

No. 22-_____

IN THE SUPREME COURT OF THE UNITED STATES

BOBBY THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did trial counsel entirely fail to present a defense to illegally possessing a firearm by conceding that Thompson possessed a gun when the court's instructions permitted the jury to convict him for that possession?

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I. PETITION FOR WRIT OF CERTIORARI

Bobby Thompson petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

II. OPINIONS BELOW

The Ninth Circuit affirmed the decision of the district court denying Thompson's request for a writ of habeas corpus in an unreported memorandum on March 18, 2022. *See Appendix 1.* The district court issued an order denying the Thompson's request for a writ of habeas corpus and issued a certificate of appealability on March 23, 2021. *See Appendix 2.* The Ninth Circuit issued a memorandum affirming the Thompson's conviction on direct appeal in an unreported memorandum on July 9, 2018. *See Appendix 3.*

III. JURISDICTIONAL STATEMENT

The Ninth Circuit issued its decision denying the petitioner's request for a writ of habeas corpus on March 18, 2022. *See Appendix I.* This petition is timely filed pursuant to Supreme Court Rule 13.1. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

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 informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

V. STATEMENT OF THE CASE

Introduction

Bobby Thompson was indicted on a charge of felon-in-possession for conduct that occurred during a traffic stop on March 22, 2016. Under the belief that Thompson could only be convicted for conduct occurring on March 22nd, trial counsel conceded that Thompson possessed a gun two days earlier on the 20th. The jury subsequently indicated its intent to convict Thompson for the conduct occurring on the 20th without considering evidence from March 22nd. The trial court's subsequent instruction to the jury permitted a conviction for the unindicted conduct and the jury convicted Thompson less than an hour later.

Thompson filed a petition for habeas corpus asserting that the trial counsel was ineffective for failing to object to the trial court's instructions and suffered a complete denial of the right to counsel when trial counsel conceded that Thompson had possessed a gun. The trial court recognized the problem with permitting the jury to convict Thompson for conduct that occurred on the 20th and the failure of its instruction to specifically address the jury's expressed intent to do so. The trial court, however, concluded that trial counsel's concession was not rendered "deficient" merely because the jury later indicated its intent to convict Thompson for that conduct.

The Ninth Circuit Court of Appeals recognized that counsel is necessarily ineffective when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." The Ninth Circuit, however, concluded that trial counsel did not "entirely fail" even though counsel conceded that Thompson illegally possessed a gun and failed to request instruction ensuring that the jury deliberated on and rendered a verdict for the indicted conduct. In so concluding, the Ninth Circuit has issued a decision in conflict with clear precedent from the United States Supreme Court and denied Thompson the right to counsel and his right to subject the prosecution's case to adversarial testing.

Trial Proceedings

Bobby Thompson was indicted on a charge of possessing a gun in violation of 18 U.S.C. § § 922(g)(1) for conduct that occurred on March 22, 2016. [Doc 2]¹ The government asserted that Thompson illegally possessed a gun that was found underneath the passenger seat of a car driven by David Treadway. [II-ER-258, 260-62; Doc. 93 at 4, 6-8] The government acknowledged that Treadway was known to carry weapons under the seat of his car, but asserted that photos showing Thompson with a gun two days earlier established that Thompson possessed the gun found under the passenger seat of Treadway's car. [II-ER-260-62; Doc. 93 at

¹ Citations to the record in the Alaska District Court are shown as [Doc. __] Citations to the record in the Ninth Circuit Court of Appeals are shown as [DktEntry __]. Excerpt of Record cites from the briefing before the Ninth Circuit Court of Appeals are shown as [__-ER-__].

6-8] Trial counsel argued that although Thompson posed with a gun at the time the photos were taken, the gun found under the seat of Treadway's car was owed by Treadway and that Thompson did not possess it on that day. [II-ER-263-65, 270; Doc. 93 at 9-11, 16]

At trial, the government presented evidence of a traffic stop of Treadway with Thompson riding in the passenger seat. [II-ER-271-73; Doc. 93 at 18-19] The Alaska Public Safety Information Network (APSIN) indicated that Treadway was known to conceal firearms under the seat of his vehicle. [II-ER-277-78, 295-96; Doc. 93 at 23-24, 41-42] A trooper searched the vehicle and found a revolver under the front passenger seat of the vehicle. [II-ER-279; Doc. 93 at 25]

