00-5859 RIGINAL

NO. _____

_____

Supreme Court, U.S.
FILED
JUN 12 2000
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

IN RE: JOHN RICHARD GIBSON,

PETITIONER ,

VS.

RICHARD EARLY, WARDEN,

AND BILL LOCKYER, ATTORNEY GENERAL

OF THE STATE OF CALIFORNIA,

RESPONDENTS, ET AL.

ORIGINAL

PETITION FOR WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE UNITED STATES

Clerk William K. Suter

Clerk Clayton R. Higgins Jr.

John Richard Gibson

John Richard Gibson
C-07217
NKSP-P.O.Box 567
A4-213-low
Delano, Calif. 93216-0567

In Pro Se

Dated: MAY 30, 2000

A

QUESTION'S PRESENTED

A1

WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT A CONVICTION OF FIRST DEGREE MURDER -

1. INSUFFICIENT EVIDENCE TO SUPPORT A FIRST DEGREE MURDER CONVICTION -

A2

2. INSUFFICIENT EVIDENCE TO SUPPORT ANY MURDER CONVICTION.

B

WHETHER THE FOURTEENTH AMENDMENT WAS VIOLATED AT TRIAL, WHEN THE JUDGE (REFUSED) DEFENSE COUNSEL (REQUEST), FOR CAL JIC. NO. (8.40) (VOLUNTARY MANSLAUGHTER INSTRUCTION)

C

WHETHER THE TRIAL COURT COMMITTED PREJUDICIAL, ERROR WHEN IT (FAILED) TO SUA SPONTE, INSTRUCT THE JURY WITH CALJIC NO. (2.71), FOR THE USE OF ORAL Admission.

D.

WHETHER THE FAILURE BY THE PROSECUTION TO DEMONSTRATE DURING A 1538.5, MOTION TO SUPPRESS THAT A CAL JIC NO. (2.70) Admission WAS VOLUNTARY BEYOND A REASONABLE DOUBT PRECLUDES AS A MATTER OF LAW THE INTRODUCTION OF THE Admission INTO EVIDENCE AT TRIAL.

D2

THE, ORDER OF THE CALIFORNIA COURT OF APPEALS, SECOND APPELLATE DISTRICT DIVISION THREE, IS ATTACHED AND IS SET-FORTH AS APPENDIX (iii)

THE, ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, IS ATTACHED AND IS SET-FORTH AS APPENDIX (iv)

E. JURISDICTION

THE, UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT, OPINION IN THIS MATTER WAS FILED JANUARY 10, 2000, PETITION DENIED, NO. 99-71636. AN IS SET-FORTH IN APPENDIX (i)

THE, UNITED STATES SUPREME COURT, JURISDICTION IS INVOKED UNDER, TITLE 28, U.S.C. SECTION 2254 (A) AND UNITED STATES SUPREME COURT RULE 14. AND RULE 20-2 AND 20.4 (A).

NOTIFICATION REQUIREMENT

UNDER, TITLE 28, U.S.C. SECTION 2403 (B) UNITED STATES SUPREME COURT RULE 29(C). PETITIONER GIBSON, SET-FORTH AND DRAWNS, IN QUESTION THE CONSTITUTIONALITY OF CALIFORNIA STATE STATUE CALJIC. NO. (8.40) JURY INSTRUCTION THE TRIAL COURT (REFUSED); TO GIVE THIS INSTRUCTION UPON (REQUEST), BY DEFENSE COUNSEL FRED MANISTER, VIOLATING THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

G

STATEMENT OF THE CASE

Petitioner John Richard Gibson, was charged with a single count of first degree murder, for the February 17, 1978 death of Goldie Martin. (CT.) After pre-trial motion to suppress custodial statement, Supp. Rt. 16-20, witness identification and certain photographs. Trial began on November 21, 1978, and lasted eight trial days, after eight days of deliberation the jury deadlocked and a mistrial was declared on December 19, 1978. (CT. 15, 20, 22 23, 32, 40)

The second trial began February 13, 1979, took tweleve trial days, and was submitted to the jury on (March 7, 1979)(CT. 46, 47, 48, 60), after five days of deliberation the jury returned a verdict finding, petitioner guilty of first degree murder, (RT. 1208-1210) and petitioner was sentenced to 7 years to life imprisonment. (CT. 119, 120) (RT. 1212-1223).

