IN THE UNITED STATES SUPREME COURT

IN RE: BURT LEON SETTS

CASE. NO.

PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. (S) 2241 BY A PERSON IN CUSTODY PURSUANT TO A STATE COURT JUDGMENT.

THE PETITIONER, BURT LEON SETTS, IN PRO SE PURSUANT TO 28 U.S.C. (S) 2241, POWER TO GRANT WRIT (A) WRIT OF HABEAS CORPUS MAY BE GRANT BY THE SUPREME COURT ANY JUSTICE THEREOF....

TO HONORABLE, MR. JUSTICE, ANTHONY KENNEDY.

DIVISION: PENSACOLA

PLACE OF CONFINEMENT: SANTA ROSA C.I. 5850 E. Milton Rd. Milton, Fl. 32583

Burt Leon Setts v. Petrovsky

Attorney General, Charlie Crist

1. Location of Adjudication: Circuit Court of The Second Judical Circuit, Gadsden County Florida

2. Date of Judgment: 1/18/1983.

3. Length of sentence: 75. years

4. Offense: Sexual battery, second degree murder.

5. Plea: Guilty

6. No Appeal

7. No Rehearing

8. Several postconvictions

9. A habeas corpus, in the Second Judicial Circuit For Wakulla County

# Questions Presented

1. Whether The "Antiterrorism And Effective Death Penalty Act (AEDPA) Restriction's Were Impermissible As Applied.

2. Whether The Essential Element Constituting Sexual Battery As Defined By Florida Statutes (s) 794.011(3) And Second Degree Murder, (s) 782.04(2) Were Met, In violation to the United States Constitution 14th Amendment Due Process Clause.

# Statement OF The Case

1. On 4/24/02, petitioner Filed a writ For habeas corpus in the circuit court of Wakulla County. Append-(e)(A-1)

Alleging that, sexual battery and second degree murder pursuant to statute has requirements, must include the criteria enouned pursuant to statute. These requirewere not met. In violation to the United States Constitution, Fourteenth Amendment Due Process Clause.

Under, Schmitt v. State, (Fla. App. 4 Dist 1990) Complete Failure of accusatory instrument to charge a crime is a defect that can be raised at any time, before trial, after trial, on appeal or by habeas corpus. 563 So. 2d 1095, jurisdiction accepted 569 So. 2d 444, approed 569 So. 2d 404, cert denied 112 S.Ct. 1572, 503 U.S. 964, 118 L.Ed 2d 216.

2. On appeal the petitioner in his brief raised same question including, State v. Gray, 435 So. 2d 816 (Fla. 1983) the supreme concluded that if a charging instrument completely Fail to charge a crime, a conviction violates due process... Since a conviction can not rest upon such an indictment or information

information, the complete Failure of an accusatory instrument to charge a crime is a defect that can be raised at any time, before trial, After trial, on appeal or by habeas corpus. Id. at 818. However, on 5/3/03 the Appeals court issued a Per Curiam Affirmed opinion. Appendix-E (A5)

## Federal Habeas Corpus Proceedings

3. On 6/26/03, petitioner erroneously Filed a petition for writ of habeas corpus in the district court requesting permission to Filed a second habeas corpus petition. Based on the prior state court arguement as actual innocence. 2254-2241, petition.

On 9/9/03, the district court dismissed the petition as a secord or sucessive petition, as authorization has not been granted by the court of Appeals. Append-B

4. On, 9/30/03, petitioner Filed an Application For Leave to File a second or seccessive habeas corpus petition.

Alleging that upon an examination of the petitioner's confession, none of the essential elements which constitute sexual battery or second degree murder were found, in violation of the United States Constitution, Fourteenth Amendment Due Process Clause. Appendix-E

Under, In re Winship, 90 S.Ct. 1068 (1970)
~~Rule Winship 9~~
Rule requiring establishment of guilt of criminal charge by proof beyond reasonable doubt is accepted in common-law jurisdictions as measure of persuasion by which prosecution must convince trier of all essential elements of guilt.

In, Jones v. Delo, 56 F.3d 878, 883 (8th Cir 1995) the court held: Although prototypical example of "actual innocence," for purpose of by passing procedural defaults as gateway to considering merits of habeas petitioner's claims is "case where state has convicted wrong person of crime one is also "actually innocent if state has right person but he is not guilty of crime with which he is charged

HOWEVER, ON 10-21-03 THE APPEALS COURT DENIED THE MOTION. THAT THE MOTION DID NOT PRESENT A NEW RULE OF CONSTITUTINAL LAW OR NEWLY DISCOVERED EVIDENCE AS REQUIRED BY AEDPA RESTRICTIONS. APPENDIX - A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 21 2003
THOMAS K. KAHN
CLERK

NO. 03-15013-H

IN RE: BURT LEON SETTS,

Petitioner.

Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. § 2244(b)

Before **ANDERSON, CARNES, and WILSON, Circuit Judges.**

BY THE PANEL:

Pursuant to 28 U.S.C. § 2244(b)(3)(A), as amended by § 106 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Burt Leon Setts has filed an application seeking an order authorizing the district court to consider a second or successive petition for a writ of habeas corpus. Such authorization may be granted only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). "The court of appeals may authorize the filing of a second or successive

application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C).

In his application, Setts indicates that he wishes to raise the following claim in a second or successive § 2254 petition: he is actually innocent of the crimes for which he was convicted because his guilty plea did not encompass all of the essential elements of the crimes. Setts concedes that his claim does not rely on a new rule of constitutional law or newly discovered evidence as required by the statute. Finally, Setts argues that the AEDPA's restrictions on second or successive habeas petitions should not apply to him because he filed his first § 2254 petition prior to the AEDPA's effective date. However, this Court has held that the AEDPA's restrictions on second or successive petitions apply to all such petitions filed after the AEDPA's effective date, regardless of whether a prior petition was filed before that date. See In re Medina, 109 F.3d 1556, 1561-63 (11th Cir. 1997).

Accordingly, because Setts has not made a prima facie showing of the existence of either of the grounds set forth in § 2244(b)(2), his application for leave to file a second or successive habeas petition is DENIED.