No. 20-7583

IN THE

SUPREME COURT OF THE UNITED STATES

Thomas Hild
(Your Name) — PETITIONER

vs.

The State of Colorado
— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Colorado Court of Appeals, Denver, CO.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thomas Hild, #107624
(Your Name)
C.S.P. D-5-12
P.O. Box #777
(Address)
Canon City, CO. 81215-0777
(City, State, Zip Code)
Unknown
(Phone Number)

QUESTION(S) PRESENTED

1) Given this Court has ruled that our criminal justice system is largely a system of pleas rather than trials, is there a constitutional requirement that counsel engage in plea negotiations with prosecuting authorities in order to provide a defendant effective assistance and protect the defendant's full panoply of autonomous rights?

2) In a state, such as Colorado, when a defendant's priors are automatically introduced if he decides to testify, is there a constitutional requirement that the defendant be advised that his admission of prior convictions cannot be used to convict him of being an habitual criminal at a latter bifuricated bench trial on that matter?

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

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TABLE OF AUTHORITIES CITED

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[ ] is unpublished.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[ ] is unpublished.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] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix B 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[X] is unpublished.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 Colorado Supreme Court court 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.

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).

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

The date on which the highest state court decided my case was Feb. 1, 2021. A copy of that decision appears at Appendix A.

[ ] 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

Sixth Amendment of the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment of the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Colorado Revised Statute, § 18-1.3-803:

Colorado Revised Statute, § 18-1.3-801:

Colorado Rule of Evidence, 404(b):

Colorado Rule of Criminal Procedure 35(c):

STATEMENT OF THE CASE

In March of 2012, a jewelry store in Parker, Colorado was burglarized at some point during the night and a significant amount of jewelry was stolen. Video surveillance identified two individuals and a third person was also seen. (Video was so poor of the third person it could not be determined whether that person was a man or a woman.) When the two individuals were apprehended, and their phones history searched, it was discovered that one of them had communicated with Mr. Hild during the evening of the burglary, so a warrant was issued for him as well, given his criminal history of having committed several prior business burglaries.

When Mr. Hild was arrested, given he was a contractor, he was found to be in possession of numerous construction tools, including a dry-wall saw, of which one had been used to break into the jewelry store from a neighboring vacant store. The construction tools, the phone calls and the testimony of one of the co-defendants who made a deal in return for his testimony against Mr. Hild was the only evidence connecting him to the burglary. Moreover, physical evidence in the form of several hairs were discovered at the crime scene, but later identified to be from a woman, hence this fact was not disclosed to the defense until trial (one of the co-defendants had a girlfriend who was believed to be connected to the crime as well, but was never charged.) It was also not disclosed to the defense that the jewelry store owner had a prior conviction for having robbed himself years earlier, until after trial, which is now the subject of one of Mr. Hild's co-defendant's case.

Mr. Hild was charged with numerous felony counts, including theft, conspiracy to commit theft, second-degree burglary, conspiracy to commit second-degree burglary, and third-degree burglary. He was also charged with two misdemeanor counts of third-degree burglary and conspiracy to commit third-degree burglary, as well as four counts of being an habitual criminal as defined by § 18-1.3-801 C.R.S.

A jury trial was held and Mr. Hild was convicted on all felony/misdemeanor counts. A bifuricated bench trial was held on the habitual criminal counts (see § 18-1.3-803 C.R.S.), and he was convicted on those counts as well, resulting in him receiving a sentence of 4 times that he would otherwise normally have been exposed to.

One of the issues before this Court involves the bifuricated habitual criminal trial, in the sense that § 18-1.3-803(4) C.R.S., requires the prosecution to prove beyond a reasonable doubt that the defendant has been previously convicted as alleged in the habitual criminal counts. In this case, Mr. Hild's prior convictions had been introduced at trial under C.R.E. 404(b), other crimes, wrongs or bad acts. In compliance with the Colorado Supreme Court's directives in People v. Curtis, 681 P.2d 504, 512-14 (Colo. 1984), that he had a right to testify, that the decision as to whether to testify was his alone (despite any advice to the contrary from counsel), that if he chose to testify, the prosecution would be allowed to cross-examine him about any prior convictions and if he chose not to testify, that the jury would be

instructed that the could only consider his prior convictions as they bear upon his credibility. Id. At no point was Mr. Hild advised that his admission of his prior convictions during trial, if he chose to testify, could not then be used as substantive proof that he was in fact the person who committed said at the latter bifuricated bench trial on the habitual criminal counts. This said, believing that if he testified his admission that he was the one who committed those priors, Mr. Hild chose not to testify. He was then convicted on all substantive counts. The bifuricated bench trial was held on the habitual criminal counts, where he was convicted as well, resulting in a sentence of 48-years in the Department of Corrections, plus 5-years of mandatory parole.

