

ORIGINAL

No. 18-6553

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JUN 29 2018  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES

Michael Fournier Dixon PETITIONER  
(Your Name)

vs.

State of TEXAS, TARRANT County RESPONDENT(S)  
FORT WORTH TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Michael Fournier Dixon  
(Your Name)

Hightower Unit - 902 FM 686  
(Address)

Dayton, Texas. 77535  
(City, State, Zip Code)

N/A  
(Phone Number)

## QUESTION(S) PRESENTED

- (1) Was Applicant's guilty plea(s) involuntary due to counsel's Ineffective deficient Assistance in Totality during All stages of the criminal process?
- (2) Did Counsel's failure to object or challenge the state's indictment or plea agreements at "Any" stage during the criminal process cause the defendant harm; considering that they all contained a factually insufficient deadly weapon finding on their face?
- (3) Are challenges to the validity of a critical element of an indictment "only" to be raised by defendant's counsel" if the defendant were to proceed to trial?
- (4) Did counsel's failure to advise applicant of the basic elements of proof the state was required to prove to sustain the inclusion of an affirmative deadly weapon finding cause the defendant prejudice and harm resulting in defendant's guilty plea's being involuntarily induced?
- (5) Did counsel's failure to develop and present any form of defense on the defendant's behalf render her assistance ineffective at all stages of the criminal process, especially during the plea proceedings?
- (6) Did trial counsel's inadequate performance during the plea proceedings cause applicant harm or prejudice?
- (7) Was counsel's representation deficient at Plea Proceedings?
- (8) Would the outcome of the Plea Proceedings been different but for counsel's unprofessional error's?
- (9) Was defendant's guilty plea(s) knowingly and voluntarily entered?
- (10) Was defendant denied Due Process and Effective Assistance of counsel when Counsel misled defendant by stating that defendant could not challenge the validity of the State's deadly weapon finding unless defendant went to trial?

## LIST OF PARTIES

~~WFD~~  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:

Sharon Wilson - Criminal District Attorney Tarrant County  
401 West Belknap, Fort Worth, Texas. 76196

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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 A-D 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 IN/A court appears at Appendix B/D 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 \_\_\_\_\_.

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 04/4/2018.  
A copy of that decision appears at Appendix A-D.

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

Appellant was charged with Evading Arrest Detention in a motor vehicle, a felony offense in violation of Texas Penal Code § 38.04 (B)(2)(A) PC. The State in their plea offer erroneously included an allegation that Appellant used his vehicle as a deadly weapon pursuant to Texas Penal Code § 12.35 (C). The Texas Code of Criminal Procedure authorizes a deadly weapon finding upon sufficient evidence that a defendant "used or exhibited" a deadly weapon during the commission of or flight from a felony offense, Texas Code of Criminal Procedure Article 42.12 § 3g (a)(2).

Texas Penal Code § 1.07 (a)(17)(b) explains in detail that in order to sustain a use of a vehicle affirmative deadly weapon finding in such cases; the record-evidence must demonstrate (1) the object or instrument meets the statutory definition of a deadly weapon; (2) the "deadly weapon" was used or exhibited during the commission of a felony offense or during immediate flight therefrom; and (3) that others were placed in "Actual Danger", and not merely a hypothetical potential for danger if others had been present.

The Sixth Amendment of the United States Constitution entitles a defendant in a criminal case where defendant may face prison time to be effectively assisted by counsel at "All stages of the entire criminal process."

The Fourteenth Amendment of the United States Constitution guarantees that the accused shall be afforded "DUE PROCESS" throughout the criminal process.

## STATEMENT OF THE CASE

On May 17, 2015 the Applicant was arrested and charged with (5) five felony cases to wit: Two (2) cases of Possession with intent to Deliver, Penalty Group 1, 4-200 grams, a Possession of MARIHUANA, 2-4 ounces, Tampering / Fabricating Evidence and Evading Arrest Detention. Several of the cases contained a Repeat Offender Notice which raised the penalty range on them to no less than fifteen years (15) and no more than ninety-nine (99) years or life, and up to a ten thousand (\$10,000.00) fine. Furthermore, the indictments contained a Deadly Weapon Finding Notice to wit: A motor vehicle that in the manner of its use or intended use was capable of causing death or serious bodily injury.

