

23-7825

No. _____

FILED

JUN 05 2024

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SUPREME COURT U.S.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Eduardo Margarito Soto — PETITIONER
(Your Name)

vs.

Bobby Lumpkin — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Court of Criminal Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Eduardo Margarito Soto
(Your Name)
Wainwright Unit
2665 Prison Rd. #1
(Address)

Lovelady, Texas 75851
(City, State, Zip Code)

(936)-636-7321
(Phone Number)

QUESTION(S) PRESENTED

- 1). Did or whether the Highest State Court reviewed the entire record and failed to recognize, Applicant has established by a preponderance of the evidence that He was Constructive Denied Assistance of Counsel in the entire proceedings, due to a silent and undeveloped record, that resulted at trial and on appeal.
- 2). Did or whether the State Court's rejected, overlooked or ignored Applicant's Claims, without a reason or explanation, that prejudiced him as contrary to or involved an unreasonable application of Federal law. due to the state Court's obligation under Tex. Code Crim. Proc. Ann. Art. 39.14 and Brady v. Maryland.

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:

Trial Court: in the 297th District Court of TARRANT County,
Texas, Case No. 1439642

Court of Appeals: in the Second District of Fort Worth, Texas
No. 02-19-00171-CR; Reporter 2019 Tex. App. Lexis
7567 | 2019 WL 3955221, judgment entered 8/22/2019

Tex. Court of Criminal Appeals: Judgment entered 4/11/2024

RELATED CASES

CLARKE v. State, 270 S.W. 3d. 573 (Tex. Crim. App. 2008)

Gifford v. State, 980 S.W. 2d. 791

Johnson v. State, 624 S.W. 3d. 579

LUNA v. CAMBRA, 306 F.3d. 954

Milke v. RYAN, 711 F.3d. 998

Miller v. Dretke, 420 F.3d. 356

Thompson v. State, 9 S.W. 3d. 808

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ 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.

☒ For cases from **state courts**:

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

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

The opinion of the Court of Appeals, Second District, Fort Worth court appears at Appendix _____ to the petition and is

☒ reported at 2019 Tex. App. Lexis 7567; 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 _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 4/11/2024.
A copy of that decision appears at Appendix C.

☒ A timely petition for rehearing was thereafter denied on the following date: 4/11/2024, and a copy of the order denying rehearing appears at Appendix C.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment - Due Process of Law

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life or property, without Due Process of Law nor shall private property be taken for public use, without just compensation.

6th Amendment - Rights of the Accused

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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense

14th Amendment

No State shall deprive any person of life, or property without Due Process of Law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Petitioner Soto seeks review of the judgment and sentencing of the 297th District Court of Tarrant County, Texas in Case No. 1439642 and the affirming and holding of the Court of Appeals, Second District Court of Fort Worth, Texas in Cause No. 02-19-00171-CR; Reported 2019 Tex. App. Lexis 7567/2019 WL 3955221 and the Texas Court of Criminal Appeals, decision in No. WR-92,640-02, byway of white card or post card

Where Petitioner Soto, was Constructive Denied Assistance of Counsel in the entire proceeding, where the trial Court abused its discretion, by allowing the State Court to disclose of exculpatory and impeachment evidence, due to a silent and undevelop record that resulted at trial and on appeal. and, where Petitioner Soto, filed his New Application for writ of Habeas Corpus on 10/31/2023 and the State Court failed to answer or filed a Proposal Findings of Facts to Petitioner Soto issue's and the Highest State Court failed to hold an independent Review of the entire record, due to the State Court's Obligation under Tex. Code Crim. Proc. Art. 39.14 and Brady v. Maryland.

Argument and Authorities

Under Texas law, the Court of Criminal Appeals may not consider the merits of or grant relief on a subsequent application for a writ of habeas corpus, unless the application contains sufficient specific facts establishing that the claimed claims and issues have not been and could not have been presented previously in an original application or in a previously considered application filed under this article. Because the factual or legal basis for the claim is unavailable on the date the applicant filed the previous application. Tex. Code Crim. Proc. Ann. Art. 11.07 § 4 (a-c).

Under the applicable standard, the applicant has the burden to prove by a preponderance of evidence that the error contributed to his conviction or punishment.

