NO. 21-5645

SUPREME COURT OF THE JUITED STATES

ORIGINAL

DONALD MACK,
PETITIONER,

v.

ASHLEY MOODY,
ATTORNEY GENERAL, STATE OF FLORIDA
RESPONDENT.

EXTRAORDINARY WRIT OF HABEAS CORPUS

Donald J. Mack #047682
Columbia Correctional Inst.
216 SE Corrections Way
Lake City Florida 32025
pro se

QUESTION PRESENTED

The Due Process Clause of the Fourteenth Amendment prohibits states from trying or convicting a defendant who is mentally incompetent. See *Pate v. Robinson*, 383 U.S. 375 (1966). Under the Fourteenth Amendment to the United States Constitution can a man who has been convicted when he is incompetent challenge his conviction notwithstanding procedural rules in the State and Federal Courts?

LIST OF PARTIES

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

RELATED CASES

In Re: Doncal J. Mack, 2021-11237-H Eleventh Circuit Court of Appeals April 27, 2021

Donald J. Mack v. Julie Jones, 2018 U.S. Lexis 16582 (S.D. Fla. 2018)

Donald J. Mack, 2021 Fla. App. Lexis 3574 (Fla. Dist. App. May 20, 2021)

Donald J. Mack, 562009-CF-002014A, Circuit Court Nineteenth Judicial Circuit, Saint Lucie County Florida. May 26, 2020.

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Federal Court: Mack v. Jones, 2018 U.S. Dist. Lexis 16582 (S.D. Fla. Fla. Jan. 08, 2018)

The opinion on the United States Court of Appeals appears at Appendix A to this Petition.

That opinion is not published

State Court

The opinion of the highest State Court to review the merits appear at

Mack v. State of Florida, 2021 Fla. App. Lexis 3574 (Fla. App. 4th Dist. 2021)

Mack v. State of Florida, 2016 WL 4065596 (Fla. App 4th Dist. 2016)

Mack v. State of Florida, 134 So.3d 471 (Fla. 4 DCA 2014).

JURISDICTION

The United States Court of Appeals decided my case April 27, 2021. There was no motion for rehearing was filed, and none is authorized. The Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1)

CONSTITUTIONAL AND STATUTORILY PROVISIONS INVOLVED

"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 protections of the laws". Article XIV 1 United States Constitution

STATEMENT OF CASE AND FACTS

On May 19, 2011, Petitioner was charged in an amended information along with two other Co-Conspirators, with RICO-conducting an Enterprise through a Pattern of Racketeering Activity, a first degree felony in violation of §893.13(1)(a) *Fla. Stat.*, and two counts of sale and delivery of controlled substances.

Petitioner asserted his right to a trial by jury which commenced May 31, 2011 and ended June 3, 2011 after a jury convicted Petitioner on all alleged counts filed against him in the information.

June 13, 2011 Defense Counsel filed a motion to arrest judgment pursuant to *Fla. R. Crim. P.* 3.610, based on claims that Petitioner was adjudicated incompetent by the Circuit Court in Broward County, Florida arising out from charges brought six years earlier, and never restored to competancy.

Defense Counsel argued Petitioner's incompetency negated the conviction, he should not have been tried, therefore sentencing should be stayed, and based on his incompetency, the verdict should be arrested, set aside, nullified, vacated, and/or a mistrial declared. Similarly, in a motion to find Petitioner incompetent to proceed to trial, Defense Counsel set forth that the adjudication of incompetency occurred just six months prior to the underlying trial and that Defense Counsel was not aware of the incompetency until after the underlying trial was complete. A post-trial hearing was scheduled for November 15, 2011.

At the hearing, the Court denied the motion to arrest judgment stating there were no supporting grounds under Rule 3.610. (Post-Trial Tr. At 7). In addressing Petitioner's claim that he was incompetent at the underlying trial based on a prior adjudication of incompetency, the Court found that (1) based on Florida law it had no independent obligation to hold a competency hearing if there was nothing to alert the Court that he lacked competency nor was it obligated to accept expert testimony or the determination of incompetency of another court, (2) there was nothing in the court file to say

Petitioner was incompetent to proceed nor were there indicators of incompetency during trial and (3) Petitioner's responses during the Court's colloquy at trial demonstrated that he fully understood his rights and freely and voluntarily exercised his right to not testify.

