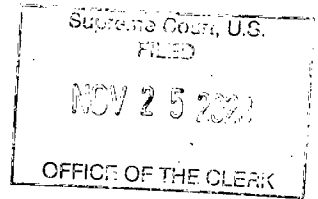


No. 20-6839

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

HENRY ALEXANDER TOWNSEND - PETITIONER

V.S.

SERI TAYLOR, ETAL. RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS 9TH CIRCUIT
PETITION FOR WRIT OF CERTIORARI

HENRY ALEXANDER TOWNSEND
SU# 14258900
777 STANTON BLVD
ONTARIO, OR. 97914

QUESTIONS PRESENTED

FIRST QUESTION PRESENTED:

WHEN IS AN INDIVIDUALS PROPERTY DISCOVERED BY POLICE AT A CRIME SCENE SUBJECT TO A WARRANTLESS SEARCH UNDER AN ABANDONE PROPERTY THEORY?

FIRST PROPOSED RULE OF LAW:

UNDER ARTICLE I SECTION 9, OF THE OREGON CONSTITUTION, AN INDIVIDUAL ABANDONS HIS PRIVACY INTEREST IN PERSONAL PROPERTY WHEN THE INDIVIDUALS STATEMENTS AND CONDUCT DEMONSTRATE HIS INTENT TO RELINQUISH ALL CONSTITUTIONALLY PROTECTED INTERESTS IN THE ARTICLES OF PROPERTY.

THE ACT OF LEAVING PROPERTY BEHIND IN AN ATTEMPT TO AVOID GOVERNMENTAL SCRUTINY OR POLICE CONTACT IS INSUFFICIENT BY ITSELF TO DEMONSTRATE AN INDIVIDUALS INTENT TO RELINQUISH ALL CONSTITUTIONALLY PROTECTED INTERESTS IN THE PROPERTY.

SECOND PROPOSED RULE OF LAW:

DID THE OFFICER WHO ARRESTED DEFENDANT HAVE PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED A CRIME?

SECOND PROPOSED RULE OF LAW:

OFFICERS ARRESTED DEFENDANT - PETITIONER A FEW MILES FROM THE CRIME SCENE AND APPROXIMATELY FOUR HOURS AFTER THE INCIDENT. THE STATE DID NOT PRESENT TESTIMONY FROM THE TWO OFFICERS WHO ACTUALLY ARRESTED DEFENDANT. WITHOUT THAT TESTIMONY, THE STATE WAS NOT ABLE TO SHOW THAT THE OFFICERS HAD SUBJECTIVE

OR OBJECTIVE PROBABLE CAUSE TO ARREST. THE LATER IDENTIFICATION OF DEFENDANT BY ANOTHER OFFICER DID NOT RETROACTIVELY VALIDATE THE ARREST.

THIRD QUESTION PRESENTED:

FOR PURPOSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 11 AND ARTICLE (VII AMENDED) SECTION 5 OF THE OREGON CONSTITUTION, IF THE STATE CHARGES AN INDIVIDUAL WITH FELONY MURDER BASED ON AN UNDERLYING FELONY BURGLARY, MUST THE STATE ALLEGE THE SPECIFIC CRIME THE DEFENDANT INTENDED TO COMMIT WHEN HE ENTERED THE PREMISES?

THIRD PROPOSED RULE OF LAW:

YES. TO SATISFY BOTH THE UNITED STATES AND OREGON CONSTITUTION THE ACCUSATORY INSTRUMENT MUST STATE THE CRIME DEFENDANT INTENDED TO COMMIT WHEN HE ENTERED THE PREMISES.

FOURTH QUESTION PRESENTED:

WHERE A HOME-INVASION ROBBERY RESULTS IN THE ASSAULT OF AN UNEXPECTED OCCUPANT OF THE HOME AND WHERE THERE IS NO EVIDENCE THAT DEFENDANT PLANNED FOR THE ASSAULT OR ASSESSED THE ASSAILANT WITH ASSAULTING THAT OCCUPANT, MUST THE COURT GRANT A JUDGMENT OF ACQUITTAL ON THE CHARGE OF ASSAULT?

FOURTH PROPOSED RULE OF LAW:

ONE OF THE THREE VICTIMS OF THE HOME INVASION ROBBERY WAS JULIE MCGARRY, A WOMAN WHO HAPPENED TO BE STAYING OVERNIGHT. A CO-DEFENDANT ASSAULTED

MCGARY WHILE DEMANDING DRUGS AND MONEY.
DEFENDANT DID NOT PARTICIPATE IN THAT
ASSAULT AND DID NOT AID THE CO-DEFENDANT.
THERE WAS INSUFFICIENT EVIDENCE THAT
DEFENDANT - PETITIONER AIDED AND ABETTED
HIS CO-DEFENDANT IN THE ASSAULT, AND THE
COURT SHOULD HAVE GRANTED A JUDGMENT OF
ACQUITTAL ON THAT COUNT.