Fingerprint analysis failed to provide an identifiable print. [II-ER-279; Doc. 94 at 25] Thompson's cell phone was subsequently seized; [II-ER-68; Doc. 94 at 43] The phone contained photos of Thompson with a firearm tucked into his waistband; the photos were taken on March 20, 2016. [II-ER-69, 93; Doc. 94 at 44, 68] The photos were texted to Thompson's girlfriend and another person shortly after they were taken, followed by a text that stated "Swag checking, Cuz". [II-ER-95-96; Doc. 94 at 70-71]

Closing Argument

In its closing argument, the government asserted that the photos showed that Thompson possessed the gun two days before the traffic stop and that it was his firearm in the car. [II-ER-151-52; Doc. 94 at 126-27] The government argued that

the photos indicated that the firearm found on the 22nd was the same as the one from the photos on the 20th. [II-ER-155, 158; Doc. 94 at 130, 133] The government then argued that “if he didn’t want to be seen with the gun he could not have possessed the gun” in the photos. [II-ER-156; Doc. 94 at 131] The government concluded that the “evidence shows the picture of him with that gun were taken two days before” and that there was “more than enough evidence here looking at the entire situation that he’s guilty beyond a reasonable doubt.” [II-ER-160; Doc. 94 at 135]

Trial counsel admitted that Thompson posed with a gun on the 20th when they were “partying, posing, and flaunting things.” [II-ER-161–62; Doc. 94 at 136–37] Trial counsel, however, argued that the photos did not prove the gun found it the car was his. [II-ER-186; Doc. 94 at 161] Trial counsel specifically argued that Thompson did not know the gun was in the car on the 22nd, that it was not his, and that he had no intention of possessing it that day. [II-ER-162; Doc. 94 at 137] Trial counsel concluded that the government had failed to prove beyond a reasonable doubt that he possessed the gun on March 22nd. [II-ER-199–200; Doc. 94 at 174–175]

In rebuttal, the government argued that Thompson “[o]bviously, possessed that gun, the same gun the he’s found with by the troopers.” [II-ER-202; Doc. 94 at 177] The government argued that the evidence “Definitively shows him possessing that firearm. There’s no question about it. No one can deny that. He

possessed it. He took numerous photos of it.” [II-ER-203; Doc. 94 at 178] The government specifically rebutted the defense argument that it was someone else’s gun by arguing “The crime is possessing the firearm. When you take a picture and you have that firearm, you’re possessing it.” [II-ER-205; Doc. 94 at 180] The government further asserted that there was no question that it was his firearm and that the jury should “look at the photos” and “view the firearm”, which would show that he possessed the gun. [II-ER-205; Doc. 94 at 180]

Jury Questions

During deliberations, the jury sent a note to the trial court stating “In the pictures from the 20th of March at the hotel, Thompson was clearly in possession of the gun ...” [III-ER-409; Doc. 68-1 at 4] The jury asked “Why do we need to consider anything about the 22nd of March in the car?” [III-ER-409; Doc. 68-1 at 4] The jury also asked “Can we convict on the evidence from the 20th alone?” [III-ER-409; Doc. 68-1 at 4]

The government argued that “on or about” included the 20th and that the jury can convict for conduct on the 20th. [II-ER-224–25; Doc. 94 at 199-201] Trial counsel requested that the jury be told that the indictment alleged conduct on the 22nd and that the jury must decide the case from the evidence. [II-ER-221, 226; Doc. 94 at 196, 201] Trial counsel argued that the date is material because that was the way the case was prosecuted and defended—based upon the traffic stop. [II-ER-228; Doc. 94 at 203] Trial counsel argued that allowing a conviction

for conduct on the 20th would create a fatal variance and violate double jeopardy.

[II-ER-229, 232–34; Doc. 94 at 204, 207-209]

The court proposed to instruct the jury that “on or about” is not defined and they should decide the case from the evidence; trial counsel indicated that he had no objection. [II-ER-237-38, 243; Doc. 94 at 212-213, 218] Trial counsel later asserted that the court’s instruction should not be changed to “although it is necessary for the government to prove beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged, it’s not necessary for the government to prove that the offense was committed precisely on the date charged.” [II-ER-241–42; Doc. 94 at 216-217]

The trial court instructed the jury that (1) the indictment charged that Thompson had committed the charged act “On or about March 22, 2016”, (2) that “the law does not provide a specific definition of the term ‘on or about’”, and instructed the jurors that they must decide the question “based upon your understanding of the language used after considering all of the evidence presented and the instructions provided.” [Doc. 68-1 at 5] The jury reached a verdict less than an hour later. [III-ER-406, II-ER-246-47; Doc. 68-1 at 1; Doc. 94 at 221-222]