Mr. Hild filed a direct appeal and a division of the Colorado Court of Appeals affirmed his convictions. See People v. Hild, (Hild I) Colo. App. No. 13CA1361 (March 3, 2016)(not published pursuant to C.A.R. 35(f)). Mr. Hild then filed a pro-se postconviction motion in his trial court under Colorado Rule of Crim. Procedure 35(c). Counsel was appointed and amended Mr. Hild's postconviction application, following which the trial court summarily dismissed said. Mr. Hild appealed and a division of the Colorado Court of Appeals affirmed the summary dismissal. See People v. Hild, (Hild II), Colo. App. No. 18CA1777 (July 30, 2020)(not published pursuant to C.A.R. 35(f)); see also, Appendix B. This action is timely and the issues before this Court have been properly exhausted at the State level, hence this Court is vested with the jurisdiction and authority to entertain said.

REASONS FOR GRANTING THE PETITION

1) Given this Court has ruled that our criminal justice system is largely a system of pleas rather than trials, is there a constitutional right requirement that counsel engage in plea negotiations with prosecuting authorities in order to provide a defendant effective assistance and protect the defendant's full panoply of autonomous rights?

It is well-settled that all criminal defendants have a Sixth Amendment right to receive effective assistance of counsel throughout the course of a State's criminal proceedings against them. See Strickland v. Washington, 466 U.S. 668, 686 (1984). This guarantee applies not only to trials, but to any plea negotiations conducted by counsel. See Montejo v. Lousiana, 556 U.S. 778, 786 (2009); Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012). Moreover, a necessary antecedent to providing a defendant with constitutionally mandated effective assistance is the requirement that counsel conduct reasonable investigations or make reasonable decisions which make such investigations unnecessary. Strickland, 466 U.S. at 691.

This Court has also not only determined that our criminal jurisprudence system is predominantly a system of pleas, instead of one of trials; but also that all criminal defendants control certain aspects of their case, including the decision as to whether to accept a plea offer, i.e., enter a plea of guilty, or proceed to trial. See Missouri v. Frye, 566 U.S. 134, 140-41 (2012); McCoy v. Louisiana, 138 S.Ct. 1500, 1508-09 (2018)(citing Jones v. Barnes, 463 U.S.

745, 751 (1983).

The issue before this Court is not a complex one, i.e., the question is one of whether there is a constitutional requirement for counsel to seek a proffer from the prosecution in order to provide his/her client with the effective assistance of counsel demanded by the Sixth Amendment. Mr. Hild submits that not only is there such a requirement, but to find otherwise would deprive him of the ability to exercise his autonomous right to decide whether to enter a plea or proceed to trial, something this Court has been adamant in protecting to date. See McCoy, Jones, supras.

The facts of Mr. Hild's case are not in dispute. In his case, trial counsel chose to exercise control over whether Mr. Hild would accept a plea offer by failing to engage in any plea negotiations with prosecuting officials. In other words, trial counsel failed to conduct the necessary investigations required by Strickland, simply because he felt that Mr. Hild would fare better by going to trial than he would if he accepted a plea. This deficiency of counsel's intruded upon Mr. Hild's ability to make a decision in an area where he exercises exclusive control, all the while believing there was no possibility of a plea, because the prosecuting officials had rejected any such possibility. Counsel deprived Mr. Hild of the exercise of his right, thereby prejudicing him through this deficiency.

In the State's decision on this issue, (see Appendix B, pp. 6-8, ¶¶ 16-

19) a division of the Colorado Court of Appeals initially found that there is no constitutional requirement for trial counsel to engage in plea negotiations. Id, ¶ 17. However, the Court then went on to find that in some cases, failure to do so may constitute ineffective assistance of counsel, provided a defendant can show that there is a reasonable probability that has counsel done so: 1) there would have been a plea offer made by the prosecution; 2) the defendant would have accepted the offer; and 3) the trial court would have approved the offer. Id.

The Colorado Court of Appeals then found that Mr. Hild failed to prove any of these facts, ("Even assuming that trial counsel was required to initiate plea negotiations under these circumstances") because he did not allege any (except for the fact that he would have accepted a plea had an offer been forthcoming, rather than risk 48-years in prison, for which Mr. Hild provides no corroborating evidence, id at ¶ 18).

Respectfully, without the allowance of evidentiary development, how is Mr. Hild supposed to provide corroborating evidence? In fact, Mr. Hild didn't even know until after trial that there had been no plea negotiation process, as he clearly had informed counsel that as a 55-year old man he had no desire to spend the rest of his life in prison. Moreover, how is Mr. Hild supposed to show that the trial court would have accepted any proffer made by the prosecution?

Mr. Hild respectfully submits that there must be a general constitutional requirement for trial counsel to seek a proffer from prosecuting officials which in turn allows a defendant his full panoply of rights. This requirement should exist regardless of whether a defendant has stated he would not accept a plea and should be a basic requirement for all attorneys given we are in fact a nation of pleas rather than trials. See Frye supra.

