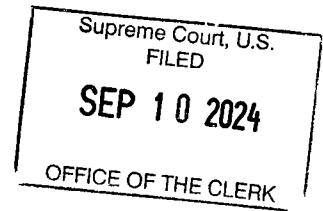


24-5571 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



Bakari Abdul Brown — PETITIONER
(Your Name)

vs.

Bobby Lumpkin — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bakari Abdul Brown, #01970889
(Your Name)

Estelle Unit, 264 FM 3478
(Address)

Huntsville, Texas 77320-3322
(City, State, Zip Code)

(936) 291-4200
(Phone Number)

QUESTION(S) PRESENTED

In proving felon status, is there a conflict between appellate courts where one court holds that trial counsel is not ineffective for offering a stipulation to a defendant's prior conviction while another court deems a claim of counsel's failure to offer a stipulation is without merit?

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

Brown v. Lumpkin, No. 1:20-cv-512, U.S. District Court for the Eastern District of Texas, Beaumont Division.

Brown v. Lumpkin, No. 24-40210, U.S. Court of Appeals for the Fifth Circuit. Appeal filed April 4, 2024, pending disposition.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION.....	11

INDEX TO APPENDICES

APPENDIX A - Decision of United States Court of Appeals, Fifth Cir.

APPENDIX B - Decision of the United States District Court, Eastern District of Texas, Beaumont Division; Report and Recommendations of the US Magistrate Judge

APPENDIX C - Order of United States Court of Appeals denying rehearing.

APPENDIX D - Decision of Court of Criminal Appeals of Texas.

APPENDIX E - Findings of fact and conclusions of law from State Habeas Court.

APPENDIX F

TABLE OF AUTHORITIES CITED

<u>CASES</u>	<u>PAGE NUMBER</u>
Federal	
<u>Harrington v. Richter</u> , 562 U.S. 86, 105 (2011).....	5
<u>Hernandez v. Cockrell</u> , 2001 U.S. Dist. LEXIS 17301, *33	
*33 (U.S.D.C., N.D. Tex. 2001).....	7
<u>Lee v. Lewis</u> , 27 Fed. Appx. 774, 776 (9th Cir. 2001).....	7
<u>Lyons v. McCotter</u> , 770 F.2d 529, 533-534 (5th Cir. 1985)....	8
<u>Old Chief v. United States</u> , 519 U.S. 172, 185-186 (1997)....	6,7,8
<u>Strickland v. Washington</u> , 466 U.S. 668, 687 (1984).....	5,7,8
<u>United States v. Rye</u> , 1999 U.S. App. LEXIS 32504, *6-7	
(6th Cir. 1999).....	8,10
State	
<u>People v. Moore</u> , 161 N.E. 3d 125, 132 (S.Ct. ILL., 2020)....	7
<u>Tamez v. State</u> , 11 s.w.3d 198, 201-202 (Tex. Crim. App.	
(Tex. Crim. App. 2000).....	6,7
<u>STATUTES AND RULES</u>	
Federal - 28 U.S.C.S. 2254(d).....	5
State - Texas Rules of Evidence (Tex. R. Evid.) 403.....	6
Other - American Bar Association Standards relating to	
the Defense Function: 5.2 Control and Direction.....	10

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 2024 U.S. App. LEXIS 12340; 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 2023 U.S. Dist. LEXIS 181895; 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 May 22, 2024.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: June 25, 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. § 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

U.S. Constitutional Amendments Sixth and Fourteenth
Texas Rules of Evidence 403

STATEMENT OF THE CASE

On January 14, 2014, Petitioner Brown was arrested and tried in a single trial for possession of a controlled substance and unlawful possession of a firearm by felon. During the guilt/innocence stage, the prosecution presented evidence to the jury revealing that Brown had previously been convicted for possession of a controlled substance and was sentenced to seven years in prison. The jury found Brown guilty of both offenses, and sentenced him to two life sentences, to run concurrent.