FIFTH QUESTION PRESENTED:

WAS MR. TOWNSEND DENIED DUE PROCESS AS
GUARANTEED BY THE 14TH AMENDMENT WHEN THE
STATE FAILED TO CHARGE OR PROVE MR. TOWNSEND
WITH ADEQUATE NOTICE OF THE SPECIFIC THEORY -
INCLUDING MR. TOWNSEND'S INTENT FOR FELONY
MURDER WHICH WAS PREDICATE ON THE FELONY
BURGLARY, WITHOUT THE SPECIFIC CRIME THAT,
TOGETHER WITH THE TRESPASS ELEMENT, MR. TOWNSEND
INTENDED TO COMMIT WITHIN THE PREMISES, TO
PERMIT HIM TO ADEQUATELY DEFEND AGAINST THE
ACCUSATIONS.

FIFTH PROPOSED RULE OF LAW:

MR. TOWNSEND HAS A SIXTH AMENDMENT RIGHT
TO A FAIR TRIAL AND AN IMPARTIAL JURY, AND
PROSECUTORS HAVE AN AFFIRMATIVE DUTY TO AVOID
MISLEADING THE COURT BY ARTIFICIAL OR FALSE
STATEMENTS OF FACT OR LAW.

SIXTH QUESTION PRESENTED:

WAS MR. TOWNSEND DENIED EFFECTIVE ASSISTANCE
OF COUNSEL WHEN PETITIONER'S STATE P.R. ATTORNEY REFUSED
TO BRIEF HIS CASE ON THE MERITS.

THE 6TH AMENDMENT GUARANTEES THAT
ALL ACCUSED PERSON SHALL HAVE "EFFECTIVE" LEGAL
COUNSEL FOR HIS/HER DEFENSE TO A CRIMINAL CHARGE.

LIST OF PARTIES

ALL PARTIES DO NOT APPEAR IN THE CAPTION OF THE
CASE ON THE COVER PAGE. A LIST OF PARTIES TO
THE PROCEEDING IN THE COURT WHOSE DOCUMENT IS
THE SUBJECT OF THIS PETITION IS AS FOLLOWS:

MULTNOMAH COUNTY CIRCUIT COURT JUDGE,
MICHAEL J. MCSHANE, WHO IS NOW ON THE FEDERAL BENCH,
APPELLATE COURT JUDGES, OTTEG, DUNCAN, AND DELOPE, U.S.
DISTRICT COURT JUDGE, ANN L. ARIEN, 9TH CIRCUIT
U.S. COURT OF APPEALS JUDGES, HINKINS, FIECKHO, AND
NELSON, FEDERAL DECEMBER, LISA C. HAY, KRISTINE HELMANN,
THOMAS J. HESTER, ATTORNEY D. BERNSTEIN, TRACI ATTORNEY,
GEOFFREY J. GOREY, AND DANIE NICKABE, APPELLANT COUNSEL,
ERIN GALLI, AND STATE PCR COUNSEL, MAX WALL.

RELATED CASES

DECEMBER 19, 2011
MULTNOMAH COUNTY CIRCUIT COURT CASE #100331057
STATE OF OREGON V. HENRY ALEXANDER TOWNSEND
DECEMBER 2, 2011
COURT OF APPEALS OF THE STATE OF OREGON CASE # A150714
STATE OF OREGON V. HENRY ALEXANDER TOWNSEND
DECEMBER 17, 2017
POST-CONTESTED STATE OF OREGON NICKELER CIRCUIT COURT #1412112779
HENRY ALEXANDER TOWNSEND V. NICKELER NORTH
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
HENRY ALEXANDER TOWNSEND V. JEFF TAYLOR, ET AL.
CASE # 2:17-cv-00324-RK
UNITED STATES COURT OF APPEALS
HENRY ALEXANDER TOWNSEND V. JEFF TAYLOR, ET AL.
9TH CIR. CASE # 20-35303

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TABLE OF AUTHORITIES

MULTNOMAH COUNTY CIRCUIT COURT CASE # 100331057
STATE OF OREGON V. HEAVY ALCOHOL TOWNSHIP
STATE OF OREGON V. HEAVY ALCOHOL TOWNSHIP
— OR App —, — 83d — (2014) COURT OF APPEALS
CASE # ALSO 714

POST - CORRECTION
MALHEUR COUNTY CIRCUIT COURT CASE #14121277P
HENRY ALEXANDER TOWNSEND V. MARK NORTH

TOWNSEND V. TAYLOR, ET AL., 9TH CIR U.S. CASE #20-35393
UNITED STATES COURT OF APPEALS

CONSTITUTIONAL AND STATUTORY PROVISIONS

- U.S. CONST AMEND IV
- U.S. CONST AMEND V
- U.S. CONST AMEND XIV
- U.S. CONST AMEND VI
- U.S. CONST AMEND
- OR CONST ART I, § 9 ORAP (1)(2)
- OR CONST ART I, § 11 ORAP 9.07(3)
- OR CONST ART I, § ORAP 9.07(2)

JURISDICTION

- 28 U.S.C. § 1254(1)
- 28 U.S.C. § 1257(2)

THE LOWER COURTS LOST JURISDICTION ONLY THEY DENIED
PETITIONER RELIEF.