On September 1, 2015, the applicant retained Glynis Adams McGinty to represent him as his attorney. At every court appearance or meeting between the applicant and his counsel, the applicant asked counsel to challenge the States Deadly Weapon finding. Applicant from day 1 (September 1, 2015) made it clear to counsel that under no circumstances was he taking any of his cases to trial. Counsel on each occasion misled the applicant by stating that the only way that the deadly weapon finding could be challenged was if the applicant would proceed to jury trial.

On April 6, 2016, applicant plead guilty to the following criminal cases: Case No. 1414520-D, 1414521-D, 1414523-D, and 1414789-D; which did "all" contain the Deadly Weapon inclusion. Then on April 3, 2017, Applicant filed an application for Writ of Habeas Corpus in the Criminal District Court No. 3 of Tarrant County, Texas. The State filed a response and order for trial counsel to create an affidavit addressing applicant's ineffective assistance of counsel and involuntary plea(s) claims. The Court designated applicant's writ application for future resolution. Applicant's attorney (Glynis Adams McGinty) filed her sworn affidavit on August 11, 2017. The State filed its Proposed Memorandum, Findings of Facts and Conclusions of Law on September 5, 2017. Applicant's writ was then filed in the Court of Criminal Appeals of Texas on September 23, 2017. On April 4, 2018 the Court of Appeals denied without written order the application for Writ of Habeas Corpus on the findings of the trial court without a hearing.

## REASONS FOR GRANTING THE PETITION

Applicant provided credible compelling evidence within his Application for Writ of Habeas Corpus of Trial Counsel's ineffectiveness at all critical stages of the criminal process; and more specifically, that counsel's deficient performance did harm applicant's eligibility for parole, future employment as a CDL TRUCK DRIVER, and a conviction that applicant is serving 15 years for that he has proven he is not guilty of. This harm resulted in Applicant's involuntary guilty plea(s) based on the erroneous advisement from his trial counsel which caused Applicant to receive a much harsher prison sentence on all (4) four felony charges. Counsel was ordered to file an affidavit in response to Applicant's Ineffective Assistance of Counsel claims.

Within counsel's affidavit she states, "... I repeatedly explained to the defendant that if we proceeded to trial the issue of whether the vehicle was a deadly weapon or not would be presented at that time," and we could present our evidence against the state's request." With that statement counsel tells defendant that the only way to challenge the validity of the deadly weapon finding is to proceed to trial.

Trial counsel's admonishments within her sworn affidavit clearly indicate how counsel misled the defendant and ultimately induced by threat, force, and fraud defendant's guilty plea(s), resulting in them being involuntarily and unknowingly given under duress. Furthermore, Counsel's affidavit is the lynch-pin of appellant's claims for relief; in that counsel in her own words admonishes that the defendant under no circumstances would ever proceed to jury trial.

Trial counsel's affidavit states, "... Each time I met with the Defendant in my office his main concern was getting the State to come off of the deadly weapon finding in his indictments." Counsel's very next statement is her own sworn admonishment that she did in fact <sup>mislead</sup> the Applicant about the issue of the deadly weapon throughout her representation; again this is evident by her own sworn statement

in which she states, "... Each time I assured him that I was continuing to discuss this with the Assistant District Attorney, and she was not budging." At the end of the exact same paragraph counsel states, "... The State was not willing to negotiate a plea without the deadly weapon finding, which I explained to the Defendant throughout my representation." Counsel again contradicts herself in the following paragraph of her affidavit when she goes on to state, "... I repeatedly explained to the defendant that if we proceeded to trial the issue of whether the vehicle was a deadly weapon or not would be presented at that time, and we could present our evidence against the State's request." Then in the following paragraph of counsel's sworn affidavit she goes on to state, "... I advised the Defendant that we could proceed to trial if he persisted in his wanting to fight the Deadly Weapon finding and he choose to accept the State's offer rather than proceed to a jury trial."

In light of trial counsel's own admonishments, the Appellant must bring the Courts attention to the fact that the defendant's attorney knew for a fact, that the defendant "under no circumstances" was going to trial, therefore when counsel choose to persist in stating that the only way counsel would challenge the validity of the deadly weapon finding was if the defendant proceeded to trial; That in itself was a blatant denial of the defendant's right to "DUE PROCESS".