A. Standard of Review not Applicable Law

To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate by a preponderance of the evidence that: 1) his trial counsel's performance was deficient and 2) a reasonable probability exist that, but for the deficiency "unprofessional error" the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674 (1984) (see) *Hernandez v. State*, 988 S.W.2d. 770-74 (Tex. Crim. App. 1999) (holding *Strickland* standard applied to ineffective assistance of counsel claim regarding non-capital sentencing proceedings). Under the first prong of *Strickland*, the defendant must show that his counsel performed fell below an objective standard of reasonableness. *Robertson v. State* 137 S.W.3d. 475, 483 (Tex. Crim. App. 2006);

Thompson v. State, 9 S.W.3d, 808, 812 (Tex. Crim. App. 1999). The second prong of Strickland requires the defendant to demonstrate prejudice - a reasonable probability that, but for his counsel's unprofessional errors the results of the proceeding would have been different. Strickland 466 U.S. at 694, 104 S.Ct. at 2068; Thompson 9 S.W.3d. at 812. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland 466 U.S. at 694, 104 S.Ct. at 2068.

The Court indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, and therefore the defendant must overcome the presumption that the defendant challenged the action constitutes "Sound trial strategy." Id. at 689, 104 S.Ct. at 2065; Williams v. State 301 S.W.3d. 675, 689 (Tex. Crim. App. 2009). The Court review is highly deferential to counsel and the Court do not speculate regarding counsel's trial strategy. Beve v. State, 77 S.W.3d. 828, 833 (Tex. Crim. App. 2002). If the record is silent regarding the reason for counsel's conduct - as it usually is on direct appeal when the record is insufficient to overcome the presumption that counsel followed a legitimate trial strategy. Tex. v. State, 25 S.W.3d. 707, 713-14 (Tex. Crim. App. 2003) (holding counsel's failure to object to an "arguably objection" victim testimony and evidence was not ineffective assistance of counsel, when the record was silent as to counsel strategy) (see) Wain v. State, 226 S.W.3d. 425, 431 (Tex. Crim. App. 2007) - Rejecting Court of Appeals' conclusion that there was no conceivable reason for trial counsel action and stating that because the record was silent on this point, defendant must rebut the presumption that trial counsel's decision was in some way be it conceivable or not - reasonable.)"

B. Analysis

The record is silent regarding why counsel failed to make the motion, as part to the punishment assessed. Without trial counsel's explanation, the record is insufficient to evaluate whether counsel's assistance fell below an objective standard of reasonableness. (See) *Tony* 25 S.W.3d at 713-14 (holding counsel's failure to object to an "arguably objectionable" testimony and evidence was not ineffective assistance of counsel when the record was silent as to counsel's strategy) (see)

Thompson, 9 S.W.3d at 813 (holding that record must affirmatively demonstrate alleged ineffectiveness) As such appellant has to overcome the strong presumption that his counsel conduct was based on a legitimate trial strategy. (see *Strickland* 466 U.S. at 689, 104 S.Ct. at 2065; *Williams* 301 S.W.3d at 687.

Additionally, Before the Court may conclude that counsel was ineffective for failing to make an objection, appellant must show that the trial judge would have erred in overruling the objection. *Vaughn v. State*, 413 S.W.2d 564, 500 Tex. Com. App. 1496).

The *Strickland* Analysis does not apply, when prejudice is presumed. (see) *United States v. Corio*, 466 U.S. 648, 659 104 S.Ct. 2039, 2047, 80 L.Ed. 2d 657 (1984). If a defendant can demonstrate that his counsel entirely failed to subject the prosecution case to meaningful adversarial testing "such that there was a constructive denial of the assistance of counsel, altogether, when prejudice is legally presumed. (see) *Corio v. State*, 252 S.W.3d 342, 347, 53 Tex. Com. App. 2005 (citing) *Corio*, 466 U.S. at 658-59, 104 S.Ct. 2039, 2046-47; (see also) *Hill v. Cove*, 535 U.S. 656, 676-97, 122 S.Ct. 1843, 1847, 152 L.Ed. 2d 914 (2002) (holding that under *Corio* defense counsel's failure to test prosecution's case must be complete before prejudice is presumed).

In *Crowder* 252 S.W.3d at 350-52 (holding defendant was constructively denied his rights to a effective assistance of counsel, when his counsel refused to participate in jury selection, enter plea for his client, make opening or closing argument statement, cross-examine any of State's witnesses, make any objections, offer any defense request, any Special jury instructions, or offer any evidence or argument with respect to punishment.