Direct Appeal

Thompson argued on direct appeal that there was a fatal variance between the allegations in the indictment and the evidence relied upon by the jury in reaching its verdict. [Dkt. Entry 6 at 39] The Ninth Circuit reviewed the claim for

plain error because trial counsel did not object to the court's instructions. [Appendix 3; I-ER-19; Dkt. Entry 37-1 at 5] The court held that Thompson did not demonstrate that he was convicted of possession of the gun on March 20th, rather than on March 22nd. [Appendix 3; I-ER-20; Dkt. Entry 37-1 at 6] The court reasoned that the photos were offered as supporting evidence that Thompson possessed the gun on the 22nd, that the government focused on the 22nd at trial, and that there was overwhelming evidence that Thompson possessed the gun because it was found under his seat. [Appendix 3; I-ER-20; Dkt. Entry 37-1 at 6] The court further reasoned that the trial judge had properly instructed the jury to reach its verdict based solely on the evidence presented. [Appendix 3; I-ER-20; Dkt. Entry 37-1 at 6]

Petition for Habeas Corpus

Thompson filed a Petition for a Writ of Habeas Corpus seeking relief. [Doc. 116] Thompson argued that defense counsel's failure to object to the trial court's instructions was ineffective and required reversing Thompson's conviction. [Doc. 116 at 11] Thompson also argued that trial counsel was ineffective for conceding that Thompson possessed a gun on March 20th when the photographs were taken. [Doc. 116 at 28]

The trial court denied Thompson's petition and granted a certificate of appealability. [Appendix 2; I-ER-2; Doc. 128] The trial court concluded that trial counsel's performance was not deficient in failing to object the court's instruction

or conceding that Thomson possessed the gun on March 20th. [Appendix 2; I-ER-8-12; Doc. 128 at 7-11] In issuing a certificate of appealability, the trial court characterized its instruction to the jury as “focused on the March 22nd date, and the ‘on or about’ language”, but acknowledged that the court’s instruction did not clarify that the jury “had to find possession *during the traffic stop*, rather than at the time the photos were taken.” [Appendix 2; I-ER-13; Doc. 128 at 12]

The trial court further acknowledged that “[i]f the jury convicted solely on the possession in the photographs, and not on the events of March 22, Defendant’s entire defense arguably was flawed.” [Appendix 2; I-ER-13; Doc. 128 at 12 (citing counsel’s affidavit)] The trial court concluded “that [Thompson] has made a substantial showing of the denial of a constitutional right, because reasonable jurists could debate the validity of [Thompson’s] arguments regarding the Court’s answer to the jury question, and/or how this issue was handled by his attorneys at trial and on appeal.” [Appendix 2; I-ER-13; Doc. 128 at 12]

Habeas Corpus Appeal

On appeal from the denial of Thompson’s petition for habeas corpus, Thompson argued that trial counsel provided ineffective assistance of counsel by failing to object to the court’s instruction and by conceding that Thompson possessed the gun. [DktEntry 6 at 28, 53]

The Ninth Circuit affirmed the trial court’s decision concluding that trial counsel had not been ineffective for failing to object to the court’s instruction or in

conceding that Thompson had possessed the gun on March 20th. [Appendix 1; DktEntry 33-1 at 3-6] The Ninth Circuit reasoned that a prior panel had previously rejected Thompson's claim that the court's instruction created a fatal variance and counsel's performance in conceding that Thompson possessed the gun was a reasonable defense strategy to shift the jury's focus from the March 20th conduct to the March 22nd incident. [Appendix 1; DktEntry 33-1 at 3-5]

Thompson now petitions this court for a Writ of Certiorari to the Ninth Circuit Court of Appeals

VI. REASONS FOR GRANTING THE WRIT

I. Thompson's Trial Counsel Entirely Failed To Subject the Government's Case to Meaningful Adversarial Testing by Conceding That Thompson Illegally Possessed a Gun Where the Jury Instructions Permitted the Jury To Convict Thompson for That Possession

“[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The United States Supreme Court has identified that the “complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice.” *United States v. Swanson*, 943 F.2d 1070, 1073 (9th Cir. 1991) (citing *Cronic*, 466 U.S. at 659-60, 104 S.Ct at 2047 (1884)).

