23-5801

No.: _____ ORIGINAL

In The
Supreme Court of the United States
_____ Term, _____

JEFFERY DUCOTE v. TIM HOOPER, Warden

On Petition for a Writ of Certiorari to

U. S. FIFTH CIRCUIT COURT OF APPEALS

Jeffery Ducote #215886
MPEY/Ash-1
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

September 18, 2023

QUESTION PRESENTED

1. Mr. Ducote's 5th, 6th, and 14th Amendment rights of the United States Constitution were violated when his right to testify was taken from him.

2. Mr. Ducote was denied effective assistance of trial counsel when counsel failed to investigate this matter prior to the commencement of trial; and was ineffective during plea agreements. *Strickland v. Washington*; **Sixth Amendment to the United States Constitution.**

LIST OF PARTIES

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

[X] 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.

District Attorney's Office
9th Judicial District Court
P.O. Drawer 7358
Alexandria, LA 71309-0358

Attorney General's Office
P.O. Box 94005
Baton Rouge, LA 70805

Tim Hooper, Warden
Louisiana State Penitentiary
General Delivery
Angola, LA 70712

RELATED PROCEEDINGS

Jeffrey Dwayne Ducote, Sr., was charged by Bill of Indictment on June 30, 2016 with: four counts of First Degree Rape, in violation of LSA-R.S. 14:42; one count of Home Invasion, in violation of LSA-R.S. 14:62.8; one count of False Imprisonment With a Weapon, in violation of LSA-R.S. 14:46.1; one count of Second Degree Kidnapping, in violation of LSA-R.S. 14:44.1; and, one count of Aggravated Assault With a Firearm, in violation of LSA-R.S. 14:37.4. He entered pleas of not guilty to all counts. Mr. Ducote elected trial by jury.

Jury selection began September 19, 2017. Testimony began September 21, 2017. Prior to the testimony, the State's ***Prieur*** motion was denied and jailhouse calls made by Mr. Ducote were otherwise admissible. At the conclusion of trial, the jury returned guilty verdicts on all counts. On September 25, 2017, Mr. Ducote's Motion for Post-Verdict Judgment of Acquittal and Motion for New Trial were denied.

Mr. Ducote was sentenced to life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence for each of the four counts of First Degree Rape; 30 years for Home Invasion; 10 years for False Imprisonment; 40 years for Second Degree Kidnapping, with at least 2 years to be served without the benefit of Probation, Parole, or Suspension of Sentence; and, 10 years for Aggravated Assault With a Firearm. The Court ordered all eight counts to run concurrently.

On April 16, 2018 (received by Mr. Ducote on May 21, 2018), Mr. Ducote timely filed his Original Brief on Appeal. On November 14, 2018, the Louisiana Third Circuit Court of Appeal affirmed Mr. Ducote's convictions, but remanded the matter to the district court in order to sentence Mr. Ducote to a "determinate sentence" for the conviction of Second Degree Kidnapping.

On December 15, 2020 Mr. Ducote filed an Application for Post-Conviction Relief to the 9th Judicial District Court concerning two Claims of ineffective assistance of counsel. On March 18, 2022 (received by Mr. Ducote on March 25, 2022), the district court denied Mr. Ducote relief with a written opinion.

On April 4, 2022, Mr. Ducote filed for Supervisory Writs, which was denied with written opinion on June 24, 2022 by the Louisiana Third Circuit Court of Appeal in Docket No.: KH 22-214. Mr. Ducote timely filed his Application for Supervisory Writs to the Louisiana Supreme Court on July 6, 2022, which was denied on November 1, 2022.

On May 25, 2023, Mr. Ducote filed his Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal, which was denied on March 29, 2022. At this time, Mr. Ducote is timely filing for Writs of Certiorari to this Honorable Court, and respectfully requests that this Honorable Court exercise its Supervisory Authority of Jurisdiction over the lower courts for the following reasons to wit:

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

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

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals 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 (but cited at 2022 WL 1101753)

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished (but cited at 2021 WL 4398982)

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix __ to the petition and is the Louisiana Supreme Court in Docket Number _____.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ 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 August 31, 2023.

[X] 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. ____.

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

[X] 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. .

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

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, _____

No.: _____

Jeffery Ducote V. TIM HOOPER, Warden

Petition for Writ of Certiorari to the U.S. Court of Appeal

Pro Se Petitioner, Jeffery Ducote respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Fifth Circuit Court of Appeal, entered in the above entitle proceeding on August 31, 2023.

