No. 24-5338

FILED
JUL 25 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

JERRY WILLIS — PETITIONER
(Your Name)

vs.

LELAND LINAHAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS - 11TH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JERRY WILLIS
(Your Name)

TELFAIR S.P., P.O. 549
(Address)

HELENA, GA. 31037
(City, State, Zip Code)

N/A
(Phone Number)

Questions Presented

NO. ONE: Under the Federal Rules of Civil Procedure 60(d), if an issue has been presented through several rounds of litigation in both state and Federal Court and the merits of the claim have never been reached, does the passage of time necessarily preclude the District Court or the U.S. Court of Appeals from issuing a competent ruling on same pursuant to a rule 60(d) motion?

NO. TWO: If a Trial Judge during a recharge to the jury on Murder, Felony Murder, and Voluntary Manslaughter, explains that these cases will be considered on Appeal and to take his word on it, is that not intimating to the jury as to the Guilt of the [P]etitioner?

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:

HONORABLE ROBIN S. ROSENBAUM, U.S. CIRCUIT JUDGE FOR THE 11TH CIRCUIT COURT OF APPEALS

RELATED CASES

N/A

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STATUTES AND RULES

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 A 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[✓] is unpublished.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 B 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[✓] is unpublished.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 _____ 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 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 21 MARCH, 2024

[ ] 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: 1 MAY, 2024, and a copy of the order denying rehearing appears at Appendix A.

[ ] 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 _____. 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. A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment Right under the U.S. Constitution to a fair trial.

Fourteenth Amendment Right to Due Process under the U.S. Constitution.

STATEMENT OF THE CASE

The record will show in the case sub judice that on 14th April, 1992, the Petitioner was convicted in a trial by jury in the Superior Court of Dekalb County, State of Georgia for the offenses of Murder and Possession of a Firearm. Subsequently, the Petitioner was sentenced to Life and Five(5) years to operate in a consecutive manner. Accordingly, a timely Direct Appeal was submitted to the Georgia Supreme Court which affirmed the convictions.

The Record then indicates the Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Lowndes County, State of Georgia, Willis V. Linahan, Warden, Civil Action No. 93-CV-2111. After Evidentiary Proceedings were conducted on 10th November, 1993, The Habeas Court in a Final Order denied the Petition on 30th June, 1994.

Subsequently, on 14th February, 1995, the Petitioner filed his Federal Petition for Writ of Habeas Corpus in the U.S. District Court for the Northern District of Georgia, Atlanta Division, Civil Action no. 1:95-CV-0359, Willis v. Linahan, Warden. On 25th September, 1996. The District Court adopted the Magistrate's report and recommendation in denying the petition. Thereafter, the petitioner filed his Request for a Certificate of Appealability in the U.S. Court of Appeals for the Eleventh Circuit; the court denied the Certificate on 3rd October, 1997. on 18th September, 2001, the Petitioner filed with the U.S. District Court a "Motion to Reopen the Case", which was denied on 28th November, 2001.

The record will then reflect that on 11th August, 2023, the Petitioner filed his Rule 60(D) Motion pursuant to the Federal Rules of Civil Procedure in the U.S. District Court. The court denied the motion on 27th October, 2023. On 12th January, 2024 the District Court denied the Petitioner's Motion for a Certificate of Appealability; the court denied the Petitioner's Motion for Reconsideration on 5th April, 2024.

Accordingly, the Petitioner filed a timely request for a Certificate of Appealability to the United

States Court of Appeals for the Eleventh Circuit; the request was denied on 21 March, 2024, Case No. 23-13897. As a result, the Petitioner submitted a Motion for Reconsideration which was denied on 1st May, 2024 and received at the Telfair State Prison on 13th May, 2024. The Petitioner now brings this petition for Writ of Certiorari Presenting Two(2) questions for the court to consider.

REASONS FOR GRANTING THE WRIT

The Petitioner shows that O.C.G.A. SEC. 17-8-57, which finds its roots in the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment under the United States Constitution, i.e., expression or intimation of opinion by judge as to matters proved or guilt of accused, states in pertinent part as follows:

> "It is error for any Judge, during any phase of any criminal case, to express or intimate to the Jury the Judge's opinion as to whether a fact at issue has or was not proved as to the guilt of the accused"

In the case sub judice, the specific error or violation by the trial judge occurred during a recharge to the jury as concerns the variations of Homicide that the Petitioner could be found guilty of, i.e., Murder, Felony Murder and Voluntary Manslaughter. Apparently confusion reigned supreme as the trial court's initial charge amounted to a sequential instruction and the recharge is as follows which is the specific point of the case at bar:

(T.T. 283-284)[1];

> The Court: "Tell the Jury to come back out:. (Whereupon the jury was returned to the courtroom.)
> The Court: "You shouldn't at all be surprised, that not only are you probably confused about the various alternatives that you have, but also the various courts that consider these cases on appeal; the Court of Appeals or Supreme Court. Sometimes the state of the law is a little bit in flux and unsettled, rather than my trying to figure out at this point what specifically someone is going to do down the road, the Appellate Court, what I am going to do or ask you to do is to find a separate verdict as to each of the first three counts, counts 1,2 and 3. Rather than trying to explain to you the reasons why I am doing that, just take my word for it, that it would be better if you could, and I will ask you to please find a separate verdict as to counts 1,2 and 3.... You have heard the evidence and the court's charge as to what the state must prove beyond a reasonable doubt to find a person – The difference between Felony Murder and the Malice Murder and the Voluntary Manslaughter. Okay?" (Emphasis added by Petitioner).

[1] The Petitioner will cite from the State Trial Transcripts as "T.T." followed by the appropriate page number.

In response to the above-stated charge, Trial Counsel stated the following;

(T.T. 285):

> Mr. Peek,"I think also that I would reserve my objections to the Motion for New Trial because when the Jury puts the court in the position where-If the court says, based on what the Appellate Courts may do-There have been a number of cases where that has been questioned as to whether or not that might be some expression of-about it going to be appealed. So, I reserve my right to make some objection later on, if it becomes necessary."

As a caveat to this argument, Peek also remained on the case as Appellate counsel during the Direct Appeal process, where he failed to raise the issue at bar at either the Motion for New Trial hearing or in the Georgia Supreme Court. Accordingly, the Petitioner addressed the issue in a State Habeas proceeding under an Ineffective claim as concerns trial! Appellate counsel Randell Peek; the Habeas Court did not reach the merits of the claim. (See Appendix E). Subsequently, the Petitioner raised the issue in Federal Habeas where again, the true merit of the ground was not reached. (See Appendix D).

In viewing the legal landscape at the time of the instant case and the Trial Court's repeated references to the Appellate Courts in his recharge to the Jury, Faust v. State, 222 GA. 2 7 (1966), appears to be the precedent case in the State of Georgia as it relates to a trial judge referring to the Appellate Courts. Also see Mitchell v. State, 22 GA. 211 and Bryant v. State, 197 GA. 641. In Faust, the court stressed the fact as to Appellate Courts and a trial judge referring to same when it stated the following in reversing the conviction;

> "Furthermore, this court has warned against reference to the reviewing courts by court or counsel, except to cite their decisions."

While it's axiomatic that the Due Process Clause of the Fourteenth Amendment safeguards against such intrusions as to a Trial Court intimating to the jury its opinion, violating the Petitioner's

right to a fair trial. The court in Faust cited no precedent from this court on the subject-matter; it only cited Mitchell and Bryant, supra, in Price v. State, 149 GA. APP. 397 (1979), the Georgia Court of Appeals noted the following in reversal of the conviction where the Trial Court referred to Appellate Courts:

> "If I make an error then there is two courts ahead of me in Atlanta, the State Court of Appeals and the State Supreme Court..."

The Court of Appeals reiterated in Price the cautionary language the State Supreme Court espoused in Faust, i.e., references should not be made to the reviewing courts by court or counsel. In Hollis v. State, 215 GA.APP. 35 (1994), the trial judge stated the following as to a decision rendered in Hunter v. State, 257 GA. 571 (1987), which essentially held that a jury must view the entire film in determining whether it may be adjudged obscene pursuant to O.C.G.A. Sec. 16-12-103(a)(i);

> "We try to expedite things. We have one more film to watch in its entirety. It is about half an hour, 30 minutes. We ought to be—that will be the end of the tapes. The good is we probably have to do some things out of your presence, which is going to take an awfully long time, and we will probably let you go after you finish watching this movie for half an hour. That will be your reward. I appreciate your understanding. I appreciate your patience. As I said before—you can write the Supreme Court of Georgia and tell them what you think about their decision. I have already told them what I think, and they will get a chance to see this record." (Emphasis supplied by court).