CASES

STRECKLAND V. WASHINGTON
466 U.S. 668 (1984)

MAPLES V. THOMAS
132 S. CT 912 (2012)

MAPP V. OHIO 367 U.S. 643 81 S CT 1684
62 ED 2D 1081 (1961)

WHALEN V. UNITED STATES
445 U.S. 684 621-92, 100 S CT 1432, 63
LED 2D 715 (1980)

STATE V. PEPPER 354 OR 513, 524, 316 P3d
255 (2013)

STATE V. SANDERS, 280 OR 685, 572 P2d 1307 (1977).
UNITED STATES V. MARTIN
157 F.3d 46, 52 (2d CIR. 1998)

STATE V. BREIDENELL
306 OR 231, 235, 759 P2d 1054 (1983)

ST. PIERRE V. COMEN
217 F.3d 939, 940-47 (7TH CIR. 2000)

JOHNSTON V. SINGLETARY
162 F.3d 630, 637 (11TH CIR. 1999)

WRIGHT V. SECRETARY FOR DEPARTMENT OF CORRECTIONS
278 F.3d 1245-55 11TH CIR. (2002)

STATE V. DAVIS, 313 OR 246, 253, 834 P2d 1008 (1992),

MARYLAND V. PRINGLE, 540 US 366, 371, 124 S CT 795,
157 LED 2D 769 (2003).

STATE V. ESPIN, 314 OR 296, 304-05, 839 P2d 211
(1992).

STATUTES

ORS 133.550
ORS 132.550
ORS 135.630
ORS 165.175
ORS 161.155
ORS 132.510
ORS 132.560
ORS 135.713
ORS 135.715
ORS 135.717
ORS 135.737
ORS 135.740
ORS 135.743

STATEMENT OF THE CASE

IN THIS PETITION FOR WRIT OF CERTIORARI PETITIONER, HENRY ALEXANDER TOWNSEND, CHALLENGES HIS MULTNOMAH COUNTY CIRCUIT COURT CONVICTION FOR MURDER, ROBBERY, ASSAULT, AND BURGLARY. AMONG OTHER CLAIMS PETITIONER ASSERTS THAT HIS CONVICTIONS WERE OBTAINED IN VIOLATION OF DUE PROCESS AS HE WAS DENIED "EFFECTIVE" ASSISTANCE OF COUNSEL; STRICKLAND V. WASHINGTON, 466 U.S. 663 (1984), AND THAT HE WAS INCOMPETENT TO STAND TRIAL ON POST-CONVICTION. PETITIONER, HENRY ALEXANDER TOWNSEND, PREVIOUSLY PRESENTED HIS CASE TO THE UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT BEFORE: HAWKINS, FRIEDLAND, AND NELSON, CIRCUIT JUDGES. PETITIONER ASKS THAT THIS COURT REVIEW, AND RULE ON THE CLAIMS IN HIS PETITION FOR WRIT OF CERTIORARI. IN MULTNOMAH COUNTY CRIMINAL CASE #100331057, THE STATE OF OREGON CHARGE PETITIONER, HENRY ALEXANDER TOWNSEND, AND THREE CO-DEFENDANTS WITH SEVERAL OFFENSES ARISING OUT OF AN INCIDENT THAT TOOK PLACE ON, MARCH 12, 2010. IN THE INDICTMENT, PETITIONER WAS CHARGED WITH AGGRAVATED MURDER, MURDER, ASSAULT, BURGLARY, ROBBERY, AND UNLAWFUL USE OF A WEAPON. SEE APPENDIX E. PRIOR TO TRIAL THE STATE DISMISSED THE AGGRAVATED MURDER CHARGES, ONE OF THE MURDER CHARGES, ONE OF THE ASSAULT CHARGES, AND THREE CHARGES OF UNLAWFUL USE OF A WEAPON, AND PETITIONER'S CASE WAS TRIED TO THE COURT,

