No. 22-5071

ORIGINAL

In The
Supreme Court of the United States

DANIEL J. TONEY
Petitioner

Vs.

RICKEY DIXON, ET AL.
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT
MIDDLE DIST. OF FLORIDA
JACKSONVILLE DIVISION

Petition for Writ of Certiorari

Daniel J. Toney #J10564
Graceville Correctional Facility
5168 Ezell Rd.
Graceville, FL 32440

Petitioner pro se

QUESTIONS PRESENTED

Question One: If the record reflects similar if not more egregious ineffective assistance by trial counsel. The claim was not refuted at evidentiary hearing. when compared to Joseph Code v. Montgomery. Are Petitioner's 6th and 14th Amendment Rights to due process being violated denying claims based on assumption and not facts?

Question Two: Is it legal or illegal according to the United States Constitution to sentence someone as a habitual offender without reasoning or factual findings written or orally on the record. Other than the required (2) prior felonies; the last being within (5) years of charged offense?

Question Three: When all evidence is purely circumstantial no one has been identified. How can the crime be proved beyond a reasonable doubt or the conviction be upheld?

Question Four: If the client presents (trial) counsel with alibi, alibi witnesses but trial counsel makes no effort to investigate or call witnesses during trial. Is it in accordance with the 6th Amendment and within the wide range of strategic judgment given to attorney's to advise his client not to testify without presenting his clients version of events or alibi witnesses?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page of this petition

Petitioner- Daniel J. Toney #J10564
Graceville Corr. Fac.
5168 Ezell Rd.
Graceville Fla. 32440

Respondent- Ricky Dixon, ET AL,.
Sec. Florida Dept. of Corrections
501 South Calhoun Street,
Tallahassee, Florida 32399-2500

Counsel for Respondent

Attorney General
Office of the Attorney General
PL 01, The Capitol
Tallahassee, Fla. 32399-2500

RELATED CASES

1. JOSEPH CODE V. CHARLES M. MONTGOMERY, U.S. Court of Appeals, No. 85-823, 9/22/86, 11th Circuit, 799 F. 2d 1481

2. CLODIS KIWAN THOMAS V. STATE OF FLORIDA, 2nd District, Case # 2D12-1218, 6/21/13, 117 So.3d 1191

3. KELVIN LEON REED, 767 F. 3d 1252; 2014 (11th Circuit)

4. OSCAR TRAYLOR V. STATE, 785 So. 2d 1179, 2000, No SC93062 6/15/2000

5. TERENCE TERMAINE ANDRUS V. TX, 590 U.S. ____, 140 S.Ct. 1875, 207, L.Ed.2d 335, (2020), No. 18-9674

6. WIGGINS V. STATE, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)

7. APPRENDI v. NEW JERSEY, 530 U.S. 510, 521, 123 S.Ct. 2348, 147 L.Ed.2D 435 (2000)

8. STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984) No. 82-1554, 5/14/84

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

FEDERAL CASE **Page**

STATE CASE

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Daniel Toney, an inmate currently incarcerated at Graceville Correctional facility in Graceville, Fl. acting pro se respectfully petitions this court for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals, Atlanta, Georgia, being Petitioner's court of last resort which conflict with the decisions of other the United States Supreme Court.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears in Appendix A: The opinion was issued on March 7, 2018 opinion published.

The opinion of the First District Court of Appeal appears at Appendix B: The opinion was issued on June 26, 2019 opinion published.

The order of the District Court of Appeal appears at Appendix C: Motion for Rehearing En Banc and Clarification with written opinion was issued January 22, 2018.

JURISDICTION

The date on which the highest state court decided my case was January 25, 2022. A copy of that decision appears at Appendix-A.

No motion for Rehearing was was filed in Petitioner's case
The Jurisdiction of this court is invoked under 28 U.S.C. 1254(1)

CONSTITUTION AND STATUTORY PROVISIONS

United States Constitution – In all criminal prosecutions, 6th-Amandment.

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 accusations; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

United States Constitution 13th-Amendments

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

United States Constitution 14th-Amendment

Section1. 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 due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the

number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

Procedural Posture

Petitioner Daniel Toney is a State prisoner in Florida, serving a life sentence. Petitioner was convicted after proceeding to trial on December 1, 2010 for the charges of Armed Robbery, Possession of a Firearm by convicted felon.