In The Instant Case,

Appellant contends from the (Holding Opinion of the Court of Appeals No. 02-19-00171 of the Second District, Fort Worth, August 22, 2014 what states:

On May 12, 2014, the Court notified Mr. Solo, by letter of what concerns that the Court have jurisdiction over this appeal, because the notice of appeal was timely filed. The Court reserved a response on May 16, 2014, stating because for continuing the appeal, the appeal could be dismissed for want of jurisdiction. Tex. R. App. 44.3

Appellant asserts, In *Rylander v. State*, 101 S.W.3d 107 (Tex. Crim. App. 2003) citing *Rylander v. State* 75 S.W.3d 119 (Tex. Crim. App. 2000). The Appellate Court discussed deficiencies in the trial counsel's representation and reversed the trial court's judgment. The court reversed that decision, however and affirmed the judgment and sentence of the trial court. The record on direct appeal was inadequate and could not adequately reflect the motives behind trial counsel's action. The record reveals what as to why

Defendant's trial counsel took or failed to take the action that undermined the appellate court's confidence in the convictions. Based on the totality of the record, the court could not conclude that defendant established that trial counsel performance fell below and objection standard of reasonableness.

Appellant asserts, *In Johnson v. State* 624 S.W.2d 579 (Tex. Crim. App. 2021) (Holding in (2) the Court may not find deficient performance from a silent record, if there was any reasonable strategy that might support counsel's decision; (3) Since counsel was not given the opportunity to explain his trial strategy, in the absence of anything in the record to show the tactics or strategy reasonably of counsel, the appellate court declared counsel's performance was deficient; (4) Because the record did not disclose counsel's reason for his conduct and a legitimate trial strategy was possible, counsel was not deficient and there was no reason to conduct a second proff prejudice analysis.

Appellant asserts, due to the record was silent in the instant case. Appellant has demonstrated the first prong of Strickland standard. Appellant writ of Habeas Corpus, Application should be granted.

Appellant asserts *In Gifford v. State*, 480 S.W.2d 791 (Tex. App. - Houston (1st Dist) (1998) (pet. ref'd). The First Court of Appeals reversed and remanded for a new punishment hearing where counsel for the defense: 1. failed to object to a victim impact statement made before sentencing, also the court stated Gifford maintains his counsel was ineffective because counsel failed to object to inadmissible statement. Counsel had objected Gifford's right to complain about it on appeal.

According to *Duffy*, the test for determining whether counsel was effective at the punishment phase of a non-capital offense is to determine whether counsel was reasonably likely to render effective assistance and then to determine whether counsel reasonably rendered effective assistance. (see) *Geig*, 825 S.W.2d. at 130.

The Court believe, if Gifford's Counsel had Object to the victim Statement, the Trial Judge would have erred in overruling the objection.

Appellant contends, due to a silent record and a undevelop record, had Counsel Objected to any of the Statement's or evidence, or newly discovered evidence appellant has obtained, the Trial Judge would have erred in overruling his counsel's objection and it would establishes that Counsel entirely failed to subject the prosecution's case to a meaningful adversarial testing, as such that there was a constructive Denial of assistance of Counsel. (see) *Carroll v. State* 252 S.W.3d. 250-52; citing *Crowe*, 466 U.S. at 658-59.

Here Appellant has demonstrated the Sound policy of Strickland Standard "is prejudice". . . . Appellant's writ of Habeas Corpus, Application Should be Granted

(10)

(see attachment in Support)

REASONS FOR GRANTING THE PETITION

Petitioner Soto asserts, as stated in Texas law of the Court of Criminal Appeals, the Highest State Court, may not consider the merits of or grant relief on a subsequent Application, unless the Application contain sufficient specific fact establishing that the current claim and issues have not been and could not have been present previously in an original Application or in a previous considered Application filed under this article. Because the factual and legal basis for the claim was unavailable on the date, the Applicant filed the previous Application. Tex. Code Crim. Proc. Ann. Art. 11.07 § 4 (A-C) and under 28 U.S.C. § 2247, of the federal Court law on Application for writ of Habeas Corpus, where Petitioner Soto present Documentary Evidence as "Exhibits" that included transcript of proceeding upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar Application by or in behalf of the same petitioner shall be admissible in evidence, where Petitioner Soto claims, He was Constructive Denied Assistance of Counsel in the entire proceeding, due to a silent and undevelop record that resulted at trial and on appeal.

Therefore Petitioner Soto seeks, this Honorable Court by means of a writ of Certiorari, that's not a matter of right, But of Judicial Discretion and of not to correct error in lower Court's decision, But to decide cases presenting issue(s) of importance beyond the particular fact and parties involved.

CONCLUSION

The petition for a writ of certiorari should be granted.

*Reversal of the judgment and sentence, and vacate in
The Interest of Justice.*

Respectfully submitted,

Eduardo M. Soto

Date: JUNE 5th, 2024