

In the United States District Court
For the Northern District of Alabama

FILED

2013 JUL 10 A 11:28

FORM FOR USE IN APPLICATION FOR
HABEAS CORPUS UNDER 28 U.S.C. § 2254

U.S. DISTRICT COURT
N.D. OF ALABAMA

CIVIL ACTION NUMBER:

CV-13-P-1279-M
JEO

(To be supplied by the Clerk of the District Court)

SUMNER ROBERT BREWSTER

Full Name of Plaintiff-Petitioner

HOLMAN PRISON

Place of Confinement

VS.

GARY HETZEL

(Name of Warden, Superintendent, Jailor, or authorized person
having custody of Petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents

(if petitioner is attacking a judgement which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN
STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

- (1) This petition must be legibly handwritten or typewritten and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.
- (2) Do not use this form unless you were convicted in one of the following counties:
BIBB, BLOUNT, CALHOUN, CHEROKEE, CLAY, CLEBURN, COLBERT, CULLMAN,
DeKALB, ETOWAH, FAYETTE, FRANKLIN, GREENE, JACKSON, JEFFERSON, LAMAR,
LAUDERDALE, LAWRENCE, LIMESTONE, MADISON, MARION, MARSHALL, MOR-
GAN, PICKENS, SHELBY, ST. CLAIR, SUMTER, TALLADEGA, TUSCALOOSA, WALKER,
WINSTON.

- (3) Upon receipt of a fee of \$5 your petition will be filed if it is in proper order.
- (4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor.
- (5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.
- (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.
- (7) When the petition is fully completed, *the original and two copies* must be mailed to the Clerk of the United States District Court for the Northern District of Alabama, 104 Federal Courthouse, 1800 Fifth Avenue, North, Birmingham, Alabama 35203.
- (8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

- 1. Name and location of court which entered the judgment of conviction under attack _____
ETOWAH COUNTY CIRCUIT COURT
- 2. Date of judgment of conviction _____
7-22-2008
- 3. Length of sentence _____
LIFE WITHOUT PAROLE
- 4. Nature of offense involved (all counts) _____
ROBBERY 1ST
TWO COUNTS
- 5. What was your plea? (Check one)
 - (a) Not guilty ()
 - (b) Guilty ()
 - (c) Nolo contendere ()
 If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

- 6. Kind of trial: (Check one)
 - (a) Jury ()
 - (b) Judge only ()
- 7. Did you testify at the trial? Yes () No ()
- 8. Did you appeal from the judgment of conviction? Yes () No ()
- 9. If you did appeal, answer the following:
 - (a) Name of court _____
ETOWAH COUNTY CIRCUIT COURT
 - (b) Result _____
DENIED
 - (c) Date of result _____
JUNE 10, 2009

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (✓) No ()

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court ETOWAH COUNTY CIRCUIT COURT
(2) Nature of proceeding RULE 32

(3) Grounds raised DEPRIVED THE RIGHT TO OBTAIN WITNESS ON BEHALF OF DEFENSE, DENIED THE RIGHT TO TESTIFY IN HIS OWN DEFENSE, FAILING TO FILE MOTION TO REScind OR A JUDGMENT OF ACQUITTAL ON THE CHARGE'S AGAINST LACORRA WOODS, FAILING TO REQUEST JURY INSTRUCTED ON JOINDER OF FACTS AND RIGHT WHETHER OR NOT TO TESTIFY OR LESSER INCLUDED OFFENSE CHARGE, FAIL TO MAKE A MOTION FOR MISFEASANCE ON DEADLINE JURY TO CONTINUING DELIBERATE

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (✓)

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (✓)

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No (✓)

(5) Result _____

(6) Date of result _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes () No ()

(2) Second petition, etc. Yes () No ()

(3) Third petition, etc. Yes () No ()

- (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

Grounds And Supporting Facts Presented For Use In
Application For Habeas Corpus.

Grounds (1) Counsel was ineffective and petitioner was prejudiced thereby when counsel deprived petitioner of his right to have witnesses for his defense.

Supporting Facts; prior to trial Petitioner requested that a witness, Mr. Fluker be present at his trial to testify in his defense. (R. 10-15)

The record reflects that the trial court was prepared to issue process to have the witness brought before the court, however, counsel for the petitioner decided not to call the witness. (Id.) Petitioner contends that he was prejudiced by counsel's unprofessional error in depriving him of his right to call witnesses in his defense. (C.T. 45)

Petitioner was primarily mistaken in identifying and Fluker as the state's key witness, Terrance Dark, Uncle.

Petitioner alleges that Dark testified that Fluker was with them on the day of the robbery, and could have testified that Petitioner was not one of the three men involved in the robberies. (C.T. 36-38)

Certainly, Fluker's testimony was relevant and counsel's error deprived petitioner of his fundamental rights to a fair trial.

Ground (2) Counsel was ineffective and Petitioner was prejudiced thereby when counsel prohibited the Petitioner from testifying in his own defense.

Supporting Facts; Petitioner avers on at least two occasions he informed counsel that he wanted to take the witness stand and testify, in which counsel informed the Petitioner that the opportunity would come for that.

At the conclusion of the case, counsel rested without calling Petitioner to the stand. (R. 293)

Petitioner avers that counsel never informed him that the decision whether to testify was a personal decision that only Petitioner could waive.

