4 months prior to trial. It was not until after the death of the witness that the State (by own admission) 1st implored the Court to go to trial,immediately, and subsequently the State for the first time filed a notice of intent to use extraneous offense evidence regarding this witness when it had never expressed this intent in any of the 3 yrs plus prior.

Mr. Rodriguex left Appellant's Employment pre-indictment (but not before submitting grand jury packetto State--which packet never saw grand jury), and Mr. Cornelius was appointed and HE had to obtain the grand jury packet from the State. Confusion was created because of this because it would be easy to assume the State provided the deceased witness' statemtent to the defense. but this is incorrect. Mr. Cornelius filed a motion to dismiss for denial of speedy trl on the grounds of prejudice caused by the death of the witness and undue delay caused by the State. The trial court found in favor of the defendant in the first three Barker factors but found in favor of the State in the prejudice factor. The Court of Appeals differed slightly in the first three factors of Barker and also found no prejudice, but in its conclusions it expressed that it considered the witness to be a witness for the State, and that single conclusion, drawn in error, was contrary to State's own admissions at trial and the record otherwise. It should be noted that the defendant himself always maintained a desire to go to trial immediately and he asserted his right by submitting multiple pro se filings on the basis of speedy trial but the Court of Appeals neglected to consider these filings as the assertion of this right because trial counsel failed to assert the right prior to filing the mentioned motion to dismiss for denial of speedy trial.

REASONS FOR GRANTING THE PETITION

1) The death of a witness cannot be remedied and where the testimony of a deceased witness could impact the verdict of a jury trial, support a defensive theory, and definitively impact a defendant's decision to testify or not to testify based on the availability of the witness, then absolute prejudice can be shown;

2) Where prejudice exists and there is undue delay in bringing a defendant to trial and the complained of prejudice is caused by that delay, then a persons right to a speedy trial has been threatened and denial can be eatablished if;

3) Delay was not caused by the defendant and any length in the delay can be attributed to the State wherein which time a trial could have taken place: and 4) So long as the defendnat asserted his right to a speedy trial and expressed desire to go to trial prior to and until the complained of prejudice occurred.

All of the above pre-requisites are met in the instant case which is why the decision reached in the opinion of the First District Court of Appeals is contrary to Federal Law and the progeny of Barker.

The deceased witness provided a statement of recantation of a juvenile adjudication, a recantation that had also been made years before to family (supported by State's Brady disclosures). The testimony of this witness would have been important for Appellant in that he could testify with impunity regarding the juvenile accusation if in the event the State chose to question him about it. The real value in the witness' testimony though was that the defense wanted to out the issue in front of a jury to begin with to show and prove its theory that the complainant and mother in the instant case were accusing the defendant because of this existing prior adjudication which the mother knew about, and not actually because the accusation was committed by the defendant. Without the witness being available, the defense was unable to propose that he was being accused because he was previously labeled a sex offender BUT that also the compainant in that case had not only recanted, but was also there to testify on behalf of the defendant. At the motion to dismiss hearing, the State argued there would be no prejudice to the defense because it would withdraw its intent to use extraneous offense evidence--but the State never offered notice of intent to use that evidence until after the witness had already died and it is incomprehensible how retracting that was not made known until after death (prejudice) had already occurred and somehow still help the state achieve its burden of proving no prejudice to the defense. It seems that notice of intent was more intended as a tool for the purpose of showing no prejudice because the State had 3-1/2yrs to give this notice, but chose to wait until the death of the witness to proffer it. Yet still required that the defendant acknowledge the conviction if he were to get on the stand to testify.

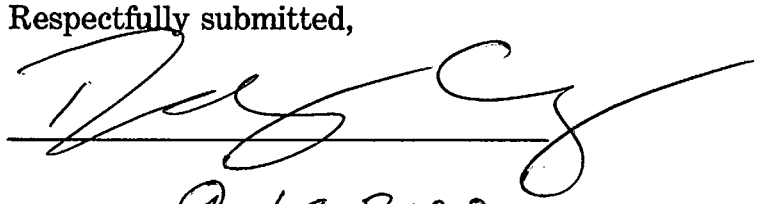
If anything, that shows bad faith intent. Furthermore, when a defendant consistently asks for a speedy trial with 13 motions, 2 habeas writs, 1 writ of mandamus, and several letters to the Judge and his own attorney, but weight in this factor is somehow diminished due to the failure of his attorney to himself assert the right is contrary to Barker and ensuing progeny on the issue of the assertion of one's right. It is the DEFENDANT who asserts this right either by and through his attorney or of his own accord. The right is not that of counsel and therefore cannot be forfieted by his inaction when actions ARE taken by defendant. The greater public is not being protected under these fundamental rights guaranteed by the constitution when the findings of reviewing courts are so contrary to the rights themselves and in the context for which the protections were precisely intended. Appellant asserted his right to a speedy trial, the length of the delay was excessive and the delay was WHOLY on the part of the State and Court, and the delay resulted in prejudice to the defendant upon the death and accompanying unavailability of this witness.

CONCLUSION

A proper Barker test should be performed to determine if the appellant's right to a speedy trial was denied. If it is found the fault of appellate counsel for the facts the court considered in error then a COA should be granted. For these reasons and any reasons the Court deems necessary,

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 9-19-2020