The Court of Appeals agreed with Hollis, and again cited that the Georgia Supreme Court has "repeatedly" held that references should not be made to Appellate Courts by the trial court or counsel. See Floyd v. State, 135 GA. APP. 217 (1975) and Bearden v. State, 159 GA. APP. (1981). However, the court noted that neither Appellate Counsel or the State applied the correct law to the issue, nor did trial counsel move for a mistrial or object to the trial court's egregious comments as cited above, thus the Appellate Court essentially waived the ground. A point of interest as to Hollis and the case sub judice

resides in the fact that both cases derived from the Superior Court of Dekalb County, State of Georgia, where Judge Castellani presided over both trials less than two years apart; Judge Castellani clearly had a propensity for informing a Jury to go ahead and convict, the Appellate Courts will proof the case.[2]

In Price v. State, 288 GA. 617 (2011), the Georgia Supreme Court addressed the following comments by the Trial Court;

> Question from Jury- "We'd like to have all the evidence. Have only exhibits through 72." The Court- "Let me tell you that you have all of the evidence, which by law, you are entitled to. There are several things that, if I give them to you, we would have to try this case all over again.... some evidence is considered to be such that it;s disadvantageous for you to have it out with you, particularly in regard to statements and things like that. They are supposed to be read like any other testimony, and it would be reversible error for me to give you all the exhibits." (Emphasis supplied by Court).

Citing Faust, supra, in Price in reversing the conviction, the court again stated its long-standing "rule" that trial courts should not reference Appellate Courts to the jury, except to cite their decisions; the ""Appellate court did not cite any precedent holding on the subject matter from this court. See Price (1979) and Hollis, supras.

As has been previously noted, Peek did not raise the issue at bar on Direct Appeal after objecting to same on the recharge by the Trial Judge. Accordingly, the Peitioner raised the claim under an Ineffective ground against Peek in the State Habeas proceedings; the following is an excerpt from the State Habeas Court's final order;

(F.O.9; Appendix E);

> "Mr. Peek reserved the right to object to that comment by the Trial Court, But knew of no cases that say that the mention of Appellate Courts of the State of Georgia by the trial court to the jury, in and of itself, constitutes grounds for reversal in a non-capital case". (Emphasis added by Petitioner).

2 At this juncture, Judge Castellani escaped two certain reversals in Hollis and the case at bar due to Ineffective Assistance of Counsel at the Trial and Appeal levels.

(F.O.10; Appendix E);

> "Therefore, this court finds that Mr. Peek was not Ineffective in failing to raise this claim on Appeal, but demonstrated the proper actions in researching the issue and making an experienced judgment call... furthermore, this court finds that the underlying issue of the court's comments to the jury is procedurally defaulted pursuant to Georgia Law since this issue was not raised at Trial and on Appeal. O.C.G.A. Sec. 19-14-48(d); Black v. Hardin".

For sake of brevity, the Petitioner would simply show that : 1) Peek did object at trial to the Appellate Court references; 2)There was ample Case Law at the time, i.e., Faust, Mitchell, Bryant, Floyd, Price and Hollis, supras, to support the claim; 3)whether the case in question is "capital" or "non-capital" is not part of the equation, although, the last time the petitioner checked, Malice Murder is a Capital Offense, and 4)The State Habeas Court failed to actually issue a competent ruling on the claim at bar.

On the next rung of the Habeas Ladder, the Magistrate's report and recommendation, which was adopted by the U.S. District Judge as the order of the court, states in pertinent part as follows in regards to the comments by the trial court:

(M.R&R, 10, Par.2; Appendix D);

> "The trial court here was simply explaining why it was recharging the jury on forms of the verdict. The Trial Judge's reference to the Appellate court referred to the unsettled state of the law in general, not necessarily Petitioner's case. It was highly unlikely that the jury would construe the court's remarks to be an assumption that its verdict would be guilty. Petitioner has not shown that the remarks constituted error, much less that Mr. Peek's decision to not Appeal on this basis was outside the wide range of reasonable judgment. Moreover, because of the strength of the evidence, the petitioner cannot show that the comments prejudiced him." (Emphasis added by Petitioner).

In each case cited herein, the court stressed the fact that, "Jurors are presumed to be intelligent

men and women; the case before the court is no different. As a result, because sitting jurors have gone through several panels, i.e., a battery of questions through the voir dire process, a jury in a Murder case such as the one at bar, would clearly understand what "Appeal" means in a Murder Trial, in particular given the fact that the question propounded by the jury to the court was only dealing with the three forms of Homicide and not the Appellate Courts; to believe that the jurors in this case were discussing the Appellate Courts during deliberations when the question was forwarded to the Trial Judge is pure, unmitigated fiction. Again, in pertinent part;

(T.T. 283-284);

> "....That not only you are probably confused about the various alternatives that you have, but also the various courts that consider these cases on appeal; the Court of Appeals or Supreme Court.... rather than my trying to figure out at this point what specifically someone is going to do down the road, the Appellate Court....just take my word for it...."

