

JUN 21 2021

OFFICE OF THE CLERK

No. 21-5889

IN THE
SUPREME COURT OF THE UNITED STATES

ANIBAL ALEJANDRO HERNANDEZ PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANIBAL ALEJANDRO HERNANDEZ
(Your Name)

TDCJ # 1993103, 810 FM 2821
(Address)

Huntsville, TX 77349
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

- I. Was Petitioner denied the effective assistance of counsel when his trial counsel failed to object to Petitioner being ordered by the trial court to be shackled during the entirety of his trial based on general courtroom security?

- II. Was Petitioner denied effective assistance of counsel when during closing arguments trial counsel told the jury that Petitioner was a "liar" and a "rat" willing to say anything to escape his charges?

LIST OF PARTIES

- ☒ 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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STATUTES AND RULES

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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B 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☒ is unpublished.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 A 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☒ is unpublished.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☐ is unpublished.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☐ is unpublished.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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 25, 2021.

☐ 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

"In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." U.S. Const. Amend. VI.

"[N]or shall any State deprive any person of life, liberty, or property without due process of law[.]" U.S. Const. Amend XIV.

STATEMENT OF THE CASE

Petitioner was charged with capital murder of Mark Anthony Torres and Aracely Charles committed during the same criminal transaction on or about September 7, 2013. Petitioner pleaded not guilty, but a jury found him guilty, and the trial court sentenced him to automatic life without parole.

Adopting the findings and conclusions of the State habeas Court, the U.S. District Court found that Petitioner was not denied his right to effective assistance of counsel when Petitioner's trial counsel failed to object to Petitioner being shackled during the entirety of his trial based on a Tarrant County, Texas trial Court policy of shackling defendants based on general courtroom security purposes. The U.S. District Court also found that trial counsel was not ineffective when, during his closing arguments, trial counsel told the jury that Petitioner was a "liar" and a "rat" willing to say anything to escape his charges.

The U.S. Court of Appeals for the Fifth Circuit affirmed and denied Petitioner a Certificate of Appealability.

REASONS FOR GRANTING THE PETITION

QUESTION I.

Was Petitioner denied the effective assistance of counsel when his trial counsel failed to object to Petitioner being ordered by the trial court to be shackled during the entirety of his trial based on general courtroom security purposes?

The Petition should be Granted because the lower State and Federal Courts' decisions are contrary to this Supreme Court's decision in Deck v. Missouri, 544 U.S. 622 (2007).

At the very outset of Petitioner's trial, prior to the start of the jury selection, the State magistrate judge ordered that Petitioner be placed in shackles for the duration of the trial. The magistrate gave no reason for the order. Petitioner at no point in the trial proceedings had displayed any form of disruptive behavior. Trial counsel lodged no objection to the order.

In his State writ of habeas corpus, Petitioner alleged he suffered prejudice by his trial counsel's failure to object to the shackling. Petitioner alleged that the shackles were noticeable to the jury based on the rattling sound whenever Petitioner moved; Petitioner alleged that the shackles impeded his ability to effectively communicate with his trial counsel throughout the trial; Petitioner alleged that being shackled negatively affected his decision as to whether or not he testified in his own behalf; and Petitioner alleged that his trial counsel's failure to object to the shackling undermined his confidence and trust in his trial counsel's representation. (Petitioner's State habeas writ).

During the State habeas proceedings, trial counsel filed an affidavit responding to Petitioner's allegations. The only allegation denied by trial counsel was that the shackles were "visible" to the jury because they were concealed by a "skirted counsel tale (sic)." Counsel explained that "this method of courtroom security is standard

"in Tarrant County and has been for over 20 years." (Affidavit of Trial Counsel).

The State habeas court denied releif on grounds that Petitioner presented no evidence that the jury was "aware" of the shackels; that Petitioner failed to complain on his direct appeal about the shackels; and that there lacked a reasonable liklihood of a different trial outcome had trial counsel objected. (State habeas record at 102).

The State habeas court ignored Petitioner's undisputed declaration that the jury was aware of the shackels due to their rattling; the court ignore Petitioner's undisputed declaration that the shackels impeded his communications with counsel during trial; the Court ignored Petitioner's undisputed allegation that the shackeling adversely affected his decision whether to testify; and the Court ignore Petitioner's allegations that trial counsel's failure to object to the shackels undermined his confidence and trust in counsel's representation.

Both the State and Federal habeas Courts placed emphasis primarily on the claim that the shackels were not "visible" to the jury.

Petitioner argued that his claim in regards to the shackeling could not be raised on his direct appeal, because trial counsel failed to preserve error.

The State habeas court also concluded that nothing in the record showed that the shackels "undermined the dignity of the judicial process." (State Habeas Court Record at 102, P.17).

In Deck v. Missouri, 544 U.S. 622,635 (2007), this Court made clear that more than whether or not shackels are visible to the jury is at issue when a defendant is made to stand trial while shackeled without the Court giving its justification for such restraints.

