20-5963

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Dan Murray — PETITIONER
(Your Name)

vs.

Bobby Lumpkin, Dir. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fifth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Dan Murray TDCJ#1468676
(Your Name)

French M. Robertson, 12071 F.M. 3522
(Address)

Abilene Tx. 79601
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1) If there is a set of plea agreements taken at the same time and the court of appeals reverses a part of the appealed agreeemnt does this,
A) Start the AEDPA time for the entire agreement over or
B) Start the AEDPA time at the time at the end of the appealed portion or
C) Allow the indigent, pro se lititgant to appeal under AEDPA the only the portion that was reversed?
2) When should the pro se, litigant calculate the time as beginning?
3) Does the HIPAA law prevent court appointed attorneys from handing over defendant medical records to the prosecution without their permission?
4) Was trial counsel ineffective for recommending a "rehabilitation" facility for a psychological opinion without doing an investigation of the facility?
5) Trial counsel admitted that he had four years to prepare for trial, but was he ineffective for failing to attempt to exclude the report made by the psychological facility?

LIST OF PARTIES

[X] 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:

RELATED CASES

Stricland v. Washington 104 S.Ct. 2039 (1984)

Hartfield v. Thaler 2012 U.S. App. Lexis 24480

Hill v. Lockhart 474 U.S. 52, 58-59 (1985)

United States v. Munoz 408 F.3d 222, 226 (5th Cir. 2005)

United States v. Somner 127 F.3d 405, 408 (5th Cir. 2997)

United States v. Cronic 104 S.Ct. 2039, 2046 (1984)

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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

[x] 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,
[X] is unpublished.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.

[ ] 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

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 7-20-20.

[X] 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

1) Sixth Amendment to the U.S. Constitution

2) Fifth Amendment to the U.S. Constitution

3) Fourteenth Amendment to the U.S. Constitution

4) Article 2 of the U.S. Constitution "Contract Clause"

5) AEDPA 28 USC §2244/ Chapter 28 2261-2266

6) Certified Question of Constitutional Law

STATEMENT OF THE CASE

Murray was given a plea agreement, one section was appealed the other was not. The A.G. persuaded the court that AEDPA, had to attach from the initial unappealed section. Murray argues that to do so was a waste of judicial resources and that both sections should be heard because they both apply to one plea agreement and to make him file writs one at a time for each section would not make sense.

Second, Murray asks this court to waive the AEDPA and to hear a request for a certified question of law which has never been resolved by any court. Specifically, whether or not the trial counsel can violate HIPPA and provide the state with a copy of a a medical record to wit a psychological report.

REASONS FOR GRANTING THE PETITION

This is long because of the separation of two charges from one plea agreement. Murray asks the court to bear with him.

Murray was indicted for three crimes on two indictments. His attorney lead him to believe that there was no hope for trial and the sole way to prevent conviction with stacked life sentences was to accept a plea agreement. Which Murray did, but the trial court in it's haste sentenced him to thirty (30) years for a second degree felony. This of course, required a reversal on appeal as it was outside the range of sentencing the maximum being 20 years. This separated the appeal timetables. Murray argues this is "extra-ordinary circumstances" and as such the court should toll the time for review regarding the circumstances for application. Additionally, there is a constitutional question of law that merits review, which has also in the past justified tolling.

Applicant Murray currently confined to the TDCJ pursuant to conviction for possession of child pornography in case number 366-80248-05 and indecency with a child in case no. 366-80173-06 in the 366th Judicial District Court of Collin County Texas. Both the A.G. and Murray agree that the state remedies are exhausted.

Of course, the devil is in the details. Trial court case no. W366-80173-06; the convictions for aggravated sexual assault and possession of pornography were affirmed by the Court of Appeals in both cases (numbers PD-0165-11 and PD-0166-11) but were refused on September 21, 2011. Proper and timely motions for rehearing were denied. The original application for a writ of habeas

corpus attacking the sexual assault and possession of pornography was filed in state court on February 5th 2013 (CCA no. Wr-71, 258,203). An amened application was filed on April 2nd 2015)

Trial court case no. W366-80248-05; where the court sentenced Murray in the indecency with a child cause to confinement for twenty years. An appeal was prosecuted and the conviction was ultimately affirmed Murray v. State, no. 05-12-00922-CR (Tex.App. Dallas Jan. 29th 2014). On April 2nd 2015, a habeas corpus application Wr-71, 258-04) was filed challenging the conviction for indecency with a child.

habeas corpus proceedings; The trial court did not hold a hearing on either writ application. On May 12th 2015, the trial court entered it's finding of fact and conclusions of law and recommended that relief be denied in both cases. On January 6th 2016 the Court of Criminal Appeals denied relief without written order in both cases. Accordingly Murray has exhausted all available state remedies.