Counsel just straight out deprived the Petitioner of his right to testify in his own defense, and such, prejudiced the Petitioner and deprived him of his fundamental rights to a fair trial. (R. 13-14)

Petitioner submits had he testified, he could have prevented his version of the events and told the jury that he was not involved in the robberies. the jury would have been able to weigh his credibility against the state,s evidence.

Petitioner contends, under the circumstances there,s a resonable probaility that, but for counsel unprofessional conduct, the result in this case would been different.

Ground(3) Counsel was ineffectve and petitioner was prejudiced thereby when counsel fail to move to dismiss and/or a judgment of acquittal on the charges against the victim Lacoria Woods.

Supporting Facts;Petitioner avers that during her testimony, she testified that she kept her head down and was unable to indentify any of the robbers. (R. 220-229)

Petitioner contends that counsel should have moved to dismiss the charges or requested a judgment of acquittal based on the state's failure to prove each element of the offense.

Petitioner contends that he was prejudiced, because petitioner was convicted based on the overlapping evidence of the other victims.

Ground(4) Counsel was ineffectve and petitioner was prejudice thereby when counsel fail to request jury instructions cn identification, on the failure of the petitioner to testify and lesser included offense instruction on second degree robbery.

Supporting Facts;The record reflects that counsel did not request any of the above jury charges was supported by the evidence and would explained to the jury the law to be applied to the facts.

The petitioner was entitle to such instruction in support of his defense of mistaken identication and was certainly entitled to instructions regarding his rights whether or not to testify, and futher the evidence supported a lesser included offense instructions on Robbery Second-Degree.

Counsel error and omission deprived petitioner of a fundamental fair trial.

Ground(5) Counsel was Ineffective and Petitioner was prejudiced thereby when counsel fail to move for a mistrial and/or object to the court further instructing the jury to return and to continue to deliberate, after the jury indicated that they were deadlocked.

Supporting Facts; Petitioner avers that the record in this case, reveals that the could not reach a verdict on the charges against the petitioner, the jury indicated on several occasions that they were deadlocked. the Court gave several instructions for the jury to continue to deliberate, however the jury returned and stated that they were deadlocked and could not reach a verdict. (R. 380-385) after given the final instruction.

The Trial Court, this time, with a substitute judge, again instructed the jury to reach a verdict. (R. 399-407)

Petitioner contends that he was prejudiced by the Court's multiple charges to the jury to continue to deliberate as such coerced the jury by placing overbearing pressure into reaching a verdict.

Counsel error in this regards prejudiced the petitioner and deprived him of a fundamental fair trial. page 382 paragraph 18-19

Ground(6) Petitioner contends that he was denied effective assistance of counsel on direct appeal of his conviction and sentence when counsel fail to raise petitioner's objection to the prosecutor use of peremptory challenges to exclude African American from serving on the petit jury on the bases of their race.

Supporting Facts; the record reflects that immediately after the jury was struck, Petitioner made a timely Batson Vs. Kentucky, challenge. (R. 90) Petitioner presented a prima facie case of purposeful discrimination and the prosecutor attempted to give race-neutral reasons for the striking three of the five african american jurors. (R. 90-99).

Petitioner showed that the prosecutor struck Leon smith, an African American, but did not strike Albert White, who was white, even though they both had family members that was convicted the same or similar offense. (R. 92-93). With respect to potential jurors Paeker, Higgins and Smith the prosecutor gave pretextual reasons. (R. 92-99).

Petitioner contends that counsel error in failing to raise this issue on appeal prejudice him, because there is a reasonable probability had this issue been raised, his conviction would have been reversed.

Ground(7) Counsel on Direct Appeal was ineffective and the Petitioner was prejudice thereby when counsel fail to raise petitioner's motion to suppress the identification of the petitioner.

Supporting Facts;Prior to trial the petitioner filed a motion suppress the in-court-identification of him by the victims, because the identification was based on an impermissible suggestive identification procedure.

Specifically, petitioner avers that the victim was allowed to identify petitioner at a docket-call and was chaeged with the robbery, the victims also knew the Petitioner's name.(R. 6-11) April 25,2007 of the consolidation hearing transcript,Exhibits;A-B-C-D-E-f-

G

Petitioner contends that based on the totalty of the circumstances, that the robbers had on Ski Masks and based on the initial description given, the victims in-court-identification testimony should have been suppressed, and counsel failure to raise this issue on direct appeal was prejudicial to the Petitioner.

Wherefore, Premises considered, Petitioner Prays that this court will set this cause for hearing, and after such review, Grant Petitioner a New Trial.

Respectfully Submitted,

Sumnar R. Brewster
AIS 159620
Holman Unit 3700
Atmore, Ala 36503-3700

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes () No ()

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

- (a) At preliminary hearing _____
- (b) At arraignment and plea _____
- (c) At trial DANE BONE 1031 FORREST AVE, GADSDEN ALA 35901
- (d) At sentencing DANE BONE 1031 FORREST AVE, GADSDEN ALA 35901
- (e) On appeal RODNEY WARD 827 CHESTNUT ST GADSDEN ALA 35901
- (f) In any post-conviction proceeding _____
- (g) On appeal from any adverse ruling in a post-conviction proceeding: _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes (✓) No ()

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes () No (✓)

- (a) If so, give name and location of court which imposed sentence to be served in the future: _____
- (b) And give date and length of sentence to be served in the future: _____
- (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes () No (✓)

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 6/21/2013
(date)

SUMNER R. BREWSTER #159620
Signature of Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 21 DAY OF JUNE 2013
COMMISSION EXPIRES 9/10/13

CLD
NOTARY PUBLIC