REASONS FOR GRANTING THE PETITION

Brown asks this Court to address whether counsel may be deemed ineffective for failing to stipulate to a defendant's prior conviction for purposes of proving his felon status, thereby prejudicing the defendant.

In criminal prosecutions, a defendant has a constitutional right to effective assistance of counsel. U.S Const. Amends. Sixth, Fourteenth. Claims alleging ineffective assistance of counsel are governed by the standard set forth in Strickland v. Washington, 466 US 668 (1984).

"To prevail on a claim of ineffective assistance of counsel a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." Strickland, 466 US at 687. "More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" id. at 687.

Further, when 28U.S.C.S. 2254(d) applies, "the question is whether there is any reasonable argument that counsel satisfied Strickland's differential standard." Harrington v. Richter, 562 US 86, 105 (2011).

Brown argues that his attorney was ineffective for failing to stipulate to his felon status and not objecting when the prosecution elicited and read the details of his prior felony judgment during the guilt/innocence stage of trial, thereby

allowing the jury to consider the highly prejudicial evidence that he was previously convicted for possession of a controlled substance and was sentenced to seven years in prison.

The record clearly shows that the prosecution's only purpose for admitting evidence of Brown's prior conviction was to prove his felon status.

In a single trial, Brown was charged with unlawful possession of a firearm by felon and possession of a controlled substance with intent to distribute. Brown argues that, faced with these facts, reasonably effective defense counsel would attempt to prevent the jury from learning that Brown's prior felony conviction was for possession of a controlled substance since the name and nature of his prior conviction was not relevant to proving his felon status.

In Old Chief v. United States, 519 U.S. 172 (1997), this Court addressed the problem with admitting other-crimes evidence of prior convictions when its only purpose was to prove the defendant's felon status. In dealing with the prior conviction element, this Court found that "there can be no question that evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant," and less prejudicial means of proof - such as a stipulation or admission could establish the defendant's felon status. *id.* at 185 - 186.

Texas courts adopted the Supreme Court's holdings of Old Chief in Tamez v. State, 11 s.w.3d 198, 201-202 (Tex. Crim. App. 2000) in regards to Tex. R. Evid. 403 and proof of felon status.

In accordance with *Old Chief* and *Tamez*, if defense counsel had offered to stipulate to Brown's prior conviction, the trial court would have been obligated to accept the stipulation.

Although the Fifth Circuit Court of Appeals holds that Brown's claim is without merit and that counsel is not required to make baseless objections, and one District Court within the Fifth Circuit, *Hernandez v. Cockrell*, 2001 U.S. Dist. LEXIS 17301, *33 (U.S.D.C., N.D. Tex., 2001), acknowledged *Old Chief*, but specifically emphasized that the Supreme Court does not address ineffective assistance of counsel in that case, other Courts of Appeal, when applying the *Strickland* standard to this Court's holding in *OLD Chief*, have found counsel to be ~~ineffective~~ ineffective for failing to stipulate to a defendant's prior conviction when the prosecution's sole purpose is to prove the element of felon status during the guilt/innocence stage of the trial, especially when the prior offense is the same or similar offense for which the defendant is on trial for.

In *LEE v. Lewis*, 27 Fed. Appx. 774, 776 (9th Cir. 2001), the Court reasoned, "in the preceding sidebar discussion, Lee's counsel clearly opposed allowing the prosecutor to discuss the details of Lee's prior conviction, suggesting that counsel's subsequent failure to object was not the result of a conscious tactical decision," finding that Lee was prejudiced as a result of counsel's failure to prevent the jury from learning the detail of Lee's prior conviction.

An even more distinguishable case, in *People v. Moore*, 161 N.E. 3d 125, 132 (S.Ct. ILL 2020), where the defendant was

on trial for unlawful possession of a firearm by felon, the Court held, "Given the high risk of prejudice inherent in disclosing defendant's prior murder conviction, defense counsel's failure to stipulate to his felon status was objectively unreasonable."

