No. [redacted] 03-9861

Supreme Court U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2004

In re ANGELO SANCHEZ — PETITIONER
(Your Name)

VS.

JERRY L. STERNES — RESPONDENT(S)
(Custodian)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of habeas corpus without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

ILLINOIS SUPREME COURT

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

QUESTION(S) PRESENTED

1. Whether the decision announced by This Court in Apprendi v. New Jersey, 530 U.S. 466 (2000) should be applied retroactively to cases pending on collateral review?

2. Whether the decisions by Illinois courts to deny relief to Petitioner on the claim that his extended term sentence is unconstitutional in light of Apprendi constitutes a violation of the Supremacy Clause, the Equal Protection Clause and the Due Process Clauses of the Fifth, Sixth and Fourteenth Amendments?

3. Whether the relevant Illinois statutes used for extending Petitioner's sentence beyond the prescribed maximum range were unconstitutional in that they were procedurally deficient and contained ambiguous language in violation of the Due Process Clauses and the Void for Vagueness Doctrine?

4. Whether Petitioner's continued confinement on the extended term portion of his sentence is unconstitutional and constitutes an "exceptional circumstance" so as to warrant relief via the Great Writ—ordering his immediate release based upon the above and foregoing?

STATEMENT OF THE CASE

The instant case involves the April 26, 1978 homicide of Miss Linda Tremaine.

On April 27, 1978 at approximately 9:30 p.m., Petitioner was unwarranted arrested and held for the murder of Linda Tremaine. On April 28th, 1978, after 17 hours of investigation while in custody, Petitioner was charged by information with murder felony murder and armed robbery in connection with the death of Miss Tremaine under information No. 78 I 2580.

On April 9, 1980, following a jury trial, the petitioner was found guilty of murder, felony murder and armed robbery in the Circuit Court of Cook County, and was sentenced on May 20, 1980 by trial Judge to an extended term of 60 years of imprisonment for murder and to 30 years of imprisonment for armed robbery, both sentences to run concurrently. As justification for imposing the extended term sentence upon the petitioner, the trial Judge opined that the "offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty." These particular factors/elements used by the trial Judge for invoking the extended term provisions was not stated in the indictment; nor was it presented to the jury; and no finding of guilt thereon was ever made by the jury.

At the time of the instant offense for which Petitioner was convicted, Illinois provided that for murder, an offender could be sentenced to a term of imprisonment of not less than 20 years and not more than 40 years. Ill.Rev.Stat.ch.38, ¶ 1005-8-1(a)(1). That sentence could be extended to a term of not less than 40

years and not more than 80 years if the court found that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. Ill.Rev.Stat.ch.38,¶ 1005-8-2(a)(1); Ill.Rev.Stat.ch.38,¶ 1005-5-3.2(b)(2). Pursuant to those statutes and based on its finding by the trial Judge that the offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty, the trial Judge sentenced Petitioner to an extended term of 60 years upon his conviction for murder.

The extended-term provision of Ill.Rev.Sta.ch.38,¶ 1005-5-3.2(b)(2) violates the right of a defendant to due process and trial by jury, because it subjects him to increased punishment without notice or a jury finding upon proof beyond a reasonable doubt of the facts qualifying defendant for an extended-term sentence.

The petitioner, having been in continuous custody since April 29, 1978, has served more than 26 years in prison, which by virtue of his entitlement to day-for-day good conduct credit, constitutes service of a sentence in excess of the maximum term permissible for murder.

Had petitioner's sentence not been extended by 20 additional years using Illinois' unconstitutional extended term sentencing statute, he would have already served the non-extended maximum term sentence of 40 years for the instant offense.

On direct appeal, appellate counsel presented evidence showing that the arresting officers did not possessed probable cause to made a warrantless arrest of the petitioner on April 27, 1978.

According to arresting officer, he testified that he arrested petitioner at approximately 10:00 p.m. on April 27, 1978, and

that after the arrest they had recovered some property from Petitioner out on the street, and when they got to Area Six Center, they recovered that property, a watch and a woman's ring at about 9:45 p.m. on April 27, 1978.

Contrary to trial evidence, the record clearly shows that these two items the watch and the ring were discovered on Petitioner to be wearing it while in custody and were taken it from him for the first time on April 28, 1978 at approximately 9:00 a.m. at Area Six by Investigator Thomas Stevens, and that those two items were identified as the property of Linda Tremaine for the first time on April 28, 1978, shortly after 10:00 a.m., one day after the illegal arrest made without probable cause. These items were fruits of the illegal arrest.

Also, the appellate court's opinion places great reliance on the fact that it was discovered later on April 28, 1978 that two pieces of jewelry worn by Petitioner at Area Six Center and taken from him by investigator Stevens and identified as the property of Lida Tremaine. (See Exhibit A-3) However, the appellate court holds that the police possessed probable cause to arrest the petitioner, and affirmed the conviction and sentences.

It is the extended term (which Petitioner began serving on October 9, 1997) is the focus of the instant application for federal habeas relief.

REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT OF THE DISTRICT IN WHICH APPLICANT IS CURRENTLY HELD

The instant application is being submitted to This Court as an original action rather than in the U.S. District Court for the Northern District of Illinois because:

(1) the Court of Appeals for the Seventh Circuit has expressly stated that it will not grant such an application pursuant to its gate-keeping function (i.e., 28 U.S.C. § 2244 (b)(3)(A)) until This Court declares that its decision in Apprendi applies retroactively to cases pending on collateral review. See Talbott v. Indiana, 226 F.3d 866 at 869 (7th Cir. 2000).

(2) Petitioner presented the Apprendi-related claims to the only State Court to never have a chance to pass upon them (i.e., the Illinois Supreme Court) in a State habeas petition as an original action prior to applying to This Court for relief.

(3) Petitioner is proceeding from the premise that "[t]he doctrine of 'res judicata' is inapplicable in habeas corpus proceedings[.]" Fay v. Noia, 372 U.S. 391 at 423 (1963).

(4) by virtue of the foregoing, "adequate relief cannot be obtained in any other form, or from any other court." S. Ct. Rule 20(1).