For these reasons, Mr. Hild respectfully moves this Court to grant certiorari on this issue and set controlling precedent for all courts to follow. This, as well as all available relief is respectfully requested.

2) In a state, such as Colorado, when a defendant's priors are automatically introduced if he decides to testify, is there a constitutional requirement that the defendant be advised that his admission of prior convictions cannot be used to convict him of being an habitual criminal at a latter bench trial on that matter?

This Court established that all criminal defendants have a fundamental constitutional right to testify on their own behalf at trial. See Rock v. Arkansas, 483 U.S. 44, 51 (1987). Moreover, the decision as to whether or not to testify is one that is strictly reserved for the defendant to exercise. See Jones v. Barnes; McCoy v. Louisiana, supras. As a result, this Court has also found that a defendant must be properly advised of this right in order to ensure that any waiver of said is knowing and

voluntary. See Carnley v. Cochran, 369 U.S. 506, 513 (1962); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Colorado adopted this constitutional requirement in People v. Curtis, supra, 681 P.2d at 510-11, and subsequent cases that followed, by mandating that all criminal defendants be advised of: 1) that they have the right to testify; 2) that the decision as to whether to testify is their alone, despite any advice to the contrary from counsel; 3) that if they choose to testify and have prior criminal convictions, those convictions will be disclosed to the jury; 4) if prior convictions are disclosed to the jury, the jury will be instructed that they may only consider said with respect to the defendant's credibility; and 5) that if the defendant chooses not to testify, the jury will be instructed that they cannot consider the defendant's exercise of his right to remain silent against him. See Curtis supra; see also, People v. Blehm, 983 P.2d 779, 786 (Colo. 1999).

Until 1993, Colorado allowed a jury determination of a defendant's habitual criminality. However, in 1993, § 18-1.3-401 et seq., C.R.S. was enacted which removed such assessment from the jury and instead allows only for a bifuricated bench trial in front of the same court that held the trial if possible. See § 18-1.3-803 C.R.S. Nonetheless, despite only allowing a bench trial, the Colorado General Assembly still requires that the prosecution prove each habitual criminal count beyond a reasonable doubt. See § 18-1.3-803(4) C.R.S.

The question presented is whether the constitutional requirement that a defendant make a knowing and voluntary waiver of his right to testify requires that a defendant who is charged as an habitual criminal be informed that his admission he was the one convicted of those prior convictions during trial cannot then be used at a latter habitual criminal trial as proof, beyond a reasonable doubt that he is in fact the individual previously convicted.

This question was presented to the Colorado courts and a division of the Court of Appeals there found:

> "We conclude that the trial court adequately advised Hild that if a felony conviction was disclosed to the jury, 'the jury can be instructed to consider it only as it bears upon [Hild's] credibility.' See Curtis, 681 P.2d at 514. Hild was not entitled to a specific or further advisement regarding the use of such convictions during subsequent habitual criminal proceeds. See Gray [People v. Gray, 920 P.2d 787, 793 (Colo. 1996)] 920 P.2d at 793."

See Appendix B, pp. 22-23, ¶ 60; see also, pp. 21-22, ¶ 57 (discussing said in general.)

Respectfully, the Court of Appeals decision is flawed for two specific reasons: 1) the question presented was not one of whether Mr. Hild should have been advised at his subsequent, bifuricated habitual criminal trial; but rather whether the initial advisement should have included advisement that the admission by him that he committed the prior criminal convictions could not be used as proof he did in fact do so at the latter, bifuricated

habitual criminal trial; and 2) the decisions in Curtis and Gray supras, have no bearing on this question as both were decided when Colorado law allowed/required the same jury to determine a defendant's habitual criminality following conviction on the substantive offenses with which the defendant was charged (reminding this Court once again that Colorado law now requires only a bench trial to prove a defendant's habitual criminality.)

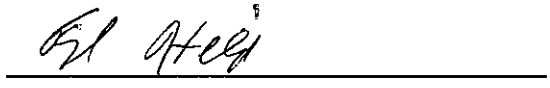
The law in this case, i.e., that a defendant must make a knowing, intelligent and voluntary waiver of his right to testify has not kept up with the changing statute in Colorado. Accordingly, Mr. Hild's Sixth and Fourteenth Amendment rights were violated as he did not make a knowing, voluntary or intelligent waiver of his right to testify due to insufficient advisement by the trial court.[1] As such, Mr. Hild respectfully moves this Court to grant certiorari on this issue, with the ultimate relief being reversal of his convictions.

1. It should be noted that Mr. Hild's prior criminal convictions had already been introduced at trial on the substantive offenses under C.R.E. 404(b) as similars. Hence Mr. Hild had no reason not to testify other than the belief his admission could be used as proof he was the person who committed those prior criminal offenses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Thomas Hild, #107624

Date: 2-15-2024

Thomas Hild, #107624
C.S.P. D-5-12
P.O. Box #777
Canon City, CO. 81215-0777
Pro-Se