Trial court case number W366-80173-06; Applicant Murray's timely motion for rehearing on his petition for discreationary review was overruled by the Court of Criminal Appeals on November 16th 2011 meaning the 1-year time limit imposed by the AEDPA began on Feb. 14th 2012. The original habeas application was filed in State District court on February 5th, 2013 and was finally denied on January 6th 2016. The habeas corpus application in the trial court case number W366-80173-06 is timely if filed on or before January 14th 2016.

Trial court case number W366-80248-05; Murray's conviction was affirmed on January 29th 2014 meaning the 1-year time limit imposed by the AEDPA began on April 29th, 2014. The original habeas corpus application was filed in state district court on April 2nd, 2015 and finally denied on January 6th, 2016. The habeas corpus application in trial court case number W366-80248-05 is timely if filed on or before February 2nd, 2016.

The U.S.D.C. Magistrates Report held Murray was not entitled to file a federal habeas application; Document 19 page 6, page ID #2927 states in part "Petitioner is mistaken. Because Petitioner did not file a PDR in the indecency conviction, the conviction became final when the time for filing a PDR expired. Roberts v. Cockrell, 319 F.3d 690 n. 24 (5th Cir. 2003)." Moreso, the Hon. Magistrate Judge made a specific finding that eliminated Murray's ability to attack the indency charge. "...he did not challenge the indencency with a child conviction in the first application..." Consequently, the petition is time barred in the absence of any equitable tolling provision."

Murray responds that the Magistrate Judge has miscalculated as the AEDPA deadline was met with extra time left over. According to the initial filing the fact is that there was almost continually an effort by Murray's attorneys to bring the state habeas to court. Murray asserts that he is not challenging only a judgment of conviction but more importantly a PLEA AGREEMENT and in this case it is the same plea agreement that is memorialized under one conviction but two separate cause numbers. His base argument is simple due process should not allow him to be penalized

because the Judge in the trial court did not realize that his second degree falony only carried a maximum sentence of only 20 years.

Murry asked that the USDC and the Honorable Fifth Circuit Court of Appeals address the issue as a "certified question of Constitutional Law". In the case of Hartfield v. Thaler, 2012 U.S. App. Lexis 24480 the court agreed taht there should be a waiver of the AEDPA in order to examine the question of whether or not Mr. Hartfield's right to a speedy trial was violated under the U.S. Constitution. The crucial question before the court in that case was "was there a valid judgment of as tate court to which one could consider Hartfield a "person in custody by a state court"?" While the facts differ and the question can be framed as should a citizen be required to attack a plea agreement on habeas when that same plea agreement is being attacked on appeal? Murray argues that this issue merits review under tha logic that most pro se petitioners would not consider and seemingly violates many state rules moreso it denies adjustments and issues to the sentence that may need to be attacked in a later habeas and raises questions of judicial economy.

By turning to 17 Fed. Prac. & Proc. Juris 2nd §4038 in reference to a pocket part/section 1254(3) the work gives the basics of how to request a certified question of constitutional law. The first part of this analysis to frame the question of howw the issues impact theU.S. Constitution. The answer is that there are issues with the due process and equal protection clause of the Bill of Rights. Becasue, the initial appeal attacked the sentence that was a part of the single plea agreement and when that plea was reversed in order to allow for a complete resent-

encing phase of the conviction. Not merely a "reformation" of the sentence but rather a new plea agreement entirly. This would have required a new plea agreement and in fact there was a new opportunity to be heard regarding the issues before the court. During that hearing the court made it clear that this was an amendment to the original agreement and that I could plead not guilty and proceed to trial but counsel informed me that the sole way that I could ever leave prison was to plead guilty to the charge. Murray argues that this amendment to the plea agreement changed the agreement and made the "finality" aspect begin from the date of the re-pleading.

The second part of this analysis is to ask the question of how this would impact other convictions. First, Murray points out that there are dozens of times the courts have held that the plea is reversed for a new hearing and such will give federal courts a chance to rule upon the nature of these pleas. Second, according to Missouri v. Frye 132 S.Ct. 1399 (2012) "plea bargains have become so central to the criminal justice system that defense counsel have responsibilities to the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires for the critical stages." Going on to explain that 97% of all convictions are had by plea agreements. As such the question of "when" a plea agreement begins and ends are important to be addressed by the Supreme Court.