Petitioner's direct appeal was denied. The State Appellate Court per curiam affirmed without a written opinion.

Petitioner timely filed his 3.850 post-conviction relief motion. However the motion was granted and Petitioner afforded an evidentiary hearing. The court erred by denying this motion without refuting any of Petitioner's claims or presenting any evidence to support a denial.

Petitioner filed his petition for writ of habeas corpus 2254 where the District Court denied relief. Petitioner was denied the opportunity to submit an application for certificate of appealability due to an untimely submission of appeal notice discrepancy.

Petitioner then appealed to the Eleventh Circuit Court of Appeals which was rejected due to jurisdiction issues.

Argument Posture

The lower courts erred by denying claim (trial) counsel failed to investigate alibi and call alibi witnesses without presenting any witnesses or evidence to refute Petitioner's claim. Petitioner's trial counsel was unavailable due to his untimely death.

The courts should have granted a judgment of acquittal due to the insufficiency of evidence. without DNA, Fingerprints or a Identification of the perpetrator or any witnesses to place petitioner at scene of crime a judgment of acquittal should have been granted.

Lower courts should have granted motions and or appeals for uniformity purposes. Their denials are in direct conflict with the 2nd and 3rd Districts, the Eleventh Circuit and the Supreme Court. Especially pertaining to the ground failure to investigate alibi witnesses.

The trial court erred in sentencing Petitioner under a Habitual Offender Statue without reasoning as to why he should be sentenced to an extended term. Other that than the Petitioner was previously convicted of two prior felonies. Nothing on the record verbally or written.

REASONS FOR GRANTING THE WRIT

Petitioner was sentenced to life plus 30 years after a trial by jury. The issues that were raised were: Sufficiency of Evidence, Illegally Sentencing as Habitual Offender, Failure to investigate and call witnesses, Testify in own defense, presence of a sleeping juror, failure to grant judgment of acquittal, violating Petitioner's 5th, 6th, and 14th Amendment Rights. Under both the Federal and State Constitutions.

QUESTION I: After evaluating all the evidence presented at the evidentiary hearing. The evidence presented is more substantially in favor of the Defense than that of cases reversed by higher courts, the State never produced any evidence or witnesses to refute claims. Are Petitioner's 6th and 14th Amendment Rights being violated by the courts denying claims based on assumptions and not facts?

THE LOWER COURTS FAILED TO ACKNOWLEDGE PETITIONER'S TRIAL COUNSEL FAILED TO:

A. Investigate witness Troy Cunningham a primary witness that worked alongside Petitioner. A witness who is potentially the foundation of alibi witnesses. He testified at evidentiary hearing to working alongside petitioner entire week in question never leaving outside of place of employment except for work materials and lunch. Never heard of trial attorney. The lower courts erred by denying this claim because witness could not be specific after eight years. (17) Seventeen other's who were employed by separate employer's for various jobs in this secluded town/neighborhood. Witnesses who could place Petitioner 30-45 minutes away from scene of crime. Prior attorney Michael Bossen who did not represent Petitioner at trial testified that actual trial counsel never inquired about case file. Without any communication with client except for court dates. There is no possible way for counsel to effectively represent Petitioner or anyone for that matter. the 2nd District reversed this claim in Clodis Kiwan Thomas v. State of Florida, 117 So. 3d 1191 District case no. 2012-1218, June 21, 2013. Petitioner presented six (6) witnesses while Thomas presented none yet it was denied.

The Court also deemed this claim waived for the reason none of the seventeen witnesses provided by client were available (Gordon Waddell) who did not attend. Post-conviction counsel was ineffective for not securing witness at evidentiary hearing.

B. Failed to acquire previous attorney's (Michael Bossen) file about case, witnesses, deposition when substituting for counsel. Prior Attorney Michael Bossen testified at evidentiary hearing that trial attorney Clifford Davis did not ask for any information or inner workings of case at substitution for counsel. Had he done so he would learn of basic witnesses/alibi a viable defense in a highly circumstantial case. Instead he proceeded with a "Do Nothing" strategy negating all evidence. Which is unacceptable.