Petitioner appealed his conviction to the California Court of Appeals, Second Appellate District, arguing that the evidence was not sufficient to support his conviction, that the trial court ERRED in refusing to instruct the jury on (voluntary, and involuntary manslaughter instruction), that the trial court ERRED in failing to instruct, sua sponte, on viewing a defendant oral admissions with caution; that petitioner post-arrest statement were involuntarily and should not have been admitted; and that acts of prosecutorial misconduct occured.

Petitioner's conviction was affirmed by the California Court

of Appeals, Second Appellate District, Division Three, recorded as L.A.S.C. No. A613586; 2d. Crim. No. 35042, Jan. 29, 1980.

Petitioner, Gibson, filed a petition for rehearing in the California Supreme Court, arguing that the prosecution had not demonstrated the voluntariness of petitioner's post-arrest statement admission; that police monitoring of post-arrest room conversation violated the right to privacy; that the trial court ERRED in failing to instruct on viewing a defendant's post-arrest statement with caution; and that the evidence was not sufficient to support his conviction.

The California Supreme Court DENIED petitioner's Petition for Rehearing. Recorded as 2d Crim. No. 35042, dated 3-27-1980.

1-7
E2

TITLE 28, U.S.C. SECTION 2242 STATEMENT OF REASON'S FOR NOT MAKING THIS PETITION FOR WRIT OF HABEAS CORPUS, TO THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA.

IN A PRIOR HABEAS CORPUS, TO THE UNITED STATES DISTRICT COURT, IN CASE NO. CV 96-7393-RAP(AN), THE DISTRICT COURT STATED THAT PETITIONER GIBSON, DID NOT HAVE AUTHORIZATION PURSUANT TO TITLE 28, U.S.C. SECTION 2244(B) 3(A), AND THAT PETITIONER MUST HAVE APPROVED AUTHORIZATION FROM, THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT. TO RE: FILE A SECOND OR SUCCESSIVE HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA. THE DISTRICT COURT THEN DISMISSED THE PETITION WITHOUT PREJUDICE.

"IN 1999" PETITIONER GIBSON, FILED NEW STATE HABEAS CORPUS, IN THE SUPERIOR COURT, AND THE CALIFORNIA COURT OF APPEALS, AND THE CALIFORNIA SUPREME COURT. ALL THREE STATE COURTS DENIED, STATE PETITION FOR WRIT OF HABEAS CORPUS. THOSE OPINION'S ARE APPENDIX ON HABEAS CORPUS.

ON DECEMBER 2ND, 1999, PETITIONER GIBSON, FILED WITH THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT.

(1). PETITIONER GIBSON, REQUEST LEAVE FOR THE AUTHORIZATION PURSUANT TO TITLE 28. U.S.C. SECTION 2244 (B) 3 (A), TO RE: FILE SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS, IN THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA.

(2). ON DECEMBER 7, 1999, PETITIONER GIBSON REQUEST TO AMEND, SUPPORTING CASE LAW INTO PENDING APPLICATION, ON REQUEST FOR LEAVE FOR AUTHORIZATION PURSUANT TO TITLE 28. U.S.C. SECTION 2244 (B) 3 (A), TO RE: FILE SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS. IN THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA.

THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT, IN CASE NO. 99-71636, DENIED PETITION, ON JANUARY 10, 2000.

"PETITIONER GIBSON, HAS PREVIOUSLY FILED, "14" PETITION FOR WRIT OF HABEAS CORPUS, IN THE UNITED STATES DISTRICT COURT," ALL OF WHICH WERE DISMISSED WITHOUT PREJUDICE.