In this case Murray asserts that there are two points that merit review in this context. The first point is that there is a question of privacy and the violation of law prior to the plea agreement. Specifically, whether it was proper for Murray's

trial counsel to provide to the District Attorney a copy of the psychological report made at the Sante facility, in violation of the HIPPA medical privacy law.

However, to properly understand these issues first we must review the allegations of ineffective assistance of counsel. FACTS; Following the motion to supress evidence within the D.A.'s possession consisting of the records of Sante', a treatment facility for behavioral problems related to drug and alcohol addiction, which trial counsel had recommended Murray attend to act as mitigation for the punishment phase of the trial. This report was obtained by the D.A. through a request from that facility. But the very existence of same would not have been even a fact if the trial counsel had not informed the D.A. of same. Further this is an undisputed fact that trial counsel Hardin informed the D.A. about the existence of the Sante' report. See Motion for New Trial RR I, prage 34, line 1-6. The question one should address is WHY??? What possible strategy could compel an attorney to provide the state with incriminating evidence during plea bargain negotiations? As such we should consider; GROUND ONE: Trial counsel recommended Murray enroll in the program at Sante without doing any real investigation into the facility or the program offered by the facility.

Under the now familiar test of Strickland v. Washington, 104 S.Ct. 2039 (1984) it is well established that a criminal defendant should be afforded effective assistance of counsel. Frye ibid extends that idea to the pre-trial plea bargain phase.

The issue under Strickland, ibid is frequently the question of whether or not "prejudice" was shown. "The benchmark for

judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland 2057 ibid. The U.S.D.C. Magistrate Judge's finding specifically stated there was no prejudice to any of the errors. In effect, the Honorable A.G. made no argument that most of the actions of trial counsel fell below the level of ocmpetent counsel. The essence was that this did not result in any unjust outcome. Here the argument presented to the court and the Hon. Court of Criminal Appeals was simply the notion that trial counsel Hardin did not investigate the "treatment" at the Sante' behavior facility. As a fact this was almost undisputed. The D.A. simply argues and the A.G. echos the notion of "how did it change the outcome?" Murray will reply at the end of the discussion of the errors. But for clairity, Murray argued that the Hon. John Hardin was simply not trained nor did he have a background in psychology to determine if the Sante' facility was a proper place for Murray to be "treated" or assessed for "treatment". Especially, considering Murray had no prior criminal history beyond a traffic ticket. Further, trial counsel had Murray seek treatment for alcholism when he entered the facility Murray informed them that he had not had a drink in months.
GROUND TWO: Trial counsel revealed the fact of Murray's "treatment" at Sante' without gaining Murray's permission. And without any agreement that could be construed as agreement for the use of that information in violation of HIPPA.

Again the Motion for New Trial confirmed this fact in a

live evidentiary hearing where habeas attorney Jasuta questioned Hardin about the use of the information. See MNT RR 25-26.

Mr. Hardin was by his own admission a member of the Texas Criminal Defense Lawyers Association, an experianced attorney with many years of practice, an ex-Assistant District Attorney and had worked as an advocate for prosecution of sex offenders while in that office. See MNT PAGE 58, Doc 3-1 page 176-178.

Once the motion to suppress the Sante' report was denied, trial counsel Hardin went on to attempt to negotiate a plea agreement using the Sante' report to "mitigate" the sentence.

GROUND THREE: Trial counsel failed to arrange for Murray to be interviewed by a forensic psychologist in a timely manner. The fact is that trial counsel Hardin referred Murray to Sante' which was part of a "behaviour treatment facility" and not a psychologist or psychiatrist. However, prior to trial Murray hired Stephen Finstein a pshchologist who told him that Mr. Hardin was aware how long it took to prepare for trial and do a proper examination. As it was only two weeks he could not develope a proper diagnosis. As such the referral was made to late to be of any benefit. See Doc 3, exhibit 8 affidavit of Stephen Finstein. This was despite the fact that for 18 months Hardin was aware that the State had damaging information in terms of the Sante' report. The results finally conducted during the habeas investigation are overwhelmingly positive for Murray and demonstrate that he is a very low risk individual who has no chance of re-offending. Trial counsel recognized that the information in the Sante' report was not favorable but he did nothing. See Doc 3, exhibit 8 page 80.

GROUND FOUR: Trial counsel Hardin failed to properly prepare for trial, including failing to prepare to litigate the admissibility or exclusion of the Sante' reports. Continuing from the same notion as above Murray argues that not only was Hardin lacking in investigation but he was unconstitutional in his diligence. Specifically Hardin limited his investigation without justification in direct violation of Wiggins v. Smith, 128 S.Ct. 2527 (2003). See Headnote 7, "Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable on claim of ineffective assistance." Headnote 11, "Decision of counsel' not to expand their investigation of petitioners life history for mitigating evidence for penalty phase of petitioners murder trial beyond presentence investigation (PSI) report and department of social services records fell short of prevailing professional standards in capital cases as required to support claim of ineffective assistance; despite well defined norms which provided that investigation into mitigating evidence should have comprised efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." As such Murray claims a constitutional liberty interest in having the Finstein report which contradicted and argued against the idea that he was ineligible for probation.

