

ORIGINAL

20-7757

No: SC20-841

December Term, 2020

IN THE

SUPREME COURT OF THE UNITED STATES

JIMMY LEE TOLIVER, Petitioner

V.

STATE OF FLORIDA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

Jimmy Lee Toliver for himself and on behalf of all
similarly situated Florida sentenced defendants

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QUESTION(S) PRESENTED

The question(s) presented in this case is whether similarly situated criminal defendants should be treated equally in pipeline cases where erroneous jury instructions have been giving? And;

Is it unconstitutional to give an erroneous jury instruction which relieves the States burden of proof?



PARTIES TO THE PROCEEDING
AND RULE 29.6 DISCLOSURE

The caption of this case contains the names of all parties to this proceeding, both here and before the Supreme Court of Florida. No corporations or parent corporations are involved in this matter.

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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 of the Florida Supreme Court in this case.

OPINION BELOW

☐ For cases from **Federal Courts: Not applicable**

☐ For cases from **State Courts:**

The opinion of the Florida Supreme Court, which is the highest state court to review the merits of this case appears at Appendix “A” to the petition and is unreported.

The opinion of the First District Court of Appeal which is reported at *Toliver v. State*, 294 So.3d 428 (Fla. 1st D.C.A 2020) Appendix-”B”

BASIS FOR INVOKING JURISDICTION

The judgment of the Florida Supreme Court that is the subject of this petition was entered on October 26th 2020. A petition for writ of certiorari to review that judgment is timely filed within 150 days after its entry. Sup. Ct. R. 13.1, as modified by the Court's order dated March 19, 2020. As this petition was filed within that number of days after the Florida Supreme Court entered the judgment and the denial of petitioner's Application to file a Second or Successive Habeas Corpus Petition, it is timely, and the Court's jurisdiction to review the question presented exists pursuant to 28 U.S.C. §1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented involves the Equal Protection, Due Process Clauses, and ex post facto law of the Fourteenth Amendment to the United States Constitution which provides in relevant part: "...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 due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

James Toliver is a prisoner in Florida serving a sentence of life for the charge of second degree murder, pursuant to §782.04(2), Florida Statutes. Petitioner entered a plea of not guilty and proceeded to trial by jury on April 26-27, 2006. Petitioner was sentenced on May 25, 2006.

Toliver had a direct appeal with the First District Court of Appeal which was per curiam affirmed on April 9, 2007. *Toliver v. State*, 953 So.2d 713 (Fla. 1st DCA 2007). Petitioner sought discretionary review in the Florida Supreme Court and on September 10, 2007 the Florida Supreme Court declined to accept jurisdiction and denied the petition for review. *Toliver v. State*, 966 So.2d 971 (Fla. 2007).

Mr. Toliver then filed his first Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.850¹ on February 26, 2008 alleging several claims of ineffective assistance of counsel and after an evidentiary hearing held on October 8, 2008, the trial court denied the motion on October 13 2008. Petitioner timely appealed that decision which was per curiam affirmed. *Toliver v. State*, 33 S0.3d 38 (Fla. 1st DCA 2010).

¹ It should be noted that Toliver amended his Motion for Postconviction Relief on three separate occasions prior to the decision by the trial court

Prior to the First District Court of Appeal rendering its decision on Toliver's appeal from the denial of his postconviction relief motion, Mr. Toliver filed a Petition for Writ of Habeas Corpus, pursuant to Rule 9.141(c) of the Florida Rules of Appellate Procedure alleging ineffective assistance of appellate counsel in reference to the decision of the Florida Supreme Court's decision in *State v. Montgomery*, 39 So.3d 252 (Fla. 2010). The First District Court of Appeal denied the habeas petition without explanation. See *Toliver v. State*, 29 So.3d 1147 (Fla. 1st DCA 2010).

Throughout the State court proceedings below, petitioner timely presented the erroneous jury instructions issue to the courts, however, the Florida courts continued to deny all motions and petitions based on timeliness and never addressed the issue on the merits. Furthermore, Mr. Toliver retained private counsel to represent him and who argued that Toliver's case was not final on April 8th 2010 when the Florida Supreme Court made its decision in *State v. Montgomery*, 39 So.3d 252 (Fla. 2010). In fact, Mr. Toliver's case was not final until April 23rd 2010. See *Toliver v. State*, 2010 Fla. App. Lexis 7210 (Fla. 1st D.C.A 2010).