NOTICE OF PRO-SE FILING

Mr. Ducote requests that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Mr. Ducote is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court. Therefore, he should not be held to the same stringent standards as those of a trained attorney.

OPINIONS BELOW

Jeffrey Dwayne Ducote, Sr., was charged by Bill of Indictment on June 30, 2016 with: four counts of First Degree Rape, in violation of LSA-R.S. 14:42; one count of Home Invasion, in violation of LSA-R.S. 14:62.8; one count of False Imprisonment With a Weapon, in violation of LSA-R.S. 14:46.1; one count of Second Degree Kidnapping, in violation of LSA-R.S. 14:44.1; and, one count of Aggravated Assault With a Firearm, in violation of LSA-R.S. 14:37.4. He entered pleas of not guilty to all counts. Mr. Ducote elected trial by jury.

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Mr. Ducote was sentenced to life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence for each of the four counts of First Degree Rape; 30 years for Home Invasion; 10 years for False Imprisonment; 40 years for Second Degree Kidnapping, with at least 2 years to be served without the benefit of Probation, Parole, or Suspension of Sentence; and, 10 years for Aggravated Assault With a Firearm. The Court ordered all eight counts to run concurrently.

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On November 21, 2022, Mr. Ducote filed his Writ of Habeas Corpus to the Louisiana Western District Court, which was denied on April 3, 2023. Mr. Ducote then filed for Application for Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal on May 25, 2023, which was denied on August 31, 2023.

JURISDICTION

The U.S. Fifth Circuit Court of Appeal denied Mr. Ducote's Request for COA on August 31, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE FACTS

This case has resulted from a game of "Role Playing" turned bad. Mr. Ducote had inadvertently left his handgun in the back of his waistband at the time of this "Role Playing," and when the alleged victim in this case opened Mr. Ducote's shorts, the gun had hit the ground. There were ***no threats*** from Mr. Ducote during this incident, and at no time did he ***ever*** pick the gun up and point it at AK. It is understandable that AK "freaked out" when she encountered the gun, but this has never been a matter of rape, home invasion, or kidnapping; just a reaction to a game gone wrong due to Mr. Ducote's failing to inform AK of the fact that he needed to put the gun in his vehicle before the interactions.

Mr. Ducote was convicted of eight felonies and sentenced to life in prison based in part upon the erroneous admission of jailhouse phone calls that took place between Mr. Ducote and his wife after he was arrested. Because the erroneous admission of this evidence was not harmless error, the convictions should be set aside.

Alleged victim, twenty-five-year-old, AK, testified that on December 27, 2015, she was forced to perform oral sex and vaginally raped after she opened her front door in Lena, Louisiana, to a stranger (Rec.pp. 184, 194, 196). The stranger asked if Heath lived at her address. She responded that he did not. He asked her a second time and asked about the lot next door to her house (Rec.p. 196).

When the conversation was over, she attempted to close her front door, but the man pushed his way in with a gun (Rec.p. 197). He forced her, at gunpoint, to go into each room to make sure no one was home and then forced her to return to the living room where he made her perform oral sex on him

(Rec.pp. 198-9).

He stopped and made her remove her clothes and attempted to penetrate her vaginally from behind. When he failed to penetrate her because he could not maintain an erection, he forced her into the bedroom where he vaginally raped her on the bed (Rec.pp. 199-200).

Afterward, he led her at gunpoint into the kitchen, where he made her perform oral sex on him again (Rec.p. 201). He attempted to penetrate her from behind again, and when this attempt failed, forced her to perform oral sex on him a third time (Rec.pp. 205-6).

The final time, AK was in a crouching position, and when the attacker put the gun down on the kitchen island, she grabbed it and ran for the door. He tackled her and they fought over the gun. AK managed to hold on to it and tried to fire several times (Rec.p. 206). When the gun wouldn't fire, she ran out, naked (Rec.p. 207).

AK ran down the street to a house, but when she saw the man running out of her house, she hid in a ditch (Rec.p. 212). She saw him drive away and realized the house she was running to was vacant. She ran across the street to her neighbor, Sadie Jower's house, but Sadie was not home (Rec.p. 213). She tried to open the door, but it was locked, so she stayed on the screened-in porch and watched cars go by, afraid to flag down any cars coming from the direction in which the attacker drove, because she was not wearing her contacts and could not see, and was concerned he would see her if he came back (Rec.p. 214).

