



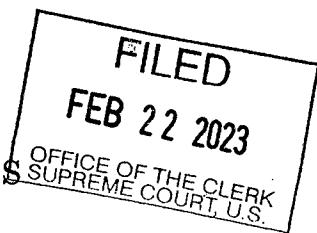
Provided To: Moore Haven C.F.

No. 22 - 6943

FEB 22 2023

For Mailing
By: _____

IN THE
SUPREME COURT OF THE UNITED STATES



TRAVIS THURSTON — PETITIONER
(Your Name)

vs.

STATE OF FLORIDA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIRST DISTRICT COURT OF APPEAL — STATE OF FLORIDA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TRAVIS THURSTON
(Your Name)

Moore Haven Correctional Facility
(Address)

P.O. Box 719001, Moore Haven, Florida 33471
(City, State, Zip Code)

863-946-2420
(Facility Phone Number)

QUESTION(S) PRESENTED

QUESTION #1:

WHETHER THE STATE COURT'S DECISION TO DEPRIVE PETITIONER OF POSTCONVICTION EVIDENTIARY HEARING COUNSEL VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER FLORIDA LAW, WHERE THE EVIDENTIARY HEARING INVOLVED COMPLEX ISSUES OF A CONSTITUTIONAL MAGNITUDE REQUIRING SIGNIFICANT LEGAL RESEARCH.

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

N/A

10/3

TABLE OF CONTENTS

OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE.....	4
REASON FOR GRANTING THE PETITION	7
CONCLUSION	11

INDEX TO APPENDICES

APPENDIX A	13
APPENDIX B	14

TABLES OF AUTHORITIES CITED

CASES

<u>Adams v. State</u> , 727 So. 2d 997 (Fla. 2 nd DCA 1999)	9
<u>Graham v. State</u> , 372 So. 2d 1363 (Fla. 1979)	PASSIM
<u>Hooks v. State</u> , 253 So.2d 424 (Fla. 1971).....	7
<u>Rosales v. State</u> , 547 So. 2d 221 (Fla. 3 rd DCA 1989)	9
<u>Russo v. Akers</u> , 701 So. 2d 366, 367 (Fla. 5th DCA1997), approved, 724 So. 2d 1151, 1152 (Fla. 1998)	7
<u>State v. Weeks</u> , 166 So.2d 892 (Fla. 1964)	7
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) 10	
<u>Thurston v. State</u> , 250 So. 3d 774 (Fla. 1 st DCA 2018).....	4,11
<u>Woodward v. State</u> , 992 So. 2d 391, 393 (Fla. 1st DCA 2008).....	8

STATUTES AND RULES

28 U.S.C § 1254(1).....	2
28 U.S.C § 1257(a).....	2
Rule 3.191(b)(1)	8,10
§§ 941.45-941.50 (1979).....	8
Rule 3.215(c)(2).....	9

IN THE
SUPREME COURT OF THE UNITED STATES
ON PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

[] For case from **federal courts**:

The opinion of the United States court of appeal 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 United States district 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.

[X] For case from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] 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 case from **federal courts**:

The date on which the United State Court of Appeal decided my case was _____

[] No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeal 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. _____.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

[X] For case from **state courts**:

The date on which the highest state court decided my case was August 31, 2022. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: December 19, 2022, and a copy of the order denying rehearing appears at Appendix B.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____.

The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISION(S) INVOLVED

FLORIDA CONSTITUTION, ARTICLE I, §9

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT

STATEMENT OF THE CASE

Petitioner was arrested in 2015 after he allegedly shot a car and bit two police officers in a McDonald's parking lot. He was charged in the Second Judicial Circuit, Leon County, Florida with multiple offenses arising from that incident. Petitioner's behavior on the day of the incident led the trial court to appoint an expert to determine whether he was competent to proceed. But before the court could make a competency determination, Petitioner was then taken into federal custody on unrelated charges. Nearly two years later, he returned to face his state charges. By then, a new judge and prosecutor were assigned, and Petitioner had a new public defender.

At the conclusion of jury trial, Petitioner was found guilty of aggravated assault with a firearm (count one); two counts of discharging a firearm in public (as lesser included offenses of count's two and three); two counts of battery on a law enforcement officer (count's four and five); and one count of resisting an officer with violence (count six). Petitioner was then sentenced to a mandatory minimum of 20 years State prison on count one; to time served on counts two and three; and to 5 years State prison on counts four, five and six. All counts were ordered to run concurrent to one another, but consecutive to the Federal prison sentence.

A direct appeal was taken, resulting in an Affirmance with a written opinion. Thurston v. State, 250 So. 3d 774 (Fla. 1st DCA 2018).

Petitioner next filed a motion for postconviction relief on or about August 16, 2019 in the Circuit Court of the Second Judicial Circuit, Leon County, Florida. On

or about February 4, 2020, the court issued an order denying some of the motion's grounds, with leave to amend other claims. Petitioner filed his amended motion on March 26, 2020. The lower court entered an order granting Petitioner an evidentiary hearing on or about August 27, 2020 on grounds one, two, three and six of his amended motion.