Thus, this petition raises claims of Equal Protection of the laws, Due Process, and mostly importantly, the treatment of Similarly Situated defendants who fall within the "Pipeline" decision of either the United States Supreme Court or the Florida Supreme Court.

REASONS FOR GRANTING THE PETITION

The Jury Instructions given in this case were unconstitutional where they relieved the State of its burden of proof and denied the petitioner equal protection of the law where the issue was raised and petitioner was not given the “pipeline decision application” as was required by controlling decisional law.

The question presented in this Petition is a Federal question of substance which involves a defendant in Florida being denied the same and equal protection of the laws as they apply to the Similarly Situated Criminal Defendants.

Crucial to the exercise of this Court’s certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties. But the fact that a federal question is found in the case doesn’t mean, standing alone, that a state decision will be reviewed. First, the federal question must be a substantial question. Second, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. Third, even then this court may not take the case if the state court’s judgment can be sustained on an independent ground of state law.

In this petition, it is clear that the issue presented is a substantial issue of federal law that arises under the United States Constitution. The issue has properly been raised

in the highest state court and could not and cannot be sustained on any independent ground of state law. Therefore, the issue here meets all the criteria necessary for consideration by the Court under its certiorari jurisdiction.

Certiorari may also be granted to determine whether a state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation. See e.g., *Bullington v. Missouri*, 451 U.S. 430, 432 (1981) (certiorari granted on issue whether reasoning of prior Court precedent also applies to different kind of sentencing procedure); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court “has read *Miranda* too broadly”); *Hankerson v. North Carolina*, 432 U.S. 233, 240 (1977) (certiorari granted on issue whether state court correctly declined to give retroactive effect to prior Supreme Court decision).

Habeas precedent places an especially heavy burden on a defendant who seeks to show constitutional error from a jury instruction that quotes a state statute. Even if there is some ambiguity, inconsistency, or deficiency in the instruction, such an error does not necessarily constitute a due process violation. Rather, the defendant must show both that the instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt. In making this determination, the jury instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. Because it is not enough that

there is some slight possibility that the jury misapplied the instruction, the pertinent question is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.

In the era of our Nation's founding, the right to a jury trial already had existed and evolved for centuries, through and alongside the common law. The jury was considered a fundamental safeguard of individual liberty. See *The Federalist* No. 83, p. 451 (B. Warner ed. 1818) (A. Hamilton). The right to a jury trial in criminal cases was part of the Constitution as first drawn, and it was restated in the Sixth Amendment. Art. III, 2, cl. 3; Amdt. 6. By operation of the Fourteenth Amendment, it is applicable to the States. *Duncan v. Louisiana*, 391 U.S. 145, 149-150, 88 S. Ct. 1444, 20 L. Ed. 2d 491(1968).

Furthermore, the jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. Over the long course its judgments find acceptance in the community, an acceptance essential to respect for the rule of law. The jury is a tangible implementation of the principle that the law comes from the people.

It also is an inherent and indispensable requisite of a fair and impartial trial under the protective powers of our Federal and State Constitutions as contained in the due

process of law clauses that a defendant be accorded the right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence.

In this case, there is no doubt that the “Manslaughter By Act” jury instruction given in this case was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the state of its burden of proving every element of the crime beyond a reasonable doubt.

Petitioner first raised the issue of the erroneous jury instruction in his first Petition for Writ of Habeas Corpus, citing to *Burroughs v. State*, 997 So.2d 522 (Fla. 1st D.C.A. 2008) in which the defendant there argued that the trial court fundamentally erred in giving the standard jury instruction for the lesser included offense of Manslaughter by Act because it erroneously “*included*” the provision that the defendant intended to cause the victims death. (emphasis added).

The Florida Supreme Court’s decision in *State v. Montgomery*, 39 So.3d 252 (Fla. 2010) shows that the jury instruction in question was of a constitutional nature and that the given of this instruction relieved the State of its burden of proving every element of the crime of second degree murder beyond a reasonable doubt, and adding an element to the crime of manslaughter. It should also be noted that the Florida Supreme Court’s decision did nothing but affirm the decision of the First District Court of Appeal in

Montgomery v. State, 70 So.3d 603 (Fla. 1st D.C.A. 2009) which held that “The trial court fundamentally erred in giving a standard jury instruction for manslaughter by act, as it erroneously suggested that intent to kill was an element of that crime”

Furthermore, the states position in the courts below is that the petitioner was not entitled to relief because he was not in the “pipeline” for the decision in *Montgomery* to be applied to his case. However, the facts of petitioner’s case do in fact put his case in the “pipeline” for several reasons.

