

IN THE
SUPREME COURT OF THE UNITED STATES

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

-vs-

RAUL TIJERINA,

Petitioner.

Appeal from the United States Court
of Appeals for the Seventh Circuit
No. 17-1919

PETITION FOR A WRIT OF CERTIORARI

TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it please the Court:

Raul Tijerina, respectfully prays that a writ of certiorari
issue to review the decision of the Appellate Court of Illinois,
First Judicial District, and the United States Court of Appeals
for the Seventh Circuit.

QUESTIONS PRESENTED FOR REVIEW

DID THE PROSECUTOR'S REMARKS TO THE JURY AMOUNT TO PROSECUTORIAL MISCONDUCT THAT DENIED THE PETITIONER HIS RIGHT TO A FAIR TRIAL ?

WAS THE PETITIONER DENIED HIS SIXTH AMENDMENT RIGHT UNDER THE U.S. CONSTITUTION, TO THE EFFECTIVE ASSISTANCE OF COUNSEL, WHEN TRIAL COUNSEL FAILED TO ARGUE THAT PETITIONER'S STATEMENT'S TO POLICE WERE TAKEN IN VIOLATION OF HIS RIGHT TO COUNSEL ?

OPINION BELOW

The order of the Appellate Court of Illinois, First Judicial District, which was published in *People v. Tijerina*, 229 Ill. App. 3d 654 (2008), is attached hereto in Appendix as exhibit A.

The order of the Appellate Court of Illinois, First Judicial District, which was not published pursuant to Illinois Supreme Court Rule 23, is attached hereto in Appendix as exhibit B.

The order of the Illinois Supreme Court denying the petitioner's request for review is attached hereto in Appendix as exh. C.

Petitioner filed a petition for Federal Habeas Corpus Relief in the United States District Court For the Northern District of Illinois, and relief was denied; District Court No. 1:14-cv-00343.

Petitioner filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit, and was denied a certificate of appealability; order is attached hereto as Appendix, exh. D.

Petitioner then filed a motion to recall the mandate, and that was denied on October 12, 2017; order attached hereto in App. as exh. E.

JURISDICTION

The order of the United States Court of Appeal .
For The Seventh Circuit was entered on October 12, 2017.
The petition is timely filed within ninety (90) days. This
Court's jurisdiction is invoked under 28 U.S.C. Section
1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendments V, VI, and XIV; and
Illinois Constitution 1970, art. I, sec. 8.

STATEMENT OF CASE

In July of 2000, fourteen-year-old Sonia Garcia lived with Raul Tijerina at 4716 South Throop in Chicago. (T.R. T24, T86, U84) Mr. Tijerina and Garcia's mother, Gloria, had dated and lived together, but when Gloria abandoned Sonia, Tijerina took care of her. (T.R. T101-102, U84-85) Mr. Tijerina was, and still is, illiterate. (T.R. U81) At trial, Mr. Tijerina denied having a sexual relationship with Garcia, but other witnesses said that they were boyfriend and girlfriend. Mr. Tijerina said as much in his post-arrest statement. (T.R. T101-102, U84-85)

Prior to trial, defense counsel filed a motion to suppress defendant's statement based on the fact that he was not given Miranda warnings, that he was not capable of waiving Miranda rights, that he invoked his right to silence and counsel and/or because the statement was physically coerced. (T.C. 28-30) At the hearing on the motion, counsel proceeded only on the physical coercion allegation. (T.R. 03) The trial judge denied the Motion. (T.R. 023) The following evidence was adduced at Mr. Tijerina's jury trial.

On July 9, 2000, at 1:00 a.m. police were called to Mr. Tijerina's apartment due to an alleged domestic disturbance. (T.R. T29-34) (T.R. T64-69) The officers left when they were refused entry to Mr. Tijerina's apartment. (T.R. T64-72)

Mr. Tijerina's sister, Deanna, also lived in the building. (T.R. T85-89) At 6:00 or 7:00 a.m., Mr. Tijerina knocked on Deanna's door, saying something was wrong with Garcia. Mr. Tijerina admitted to Deanna that he had slapped and hit Garcia the previous evening, because she had been acting as if she were on drugs. (T.R. T104-105) After discovering that Garcia was dead, Deanna called the police. (T.R. T91-92, T96 U237) Mr. Tijerina wandered off and Deanna did not see him until he was arrested four years later. (T.R. T93)

When the police arrived, Garcia and her unborn child were dead, there were abrasions on her face, and blood coming from her mouth and nose, and her eyes swollen shut. (T.R. T135-138; U19, U31-34, U53-54) Garcia's blood on the walls, hallway, window fan and a cooler in the hall. (T.R. T139-141, U151) Nevertheless, the police initially classified this as a non-criminal death investigation. (T.R. T157-159).