She left the porch and hid behind a tree until she saw a van driving from the opposite direction. She ran into the middle of the road and flagged it down, running up to it naked with the gun. She put the gun down so she wouldn't scare the couple inside and asked them to take her to her parent's house, which was nearby. They did not want to let her into the van, but when she told them she had been raped, Shirley Thayer walked her to Sadie's house, who was Thayer's aunt, and told her to remain hidden on the porch while she and her husband went for help (Rec.pp. 214, 251-2).

AK remained on the porch while the Thayers drove off to find someone to help. Four or five houses down, they saw Greg Bennett standing outside. Shirley asked him for a blanket and told him that a neighbor had been raped. Bennett retrieved a blanket and the three went back to help AK (Rec.p. 252).

Shirley brought the blanket to AK and convinced AK to put the gun down on the top step of the porch (Rec.pp. 252, 255, 256). 911 was called and the Thayers and Greg Bennett tried to call AK's parents. Bennett finally got through and told them something happened to their daughter and to come (Rec.p. 254).

AK was brought to the hospital by ambulance and a rape kit performed and submitted to be tested. The Sexual Assault Nurse Examiner, Amanda McLin Bowdon, testified as a fact witness and was not qualified as an expert (Rec.p. 453). She noted two vaginal lacerations, and that AK's cervix was red and had an excessive amount of fluid (Rec.pp. 465-6). She provided the opinion that redness on the cervix indicated increased level of force and that the injuries were consistent with the description of events as provided by AK. The defense did not lodge an objection (Rec.pp. 468, 471).

Deputy Hans Deselle was the assigned crime scene detective. He provided the rape kit to the nurse, took photos of AK and her house, took photos of tire imprints left by the suspect's car, and retrieved evidence at AK's house, including a watch face and pins from a watch, a sheet, and the gun retrieved by Detective Koonce from AK (Rec.pp. 298, 301, 305, 310, 313, 319).

When he was finished processing the house, he went back to the hospital to pick up the rape kit and put in the evidence room refrigerator at the CID (Rec.p. 303).

He noted scratches and abrasions on AK's body, a red mark on her neck, which he suggested appeared to have been caused by a struggle. He also noted things out of place in the house, such as the cat food bowl spilled over, which also indicated to him a possible struggle (Rec.pp. 300, 309).

Detective Stephen Phillips took over the investigation the day after the alleged attack. An ATF trace was performed on the gun, which led to a man named Tony Boswell, who had traded the gun to a man

named Ronnie Smith (Rec.p. 426). Phillips created a photo line-up with Smith's photo in it and Detective Natalie Brown showed the line-up to AK (Rec.pp. 349, 416).

AK chose Ronnie Smith's photo, saying it looked like the suspect, but she wasn't a hundred percent and wondered if his hair was different (Rec.p. 226).

Ronnie Smith advised the detectives that he had traded the pistol for a shotgun with a man named Jeff or Jeffery. Smith did not know Jeff's last name, but did know his cell phone number (Rec.pp. 417-8).

Detective Phillips used an online program and traced the cell phone to Mr. Ducote and his wife, Lois (Rec.p. 418). He researched them and learned they owned a Ford Expedition. He ran the VIN in the state computer and the SUV matched the make, model, and color of the suspect's vehicle, which was parked at AK's house during the attack. Phillips then prepared a second line-up, this one containing Mr. Ducote's photo (Rec.p. 419).

Detective Brown showed the second line-up to AK. She chose Mr. Ducote's photo as the suspect (Rec.p. 350).

Smith provided a buccal swab voluntarily. A buccal swab was also obtained from Mr. Ducote pursuant to a search warrant (Rec.p. 420). Two search warrants were executed on Mr. Ducote's house. A phone was retrieved, a .380 caliber gun, and clothing that matched the outfit that AK described him wearing during the incident. AK also provided a button she had found inside her house when she was packing her things to move after the assault, and provided it to the police (Rec.p. 372). Detective Brown noted at trial that one of the pairs of khaki shorts retrieved from Mr. Ducote's house was missing its button (Rec.p. 352).

The tire treads on Mr. Ducote's Expedition were compared to the photo of the tire treads of the SUV parked at AK's house and determined to be consistent, although there was not enough detail to case the print to obtain a match (Rec.p. 327).

