Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

03 6339

No. _____

ORIGINAL

IN The
Supreme Court of the United States

_____

IN Re: Robert Eugene Johnson, Jr.

Motion for Leave to Proceed in Forma Pauperis

The Petitioner asks leave to file the attached petition for an extraordinary writ of habeas corpus without prepayment of costs and to proceed in forma pauperis.

Petitioner has NOT previously been granted leave to proceed in forma pauperis in any other court as related to this petition for an extraordinary writ of habeas corpus.

Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

ORIGINAL

No. 03-6339

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE: ROBERT EUGENE JOHNSON, JR.

ON A PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS TO THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

PETITION FOR AN EXTRAORDINARY WRIT OF HABEAS CORPUS

ROBERT EUGENE JOHNSON, JR., #236781
WALLENS RIDGE STATE PRISON
P.O. BOX 759
BIG STONE GAP, VIRGINIA 24219

Questions Presented

1. Was There Any Evidence At All To Indicate Guilt Of Inanimate Object Sexual Penetration?

2. Does The Allen Charge, ie: Allen v. United States, 164 U.S. 492 (1896), Serve To Violate The Equal Protection Clause Of The Fourteenth Amendment?

3. Did Constitutional Violations In The Criminal Proceedings Result In A Fundamental Miscarriage Of Justice?

3. The Writ Will Be In Aid Of The Court's Appellate Jurisdiction

This petition for an extraordinary writ of habeas corpus is in aid of this Honorable Court's appellate jurisdiction in that the Judgment of the Circuit Court for the City of Virginia Beach in Commonwealth v. Johnson, No. CR95-1813, is in violation of the Constitution of the United States and this Honorable Court is the final arbiter in any matter of a significant federal constitutional question.

Relief Sought

That Petitioner's convictions of:

1. Statutory Burglary,
2. Attempted Rape,
3. Forcible Oral Sodomy,
4. Inanimate Object Sexual Penetration,
5. Aggravated Sexual Battery,

All be vacated with allowance for new trial

3. Did Constitutional Violations In The Criminal Proceedings Result In A Fundamental Miscarriage Of Justice?

In United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976), the Court held:

"What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict". Agurs, 427 U.S. at 113, 96 S.Ct. at 2402.

In Petitioner's case the only evidence of any crime was the testimony of the alleged victim and statements the alleged victim made to others. During deliberations the Jurors requested to view the alleged victim's testimony, clearly questioning credibility. Thier request was denied; (Trial Transcript p. 187). The Jurors then reached an impasse with one-third ($\frac{1}{3}$) voting "not guilty". The Jury was given the Allen charge, sent back to deliberations, and returned with a guilty verdict. Clearly, the convictions against Petitioner Are very questionable to begin with.

A. Denied Right to Effective Assistance of Counsel under the Sixth Amendment, and Denied Right to Due Process under the Fourteenth Amendment by Prosecutor.

In Napue v. Illinois, 360 U.S. 264 (1959), this Court held:

"First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment, ... the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."
Napue, 360 U.S. at 269.

Stipulated testimony was given for the Investigating Detective, who failed to appear for trial. What Trial Counsel told the Jury on Trial Transcript p. 167, was not part of the stipulated testimony:

"You realize of course that no forensic evidence was taken ..... the police didn't even bother to do any type of scientific

Further, the Prosecutor knew Trial Counsel had presented false prejudicial evidence to the Jury and was required to immediately make the Court aware of this, yet deliberately failed to do so. The Prosecutor let this false evidence go uncorrected to deceive the Jurors and to keep the Jurors from hearing the truth about forensic evidence sent to the lab.

B. Denied Right to Effective Assistance of Counsel, and Denied Right to Due Process by the Prosecutor.

Prior to trial Petitioner made Trial Counsel aware that he needed Robert Butler subpoenaed for trial, which is proven by the witness list in Trial Counsel's own handwriting (Petitioner's Exhibit 2). Trial Counsel told Petitioner that it was not necessary to subpoena Robert Butler as he had already been subpoenaed by the Prosecutor. (Trial Counsel had already had several phone conversations with Mr. Butler and was very well aware of how crucial his testimony would be. (Please see affidavit of Robert Butler - Petitioner's Exhibit 3).

On the day of trial Petitioner was reassured by Trial Counsel that Robert Butler had to be at trial because the Prosecutor had him subpoenaed.

2. Adequate Relief Cannot Be Obtained In Any Other Form Or From Any Other Court.

A. In "State" habeas proceedings Petitioner procedurally defaulted his claims of ineffective assistance of counsel because he did not learn, until it was too late, that he was suppose to appeal the lower court decision to the Supreme Court of Virginia. (Petitioner erroneously believed he had to file a seperate habeas petition to the Supreme Court of Virginia).

B. Appellate Counsel failed to litigate on direct appeal that there was NO evidence or testimony to indicate guilt of "Inanimate Object Sexual Penetration" or, any of the numerous Due Process violations raised in this petition for an extraordinary writ of habeas corpus.

Petitioner did not learn, until it was too late, that he could raise grounds of ineffective assistance of Appellate counsel in habeas proceedings

C. In "State" habeas proceedings only grounds of ineffective assistance of counsel can be raised. Thus, Petitioner erroneously believed he could only litigate grounds of ineffective assistance of counsel in his § 2254 "Federal" habeas petition.

Because Petitioner had procedurally defaulted his claims of ineffective assistance of counsel, in "State" habeas proceedings, the United States District Court declined to rule on the merit of these claims in "Federal" habeas proceedings.

There are NO "state" or "Federal" habeas remedies available to Petitioner.

There are no other remedies in any other form or from any other court. The ONLY remedy available to correct this grossly clear fundamental miscarriage of justice is this petition for an extraordinary writ of habeas corpus as authorized by 28 U.S.C. § 1651(a).