THE DISTRICT COURT, HAS NEVER RULED, ON THE MERITS OF ANY OF THE CLAIMS AND All OF THE GROUND'S, ARE ORIGINAL FROM PETITIONER GIBSON. STATE APPEAL FROM THE CALIFORNIA COURT OF APPEALS, SECOND APPELLATE DISTRICT DIVISION THREE, IN CASE NO. (A613586) L.A.S.C. NO. (35042)

PETITIONER GIBSON, FIRST HABEAS CORPUS, TO THE UNITED STATES DISTRICT COURT, WAS DISMISSED WITHOUT PREJUDICE, THE DISTRICT COURT, STATED THE PETITIONER HAD NOT EXHAUSTED STATE SUPREME COURT REMEDIE'S, ON THE (VOLUNTARY) (MANSLAUGHTER) CHARGE.

" All 13 PETITION'S THAT PETITIONER GIBSON, SUBMITTED TO THE DISTRICT COURT, AFTER THAT WERE THE DISMISSED WITHOUT PREJUDICE.

" TO THE HONORABLE CHIEF AND ASSOCIATE'S JUSTICE'S IN THE UNITED STATES SUPREME COURT.

PETITIONER GIBSON, STATES THAT EXCEPTIONAL CIRCUMSTANCE HERE WARRANT THE EXERCISE OF THI'S COURT DISCRETIONARY POWER.

PETITIONER GIBSON, STATES THAT RELIEF CAN ONLY BE HAD IN THIS COURT.

4

"NOTE" All of Petitioner Gibson, prior District Court, Habeas Corpus were dismissed Without Prejudice- "ARGUMENT"

"A Dismissal of first Federal Habeas Petition, is a particularly serious matter, for that dismissal denied the petitioner the protection of the Great, writ entirely risking injury to a important interest in Human Liberty. McCleskey v. Zant, 499 U.S. 467, 492, 111 S.Ct. 1454-1469, 113 L.Ed 2d. 517 (1991).

In, In Re: Turner, we concluded that section 2244, Does not apply To Second or Successive or Subsequent Habeas Corpus Petition, Where the first Petition was dismissed without Prejudice for failure to exhaust State Court Remedie's In Re: Turner, 101 F.3d. 1323, 1323, (9th Cir. 1999).

"The Second Circuit arrived at the same conclusion in Camarano v. Irvin, 98 F.3d. 44 (2nd Cir. 1996) The Camarano, Court confronted the Question of "whether" a Habeas Corpus Petition Qualifies as "Second or Successive application within the meaning of section 2244, where it is filed after a prior Petition is dismissed without Prejudice for failure to exhaust State Court Remedies.

CAMARANO, 98 F.3d. AT P. 46, THE COURT CONCLUDED THAT "BECAUSE APPLICATION OF THE GATE KEEPING PROVISION OF [SECTION 2244], TO DENY A RESUBMITTED PETITION IN CASE'S SUCH AS THIS WOULD EFFECTIVELY PRECLUDE ANY FEDERAL HABEAS CORPUS REVIEW.... A DISMISSAL WITHOUT PREJUDICE CAN HAVE NO PRECLUSIVE EFFECT ON SUBSEQUENT PETITION. ID. AT. 46-47." SEE ALSO CHRISTY V. HORN 115 F.3d. 201 (3RD CIR. 1997).

TURNER AND CAMARANO, ARE FOUNDED UPON EXHAUSTION PRINCIPLE, WHERE A STATE PRISONER HAS FAILED TO EXHAUST STATE REMEDIES, THE FEDERAL HABEAS CORPUS COURT MAY NOT GRANT HIS PETITION. 28. U.S.C. SECTION 2254 (B)(1) THIS RULE OBTAINS BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS. SEE: ROSE V. LUNDY, 455 U.S. 509-522, 102 S.CT. 1198-1205, 71 L.ED. 2d. 379 (1982). A DISTRICT COURT MUST DISMISS HABEAS CORPUS PETITION CONTAINING BOTH UNEXHAUSTED AND EXHAUSTED CLAIMS." WHERE ROSE, APPLIES. A PETITIONER MUST RETURN TO STATE COURT AND LITIGATE THE UNEXHAUSTED CLAIMS BEFORE PRESENTING THOSE CLAIMS IN A NEW HABEAS CORPUS PETITION TO "PROTECT THE STATE COURT ROLE IN THE ENFORCEMENT OF FEDERAL LAW AND PREVENT.