Therefore, the defendant's choice to accept the Plea Agreements were unknowingly and involuntarily induced by the "Threat of proceeding to trial with an attorney whom had already displayed their conflict of interest, mainly through counsel's inadequate assistance and deficient performance during the pre-trial stages and ultimately during the Plea Proceedings; in that counsel could not object, challenge, nor subject the States erroneous inclusion of the deadly weapon finding to "Any" form of adversarial testing!

By proceeding to trial defendant would have essentially <sup>have</sup> subjected himself to the possible "WORSE-CASE-SCENARIO" and recieved a (99) ninety-

YEAR SENTENCE for each of the (4) four charges that also could have been stacked instead of being ran concurrently, they easily could've been consecutively!

Therefore, the threat of this worse possible outcome in conjunction with counsels mis-leading and fraudulent behavior caused defendant to feel he was forced to accept the Plea Agreements "As-Is" with the inclusion of the factually and legally insufficient deadly weapon finding! In this regard the record clearly shows that the defendant has suffered harm and prejudice because of this inclusion which ultimately affects the defendant's parole eligibility and actual time he must serve before release.

With the deadly weapon inclusion under Texas Code of Criminal Procedure Article 42.12 § 3 g. (a)(2) the defendant is required to serve  $\frac{1}{2}$  calendar time (7 $\frac{1}{2}$  years) / (50%) before he becomes eligible for release on parole which is a difference of 25% ( $\frac{1}{4}$  calendar time) had counsel not allowed the inclusion and/or advised applicant to Plea True to Plea Agreements that erroneously contained the deadly weapon findings. Also, since the defendant is a Commercial Truck Driver by trade his potential livelihood upon his release from prison has been negatively affected resulting in him becoming virtually unemployable due to the use of a motor vehicle as a deadly weapon inclusion on his record.

Had counsel addressed the validity of the deadly weapon findings and the inclusion there exist a likely-hood that the outcome of those Plea Proceedings would have had a different outcome, in that there would not have been any deadly weapon inclusion on "Any" of the (4) four plea agreements. In this regard, the lower court is in error because Article 42.12 (3g) of the Texas Code of Criminal Procedure and Texas Penal Code § 1.07 (a)(17)(B) explicitly states... "In order to sustain a use of a vehicle affirmative deadly weapon finding in such cases; the record - evidence must demonstrate (1) The object or instrument meets the statutory definitions of a

deadly weapon; (2) the "deadly weapon" was used or exhibited during the commission of a felony offense or during immediate flight therefrom; and (3) that others were placed in "Actual Danger"; and not merely a hypothetical potential for danger if others had been present.

This is an issue of national importance that should be decided and settled by the Supreme Court because <sup>without</sup> the (3) **THREE PRONG BURDEN OF PROOF** requirement; "Anytime, Anyone," EVADED ARREST / DETENTION while operating a motor vehicle they would essentially be guilty of using that vehicle as a deadly weapon. Also, the applicants decision by the Court of Criminal Appeals in this case is in direct conflict with the Appellate Courts prior decision and findings in "Drichas v. The State of Texas, 219 S.W. 3d 471, 476 (Tex. App. TEXARKANA 2007); "The evidence that was presented by the State was factually and legally insufficient on it's face because the state has failed to show "Actual Danger"; which is exactly what has transpired in this applicants case.

The Applicant realizes that in order to show counsel was ineffective the Court cannot just look at one single instance and that it is on the applicant to show by a preponderance of evidence that counsel was ineffective and that also the applicant was harmed or prejudiced by counsels deficient performance.

Therefore, applicant must address the multitude of counsels inadequate representation at the Plea Proceedings. Not only did counsel mislead the defendant (throughout every stage of the criminal process) to believe that the validity of the deadly weapon could not be raised or challenged unless the defendant proceeded to trial; but did in fact continue to mislead the applicant at the Plea Proceedings as well. Also, since the offense Possession of MARIHUANA 2-4 oz Cause No. 1414522 was dismissed at the Plea Proceedings on April 6, 2016; and the official Police Report

of 4081 / ALLRED, C. # 15-46140 dated 05/19/2015 @ 12:23 (Page 8 of 21) expressly states ... "We were later advised by Officer Marti and Officer Scholl, who inventoried the impounded vehicle, the powder substances had not been located with the green leafy substance that had been thrown from the vehicle during the pursuit. It was clarified to us "that the only item thrown from the vehicle was the green leafy substance." The white and brown powder substances were located in the vehicle in which Michael was in complete care, custody and control of." The signed affidavit at the jail notes all items had been thrown from the vehicle, and is incorrect." see (Affidavit of C. Allred #4081 dated 05-17-2015 Exhibit A States Response).