Nearly four years later, on June 4, 2004, Detective Richard Milz of the cold case unit got a warrant for Tijerina's arrest. (T.R. T162-164, T.C. 8) Immediately thereafter, Milz, several other officers and Assistant State's Attorney (ASA) Lou Longhitano went to Carrizo Springs, Texas, where Tijerina lived and arrested him in his garage. (T.R. T162-166)

According to Milz, after his arrest, Mr. Tijerina waived his Miranda rights and made the following statement. Mr. Tijerina told detectives that Garcia was his girlfriend and was 8 months pregnant with his baby. Mr. Tijerina said he woke up from a nap and, because Garcia appeared glassy-eyed, he thought she might have taken drugs. (T.R. T170) He began slapping her and asking where she got the drugs. Garcia denied taking drugs. (T.R. T170) Tijerina went back to sleep and when he woke, Garcia was dead on the floor. (T.R. T170) Milz told Tijerina he did not believe him because the autopsy showed that Garcia had more severe injuries. (T.R. T171) At that point, Tijerina began to cry and said that he had also punched Garcia with a closed fist, bit her 2-3 times, and choked her for three to four minutes, after which Garcia was conscious, gasping for air and crying. (T.R. T171-172) Then Tijerina went back to sleep and, when he woke up, Garcia was dead on the floor. He said he picked Garcia up, clothed her, put her body on the bed, and then left the apartment. (T.R. T172)

After he talked to his sister, Tijerina did not want to be home when the police arrived so he ran away, without even putting on shoes. (T.R. T172) For the next couple of days, Tijerina stayed at a hotel, though he was not sure where this hotel was, and then he took a bus to Texas. (T.R. T172-173) Tijerina related this story to ASA Longhitano and on tape. (T.R. T179, T181-182, T238, T240, T242-244, T248-249)

At trial, Mr. Tijerina testified that he was born in Chicago, he could not speak Spanish, nor could he read or write English. (T.R.U81) Mr. Tijerina dated Garcia's mother, Gloria, and lived with her and Garcia. (T.R.U84) When Gloria left Mr. Tijerina lived with Garcia because she had nowhere to go and he could not just kick her out. (T.R.U85) Mr. Tijerina said that he and Garcia were never lovers and he was not the father of her unborn child. (T.R.U84) The night Garcia died, Mr. Tijerina was sleeping and, when he awoke, Garcia was staring blankly at static on the television screen. Mr. Tijerina slapped her. (T.R.U86) Garcia got up and head-butted Mr. Tijerina twice. He grabbed her in an attempt to make her stop and she head-butted him again, knocking out his teeth. Mr. Tijerina retaliated by biting Garcia. (T.R.U86)

At that point, the police came to the apartment. (R.Vol. V86) Tijerina waited for the police to leave and then he left the apartment. (R.Vol. V86, 90) When Tijerina returned, Garcia was no longer in the front room. (R.Vol. V87-88) Tijerina called her and she did not answer, so Tijerina went to see what was wrong. (R.Vol. V88) Garcia was in the bedroom and would not get up. (R.Vol. V88) When he left, Garcia was wearing a t-shirt and shorts; Tijerina never tried to change or dress Garcia. (R.Vol. V88-89) Deana said Garcia was dead and they went to call the police and ambulance. (R.Vol. V89) As Deana was calling, Tijerina left, because he was scared. (R. Vol. V89) Tijerina had hit Garcia when they were arguing,

but he never meant to kill her. (R.Vol. V89) When Tijerina talked to police and the prosecutor at the courthouse in Texas, they told Tijerina that they would let him go if he said yes to all their questions, but what Tijerina told them was not the truth. (R.Vol. V92-93, 130-34)