On or about September 25, 2020, Petitioner filed a motion for appointment of counsel for purposes of the evidentiary hearing, which the court apparently granted¹. On or about April 29, 2021, Petitioner filed a pro se "motion to schedule evidentiary hearing and timely rule" after 5 months had lapsed without the court setting his postconviction motion for hearing. Thereafter, and on or about May 19, 2021, the office of the public defender filed a motion to withdraw as counsel and motion to appoint conflict-free counsel. The basis of the motion to withdraw was the fact that the public defender could not represent Petitioner on claims of ineffective assistance against the same office that represented Petitioner at trial.

On or about June 22, 2021, the court issued two separate orders. The first was an order setting the motion for an evidentiary hearing. The second order granted the motion to withdraw by the public defender's office, but denied both Petitioner's motion for appointment of counsel and the public defender's request that Petitioner be appointed conflict-free counsel to represent Petitioner at the evidentiary hearing.

¹ Petitioner says "apparently" because the public defender's office later filed a motion to withdraw due to a conflict of interest. It should be noted that the record on appeal does not contain an order granting Petitioner's motion.

The evidentiary hearing was held on August 27, 2021. The trial court denied the motion at the conclusion of the hearing and subsequently entered a final order on September 9, 2021 denying the motion for the reasons stated during the hearing.

Petitioner then appealed to the Florida First District Court of Appeal. There, Petitioner argued that the State lower court had abused its discretion when it refused to appoint him counsel at his postconviction evidentiary hearing. Following briefing, the First District Court of Appeal affirmed the lower court decision in an unelaborated per curiam opinion (Appendix A).

Petitioner filed a timely motion for rehearing, requesting that the First DCA issue a written opinion elaborating on its basis for denying him relief. The First DCA denied the motion for rehearing on December 19, 2022 in a one sentence order (Appendix B).

Petitioner now seeks timely review in this Court.

REASON FOR GRANTING THE PETITION

Although there is no absolute right to counsel in postconviction relief proceedings under Florida law, the decision whether to appoint counsel must be decided in light of the Fifth Amendment's due process requirements. Under Florida law, any doubts as to whether to appoint counsel should be decided in favor of the defendant. Graham v. State, 372 So. 2d 1363, 1365-66 (Fla. 1979). See also Russo v. Akers, 701 So. 2d 366, 367 (Fla. 5th DCA1997), approved, 724 So. 2d 1151, 1152 (Fla. 1998) (Although there is no absolute right to counsel in a postconviction proceeding under Florida law, the due process clause requires that counsel be provided if a postconviction motion presents a meritorious claim and a hearing on the motion is potentially so complex that counsel is necessary).

In Graham v. State, 372 So. 2d 1363, 1365-66 (Fla. 1979) (quoting Hooks v. State, 253 So.2d 424, 426 (Fla. 1971), the Florida Supreme Court specifically held:

The question in each proceeding of this nature before this Court should be whether, under the circumstances, the assistance of counsel is essential to accomplish a fair and thorough presentation of the petitioner's claims. Of course, doubts should be resolved in favor of the indigent defendant when a question of the need for counsel is presented. Each case must be decided in the light of the Fifth Amendment due process requirements....See State v. Weeks, 166 So.2d 892 (Fla. 1964). The adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research are all important elements which may require the appointment of counsel. This appointment authority is discretionary, with any doubts being resolved in favor of an indigent defendant. There is no absolute duty to appoint counsel for an indigent defendant in a post-conviction relief proceeding unless the application on its face reflects a colorable or justiciable issue or a meritorious grievance.

Stated differently, counsel should be appointed in situations where the need for counsel is essential to accomplish a fair and thorough presentation of the defendant's claims. Here, the State trial court was not only aware that Petitioner had a significant mental health history, but that several of the grounds set for hearing were complex legal issues requiring significant research and legal argument. Thus, the lower court abused its discretion when it refused to appoint counsel to represent Petitioner at his evidentiary hearing; abuse of discretion being the standard of review applied when reviewing a decision to deny counsel in such situations in Florida. Woodward v. State, 992 So. 2d 391, 393 (Fla. 1st DCA 2008).

The lower court's refusal to appoint counsel prejudiced Petitioner in his ability to adequately present and argue his claim that counsel was ineffective for failing to move for discharge due to a speedy trial violation. Had counsel been appointed to represent Petitioner at the hearing, they would have argued that counsel was ineffective for failing to follow the procedures as set forth under the 1980 Amendment to Rule 3.191(b)(1) Florida Rules of Criminal Procedure and to Florida Statutes §§ 941.45-941.50 (1979), where Petitioner would have been entitled to discharge had these procedures been followed.