In Deck, this Court held that other constitutional guarantees to a fair trial under due process of law "are directly implicated" by the shackling, including the presumption of innocence, the impediment of a defendant's ability to effectively communicate with counsel, and that the routine use of shackles compromises "[t]he courtroom's formal dignity which includes the respectful treatment of defendants[.]"

These "guarantees" elucidated by this Court in Deck were disregarded and given no meaningful consideration by any of the lower courts.

Moreover, trial counsel's failure to object to the "routine" use of shackles on Petitioner was not due to any "strategic" or "tactical" decisions. Instead, per counsel's affidavit, his action, or lack of action, was in acquiescence to Tarrant County's unconstitutional and longtime policy of routinely shackling defendants based on general courtroom security, despite this Court's decision in Deck.

Counsel's failure to object to a policy this Court outlawed long ago constitutes deficient performance, as well as prejudicial performance under this Court's decision in Strickland v. Washington, 466 U.S. 668, 688 (1984).

As well, this Court should exercise its supervisory authority to rein in, and put an end to, Tarrant County Courts' routine use of shackles for general courtroom security.

Petitioner respectfully request this Court GRANT a writ of certiorari.

QUESTION II.

Was petitioner denied effective assistance of counsel when during closing arguments trial counsel told the jury that Petitioner was a "liar" and a "rat" willing to say anything to escape his charges?

The Petition should be Granted because, while this Court has ruled that when trial counsel explicitly concedes a defendant's guilt over the defendant's objections he renders ineffective assistance of counsel, (McCoy v. Louisiana, 138 S.Ct. 1500 (2018)), the question of whether counsel's implicit concession of guilt, combined with his disparaging epithets, satisfies both prongs of Strickland creates a split amongst the circuits.

In Rickman v. Bell, 131 F.3d 1150,1159 (6th Cir. 1997), the Court found that similar conduct by the defendant's counsel in disparaging the defendant in the eyes of the jury satisfied both prongs of Strickland.

In Petitioner's case, Petitioner was interviewed three separate times by police. Some of the statements made to police and other state witnesses were contradictory.

At trial, Petitioner's defense was to ameliorate the contradictions by explaining that he was under coercion and duress from a party implicated in the case, whom Petitioner described as connected to a violent drug cartel. In Petitioner's final statement to police, he explained that he was intimidated into making earlier claims out of fear and intimidation of and by the cartel connected associate. (Volume 8 of Reporter's Record of Trial, at P. 57).

Importantly, the lead detective testified and conceded that he could not disprove Petitioner's final version of how the murders occurred. The final version exonerated Petitioner. (Volume 8, Reporter's Record, at P. 106).

Nevertheless, at his closing arguments, trial counsel told the jury that the defensive theory put forward, which tracked Petitioner's final version of how the murder occurred, was "fabricated." (Id., at P. 177). Trial counsel, directly, called Petitioner a "liar" and a "rat" willing to say anything to escape his charges. (Id., at P. 178).

Despite trial counsel's statements being recorded in the record of trial, in his post conviction affidavit responding to Petitioner's claim, trial counsel claimed to have no recollection of "directly" calling Petitioner a liar and a rat. (See Affidavit of Trial Counsel) He never explained why he told the jury that the defensive theory put forward by Petitioner, which the lead detective admitted he could not disprove, was "fabricated."

The State habeas court ruled that trial counsel calling Petitioner a liar and a rat, "when read in the "context" of counsel's closing argument, "was an attempt to create reasonable doubt regarding the credibility of Petitioner's confession," (Federal Court Docket No. 22, at P. 16).

However, in his affidavit, trial counsel never claimed that his comments to the jury that Petitioner's defensive theory was "fabricated", or that his calling Petitioner a "liar" and a "rat" willing to say anything to escape the charges was a tactical or strategic decision. His explanation was that he had no recollection of directly calling Petitioner the disparaging names. Counsel never explained why he told the jury the defensive theory was fabricated.

Trial counsel's actions in implicitly conceding Petitioner's guilt and undermining Petitioner's defensive theory while referring to Petitioner in highly inflammatory and derogatory epithets devastated Petitioner's defense. The Sixth U.S. Court of Appeals decision in Rickman v. Bell, 131 F.3d 1150,1159 (6th Cir. 1997), which deals with virtually the same conduct by the trial counsel in that case, is opposite to the decision affirmed by the Fifth Circuit in Petitioner's case.

Nevertheless, while there may be a split amongst the circuits as to the outcomes, and while whether an attorney's "implicit" conceding of his client's guilt may not have been directly addressed in this Court's decision in McCoy, supra, it is well established law that a trial counsel's loyalty is due to his client, and that belittling his client in the eyes of the jury does not satisfy the mandates of effective assistance of counsel, as set forth in Strickland v. Washington, 466 U.S. 668 (1984).

The lower court's decisions that Petitioner's trial counsel's actions do not satisfy both prongs of Strickland is contrary to well established law.

Wherefore, Petitioner respectfully request that this Court grant a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Anibal A. Hernandez

Date: September 15, 2007