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WITH THE HONORABLE, MICHAEL J. MCSHANE, PRESIDING WHO HAS SINCE BEEN APPOINTED TO THE FEDERAL BENCH BY PRESIDENT, BARACK OBAMA, FOR A LIFE TERM. THE EVIDENCE ADDUCED AT TRIAL IS SUMMARIZED IN THE APPELLATE BRIEFS THAT WERE IN THE DIRECT APPEAL. SEE APPENDIX D. AT THE CONCLUSION OF TRIAL, THE TRIAL COURT JUDGE, MICHAEL J. MCSHANE, FOUND PETITIONER, HENRY ALEXANDER TOWNSEND, GUILTY OF FOUR COUNTS OF MURDER, ONE COUNT OF FIRST-DEGREE ASSAULT, THREE COUNTS OF FIRST-DEGREE ROBBERY, AND THREE COUNTS OF SECOND-DEGREE ROBBERY. AT SENTENCING, THE COURT MERGED THE GUILTY VERDICT ON THE CHARGES OF MURDER INTO A SINGLE MURDER CONVICTION. THE COURT ALSO MERGED THE CONVICTION FOR FIRST-DEGREE ASSAULT AND FIRST DEGREE BURGLARY INTO THE MURDER CONVICTION. ON THE MURDER CONVICTION THE COURT SENTENCED PETITIONER TO LIFE IN PRISON WITH A MINIMUM OF 25 YEARS. ON THE ASSAULT CONVICTION, THE COURT IMPOSED PRISON TERMS OF SEVENTY MONTHS. ON THE FIRST-DEGREE ROBBERY CONVICTION, THE COURT IMPOSED TERMS OF NINETY MONTHS IN PRISON. ON THE SECOND-DEGREE ROBBERY CONVICTION, THE COURT IMPOSED PRISON TERMS OF NINETY MONTHS. THE COURT ORDERED THOSE SENTENCES TO RUN CONCURRENT WITH THE EXCEPTION OF ONE OF THE SECOND-DEGREE ASSAULT SENTENCES. ON THAT CONVICTION THE COURT ORDERED THAT TWELVE MONTHS OF THAT

SENTENCE BE SERVED CONSECUTIVE TO THE LIFE SENTENCE FOR MURDER. PETITIONER, HENRY ALEXANDER TOWNSEND, WAS ALSO ORDERED TO SERVE A TERM OF POST-CONVICTION SUPERVISION. THE CRIMINAL JUDGMENT IS CONTAINED IN THE APPENDIX.

DIRECT APPEAL:

PETITIONER, HENRY ALEXANDER TOWNSEND, APPEALED HIS CONVICTION TO THE OREGON COURT OF APPEALS. TWO ASSIGNMENTS OF ERROR CHALLENGING THE POLICE SEIZURE OF CERTAIN EVIDENTIARY ITEMS; ALONG WITH THE ARREST. AN ADDITIONAL ASSIGNMENT CHALLENGED, ON THE STATE LAW GROUNDS, THE TRIAL COURT'S DENIAL OF A DEMURER TO THE CHARGE OF FELONY MURDER. THE FOURTH ASSIGNMENT OF ERROR CHALLENGED THE DENIAL OF A JUDGMENT OF ACQUITTAL ON ONE COUNT OF SECOND-DEGREE ASSAULT. THE OREGON COURT OF APPEALS CONVENIENTLY AFFIRMED PETITIONER'S CONVICTIONS WITHOUT ISSUING AN OPINION RENDERING THE STATE APPELLATE PROCESS AN IN-EFFECTIVE MECHANISM. PETITIONER THEN PETITIONED FOR REVIEW, AND RECONSIDERATION; HOWEVER, THE OREGON SUPREME COURT DECLINED TO REVIEW AND/OR RECONSIDER PETITIONER'S CASE.

POST-CONVICTION RELIEF:

IN 2014, PETITIONER, HENRY ALEXANDER TOWNSEND, FILED A PRO SE PETITION FOR POST-CONVICTION RELIEF IN THE CIRCUIT COURT FOR MALHEUR COUNTY. PETITIONER ASSERTED VARIOUS

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CLAIMS INCLUDING ONES OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. AFTER SUBSTITUTION OF COUNSEL ATTORNEY, MAX RYAN WALL, WAS APPOINTED AS COUNSEL TO REPRESENT PETITIONER, HENRY ALEXANDER TOWNSEND, IN PETITIONERS STATE POST-CONVICTION. IN OCTOBER OF 2016, ATTORNEY, MAX RYAN WALL, FILED A DECLARATION WITH THE MILHEUT COUNTY CIRCUIT COURT. IN MR. WALLS DECLARATION, HE DESCRIBED THE WORK HE DID ON THE CASE AND STATED THAT HE COULD NOT CERTIFY A CLAIM THAT WOULD BE A BASIS FOR POST-CONVICTION RELIEF DENYING PETITIONER "EFFECTIVE" ASSISTANCE OF COUNSEL; STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984), AND RAMOS V. LOUISIANA. THE 6TH AMENDMENT ALLOWS PETITIONER A RIGHT TO A FAIR TRIAL, AND IMPARTIAL JURY, AND ALL ACCUSED PERSONS SHALL HAVE EFFECTIVE LEGAL COUNSEL FOR HIS/HER DEFENSE TO A CRIMINAL CHARGE. POST-CONVICTION COUNSEL, MAX RYAN WALL, FURTHER STATED THAT HE HAD PETITIONER EVALUATED BY DR. BROOK HOWARD WHO FOUND PETITIONER UNABLE TO ADV AND ASSEST AT THE TIME OF HER EVALUATION; DR. HOWARDS REPORT WAS DATED APRIL 20TH, 2016. IN RESPONSE TO DOCTOR HOWARDS REPORT/EVALUATION A GAL HEARING WAS HELD, AND THE STATE PCR COURT JUDGE DENIED