The rape kit was submitted for DNA testing and compared to the DNA of Smith and Ducote. Smith

was excluded as the perpetrator (Rec.p. 503). Of the eight items submitted from the rape kit, prostate specific antigen was found on the perineal swab and a vaginal swab. The other swabs did not contain either spermatozoa or prostate specific antigen (Rec.p. 499). The DNA profile obtained from epithelial and sperm fractions from the cervical swab was consistent with Mr. Ducote, and the analyst testified neither he nor all of the male individuals in his parentage could be excluded (Rec.pp. 502-3).

The watch face was collected because Deputy Deselle believed it had residue on it that may contain DNA, but it was not tested (Rec.p. 311). The sheet from AK's bed was negative for semen. The grey shirt retrieved pursuant to the search warrant was tested presumptively for blood, but no match was done to the victim.

Mr. Ducote's wife, Lois, testified that Mr. Ducote had a drinking problem and blacked out when drinking without any recollection of the things he did (Rec.pp. 526-7). Lois also indicated Mr. Ducote has several pairs of shorts missing buttons, as well as clothes with tears or rips because he's active (Rec.p. 536).

The State played jailhouse calls between Mr. Ducote and Lois, with varying statements made by Mr. Ducote; one in which he admitted he was at AK's house and one in which he denied his presence. He also denied to his wife any romantic affair with AK. Lois Ducote mentioned on one of the recordings that she did not believe Mr. Ducote would commit a rape, but she believed the gun charges.

REASONS FOR GRANTING THE WRIT

In accordance with this Court's *Rule X, § (b) and (c)*, Mr. Ducote presents for his reasons for granting this writ application that:

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A petition for a Writ of Certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers.

A state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Courts have erroneously denied Mr. Ducote collateral estoppel due to the Louisiana State Penitentiary being placed on Lock-Down during the Pandemic. On April 1, 2020, the Louisiana State Penitentiary was placed on a limited lock-down due to the Covid-19 Pandemic. With this limited lock-down, the Legal Programs Department has allowed for all Offender Counsel Substitutes and the Law Library to be locked down, effectively halting any and all legal assistance and/or access to legal materials.

At that time, all legal aid at the Louisiana State Penitentiary was offered on a limited basis due to the fact that numerous Offenders have refused to be vaccinated, effectively disallowing any research or access to any materials needed to advance pleadings. The Offenders who have not been vaccinated are not allowed to roam around the institution (Law Library, Library, Church, work, education, or Call-Outs). The Offender Counsel Substitutes, who provide assistance in the submission of meaningful litigation, have only recently been allowed access to the Offenders who are not vaccinated.

At the time that Mr. Ducote had received his ruling from the Louisiana Supreme Court, the Louisiana State Penitentiary had allowed the Counsel Substitutes ***very limited*** access to their computer files in order to assist the Offenders whose cases have been assigned to them. The Offenders who are not assigned as Counsels, were limited to ***two hours a week*** (*if* they were able to be placed on the Call-Out) in which to either work on their cases, or assist the Counsels that are assigned to assist them.

Although the Offenders were allowed limited access to the Law Library, their access is limited by a "by name Call-Out" only; which is a limited number of Offenders allowed in the Law Library in order

to prevent Offenders from being exposed to the Covid -19 virus. At the time that the Louisiana State Penitentiary allowed Call-Outs to the Law Library, Mr. Ducote was being housed in Ash-1 (which is a medical dorm). Offenders housed in the medical dorms were restricted to their dorms, and were not allowed to co-mingle with any other Offenders (which includes Inmate Ministers, Offender Counsel Substitutes, and the Library).

Although these measures may be considered extensive, it appears that the measures have most likely saved many lives at this institution, considering the fact that Covid-19 had spread through many of the prison facilities at an alarming rate. Even though Louisiana received an "F" in protection of Inmates and Offenders during the course of the Pandemic, Louisiana State Penitentiary had a relatively low number of deaths due to exposure of the virus compared to the rest of the nation (even with Offenders living in "close quarters" to each other).

When Mr. Ducote received the Ruling from the Louisiana Supreme Court, he was still denied access to the Law Library. Immediately upon being allowed access to the Law Library, Mr. Ducote was placed on the Call-Out for the Law Library. Mr. Ducote fully argued this in his Objection to the Magistrate's Report and Recommendation. Mr. Ducote respectfully requests that this Honorable Court deem the time-frame of the Law Library's Closing, and his denial to access to the Law Library, effectively denying him access to the courts, and should be considered collateral estoppel.