In *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991), for example, the 9th Circuit Court of Appeals addressed an ineffective assistance of counsel claim where trial counsel conceded that the evidence against his client was overwhelming and that the evidence did not come to the level of raising reasonable doubt. The court stated that “[w]hen a defense attorney concedes that there is no reasonable doubt concerning the only factual issues in dispute, the Government has not been held to its burden of persuading the jury that the defendant is guilty.” *Id.* at 1073. The court concluded that the error compelled applying an exception to the

prejudice requirement and reversal of the conviction. Id. at 1074 (citing Cronic, 466 U.S. at 659, 104 S.Ct. at 2047).

In the present case, defense counsel similarly conceded Thompson's guilt. The government indicted Thompson for conduct that occurred during a traffic stop on March 22, 2016. [III-ER-415; Doc. 2] The government's evidence from the traffic stop, however, was insufficient to support a conviction because there were two other occupants and the driver was known to keep guns under the seat of his car. [II-ER-277-78, 295-96; Doc. 93 at 23-24, 41-42]; *See United States v. Carrasco*, 257 F.3rd 1045, 1049 (9th Cir. 2001) ("Mere proximity to contraband, presence on property where it is found and association with a person or persons having control of it are all insufficient to establish constructive possession.") (citation omitted).

The government relied on photographs taken on March 20, 2016 showing Thompson with a gun in his waistband in support of its case. [II-ER-76-77; Doc. 94 at 51-52] Trial counsel defended the allegation that Thompson had possessed a gun by arguing that the gun in the car was Treadway's and that the photographs taken two days earlier did not establish that the gun was Thompson's or that he intended to possess it during the traffic stop. [II-ER-263-65; II-ER-161-162, 186; Doc. 93 at 9-11; Doc. 94 at 136-137, 161] In so arguing, defense counsel specifically conceded that Thompson possessed a gun when the photographs were taken. [II-ER-161-162, 186; Doc. 94 at 136-137, 161] The government repeatedly

argued in closing that the photographs showed that Thompson possessed the gun on March 20th. [II-ER-152, 156, 160, 202–03, 205; Doc. 94 at 127, 131, 135, 177-178, 180]

During deliberations, the jury indicated that it wanted to disregard the question of whether Thompson possessed the gun on March 22nd and convict him of possessing the gun on March 20th. [III-ER-409; Doc. 68-1 at 4] The jury specifically stated “In the pictures from the 20th of March at the hotel, Thompson was clearly in possession of the gun ...” [III-ER-409; Doc. 68-1 at 4] The jury then asked “Why do we need to consider anything about the 22nd of March in the car?” [III-ER-409; Doc. 68-1 at 4] The jury also asked “Can we convict on the evidence from the 20th alone?” [III-ER-409; Doc. 68-1 at 4]

The government advocated for telling the jury that it could convict for conduct that occurred on the 20th. [II-ER-224–25; Doc. 94 at 199-200] Trial counsel argued that the date was material because that was the way the case was prosecuted and defended—based upon the traffic stop. [II-ER-228; Doc. 94 at 203] Trial counsel further argued that allowing a conviction for conduct on the 20th would create a fatal variance and violate double jeopardy. [II-ER-229, 232–34; Doc. 94 at 204, 207-209] *See U.S. v. Ford*, 872 F.2d 1231 (6th Cir. 1989); *See also United States v. Tsinhnahjinnie*, 112 F.3d 988 (9th Cir.1997).

Without objection from trial counsel, the trial court instructed the jury that (1) the indictment charged that Thompson had committed the charged act “On or

about March 22, 2016”, (2) “the law does not provide a specific definition of the term ‘on or about’”, and that (3) the jury must decide the question “based upon your understanding of the language used after considering all of the evidence presented and the instructions provided.” [III-ER-410; Doc. 68-1 at 5] The jury reached a verdict less than an hour later. [III-ER-406, II-ER-246-47; Doc. 68-1 at 1; Doc. 94 at 221-222]

Trial counsel’s decision to concede that Thompson possessed the gun on March 20th was founded on trial counsel’s view that Thomson could only be convicted for conduct that occurred during the traffic stop on the 22nd. [II-ER-23–24; Doc. 116-2 at 1-2] The jury’s subsequent questions indicated that it had reached a consensus that Thompson possessed the gun on the 20th. [III-ER-409; Doc. 68-1 at 4] But trial counsel failed to object to the court’s instructions and to propose an instruction requiring the jury to deliberate on the indicted conduct. This failure, combined with trial counsel’s concession, relieved the government of its burden to prove each element of the charge, rendered the defense meaningless, and ensured that Thompson would be convicted.