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PETITIONERS REQUEST FOR A GUARDIAN TO BE APPOINTED TO PROTECT, AND DEFEND PETITIONERS RIGHTS, AND INTERESTS. SHORTLY THEREAFTER, THE PCR DEFENDANT (NOMINALLY THE WARDEN OF SRCI, BUT IN FACT, THE STATE OF OREGON), REPRESENTED BY THE ATTORNEY GENERAL'S OFFICE FILED A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR RELIEF. A HEARING ON THE MOTION WAS HELD, AND THE JUDGE GRANTED THE STATES MOTION VIOLATING THE DUE PROCESS CLAUSE. A JUDGMENT WAS ENSUED FORMALLY MEMORIALIZING THE DISMISSAL. NO APPEAL WAS TAKEN FROM THE PCR COURTS RULING DUE TO PETITIONER BEING INCOMPETENT; MAPLES V. THOMAS, 132 S. CT. 912 (2012); WRIGHT V. SECRETARY FOR DEPT OF CORRECTIONS, 278 F. 3d 1245-55 11TH CIR. (2002), AND JOHNSTON V. SINGLETARY, 162 F. 3d 630, 637 (11TH CIR. 1998), MOREOVER, SEE ST. PIERRE V. COWAN, 217 F. 3d 939, 940-47 (7TH CIR. 2000); QUESTIONABLY COMPETENT PETITIONER DID NOT PROCEDURALLY DEFAULT HIS CLAIMS BY WAIVING STATE POST-CONVICTION PROCESS UNDER CIRCUMSTANCES LACKING "ANY KIND OF PROCEEDING, FORMAL OR INFORMAL, AT WHICH ANY COURT WAS ABLE TO ASSURE ITSELF THAT ST. PIERRES WAIVER

SATISFIED THE REQUIREMENTS FOR A KNOWING, AND VOLUNTARY WAIVER"). PETITIONER CLAIMS, AND ALLEGATIONS FALL WITHIN THE ESCAPE CLAUSE BECAUSE THE CLAIMS WERE NOT RAISED BY TRIAL COUNSEL, AND RAMOS V. LOUISIANA, WAS DECIDED ON APRIL 20TH, 2020. PLEASE SEE APPENDICES H, AND I.

FEDERAL HABEAS CORPUS:

PETITIONER, HENRY ALEXANDER TOWNSEND, FILED HIS FEDERAL HABEAS CORPUS PETITION. WITH HIS PRO SE PETITION HE APPENDED THE AED AND ASSIST EVALUATION OF DR. BROOKE HOWARD. IN THAT REPORT, DATED APRIL 20TH, 2016, DR. HOWARD CONCLUDED THAT PETITIONER HAD A DELUSIONAL DISORDER OF AN UNSPECIFIED TYPE. HOWARD FURTHER FOUND PETITIONER TO BE UNABLE TO AED AND ASSIST DURING PETITIONERS PCR CASE. AN AMENDED FEDERAL HABEAS CORPUS PETITION WAS FILED BY FEDERAL DEFENDER, THOMAS J. HESTER, CERTIFYING THE DUE PROCESS VIOLATIONS IN-CONNECTION TO THE INEFFECTIVE INDICTMENT, INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, THE DENIAL OF THE MOTION FOR A JUDGMENT OF ACQUITTAL ON THE MCGARY ASSAULT CONVICTION, ALONG WITH THE CLAIM THAT PETITIONER WAS INCOMPETENT TO STAND TRIAL