Although Mr. Ducote was able to file his Federal Habeas Corpus Petition to the U.S. Western District, at the time that the State had filed their Response, Mr. Ducote and the Counsels were, once again, denied access to the Law Library. In fact, Mr. Ducote was unable to file a Traverse to the State's Response in this matter.

Simply put, Mr. Ducote was denied access to the Law Library and the Offender Counsel Substitute who are assigned to assist other Offenders. As Mr. Ducote is a layman of the Law, he relies solely on the assistance of Offender Counsels in order to file his pleadings.

Many courts have considered the fact that Offenders (especially at the Louisiana State Penitentiary) were denied access to the courts due to closures of the Law Libraries and denial of access to the Offender Counsel Substitutes. These courts have considered pleadings timely which would not have been considered such as Offenders were actually "cut off" from researching their Issues, arguing their Issues, or having the ability to discuss their case with the Offender Counsel Substitutes.

LEGAL ARGUMENT

Mr. Ducote had questioned whether the state court decision is contrary to clearly established precedent of the United States Supreme Court, as to warrant federal habeas relief where the state court applied a rule that contradicts the governing law as set forth in the United States Supreme Court case law, and where the state court confronts a set of facts that are materially indistinguishable from those in a decision of the United States Supreme Court and nevertheless arrives at a result different from Supreme Court precedent.

Mr. Ducote had also questioned whether an unreasonable application of federal law accrues, as to warrant federal habeas relief, when the state court identifies the correct legal rule from the United States Supreme Court case law, but unreasonably extends, or unreasonably declines to extend a legal principle from the United States Supreme Court case law to a new context. *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985).

WHEREFORE, for the arguments in Mr. Ducote's original State pleadings and the arguments above, Mr. Ducote requests that this Honorable Court Grant him the necessary relief.

LAW AND ARGUMENT

ISSUE NO. 1

Reasonable jurists would find it debatable that Mr. Ducote's 5th, 6th, and 14th Amendment rights of the United States Constitution were violated when his right to testify was taken from him.

The courts have abused their discretion in denying Mr. Ducote relief in this Claim. Although the jury is instructed that it cannot be held against the defendant if he does not testify; people still want a

defendant to testify that "I didn't do it."

Because "the most important witness for the defense in many criminal cases is the defendant himself," ***Rock v. Arkansas***, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987) deemed the accused's right to present his or her testimony at trial, "[e]ven more fundamental to a personal defense than the right to self-representation" under the Sixth Amendment. ***Rock***, 483 U.S., at 52, 107 S.Ct., at 2709; see also: ***United States v. Walker***, 773 F.2d 1173, 1179 (5th Cir. 1985)("Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance."). No matter how daunting the task, the accused therefore is entitled to his right to face jurors and address them directly without regard to the probabilities of success. As with the right of self-representation, denial of the accused's right to testify is not amenable to the harmless error analysis. The right "is either respected or denied; it's deprivation cannot be harmless." ***McKaskle v. Wiggins***, 465 U.S. 168, 177, n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

Mr. Ducote contends that several attempts were made to have trial counsel allow him to testify in this matter. Yet, trial counsel refused to allow Mr. Ducote to take the stand. Trial counsel specifically, at one instance, informed Mr. Ducote that he would not allow Mr. Ducote to "to take the stand for any reason." A criminal defendant's right to testify is well-established by the Fifth and Fourteenth Amendments to the United States Constitution. Only the defendant may waive this right, not his counsel, and it must be shown to be knowing and voluntary.

The right to testify in one's behalf is one of the rights that is essential to Due Process in a fair adversarial proceeding. See: ***Faretta v. California***, 422 U.S., at 819, no. 15, 95 S.Ct. 2525 (1975). In interpreting the Due Process Clause, the Supreme Court held:

> [t]he necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without Due Process of Law include a right to be heard and *offer testimony*. (emphasis added).

A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the evidence against him, ***to offer testimony***, and to be represented by competent counsel.