The Court also found that the facts supporting Petitioner's conviction in the instant case was inconsistent with someone who is incompetent or mentally disabled. Petitioner's incompetency was not apparent to Defense Counsel after more than two years of representation, the State Attorney's office, or the trial court, no one came forward with information about incompetency until after a guilty verdict was rendered, and the psychological reports used to support the determination of incompetency were unreliable because there was no medical evidence to support any diagnosis. (*Id.* at 143-155).

The post-trial hearing included determining the Competency of Petitioner to proceed to sentencing, not trial. The State presented its expert witness, a clinical and forensic psychologist[1] who testified he personally assessed Petitioner and reviewed his prior psychological evaluations. (Post-Trial Tr.at 75-132). The psychologist testified that he could not conclude whether Petitioner "was or was not malingering," as that would require further analysis. (*Id.* at 115,124). The psychologist testified that Petitioner was incompetent to proceed to sentencing. (*Id.* at 118). He did not render an opinion as to whether Petitioner was competent to proceed at any time other than the time of his evaluation. (*Id.* at 125).

The Court took judicial notice of the psychological reports and determined there was no evidence to support a diagnosis of mental illness or cognitive disorders. However, based on the

1. Dr. Gregory Landrum examined Petitioner for approximately "90 minutes to 2 hours" on June 27, 2011, and reviewed three prior psychological evaluations of Petitioner: an evaluation by Dr. Dennis Day completed November 10, 2010; an evaluation by Dr. Trudy Block-Garfield completed on May 27, 2009; and an unsigned letter from Broward Regional Health Planning Counsel written on December 21, 2005. (Post-Trial Tr. 76-79). Dr. Landrum's report at p. 1510-1516; Dr. Day's report at p. 1517-1520; Dr. Braunstein's report for Henderson Mental Health Center at p. 1521-1522; Dr. Block-Garfield's report at p. 1523-1525; and Broward Regional Health Planning Council's letter at p. 1527-1529.

testimony of the psychologist, the Court found Petitioner temporarily incompetent to proceed to sentencing and ordered a full evaluation in a competency restoration program in a state forensic facility that would receive all of the relevant facts and evidence to assist in its evaluation. (Post-Trial Tr. at 147-162). On May 18, 2012, the Court held a hearing to accept the report from Treasure Coast Forensic Treatment Center, which stated Petitioner was now competent to proceed to sentencing . (*Id.* 169-170) .

At the sentencing hearing on May 24, 2012, Defense Counsel renewed the competency objections and objected to the psychological report but the court overruled the objections based on the same reasoning it articulated during the post-trial hearing held on November 15, 2011. (*Id.* at 176-196). Accordingly, the Court sentenced Petitioner to thirty (30) years imprisonment with credit for time served for Count 1; for Count 2, a period of fifteen (15) years drug offender probation to run consecutive with Count 1; for Count 3, a period of fifteen (15) years drug offender probation to run concurrent with Count 2; and, for Count 4, a period of fifteen (15) years drug offender probation to run concurrent with Count 3. (*Id.* at 225). Petitioner filed a timely appeal.

In his appellate brief, Petitioner presented two claims:(1) ineffective assistance of counsel resulting from counsel's failure to discover his adjudication of incompetence from Broward County and (2) trial error in not granting Petitioner's motion for acquittal for the State's failure to prove association with a criminal enterprise to support the RICO conviction. On February 20, 2014, the appellate court per curiam affirmed Petitioner's conviction. (See *Mack v. State of Florida*, 134 So.3d 471, (Fla. 4 DCA 2014). On July 3, 2014, Petitioner filed his motion for post-conviction relief pursuant to *Fla. R. Crim. P.* 3.850. (R-40-75) As grounds for relief he asserted eight claims of ineffective assistance of counsel and the ninth claim asserted that the cumulative effect of counsel errors entitled Petitioner to a new trial. *Id.* On September 3, 2015, the Circuit Court entered an order dismissing without prejudice as to the insufficient claim presented as Claim One in the 3.850 motion.