FEDERAL DEFENDER, ANTHONY D. BORNSTEIN,
THEN SUBSTITUTED AS PETITIONERS ATTORNEY;
AGAIN, CERTIFYING ALL CLAIMS THAT
FEDERAL DEFENDER, THOMAS J. HESTER,
INCORPORATED INTO PETITIONER'S FIRST
AMENDED PETITION FOR WRIT OF FEDERAL
HABEAS CORPUS WHICH WAS PREPARED, AND
FILED BY FEDERAL DEFENDER, THOMAS J. HESTER,
NOVEMBER 6TH, 2017. NOW COMES THE TIME
THAT PETITIONER, HENRY ALEXANDER TOWNSEND,
ADOPTS AND/OR INCORPORATES ALL CLAIMS, AND
CASE LAW OUTLINED IN THE FIRST, AND
SECOND AMENDED PETITION FOR WRIT OF
FEDERAL HABEAS CORPUS. IN THE FIRST, AND
SECOND AMENDED PETITION FOR WRIT OF FEDERAL
HABEAS CORPUS, FEDERAL DEFENDER, THOMAS J.
HESTER, AND ANTHONY D. BORNSTEIN, PROVIDED
LEGAL AUTHORITY ON THE INEFFECTIVE
INDICTMENT - INEFFECTIVE ASSISTANCE OF TRIAL
COUNSEL, THE DENIAL OF MOTION FOR JUDGEMENT
OF ACQUITTAL ON THE MCGARY ASSAULT
CONVICTION; ALONG WITH THE CLAIM THAT
PETITIONER WAS INCOMPETENT TO STAND TRIAL.
THE U.S. DISTRICT COURT, AND THE 9TH
CIRCUIT LOST JURISDICTION OVER PETITIONER'S
CASE ONCE THEY DENIED PETITIONER RELIEF,
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AND PETITIONER FILED HIS NOTICE OF APPEAL OF THE DISTRICT COURT'S JUDGEMENT DENYING PETITIONERS FEDERAL HABEAS CORPUS; GOULD V. MUTUAL LIFE INS. CO., 790 F.2d 769, 772 (9th Cir. 1986), AND THE 9TH CIRCUIT UNITED STATES COURT OF APPEALS ABUSED ITS DISCRETION BY REFUSING TO REVIEW PETITIONERS CASE DE NOVO. THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. SS 1254(1), AND 28 U.S.C. SS 1257(2). FOR THESE REASONS PETITIONER BELIEVES HIS PETITION FOR WRIT OF CERTIORARI MUST BE GRANTED. THE LOWER COURTS LOST JURISDICTION ONCE THEY DENIED PETITIONER RELIEF. MOREOVER, NIPP V. OHIO, 367 U.S. 643 81 S CT 1684 6 L ED 2d 1081 (1961), PROHIBITS THE USE OF EVIDENCE AT FEDERAL OR STATE TRIAL WHICH IS FRUIT OF AN ILLEGAL SEARCH AND OR SEIZURE, AND THE DOUBLE JEOPARDY CLAUSE PROHIBITS A NEW TRIAL. AGAIN, FOR THESE REASONS PETITIONER BELIEVES HIS PETITION FOR WRIT OF CERTIORARI MUST BE GRANTED. PLEASE SEE FRUIT OF THE POISONOUS TREE DOCTRINE.

REASON FOR ALLOWING REVIEW

THERE ARE SEVERAL REASONS THAT THIS COURT SHOULD EXERCISE ITS DISCRETION AND GRANT REVIEW IN PETITIONERS CASE:

FIRST, THE CASE PRESENTS A SIGNIFICANT ISSUE OF LAW INVOLVING THE PROPER INTERPRETATION OF ARTICLE I SECTION 9, ORAP (1) (2). NOTABLY, THIS CASE INVOLVES THE STATES SEARCH OF AN ITEM OF PROPERTY ALLEGEDLY "ABANDONED" BY DEFENDANT AT THE SCENE OF A CRIME. THE LAW INVOLVING ABANDONED PROPERTY AND PRIVACY RIGHTS UNDER ARTICLE I SECTION 9 IS DIFFICULT TO ACCESS AND CLARIFICATION FROM THIS COURT WOULD BENEFIT THE PUBLIC BENCH, AND BAR. ORAP 9.07(3).

FOR EXAMPLE, IN THIS CASE THERE WAS EVIDENCE THAT DEFENDANT FLEW FROM THE VICTIMS APARTMENT, LEAVING BEHIND TWO SHOES, ONE INSIDE AND ONE OUTSIDE THE APARTMENT. THE TRIAL COURT DID NOT SPECIFICALLY FIND THAT DEFENDANT DID NOT INTEND TO RETRIEVE THE SHOES. RATHER, IT NOTED THAT WHEN "SOMEBODY COMMITS A CRIME ON YOUR PROPERTY AND FLEES, AND FLIGHT FROM THE POLICE *** THINGS LEFT BEHIND ARE BY ANY IMAGINATION I CAN COME UP WITH, ARE -- FALL UNDER THE

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ABANDONED PROPERTY CATEGORY AS OPPOSED TO 'WE'LL COME BACK FOR THAT LATER' CATEGORY." (TR. 467)