Mr. Ducote repeatedly informed his trial counsel that he wished to testify in his own behalf as to the truth of the matter. Mr. Ducote felt, and rightly so, that the testimony from the witnesses, without the jury being afforded the opportunity to hear directly from the defendant, would prejudice the truth of the matter and to his defense. Trial counsel had informed Mr. Ducote, in another instance, that **he felt** that Mr. Ducote did not need to testify because the State's prosecutor had the burden of proving the charges with serious consequences concerning sexual abuse allegations, and that he (trial counsel) was the one who made that ultimate determination as to whether he would testify or not to testify.

A criminal defendant has a constitutional right to testify at trial which cannot be waived by defense counsel. *Hester v. United States*, 335 F.Appx. 949, 951 (11th Cir. 2009); *United States v. Teague*, 953 F.2d 1525 (11th Cir), *cert. denied*, ___ U.S. ___, 130 S.Ct. 311, 175 L.Ed.2d 206 (2009).

Mr. Ducote contends that the trial counsel never once informed him that it was his right to determine if he would testify at trial or not. Trial counsel never informed Mr. Ducote of a valid reason as to the failure to call him to testify.

Furthermore, the district court has abused its discretion in stating, "Further, and under the jurisprudence, the court is not required to make an inquiry into whether a defendant wishes to testify or not." The Court must determine whether a defendant is making a knowing and intelligent waiver of *any* of his rights as enumerated in the United States Constitution.

ISSUE NO. 2

Reasonable jurists would agree that Mr. Ducote was denied effective assistance of counsel (trial and appellate counsel) as guaranteed by the Sixth Amendment to the United States Constitution. ***Strickland v. Washington.***

Mr. Ducote was denied effective assistance of counsel during the course of these proceedings for the following reasons to wit:

Standard of Review:

The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. U.S. Const. amend. VI. The purpose of this Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The skill and knowledge counsel is intended to afford a Defendant "ample opportunity to meet the case of the prosecution." *Strickland*, 466 U.S. at 685 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942)).

Acknowledging the extreme importance of this right, the United States Supreme Court has held: That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland v. Washington, 466 U.S. at 685. Thus, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763, 773 (1970).

In *State v. Myles*, 389 So.2d 12, 28-31 (La. 1980), the Supreme Court of Louisiana found

ineffective assistance of counsel on the face of the appellate record under circumstances very similar to this case. Trial counsel rested without additional evidence, failed to object to inadmissible evidence, and failed to object to erroneous instructions. Id. at 28-29. See also: *United States v. Otero*, 848 F.2d 835, 837, 839 (7th Cir. 1988); *Deutscher v. Whitley*, 884 F.2d 1152, 1162 (9th Cir. 1989); *Duckworth v. Dillon*, 751 F.2d 895 (7th Cir. 1984); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982)(ineffective assistance found where counsel failed to: (1) investigate; (2) raise a challenge to the petit jury selection system; (3) raise illegality of the arrest; (4) interview crucial witnesses; and (5) object to an improper *Witherspoon* excusal); *Blake v. Zant*, 513 F. Supp. 772 (S.D.Ga. 1981)(ineffective Counsel in capital cases; standards applied with particular care; showing of prejudice not always required); *State v. Harvey*, 692 S.W.2d 290 (Mo. 1985)(counsel's non-participation at the trial without the client's express consent is ineffective assistance of counsel).

"Counsel's ineffectiveness cries out from a reading of this transcript." *Douglas v. Wainwright*, 714 F.2d 1532, 1557 (11th Cir. 1983)(citing *Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982); *Yarborough v. State*, 529 So.2d 659, 662 (Miss. 1988)(quoting *Waldrop v. State*, 506 So.2d 273, 275 (Miss. 1987)).

While a defendant must ordinarily show that counsel's ineffective assistance resulted in actual prejudice, such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary. *Frett v. State*, 378 S.E.2d 249, 251 (S.C. 1988) (citing *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984)).

A defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984); *State v. Fuller*, 454 so.2d 119 (La. 1984). The defendant must show that: (1) counsel's performance was deficient; and (2) that the deficiency prejudiced the defendant. Counsel's deficient performance will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. ***State v. Sparrow***, 612 So.2d 191, 199 (La. App. 4 Cir. 1992).