Petitioner filed a Supplemental Rule 3.850 motion and attached the psychological reports

referenced in the post-trial hearings. On March 7, 2016, the court denied all claims in Petitioner's Rule 3.850 motion and Supplemental Rule 3.850 motion as procedurally barred, refuted by the record, and without merit. (R-76-84) Petitioner appealed the denial of his 3.850 of motion and filed an initial brief claiming (1) the trial court erred in denying Claim One as procedurally barred and refuted by the record and (2) that the trial court erred in denying Claim Two without attaching a portion of the record that conclusively showed he was not entitled to relief. On July 28, 2016, the Fourth District Court of Appeal per curiam affirmed the denial of Petitioner's 3.850 motion. *Mack v. State,* 2016 WL 4065596 (Fla. 4th DCA 2016). The mandate was issued on August 26, 2016.

Petitioner filed a Petition for Writ of Habeas Corpus in the Southern District of Florida challenging his conviction, which was denied. See, Mack v. Jones, 2018 U.S. Dist. LEXIS 3813 (S.D. Fla., Jan. 8, 2018).

Petitioner filed a Petition for Writ of Habeas Corpus arguing that he was tried while incompetent and his conviction should be vacated, that was denied May 26, 2020. The order was affirmed by the Fourth District Court of Appeals. Mack v. State, 4D20-

Petitioner then sought leave to file a second or successive petition for writ of habeas corpus pursuant to §2254 in the Eleventh Circuit Court of Appeals which was denied April 27, 2021.

Petitioner filed in this Court a Petition for Writ of Habeas seeking review of the denial of his application to file a second or successive habeas corpus that was returned August 2, 2021 citing that there was no leave to proceed in forma pauperis, no notarized affidavit of declaration of indigency and that the petition did not follow the form prescribed by Rule 14 as required by Rule 20.2. The Clerk also noted that: "Petitioner does not show how the writ will be in aid of the Court's appellate jurisdiction, what exceptional circumstances warrant the exercise of the court's discretionary powers, and why adequate relief cannot be obtained in any other form or from any other court. The petition does not state the reasons for not making application to the district court of the district in which you are held".

Petitioner cannot file a Petition for Certiorari in this Court to review the denial of an application to file a second or successive petition for writ of habeas corpus pursuant to Title 28 U.S.C. §2254. Habeas Corpus is the only application that can be filed to seek review.

No other pleadings or petitions have been filed in this cause, the Petition follows:

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fourteenth Amendment prohibits states from trying or convicting a defendant who is mentally incompetent. See *Pate v. Robinson*, 383 U.S. 375 (1966). The Supreme Court set the standard to be used in determining mental competency as to whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402(1960) (per curiam); *Drope v. Missouri*, 420 U.S. 162, 171 (1975); see also *Indiana v. Edwards*, 554 U.S. 164 (2008).

A petitioner who makes a substantive competency claim, contending that he was tried and convicted while mentally incompetent, is entitled to a presumption of incompetency. *James v. Singletary*, 957 F.2d 1562, 1571 (11th Cir. 1992).

To prevail on a procedural competency claim, a petitioner must establish that the state trial judge ignored facts raising a 'bona fide doubt' regarding the petitioner's competency to stand trial. *Id.* at 1572 n.15 (citing *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987), 819 F.2d at 1568). A petitioner who presents clear and convincing evidence which creates a real, substantial and legitimate doubt as to his competence is entitled to an evidentiary hearing on his substantive competency claim.