In the case at bar, the State court entered an order granting Petitioner an evidentiary hearing on four of the grounds in his amended postconviction relief motion. Those grounds centered on multiple complex legal principles and constitutional rights of speedy trial, rejection of and/or misadvice regarding favorable plea offers, jury instructions and failure to investigate/present favorable

evidence. The simple fact that the court granted an evidentiary hearing meant that the lower court necessarily found that the four grounds reflected on their face "a colorable or justiciable issue or a meritorious grievance." Graham v. State, 372 So. 2d at 1366.

At the commencement of the evidentiary hearing, Petitioner once again implored the court to provide him with counsel in order to argue his claims. And once again the court refused that request. What occurred from there further cemented the need for counsel. The evidentiary hearing record is littered with the prejudicial effects of lack of counsel. For example, Petitioner was limited to the presentation of just one of the three or more calls he made to 911 because he did not know he was required to issue a subpoena duces tecum to ensure the availability and admission of those calls into evidence at the hearing. As a result, Petitioner had no choice but to acquiesce to the admission of just one call that the State happened to have available.

Petitioner was further prejudiced and prevented from calling a defense witness who would otherwise have offered testimony in support of his ineffective claim for failing to investigate/present the 911 calls at the hearing, also because he had failed to issue a subpoena to that witness.

At the State evidentiary hearing, Petitioner confused the issues of his competency to proceed to trial with his claim that counsel was ineffective for failing to request a jury instruction pursuant to Rule 3.215(c)(2). See Rosales v. State, 547 So. 2d 221 (Fla. 3rd DCA 1989); Adams v. State, 727 So. 2d 997 (Fla. 2nd DCA 1999).

Petitioner was unable to articulate either of the Strickland prongs ² when attempting to explain why counsel was deficient for failing to require the court to instruct the jury that his demeanor and mental stability at trial was only due to the administration of psychotropic medications. He was also unable to articulate how that failure prejudiced him sufficient to undermine confidence in the result of his trial, where there was a valid basis for requesting that instruction.³

Perhaps the most egregious issue resulting from the court's failure to appoint counsel came when Petitioner attempted to argue his speedy trial claim. The record shows Petitioner had no clue that Florida Rule of Criminal Procedure Rule 3.191 even existed, let alone its contents and the legal effect of the Rule's protections. He clearly had no clue that counsel could indeed be ineffective for failing to petition the court for his return to State jurisdiction utilizing the Interstate Compact Statute and to then move for discharge due to a speedy trial violation.

The lower court was certainly aware of Petitioner's mental health issues and significant mental health history; if not prior to the commencement of the hearing, then certainly after Petitioner informed the court of that history. And yet despite the court questioning Petitioner about that history and diagnosis, the court continued to steadfastly refuse to appoint counsel to represent him at the hearing,

² Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

³ The evidentiary hearing record shows trial counsel affirmatively stated that he never even considered that this specific jury instruction be given.

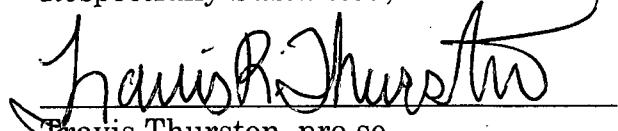
even after repeatedly faulting Petitioner for failing to issue subpoenas to secure evidence and witnesses for the hearing.

Even the Florida First District Court of Appeal described Petitioner's behavior on the day of the incident (giving rise to the criminal prosecution against him) as "bizarre" in its opinion affirming the direct appeal. See Thurston v. State, 250 So. 3d 774 (Fla. 1st DCA 2018). Thus, this Court should find that the lower court abused its discretion when it failed to appoint counsel to represent him for his evidentiary hearing based upon the foregoing, resulting in violation of Petitioner's Constitutional Right to Due Process under Florida law.

CONCLUSION

The petition for a writ of certiorari should be granted based upon the foregoing.

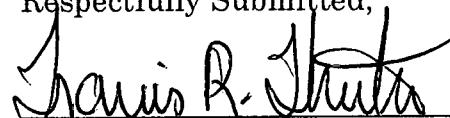
Respectfully Submitted,


Travis Thurston, pro se
DC # 220423

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to the Office of the Attorney General, State of Florida, PL-01, the Capitol, Tallahassee, Florida 32399 by placing this document into the hands of prison officials for mailing by First Class United States Mail, postage prepaid on this the 22 day of February, 2023.

Respectfully Submitted,



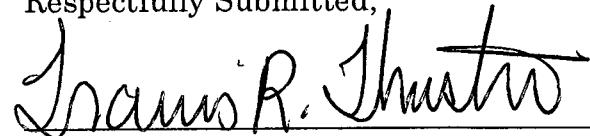
Travis Thurston, pro se
DC # 220423

Moore Haven Correctional Facility
P. O. Box 719001
Moore Haven, Florida 33471

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing petition for writ of certiorari was prepared in Century Schoolbook 12 point font and contains 3,083 words, inclusive.

Respectfully Submitted,



Travis Thurston, pro se
DC # 220423
Moore Haven Correctional Facility
P. O. Box 719001
Moore Haven, Florida 33471