The trial court denied Tijerina's requests to instruct the jury on involuntary manslaughter of Sonya Garcia, and her unborn child. (R.Vol. VI61-63) Tijerina requested jury instructions on second degree murder, based on both provocation and unreasonable belief in self-defense. (R.Vol. VI63-66) The trial court granted Tijerina's request regarding unreasonable belief in self-defense only, stating that the second-degree murder instruction was "not an instruction the court is gleefully willing to give but the law requires me to give it." (R.Vol. VI69-170) The trial court further stated that no rational juror would believe this was self-defense. (R.Vol. VI82)

The jury found Tijerina guilty of first degree murder and intentional homicide of an unborn child. (C.44,45) The trial court sentenced Tijerina to consecutive terms of 60 and 40 years in prison.

On appeal, Tijerina argued that the trial court erred in refusing to instruct the jury on involuntary manslaughter and second degree murder based on provocation; the prosecution's repeated improper comments in rebuttal argument denied him a fair trial; the prosecution improperly presented extensive

evidence that he had a sexual relationship with the minor victim despite assuring defense counsel pretrial that it would not present such evidence of other crimes; and his 100 year sentence was excessive. *People v. Tijerina* — Ill. App. 3d —, No. 1-06-0682, slip op. at * 1-2 (1st Dist. March 31, 2008). The appellate court affirmed in a published opinion. *Id.* Petition for leave to appeal to the Illinois Supreme Court was denied. See, Appendix A and B.

Mr. Tijerina's filed a timely pro se post conviction petition. (C.45 et seq.) In his petition, Mr. Tijerina alleged, inter alia, that trial counsel was ineffective for failing to move to suppress his statement taken in violation of his Fifth and Sixth Amendment rights to counsel. The trial court summarily dismissed Mr. Tijerina's petition as frivolous. (C.97-104; R. E3) The appellate court affirmed the dismissal. *People v. Tijerina*, No. 1-09-1013, Rule 23 Order, January 26, 2011. Petition for leave to appeal to the Illinois Supreme Court was denied.

REASON FOR GRANTING WRIT

THIS COURT SHOULD GRANT PETITIONER A WRIT OF CERTIORARI BECAUSE THE PROSECUTION'S PERVASIVE PATTERN OF INTENTIONAL MISCONDUCT WAS DESIGNED TO INFLAME THE PASSIONS OF THE JURY AND DENIED THE PETITIONER HIS RIGHT TO A FAIR TRIAL.

1. The Illinois State Court has ruled that multiple instances of prosecutorial misconduct threaten the trustworthiness and reputation of the judicial process and therefore corrective action is necessary to protect the integrity of the process. *People v. Wheeler*, 226 Ill.3d 92, 212 (2007); *People v. Johnson*, 208 Ill.2d 53, 88 (2004). "Even those guilty of the most heinous offenses are entitled to a fair trial" and courts must reverse when the taint of the misconduct deprives the defendant of a fundamentally fair trial "regardless of the strength of the evidence of defendant's guilt." *People v. Blue*, 189 Ill.2d 99, 138-39 (2000). The Courts have noted an "intolerance of pervasive prosecutorial misconduct that deliberately undermines the process by which we determine a defendant's guilt or innocence" and has noted that "threats of reversal, and words of condemnation and disapproval, have been less than effective in curbing prosecutorial misconduct." *Wheeler*, 226 Ill.2d at 122 (quoting *Johnson*, 208 Ill.2d at 66-67).

2. In the instant case, the prosecutor's improper arguments constituted a pattern of intentional misconduct that

denied the petitioner his right to a fair trial. This was not a case where the prosecutor made an isolated or inadvertent improper comment. The prosecution repeatedly instructed the jury to disregard the petitioner's testimony; told the jury fourteen times that the petitioner was a liar; repeatedly called petitioner's testimony and defense "rediculous", "insane", and "insulting" to the jurors' intelligence; told the jurors that a person would have to be "a lunatic" to believe petitioner's testimony; and told the jury that the police officer and ASA who testified for the State had told them the truth. (R.Vol. VI V31-33, 66-83)

3. Additionally, the prosecution improperly attacked defense counsel five times, including accusing defense counsel of using diversionary tactics, changing its defense every day of trial, and demonizing and insulting the victim. (R.Vol. VI 31-33, 60-61, 75-76, 80, 86-87) The prejudicial effect was greatly increased because all but one of defense counsel's more than 20 objections during rebuttal argument were overruled. See *People v. Ray*, 126 Ill.App.3d 656, 661 (1st Dist. 1984).