6

DISRUPTION OF STATE JUDICIAL PROCEEDING," ROSE" 455 U.S. AT 518, 102 S.CT. AT 1203. BUT ROSE ALSO ENSURES THAT A PETITIONER, FEDERAL CLAIMS, ONCE EXHAUSTED WILL BE SUBJECT TO FEDERAL REVIEW, BY DEMANDING THAT A PETITION CONTAINING BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS BE DISMISSED IN ITS ENTIRETY.

TURNER AND CAMARANO, SUSTAINED THE VIABILITY OF THIS SCHEME. BY ENSURING THAT ONCE ALL CLAIMS HAD BEEN PROPERLY EXHAUSTED IN STATE COURT, THE PRISONER WOULD STILL BE ABLE TO RAISE HIS FEDERAL CLAIMS IN A FEDERAL FORUM. TO ACCOMPLISH THIS RESULT, BOTH COURT'S HELD THAT THE NEW STATUTES REFERENCE TO "SECOND OR SUCCESSIVE PETITION DOE'S NOT ENCOMPASS PETITIONS THAT ARE FILED AFTER ORIGINAL APPLICATION WERE DISMISSED IN THEIR ENTIRETY FOR FAILURE TO EXHAUST STATE REMEDIE'S.

G2

STATEMENT OF EXHAUSTION OF STATE AND FEDERAL COURT REMEDIES

PETITIONER GIBSON, HAS EXHAUSTED STATE AND FEDERAL COURT REMEDIE'S, BY MEANS OF PETITION FOR WRIT OF HABEAS CORPUS.

1. UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT APPLICATION TO RE: FILE SECOND OR SUCESSIVE PETITION FOR WRIT OF HABEAS CORPUS. DENIED, JANUARY 10, 2000 CASE NO. 99-71636.

2. CALIFORNIA SUPREME COURT, PETITION FOR WRIT OF HABEAS CORPUS. DENID, DATE. NOVEMBER 23, 1999. NO. S081314.

3. CALIFORNIA COURT OF APPEALS, SECOND APPELLATE DISTRICT DIVISION THREE. PETITION FOR WRIT OF HABEAS CORPUS. DENIED, DATE JULY 28, 1999. NO. (B133540) NO. (A613586)

4. CALIFORNIA SUPERIOR COURT, COUNTY OF LOS ANGELES, DEPT. 100. PETITION FOR WRIT OF HABEAS CORPUS. DENIED, DATE JULY 6, 1999. NO. (A613586)

G34

EXCEPTIONAL CIRCUMSTANCES THAT WARRANT ISSUANCE OF THE PETITION FOR WRIT OF HABEAS CORPUS.

I. PETITIONER SUBMITS THAT THE HONORABLE UNITED STATES SUPREME COURT, HAS ORIGINAL JURISDICTION TO ENTERTAIN THIS APPLICATION FOR PETITION FOR WRIT OF HABEAS CORPUS. FELKER V. TURPIN, 135 L.ED. 2d. 827 (1996)

II. PETITIONER JOHN RICHARD GIBSON, IS CURRENTLY DEPRIVED OF HIS LIBERTY IN VIOLATION OF THE CONSTITUTION, OR LAW'S OR TREATIE'S OF THE UNITED STATES, UNDER, TITLE 28, U.S.C. SECTION 2241(C)(3) AT NORTH KERN STATE PRISON
P.O. BOX 5000 - A4 - 213 - LOW
C07217
DELANO, CALIFORNIA, 93216

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 10 2000

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOHN RICHARD GIBSON,

Petitioner,

v.

RICHARD EARLY,

Respondent.

No. 99-71636

Central California

ORDER

Before: BEEZER, O'SCANNLAIN and THOMAS, Circuit Judges

The petition for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition in the district court is denied. Petitioner has not made a prima facie showing under 28 U.S.C. § 2244(b)(2) that:

> (A) 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 constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

No petition for rehearing shall be filed or entertained in this case. *See* 28 U.S.C. § 2244(b)(3)(E).