The petitioner has consistently presented this issue to the courts below starting when *Montgomery* was first decided and the question was certified by the First District Court of Appeal in February of 2009, while petitioner’s case was still pending in the Florida Supreme Court.

In *Marshall v. State*, 240 So.3d 111 (Fla. 3rd D.C.A. 2018), a similarly situated case, the defendant there was charged with Second Degree Murder on April 2nd 2004, whereas petitioner in this case was charged with Second Degree Murder and was not convicted until April 27th 2006. The defendant in Marshall filed a Petition for Writ of Habeas Corpus alleging ineffective assistance of appellate counsel for failing to file a supplemental brief in his direct appeal citing to *Montgomery v. State*, 70 So. 3d 603 (Fla. 1st DCA2009). Petitioner in this case raised the identical issue.

In the courts below, the State of Florida has consistently denied relief to the petitioner based on the reasoning that petitioner's case was not in the "pipeline" because a postconviction claim raised in a motion for postconviction relief or in a petition for a writ of habeas corpus does not qualify as a "pipeline" case due to the fact that petitioner's direct appeal was final at the time that the First District decided *Montgomery*.

However, the Florida Supreme Court and several of the District Courts of Appeal have held otherwise. In *Smith v. State*, 598 So.2d 1063 (Fla. 1992) the Florida Supreme Court held that "Any decision of the Florida Supreme Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final. Fla. Const. Art. I, § 9 & 16. To benefit from the change in law, defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review." See also *Luckey v. State*, 979 So.2d 353 (Fla. 5th D.C.A. 2008); *Polewarzyk v. State*, 978 So.2d 250 (Fla 5th D.C.A. 2008); *Monfiston v. State*, 924 So.2d 61 (Fla. 4th D.C.A. 2006); *Barthel v. State*, 882 So.2d 1054 (Fla. 2nd D.C.A. 2004); and *Marshall v. State*, 240 So.3d 111 (Fla. 3rd D.C.A. 2018).

Lastly, petitioner's case cannot be deemed final when his case was still pending on a Petition for Writ of Habeas Corpus in February 2009, where *Montgomery* was not decided and a question certified by the First District Court of Appeal until February 12th

2009 and decided on April 8th 2010 when the Florida Supreme Court made its decision in *State v. Montgomery*, 39 So.3d 252 (Fla. 2010). In fact, Mr. Toliver's case was not final until April 23rd 2010. See *Toliver v. State*, 2010 Fla. App. Lexis 7210 (Fla. 1st D.C.A 2010).

Furthermore, Toliver's argument that the trial court's jury instructions violated his constitutional right to due process has merit. As shown above, the Florida Supreme Court in *Montgomery* agreed that the jury instruction, as given, plainly violated due process. Instructing the jury that it "must" infer Toliver's specific intent removed the issue of intent from the jury's consideration and relieved the State of its burden to prove each element of the crime beyond a reasonable doubt. See *Sandstrom v. Montana*, 442 U.S. 510, 523, 99 S. Ct. 2450, 61 L. Ed. 2d 39(1979). Such presumptions, this Court has held, violate the Due Process Clause. *Francis v. Franklin*, 471 U.S. 307, 325, 105 S. Ct. 1965, 85 L. Ed. 2d 344(1985).

CONSLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

/s/ Jimmy Lee Toliver
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P.O. Box 1000
Raiford, Florida 32083-1000

CERTIFICATE OF SERVICE

I Jimmy Lee Toliver, HEREBY CERTIFY, under 28 U.S.C. §1746 and the authority of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 2382, 101 L. Ed. 2d 245 (1988). (Prisoner's mailbox rule) that I have placed a true and correct copy of the foregoing "Petition for Writ of Certiorari and Appendix to Petition for Writ of Certiorari" into the hands of prison officials for mailing to: Office of Attorney General The Capitol PL-01, Tallahassee, Florida 32399-1050 On this 1st day of 3rd 2020.

Respectfully Submitted,

18/ Jimmy Lee Toliver
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