GROUND FIVE: Trial counsel failed to investigate the disk drives on which the pornography was allegedly found. Murray

worked as a computer professional for Alcatel in programming and various hardware applications. As such Murray informed trial counsel Hardin that he did not put child pornography on any disk drive he owned and that he had bought several drives "used" and put them in a box. And, if they contained pornography it was a surprise to Murray. Hardin made no effort to examine these images and determine if they were pornography. Moreso, Murray argues that an investigation was necessary at the habeas level to confirm if Murray had ever accessed the images. All computers are time and date stamped as to when and how they were accessed. Murray's argument was simple if they had porn on them it was from before Murray opened them. Because child porn has a requirement when it is in the "electronic" form that it be accessed in order to be considered "possessed" by the person whose computer it appears on.

GROUND SIX: Trial counsel failed to object to the failure of the trial court to properly effectuate a plea bargain. Murray agreed to a plea bargain by which his three pleas of guilty would be handled unitarily. However, during the sentencing colloquy, the trial judge imposed only one sentence, causing the conviction in count 2 of the trial court case number 366-80173-06 to be served separately. Hardin made no objection to the trial court's actions see Doc 3, exhibit 7 page 6-7.

Murray argued in the Texas Court of Criminal Appeals that the trial court had sentenced him to an illegal sentence in the one second degree felony to which he had plead guilty, the indencency with a child. The state argued that his plea bargain calleed for

for a unitary thirty year sentence for the aggravated sexual assault and the indecency with a child case. Neither opinion prevailed as the court held that in reality the court simply failed to sentence Murray in the indecency with a child case properly.

A defendant is entitled to effective assistance of counsel when entering a guilty plea Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). It is true that any review of counsel's representation is highly deferential and reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation accord Strickland ibid. Nevertheless there is no presumption which can excuse counsel's lack of participation in this case. A guilty plea is not knowing or voluntary if made as a result of ineffective assistance of counsel, when it is established that, but for ocunsel's deficiencies the defendant would have pleaded not guilty and insisted on going to trial. Lockhart ibid page 60.

It is clear the plea bargain was breached as Murray did not recieve the sentence he was promised. "If a defendant pleads guilty as part of a plea agreeemnt, the government must strictly adhere to the terms and conditions of its promises in the agreement United States v. Munoz, 408 F.3d 222, 226 (5th Cir. 2005) And, "To assess whether a plea agreement has been violated, this court consideres "whether the government's conduct is consistent with the defendant's reasonable understanding of the agreement." See United States v. Somner, 127 F.3d 405, 408 (5th Cir. 1997)

Murray argues the failure to bring the breach, and violation

of the agreement to the attention of the trial court was prejudicial.

GROUND SEVEN; Trial counsel Hardin failed to obtain and present favorable character evidence which was easily obtainable. During his "investigation" Hardin completely failed to prepare for the eventuality that there would be a trial or that there would be a punishment phase of that trial. He did not seek character witnesses prior to trial nor were any character witnesses interviewed, prepared or presented at the punishment phase.

Character witnesses were available because Murray was a respected resident of Collin County who interacted with many people. There was available witnesses within the community who not only knew Murray's actions and trusted him, but who witnessed interactions between him and the Complainant during the times the Complainant alleged abuse. Sevaral of these witnesses could have crucial testimony relating to the notion of reduction of punishment. one Charlotte Ragan would have been especially helpful and was especially eager to do so, because she knew the Complainant very well interacted with her as her aunt throughout this time, knew her moods and could testify that the periods of time in question did not appear to be periods of great stress for the complainant. See affidavit.

To condlude this section Murray asks the court to read one part of the MNT transcripts where trial counsel was asked did Mr. Murray ever admit guilt to you? His reply was "NO". Yet trial counsel believed that the charge was indefeatable and could not be won. This merits review under the Certified QUestion of Law exceptions.

Where in our legal jurisprudence did this country lose the ability for an innocent man to defend himself. Even with a 60,000.oo attorney Murray was told over and over that he had no hope for a win agains the charge of sexual assault. If there is a single innocent man in prison when will this court or any other recognize that the system is in need of review and hear questions that impact the Constituion?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daniel Murray

Date: September 14, 2020