"At the heart of effective representation is the independent duty to investigate and prepare." ***Goodwin v. Balkcom***, 684 F.2d 794, 805 (11th Cir. 1982); accord ***Porter v. Wainwright***, 805 F.2d 930, 933 (11th Cir. 1986); ***Tyler v. Kemp***, 755 F.2d 741 (11th Cir. 1985); ***Douglas v. Wainwright***, 714 F.2d 1532 (11th Cir. 1983), *vacated*, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984), *adhered to*, 739 F.2d 531 (1984). As the Court held in ***Wade v. Armontrout***, 798 F.2d 304 (8th Cir. 1986): Investigation is an essential component of the adversary process. "Because [the adversarial] testing process generally will not function properly unless counsel has done some investigation into the prosecution's case and into various defense strategies . . . 'counsel has a duty to make reasonable investigations. . . .'" Id. at 307 (quoting ***Kimmelman v. Morrison***, 477 U.S. 365, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986) (quoting ***Strickland v. Washington***, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

However, the mere presence of an attorney does not satisfy the constitutional guarantee of counsel. As the Supreme Court has often noted, an accused is entitled to representation by an attorney, whether retained or appointed. "Who plays the role necessary to ensure that the trial is fair." ***Morrison***, 477 U.S. At 377, 106 S.Ct. At 2584, quoting ***Strickland v. Washington***, 466 U.S. 668, 685, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 274 (1984). "In other words, the right to counsel is the right to effective assistance of counsel, citing ***Evitts v. Lucey***, 469 U.S. 387, 395-96, 105 S.Ct. 830, 835-36, 83 L.Ed.2d 821 (1985).

A. Failure to Investigate:

Defense counsel failed to investigate this matter. Mr. Ducote had informed his trial counsel that when he first spoke with the alleged victim in this matter, he was attempting to find the owner of the property adjacent to the home that she was renting. Defense counsel was also informed that AK had

actually made a phone call in order to assist Mr. Ducote (See: letters written to defense counsel prior to the commencement of trial; Exhibit "B").

Had defense counsel actually investigated this matter, it would have been discovered that AK had actually attempted to contact the property owner (which would have added credibility to Mr. Ducote's statements).

However, as it stands, the State was the only party in this matter who presented evidence to the jury.

Also, if defense counsel had investigated this matter, it would have been noted during the course of Mr. Ducote's trial that counsel failed to have the "additional" firearm removed from these proceedings. Simply put, the State already had the firearm that Mr. Ducote had on his person during this "misunderstanding" between himself and AK. Had counsel properly investigated this matter prior to the commencement of trial, he would have noted that the "additional" firearm was being introduced in order to prejudice Mr. Ducote and "show him as a bad person." This "additional" firearm had *nothing* to do with the alleged crime.

It must also be noted that defense counsel was ineffective during the course of the trial due to the fact that counsel had failed to capitalize on the testimony of the DNA Expert when it was noted that some of the DNA evidence could have been "transferred" by other means other than Mr. Ducote actually either attempting to penetrate, or penetrating.

B. Ineffective during plea agreement:

Mr. Ducote respectfully requests that this Honorable Court grant him an evidentiary hearing in order to obtain testimony in order to support his contentions of this Subsection of the ineffective assistance of counsel Claim.

Mr. Ducote was denied effective assistance of counsel during the course of the plea agreement process prior to the commencement of his trial.

In 2012, the U.S. Supreme Court decided two cases that specifically address the importance of effective assistance of counsel in plea negotiations. In *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), the Court noted:

> "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process."

In *Missouri v. Frye*, --- U.S. ---, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012), the Court noted:

> "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process...that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at criminal stages."

Plea bargaining is an essential part of our criminal justice system and is "a highly desirable part for many reasons." *Santobello v. New York*, 404 U.S. 257, 260-61, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) accord *Blackledge v. Allison*, 431 U.S. 63, 71, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Brady v. United States*, 397 U.S. 742, 752, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

In this case, counsel improperly advised Mr. Ducote to reject a plea bargain which had been offered by the State. Instead, he was advised to submit a "counter-offer" to the State, which had been rejected by the State.

The Standards of Strickland and Cronic

A claim of ineffective assistance of counsel is analyzed under the standards enunciated in *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and in many cases, *United States v. Cronic*, 466 U.S. 648, 662 (1984). The difference between the ineffectiveness of counsel in cases governed by *Strickland* and those governed by *Cronic* is a difference in "kind" other than simply "degree" and the *Cronic* standard applies only if counsel's failure to test the prosecution's case is "complete." See *Bell v. Cone*, 535U.S. 685, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002).