4. The appellate court found that the prosecutor "should have resisted the temptation to utilize such extensive rhetoric in closing argument" but "while [the prosecutor] came dangerously close to tainting the trial, his arguments were not such error that reversal is required" *People v. Raul Tijerina*, - Ill.App.3d - , No. 1-06-0682, slip op. at *18 (1st Dist. March 31, 2008).

The lower Courts erred by looking only at the isolated effect of the prosecutor's individual comments, and failing to consider that the prosecutor in this case created an intentional pattern of misconduct that threatened the integrity of the judicial process and denied Tijerina his right to a fair trial. Johnson, 208 Ill. 2d at 64-67. See also, Appendix F, Exhibit 1. pages 14-16.

5. Here, the prosecution intentionally made statements to inflame the passions of the jury, which in effect deprived the petitioner his right to a fair and impartial jury. The Sixth Amendment provides in pertinent part that "the accused shall enjoy the right to a 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." U.S. Const. amend. VI.

6. In other cases, the Courts have found that it is prosecutorial misconduct, where the prosecutor described the defendant as a liar; see Hodge v. Hurley, 426 F.3d 368, 377 (6th Cir. 2005); and U.S. v. Garcin-Guizar, 160 F.3d 511, 520 (9th Cir. 1998); "prosecutor's statement describing defendant as 'a liar' was improper because personal opinion regarding defendant's credibility." The Courts have also found that it is error where the prosecutor vouches for the credibility of their own witness; see U.S. v. Garcia, 522 F.3d 597, 603-05 (5th Cir. 2008); and lastly, the Courts have also found it to be error where the prosecutor makes personal

attacks on opposing counsel; see U.S. v. Carter, 236 F.3d 777, 785 (6th Cir. 2001).

7. In the instant case, not only did the prosecutor commit one act of prosecutorial misconduct by describing the defendant as a liar, but the prosecutor went on to commit two other acts of prosecutorial misconduct by (1) vouching for the credibility of their own witness, and (2) by making slanderous comments about the petitioner's defense counsel, and their trial tragedy; see also, Appendix F; exh. 2 pages 13-18.

8. Further, it could be said that the prosecution committed prosecutorial misconduct when they brought up the issue of the petitioner's alleged relationship with 14 year old victim, because before trial the prosecution had already agreed not to bring that issue up to the jury; see (R.Vol. V84, 92-93, 130-34).

9. The fact that the prosecution agreed before trial, not to bring up evidence of other crimes, specifically, that being, (that the then 31 year old defendant was allegedly in a relationship with the then 14 year old victim), but during closing arguments brought it up to the jury anyway, shows that the prosecutor was intentionally trying to inflame the jury's passions.

10. Where the prosecutor intentionally made statements to inflame the jury's passions it can not be said that the jury was impartial; U.S. const. amend. VI.

11. Hodge v. Hurley, 426 F.3d 368, 377 (6th Cir. 2005), "prosecutor's statement that defendant was lying, especially when contrasted with comment that government witness was "absolutely believable", was improper"; U.S. v. Garcia, 522 F.3d 597, 603-05 (5th Cir. 2008), "plain error because prosecution improperly vouched for credibility of government witness"; U.S. v. Carter, 236 F.3d 777, 785 (6th Cir. 2001) "plain error because prosecutor misstated evidence and made personal attacks on opposing counsel in closing statements"; U.S. v. De Geratto, 876 F.2d 576, 586 (7th Cir. 1998) "plain error because government used "inflammatory" characterization of defendant as "loan shark" in closing argument". In the present case prosecutor characterized defendant as "a liar".

12. Given the circumstances in the present case, where the prosecution (1) described the defendant as a liar, (2) attacked defense counsel five times, (including accusing defense counsel of using diversionary tactics - changing its defense every day of trial - and demonizing and insulting the victim); and (3) vouching for the credibility of their own witness... Petitioner raises that all three acts of prosecutorial misconduct when cumulated together amounts to "plain error", and deprived petitioner his right to a fair trial before an impartial jury; U.S. Const. amend. VI and XIV.