THAT STATEMENT WAS ESSENTIALLY A CONCLUSION THAT PROPERTY LEFT BY AN OWNER WHO FLEES A CRIME SCENE IS CATEGORICALLY ABANDONED. THE COURT'S BELIEF IS FURTHER EVIDENT IN ITS NEXT STATEMENT "I -- I JUST CAN'T FORSEE ANY TEST THAT WOULD ALLOW THE PROPERTY LEFT AT A VICTIM'S RESIDENCE TO BE ANYTHING OTHER THAN ABANDONED PROPERTY." (TR. 467). FROM THERE, THE COURT CONCLUDED DEFENDANT HAD NO PRIVATELY INTEREST IN ANYTHING LEFT AT THE APARTMENT.

THE PROBLEM WITH THE COURT'S CONCLUSION IS THAT IT DID NOT CONSIDER WHETHER THIS PARTICULAR DEFENDANT INTENDED TO RETRIEVE THE PROPERTY. RATHER, IT ASSUMED THAT THE PROPERTY MUST BE ABANDONED MERELY BECAUSE IT WAS LEFT BY A FLEEING DEFENDANT. THAT REASONING IS INCORRECT. THE PROPERTY WOULD ONLY BE ABANDONED IF DEFENDANT - PETITIONER HAD IN FACT ABANDONED IT. BECAUSE THE COURT APPLIED AN INCORRECT TEST TO THE QUESTION, IT CANNOT BE ASSUMED THAT THE COURT IMPLICITLY FOUND THAT DEFENDANT HAD ABANDONED THE PROPERTY. THUS, THE COURT DID NOT FIND THAT DEFENDANT HAD IN FACT ABANDONED THE PROPERTY.

SECOND, THE ISSUE ARISES OFTEN DRAP 9.07(2) DRAP 9.07(3). THIS CASE INVOLVES THE POLICE SEIZURE OF ITEMS AT A CRIME SCENE, WHICH OCCURS ON A REGULAR BASIS. MOREOVER, THIS CASE INVOLVES THE SEARCH OF THAT PROPERTY WITHOUT A WARRANT BASED ON A THEORY OF ABANDONMENT. THIRD, THE LEGAL ISSUES INVOLVE ISSUES OF FEDERAL AND STATE LAW. IN ADDITION TO THE SEARCH ISSUE DISCUSSED ABOVE, THIS CASE ALSO PRESENTS FEDERAL AND STATE LAW ISSUES INVOLVING THE PROPER METHOD OF INDICTING AN INDIVIDUAL FOR FELONY MURDER BASED ON AN UNDERLYING BURGLARY, AND THIS CASE INVOLVES THE SUFFICIENCY OF EVIDENCE NECESSARY TO ESTABLISH THAT AN INDIVIDUAL AIDED AND ABETTED AN ASSAULT OF NUMEROUS PEOPLE WHEN THE ASSAULT APPEARS TO BE SECONDARY TO THE BURGLARY. FOURTH, THE LEGAL ISSUES ARE PROPERLY PRESERVED AND THE CASE IS FREE FROM FACTUAL DISPUTE OR PROCEDURAL OBSTACLES THAT PREVENT THE UNITED STATES SUPREME COURT FROM REACHING THE LEGAL ISSUES. THE ERRORS IN THIS CASE WILL RESULT IN A SERIOUS OR IRREVERSIBLE INJUSTICE OR IN A DISTORTION OR MISAPPLICATION OF A LEGAL PRINCIPLE, BECAUSE

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DEFENDANT - PETITIONER IS FACING A LIFETIME
IN PRISON

ARGUMENT

PETITIONER RELIES ON THE ARGUMENTS IN HIS BRIEF. IN THE EVENT THAT THE COURT GRANTS DEFENDANT - PETITIONER REVIEW, PETITIONER WILL SUBMIT FURTHER ARGUMENTS IN THE FORM OF A BRIEF ON THE MERITS. PETITIONER OFFERS THE COURT THE FOLLOWING SUMMARY OF ARGUMENTS TO SUPPLEMENT HIS PETITION.