Three types of cases warrant ***Cronic's*** presumption of prejudice analysis. The first is the complete denial of counsel, in which the "accused is denied the presence of counsel 'at a critical stage'." ***Bell***, 122 S.Ct. at 1851 (quoting ***Cronic***, 466 U.S. at 659, 104 S.Ct. 2039.) The second is when counsel "'completely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* (quoting ***Cronic***, 466 U.S. at 659, 104 S.Ct. 2039). The third is when counsel is placed in circumstances in which competent counsel very likely could not render assistance. **Mr. Ducote submits that Trial Counsel failed to subject the State's case to any meaningful adversarial testing, and that failure was complete.** Therefore, Mr. Ducote submits that the ***Cronic*** standard, where prejudice is presumed, *Id* at 658, should also have been applied to this case, and the Court's failure to apply the ***Cronic*** standard was contrary to established law and unreasonable.

Mr. Ducote submits that counsel is a licensed and experienced attorney, and presumed to know the law. Counsel was also fully informed of Mr. Ducote's lack of knowledge of criminal proceedings throughout the pre-trial stages.

Mr. Ducote submits that based upon the facts and circumstances presented, this was akin to having no counsel at all. Trial Counsel "**completely failed**" to subject the prosecution's case to meaningful adversarial testing. Counsel's failure was "complete" from the onset of the proceedings and thereafter. ***United States v. Cronic***, 466 U.S. 648, 662 (1984).

Mr. Ducote submits that he established that counsel was incompetent and the performance fell below an objective standard of reasonableness measured by prevailing professional norms meeting the two prongs of ***Strickland*** and the additional standards enunciated in ***Padilla v. Kentucky***, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 1473 (2010), and ***Hernandez v. United States***, supra. Mr. Ducote further submits that he has met the standard enunciated in ***United States v. Cronic***, supra.

In ***U.S. v. Padilla-Martinez***, 762 F.2d 942 (11th Cir. 1985), the Court held that: The Sixth Amendment provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to have

the assistance of counsel for his defense." This broad guarantee of counsel has been interpreted to include four rights; 1) The right of counsel, *Powell v. Alabama*, 287 U.S. 45 (1932); 2) The right of effective assistance of counsel, *Glasser v. U.S.*, 315 U.S. 60 (1942); 3) The right to a preparation period sufficient to insure a minimal level of quality of counsel; 4) The right to be represented by counsel of one's choice. Id. at 70, 62 S.Ct. 464.

In *Lafler v. Cooper*, 132 S.Ct. 1376 (3/21/12); and, *Missouri v. Frye*, 132 S.Ct. 1399 (3/21/12), the United States Supreme Court held that a defendant is guaranteed effective assistance of counsel during the course of a guilty plea. However, in this case, Mr. Ducote was not afforded effective counsel during the guilty plea.

Question: Does a defendant still has an equal protection claim if he pleas guilty? Possibly. He has to raised ineffective assistance of counsel. But should also raise the claim straight out.

A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant pleas guilty, he cannot thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. The defendant may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was outside the "range of competence demanded of attorneys in criminal case." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973).

A guilty plea is open to attack on the ground that counsel did not provide the defendant with "reasonable competent advice." *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980).

WHEREFORE, for the above reasons, Mr. Ducote respectfully request that after a fair and impartial review of the pleadings and Record, this Honorable Court conclude that Mr. Ducote was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 18th day of September, 2023 upon counsel of record for Respondent, pursuant to Rule 29 at the following address: District Attorney's Office, P.O. Drawer 7358, Alexandria, LA 71309-0358.

Jeffery Ducote

348 So.3d 1279 (Mem)
Supreme Court of Louisiana.

STATE of Louisiana

v.

Jeffery Dwayne **DUCOTE**, Sr.

No. 2022-KH-01147
November 1, 2022

Applying For Supervisory Writ, Parish of Rapides, 9th Judicial District Court Number(s) 329,700, Court of Appeal, Third Circuit, Number(s) KH 22-00214.

Opinion

***1280 **1** Writ application denied. See per curiam.

PER CURIAM

Denied. Applicant fails to show that he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As to his remaining claim, applicant fails to satisfy his post-conviction burden of proof. La.C.Cr.P. art. 930.2.

Applicant has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Applicant's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, applicant has exhausted his right to state collateral review. The district court is ordered to record a minute entry consistent with this per curiam.

All Citations

348 So.3d 1279 (Mem), 2022-01147 (La. 11/1/22)

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