This is the arresting officers original police report stating that the very affidavit that he had sworn to on the 18th day of May 2015 was "Incorrect." At the plea proceedings on April 6, 2016 counsel again ineffectively assisted the applicant, in that she advised the defendant erroneously to plea guilty to Cause No. 1414523-D Tampering / Fabricating Physical Evidence with Intent to Impair EVEN though there exist "No Evidence" to support that defendant was guilty.

The very moment that the MARIHUANA Possession charge Cause No. 1414522 was dismissed counsel neglected to challenge or object, nor subject the States Plea Agreement to adversarial testing in any form. Counsel failed to request a Factual Sufficiency Review on the Tampering Charge or the Deadly Weapon inclusion on the Plea Agreement. Because of counsels ERRONEOUS advice the applicant pled guilty and and recieved 15 years for a third degree felony that the record shows he is not guilty of, and because of the deadly WEAPON inclusion the charge is considered a 3g offense, thus making the applicant ineligible for parole until he serves 50% (7 1/2 years) calendar time for a conviction that he should not have, but because of counsels ERROR'S he has.

Also, the applicant must attest that the only way a competent attorney could miss something like this, which was preserved within the discovery file package is if counsel failed to review those files. Counsel's deficient performance cannot be written off as harmless error, to do so would be a mis-carrriage of justice. It is clear from the evidence

presented within applicant's Writ of Habeas Corpus, that counsel failed to investigate or subject the States cases to "Any" forms of adversarial testing and specifically at the defendant's Plea Proceedings. Trial counsel's advice at those proceedings was ERRONEOUS also because not only did counsel advise her client to plea true to the affirmative deadly weapon findings that were factually insufficient and did not meet the requirements of the Statute; but also because "NONE" of the other (3) Three Plea Agreements should have contained the deadly weapon inclusion (if provable) but Cause No. 1414789-D Evading Arrest / Detention with vehicle if it would've been factually and legally sufficient in meeting the (3) three prong burden of proof requirement Texas Penal Code § 1.07 (a) (17) (B).

Based on the requirements there is "NO EVIDENCE" that applicant did use his vehicle as a deadly weapon and that because counsel repeatedly refused to address the validity of its inclusion when there existed a REASONABLE likely-hood that such a challenge would have been successful and led to a different outcome. "That outcome would have been no inclusion of the States alleged deadly weapon finding on any of the indictments or plea agreements; and there would be no sentence of 15 years, nor conviction on the Tampering / Fabricating Physical Evidence with Intent to Impair (Cause No. 1414523-D).

In light of the preponderance of evidence applicant has presented to the Court in support of the facts that he has been denied the fundamental rights of the 6th and 14th Amendments of the United States Constitution, which guarantee the accused Due Process of Law and Adequate effective Assistance from counsel throughout all stages of the criminal process. Based on trial counsel's ineffectiveness during the plea proceedings Applicant believes that his guilty plea(s) were involuntarily induced by force, threat, and fraudulent misleading by counsel and counsel's ERRONEOUS advice during applicant's Plea Proceedings.

Therefore, Applicant prays that this Court will review the evidence and grant applicant's Writ of Certiorari and not allow these Constitutional violations to stand. The State's response to the applicant's Writ of Habeas Corpus completely avoided, ignored, and failed to address this preponderance of evidence that validates applicant's position and contentions about his claims of Ineffective Assistance by trial counsel. Applicant has addressed all of these cognizable claims, and proven beyond a doubt that the applicant has received deficient representation in the form of Ineffective Assistance by his trial counsel in totality during all critical stages of the Criminal Process.

The Court of Criminal Appeals in this case has entered a decision in conflict with its prior decision in "Drichas v. The State of Texas, 219 S.W. 3d 471, 476 (Tex. App. TEXARKANA 2007, ref) which is identical to this Applicant's claims in regard to the State's deadly weapon finding.

## CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Michael J. Dyer Sr.

DATE: October 26, 2018