PETITION DENIED.

S:\MOATT\Panelord\1.6.00\ss3\99-71636.wpd

APPENDIX

1

S081314

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE JOHN RICHARD GIBSON

ON

HABEAS CORPUS

FILED
NOV 2 3 1999
Robert Wandruff Clerk
DEPUTY

Petition for writ of habeas corpus is DENIED. (*In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Clark* (1993) 5 Cal.4th 750; *In re Lindley* (1947) 29 Cal.2d 709, 723; *In re Waltreus* (1965) 62 Cal.2d 218, 225; *In re Miller* (1941) 17 Cal.2d 734, 735.)

George

Chief Justice

APPENDIX
(ii)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL - SECOND DIST.
FILED
JUL 28 1999
JOSEPH A. LANE Clerk
V. GRAY
Deputy Clerk

In re JOHN RICHARD GIBSON, on Habeas Corpus.	B133540 (Super. Ct. No. A613586) ORDER

BY THE COURT:

The petition for writ of habeas corpus, filed July 16, 1999, has been read and considered with the appeal (People v. Gibson (Jan. 29, 1980) 2d Crim. No. 35042 [nonpub. opn.]) and prior writ petitions too numerous to list here. We again decline reconsideration of issues previously decided adversely to petitioner. (*In re Clark* (1993) 5 Cal.4th 750, 765-766; *Hagan* v. *Superior Court* (1962) 57 Cal.2d 767, 769-771; *In re Waltreus* (1965) 62 Cal.2d 218, 225.) The petition is denied.

APPENDIX
(iii)

ENTERED
CLERK, U.S. DISTRICT COURT
JUN 11 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
JUN 10 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JOHN RICHARD GIBSON,

Petitioner,

v.

GEORGE GALAZA, Warden, et al.,

Respondent.

Case No. CV 96-7393-RAP(AN)

JUDGMENT

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.
DATED 6/11/97

IT IS HEREBY ADJUDGED that this action is dismissed without prejudice for the reasons set forth in the related Memorandum and Order Dismissing Successive Petition for Writ of Habeas Corpus by a Person in State Custody for failure to obtain authorization from the Ninth Circuit Court of Appeals to file a successive petition in the district court.

DATED: June 9, 1997

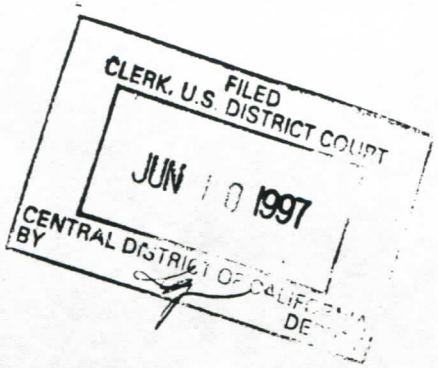
I hereby attest and certify on 6/11/97 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

By _____ Deputy

Richard A. Paez

RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

JOHN RICHARD GIBSON, Petitioner, v. GEORGE GALAZA, Warden, et al., Respondents.	Case No. CV 96-7393-RAP(AN) MEMORANDUM AND ORDER DISMISSING SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

I. BACKGROUND

On October 21, 1996, Petitioner, a state prisoner proceeding pro se, filed this petition for writ of habeas corpus. The petition raises four grounds for relief challenging Petitioner's March 12, 1979 first degree murder conviction in Los Angeles County Superior Court case number A613586. [Pet. at 3.] Petitioner is presently serving a seven years to life sentence. [Pet. at 3, 6-7.] The present petition represents Petitioner's fourteenth attempt to obtain federal habeas relief from this conviction.[1]

[1] The court takes judicial notice of its files and records pursuant to Fed.R.Evid. 201 and notes the other case numbers wherein Petitioner has sought to attack the same conviction in this Court: (1) CV 80-1830-WMB(JR); (2) CV 80-5614-TJH(JR); (3) CV 84-7198-WJR(JR); (4) CV 87-8361-DWW(JR); (5) CV 88-2467-RG(JR); (6)

(continued...)