THIS COURT SHOULD GRANT PETITIONER A WRIT OF CERTIORARI, WHERE THE PETITIONER RAISED IN THE STATE COURTS THE ARGUABLE BASIS OF A MERITORIOUS CONSTITUTIONAL CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS PETITIONER'S POST-ARREST STATEMENT ON THE CORRECT GROUNDS, THIS COURT SHOULD REVERSE THE JUDGMENT OF THE STATE COURT AND THE U.S. DISTRICT COURT 7TH CIRCUIT, AND REMAND THE CAUSE BACK TO THE TRIAL COURT FOR SECOND STAGE POST-CONVICTION PROCEEDINGS.

13. Petitioner filed a prose post-conviction petition alleging, *inter alia*, that after he was arrested in Texas, but before police began questioning him, he repeatedly asked for a lawyer. Despite Mr. Tijerina's, (petitioner) request, police officers nevertheless continued to question him until he made a statement. Because petitioner was subjected to custodial interrogation and provided a statement before ever speaking to an attorney, inclusion of this allegation in a motion to suppress would have resulted in the suppression of his statement. *Edwards v. Arizona*, 451 U.S. 477 (1981).

14. Although trial counsel did move to suppress petitioner's statement on the grounds that it was physically coerced, she failed to argue that it was taken in violation of petitioner's right to counsel. Moreover, at the hearing on the motion to suppress, there was no testimony about whether petitioner had ever asked for counsel after his arrest and before questioning. Thus, petitioner's allegations are not rebutted by the record. The court below found that the record did

contradict the allegations raised in petitioner's petition because trial counsel originally included the issue raised in the petition in the motion to suppress, but withdrew it on the record. The court also found that testimony from the state during the motion hearing and at trial indicated that petitioner was informed of his Miranda rights before being questioned. *People v. Tijerina*, No. 1-09-1013, Rule 23 order at 13, January 26, 2011.

15. On the contrary, it is unclear why defense counsel withdrew the allegation. On the other hand it is clear that in his affidavit, that he requested counsel when he was arrested in Texas and was told he could have an attorney when he returned to Chicago and told him that the Texas authorities would not let him talk to counsel. (C.85) Moreover, whether petitioner was Mirandized is not the issue. Rather, the issue is whether he invoked his right to counsel. At the suppression motion hearing, the focus was whether there was physical coercion, not whether petitioner invoked his right to counsel. Had trial counsel litigated this issue, other evidence could have come to light. At first-stage proceedings, petitioner stated the gist of a constitutional claim.

16. The Illinois Post-Conviction Hearing Act ("the Act") provides that a pro se post-conviction petition may be summarily dismissed at the first stage of proceedings only if, taking the allegations as true, the petition is frivolous or is patently

without merit. *People v. Edwards*, 197 Ill.2d 239, 244 (2001); 725 ILCS 5/122-2.1(a)(2) (West.2008). A petition can be properly dismissed as frivolous or patently without merit only if it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill.2d 1, 11-12 (2009). "The question before the court was whether defendant's petition had no arguable basis either in law or in fact, i.e., whether it was based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16.

17. The petitioner's petition included a non-frivolous allegation that he was denied his Fifth Amendment right to the effective assistance of counsel. Petitioner alleged that trial counsel's motion to suppress statements failed to allege that the police who arrested him continued to question him despite the fact that he repeatedly requested an attorney and, had counsel included this allegation in the motion to suppress statements, his confession would have been suppressed.

18. Petitioner is guaranteed the right to effective assistance of trial counsel under the United States and Illinois Constitutions. U.S. Const. amends VI, XIV; Ill. Const. 1970, art. I, sec. 8; *Strickland v. Washington*, 466 U.S. 667. Under *Strickland*, the defendant must show that (1) trial counsel's representation fell below an objective standard of reasonableness; and (2) that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

19. Thus, the question before this honorable court is whether petitioner's allegation that counsel provided inadequate representation that prejudiced his case, and should the petitioner's case be reversed back to the trial court for further proceedings.

CONCLUSION

Wherefore, Raul Tijerina respectfully requests that a writ of certiorari be issued to the Appellate Court of Illinois, First Judicial District.

Respectfully submitted,

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