On the contrary, in United States v. Rye, 1999 U.S. App. LEXIS 32504, *6-7 (6th Cir.1999) the Court found that counsel exercised reasonable professionalism in holding that "counsel realized that under Old Chief, 519 U.S. 172 (1997) the court would be required to accept defendant's offer to stipulate to his past felony conviction for the purpose of proving the felon in possession of a firearm charges against him."

Also in contradiction to the Fifth Circuit's decision denying Brown a certificate of appealability on this claim is the Fifth Circuit's holding in Lyons v. McCotter, 770 F.2d 529 (5th Cir. 1985). Preceding Old Chief, in Lyons, the Court granted relief by finding that, under Strickland, counsel was ineffective for failing to object to the details of Lyons prior conviction for aggravated robbery, the same offense for which he was on trial. Lyons, 770 F.2d at 533-534.

After reading the indictments, which also revealed to the jury Brown's prior conviction for possession of a controlled substance, the prosecution, during its case-in-chief, sought to have admitted a prior judgment on Brown for possession of a controlled substance to "prove up the felon element in possession status." Prior to trial, counsel filed a motion in limine to prevent the prosecution from introducing evidence of prior ² crime.

crimes, and during a bench conference, initially counsel objected to the judgment on grounds of prejudice and authenticity because the judgment , alone, was not certified, but rather the judgment was part of a certified penitentiary packet containing a total of five judgments on Brown, all convictions for possession of a controlled substance. Although counsel made an initial objection to the judgment, he ultimately agreed to allow the judgment to be admitted subject to a redacted version.

However, the name, nature, and prison sentence in the judgment was never redacted before being admitted during the guilt/innocence stage. Without objection, Terri Hughes, the prosecution's fingerprint expert, testified that the judgment was "on Bakari Brown for possession of a controlled substance," and that the judgment contained "the right thumbprint of Bakari Brown."

Further, after Hughes was excused, without objection, the prosecution requested, and received, permission from the Court to once again read the details of Brown's judgment to the jury to drive home the fact that Brown was convicted for possession of a controlled substance in 2010, and that he was sentenced to seven (7) years in prison.

Brown elected not to testify during either stage of trial.

During deliberations on guilt/innocence, the jury requested to review the testimony of Terri Hughes, reminding them that Brown was previously convicted for possession of a controlled substance and that he received seven years in prison on that offense.

In his affidavit, counsel says that he didn't stipulate to Brown's felony status and object when the prosecution introduced those details of Brown's prior conviction to the jury is because Brown wanted a trial, and that Brown did not want to agree to any part of the prosecution's case, including the fact that Brown is a convicted felon.

Contrary to counsel's explanation, nowhere in the record does it reveal or suggest that a stipulation was offered to Brown by the prosecution, nor is it shown that counsel discussed a stipulation with Brown before or during trial. Rye, 1999 U.S. App. LEXIS 32504, *7 ("counsel's questioning of defendant in open court makes clear that they discussed the matter previously and that defendant understood his rights, but was steadfastly refusing to stipulate to his past crimes."); The American Bar Association Standards relating to the Defense Function; 5.2 Control and Direction of the case: "(c) If a disagreement on significant matters of tactics or strategy arises between the lawyer and client, the lawyer should make a record of the circumstances, his advice and reasons, and the conclusion reached

Without a full and fair hearing, the habeas court found trial counsel's affidavit to be credible, while finding any affidavit submitted by Brown to be not credible. The Court of Criminal Appeals of Texas denied habeas relief to Brown on the findings and conclusions of the habeas court. The U.S. District Court and the Fifth Circuit Court of Appeals deferred to the State Court's decision.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted this day, September 10, 2024.

Bakari L. Brown

Bakari Abdul Brown,

Petitioner, Pro se

TDCJ# 01970889

Estelle Unit

264 FM 3478

Huntsville, Texas 77320-3322