For any defendant, the consequences of an erroneous determination of competence is dire, because if he lacks the ability to communicate effectively with counsel, he is unable to exercise other rights deemed essential to a fair trial. *Riggins v Nevada*, 504 US, 127, 139 (1992). After making the profound choice not to plead guilty, *Godinez v Moran*, 509 US 389, 398 (1993), the defendant proceeds

to trial having to decide whether to waive his privilege against compulsory self-incrimination, *Boykin v Alabama*, 395 US 238, 243 (1969), by taking the witness stand; in consultation with counsel, he has to decide whether to waive his right to confront [his] accusers, *ibid.*, by declining to cross-examine witnesses for the prosecution." *Ibid.*

The question in this case is whether a State may leave undisturbed a criminal conviction once the defendant demonstrated, post trial, that he was incompetent during trial.

At a post-trial hearing in this case, to address questions concerning Petitioner's competency Dr. Landrum, a Court appointed expert, clinical and forensic psychologist[2] testified he personally assessed Petitioner and reviewed Petitioner's prior psychological evaluations. (Post-Trial Tr. at 75-132). The psychologist testified that Petitioner was incompetent. (*Id.* at 118). He did not render an opinion as to whether Petitioner was competent to proceed at any other time. (*Id.* at 125).

The Court took judicial notice of the psychological reports and determined Petitioner was competent for trial, based on the conduct the State presented to convict him. In the same breath, the Court determined Petitioner was incompetent to proceed to sentencing and ordered a full evaluation in a competency restoration program at a state forensic facility that would receive all of the relevant facts and evidence to assist in its evaluation. (Post-Trial Tr. at 147-162).

This ruling rejected multiple Mental Health Experts who opined that Petitioner was incompetent for trial, and sentencing. The expert findings supported the ruling that Petitioner was incompetent before trial and nothing intervened to indicate he had been restored to competency before trial.

Petitioner's competency was an impediment to his ability to have a fair trial, where he was

2. Dr. Gregory Landrum examined Petitioner for approximately "90 minutes to 2 hours" on June 27, 2011, and reviewed three prior psychological evaluations of Petitioner: an evaluation by Dr. Dennis Day completed November 10, 2010; an evaluation by Dr. Trudy Block-Garfield completed on May 27, 2009; and an unsigned letter from Broward Regional Health Planning Counsel written on December 21, 2005. (Post-Trial Tr. 76-79). Dr. Landrum's report at p. 1510-1516; Dr. Day's report at p. 1517-1520; Dr. Braunstein's report for Henderson Mental Health Center at p. 1521-1522; Dr. Block-Garfield's report at p. 1523-1525; and Broward Regional Health Planning Council's letter at p. 1527-1529.

unable to meaningfully communicate with counsel as a normal defendant would. Petitioner's incompetency prevented him from telling counsel he had been declared incompetent in Broward County on December 22, 2010, six months before trial, and that he was never restored to competency.

An individual who has been adjudicated incompetent is presumed to remain incompetent until adjudicated competent to proceed by a Court. *Jackson v. State*, 880 So. 2d 1241, 1242 (Fla. 1st DCA 2004) (citing *Holland v. State*, 634 So. 2d 813, 815 (Fla. 1st DCA 1994)); see also *Corbin v. State*, 129 Fla. 421, 176 So. 435 (Fla. 1937); *Erickson v. State*, 965 So. 2d 294 (Fla. 5th DCA 2007); and *Molina v. State*, 946 So. 2d 1103 (Fla. 5th DCA 2006).

In this case, the Petitioner was never restored to competency before trial, and the Circuit Court had no authority to reject the Broward County Judges findings/orders of incompetency by relying on the Petitioners criminal conduct to find he was competent post trial.

The State Court could have made a nunc pro tunc determination of Petitioner's competency based on competent substantial evidence, from qualified medical professional's available close in time to the determination, but could not rely on the Petitioner's criminal conduct, as the Court in this case did. See *Daugherty v. State*, 149 So3d 672 (Fla. 2014); *Pate v Robinson*, 383 U.S. 375 (1966) (which held that due process is violated if the trial court fails to afford an adequate hearing to a defendant on the issue of his competency to stand trial).

The Court's expert that examined the Petitioner after trial concurred with the Broward County experts, testifying that Petitioner was not competent.