The first item in the court's language that should have immediately raised a red flag is, why would the jury be confused as to the various courts that consider <u>these</u> cases on appeal? However, the statements in the recharge conveyed the message to convict, let the Appellate Courts handle it, "just take my word for it"; the last statement by the court carried with it the imprimatur of the government, designed to induce the jury to "trust" the words of the judge rather than what its own view of the evidence may have been. In this instance, the jury could not escape the impression and conclusion that the court intimated that they should simply convict and let the Appellate Courts sort it out, "these cases". Thus in viewing the totality of the court's comments, the District Court's opinion that the jury was highly unlikely to have taken the trial judge's recharge as an opinion to convict, is misplaced and diametrically opposite of the reality of the language cited. In furtherance, the Petitioner submitted his Certificate of Appealability to the United States Court of Appeals for the Eleventh Circuit which denied

same without an opinion; again, the merits of the claim were not reached.

The Petitioner filed with the U.S. District Court a rule 60(d) Motion Pursuant to the Federal Rules of Civil Procedure; it was clearly a delayed filing, although, the Petitioner has exercised extreme due diligence to get the case to this point, given his pro se status. (Appendix C). The District Court in its Final Order, ("Appendix B), as to the 60(d) motion, simply glossed over the actual subject-matter at bark, cited the time factor involved in the filed motion and stated that the original "R&R" adopted by the District Court addressed the issue. As was previously shown, the Magistrate's "R&R" which appears to be the escape clause for all concerned in this affair, (Appendix D), did not properly or correctly interpret the language as to the Trial Court's recharge; the magistrate's order was a compilation of rhetoric condensed into a half of paragraph, citing no precedent from this court. At this juncture, it must be stated that generally speaking, most adult people who would stand for jury service, know what the word "Appeal" means and that in most cases it indicates that some form or variation of an adverse decision was or is about to be rendered; Appeal is at the opposite end of the spectrum from acquittal, not guilty or exonerated, and this is not some theory of juris prudence that takes three years of law school to comprehend. On the contrary, it is a word that clearly denotes a loss, in particular in a criminal trial for Murder such as the case at bar where the Trial Judge for all intent and purposes, instructed the jury to convict the Petitioner and let the Appellate Court review it "down the road". In other words, the Trial Judge's statement as to the availability of Appellate review, intimated that the Petitioner was guilty and would need to Appeal the conviction which is wholly violative of O.C.G.A. Sec. 17-8-57 and the Petitioner's right to a fair trial under the Sixth and Fourteenth Amendments of the U.S. Constitution. The District Courts in both instances, i.e., Habeas objections to the Magistrate's R&R" and the rule 60(d) motion, failed to correct a grievous wrong. See Pickett v. U.S., 2021 U.S.APP. 23280 (11th Cir. 2021) and Ramsey v. Walker, 304 FED.APPX. 827 (11th Cir.2008).

The U.S. Court of Appeals for the Eleventh Circuit denied the Petitioner's request for a

Certificate of Appealability, (Appendix A), reasoning that the Petitioner had not made a "substantial showing" of the denial of a Constitutional Right and that the time frame as to the submission of the 60(d) Motion was "undeniably unreasonable", regardless of the [Petitioners] diligence. The facts of the matter before this court are still "unreasonably" undecided in a competent and comprehensive manner, as each court that has even viewed the issue under an Appellate lens has passed the baton without truly reaching or formulating an opinion based on the content of the Trial Judge's recharge to the jury. When a Trial Judge has gone from a supposedly neutral arbiter who carries great weight and credibility in a courtroom. To one who essentially instructs the jury to convict and let the Appellate Court sort it out, the Petitioner has been denied a fair trial and has made a "substantial showing" as to the denial of the right. See Martinez v. Dretke, 404 F.3rd 878 (5th Cir. 2005) and Lott v. Att'y. Gen. Of Fla., 594 F.3rd 1296 (11th Cir. 2007). Also see Slack v. McDaniels, 529 U.S. 473 (2009). The old adage, "time heals all wounds, is inapplicable here as Justice has never been served as to the Trial Judge's egregious and intentional message to the jury during his recharge; "Just take my word for it". (T.T. 283-284).

This Court should evaluate whether or not the omitted issue was stronger than that raised on Direct Appeal by Appellate Counsel in determining whether or not Appellate Counsel's deficient performance prejudiced his case, Eagle v. Linahan, (11th Cir. 2001).