FIRST, THE COURT ERRED IN ADMITTING EVIDENCE TAKEN FROM THE SEARCH OF THE NIKE SHOES. THE STATE PRESENTED EVIDENCE INDICATING THAT DEFENDANT - PETITIONER FLED FROM A HOME - INVASION ROBBERY, LEAVING TWO SHOES AT THE CRIME SCENE. IN CONCLUDING THAT THE SHOES WERE ABANDONED, THE COURT DID NOT CONSIDER WHETHER PETITIONER - DEFENDANT INTENDED TO RELINQUISH HIS INTEREST IN THE SHOES. RATHER, THE COURT CONCLUDED THAT, GENERALLY, WHENEVER A DEFENDANT FLEES A CRIME SCENE AND LEAVES PROPERTY, THE PROPERTY IS ABANDONED. THAT CATEGORICAL CONCLUSION IS INCORRECT, AND THUS, THE COURT

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IMPROPERLY APPLIED THE TEST. IN ADDITION, THE POLICE COULD NOT LAWFULLY SEIZE THE SHOES UNDER THE PLAIN VIEW DOCTRINE BECAUSE THERE WAS NO BASIS TO CONCLUDE THAT THE SHOES THEMSELVES WERE TIED TO ONE OF THE INTRUDERS. FURTHERMORE, EVEN IF THE POLICE LAWFULLY SEIZED THE SHOES, THEY COULD NOT TEST THE SHOES FOR DNA EVIDENCE WITHOUT OBTAINING A WARRANT. ANY EMERGENCY THAT MIGHT HAVE ALLOWED SEIZURE OF THE EVIDENCE WOULD HAVE DISSIPATED BY THE TIME OF THE TESTING. FOR THOSE REASONS, ANY EVIDENCE OBTAINED FROM THE TESTING OF THE SHOES MUST BE SUPPRESSED; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), AND *State v. Bridewell*, 306 Or. 231, 759 P.2d 1054 (1988). SECOND, THE COURT ERRED IN ADMITTING EVIDENCE THAT DEFENDANT HAD BEEN ARRESTED. OFFICERS ARRESTED PETITIONER - DEFENDANT A FEW MILES FROM THE CRIME SCENE AND APPROXIMATELY FOUR HOURS AFTER THE INCIDENT. THE STATE DID NOT PRESENT TESTIMONY FROM THE TWO OFFICERS WHO ACTUALLY ARRESTED DEFENDANT - PETITIONER. WITHOUT THAT TESTIMONY, THE STATE WAS NOT ABLE TO SHOW THAT THE OFFICERS HAD SUBJECTIVE OR OBJECTIVE

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PROBABLE CAUSE TO ARREST. THE LATER IDENTIFICATION OF DEFENDANT BY ANOTHER OFFICER DID NOT RETROACTIVELY VALIDATE THE ARREST. THIRD, THE COURT FRIED IN GRANTING DEFENDANTS - PETITIONERS DEMURRER TO THOSE COUNTS OF FELONY MURDER BASED ON AN UNDERLYING BURGLARY. THE INDICTMENT ALLEGES THREE COUNTS OF FELONY MURDER BASED ON THE COMMISSION OF A BURGLARY, BUT IT DOES NOT SPECIFY WHAT CRIME PETITIONER-DEFENDANT INTENDED TO COMMIT WHEN HE ENTERED THE PREMISES. THE INDICTMENT MUST ACCURATELY REFLECT PETITIONERS CRIMINAL CONDUCT, AND THE COURT MUST PROVE FELONY MURDER WITH PROOF THAT PETITIONER COMMITTED A COMPLETED OR AN ATTEMPTED PREDICATE FELONY; WHEN THE STATUTE HAS AN ALTERNATIVE WAY OF PROVING A SINGLE ELEMENT OF THE PREDICATE FELONY "NARROWING INQUIRY" IS NECESSARY TO SATISFY THE REQUIREMENTS, ORS 163.115 (1) (b). LIKE THE OREGON STATUTE, THE FELONY MURDER STATUTE IN WHALEN V. UNITED STATES, 445 U.S. 684 691-92, 100 S CT 1432, 63 LED 2d 715 (1980), ALLOWED THE GOVERNMENT TO PROVE FELONY MURDER WITH PROOF THAT THE DEFENDANT COMMITTED A COMPLETED OR AN ATTEMPTED PREDICATE FELONY.

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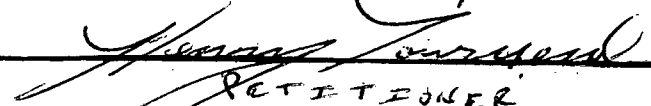
ALSO SEE; STATE V. PEPKIN, 354 OR 513, 524,
316 P3d. 255 (2013), WHICH PROVIDES AN
EXAMPLE OF AN OFFENSE THAT CONTAINS
ALTERNATIVE MEANS FOR THE STATE TO
PROVIDE A SINGLE ELEMENT. FOR THESE
REASONS PETITIONERS PETITION FOR WRIT
OF CERTIORARI SHOULD BE GRANTED

CONCLUSION

FOR THE FOREGOING REASONS PETITIONERS
CONVICTIONS SHOULD BE VACATED.

I DECLARE UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT.

DATED THIS 11TH DAY OF DECEMBER 2020.



PETITIONER
HENRY ALEXANDER TOWNSEND
SID # 14258900
777 STANTON BLVD
ONTARIO, OR. 97914