In *Lucas v. O'Dea*, 179 F.3d 412 (6th Cir. 1999), for example, Lucas was indicted for robbery and first-degree murder for shooting a pawn shop owner during a robbery. At trial, a witness to the murder testified that he did not know whether Lucas or his accomplice had fired the fatal shot. Lucas defended the murder charge arguing that he did not shoot the shop owner. The trial court,

however, instructed the jury that it could find Lucas guilty if it found that the shop owner had been killed in the course of a robbery in which Lucas had participated. The trial court further instructed the jury that it was immaterial which person fired the fatal shot.

In evaluating whether trial counsel was ineffective for failing to object to the court's instructions, the court found that defense counsel's failure to object to the trial court's instructions rendered the defense meaningless. *Id.* at 419. The court held that the instructions had the effect of directing a verdict of guilty on the murder charge. *Id.* The court further held that the attorney's performance fell below the level of competence required by *Strickland* and that there was a "reasonably probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (internal quotations omitted)).

In the present, defense counsel's failure to object to the trial court's instructions similarly resulted in a directed verdict. Thompson defended the charge by arguing that although he possessed a gun on March 20th when the photographs were taken, the gun found in the car on March 22nd was Treadway's and that he was unaware it was under the seat. [II-ER-161-62, 186, 200; Doc. 94 at 136-37, 161, 175] Counsel advised the court that the date of the charge was material because of the way the case was prosecuted and defended and that allowing a conviction for conduct that occurred on the 20th would create a fatal variance. [II-

ER-228; Doc. 94 at 203] Thompson's counsel, however, neglected to follow up on his concerns and did not have a strategic reason for not objecting to the instructions or proposing an instruction to ensure that the jury deliberated on the indicted charge. [II-ER-24-25; Doc. 116-2 at 2-3]

The Ninth Circuit, however, concluded that trial counsel was not ineffective because the jury had been charged with determining the meaning of "on or about March 22" and counsel repeatedly argued that the phrase did not include March 20th. [Appendix 3; DktEntry 33-1 at 5] Relying on *United States v. Fredman*, 390 F.3d 1153, 1156 (9th Cir. 2004) (citing *Yarborough v. Gentry*, 540 U.S. 1, 9-11 (2003) (per curiam)), the court characterized trial counsel's concession as "an attempt to shift the jury's focus" to March 22nd. The court's reliance on *Fredman* and *Gentry*, however, is misplaced and results in a framework that excuses trial counsel's failures that necessarily resulted in Thompson's conviction.

In *United States v. Fredman*, 390 F.3d 1153, 1156 (9th Cir. 2004), the petitioner, who had been convicted in federal court of conspiracy to manufacture methamphetamine, asserted that his trial attorney was ineffective for telling the jury that he was a "meth cook" and had been previously convicted in state court for conspiracy to manufacture methamphetamine. The court held that the defense strategy of telling the jury that the petitioner was a "meth cook" who had been previously convicted of conspiracy was a reasonable strategy to build credibility

with the jury when attempting to distance himself from the federal conspiracy. *Id.* at 1156-57 (discussing *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam)).

In *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), the respondent, who had been convicted of assault for stabbing his girlfriend, argued that trial counsel was ineffective for arguing that the jury must acquit if the jury believed the respondent's testimony that the stabbing was accidental, even though the respondent was a “bad person, lousy drug addict, stinking thief, jail bird.” *Id.* at 9. The Court reasoned that the admissions regarding the respondent's character was a reasonable strategy to build credibility with the jury and get the jury to focus on other relevant issues. *Id.* at 9-10(citing J. Stein, *Closing Argument* § 204, p. 10 (1992-1996)).

In contrast, trial counsel's concession in the present case did not shift the jury's focus, but instead relieved the government of its burden. Trial counsel conceded that Thompson illegally possessed a gun and failed to request instruction requiring the jury to deliberate on and render a verdict for the indicted conduct. Such a concession can not be characterized as a reasonable diversionary tactic where, as here, trial counsel's decisions constituted a failure to offer a defense and necessarily resulted in a conviction. Accordingly, Thompson suffered a complete denial of the right to counsel and is entitled to a presumption of prejudice. *See Cronic*, 466 U.S. at 659-60.

CONCLUSION

The Ninth Circuit's decision in this case is in conflict with precedent from this court and constitutes a rule of law that permits trial counsel to concede a defendant's guilt without providing a defense to the charge. Accordingly, this court should issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Dated this 20th day of May, 2022.



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