C. Failed to call any witnesses on behalf of defense. Petitioner's mother-in-law who employed Petitioner and Troy Cunningham with roofing project who also had knowledge of accumulated receipts in question. Failed to call Adeline Dixon a neighborhood witness of no relation who also saw both Petitioner and Testified to both being on roof entire week of crime occurring. People without a question would have had interaction at some point in time with trial attorney. Joseph Code v. Charles M. Montgomery, U.S. Court of Appeals No. 85-8273, 9/22/86, 799 F.2d 148. Trial counsel's failure to prepare for trial violated Petitioner's Sixth Amendment Rights, due process and rights to effective representation by counsel. These claims are supported by trial/evidentiary hearing transcripts and case law. Over turned by several different Districts.

QUESTION II. PETITIONER WAS SENTENCED TO A HABITUAL OFFENDER SENTENCE WITHOUT FACTUAL FINDINGS AT TO WHY HE SHOULD BE SENTENCED TO A EXTENDED TERM. IS THE STATE OF FLORIDA'S SENTENCING LAWS IN ACCORDANCE WITH THE U.S. CONSTITUTION GOING OUTSIDE OF THE GUIDELINES WITHOUT REASON STATED ON THE RECORD WRITTEN OR ORAL?

A. Trial court failed to give any reason why Petitioner should be sentenced to an extended term under Habitual Offender Statute, other than the fact Petitioner had two prior felony convictions. There is no evidence whatsoever to support the implementation of a HFO sentence in this instant case. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

QUESTION III: WHEN NO ONE HAS BEEN IDENTIFIED ALL EVIDENCE IS CIRCUMSTANTIAL AT BEST. THE CRIME HAS NOT BEEN PROVEN BEYOND A REASONABLE DOUBT. IF THE SUFFICIENCY OF EVIDENCE IS BELOW STATUTORIAL STANDARDS. CAN THE CONVICTION BE UPHELD AND IS IT SUPPORTED BY THE U.S. CONSTITUTION.

A. Only evidence was a receipt with Petitioner's fingerprints the State called their "Key Piece of Evidence" No DNA, no fingerprints or identification of anyone. A DVR recording that no one has been I.D. in. One witness who testified Petitioner looked similar to guy who robbed her. Which makes the testimony of Belinda Smith or The Defendant extremely important to explain Petitioner was in possession of all receipts nullifying the allegation that because Petitioner's fingerprints were on receipt he committed the offense. Virtually Petitioner is incarcerated for looking similar to the guy who committed the offense.

B. Petitioner's fingerprints should have never been deemed as prosecutoral evidence when it was a known fact Petitioner's prints were on receipts due to handling of all receipts for roofing project.

QUESTION IV: IF A CLIENT PRESENTS COUNSEL WITH AN ALIBI AND WITNESSES TO SUPPORT IT BUT TRIAL COUNSEL MAKES NO EFFORT TO INVESTIGATE OR CALL WITNESSES AT INVESTIGATION PHASE OR TRIAL IS IT INEFFECTIVE TO ADVISE CLIENT NOT TO TESTIFY BECAUSE OF BACKGROUND FURTHER SUPPRESSING PETITIONER'S VERSION OF EVENTS WITH NO INTENTIONS OF PRESENTING WITNESSES OR ANY EVIDENCE TO SUPPORT COUNSEL'S STRATEGY, WITHIN THE WIDE RANGE OF TACTICAL DECISION MAKING OR A VIOLATION OF THE CLIENT'S SIXTH AND 14TH AMENDMENT RIGHTS?

A. counsel was ineffective for advising Petitioner to not testify due to his prior criminal history. Informing client his alibi would be introduced through out course of trial.

B. Counsel presented no witnesses to establish alibi or his clients version of events. Counsel informed Petitioner "If DNA and Fingerprints come back negative its an open an shut case." that the

burden was on the State to prove case. STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984) No. 82-1554, 5/14/84

C. Lower courts denied this claim stating Petitioner understood it was his right to testify. Concluding the colloquy before trial equates to understanding. However, it was not an understanding and should not be misconstrued Petitioner should go against advise of counsel no matter how egregious the ineffective advise. Colloquy was to understand why the judge needed to inform the jury ahead of trial Petitioner was not testifying. A question to quell the feeling the jury was improperly being informed about something they would easily be able to determine on their own. Tainting the jury with food for thought before the trial ever began.

Notice: Petitioner filed for extension of time on March 25, 2022 that was granted. Petitioner then filed for a second extension on the 20th of May 2022.

CONCLUSION

The petition for Writ of Certiorari should be granted

Respectfully Submitted

Date: 5·25·22 Daniel Toney #J10564