The error in this case is that on December 22, 2010, six months before trial, Petitioner was declared incompetent. No one examined Petitioner for competency before the instant trial, and he was tried while incompetent. This was error. See e.g. *Alexander. State*, 291 So3d 978 (Fla. App. 3rd Dist. 2019) ([T]he fact that the trial court believed Mr. Alexander "presents very lucid in court" cannot be characterized as a finding of competency because a determination of competency is based on numerous

relevant factors, not only whether a defendant presents as "very lucid in court.").

The evidence introduced on Petitioner's behalf entitles him to review of this issue, where the State Court's failure to honor the evidence of incompetency deprived Petitioner of his constitutional right to a fair trial. See *Thomas v Cunningham*, 313 F.2d 934(CA 4th Cir 1963). The State court's failure to follow the procedures mandated by the Constitution amounted to an unreasonable application of clearly established law as determined by the Supreme Court. Petitioner made a substantial showing of incompetency, which entitles him to, among other things, an adequate means by which the expert psychiatric evidence is evaluated, in response to the evidence solicited by the State. And it is clear from the record that the State Court reached its competency determination without providing Petitioner with due process, notwithstanding sustained effort, diligence, and compliance with Court rules.

Once a prisoner seeking habeas corpus based on competency, has made a substantial threshold showing of incompetency, the protection afforded by procedural due process includes a fair hearing in accord with fundamental fairness. *Ford v. Wainwright*, 477 U.S. 399, 424 (1986).

This protection means a prisoner must be accorded an opportunity to be heard, *id.*, at 424, through a constitutionally acceptable procedure that affords process to the Prisoner, *id.*, at 427. As an example of how the state procedures were deficient, the determination of competency appeared to have been made solely on the basis of the examinations performed by examining the Court files, and the evidence produced to convict Petitioner. Such a procedure invited arbitrariness and error by rejecting contrary medical evidence which sustained an arbitrary result.

The precise limits that due process imposes in this area, includes an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that would refute the State's evidence.

Petitioner was entitled to these protections once he made a substantial threshold showing of incompetency. *Id.*, at 426. He made this showing when he filed Motion To Determine Competency after

trial, confirmed by the trial court's appointment of mental health experts pursuant to *Fla. R. Crim. P.* 3.211(a)(2). *Dougherty v. State*, 149 So. 3d 672, 676 (Fla 2014) and verified by independent review of the record. The Motion included observations made by a Court appointed expert after Petitioner's trial and it, references the extensive evidence of mental dysfunction considered in earlier legal proceedings. In light of this showing, the Sate Court failed to provide Petitioner with the minimum process required. *Id.*

Under AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a] claim on the merits . . . resulted in a decision that . . . involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in 2254(d)(1) is satisfied.

A federal court must then resolve the claim without the deference AEDPA otherwise requires. See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (performing the analysis required under *Strickland's* second prong without deferring to the state court's decision because the state court's resolution of *Strickland's* first prong involved an unreasonable application of law); *id.*, at 527-529 (confirming that the state court's ultimate decision to reject the prisoner's ineffective-assistance-of-counsel claim was based on the first prong and not the second). See also *Williams*, supra, at 395-397; *Early v. Packer*, 537 U.S. 3, 8 (2002) (indicating that 2254 does not preclude relief if either "the reasoning [or] the result of the state-court decision contradicts [our cases]"). Here, due to the state court's unreasonable application of *Ford*, the fact finding procedures upon which the Court relied were not adequate for reaching reasonably correct results or, at a minimum, resulted in a process that appeared to be seriously inadequate for the ascertainment of the truth. 477 U.S. at 423-424.

Petitioner seeks a Petition for writ of habeas corpus to review the State Court's determination of competency for trial nun pro tunc.

CONCLUSION

Petitioner has shown that he was tried while incompetent, and the order on review must be reversed to allow a nunc pro tunc determination of competency for trial after considering medical and non-medical information relevant to such a determination. *Alexander.*

Wherefore the Petitioner moves this Honorable Court to grant the Writ, issue an order directing the District Court to review the merits of this issue and make a merits determination and any other orders this Court deems necessary and just.

This 30 day of August, 2021

Donald J. Mack

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